

MINUTES OF THE HOUSE JUDICIARY COMMITTEE.

The meeting was called to order by Chairman Michael R. O'Neal at 12:00 p.m. on February 24, 2003 in Room 313-S of the Capitol.

All members were present except:

Representative Tim Owens - 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:

Representative Ethel Peterson
Tim O'Sullivan, Kansas Bar Association

The hearing on **HB 2351 - identity theft; certificate for repair of damage**, was opened.

Representative Ethel Peterson appeared before the committee as the sponsor of the proposed bill which would mandate that the Attorney General design an application form to establish that the victim has indeed been a victim of identity theft. The certificate could then be presented to any credit reporting agency, financial institution, business, governmental agency or any other entity so show that the bad credit record is related to identity theft (Attachment 1).

The hearing on **HB 2351** was closed.

The hearing on **HB 2290 - amendments to the Uniform Trust Code**, was opened.

Tim O'Sullivan, Kansas Bar Association, appeared before the committee and explained the proposed changes to the Uniform Trust Code (Attachment 2)

The hearing on **HB 2290** was closed.

HB 2294 - construction defects; contractor's rights to cure prior to filing a civil action

A balloon amendment was provided by Kansas Trial Lawyers and Kansas Building Industry. (Attachment 3) Gary White, Kansas Trial Lawyers Association, explained the two industries had met and worked out the following agreements:

- most references to subcontractors and suppliers have been stricken from the bill
- Section 2(a) requires the homeowner to give notice of the claim before it is filed. If notice is not given the contractor may ask the case to be dismissed without prejudice. The amendment would provide that the case that is refilled will be deemed filed on the date of the original filing and shall not count as a dismissal under K.S.A. 60-241(a)(1).
- an option to remedy the defect without the inspection has been added as an option in Section 4(d) to help resolve the construction dispute in a timely manner
- Due to the dismissal without prejudice provision in Section 4(o) a requirement has been added to preserve the homeowner's statute of limitations when the statute would expire during the period of notice, remedy of the construction defect or when payment is to be made.
- Section 10(b) has been stricken due to concerns that it infringes upon the attorney-client privilege.

Representative Patterson made the motion to adopt the balloon. Representative Long seconded the motion. The motion carried.

Representative Loyd made the motion to replace on page 2, line 27 "In every action brought" with "Before the filing of an action". Representative Goering seconded the motion. The motion carried.

CONTINUATION SHEET

MINUTES OF THE HOUSE JUDICIARY COMMITTEE at 3:30 p.m. on February 24, 2003 in Room 313-S of the Capitol.

Representative Pauls made the motion to amend (e) to allow "In the absent of a contractual agreement the executive board..." Representative Long seconded the motion. The motion carried.

Representative Patterson made the motion to report Substitute for HB 2294 favorably for passage. Representative Long seconded the motion.

After committee discussion regarding the tolling provisions, the Chairman informed members that they would study the balloon amendment and continue to work the bill the next day.

The committee meeting recessed at 1:25 p.m and returned at 3:30 p.m.

HB 2217 - igniton interlock devices, certificate requirements

Representative Pauls made the motion to amend the bill so those who have not installed an ignition interlock but instead have chosen not driven to would be able to provide an affidavit at the end of the period of suspension to receive their license back. Representative Long seconded the motion.

Chairman O'Neal requested that staff prepare an amendment for the committee review at the committee meeting the next day.

HB 2293 - Sheriff's fee for service of process

Representative Long made the motion to adopt the balloon amendment provided by Kansas Sheriffs' Association (see February 20, 2003 minutes). It would strike New Section 3 and clarify that the \$10 fee is to be paid up front to the court and remitted to the county general fund. Representative Pauls seconded the motion. The motion carried.

Representative Jack made the motion that if the sheriff failed to serve the papers then the fee would be reimbursed. Representative Ward seconded the motion for purposes of discussion. The motion failed.

Representative Patterson made the motion to have a fee fund established and earmarked to a specific fund to offset the cost of service process with a 50/50 split of money going to the district clerk and the sheriff's department, of which funds should go outside the county purchasing department. Representative Crow seconded the motion. The motion carried.

Representative Long made the motion to report HB 2293 favorably for passage, as amended. Representative Patterson seconded the motion. Representative Goering was concerned that the proposed bill would not allow those with small cases to hire someone to serve papers due to the \$10 fee. Representative Loyd saw the proposed bill as an increase in court costs.

Representative Klein made the substitute motion to change the proposed bill to allow the chief judge of the court administer the fund. Representative Ward seconded the motion. The motion carried.

Representative Long renewed her motion with Representative Patterson seconding. The motion carried

HB 2215 - Increasing claim limit in small claims court from \$1,800 to \$5,000

Representative Long made the motion to report HB 2215 favorably for passage. Representative Goering seconded the motion.

Representative Swenson made the substitute motion to table the bill. Representative Loyd seconded the motion. The motion failed 7-7.

The motion to report HB 2215 failed 6-8.

HB 2297 - Garnishment; release of funds if no order to pay is issued

CONTINUATION SHEET

MINUTES OF THE HOUSE JUDICIARY COMMITTEE at 3:30 p.m. on February 24, 2003 in Room 313-S of the Capitol.

Representative Long made the motion to report **HB 2297** favorably for passage. Representative Crow seconded the motion.

Representative O'Neal made the substitute motion to have the order to pay the garnishment be 60 days from the date of when the answer is served. Representative Loyd seconded the motion. The motion carried.

Representative Long made the motion to report **HB 2297** favorably for passage, as amended. Representative Jack seconded the motion. The motion carried.

HB 2133 - Municipal courts collecting fines and court costs

Representative Patterson made the motion to adopt the balloon amendment. Representative Goering seconded the motion. The motion carried.

Representative Ward made the motion to adopt a 180 day time frame for trying to get the amount due before turning it over to a collection agency. The motion was seconded. The motion carried

Representative Patterson made the motion to amend in the provisions of **HB 2200** with the correct reference to chapter 61 instead of the limited actions provisions. Representative Long seconded the motion. After committee discussion the motion was withdrawn.

