Approved: May 4, 1991
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Richard Rock at 10:05 a.m. on February 13, 1991 in room 514-S of the Capitol.

All members were present except: Senator Moran 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:
Jerry Palmer, Kansas Trial Lawyers Association
Bob Corkins, Kansas Chamber of Commerce and Industry
Thomas R. Buchanan, Kansas Association of Defense Counsel
Elizabeth Kaplan, Kansas Trial Lawyers Association
John Jurcyk, Jr., Kansas City Kansas Area Chamber of Commerce
William Henry, Pharmaceutical Manufacturers Association
Jay F. Fowler, Kansas Association of Defense Counsel
Harvey L. Kaplan, Shook, Hardy & Bacon

Senator Rock called the meeting to order by opening the hearing for SB 103.

SB 103 - statute of limitation provision regarding 10-year limitation, does not affect product liability claim.

Jerry Palmer, Kansas Trial Lawyers Association, testified in support of SB 103. (ATTACHMENT 1)

Bob Corkins, Kansas Chamber of Commerce and Industry Director of Taxation, testified with amendments to SB 103. (ATTACHMENT 2) Mr. Corkins testimony also included their position in opposition to SB 104.

Thomas R. Buchanan, Kansas Association of Defense Counsel, testified in opposition to SB 103. (ATTACHMENT 3)

This concluded the hearing for SB 103.

Chairman Winter opened the hearing for SB 104.

SB 104 - creating the Kansas sunshine in litigation act concerning concealment on public hazards.

Elizabeth Kaplan, Kansas Trial Lawyers Association, testified in support of SB 104. (ATTACHMENT 4)

John Jurcyk, Jr., Chairman of the Kansas City Kansas Area Chamber of Commerce, testified in opposition to SB 104. (ATTACHMENT 5)

William Henry, Pharmaceutical Manufacturers Association, when called to testify deferred to Jay Fowler.

Jay F. Fowler, Kansas Association of Defense Counsel, testified in opposition to SB 104. (ATTACHMENT 6)

Harvey L. Kaplan, Shook, Hardy & Bacon, testified in opposition to SB 104. (ATTACHMENT 7)

This concluded the hearing for SB 104.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:05 a.m. on February 13, 1991.

Senator Bond moved to approve the minutes of January 24, January 25, January 28 and January 29. Senator Kerr seconded the motion. The motion carried.

The meeting was adjourned.

Date 13 February 17..

VISITOR SHEET
Senate Judiciary Committee

(Please sign)

Name/Company	Name/Company
[illegible] Shook, Hardy & Bacon for PMA	
Debbie Arnett McDonald, Tinker, Skeer, Quinn & Herrington	
Shelley Sutton - KES	
[illegible] Foulston, Siefkin KADC	
Bill Henry	Pharm. Mfg. Assn
Trudy Aron	AIA Ks
Laurie A. Hartman	Ks. Bar Assoc
Julie Hein	Hein & Ebert
JOHN J. JURCYK JR	KCK AREA CHAMBER OF COMMERCE
Richard E. Wilborn	Alliance Ins. Co's
Dave Hanson	Ks INSUR. ASSOCS.
Mike Germann	The Boeing Company
JANET STUBBS	HOME BUILDERS ASSN. of KS.
RALPH SKOOG	K CATV
LeAnne Lummus	KTLA
Elizabeth Kaplan	KTLA
[illegible]	"
Bob Corkins	KCCI
Michael Woolf	Common Cause
Lori Callahan	AIA
Mark Skinner	AIA

KANSAS TRIAL LAWYERS ASSOCIATION

Jayhawk Tower, 700 S.W. Jackson, Suite 706, Topeka, Kansas 66603
(913) 232-7756 FAX (913) 232-7730

TESTIMONY OF THE KANSAS TRIAL LAWYERS ASSOCIATION BEFORE THE SENATE JUDICIARY COMMITTEE

February 13, 1991

SB103 - Statutes of Repose for Products Liability Action

The Kansas Trial Lawyers Association appreciates the opportunity to present its testimony in support of SB103.

Substantive History: In 1987 K.S.A. 60-513 was amended. The 1987 amendment was proposed and hardly debated (HB2386, 1987) when it was brought on by some representatives of the building industry. The only thing appearing in the legislative history is a letter from Mr. Crockett, an attorney in Wichita, declaring the unfairness to contractors of being responsible for buildings built more than ten years. He cited as an example a case he personally defended (no recovery by the plaintiff) and a hypothecated case of liability for a building that was on the National Historic Register. The claim was made that the Ruthraff Decision was terribly unfair as it applied to builders. These, though, were the only examples cited, even though the Ruthraff case had been on the books for some 14 years. What was not considered before any legislative committee or discussed by any conferee was the impact this would have on product liability cases.

K.S.A. 60-3303 which included a detailed approach to repose in product liability cases was enacted in 1981 and went through a period of legislative gestation of approximately four years. A similar bill had been vetoed by Governor Carlin in the 1980 session, and the 1981 bill was the product of a great deal of discussion and compromise between the various interested parties. The affect, though, of the 1987 amendment to K.S.A. 60-513 was to nullify all of that work and make K.S.A. 60-3303 dead-letter law. Rather than the rather sophisticated analysis used in K.S.A. 60-3303, K.S.A. 60-513 simply cut off all liability for acts more than ten years old.

An absolute ten-year cut off with respect to products claims would never have been agreed upon in 1981 and was not part of the discussion in 1987. Everyone recognizes that there are products in use for more than ten years which can be defective in their design or in their warnings and there are situations which make it fair for manufacturers to be responsible for those products after ten years. Certainly no one can bring an action before they are injured, but under Kansas law now if they are not injured within ten years from the date of the manufacture of the product, then they will never have a claim, even though they may have a serious disabling injury. It is easy to conceive of products that are manufactured and expected to be used for more than ten years when we think of air frames and machinery designed for amortization over a more than ten year period, and in some cases, which carry warranties that exceed ten years.

Senate Judiciary Committee
2-13-91
Attachment 1

Therefore, there is need to amend to K.S.A. 60-513 to restore the vitality of K.S.A. 60-3303 since it is the more specific statute and had substantial input from all interested parties at the time of its passage.

Procedural History: In the 1989 session, HB2689 was requested to be introduced and this modification to K.S.A. 60-513 was part of that and the other part dealt with latent diseases such as asbestos and a revivor of claims which had been barred by the decision in Tomlinson v. Celotex. That bill which contained a clause having the same affect as SB103 passed the House 121 to 3. It was approved by a special subcommittee, chaired by Senator Rock which specifically considered this issue, and passed the Senate Judiciary Committee. On the floor of the Senate Representative O'Neal requested that a different approach be used to affect the same outcome and delivered text that transferred the amendments from K.S.A. 60-513 to being amendments to K.S.A. 60-3303. This was accepted by the Senate in good faith as doing the same thing, but without having any unintended consequence for the home builders of repealing that which they had successfully lobbied for in 1987.

(Unfortunately the concept embodied in SB103 was not part of that amendment nor could it have been.)

The friendly amended HB2689 passed the Senate 40 to 0. Because of the dropping of the concept contained in this bill, the House nonconcurred and the matter went to a conference committee. The senators on the conference committee agreed that the concept of SB103 should be restored but Representative O'Neal would not agree to that revision (which was unusual in light of the fact that the House position in favor had been so overwhelming at 121 to 3), but nevertheless, impasse was reached on the point and HB2689 was enacted without this important concept. It is all the more amazing in light of discussions with Representative O'Neal as reflected in correspondence authored by Jerry Palmer of April 2, 1990 and by Richard Mason of April 17, 1990, reflecting understandings of the mutual intent of HB2689 to include "to restore other product liability cases to limitations controlled by K.S.A. 60-3303, rather than the flat ten years." Those letters are attached as Exhibits A and B.

Conclusion: It is fair that the Product Liability Act with its statute of repose requiring the balancing of many interests which was the product of compromise and several years of legislative attention should be restored to control this specific area rather than being excluded unintentionally by a quite broad amendment enacted in 1987 where the issue of the impact on products liability was never considered in any legislative hearing or debate.

Respectfully submitted,

Jerry R. Palmer

PALMER & MARQUARDT

ATTORNEYS AT LAW

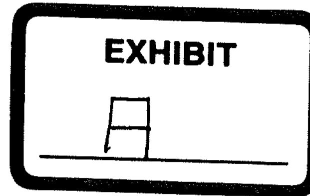
COLUMBIAN BUILDING
112 W. SIXTH, SUITE 102
TOPEKA, KANSAS 66603-3862
(913) 233-1836

JERRY R. PALMER*
CHRISTEL E. MARQUARDT
KIRK LOWRY

*CERTIFIED CIVIL TRIAL ADVOCATE
BY THE
NATIONAL BOARD OF TRIAL ADVOCACY

April 2, 1990

The Honorable Mike O'Neal
STATE CAPITOL
Topeka, KS 66612



Re: HB 2689

Dear Mike:

I have reviewed the Senate version of the Bill. I have talked with Richard and he indicated you still had concern about Home Builders. The Senate version, though, needs to be fine-tuned some more if it's going to carry out the mutual intent of all the parties. I understand the mutual intent to include three things:

1. To exempt latent diseases from the 10-year repose.

2. To restore other product liability cases to limitations controlled by 60-3303 rather than the flat 10 years.

3. To revive latent disease cases barred by the Celotex decision.

This Bill probably accomplishes the first and third but does not accomplish the second.

