Approved: April 28, 1995
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Michael R. O'Neal at 3:30 p.m. on March 15, 1995 in Room 313-S of the Capitol.

All members were present except:
Representative David Adkins - Excused
Representative Belva Ott - Excused
Representative Candy Ruff - Excused
Representative Vince Snowbarger - Excused

Committee staff present: Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the committee:
Jeanne Gawdun, Kansans for Life
Pat Goodson, Right to Life of Kansas, Inc.
Carla Dugger, American Civil Liberties Union
Camille Nohe, Attorney General's Office
Patricia Henshall, General Counsel Office of Judicial Administration
Chuck Simmons, Acting Secretary Department of Corrections
Jim Clark, Kansas County & District Attorneys Association
Kyle Smith, Kansas Bureau Investigation
Richard Morrissey, Kansas Department of Health & Environment
Chip Wheelen, Kansas Medical Society
Senator Bob Vancrum
Steve Rarrick, Deputy Consumer Division, Attorney General's Office
Lynn Gansert, Individual
Maxine Taylor, Individual
Caroline Hall, Individual

Others attending: See attached list

Hearings on **SB 16** - Definition and application of term "preborn human being" to certain criminal code sections, were opened.

Jeanne Gawdun, Kansans for Life, appeared before the committee in support of the bill. She stated that over 30 states have passed laws dealing with a criminal felony activity causing a pregnant woman to miscarry. She also proposed an amendment to include misdemeanors. (Attachment 1)

Pat Goodson, Right to Life of Kansas, Inc. appeared before the committee as a proponent of the bill. She told the committee that nothing would bring back the children that have been killed but this law would make sure that the perpetrator of future crimes would not go unpunished. (Attachment 2)

Carla Dugger, American Civil Liberties Union, appeared before the committee in opposition of the bill. She commented that they would prefer to have the act of causing a miscarriage or still birth of a fetus to the list of aggravating factors in the statute on vehicular crime. (Attachment 3)

Hearings on **SB 16** were closed.

Hearings on **SB 3** - Civil commitment, evaluation, care and treatment of persons who commit sexually violent offenses, were opened.

Camille Nohe, Assistant Attorney General, appeared before the committee in support of the proposed bill. She brought to the committee's attention that New Section 8 is inconsistent with the sexual predator proceedings because psychological and treatment reports are not submitted to the court prior to trial. Because this section does not serve a purpose they recommend that it be deleted. They also requested that all sex predators cases be handled through the Attorney General's office (Attachment 4)

Patricia Henshall, General Counsel Office of Judicial Administration, appeared before the committee in support of the bill. She requested three amendments. The first would delete New Section 8 because it does nothing new; the next would eliminate district magistrate jurisdiction of the commitment of sexual predators; and the last would be to assess the same docket fee for those under the treatment act for mentally ill and the care and treatment act for alcoholism or drug abuse. (Attachment 5)

Chuck Simmons, Acting Secretary Department of Corrections, appeared before the committee in support of the bill and provided the committee with an update of the three sex predators that have been committed. (Attachment 6)

Jim Clark, Kansas County & District Attorneys Association, appeared before the committee in support of the bill. He told the committee that the other conferees had covered the Associations concerns. (Attachment 7)

Carla Dugger, American Civil Liberties Union, appeared before the committee in opposition to the bill. She stated that they would like to see the repeal of the Sexual Predator Act because the cost for the defense is too high and many will not take these cases. (Attachment 8)

Hearings on **SB 3** were closed.

Hearings on **SB 237** - Sex offenders, registration; adjudication as juvenile offenders and diversions records, were opened.

Kyle Smith, Assistant Attorney General Kansas Bureau of Investigation, appeared before the committee in support of the bill. He told that committee that this bill does three things; provides a data bank on the sex offenders; sex offenders are put on notice that if any sex crime happens in the community where the sex offender lives he will be considered in the investigation; and third it would provide public safety. This bill would also include juveniles. (Attachment 9) He requested that the committee amend in **HB 2449** - creates a DNA data bank at the KBI. (Attachment 10)

Carla Dugger, American Civil Liberties Union, appeared before the committee in opposition to the bill. She stated that this bill encourages public hysteria and prevents many sex offenders from reintegrating into society as productive members. (Attachment 11)

Hearings on **SB 237** were closed.

Hearings on **SB 285** - Tort claims fund payments for charitable health care providers, local health departments and indigent health care clinics, were opened.

Richard Morrissey, Kansas Department of Health & Environment, appeared before the committee as a proponent of the bill. He told the committee that this bill would allow Charitable Health Care Providers to be protected in cases where the indigent person files a medical malpractice action. The physician would be defended by the Attorney General's office and the state would pay the any award. (Attachment 12)

Chip Wheelen, Kansas Medical Society, appeared before the committee as a proponent of the bill. He stated that this bill would simply remove the sunset day. (Attachment 13)

Hearings on **SB 285** were closed.

Hearings on **SB 212** - Award of attorney fees to attorney general or county or district attorney in consumer protection cases, were opened.

Steve Rarrick, Deputy Attorney General, appeared before the committee in support of the bill. He stated that this bill would allow the Attorney General's office and local districts attorneys to collect attorney fees in consumer protection actions. The threat of attorney fees would help in negotiating cases. (Attachment 14)

Senator Bob Vancrum appeared before the committee as the sponsor of the proposed bill. He explained that many homeowners who recently have purchased homes have found that the houses have not met building standards. Many of these homeowners have hired lawyers to bring lawsuits because the builders will not return and fix their homes. This bill would simply allow the recovery of attorney's fee if homeowners used the A.G.'s office. (Attachment 15)

Lynn Gansert, Maxine Taylor, and Caroline Hall, are members of an organization called Homeowners Against Deficient Dwellings (H.A.D.D.), an organization which was started because the individuals had found numerous defects in their houses which they had contracted to be built. They appeared before the committee and explained what happened in each of their cases. (Attachments 16)
Hearings on **SB 212** were closed.

The next meeting is scheduled for March 16, 1995.

HOUSE JUDICIARY COMMITTEE GUEST LIST

DATE: March 15, 1995

NAME	REPRESENTING
(Myra) Lynn Hansen	SB 212 pro
Mary Maxine Taylor	212 pro
Carolyn Hall	SB 212 pro
PATRICIA HENSHALL	OJA
Kyle G. Smith	KBI
Dale Finger	KBI
Linda Punchard	CP
Duane Pritchett	SRS
Roger Nafziger	writer
Karla Taylor	Intern
Kathi Sparks	DOB
Scott Alisoglu	DOB
Barbara Reed	Legislative Post Audit
Chris Clarke	"
Jerry D. Murdie	Legis Post Audit
Jim Yonally	KS Governmental Consulting
Kim Winegar	KTLA

ters and Affiliates

Abilene
Atchison
Arkansas City
Augusta
Barber County
Brown County
Chanute
Chase County
Cheyenne County
Clay Center
Coffeyville
Colby
Coldwater
Columbus
Concordia
Copeland
Council Grove
Decatur County
Dodge City
Doniphan County
Edwards County
El Dorado
Elk County
Emporia
Erie
Fort Scott
Franklin County
Garden City
Girard
Great Bend
Hamilton County
Hanover
Harper County
Harvey County
Herington
Holyrood
Hugoton
Hutchinson
Independence
Iola
Jackson County
Johnson County
Kingman
Kiowa County
Larned
Lawrence
Leavenworth
Liberal
Linn County
Manhattan
Marion
McPherson
Miami County
Miltonvale
Norton
Olathe
Osage County
Osborne
Ottawa County
Parsons
Phillips County
Pittsburg
Pratt
Republic County
Rose Hill
St. Paul
Salina
Scott City
West Sedgwick County
Smith County
Sublette
Topeka
Ulysses
West Washington County
Wellington
Wichita
Wilson County
Wyandotte County

Colleges & Universities

(12) Chapters

Kansans for Life

3202 W. 13th St., Suite 5
Wichita, Kansas 67203
(316)945-9291 or 1-800-928-LIFE (5433) FAX (316)945-4828

KANSANS FOR LIFE SUPPORTS SENATE BILL 16

Kansans for Life, the state's largest pro-life organization, supports Senate Bill 16. The current criminal code does not provide for the punishment of someone who causes the miscarriage of an unborn child as a result of injury to the mother in the commission of a crime. Several cases have arisen, most recently that of the Woodruff family who lost their child, Morgan the day before she was due to be born as a result of her mother being injured in a car accident. The Kansas Senate unanimously agreed that SB 16 is needed to address such situations and provide for punishment.

In the interest of assuring that the bill will encompass any criminal act resulting in the miscarriage of the unborn child without the parents' permission, I offer a very brief amendment to the bill. This amendment simply adds the term "misdemeanor" to the type of criminal activity which might cause the pregnant woman to miscarry. I am sure that the legislature does not want to have to apologize to a family in the future because of its failure to visualize any circumstance that may arise and make provision for it.

Over thirty states have passed laws dealing with this issue. SB 16, with the amendment, is comprehensive in its language and will fill the current void in the Kansas criminal code. I ask you to find it favorable for passage.

Jeanne L. Gawdun
Lobbyist
Kansans for Life

House Judiciary
3-15-95
Attachment 1

As Amended by Senate Committee

Session of 1995

SENATE BILL No. 16

By Senator Sallee

1-9

AN ACT concerning the criminal code; ***creating the crimes of injury to a pregnant woman and injury to a pregnant woman by vehicle and prescribing penalties therefor*** ~~relating to definitions; amending K.S.A. 1994 Supp. 21-3110 and repealing the existing section~~.

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

Section 1. (a) Injury to a pregnant woman is injury to a pregnant woman by a person other than the pregnant woman in the commission of a felony causing the pregnant woman to suffer a miscarriage as a result of that injury.

or misdemeanor

(b) As used in this section, "miscarriage" means the interruption of the normal development of the fetus, other than by a live birth, resulting in the complete expulsion or extraction from a pregnant woman of a product of human conception.

(c) Injury to a pregnant woman is a severity level 4, person felony.

(d) The provisions of this section shall be part of and supplemental to the Kansas criminal code.

Sec. 2. (a) Injury to a pregnant woman by vehicle is injury to a pregnant woman by a person other than the pregnant woman in the unlawful operation of a motor vehicle causing the pregnant woman to suffer a miscarriage as a result of that injury.

(b) As used in this section, "miscarriage" means the interruption of the normal development of the fetus, other than by a live birth, resulting in the complete expulsion or extraction from a pregnant woman of a product of human conception.

(c) (1) Injury to a pregnant woman by vehicle while committing a violation of K.S.A. 8-1567 and amendments thereto is a severity level 5, person felony.

(2) Injury to a pregnant woman by vehicle while committing a violation of law related to the operation of a motor vehicle other than K.S.A. 8-1567 and amendments thereto is a severity level 7, person felony.

(d) The provisions of this section shall be part of and supple-

2-1

RIGHT TO LIFE OF KANSAS, INC.

701 S.W. Jackson St., Suite 203, Topeka, KS 66603-3729 (913) 233-8601

TESTIMONY IN SUPPORT OF SB 16
HOUSE JUDICIARY COMMITTEE
MARCH 15, 1995

Senate Bill 16 creates the crimes of injury to a pregnant woman resulting in the death of her unborn child. The current push for this legislation resulted from the tragic death of a nine month old unborn baby, Morgan Elizabeth Woodruff, just a year ago. We are supporting SB 16 because it is a prolife bill, even though it has nothing to do with abortion, but rather with the deaths of babies whose mothers have chosen not to have an abortion. I have attached to this testimony the details of some of those deaths which have ocurred in the past few years and a summary of the status of the law.

In a 1969 revision of the criminal code, this legislature failed to reenact a fetal homicide statute on the books since territorial days. The Kansas Supreme Court in 1988, in *State v. Trudell*, 243 Kan. 29, 755 P 2d 511 (1988), ruled that existing homicide laws did not cover the deaths of unborn children, creating the clear need for this legislation. Our involvement in the issue came, prior to that ruling, in 1985, after an unborn child, baby boy Stumpner, was killed in an accident in Kansas City, Kansas, involving a drunk driver. At the time we disagreed with District Attorney, Nick Tomasic's decision not to prosecute, but to ask the legislature to enact a fetal homicide statute. That effort and subsequent attempts failed because they became embroiled in the abortion issue.

