

Approved: March 5, 1997  
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Mike Harris at 10:12 a.m. on February 17, 1997 in Room 514-S of the Capitol.

All members were present except: Senator Petty (excused)  
Senator Steffes (excused)

Committee staff present: Mike Heim, Legislative Research Department  
Jerry Donaldson, Legislative Research Department  
Gordon Self, Revisor of Statutes  
Mary Blair, Committee Secretary

Conferees appearing before the committee: Bob VanCrum, Task Force on Regulation of Residential Building Contractors (TFRRBC)  
Steve Dickerson, Kansas Trial Lawyers Association (KTLA)  
Carolyn Hall  
Bob Bartunek, Atty representing Home Builders Asso. (HBA)

Others attending: See attached list

**SB 189 - Implied warranties of workmanlike construction and habitability**

**SB 191 - Civil procedure, notice of intent to perform, oral contracts; amounts in excess of written contracts**

Conferee VanCrum presented the report and recommendations of TFRRBC, a task force created by the 1996 legislature to investigate continuing complaints about shoddy workmanship and violations of city and county building codes and the extreme difficulty some consumers have had in recovering enough to avoid bankruptcy when faced with a builder who chooses to litigate rather than make the necessary repairs or corrections. Mr. VanCrum covered such subjects as : breach of an implied warranty of habitability, inequality in ability to pay litigation expenses, areas of increasing negligent construction, and consequences of failing to file a notice of intent to perform. **SB 189** and **SB 191** reflect the recommendations of TFRRBC. (attachment 1)

Conferee Steve Dickerson, legislative chair for KTLA, testified before committee taking a neutral position on **SB 189** which he stated is intended to provide consumers with increased legal protection when "their dream home turns sour". He stated that KTLA felt the bill could be significantly improved with 3-4 key adjustments, which he elaborated on. (attachment 2) On inquiry by a committee member regarding pre-fabricated homes Mr. Dickerson stated that these types of homes are adequately federally regulated and therefore not addressed in this bill.

Conferee Hall stated that she was a consumer representative of TFRRBC and appeared before the committee as an opponent of **SB 189**. She addressed the issue of insurance concerns and the Insurance Services Office (ISO) development of a system that will grade the effectiveness of communities' building code enforcement to make insurance pricing more accurate and encourage safer homes and commercial building. She suggested the committee postpone this bill until further information regarding ISO is available. (attachment 3)

Conferee Bartunek testified before committee opposing **SB 189** and **SB 191**. He pointed out unrelated concepts in subsection g in **SB 191** and addressed the following issues in **SB 189**: Ambiguous Standards; Procedure/Enforcement of Homeowner Rights; Deadlines; and Attorney Fees. (attachment 4)

No action was taken on either bill. Hearing for **SB 259** moved to 2/18/97.

Committee adjourned at 11:04 a.m. The next meeting is Tuesday, February 18, 1997

# SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2-17-97

| NAME              | REPRESENTING                                  |
|-------------------|---|
| Bob Hancock       | Task Force on Residential Housing Contractors |
| Chris McKee       | League of Ks. Municipalities                  |
| Bob Bactrook      | NBA of KC                                     |
| Brod Smoot        | NBA of KC                                     |
| Jane Stubbs       | Ks. BIA                                       |
| Bob Brown         | mid. America Summit Assoc                     |
| Kelly Kuitala     | City of Overland Park                         |
| George Hall       | Task Force on Residential Housing Contractors |
| Tom Kungles       | KTLA  |
| Steve Dickerson   | "   |
| Martha Ann Smith  | KMHA  |
| Kathy Taylor      | KBA   |
| Leigh Anne Horton | Budget Division                               |
| Gail Bright       | Attorney General                              |
| DAVID B SCHLOSSER | Pete McGill & Assoc.                          |
| Jim Chark         | KC DAA  |
|                   |   |
|                   |   |
|                   |   |

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TESTIMONY OF BOB VANCURUM, CHAIR,  
TASK FORCE ON THE REGULATION OF RESIDENTIAL BUILDING CONTRACTORS

Thanks for the opportunity to appear before the committee and present the report and recommendations of the above task force. You have all received a copy of our 12 page report, so I won't repeat what's in it. Most of you will remember that the task force was created by the 1996 legislature to investigate continuing complaints about shoddy workmanship and even violations of city and county building codes and the extreme difficulty some consumers have had in recovering enough to avoid bankruptcy when faced with a builder who chooses to litigate rather than make the necessary repairs or corrections.

The task force had 15 members, with 4 from the building industry, 2 from city building code departments, 2 consumers, the attorney general, an architect, a League of Municipalities rep and four legislators. We met a number of times, took one field trip, took testimony from 40 conferees, and considered a wide variety of measures, including licensing of homebuilders, bonding, statewide building codes and consumer protection amendments. Eventually the Task force agreed without dissent on the two bills before you today. I want to publicly express my appreciation to the members of this task force who took time to seriously attempt to address some real problems facing the homebuilding industry. I was especially pleased that the several representatives of the homebuilding trade on the committee were willing to compromise and support the bills you see before you.