Representative Davis made the motion strike lines 33-37 with is the intent to have defendants pay the cost of collection. Representative Swenson seconded the motion. The motion failed.

Representative Rehorn made the motion to clarify that the bill is referring to Chapter 61 cases. Representative Long seconded the motion. The motion carried.

Representative Long made the motion to report **HB 2133** favorably for passage, as amended. Representative Goering seconded the motion. The motion carried.

HB 2307 - Elimination or reassignment of district magistrate judge positions upon vacancy

Chairman O'Neal announced it was his intent to take up the proposed bill at the next meeting and to only consider the authority of the Chief Justice to reassign district magistrate judges.

The committee meeting adjourned at 5:45 p.m. The next meeting was scheduled for February 25, 12:00 p.m. in room 313-S.

ETHEL M. PETERSON

REPRESENTATIVE, 119TH DISTRICT
 HOME ADDRESS: 2315 MELENCAMP
 DODGE CITY, KANSAS 67801
 (620) 227-6849

OFFICE ADDRESS: STATE CAPITOL, SUITE 270-W
 TOPEKA, KANSAS 66612-1504
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TOPEKA

HOUSE OF
 REPRESENTATIVES

COMMITTEE ASSIGNMENTS
 RANKING DEMOCRAT: TOURISM (MON./WED.)
 MEMBER: EDUCATION
 FEDERAL & STATE AFFAIRS
 LOCAL GOVERNMENT

**Testimony before the
 House Judiciary Committee
 Regarding
 House Bill 2351
 on
 February 24, 2003**

Mr. Chairman and Committee members.

Thank you for allowing me time to appear before this committee on behalf of the proponents of HB 2351. This is a bill that I requested after learning of the difficulties encountered by some people who have been the victims of identity theft.

Simply put, this bill provides that any person who establishes that he or she has been the victim of identity theft, for which there has been an investigation and a report by law enforcement, may make application to the state Attorney General for a certificate indicating that such person has been a victim of identity theft.

Such certificate may then be used to present to any credit reporting agency, financial institution, business, governmental agency, or any other entity which may use consumer credit reports in connection with approval of credit based on an application for extension of credit, or any purpose relating to restoration of the victim's credit record, or correction of negative credit related to the identity theft.

Further the office of the Attorney General shall design and provide for the issuance of the certificate required and shall prescribe application procedures and acceptable application forms which specify the kinds and forms of information and documentation required to establish the applicant has been the victim of identity theft.

The written testimony you should have received from B.A. Leonard, Robert Schneweis, Nancy Churning, and Henry Goertz describe some of the experiences which precipitated this bill. A particular case I might refer to, is the one where the victim only learned of the theft when he applied for bonding in order to serve as a township official and learned he was not "bond-worthy" due to a huge outstanding debt of which he was unaware. Others experienced having student loans denied for their children's college expenses. One person, suffering from cancer, had concerns about his estate, whether his heirs could inherit with his correct identity under challenge.

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Attachment: 1

For all these reasons, I believe we must do something to assist such victims in re-establishing their good names and in starting the necessary steps toward helping them re-build their credit and their lives, HB 2351 is an attempt to do that.

Thank you again for your time, I would be happy to stand for questions if and when that is appropriate.

Respectfully,

A handwritten signature in cursive script that reads "Ethel M. Peterson". The signature is written in black ink and is positioned below the word "Respectfully,".

Ethel M. Peterson
Representative 119th District

February 20, 2003

Chairman Mike O'Neal
And Committee Members,

On February 28, 2002 I received a phone call from Gateway Credit Department about my purchase of a Computer System. I had not order a computer system so I started checking my credit file. I have spent the past year trying to find out who took my identity and what the were doing with my information.

I have succeeded in finding out who did get my information but, only after many hours of research and phone calls. I did manage to find this person and she is being convicted of identity theft on a class 4 felony, in Phoenix Az.

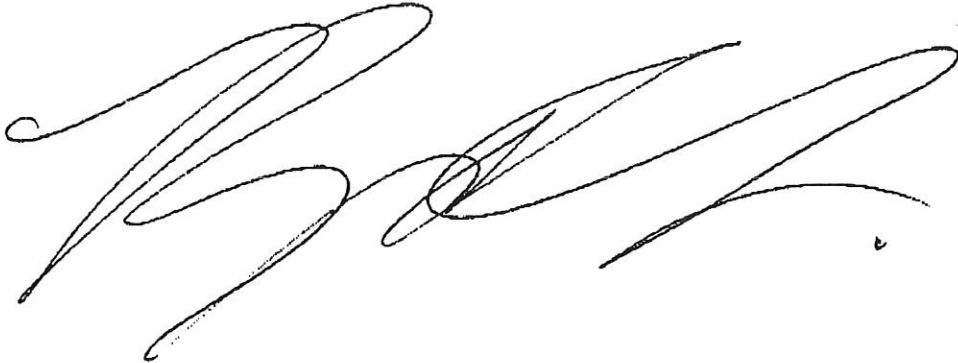
I was able to get all of my Credit information fixed and back in good standing, and I don't want someone to violate me again and get by with it.

I would really like to see stiffer Laws and stiffer convictions of people who think that they can take someone life and try and completely destroy them and their good credit.

I am one of the lucky ones, but not without a lot of man hours and sleepless nights. I hope Kansas Laws can be established to help more victims.

Thank you for taking the time to listen.

Nancy Churning

A large, stylized handwritten signature in black ink, appearing to read 'Nancy Churning'. The signature is written in a cursive style with large loops and flourishes.

Goertz Law Office

Henry A. Goertz

Attorney at Law

February 21, 2003

Mike O'Neal, Chairman
House Judiciary Committee

Chairman O'Neal,

~~1000 Military Plaza~~
~~Suite 200~~ P.O. Box 1535
Dodge City, Kansas 67801
Telephone [620] 225-7257
Fax [620] 225-7082

Thank you for allowing me this opportunity to address you and the Judiciary Committee about a serious problem facing increasing numbers of Kansans, about which I personally have been made aware in a most disconcerting way a few days ago.

