Approved: March 29, 2002
Date

MINUTES OF THE HOUSE BUSINESS, COMMERCE AND LABOR COMMITTEE.

The meeting was called to order by Chairperson Al Lane at 9:10 a.m. on February 22, 2002 in Room 521-S of the Capitol.

All members were present except: Todd Novascone - excused
Rick Rehorn - excused
Dale Swenson - excused

Committee staff present: Jerry Donaldson, Legislative Research
Bob Nugent, Revisor of Statutes
Renae Jeffries, Revisor of Statutes
Bev Adams, Secretary

Conferees appearing before the committee: Bryan Smith, - Kansas Trial Lawyers
Martha Neu Smith - Ks Manufactured Housing Assn.

Others attending: See attached list

Continued Hearing on: HB 2835 - Home Owner Warranty act.

Jerry Donaldson, Legisaltive Research, furnished the committee with a copy of the Interim Report on Residential Building Contractors - dated January 1997. (Attachment 1)

Handed out better copy of Internet article from Nancy Seats on *Nations's Home Builders Grow Worried about Mold.* (Attachment 2)

Written testimony from Ginger Hayes, Kansas Homeowner, supporting **HB 2835** was passed out to the committee. (Attachment 3)

Bryan Smith, Kansas Trial Lawyers (KTLA), appeared before the committee to oppose the bill. They do not believe the bill accomplishes what it sets out to accomplish. The KTLA endorses any legislation that protects the rights of Kansans. The concept of providing a mandatory warranty on all new homes and on improvements performed to existing homes is one that the KTLA would support. However, enacting legislation that creates such a warranty but thereby provides immunity to a contractor for certain types of defects and potentially limits the rights of Kansans to pursue other remedies for damages caused by defective construction of a house cannot be support by the KTLA.. (Attachment 4) He concluded his testimony by answering questions from the committee.

Martha Neu Smith, Executive Director, Kansas Manufactured Housing Association, brought to the committee an amendment to the bill. The Manufactured Housing Industry is currently required by Kansas law to provide a one-year warranty on all new homes and are also covered by some federal laws. Since the industry is already required by law to warranty their homes, they respectfully request the following amendment to be included in the definition of "dwelling" "but such term shall not include manufactured housing as defined in K. S. A. 58-4202, and amendments thereto, subject to the federal manufactured home construction and safety standards established pursuant to 42 U. S. C. §5403." (Attachment 5) She answered several questions about manufactured housing from the committee.

Written testimony was passed out from Whitney Damron, Kansas Bar Association, opposing one provision contained in the bill. (Attachment 6)

No others were present to testify for or against **HB 2835** and Chairman Lane closed the hearing.

Chairman Lane adjourned the meeting. The next scheduled meeting is February 26, 2002.

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

HOUSE BUSINESS, COMMERCE AND LABOR COMMITTEE
GUEST LIST

DATE: February 22, 2008

NAME	REPRESENTING
BILL YANEK	Kansas Assoc of REALTORS
Connie Burns	Whitney B Damron, PA
Janet Stubbs	KBIA
Martha Jo Smith	KMHIA
Dave Hollwick	K.C. Home Builders Association
Anne Spiess	KCRAR - K.C. Realtors
Steve Karrick	A.G.
Dave Harder	A.G.

REPORT ON

RESIDENTIAL BUILDING CONTRACTORS

Presented to the

KANSAS LEGISLATURE

by the

TASK FORCE ON THE REGULATION OF RESIDENTIAL BUILDING CONTRACTORS

January 1997

House Business, Commerce & Labor Committee
2-22-2002
Attachment 1

MEMBERS OF THE RESIDENTIAL BUILDING CONTRACTORS TASK FORCE

Robert Vancrum, Chairperson
Legislative Appointee

Senator U. L. "Rip" Gooch
Legislative Appointee

Representative John Ballou
Legislative Appointee

Representative Daniel J. Thimesch
Legislative Appointee

Kurt von Achen
Architect Appointee

Robert Hiatt
Consumer Appointee

Gail Bright
Assistant Attorney General Appointee

Wes Galyon
Builder Appointee

Chris McKenzie, Vice-Chairperson
League of Kansas Municipalities Appointee

Tim Ryan
Building Code Enforcement Appointee

Carolyn Hall
Consumer Appointee

Darol Rodrock
Home Builder Appointee

Mike Perry
Builder Appointee

Ron Worley
City Building Code Enforcement Appointee

Robin Lehman
Home Builders Appointee

January 23, 1997

REPORT ON THE TASK FORCE ON REGULATION OF RESIDENTIAL BUILDING CONTRACTORS

Summary

During the 1996 Session, the Legislature passed H.C.R. 5053 which established a 15-member Task Force on the Regulation of Residential Building Contractors and directed a study of the residential building industry.

H.C.R. 5053

H.C.R. 5053 states the following:

the residential building industry is a major Kansas industry and is vital to the economic health of the state;

residential building contractors are not required to be licensed or regulated by the state;

all cities and counties have not exercised the authority to license or regulate residential building contractors;

problems resulting from violations of city and county building codes continue to occur;

existing city and county building codes are not always adequately enforced;

lack of consumer knowledge prevents home buyers from adequately protecting themselves from dishonest or unqualified residential building contractors; and

losses incurred by homeowners as a result of improper construction practices are of concern to the Legislature.

H.C.R. 5053 gave the Task Force the specific charge to conduct a study and review of the issues surrounding the need for regulation or licensure of residential building contractors and to provide comprehensive solutions to the problems that exist in purchasing and constructing safe and structurally sound residences.

The Task Force was comprised of 15 members as follows:

- one member to be appointed by the Kansas Building Industry Association;
- one member to be appointed by the Lawrence Home Builders Association;
- one member to be appointed by the Wichita Area Builders Association;

- one member to be appointed by the Home Builders Association of Greater Kansas City;

- two city or county building code enforcement officers, one to be appointed by the President of the Senate and one to be appointed by the Speaker of the House of Representatives;

- two members of the general public representing consumers, one to be appointed by the President of the Senate and one to be appointed by the Speaker of the House of Representatives;

- four legislators, of which one shall be appointed by the President of the Senate, one shall be appointed by the minority leader of the Senate, one shall be appointed by the Speaker of the House of Representatives and one shall be appointed by the minority leader of the House of Representatives;

- an Assistant Attorney General from the Consumer Protection Division to be appointed by the Attorney General;

- one member who is an architect to be appointed jointly by the President of the Senate and the Speaker of the House of Representatives; and

- one member appointed by the League of Kansas Municipalities.

A written report, including any recommendation of proposed legislative alternatives was to be presented by the Task Force to the Governor and the Legislature no later than January 31, 1997.

Background

There has been legislative interest in problems associated with the residential home building industry for some time. Several bills directed at regulating various facets of the home building industry have been introduced in recent legislative sessions as follows:

1995 S.B. 212 would have amended the Consumer Protection Act to allow for the award of attorney fees to the Attorney General and local prosecutors for enforcement of the Act.

1995 S.B. 224 would have prohibited cities from issuing certificates of occupancy for newly constructed dwellings prior to the dwelling meeting structural, electrical, plumbing, heating, air conditioning, and mechanical standards under all applicable building codes.

1995 S.B. 331 would have provided for the establishment of homeowners recovery fund and for the recovery of certain losses by homeowners caused by contractors for single-family residences.

1996 S.B. 629 would have required statewide licensure of residential building contractors under the State Board of Technical Professions.

None of the above-mentioned measures were passed by the Legislature, although S.B. 212 passed the Senate and the House Judiciary Committee. The bill was defeated on the House Floor and was stricken from the House Calendar.

Task Force Activity

The Task Force met for a total of seven days. The Task Force heard from over 40 conferees, and reviewed letters received from others who did not appear; conducted a field tour of seven homes where owners had complained of substandard contractor work; conducted a survey of selected Kansas communities; reviewed other states' laws; and reviewed considerable other research in this area.

Conferees included a number of aggrieved homeowners, a home builder, and representatives of several local homebuilder associations, representatives of the Attorney General's Consumer Protection Division, the Kansas Insurance Department, the Kansas Real Estate Commission, the Kansas Board of Technical Professions, a number of city and county building and planning and zoning officials, a mortgage broker, a representative of a mediation and arbitration service, a representative of the Kansas Trial Lawyers Association, an Arizona consumer attorney by teleconference call, and others.

Aggrieved Homeowners

Initially, the Task Force heard from a number of aggrieved homeowners who related their individual problems encountered in the construction of a new home. Examples of construction problems cited ranged from minor to severe and included misplacement of interior walls, inadequate or lack of support beams, faulty roofs, cracked concrete in basements, and driveways, major water leaks, cracks in sheet rock and walls, use of substandard construction materials, failure to follow architectural designs, faulty installation of windows, and various other problems. Several testified they had been involved with protracted litigation and had incurred large legal fees, had inadequate remedies available to them under current law, and had suffered major family disruptions. Some conferees expressed frustration with their attorneys as well as the judicial system. These conferees offered suggestions about how the law or the process might be changed to deal with inadequate home construction which included the following:

1. improve information availability regarding home construction warranties;

2. provide for more adequate inspection and enforcement of building codes;

3. provide for more and better-trained building inspectors;

4. provide for better monitoring of the issuance of home occupancy permits;

5. establish increased accountability on the part of home builders;

6. establish a system of statewide licensure, bonding, and certification for contractors and subcontractors in the home building industry;

7. require those involved in the home building business to have the company name clearly indicated on work vehicles for identification purposes;

8. enact specific home buyer protection measures within the Consumer Protection Act;

9. require lender and real estate seller accountability in regard to home construction;

10. strengthen measures to ensure that home construction is finished on schedule;

11. provide better methods for checking on home builders, especially their financial condition;

12. allow the recover attorney fees by homeowners against builders;

13. provide better consumer education;

14. establish lemon laws similar to those used in the automobile industry;

15. require registration of contractors; and

16. provide for specific disclosure of home buyer remedies and other requirements at closing.

