

MINUTES OF THE HOUSE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Michael R. O'Neal at 3:30 p.m. on March 7, 2002 in Room 313-S of the Capitol.

All members were present except:

Representative Andrew Howell - Excused
Representative Ward Loyd - Excused
Representative Rick Rehorn - Excused
Representative Candy Ruff - Excused

Committee staff present:

Jerry Ann Donaldson, Department of Legislative Research
Jill Wolters, Department of Revisor of Statutes
Sherman Parks, Department of Revisor of Statutes
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:

Gorden Smith, Hutchinson Police Department
Tuck Duncan, Kansas Wine & Spirits Wholesalers Association
Pedro Irigonegaray, Kansas Trial Lawyers Association

Hearings on **HB 2899 - Providing immunity from liability for parties participating in a program that provides alcohol level indicators**, were opened.

Gorden Smith, Hutchinson Police Department, requested that the bill be introduced, appeared as a proponent. Evidence shows that a great number of people who drink do not know or realize that they are over the legal limit of liquor consumption. If they knew they probably would choose not to drive. With the introduction of the Intoxilizer Stick into drinking establishments, patrons would be made aware of their consumption and would hopefully take appropriate action and not drive home. (Attachment 1)

Tuck Duncan, Kansas Wine & Spirits Wholesalers Association, appeared in support of the bill and stated that this would be most effective with those who are noticeable intoxicated to convince them that they shouldn't drive. (Attachment 2)

Pedro Irigonegaray, Kansas Trial Lawyers Association, agreed that something needs to be done with those who drink and drive, but because it gives blanket immunity, which is not in the best interest of Kansans, he opposed the bill. (Attachment 3)

Hearings on **HB 2899** were closed.

HB 2867 - Right of certain aliens to transfer or inherit real property, repealer

Representative Lloyd made the motion to report HB 2867 favorably for passage. Representative Long seconded the motion. The motion carried.

Committee minutes from February 6, 7, 11 and 12 were distributed.

The committee meeting adjourned at 6:00 p.m.



HUTCHINSON POLICE DEPARTMENT TRAFFIC UNIT

210 W. 1ST HUTCHINSON, KANSAS 67501

PHONE NUMBERS:
OFFICE: (620) 694-2854 SEATBELT SAFETY: (620) 694-2853
FAX: (620) 694-2862

Kansas State Judiciary Committee;

Dear Mr. Chairman and Committee Members,

Project Last Call was started September 3, 2001 and was designed as a pilot program to start in the City of Hutchinson.

The program was designed as an educational program for the general public. To help them to become aware of their alcohol consumption limitations. This program provide alcohol detection sticks to the local drinking Establishment to be distributed to their patrons at random.

We know that at least ½ of all car crashes are alcohol related, and we also believe that a large portion of the drivers that drive under the influence of alcohol, are probably not aware that they are over the legal limit allowed by the State of Kansas. I also believe that if a person is made to know that they are over the limit. They would probably not drive home but elect to have someone to take them home or call someone to come and get them. This was the whole purpose behind Project Last Call.

After the program got under way. Legal questions started to arise about liability to the program sponsors. (i.e. Budweiser, Coors, business owners, the makers of the breath sticks and the Government agencies) that were involved with this program. This caused us to have to stop this worthy program and turn to you for your help.

Please take a look at this program and consider passing HB # 2899. We may never be able to Stop Drinking and driving completely. But we can do what ever it takes to reduce it. And I believe that Education is going to be a greater deterrent. And this is an idea whose time has come.

Thank you.

Sincerely,
Gordon Smith

House Judiciary
Attachment 1
3-7-02



HUTCHINSON POLICE DEPARTMENT TRAFFIC UNIT

210 W. 1ST HUTCHINSON, KANSAS 67501

PHONE NUMBERS:

**OFFICE: (620) 694-2854 SEATBELT SAFETY: (620) 694-2853
FAX: (620) 694-2862**

Kansas State Judiciary Committee;

Dear Mr. Chairman and Committee Members,

I believe that Project Last Call would be a great benefit to the Citizens of the State of Kansas.

If HB# 2899 were passed. I do not think that we would have a problem in getting sponsors to participate in This program. This program would be a way to show that the local law enforcement agency, and alcohol industry Along with the cooperation of the makers (tetrad Labs) of the breath sticks are willing to work together as a team To reduce drinking and driving in the State of Kansas.

I also believe that the passing of HB#2899. Would open the door for other States to take a serious look at this program for their state.

I personally look forward to the day that alcohol would not be the #1 reason for car crashes and the #1 Reason for crash fatalities in the State of Kansas and possibly this Country.

Thank you.