I have been contacted by Rep. Ethel Peterson, who learned that I recently was a victim of identity theft when she spoke with another of her constituents here in Dodge City about that person's attempts to reconstruct the integrity of her financial life after falling victim to identity theft about a year ago. I had visited with that other fellow Dodge City victim about her experience, who then put Rep. Peterson in touch with me. After learning about the magnitude of the complications that several of her constituents have experienced as the result of the theft of their identities, including name and Social Security number, for fraudulent attempts to obtain credit and theft of money, I understand that Rep. Peterson is advocating for legislation that would put in place an effective law enabling victims of identity theft to restore their creditworthiness more easily than now is possible.

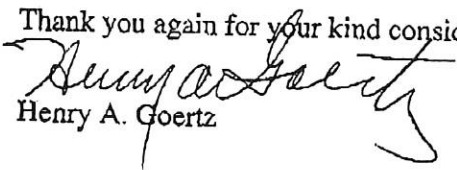
My own experience as a victim of identity theft and the enormous complications the misuse of my identity can involve appears only to have begun. A man identifying himself as Jim Zimmerman with Pete Franklin Auto Sales in Kansas City called approximately 11:00 a.m. this Monday, February 17, asking for me. I identified myself as "Henry Goertz," and asked why he was calling. Jim explained that someone using my name, and giving my correct Dodge City address, and also giving my correct Social Security number, had called in response to Pete Franklin's "infomercial" that had run on Saturday and Sunday. The caller claiming to be "Henry Goertz" was interested in buying a vehicle, using my identity to obtain credit. This person also had left home and work telephone numbers having a prefix of "913," indicating the Kansas City, Kansas, area. Based on my Social Security number and name, Mr. Zimmerman said there was evidence of an excellent credit record, and so he had called the home number, asking for me. The person who answered the phone seemed thrown a bit off guard by the request to speak with "Henry Goertz," and then answered that there was no one there by that name.

Suspecting that the use of my name and credit information had been fraudulent, Jim Zimmerman then called information to ask for a telephone number with my name, and that was how he had called my correct number in Dodge City. In subsequent communications with Mr. Zimmerman, he has continued to express his willingness to do what he can to track down the impostor who was using my identity at the other end of Kansas, but there has not been much that he can do.

Based upon what I have learned since Monday morning about the potential disastrous implications for my family's finances from the sort of identify theft that I have just experienced, I have spent much of this week doing what I can to rebuild the "firewall" necessary to keep this same impostor (and potentially others) from gaining access to my other financial records, and then perpetrating potential theft through credit card fraud, theft from banking accounts and other misuse of my identity for credit purposes. I have been assured by several people within the past few days that this task is almost certain to be long and arduous, and may not be entirely successful.

I understand that the proposed legislation that Rep. Peterson is helping to sponsor would make the rebuilding of that "firewall" easier and more effective. I urge the 2003 Kansas Legislature to do what it reasonably can to facilitate the protection of Kansans from the effects of identity theft.

Thank you again for your kind consideration of my experience.


Henry A. Goertz



SCHNEWEIS TAX AND ACCOUNTING

PUBLIC ACCOUNTANTS

FEBRUARY 20, 2003

MR. CHAIRMAN O'NEAL AND COMMITTEE MEMBERS,

THANK YOU FOR THE OPPORTUNITY TO ADDRESS AN ISSUE THAT IS ULTIMOST IN THE THOUGHTS OF PEOPLE IN KANSAS.

THE PROPOSED BILL HB2351, RELATING TO IDENTITY THEFT, IS A VERY IMPORTANT BILL TO COME BEFORE THE JUDICIARY COMMITTEE.

WE SERVICE THE PEOPLE OF DODGE CITY, OTHER AREAS IN KANSAS, AND EVEN OTHER STATES. OUR FIRM, SCHNEWEIS TAX & ACCOUNTING OF 212 E. FRONTVIEW, SUITE B DODGE CITY KS 67801 SERVES APPROXIMATELY 1400 CLIENTS THROUGH OUT THE TAX YEAR.

THIS LAST MONTH WE WITNESSED TWO OF OUR CLIENTS WHO WERE VICTIMS OF IDENTITY THEFT. ONE OPERATES A BUSINESS IN THIS CITY. THE OTHER CLIENTS ARE AN 80 YEAR OLD COUPLE. THIS IS A SEVERE BLOW TO THESE PEOPLE. NUMBER ONE, THERE SELF WORTH WENT TO ZERO. AND NUMBER TWO, THEY HAVE NO IDFA WHERE TO GET HELP AT THEIR AGE. WE CONTACTED THE POSTAL DEPARTMENT. LAW ENFORCEMENT DEPARTMENT. AND CALLED THEIR CREDITORS. HAVE YOU EVER TRIED TO TELL A FRIEND IT WILL BE OKAY? THEY LOOK UP TO YOU AND SAY, WHO WILL PAY THIS \$22,000.00 CHARGED AGAINST OUR CREDIT.

WE ASK THE COMMITTEE TO CONSIDER THIS BILL, THIS COULD HAPPEN TO YOU. LET'S NOT WAIT UNTIL THIS SITUATION LANDS ON OUR FRONT DOOR BEFORE WE DO SOMETHING.

SINCERELY,

ROBERT SCHNEWEIS
212 E. FRONTVIEW, SUITE B
DODGE CITY, KS. 67801
TELEPHONE: (620) 227-7754
FAX: (620) 227 7797

800-300-7754

FEBRUARY 20, 2003

MR. CHAIRMAN O'NEAL AND COMMITTEE MEMBERS,

THANK YOU FOR THE OPPORTUNITY TO ADDRESS AN ISSUE THAT IS UTMOST IN THE THOUGHTS OF PEOPLE IN KANSAS.