Home Building Industry

The Task Force received testimony describing the home building industry practices in Wichita and Sedgwick County where licensing of building contractors and subcontractors is required. According to a Wichita building code inspector, the municipality has a strong licensure and regulation program with enforcement authority through the municipal court. Some transgressor builders have done jail time for their repeated failure to comply with local building codes. A Task Force member who represents the Wichita Area Builders Association (WABA) reviewed the WABA efforts to safeguard the integrity of the building industry. Approximately 50 or 60 complaints are received each year against builders and most of these are resolved by telephone.

Zoning Administration—County Planning

Two zoning administrators, one from Hays and one from El Dorado, testified before the Task Force. The administrator from Hays described the growth of building codes in his area. He expressed a belief that national codes will be in place by the year 2000. The administrator from Hays indicated that currently there is a lack of building codes in most of the rural areas of Kansas and that rural homes are not inspected at all. According to the conferee a prior attempt to adapt building codes in 1994 was abandoned due to the opposition of builders who stated that adherence to codes would price them out of business, that government intrusion in their lives was unwelcome, and that local builders were fearful they would not be allowed to do their own work.

A county planning task force member from Andover urged the adoption of a statewide contractor provision for licensing and bonding. He expressed a concern that local officials are reluctant to enforce local licensure provisions. The suggestions offered by these conferees are not necessarily the positions taken by their elected city or county officials.

Building Code Enforcement

A Task Force member, involved in building code enforcement, presented statistical information regarding the building code compliance inspection and certification in Overland Park. He indicated less than ten complaints are received each year, whereas approximately 934 single family permits were issued in 1995 and approximately 983 single family permits were issued through October 1996.

Home Buyers Warranty—Insurance

A marketing representative for Home Buyers Warranty presented information on the 2-10 Home Buyers Warranty which stands for ten years of structural coverage, starting with the closing date, one year of workmanship coverage, and two years of mechanical systems coverage. The builder application process for membership with the company was outlined. Arbitration of claims is required and the homeowner must waive their right to sue the builder.

An official with the Kansas Insurance Department described how a homeowner's insurance policy is designed to cover acts of God, negligence and liability of homeowners, but does not cover faulty workmanship of builders. He also addressed bonding systems for contractors and added that such a system could be costly. He explained that home buyers' warranty programs are formed under federal law. States cannot review their rates, investigate how claims are settled, or review their financial status.

Kansas Real Estate Commission

A member of the Real Estate Commission addressed the Task Force noting that the agency is fee funded. He stated there are five investigators for complaints and approximately 10,000 licensed real estate agents. He indicated that most complaints are worked out through the realtor, builder, and buyer and do not require litigation. The conferee said it would be extremely difficult, if not impossible, to develop a statewide real estate contract for all home purchases.

Conference Call on Implied Warranties

An attorney from Arizona with long standing experience in home construction litigation, testified by a telephone conference call. He spoke on the legal concept of implied warranty and compared this theory to negligence and breach of express warranty laws. As a court generated theory, and not a statutorily created one, the implied warranty in the State of Arizona requires that a new home is built in a workmanlike manner or in an ordinarily skilled manner, or to the mean standard of competence. According to the conferee, the national trend is to follow the implied warranty theory. States such as Florida, Arizona, New Mexico, and California, which

are experiencing high growth are developing case law on the theory of implied warranty. The Arizona law regarding licensure requirements for all contractors was described in detail.

Consumer Protection Act

An Assistant Attorney General addressed the Consumer Protection Act (CPA) as it applies to issues involved in home building cases. According to the conferee there were 40 complaints with 28 from Johnson County in 1995 and 18 complaints filed through September of 1996. He described the difficulties in pursuing a case under the CPA. In order to show a lack of merchantability a plaintiff must prove many defects. The workmanship would have to be unconscionable in the court's opinion. Negligence or breach of contract would not be enough without showing pattern of conduct by a builder. Attorney fees are allowed but overall, cases in the building construction area are difficult to prove. The conferee later advised the Task Force that the Attorney General's office is short on staff to pursue implied warranty actions under the CPA. He suggested that a better approach would be to create an independent implied warranty statute and to allow the recovery of attorney fees in a private cause of action against a builder.

Kansas Trial Lawyers

An attorney from the Kansas Trial Lawyers Association spoke to the Task Force about the difficulty representing clients in actions against builders in both new construction as well as renovation cases. He indicated that attorney fees, expenses of litigation, study reports, professional opinions, and expert witness fees are costs that are not covered in awards which are all part of the actual cost of restoring a home to the condition it should have been in the first place. The conferee said the CPA was changed recently from intentional to willful wrongdoing. He said that there are problems with the definition of willful.

Other Attorney's Comments

One attorney from Kansas City suggested the creation of an implied warranty of merchantability with damages available in addition to costs. He further recommended that consumers should have a right of action under product liability theories.

An attorney from Independence, Missouri, addressed the Task Force with complaints of the inferior quality of homes built in the $300,000 to $700,000 range. He suggested the state allow treble damages to cover residential consumer fraud.

An Olathe attorney who was also an aggrieved homeowner suggested the adoption of statewide safety codes to supplement local safety codes. He further suggested a limit on a construction lender's ability to secure a lien interest beyond the contract price of a home; a prohibition under which subcontractors cannot sue homeowners without a written contract; and a measure to address the problem of developers selling lots to builders rather than homeowners.

The attorney for the builder who constructed the residence of one of the complaining homeowners presented testimony on behalf of the builder and generally addressed the ongoing lawsuit and problems surrounding the situation.

Arbitration and Mediation

A representative of a mediation and arbitration service made a number of suggestions which included, among others, the following:

1. State law should be changed to put both parties on a level playing field and to encourage both parties to enter into arbitration contracts. The consumer should receive informational materials explaining the procedure at the time of signing the building contract.

2. Predispute resolution clauses in contractual agreements should be made illegal unless both parties agree on dispute resolution. These contractual agreements should meet certain levels of fairness, full disclosure, and procedural fairness.

3. An equal exchange of information needs to be mandated. There is no right to discovery in arbitration in Kansas at this time.

4. Procedures need to be established that require promptness of settling disputes, thus lowering costs.

5. The selection process of the mediator or arbitrator which is fair to both parties needs to be outlined. The builder's liability insurance company would have to be notified of upcoming arbitration.

6. Costs and how they are to be paid need to be described.

7. A consumer should be able to contact a designated state office for additional information about other dispute resolution programs or to report the results of the arbitration experience. This would require that the state establish an office to act as a clearing house and monitoring agency for information about dispute resolution programs.

8. The law needs to be changed to allow the parties to sue if arbitration is not satisfactory. All causes of action should be tried in one procedure. Property owners should be allowed to back out if arbitration is unsuccessful. This would allow arbitration of a tort as well as a contractual disagreement.

9. The law should be changed to provide that any application to enforce or challenge an arbitration award should be made directly to the Court of Appeals rather than going through District Court first.

Other State's Contractor Licensing and Bonding Laws

Many states around the country have some form of contractor licensing. There are basically two types of licensing. The first is registration which usually requires a contractor to show proof of workers' compensation and liability insurance and sometimes post a bond. The second type is a certification process which, in addition to the requirements of registration, also requires the applicant to be tested on trade and business management knowledge. Some of the most stringent laws require the contractor to show proof of practical trade experience, proof

of financial responsibility, and contribute money to a Consumer Recovery Fund. The majority of states that license contractors regulate general, residential, and home improvement contractors. A few states only regulate home improvement contractors. Certain states only have requirements for nonresident (out-of-state) contractors. Currently, 36 states require some sort of contractor licensing or registration; 27 of which include home builders.

Information was requested by the Task Force on the budget and the number of inspectors from Arizona and Utah. The response from these states revealed that Arizona has a budget of approximately $4,786,000 for the entire state agency (Arizona Registrar of Contractors) and employs 22 inspectors located throughout the state in 12 different sites. Utah's Department of Commerce operates with a budget of approximately $257,820 and employs 28 inspectors who work out of Salt Lake City with one inspector located elsewhere in the state. Copies of state statutes from Utah, Virginia, and Oklahoma governing the building industry were distributed to the Task Force for their review.

A number of states have some type of bonding requirement for home builder contractors. The purpose of the bonding requirement varies. For example, in Arizona, bond requirements for general contractors are between $5,000 and $90,000; for residential contractors between $5,000 and $15,000; and speciality residential contractors between $1,000 and $7,000. Contractors may file a $100,000 bond in lieu of contributing to the Residential Contractors Recovery Fund. The latter bonds and the Recovery Fund are for claims for persons injured by a contractor's failure to adequately build or improve a residential structure. By contrast, in Montana, all contractors and subcontractors must be licensed and must post a bond in an amount equal to the contractor's monthly payroll not to exceed $25,000. The minimum amount is $6,000 for a general contractor and $4,000 for a speciality contractor. The bond is surety for taxes due to the state, wages and fringe benefit, and other payments to persons furnishing labor.

