

Approved: April 24, 1991
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Senator Wint Winter Jr. at 10:05 a.m. on February 12, 1991 in room 514-S of the Capitol.

All members were present except: Senator Yost who was excused.

Committee staff present:

Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Judy Crapser, Secretary to the Committee

Conferees appearing before the committee:

James Clark, Kansas County and District Attorneys Association
Ray Petty, Independence, Inc.
Art Brown, Kansas Lumber Dealers Association
Ben R. Swank, Jr., Mid-America Lumbermen Association
Harold Baalman, Mid-America Lumbermen Association
Tom Slattery, Associated General Contractors of Kansas
William Larson, Associated General Contractors of Kansas

Chairman Winter opened the meeting with a suggestion for introduction of a bill to repeal Article 6 of the uniform commercial code, relating to bulk transfers. He stated that it would be a step in bringing Kansas statute one step closer to becoming uniform with other states and that this action was suggested by the Uniform Law Commission.

Senator Gaines moved to introduce the bill as requested by the Chairman. Senator Oleen seconded the motion. The motion carried.

James Clark, Executive Director of the Kansas County and District Attorneys Association, requested the Committee introduce three bills. (ATTACHMENTS 1, 2 and 3)

Senator Morris moved to introduce the three bills requested by Mr. Clark. Senator Gaines seconded the motion. The motion carried.

Ray Petty, Executive Director of Independence, Inc., requested introduction of legislation regarding disability accessibility. (ATTACHMENT 4)

Senator Gaines moved to introduce the legislation as requested by Mr. Petty with the exception of replacing the mandatory injunction with mandamus. Senator Martin seconded the motion. The motion carried.

Chairman Winter brought to the Committee two requests from the Douglas County District Attorney for introduction of legislation. One bill to make clear that possession of an out of state fake drivers licence or I.D. is a crime just as the possession of a fake Kansas drivers licence or I.D. is a crime. The second request is to make clear that violation of a city ordinance which is a misdemeanor can be the basis of a finding or adjudication of a minor as a "juvenile offender."

Senator Bond moved to introduce the two bills as described by the Chairman. Senator Gaines seconded the motion. The motion carried.

Chairman Winter turned the Committee's attention to SB 30.
SB 30 - service charge on worthless checks.

The active motion on the table was to amend SB 30 to make the charge for insufficient checks "up to, but not exceed, \$20." Senator Bond withdrew his second and Senator Gaines withdrew his motion.

Senator Morris moved to recommend SB 30 favorable for passage with technical amendments as deemed necessary by the Revisor. Senator Bond seconded the motion. The motion carried.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,
room 514-S, Statehouse, at 10:05 a.m. on February 12, 1991.

The Chairman opened the hearing on SB 123.

SB 123 - crime of deceptive commercial practices to include construction fund fraud.

Art Brown, Kansas Lumber Dealers Association, testified in support of SB 123.
(ATTACHMENT 5)

Ben R. Swank, Jr., Mid-America Lumbermen Association, testified in support of SB 123.
(ATTACHMENT 6)

Harold Baalman, Chairman of the Kansas State Committee of the Mid-America Lumbermen
Association, testified in support of SB 123. (ATTACHMENT 7)

Written testimony from Karen France, Kansas Association of Realtors Director of Governmental
Affairs, in support of SB 123 was presented to the Committee. (ATTACHMENT 8)

Tom Slattery, Executive Vice President of Associated General Contractors of Kansas, testified in
opposition to SB 123. (ATTACHMENT 9)

William Larson, Legal Counsel for Associated General Contractors of Kansas, testified in
opposition to SB 123. (ATTACHMENT 10)

This concluded the hearing for SB 123.

The meeting was adjourned.

Date 12 February 1991

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VISITOR SHEET
Senate Judiciary Committee

(Please sign)

Name/Company

Name/Company

Tom Slattery - AGC of KS	
Will Gross - ABC of KS	
Janet Stubbs - NBPK	
FRANCES KASTNER - Food Dealer	
Erin Ring - Unincorporated	
Paul Stuewe - Close Up - KS	
Walt Busse " " Lawrence	
JEFF SONNICH KNLSI / TOPEKA	
Jim Gardner - Close-up - KS	
Danielle Decker - Close-up - KS	
CAREY GARDNER - Close - Up	
James Stude - Close-up	
Jennifer Lucas - Close-up	
Walter JACK - Close up	
Dan Burton - Close-up	
Joe Bond	
Sarah Sansen - KS Close-up	
Amy Booth - close-up	
KATHY WILLIAMS - Close-up	
Kelli Case Close-up	
Heidi Wrimblester closeup	
Will Belden LWVK	
Jonathan Mayskens Closeup	
Jon Smith KBA	
Paul Shelby OSA	
Blairson KTLA	



