Approved: May 1, 2003
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairman John Vratil at 9:35 a.m. on March 24, 2003, in Room 123-S of the Capitol.

All members were present except: Senator Allen (E)

Committee staff present: Mike Heim, Kansas Legislative Research Department
Lisa Montgomery, Office of the Revisor of Statutes
Dee Woodson, Committee Secretary

Conferees appearing before the committee:
Chris Schneider, Assistant District Attorney, Wyandotte County
Kevin Graham, Assistant Attorney General
Kathy Porter, Office of Judicial Administration
Bob Totten, Kansas Contractors Association
John D. Sherwood, Sherwood Construction Co., Wichita
Will Larson, General Counsel, Associated General Contractors of Kansas
George Barbee, Kansas Consulting Engineers
SueAnn Schultz, Vice President & General Counsel, The IMA Financial Group, Inc.
Mark Wilkerson, IMA, Topeka (written only)
John Cassidy, Chief Council for the Kansas Department of Transportation
Trudy Aron, American Institute of Architects
Gus Meyer, Rau Construction Co., Overland Park, KS
Larry Magill, Kansfas Association Insurance Agents
Cory Peterson, Associated General Contractors of Kansas (written only)
Chris Wilson, Kansas Building Industry Association (written only)
Woody Moses, Kansas Ready Mix Concrete Association
Roy Farwell, Union Pacific Railroad
John T. Frederick, The Boeing Co. (written only)

Others attending: see attached list

HB 2312 - Time limitations for defendant to be brought promptly to trial

Chairman Vratil opened the hearing on **HB 2312**. Chris Schneider, Assistant District Attorney for Wyandotte County, testified in support of **HB 2312**, and stated that current statute sets specific time limits in which a defendant must be brought to trial, but leaves in confusion the question of what time limits apply when a defendant causes a delay in the trial. He explained how the problem arises in a couple of different ways, i.e. when a defendant fails to appear for trail or a pretrial hearing set after arraignment. He said the same situation arises when the issue of a defendant's competency arises and his or her case is approaching trial. Mr. Schneider explained the legislation, as originally proposed, would give the state 90 days after a defendant was arrested on a bench warrant or after competency had been ascertained to get the defendant brought to trial. He said the House amended the legislation to keep the law the same as it is currently when a case is continued at the last minute because of a question of competency. He requested passage of this legislation, with an amendment to give a set number of days to bring a defendant to trial after competency is determined. (Attachment 1)

Kevin Graham, Assistant Attorney General, testified as a neutral conferee, and said that the original bill language was designed to provide greater specificity to the courts and attorneys regarding when a criminal trial must take place in cases where certain types of delays occur. He stated that the intent of **HB 2312** was to prevent ambiguity, to help insure defendants are brought to trial in a timely fashion, and to protect the rights of defendants. He explained that the amendments the House Committee adopted may create substantial confusion for criminal justice practitioners, and could actually result in certain criminal defendants being set free without ever standing trial. Mr. Graham stated that the Attorney General would like to see the House Committee amendments to **HB 2312** removed and the bill returned to the original language so that he can once again support the bill. (Attachment 2)

Kathy Porter, Office of Judicial Administration, appeared before the Committee in opposition to **HB 2312** as amended by the House Committee, and submitted a letter from Chief Judge Larry Solomon of the 30th

Judicial District, who is President of the Kansas District Judges Association (KDJA). Judge Solomon urged the Committee to delete the House Committee amendments to **HB 2312**. (Attachment 3)

Following brief discussion, the Chairman closed the hearing on **HB 2312**.