The most significant of the bills would establish in statute the right of an aggrieved homeowner to recover if they show a breach of an implied warranty of habitability or workmanlike construction. In addition to defining the warranty of habitability in some detail (bottom of page 1 and top of page 2), the bill in Section 1(g) would permit the award of attorney's fees to the prevailing party. One of the common threads running through the complaints of the victims of poor construction and in some cases homes that were structurally unsound that I've heard is that they have no ability to take the contractor to court and recover enough damages to correct the problems because most of what they needed to do so would be consumed in litigation costs. These are costly cases to bring with lots of expensive witnesses and there is often a disequal ability to bear the expenses, because builder's insurance often pays defense costs.

It is true that Kansas law already assumes an implied warranty of performing construction in a workmanlike manner. *Scott v. Strickland* 10 Kan App 14,18 (1984). But it is not clear what that warranty covers, and it is probable that a court would not allow

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the award of attorneys fees, which this statute would permit. The bill also sets forth a statute of limitations, that certain of these actions must be brought within one year, and certain may be brought for three years from the date of closing. These are essential changes in the law if we are to give consumers even a fighting chance of recovering their damages from negligent, sloppy and sometimes unscrupulous homebuilders and remodelers.

Our Task Force did find that the overwhelming number of these complaints are coming from the rapidly developing urban areas of the state. This shouldn't be surprising, because that's where the majority of construction is occurring. Furthermore, it's the area where many new and inexperienced builders flock. I would suggest that you are going to have a lot fewer complaints about substandard and negligent construction in communities where everyone knows most everybody than in an area where there are over 1,000 so-called homebuilders (KC area). The task force also noted that complaints seemed to be much reduced in the areas like Wichita where there has been local licensing of homebuilders. There also is such licensing in Hays. There are no building codes in most of the rural areas of the state however and some of the biggest abuses seem to be occurring in rural areas like Butler county and Leavenworth county that are beginning to see new housing construction spill over from nearby urban areas.

I need to say a few words about the other bill our Task Force recommended. This bill would bar recovery by a subcontractor on an oral contract theory if they had failed to file a notice of intent to perform. We had at least one conferee testify before us who said he was sued on a supposed oral contract by a subcontractor who hadn't filed a notice of intent and claimed he wasn't paid by the general contractor. I recognize this bill presents some difficult issues, but it was approved on a majority vote of our Task Force.

I would be happy to try to answer any other questions.

§ 5. implied warranty

**SENATE COMMITTEE ON JUDICIARY**  
**Monday, February 17, 1997**

My name is Steve Dickerson and I am legislative chair for the Kansas Trial Lawyers Association (KTLA) for the 1997 legislative session. KTLA always welcomes the opportunity to appear before this committee as it considers and works legislation affecting consumers' legal interests.

The Task Force on Regulation of Residential Building Contractors met extensively last year and earnestly explored a host of measures to improve the integrity of residential building construction in this state. The Task Force gave KTLA and others the opportunity to be heard and KTLA voiced its perspective at several Task Force meetings.

Most consumers dream of building a new home and many are able to make their dream come true. When a family builds a new home it is usually the family's biggest financial undertaking. SB 189 is intended to provide consumers with increased legal protection when their dream home turns sour.

Although KTLA believes the language of the bill is a good starting point, the bill could be significantly improved with a few key adjustments. Attached is a copy of the bill with these key changes noted thereon as follows:

**Statute of Limitations**  
**Subsection (e), page 2, lines 28 to 32**

Implied warranty breaches are subject to a three-year statute of limitations under longstanding Kansas law. Shortening this period of limitations to one year for certain claims clearly does not advance the objectives of the bill.

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**Fees**

**Subsection (g), page 2, lines 38 to 40**

The attorney fee language contained in the Kansas Consumer Protection Act, which is specifically designed for consumer transactions, should be substituted for the language contained in subsection (g).

**Cost of Curing**

**Subsection (j), page 3, line 4**

After giving the contractor a fair chance to cure any broken promises or defects, the consumer needs to be able to hire another contractor to cure the problem and have the original contractor pay the substitute contractor's bill. Damages based on value of the home with and without the defect are hard to figure, although that is a common standard for determining damages.

**Definition of Contractor**

**Subsection (a)(2), page 1, lines 24 to 26**

Although it is remote, the existing definition of "contractor" could be construed to mean that a contractor is only one who undertakes to build a new home "with or for another." Adding "alone or" would clarify that a contractor doesn't have to undertake the project with or for another.

