Approved: May 4, 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 18, 1991 in room 514-S of the Capitol.

All members were present.

Committee staff present:
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Office of Revisor of Statutes
Judy Crapser, Secretary to the Committee

Conferees appearing before the committee:
James Clark, Kansas County and District Attorneys Association
Paul Shelby, Office of Judicial Administration

Chairman Winter opened the meeting by sharing with the committee a letter he received from Gene Johnson on behalf of Judge William R. Carpenter requesting introduction of legislation to require counties to provide security for the District Courts in the State of Kansas. (ATTACHMENT 1)

Senator Gaines moved to introduce the legislation as requested by Judge Carpenter. Senator Oleen seconded the motion. The motion carried.

Chairman Winter opened the hearing for SB 183.
SB 183 - condition of probation to include confinement in county jail.

James Clark, Kansas County and District Attorneys Association, testified in support of SB 183. (ATTACHMENT 2)

As no other conferees appeared, this concluded the hearing on SB 183.

Senator Rock made a motion to strike "service of a definite term of" on line 23 and wherever the term appears in the bill. Senator Bond seconded the motion. The motion carried.

Paul Shelby, Office of Judicial Administration, responded to questions from the Committee by stating that the Kansas District Judges Association supports the concept contained in SB 183.

Senator Bond moved to recommend SB 183 favorable for passage as amended. Senator Rock seconded the motion. The motion carried.

The Chairman turned the Committee's attention to bills previously heard and awaiting the Committee's discussion and possible action.

- SB 103 - statute of limitation provision regarding 10-year limitation, does not affect liability claim.
- SB 104 - creating the Kansas sunshine in litigation act concerning concealment of public hazards.
- SB 123 - crime of deceptive commercial practices to include construction fund fraud.
- SB 124 - suspension and restriction of driver's license on conviction of DUI or refusal to take blood alcohol test.
- SB 125 - lower blood alcohol levels for DUI convictions.

Written information was distributed to the committee from:
Richard Mason, Kansas Trial Lawyers Association, on SB 103 (ATTACHMENT 3)
Richard Mason, Kansas Trial Lawyers Association, on SB 104 (ATTACHMENT 4)
Janet Stubbs, Home Builders Association of Kansas, Inc., on SB 123 (ATTACHMENT 5)

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 18, 1991.

Chairman Winter noted that Professor William E. Westerbeke, University of Kansas School of Law, has the expertise to address the subject matter in SB 103. With the Committee's approval, the Chairman directed the Committee's staff to contact Professor Westerbeke and request his thoughts and opinions on the subject, and the bill if he so desires.

Committee discussion turned to SB 104. The discussion centered on the public policy of the legislature establishing statutory requirements for operations and discretion of the courts. It was further noted that the bill would also affect individuals as the action would not be limited or restricted to civil cases.

Senator Gaines moved to report SB 104 adversely. Senator Morris seconded the motion. The motion carried.

The Committee's attention was directed to SB 123.

Senator Gaines moved to recommend SB 123 be not passed. Senator Kerr seconded the motion. The motion carried.

Discussion was delayed on SB 124 and SB 125 to await further information.

The Committee was given a copy of Chief Justice Richard Holmes' response to the Committee's inquiry of the misdemeanor payment docket being adminsitered by the Third Judicial District. (ATTACHMENT 6)

The meeting was adjourned.

Date 18 February 1991

VISITOR SHEET

Senate Judiciary Committee

(Please sign)

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Art Brown - KS LBR Dealers	
Jim Langford - DOB	
Willy Belden - LWVK	
Gene Johnson	
Brad Smoot	Bank IV
Paul Shelby OJA	
Jim Clark - KCDAA	

Sunflower Alcohol Safety Action Project, Inc.

Suite F, 112 S.E. 7th / Topeka, Kansas 66603 / Phone (913) 232-1415

February 18, 1991

Senator Wint Winter, Jr.
Chairman, Senate Judiciary Committee
Statehouse
Topeka, Kansas 66612

Dear Senator Winter:

The Honorable William R. Carpenter, Administrative Judge of the Third JUdicial District has asked me to follow up on his request concerning possible legislation to provide security for the District Courts in the State of Kansas. Judge Carpenter has provided me with a copy of K.S.A. 20-613a as a means of introducing this legislation.