Sincerely,
Gordon Smith



HUTCHINSON POLICE DEPARTMENT TRAFFIC UNIT

210 W. 1ST HUTCHINSON, KANSAS 67501

PHONE NUMBERS:

OFFICE: (316) 694-2854 SEATBELT SAFETY: (316) 694-2853

FAX: (316) 694-2807

PROJECT: "LAST CALL"

Dear Business Owner/Manager,

The Hutchinson Police Department, Budweiser Beer and Tetrad Labs (makers of Last Call Breath Sticks) will be sponsoring a new project in the City of Hutchinson. This will be a pilot program that will start Labor Day Weekend 2001 and last to Labor Day weekend 2002.

We are looking for establishments, such as yours, to participate in this program called "Project: Last Call." This is a Public Awareness Program, designed to educate the general public and reduce drinking and driving. Over half of all Car Crashes are alcohol related and over half of all people that drink and drive do not realize that they have consumed the limit or are over the legal limit allowed (0.08 % B.A.C.) in the State of Kansas. "PROJECT: LAST CALL" will place in your establishment disposable breath sticks, to be given to those persons that the program will target.


We will be meeting at the Law Enforcement Center (210 w.1st Hutchinson Kansas) in the auditorium on August 9th 2001 at 6pm. There will be a representative from the Hutchinson Police Department, Budweiser Beer and Tetrad Labs on hand to answer any questions you may have. Also there will be an Attorney present to answer any of your legal questions. We will also be conducting a demonstration of the proficiency of the breath sticks.

We would appreciate it if you would mark your calendar and plan on participating in this new program.

Please contact us at:

(620) 694-2853 or 2854 to advise whether you will be attending the meeting.

Thank you.

Sincerely,
PTLM. G.A. Smith
Hutchinson Police Department


Input From: Vic's, 1514 E 4th - A Drinking Establishment
P. O. Box 1828, Hutchinson, KS

Subject: Project Last Call

We at Vic's feel very strongly in favor of using "Project Last Call" in our establishment.

While we were able to have "Last Call" in our drinking establishment we offered it to patrons whom we felt should not drink anymore and then drive. If their test showed they had more than the legal limit we volunteered to call them a taxi or we found them a ride with someone who had not been drinking.

"Last Call" also was a benefit to us, when patrons come in and were already intoxicated we suggested they try the "Last Call" test, if they tested over the limit we did not serve them plus offered them a call for the taxi.

Another use we had for the "Last Call" was at any time we felt we had served a patron all he should have we offered the patron the "Last Call" test and then stopped serving alcohol if their test showed over legal limit and suggested something non-alcohol.

This program needs to be used if used properly and not treated as a game. Common sense will make this a good benefit for the community and the owners/operators of all establishments serving alcohol.
Thank you, Vic + Clara Mitchell
Owners / Operators of Vic's

JUHNKE & BRETZ
Individual Legal Practitioners

Stanley R. Juhnke
Matthew L. Bretz*

*Licensed in Kansas and California

400 West First
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Hutchinson, Kansas 67504-0567

(620) 669-1022
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October 17, 2001

Officer Gordon Smith
Hutchinson Police Department
210 West First
Hutchinson, KS 67501

Re: Project Last-Call

Dear Officer Smith:

Thank you for taking the time to speak with me concerning "Project Last-Call". Your ideas sound great, and may well save lives if the Project could be implemented.

You have asked that I, as a personal injury lawyer, evaluate your Project to look at the potential for various liability claims which might be made as a result of use of the alcohol level indicators at a bar or nightclub and then later involvement in an accident. I do see some potential areas of liability, and will try to discuss the same for you based on the following hypothetical situation.

Joe Ilikethetaste, a rarely employed painter, goes to Friendly Neighborhood Tavern for a few adult beverages. Over the course of a few hours he has several drinks. As Joe is leaving the Tavern, the bartender stops Joe and tells Joe that the Tavern is participating in Project Last-Call and that they will give him an alcohol level indicator to see if he is okay to drive. Joe Ilikethetaste, in his intoxicated state, thinks that it sounds good, because he doesn't want to get a DUI. So Joe takes the test and blows in the tube. He waits a couple of minutes and the tester doesn't turn "greenish blue", so he concludes that his BAC must be under .08 and that he must be okay to drive.

Joe Ilikethetaste gets in his '72 Camaro, which (not surprisingly) has only the statutory minimum liability limits, and squeals the tires as he pulls out of the parking lot. A few blocks later, he doesn't see Jane Nowcrippled who is walking across the street in the crosswalk at an intersection. Joe hits Jane, causing loss of one leg and closed head injuries which will prevent her continued work as a high-paid executive.

As it turns out, when Joe Ilikethetaste is tested at the hospital, his BAC turns out to be .11 and he is charged with, and found guilty of, driving under the influence of alcohol.

Having been in the hospital for two months, and in the rehabilitation center for six months, Jane has \$650,000.00 in medical bills. Jane won't work again so has lost \$80,000.00 per year in income and has 25 more years until she would have reached retirement age. In addition, long-term care at a nursing home will cost \$3,800.00 per month and she has a 35 year life expectancy.

Jane's husband and her two young children wheel drooling Jane into my office and they want to sue.