THE PROPOSED BILL HB2351, RELATING TO IDENTITY THEFT, IS A VERY IMPORTANT BILL TO COME BEFORE THE JUDICIARY COMMITTEE.

WE ASK THE COMMITTEE TO CONSIDER THIS BILL (HB2351) BECAUSE WE ARE VICTIMS OF THIS CRIME. WE ARE B.A. LEONARD AND MADELENE LEONARD, WE ARE EIGHTY YEARS OLD. WE FIRST FOUND OUT OF THIS CRIME WHEN WE WERE NOTIFIED BY MAIL, BY A COLLECTION AGENCY, THAT WE OWED AMERICAN EXPRESS \$11,428.00 AND WERE IN DEFAULT. TWO DAYS LATER WE RECEIVED A PHONE CALL FROM VISA CREDIT CARD THAT WE OWED \$10,000.00. WE WERE SHOCKED! WE DIDN'T KNOW WHERE TO TURN. WITH THE HELP OF OTHER PERSONS WE DID MAKE SOME ADJUSTMENTS.

THEN WE WERE FACED WITH A SECOND PROBLEM, I AM THE TREASURER OF DODGE TOWNSHIP. AND MY BOND WAS UP FOR RENEWAL, THEY WOULD NOT RENEW MY BOND, DUE TO BAD CREDIT. WITH MY DAUGHTER'S HELP WE WERE ABLE TO CLEAR THIS SITUATION UP AND NOW I AM BONDED.

WE ASK THE COMMITTEE FOR CONSIDERATION REGARDING THIS BILL. NO PERSON SHOULD HAVE TO WITNESS THE MENTAL FATIGUE WE WENT THROUGH.

SINCERELY,

B.A. Leonard

B. A. LEONARD
10663 US HWY. 50
DODGE CITY, KS. 67801
(620) 227-2662

Madeleine Leonard
MADELENE LEONARD

Testimony Before the House Judiciary Committee
February 24, 2003
H.B. 2290

SUGGESTED CORRECTIONS TO UTC

I. Section 103(12) [as revised by Kansas]. Definition of “qualified beneficiary.”

Defined as “a beneficiary who, on the date of the beneficiary’s qualification is determined:

- (A) is a distributee of trust income or principal; or
- (B) would be a distributee of trust income or principal if the trust terminated on that date.

Under the UTC, defined as “a beneficiary who, on the date the beneficiary’s qualification is determined:

- (A) is a distributee or permissible distributee of trust income or principal;
- (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date; or
- (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

Reason For Change: The language is somewhat ambiguous as many practitioners and trustees are reading (A) and (B) in the disjunctive, whereas it should be read in the conjunctive. The term “qualified beneficiary” is used in: Section 705 to define the class to whom notice must be given of a trustee resignation; Section 813 defining the class to be kept informed of the trust administration; Section 417 specifying to whom notice must be given before a trust is combined or divided; Section 704 defining persons who may consent to certain actions such as the appointment of a successor trustee; and Section 108(d) requiring to whom notice must be given in transferring a trust’s principal place of administration. The definition in this context simply makes no sense unless read in the conjunctive, nor would it appear to be good public policy to permit “first tier” remainder beneficiaries to be potentially excluded from all of the foregoing statutory provisions.

II. Section 813 currently reads as follows:

Sec 70. (UTC 813) DUTY TO INFORM AND REPORT. (a) A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a qualified beneficiary's request for information related to the administration of the trust.

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- (b) A trustee:
- (1) Upon request of a qualified beneficiary, shall promptly furnish to the qualified beneficiary a copy of the trust instrument;
 - (2) within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number;
 - (3) within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument and of the right to a trustee's report as provided in subsection (c); and
 - (4) shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.
- (c) A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property including liabilities, receipts and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values, and if requested, the trust's association of investment management and research compliant rate of return. Upon a vacancy in a trusteeship, unless a co-trustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, conservator, or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.
- (d) A qualified beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A qualified beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.
- (e) The provisions of this section are inapplicable as to notice to persons other than a surviving spouse so long as a surviving spouse is or may be entitled to receive income or principal distributions from a trust, or holds any power of appointment therein, and where any or all qualified beneficiaries are the issue of the surviving spouse.

Reason for Change: Subsection (e) of K.S.A. section 58a-813 renders the section's notice provisions inapplicable to persons other than a surviving spouse with respect to certain trusts, principally "bypass" trusts where the remainder beneficiaries are

descendants of the surviving spouse. Clearly, subsection (e) would preclude a trustee from sending to non-surviving spouse beneficiaries the three notices described in subsections (b)(2), (b)(3) and (b)(4). Subsection (e), however, does not specifically reference a trustee's reporting requirements under subsection (c) or a trustee's requirement to furnish a copy of the trust instrument upon request under subsection (b)(1).

The intent was not to limit Section 58a-813 to notice provisions only. If a non-surviving spouse beneficiary is a distributee or permissible distributee of a trust described in subsection (e), the trustee would still have a requirement under subsection (c) to send a periodic report to that beneficiary. Or, if a non-surviving spouse beneficiary, who is a first-line remainderman of a trust described in subsection (e), requests a periodic report, the trustee would still have a requirement under subsection (c) to furnish the requested report. Or, if a non-surviving spouse beneficiary of a trust described in subsection (e) requests a copy of the trust instrument, the trustee would still have a duty under subsection (b)(1) to furnish the requested copy.

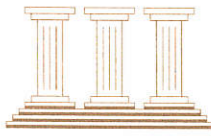
III. For purposes of determining whether an individual has created a “self-settled” trust with respect to creditor issues, Section 505 addresses the issue of lapses of withdrawal rights. Although there was not a significant amount of prior case law on this issue, it would appear that lapses of withdrawal rights would not literally meet the requirements under most self-settled trust statutes, including that under Kansas law (K.S.A. 33-101). These statutes, literally read, would seem to require an affirmative act. In deciding to include trust property with respect to which lapse of a withdrawal right (which would appear to include general powers of appointment) had occurred in this category, the Uniform Commissioners carved out a safe harbor under 505(b), which reads as follows:

(b) for purposes of this section:

- (1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and
- (2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or Section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on [the effective date of this [Code]] [, or as later amended].