Field Tour

The Task Force spent one day in the field touring homes of several consumers who voiced complaints. Of the six residences on the tour one was in Eudora, one was in Overland Park, three were in Olathe, one was in Lenexa and one in Basehor. As a result of the field trip, certain members of the Task Force expressed a belief that some the the complaints were of dubious merit and further, that some of the homeowners may have contributed to their problem by the unauthorized use of plans or designs.

Survey of Local Officials

A survey regarding residential home building issues was sent out to various local government building officials. Responses were received from 12 entities including the cities of Augusta, El Dorado, Leawood, Lenexa, McPherson, Olathe, Overland Park, Prairie Village, Shawnee, and Salina, and Butler and Johnson counties. The following is a brief summary of the survey questions and responses received:

1. What are the number of building permits issued in your area for calendar year 1995 and to date (October 24, 1996) in 1996? How many of the building permits are for new home contractors?

The City of Augusta reported the fewest building permits issued in 1995 with a total of 188, 40 of which were for new residences. The City of El Dorado reported the fewest building permits through September of 1996 with 148 and 20 of which were for new residences. The City of Overland Park reported the largest number of building permits for 1995 and 1996 with 4,205 of which 934 were new residences in 1995 and 3,641 of which 983 were for new residences through reporting period for 1996.

2. What problems have been encountered with residential home builders in your locality? Does your locality have some type of complaint procedure?

   Problems reported varied. Examples of responses included: inability to get subcontractors licensed (Augusta); refusals to respond to call backs (Overland Park); failure to get a final inspection or certificate of occupancy (Shawnee); and inexperienced builders (Salina). Several local units of government responded there were few problems or the problems were solved at the time they arose (Johnson County, Leawood, and McPherson). No local unit reported that a formalized complaint procedure existed.

3. Do you have a local licensure requirement for residential contractors? What is the annual fee for licensure?

   Seven local units responded that a license was required. Two of these responses said that only a business license was required.

4. Do you have any recommendation or solutions for problems that you have raised?

   Responses included: require state licensure (Augusta and Shawnee); continued education for contractors (Augusta); require mortgage companies to have a city-issued certificate of occupancy before real estate closing and require realtors to inform buyers whether the home has been approved by the local jurisdiction (Olathe); and suspend contractor licenses for three building code violations in one year (Shawnee).

5. Should the state license residential contractors?

   Five local units favored state licensure. The other seven responses either opposed state licensure or expressed reservations.

6. Should the state adopt a statewide building code?

   Five local units favored the adoption of a statewide building code; four opposed such action; and the other three local units did not respond to this question.

7. Should the state require residential contractors to secure performance bonds?

   Six favored and six opposed this idea.

Conclusions and Recommendations

The Task Force on the Regulation of Residential Building Contractors recognizes the fact that the issues and problems involved in residential home building are vast and complex. In an attempt to sort out the various complexities that surfaced during the hearings on the topics during the interim, the Task Force elected to focus on the following topics.

Implied Warranty. The Task Force considered a bill that would have expanded the Consumer Protection Act to include a theory of implied warranty of habitability and implied warranty of workmanlike construction as it applies to a new single family dwelling sales or construction or remodeling or renovation of an existing residence. The Task Force rejected the idea of amending the Consumer Protection Act in part because the Attorney General's Office said it did not have adequate staff to take on expanded responsibilities under this law.

The Task Force believes, however, that Kansas law should recognize implied warranties of habitability and workmanlike construction. The Task Force therefore recommends the introduction of legislation apart from the Kansas CPA as a bill which establishes a private civil cause of action and creates implied warranties of habitability and workmanlike construction. The warranties would attach to every contract or agreement for the sale or construction of a new residence or the alteration, repair, remodeling, or renovation of an existing residence. Items to be warranted under the implied warranty of habitability include the following:

1. work performed and materials used must comply with any plans and specifications contained in the contract or agreement;

2. work performed and materials used must comply in all material respects with applicable building codes and other public requirements establishing standards of quality and safety which have been adopted by statute, city ordinance, or county resolution or by rules and regulation;

3. the roof, supporting walls, floors, windows, doors, insulation, and foundation of the residence must be in safe working order and structurally sound;

4. the electrical, plumbing, or mechanical systems must be in safe working order and condition; and

5. the residence, or affected part in the case of a renovation, repair, remodeling, or alteration must be reasonably suited for its intended use.

Under an implied warranty of workmanlike construction, the contractor also would warranty that the work was done using due care and skill according to generally accepted industry practices.

The bill provides that the cause of action cannot be initiated until the contractor has been reasonably notified in writing of a defect and the contractor either: (1) denies the claim or (2)

fails to cure or remedy the defect in a timely manner. The contractor has 30 days, after notice, to cure a defect that renders the residence unsafe to occupy and 90 days to cure any other defect. A three-year statute of limitation is established, from the date of closing for a new residence and from the date of final payment for a remodeling, repair, renovation, or alteration project regarding items 1 to 3 outlined in the paragraph above. A one-year statute of limitations is provided to bring an action under items 4 and 5 above as well as for enforcement of the implied warranty of workmanlike construction.

Reasonable attorney fees and costs can be awarded to the prevailing party at the discretion of the court. Any warranty created by the bill will not supersede any express manufacturer's warranty and shall be in addition to any express or other implied warranty provided by law.

Oral Contracts. The Task Force considered a recommendation that legislation be recommended which imposes a statutory limitation on the right of subcontractors to file suit against homeowners absent a written contract by amending the Statute of Frauds. The Task Force rejected this recommendation being unwilling to tamper with the Statute of Frauds.

The Task Force, however, recommends a bill to limit the enforcement of oral contracts by amending the mechanics' lien law notice of intent to perform provision regarding new residential property. The bill provides that a person may not enforce an oral contract in law or in equity unless a notice of intent has been filed. The bill also provides that a written contract may not be enforced in excess of the amount expressed in such a contract in law or equity.

Licensure. The Task Force considered a bill draft on licensure of residential building contractors but rejected this concept as unwarranted at this time. The bill under consideration contained a definition of a residential contractor as one who offers or submits a bid to construct any new one or two-family dwelling that would require a building permit. The bill would have exempted various professionals such as architects, engineers, plumbers, electricians, subcontractors working under the supervision of a licensed residential contractor, and wage earning employees.

The bill contained many similarities to 1996 S.B. 629.

Plans. The Task Force also considered but rejected the idea of endorsing legislation that would have required building plans, either certified or sealed, to be filed in order for a building permit to be issued. City or county units of government could have opted-out of the provisions of the bill.

Mediation or Arbitration. The Task Force also considered but rejected a bill which would have prohibited the use of predispute alternative dispute resolution provisions in homebuilder contracts.

Other Issues. Other issues were considered by the Task Force during the interim study, including the following:

1. temporary occupancy certificates;

2. lemon laws for single family residential;

3. homeowner recovery fund;

4. adoption of a statewide building code;

5. contractor performance bonds;

6. contract requirements insurance;

7. lender liability issues when moneys are released inappropriately to a builder; and

8. statewide certification for building inspectors.

Members of the Task Force recognize that the lack of trained workers in the home construction area can be problematic. One approach to help alleviate this situation is to enlist the assistance and cooperation of secondary and vocational educators in an effort to fill the void caused by the shortage of trained, experienced home building craftsmen. Individuals within the home building industry are encouraged to become active partners with the schools to achieve this goal.

As a final concern, the Task Force is aware that the Insurance Service Organization (ISO) is in the process of rerating homeowners' insurance policies on a nationwide basis. Some informed persons believe ISO rerating will result in an emphasis on tougher building inspection programs and building code requirements. These changes are expected to be ready for implementation in 1998 and could result in substantially higher homeowner insurance rates for those persons living in areas that do not have building codes and building inspections. The Task Force is further aware that many cities and counties in Kansas do not have building codes or building inspectors.

When the ISO rerating procedure is completed, a further review of the need for a statewide building code and inspection process may be necessary. The Task Force realizes that consumers are often confused by the complex nature of various building codes as well as a total lack of building codes in some areas. In addition, the Task Force is concerned that tracking building code provisions as well as other complicated measures involved in a residential construction project can prove to be a daunting task for many homeowners. Certain members of the Task Force believe that a method should be developed by the Legislature to continue to monitor the status of the home building industry since the potential for problems that affect consumers within the home building industry will continue. Other members of the Task Force believe that, since in Kansas cities and counties have home rule power, the local level is the appropriate level to deal with these problems.

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Nation's Home Builders Grow Worried about Mold

Feb. 11–ATLANTA–During the last few years, America's home builders have grappled with rising material costs, labor shortages and a growing burden of government regulations.
But the housing industry's current foe has been around since the dawn of time: mold.
ADVERTISEMENT

A series of multimillion-dollar legal awards and exploding consumer concern about mold contamination have caught the attention of the residential construction industry, which convened in Atlanta over the weekend for the National Association of Home Builders' annual show.
"It's one of the most important issues home builders face," said Bruce Smith, a California home builder who has spent the last year heading the 200,000-member association.
"We've gone from talking about dirty office buildings to mold in houses.
"It's an issue that is affecting the housing industry very much," he said. "The potential costs to builders are huge."
Home-builder worries about liabilities resulting from mold infestation have reached a crisis level after a series of highly publicized court awards.
Homeowners in Texas, California and Florida have won as much as $32.1 million in damages after their homes were invaded by toxic molds.
So far, most of the litigation has been against insurance companies, but builders fear their potential liability.
So many people at the builders' convention showed up for a seminar on mold litigation that the crowd overflowed the meeting hall.
"It's the current media rage and the current legal rage," Patrick Perrone, an attorney with New Jersey law firm McCarter & English LLP, told the

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Attachment 2

builders. "Lawsuits are being filed from California to Florida, and from Florida all the way up to Maine.