SB 16, as initially drafted, avoided the abortion issue and Senator Sallee has stated, that was his intention. However pro-abortion lobbyists still objected to the terminology. Senator Sallee, Senator Parkinson and the Senate committee labored hard to come up with compromise language that not only completely avoids the issue of abortion, but also avoids any terminology that could be construed as inflamatory to the proabortion position. We would have preferred the original language, but we believe this is an excellent compromise. We commend the Senate for its work and we ask this committee to pass the bill without amendments that might undo that work.

Twenty four states have enacted fetal homicide legislation. This is a long overdue bill that would correct the tragic injustices to families such as the Woodruff and Stumpner families. Becky Woodruff testified in the Senate Committee but felt unable to go through the trauma again today. Nothing will bring back her little girl, but on the anniversary of her baby's death later this month, we can at least give her the consolation of knowing that the next time a drunken driver kills a baby like Morgan Elizabeth, that driver will not go unpunished.

Respectfully submitted,
Pat Goodson, Legislative Director

AMERICAN LIFE LEAGUE INC

Affiliated with American Life League

THESE KANSAS WOMEN WERE DENIED THE CHOICE OF LIFE FOR THEIR UNBORN BABIES

- **Kathryn Cummings** - June, 1979; Shawnee County; Kathryn was fatally stabbed to death by an assailant in June, 1979. Her 26 week old unborn child was also killed. Topeka Judge Michael Barbara ruled that manslaughter charges could be filed for the baby's death. Assailant was convicted in Kathryn's death and no charges were filed in the baby's death.

- **Julie Covert** - April, 1984; Sedgwick County; Julie and her eight month old unborn child were killed in a car accident on April 6, 1984. The accident ocurred when a driver who had been drinking ran a stop sign. The driver was charged with two counts of involuntary manslaughter. The case was appealed to the Kansas Supreme Court over the issue of whether the defendant's acts were "wanton". *State v. Burrell*, 237 Kan. 303, 699 P.2d 499 (1985). The court ruled that Burrell should be prosecuted on "both counts". Burrell later pled guilty.

- **Mary Kathleen Stumpner** - October, 1985; Wyandotte County; Mary Kathleen was seriously injured and her six month old unborn son was killed when the truck she was driving was struck by another car. The driver of that car later received a DUI conviction, but no charges were filed for the death of the baby.

- **Patricia Brixius** - July, 1986; Sedgwick County; Patricia who was 25 weeks pregant was thrown from the truck in which she was riding when it was struck by a car driven by Stephen Trudell. As a result of the accident her child was stillborn a few days later. Trudell who had a .208% alcohol level in his blood at the time of the accident was charged with aggravated vehicular homicide in the death of the baby. The case was appealed to the Kansas Supreme Court. *State v. Trudell*, 243 Kan. 29, 755 P 2d 511 (1988). The court ruled that Trudell could not be so charged.

- **Zeola Wilson** - April, 1987; Sedgwick County; Zeola was shot in an argument with a former boyfriend. Willard Green. She was eight months pregnant and when it became apparent that she would not survive, the baby was delivered by caesarian section. Even though the baby was revived and sustained a heartbeat for a short period of time, the Kansas Supreme Court ruled that Green could not be charged in the baby's death.

- **Barbara Ishmael** - September, 1988; Johnson County; Ishmael and her seven month old unborn child were killed in an accident caused by a driver allegedly under the influence of drugs.

- **Lisa Lang** - September, 1989; Sedgwick County; Lisa was shot and killed by a stray bullet fired by a man trying to steal some crack cocaine. Lisa was 6 months pregnant. Her baby boy was delivered by C- section and since he managed to survive for about four hours, the **District Attorney was able to classify his death as a homicide**!

- **Rebecca Woodruff** - March, 1994; Franklin County; Rebeccca and her husband Max went to fertility doctors for 17 months before Rebecca finally conceived their second child. Just one day before the scheduled delivery of this desparately wanted daughter, their car was struck by a man driving under the influence of alcohol. The baby, Morgan Elizabeth, was stillborn a few hours later. **According to Kansas "law" Morgan's death was not a "homicide".**

FETAL HOMICIDE IN KANSAS

- From its beginning **Kansas departed from the common law rule that the killing of a fetus was not homicide, unless the child was born alive and died as a result of injuries inflicted before birth.** In 1855 the first territorial legislature enacted the following statute which was in force until 1969.

> "The willful killing of any unborn quick child, by an injury to the mother of such child, which would be murder if it resulted in the death of such mother shall be deemed manslaughter in the first degree."

- **The legislature did not reenact this statute in a 1969 revision of the criminal code**. The reason for this failure was debated in *State v. Trudell* 243 Kan. 29, 755 P 2d 511 (1988).

- While not specifically ruling on the issue of whether charges could be filed in the death of an unborn child the Kansas Supreme Court, **in a 1985 case *State v. Burrell***, 237 Kan. 303, 699 P.2d 499 (1985), stated: "...the defendant had committed an unlawful act ...**which resulted in the unintentional killing of two human beings." (referring to a mother and her unborn child).**

- **The reference was interpreted differently by prosecutors in Wyandotte and Sedgwick Counties.** In Wyandotte, the district attorney declined to prosecute for the death of a 6 month old unborn child killed when her mother's vehicle was struck by a car driven by a woman who later received a dui conviction.

- In 1987, the Wyandotte County attorney asked that the legislature pass a fetal homicide statute. The bill was never reported out of committee.

- **The Sedgwick County Attorney, filed a charge of aggravated vehicular homicide in the death of a baby stillborn in July, 1986**. The court granted the defendants motion to dismiss the charge and the state appealed. *State v. Trudell*, 243 Kan. 29, 755 P.2d 511 (1988). The state relied on several issues including the court's statement in *Burrell* and argued that the legislature did not reenact the fetal homicide statute in 1969 because it intended the term human being in the regular homicide statutes to include unborn human beings.

- **In 1988 the Kansas Supreme Court, *State v. Trudell*, rejected those arguments and ruled that the Kansas Legislature would need to amend the homicide statutes in order for them to apply to unborn human beings.**

Testimony Concerning Senate Bill 16
Wednesday, March 15, 1995
House Judiciary Committee, Hon. Michael O'Neal, Chair

Good afternoon. My name is Carla Dugger. I am the Associate Director of the American Civil Liberties Union of Kansas and Western Missouri, a membership organization which supports and defends civil liberties.

ACLU submitted testimony in clear opposition to SB 16 as it was introduced this year. The provisions in the original bill, which applied a new definition of "human being" (including the "preborn") to various criminal statutes, was clearly unconstitutional and easily challengeable. Proponents of such legislation keep forgetting that a woman's right to choose abortion is constitutional, and legislation which lays the groundwork for criminalizing abortion is not.

That said, we do acknowledge that SB 16 in its present form is a big improvement. The new amendments remove the objectionable definition of "human being," and do not convey obvious full-personhood status on the fetus when miscarriage or stillbirth are caused by the commission of a vehicular crime.

However, ACLU objects to instituting a separate statute related to miscarriage or stillbirth caused by the commission of a vehicular crime, preferring instead to include the act of causing the miscarriage or stillbirth of a fetus to the list of aggravating factors in the consideration of a vehicular crime.

We absolutely oppose any attempts to worsen SB 16 by amending back into it the original offensive language and provisions.

State of Kansas

Office of the Attorney General

301 S.W. 10TH AVENUE, TOPEKA 66612-1597

CARLA J. STOVALL
ATTORNEY GENERAL

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TESTIMONY ON BEHALF OF ATTORNEY GENERAL CARLA STOVALL
by Camille Nohe, Assistant Attorney General
House Judiciary Committee
Senate Bill 3
March 15, 1995

The Attorney General is a strong supporter of the concept of the sexually violent predator law as many of you know. She spoke of it frequently while campaigning and has continued her support of this law since being elected.

Most of the changes proposed in S.B. 3 were drafted by our office after reviewing the Washington state law and a Washington state Supreme Court decision which addressed the sexually violent predator law. These changes consist of technical and procedural changes to provide lengthened time frames for notice, filing of the petition and trial, to require the probable cause hearing within 72 hours, to provide for a continuance upon good cause, to continue confinement upon a mistrial until a subsequent trial, to allow SRS to contract with DOC for placement of these predators, and other technical changes.

New section 8, proposed by the Office of Judicial Administration, is inconsistent with the sexual predator proceedings because psychological and treatment reports are not submitted to the court prior to trial. Certain reports may be admitted into evidence during the course of trial. Because this section does not serve a meaningful purpose, the Attorney General recommends that new section 8 be deleted.

The Attorney General supports the senate committee's deletion of former new section 9. Her concern was that the language allowed a judge to exclude all persons not necessary for the conduct of the proceedings. Victims are not necessary and therefore could have been prohibited from the proceedings. The Attorney General strongly believes that victims of past acts (whether or not convictions) of the respondent should be allowed in the courtroom.

Section 10 (former section 11) would allow someone to be charged with aggravated escape if the person were being held after the probably cause hearing or after commitment. The language needs to be modified so that a person held prior to the probably cause hearing could also be found guilty of aggravated escape. The Attorney General therefore offers the following amendment:

> Aggravated escape from custody is: (a) Escaping while held in lawful custody upon the filing of a petition as provided in K.S.A. 59-29a05...

Many county and district attorneys are desiring the responsibility for initiating these actions to be removed to the state level - to the Attorney General's office. The Attorney General strongly supports that move and has asked for inclusion within her budget, dollars sufficient to hire a sexual predator prosecutor. The Governor's budget message approves the Attorney General's office handling that responsibility - but did not provide adequate funding for such. The Attorney General urges legislators to add in the dollars to allow this to occur. As many of you know, our Kansas sex predator law was modeled after the state of Washington's. The experience there has shown that their Attorney General's office handles the cases statewide - with the exception of the state's largest two or three counties. The Attorney General would expect that to be the practice here should she be able to assume this additional task with adequate funding.

In summary, the Attorney General supports Senate Bill 3 with the changes suggested.

SENATE BILL NO. 3

House Judiciary Committee
March 15, 1995

Testimony of Patricia Henshall
General Counsel
Office of Judicial Administration

Thank you for the opportunity to appear today and discuss Senate Bill No. 3, concerning the civil commitment of sexual predators act. I appear in support of the current version of the bill.

Last year, while developing procedures for handling these cases, we noted three issues which needed resolving: Docket fees, confidentiality, and the jurisdiction of district magistrate judges.

The amendments which respond to these issues appear in New Section 8, Section 9, and Section 12 of the bill. New Section 8 addresses confidentiality. It limits access to psychological reports, drug and alcohol reports, treatment records, reports of the diagnostic center, medical records and victim impact statements. Statutes specifically limit or prohibit access to these sorts of records in most types of court proceedings. The treatment acts for mentally ill persons and drug and alcohol abuse provide for the confidentiality of all court records. Federal statutes seal certain treatment records. This amendment does nothing new or startling.

Section 9 amends K.S.A. 1994 Supp. 20-203b to eliminate district magistrate jurisdiction over the commitment of sexual predators. Under current law, these matters could be heard by a magistrate and appealed de novo to a district judge. This easily could mean twice the expense of time and money at the district court level. In addition, an appeal to the district judge suspends the operation of a magistrate's order until the appeal is decided or the judge hearing the appeal orders otherwise.

Section 11 provides for a $21.50 docket fee, the same assessed for actions under the treatment act for the mentally ill and the care and treatment act for alcoholism or drug abuse. Currently, neither K.S.A. 59-104 nor the sexual predator commitment act specifies a docket fee for these cases, yet the former statute requires a docket fee in all probate cases.

Thank you for your time and attention in addressing these issues.