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Terry Gross, Past President



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Wade Dixon
Nola Foulston
John Gillett
Dennis Jones

Kansas County & District Attorneys Association

827 S. Topeka Ave., 2nd Floor • Topeka, Kansas 66612
(913) 357-6351 • FAX # (913) 357-6352
EXECUTIVE DIRECTOR • JAMES W. CLARK, CAE

REQUEST FOR LEGISLATION

The Kansas County and District Attorneys Association requests a bill amending K.S.A. 1990 Supp. 8-2106(a)(2) by adding violations of K.S.A. 41-727 and amendments thereto.

*Senate Judiciary Committee
Attachment 1*

2-12-91

1-1/1



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REQUEST FOR LEGISLATION

The Kansas County and District Attorneys Association requests legislation combining the statutes dealing with transporting an open container of either alcoholic liquor or cereal malt beverage. These statutes include K.S.A. 41-719, 41-2719 and 41-2720. KCDA would also request that the statute which results from such combination be included in K.S.A. 8-2106(a)(2).

*Senate Judiciary Committee
Attachment 2*

2-12-91

2-11



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REQUEST FOR LEGISLATION

The Kansas County and District Attorneys Association requests a bill amending K.S.A. 21-4605 in accordance with the attached memo from the Sedgwick County District Attorney's Office.

*Senate Judiciary Committee
Attachment 3
2-12-91
3-1/3*

OFFICE OF THE DISTRICT ATTORNEY
Eighteenth Judicial District
Sedgwick County Courthouse
535 North Main
Wichita, KS 67203

NOLA FOULSTON
District Attorney

(316) 383-7281

M E M O R A N D U M

TO: Nola Foulston
FROM: James E Puntch, Jr., Assistant District Attorney
DATE: January 25, 1991
RE: Revision of KSA 21-4605

Below is my proposed revision of KSA 21-4605 regarding PSI's and SRDC's.

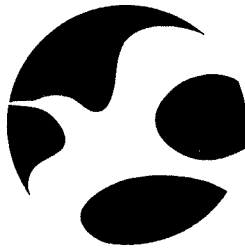
21-4605. Availability of report to counsel. (a) Upon request of the attorney for the state or counsel for the defendant, the judge shall make available to the attorney or the counsel the presentence report, any report that may be received from the Kansas state diagnostic center or the state security hospital and other diagnostic reports and shall allow the attorney or counsel a reasonable time to review the report before sentencing the defendant. Except as otherwise provided in this section, all these reports shall be a part of the record but shall be sealed and opened only on order of the court. *(New paragraph)* The court shall permit the attorney for the state, upon request, to copy and retain any of the reports in this section. Any reports copied and retained shall be kept in the records of the attorney for the state and shall not be disclosed to any unauthorized person without permission of the court. All costs of copying such reports shall be paid by the office of the attorney for the state making the request.

(b) If a defendant is committed to the custody of the secretary of corrections, all reports under subsection (a) shall be sent to the secretary of corrections, and, in

accordance with K.S.A. 75-5220, to the director of the state correctional institution to which the defendant is conveyed.

(c) Nothing in this section shall be construed as prohibiting the attorney for the defendant from disclosing the report of the presentence investigation, or other diagnostic reports, to the defendant after receiving court approval to do so.

JEP:jep



2/12

February 12, 1991

Mr. Chairman and Members of the Committee:

My name is Ray Petty and I am the executive director of Independence, Inc., a private not-for-profit corporation located in Lawrence dedicated to full integration of people with disabilities. Thank you for allowing me this opportunity to request the introduction of a bill which is very much needed in order to insure the accessibility of public buildings in the State of Kansas.

Since 1979, Kansas has adopted by statute requirements for new construction or substantial renovation of buildings used by the public which provide barrier-free access to most persons with disabilities. Unfortunately, the enforcement mechanism is not sufficiently clear and the law has not been sufficiently disseminated. There also appear to be entities within the state which are gambling that the Legislature will not put teeth into this statute. I am here to ask you to make your position known.

Specifically, what this bill would do is:

1. Make it absolutely clear that the attorney general has the overall responsibility for enforcement of the act,
2. Provide rule and regulation authority to the attorney general to establish a clear administrative procedure, and
3. Make explicit in the law that compliance with the law may be compelled by mandatory injunction in a court of law.