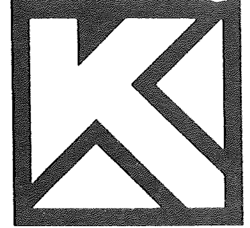
I would suggest that paragraph C then of 3303 be revised to read as follows:

> The provisions of this statute supersede the application of K.S.A. 60-513, and amendments thereto.

Subsection c when it was initially enacted was intended to apply 60-513 as interpreted by the supreme court in the Ruthraff decision. The 1987 amendment therefore turned that section on its head. Even K@CI suggested language for 60-513 which would have permitted the useful safe life issue to control the limitations. Product manufacturers were unintended beneficiaries of the 1987 amendment.

1-3/8

LEGISLATIVE TESTIMONY



Kansas Chamber of Commerce and Industry

500 Bank IV Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321

A consolidation of the Kansas State Chamber of Commerce, Associated Industries of Kansas, Kansas Retail Council

SB 103 & 104

February 13, 1991

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

Senate Judiciary Committee

by

Bob Corkins
Director of Taxation

Mr. Chairman and members of the Committee:

My name is Bob Corkins, director of taxation and small business development for the Kansas Chamber of Commerce and Industry, and I thank you for the opportunity to address you today.

> The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.
>
> KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.
>
> The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

The Chamber has consistently supported efforts to curb the explosive growth of litigation, legal expenses and associated insurance costs. We now oppose SB 104 because

Senate Judiciary Committee
2-13-91
Attachment 2

it would diminish the progress this state has made in restricting litigation-related expenses, and it would represent a great threat to legitimate privacy interests of all kinds -- whether business or personal.

Assuming there is <u>any</u> need for a more liberal disclosure policy regarding court documents, the rationale is extremely weak. Existing regulations and other legal duties now impose strong disclosure obligations on the part of businesses, whether in regard to the safety of workers, the public, manufactured products, environmental quality or many other potential "public hazards." Workers' compensation statutes require employers to report work-related accidents. Both the federal and state Emergency Planning and Community Right-to-Know statutes mandate the disclosure of actual or potential environmental threats, as well as other hazards. Product liability standards impose both statutory and common law duties to inform consumers of potential product risks. Furthermore, there is an avalanche of other applicable federal regulations from the EPA, OSHA, FDA and the whole alphabet of governmental agencies which are aimed at protecting individuals from "public hazards."

Once reported, this information is made available to the public. The federal Freedom of Information Act and the Kansas Open Records Act are examples of our government's general policy of openness with respect to such data.

The other side of the case against SB 104 concerns its disadvantages. One argument addresses the proposal's intrusion into the field of legitimate privacy interests. Businesses' specific tax information or details of their profits and expenses could be opened for all competitors to examine. Even the amount of money agreed upon by parties to a settlement, if disclosed, could place the paying business at a competitive disadvantage. Although SB 104 purports to continue protecting "trade secrets," that term is subject to interpretation which may narrow the scope of confidential information. Furthermore, while sections 3 and 4 of this bill confine the scope of this new disclosure standard to public hazards, section 5(a) would set a new procedure for sealing court records which would apply in all types of litigation.

This new procedure will also lead to the additional court costs, attorney fees and consequent higher liability insurance costs I referred to above. A public hearing would be required for any motion to seal confidential information. Not only would this cause greater court backlog and related expenses, it would force at least limited disclosure of the very information which is sought to be kept confidential...before the merits of the motion to seal documents are even debated. With so much at risk, there will be no incentive to settle the case before trial. Immediately upon being served with a petition, a defendant business would have to make the commitment to take the case to trial if there is any significant risk that a settlement, too, would lead to disclosure.

The remaining contentions of KCCI pertain to the incredible vagueness of this proposal. Is a hazard "public" if it affects only workplace safety? Do "court documents" indeed include depositions and other pre-trial discovery? Is the term "court" meant to include screening panels and administrative law judges? What information might be "useful" to the public in protecting themselves against public hazards? What must a "brief but specific" description of the records include?

For these reasons, KCCI urges you to reject SB 104.

Turning now to SB 103, I will specify that KCCI neither opposes nor supports this proposal. However, we do have a suggested amendment which should be consistent with its proponents' intent.

We propose that in line 40 under Section 1 the word "shorten" be omitted and replaced with the word "alter." In line 42 of Section 1 we propose that the word "less" be omitted and replaced with the word "other."

We believe that these changes better clarify the intent that the 10-year statute of limitations in KSA 60-513(b) should have no bearing on the 10-year period of repose applicable to product liability claims as provided in KSA 60-3303.

Thank you for your time and consideration of our concerns.

My only other suggestion would be in paragraph D to change the word "manufacturer" to "seller" and then strike the words "produced by such manufacturer." Seller is the broader concept. I still don't think it includes Home Builders as the definition specifically include manufacturers, wholesalers, distributors and retailers.

The Products Liability Act has provisions then to exempt the various sellers if you can reach people on up the line. If you want to be more neutral about it you could just delete the words "in a product liability claim against the manufacturer," capitalize the "t" on "the" and then delete the words "produced by such manufacturer."

I really don't think there is any problem for Home Builders by leaving the Bill in the form that it came out of the Senate Judiciary Committee amending 60-513. I do believe amending 60-513 is the better approach since that is where people look for limitations. It is possible that lawyers will misadvise clients about liability claims by a straight reference to 60-513 and the interpretations of that statute. Thus, your professional liability insurers should have some real concerns as the toughest cases to defend in a legal malpractice case is a missed statute of limitations. I can certainly envision the lawyer reading 60-513 and telling someone that they have lost their cause of action because they failed to look at 60-3303, the unusual place to find a limitation. That error then becomes a legal malpractice claim affecting Kansas legal malpractice rates rather than a culpable foreign manufacturer's rates.

I would urge you to reconsider your decision about which statute to amend but if you are married to this idea of amending 3303, please do carry out the intent by amending subparagraph C.

Yours truly,

JERRY R. PALMER

JRP/sd

KANSAS
TRIAL LAWYERS ASSOCIATION
Jayhawk Tower, 700 S.W. Jackson, Suite 706, Topeka, Kansas 66603
(913) 232-7756 FAX (913) 232-7730

April 17, 1990

EXHIBIT
B

Rep. Mike O'Neal
2605 Heather Pkwy
Hutchinson, KS 67502

Dear Mike:

There are plenty of major, controversial issues on the agenda for the veto session. If at all possible, I'd much prefer that HB 2689 not be on the "controversial" list. To that end, I am writing to re-state KTLA's position in the hopes an "agreed to" bill can be developed as quickly as possible.

As you will recall from Jerry Palmer's letter to you dated April 2, we understand the mutual intent of HB 2689 to be:

1. To exempt latent diseases from the 10 year statute repose.
2. To restore other product liability cases to limitations controlled by 60-3303, rather than the flat 10 years.
3. To revive latent disease cases barred by the Celotex decision.

In its present form, HB 2689 does not adequately address the second goal. We suggest lines 9 and 10 of page 4 be amended to read as follows: "The provisions of this statute supersede the application of K.S.A. 60-513, and amendments thereto."

You will note the other suggested changes we have made on page 4 of the attached balloon. These are being recommended because the term "seller", as defined in the product liability act is a much broader concept than "manufacturer". At the same time, we do not believe it is so broad as to include home builders.

Obviously, our balloon contemplates a modification in the Senate version of the bill. As you know, we still believe the version passed by the Senate Judiciary Committee is a more preferable vehicle.

First, we simply do not feel the Senate Committee language creates problems for the home builders.

RICHARD H. MASON
EXECUTIVE DIRECTOR

1-5/8

Second, K.S.A. 60-513 is considered by most practitioners to be the primary statute of limitations law. With the change in latent disease cases being proposed in this bill, it is paramount that it be clearly understood and implemented promptly. We think addressing the issue in "513" would facilitate that process.

Additionally, Jerry has made our arguments that using the K.S.A. 60-513 statute very well may preclude some avoidable legal malpractice cases in the future.

Mike, if there's further information we can provide, please let me know. Otherwise, see you April 25.