SENATE BILL No. 189

By Committee on Judiciary

2-4

9 AN ACT concerning residential building contractors; creating implied  
10 warranties of habitability and workmanlike construction.  
11

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

13 Section 1. (a) When used in this act:

14 (1) "Residence" means any: (A) Single family house; or (B) unit in a  
15 building containing living quarters occupied or intended to be occupied  
16 by not more than four families living independently of each other; or (C)  
17 unit in a multiunit residential structure of five stories or less in which title  
18 to the individual units is transferred to owners under a condominium or  
19 cooperative agreement. Such term shall not include mobile or manufac-  
20 tured homes, appurtenant recreational facilities, detached garages, drive-  
21 ways, walkways, patios, boundary walls, retaining walls not necessary for  
22 the structural stability of the residence, landscaping, fences, nonperma-  
23 nent construction materials, off-site improvements and all similar items.

alone or

24 (2) "Contractor" means any person who undertakes, with or for an-  
25 other, to build or construct a new residence or alter, repair, remodel or  
26 renovate an existing residence.

joint venture,

27 (3) "Person" means any individual, corporation, partnership, associ-  
28 ation or other legal entity.

29 (b) (1) An implied warranty of habitability and an implied warranty  
30 of workmanlike construction shall attach to every contract or agreement  
31 for the sale or construction of a new residence or the alteration, repair,  
32 remodeling or renovation of an existing residence in this state.

33 (c) Under the implied warranty of habitability, the contractor repre-  
34 sents and warrants each of the following:

35 (1) The work performed and materials used comply with any archi-  
36 tectural or other plans and specifications contained in or incorporated  
37 into the contract or agreement;

38 (2) the work performed and materials used comply in all material  
39 respects with applicable building codes and other public requirements or  
40 regulations establishing standards of quality and safety which have been  
41 adopted by statute, city ordinance or county resolution or by rule or reg-  
42 ulation adopted to implement such statute, ordinance or resolution;

43 (3) the roof, supporting walls, floors, windows, doors, insulation and

and free from leaks

1 foundation of the residence shall be in <sup>good and</sup> safe working order <sup>and condition,</sup> and structurally  
2 sound; <sup>and</sup>

3 (4) the electrical, plumbing <sup>or</sup> mechanical systems shall be in safe  
4 working order and condition; and

5 (5) the residence, or the affected part of the residence in the event  
6 of alteration, repair, remodeling or renovation, shall be reasonably suited  
7 for its intended use.

8 (d) Under the implied warranty of workmanlike construction, the  
9 contractor represents and warrants that the work performed was done  
10 using due care and skill according to generally accepted industry prac-  
11 tices.

12 (e) No civil action directed to a breach of any warranty contained in  
13 this section shall be commenced until after the contractor has been rea-  
14 sonably notified in writing of the breach or defect and the contractor (1)  
15 denies the claim or (2) fails to cure, correct or remedy the breach or  
16 defect in a timely manner. The contractor shall have 30 days after receipt  
17 of the notice to cure, correct or remedy any breach of warranty or defect  
18 that has made the residence unsafe to occupy, and 90 days after receipt  
19 of the notice to cure, correct or remedy any other breach of warranty or  
20 defect. If the contractor is not reasonably available to notify as required  
21 by this subsection, a civil action directed to a breach of any warranty  
22 contained in this section may be commenced at any time. Any action  
23 brought pursuant to paragraph (1), (2) or (3) of subsection (c) shall be  
24 commenced within three years of the date of closing in the case of a new  
25 residence or three years from the date of final payment to the contractor  
26 in the case of alteration, repair, remodeling or renovation of an existing  
27 residence or it shall be forever barred. Any action brought pursuant to  
28 paragraph (4) or (5) of subsection (c) or pursuant to subsection (d) shall  
29 be commenced within one year of the date of closing in the case of a new  
30 residence or one year from the date of final payment to the contractor in  
31 the case of alteration, repair, remodeling or renovation of an existing  
32 residence or it shall be forever barred. If compliance with the notice  
33 provisions of this subsection would result in the barring of an action, such  
34 time shall be extended by the time period required for compliance with  
35 the provisions of this subsection.

this section shall be commenced with the time period provided in K.S.A. 60-512, and amendments thereto,

36 (f) Any disclaimer or limitation of any warranty contained in this sec-  
37 tion shall be void.

38 (g) In any action brought under this section, the court may award to  
39 the prevailing party costs and reasonable attorney fees, including those  
40 on appeal →

41 (h) The remedies provided in this section shall not be construed to  
42 limit, impair or exclude any other common law or statutory remedies or  
43 claims for relief.

, limited to the work reasonably performed if:  
(1) The consumer has brought or maintained an action the consumer knew to be groundless and the prevailing party is the contractor; or a contractor has breached a warranty contained in this section and the prevailing party is the consumer; and  
(2) An action under this section has been terminated by a judgment, or settled.