It is our intent to continue pursuing an educational and technical assistance posture with regard to enforcement. In fact, my office is working diligently with the City of Lawrence to not only make certain that our buildings are accessible, but that our efforts can be replicated by other local governments across the state. These amendments to the law are timely with regard to the Americans with Disabilities Act recently passed by Congress. This is the year to invest in low cost, high productivity measures. This is clearly such an investment.

Thanks for your support.

Lawrence Independent Living Resource Center • 1910 Haskell • Lawrence, Kansas 66046 • 913-841-0333

INDEPENDENCE INC.

*Senate Judiciary Committee
Attachment 4*

2-12-91

4-1/6

Sec. 2. K.S.A. 1990 Supp. 58-1304 is hereby amended to read as follows: 58-1304. The responsibility for enforcement of K.S.A. 58-1301 to 58-1309, inclusive, and amendments thereto, shall be as follows: (a) For all school building construction or renovation, the state board of education, by plan approval as required by K.S.A. 31-150, and amendments thereto;

(b) for all construction or renovation for which state funds are utilized, the secretary of administration;

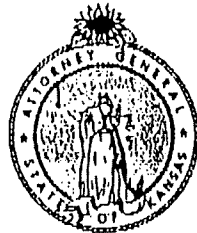
(c) for all construction or renovation where funds of a county, municipality or other political subdivision are utilized, the governing body thereof or an agency thereof designated by the governing body;

(d) for all other construction or renovation of buildings or facilities which are subject to the provisions of K.S.A. 58-1301 to 58-1309, inclusive, and amendments thereto, the building inspector or other agency or person designated by the municipality in which the building or facility is located.

(e) The attorney general of the state of Kansas shall oversee the enforcement of this act by the persons listed in subsections (a), (b), (c) and (d).

Sec. 3. K.S.A. 1990 Supp. 58-1308 is hereby amended to read as follows: 58-1308. The attorney general or any person, agency or governing body responsible for the enforcement of K.S.A. 58-1301 to ~~58-1309~~ 58-1311, and amendments thereto, may apply in the name of the state of Kansas to the district court for a temporary or permanent injunction restraining any individual, corporation or partnership from violating the standards established by K.S.A. 58-1301, and amendments thereto. Such court shall have jurisdiction upon hearing and for cause shown to grant such injunction. Such court may require the modification of any public or governmental building or facility by mandatory injunction to insure compliance with the provisions of this act.

New Sec. 4. The attorney general of the state of Kansas shall adopt any rules and regulations necessary to implement the provisions of this act.



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

January 29, 1991

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 91- 7

Ray D. Siehndel
Secretary
Kansas Department of Human Resources
401 S.W. Topeka Blvd.
Topeka, Kansas 66603-3182

Re: Personal and Real Property--Public
Buildings--Handicapped Accessibility Standards
Responsibility for Enforcement; Injunction to
Restrain Violation of Standards; Violation of
Injunction; Civil Penalty

Synopsis: Mandatory injunctive relief may be sought pursuant
to K.S.A. 1990 Supp. 58-1308 to remedy facilities
built in violation of the Handicapped Accessibility
Standards found in K.S.A. 58-1301 et seq.
Cited herein: K.S.A. 58-1301 et seq.; K.S.A.
1990 Supp. 58-1304; 58-1308; K.S.A. 60-901; K.S.A.
1990 Supp. 60-906.

* * *

Dear Mr. Siehndel:

As secretary of the Kansas department of human resources you
ask several questions about K.S.A. 1990 Supp. 58-1308 dealing
with injunctive relief for the enforcement of the Kansas
Handicapped Accessibility Standards. The act requires new
public buildings be built using the 1980 ANSI standards in
order to make them accessible to persons with disabilities.

You inquire "1. What does 'injunctive relief' mean in terms of
existing facilities which should have been built according to

Ray D. Siehndel
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the 1980 ANSI standards as required by law, but were not?
2. Can a court order certain steps to be taken within a certain time-frame to bring facilities into compliance? 3. If so, who is responsible for paying for the needed alteration? 4. What procedure would be required to seek such relief?"

Your first question concerns the definition of injunctive relief. K.S.A. 60-901 in the Code of Civil Procedure defines an injunction as "an order to do or refrain from doing a particular act. It may be the final judgment in an action, and it may also be allowed as a provisional remedy." When an injunction is issued requiring affirmative action involving a change of existing conditions it is classified as mandatory in form. 42 Am.Jur.2d Injunctions §§ 9, 16, 17 (1969). Thus the issue presented by your questions is whether K.S.A. 1990 Supp. 58-1308 authorizes one to seek mandatory injunctive relief ordering that a building built in violation of this act be made to conform to the standards by providing accessibility to handicapped individuals.

