Approved: 14 June 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 March 8, 1991 in room 514-S of the Capitol.

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

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:
William E. Westerbeke, University of Kansas School of Law
Bob Frey, Kansas Trial Lawyers Association
Bob Sampson, Kansas Association of Defense Counsel
Janet Stubbs, Home Builders Association of Kansas

Chairman Winter called the meeting to order by continuing the reports from Subcommittees.

SB 329 - requiring collection of DNA exemplars from convicted felons.

Senator Moran reported the Subcommittee on Criminal Law recommended that SB 329 be amended to change the criteria of who administers the test to equal that of DUI testing and to add the crimes of incest, aggravated incest and abuse of a child as convictions requiring the submission of blood and saliva samples. Senator Moran moved to adopt the Subcommittee report to amend SB 329. Senator Bond seconded the motion. The motion carried.

Senator Moran moved to recommend SB 329 favorable for passage as amended. Senator Bond seconded the motion. The motion carried.

SB 292 - creating crime involving laundering of money.

Senator Moran reported the Subcommittee on Criminal Law had no recommendation. Senator Feleciano moved to amend SB 292 by removing the exception of transactions between defendants and their lawyers, lines 16 through 23. Senator Moran seconded the motion. The motion carried.

Senator Feleciano moved to recommend SB 292 favorable for passage as amended. Senator Kerr seconded the motion. The motion carried.

SB 351 - wage garnishment, amount to satisfy judgment and social security number required on order, fee for processing by garnishee.

Senator Rock reported the Subcommittee on Civil Procedure had not taken action on the SB 351. Senator Rock made a conceptual motion to amend SB 351 so listing of social security number is only required when known and to strike language on page 4, lines 4 through 9, removing the garnishee's withholding of costs. Senator Feleciano seconded the motion.

Senator Bond made a substitute conceptual motion to amend SB 351 by requiring social security number only if known, and broadening on page 4 in lines 4 through 9 to include financial institutions. Senator Yost seconded the motion. The motion was declared lost and a division was called. With three having voted for the motion and four having voted against, the motion failed.

The question reverted to Senator Rock's original motion to amend. The motion carried.

Senator Rock moved to recommend SB 351 favorable as amended. Senator Feleciano seconded the motion. The motion carried.

SB 359 - repealing article 6 of the uniform commercial code regarding bulk transfers.

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:05 a.m. on March 8, 1991.

SB 360 - enacting the uniform fraudulent transfer act.

Senator Rock moved to recommend SB 359 and SB 360 for an interim study. Senator Petty seconded the motion. The motion carried.

SB 294 - statute of limitations for crimes to be five years.
SB 297 - engaging in continuing criminal enterprise.
SB 300 - conspiracy to commit drug offense treated as actual offense.
SB 301 - admission of hearsay evidence at preliminary hearings.
SB 302 - use of firearms in drug offenses
SB 331 - drug-free housing act.

Senator Rock moved to recommend SB 294, SB 297, SB 300, SB 301, SB 302, and SB 331 for interim study. Senator Moran seconded the motion. The motion carried.

SB 12 - security interests in oil and gas production.
SB 13 - interest on proceeds from oil and gas production.

Senator Rock reported the Subcommittee on Civil Procedure had asked staff to contact Professor William Westerbeke at the University of Kansas School of Law, requesting his comments on SB 12 and SB 13. His response was shared with the Committee. (ATTACHMENT 1)

Senator Rock moved to recommend SB 12 and SB 13 favorable for passage. Senator Gaines seconded the motion. The motion carried.

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

Professor Westerbeke addressed the Committee with his responses to their request for his review of SB 103. (ATTACHMENT 2) He concluded his comments by stating he would like to see an on-going study to look at the statute of limitation provisions and offered to help in any way he could.

Bob Frey, Kansas Trial Lawyers Association, responded to the suggestions of Professor Westerbeke. (ATTACHMENT 3) He concluded by stating the KTLA feel an in-depth study could create extreme anxiety.

William R. Sampson, Kansas Association of Defense Counsel, offered his comments on SB 103 and supported the suggestion of a careful study of the issue. (ATTACHMENT 4)

Janet Stubbs, Home Builders Association of Kansas, asked the Committee for time to submit comments after they had reviewed the suggestions made at this meeting.