"If you are a builder, you can't ignore this," Mr. Perrone said.

In reaction to the flood of moisture-related mold claims, the housing industry is scrambling to change construction techniques, and to improve construction materials and mechanical systems. But in many cases, the problem can be solved by builders acting quickly at the first sign of a customer complaint about moisture in a new house.

"If you hear about a moisture problem, don't let it become a mold problem," Mr. Perrone said. "You have to act quickly. You can go from a $1,000 repair job to a multimillion-dollar jury verdict."

Even if builders aren't sued for mold problems, they are already paying the price. Residential builders say that their liability insurance costs have, in some cases, gone up by 100 percent or more.

"We are a business made up mostly of small businesses, and the rising cost of insurance is very much a problem," said Mr. Smith.

Tom Kenney with the National Association of Home Builders' research center said builders already know that some of their houses have problems with moisture.

"We've found that 28 percent of the builders reported that they had mold in at least one house under construction in the past year," Mr. Kenney said. "Eighteen percent have reported at least one occupied house with a mold problem."

Most often the growth of mold is caused by easy-to fix problems like a roof or plumbing leak or faulty installation of materials, he said.

There is still a lot of disagreement in the building industry over whether today's more tightly sealed houses contribute to the growth of mold and other indoor air pollutants.

"On balance, we are not finding that," Mr. Kenney said. "We cannot tie it to tight houses at this point in time."

Maybe not, but manufacturers of air handling systems have capitalized on mold concerns with a new generation of heating and air-conditioning systems. Dozens of such products that claim to help control indoor air quality were displayed to builders at the Atlanta show.

Manufacturer Broan-NuTone of Wisconsin was showing off a range of whole-house hepa filtration and fresh-air systems designed to screen mold spores and bring outside air into the house.

Other firms, such as Michigan-based Evolve Corp., were touting exhaust systems that pull moisture out of bathrooms to prevent buildups in the rest

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of the house.
Chicago-area builder Scott Sevon is building a whole line of homes he says are certified by the American Lung Association as "health houses."
"We are learning to be very concerned about the indoor air environment," he said. "Did you know your dishwasher puts out five pints of moisture into the air every time you run it?
"As a builder, you have to know what you are doing and know what products you are putting in the home," he said.
David Stumbos, an executive with Dallas-based Centex Corp., knows firsthand about mold damage in houses.
He told builders that he has spent months repairing his family's Dallas house after a hidden water heater leak pumped thousands of gallons of water into the crawl space under the house.
"We build 22,000 houses a year, and it's my job to understand this problem," he said. "What you have to do is find the water that caused the mold and get rid of it."
And in the case of mold contamination, time is quite literally money, Mr. Stumbos said.
"In my particular case [the damage] was probably in excess of $50,000," he said. "That's a lot of money for a broken water pipe."
MORE INFORMATION
Severe mold contamination has led to a series of high-dollar damage claims that builders can't ignore:
– $32.1 million award by an Austin court for to a family whose home was overrun by toxic molds.
– $18.5 million awarded to a California family for mold damage.
– $17.4 million awarded in Florida for mold caused by construction defects.
– $11 million Delaware award for mold damage.
Common sources of mold-causing moisture in new homes:
– Improper storage of building materials during construction.
– Roof and plumbing leaks.
– Faulty or improperly installed siding, shingles, and windows.
– Condensation caused by improper ventilation.
– Improper site drainage around house.
SOURCES: McCarter & English LLP, National Association of Home Builders
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We feel that a builder should be held 100% liable for all warranty items. We also feel that 1 year is not enough time for a new home to work out all its "BUGS". We need a Bill for Consumer Protection from Home Builders & Loan Company's. With our recent experience, we know first hand about the so called Builder's 1 year warranty. Our Builder has refused to do any repairs in our $260,000 new home. Which has resulted in mold that is over taking our home. He told us it was a homeowners problem + to contact our homeowner insurance company. Our Builder also has not completed 1 thing on our punchlist which contains over 40 different complaints. It ranges from a missing piece of trim to no anchor bolts in our foundation. Also, we have alot of fraud contained in our home loan which was prepared by the Builders loan dept. →

We now are fighting for our home and it's a battle + very stressful. Please consider this Bill to help furture home buyers, to protect them. from "BAD BUILDERS" I could write abook for all of you, but please take in consideration pictures, tapes + other letters from very concerned homeowners who now are fighting for our homes. Thank You All for your time.

Ginger Hayes
Kansas HomeOwner.

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TO: Members of the House: Business, Commerce, and Labor Committee

FROM: Bryan W. Smith on behalf of the Kansas Trial Lawyers Association

RE: House Bill 2835

DATE: February 21, 2002

Representative Lane and members of the committee, thank you for the opportunity to submit comments on House Bill 2835.

The Kansas Trial Lawyers Association (KTLA) opposes this proposed legislation. House Bill 2835 purports to provide additional protection and warranties to new home buyers and existing home buyers who contract for home improvements. However, this bill, if enacted, would severely limit the rights of Kansas home buyers and home owners.

Under Section 4(c), a builder or home improvement contractor is not responsible for personal injury or property damages that occur due to their own fault. For example, if the roof collapses and injures an occupant of the dwelling, the injured person would be precluded from pursuing a claim for recovery of medical bills, lost wages, and other components of personal injury under this bill.

Under Section 4(m), the builder or home improvement contractor is immune from liability from damages resulting from an act of God which are defined to include: fire, explosion, smoke, water, escap, windstorm, hail, lightening, falling trees, aircraft vehicles, flood and earthquake. The bill does make an exception when the loss or damage results from failure to comply with building standard. Building standards, as defined by the Bill, are quality standards of the home building industry for the geographic area in which the dwelling is situated. Many trades, such as electrical and plumbing, as well as many others, are held to a national standard. In addition, in many rural areas, there may be only one or two builders and it would be very difficult if not impossible to challenge whether their method of constructing a house falls below generally accepted standards in the industry when the statute limits the definition to the immediate geographic area around the dwelling.

Section 4(f), limits liability for damages resulting from dampness and condensation due to insufficient ventilation after occupancy. Excessive condensation or dampness can foster the growth of toxic mold in a dwelling. Exposure to toxic mold has been associated with allergic reactions such as irritation of the eyes, nose, or throat, dermatitis, aggravation of asthma and respiratory distress. I have attached to my testimony a copy of an article that further discusses the issues involving the potential dangers of toxic mold. There have been a number of recent cases in Shawnee County in which homeowners have had to vacate their houses because of toxic mold growth that is believed to be related to defective construction by the builder.

Paragraph 4(n), limits liability for damages caused by soil movement, which is compensated by legislation or covered by insurance. The building contractor should not receive partial immunity simply because the homeowner had the foresight to purchase insurance that may help offset the cost associated with a defect in construction. In addition, a contractor should not be immune from liability if he or she failed to properly assess potential problems with soil conditions and address the same during construction.

Section 4(a), limits a building contractor's liability if a problem is not presented to the contractor within six (6) months after the date of discovery, or, within six (6) months after the problem should have been discovered. This is in direct conflict with Section 10, which allows any lawsuit arising under the bill to be brought within two years after the defect was discovered or should have been discovered. If a homeowner has two years in which to file the lawsuit, they should also have two years in which to present the claim to the contractor. There are many defects that occur in a house that may not be readily recognized by a homeowner.

The KTLA endorses any legislation that protects the rights of Kansans. The construction and purchase of a home is probably the largest single investment that a person will make in their lifetime. The concept of providing a mandatory warranty on all new homes and on improvements performed to existing homes is one that the KTLA would support. However, enacting legislation that creates such a warranty but thereby provides immunity to a contractor for certain types of defects and potentially limits the rights of Kansans to pursue other remedies for damages caused by defective construction of a house cannot be supported by the KTLA.

Thank you for the opportunity to express our concerns regarding this bill. If the Committee desires any further input from the KTLA regarding this bill, we would be glad to provide the same.

"TOXIC" MOLD

PART I: WHAT IS IT? WHAT CAUSES IT? AND WHY DO WE KEEP HEARING ABOUT IT?!

Lawsuits over "toxic" mold are becoming as prevalent as mold itself. No one involved in constructing buildings with mold problems is safe from litigation. Contractors are often considered fair game, even when the fault lies wholly with the design—and even when the contractor builds exactly to spec.

In this three-part series, we will examine (Part I) what constitutes "toxic" mold and what causes it to grow; (Part II) what legal and financial risks "toxic" mold creates; and (Part III) what contractors can do to ensure that their insurance adequately covers those risks.

THE WONDERFUL WORLD OF MOLD

Before we look at "toxic" molds and the problems they cause, let's take an up-close look at mold (hold your nose if you like). Molds—members of the family of plants known as fungi—are everywhere in this country. In fact, they're almost everywhere in the world. Molds are in the air we breathe and all around us. They are the "bleu" in bleu cheese and Roquefort; they improve our wine, produce antibiotics, and are used in the food and beverage industry. They also help break down organic matter in the soil, and many fungi act as a part of nature's "trash crew," cleaning up dead or decaying material.

Molds contain no chlorophyll, so they don't photosynthesize like flowering plants or trees. They reproduce through spores, which can germinate wherever they find a food source (virtually any organic substance) and moisture. How much moisture varies by species, though all molds need some moisture to grow and reproduce. They meet all their nutritional needs from the substances they grow on, and they are very good at growing.

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WHAT'S THE PROBLEM?