K.S.A. 1990 Supp. 58-1308 provides:

"The attorney general or any person, agency or governing body responsible for the enforcement of K.S.A. 58-1301 to 58-1309, and amendments thereto, may apply in the name of the state of Kansas to the district court for a temporary or permanent injunction restraining any individual, corporation or partnership from violating the standards established by K.S.A. 58-1301, and amendments thereto. Such court shall have jurisdiction upon hearing and for cause shown to grant such injunction."

This statute authorizes the attorney general or any person charged with its enforcement [see K.S.A. 1990 Supp. 58-1304] to apply to the district court for a temporary or permanent injunction to restrain any individual or entity from violating the act. The question becomes one of legislative intent; did the legislature intend the provision to authorize both prohibitory and mandatory injunctive relief?

Similar injunctive power was interpreted by the Supreme Court in State, ex rel., v. Ross, 159 Kan. 199 (1944) to provide for only preventive injunctive relief (as distinct

Ray D. Siehndel
Page 3

from mandatory [prohibitory] injunctive relief). However Ross, an appeal from the denial of a mandatory injunction to restore a stream to its unobstructed state, involved an order to require the restoration to a private landowner of what he claimed to have lost by the unauthorized acts of the defendant.

In our instance, the mandatory injunctive relief involves an order to restore to the public generally and to those citizens physically handicapped access to all public buildings and facilities covered by the act. The order would make operative legislative intent found in K.S.A. 58-1303:

"It is intended to make all buildings and facilities covered by this act accessible to, and functional for, the physically handicapped to, through, and within their doors, without loss of function, space or facilities where the general public is concerned."

The circumstances involve a violation of a continuing nature wherein the injury will continue unless otherwise enjoined.

Furthermore, if the legislature had intended that only preventive or prohibitory injunctive relief could be obtained, all an individual would have to do to circumvent the act's application is to violate it. And, the only way those charged with the act's enforcement could seek injunctive relief would be to find out about its intended violation and enjoin it. Thus to find that only preventive or prohibitory injunctive relief was intended would be to render the act meaningless.

Therefore, it is our opinion that K.S.A. 1990 Supp. 58-1308 authorizes those charged with the acts enforcement to seek both prohibitory and mandatory relief from a district court. If the facts of a case clearly favor such a remedy the court, in accordance with principles of equity, may order a public building, built in violation of K.S.A. 58-1301 et seq. be brought into compliance by providing access for the handicapped. See American Carriers, Inc. v. Baytree Investors, Inc., 685 F.Supp. 800, 806 (D.Kan., 1988); 42 Am.Jur.2d Injunctions §§ 2, 16, 23 (1969).

Your third question involves liability. An injunction, be it prohibitory or mandatory in nature, is an equitable remedy, granted or denied in accordance with the justice and equity of each case. U.S.D. No. 503 v. McKinney, 236 Kan. 224,

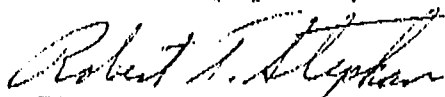
Ray D. Siehndel
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226 (1984); Wichita Wire Inc. v. Lenox, 11 Kan.App.2d 459 (1986); 42 Am.Jur.2d Injunctions §§ 2, 20, 23, 24 (1969). Thus, the question of who would be responsible or liable for the necessary alterations will depend on how principles of equity apply to the facts of the case. The court will balance the equities and consider the benefit provided to handicapped individuals and the public good against the inconvenience and costs to the defendant. See 42 Am.Jur.2d Injunctions, § 21 (1969).

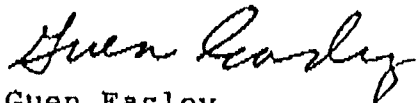
Your last question is what procedure would be required to seek such relief. Those charged with enforcement of the act may apply in the name of the state of Kansas to the district court. See K.S.A. 1990 Supp. 60-906 requirements of form and scope of order. See also K.S.A. 1990 Supp. 58-1308. Actions brought do not require that an aggrieved physically handicapped individual be party to the lawsuit. See K.S.A. 58-1309.

In our judgment, K.S.A. 1990 Supp. 58-1308 authorizes those charged with the act's enforcement to seek mandatory injunctive relief requesting that a public buildings, subject to the act and in violation thereof, be brought into compliance by making it accessible to the handicapped.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Guen Easley
Assistant Attorney General

RTS:JLM:GE:jm



MID-AMERICA LUMBERMENS ASSOCIATION

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE
SENATE BILL #123

February 12, 1991

Room 514-N

Topeka, Kansas

My name is Art Brown and I represent the Kansas Lumber Dealers Association. I wish to thank the committee for the opportunity to speak to you today on Senate Bill #123 involving Construction Fund Fraud.