We are suggesting that language be placed in this statute to provide the security necessary in those counties as identified by the statute as follows:

20-613a. Courtrooms and supplies in counties over 110,000. In every county in this state comprising a judicial district which has or shall hereafter have a population of more than 110,000, the board of county commissioners of such county shall provide suitable quarters with proper court security for holding court for each division of the district court in said district and shall provide such jury and retiring rooms as the judges of said courts shall determine to be necessary and proper. Said county commissioners shall furnish for each division of the court a copy of the Kansas reports, session laws, general statutes, supplements and citators as the same may be published from time to time, and shall also furnish such books of records, blanks, stationery, supplies, furniture and equipment as in the judgment of the judge or judges shall be necessary for the proper conduct of the business of each division of the court.

As previously noted, Judge Carpenter requests this committee sponsor such legislation to reduce such risks that exist now in our District Courts in the State of Kansas.

Respectfully,

Gene Johnson

Gene Johnson
Project Coordinator
Sunflower Alcohol Safety Action Project, Inc.

GJ:ej

Senate Judiciary Committee
2-18-91
Attachment 1

District Court of Kansas
Third Judicial District

Shawnee County, Kansas

Chambers of
William Randolph Carpenter
Administrative Judge of the District Court
Division No. One
Shawnee County Courthouse
Topeka, Kansas 66603

Officers:
Carol A. Meggison, C.S.R.
Official Reporter
295-4351
Pamela S. Patton
Administrative Assistant
913-295-4365

January 16, 1991

Senator Wint Winter, Jr.
Chairman, Senate Judiciary Committee
Statehouse
Topeka, Kansas 66612

Dear Senator Winter:

In contrast to the high security level of the U.S. District Court, the Shawnee County District Court is virtually wide open. Our only security is provided by the Sheriff's Office in the basement of our building which we communicate with over an ordinary telephone line. If, as has been discussed, the Sheriff's office moves to another location at some future time, our courts would be absolutely vulnerable.

The Shawnee County Commission has not seen fit to take action on our repeated requests to provide funding for court security. At a time when schools, hospitals, businesses and many private institutions have security systems and personnel, the Shawnee County District Court lacks similar protection and remains at risk.

A statute requiring the urban counties to provide, within certain limitations, a security system specified by district court would seem to be a reasonable solution.

Thank you for your interest and consideration.

Best wishes,

William R. Carpenter
Administrative Judge

WRC:psp

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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

Testimony in Support of

SENATE BILL 183

The Kansas County and District Attorneys Association appears in support of Senate Bill 183, which simply allows courts to continue sentencing convicted felons to incarceration in the county jail as a condition of probation. The legislation is necessary because of the recent decision of the Kansas Supreme Court in State v. Walbridge, No. 64,127 (January 18, 1991). In that case, the Supreme Court reverses both the trial court and the Court of Appeals and construes confinement in the county jail as imprisonment and as such is prohibited by the definition of "probation" in K.S.A. 21-4602(3). The Court of Appeals had held that the language of K.S.A. 21-4610, as construed by prior decisions, gave the trial court broad powers to impose conditions of probation, which could include jail time. The Supreme Court recognizes that while its previous decisions may have implied that jail may be required as a condition of probation, and that the practice has been used in Kansas for many years, it had never given specific authorization or condonation of it. The Court also recognizes that jail may well have a beneficial effect on some defendants, however, "it is for the legislature to provide for such a procedure and not the courts."

While defendant Walbridge may have won the battle he (and those concerned about prison overcrowding) has most likely lost the war. The Supreme Court quotes extensively from the trial judge during the sentencing proceeding:

> "Gilbert Walbridge, Jr.... was pummeled in a manner that this court can find inconceivable. Not only that, you couldn't bother to do it yourself, you had to get a couple of buddies to help you beat your son to a pulp. There is nothing in God's world that can justify what you did to this child."