Despite the many harmless and beneficial molds, toxic molds do exist and can pose serious health threats. To see that toxic mold in building construction is indeed a matter for concern, consider the recent rash of lawsuits sweeping the country: In California, more than 100 workers have filed a personal injury suit against the County of Tulare and the contractors who built their new courthouse, alleging that exposure to mold has caused a variety of adverse health effects.[1] In another case, in Washington State, a schoolteacher has filed suit against the contractor and others who participated in the building of a middle school on Bainbridge Island, alleging that exposure to toxic mold caused serious injuries.[2] The contractor in that case later filed cross-complaints against several subcontractors who participated in building the site.[3] And in yet another recent case in Chattaroy, Wash., teachers and students from Riverside High School filed a complaint against the Riverside School District and its superintendent of schools as well as against the contractors and architect who built an addition onto the school.[4] Their complaint? That mold in the school made them sick.

Then there are the three Maryland workers who filed a suit seeking damages for injuries alleged to arise from exposure to "toxic" mold.[5] Also, consider the former residents of two Seattle apartments who sued the building owner, alleging that substandard construction and maintenance allowed toxic mold to grow in the walls of their apartments, causing chronic illnesses.[6] How about that cute little courthouse in California, currently scheduled for demolition because leaks and water intrusion allegedly brought about uncontrollable mold growth? Getting the picture? How about the case of the insurance company in Texas charged with child endangerment for failing to properly handle a water damage claim? You know the case? That's the one where they were also sued in civil

(continued) 4-3

court for $100 million for allowing the mold growth to occur.

HOW TO GROW (OR NOT GROW) MOLD

Whether molds are beneficial, harmless, or "toxic" depends on where, when, and how they grow. According to the Environmental Protection Agency (EPA), all molds can cause health problems under the wrong conditions.[7] Unfortunately, the press has taken up the hue and cry, often labeling several species as "toxic molds." That phrase may sell newspapers or increase audience share on the television, but it hardly helps solve any of the problems faced by people exposed to harmful molds. So, what is a toxic mold? The closest definition of that phrase I've found is that a toxic mold is any mold that regularly produces toxic compounds. However, some species of mold are commonly viewed as more of a problem than others, and not all toxic molds produce toxins all the time.

Often included on the toxic list are Stachybotrys chartarum, along with various species of Aspergillus, Alternaria, Acremonium, Cladosporium, Fusarium, Penicillium, and others. Currently, it appears that all molds require certain environmental conditions in order to produce toxins, so even the most vilified mold is not always toxic. The EPA is currently researching the conditions necessary for mold toxins to be produced and to become airborne.[8] Please bear in mind that many toxins produced by molds are extremely potent.

WHAT IS "TOXIC" MOLD?

So, what do these "toxic" molds really do? Among the many health effects with strong evidence correlating to mold exposure are allergic reactions such as irritation of the eyes, nose or throat; dermatitis; worsening of asthma; and respiratory distress. Other reported effects include fever, flu-like symptoms, fatigue, dizziness, headaches, and diarrhea. Rare, but more severe, effects can include hypersensitivity pneumonitis, invasive pulmonary aspergillosis (actual colonization of the mold in the lungs), allergic bronchopulmonary aspergillosis, or aspergilloma.[9] Hemosiderosis, or bleeding into the lungs (especially in infants), has been blamed on the mold stachybotrys. However, researchers haven't conclusively linked hemosiderosis to mold exposure and continue to study this issue.[10, 11]

CONTROLLING MOLD IN CONSTRUCTION

The key to dealing with mold—and with the rising tide of public interest and adverse publicity that surround the issue—lies in preventing mold growth in the first place. Many construction materials contain enough organic material to cultivate mold. (Stachybotrys, for example, is particularly fond of the paper used in gypsum wallboard production.) Since we cannot eliminate mold's food sources from the construction process, we must control the other ingredient mold needs to grow: moisture. Remember that without excess water (or, in construction, without the penetration of water through the building envelope) mold growth will not occur.

According to the Environmental Protection Agency (EPA), all molds can cause health problems under the wrong conditions. Unfortunately, the press has taken up the hue and cry, often labeling several species as "toxic molds."

What does this mean for contractors and their employees? First and foremost, the "mold problem" is here to stay—it won't diminish as time goes on. Those contractors that recognize and deal with the issue will more likely succeed than those who don't. Second, issues of constructability, the integrity of the building envelope, and the ability to control moisture will only become more critical as we learn more about them. Third, the degree to which incomplete, "conceptual only," or outright improper plans are used to make daily construction decisions affects the long-term profitability and viability of a project. Contractors that reject inadequate architectural detailing will survive more often than those who merely shrug and build.

KEEPING THE OUTDOORS OUT

Of all the questions about toxic mold, probably the simplest to answer is "What causes it to grow on one project and not another?" There are three measures contractors can take that will eliminate the vast majority of mold growth. The first is to prevent the exposure of interior building products to exterior conditions. I personally recall one project manager in Northern California who (despite the fact that the roof had been left off the building through two very wet winters) was surprised that the installed sheet rock began turning green and black. Proper sequencing of work and coordination among the trades is vital to prevent this cause of mold growth.

WATER-POOLING AND OTHER DASTARDS

The second step a contractor can take, which will prevent mold growth in the long term, is to achieve balance and moisture control in the building's mechanical system. To prevent mold growth (as well as for other reasons), water-pooling must be eliminated from the mechanical systems. Humidification should not be allowed to exceed acceptable parameters, and the systems should be easy to clean. Duct liners, duct placement, and roof and external-wall penetrations should all receive proper attention in the design and construction phases of the building. Proper maintenance after completion is also important, and building owners and operators should receive adequate instruction in maintaining these complex components of their properties.

SEALING THE BUILDING "ENVELOPE"

The third primary step that will prevent moisture is to maintain the integrity of the building envelope.

(continued on page 16)

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Especially critical are the proper design and installation of doors and doorjambs, windows, parapet elements such as caps, flashings, caulking, waterproofing membranes (including proper lapping at architectural reveals, joints, and corners), roofing systems, and related components. Failure of any of these components often results in significant water intrusion, and water intrusion means mold. All too often, changes in one part of the building have unintended effects on other parts of the building. For that reason, comprehensive coordination by the general contractor or construction manager is vital and should not be neglected because of scheduling pressures or other transitory concerns. Proper attention to the design and detailing phases of construction is often the determining factor in successfully completing the project and avoiding of mold growth down the road. As the Barrett Commission in British Columbia notes:

"There has been no evidence that building envelopes, constructed according to the building code, will fail. The Commission is aware that some building envelope systems, certain design approaches, and combinations of materials are conducive to higher standards than others. However, according to the extensive testimony received from numerous professionals, if the Building Code is followed—with a requisite understanding of building science—the building envelope system will work."[12]

The commission further notes that:

"Although discussion surrounding air barriers, vapour barriers, permeance, and poly are all interesting, they are not relevant to the problems facing British Columbia's building envelope failures. Building envelopes are failing because litres of water are entering the walls from the outside through poorly designed roofs, balconies and windows; because of badly constructed joints, missing flashings, inappropriately lapped building paper and thinly-applied stucco."[13]

We would be arrogant indeed, and flat wrong, to assume that the problems that have recently plagued our neighbors to the north are not present in the United States as well.

Building owners must also properly maintain their structures. Many components of the building envelope, especially but not only the caulking, should be inspected regularly. For walls, regular water exposure (as from improperly adjusted sprinkler systems) can contribute to premature failure of stucco and degradation of the building. Improper drainage can also cause ponding, and water intrusion, leading to—you guessed it—mold growth.

Among the many health effects with strong evidence correlating to mold exposure are allergic reactions such as irritation of the eyes, nose or throat, dermatitis, worsening of asthma and respiratory distress.

AIRTIGHT QUALITY ASSURANCE

As a final note, the real bottom line in preventing mold growth is a firm, concise, and easily followed quality-assurance plan. The three major points of any such plan must be a strong commitment to (1) building in strict accordance with the plans and specifications provided; (2) having competent design professionals completely correct flaws in plans and specs that are likely to result in water intrusion; and (3) documenting every step of the quality-assurance process, including, if necessary, photographing key installations as they are being put into place. If all of us in the construction industry followed these steps, we would maximize our ability to deliver a high-quality, waterproof building to our clients, and correspondingly minimize the likelihood mold growth and the ensuing litigation and costs. We in the building industry must do a better job of coordinating among all the participants in this process. As Benjamin Franklin observed at the signing of the Declaration of Independence, "We must all hang together, else we shall all hang separately!"

—By Dave Dolnick. *Dolnick is risk manager for the Brady Companies, a multifaceted specialty subcontractor headquartered in La Mesa, Calif. He has been involved in the risk management field for more than 14 years. Before that, he served in underwriting, loss control, and marketing capacities with several insurance carriers. He has made presentations at national, regional, and local conferences on risk management, loss control, and safety-related topics.*

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"TOXIC" MOLD

PART II

IF YOU WORK ON BUILDING CONSTRUCTION PROJECTS, THIS IS YOUR PROBLEM, AND THE STAKES ARE HIGH. KNOW THE RISKS, AND LEARN HOW TO AVOID THEM.