If this family were to come into my office and ask for my evaluation, there are a number of potential target defendants that I see.

The first potential target is, of course, Joe Ilikethetaste. However, Joe only has minimum liability limits. Further, given Joe's employment status, garnishing his wages would be pointless and we all know he would probably file for bankruptcy. We would probably take Joe's policy limits and use the money to finance claims against the other deeper-pocketed targets.

So it immediately becomes apparent that we need to pursue a target that has deep pockets. The next targets that I would look at would be the Tavern and bartender. Now, I know that Kansas did away with dram shop liability, so I can't pursue a claim against the Tavern and bartender simply because they served intoxicating beverages. But I can sue the bartender for telling Joe that since Joe passed the test, Joe was okay to drive.

I would probably throw in a claim that the bartender negligently performed the test, or that the Tavern owner was negligent for overworking the bartender such that the bartender did not have enough time to properly administer the test. (Recognize that the test requires the patron to wait 15 minutes after the last alcoholic drink, some rather technical test-taking procedures, and then another 2 minutes of waiting for the results.) Regardless of whether the Tavern owner was independently negligent, the Tavern owner would be liable for the negligent actions of the employee. Either way, we now have a deep pocket as a result of the Tavern's involvement in Project Last-Call.

Given the enormity of the client's injuries and damages, even the Tavern owner probably would not have enough assets or insurance to pay all of the claims. Accordingly, we continue looking for deep pockets.

The next target would be Tetrad Labs, LLC, which sells the "Last Call Alcohol Level Indicators". We could pursue claims for negligence/strict liability in the design or manufacture of the Indicator, negligence/strict liability in the instructions provided with the Indicator, or even negligence/strict liability with the warnings which accompany the Indicators.

In all likelihood, we could even use Joe Ilikethetaste and the bartender to prove claims against the manufacturer. It would serve the bartender's interests to testify that he and the drunk followed the

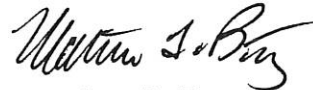
instructions, but that the Indicator indicated that Joe's BAC was under .08. The bartender might testify that the instructions for using the Indicator were too complicated, or that following the instructions in a busy tavern is impractical if not impossible. There could also be disputes about the color of the Indicator, especially since a certain percentage of the population is color blind. Tetrad Labs might have a tough time defending any of these claims because it is unlikely that the bartender would have saved the Indicator and identified it as the specific one used by Joe.

The deepest pocket, by far, is the governmental entity which promoted and helped implement "Project Last-Call". Given the extent of Jane's injuries and damages, her attorney would have to do everything possible to try to pursue a claim against the governmental entity which promoted and helped implement the Project. Essentially, the argument would be that by implementing the Program, the governmental entity created the situation where Joe thought that he was safe to drive when, in fact, his BAC was over the legal limit.

In conclusion, I think that your ideas about Project Last-Call are great ideas which should decrease the number of drunk drivers and injured people. However, the Project might be used by injured people to try to get at deeper pockets than the typical drink driver has.

If you have any questions regarding this matter, please do not hesitate to call.

Sincerely,



Matthew L. Bretz

Important Facts You Should Know

Alcohol Related Facts from year 2000 in the State of Kansas

3,487 Crashes
7,305 Persons Involved
2,469 Injuries
78 Fatalities
\$382 Million in Societal Costs

- ⇒ Approximately two in every five Kansans will be involved in an alcohol-related crash sometime in their lives. (KDOT)
- ⇒ One of every three people killed in an alcohol-related crash is not the drinking driver.
- ⇒ Approximately seven (7) persons are injured daily in Kansas as a result of an alcohol-related crash. (KDOT)
- ⇒ Out of the 2,957 children under the age of 10 involved in an alcohol-related crash since 1990: 857 injured 22 were killed. Approximately 40% of the children involved were riding with a drunk driver.

New DUI laws include: DUI offenders who have a child under the age of 14 in the car will receive one month extra imprisonment.

- ⇒ Most alcohol-related crashes occurred on Sunday between 2:00 A.M. and 3:00 A.M. during 2000. (KDOT)

Information is useful when conducting Sobriety Check Points.

- ⇒ Most alcohol-related crash fatalities occurred on Saturday between midnight and 1:00 A.M. (KDOT)
- ⇒ Based on wages lost, medical expenses, insurance administration costs and property damage, alcohol-related traffic deaths and injuries in 1999 cost the people of Kansas more than \$122.7 million in direct costs. Nearly 30% of first-year medical costs end up being paid for by tax dollars. (NHTSA)
- ⇒ Impaired driving causes more violent deaths and injuries than any other crime in America. (NHTSA)
- ⇒ More than 20,000 drivers are arrested annually for DUI in Kansas. Approximately 10% of these arrested are under the age of 21.

Zero Tolerance Driver's License Suspension: The DUI Law states that anyone under the age of 21 with a BAC of .02 or greater but less than .08 on the first occurrence is changed from one year to 30 days and restricted for 330 days.