STATE OF KANSAS

DEPARTMENT OF CORRECTIONS
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Bill Graves
Governor

Charles E. Simmons
Acting Secretary

M E M O R A N D U M

To: House Judiciary Committee

From: Charles E. Simmons
Acting Secretary of Corrections

Re: Senate Bill No. 3

Date: March 15, 1995

The Department of Corrections suggested a number of amendments to Senate Bill No. 3 which are contained in the bill as it is now before this Committee. We believe it is important that these provisions remain in the bill and become law.

To date there have been three individuals committed as sexually violent predators. By statute these individuals are committed to the custody of the Department of Social and Rehabilitation Services. However, SRS lacks secure facilities suitable for housing these individuals in locations where they can be kept separate from other patients under the supervision of SRS. As a result, the Department of Corrections and Department of Social and Rehabilitation Services entered into an interagency agreement several weeks ago which provides that those individuals committed as sexually violent predators be housed at the Larned Correctional Mental Health Facility. The three individuals committed to date were transferred to LCMHF in early February.

On page 5 of the bill is language which authorizes an interagency agreement of this nature. We believe it is important to have statutory authorization for this type of agreement and placement of those committed as sexually violent predators. The language on page 5 includes an amendment requested by the Department of Corrections that those committed will be housed separately from inmates and will have only occasional instances of supervised incidental contact with inmates. We believe it is necessary to maintain a separation between these groups in order to not lose

sight of the fact that the sexual predators are civil, not criminal, commitments.

The Department requested the amendment to Section 2 (p.2, lines 34-39) to ensure that it would have adequate time to provide notice in cases where the offender has been returned to incarceration for 90 days as a postrelease supervision violator. The amendment provides for the notice to be made as soon as practicable following the person's readmission to prison.

The Department requested New Section 7 of the bill to ensure that it is authorized by statute to release individual offender information which is relevant to determining whether the offender is a sexually violent predator, but which is by law confidential and therefore protected from release. Although the department received an Attorney General's opinion indicating that such information could be shared with prosecutors, statutory authorization more fully resolves this issue.

The Department supports Section 10 of the bill. This provision expands the definition of aggravated escape from custody to include persons under evaluation or civilly committed as sexual predators. Because sexual predators are subject to civil commitment since they present a risk to the public, both public safety and staff safety will be enhanced if escape from custody is punishable as a felony offense.

CES/nd

Kansas County & District Attorneys Association

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EXECUTIVE DIRECTOR, JAMES W. CLARK, CAE • CLE ADMINISTRATOR, DIANA C. STAFFORD

Testimony in Support of
SENATE BILL NO. 3

The Kansas County and District Attorneys Association appears in support of Senate Bill 3, which makes technical changes to the Sexually Violent Predator Act, passed by the 1994 Legislature. Our primary interests concern:

Page 2, Line 32, extending the notice to prosecutor time from 60 to 90 days.

Page 3, Line 17, extending the time for filing a petition after the notice from 45 to 75 days.

Page 3, Line 43, allowing detention in county jail after a probable cause determination.

Page 4, Section 5, extending time period for evaluations before trial, and giving the court authority to grant a continuance.

Page 5, Lines 27 - 32, allowing a retrial if a mistrial is declared.

Page 6, New section 7, allowing access to case files by prosecutors and allowing confidentiality of the proceedings.

Page 6, New section 8, allowing discovery of expert witness reports and treatment records.

Page 7, beginning at line 43, removing proceedings from magistrate judge jurisdiction.

Page 8, Lines 24 - 28, and 32 - 35, providing penalty for escape by sex predator
We would suggest also that on Page 8, Line 24, insert "a" before "felony".

There is no question that the Sex Predator Act is a major piece of legislation. While the protection of the public is obviously enhanced, the impact on counties involved in the commitment proceedings is significant. Partly in response to this impact, former Corrections Secretary Stotts got the entities involved (SRS, DOC, Parole Board, AG and KCDAA) to enter into an interagency agreement in which a protocol was established in which the cases would be reviewed by both the custodial agencies and a committee of prosecutors prior to referral to the local prosecutor. The Prosecutor Advisory Committee is composed of Johnson County District Attorney Paul Morrison, Assistant Sedgwick County D.A. Debra Barnett (now Assistant U.S. Attorney), Greeley County Attorney Wade Dixon, Assistant Attorney General Camille Nohe, and Pawnee County Attorney Terry Gross. The latter was added because of expertise in mental commitment proceedings and access to Larned State Hospital. The former had experience either in the drafting of the bill or trying the first cases. Since November the PAC has reviewed 53 cases and recommended filing petitions in eight.

House Judiciary
3-15-95
Attachment 7

Testimony
in Opposition to Senate Bill 3
Wednesday, March 15, 1995
House Judiciary Committee, Hon. Michael O'Neal, Chair

Good afternoon. My name is Carla Dugger. I am the Associate Director of the American Civil Liberties Union of Kansas and Western Missouri, a membership organization which supports and defends civil liberties.

ACLU submitted testimony last year in opposition to SB 525, which enacted the Sexual Predators Act. Our position on the enacting legislation has not changed, even though the amendments in SB 3 have been improved over those it contained upon introduction.

Specifically, we approve of the change which requires a unanimous, not 10 of 12, decision by a jury in order to commit a person as a sexual predator (lines 42–43 on page 4, and lines 1–2 on page 5).

As we stated last year, when an early version of SB 525 specified six, not twelve, jurors would be all that would be needed for the commitment hearing, "In recognizing the right to trial by jury, the state recognizes the high standard of proof in the proceedings and the appropriateness of a jury determination of the need for involuntary commitment...however, where a lifetime commitment with little opportunity for release is at issue, the jury number should be set at twelve." For the same reason, we have opposed dropping the number needed for conviction on a panel of 12 to 10 in SB 3.

A verdict should not be easy to obtain. High numbers of "convictions" must never be equated with increased justice. This legislation in particular should have extremely high standards of due process, since its entire premise is already a constitutionally suspect hybrid of civil and criminal justice characteristics. We strongly recommend that this Committee leave the unanimous verdict requirement intact.

We also support striking New Section 9, which would have allowed closed hearings. Aside from our obvious First Amendment concerns, we do not believe hiding these proceedings from public scrutiny does much more than heighten the perception that there is something amiss in the courtroom.

New changes in Section 5 help clarify the help the court may give to a person facing a sexual predator hearing and who needs expert testimony to assist with the defense. The court may determine whether these services are "necessary and reasonable." Our caution is that "reasonable" costs may be too easily limited according to budgetary constraints, which may make sense from a balanced budget viewpoint but may seriously undermine the defense.

ACLU has been criticized by proponents of this legislation for defending the rights of "sexual predators," as if exclusions for extremely vile criminals were built into the Bill of Rights. The constitutional premise is, as always, that rights taken away from the most vilified can be taken away from others. This legislation, which pretends to be civil and is at least equally criminal, which pretends to provide meaningful treatment but doesn't, and which -- worst of all -- "convicts" persons based not on what they've done but on what they may do in the future -- provides a dangerous precedent for other crimes and other people.

The constitutional challenges to sexual predator–type laws in other states have been based upon violations of substantive and procedural due process, violations of the ex post facto and double jeopardy provisions, and violations of plea agreements. These challenges have met with mixed results. Washington state and Minnesota have upheld, but Wisconsin found a similar act unconstitutional -- and all are subject to continuing litigation.

The Senate's amendments are improvements over SB 3 as introduced, but our continued hope is for the repeal of the Sexual Predators Act itself.

House Judiciary
3-15-95
Attachment 8

State of Kansas
Office of the Attorney General
301 S.W. 10TH AVENUE, TOPEKA 66612-1597

CARLA J. STOVALL
ATTORNEY GENERAL

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STATEMENT OF
ATTORNEY GENERAL CARLA J. STOVALL
BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE
RE: SENATE BILL 237
MARCH 15, 1995

Dear Chairperson O'Neal and Members of the Committee:

I appear before you today to ask for your support of Senate Bill 237. Since members of this committee were instrumental in the creation and subsequent amendments to the Sex Offender Registration Act, I am not going to attempt to repeat the history to those who made it. Suffice it to say that the Sex Offender Registration Act is, in my opinion, a wonderful pro-active effort, which not only provides law enforcement with an invaluable investigative tool and it is perceived as a real deterrent to known sex offenders, but it also increases public safety by allowing members of the public to identify known and offenders in their communities. I am pleased to have the KBI in charge of the procedural operations of this law and to be the central repository of the registrations.

Senate Bill 237 expands the application of the act to require registration by those individuals who are granted

diversion for one of the violent sex offenses covered by the act, and for juveniles who are "adjudicated" as a "juvenile offender" for such an act rather than "convicted" of a "crime."

Since we are dealing with juvenile offenders and diversions, the term of registration is not for ten years or life, as is the case of felony adult convictions, but for a period of five years after adjudication or release as a juvenile offender, whichever is longer, and for a period of five years after completion of terms of the diversion.

KBI statistics indicate that in 1993, 250 juveniles were arrested for various sex offenses. While not all juveniles would be adjudicated or placed on diversion, there is certainly a significant number of individuals who are committing these crimes that are outside of the current registration law. There are relatively few adult offenders placed on diversion for these offenses because of the seriousness of these types of crimes. The KBI's records indicate that 18 individuals were placed on diversion for sex offenses in 1993.

Using these figures, the KBI has calculated that these changes would increase the number of registrations by 136 registrants per year. Current staffing and resources can handle this increase and the gain in public safety and investigative resources would make this amendment well worthwhile.

The other changes contained in Senate Bill 237 are primarily clean-up, e.g. clarifying that the registrant has a duty to keep the registration information current by means of a yearly update and enumerating within the statute the information that is required for registration on the form.

Another addition that is being requested is requiring the submission of genetic marker exemplars, DNA data. This will probably be done by means of hair and saliva, however, if blood is drawn, the amendments also require that it be done by a qualified individual. The addition of DNA material to the registration will be an important improvement to the Kansas Sex Offender Registration Act as far as its use in criminal investigations involving unknown assailants.

I ask for your support on behalf of all Kansas law enforcement agencies, and I urge your favorable consideration of Senate Bill 237.

KANSAS BUREAU OF INVESTIGATION
DIVISION OF THE OFFICE OF ATTORNEY GENERAL
STATE OF KANSAS

LARRY WELCH
DIRECTOR

CARLA J. STOVALL
ATTORNEY GENERAL

TESTIMONY
KYLE G. SMITH, ASSISTANT ATTORNEY GENERAL
KANSAS BUREAU OF INVESTIGATION
IN SUPPORT OF SENATE BILL 237
BEFORE THE HOUSE JUDICIARY COMMITTEE
MARCH 15, 1995

Mr. Chairman and Members of the Committee:

I am Kyle Smith, Assistant Attorney General with the Kansas Bureau of Investigation (KBI) and I appear today on behalf of Director Larry Welch and the KBI in support of SB 237. The merits of this bill have already been addressed by Attorney General Stovall and on behalf of the KBI I would echo her remarks as this bill would strengthen an already powerful weapon against repeat sex offenders. However, the main purpose of my testimony today is to request a friendly amendment. General Stovall has approved this amendment and it will, as the saying goes, hopefully make a good bill better. HB 2449 would have amended K.S.A. 21-2511 the statute which creates the DNA data bank at the KBI, and requires all convicted sex offenders to have samples submitted to the KBI. however, due to restraints of time, no hearing was held.

The amendments in HB 2449 did three things; the most important of which was authorizing the KBI to participate in a pilot program with the Federal Bureau of Investigation (FBI) called CODIS (Combined DNA Index System). Kansas is one of thirteen states that has been selected to participate in this program which is designed to create a nationwide data base of genetic markers to aid in investigation of violent sexual offenses and crimes of violence. Without the amendment, it is doubtful the KBI would be able to participate in the development of this program. The other amendments in HB 2449 merely clarified that failure to cooperate

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Attachment 10

1620 TYLER TOPEKA, KANSAS 66612
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with the collection of specimens could result in contempt of court or revocation of probation and clarified what professionals are qualified to draw blood. We are requesting that the provisions of HB 2449 be amended into SB 237 as both deal with the taking of genetic markers or DNA samples.