1 (i) Any warranty created by this section shall not supersede any ex-  
2 press warranty and shall be in addition to any express or other implied  
3 warranty provided by law.

4 Sec. 2. This act shall take effect and be in force from and after its  
5 publication in the statute book.

(j) In any action to enforce a breach of any warranty contained in this section an aggrieved consumer may claim as damages and recover the cost of curing, correcting or remedying the breach of warranty or defect.

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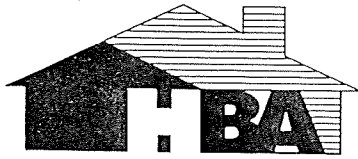
The Insurance Services Office is developing a system that will grade the effectiveness of communities' building-code enforcement to make insurance pricing more accurate and encourage safer homes and commercial buildings. The system is an evaluation process that has already begun in Missouri and we are told Kansas will be done next year. The system will parallel the ISO's Fire and Flood community rating systems and could have a far reaching affect. Because of this, I would respectfully request that this legislation be postponed until more information regarding the ISO impact is available as it could necessitate the need to amend this bill or change its scope.

In addition, I would request that the committee consider adopting minimum workmanship standards for residential building contractors as the definitions contained in this bill are vague and subject to interpretation which would only serve to increase the cost of proving one's case as to whether a house met the criteria of this bill. The state of Arizona currently publishes such a document.

In order to achieve the above recommendations, I would recommend that the legislature again appoint a Task Force to deal with these issues. The Task Force on the Regulation of Residential Building Contractors, of which I was a member serving as a consumer appointee, recommended that the Task Force continue in some form to deal with The ISO and other issues. I would like to see a larger contingent of consumers serving on the Task Force as a balance to the larger number of the building industry representatives that made up the past Task Force.

Thank you,  
Carolyn Hall

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*Attachment 3*  
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**Home Builders  
Association**  
of Greater Kansas City



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**Home Builders Association of Greater Kansas City**  
**Testimony in Opposition to SB 189 and SB 191**  
(Implied Warranties of Workmanlike Construction & Habitability and Oral Contracts)  
Senate Judiciary Committee  
February 17, 1997  
Topeka, Kansas

Chairman Harris and members of the committee, my name is Bob Bartunek, and I am an attorney representing the Home Builders Association of Greater Kansas City (HBA). I wanted to make you aware of our **opposition** to SB 189 and SB 191.

Briefly, we are opposed to these bills for the following reasons:

SB 191: Bill Concerning Civil Procedure, Relating to Subcontractors' Liens, Amending K.S.A. 60-1103b

**Oral Contracts:** Subsection (g) is unrelated to the subcontractor mechanics lien provisions of this section. It provides that an oral contract may not be enforced unless the Notice of Intent to Perform has been filed. These are unrelated concepts. The Notice of Intent relates to mechanics liens, not oral contracts. There is a large body of law, totally unrelated to mechanics liens, regarding the enforceability of oral contracts. This subsection confuses the issue. Oral changes are often made in good faith regarding house plans, appliances, light fixtures, etc.

Also, the last sentence of the bill provides that a written contract may not be enforced in excess of the amount expressed in the contract. Theoretically, this has always been the case. It is only through change orders, whether written or oral, that the contract amount changes.

SB 189: Bill Concerning Residential Building Contractors, Creating Implied Warranties

**Ambiguous Standards:** The legislation would set an ambiguous standard in the implied warranty of workmanlike construction, i.e., work must be performed according to accepted industry practices. This standard would lead to more litigation in the home buying process, which would only create problems rather than solve them.

**Procedure/Enforcement of Homeowner Rights:** Subsection (e) creates a procedure for homeowners to enforce their rights. Some lawsuits must be brought within one year. Under most current warranties, a claim must be made within one year, but there is a significantly longer period to file a lawsuit. The bill's one year deadline could encourage homeowners to quickly sue for fear of losing their rights.

(over)

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**Deadlines:** Additionally, the deadlines run from either “closing” or “final payment.” If there is no formal closing, or if the contractor does not receive final payment, there would be confusion as to when the deadline starts to run.

**Attorney fees:** Under subsection (g), the prevailing party in a lawsuit brought under the bill could recover costs and reasonable attorney fees. This provision is a major change in current law and in a long-standing policy regarding the recovery of attorney fees in contract disputes. Recovery of attorney fees is more typically applied in cases of fraud and deceit and is inappropriate in cases of warranty disputes. Once again, this would encourage litigation rather than encourage parties to solve their problems.

Warranties attempt to address situations and defects that occur after construction. We’re not aware of problems that have resulted from inadequacies in current warranty law or from a lack of warranties . What would be gained by making these revisions?

We urge you to oppose SB 189 and SB 191.

Thank you for your consideration. I am happy to answer any questions you may have.

g/ksresid/testmny