Sincerely,

Richard H. Mason
Executive Director

cc: Jerry Palmer
encl.
sjs

121-3

[As Amended by House Committee of the Whole]

As Amended by House Committee

Session of 1990

HOUSE BILL No. 2689

By Committee on Judiciary

1-23

~~to another person's wrongful conduct, then the period of limitation shall not commence until the injured party knew or should have known of the fact of the injury and its relation to the adverse party's conduct.~~ until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action. The 10-year limitation shall not apply to:

(1) Alter the time to bring a product liability claim, as defined by K.S.A. 60-3302, and amendments thereto, and as procedurally prescribed in K.S.A. 60-3303, and amendments thereto; or

(2) the time to discover a disease which is latent caused by exposure to a harmful material, in which event the action shall be deemed to have accrued when the disease and such disease's cause have been made known to the person or at the point the person should have been aware of the disease and such disease's cause.

(c) A cause of action arising out of the rendering of or the failure to render professional services by a health care provider shall be deemed to have accrued at the time of the occurrence of the act

40-0

[As Amended by Senate on Final Action]

As Amended by Senate Committee

[As Amended by House Committee of the Whole]

As Amended by House Committee

Session of 1990

HOUSE BILL No. 2689

By Committee on Judiciary

1-23

[Section 1. K.S.A. 60-3303 is hereby amended to read as follows: 60-3303. (a) (1) Except as provided in paragraph (2) of subsection (a) of this section, a product seller shall not be subject to liability in a product liability claim if the product seller proves by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired. "Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner. For the purposes of this section, "time of delivery" means the time of delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold.

[Examples of evidence that is especially probative in determining whether a product's useful safe life had expired include:

[(A) The amount of wear and tear to which the product had been subject;

[(B) the effect of deterioration from natural causes, and from climate and other conditions under which the product was used or stored;

60-3302. Definitions. (a) "Product seller" means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor or retailer of the relevant product.

(b) "Manufacturer" includes a product seller who designs, produces, makes, fabricates, constructs or remanufactures the relevant product or component part of a product before its sale to a user or consumer. It includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer, or that is owned in whole or in part by the manufacturer.

(c) "Product liability claim" includes any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product. It includes, but is not limited to, any action based on, strict liability in tort, negligence, breach of express or implied warranty, breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent, misrepresentation, concealment or nondisclosure, whether negligent or innocent, or under any other substantive legal theory.

(d) "Harm" includes: (1) Damage to property; (2) personal physical injuries, illness and death; (3) mental anguish or emotional harm attendant to such personal physical injuries, illness or death. The term "harm" does not include direct or consequential economic loss.

60-3303. Useful safe life ten-year period of repose; evidence. (a) (1) Except as provided in paragraph (2) of subsection (a) of this section, a product seller shall not be subject to liability in a product liability claim if the product seller proves by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired. "Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner. For the purposes of this section, "time of delivery" means the time of delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold.

Examples of evidence that is especially probative in determining whether a product's useful safe life had expired include:

(A) The amount of wear and tear to which the product had been subject;

(B) the effect of deterioration from natural causes, and from climate and other conditions under which the product was used or stored;

(C) the normal practices of the user, similar users and the product seller with respect to the circumstances, frequency and purposes of the product's use, and with respect to repairs, renewals and replacements;

(D) any representations, instructions or warnings made by the product seller concerning proper maintenance, storage and use of the product or the expected useful safe life of the product; and

(E) any modification or alteration of the product by a user or third party.

(2) A product seller may be subject to liability for harm caused by a product used beyond its useful safe life to the extent that the product seller has expressly warranted the product for a longer period.

(b) (1) In claims that involve harm caused more than 10 years after time of delivery, a presumption arises that the harm was caused after the useful safe life had expired. This presumption may only be rebutted by clear and convincing evidence.

(2) (A) If a product seller expressly warrants that its product can be utilized safely for a period longer than 10 years, the period of repose, after which the presumption created in paragraph (1) of this subsection arises, shall be extended according to that warranty or promise.

(B) The ten-year period of repose established in paragraph (1) of this subsection does not apply if the product seller intentionally misrepresents facts about its product, or fraudulently conceals information about it, and that conduct was a substantial cause of the claimant's harm.

(C) Nothing contained in this subsection shall affect the right of any person liable under a product liability claim to seek and obtain indemnity from any other person who is responsible for the harm which gave rise to the product liability claim.

(D) The ten-year period of repose established in paragraph (1) of this subsection shall not apply if the harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by a reasonably prudent person until more than 10 years after the time of delivery, or if the harm caused within 10 years after the time of delivery, did not manifest itself until after that time.

(c) Nothing contained in subsections (a) and (b) above shall modify the application of K.S.A. 60-513.

POSITION PAPER

TO: SENATE JUDICIARY COMMITTEE

FROM: KANSAS ASSOCIATION OF DEFENSE COUNSEL

DATE: February 13, 1991

RE: SENATE BILL 103

The Kansas Association of Defense Counsel opposes Senate Bill 103. The proposed legislature is both ambiguous, unnecessary, and apparently is intended to make substantial modifications to Kansas law to the detriment of businessmen, manufacturers, governmental entities and others.

The current statute of limitations framework for most tort causes of action may be summarized as follows:

K.S.A. 60-513.

(a) Two (2) years for most tort actions.

(b) Accrues upon first substantial injury, or when fact of injury first becomes reasonably ascertainable to injured person, but no more than ten (10) years, which is the period of repose.

(c) Medical malpractice actions subject to four (4) year statute of repose.

I. The Proposal Provides No Meaningful Repose Period

Last year, the plaintiff's bar requested an extended statute of repose for asbestosis cases. That was enacted with the cooperation of the Kansas Association of Defense Counsel. K.S.A. 60-3303(d). However, now a bill has been proposed in an effort to make the statute of repose for products liability actions completely inoperative. The basis for that analysis is as follows:

1. Senate Bill 103 would exempt product liability actions from the ten (10) year period of repose in K.S.A. 60-513.

2. The only period of repose for product liability actions would be that contained in K.S.A. 60-3303, the relevant provisions

Senate Judiciary Committee
2-13-91
Attachment 3

of which may be summarized as follows: K.S.A. 60-3303 provides that a product seller has no liablity after product's useful safe life expires. There is a rebuttable presumption of a 10 year period of useful safe life. However, the 10 year period has had virtually no effect on litigation as it does not apply:

> (D) . . . if the harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by a reasonably prudent person until more than 10 years after the time of delivery, or if the harm caused within 10 years after the time of delivery, did not manifest itself until after that time. (emphasis added).

If a court were to attempt to interpret the repose provisions of K.S.A. 60-3303, whether a particular action would be barred would almost always be a fact issue for the jury and not a legal issue for the court. After all, whether the "injury-causing aspect of the product . . . was not discoverable by a reasonably prudent person until more than 10 years after the time of delivery," would almost always be subject to factual dispute. Such a result is inconsistent with the very purpose of statutes of repose, which are designed to define certain periods of limitation.

II. The Proposal Affects More Than Just Large Manufacturers

The few words contained in the proposal do no impart its potential for dramatic effect and those effected are more than appear at first blush. First, the obvious point - not all manufactures are large industries. Often they are the small producers on which many Kansas communities depend for survival.

Second, the proposal affects retailers and other merchants. The proposal directs one's attention to K.S.A. 60-3303. However, that statute is part of a much broader enactment, the Kansas Product Liability Act. Under the Act, retailers are often exposed to liability as "product sellers." As one court which interpreted the Act noted, retailers which place their own labels on the product can be considered a manufacturer for purposes of Kansas products liability law. Alvarado v. J.C. Penney Co., Inc., 713 F. Supp. 1389 (D. Kan. 1989).

The Product Liability Act contains some protection for retailers under certain limited circumstances, but that is no substitute for a clearly defined statute of repose.

Governmental entities may be subject to liability under the Kansas Product Liability Act. See Attorney General Opinion No. 86-173, which concluded that a county may be exposed to liability for claims arising from the sale of chemicals, even though those sales are required by noxious weed laws. Even if that particular concern were cured by amending the Kansas Tort Claims Act, the very act of protecting governmental entities from extended liability from the sale of chemicals demonstrates why businesses are concerned about unknown - and often unknowable- future liability.

Although it has not yet been decided by any reported judicial decision, a good plaintiff's attorney may well argue that a farmer is subject to liability under the Kansas Product Liability Act. After all, "product seller" is any person engaged in the business of selling products. K.S.A. 60-3302(a). In turn, "manufacturer" includes a product seller who produces the product he sells. Farmers fit those definitions.

III. The Proposal is Harmful to the Business Environment

The uncertainty of this proposal is contrary to the very purpose of limitations periods and statutes of repose. They are designed to provide a substantial measure of certainty and stability by defining the period of time in which a suit may be brought. Statutes of repose have been adopted by many, if not most, of the states during the last ten years to provide certainty to liability exposure and thus enhance the business environment by reducing the litigation environment. As the respected Brookings Institute recent report on the high costs of civil litigation in America observed:

> The high costs of litigation burden everyone. Our businesses spend too much on legal expenses at a time when they are confronted with increasingly intense international competition.