Reason for Change: This limited exception, patterned after Texas and Arizona laws, was designed to accommodate “Crummey” powers. It does not accommodate “reciprocal general powers of appointment” between spouses which are being increasingly used to balance estates between spouses for federal estate tax purposes (as sanctioned by recent IRS letter rulings) and/or to arguably achieve a “step up” in basis in all spousal assets upon the death of the first spouse. The lapse of the surviving spouse’s general power of appointment over the predeceased spouse’s assets upon the death of the predeceased

spouse could subject all assets left in trust by the predeceased spouse for the benefit of the surviving spouse not only to the claims of the surviving spouse's creditors, but also to inclusion in the surviving spouse's taxable estate, as the exposure of the trust assets to the surviving spouse's creditors would constitute a general power of appointment under I.R.C. Section 2041.



KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: House Judiciary Committee

From: Gary D. White, Jr., Vice President Legislation
Kansas Trial Lawyers Association

Re: HB 2294

Date: February 24, 2003

Chairman O'Neal and members of the House Judiciary Committee. Pursuant to your request, enclosed is additional information concerning the proposed amendments to the above bill.

As you are aware, the attached amendments have been agreed upon by KTLA and the Kansas Building Industry Association to establish a fair procedure for the handling of construction defect claims. The vast majority of the agreed upon amendments are self-explanatory so we are providing additional information on those with which the committee may have questions.

- Most references to subcontractors and suppliers have stricken from the bill. Generally, the homeowner does not contract directly with either of the entities. The contractor, however, contracts directly with the subcontractor and has a working relationship with them. Under section 4(b) the contractor is required to notify any subcontractor who may be responsible for the defect. This allows the contractor and subcontractor to work to resolve the defect but does not place the consumer between the two entities. The contractor will certainly have the opportunity to work with the subcontractor to resolve any issues while addressing the defect with the homeowner through the procedures outlined in the bill.
- Section 2(a) requires the homeowner to give notice of the claim before filing a lawsuit. If such notice is not given, the contractor may move to have the case dismissed without prejudice. So that a homeowner is not prejudiced by this provision, an amendment has been agreed upon that provides the refiled action will be deemed filed on the date of the original filing and shall not count as a dismissal under the one dismissal rule under K.S.A. 60-241(a)(1).

H. JUDICIARY

Terry Humphrey, Executive Director

Fire Station No. 2 • 719 SW Van Buren Street, Suite 100 • Topeka, Ks 66603-3715 •

E-Mail: triallaw@ink.org

2.24.03

Attachment: 3

- Under Section 4(d) a contractor has four options which must be exercised within 30 days after a homeowner presents a notice of claim—request an inspection, offer to remedy the defect without inspection (with a commencement and completion date), offer a monetary payment (with the amount and date specified), or state that it disputes the defect claim. The offer to remedy the defect without the inspection has been added as an option to more timely resolve the construction dispute. Under Section 4(h), the contractor has the same three options after conducting an inspection.
- Section 4(o) provides a tolling provision for the statute of limitations of 180 days after the giving of notice of the claim, the date payment is to be made under subsection (d)(3) or h(2), or the contractor was to remedy the defect under subsection (d)(2) or h(1), whichever date is later. Due to the dismissal without prejudice provision and the requirement that notice be given under the bill, a provision must be added to preserve the homeowner's statute of limitations when the statute would expire during the period of notice, remedy of the construction defect, or when payment is to be made.
- Section 10(b) has been removed by agreement of the parties due to concerns that it infringes upon the attorney-client privilege, would cost the association considerable attorney fees for the attorney to implement, and is most likely controlled by association rules governing the board.

HOUSE BILL No. 2294

By Committee on Judiciary

2-11

AN ACT concerning civil procedure; relating to the filing of lawsuits concerning construction defects.

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

Section 1. As used in this act:

(a) "Action" means any civil lawsuit between a claimant and a contractor or action or arbitration proceeding for damages or indemnity asserting a claim for injury or loss to a dwelling or personal property caused by an alleged defect arising out of or related to the construction or condition of the dwelling or a remodel of a dwelling.

between a claimant and a contractor

(b) "Association" means a non-profit homeowners organization as defined in K.S.A. 60-3611, an amendments thereto.

(c) "Claimant" means a homeowner, including a subsequent purchaser, or association who asserts a claim against a contractor or subcontractor concerning a defect in the construction of a dwelling or in the remodel of a dwelling.

(d) "Construction defect" or "defect" means a deficiency in, or a deficiency arising out of the specifications, planning, supervision or construction of residential improvements that results from any of the following:

(1) Defective material, products or components used in the construction of residential improvements.

(2) Violation of the applicable codes in effect at the time of construction of residential improvements. Compliance with the applicable codes in effect at the time of construction shall conclusively establish construction in accordance with accepted trade standards for good and workmanlike construction with respect to all matters specified in such codes.

(3) Failure to construct residential improvements in accordance with accepted trade standards for good and workmanlike construction at the time of construction. In jurisdictions where there are no applicable codes, compliance with the national association of home builders residential construction performance guidelines, second edition, in effect on the effective date of this act, shall conclusively establish construction with respect to all matters specified in those guidelines.

(e) "Contractor" means any person, firm, partnership, corporation,

1 association or other organization that is engaged in the business of de-
2 ~~veloping or constructing dwellings.~~

3 (f) "Dwelling" means a single-family house, duplex or multifamily
4 unit designed for residential use in which title to each individual unit is
5 transferred to the owner under a condominium or cooperative system
6 and shall include common areas and improvements that are owned or
7 maintained by an association or by members of an association. A dwelling
8 includes the systems and other components and improvements that are
9 part of a single or multifamily unit at the time of construction. For the
10 purposes of this act "dwelling" does not mean manufactured home as
11 defined in K.S.A. 58-4202, and amendments thereto.