The meeting was adjourned.

Date 8 March 1991
10:00 a.m.

VISITOR SHEET
Senate Judiciary Committee

(Please sign)

Name/Company	Name/Company
Paul Shelby OJA	
Kyle Smith A.G.	
Steve Stafford KBI	
Jim CLARK - KCDAA	
Ben & Doug Bowman Children & Youth Adv	
Beth SAMPSON	
Anne O'Brien KAJC	
Julene Mushu A.G.	
Nancy Lindberg A.G.	
RG Drew KTLA	—
Brad Smoot KCLF	
Bill Westerbeke KU Law School	

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March 4, 1991

Mr. Michael R. Heim
The Legislative Research Department
Room 545 - N. Statehouse
Topeka, KS 66612-1586

Dear Mr. Heim:

I am enclosing my commments in response to your request concerning Senate Bill No. 12. I hope that they will be of some assistance.

Sincerely,

William H. Lawrence

William H. Lawrence
Professor of Law

Senate Judiciary Committee
3-8-91
Attachment 1

Mr. Michael R. Heim has asked me to prepare my observations concerning Senate Bill No.12 (re Proposal No. 8), which is an Act supplementing the Uniform Commercial Code with respect to interests in gas and oil production. My observations, provided below, do not take into consideration the merits of the advisability of creating a mechanism to ensure the timely payment of royalty interest payments on proceeds derived from oil or gas production. Because I am not familiar with the practices in this particular field, I do not consider myself qualified to assess the need for such additional protection. Instead my comments are directed toward the proposed mechanism of amending provisions of the Uniform Commercial Code as an appropriate response to the asserted problem.

The proposed legislation would add a new section to the Uniform Commercial Code (U.C.C. or Code) that would provide a security interest for oil and gas interest owners. This security interest would secure an obligation of the first purchaser of oil or gas production to pay the purchase price to the holder of the security interest (the interest owner). The security interest would be created by a signed writing giving the interest owner a right under real estate law. This security interest is then considered to be authenticated and adopted by the first purchaser of severed oil and gas simply by signing an agreement to purchase oil or gas production.

Irrespective of the merits of a policy designed to further protect the interests of owners in gas and oil production, the adoption of the proposed mechanism should be rejected. The nature

of the subject transactions is inconsistent with the conceptual nature of Article 9 transactions, and thus does not fit within the scope of the Code provisions. Article 9 applies to security interests that are consensual in nature. With one relatively minor exception,[1] Article 9 of the U.C.C. applies to transactions intended to create a security interest in personal property.[2] The exclusive methods of creating Article 9 security interests require a secured party to be in possession of collateral pursuant to agreement or a debtor to have signed a security agreement.[3] "'Security agreement' means an agreement which creates or provides for a security interest."[4] Article 9 security interests thus are based on a contractual relationship between the secured party and the debtor. The hallmark of any contractual relationship is its consensual nature.[5]

The security interest created under the proposed legislation is not consensual, but is rather mandated by law. Any first purchaser of oil and gas production is automatically subject to the

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[1]Article 9 applies to the sale of accounts and chattel paper. K.S.A. §84-9-102(1)(b) (1983). Even these purchasers, however, must comply with the agreement aspects of Article 9. See infra note 3.

[2]K.S.A. §84-9-102(1)(a) (1983).

[3]K.S.A. §84-9-203(1)(a) (1989 Supp.).

[4]K.S.A. §84-9-105(1)(l) (1989 Supp.).

[5]The Official Comment to the scope provision of Article 9 is quite explicit: "The main purpose of this Section is to bring all consensual security interests in personal property and fixtures under this Article, except for certain types of transactions excluded by Section 9-104." K.S.A. §84-9-102, Official Comment (statement of purposes) (emphasis added).

required security interest. The security interest also runs in favor of the owner of interest of the oil and gas production-- a party with whom the purchaser may not even deal in the purchase transaction. The mere act by the first purchaser of agreeing to purchase oil or gas production "operates an [sic] an authentication and adoption of the security agreement ...."[6] The proposed legislation simply forces a statutory lien into a statutory framework where is does not fit.