Underage Drinking or Possession Violation (KSA 41-727): This bill requires a 30 day driver's license suspension for a person under 21 found drinking or in possession of a cereal malt beverage or alcoholic liquor. If the person does not have a driver's license at the time of the offense they may not apply for one for a 30 day period following conviction.

Insurance companies rates increase at least 50% for minors who have been convicted of a DUI.

Overview

Alcohol plays an important and integral part in almost every society in the world. While not all alcohol usage is problematic, alcohol remains the most abused drug in history. In the United States, alcohol plays a part in half the automobile fatalities and nearly half of all industrial accidents. For employers, alcohol abuse accounts for two thirds of all substance abuse complaints and depletes a similar percentage from the health care benefit budgets of American companies. While the responsible, adult use of alcohol has its appropriate place in our society, an increasing number of public safety officials, corporate officers and small business managers are concerned about problems with alcohol abuse in the work place and in public places, particularly when the substance abuser is in control of a vehicle or heavy equipment. As a result, there is a demand for more effective detection of alcohol impairment, where possible, or of blood alcohol content (BAC) in individuals engaged in work or driving.

Traditional testing has centered on the testing of blood alcohol content rather than impairment, since impairment is significantly difficult to prove without highly specialized and specific evaluation of the subject. Generally, professionals in the testing field have found it advantageous and practical to test blood alcohol content and to rely on set levels of content in lieu of proof of impairment. Generally, .10% or .08% BAC levels have been used by legislators and jurists as the benchmark for the regulation of behaviors related to, or negatively affected by, alcohol. Unfortunately, these testing modalities (such as Breathalyzer) require highly specific and accurate instrumentation which is both expensive and immobile. As a result, alcohol testing has presented problems for testing professionals in both the public or private sectors. The high cost of sensitive equipment that cannot be transported has meant that most private sector needs for alcohol testing have gone unfilled until the introduction of disposable breath testing devices.

The BreathScan® Alcohol Detector

The BreathScan® Alcohol Detector is considered by many to be the best example of these devices. BreathScan® is a portable, disposable alcohol detector with an extremely low unit cost that makes it suitable for general use in the workplace or other remote locations. Various independent agencies have conducted validation studies that examined the BreathScan® instrument's accuracy and suitability as a preliminary screening device when used to determine probable cause for more extensive testing. The following is a survey of their findings.

U.S. Department of Transportation, National Highway Traffic Safety Administration

The NHTSA looked at the use of BreathScan® specifically as an aid to police officers in making an objective evaluation in drunk driving cases. While not intended as an evidentiary test, the NHTSA found BreathScan® suitable as a first line of BAC quantification. The NHTSA determined that the BreathScan® alcohol detector was able to accurately distinguish between alcohol levels below and above .10% BAC (or .08% BAC for BreathScan® units calibrated at the lower BAC level). Several tests at different room temperatures were performed in accordance with established methodology. Since evaluation specifications for preliminary test devices do not exist, the NHTSA used the guidelines "Specifications for Evidential Breath Testers", specifically the precision and accuracy tests, the blank reading test, the breath sampling test, the ambient temperature test and mobile test from existing NHTSA guidelines. Using standard aqueous alcohol solutions contained in 34-degree thermostats, researchers duplicated breath alcohol concentrations in controlled conditions. This breath sampling test was designed to yield maximum sampling consistency and efficiency. The BreathScan® alcohol detector contains a crystalline preparation which is hermetically sealed in a glass ampoule. The subject breathes through the tube so as to deliver approximately two liters of breath over the crystals. At .00% BAC (no alcohol present) the crystals remain uniformly yellow. At .05% BAC, some of the crystals turn green. Above .10% BAC, virtually all the indicators showed all the crystals turned green. At precisely .10% most of them were fully changed and a small number were partially changed with only a few yellow crystals remaining. This indicates a borderline situation and should be treated as a caution to the operator. The DOT testing was conducted with indicators calibrated for full crystal change at .10% BAC. BreathScan® alcohol testers are also available calibrated for the .08% BAC level, a figure becoming more widely adopted in many states as the legal limit for the operation of a motor vehicle. No difference in test results was noted when samples were compared under incandescent and fluorescent lighting.

W.R. Grace & Company

Fortune 500 company, W.R. Grace & Company conducted testing at their Davison Chemical Division and produced results that concurred with DOT findings. They found that small beds of the chemical agent in BreathScan® accurately distinguish between alcohol concentrations representing BAC levels of .00%, .05% and .10%. In their testing simulation, Grace used a Draeger Mark IIA Alcohol Breath Simulator. The simulator passes air through a constant temperature bubbler containing a predetermined concentration of alcohol and water. The alcohol laden air is then passed through the BreathScan® device for ten seconds, disconnected and allowed to sit for two minutes before evaluation. At .00% BAC, all the crystals retained their yellow coloration. As low as .02% BAC, some discoloration of crystals from yellow to blue-green occurred. At .06% BAC, substantial color change occurred to the entire sample, with yellow residue. At .08% BAC, there was less yellow remaining and at .10% BAC almost all the original yellow coloration had disappeared. Grace tested samples of the testing agent packed in both glass tubes and in BreathScan®'s patented glass ampoules with similar results except that the color change produced in the glass ampoules appeared to be slightly less intensive. They also noted a slight concentration of colored crystals near the intake end of the ampoule.