12 (g) ~~"Service" means personal service or delivery by certified mail,~~
13 ~~return receipt requested, to the last known address of the addressee.~~

14 (h) "Subcontractor" means a contractor who performs work on behalf
15 of ~~another~~ contractor in the construction of a dwelling.

16 (i) ~~"Supplier" means a person who provides materials, equipment or~~
17 ~~other supplies for the construction of dwelling.~~

18 Sec. 2. (a) If a claimant files an action without first complying with
19 the provisions of this act, on application by a ~~party to the action, the court~~
20 ~~shall dismiss the action,~~ without prejudice, and the action may not be
21 refiled until the claimant has complied with the requirements of this act.

22 (b) This act shall not supersede express warranty, ~~settlement of dis-~~
23 ~~putes~~ or other provisions of a contract between the contractor and the
24 claimant.

25 Sec. 3. Nothing in this act shall apply to actions arising out of claims
26 for personal injury or death.

27 Sec. 4. (a) In every action brought against a contractor arising out of
28 the construction of a dwelling, the claimant, ~~at least 90 days before filing~~
29 ~~an action,~~ shall serve written initial notice of claim on the contractor. The
30 initial notice of claim shall state that the claimant asserts a construction
31 defect claim and the notice of claim shall describe the claim or claims in
32 detail sufficient to determine the general nature of any alleged construc-
33 tion defects ~~and a description of the results of the defects, if known.~~

34 (b) Within 15 days after service of the ~~initial~~ notice of claim, the
35 contractor shall serve a copy of the notice to each subcontractor ~~and~~
36 ~~supplier~~ who may be responsible for a defect specified in the notice and
37 include with the notice the specific defect for which the contractor be-
38 lieves the subcontractor ~~or supplier is~~ responsible.

39 ~~(c) On the request of the contractor, subcontractor or supplier who~~
40 ~~has received an initial notice of claim, the claimant shall provide to the~~
41 ~~contractor, subcontractor or supplier any evidence that depicts the nature~~
42 ~~and cause of the defect and the nature and extent of repairs necessary to~~
43 ~~remedy the defect, including any assessment provided by a reliable~~

"Serve" or

contractor to the action, the action shall be dismissed

The refiled of an action after a dismissal pursuant to this subsection shall be deemed to have been filed on the date the original action was filed for statute of limitations purposes. A dismissal under this subsection shall not count as a dismissal for purposes of K.S.A. 60-241(a)(1).

implied warranty

or where the defect or damage to the dwelling is so substantial that it is not habitable.

before filing the action.

may be

1 ~~craftsman.~~

2 (d) Within 30 days after service of the ~~initial~~ notice of claim by claim-
3 ant ~~required~~, each contractor, ~~subcontractor or supplier~~ that has received
4 such notice shall serve a written response on the claimant. The written
5 response shall:

6 (1) Propose to inspect the dwelling that is the subject of the claim;

(3) 7 ~~(2) offer to compromise and settle the claim by monetary payment~~
8 ~~without inspection; or~~

9 ~~(3) state that the contractor, subcontractor or supplier disputes the~~
10 ~~claim and will neither remedy the alleged construction defect nor com-~~
11 ~~promise and settle the claim.~~

(4) 12 (e) If the contractor, ~~subcontractor or supplier~~ disputes the claim
13 pursuant to subsection (d)(2) and will neither remedy the alleged con-
14 struction defect nor compromise and settle the claim, or does not respond
15 to the claimant's notice of claim within the time stated in subsection (d),
16 the claimant may bring an action against the contractor, ~~subcontractor or~~
17 ~~supplier for the claim described in the initial notice of claim~~ without
18 further notice.

19 (f) If the claimant rejects the inspection proposal or the settlement
20 offer made by the contractor, ~~subcontractor or supplier~~ pursuant to sub-
21 section (d), the claimant shall serve written notice of the claimant's re-
22 jection on the contractor, ~~subcontractor or supplier~~. The notice shall in-
23 clude a statement of the basis for the claimant's rejection of the
24 contractor, ~~subcontractor or supplier's~~ proposal or offer. After service of
25 the rejection, the claimant may bring an action against the contractor,
26 ~~subcontractor or supplier for the claim or claims described in the initial~~
27 ~~notice of claim~~ without further notice. The claimant may alternatively
28 elect an arbitration process pursuant to K.S.A. 5-201 *et. seq.*, and amend-
29 ments thereto.

30 (g) If the claimant elects to allow the contractor, ~~subcontractor or~~
31 ~~supplier~~ to inspect the dwelling in accordance with the contractor, ~~sub-~~
32 ~~contractor or supplier's~~ proposal pursuant to subsection (d)(1) the claim-
33 ant, ~~within 15 days~~, shall notify the contractor, ~~subcontractor or supplier~~.
34 The claimant shall provide the contractor, ~~subcontractor or supplier~~ and
35 its ~~contractor or other~~ agents access to the claimant's ~~residence~~ during
36 normal working hours to inspect the premises and the claimed defect to
37 determine the nature and cause of the alleged defects and the nature and
38 extent of any repairs or replacements necessary to repair the alleged
39 defects.

40 (h) Within 30 days following completion of the inspection, the con-
41 tractor, ~~subcontractor or supplier~~ shall serve on the claimant a written:

42 (1) Offer to remedy the construction defect at no cost to the claimant,
43 including a report of the scope of the inspection, the findings and results

(2) Offer to remedy the alleged construction defect at no cost to the claimant including a description of the additional construction necessary to remedy the defect, a specification of the date when the contractor proposes to commence the work and the date the work will be completed; or

including a specification of the amount of the payment and the date the payment will be made;

refuses service under subsection (a) or

or does not commence or complete the work on the alleged construction defect on the date specified in subsection (d)(2) or does not make the payment in the time specified in subsection (d)(3),

Failure to give the notice required by this subsection shall not require the dismissal of the action under section 2(a).

and dwelling

Said inspection shall occur within 30 days of the claimant's notification to the contractor under this section.

