Approved: 3-17-03
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE.

The meeting was called to order by Chairman Michael R. O'Neal at 3:30 p.m. on February 10, 2003 in Room 313-S of the Capitol.

All members were present except:
Representative Ward Loyd - Excused
Representative Dan Williams - Excused

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:
Bob Totten, Kansas Contractors Association
John Sherwood, Attorney for Sherwood Construction of Wichita
Will Larson, Attorney for Kansas Contractors Association and Associated General Contractors
Larry Magill, Kansas Association of Insurance Agents
Sue Ann Schultz, General Counsel, IMA Financial Group
Corey Peterson, Associated General Contractors of Kansas
George Barbee, Kansas Consulting Engineers
Trudy Aron, American Institute of Architects
John Cassidy, Attorney for Office of Chief Counsel, Kansas Department of Transportation
David Burr, Assistant V.P. Risk Management, Burlington-Northern-Santa Fe Railway Company

Hearings on **HB 2154 - Construction contracts; indemnification agreements,** were opened.

Bob Totten, Kansas Contractors Association, explained that some companies include in their contracts language that assigns risk of anything that happens on their property to the contractor. The proposed bill would make each party responsible for their own act of negligence and not allow the shift of liability. (Attachment 1)

John Sherwood, Attorney for Sherwood Construction of Wichita, relayed a case where they were taken to court, as a third party, it put Sherwood Construction in the position of paying worker's compensation and then having to defend a civil suit. He believes that the proposed bill is fair and would have parties take responsibility for their own negligent acts. (Attachment 2)

Will Larson, Attorney for Kansas Contractors Association and Associated General Contractors, appeared in support of the proposed bill because it affects situations where one doesn't want to pay for their own negligence. (Attachment 3)

Larry Magill, Kansas Association of Insurance Agents, introduced Sue Ann Schultz, General Counsel, IMA Financial Group, who stated that 42 other states have enacted similar legislation that restricts the use of indemnification provisions in construction contracts. Many insurance carriers exclude coverage for liability assumed under a contract and therefore, those who sign contracts with indemnification provisions are mistaken that if a claim is brought against them they will be covered by their liability insurance. (Attachment 4)

Corey Peterson, Associated General Contractors of Kansas, commented that contractors are having a difficult time finding insurance companies that will provide coverage on contracts that have indemnification agreements. (Attachment 5)

George Barbee, Kansas Consulting Engineers, informed the committee that many small companies cannot afford to hire an attorney to direct them when signing a contract. (Attachment 6)

Trudy Aron, American Institute of Architects, believes that the proposed bill is good public policy, since our society is litigious and everyone wants someone else to bear the blame for their own wrongdoing. (Attachment 7)

MINUTES OF THE HOUSE JUDICIARY COMMITTEE at 3:30 p.m. on February 10, 2003 in Room 313-S of the Capitol.

John Cassidy, Attorney for Office of Chief Counsel, Kansas Department of Transportation, explained that the proposed bill does not prohibit all indemnification provisions, just those relating to contractors. (Attachment 8)

David Burr, Assistant V.P. Risk Management, Burlington-Northern-Santa Fe Railway Company, appeared as an opponent of the bill because it would limit their contracts with third parties regarding the allocation of risk relating to construction projects that occur on their property. He commented that in many situations they give access to their property for the purpose of utility construction projects. They are not compensated for the use of land or the disruption it may cause to the railroads. They agree to these types of arrangements because they are able to shift the risk of any liability that occurs to the contractor in charge of the construction sight. (Attachment 9)

Boeing did not appear before the committee but requested their written testimony in opposition to the bill be included in the committee minutes. (Attachment 10)

Hearing on **HB 2154** was closed.

The committee meeting adjourned at 5:30 p.m. The next meeting was scheduled for February 11, 2003 at 3:30 p.m. in room 313-S.

THE KANSAS CONTRACTORS ASSOCIATION, INC.