HB 2154 - Construction contracts; indemnification agreements

Chairman Vratil opened the hearing on **HB 2154**. Bob Totten, Public Affairs Director for the Kansas Contractors Association, testified in support of **HB 2154**, and said this bill provides that each part should be responsible for their own acts of negligence, and not be allowed by operation of a contract provision to shift their own liability. He stated that Kansas is a comparative negligence state. These types of hold harmless/indemnification provisions operate as a contractual mechanism to shift liability and circumvent state law. (Attachment 4)

John D. Sherwood, Corporate Counsel for Sherwood Construction Co., spoke in favor of **HB 2154**. He said that 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. He stated 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. (Attachment 5)

Will Larson, General Council for the Associated General Contractors of Kansas, testified in support of **HB 2154**. He explained that the bill would outlaw indemnity provisions in constructions contracts which require one part, to indemnify the other party for the others own negligence. These types of indemnity provisions are called exculpatory indemnity clauses. He stated 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 contractor's negligence. (Attachment 6)

George Barbee, Executive Director of the Kansas Consulting Engineers, appeared before the Committee to testify in favor of **HB 2154**. He said that 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. He stated this bill would prevent the inequity of some clients demanding that designers accept risk that is far beyond that which is insurable by limiting a designer to being held responsible for professional negligence. (Attachment 7)

SueAnn Schultz, Vice President and General Counsel for The IMA Financial Group, Inc., testified in favor of **HB 2154** as it represents fair and reasonable legislation ensuring that each party bear responsibility for their own acts of negligence. She gave examples of liability shifting that is currently taking place. (Attachment 8)

Mark Wilkerson, IMA, Topeka, submitted written testimony in support of HB 2154. (Attachment 9)

John Cassidy, Chief Counsel for the Kansas Department of Transportation (KDOT), spoke in support of **HB 2154**. He said that KDOT has spent numerous hours in recurring contract negotiations with railroad owners who wish to force KDOT into incorporating these indemnification clauses into KDOT's contracts. He stated that it is KDOT's view that such indemnification provisions are neither fair nor a proper method of risk allocation, and KDOT has not acceded to the demand for such indemnification clauses in its contracts. Mr. Cassidy added that it is KDOT's understanding that the majority of Kansas contractors do not have sufficient assets to absorb the costs incurred by another party's negligence, especially another party over which the contractor has no control. (Attachment 10)

Trudy Aron, Executive Director of the American Institute of Architects in Kansas, testified in favor of **HB 2154**. She said the bill was good public policy. It says that one cannot pass one's own negligence to someone else. She stated that 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. Ms. Aron reiterated that the bill was good public policy. (Attachment 11)

MINUTES OF THE SENATE JUDICIARY COMMITTEE on March 24, 2003 in Room 123-S of the Capitol.

Gus Meyer, President of Rau Construction Company in Overland Park and Chairman of the Builders Association, testified in support of **HB 2154**. He stated that this legislation would render unenforceable indemnification provisions in construction contracts that require the promisor (contractor) to hold harmless, indemnify, or defend the promisee (owner) or others against liability for damages caused by the promisee's own negligence. He said these new indemnification provisions defy common sense as well as ethical business practices. (Attachment 12)

Larry Magill, representing the Kansas Association of Insurance Agents, spoke in favor of **HB 2154**. He pointed out that if these types of indemnity agreements are allowed to stand, they will undermine the exclusive remedy of the Workers Compensation Act through the "back door". (Attachment 13)

Corey Peterson, Executive Vice President of the Associated General Contractors of Kansas, Inc., submitted written testimony in support of **HB 2154**. (Attachment 14)

Chris Wilson, Government Affairs Director of Kansas Building Industry Association, submitted written testimony in support of **HB 2154**. (Attachment 15)

Woody Moses, Managing Director of the Kansas Aggregate Producers' Association and the Kansas Ready Mixed Concrete Association, testified as a neutral party on **HB 2154**. He stated that as an association their members have not taken a position on **HB 2154**, but if the committee considers it good public policy, his association urges consideration of the submitted amendment attached to his written testimony. He explained the amendment would expand the definition of construction contracts to clearly include subcontracts and purchase orders. (Attachment 16)