Colorado Department of Health

The Colorado Department of Health's Alcohol Test Program tested the BreathScan® device to determine its suitability for use by law enforcement personnel in traffic stops. They noted that the unique packaging provided by the BreathScan® ampoule effectively prohibits the contamination of the crystals until the device is ready to be used. They also noted that the BreathScan® alcohol detector was suitable for screening only, and should be backed up by confirmation testing of bodily fluids. Colorado's testing is significant in that it was conducted on live subjects for the .00% BAC benchmark. A SmithWesson Mark IIA breath alcohol simulator was used to test alcohol concentrations. Testing was conducted at 34-degree centigrade, as in the previous two tests, and results were checked using gas chromatography. Testing was conducted at .85% BAC and .108% BAC. At both levels significant discoloration of the crystals occurred, enough to indicate that a subject's BAC was in the impaired range and they found BreathScan® to be suitable for use as screening device prior to further testing. In fact, the chief of the testing program noted that BreathScan® was one of the better products they had evaluated and was well suited for the market it is intended to serve.

Denver Police Department

Field studies of BreathScan® were conducted by the Denver, Co. Police Department. Officers used BreathScan® at traffic stops as a screening for drunk drivers and found a 98% accuracy correlation. Of 200 tests of truck drivers, only four BreathScan® tests were inconclusive. The Department considered this an excellent rate of accuracy for a portable testing device.

Barbara Davis Center for Childhood Diabetes

Of concern to medical professionals is the possibility that physiological conditions not related to alcohol use might affect the test, particularly when testing diabetics. Diabetics produce breath ketones, but when tested on the largest degree of ketonemia on severely ill patients when admitted to intensive care, at no time did the ketones discolor the BreathScan® crystals. The testing at the Davis Center rules out the chance of a false positive for acetone or ketones when checking for breath alcohol.

Drug Control and Teaching Center, King's College, London

Results of the King's College study, conducted on .08% BAC testers, support manufacturers' claims that BreathScan® devices are capable of accurately detecting breath alcohol concentrations at .08% BAC.

In a recent study, using a test protocol similar to the one developed by Dr. David Cowan of King's College, London, an independent laboratory measured the effectiveness and reproducibility of the indicator color change at claimed alcohol concentration levels. Their evaluation conclusion supported the claim that BreathScan® testers are capable of detecting breath alcohol concentrations of .02%, .04%, .08% and .10%.

Evaluation of BreathScan® Alcohol Detector

January 3, 2000

**Donald R. Wilkinson, Ph.D.
Toxtrap, Inc.
1059 Horsepond Rd.
Dover, DE 19901**

**(302) 736-0202
FAX (302) 736-3662
toxtrap@aol.com**

Toxtrap, Inc.
1/03/00

BreathScan® is a disposable breath alcohol indicator intended to provide a reliable indication of alcohol present in exhaled breath of test subjects. The device is intended for use as a single, cost-effective breath alcohol screen and therefore need not meet the specifications expected of an evidential breath-testing device.

Twenty-five tubes from each of four batches were submitted for evaluation. Each batch was designed to test different breath-alcohol concentrations. The tubes were evaluated in groups of five on five individual occasions. The devices were evaluated at the value equivalent to the ethanol blood concentration stated on their label. (A concentration of 0.04% indicates an equivalent of 0.04 g. alcohol/100 mL blood, or 0.04 g alcohol/210 L breath.)

EXPERIMENTAL:

A simulator, thermostatically controlled at 34.0 +/- 0.1 °C, was used to produce constant samples of simulated breath alcohol concentrations of 0.02%, 0.04%, 0.08% and 0.10% (g alcohol/100 mL blood or g. alcohol/210 L breath) at a flow of 12 liters/minute. Standard simulator solutions were supplied by Toxtrap, Inc. Each device tested was attached to the simulator and the simulator's headspace blown through the device for ten seconds. The device was removed, shaken and observed one minute, two minutes and three minutes after exposure. The color of the crystals were recorded after each observation. Observations were made in white light.

KEY:

- +++++ Approximately 95% of crystals had turned blue/green/white
- ++++ Approximately 80% of crystals had turned blue/green/white
- +++ Approximately 60% of crystals had turned blue/green/white
- ++ Approximately 40% of crystals had turned blue/green/white
- + Approximately 20% of crystals had turned blue/green/white
- ? No color change observed. Crystals remained yellow
- NFC No further color change observed

COMMENTS:

All readings are subjective. The color change was normally observed as a gradient along the tube. There were always some unchanged or more pale yellow crystals present in the device.