IV. The Proposal Will Result in Statutory Ambiguity

The proposal would add certain language to the 10 year period of repose contained in K.S.A. 60-513(b), as follows:

> The provisions of this subsection shall not be interpreted to shorten the time to bring a product liability claim, as defined in K.S.A. 60-3302 and amendments thereto, to a period of time less than that provided in K.S.A. 60-3303 and amendments thereto.

A summary of the provisions of K.S.A. 60-3303 is as follows:

K.S.A. 60-3303.

(a)(1) No liability after product's useful safe life expires.

(b)(1) Ten (10) year rebuttable presumption of useful safe life.

(2)(A) - (D) Exceptions to 10 year period.

(c) Nothing in (a) and (b) modify K.S.A. 60-513.

(d) The ten (10) year limitation does not apply to latent disease cause by exposure to a harmful material.

Thus the Legislature will have enacted two contradictory and circular provisions:

1. K.S.A. 60-513(b) will provide that nothing herein shortens the time provided in K.S.A. 60-3303 to bring a product liability action.

2. K.S.A. 60-3303's "time" is set forth in subsections (a) and (b), yet subsection (c) states that nothing in those sections modify K.S.A. 60-513.

Clearly, the confusion resulting from enactment of the proposal will cause litigation in an effort to gain clear judicial guidance as to what "the legislature intended."

If the purpose of S.B. 103 truly is to harmonize K.S.A. 60-513 and K.S.A. 60-3303, then the amendment to 60-513 should read as follows:

> The provisions of this subsection shall not be interpreted to shorten the time to bring a product liability claim arising out of a disease that

> is latent caused by exposure to a harmful material, as defined in K.S.A. 60-3303(d)(2), to a period of time less than that provided in K.S.A. 60-3303(d)(1).

In our opinion, the proposed language in S.B. 103 is unclear and is entirely inconsistent with Kansas' present statute of repose. The proposal is unnecessary and harmful to many groups including large and small manufacturers, retailers, governmental entities and others.

Respectfully submitted,

Thomas R. Buchanan
KANSAS ASSOCIATION OF DEFENSE COUNSEL

KANSAS
TRIAL LAWYERS ASSOCIATION

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TESTIMONY
OF THE
KANSAS TRIAL LAWYERS ASSOCIATION
BEFORE THE
SENATE JUDICIARY COMMITTEE

February 13, 1991

SENATE BILL 104 - Sunshine in Litigation Act

I. INTRODUCTION

"What transpires in the courtroom is public property,"[1] so says the United States Supreme Court. Yet an ever increasing number of proceedings and court documents are secret or sealed from public disclosure, and often the orders allowing secrecy are themselves sealed without prior public notice or hearings, or even a showing that secrecy was proper. In cases concerning environmental contamination, medical implants - such as heart valves or breast implants - automobile hazards, and medical malpractice, this secrecy can mean loss of human lives or significant impact on health and welfare.

One case in point: the Bjork-Shiley convexo-concave heart valve. Problems with fractures and failures of the heart valve first appeared in 1978, but it was marketed and implanted until 1986, when the company withdrew them for "economic reasons". A congressional committee staff report, issued in February of 1990, found that 389 of the valves were known to have broken, leading to the bearer's death in 248 instances.[2] In response to this report, James Benson, the acting head of the FDA, acknowledged to the press that the agency had not acted fast enough in taking the valve off the market. He promised to investigate whether the company had deceived the agency about why it eventually recalled the valves.[3] Last summer Shiley finally announced an effort to contact about 20,000 North Americans who had been given the valve and warn them of the potential problem. For years, Shiley has hidden this important safety information from the public, having settled about 180 suits arising from valve fractures conditioned on umbrella confidentiality orders. Kansans

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[1] Craig v. Harney, 31 U.S. 367, 374 (1947).
[2] Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 101st Cong., 2nd Sess., Com. Print 101-R.

[3] Los Angeles Times, Feb. 27, at D1.

Senate Judiciary Committee
2-13-91
Attachment 4

are as affected as consumers of heart valves, Dalkon Shields, or other nationally marketed products, as the rest of the citizens across our nation.

The public interest is not served by concealing information which would enhance government accountability or advance public health and safety. The Kansas Supreme Court, too, has recognized the significance of public inspection and scrutiny, when it stated, "We recognize . . . the importance of public access to judicial records. Such a right should not be lightly regarded or restricted for trivial purposes."[4] Despite the premise that courtroom proceedings should be open, the proliferation of sealing orders in recent years has resulted in recommendations such as the one from Defense Research Institute that in product liability litigation,

> [e]ven where defense counsel can make no special claim of confidentiality, he or she should routinely seek a protective order limiting the examination of discovery information.[5]

Sealing orders are usually approved with no consideration of the broader public interest. In the vast majority of cases the proposed order has been stipulated to by attorneys on both sides. In such cases, the attorney receiving such a proposed order is in the untenable position of trying to balance the greater good of the public versus representing the best interest of the particular client. If fighting a proposed sealing order means delay in discovery and added costs, stipulations are given to orders that ligitimately should not be entered.

Problems also come about from secret settlement agreements which often require return of documents, virtual destruction of files, or prohibitions on attorneys from representing the interests of other individuals who may have similar claims. The result is an inequity in justice, a requirement that each attorney "start from scratch" and no checks against important documents becoming "lost" or destroyed.

There are legitimate interests that would support a sealing order. These would include:

- Right to Privacy (for indidviduals, not corporations)
- Trade Secrets, if not concealing fraud or work an injustice
- Law enforcement or national security
- Personal safety
- Right to a fair trial

The problem caused by the proliferation of sealing orders and secret agreements has been addressed in a number of states. Florida, North Carolina and Virginia have recently passed legislation. California, New York and Texas have amended their Rules of Court or

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[4] Stephens v. Van Arsdale, 227 Kan. 676, 608 P.2d 972, at 982 (1980).

[5] Kearney & Benson, Preventing Non-Party Access to Discovery Materials in Products Liability Actions: A Defendant's Primer, 1987 Current Issues in Law and Medicine 36, 40.

their Rules of Civil Procedure to correct the problem. States including Alaska, California, Colorado, Georgia, Hawaii, Missouri, Pennsylvania, Rhode Island, and Washingtron have indicated that this topic will emerge in their 1991 legislative session.

II. PROPOSED SOLUTION - SENATE BILL 104

The Sunshine in Litigation Act was designed to do several things, including:

1) Prohibit Kansas courts from entering orders or judgments that would conceal information that could protect citizens from any sort of "public hazard";

2) Void agreements or contracts that would conceal "public hazards";

3) Give individuals the right, through court motion or declaratory judgment action, to contest an order, judgment, agreement or contract that violated the provisions of this section;

4) Require a posting of notice of all motions requesting protective orders, in a known, specified location, insuring that potentially affected persons have an opportunity to be heard.

This particular bill was patterned after the legislation passed last July in Florida, with elements of the Texas court rule incorporated.

The existing laws in Kansas are not adequate, since they do not provide for any public notice that such an order is being requested, nor allow for the intervention of interested third parties to contest proposed orders. And certainly, existing laws have not deterred corporations from seeking protective orders or secret settlement agreements which have placed the opposing attorneys in a position in which, for the sake of that client, they have no choice but to agree.

III. SUMMARY

SB 104 presents a major public policy question to the Kansas legislature. In the short run, it would likely result in some cases being made more difficult to settle. However, the long term interest of Kansas citizens will be well served, as we believe the bill would reduce future negligent behavior by individuals and corporations. The bottom line is a safer Kansas.

We appreciate the opportunity to testify on this important issue and encourage you to report it favorably for passage. Thank you.

KANSAS CITY BUSINESS JOURNAL

January 1, 1991

Courts' urge to secrecy is tempting but shortsighted

One of the glories of our democracy is that our public institutions conduct their business for all to see. Our elected officials, their administrations and our courts are open to the public. Or are they?

Anyone familiar with our court system, including many lawyers, will tell you that an alarming number of cases, after having taken up a considerable amount of publicly funded time, end up sealed by judges, unavailable to the public our court system is there to protect.

Lawyers are not necessarily opposed to this because it is often their clients who want to keep their legal disputes out of the public eye. But when secrecy impinges upon their ability to earn a living, lawyers can be outspoken about such practices. The Kansas Trial Lawyers Association, an organization that represents plaintiffs' attorneys, is introducing legislation this year that would restrict the use of protective orders in civil suits.

Although the KTLA is particularly concerned about product liability cases, in which findings that a product is dangerous may be hidden from the public and thus from the next lawyer suing its manufacturer, their supporting arguments pertain to almost any case.

"There are two aspects to the public's right to know," said Liz Kaplan, a lawyer with the Overland Park firm of Shetlar Benien Kaplan & Donham and vice president for public affairs of the Kansas Trial Lawyers Association. "One is their right to know as taxpayers who support the court system. And the second is their right as consumers to know about products on the market that are potentially dangerous."