Roy Farwell, General Attorney for the Union Pacific Railroad, testified in opposition to **HB 2154**. He stated that the bill will not result in the gains envisioned by the proponents and will end up having adverse consequences. He said that indemnity against one's own negligence is the principle upon which liability insurance is founded. Mr. Farwell testified that the Kansas courts have rejected indemnity clauses in certain specific abusive cases, such as those involving vast disparity of bargaining power, but have otherwise held that, when fairly bargained for, they do not violate public policy. He said the bottom line is that it does not make sense for a railroad, or any party, to be forced to permit contractors onto their property without the ability to insist that the contractors bear the responsibility for accidents that would not have occurred but for their presence. (Attachment 17)

John Frederick, Government Relations Manager for The Boeing Company, submitted written testimony in opposition of **HB 2154**. (Attachment 18)

Committee discussion and questions regarded worker's compensation issues, that railroad workers are not covered by the Workers Compensation Act but the Federal Employers Liability Act, why the railroads don't purchase their own insurance, what the approximate cost of insurance is for contractors, and that insurance policies are available .

Chairman Vratil announced that he does not intend to work this bill this session, but does not intend to let this issue die. He said that this bill presents a significant issue of public policy for the Legislature. It also presents another issue of public policy which is even more significant. It asks the Legislature to get involved in specifying what provisions can and cannot be placed inside contracts. Chairman Vratil stated that heretofore the Legislature has not shown significant inclination to get involved in matters between private contracting parties, and he thinks that is a good thing for the most part. He explained that he wants to give the interested parties in this issue the opportunity to resolve their own problem over the next year and before the commencement of the 2004 legislative session. The Chairman intends to work with KCCI and some other parties to convene a meeting among all the interested parties to give them an opportunity to arrive at a satisfactory solution; one that would be satisfactory to both the owners as well as the contractors. The Chair said that he would suggest to those parties that the solution they would arrive at will probably be much better then the solution the Legislature arrives at, because the Legislature's solution will be a win or lose solution for the parties. He encouraged the interested parties to enter into those discussions in good faith. Chairman Vratil stated that he will coordinate at least the initial meeting, and

then let the KCCI take it from there. He told the Committee members that was his intention with respect to this bill this session. He clarified that if the parties are not able to arrive at a satisfactory solution, the bill will be alive next year and he assured everyone that it would be taken up then for final action on this bill.

The meeting adjourned at 10:32 a.m. The next scheduled meeting is March 25, 2003.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Mon., March 24, 2003

NAME	REPRESENTING
Trudy Aron	Am Inst of Architects
Erik Sartorius	City of Overland Park
Kyle Smith	KBI
Bob Totten	Ks Contractors
Larry Magill	Ks. Assn. of Ins. Agents
Ray Farwell	Union Pacific RR
Scott Moore	Union Pacific RR
Pat Hubbell	" " "
John Federico	The Boeing Co.
Scott Heidner	KS Consulting Engineers
Tom Slattery	AGC / KS
Corey Peterson	AGC / KS
Gus Meyer	Rau Construction / Builders Assoc
Matthew Bergmann	—
Wendy McFarland	KRMCA
Woody Moses	KRMCA
Jeff Bottenberg	State Farm
Susan Schultz	IMA Financial Group
Mark Wilkerson	IMA of Kansas

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Mon., March 24, 2003

NAME	REPRESENTING
Will Larson	AGC of Kansas
Laurie Quaife	Intern for Senator O'Connor
Kathy Porter	Judicial Branch
Tom Bruning	Self
[illegible] Bigge	Self
Chuck Stones	Ks Bankers Assn
John Cassidy	KDOT
KEVIN GRAHAM	KAG
[illegible] Schmidt	KCDAA / 4th Dist. Atty.
Michael White	KCDAA
George Barbee	KCC
Bill Jones	KSC
John D. Sherwood	Sher. County Co. KCA
Scott Schneider	KADC
Lorrie Ann Bowers	KS Govt Consulting

Remarks of Christopher L. Schneider, Assistant Wyandotte County District Attorney, regarding H.B. 2312

Before the Judiciary committee of the Kansas Senate

March 24, 2003

Mr. Chairman and members of the committee:

The current version of K.S.A. 22-3402 sets specific time limits in which a defendant must be brought to trial (i.e., ninety days after arraignment if defendant is held in custody solely because of that case, and one hundred eighty days otherwise), but leaves in confusion the question of what time limits apply when a defendant causes a delay in the trial.