Finally, we have attached a balloon amendment which would prevent duplication of these DNA data banks by making those collected pursuant to the Sex Offender Registration Act become part of the data bank already in existence under K.S.A. 21-2511. This has the added benefit of incorporating the procedures already set out in that statute.

I would be happy to stand for questions.

SB231.2

10-3

Session of 1995

HOUSE BILL No. 2449

By Committee on Judiciary

2-8

AN ACT concerning criminal procedure; relating to collection of specimens; amending K.S.A. 1994 Supp. 21-2511 and repealing the existing section.

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

Section 1. K.S.A. 1994 Supp. 21-2511 is hereby amended to read as follows: 21-2511. (a) Any person convicted or adjudicated as a juvenile offender because of the commission of an unlawful sexual act as defined in subsection (4) of K.S.A. 21-3501, and amendments thereto, or an attempt of such unlawful sexual act or convicted or adjudicated as a juvenile offender because of the commission of a violation of K.S.A. 21-3401, 21-3402, 21-3602, 21-3603 or 21-3609, and amendments thereto, regardless of the sentence imposed, shall be required to submit specimens of blood and saliva to the Kansas bureau of investigation in accordance with the provisions of this act, if such person is:

(1) Convicted or adjudicated as a juvenile offender because of the commission of a crime specified in subsection (a) on or after the effective date of this act;

(2) ordered institutionalized as a result of being convicted or adjudicated as a juvenile offender because of the commission of a crime specified in subsection (a) on or after the effective date of this act; or

(3) convicted or adjudicated as a juvenile offender because of the commission of a crime specified in this subsection before the effective date of this act and is presently confined as a result of such conviction or adjudication in any state correctional facility or county jail or is presently serving an authorized disposition under K.S.A. 21-4603, 22-3717 or 38-1663, and amendments thereto.

(b) Any person required by paragraphs (a)(1) and (a)(2) to provide specimens of blood and saliva shall be ordered by the court to have specimens of blood and saliva collected within 10 days after sentencing or adjudication:

(1) If placed directly on probation, as a condition of probation, that person must provide specimens of blood and saliva, at a collection site designated by the Kansas bureau of investigation. *Failure to cooperate with the collection of the specimens and any deliberate act by that person*

intended to impede, delay or stop the collection of the specimens shall be punishable as contempt of court and constitute grounds to revoke probation;

(2) if sentenced to the secretary of corrections, the specimens of blood and saliva will be obtained immediately upon arrival at the Topeka correctional facility; or

(3) if a juvenile offender is placed in the custody of the secretary of social and rehabilitation services, in a youth residential facility or in a state youth center, the specimens of blood and saliva will be obtained immediately upon arrival.

(c) Any person required by paragraph (a)(3) to provide specimens of blood and saliva shall be required to provide such samples prior to final discharge, parole, or release at a collection site designated by the Kansas bureau of investigation.

(d) The Kansas bureau of investigation shall provide all specimen vials, mailing tubes, labels and instructions necessary for the collection of blood and saliva samples. The collection of samples shall be performed in a medically approved manner. No person authorized by this section to withdraw blood and collect saliva, and no person assisting in the collection of these samples shall be liable in any civil or criminal action when the act is performed in a reasonable manner according to generally accepted medical practices. The withdrawal of blood for purposes of this act may be performed only by: (1) A person licensed to practice medicine and surgery or a person acting under the supervision of any such licensed person; (2) a registered nurse or a licensed practical nurse; or (3) any qualified medical technician *including, but not limited to, an emergency medical technician-intermediate or mobile intensive care technician, as those terms are defined in K.S.A. 65-6112, and amendments thereto, or a phlebotonist*. The samples shall thereafter be forwarded to the Kansas bureau of investigation for analysis and categorizing into genetic marker groupings.

(e) The genetic marker groupings shall be maintained by the Kansas bureau of investigation. The Kansas bureau of investigation shall establish, implement and maintain a statewide automated personal identification system capable of, but not limited to, classifying, matching and storing analysis of DNA (deoxyribonucleic acid) and other biological molecules. *The genetic marker grouping analysis information and identification system as established by this act shall be compatible with the procedures specified by the federal bureau of investigation's combined DNA index system (CODIS). The Kansas bureau of investigation may participate in the CODIS program by sharing data and utilizing compatible test procedures, laboratory equipment, supplies and computer software.*

(f) The genetic marker grouping analysis information obtained pursuant to this act shall be confidential and shall be released only to law enforcement officers of the United States, of other states or territories, of the insular possessions of the United States, or foreign countries duly authorized to receive the same, to all law enforcement officers of the state of Kansas and to all prosecutor's agencies.

(g) The Kansas bureau of investigation shall be the state central repository for all genetic marker grouping analysis information obtained pursuant to this act. The Kansas bureau of investigation may promulgate rules and regulations for the form and manner of the collection of blood and saliva samples and other procedures for the operation of this act. The provisions of the Kansas administrative procedure act shall apply to all actions taken under the rules and regulations so promulgated.

Sec. 2. K.S.A. 1994 Supp. 21-2511 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

10-4

(5) ~~a photograph~~ *sex and age of the victim;*
(6) ~~fingerprints; and~~ *current address;*
(7) social security number;
(8) identifying characteristics such as race, sex, age, hair and eye color, scars and blood type;
(9) occupation and name of employer; and
(10) drivers license and vehicle information.
(b) The sex offender shall also provide to the registering law enforcement agency:
(1) A photograph;
(2) fingerprints; and
(3) DNA exemplars X
(c) If the exemplars to be taken require the withdrawal of blood, such withdrawal may be performed only by:
(1) A person licensed to practice medicine and surgery or a person acting under the supervision of any such licensed person;
(2) a registered nurse or a licensed practical nurse;
(3) any qualified medical technician; or
(4) a licensed phlebotomist.
~~(b)~~ *(d)* Within three days, the registering law enforcement agency shall forward the statement and any other required information to the Kansas bureau of investigation.

Sec. 6. K.S.A. 1994 Supp. 22-2909, 22-4902, 22-4904, 22-4906 and 22-4907 are hereby repealed.

Sec. 7. This act shall take effect and be in force from and after its publication in the Kansas register.

unless previously submitted pursuant to K.S.A. 21-2511 and amendments thereto. DNA exemplars shall be collected in accordance with the procedures set out in K.S.A. 21-2511 and amendments thereto and shall become part of the genetic marker grouping analysis information and identification system at the Kansas bureau of investigation.

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Testimony
in Opposition to Senate Bill 237
Wednesday, March 15, 1995
House Judiciary Committee, Hon. Michael O'Neal, Chair

Good afternoon. My name is Carla Dugger. I am the Associate Director of the American Civil Liberties Union of Kansas and Western Missouri, a membership organization which supports and defends civil liberties.

The problems with sex offender registration, in our opinion, remain the following:

--- It does not guarantee public safety, but can encourage public hysteria

--- It in no way encourages the rehabilitation of sex offenders, but prevents many from re-integrating into society as productive members

--- It therefore, in some instances, has the opposite effect than that which was intended: sex offender registation can result in increased, not decreased, recidivism, and therefore less, not more, public safety.

Adding juvenile offenders to this process only exacerbates the above-stated problems. Even more than adult offenders, juveniles should not have to negotiate additional stumbling blocks in their path to eventual reintegration into society. Further isolation and public vilification make no sense unless the state of Kansas really wants to say these are disposable youth not worthy of rehabilitation.

State of Kansas

Bill Graves Governor

Department of Health and Environment

James J. O'Connell, Secretary

Testimony presented to

House Committee on Judiciary

by

The Kansas Department of Health and Environment

Senate Bill 285

Senate Bill 285 repeals sections of the Tort Claims Act that would sunset the Charitable Health Care Provider Program on July 1, 1995.

Though originally conceived as a means to allow retired physicians to donate their professional services to the medically indigent, the Charitable Health Care Provider Program has become a larger and more dynamic force in the delivery of primary care services to the medically underserved. The final wording of the original legislation in 1991 allowed for any Kansas physician with an active or exempt license and several other types of health care providers to participate. In four years that has come to mean a Charitable Health Care Provider registry of 636 physicians, 45 dentists and 227 nurses.

Amendments to the Act allowing providers participating in Operation Immunize weekends to get coverage under the Act resulted in approximately 1,163 nurses attaining Charitable Health Care Provider status and providing volunteer services in the statewide immunization program.

There are 68 points of entry into the program for potential clients, representing health departments and indigent health care clinics distributed across the state. Several of the indigent health care clinics that have opened their doors since 1991 were able to do so partly because of the provider liability protection afforded by the Act - notably Salina Cares Health Clinic in Salina and Harvey county Health Ministries in Newton, to name only two. Several existing clinics have been able to expand their services because of the coverage.

Since the inception of the program there have been no claims against the Tort Claims Fund arising from the rendering or failure to render professional services by a charitable health care provider.

The Charitable Health Care Provider program has proven to be an effective and low cost approach to increasing primary health care services for the medically indigent.

The Department of Health and Environment recommends that Senate Bill No. 285 be recommended favorably for passage.

Testimony presented by: Richard J. Morrissey
Director
Bureau of Local and Rural Health Systems
March 15, 1995

Bureau of Local and Rural Health Systems
900 SW Jackson, Rm 665, Topeka, KS 66612-1290

DEPARTMENT OF HEALTH AND ENVIRONMENT
OFFICE OF LOCAL AND RURAL HEALTH SYSTEMS

CHARITABLE HEALTH CARE PROVIDER PROGRAM
FACT SHEET

CY 1994

- Number of Providers
    - 636 physicians
    - 45 dentists
    - 227 nurses
    - 3 chiropractors
    - 3 optometrists
    - 1 pharmacist
    - 4 physical therapists
    - 4 physician assistants
    - 3 podiatrists
    - 23 registered dental hygienists

- 68 points of entry into the program.

- 1,163 nurses registered as Charitable Health Care Providers for Operation Immunize.

- 89% of the clients met indigency requirements.

- 11% were receiving medical assistance.

- No claims against the Tort Claims Fund.

KANSAS MEDICAL SOCIETY
623 SW 10th Ave. • Topeka, Kansas 66612 • (913) 235-2383
WATS 800-332-0156 FAX 913-235-5114

March 15, 1995

To: House Judiciary Committee

From: C. L. Wheelen, KMS Director of Public Affairs

Subject: Senate Bill 285; Charitable Health Care Providers

Thank you for conducting a hearing on SB285 and for the opportunity to express our support. Although it may not look like much, it is extremely important for uninsured patients who receive medical care and other health services from charitable providers.

Some of you may recall that in 1990 the Kansas Medical Society asked the Legislature to help us encourage physicians and other health care providers to provide more charity care to indigent patients. We requested a bill that defined charitable health care providers as state employees so long as they were providing gratuitous services to persons deemed medically indigent. This means that if the patient should sue the physician for malpractice, the Attorney General's office would defend the physician and if there was ever a judgment or settlement, the state would pay the claim.

The Kansas Department of Health and Environment supported the bill and enthusiastically volunteered to administer the program, if enacted. The 1990 Legislature passed the bill unanimously.

The program was so successful at the outset that in 1992 the Legislature decided to broaden application of the concept to cover other situations. Although the KMS did not request the expansion, we did support the bill. The Governor, however, did not, and vetoed the bill.

During the 1992 interim we met with representatives of the Governor's office and with the help of KDHE addressed some of the questions that precipitated the veto. The Governor agreed to sign a similar expansion bill but only if a sunset date were attached so that the program could be evaluated prior to any long-term commitment by the State to assume liability for a bad medical outcome as a result of charity care provided a needy person. Such untoward events have not occurred.