Even if a first purchaser's obligation to the interest owners of oil and gas production is to be considered secured, the security interest is not the type of interest toward which Article 9 is directed. The genius of the drafters of Article 9 was to bring all consensual security interests in personal property and fixtures within the scope of a single statute.[7] Prior law consisted of a confusing maze of statutes directed toward the recognition and regulation of a wide variety of security devices. Inconsistent requirements that did not serve any useful functions beset the separate laws on pledges, assignments, chattel mortgages, chattel trusts, trust deeds, factor's liens, equipment trusts, trust receipts, and conditional sales. The promulgation of Article 9 was hailed for its service of unifying these disparate prior laws on security devices. The fundamental premise of Article 9 was made crystal clear: "The aim of this Article is to provide a simple and

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[6]S.B. No. 12, New Section 1(1). This New Section specifies that the security interest is in accordance with §84-1-201(39).

[7]K.S.A. §84-9-101, Official Comment (1983).

unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty."[8] The obligation covered by S.B. No. 12 does not arise from a secured financing transaction. There is no financing relationship between the interest owner and the first purchaser.[9] First purchasers of gas and oil are required to pay interest owners properly in order to acquire their purchases free from a statutory encumbrance of the interest owners. Simply calling these liens a security interest does not bring the transaction within the scope of transactions upon which Article 9 has been consistently premised.

The conceptual difficulties resulting from forcing the statutory encumbrance of S.B. No. 12 into the Article 9 framework is further demonstrated through consideration of the concept of purchase money secured parties. The Senate Bill provides that the security interests it creates shall be treated as purchase money security interests for purposes of determining priority under section 84-9-312.[10] To the extent that an interest owner is not

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[8]K.S.A. §84-9-101, Official Comment (1983).

[9]The rationale that supports the inclusion of sales of accounts and chattel paper within the scope of Article 9 is the relationship of these sales to secured financing. "Commercial financing on the basis of accounts and chattel paper is often so conducted that the distinction between a security transfer and a sale is blurred, and a sale of such property is therefore covered by subsecton (1)(b) whether intended for security or not, unless excluded by Secton 9-104." K.S.A. §84-9-102, Official Comment 2 (1983).

[10]S.B. No. 12, New Section 2(6)(a).

involved in the sale of the production to the first purchaser,[11] the security interest created under the Senate Bill is not "taken or retained by the seller of the collateral to secure all or part of its price."[12] Furthermore, the security interest created under these circumstances is not "taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral."[13] The definitions of purchase money security interest are not applicable in these contexts because the interest owner is not engaged in secured financing of the debtor.

In addition to problems related to the distortion of the nature and scope of Article 9, the proposed legislation is objectionable because of the approach it takes to the creation and perfection of the security interest it would recognize. Under the Senate Bill a security interest would be created under any signed writing that gives the owner a right under real estate law, and that security interest would be made effective against the first purchaser as a debtor by "[t]he act of the first purchaser in signing an agreement to purchase oil or gas production, in issuing a division order, or in making any other voluntary communication to

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[11]An interest owner can be entitled just to royalty payments. S.B. No. 12, New Secton 1(16)(b). The Background Paper accompanying the Senate Bill indicates that securing these royalty payments is the concern in Proposal No. 8.

[12]K.S.A. §84-9-107(a) (1983) (definition of purchase money security interest).

[13]K.S.A. §84-9-107(b) (1983) (definition of purchase money security interest).

the interest owner or any governmental agency recognizing the interest owner's right."[14] This approach completely evades the provision of section 84-9-203(1) with which any Article 9 secured party, including sellers of accounts and chattel paper, must comply in order to create an enforceable security interest. Any writing creating rights in the interest owner under real estate law (a deed, mineral deed, reservation for a deed or mineral deed, oil or gas lease, assignment, or any other such writing) operates automatically as the security agreement.

In making the first purchaser of oil or gas production the debtor of the security agreement, the Senate Bill further convolutes the essence of Article 9 relationships. By signing an agreement to purchase oil or gas production, the first purchaser is held to adopt the security interest created in favor of the interest owner. That security interest arises through the inferred security agreement created by a signed writing giving the interest owner rights under real estate law. Not only does the first purchaser become a debtor under the security interest without having dealt with the interest owner, but the security agreement initially (prior to its applicability to the first purchaser of production) does not even appear to have a debtor.[15]

The Senate Bill also recognizes automatic perfection for the

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[14]S.B. No. 12, New Section 1(1).