The Supreme Court declines to simply continue the probation without the jail time, but remands "for the trial court to determine whether this defendant, who brutally participated in the beating of his young son, should be placed on probation given the limitation imposed by this opinion."

Senate Judiciary Committee
2-18-91
Attachment 2

SB 103

KANSAS TRIAL LAWYERS ASSOCIATION

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

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RICHARD H. MASON
EXECUTIVE DIRECTOR

February 15, 1991

Hon. Wint Winter
Statehouse
Topeka, Kansas 66612

RE: SB 103 - Products Liability Act

Dear Senator Winter:

As a follow-up to the hearing on SB 103 Wednesday, there are three points I feel should be emphasized:

1. The full House and Senate Judiciary Committee approved the change we are seeking by overwhelming margins in 1990 HB 2689. It wasn't until the bill hit the floor of the Senate that a last minute amendment was requested by Representative O'Neal. At the time we were assured that the change contained in SB 103 would be addressed in Conference committee, but it obviously was not.

2. Yes, we did refer to the Product Liability Act last session as virtually meaningless. That's because the Supreme Court said in the <u>Tomlinson</u> case that it didn't matter what was in KSA 60-3303, the statute of limitations is 10 years, period.

3. All SB 103 does is say that KSA 60-3303 really means what it says. And it says that a product's "useful safe life" can operate to modify the 10 year statute of limitations. It can make it shorter or longer...it cuts both ways.

While we feel that the amendments proposed by KCCI would make the law less clear, we won't oppose their adoption if that is the sentiment of the Committee.

Sincerely,

Richard H. Mason
Executive Director

RHM:vmf

Senate Judiciary Committee
2-18-91
Attachment 3

SB 104

KANSAS TRIAL LAWYERS ASSOCIATION

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

February 14, 1991

TO: Senate Judiciary Committee

FROM: Richard H. Mason Richard

SUBJECT: SB 104 - Sunshine in Litigation Act

First, thank you for the opportunity to at least open a dialogue on the issue of protective orders. It is an importanat public policy question that is deserving of the legislature's consideration.

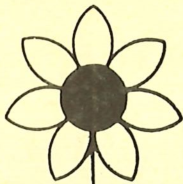
Second, we have no pride of authorship in SB 104. Protective orders have never before been debated and we are aware the bill would receive considerable scrutiny and likely need modifications.

To reverse the words of one opponent, we contend the system is broken. Our members increasingly find themselves involved in protective orders. It happens a lot. While it may be good for an attorney's individual client, we're convinced it's not good for Kansans in general.

The goal of SB 104 is to reduce negligent behavior and the personal injuries that follow. We're willing to work with all interested parties and the Judiciary Committee to achieve that goal.

Senate Judiciary Committee
2-18-91
Attachment 4

SB 123



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February 13, 1991

TO: MEMBERS OF SENATE JUDICIARY COMMITTEE

FROM: JANET J. STUBBS, EXECUTIVE DIRECTOR

The attached is a review of SB 123 by the attorney for the Wichita Area Builders Association which I received too late for preparation and submission at yesterday's hearing.

The Home Builders Association of Kansas supports the goal of the Mid-America Lumbermen's Association--prompt payment by every customer. We have worked with interested groups over the years to amend the statutes pertaining to mechanics liens to enable the contractor and the customer to exercise prudent business practices to avoid the problems which were experienced prior to enactment of the current law.

We ask that you give serious consideration to the attached summary prepared by Mr. Crockett.

Thank you.

Senate Judiciary Committee
2-18-91
Attachment 5

803 Merchants National Bank Building • 8th and Jackson Street • Topeka, Kansas 66612 • (913) 233-9853

ANALYSIS OF SENATE BILL NO. 123

BACKGROUND

Senate Bill 123 defines construction fund fraud as "... the failure with intent to defraud ... to pay invoices or contractual obligations within 30 days of final receipt of all construction funds ... exposing the property under construction or improvement to the filing of one or more mechanic's liens."