We are here today asking you to remove the sunset date. That's all that SB285 does. Representatives of KDHE will tell you that the program is a success, resulting in substantial health care services to Kansans who lack insurance or other resources; including many children. We urge you to **pass SB285**. Thank you.

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3-15-95
Attachment 13

State of Kansas
Office of the Attorney General
301 S.W. 10TH AVENUE, TOPEKA 66612-1597

CARLA J. STOVALL
ATTORNEY GENERAL

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Testimony of
C. Steven Rarrick
Deputy Attorney General
Before the House Judiciary Committee
RE: Senate Bill 212
March 15, 1995

Chairperson O'Neal and Members of the Committee:

Thank you for the opportunity to appear before you today on behalf of Attorney General Carla Stovall to testify in support of Senate Bill 212.

The Attorney General supports Senate Bill 212. This bill will allow our office and local district and county attorneys to recover attorney fees in consumer protection actions. Currently, attorney fees are recoverable by attorneys for private litigants. However, consumers often experience great difficulty finding an attorney who will take their cases. In addition, when consumers are able to retain counsel to file an action under the consumer protection act, we defer to that lawsuit and do not seek or obtain compensation on behalf of that consumer. Because of these factors, we do not and will not be competing against private sector attorneys.

Our office is currently able to request investigative fees and expenses in consumer protection actions, but have encountered difficulties in recovering them due to the absence of established standards or methodologies for computing investigatory fees by the courts. On the other hand, courts have well established standards and methods for computing attorney fees which should result in consistent revenues to assist our office in enforcing the consumer protection act.

Since 1988, the consumer protection division of the Office of the Attorney General has received between 4,500 and 5,400 formal written complaints each year. Currently, the five special agents in the consumer protection division have an average of 437 open complaint files per agent. Because of these enormous caseloads, we simply do not have the resources available to spend significant time actively investigating complaints. As a result, much of our

investigation is limited to gathering information from consumers and suppliers and attempting to determine from that information whether a deceptive or unconscionable act or practice has been committed. Even with this limited type of investigation, it is often difficult for our agents to process complaints within a time frame satisfactory to consumers or our office.

We believe the recovery of attorney fees will consistently generate revenues from a non-General Fund source to enable us to hire additional agents to investigate consumer protection violations. This would lower the caseload of our agents, allow them to spend more time investigating each complaint, and enable them to conduct more active investigations. In addition, the threat of attorney fees should provide suppliers who have violated the consumer protection act with additional motivation to enter into settlement agreements or consent judgments without protracted litigation.

Again, thank you for the opportunity to voice our support of this bill. We request your approval of the bill.

STATE OF KANSAS

BOB VANCRUM
SENATOR, ELEVENTH DISTRICT
OVERLAND PARK, LEAWOOD,
STANLEY, STILWELL, IN
JOHNSON COUNTY
9004 W. 104TH STREET
OVERLAND PARK, KANSAS 66212
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SENATE CHAMBER
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COMMITTEE ASSIGNMENTS
VICE-CHAIRMAN: ENERGY AND NATURAL RESOURCES
MEMBER: WAYS AND MEANS
JUDICIARY
MEMBER: COMMERCE, LABOR AND REGULATIONS
COMMITTEE, NATIONAL CONFERENCE ON STATE LEGISLATURES
MEMBER: ENVIRONMENTAL TASK FORCE, COUNCIL ON STATE GOVERNMENTS

TESTIMONY OF ROBERT VANCRUM

TO SENATE LOCAL GOVERNMENT COMMITTEE

SENATE BILLS 212, 224, 331

MARCH 15, 1995

Thank you for taking time late in the session to hear these bills. For over a year now I have been working with a group of people who have purchased homes in the Kansas City area who call themselves Homeowners Against Deficient Dwellings (HADD). I have discovered that even though a house is probably the largest consumer purchase most everyone will ever make, there are very few real options available to people who find themselves confronted with an unethical, unscrupulous, under financed or bankrupt builder. I have letters to show you, and these people have present testimony to indicate the scope of this problem is alarming in the Kansas City area. I personally believe it is not confined to the Kansas area, but builders are much more likely to try to keep their buyer satisfied in smaller cities and towns where they are much more visible.

The major problem homeowners face is that litigation of this type requires very expensive experts and a tremendous amount of lawyers time. Furthermore, the District Attorney or County Attorney and even the Attorney General, who has power to enforce consumer protection act violations usually are unwilling or unable to devote substantial staff time to preparing and filing such cases for the same reason. Furthermore, there are very real economic pressures brought to bear on consumers to simply keep their mouths shut, sell the house and leave. If they publicize the fact that the house was built without beams and structural supports and with foundations that are caving in (and all of these are real cases arising within the last three years in my district), this impacts their insurance coverage, their financial credit standing,and of course this will also prevent them from selling the house to get out of their financial bind as well.

Although the real solution of these problems is the adoption and enforcement of uniform state building codes as well as licensing and bonding of all

home builders and home improvement contractors, I understand the political difficulties of obtaining passage of such legislation in a state as diverse as the State of Kansas. However, many other states have already taken such steps. There are, however, a few little things that can help some people. These more conservative changes are incorporated in the three bills before you.

Senate Bill 224 simply says that you shall not give temporary certificates of occupancy or temporary permits when homes fail to meet the internal structural requirements of the building code. This would seem to be only common sense, but in the last three building seasons the city of Overland Park has taken such action on a number of occasions. Furthermore, the city maintains that they have no obligation to assure that a house is structurally sound or that the building codes are enforced, leaving the poor home owner stuck to try to enforce the codes in a civil law suit. I think this is an outrageous position for the city to take. It is not a sufficient answer, for the city to state that the problem houses are only a 2% to 5%" of the new home buyers. It has been estimated that even if this percentage of defects is correct you could be impacting over 400 families with new homes in Johnson County each year. I don't understand why Senate Bill 224 should not be enacted into law immediately. If the cities tell you they have stopped issuing such temporary permits, then they certainly should not oppose putting the prohibition into law.

Senate Bill 331 would establish within the Attorney Generals's consumer protection office a revolving fund for the payment of a part of the damages caused by builders who simply are unwilling or unable to correct known deficiencies in dwellings. You will note that the fund is financed by a levy on every building permit issued in the State of Kansas. Truthfully, the additional surcharge would have to be in the range of $25 dollars for each permit to generate a useful amount in this fund. The bill does require that in order to be reimbursed, a person must have obtained a civil judgement against a builder, or a builder must actually have been adjudicated bankrupt.

Senate Bill 212 is an entirely different approach. This bill would allow the recovery of Attorney's fees by the Attorney General, District Attorney, or County Attorney bringing a consumer protection action. The idea is that often the reason a consumer protection action is not brought is they are highly complex and require an incredible amount of staff time to prepare, file and obtain judgement The current Attorney General (unlike her predecessor) has indicated a willingness to aggressively pursue consumer protection cases in the home improvement and even in the new home area, but the Attorney General simply doesn't have the staff to devote several people to work on such cases. The intention is that these funds stay in the Attorneys General's office to defray cost in bringing similar protection actions in the future. If it is not clear in the existing language, I have an amendment that will clarify such intent. I realize that this changes the consumer protection law and also impacts other consumer protection actions brought, but I have no problem with the concept that someone found guilty of violation of the consumer protection act should reimburse the tax payers for the cost of such an action.

I have brought several homeowners with me to support this legislation, and I will be happy to answer questions when we are through or at any other time.

Sincerely,

Robert J . Vancrum

Blue Valley & Leawood Star

Wednesday, March 15,
LEA The Kansas City

Homeowners unite to fight bad builders

By KEVIN HOFFMANN
Staff Writer

A group of metropolitan area homeowners who think they have been bamboozled by builders will meet Thursday to discuss fears, concerns and what action to take.

The group, upset that their dream homes have turned into their worst nightmares, will meet at 7 p.m. Thursday night at the Merriam Community Center, 5701 Merriam Drive, to discuss what can be done.

H.A.D.D.— Homeowners Against Deficient Dwellings— was formed several months ago after its founders discovered other people with similar circumstances.

Lynn Gansert, who helped establish the group after she discovered problems with the house she and her husband had built near 127th Street and Switzer Road, said H.A.D.D. was formed while several members were lobbying in Topeka and Jefferson City for consumer protection bills.

"We were having dinner together and we decided that we should start a group," Gansert said. "We just want other people to know we're there for emotional support and also to educate them on what help can be obtained."

Gansert said Bob Kennedy, assistant insurance commissioner, will speak at Thursday's meeting on what recourse homeowners could take through their insurance companies.

Maxine Taylor, 69, plans on attending the meeting to share horror stories of the home she had built in the Sylvan Lake area of southern Johnson County.

"I'm nearly 70 years old and this is the most distressing thing that has ever happened to me," she said. "You can't get anyone to do anything."

Taylor said that she called her builder when problems with her home began developing only to have him give her telephone numbers of other people to call.

"You had to take care of the problems yourself," she said. "I assumed that the builder would be held accoutable for the work he did."

Taylor said it took two years before she could find an attorney to take her case against her builder, and to date she has spent over $10,000 on attorney and engineering fees.

"Sometimes my monthly fees were more than my monthly income," she said.

Kansas senator Bob Vancrum, of Overland Park said he has worked with the group while trying to pass legislation protecting homeowners.

Vancrum, while applauding the efforts of H.A.D.D., said he was working on legislation that would authorize the state attorney general's office to recover attorney fees for clients in consumer protection cases.

Group takes aim at poor construction in homes

By Phil LaCerte
Sun Staff Writer

An organization is forming to offer support to citizens whose dream homes turned out to be lemons.

The effort, called Homeowners Against Deficient Dwellings (HADD), is headed by Lynn Gansert, whose home in a southern Overland Park subdivision still does not meet code, despite a re-build ordered by a Johnson County District Court judge.

"We've been fighting this since 1991," Gansert said. "I won't even let my children sleep upstairs."

Gansert said she had met many homeowners from across the metropolitan area with similar tales of woe since her battle was launched four years ago. She tells of a 69-year-old woman who invested her life savings in a home in a subdivision in Overland Park so she could be near her children. The house doesn't meet code and thus can't be sold, and the woman has spent $10,000 on fees for attorneys and engineers.

Gansert, who has spent more than $20,000 pursuing her battle, said her five-bedroom, 3½-bathroom home was the largest in the neighborhood. But it's hardly worth more than the property it sits on, according to the Johnson County Appraiser's Office. That agency recently appraised Gansert's home at $53,000; her lot was valued at $47,000. Other homes in the neighborhood were appraised at more than $200,000, Gansert said.

Gansert counts as allies Sen. Bob Vancrum, an Overland Park Republican, and Rep. Bill Boucher of Missouri, a Democrat. Johnson County Commissioner Elaine Beckers Braun also has been supportive of Gansert.

The first meeting of HADD, featuring comments from Assistant Insurance Commissioner Bob Kennedy, will be from 7 to 9 p.m. on Thursday at the Merriam Community Center, 5701 Merriam Drive. For more information, call Gansert at 685-0855.

March 15,1995

Dear Members of the House,

Thank you for the opportunity to present testimony to your committee, regarding the need for attorny fees to be awarded under the consumer protection act. We want to lend our support to your work in broadening consumer protection for people building and buying new homes in Kansas.

We signed a contract to build a new house in December 1992. As of today, the house, landscaping, flatwork, grading and finish work is still not completed. We have been through arbitration, lawyer negotiations, the attorney general, the district attorney, the Overland Park Police, codes administrators, city councilmen, county commissioners, restoration companies, over $23,000 in legal, expert, and arbitration fees and HELL.

We have painfully found out that although our home is the biggest investment we have made, it is our least protected. We would have more protection from a door-to-door vacuum cleaner salesman than a builder. We were left with over $50,000 in damages to our house, additional damages to our property, thousands of out of pocket expenses and over two years of our lives we will never recover.

Our arbitration left us with an unenforceable award: the builder simply refused to correct the work. With all we have spent in legal fees, we have not received any relief in the costs to repair our home. You face the decision of spending the money on legal fees or using the money to fix your home. Some people do not have the money to make those choices. We borrowed from our retirement to fix our house and pay legal fees. I use the term "borrow" loosely as we may never recover any of it.