[15]"This section provides a security interest in favor of interest owners (as secured parties) to secure the obligations of the first purchaser of oil and gas production (as debtor) to pay the purchase price." S.B. No. 12, New Section 1(1).

1-7/9

security interest it creates. The secured party's interest only has to be evidenced on a deed or other writing recorded in the real estate records of a register of deeds.[16] Even though Article 9 does recognize the wisdom of allowing perfection for real estate-related collateral in the real estate filing records rather than the personal property records,[17] it merely changes the filing location. It does not delete the requirement to file a financing statement in order to perfect security interests in the collateral. The Senate Bill allows the creation of secret liens.

Ultimately, of course, the Senate Bill establishes different priorities with respect to the security interests and liens that it creates. Like the deviations introduced for creation and perfection of the security interests, the ad hoc tinkering with the Code scheme is undesirable as a matter of policy. Irrespective of the merits of the proposed order of priorities, it is a piecemenal approach that distorts the Code scheme. Article 9 does include a priority provision covering certain nonconsensual possessory liens.[18] It does not address at all, however, the large number of nonpossessory liens that have been recognized under state law. Casting the interest owner's nonconsensual, nonpossessory rights in terms of a security interest does not alter the reality that the Senate Bill imposes a unique priority format.

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[16]S.B. No. 12, New Section 1(2).

[17]K.S.A. §84-9-401(1)(b) (1989 Supp.).

[18]K.S.A. §84-9-310 (1983). The creation, perfection and enforcement of these liens is controlled by the statute or caselaw that recognizes the particular lien.

1-8/9

A system that would apply some principles of uniformity to the vast array of liens recognized under state law would be a desirable achievement. Perhaps all types of lien claims should ultimately be brought under a broadened scope of Article 9. Selective treatment of only some transactions, however, is a bad policy choice. It ignores the legal position of other similarly situated transactions. In addition, codes should not be amended on such a piecemeal approach, particularly a code that advances uniformity among the jurisdictions as a basic objective.[19]

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[19]"Underlying purposes and policies of this act are: --(c) to make uniform the law among the various jurisdictions." K.S.A. §84-1-102(2) (1983).

1-9/9

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March 4, 1991

Mr. Michael R. Heim
Legislative Research Department
Room 545-N, Statehouse
Topeka, Kansas 66612-1586

Dear Mr. Heim:

In response to your inquiry this morning concerning Senate Bill No. 103, I have the following observations.

1. I assume that when the Legislature enacted the statute of repose provision as part of the Kansas Product Liability Act in 1981, it intended that provision to provide for only a rebuttable presumption of repose after 10 years as well as no repose period whatsoever for the enumerated exemptions from the 10 year presumption period. Kan. Stat. Ann. 60-3303(b). Such an interpretation is clearly consistent with the analysis of the parallel section in the Model Uniform Product Liability Act from which this provision was taken verbatim.

2. Under this provision plaintiff must prove by "clear and convincing evidence" that a product injury caused more than 10 years after sale of the product resulted from an original product defect in order to rebut the presumption that the injury was merely the result of the expiration of the product's useful safe life.

In addition, the 10 year presumption period is inapplicable to cases in which [1] the seller expressly warranted the product for more than 10 years, [2] the seller intentionally misrepresented or fraudulently concealed the condition of the product, [3] the issue is merely contribution and indemnity among the various defendants, [4] the harm was caused by prolonged exposure to a defective product, [5] the harm was caused within the 10 year period, but did not manifest itself until after the 10 year period, and [6] the harm occurring after the 10 year period was caused by a latent defect in the product that existed when the product was originally sold.

3. As of 1981 the statute of repose provision in the Kansas Product Liability Act was in conflict with the statute of limitations,

Senate Judiciary Committee
3-8-91
Attachment 2

Kan. Stat. Ann. 60-513, with respect to two specific exemptions from the 10 year presumption period: (1) "if the harm was caused by prolonged exposure to a defective product"; and (2) "if the harm caused within 10 years after the time of delivery, did not manifest itself until after that time." Because asbestosis, mesothelioma and other harms from exposure to asbestos do not usually manifest themselves until 15-to-25 years after exposure, such exposure claims would be cut off by the 10 year limit on the discovery rule measured from the date on which "substantial injury" first occurred. See Tomlinson v. Celotex Corp., 244 Kan. 474, 770 P.2d 825 (1989). Thus, in "exposure" cases the apparent intent of the product liability act was thwarted by the apparent intent of the statute of limitations.