316 SW 33RD ST PO BOX 5061
TOPEKA KS 66605-0061

TEL (785) 266-4152
FAX (785) 266-6191
kca@ink.org
www.ink.org/public/kca

Testimony

By the Kansas Contractors Association before the House Judiciary Committee regarding Indemnification ---H 2154

February 10, 2003

Mr. Chairman and members of the House Judiciary Committee, I am Bob Totten, Public Affairs Director for the Kansas Contractors Association. Our organization represents over 400 companies who are involved in the construction of highways and water treatment facilities in Kansas and the Midwest.

Today, I want to thank you for allowing me to testify in support of House Bill 2154. This bill goes to the heart of a concern our contractors, our insurance carriers and the Kansas Department of Transportation has with language involving contracts and the use of indemnification in construction contracts.

In the best of terms that I can understand, various companies including some municipalities put in their contracts language that basically assigns the risk of anything that happens on their property unfairly on the contractor.

H. JUDICIARY
2-10-03
Attachment: 1

Our contractors do not have any problem in bearing the risk that is theirs…
But they resent and protest the risk of another placed upon them.

When most construction jobs are bid, the specs rarely include the "Agreement" that contains the indemnification provisions that are the subject of this bill. The contractors obtain the bid specs, forward the same to their insurance providers and ask that they get whatever coverages are required and advise what the cost of those coverages are so that they may then factor them into their bid.

The insurance providers generally obtain quotes for general liability, excess umbrella, worker's comp., owned and non-owned auto, surety bonds, etc. Once the job is awarded, then various other documents are presented to the contractor, including a letter or standard form "Indemnification Agreement", which contains the broad hold harmless/indemnification provision that operates to shift even the sole negligence of another party to the contractor. At this point, the contractor has already gotten the bid, and because they want the job, they have historically signed anything and everything, even after being advised by their insurance provider that the liability they are agreeing to assume is not insured. As the testimony of others today will show this liability shifting has resulted in actual situations where a contractor has had to defend and pay a claim twice, even though they were not the responsible party; and that payment comes out of the assets of the contractor, not his insurance.

House Bill 2154 simply provides that each party should be responsible for their own acts of negligence, and not be allowed by operation of a contract provision to shift their own liability.

Kansas is a comparative negligence state, and these types of hold harmless/indemnification provisions operate as a contractual mechanism to circumvent state law. Enacting House Bill 2154 would stop this process, and ensure that all parties remain liable for their own actions. I am not a lawyer and do not understand a lot of the issues involved as many others and so I have brought along some who do....and at this time, I would like to ask John Sherwood of Sherwood Construction to explain a situation his company has had in this regard.

Judiciary Committee of the Kansas House of Representatives

Ladies and Gentlemen:

I have been requested to speak in favor of passage of HB2154 as amended on behalf of the construction industry.

First, indemnity clauses have been a long time problem in the insurance, construction and legal communities. There are 36 states which have similar statutes outlawing indemnification clauses. Therefore, you can tell this is not revolutionary new legislation.

Second, as an example of a real day-to-day problem with indemnification clauses, I will tell you of the case of Phillip Smiley.

Phillip Smiley was a heavy equipment operator for Sherwood Construction Co., Inc. on a project called "Lone Mountain" in Oklahoma. Lone Mountain was a hazardous waste dump site and Sherwood Construction had a contract to build more cells to be used to dump additional hazardous waste.

Phillip Smiley got something in his eye and after seeing a doctor filed a worker's compensation case against Sherwood Construction. This case was eventually settled with Mr. Smiley receiving a cash settlement. Mr. Smiley then filed suit against the operator of the hazardous waste site claiming that what he had gotten in his eye came from the hazardous waste site. The operator of the hazardous waste site then made demand upon Sherwood Construction to defend in the law suit and joined them as third party defendants based on an indemnification clause in the contract.

As you can tell, this put Sherwood Construction in the position of paying a worker's compensation case and then having to defend in a civil suit arising out of the same circumstances, all without any fault or negligence on our part.

Third, this proposed legislation arose out of agreements proposed by the railroads to KDOT. In these agreements, the railroads wanted highway contractors to indemnify them from all loss that occurred in the construction zone, no matter who was at fault. As you can tell, this would mean the contractor (or his insurance company) would pay even if the accident was caused by a transport truck driving through the work zone during the night time when the contractors work force was not present or an accident caused solely by the railroad's own negligence.