We thought we had done our homework in picking our builder. Our builder was not only a Certified Master Builder, but one of the founding fathers. We chose a Certified Master Builder based on their programs claims and promises. We believed it gave us consumer protection. However, we soon learned their program provided us with no protection, no help and no where to turn. We had believed it when we read in the K C Star on "October 4, 1992: "The guesswork about qualifications is gone." said Tim Underwood, HBA executive vice president. "This program is a response to consumer demand for quality work and accountability from the home building industry. Consumers will benefit because a CMB/R signifies that character, trust and professionalism are the watchwords for home builders and remodelers in the 1990s and beyond."

16-2

We would like to see Kansas adopt legislation that would provide what HBA states that consumers are demanding: quality work and accountability. Certified Master Builders has no leverage other than to throw someone out of their program, It does not prevent them from building again. It has no mechanism to provide actual relief for damages. We would like to encourage licensing of builders and bonding to cover losses caused by the builder. A builder can have many projects going at the same time, worth millons of dollars, bonding seems to be the only logical means for a builder to be able to underwrite all his work. It works for commercial development.

We feel something must be done as shabby construction costs all of us. Insurance rates rise as these structures fail to weather storms and the economic status of neighborhoods is threatened when these houses deteriorate and the home owners do not have the means to repair them

Thank you for your hard work and let us know if we can be of further assistance.

Sincerely,

John & Carolyn Hall
26260 W 67th Street
Shawnee, Ks 66226
phone: 913-441-4386
fax: 913-422-7785

This is a copy of a statement that I made this morning, February 16th, 95 before the Kansas Senate regarding the passage of Senate Bill #224, which is a bill favoring protection for the buyers of new homes.

I am Mary Taylor. I am sixty-nine years of age. I am from Overland Park. The same builder who built Debbie's (Sickler) house built mine. I have spent nearly ten thousand dollars for engineer s fees and attorney s fees.

I have come here to tell you what the purchase of a new, custom built, house has done to my life.

I moved on July 28th, 92 and within six weeks the concrete in the garage floor, the basement floor and the foundation began to crack all to pieces.

I immediately began to call every-one that I could think of. I called the city codes inspection supervisor, the city engineer's office, and went to city hall, where I was shown a plat map of the area.

During October of 92 I spoke with an attorney and subsequently engaged him. I have had very little experience with attorneys and I assumed that once I had an attorney my problem would be resolved. I was just living in a fool's paradise. The attorney suggested that I call an engineer, with whom he had done some previous work. I later found out that the engineer routinely testifies in court cases for the builders. Upon receiving the engineer's report, which minimized the problems with my house, the attorney called me and said, "Well, I know that you have been wronged, but---".

Shortly after that I managed to find myself a new attorney, through an aquaintance who had also had problems with their house.

I was terrified that the statute of limitations was going to expire before I could get anything done. It has been extremely difficult to find anyone who is willing to do anything and to say that this mess has made a basket case out of me is the under-statement of all time.

The emotional cost is absolutely devastating. At first I could not speak to anyone about it without crying. I could not eat and could not sleep. I became hysterical. My sister has said that our entire family has been traumatized. My family became concerned that I might have a heart attack or a stroke. My son called my personal physician, who insisted that I come into his office. He prescribed a tranquilizer for me, which I refused to take. I am already taking two other medications and in addition I would like to think that I have full use of my faculties at all times.

When I have any reason to dwell upon the problems of this house for any length of time I become very upset. I still have a great deal of trouble sleeping. You cannot get away from it, it is with you twenty-four hours a day. It is the last thing you think of before you go to sleep and the first thing you think of upon awakening.

I have put my life savings into this house and it is a distinct possibility that I may very well lose a major portion of it, and possibly all of it.

My son and daughter-in-law moved into the area in December of 91 and I wanted to live near them, not that I need anything from them, but it is

a comfort to me to know that they are near.

I had expected this house to be my last stop, before either the nursing home or the cemetery. Also in the event that I passed away I wanted them to be able to go just a short distance to dispose of my possessions, instead of fifteen miles, as I had moved to Overland Park from Grandview.

Of course if I ever extricate myself from this mess I will no longer be living near them, as they have no plans to move.

Even though this situation is with me every waking moment, that does not mean that I will ever give up. I will continue trying to remedy the problem for as long as I am able to do so.

It is almost everyone's American dream to own a new home, well, I am telling you that this is the American nightmare.

On that note I will close. Thank you all for your attention.

My name is Lynn Gansert 10717 W. 128th street Overland Park, Kansas.
In 1990 my family moved to Kansas. We had a house custom built. Within a couple of months we noticed the floors were sinking and cracks in the walls. We hired an engineer and an architect. They found that an I-Beam and triple floor joists were missing. So were the solid wood blockings. Our deck was not anchored properly. We went to our city and were told that a mistake was made, that our house did not meet code and an Occupancy Permit should not have been issued. The city said since we owned the house it was a civil matter and to hire an attorney..

We hired an attorney and our builder agreed to rebuild our house. The city Code Administrator sent a letter stating that Koehler was to supply calculations and specifications of all work to be performed.. In June of 1991 Koehler started rebuilding our house without applying for a building permit. After I called the city and complained for over an hour they let him take out a one sentence building permit! He was adding an I-Beam, raising another, moving a wall, and changing the roof line and he did not provide calculations or specifications. After finishing the beams, Koehler called for an inspection. My engineer had said the work still did not comply with code. I told the inspector. He said that he did not care. He issued the Certificate of Occupancy. The minute he left my door I called my City Councilwoman, the Code Administrator, the City Manager, the City Attorney, and the Mayor's office. Nothing was done. We went to a lawyer again and hired another engineer and architect. We went to the city with the reports stating that the house did not meet code. They said they did not rescind Occupancy Permits. They could not help. It was a civil matter. We filed suit in Johnson County Court. Judge McClain ruled that we must made us arbitrate. After months of trying to get Koehler to agree on any arbitrator Judge McClain ruled that Former Judge Walton would have to Arbitrate. It took over 60 hours to arbitrate. It should of cost $7,000 for Judge Walton's fees, but he amended them to $3,000. We went back to Court and Judge McClained ruled that the Arbitrators award be confirmed and adopted by the Court. Koehler Appealed in the State Court of Appeals on May 23, 1994. We are still awaiting a ruling. Our judgement included all inside and outside paint, the grading of the yard, deflections in construction, missing purlins in the attic, cabinets and floor, Laundry room, tub and tile work, an exterior wheelchair ramp, carpet replacement, garage work, wallpaper, windows and doors because of air and water filtration, and the bannister to be rebuilt. The bannister is secured by ropes across the hall impairing fire egress from the bedrooms so we don't sleep in them. We will have to move out of our house while the work is being done. In May 1994 I received a letter from Bob Pledge, Code Administrator of Overland Park, stating they had decided not to resind our occupancy permit. I have a letter from Overland Park verifying a couple code violations. But the City did not accept reports from our engineer and architect giving specifications and calculations. Also the Codes Department testified that the inspectors are doing engineering calculations on houses out in the field and they are not engineers. The Code Administrator testified during Arbitration that "a Certificate of Occupancy had been issued."

We have five children. We live with ropes present from the front entry, leaks that cause mold on floors and in the attic. Our 2 year old is on a nebulizer to help his breathing. We sold furniture to pay bills for architects, engineers, and lawyers which have passed $20,000. My husband lost his job because of this. He took a job paying less money because our house could not be sold and we could not move where there were better openings. We can not remortgage the house. Our house and lot are assessed by the county for less than half of the price paid for it. We also have a letter from State Farm Insurance that states that the work cannot be covered by insurance because the house was not built properly.
The builder has not been cited or fined $1.00 for this. And the worst thing is that neighbors, family, and freinds have a hard time beleiving that something was wrong when the city was not doing anything to help us.

One last comment. A Certificate of Occupancy states that the dwelling complies with Ordinances and Codes adopted by that city or county. Codes and Ordinances usually are the very minimal standards to ensure health and safety. Why should a temporary permit be issued if a dwelling does not meet health and safety standards even if for a short time? Why should a Certificated of Occupancy not be resinded if the dwelling does not meet minimal health and safety standards? And my most important question is "Will the State of Kansas protect us when our cities fail?"

W.C. Alexander
5600 Neosho
Fairway, Kansas 66205

28 March, 1994

District Attorney's Office
Johnson County Court House
Olathe, KS

As per your request I am writing to explain how I feel I have been defrauded by Mr. and Mrs. Mike Everhart D.B.A. Everhart Homes of Overland Park, Kansas.

When I was considering Mr. Everhart for the building of my house he asked me if I was familiar with the Certified Master Builder Program. I said no I wasn't, what is it? He went to great length to explain the program as a method of being sure of selecting a well-qualified builder and that he was instrumental in the development of the Program. He pointed out that to become a Certified Master Builder he had been reviewed by the Home Builders Association of Kansas City and approved in all of the areas listed in the brochure he presented me. This conversation was one of the reasons I chose Mr. Everhart to be my builder. I have since found out that Mr. Everhart had not been checked out by the Home Builders Association as he said. He had been grandfathered as had all of the original builders.

On going over the contract with Mr. Everhart I had several questions regarding items in the contract. One being, why was he charging me for the realtors commission on the purchase of the land as a construction cost, when the purchase of the land was a separate transaction? My real estate agent wanted to know also as it is her experience that the seller always pays the commission. He referred to the top of the contract pointing out that it was the standard contract used by the H.B.A. and referred to paragraph 4.2 showing that real estate commission was a chargeable item. Upon asking other questions regarding the contract I was again told that these things were all standard and approved by the H.B.A. Others and I, in conjunction with the H.B.A., have found out that Mr. Everhart had changed the standard contract to suit his needs and the contract was not what it was represented to be.

Mr. Everhart has fabricated several companies (J.J. Construction, Legacy Landscaping, Everhart Energy) all employing the same people working under his direction. I believe that these companies were developed to dodge paragraph 4.1 (D) of the contract that sets out the amount I should be charged for work performed by the builder's employees. I also feel that these other companies are used by Everhart Homes as a method of avoiding payment of sales and income tax. The fact that all of these companies are in actuality Everhart Homes can be substantiated by a claim made by Everhart Homes to the Maryland Insurance Company for damage done to my property by Legacy Landscaping.

When construction of my home began Mr. Everhart told me that he was unable to get temporary electrical service from the electric company and he would have to use a temporary generator owned by him. After two months use I received a bill for July and August of $1188.00 for generator rental. I called him and told him that I thought that this charge was outrageous. He again said that the electric company would not provide power. I called Kansas City Power and Light and was told that we could have had power at the pole from the start and that as soon as the next day we could have electricity. I called Mr. Everhart and told him power was available and had been since the start of construction. At first he denied that power was available but then changed his mind and recommended that we use the generator without charge from that point, until the underground line could be installed. I paid the bill and feel that this experience was designed by Mr. Everhart to make more for himself at my expense.

I have been charged for items that have not or could not have been used in my house including approximately 2700 square feet of R Board, 50.51 tons of stone, $1781.93 in hidden charges for waterproofing, and an electric saw. I suspect due to the lack of proper documentation accompanying bills and lack of delivery information that there are other items that would show up in a complete audit. I talked to the person who received the stone I was charged for and have found that he also is enraged in his dealings with Everhart Homes having been charged $7500.00 for a job bid at $2500.00. We met on March 27 and found that we had both been charged and paid for three identical invoices.

I, as have others, had excessive non approved overcharges in the construction of my home. These have been handled in a deceptive way by Everhart Homes. Even though required by our contract I did not receive monthly variance reports to tell how over or under budget the job was. I was told everything was going along fine and judging from the bills I was paying it seemed to be at first. About the eighth month of construction I started to receive excessive charges for work provided by Everhart Homes and started to receive bills

several months old that had been retained by Mr. Everhart. At the present time I have accumulated charges in excess of $40,000.00 in unapproved overages. Most of these charges were for work performed by workmen employed by Mike Everhart.