One can understand the reason companies want cases sealed. Besides the embarrassment of being accused of practices that may not be true, they believe important aspects of their private business, aspects they don't want competitors to know about, are being dragged into the open.

The *Business Journal* has always held the position that courts are public institutions and the public is entitled to all information that flows through them.

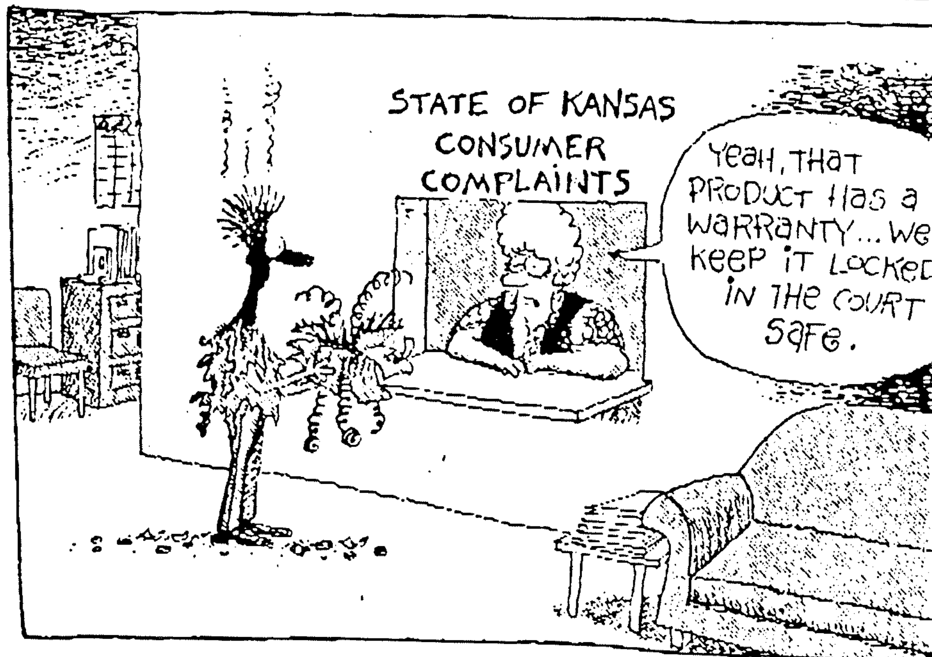
In recent months, we raised questions over why a judge in Jackson County has closed records and proceedings in a case involving the J.C Nichols Co., and why a judge in Jefferson City has been allowed to oversee the largest insurance company liquidation in history in virtual secrecy. And so we support this proposal, and believe there are few situations in which the concern for embarrassment, or even the public display of private enterprise, outweigh the public's right to know what business is conducted in its courts.

One must remember that often the allegations made are in fact true, and if private parties are allowed to hide proof of those allegations, then, in business, competitors who are acting in unethical ways can escape being exposed.

Judge Lloyd Doggett of the Texas Supreme Court explained the danger pointedly in a seminar before Kansas lawyers. He said the Supreme Court rule in Texas begins with a clear presumption that all civil records are open to the public. The litigant who wants them sealed must, by "a preponderance of the evidence," establish that its interest in secrecy outweighs that presumption and "any probable adverse effect that sealing will have upon general public health or safety.

"In this regard," Doggett said, "the philosophy underlying Rule 76a differs sharply from those who perceive our courts solely as a setting for the resolution of private disputes between private parties concerning private matters for private purposes."

EDITORIAL



4-4/8

Kansas lawyers seek to restrict use of protective orders in civil suits

By DAN MARGOLIES

The landmark tobacco liability case of Cipollone vs. Liggett Group Inc., apart from being the first to result in a jury verdict requiring a cigarette manufacturer to pay damages to the family of a smoker who died of cancer, is noteworthy for another, less remarked reason.

The case is one of hundreds of product liability suits filed every year in which the defendants seek court orders barring dissemination of information about their products. Most of these requests — some of which involve motions to seal entire court files — are granted as a matter of course, with little consideration given to the public's right to know about a product's potentially harmful effects.

But in the Cipollone case, tried in New Jersey in 1988, U.S. District Judge H. Lee Sarokin found that while the information the tobacco company defendants sought to suppress might be embarrassing or even incriminating, "that alone would not be sufficient to bar (the information) from the public and the press."

For the plaintiff's bar, it's an increasingly vexing issue. Sealed court records not only hurt the public by making information on potentially hazardous products inaccessible. They force plaintiffs' lawyers to constantly reinvent the wheel because the information, often painstakingly developed in the face of defendants' recalcitrance, can't be shared.

In recent years, several states have responded with legislation limiting the circumstances under which court records may be sealed. Kansas might be next.

The Kansas Trial Lawyers Association plans to introduce legislation in the 1991 session of the Kansas Legislature to restrict the use of protective orders in civil suits. Although the Kansas Open Records Act already provides for public access to official public records — including court records — it also grants exceptions for records closed by a judge.

"There are two aspects to the public's right to know," said Liz Kaplan, a lawyer with the Overland Park firm of Shetlar Benien Kaplan & Donham and vice president for public affairs of the Kansas Trial Lawyers Association. "One is their right to know as taxpayers who supports the court system. And the second is their right to know about products on the market that are potentially dangerous."

Kaplan said the KTLA's proposed bill "would mainly set more guidelines and more hoops to be jumped through before a judge can seal a file. This way judges won't have untrammeled discretion."

Although no statistics are available on how many cases or portions of cases are sealed every year in Kansas, anecdotal evidence suggests that the practice is not uncommon.

Dianne Nygaard, another Overland Park lawyer, said she has been stymied in her efforts to obtain discovery in court cases involving the use of the acne drug Accutane because of confidentiality agreements signed by the litigants and approved by the courts. Nygaard sued the drug's manufacturer two years ago, contending that it caused birth defects in the daughter of a woman who had taken it while she was pregnant.

"I know of no cases in which the documents are freely available to plaintiffs," she said.

The KTLA last month sponsored a seminar in Kansas City on sealed court records. Speakers at the weekend event, attended by nearly 100 lawyers, included Judge Lloyd Doggett of the Texas Supreme Court, which recently enacted a rule, formally known as Texas Rule of Civil Procedure 76a, limiting closure of court records.

"When a private dispute is taken before a city council, a state regulatory board, or into the halls of Congress, it is no longer purely private," Doggett told the gathering. "The public finances these legislative institutions and has a fundamental right to know how these matters are being resolved.

"But the public's interest is often every bit as real when a private dispute is resolved in the third branch of government. Like the other two branches, our judiciary is taxpayer funded, and its decisions often have far-reaching policy implications."

Doggett said Rule 76a begins with a clear presumption that all civil records are open to the public. The litigant who wants them sealed must, by "a preponderance of the evidence," establish that its interest in secrecy outweighs that presumption and "any probable adverse effect that sealing will have upon general public health or safety."

"In this regard," Doggett said, "the philosophy underlying Rule 76a differs sharply from those who perceive our courts solely as a setting for the resolution of private disputes between private parties concerning private matters for private purposes."

Dan Margolies is a reporter with the Kansas City Business Journal.

4-5-8

THE NATIONAL LAW JOURNAL
January 14, 1991

In Courts, Legislatures

Anti-Secrecy Drive Spreads in the States

BY ANDREW BLUM
National Law Journal Staff Reporter

THE MOVEMENT TOWARD less secrecy in civil suits takes on new steam this year with a flurry of legislative efforts in California, Illinois and Congress as well as a review of court rules in New York state.

If successful, the states will join Texas in changing court rules and Florida, Virginia and North Carolina in passing bills to open up civil court records. These changes — all since 1989 — mostly deal with barring secrecy or forcing civil litigants to prove the need for it. In North Carolina, the law bans the state from entering sealed settlements. (NLJ, 5-7-90.)

The 1991 actions mark the latest battle for the plaintiffs' bar — the motivating force behind a sort of glasnost in the courts — and its defense counterpart over an issue that has drawn in the courts and the news media as players in the debate. Though statistics are hard to come by, anti-secrecy forces say sealed records keep from the public important information, on dangerous products, for instance. Defense attorneys say it boils down to a question of privacy.

But defense and business interests have had some wins, such as one in Rhode Island, where the governor vetoed an openness bill last year. But proponents plan to reintroduce legislation in 1991, and bills are also expected in Hawaii, Wisconsin and Washington.

On the national front, an aide to U.S. Sen. Herbert Kohl, D-Wis., said anti-court-secrecy legislation is under consideration for 1991.

In California, the conflagration began in earnest last year as the Superior Court of San Diego adopted local rules to prevent secret settlements in cases including those about hazardous products. It also calls for a three-part test to obtain a court seal.