The tests described in this document are not intended to imply approval of Toxtrap, Inc. of the application of BreathScan® devices for blood ethanol determination

**Toxtrap, Inc.
1/03/00**

Evaluation of BreathScan® Alcohol Detector

At the request of Mr. J. Robert Zettl, Forensic Consultants, Inc. 1500 East Mineral Place, Littleton, Co, Toxtrap, Inc. completed an evaluation of four batches of BreathScan® alcohol detectors consisting of twenty five tubes per batch. Each batch was designed to indicate a different alcohol level (0.02%, 0.04%, 0.08% and 0.10%). The test protocol used was similar to the protocol developed by Dr. David Cowan of Kings College London and used in a previous evaluation by Duo Research, Inc. in April 1992. This evaluation was carried out on December 22, 1999 and December 29, 1999.

The purpose of the evaluation was to measure effectiveness and reproducibility of the indicator color change at claimed alcohol concentration levels. On five separate occasions, five randomly selected tubes from each batch were exposed to its corresponding simulated breath containing either 0.02%, 0.04%, 0.08% or 0.10% alcohol. Readings were taken in one, two and three minutes following exposure.

Four different tube batches were evaluated:

- A. Batch A081699 (0.02%)
- B. Batch B040899 (0.04%)
- C. Batch C061699 (0.08%)
- D. Batch D060899 (0.10%)

SUMMARY OF RESULTS AFTER TWO MINUTES OF EXPOSURE:

	95% change		80% change	
	<u>Number</u>	<u>Percent</u>	<u>Number</u>	<u>Percent</u>
Device A. Batch A081699 (0.02%)	16	64%	9	36%
Device B. Batch B040899 (0.04%)	13	52%	12	48%
Device C. Batch C061699 (0.08%)	6	24%	19	76%
Device D. Batch D060899 (0.10%)	13	52%	12	48%

In all cases 80% or more of indicator crystals produced a color change. At this level there is an obvious color change indicating presence of alcohol concentration no lower than the level tested.

Toxtrap, Inc.
1/03/00

CONCLUSIONS:

From this evaluation it was observed that each batch of breath alcohol detectors produced a maximum (95%) or near maximum (80%) color change within the prescribed two minutes of exposure to simulated breath alcohol concentrations at their labeled detection levels. These results support the manufacturer's claim that these devices are capable of detecting breath alcohol concentrations of 0.02% (Device A), 0.04% (Device B), 0.08% (Device C) and 0.10% (Device D).

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	++	++++	NFC
2	+++	++++	NFC
3	+++++	+++++	NFC
4	+++++	+++++	NFC
5	+++	++++	NFC

Table D5: Batch D060899 (0.10%)

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	++++	+++++	NFC
2	++++	+++++	NFC
3	+++++	NFC	NFC
4	+++++	NFC	NFC
5	+++	++++	NFC

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	+++++	+++++	NFC
2	++++	++++	NFC
3	++++	++++	NFC
4	++++	+++++	NFC
5	++++	++++	NFC

Table D2: Batch D060899 (0.10%)

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	+++	++++	NFC
2	+++	++++	NFC
3	+++++	NFC	NFC
4	++++	++++	NFC
5	+++++	NFC	NFC

Table D3: Batch D060899 (0.10%)

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	+++	++++	NFC
2	+++	++++	NFC
3	++++	+++++	NFC
4	++++	+++++	NFC
5	+++	++++	NFC

Table D4: Batch D060899 (0.10%)

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	+++	++++	NFC
2	++++	++++	NFC
3	++++	NFC	NFC
4	++++	++++	NFC
5	++++	++++	NFC

Table C4: Batch C061699 (0.08%)

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	+++	++++	NFC
2	+++	++++	NFC
3	++++	NFC	NFC
4	+++	++++	NFC
5	++++	NFC	NFC

Table C5: Batch C061699 (0.08%)

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	+++++	+++++	NFC
2	+++++	NFC	NFC
3	++++	++++	NFC
4	++++	NFC	NFC
5	++++	++++	NFC

Table D1: Batch D060899 (0.10%)

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	+++	++++	NFC
2	+++	++++	NFC
3	+++	++++	NFC
4	+++++	NFC	NFC
5	++++	+++++	NFC

Table C1: Batch C061699 (0.08%)

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	++++	++++	NFC
2	+++	++++	NFC
3	+++++	+++++	NFC
4	+++++	NFC	NFC
5	+++++	NFC	NFC

Table C2: Batch C061699 (0.08%)

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	++++	++++	NFC
2	++++	+++++	NFC
3	++++	++++	NFC
4	+++	++++	NFC
5	+++	++++	NFC

Table C3: Batch C061699 (0.08%)

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	++++	++++	NFC
2	+++++	+++++	NFC
3	+++++	+++++	NFC
4	++++	++++	NFC
5	+++++	+++++	NFC