INTENT TO DEFRAUD

The starting point for an analysis of this Bill is that failure to pay a debt is not, in and of itself, a crime. Kansas Constitution, Bill of Rights, Section 16.

Therefore this Bill qualifies "failure ... to pay" with "intent to defraud." The crime under the Bill presumably would be fraud rather than mere failure to pay.

Unfortunately, it is often very difficult to determine whether a party committed or omitted an act with "intent to defraud." For example, in State v. Harris, 6 Kan.App.2d 721, 633 P.2d 1171 (1981), the defendant was charged with the crime of defrauding an innkeeper by leaving a hotel without paying for his lodging. The Court of Appeals reversed the conviction on the basis that the State had failed to prove an intent to defraud when the defendant checked into the hotel. It is important to note, however, that the defendant was charged with a crime, was

subjected to a trial, and was found guilty prior to the decision of the Court of Appeals, which illustrates the difficulty in determining fraudulent intent.

If a contractor did not pay an obligation within the time-frame established by the Bill, did he fail to do so with an intent to defraud? This is obviously a subjective determination. The interpretations of the contractor and the party issuing the invoice may be expected to differ. The discretion of the prosecuting authority is an imperfect safeguard, as demonstrated by the Harris case. The right to trial by jury is also imperfect. Harris. If the Bill were enacted, we could expect inconsistent enforcement and erratic results due to the subjective issues involved.

A further concern is the point in time at which the debtor must form the required intent to defraud. Must the intent be formed at the time the obligation was incurred, as in most fraud cases? Or is it sufficient to infer an intent after the obligation is incurred, or even after the debtor's receipt of the construction funds? Note that in Harris the pivotal point in time was the point at which the defendant checked into the hotel, i.e. a point in time before the transaction was entered into and before the obligation was incurred. The manner in which the Bill is drafted, however, invites an interpretation that the requisite intent may be inferred merely through the failure to make payment. At worst, such an interpretation would convert the criminal justice system into a debt collection agency. At best,

such an interpretation would grant a creditor tremendous leverage through the threat of criminal action if an invoice were not paid.

THE 30 DAY DEADLINE

The Bill's definition of construction fund fraud includes the failure "... to pay invoices or contractual obligations within 30 days of final receipt of all construction funds...." Construction funds are defined as all construction loans "or moneys otherwise received for the payment of improvements to real property."

The Bill draws no distinction between valid invoices acknowledged by the contractor and those which are subject to a good faith dispute. Under the Bill, even disputed invoices must be paid unless the contractor is comfortable in relying upon a subjective determination by others at a later time that he was not guilty of an intent to defraud.

The Bill's requirement that "contractual obligations" be paid is even worse. Since the Bill refers to "invoices or contractual obligations," the term "contractual obligations" must mean something other than invoices. What does it mean?

The amount of some obligations cannot even be determined until more than 30 days after receipt of construction loan funds. How can a contractual obligation in an uncertain amount be paid before the deadline? If it is not paid, is the contractor at risk that someone will later claim that his non-payment was due to an intent to defraud?

The Bill also provides for payment within 30 days of <u>final</u> receipt of <u>all</u> construction funds. Does this mean the last draw under a construction loan? If so, the Bill's protection is illusory since it does not address the disposition of proceeds prior to final draw.

EXPOSURE TO MECHANIC'S LIENS

The last component of the Bill's definition of construction fund fraud is that the non-payment exposes the property to the filing of a mechanic's lien. This provision is impractical for the following reasons:

1. If the property is a federal or state project, there is no exposure to a mechanic's lien. Therefore a fraudulent contractor on a government project would be immune to criminal liability, whereas a contractor engaged on a private project would be subject to prosecution. This would seem to violate Constitutional guarantees of equal protection.

2. On certain residential projects, the property is not exposed to the mechanic's liens of subcontractors or suppliers unless a warning statement was provided or a notice of intent to perform was filed. Therefore a fraudulent contractor on such a residential project where no warning statement or notice was used would enjoy immunity, whereas another contractor on a different project would be prosecuted. Again, an equal protection problem.