This is the second article in CONSTRUCTOR's *three-part series on "toxic" mold. Part I, which appeared last month, examined the question "What is 'toxic' mold?" and discussed the practical steps contractors should take to avoid mold-related problems. This article, Part II, covers the legal and financial risks that "toxic" mold creates. Next month, Part III will discuss the ways contractors can ensure that their insurance adequately covers the risks associated with "toxic" mold.*

If you are interested in or concerned about mold, take heart! You have a limitless supply of articles and information about "toxic" mold. Nearly every night, the television news broadcasts stories on "black" or "toxic" mold, about homeowners who lose their homes to mold, and about public schools that close because parents fear for the health of their children. As of August 2001, you could log on to more than 21,000 websites on "toxic" mold, covering everything from "Toxic Mold Survivors"[1] to the "Sick Building Syndrome."[2] At least one site, "Toxic Mold & Tort News Online," even provides state-by-state information about the lawyers engaged in mold litigation.[3]

PERCEPTION = REALITY

From the media hype, you would think that mold is a plague of biblical proportions that has recently descended upon us. Of course mold is not a new phenomenon. Mold is older than humankind, and our acquaintance with it can be traced at least as far back as the Bible. In fact, in Leviticus, Chapter 15, you'll find what might be the first recorded mold-remediation strategy: "He shall command...that the house be scraped on the inside round about, and the dust of the scraping be scattered without the city into an unclean place: And that other stones be laid in the place of them that were taken away, and the house be plastered with other mortar."

Mold isn't new, and neither is it easily confined. It is in the air we breathe, the food we eat, and all of our homes and workplaces. For this reason, there are many in the scientific community who believe that the hysteria over mold is vastly outpacing the scientific evidence.

Although the true extent of the problem may be hazy, one thing is crystal clear: At this point, the truth doesn't matter. Perception is reality, and the public perception of mold is that it is highly toxic to humans.

Despite the very real debate as to the alleged health risks associated with mold, mold is a real problem for everyone in the construction industry. Whether or not the hysteria is justified, the fear is real, and it has created a multi-billion dollar mold industry. Not surprisingly, personal injury attorneys are at the center of this trend. The construction, insurance, and real estate markets are besieged by mold litigation and the never-ending quest to locate and eradicate mold. Although the true extent of the problem may be hazy, one thing is crystal clear: At this point, the truth doesn't matter. Perception is reality, and the public perception of mold is that it is highly toxic to humans.

MOLD = BIG $$ WON AND LOST

The sheer magnitude of the mold-litigation and -remediation industry should be enough to convince everyone in the construction industry that all risk management programs have to take mold into account. Nowadays, any mold problem that develops on a construction project is likely to spawn worker compensation claims, personal injury lawsuits, and demands for immediate and costly remediation efforts. For contractors, these things translate into huge financial losses, project delays, and very bad publicity.

In the vacuum of definitive knowledge about mold, owners often take the "better safe than sorry" approach. That is to say, they reason that if mold has any chance of being as deadly as some believe, then it must be eradicated, regardless of the cost.

If you are still unconvinced that "toxic" mold is a force to be reckoned with, consider the following cases of mold litigation around the country.

FROM COAST TO COAST MOLD CLAIMS SPREAD LIKE...MOLD

❑ **New York.** In New York City, 125 tenants have sued two apartment building owners for $8 billion in damages for a variety of mold-related personal injury and property damage claims.[4]

❑ **Texas.** A Texas jury has awarded a homeowner a $32 million verdict against her homeowners' insurance carrier for, among other things, fraudulent claims-handling in connection with a claim for water damage. Ulti-

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mately, the water caused mold to develop in the house, and the plaintiff and her family complained of various mold-related illnesses.[5] Significantly, the judgment included $5 million for mental anguish.[6]

❑ **Florida.** Shortly after its initial occupancy of the Martin County Courthouse in 1989, the county complained to the construction manager about leaking windows, excessive humidity, and the discovery of mold within the building envelope. A subsequent investigation discovered water infiltration through the exterior synthetic hardcoat system and various problems with the building's HVAC systems. By 1992, the county had received numerous health complaints, and about 25 percent of the building occupants had moved out. In September 1992, the county filed suit against the construction manager, the architect, the masonry contractor, and the construction manager's sureties. In December 1992, the county evacuated the entire building.

It is instructive that the county elected to evacuate the building—a decision that greatly increased the county's damages—despite the fact that neither of its mold experts specifically recommended such an action.[7] It later testified that it could not "in good faith and good conscience" allow people to enter the building under the circumstances.

Before trial, the county settled the claims against the architect and masonry contractor for $2,750,000. In the trial of the construction manager and its sureties, the jury concluded that the mold and water problems were caused by construction defects and awarded the county $11,550,000 in damages. After the court took the earlier settlement with the architect and the mason into account and added prejudgment interest, the judgment against the construction manager soared to $14,211,156.[8]

❑ **North Carolina.** Like the Martin County, Fla., case, the Buncombe County, N.C., case is notable for the knee-jerk reaction of the project owner. This case arose as a result of a sudden and catastrophic release of water into a nearly completed hotel. The contractor immediately attempted to investigate the cause of the water discharge, but the owner elected to terminate the contract and hire its own professionals, who conducted extensive and costly mold remediation throughout the structure.

In response, the contractor sued the owner, and the owner counterclaimed for the damages caused by the water discharge, including mold-related damages. Ultimately, the case was settled when the contractor waived its claim for the contract balance and agreed to pay the owner $6.7 million in damages.

❑ **Elsewhere.** Besides the cases cited above, there are dozens of mold-related personal injury and property damage claims pending all around the country. Often these cases are brought as class actions by a group of plaintiffs who believe they were exposed to "toxic" mold. The defendants include contractors, design professionals, owners, developers, material suppliers, maintenance companies, and anyone else involved in the construction or maintenance of a building. As you can see from the preceding cases, even in the absence of personal injury claims, the damages assessed in mold cases often soar into the tens of millions of dollars.

Even if you win a mold litigation case, you will likely spend hundreds of thousands of dollars on legal fees, expert witnesses, and other expenses associated with complex litigation.

IMPLEMENT A "MOLD EDUCATION" PROGRAM

In sum, mold has become a serious problem that can destroy a construction company, and it creates very serious and complicated risk-management issues. Contractors need to understand how and why mold grows, and adopt a risk management program that specifically addresses mold avoidance procedures. At minimum, these procedures should include an education program that

❑ Makes all construction employees aware of the potential for mold and other problems associated with moisture;

❑ Alerts estimators and field employees of design-related issues that could contribute to moisture problems;

❑ Authorizes periodic inspection of all enclosed areas that have the potential for the accumulation of moisture; and

❑ Provides an action list in the case of excessive moisture detected on a project.

Preventing mold growth is the best and most cost-effective way to deal with this problem.

REEVALUATE YOUR INSURANCE NEEDS

Finally, all contractors should discuss "toxic" mold with their insurance professionals. This discussion should include not only the contractor's insurance needs, but also what, if any, additional insurance requirements should be demanded of subcontractors and suppliers. Insurance is no substitute for mold avoidance, but in some instances, it may limit your financial exposure if mold develops on a project. Stay tuned, as we discuss insurance options in detail next month in "'Toxic' Mold: Part III."

—By Michael F. Dehmler, *associate, Ernstrom & Dreste. Mr. Dehmler practices law in the areas of suretyship, fidelity, contract law, litigation, and other areas surrounding the surety, fidelity, and construction industries. His previous experience includes construction site inspection and project coordination for civil engineering firms.*

Mr. Dehmler graduated with honors from the State University of New York, College at Oswego and received his Juris Doctor, with honors, from the State University of New York at Buffalo Law School.

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"TOXIC" MOLD

PART III

ARE YOU COVERED FOR MOLD LIABILITY? HERE'S THE SCOOP ON CONSTRUCTION INSURANCE COVERAGE FOR MOLD.

This is the third article in CONSTRUCTOR's three-part series on "toxic" mold. Part I, which appeared in October, examined what "toxic mold" is and discussed the practical steps contractors should take to avoid mold-related problems. Part II, which appeared in November, covered the legal and financial risks that "toxic" mold creates. This month, Part III discusses the difficulties of obtaining adequate insurance coverage for mold liability and outlines the measures that contractors can take to protect themselves.

Water infiltration that causes mold to grow can severely damage a building and make its occupants ill. Often major litigation ensues—as happened in a case involving the Tulare County Courthouse in Visalia, Ca., built in the late 1980s. Led by a state district judge, county employees filed suit against the county, seeking damages for personal injury caused by exposure to mold in the courthouse. The trial court held that the county was liable to the employees only for aggravation of their injuries caused by alleged fraudulent concealment of the condition of the courthouse. In this situation, however, (as often happens) the employees also sought other potential defendants in the designers, contractors, and subcontractors who worked on the building.

THE POLLUTION EXCLUSION

This litigation over "toxic mold" presents unique insurance coverage issues for contractors. A contractor's primary "litigation insurance" is the commercial general liability (CGL) insurance policy, which is usually issued on a standard form produced by the Insurance Services Office (ISO). Included in the form is a standard "pollution exclusion" that is frequently implicated in mold claims and relates to both bodily injury and property damage. The exclusion states that the insurance does not apply to the following

"Bodily Injury or Property Damage arising out of the actual, alleged, or threatened discharge, dispersal, release, or escape of pollutants . . ."

"Pollutants" is defined as any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. "Waste" includes materials to be recycled, reconditioned, or reclaimed.

Two major questions surround the pollution exclusion. The first is whether mold constitutes a "pollutant" as defined in the pollution exclusion. The second is whether the way in which exposure to the mold actually occurs is "a discharge, dispersal, release, or escape" under the exclusionary language.

Two major factors determine whether or not the pollution exclusion to a mold claim applies. The first is whether mold constitutes a "pollutant" as defined in the pollution exclusion. The second is whether the way in which exposure to the mold occurs constitutes a "discharge, dispersal, release, or escape" under the exclusionary language.