I have been threatened by the use of intimidation, profanity, law suits, arbitration, interest charges, liens, and spying since I stood up to Everhart Homes and started to question their actions. However this is minor in comparison to the threats Mike Everhart has made to sub-contractors involving physical violence and death threats.

My concerns seemed to be singular until I met a number of other customers of Everhart Homes and have found out that they all have stories similar to mine which points out that I am not the exception but the rule.

It is not easy to be brief in summarizing a year long struggle to complete my home and to pay no more or less than a fair amount. I think that if a meeting could be arranged with some or all of the people that have had problems with Mr. and Mrs. Everhart D.B.A. Everhart Homes your office would have all the information needed to file criminal charges and hopefully protect future buyers from Everhart Homes.

Respectfully,

W.C. Alexander

16-10

HAVE YOU BEEN

H.A.D.D.

?

(H.omeowners A.gainst D.eficient D.wellings)

Are you a **Kansas or Missouri** homeowner plagued with new home construction problems OR has your contractor refused to repair your home? Please join us and Mr. Bob Kennedy, Assistant to the State of Kansas Insurance Commissioner.

Meeting

7 pm - 9 pm

Thursday - March 16, 1995

MERRIAM COMMUNITY CENTER

5701 Merriam Drive
Merriam, Kansas 66203
Telephone: 362-8245

Mr. Bob Kennedy

Will speak on homeowners rights, contractor responsibilities, and possible remedies thru insurance.

For more info, please call 685-0855

16-11

VOL. LXXVI NO. 33

Shaky Support

Some Home Buyers Find Their Warranties Can Be Nearly Useless

Insurer Responsibility to Fix Defects Is Often Limited, And Firms Pay Up Slowly

Stuck in a House You Loathe

By KAREN BLUMENTHAL
Staff Reporter of THE WALL STREET JOURNAL

When Lloyd and Kathleen Roach were considering buying a new home, the 10-year insured warranty that the builder dangled helped seal the deal.

But after five years of living with cracked walls and bursting pipes, the Texas couple no longer think much of the warranty. "It's not worth the powder to blow it to hell," says Mrs. Roach, apologizing for her language.

In two decades of existence, warranties have injected trust into that most terrifying of transactions – buying a new home. Builders have touted warranties as peace of mind, and both lenders and buyers have been seduced. Government regulations let lenders under the Federal Housing Administration and Veterans Administration mortgage programs treat homes with warranties as special: They allow buyers to make smaller down payments and builders to skip certain inspections.

Lackadaisical Buyers

Lulled by that assurance, many buyers neglect to examine the house and the fine print in the warranty. A bad idea. "You have more of a warranty on your toaster than on your house," says Jordan Clark, president of the United Homeowners Association, a Washington advocacy group.

Indeed, new-home warranties are sharply limited. Homes with major structural defects, for instance, must be deemed unsafe, unsanitary or unlivable to qualify for repair under most warranties—and it is the warranty company that makes that judgment. Even when claims are declared legitimate, payouts can be months, even years, in coming. And warranty companies frequently provide quick fixes rather than permanent cures for even major problems, such as faulty foundations.

That tightfisted approach goes back to the history of warranties. Created by a builders' trade group, insured warranties have helped them head off the lemon laws that require car makers and other manufacturers to buy back defective products. But builder-owned insurers often charge just $300 or so per house, a small amount for a decade of coverage.

Some Companies in Tro

Now, the solvency of sc jor home warranty companies is in doubt. Las month, Virginia regulators moved agains Home Owners Warranty Corp. of Arling ton, Va., a home-warranty marketer an administrator with about half the market Concluding that HOW's Arlington-base insurer, HOW Insurance Co., had a $4 million capital shortfall, the regulators pu the two companies and their parent, Hom Warranty Corp., into receivership. Witt out a buyer or a major cash infusion, "it' highly unlikely" that homeowners' claim will be paid in full, says Patrick Cantilc special deputy receiver for HOW. Some 1. million homeowners could be affected.

Mr. Cantilo attributes HOW's problem partly to some 230 lawsuits currently penc ing over claims that the company denied

The company, which halted payment in October and currently isn't selling an policies, is expected to begin paying thi week for repairs on its 2,000 open claims but at less than 100%. Mr. Cantilo says th company is talking with home builders associations about getting builders' help i fixing homes, while continuing to suspen payments for such things as punitive dan ages or legal fees. Eventually, he adds HOW hopes to pay repair claims in full, bu that won't happen until the size of th claims and the company's assets are bette known. Because HOW is a risk-retentio group – essentially self-insurance by th 7,000 builders that own it – no state fund standing by to pay shortfalls.

Dream House Gone Sour

At the Roaches' home in North Rich land Hills, a Fort Worth suburb, Kathlee Roach points out crack after crack in he five-year-old house. "My husband wa buying me my dream house," she says But walls began to crack within months Operating under a HOW warranty, th builder patched and painted and the added 14 piers to the foundation. When th interior of the house began to sag, h added two dozen more piers.

The problems continued, but by ther more than two years had passed. Mrs Roach says HOW sent engineers and tool four months to conclude that the founda tion had been damaged. But HOW said th builder, and not it, was responsible.

Without structural problems, the hous would be valued at $140,000, Mrs. Roacl says. But with cracks and bulges stil appearing, she says, "there's no way w can sell this house." The Roaches ar suing the builder and warranty company.

Of course, most home buyers don' encounter major problems. Of those wh do and who have warranties, most have nc complaints. The second largest home-war ranty company, Home Buyers Warranty Corp., of Aurora, Colo., says its cus tomer surveys show that 95% of its claims are resolved satisfactorily.

But HOW's financial difficulties aren't unusual. National Home Insurance Co., the insurer behind Home Buyers War ranty, was operating under regulatory

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Shaky Support: Some Home Buyers Say Warranties Are Often Almost Useless if a House Is Poorly Built

Continued From First Page

supervision until it met new capital requirements last month. Even now, auditors say its business is too unpredictable to estimate future liabilities accurately.

Home warranties are "a national scam," contends David Freishtat, a lawyer who is suing Residential Warranty Corp. of Harrisburg, Pa., in state court in Baltimore over claims at a condominium. "These policies are really nothing but a sales gimmick used by developers."

While saying he isn't familiar with the case, Tom Bothell, vice president of marketing at Residential Warranty, comments, "Our purpose is to handle claims as expeditiously as possible."

Without question, the warranty helps sell homes. Just as some purchasers of cars buy new because of a warranty, so do some home buyers. In some markets, warranties are offered on as many as half of the new homes. Cambridge Homes Inc. of Libertyville, Ill., has never asked its warranty company to pay a claim, but it offers warranties because "they give buyers some comfort" while providing a "marketing tool," says Philip Walters, general sales manager.

And builders get more than just a marketing tool. For $1 to $4 per $1,000 of home value, they get the kind of protection that warranties purport to give homeowners. Under most warranties, builders are liable for a wide range of claims during the home's first two years, with the warranty company supposed to step in if the builder can't or won't pay. After that, the warranty allows builders to put responsibility for major defects largely on the warranty company. Without a warranty, most courts hold the builder fully liable.

Less Than Insurance

Despite the high stakes involved in purchasing a house, some buyers simply assume that a warranty is a form of insurance. But it is much less than that. To educate buyers, Home Buyers Warranty has produced a short video in which 1970s TV star Chad Everett practically recites the warranty, limitations and all. But whether taped or written, such information typically isn't reviewed or even received until a buyer is closing the deal.

Not surprisingly, so many homeowners are suing warranty companies that it is almost becoming a legal specialty. D. Brent Lemon, a Dallas attorney, estimates that he has 40 to 50 cases against HOW and other warranty companies.

But these can be tough cases. For one thing, the builder and home-warranty company can try deflecting liability toward each other. Some homeowners in Highlands Ranch, Colo.—whose basement foundations cracked and heaved and in some cases damaged upstairs walls and doors—sued the builder, Mission Viejo Co. of California, in federal court in Denver. Mission Viejo turned around and sued HOW for coverage. HOW responded by suing both the builder and the homeowners, arguing it shouldn't have to pay.

In New Jersey, where state law requires an insured warranty on all new homes, the state has been battling HOW before an administrative-law judge for four years. State officials decided not to renew HOW's license in 1990 after HOW refused to pay for replacement of rotting fire-retardant plywood in condominium fire walls. HOW appealed, and the case has twice gone to appellate courts. Meanwhile, the state also is trying to recover about $4 million in repair bills that a state-run warranty program, acting under a 1991 law, paid for homeowners who thought they were covered by HOW.

Aggressive in Court

In other instances, warranty companies are being aggressive in court. After an engineer concluded in 1992 that the foundation of a house belonging to Mary Kay and David McPherson was inadequate, Home Buyers Warranty refused to fix it; it said the home wasn't unsafe. The Mansfield, Texas, couple sued, and a judge in Tarrant County recently fined Home Buyers Warranty and its affiliates $10,000 for delaying and abusing the discovery process by refusing to answer questions. The companies are expected to appeal the decision.

Mrs. McPherson says the case runs to 18 files in the courthouse, including seven days of depositions by her husband and herself. Meanwhile, their front door won't open, and a tax appraiser cut the assessed value of the house to $59,388 from $212,100. But with four small children and most of their net worth in the house, "we can't afford to walk away," Mrs. McPherson says.

Now, Home Buyers is moving to protect itself from litigation altogether. Its latest warranty requires homeowners to agree to arbitration and give up their right to sue.

Data provided in discovery proceedings in a 1991 lawsuit against Home Buyers showed how slow the company can be in paying claims – if it pays them at all. Of claims resolved between January 1988 and June 1991, it accepted 95% of those made in a warranty's first year – but only after an average of more than five months. Of claims made during the third through the 10th year, Home Buyers accepted only 17% – and acceptance took, on average, more than a year. Home Buyers officials decline to comment on the numbers.

Buying a defective house and getting trapped in it can be a nightmare. The misery that buyers can suffer is illustrated by construction problems in Texas, where so-called active soils, which swell when wet, can lift and twist foundations. Along Rembrandt Terrace in northern Dallas, allegedly inadequate foundations laid on active soil are being blamed for cracked walls and broken pipes. But David and Terri Brigham thought a warranty "would keep us secure" when they built their $140,000 home in 1990. Last July, however, their backyard split after a heavy rain and slid some 12 feet toward a creek.

Now, the landslide is within inches of their garage. The shifting broke a water main, and the back of the house is seven inches lower than the front. But Warranty Underwriters Insurance Co. has denied their claim. "They're saying we don't have a foundation problem," complains Mr. Brigham, a lawyer. Through corporate counsel, Warranty Underwriters, a Texas company controlled by George A. Parmer, who also owns Residential Warranty, declines to comment on specific cases.

Next door to the Brighams, the Daya family has spent most of this year without carpet or tile, waiting for HOW to finish repairs begun in 1991. Connie and Kamal Daya had bought their home in 1989 for the good suburban schools and view of the creek. The previous owners had left the warranty for them on the kitchen counter. "We thought, 'That's nice, but we'll never need it,' " Mrs. Daya says.

Almost immediately, she noticed doors that didn't shut properly and cracked walls. In 1990, she called HOW. An inspector found foundation damage but concluded the home wasn't unsafe or unlivable. Twice, however, Mrs. Daya called police after finding the double doors to her side yard standing open because the deadbolt wouldn't hold. After 14 months, HOW accepted her claim. Six more months passed before any work was done.

After cracks and shifting recurred in 1992, negotiations resumed. Earlier this year, the warranty company injected a chemical into the soil under the house by drilling more than 200 holes through the slab, leaving the cracks to be caulked later. "I don't feel like this is a home any longer," Mrs. Daya says. Her family and the neighbors have hired a lawyer, and she says, "I'm just counting the days until we can get out of here."