Table B3: Batch B040899 (0.04%)

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	+++++	+++++	NFC
2	+++++	NFC	NFC
3	++++	+++++	NFC
4	++++	+++++	NFC
5	+++++	NFC	NFC

Table B4: Batch B040899 (0.04%)

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	+++	++++	NFC
2	+++	++++	NFC
3	+++	++++	NFC
4	++++	NFC	NFC
5	++++	NFC	NFC

Table B5: Batch B040899 (0.04%)

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	+++++	NFC	NFC
2	+++	++++	NFC
3	+++++	+++++	NFC
4	+++++	+++++	NFC
5	++++	NFC	NFC

Table A5: Batch A081699 (0.02%)

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	++++	+++++	NFC
2	+++++	NFC	NFC
3	++++	++++	NFC
4	+++++	NFC	NFC
5	+++	++++	NFC

Table B1: Batch B040899 (0.04%)*

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	++++	++++	NFC
2	++++	++++	NFC
3	+++++	+++++	NFC
4	++++	++++	NFC
5	+++++	+++++	NFC

Table B2: Batch B040899 (0.04%)*

Table A1: Batch A081699 (0.02%)

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	+++++	+++++	NFC
2	+++++	+++++	NFC
3	++++	++++	NFC
4	++++	++++	+++++
5	+++++	+++++	NFC

Table A2: Batch A081699 (0.02%)

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	++++	++++	NFC
2	++++	+++++	NFC
3	+++	++++	NFC
4	++++	++++	NFC
5	+++	++++	NFC

Table A3: Batch A081699 (0.02%)

TUBE NUMBER	ONE MINUTE	TWO MINUTES	THREE MINUTES
1	++	++++	NFC
2	+++	+++++	NFC
3	++++	++++	NFC
4	++++	++++	NFC
5	+++++	NFC	NFC

Table A4: Batch A081699 (0.02%)

March 7, 2002

To: House Judiciary Committee

From: R.E. "Tuck" Duncan 
Kansas Wine and Spirits Wholesalers Association

Re: HB2899

The Kansas Wine and Spirits Wholesalers Association supports HB 2899. Incentives to reduce impaired driving benefit all Kansans. The old maxim is that it is better to use a carrot instead of a stick. The legislature has adopted a number of *stick* laws. This *carrot* may hopefully reduce the use of the *stick* in the future. Absent such incentives it is doubtful products such as "Last Call" will be widely used.

Thank you for your attention to and consideration of this matter.

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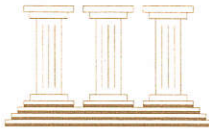
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House Judiciary
Attachment 2
3-7-02



KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Members of the House Judiciary Committee
FROM: Pedro Irigonegaray, President, Kansas Trial Lawyers Association
DATE: March 7, 2002
RE: HB 2899

Representative O'Neal and members of the committee, I am Pedro Irigonegaray, president of the Kansas Trial Lawyers Association. Thank you for this opportunity to present testimony in opposition to HB 2899.

As an attorney in practice for nearly 30 years, I am all too familiar with the devastation caused by drunk driving. I and many of my colleagues have represented individuals who have been injured or killed by drivers who chose to drink and drive. As a former special assistant to the Attorney General's Office and to several Kansas counties, I have also prosecuted drunk drivers. Speaking on behalf the Kansas Trial Lawyers Association, I can assure you that no organization believes more strongly that drunk drivers must be held accountable for their actions.

In fact, we believe that accountability is essential to maintaining our free society and a fair and just system of laws. Those who seek immunity, seek freedom from responsibility and accountability. Unfortunately, freedom from accountability is exactly what HB 2899 proposes. Under this bill, any program or its members that provide disposable breathalyzers for the purpose of educating the public about alcohol consumption cannot be held liable for the actions of its program participants. That means that persons who provide the device and/or who instruct participants on its use cannot be held accountable. Nor can the manufacturer or distributor who supplied the breathalyzers—even if the device is defective and contributes to the injury or death of an innocent third party.

I cannot think of another industry or organization that has such blanket immunity. Drug companies whose products are tested and approved are not immune. Doctors, pharmacists, even lawyers are not immune from liability. Yet HB 2899 proposes immunity for anyone who provides free, disposable breathalyzers as part of a so-called education program.

The reasons proponents of HB 2899 seek such immunity becomes abundantly clear on closer examination of the breathalyzers they want to distribute to the public. The "Last Call™" disposable breathalyzer is a good example. It consists of a small tube containing crystals that are supposed to change color based on the alcohol content of your breath. It is marketed as a "break-through product which can give you an objective answer to your question: Am I okay to drive?" It also claims to "prevent drunk driving and DUI arrests." But its packaging includes the following disclaimer:

Terry Humphrey, Executive Director

Jayhawk Tower • 700 SW Jackson, Suite 706 • Topeka, Kansas 66603-3758 • 785.232.7756 • Fax 785

E-Mail: triallaw@ink.org

House Judiciary
3-7-02
Attachment 3

“Accuracy of test results may not be reliable if the test is not conducted according to instructions....The manufacturer, suppliers, agents, distributors and retailers make no warranty, expressed or implied, as to the ability of this device to determine or detect intoxication of the subject or to accurately indicate the subject’s blood alcohol level.”