For those of you who might recall the last session, we introduced Senate Bill #715 which was not accepted by the committee at that time. It was felt that the Legislature was being asked to give a "favored nation" status in the area of collections by imposing a criminal penalty for non-payment of debt to materialmen. In taking the results of this action by the committee to our State Committee, it was decided to use a better approach to this concern and not necessarily "invent the wheel" legislatively to get this done.

What you see before you is the result of dealer input, our legal staff composing the language and finding the proper statute in which to couch this legislation, and some fine tuning by Chairman Winter in a meeting we had with him this Fall to discuss the shortcomings of S.B. 715.

In its simplest format, this bill is designed to protect the consumer from any fraudulent acts against same from a contractor who has failed to pay a materialman for product.

Under Kansas Law, a property owner is responsible for the payment to a materialman for work performed on his property. By Kansas Law, the materialmen can make the owner responsible for these debts, even though the contractor has been paid. Believe me, this is one call the materialman absolutely hates to make.

Laws in Missouri, Oklahoma, and Arkansas are similar to this bill and have had a positive impact on the number of liens filed against property. In essence we are trying to accomplish a "win-win" situation here by cutting down on lien filings, and to make sure the consumer is not a big loser by having a criminal provision in place over a civil one to assure consumer protection.

We have a State Committee of 12 dealers throughout Kansas who have given us a mandate that such a bill become law to provide a tool which can be used to circumvent the lien process and protect the consumer. After much input from the members, our legal staff and Senator Winter, such a bill is now before you. We can only hope you see fit to pass it into law. We feel you will never regret such an action.

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Senate Judiciary Committee
Senate Bill #123
page 2

I would gladly answer any questions or listen to any comments the committee has at this time in regard to this bill. Thank you for providing this format to present this legislation to you today.

SLAGLE, BERNARD & GORMAN

A PROFESSIONAL CORPORATION

600 PLAZA WEST BUILDING

4600 MADISON AVENUE

KANSAS CITY, MISSOURI 64112

(816) 561-4600

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GERALD W. GORMAN
BEN R. SWANK, JR.
ERNEST N. YARNEVICH, JR.
JOHN J. WILLIAMS, III
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OF COUNSEL
BEN R. SWANK

*ADMITTED IN MISSOURI AND KANSAS
**ADMITTED IN MISSOURI, KANSAS AND IOWA
***ADMITTED IN MISSOURI AND MINNESOTA

FAX: (816) 561-4498

MEMORANDUM

TO: Members of the Senate Judiciary Committee
FROM: Ben R. Swank, Jr., Attorney, Mid-America Lumbermens Association
RE: Senate Bill No. 123
DATE: February 12, 1991

On behalf of Mid-America Lumbermens Association, an association representing 281 Kansas lumber yards, I appear today in support of Senate Bill No. 123.

The purpose of this bill is to discourage a "deceptive commercial practice"; that is, the use of construction funds for other purposes than paying the costs of a construction project, with an intent to commit a fraud on the project owner.

The problem is that a contractor, may receive construction funds from a payor (owner, lender, contractor) that intends such funds to be used to pay the construction bills on the project. The contractor may instead use said funds for an unrelated purpose. The result is that those furnishing labor and/or materials that have not been paid file mechanic's liens against the project to the detriment of the owner.

Senate Bill No. 123 provides when this occurs and the contractor has an intent to defraud, "construction fund fraud" is the result and the offense prohibited herein has been committed.

There is no existing provision in the criminal code that covers this circumstance. Accordingly, the bill incorporates this additional "deceptive commercial practice" into existing KSA 21-4403.

Please note that the offense is not committed merely by the failure to use construction funds to pay construction bills. Rather, there must also be an intent to defraud. It is the fraud that is to be punished; not just the failure to pay the bills. Accordingly, the "unintended consequence, the unintended inappropriate application of this law" would not occur as there is no crime without an intent to defraud.

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Memorandum
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Section 16 of the Kansas Constitution Bill of Rights provides no person shall be imprisoned for debt except in cases of fraud. The courts have held since the fraud is being punished rather than a failure to pay bills, this would not create a constitution prohibited debtors prison.

The practical effect of the bill is to encourage contractors to exercise their discretion in favor of paying construction obligations rather than to use construction funds for unrelated purposes. If construction bills are paid, liens are not filed and the project owner is not exposed to paying twice.