4. In order to give full meaning to the intended treatment of these "exposure" cases in the product liability act, the legislature amended the statute of repose in 1990 to correct the hardship in asbestos and other "exposure" cases [although I am not sure that the amendment solved all problems in this area]. In other words, the legislature acted to correct a conflict between the 10 year period in the general tort statute of limitations and the statute of repose in the product liability act in favor of the approach originally adopted in the product liability act.

5. The real problem now raised by Senate Bill No. 103 relates to the 1987 amendment of the statute of limitations to change the starting date of the 10 year limit on the discovery rule from the date on which substantial injury first occurred to the date of the act giving rise to the cause of action. In product liability claims the "act" giving rise to the cause of action will be the sale of a defective product. Many products such as factory equipment, construction equipment, vehicles, etc. are fully expected by both seller and buyer to last for much more than 10 years. The statute of repose in the product liability act reflects this reality and provided a 10 year presumptive period of repose in order to protect sellers of products that merely wore out as opposed to being defective when originally manufactured and sold. In other words, the legislature intended to permit certain categories of product liability claims to be brought more than 10 years after manufacture and sale.

The 1987 amendment to the statute of limitations wholly negates the entire presumptive statute of repose provision in the product liability act by imposing an absolute 10 year statute of repose hidden within the statute of limitations. Thus, under Kan. Stat. Ann. 60-3303(b) plaintiff could maintain an action against the manufacturer of a vehicle if the axle broke down after 12 years if plaintiff could prove by clear and convincing evidence that the breakdown was the result of an original product defect rather than mere wear and tear. If the defect was latent, the 10 year presumption period did not apply at all. This was clearly the original intent of Kan. Stat. Ann. 60-3303(b).

6. The question now becomes whether it was the intent of the 1987 amendment to essentially abolish Kan. Stat. Ann. 60-3303(b). The 1987 amendment would permit no product liability claim to be brought more than 10 years after manufacturer and sale of the product. The 1990 amendment was really a response to an original conflict between the product liability act and the earlier version of the statute of limitations, not a response to the problem created by the 1987 amendment. It is my opinion that a provision as significant as the product liability statute of repose should not be repealed "by accident." It appears that the "repeal" of the presumptive statute of repose in Kan. Stat. Ann. 60-3303 was inadvertent in the sense that the 1987 amendment was apparently considered to be a minor matter of importance only to the housing construction industry. There is no indication that the 1987 amendment was intended to rewrite a major portion of the product liability act.

7. The difficult question is how to cure the "accidental" abolition of the product liability statute of repose. Senate Bill No. 103 seeks to do so by stating that Kan. Stat. Ann. 60-513(b) shall not apply to product liability actions. The only problem with this approach is that the subsection also contains the basic discovery rule that accrual occurs when the wrongful act first causes substantial injury or the fact of substantial injury is reasonably ascertainable. This provision is necessary for product liability claims as well as for tort claims generally, yet the amendment makes it inapplicable to product liability claims. Thus, if Kan. Stat. Ann. 60-3303 is to govern product liability claims, this definition of accrual must be repeated in that section.

8. The other solution would be to delete the 1987 amendment. The "exposure" cases were covered separately by the 1990 amendment to the product liability act. If the statute of limitations were restored to its pre-1987 form, the remainder of the product liability statute of repose would be restored to effectiveness. All the claims would be brought within 10 years of the fact of injury or its discovery.

If this approach is followed, then the housing construction industry once again is "unprotected" from Ruthrauff-type claims. The solution would be a statute of repose for that industry, a provision that commonly exists in many other states [although in various forms].