The instructions for using the “Last Call” device offer little reassurance. To follow the instructions involves a multi-step process that even a sober user might have difficulty completing correctly, let alone someone who has been drinking.

It is the inherent unreliability of disposable breathalyzers such as “Last Call” that proponents of HB 2899 seek to distance themselves from. Rather than establish strict guidelines for their program, intensive training for program participants or high standards for the breathalyzers they dispense, they seek to hide behind a shield of immunity. It is possible that a person who is drunk could use one of these breathalyzers and, because he failed to follow the instructions or the device is defective, be misled into believing he is sober enough to drive. On his drive home, he has an accident that injures or kills an innocent driver or pedestrian. This is the scenario proponents of HB 2899 most fear. In such a case, we believe that the drunk driver should be held accountable. But it is also reasonable to determine whether the manufacturer of the breathalyzer or the program participants who distributed the device may share some responsibility for the innocent injured party. That determination should be made by our civil justice system, and neither the manufacturer nor the program should be exempt.

Given the unreliability of disposable breathalyzers, it is difficult to understand how devices like “Last Call” can be considered tools to educate the public. Moreover, by granting immunity to the manufacturers of such devices and to the programs that promote them, HB 2899 reduces their incentive to improve the quality and reliability of breathalyzers. Why should they, if they can’t be held accountable for the consequences? Ultimately, we believe HB 2899 undermines both safety and accountability, and we strongly urge the committee to reject it.

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Each blister card (pictured at left) contains two (2) .08% alcohol level indicators.

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Last Call™ Web Site
<http://www.lastcall.org/lcproduct.htm>
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Last Call™



Alcohol Level Indicators

LAST CALL is a ready-to-use disposable unit designed to test the alcohol content of exhaled air.

INSTRUCTIONS FOR USE

1. Wait 15 minutes after last alcoholic drink (alcohol takes about 15 minutes to have an effect on your system) OR drink a glass of water before taking the test.
2. Squeeze the middle of the outer plastic tube between thumb and forefinger to break inner glass ampule containing yellow crystals. Use tester immediately. SQUEEZE ONLY ONCE. DO NOT CRUSH OR BEND TUBE.
3. Take a deep breath and BLOW VERY HARD continuously through end of tube for 12 seconds. EXHALE HARD THROUGH TUBE – DO NOT INHALE
4. Shake tester to distribute crystals evenly in the viewing area. Lay tester flat for two (2) minutes. Identify color change of the majority of the crystals. A GREENISH ~~yellowish or colorless~~ ~~yellowish or colorless~~ BLUE cast indicates that the alcohol level is at or above the level being tested (.08).

NOTE : Accuracy of test results may not be reliable if the test is not conducted according to instructions. This detector contains indicator chemistry which will undergo a color change in the presence of alcohol contained in the breath of the subject. This product provides a reliable indication of alcohol present in the exhaled breath of the test subject when the instructions are rigidly followed. The manufacturer, suppliers, agents, distributors and retailers make no warranty, expressed or implied, as to the ability of this device to determine or detect intoxication of the subject or to accurately indicate the subject's blood alcohol level. Decisions and/or actions based on the use of this product by any person shall be at such person's own risk. The manufacturers, suppliers, agents, distributors and retailers assume no responsibility for consequences of subjects who test negative to this device but who later show that they are under the influence of, or their judgement has been impaired by, alcohol. Use immediately after breaking glass vessel. Do not use if glass vessel containing crystals is ruptured prematurely or if crystals are not yellow.

WARNING - This product should be used only as a screening device and is only an indication of the possible presence of alcohol in the blood of the test subject. Correlation between breath alcohol and blood alcohol content depends on many variables, including altitude. The exact concentration of alcohol in the blood of the test subject cannot be accurately determined by using this device. This device is not intended to legally determine blood alcohol level. No inference of intoxication is to be made from a positive indication. This product is guaranteed to be free from manufacturer's defects. This warranty is expressly made in lieu of any and all other warranties expressed or implied including the warranties of merchantability and fitness for a particular purpose or use. There are no warranties expressed beyond the description of the product contained on this package. The warrantor expressly disclaims liability for incidental, special or consequential damages of any nature.

To the maximum extent permitted by law, the user of this product expressly waives any claims or causes of action against the manufacturer, supplier, distributor or retailer, their agents, employees, officers or directors, for any costs, expenses, damages, liabilities, civil or criminal penalties, personal injury or death or property damage arising from directly or indirectly out of the use of this product. KEEP OUT OF REACH OF CHILDREN. Do not immerse in liquid. Do not inject. If injected, induce vomiting and contact your physician.



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