Lawyers and consumer advocates say people hunting for a new house should treat it the way they would a used car—with skepticism. Buyers should check references and hire their own inspectors, says Alan Fields, co-author of "Your New House." He adds: "That's your warranty—doing your homework up front."

16-13

NOTICE OF REDEMPTION
To the Holders of
Heart of Texas Housing Finance Corporation
Single Family Mortgage Revenue Bonds
Series 1984

NOTICE IS HEREBY GIVEN that pursuant to the provisions of Section 4.02 of the Trust Indenture dated as of August 1, 1984, between Heart of Texas Housing Finance Corporation and Ameritrust Texas National Association, fka MTrust Corp, National Association, Substitute Trustee for MBank Dallas, N.A. (formerly Mercantile National Bank at Dallas), as Trustee, $1,330,000 principal amount of the Bonds has been called for early redemption on July 1, 1993 at a redemption price of PAR (100%) plus accrued interest on the Current Interest Bonds, and the Compounded Interest Bonds to the redemption date.

Current Interest Bonds With Prefix R

Bond Number	*CUSIP # 422337	Maturity Date	Interest Rate	Principal Amount	Amount Called
2639	AT2	01 01 94	10 00%	$ 5 000	$5 000
3635	AT2	01 01 94	10 00%	20 000	5 000
3680	AT2	01 01 94	10 00%	10 000	5 000
3684	AT2	01 01 94	10 00%	10 000	5 000
3724	AT2	01 01 94	10 00%	10 000	5 000
2920	AU9	07 01 94	10 00%	25 000	10 000
3725	AU9	07 01 94	10 00%	55 000	5 000
3731	AU9	07 01 94	10 00%	15 000	10 000
669	AV7	01 01 95	10 15%	50 000	50 000
3631	AV7	01 01 95	10 15%	50 000	15 000
3692	AV7	01 01 95	10 15%	45 000	5 000
767	AX3	01 01 96	10 30%	50 000	50 000
3693	AX3	01 01 96	10 30%	55 000	15 000
3634	AX3	01 01 96	10 30%	65 000	5 000
849	AZ8	01 01 97	10 45%	5 000	5 000
855	AZ8	01 01 97	10 45%	5 000	5 000
2860	AZ8	01 01 97	10 45%	5 000	5 000
3733	AZ8	01 01 97	10 45%	25 000	10 000
3733	AZ8	01 01 97	10 45%	50 000	5 000
3319	B00	01 01 98	10 60%	5 000	5 000

Home Buyers Unite to Air Complaints Against Builders That Cut Corners

By Jim Carlton
Staff Reporter of The Wall Street Journal

New-home buyers are rising up against their builders in growing numbers, complaining that shoddy practices and troubled builders who abandon projects have become too common in the industry.

In Texas, 300 homeowners recently formed a group called Sick of Bad Builders, and will today meet with federal prosecutors in Fort Worth to air their complaints of fraud and poor workmanship.

In North Carolina, more than 1,200 homeowners have formed the North Carolina Homeowners Association, urging the state to crack down on local inspectors who, they say, let slipshod construction slip by. In Florida, hundreds of people have sued builders alleging construction defects that contributed to damage of their homes during Hurricane Andrew.

Seeking Relief

And in Washington, D.C., the United Homeowners Association wants states to set up a relief mechanism that, among other things, could include an insurance pool funded by builders to compensate homeowners who have been defrauded. Home buyers now have little recourse against builders, other than the courts.

"You have more protection against your toaster than your house," says Jordan Clark, the association's president. The group gets 50 to 70 consumer complaints a month about construction defects, up from 30 to 40 monthly a year ago.

Complaints are on the rise as builders strapped by the prolonged housing slump file for bankruptcy midway through projects, leaving the homeowner to face unpaid creditors. And with far fewer homes being built these days than in the 1980s, competition also is so fierce that some builders are cutting corners.

Loans Diverted?

Some builders are diverting bank loans intended for one home into other homes or to pay bills, in violation of federal law, says Alan Fields, a Boulder, Colo., consumer advocate. The Texas homeowners' group also will make this charge in its meeting today with representatives of the U.S. attorney's office in Fort Worth and other federal officials.

The National Association of Home Builders, the industry trade group, last year began organizing local builders groups to monitor quality. In Cincinnati, homeowners can call the local builders' association and have it try to work with a problem builder to get things right.

"Certainly, when times are tough and builders are having challenges in terms of getting financing, something of that will play out in the marketplace," says Kent W. Colton, executive vice president of the home builders' group. But "we strongly feel that this would be the exception rather than the rule. A large percentage of builders are clearly interested in staying in business for a long time. It's not only the right thing ethically, but it's also good business."

Even home buyers with backgrounds in real estate, however, can run into problems. Kathy Fragnoli, a corporate real-estate lawyer in Arlington, Texas, and her husband interviewed 10 builders before selecting one who received glowing references from customers and his bank. Their $175,000 house was nearly complete, she says, when the builder, Adlai Pennington, phoned to say he had filed for bankruptcy. She went right to the property to find unpaid subcontractors ripping out windows, doors and other fixtures. "I called the police and started crying," Ms. Fragnoli says.

Settling Debt

The subcontractors eventually filed nearly $50,000 in liens on the house, leaving the Fragnolis to settle the debt. The couple hired another builder to finish the house and demanded that Mr. Pennington's bank compensate them for having provided a healthy financial report that, she says, turned out to be erroneous. The bank ended up settling for an undisclosed sum, which Ms. Fragnoli says covered most of her family's costs, but not the misery. Mr. Pennington didn't return calls seeking comment.

Hooking up with builders who have won local acclaim won't necessarily prevent serious problems. In Wilmington, N.C., retirees Fred and Pamela Sullivan thought they had done well three years ago in selecting as their builder the president of the local builders group and the city's "builder of the year."

The builder, Lawrence W. Nicolaysen, built homes side by side for the Sullivans and an elderly relative and had a final $11,000 coming from both jobs. But the Sullivans found that, among other problems, a county inspector said some front steps hadn't been installed properly and had to be replaced. They say the builder refused to do more work until he had gotten his money. The couple balked, and the builder filed liens on both properties.

Plugging Holes

The Sullivans say they later found other defects, including an unstable chimney, a drainless crawl space that accumulated water, and gaps in the frame around glass patio doors that the couple had to plug with toilet paper. They say the local building inspectors didn't uncover these problems. The couple sued the builder over the alleged defects in state court in Wilmington; a decision is pending. Mr. Nicolaysen and his lawyer wouldn't comment.

The episode has cost the Sullivans $20,000 in legal fees. Says Mrs. Sullivan: "It has completely ruined our lives."

Morgan Stanley Group Plans an Expansion In the Asian Market

Special to The Wall Street Journal

NEW YORK – The chairman of Morgan Stanley Group Inc. said the securities company considers Asia, excluding Japan, its next emerging market and plans to beef up its staff in the region.

Morgan Stanley plans to boost its staff there by 50% this year, to 300 people, Chairman Richard Fisher said yesterday after the company's annual shareholders' meeting. At the start of the year the company had 150 employees in Hong Kong, and it expects to expand to 200 there by year's end. It also plans to double to 100 its Asia staff stationed outside Hong Kong.

Mr. Fisher added that the company hopes to open an office in Shanghai, China, this year. The move is part of a trend by Wall Street firms, including Merrill Lynch & Co. and Bear Stearns Cos., of establishing beachheads in China for what is expected to be considerable future growth.

Mr. Fisher also said Morgan Stanley received a positive response to its recent entry into retail-oriented mutual fund

We anticipated that having a home built was going to be stressful and time consuming, but we were up to the challenge. We had selected the house and builder we wanted, he was a Certified Master Builder. The Certified Master Builder Corporation states, "The Builder who displays the Certified Master Builder Seal has demonstrated the highest standards of character, trust, and professionalism; your assurance of Quality." This program had a code of ethics for the builders and offered a one year warranty. We had confidence that of course they had checked to ensure that their builders' work lived up to these standards.

We discovered early in the construction process, that my husband and I seemed to discover the mistakes and had to point them out to the builder. Our first was observing the pipes for sewage were running the wrong direction, we notified the builder, a change was made. The first floor laundry room was completely omitted. There was no doorway from the kitchen to the dining room, the doorway to the first floor bathroom was in a location which would have required one to step over the stool to enter. The hardwood floors were installed before the back door was on. Numerous meetings with the builder were set up which he would not show, then state he had a flat tire, or the gas station wouldn't honor his charge card, etc.. Sometimes he was unable to meet us because his wife was out of town and he was baby sitting or they were having a garage sale, etc.. This was supposed to be a custom home, yet we were not given the opportunity to make various selections, the builder just ordered/installed and charged for upgrades. We were charged for a composition roof and a cedar shake roof (we actually have a wood roof). We were charged for the replacement hardwood floors when the original floors required replacement after the water damage. We were charged for paint which was not the color of our house and not delivered to our house. There were additional suspect billings. When we started noticing how much over the estimate we were going, we started to downgrade to make up the difference.

The builder told us we would need fill dirt. A short time later, he called up and asked if he could put some fill on our lot. We agreed, then went out to our lot to see the dumping of about 6 truck loads of gravel, R-bars, railroad ties, and concrete chunks in progress of being dumped. We did not need the "fill" (actually debris), so the builder simply pushed it onto the neighbor's lot. Our neighbor finally had it hauled off at his own expense.

The house is defective and does not meet city building codes. The chimney has inadequate support and most likely is not anchored to the structure. The concrete front porch is not on foundation walls and footings as shown in the house plans, but is loaded on the front foundation wall. As a result, the foundation wall is being pulled out. A 32 foot steel beam which spanned the garage an supported the second story was supposed to be supported by a steel column. This steel column was omitted. Windows were installed crooked so they don't seal properly. The hardwood floors are warped again, due to water penetration. There are other deficiencies and variations from the house plans. Although the builder was able to sell us the house with code violations and defects, we would not be able to resell the house in it's present

condition, knowing of it structural deficiencies. We recently received an estimate for repairs, $50,000.00 for an eighteen month old house.

When we called the Certified Master Builder Corporation about these problems, they said they could not help us until we closed. They did not specify until later that the only issues they could assist us with was warranty issues, and the only leverage they had over the builder was to pull his membership. His membership was pulled and we continue to live in a defective, code deficient house. We have spent over $4000.00 so far in inspection fees, legal fees and a few minor repairs. The most costly event is yet to come, when we have to have our attorney, engineer, architect, and home repair company to represent us in arbitration, all charging an hourly rate. Is it possible that the home building industry knows the costs of major home repairs, and the cost of conciliation, arbitration and a law suit; and takes comfort in knowing that most people will simply pay directly to have their homes repaired rather than insist on builder accountability?

Usually the title company holds a small sum in escrow for an item such as sod or a few last minute repairs. Chicago Title had $23,000.00 placed in escrow. It stated that checks would be issued on an item by item basis to pay the remainder of the bills. Seven days after we signed, a check for the full amount was made out directly to the builder. He did not pay the painter $4000.00 and we question how much of that escrow check was actually paid out. Why did Chicago Title not issue the checks as stated in the agreement? Also in the escrow agreement was a statement that any bills in excess of the escrow amount would be the responsibility of the home buyer. If the buyer neglected to pay these bills, the builder did not have to honor the warranty. This procedure, honoring a warranty, contingent on the payment of post closing billing appears like a way to retract a warranty which was part of the original sale. Originally we bought a house with a one-year warranty. The warranty retraction was printed in settlement contract in print which was not conspicuous. We were not advised of this clause until we requested warranty work.

It is hard to measure the emotional toll this has had on our family. It is hard to measure the costs of the time we have committed to make a difference and attempt to prevent similar experiences for other families. We have pursued justice through the Certified Master Builder Corporation, The local Home Builders Association, The National Association of Home Builders, the builder's liability insurance, our city codes department, our district council person, The Kansas and the Missouri Attorney General's Office, our lender, Missouri and Kansas state Legislatures. All of these contacts have not yielded a change, yet, but we are persistent and will continue to try to make changes in an industry which lacks adequate internal or external controls.

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