It appears that the deterrent works. The State of Missouri, which has a similar construction fund statute has not been deluged by an avalanche of prosecutions. We are advised prosecutions in the City of St. Louis, Jackson County and Green County, Missouri since the enactment of the Missouri comparable statute total less than six.

All interests would be served by the enactment of Senate Bill No. 123. We urge your vote in its favor.

I will be pleased to try to answer any questions you may have.



Phone 316-522-1522

11011 SOUTHWEST BLVD.
WICHITA, KANSAS 67215

TESTIMONY TO THE JUDICIARY COMMITTEE

FEBRUARY 12, 1991

MY NAME IS HAROLD BAALMANN AND I AM CHAIRMAN OF THE KANSAS STATE COMMITTEE OF THE MID AMERICAN LUMBERMEN ASSOCIATION. I HAVE BEEN IN THE LUMBER BUSINESS FOR 23 YEARS. DURING THE LAST 13 YEARS I HAVE OWNED AND OPERATED B AND B LUMBER COMPANY IN WICHITA, KANSAS.

APPROXIMATELY 65% OF MY BUSINESS IN WICHITA IS WITH CONTRACTORS, LARGE AND SMALL, AND 35% IS DO IT YOURSELF AND FARM CUSTOMERS.

I HAVE FILED LIENS NUMEROUS TIMES DURING THE PAST 13 YEARS. OFTEN TIMES THESE PEOPLE HAD ALREADY PAID THE CONTRACTORS THAT DID THE WORK AND THE CONTRACTOR HAD NOT PAID ME OR THEIR SUB CONTRACTOR.

CONSUMERS TODAY, MORE THAN EVER, SEARCH FOR CONTRACTOR'S THAT DO A COMPLETE JOB. THEY EXPECT THEIR CONTRACTOR TO DO THE CEMENT WORK, FRAMING, ROOFING, AND FINISHING, ETC. THIS USUALLY NECESSITATES SUB CONTRACTORS HIRED NOT BY THE CONSUMER BUT BY THE CONTRACTOR.

ONCE THE CONSTRUCTION FUNDS HAVE BEEN ALLOCATED THE CONSUMER HAS THE RIGHT TO EXPECT THE CONTRACTOR OR SUB CONTRACTOR'S TO PAY THEIR BILLS AND AT LEAST BE SUBJECT TO PENALTYS IF THEY DON'T. ONCE THE FUNDS ARE ALLOCATED TO THE CONTRACTOR FOR THE WORK DONE THE CONSUMER HAS NO FURTHER INFLUENCE ON WHAT THE CONTRACTOR DOES WITH THAT MONEY. THE CONTRACTOR HAS CERTAINLY OBLIGATED HIMSELF BY THE ACCEPTANCE OF THIS MONEY TO PAY HIS PEOPLE. THE HOMEOWNER SHOULD NOT BE OBLIGATED AGAIN.

*Senate Judiciary Committee
Attachment 7
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LADIES AND GENTLEMEN, THIS CHANGE WE ARE TRYING TO IMPLEMENT TODAY IS SIMPLY SAYING A MATERIALMAN OR CONTRACTOR CANNOT INSTITUTE ANY ACTIONS UNTIL ALL CONSTRUCTION FUNDS HAVE BEEN RELEASED, BUT IF THEY HAVE BEEN RELEASED EVERYONE SHOULD HAVE THE RIGHT TO THEIR PART OF THE PROCEEDS.

I HAVE DISCUSSED THIS LAW WITH CONTRACTORS, CONSUMERS, CONTRACTOR GROUPS, AND ALSO FOR THE PAST TWO (2) YEARS WITH MATERIAL SUPPLIERS LIKE MYSELF. NOT ONE GROUP OR PERSON THOUGHT THE TERMS WERE UNFAIR. ALL EMBRACED THIS CONCEPT WHOLEHEARTEDLY. IT PROVIDES A WAY AROUND LIEN FILING TO SOME EXTENT AND IT TAKES MOST OF THE LIABILITIES OFF THE HOMEOWNER AFTER HE HAS PAID THE BILLS.

MEMBERS OF MY COMMITTEE HAVE RELATED MANY EXAMPLES OF FRAUD PERPETRATED ON THEIR CUSTOMERS. HAIL STORMS AND NATURAL DISASTERS SEEM TO LEAD THE LIST. AFTER A HAIL STORM SMALL TOWNS ARE SWAMPED BY OUT OF TOWN CONTRACTORS. EVERYONE IS IN A HURRY TO GET ROOFS ON BECAUSE THE ROOF IS LEAKING. THEY GO TO THE LOCAL SUPPLIERS AND CHARGE THINGS TO THE HOMEOWNER'S ACCOUNT OR SOMETIMES EVEN TO THEMSELVES AND AFTER RECEIVING FUNDS THEY SIMPLY LEAVE TOWN WITH ALL THE MONEY. THIS IS NOT RIGHT AND THOSE CONTRACTORS HAVE COMMITTED A CRIME AS SURELY AS IF THEY ROBBED SOMEONE.