Therefore, we believe that it is only fair and equitable to pass this proposed legislation so that each party takes responsibility for its own negligent acts and misdeeds.

Respectfully submitted,

John D. Sherwood
Corporate Counsel
for Sherwood Construction Co., Inc.

H. JUDICIARY
2-10-03
Attachment: 2

TESTIMONY WILL LARSON GENERAL COUNCIL
FOR THE ASSOCIATED GENERAL CONTRACTORS
OF KANSAS IN FAVOR OF HB 2154

I am the general counsel for the Associated General Contractors of Kansas and I am here to testify in favor of HB 2154. I also represent the Kansas Contractors Association who also supports HB 2154.

The concept of HB 2154 is very simple. All it does is to outlaw indemnity provisions in construction contracts which require one party to indemnify the other party for the others own negligence. For example this bill would out law the owner from requiring the contractor to indemnify the owner for damage caused to others by the owner's own negligence on a construction project. These types of indemnity provisions are called exculpatory indemnity clauses. This bill would not affect or outlaw standard indemnity provisions which would, for example, require a contractor to indemnify the owner for the owner's liability for damage caused to others as a result of the contractors negligence.

It has been my experience in working for contractors and contractors associations that the use of such exculpatory indemnity clauses is becoming more frequent. Such clauses are inherently unfair in that they require an innocent party to indemnify a guilty party for the guilty parties own fault. While the Kansas Court's have agreed to enforce such clauses because they arise in contracts the Court's have only done so reluctantly and require strict construction of such clauses. The following excerpt appears in the Kansas Court of Appeals case of [illegible] (1992):

> **1203 " 'Contracts for exemption for liability from negligence are not favored by the law. They are strictly construed against the party relying on them....' "
> " 'The rule seems to be that, unless against public policy, a contract exempting liability will be enforced, however, it will be enforced very strictly. In *Cason v. Geis Irrigation Co.,* 211 Kan. 406, 507 P.2d 295 (1973), we said:
> " ' "Contracts for exemption from liability for negligence are not favored by the law and are strictly construed against the party relying on them." ...
> ....
> " ' "The general rule is that private contracts exculpating one from the consequences of his own acts are looked upon with disfavor by the courts and will be enforced only when there is no vast disparity in the bargaining power between the parties and *the intention to do so is expressed in clear and unequivocal language....*"
> ....
> " ' "... [T]he law does not look with favor on provisions which relieve one from liability for his own fault or wrong.... [C]lauses limiting liability are given rigid scrutiny by the courts...." ' " (Emphasis added.)

Exculpatory indemnity clauses are also in conflict with the law in Kansas concerning comparative negligence. Under our comparative negligence law a party is only responsible for

H. JUDICIARY
2-10-03
Attachment: 3

its own negligence or fault. There is no joint and several liability and even the negligence of non-parties can be compared.

As other conferees have or will testify a large number of other states have passed laws similar to HB 2154. We would urge the committee to favorably consider the bill.

TESTIMONY REGARDING HOUSE BILL No. 2154
Judiciary Committee - Kansas House of Representatives
February 10, 2003

Mr. Chairman and members of the committee, thank you for this opportunity to testify regarding House Bill 2154.

I currently serve as Vice President and General Counsel to The IMA Financial Group, Inc., a Kansas company that is the 18th largest independent insurance agency in the United States. Our client base consists of numerous companies and businesses throughout the U.S. with in excess of three quarters of our revenues derived from commercial property and casualty coverages. As a large provider of commercial property and casualty insurance, we have many clients that are supporters of House Bill 2154 and we appear on behalf of those clients, which include Neosho Companies (Topeka/Parsons), Eby Companies (Wichita), N.R. Hamm Companies (Perry), Jomax Construction Company (Great Bend) and Martin Tractor Company (Topeka/Emporia/Chanute, Concordia, Colby and Manhattan) as well as appearing as a representative of the insurance industry and the Kansas Association of Independent Insurance Agents.