The movement spread statewide, with legislation being pushed by the California Trial Lawyers Association and the California-based Center for Public Interest Law. Democratic State Sen. Bill Lockyer will introduce the bill early this year.

The center's legislative director, Steve Barrow, said all secrecy agreements over cases involving public hazards would be barred. Though optimistic about the bill's passage, he admitted "it will not happen quickly."

In Illinois, Larry Stuffle, assistant legislative director of the Illinois Trial Lawyers Association, said legislation has not yet been drafted. But an eventual bill, expected later this year, essentially would call for proof of the need "for any sort of secrecy or gag order."

Crucial to the group's strategy is framing it as a "safety issue" and focusing on "the public's right to know," according to a memo by Illinois Trial Lawyers Association Executive Director Jim Dudley.

New York Actions

In New York, the state Office of Court Administration has taken up the issue at the urging of Chief Judge Sol Wachtler of the Court of Appeals, the state's highest court. A 30-member advisory committee has put forth a proposal that would ban sealing of records in the absence of a finding of "good cause" by courts. The administrative board — composed of Judge Wachtler and the presiding justices of the four appellate divisions — is to act Feb. 4.

While the matter is pending, New York Attorney General Robert Abrams has urged a provision to grant state agencies access to sealed information needed to protect the public.

New York State Trial Lawyers Association President Philip M. Damashek of New York's Philip M. Damashek P.C. said the advisory report does not go far enough. Instead, the New York group supports a rule similar to the one in Texas, which established a "presumption of openness" in court records and detailed procedures under which seals could be ordered.

But Lawrence P. Justice of Albany, N.Y.'s Rice & Justice, counsel to the Business Council of New York, said the issue boils down to privacy, which he contends the new rules might eliminate. The group, in a letter to Judge Wachtler, said, "We believe that there are fundamental issues which justify no rule being adopted. These involve ...the desire to facilitate prompt settlement and the overall efficient administration of the courts."

> The actions this year mark the latest battle for the plaintiffs' bar — the motivating force behind a sort of glasnost in the courts — and its defense counterpart over an emotional, divisive issue.

All the action nationwide comes as a welcome sign to such secrecy critics as Trial Lawyers for Public Justice Executive Director Arthur H. Bryant. "There is no question the movement for greater openness is gaining momentum," he said. "More legislatures are looking at it, judges are more sensitive to the need to protect the public from unnecessary secrecy and more plaintiffs and attorneys are starting to fight protective orders."

But one thing neither the Trial Lawyers for Public Justice nor other anti-secrecy forces like the Association of Trial Lawyers of America have are statistics. Said Mr. Damashek: "The

4-48

problem with attempting to determine statistics is that because of the nature of secrecy agreements, it virtually inhibits attempts to find out how often it happens." But he added, "The surest indication as to how big a problem this is is the amount of time, energy and money which the other side is spending to try to continue the current practice of burying secrets."

A leading opponent of the movement, defense attorney James W. Morris III of Richmond, Va.'s Morris and Morris, said the Texas rules — which took effect Sept. 1 — should shed light on how often secrecy is sought.

Mr. Morris, honorary chairman of the Defense Research Institute, said Texas Supreme Court Justice Lloyd Doggett — a moving force behind that state's rules and a co-panelist with him at a recent meeting — said the rules, like them or not, mandate keeping statistics. From Sept. 1 to Dec. 19, there were 19 such secrecy motions filed in courts around the state, according to the court.

Mr. Morris said the issue has taken on so much steam partly because ATLA has tapped into the "motherhood" of the First Amendment and attracted the media. "Press interest in this is natural. ATLA has locked onto this combination," he said.

"What everybody keeps missing is that the civil justice system was given a simple but important task: to solve civil disputes in an orderly, fair, nonviolent and expedient manner," Mr. Morris said. "Its job is not to provide information, no matter how valuable, to other people for other purposes."

Despite the anti-secrecy storm, he vowed, the defense will keep fighting. "We haven't quit."

LAW

Firms' Secrets Are Increasingly Bared by Courts

By Amy Dockser Marcus
Staff Reporter of The Wall Street Journal

Corporations that venture into court increasingly face the risk that company secrets will be opened to public view.

Efforts to make sealing court records and settlements more difficult are gaining momentum in a number of states. Florida, North Carolina, Texas and Virginia have already adopted rules aimed at reducing the number of secret agreements and opening up the pretrial information-gathering process.

Today, a group of New York judges will consider a proposal requiring litigants to show "good cause" before court records can be sealed. The state bar association has voted to oppose the proposal, arguing there is no need for such a rule. Related legislation is expected to be equally controversial when it is introduced this year in Georgia, Hawaii and California, among other states.

The debate over such measures pits the public's interest in knowing about possible health, environmental and other public hazards—as well as about the operation of the court system itself—against the litigants' right to privacy. And it has enormous consequences for corporations, which must often provide the court with information during lawsuits about marketing strategies, customer lists and manufacturing processes.

"Trade secrets and other proprietary information will be subject to indiscriminate disclosure," says Alfred W. Cortese Jr., a Washington defense lawyer who has written and lectured widely about the subject. In addition, many companies fear that the new rules will discourage settlements and impair their ability to ward off frivolous lawsuits.

Judges already have the power under existing laws to consider the public interest when determining whether to seal documents. But legal experts say that the courts are so clogged that judges often routinely approve secrecy requests as long as both parties agree.

Plaintiffs' lawyers, who have been the main force behind greater openness, insist the companies' fears are unfounded. "There is a small set of cases that would not settle if the settlement didn't guarantee secrecy. But those are precisely the cases the public should not want settled because the plaintiffs' secrecy is being bought," says Arthur L. Bryant, executive director of Trial Lawyers for Public Justice, a Washington-based group that successfully challenged secrecy agreements in the Exxon Valdez litigation.

These lawyers say the new rules will help them avoid duplicating their investigations in product-liability cases because information gathered in one case will be made available for others. And proponents say that litigants will not have to give up their right to privacy once they walk through the courthouse doors.

"Judges are capable of fashioning limited protection where necessary while still ensuring that important records in matters affecting public health and safety are not sequestered from public view," says New York State Attorney General Robert Abrams, who plans to introduce legislation that would grant government agencies access to certain information even when a court has agreed to seal the records.

Mr. Abrams and others point to a case involving Xerox Corp. as an illustration of the potential dangers of sealing records involving matters of public interest. In the case, two families sued Xerox, alleging that exposure to toxic chemicals emanating from its plant in Rochester, N.Y., had damaged their health. The case was settled in 1988, and Xerox reportedly paid several million dollars to the families in exchange for a promise of confidentiality, according to Richard Rifkin, counsel to Mr. Abrams.

Fearful that other families in the community might also be affected by the pollution, the health departments of Monroe County and New York state sued to open the records. The judge in the case agreed to grant the agencies access to the file, but upon examination, it turned out that no critical scientific data were contained there. "The time and effort involved could have been avoided if the documents had been available to the state agencies from the outset," says Mr. Rifkin.

For many others, the case supports their contention that the current system already provides adequate protection for public safety. Robert L. Beck, a Rochester lawyer who represented the families, says that the only documents under seal were the children's medical records, kept confidential in order to ensure their privacy. Moreover, Mr. Beck claims that he alerted the local health department about the potential hazard but that the agency didn't act on the information.

Insufficient Information

But many lawyers say that corporations do not give government agencies sufficient information about problems early enough, particularly involving possible defects.

Marc Lappe, a professor at the University of Illinois College of Medicine who has testified at trials about his research on breast implants, says secrecy agreements obtained by corporations have hampered his ability to alert the public to potential dangers associated with the product or to share his findings with other scientists. "I don't see why an adverse effect of a product can or should be protected legally from disclosure. It cannot be justified as proprietary information," Mr. Lappe says.

A spokesman for Dow Corning Corp., a manufacturer of silicone products that has obtained protective orders against Mr. Lappe, says the company seeks such agreements to protect trade secrets and information necessary to maintain a competitive edge.

"A scientific test that shows an adverse reaction doesn't mean the product itself is unsafe. But when repeated studies show a problem, we are the first to bring the information to the appropriate regulatory agencies," says the spokesman for the joint venture between Dow Chemical Co. and Corning Inc.

Trade Secrets

The states that have adopted changes are now struggling to define how far the rules go in requiring information to be made public. William and Erma Dunshie, who were injured in an automobile accident in 1989, have alleged in a lawsuit that the seatbelt system in their car was defective. They opposed an effort by the car's maker, General Motors Corp., to withhold from public scrutiny certain safety test results sought by the couple in the pretrial stages of the litigation. Last November, at a hearing in Beaumont, Texas, the judge agreed with General Motors that the information should be kept confidential because it involved trade secrets.

"In theory, it's a great rule. But in this case it didn't do any good at all. The problem is it's still not clear what level of proof is required to get documents released," says Brent Carpenter, the Houston lawyer for the couple. He says that his clients are considering appealing. A lawyer for General Motors said he couldn't comment on pending litigation.