THE PROPOSAL WE ARE ADVOCATING TODAY PUTS THE BLAME FOR NON PAYMENT SQUARELY WHERE IT BELONGS AND THAT IS ON THE PAYEE WHO DOESN'T PAY HIS BILLS.

THIS PROPOSAL IS A WIN WIN ISSUE. THE CONSUMER WINS AND THE REPUTIBLE CONTRACTOR WINS. CASH FLOW FOR SUB CONTRACTORS AND SUPPLIERS IS ENHANCED BENEFITTING ALL. THE ONLY LOSER THERE COULD POSSIBLY BE IS THE GUY WHO TAKES THE MONEY AND RUNS AND WE DON'T WANT HIM IN THE INDUSTRY ANYHOW. WITH THE PASSING OF THIS PROPOSAL MAYBE HE WILL RUN BEFORE HE TAKES THE MONEY.

I URGE YOU TO NOT ONLY SUPPORT THE PROPOSAL TODAY BUT ALSO TO ENLIST THE SUPPORT OF YOUR COLLEAGUES WHEN IT COMES UP ON THE FLOOR.

THANK YOU.



Executive Offices:
3644 S. W. Burlingame Road
Topeka, Kansas 66611
Telephone 913/267-3610

TO: THE SENATE JUDICIARY COMMITTEE
FROM: KAREN FRANCE, DIRECTOR, GOVERNMENTAL AFFAIRS
DATE: FEBRUARY 12, 1991
SUBJECT: SB 123

Thank you for the opportunity to submit written testimony. I apologize for not being at the hearing in person, however I have a schedule conflict which prevents me from being available.

The Kansas Association of REALTORS® is in support of SB 123 and the concepts which it proposes. KAR has always worked hard to improve the mechanics lien laws in order to prevent innocent homeowners for paying for the bad business decisions of others.

While this bill does not impact the mechanics lien laws directly, it does put some added teeth into the law, which might prevent liens from being filed against homeowners. Liens are only typically filed when someone does not get paid for the work they perform or for the supplies they provide. To the extent that we can help to insure that payment occurs on a reasonable, timely basis, then we reduce the need for the filing of mechanics liens against innocent homeowners.

Once again, I apologize for not appearing in person. Please feel free to contact me if you have any questions.

*Senate Judiciary Committee
Attachment 8
2-12-91*

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE ON SB 123

Tom Slattery, Executive Vice President

Associated General Contractors of Kansas, Inc.

February 12, 1991

I am Tom Slattery, Executive Vice President of Associated General Contractors of Kansas. AGC is a commercial building contractors trade association representing 260 general contractors, subcontractors and suppliers.

We empathize with the proponents of SB 123 in their attempt to insure payment for materials within a reasonable time after the contractor receives his payment.

AGC of Kansas has many subcontractor and supplier members and we believe that all members of the "construction chain" should receive "prompt payment" for their services and materials.

To illustrate our concern and desire for prompt payment we have requested and have received a favorable response from the Senate Local Government Committee to introduce a bill requiring prompt payment to all members of the construction chain, general contractors, subcontractors, and suppliers on all public works projects. This will be introduced in the next few days. The bill is very similar to a proposal that was passed last year in the state of Missouri and AGC intends to support

*Senate Judiciary Committee
Attachment 9*

2-12-91

9-1/2

this legislation vigorously. At least 24 states now have some kind of prompt payment statutes in place.

As in the past we have some concerns about the provisions of SB 123 even though it is somewhat more acceptable than previous proposals.

To describe AGC's concerns I have asked our legal counsel to join me today and speak in our behalf.

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE

WILLIAM A. LARSON

LEGAL COUNSEL FOR
ASSOCIATED GENERAL CONTRACTORS OF KANSAS

February 12, 1991

I am appearing this morning as Legal Counsel for the Associated General Contractors of Kansas to discuss concerns I have about Senate Bill 123. Before addressing specific concerns, however, I would like to make a general comment about the purpose of the bill.

For at least the last few years bills have been introduced in the Legislature attempting to impose criminal penalties on contractors and others who do not promptly pay subcontractors and material suppliers on construction projects. These bills have usually been directed to situations where a mechanic's lien either has been filed or the failure to pay has exposed the owner to the potential of a mechanic's lien.