A hold harmless or indemnification clause is basically the assumption, by contract, by one party (the "Indemnitor") of the liability of another party (the "Indemnitee"), arising out of the contract. Proposed House Bill 2154 provides that all hold harmless or indemnification provisions in construction contracts that require the Indemnitor to indemnify or hold harmless the Indemnitee for the Indemnitee's negligence would be void and unenforceable as against public policy.

The insurance industry is familiar with hold harmless/indemnification statutes - currently 42 other states have enacted similar legislation that restricts the use of hold harmless/indemnification provisions in construction contracts. These states have passed statutes that recognize it is against public policy for construction contracts to contain provisions that purport to indemnify an Indemnitee for its own negligence. These states have recognized that determination of liability is the responsibility of the courts, and upon such a determination of negligence by a party for any act, the responsible party should not be allowed to shift that liability to another party simply by operation of an indemnification provision in a construction contract.

In addition, many insurance carriers specifically exclude coverage for liability assumed under contract, thus many individuals and companies that have signed construction contracts that contain indemnification provisions are under the mistaken belief that if a claim is brought against them by virtue of an indemnification provision in their master construction contract that such claim will be considered a covered claim under their

H. JUDICIARY
2-10-03
Attachment: 4

liability insurance. In actuality, there is a very good possibility that the carrier will deny coverage for these types of claims.

The existence of these indemnification provisions in construction contracts reflect a long past era where the party providing the service under the construction contract would sign anything in order to get the job, and the party benefiting from the contract took full advantage of that unfair situation and included these broad form indemnification provisions. Today this type of liability shifting just because of the relatively unequal bargaining positions of the parties has been recognized as against public policy by numerous states - each party should be responsible for their own acts of negligence.

House Bill No. 2154 represents fair and reasonable legislation that ensures that each party bear responsibility for their own acts of negligence. IMA and our clients, all of whom are your constituents, respectfully request that you pass House Bill No. 2154. I am open for questions.

Respectfully submitted,

SueAnn V. Schultz
Vice President and General Counsel,
The IMA Financial Group, Inc.

632/2003files/2003imafg/constleg.doc

AGC of KANSAS

Building a Better Kansas Since 1934

TESTIMONY OF
ASSOCIATED GENERAL CONTRACTORS OF KANSAS
BEFORE HOUSE COMMITTEE ON JUDICIARY
ON HB 2154

February 10, 2003

By Corey D Peterson, Associated General Contractors of Kansas, Inc.

Mr. Chairman and members of the committee, my name is Corey D Peterson, Executive Vice President of the Associated General Contractors of Kansas, Inc. The AGC of Kansas is a trade association representing the commercial building construction industry, including general contractors, subcontractors and suppliers throughout Kansas (with the exception of Johnson and Wyandotte counties).

The **AGC of Kansas is in support of HB 2154.** In our opinion, this is a very common sense bill that states that Company A (owner) cannot require Company B (contractor or designer) to assume the liability for Company A's own negligence in order to do business.

There are currently construction contracts being issued by both private and public owners that require contractors hold the owner harmless, even if the owner is negligent. Contractors are having a difficult time finding insurance companies that will provide coverage on contracts that feature these terms.

The members of AGC of Kansas **respectfully requests that you vote favorably on HB 2154.**
Thank you for your consideration.

H. JUDICIARY
2-10-03
Attachment: 5

KANSAS CONSULTING ENGINEERS

Affiliated with:
American Council of Engineering Companies
Kansas Society of Professional Engineers
National Society of Professional Engineers
Professional Engineers in Private Practice

DATE: February 10, 2003

TO: House Judiciary Committee

FROM: George Barbee, Executive Director
Kansas Consulting Engineers

RE: Design Professional Liability (HB-2154)

Mr. Chairman and members of the committee, my name is George Barbee. I am appearing today as the Executive Director of the Kansas Consulting Engineers. KCE is an association of design firms engaged in contracting for the design of public works and private industry for projects that include an array of capital improvements, including transportation, buildings, water and sewer.

These projects require detailed contractual agreements that include elements of assignment of risk to the appropriate party. Design services contracts will usually be between the client and the designer, but will also include sub-consultants.