Current case law does not do much to help. In *State v. Dreher*, 239 Kan. 259, 261, 717 P.2d 1053 (1986) the Kansas Supreme Court said: "any additional period of time assessed against a defendant due to the necessity of rescheduling a trial because of his fault should be limited to a reasonable time measured by the particular circumstances of the case." Unfortunately, what should be considered a "reasonable" time period is subject to conflicting interpretations, making it difficult to foresee what would be a reasonable period of time in a particular case.

The problem arises in a couple of different ways. First, when a defendant fails to appear for trial or a pretrial hearing set after arraignment. The time limit is tolled when a bench warrant is issued for the defendant. However, once the defendant is picked up on the bench warrant, a literal interpretation of the statute indicates that the state only has the number of days that remained in the speedy trial time at the time of the defendant's failure to appear to get him or her to trial. For instance, if a case has a speedy trial deadline of March 27, 2003, and is set for trial today (March 24, 2003), and the defendant fails to appear, a bench warrant is issued and speedy trial time is tolled. However, once the defendant is picked up on the warrant, there would only be three days in which a trial could be commenced.

The same situation arises when the issue of a defendant's competency arises as his or her case is approaching trial. Speedy trial time is tolled while the defendant's competency is determined and, if necessary, treated. However, the state can still be in a position of only having a few days to get a defendant to trial, just as when the defendant fails to appear for trial of his own volition.

The present situation is a problem for the courts, which have their dockets set in advance with other cases having speedy trial deadlines. In order to resolve a case with the problem addressed here, another case has to be continued. For instance, in Wyandotte County, criminal trials are set five to eight weeks in advance.

The situation is a problem for prosecutors because we need a reasonable amount of time

to contact witnesses so that they can be made available to testify. In a complicated case with numerous witnesses, this is not something that can be done on short notice. Expert witnesses, such as lab personnel or doctors, are often unavailable on short notice, and the average person needs to make arrangements with their employer to be off work to testify. In addition, in a society as mobile as ours in this day and age, it is often necessary to work around travel arrangements of people whose testimony is necessary to prove a case. In order to be fair to victims and witnesses, it is only right to have a reasonable period of time to schedule a case for trial. When a defendant fails to appear on the day of trial, or when competency is raised at such a late date the state has already met with witnesses, obtained service upon reluctant witnesses, and perhaps secured the attendance of witnesses from outside Kansas, all of which cannot be done in a couple of days.

The legislation, as originally proposed, would give the state 90 days after a defendant was arrested on a bench warrant or after competency had been ascertained to get the defendant brought to trial. The other body amended the legislation to keep that law the same as it is currently when a case is continued at the last minute because of a question of competency.

We would sincerely request passage of this legislation, with an amendment to give a set number of days to bring a defendant to trial after competency is determined.

State of Kansas
Office of the Attorney General
120 S.W. 10th Avenue, 2nd Floor, Topeka, Kansas 66612-1597

Kevin Graham

Phill Kline
Attorney General

Main Phone: (785) 296-2215
Fax: 296-6296

TESTIMONY OF
ASSISTANT ATTORNEY GENERAL KEVIN GRAHAM
BEFORE THE SENATE JUDICIARY COMMITTEE

RE: HOUSE BILL 2312 AS AMENDED BY HOUSE COMMITTEE
March 24, 2003

Chairperson Vratil and Members of the Committee:

Thank you for the opportunity to appear before you today on behalf of Attorney General Phill Kline to speak to you concerning H.B. 2312, as amended by House Committee.