1 of the inspection, a description of the additional construction necessary
2 to remedy the defect ~~described in the claim and a timetable for the com-~~
3 ~~pletion of such construction;~~

4 (2) offer to compromise and settle the claim by monetary payment;
5 or

6 (3) statement that the contractor, ~~subcontractor or supplier~~ will not
7 proceed further to remedy the defect.

8 (i) If a claimant accepts a contractor, ~~subcontractor or supplier's~~ offer
9 made pursuant to subsection (h)(1) or (h)(2) and the contractor, ~~subcon-~~
10 ~~tractor or supplier~~ does not proceed to remedy the construction defect
11 or make the monetary payment within the agreed timetable, the claimant
12 may bring an action against the contractor, ~~subcontractor or supplier~~ for
13 ~~the claim described in the initial notice of claim~~ without further notice.

14 (j) If a claimant receives a written statement that the contractor, ~~sub-~~
15 ~~contractor or supplier~~ will not proceed further to remedy the defect, the
16 claimant may bring an action against the contractor, ~~subcontractor or~~
17 ~~supplier~~ for the claim described in the initial notice of claim required
18 without further notice.

19 (k) If the claimant rejects the offer made by the contractor, ~~subcon-~~
20 ~~tractor or supplier~~ to either remedy the construction defect or to make
21 the monetary payment, the claimant shall serve written notice of the
22 claimant's rejection on the contractor, ~~subcontractor or supplier~~. The no-
23 ~~tice shall include the basis for the claimant's rejection of the contractor,~~
24 ~~subcontractor or supplier's proposal or offer.~~ After service of the rejection
25 the claimant may bring an action against contractor, ~~subcontractor or~~
26 ~~supplier~~ for the claim described in the initial notice of claim without
27 further notice.

28 (l) If a claimant rejects an offer made as provided by this section or
29 does not permit the contractor, ~~subcontractor or supplier~~ a reasonable
30 opportunity to repair the defect pursuant to an accepted offer of settle-
31 ment, the claimant shall not recover an amount in excess of:

32 (1) The reasonable cost of the offered repairs which are necessary to
33 cure the construction defect and the responsibility of the contractor, ~~sub-~~
34 ~~contractor or supplier,~~ or

35 (2) the amount of the monetary settlement offered by the contractor,
36 ~~subcontractor or supplier.~~

(l) ~~(m)~~ Any claimant accepting the offer of the contractor, ~~subcontractor~~
38 ~~or supplier~~ to remedy the construction defects shall do so by serving the
39 contractor, ~~subcontractor or supplier~~ with a written notice of acceptance
40 within a reasonable period of time after receipt of the offer but no later
41 than 30 days after receipt of the offer.

(m) ~~(n)~~ If a claimant accepts a contractor, ~~subcontractor or supplier's~~ of-
43 fer to repair a defect described in an ~~initial~~ notice of claim, the claimant

a specification of the date when the contractor
proposes to commence the work and the date the
work will be completed;

including a specification of the amount of the
payment and the date the payment will be made;

the contractor does not respond within the time
period specified by subsection (h) or

1 shall provide the contractor, ~~subcontractor or supplier~~ and its ~~contractors~~
2 ~~or other~~ agents reasonable access to the claimant's ~~residence~~ during normal working hours to perform and complete the construction by the time-
3 table stated in the offer. dwelling

4
5 ~~(o) A claimant's failure to do any of the following is admissible in any~~
6 ~~action and creates a rebuttable presumption that the claimant's damages~~
7 ~~may have been mitigated.~~

8 ~~(1) Allow a reasonable inspection requested by the contractor, sub-~~
9 ~~contractor or supplier, or~~

10 ~~(2) provide a good faith, written response to a contractor, subcon-~~
11 ~~tractor or supplier's offer.~~

(n) 12 ~~(p) Absent good cause, the contractor, subcontractor or supplier's~~
13 ~~failure to respond in good faith to the claimant's initial notice of claim~~
14 ~~shall preclude the contractor, subcontractor or supplier from asserting~~
15 ~~that the claimant did not comply with the provisions of this act.~~

(o) 16 ~~(q) A claimant's initial written notice of claim tolls the applicable statu-~~
17 ~~te of limitations from the date the notice is sent until 120 days after the~~
18 ~~contractor, subcontractor or supplier receives the notice or until such~~
19 ~~time as the agreed upon repairs are completed.~~

pursuant to section 2(a) shall toll the applicable statute of limitations for one hundred eighty days after the claimant personally serves or mails the notice as required by this act or from the date payment was to be made under subsection d(3) or h(2) or the contractor was to complete work to remedy the construction defect under subsection d(2) or h(1), whichever date is later.

20 ~~Sec. 5. A construction defect which is discovered after a claimant has~~
21 ~~provided a contractor with the initial notice of claim required in section~~
22 ~~4, and amendments thereto, may not be alleged until the claimant has~~
23 ~~given the contractor, subcontractor or supplier who performed the orig-~~
24 ~~inal construction.~~

25 ~~(a) An additional written notice of claim of the alleged defect in the~~
26 ~~same manner as provided for in the initial notice of claim required by~~
27 ~~section 4, and amendments thereto; and~~

28 ~~(b) a reasonable opportunity to repair the alleged construction defect~~
29 ~~in the manner provided in section 4, and amendments thereto.~~

30 ~~Sec. 6. (a) A contractor, subcontractor or supplier who receives an~~
31 ~~initial notice of claim pursuant to section 4, and amendments thereto,~~ of a construction defect pursuant to this Act
32 may present the notice to an insurer who issued a policy of insurance
33 covering all or part of the conduct or business of the contractor, subcon-
34 tractor or supplier. or

35 (b) Such notice provided to an insurer:

36 (1) Constitutes the making of a claim under the policy; and

37 (2) requires the contractor, subcontractor or supplier and the insurer
38 to perform any obligations or duties required by the policy upon the
39 making of a claim.