Contractual indemnification provisions, like other provisions of an agreement between a client and a design professional, establish rights and obligations for the parties and may shift risk from one party to another.

Any indemnifications provision that obligates a design professional to defend the client or to indemnify or rectify damages to a client or a third party that does not result from a negligent act, error, or omission of the design professional, represents a risk to the design professional beyond the designers' normal legal liability and outside the scope of professional liability insurance.

Professional liability insurance exists to provide protection from claims of harm caused to a party by the negligence of the insured in the performance of professional services. Professional liability insurance policies specifically exclude coverage for contractual obligations unless the breach of the obligation was caused by the negligent act, negligent error, or negligent omission of the insured professional service company. The insurer would defend the breached contractual obligation due to negligence, and if the claim were substantiated, the harm caused by it would be indemnified by the policy subject to terms and conditions, such as the limits of the policy.

George Barbee, Executive Director • Scott Heidner, Associate Executiv
300 SW 8th Ave., Third Floor • Topeka, KS 66603-3912 • 785/357-1824 • Fax 785/233-2206 •

H. JUDICIARY
2-10-03
Attachment: 6

There must be a causal link between the negligence and the indemnification obligation in the contractual agreement. One provision common to design professional contracts that expresses this causal link is the following:

> Design Professional shall indemnify Client for cost, losses, and damages to the Client to the extent they are caused by the negligent act, error, or omission of the Design Professional in providing services on the project.

HB-2154 recognizes the above standard of the construction industry design contracts. It simply implies that parties are held responsible for their own negligence in performing their respective duties and services. Furthermore, with the above language, the designers are quite willing to indemnify clients for the designer's mistakes.

Unfortunately, some clients demand that designers accept risk that is far beyond that which is insurable.

HB-2154 would prevent this inequity by limiting a designer to being held responsible for negligence. The members of Kansas Consulting Engineers urge you to act favorably on the bill.

AIA Kansas
A Chapter of The American Institute of Architects

February 10, 2003

TO: Representative O'Neal and Members of the House Judiciary Committee

FROM: Trudy Aron, Executive Director

RE: **SUPPORT FOR HB 2154**

Good Afternoon, Madam Chair and members of the Committee. I am Trudy Aron, executive director, of the American Institute of Architects in Kansas (AIA Kansas.) Thank you for the opportunity to address your committee today regarding our support for HB 2154

AIA Kansas is a statewide association of architects and intern architects. Most of our 700 members work in over 100 private practice architectural firms designing a variety of project types for both public and private clients including justice facilities, schools, hospitals and other health facilities, industrial buildings, offices, recreational facilities, housing, and much more. The rest of our members work in industry, government and education where many manage the facilities of their employers and hire private practice firms to design new buildings and to renovate or remodel existing buildings.

HB 2154 is just good public policy. In our litigious society, everyone wants someone else to bear the blame for their own wrongdoing. This bill unequivocally says one cannot pass one's own negligence to someone else. This is especially important for us in the design and construction industry. Insurance for design professionals covers an architect for their negligent acts, errors or omissions as it pertains to the applicable standard of care. Architects, engineers, and contractors each insure themselves for their own actions but should not be asked to shoulder risks for which they have no responsibility or control.

AIA Kansas urges you to favorably pass HB 2154. I'll be happy to answer any questions you may have. Thank you.

700 SW Jackson, Suite 209
Topeka, KS 66603-3757
Telephone: 785-357-5308 or 800-444-9853
Facsimilie: 785-357-6450
Email: info@aiaks.org

H. JUDICIARY
2-10-03
Attachment: 7

STATE OF KANSAS

KANSAS DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY OF TRANSPORTATION
Docking State Office Building
915 SW Harrison Street, Rm.730
Topeka, Kansas 66612-1568
Ph. (785) 296-3461 FAX (785) 296-1095
TTY (785) 296-3585

Deb Miller
Secretary of Transportation

Kathleen Sebelius
Governor

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE

REGARDING HOUSE BILL 2154 RELATING TO CONSTRUCTION CONTRACTS INDEMNIFICATION PROVISIONS

February 10, 2003

Mr. Chairman and Members of the Committee:

I am John Cassidy, with the Kansas Department of Transportation (KDOT), Office of Chief Counsel. On behalf of KDOT, I am here to support House Bill 2154, an act concerning indemnification provisions in construction contracts.