KEY LANGUAGE IN COURT CASES

Very few courts have directly addressed the issue of insurance coverage for mold under liability policies. Those that have done so for mold or similar issues seem hesitant to apply the standard pollution exclusion; they are unsure whether mold constitutes a "pollutant" that is "discharged" or "dispersed." In an early case, a Wisconsin court concluded that mold from water vapor trapped in the walls did not constitute a "release" of contaminants, but rather was formed over time by environmental conditions.[1]

In a similar context, another court held that the pollution exclusion did not apply to a claim involving an inadequate HVAC system that caused excessive accumulation of carbon dioxide. The resultant poor air quality caused the plaintiffs' headaches, sinus problems, eye irritation, and extreme fatigue. The court held that the pollution exclusion was ambiguous when applied to injuries resulting from the breathing of carbon dioxide, "in every day activities gone slightly, but not surprisingly, awry."[2]

In yet another case involving the pollution exclusion, the plaintiffs sought damages for styrene fumes from a floor-resurfacing job that contaminated chicken in a processing plant. The court held that "discharge," "dispersal," "release," and "escape" were terms of art in environmental law and that indoor emissions did not constitute any of these terms as regulated by the pollution exclusion.[3]

On the other hand, other cases have found that indoor emissions of various substances, such as carbon monoxide fumes from an HVAC unit,[4] fumes from concrete curing chemicals,[5] and lead paint chips[6] *do* indeed constitute a "dispersal" or "discharge" under the pollution exclusion. Some argue that mold is like lead in the way it flakes out or otherwise eventually "disperses" into the air from plenums, ductwork, and walls. This line of argument maintains that mold (like lead) should be subject to the pollution exclusion.

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IS MOLD A "POLLUTANT"?

The companion issue to the "discharge, dispersal, release, escape" controversy relates to whether the pollution exclusion's definition of "pollutant" applies to mold. Some argue that the pollution exclusion has historically been directed at chemical or hazardous substances produced by industry (not live organisms such as mold). Nevertheless, the symptoms of mold inhalation may qualify mold as an "irritant" or "contaminant," and therefore as a "pollutant," under the pollution exclusion.

Still, some courts have hesitated to classify airborne mold, fungi, or other organisms as "pollutants." In a Florida case, former bank employees sued the building owner, charging that the negligent design, maintenance, installation, and repair of the HVAC system led to airborne molds, fungi and yeasts that made them sick. The owner tendered its defense to its CGL carrier which denied coverage based on—among other things—the pollution exclusion. The trial court found the policy to be ambiguous because it did not define "pollutant." In the absence of another definition, the term was interpreted according to its popular meaning: Broadly defined, the term can include naturally occurring substances—even dust. Narrowly defined, it includes only extreme toxins such as nuclear waste. The court chose the narrow definition and ruled in favor of the insured.[7]

Another case that has attracted considerable attention for the way it addressed the issue of microorganisms as pollutants is Keggi v. Northbrook Property & Casualty Insurance, a case in which the plaintiff became seriously ill after drinking water from a public water system that was contaminated with fecal coliform bacteria.[8] The court refused to apply the pollution exclusion, stating that it was intended to preclude coverage for only widespread industrial pollution of the environment and not for all contact with substances that can be classified as pollutants. In addition, the court determined that the exclusion was only intended to deny coverage for cleanup operations ordered under environmental laws. Since the source of the bacteria was unknown, it could have resulted from causes unrelated to what is traditionally considered "environmental pollution."

Obviously, the court cases so far haven't definitively determined the proper application of the standard pollution exclusion. However, we do know that the standard pollution exclusion in the ISO CGL policy generally does not apply to property damage or bodily injury occurring within the "products-completed operations hazard," or after the work has been completed. (Work is deemed complete when all the work called for in the contract is finished or has been put to its intended use by the owner.) Therefore, the standard pollution exclusion will likely not apply to mold infestations that occur over time and after project completion.

NEW INSURANCE LANGUAGE THAT EXCLUDES COVERAGE FOR MOLD

Because of the standard pollution exclusion's limitations, many policies may contain provisions that broaden its scope to deny coverage for mold. One such exclusion is called the "Total Pollution Exclusion," a standard endorsement also promulgated by the ISO. Yet even this exclusion shares essentially the same definition of "pollutant" and requires a "dispersal" or "discharge" in the same manner as the standard ISO pollution exclusion discussed above. As such, the same issues relating to the status of mold as a "pollutant" and whether indoor circulation of spores constitutes a "discharge" or "dispersal" apply to this exclusion.

While standard ISO forms are still in the works, some insurers have adopted exclusions that state that the insurance does not apply to bodily injury or property damage arising out of or contributed to by any fungus, mildew, mold, or resulting allergens. Neither does it cover any costs associated with abatement, mitigation, remediation, or containment of mold.

NEW INSURANCE PRODUCTS TO DEAL WITH MOLD

Still other insurers are contemplating providing coverage for mold under pollution legal liability (PLL) policies or contractors pollution liability (CPL) policies, expressly extending the definition of "pollutant" to include "fungi"—bacterial matter that produces the release of spores or the spreading of cells, including mold, mildew, and viruses. However, it appears that such coverage may be provided only through a relatively small sublimit. Alternatively, in order to obtain a higher limit, an additional premium may be charged on a case-by-case basis. Still other carriers may not offer such coverage or enhancements at all.

CONTRACTOR BEWARE

The bottom line is that mold claims are serious business for insurance companies. Contractors are well advised to address this issue when their current CGL coverage is up for renewal. Ongoing coverage for mold may not be easily obtainable, especially in light of the hardening of the insurance market which will make insurance more expensive for all. It's likely that claims will be eventually excluded from coverage by standard CGL policies. Whether this happens because of court interpretations of the pollution exclusion, or because of additional mold exclusionary endorsements, it will become even more necessary for contractors to consider PLL or CPL policies.

Setting aside all issues relating to possible pollution and environmental effects, the root of a mold claim against a contractor is likely to remain the alleged construction defect which caused the water damage out of which the mold infestation arose. These are always hotly contested claims by insurers and they raise issues about whether the alleged defective workmanship constitutes an occurrence or property damage as defined in the CGL policy, and whether the so-called "business risk" exclusions apply. Basically, these exclusions are designed to ensure that the policy does not provide coverage to a contractor for risks such as faulty workmanship which are within the contractor's own control. However, these exclusions are often not held to apply where the allegedly defective work damages other nondefective components of the work. As such, mold growing on drywall, or inside a wall, may in fact be covered as property damage to other work.

But whatever issues are involved, once a contractor is hit with one of these claims, the first thing to do is report it promptly to the insurance company and aggressively pursue coverage.

—By Patrick J. Wielinski. *Patrick Wielinski is a lawyer in the Fort Worth, Texas, office of the law firm of Haynes and Boone, LLP. He practices in the areas of construction and insurance law and has spent his career advising clients on contract, insurance coverage, and risk management issues.*

FOR MORE INFORMATION

Contact Patrick Wielinski. Call him at (817) 347-6623 or e-mail him at wielinsp@haynesboone.com

ENDNOTES

1 Leverence v. USF&G, 462 N.W.2d 218 (Wis. App. 1990).

2 Donald v. Urban Land Interests, Inc., 564 N.W.2d 728 (Wis. 1997).

3West America Ins. Co. v. Tufco Flooring East, Inc., 409 S.W.2d 692 (N.C. App. 1991).

4 Bernhardt v. Hartford Fire Ins. Co., 102 Md. App., 648 A.2d 1047 (1994)

5 Madison Constr. Co. v. The Harleysville Mut. Ins. Co., 557 Pa. 595, 735 A.2d 100 (1999).

6 Peace v. Djukic, 228 Wisc.2d 106, 596 N.W.2d 429 (1999); Auto-Owners Ins. Co. v. Hansen, 588 N.W.2d 777 (Minn. App. 1999).

7 Stillman v. Charter Oak Fire Ins. Co., No. 1949-CV (S.D. Fla. June 18, 1993), rev. on other grounds, Stillman v. Travelers, 88 F.3d 911 (11th Cir. 1996).

8 13 P.3d 875 (Ariz. App. 2000).

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TESTIMONY BEFORE THE

HOUSE COMMITTEE ON

BUSINESS, COMMERCE AND LABOR

TO: Representative Al Lane, Chairman
And Member of the Committee

FROM: Martha Neu Smith
Executive Director

DATE: February 21, 2002

RE: House Bill 2835 – Home Owner Warranty Act

Chairman Lane and Members of the Committee, my name is Martha Neu Smith and I am the Executive Director of the Kansas Manufactured Housing Association (KMHA) and I appreciate the opportunity to submit my comments. KMHA is a statewide trade association representing all facets of the manufactured housing industry (i.e. manufacturers, retailers, community owners, suppliers, finance and insurance companies and transporters).

The Manufactured Housing Industry is currently required by Kansas law to provide a one-year warranty on all new homes. The warranty runs one year from the date of delivery of the home and includes defects in materials or workmanship (K.S.A. 75-1221). In addition, in 1974 the federal government passed the National Manufactured Housing Construction and Safety Standards Act, which set forth a federal preemptive building code that all manufactured homes must be built to. Under this Act, the Secretary of Housing and Urban Development regulates and enforces the provisions of the Act including a provision of "*NOTIFICATION AND CORRECTION OF DEFECTS*". Attached.

Since the industry is already required by law to warranty our homes, I would respectfully request the following amendment to be included in the definition of "dwelling":

"*but such term shall not include manufactured housing as defined in K.S.A. 58-4202, and amendments thereto, subject to the federal manufactured home construction and safety standards established pursuant to 42 U.S.C. § 5403* "

Thank you for the opportunity to submit my comments in writing.