Texas Supreme Court Justice Nathan L. Hecht, who wrote a dissenting opinion when the state's high court approved the rule last year, says he fears the rule's broad language will cause an increase in litigation.

"It is unworkable for the courts to decide what information the public needs to know," he says. "The judges are already overburdened."

4-8/8

THE KANSAS CITY KANSAS

AREA CHAMBER OF COMMERCE

913/371-3070

February 13, 1991

TO: THE SENATE JUDICIARY COMMITTEE

FROM: JOHN J. JURCYK, JR.
CHAIRMAN KANSAS CITY, KANSAS AREA CHAMBER OF COMMERCE

RE: S.B. 104

DATE: FEBRUARY 12, 1991

The Kansas City, Kansas Area Chamber of Commerce opposes S.B. 104 for reasons as follows:

1. The Bill Will Make The Kansas Courts An Extremely Hostile Environment For Businesses.

Some of the most valuable assets that a business owns are contained in information, like trade secrets. This valuable information is often placed at risk of disclosure during litigation. The proposed bill would make it very difficult for judges to adequately protect trade secrets and other proprietary information, creating unnecessary risks for businesses involved in litigation

Senate Judiciary Committee
2-13-91
Attachment 5

P.O. Box 171337, Kansas City, Kansas 66117 • 727 Minnesota Avenue 66101

in Kansas. Further, the bill could be interpreted to apply to confidential business agreements entirely unrelated to litigation, like confidential licensing agreements. Confidentiality is often essential to a business in order maintain a competitive edge. Reducing the ability of the courts to protect the confidence would work a substantial hardship on the business community.

2. The Definition of "Public Hazard" Would Violate Privacy Rights.

The proposed bill defines public hazard so broadly that it is difficult to think of anyone or anything involved in litigation that would not meet the definition. Is a public school teacher involved in an employment discrimination case a public hazard when discovery reveals that he had psychiatric care as a minor? Is a physician who has a meritless malpractice claim filed against her a public hazard?

The bill eliminates the authority of judges to protect the privacy of individuals who, because of liberal discovery rules, must reveal very private details of their lives in litigation.

3. The Bill Calls For Pre-Judgment of the Merits.

In many lawsuits, the ultimate issue is whether or not the defendant harmed the plaintiff. Yet, the bill requires the court to determine that very issue whenever a motion for a protective order is requested. This is generally at the start of the litigation. In essence, then the bill would require the court to prejudge the merits of the case before it ever went to trial, resulting in a sort of summary judgment.

4. Senate Bill 104 is Unnecessary.

Courts already have the authority under existing law to make public any information produced in a lawsuit that concerns a public hazard. Courts must maintain discretion to protect both the litigants and the public -- that discretion exists already under existing law, making the bill unnecessary.

Further, the public already has broad access to the courts, including access to any records filed with the court and access to all court proceedings. Anytime a product liability suit is filed against a manufacturer,

the suit is inevitably reported in both local and national media.

S.B. 104 should not be passed.

STATEMENT OF JAY F. FOWLER
KANSAS ASSOCIATION OF DEFENSE COUNSEL

The Kansas Association of Defense Counsel is an organization of Kansas lawyers who devote a substantial portion of their time to the defense of litigated cases. It has as its objectives the improvement of our system of jurisprudence and the administration of justice.

I have been asked by the Association to address the serious concerns of the Association and many of its client groups regarding Senate Bill 104. By way of background, I am a partner in the law firm of Foulston & Siefkin. Our firm represents a wide variety of Kansans from average individuals, physicians, and business people to major corporate employers and insurance carriers. Much of my particular practice is in the defense of injury claims against individual defendants, corporations and insurance carriers. My range of experience runs from traditional automobile negligence claims to medical malpractice and product liability litigation involving corporate defendants.

Much has been written on the question of public access to information held by private citizens or corporations as a result of the lawsuit process. Attached as an appendix to this statement are a number of articles and position papers addressing the concerns raised by the type of bill proposed here. Rather than restate much of what is said in the attached material, this

Senate Judiciary Committee
2-13-91
Attachment 6

statement will focus on the particular problems presented by the proposed legislation.

Senate Bill 104 would substantially alter current law and practice as applied to civil litigation disputes between private parties in Kansas. While the extent to which it would affect the rights of private litigants may be subject to some dispute, there is no doubt that the current proposal goes far beyond existing law in most states and on the national level. In considering this bill, this committee needs to understand the scope of the proposed language in Senate Bill 104 and then weigh it against the current procedure and practice with regard to protective orders. This writer submits that the current practice and procedure allows litigants and the public substantial access to information concerning claims and lawsuits while at the same time protecting, where appropriate, the rights of private litigants to confidentiality.

Current Kansas civil practice allows for the entry of protective orders in the discretion of the court only upon "good cause shown." K.S.A. 60-226(c). The court is given leeway to protect parties from abusive discovery and to limit discovery or disclosure of trade secrets or "other confidential research, development, or commercial information." The practice also allows for protective orders to be entered to protect from disclosure (either within a lawsuit or outside the confines of a lawsuit), information that is confidential or particularly private in nature

6-2/11

either because of a statute establishing privilege or because of the confidentiality inherent in the nature of the information itself.

Protective orders are not routinely granted in Kansas unless all parties to the lawsuit are in agreement that such an order be entered. Absent agreement, the court must make a specific finding that a protective order should issue and the court, not the private litigants, determines the extent of the protective order's scope. Current law allows the court to take into consideration any factors relevant to not issuing a protective order, including all aspects of the need for the requested information in the litigation process.

It is my understanding, based on personal experience, that most of the protective orders entered by Kansas courts are the result of an agreement between adverse parties in civil litigation. The parties agree to exchange information with restrictions on its subsequent disclosure to nonparties as a part of an effort to facilitate the exchange of information in a dispute, recognizing that it is often more efficient to privately agree to the protection of what would otherwise be confidential information. This is done to avoid what would otherwise be repeated and hard fought motions with the court to limit the "discoverability" of documents and information. As such, the use of protective orders can facilitate the exchange of private

information between litigants and ultimately the resolution of disputes.

The enactment of a "protective order" bill would alter what has historically been recognized as a balancing of interest between the need for disclosure of information to facilitate a lawsuit and the protection of privacy generally accorded individuals and businesses in their personal or business affairs. It must be remembered that much of the information "discovered" during the process of a lawsuit is information proprietary or personal to the individual or business from which it is being "discovered". The discovery process allowed under the Kansas Rules of Civil Procedure allow litigants access to that type of information so that the facts concerning a claim may be accurately developed and the dispute resolved. The litigation process represents a very real intrusion into the affairs of private individuals and businesses and must be recognized as such. The law and the court allow that intrusion in order to provide a process to resolve private disputes and redress claims. The enactment of a bill of the nature of Senate Bill 104 would destroy the "balance" that now exists. Presently, the litigant's need for information is preserved while the confidential or private nature of the material being produced in discovery is protected.

It is important to recognize that there is a substantial difference between what is traditionally produced during the discovery process in a lawsuit and those materials that are

ultimately determined to be relevant and actually used in evidence in a trial or hearing. As noted by the Kansas Supreme Court,

> "[T]he scope of relevancy in a discovery proceeding is broader than the scope of relevancy at trial. Relevancy includes information which may be useful in preparation for trial. A request for discovery would be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the lawsuit."

Gleichenhaus v. Carlyle, 226 Kan. 167, 170, 597 P.2d 611 (1979).

The documents produced in a typical products liability case, medical malpractice case, or other complex tort lawsuit can easily reach into the multiple thousands of pages. When those cases are ultimately tried or resolved on motions for summary judgment, the actual volume of the material used in a court proceeding may only be a small fractional percentage of the total material "discovered". While what turns out to be "relevant" to the presentation of the claim to the jury or judge may be relatively small, all of the material oftentimes contain confidential business or personal information that would not otherwise be required to be disclosed by the individual or company except for the existence of a lawsuit.

Most protective orders do not include within their scope documents or information produced during discovery once they have been put into evidence during the trial of a case. As a general rule, protective orders have historically been utilized to protect confidentiality during the pretrial discovery process. While protective orders continue on to cover those items produced during

discovery that are not relevant to or utilized during the trial of a case, they do not generally operate to conceal or make secret the traditional public nature of a trial or judicial decision. In fact, most documents subject to a protective order are never to be found in the court record of a trial or judicial proceeding simply because they have never been placed into the record by the parties, as they are not relevant. This is not a result of a protective order being in place, but the natural result of the document screening process known as "discovery", and would be the result whether or not there was a protective order in place in the case.