KDOT's support of this legislation comes after working with the Kansas Contractors Association and Kansas Association of Insurance Agents for several years to ensure that the scope of the legislation does not extend beyond the problem that needs to be addressed. Please note that the proposed legislation does not prohibit all indemnification provisions. Instead, the proposed legislation prohibits only those indemnification provisions that require one party to be liable for damages caused by the other party's negligence. Accordingly, an owner cannot hold a contractor liable for damages caused by the owner's negligent acts, and contractors cannot hold subcontractors liable for damages caused by the contractor's negligence. It is KDOT's view that such indemnification provisions are neither fair nor a proper method of risk allocation.

The proposed legislation, however, does not restrict a party from recovering damages which that party paid for another party's negligent acts under express or implied indemnification provisions. Accordingly, and this list is not exhaustive, an owner can hold a contractor liable for damages caused by the contractor's negligent acts, contractors can hold subcontractors liable for damages caused by the subcontractor's negligence, owners and contractors can hold manufacturers liable for breaches of express or implied warranties, and surety companies can hold contractors liable for damages caused by the contractor's default.

H. JUDICIARY
2-10-03
Attachment: 8

Statement of David T. Burr
Assistant Vice President – Risk Management
The Burlington Northern and Santa Fe Railway

My name is David Burr and I am an Assistant Vice-President for Risk Management with The Burlington Northern and Santa Fe Railway Company ("BNSF"). In that capacity I am responsible for the company's risk management programs and am familiar with the issues that are presented to BNSF by the proposed legislation. I would like to begin by stating that BNSF has never been reluctant to take responsibility for its conduct and to do the right thing as it relates to anyone we interact with. However, we also have an obligation to our shareholders to ensure that BNSF does not unnecessarily expose itself to financial risks. The proposed legislation would prohibit BNSF from exercising its freedom to contract with third parties regarding the allocation of risk relating to construction projects that occur on our property; many of which are done for the benefit of others and with no compensation to BNSF. It is this elimination of our freedom to contract that we take objection to. Beyond the adverse financial impact this legislation would have on BNSF in terms of unfair transfer of costs to BNSF, we have concerns regarding the potential increase in risk of injury to the public as well as increased litigation that this legislation will create and the attendant costs to the states of administering that litigation. For these reasons BNSF feels that this bill should not be enacted.

BNSF operates a large railroad system that moves much of this country's freight. Many significant parts of that system are located within the state of Kansas, and BNSF is a substantial landowner in this state. When we are contracting for construction work we believe that because the contractor, rather than the owner, is the party with construction expertise and control over how the construction activities are performed the risk of liability due to construction activities should lie with the contractor. While this arrangement may increase the initial cost to the owner of the construction, we believe it lowers the risk of injury to third parties by providing financial incentives for the party best able to prevent injuries. This translates into lower costs in the long run for the owner, as well as fewer injuries to third parties.

In addition, on numerous occasions we have been called upon to give access to our property by either a governmental authority or a utility for purposes of construction projects that benefit, in whole or in part, the

H. JUDICIARY
2-10-03
Attachment: 9

public. In most of these situations BNSF is not compensated for the use of its land or the disruption that the construction activities cause to our system. At most we are compensated for the actual cost of our employees working in conjunction with the project. We are able to agree to this type of an arrangement because we are able to shift the risk of any liability that occurs because of the presence of the construction activity to the contractor that is in charge and control of the construction site. It is important to note that but for the construction activity that BNSF would not have any increased risk of liability. It is fundamentally unfair for a state to ask BNSF to not only shoulder the responsibility of giving access to BNSF's property but also to pay for losses that occur solely as the result of the presence of the construction activities that are taking place on our property.