9. Paragraphs 7 and 8 of this letter contain my two suggested solutions to the unintended abrogation of the product liability statute of repose. The Association of Kansas Defense Counsel have pointed out that product sellers need more certainty/repose regarding claims against older products. In essence these are arguments against the form of statute of repose originally adopted

in Kan. Stat. Ann. 60-3303. At this time, I take no firm position about whether this section reflects the best public policy concerning injuries caused by older products, other than to note that there are persuasive arguments on both sides of the issue. The problem lends itself to no simple and fair solution and should not be resolved without careful study. No careful study was involved in the 1987 amendment to the statute of limitations, and it is not a persuasive basis for completely revising the approach to the statute of repose in Kansas.

I apologize for the hurried form of these comments. I hope that I will be able to clarify the above points at the hearing on Friday.

Yours very truly,

William E. Westerbeke
Professor of Law

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

March 8, 1991

TO: Senate Judiciary Committee Jen Winter

FROM: Richard H. Mason Richard

SUBJECT: SB 103 - Product Liability Act

Following Friday's discussion of SB 103 , we want to state our position on the bill as we understand Prof. Westerbeke's testimony.

I have attached a copy of SB 103 with the amendment we believe was recommended by the professor. This language is consistent with our intent in requesting the bill introduction and thus we will support it.

Thank you.

Senate Judiciary Committee
3-8-91
Attachment 3

Session of 1991

SENATE BILL No. 103

By Committee on Judiciary

1-31

AN ACT concerning civil procedure and civil actions; regarding statute of limitations; product liability claims; amending K.S.A. 1990 Supp. 60-513 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1990 Supp. 60-513 is hereby amended to read as follows: 60-513. (a) The following actions shall be brought within two years:

(1) An action for trespass upon real property.

(2) An action for taking, detaining or injuring personal property, including actions for the specific recovery thereof.

(3) An action for relief on the ground of fraud, but the cause of action shall not be deemed to have accrued until the fraud is discovered.

(4) An action for injury to the rights of another, not arising on contract, and not herein enumerated.

(5) An action for wrongful death.

(6) An action to recover for an ionizing radiation injury as provided in K.S.A. 60-513a, 60-513b and 60-513c, and amendments thereto.

(7) An action arising out of the rendering of or failure to render professional services by a health care provider, not arising on contract.

(b) Except as provided in subsection (c), the causes of action listed in subsection (a) shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable 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 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.*]

[means take out]

THE 10 YEAR LIMITATION CONTAINED IN THIS SUBSECTION SHALL NOT APPLY TO

3-12

KADC

March 7, 1991

Senate Judiciary Committee
Winton A. Winter, Jr., Chairman

RE: Senate Bill 103

Dear Senator Winter:

We were provided a copy of Professor William Westerbeke's letter to Michael Heim regarding Senate Bill 103, and we would like to offer these thoughts for you and your Committee to consider.

The proponents of S.B. 103 have not provided a single example of a plaintiff who has not been able to bring a lawsuit because of the 10-year rule in K.S.A. 60-513(b). Moreover, the existing system provides individuals and businesses in Kansas with a predictable period of time in which they can be sued, which is the essential purpose of any statute of limitations.

A statute of limitations is, by its very nature, arbitrary. What is at issue is whether it is constitutional and whether it appropriately reflects the public policy of the state in which it is enacted. Our 10-year statute of limitations is constitutional. Tomlinson v. Celotex Corporation, 244 Kan. 474 (1989). In our opinion, it is also appropriate. Kansas is a small state with many small businesses, especially manufacturing businesses. A 10-year period of repose is appropriate to protect our businesses and manufacturers against the numbing judgments and debilitating insurance premiums that a longer "tail" on claims would cause.

Professor Westerbeke argues we should not retain a statute of limitations established "by accident" in 1987. Yet, if the result is appropriate to Kansas, why should we scrap it? Professor Westerbeke does urge that any change to the existing statute of limitations be the product of "careful study." Again, the KADC does not agree that the current law is in need of change; but we join Professor Westerbeke and urge you to study any proposed changes carefully.

We look forward to the opportunity to be of assistance to you and your Committee.

Respectfully submitted,

THE KANSAS ASSOCIATION OF DEFENSE COUNSEL

By: Bill Sampson
William R. Sampson

Kansas Association of Defense Counsel / 627 SW Topeka / Topeka, Kansas 66603

Senate Judiciary Committee
3-8-91
Attachment 4