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(1) each prospective purchaser of a manufactured home before its first sale for purposes other than resale, at each location where any such manufacturer's manufactured homes are offered for sale by a person with whom such manufacturer has a contractual, proprietary, or other legal relationship and in a manner determined by the Secretary to be appropriate, which may include, but is not limited to, printed matter (A) available for retention by such prospective purchaser, and (B) sent by mail to such prospective purchaser upon his request; and

(2) the first person who purchases a manufactured home for purposes other than resale, at the time of such purchase or in printed matter placed in the manufactured home.

(h) All information reported to or otherwise obtained by the Secretary or his representative pursuant to subsection (b), (c), (f), or (g) which contains or relates to a trade secret, or which, if disclosed would put the person furnishing such information at a substantial competitive disadvantage, shall be considered confidential, except that such information may be disclosed to other officers or employees concerned with carrying out this title or when relevant in any proceeding under this title. Nothing in this section shall authorize the withholding of information by the Secretary or any officer or employee under his control from the duly authorized committees of the Congress. [42 U.S.C. 5413]

NOTIFICATION AND CORRECTION OF DEFECTS

Sec. 615. (a) Every manufacturer of manufactured homes shall furnish notification of any defect in any manufactured home produced by such manufacturer which he determines, in good faith, relates to a federal manufactured home construction or safety standard or contains a defect which constitutes an imminent safety hazard to the purchaser of such manufactured home, within a reasonable time after such manufacturer has discovered such defect.

(b) The notification required by subsection (a) shall be accomplished—

(1) by mail to the first purchaser (not including any ~~dealer~~ retailer or distributor of such manufacturer) of the manufactured home containing the defect, and to any subsequent purchaser to whom any warranty on such manufactured home has been transferred;

(2) by mail to any other person who is a registered owner of such manufactured home and whose name and address has been ascertained pursuant to procedures established under subsection (f); and

(3) by mail or other more expeditious means to the ~~dealer or dealers~~ retailer or retailers of such manufacturer to whom such manufactured home was delivered.

(c) The notification required by subsection (a) shall contain a clear description of such defect or failure to comply, an evaluation of the risk to manufactured home occupants' safety reasonably related to such defect, and a statement of the measures needed to repair the defect. The notification shall also inform the owner whether the defect is a construction or safety defect which the manufacturer will have corrected at no cost to the owner of the manufactured home under subsection (g) or otherwise, or is a defect which must be corrected at the expense of the owner.

(d) Every manufacturer of manufactured homes shall furnish to the Secretary a true or representative copy of all notices, bulletins, and other communications to the ~~dealers~~ retailers of such manufacturer or purchasers of manufactured homes of such manufacturer regarding any defect in any such manufactured home produced by such manufacturer. The Secretary shall disclose to the public so much of the information contained in such notices or other information obtained under section 614 as he deems will assist in carrying out the purposes of this title, but he shall not disclose any information which contains or relates to a trade secret, or which, if disclosed would put such manufacturer at a substantial competitive disadvantage, unless he determines that it is necessary to carry out the purposes of this title.

(e) If the Secretary determines that any manufactured home—

(1) does not comply with an applicable Federal manufactured home construction and safety standard prescribed pursuant to section 604; or

(2) contains a defect which constitutes an imminent safety hazard, then he shall immediately notify the manufacturer of such manufactured home of such defect or failure to comply. The notice shall contain the findings of the Secretary and shall include all information upon which the findings are based. The Secretary shall afford such manufacturer an opportunity to present his views and evidence in support thereof, to establish that there is no failure of compliance. If after such presentation by the manufacturer the Secretary determines that such manufactured home does not comply with applicable Federal manufactured home construction or safety standards, or contains a defect which constitutes an imminent safety hazard, the Secretary shall direct the manufacturer to furnish the notification specified in subsections (a) and (b) of this section.

(f) Every manufacturer of manufactured homes shall maintain a record of the name and address of the first purchaser of each manufactured home (for purposes other than resale), and, to the maximum extent feasible, shall maintain procedures for ascertaining the name and address of any subsequent purchaser thereof and shall maintain a record of names and addresses so ascertained. Such records shall be kept for each home produced by a manufacturer. The Secretary may establish by order procedures to be followed by manufacturers in establishing and maintaining such records, including procedures to be followed by distributors and ~~dealers~~ retailers to assist manufacturers to secure the information required by this subsection. Such procedures shall be reasonable for the particular type of manufactured home for which they are prescribed.

(g) A manufacturer required to furnish notification of a defect under subsection (a) or (e) shall also bring the manufactured home into compliance with applicable standards and correct the defect or have the defect corrected within a reasonable period of time at no expense to the owner, but only if—

(1) the defect presents an unreasonable risk of injury or death to occupants of the affected manufactured home or homes;

(2) the defect can be related to an error in design or assembly of the manufactured home by the manufacturer.

The Secretary may direct the manufacturer to make such corrections after providing an opportunity for oral and written presentation of views by interested persons. Nothing in this section shall limit the rights of the purchaser or any other person under any contract or applicable law.

(h) The manufacturer shall submit his plan for notifying owners of the defect and for repairing such defect (if required under subsection (g)) to the Secretary for his approval before implementing such plan. Whenever a manufacturer is required under subsection (g) to correct a defect, the Secretary shall approve with or without modification, after consultation with the manufacturer of the manufactured home involved, such manufacturer's remedy plan including the date when, and the method by which, the notification and remedy required pursuant to this section shall be effectuated. Such date shall be the earliest practicable one but shall not be more than sixty days after the date of discovery or determination of the defects or failure to comply, unless the Secretary grants an extension of such period for good cause shown and publishes a notice of such extension in the Federal Register. Such manufacturer is bound to implement such remedy plan as approved by the Secretary.

(i) Where a defect or failure to comply in a manufactured home cannot be adequately repaired within sixty days from the date of discovery or determination of the defect, the Secretary may require that the manufactured home be replaced with a new or equivalent home without charge, or that the purchase price be refunded in full, less a reasonable allowance for depreciation based on actual use if the

Note: Heading ranking is Section. (a), (1), (A), (i), (I)

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LEGISLATIVE TESTIMONY

February 20, 2002

TO: Members of the House Business, Commerce and Labor Committee

FROM: Whitney Damron, Kansas Bar Association Lobbyist

RE: House Bill 2835

My name is Whitney Damron, and I am representing the Kansas Bar Association. The KBA is a diverse organization with 6,000 members, including judges, prosecutors, plaintiffs' attorneys, defense attorneys, etc. We have no position on House Bill 2835 as a whole, however, we would like to voice our opposition to a provision contained in this bill.

In Section 6, part (b), line 27, the bill calls for a "loser pays" rule in which the losing party pays for the winning party's attorney fees. This is contrary to the general rule of awarding attorney fees in Kansas.

The Kansas Bar Association has traditionally opposed provisions that call for a "loser pays" rule. Such a provision could chill plaintiffs who have no access to justice without contingent fee availability and attorneys willing to accept this risk.

The KBA would like to suggest an amendment to House Bill 2835 that removes the "loser pays" provision. The amendment would delete language in Section 6, part (b), line 27, beginning with "in any action . . .," to line 29, ending with ". . . reasonable attorney fees." The attachment further illustrates the Kansas Bar Association's proposed amendment.

I thank you for you time and consideration on this issue and ask that you embrace the Kansas Bar Association's amendment to House Bill 2835.

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thereto, may be waived for the defect specifically identified in the waiver instrument, after full oral disclosure of the specific defect. The waiver statement shall be in writing and shall disclose in specific detail:

(1) The specific defect;

(2) the difference between the fair market value of the dwelling without the presence of defect and the fair market value of the dwelling with the defect, as determined and attested to by an independent appraiser, contractor, insurance adjuster, engineer or any other similarly knowledgeable person selected by the vendee;

(3) the price reduction of the dwelling;

(4) the date the construction of the dwelling was completed;

(5) the legal description of the dwelling;

(6) the consent of the vendee to the waiver; and

(7) the signatures of the vendee, the vendor and two witnesses.

(d) No waiver made pursuant to subsection (c) shall apply to more than one major construction defect in a dwelling. No waiver made pursuant to subsection (c) shall be effective unless filed with the registrar of deeds.

Sec. 6. (a) Upon breach of any warranty imposed by section 2, and amendments thereto, the vendee shall have a cause of action against the vendor for damages arising out of the breach or for specific performance. The vendee shall be entitled to:

(1) The amount necessary to remedy the defect or breach; or

(2) the difference between the fair market value of the dwelling without presence of the defect and the fair market value of the dwelling with the defect.

(b) In addition to actual damages, ~~in any action brought under sections 1 through 10, and amendments thereto, the court shall assess against the vendor the costs of the action, including reasonable attorney fees. The~~ the court may also assess punitive damages if the court finds that the breach of such warranty was willful, deceitful or based upon fraud.

Sec. 7. Upon breach of any warranty imposed by section 3, and amendments thereto, the owner shall have a cause of action against the home improvement contractor for damages arising out of the breach or for specific performance. Damages shall be limited to the amount necessary to remedy the defect or breach. In addition to actual damages, the court shall assess against the home improvement contractor the costs of the action; including reasonable attorney fees. The court may also assess punitive damages if the court finds that the breach of such warranty was willful, deceitful or based upon fraud.

Sec. 8. Each statutory warranty provided for in sections 2 and 3, and amendments thereto, shall be in addition to all other warranties imposed by law or by agreement. Each remedy provided in sections 6 and 7, and