If the bill is enacted it is extremely likely that the costs to all parties to construction contracts will increase. When an unfortunate accident occurs, all parties who are in the vicinity of the accident often find themselves embroiled in litigation. Without a contract provision that sets out a bright line as to who is responsible to defend and pay for the litigation, the parties will find themselves at odds and filing additional suits to determine each of their respective obligations relating to the accident. Thus the courts will be forced to hear more claims, and judicial resources will be consumed. In addition, if parties are expected to give access to their property for the benefit of the public, and they are unable to allocate the risks relating to that access, they will seek compensation for the risk that they take. Either the public entities will pay for that access, or will be forced to institute condemnation proceedings to gain access to the land. In either event, the public will incur greater costs.

Whether it is appropriate to shift the risk of losses from one party to another is an issue that should be left to the marketplace; with arm's length transactions allowing the parties to allocate among themselves the risks relating to a particular transaction. It should be noted that no contractor is required to enter into any agreement providing for the types of indemnities the proposed bill would prohibit. To the extent contractors have agreed to these types of indemnities, presumably they profited from the transaction. This freedom to contract is one of the fundamental tenets of our American legal system, it should not lightly be abrogated, particularly when the effect is to transfer wealth from one party to another.

With all due respect, BNSF believes that the proposed legislation should not be adopted. If the panel has any questions I would be happy to answer them to the best of my abilities.

House Judiciary Committee

February 10, 2003

House Bill No. 2154

Mr. Chairman and members of the House Judiciary Committee, thank you for the opportunity to allow The Boeing Company to offer its perspective on House Bill No. 2154 and explain why it cannot support it.

Kansas law has historically embraced the concept of freedom of parties to contract on mutually agreeable terms and conditions. As is well known, contracts are comprised of various provisions that reflect the parties' allocation of risks and liabilities. Examples are provisions relating to warranty, liquidated damages, indemnity for mechanics liens, and indemnity for patent infringement and trade secret information all of which are commonly found in construction contracts as are indemnity provisions for personal injury damage, property damage, and economic loss which is the specific subject of HB No. 2154. All these provisions are subject to negotiation by the parties to produce an agreement that reflects the parties' allocation of risk and liability.

From time to time, Kansas courts have found that certain types of contracts and certain contract provisions are void as against public policy. For example, a contract provision which requires a party to be indemnified for liability arising from its intentional conduct is void as against public policy. Kansas courts are vigilant in protecting the public policy of the state and, consequently, from imposition of unenforceable contract provisions. Kansas law provides adequate remedies for parties who believe they are aggrieved by an unenforceable indemnity provision.

However, Kansas courts have not found indemnification provisions of the kind defined in HB No. 2154 to be void as against public policy in circumstances where there is no vast disparity in bargaining power between the parties. Under Kansas law, such provisions are strictly construed by the court and are enforceable so long as the provision expresses in clear and unequivocal terms the intent to indemnify the indemnitee from its own negligent acts. (20 Kan. App. 2d 733)

Boeing believes the freedom to contract on legally permissible terms should continue to prevail. The parties to a contract should remain free to allocate risk and liability as mutually agreed by the parties. Boeing, as do many other companies, enters into contracts in Kansas with parties of equal bargaining strength, including construction contracts. Boeing or the other party may propose indemnification provisions relating to personal injury, property damage, and economic loss which (i) require the indemnitor to indemnify the indemnitee from liability arising from the indemnitor's negligence, or (ii) require the indemnitor to indemnify the indemnitee from liability arising from both the indemnitor's and indemnitee's concurrent negligence, or (iii) require the indemnitor to indemnify the indemnitee from liability arising from the indemnitee's sole negligence. All these types of indemnities may be enforceable under Kansas law and may be insured under currently available insurance policies. Depending on the particular circumstances, Boeing contracts have included each of these types to appropriately reflect the parties' agreement on allocation of risk and liability. The important point is that the parties are free to fashion an agreement that is unique to the parties needs. HB No. 2154 results in significant restriction on the legal rights of the citizens of Kansas.

In closing, Boeing submits that indemnity provisions of the type addressed in HB No. 2154 have been subjected to judicial scrutiny and found to be enforceable. Parties should remain subject to the freedom to contract on terms of their own choosing.