All of this would be changed by the proposed Senate Bill 104. The bill would allow strangers to the litigation the ability to intervene into the case in order to obtain access to information that may not even be used as part of the trial of the case. It substantially modifies traditional rules and expectations concerning privacy rights of individuals and corporations regarding their personal and business affairs, and would undoubtedly modify the character of most litigation of that type here in Kansas. It could be expected that instead of more information being voluntarily produced to the litigants during the course of a lawsuit, there would be less. Those individuals or businesses wanting to preserve the confidentiality of their affairs would simply have to fight "the discoverability" of the information in the first instance rather than allowing it to be produced without a protective order preserving some confidentiality for the

information. All of this would likely complicate the litigation process and most probably result in a lesser amount of information being utilized in the process of resolving disputes through lawsuits.

With regard to Senate Bill 104 itself, there are several fundamental aspects of that bill that need to be understood in order to assess its potential adverse impact on dispute resolution in Kansas:

1. The bill would effectively outlaw protective orders or agreements in civil litigation. This is true whether or not the private litigants voluntarily agree to the entry of such an order or agreement. The bill goes beyond court-entered orders to encompass agreements or contracts between parties, which also protect confidentiality.

2. The bill would apply to any situation where injury is alleged to have occurred involving a person, procedure, or product as a cause. There is no requirement that there be actual culpable conduct (negligence, fault, defectiveness, or other wrongful acts), and apparently no judicial protection is to be afforded to private litigants to protect confidential or personal information from unwarranted disclosure to outsiders.

3. The bill would allow third parties, whether they be private citizens, interest groups, or the news media, to become active participants in the litigation process. No longer would civil litigation be a forum for private litigants to resolve their

disputes with the court as a referee. Third parties, seeking access to previously confidential information, could now become active participants in the lawsuit process.

In addition to the three points addressed above, the bill would also substantially affect the privacy rights of nonparties to a lawsuit. It is not uncommon for a business or individual to have information concerning a person or subject matter that is involved in litigation. The information could include banking records, medical information, employment records, independent studies or reviews of various nature, and other types of materials frequently constituting confidential records of a nonparty. During the discovery process in a lawsuit, a subpoena or other discovery request could be directed to the nonparty seeking production of the nonparty's books and records. Traditionally, a protective order would be issued by the court either limiting or protecting from subsequent disclosure any materials required to be produced by that nonparty as part of the litigation process. Senate Bill 104 would overrule those confidentiality rights traditionally afforded nonparties when information is sought from them in the litigation process.

With regard to nonparties, the Kansas courts have developed and discussed a number or rules and considerations to apply in determining what needs to be disclosed and any limitations that should be imposed on such a disclosure. See, e.g., Berst v. Chipman, 232 Kan. 180, 663 P.2d 107 (1982). In Berst v. Chipman,

the Kansas Supreme Court observed that the court's supervisory powers over discovery allow it to fashion appropriate orders to protect the competing interest of "the litigant's interest in obtaining the requested information with the resisting party's interest, as well as the public interest. . . ." Id. at 187. The consideration of each situation on a case-by-case basis by a court charged in its discretion to facilitate the discovery process and protect the interests of all concerned provides perhaps the best basis for protecting all interests involved. The ability of a court to weigh the considerations involved in each case and enter appropriate orders to protect all interests involved would be destroyed by Senate Bill 104.

Whether involving parties or nonparties, the appropriate resolution of the competing concerns over protective orders best belong with the courts with their ability to analyze each case on its individual merits. Current restrictions on the availability of protective orders allow the courts to exercise suitable discretion in weighing the many issues involved. If the parties are unable to mutually agree to an order, the court's ability to grant such an order requires a hearing on the motion and a finding by the court of just cause. The hearing procedure and the required court finding provide significant protection to those interested in disclosure of information in the discovery process.

The treatment of protective orders by the Kansas Code of Civil Procedure and by the Kansas courts is similar to the practice

in place in the federal judicial system and that of many states. The current use of protective orders here in Kansas and elsewhere effectively balances the many competing considerations involving fairness, privacy, due process, and the effective judicial resolution of disputes. This committee should look critically upon any effort to modify the current system and should reject Senate Bill 104 as simply not recognizing the important rights of privacy and confidentiality of parties and nonparties to the litigation process.

Submitted by,

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APPENDIX TO STATEMENT OF JAY F. FOWLER

A. Statement of the Honorable Joseph F. Weis, Jr., before the Subcommittee on Courts and Administrative Practice, Committee on the Judiciary, United States Senate, May 17, 1990.

B. Statement of Richard P. Campbell before the Subcommittee on Courts and Administrative Practice, Committee on the Judiciary, United States Senate, May 17, 1990.

C. "Court-Approved Confidentiality Orders: Why They are Needed," 57 Defense Counsel Journal 89 (Jan. 1990).

D. Miller, "Privacy, Secrecy and the Public Interest, " For the Defense (Sept. 1990).

E. Miller, "Memorandum on New York Civil Practice Law and Rules Regarding a Right to Public Access to Inormation Produced in Litigation," Submitted to the New York Advisory Committee on Civil Practice, June 15, 1990.

F. Lawyers for Civil Justice, Protective Orders Educational Kit, with attachments.

(These documents are available in the office of the Senate Judiciary Committee)

SHOOK, HARDY & BACON

TO: MEMBERS OF THE SENATE JUDICIARY COMMITTEE

FROM: HARVEY L. KAPLAN
SHOOK, HARDY & BACON
1200 MAIN STREET, 27TH FLOOR
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OVERLAND PARK, KANSAS 66210

DATE: FEBRUARY 13, 1991

RE: SENATE BILL NO. 104

Under modern rules of civil procedure, objections regarding admissibility in evidence are not a proper basis for refusing discovery; litigants must allow their opponents broad access to all information that could reasonably lead to discovery of information relevant to the lawsuit. To protect litigants against the harms that could flow from this process, courts have had the authority to ensure the confidentiality of particularly sensitive information, such as trade secrets and other proprietary information, through the issuance of a protective order. With a protective order in place, the confidential information can be used in the litigation at hand, but disclosure outside the lawsuit is prohibited.

Private parties in a private dispute should be able to agree on what happens to private records and whether they can conclude a private dispute on terms that are known only to them. Senate Bill No. 104, however, would restrict or eliminate this discretion.

The advocates behind proposals of this type argue that courts are granting protective orders with increasing frequency to conceal from the public information about dangerous consumer products or harmful corporate practices such as environmental pollution. Courts are meant to resolve legal disputes between private litigants. Senate Bill No. 104 imposes restrictions on protective orders and confidentiality that constitute a fundamental change in the role of courts in our society. Traditionally, civil litigation between private parties has been private. If courts are saddled with a presumptive right of public access to all information produced in litigation, the courts would become public information clearinghouses and libraries, a burden that the courts cannot assume in light of their already excessive workload.

Senate Judiciary Committee
2-13-91
Attachment 7

Even if the courts had the resources to act as information clearinghouses, they are not the appropriate government agencies to do so. This responsibility already lies in a plethora of executive and administrative agencies. Duplicating this function within the judiciary cannot be justified. The real purpose behind proposals such as Senate Bill No. 104 is to allow plaintiffs' lawyers to share or sell information from litigation for use in other litigation, thus perpetuating the litigation explosion and generating additional contingency fees.

American law traditionally has punished the individual who reveals the confidential information -- not the individual who owns it. This philosophy underlies insider-trading laws, government contracting law, and laws surrounding other uses of privileged information. Even the media recognize the importance of confidentiality, often invoking shield laws to maintain the confidentiality of sources.

Confidentiality plays a legitimate role in litigation-- not just for the corporate defendant. Plaintiffs, defendants, and witnesses often expose very personal, sensitive information in courts. Public disclosure of this information would be an unwarranted invasion of the right to privacy. Corporations and businesses, whether plaintiff or defendant, must frequently reveal information of great commercial value in order to resolve lawsuits, information in which the organization has a valuable property right.

Confidentiality promotes judicial efficiency and economy, essential elements of the just, speedy, and inexpensive resolution of disputes. With a protective order in place during discovery, the court can require the litigants to disclose information among themselves without fear of public disclosure and without constant judicial supervision. This frees the court's time, allowing it to deal with other cases.

Confidentiality also promotes settlement, reducing the number of time-consuming and costly trials. Litigants often condition settlement on an agreement that the terms of settlement will be kept confidential. Settlements are especially essential today in light of the overwhelming caseloads pending on most court dockets.

In summary, protective orders, and the confidentiality they ensure, are crucial components of the litigation process. The rules governing discovery and settlement operate as a system of checks and balances designed to ensure that both plaintiffs and defendants are treated fairly. When the rules give parties free access to their opponents' most sensitive and confidential information, courts must have the authority to balance this

7-2/3

intrusion with a guarantee of confidentiality. Although both plaintiffs and defendants have important rights at stake, defendants often have far more to lose when confidentiality cannot be guaranteed. Thus, restricting or eliminating the discretion of courts to protect confidential information will undermine the delicate system of checks and balances to the detriment of litigants, the courts, and the public.

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7-3/3