3. There are time requirements for the filing of a mechanic's lien. A subcontractor or supplier must file within three months after labor or material was last furnished. A general contractor has four months from the date labor or material was last furnished. Once the applicable time period expires, the property is no longer exposed to the filing of a mechanic's lien. Therefore uniformity in the enforcement of criminal laws would be frustrated by the vagaries of whether private

creditors filed mechanic's liens in a timely manner.

IMPROPER CLASSIFICATION

The Bill provides that if "... an owner, contractor, owner-contractor or subcontractor is a corporation or any entity other than an individual ..." such corporation and other entity and its managing officers shall be responsible under the Bill and subject to its penalties. In other words, an individual is immune under the Bill. If that individual joins with another individual, however, he would be in partnership and therefore subject to penalties under the Bill.

This provision may have been included to reduce resistance to the Bill during the legislative process, but it creates a constitutionally impermissible classification. After all, a great many owners and owner-contractors are individuals. So, for that matter, are many contractors and subcontractors. It is not permissible to grant immunity to a person who has chosen to conduct his business as an individual while imposing criminal sanctions against a person who has elected to incorporate his business or to conduct it as a partnership.

MECHANIC'S LIENS PRESERVED

Construction is one of the few business and professional endeavors in which the Legislature has granted claimants the right to record a non-consensual, statutory lien against property owned by someone else. This is an extraordinary remedy, and one which is shared by few other industries.

It is significant that the proponents of the Bill seek to preserve their lien remedy. They clearly recognize the value of that remedy which has been bestowed upon them by the Legislature. The Bill does not purport to substitute its criminal sanctions for lien rights, and in fact expressly provides that the claimant can file his lien and still clamor for prosecution.

PUBLIC POLICY CONSIDERATIONS

The resources of our criminal justice system are severely strained by demands that it cope with drugs, gangs, child abuse, sex offenders, DUI's, and crimes against persons. It would not be good public policy to further burden the system with matters which traditionally have been handled as civil collections. This is particularly true in an industry in which the Legislature has already granted claimants the potent remedy of a statutory lien.

Supreme Court of Kansas

Kansas Judicial Center
Topeka, Kansas 66612-1507

RICHARD W. HOLMES
Chief Justice

(913) 296-4898

February 14, 1991

Sen. Wint Winter, Jr., Chairman
Senate Judiciary Committee
Statehouse
Topeka, Kansas

Dear Senator Winter:

Thank you for your letter of February 8, 1991, inadvertently addressed to former Chief Justice Robert H. Miller.

I appreciate your comments about the misdemeanor payment docket being administered by the Third Judicial District here in Topeka. Senator Petty mentioned her interest in this program to me at our legislative reception in January and I have asked the Office of Judicial Administration to survey our other judicial districts to see what other programs have been undertaken for collection of the various items mentioned in your letter.

I do understand that Judge Carpenter's program is considered successful here in Shawnee County but that does not mean that other judicial districts are not equally successful with their programs. Certainly we wish to do everything in our power to make certain that these obligations are paid.

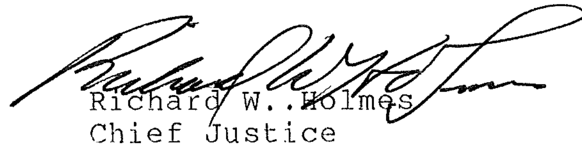
In any program such as this it must also be kept in mind that additional docket calls, record keeping, etc., also require additional judge and nonjudicial personnel time. In some of our judicial districts, due to the budget constraints, we are stretched far past the limits already required to adequately administer the judicial branch of government.

I will, however, continue to monitor this matter and will advise you of the information which we develop and any action which we may take to improve these collections. I think it would be premature to issue a rule implementing a statewide program until we are fully advised as to what other programs are being used throughout the state and whether or not they are just

Senate Judiciary Committee
2-18-91
Attachment 6

as effective or, perhaps, even better than the Third Judicial District program. We will keep you advised.

With best personal regards,



Richard W. Holmes
Chief Justice

RWW:cv
pc: Howard Schwartz.

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