40 ~~Sec. 7. (a) Upon entering into a contract for sale, construction or~~
41 ~~substantial remodel of a dwelling, the contractor, subcontractor or sup-~~
42 ~~plier shall provide notice to the potential claimant of the contractor, sub-~~
43 ~~contractor or supplier's right to offer to repair construction defects before~~

1 a claimant may commence litigation against the contractor, ~~subcontractor~~
2 ~~or supplier~~. Such notice shall be conspicuous and may be included as part
3 of the underlying contract.

4 (b) Such notice shall be in substantially the following form: Kansas
5 law, ~~sections 1 through 8, and amendment thereto~~, contains important
6 requirements you must follow before you may file a lawsuit for defective
7 construction against the contractor who constructed your home. Ninety
8 days before you file your lawsuit, you must deliver to the contractor a
9 written notice of any construction conditions you allege are defective and
10 provide your contractor ~~and any subcontractors or suppliers~~ the oppor-
11 tunity to make an offer to repair or pay for the defects. You are not
12 obligated to accept any offer made by the contractor ~~or any subcontractors~~
13 ~~or suppliers~~. There are strict deadlines and procedures under state law,
14 and failure to follow them may affect your ability to file a lawsuit.

15 Sec. 8. Each contractor who constructs a new residential dwelling
16 shall, within 30 days after the close of the sale, provide in writing to the
17 initial purchaser of the residence:

18 (a) The name, license number if applicable, business address and tel-
19 ephone number of each subcontractor who performed any work related
20 to the construction of the dwelling; and

21 (b) a brief description of the work performed by each subcontractor
22 identified pursuant to this section.

23 Sec. 9. (a) A person shall not provide or offer to provide anything of
24 monetary value to a property manager of an association or to a member
25 or officer of an executive board of an association to induce the property
26 manager, member or officer to encourage or discourage the association
27 to file a claim for damages arising from a construction defect.

28 (b) A property manager shall not accept anything of value given in
29 exchange for encouraging or discouraging the association that such prop-
30 erty manager manages to file a claim for damages arising from a construc-
31 tion defect.

32 (c) A member or officer of an executive board of an association shall
33 not accept anything of value given in exchange for encouraging or dis-
34 couraging the association of which such person is a member or officer of
35 the executive board to file a claim for damages arising from a construction
36 defect.

37 (d) A person who willfully violates this section shall be guilty of a class
38 C nonperson misdemeanor.

39 Sec. 10. (a) An association may bring an action to recover damages
40 resulting from construction defects in any of the units, common elements
41 or limited common elements of the common-interest community only:

42 ~~(1) If the association first obtains the written approval of each unit's~~
43 ~~owner whose unit or interest in the common elements or limited common~~

1 elements will be the subject of the action or claim;

2 (2) upon a vote of the units' owners to which at least a majority of
3 the votes of the members of the association are allocated; and

4 (3) Upon a vote of the executive board of the association.

5 ~~(b) If an action is brought by an association to recover damages re-~~
6 ~~sulting from construction defects in any of the units, common elements~~
7 ~~or limited common elements of the common-interest community, the~~
8 ~~attorney representing the association shall provide to the executive board~~
9 ~~of the association and to each unit's owner a statement that includes, in~~
10 ~~reasonable detail:~~

11 ~~(1) The defects and damages or injuries to the units, common ele-~~
12 ~~ments or limited common elements;~~

13 ~~(2) the cause of the defects, if the cause is known;~~

14 ~~(3) the nature and the extent that is known of the damage or injury~~
15 ~~resulting from the defects;~~

16 ~~(4) the location of each defect within the units, common elements or~~
17 ~~limited common elements, if known;~~

18 ~~(5) A reasonable estimate of the cost of the action or mediation, in-~~
19 ~~cluding reasonable attorney fees;~~

20 ~~(6) an explanation of the potential benefits of the action or arbitration~~
21 ~~and the potential adverse consequences if the association does not com-~~
22 ~~mence the action or submit the claim to arbitration or if the outcome is~~
23 ~~not favorable to the association; and~~

24 ~~(7) all disclosures that the unit owner's is required to make upon the~~
25 ~~sale of the property.~~

26 (c) An association or an attorney for an association shall not employ
27 a person to perform destructive tests to determine any damage or injury
28 to a unit, common element or limited common element caused by a
29 construction defect unless:

30 (1) The person performing the tests is someone in the business of
31 performing such tests and analysis;

32 ~~(2) the association has obtained the prior written approval of each~~
33 ~~unit's owner whose unit or interest in the common element or limited~~
34 ~~common element will be affected by such testing;~~

35 (3) the person performing the tests has provided a written schedule
36 for repairs;

37 (4) the person performing the tests is required to repair all damage
38 resulting from such tests in accordance with state laws and local ordi-
39 nances and codes relating thereto; and

40 (5) the association or the person so employed obtains all permits re-
41 quired to conduct such tests and to repair any damage resulting from
42 such tests.

43 (d) An association may commence an action only upon a vote or writ-

1 ten agreement of the owners of the units to which at least a majority of
2 the votes of the members of the association are allocated. In such a case,
3 the association shall provide written notice to the owner of each unit of
4 the meeting at which the commencement of an action is to be considered
5 or action is to be taken within 21 calendar days before the meeting.

6 (e) The executive board of an association, without giving notice to the
7 units' owner's, may employ a contractor and such other persons as are
8 necessary to make such repairs to a unit or common element within the
9 common-interest community as are required to protect the health, safety
10 and welfare of the units' owners.

11 Sec. 11. If any provision of this act or the application thereof to any
12 person or circumstance is held invalid, the invalidity does not affect other
13 provisions or applications of this act which can be given effect without
14 the invalid provision or application, and to this end the provisions of this
15 act are severable.

16 Sec. 12. This act shall take effect and be in force from and after its
17 publication in the statute book.

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