I am aware that there has been concern about past instances where contractors and others have failed to pay their lower tier subcontractors and suppliers causing owners and in those instances where subcontractors were guilty of failing to pay, contractors¹ exposure under the mechanic's lien laws.

¹ A mechanic's lien is of course filed against the property of the owner and the initial burden of seeing that the lien is ultimately cleared is on the owner. In situations, however, where a subcontractor fails to pay a material supplier, the ultimate responsibility may end up resting with the contractor, because the operation of K.S.A. 60-1106 would make the contractor responsible to the owner in those situations.

Senate Judiciary Committee
Attachment 10

2-12-91

10-1/5

Even though I recognize the legitimate concern about prompt payment in the construction industry, I philosophically have a difficult time accepting bills such as Senate Bill 123. I do not believe it is proper to impose criminal penalties on what is essentially a civil problem. Even though Senate Bill 123 is couched in terms of fraud, the gravamen of the problem it seeks to redress is the simple failure of a contractor or subcontractor to make payment to lower tier subcontractors and suppliers from money received on the project. Essentially it is a simple failure to pay a debt. Historically failure to pay debts in this country have been dealt with in the civil area of the law.

There are all sorts of analogous situations in which an employer or one who contracts with another fails to make payment, yet we do not impose criminal penalties under those circumstances. Rather we rely on well establish civil remedies to redress those wrongs. I do not believe the construction industry should be singled out as one of the few and possibly only area in which the failure to pay a private debt is criminally punishable.

The specific concerns I have with Senate Bill 123, briefly stated, are as follows:

1. I believe there may be a constitutional question under the equal protection clause with the way in which "construction fund fraud" is defined. Under section 1, paragraph 4(a) of the Act, construction fund fraud only occurs in those situations where the property under construction, or improvements, is exposed to the filing of one or more mechanic's liens. The

problem with this approach is that there are many projects which by law are not subject to the filing of mechanic's liens. For example projects on which there is a public works bond or projects on which there is a statutory bond. This means that an individual who engages in acts that could be deemed construction fund fraud under Senate Bill 123 could be criminally liable for doing so on a project that would be subject to the filing of a mechanic's lien, but could engage in exactly the same acts on a project that was not subject to the filing of a mechanic's lien and not be criminally liable. This is certainly inconsistent and possibly unconstitutional.

2. This bill, as opposed to some of the past bills, has a requirement of criminal intent. Again, under the definition of "construction fund fraud" appearing in section 1 paragraph 4(a), a party is not guilty of construction fund fraud unless he acts with "intent to defraud". One of the problems that concerns me about the bill is how to define the term "intent to defraud". It strikes me that it is difficult to define this term accurately or at least in a manner in which one can be reasonably certain of knowing whether one has committed a crime or not, in the construction context. For example, assume John Doe Construction Company uses some payments made on one construction project to pay material suppliers on another. When it comes time to pay the suppliers on the project on which the funds were paid, he finds he no longer has sufficient funds to do so. Normally the contractor who takes this sort of action would argue that he had assumed he would be

obtaining funds from other sources sufficient to pay all suppliers which is the reason he used the funds from that particular project to pay other suppliers on other jobs. Assume that the contractor who failed to make payment validly expected to receive funds from other sources sufficient to pay all suppliers on the job on which he was paid the funds. Does his act in using the construction funds from one project to pay expenses on another constitute fraud? It appears to me that there will be a number of difficult situations that could arise that would make it very difficult to know what would constitute intent to defraud in the construction context.

3. Another problem with the Act is that apparently innocent managing officers of companies could be deemed criminally liable for failure to pay subcontractors or suppliers. For example, assume money is paid on a project and the bookkeeper of the general contractor embezzles the money and absconds with the funds. Under section 1, paragraph 4(b) of the Act, the managing officers may be liable for "construction fund fraud". In this instance it's obvious that the bookkeeper intended to defraud not only the company, but also the subcontractors and suppliers to whom payment was owed out of the construction funds. It seems wholly unfair, however, under these circumstances, that a managing officer could be criminally liable when he may have been totally innocent of any fraudulent intent.

These are only some of the potential concerns with the bill. There may be others. I submit that there are probably

better ways in which to approach the problem of the failure of contractors or owners to make prompt payment. For example, the Associated General Contractors is suggesting, in conjunction with a number of other interested parties, prompt payment legislation in the public construction field. This sort of bill would carry no criminal liability but would impose civil sanctions to encourage prompt payment to contractors, subcontractors and suppliers. In my view this is a much better alternative.