When H.B. 2312 was originally introduced the bill amended and clarified provisions of K.S.A. 22-3402 (the "speedy trial" statute.) The amendments and clarifications included in the original bill were requested by the Kansas County and District Attorneys Association, and were supported by the Attorney General. The original bill language was designed to provide greater specificity to the courts and attorneys regarding when a criminal trial must take place in cases where certain types of delays occur. For example, in a case where a defendant fails to appear for a hearing and a bench warrant must be issued for the arrest of the defendant the original bill set a clear, fixed maximum time limit for bringing that individual to trial. Another example would be a case where the defendant was originally found to be incompetent to stand trial then later is determined to be competent; the original bill would have imposed a clear, maximum time limit for bringing the defendant to trial. The intent of H.B. 2312 was to prevent ambiguity, to help insure defendants are brought to trial in a timely fashion and to protect the rights of defendants.

However, H.B. 2312 was amended in House Committee in such a way that may create substantial confusion for criminal justice practitioners and could actually result in certain criminal defendants being set free without ever being required to stand trial. The House Committee added the words "**minus the number of days the defendant was held in jail prior to such finding**" to lines 2 and 3 and lines 8 and 9 of page two of the bill. The effect of these seemingly simple amendments could be great. Please consider a hypothetical example: A defendant is arrested and charged with a crime. For a period of time the defendant is incarcerated in jail prior to trial and during that period of time is provided a mental evaluation. The result of the mental evaluation is a

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finding that the defendant is incompetent to stand trial. Some period of time later the defendant is re-evaluated and determined to have regained competency to stand trial for his/her crimes. Under the language amended into H.B. 2312 by the House Committee, if that defendant had been held in jail on the charged crime for an aggregate period of 90 days or more the state would be barred from taking the defendant to trial. Another example could be a similar case where a defendant was held in jail for a total period of 85 days, then was determined to be competent to stand trial. The state would then be required to bring that defendant to trial within just five days, meaning the state would be forced into a position of having to completely prepare for trial (locate and subpoena witnesses, prepare exhibits and arguments, clear other matters from their calendars, etc) within five days or watch the defendant go free. Similarly, the court would be forced to immediately make room on the court's docket for the defendant's trial, or run the risk the defendant would go free.

The Attorney General believes that H.B. 2312, as originally worded, to be productive legislation designed to clarify Kansas criminal procedure and prevent errors. If passed into law as amended H.B. 2312 would create misunderstandings and confusion for criminal justice professionals and may have the unintended result of prohibiting the prosecution of certain defendants. Attorney General Kline would like to see the House Committee amendments to H.B. 2312 removed so that he can once again support the bill.

On behalf of Attorney General Kline I would like to thank you again for the opportunity to appear before the committee concerning H.B. 2312, as amended by House Committee.

March 24, 2003

Senator John Vratil
Senate Judiciary Chairperson
Room 123-S, Statehouse
Topeka, KS 66612

Dear Senator Vratil and Senate Judiciary Committee Members:

As President of the Kansas District Judges Association (KDJA), I am writing to express the concerns of the KDJA Executive Board regarding the House Committee amendments to HB 2312.

The House Committee amendments provide that, upon a finding that a defendant is competent to stand trial, the trial is to be scheduled within 90 days of that finding, **"minus the number of days the defendant is held in jail prior to such finding."** The House Committee amendment, while well-intentioned, could create situations in which a defendant is found to be competent, and the trial must be held immediately because the defendant was held in jail for almost 90 days prior to the finding of competence. The bill is silent as to what might happen if the defendant was held in jail for more than 90 days prior to the finding of competence.

I cannot venture an opinion at this point as to whether the 30-day extension found in Section 1(5)(d) would apply in those situations. However, even if the 30-day extension applies, most courts would have difficulty scheduling a trial in less time given current caseloads and staffing patterns. In small judicial districts, such as mine (30th Judicial District), we do not have a regular jury trial docket. Juries are specially summoned for each jury trial. It is difficult to specially summons a jury, get the questionnaires back, and go to jury trial in less than 30 days.

It has also been my experience over the last 14 years on the bench that defendants and defense counsel frequently file motions to determine competency shortly before the scheduled jury trial. Because most dockets are fairly "backed up," criminal jury trials tend to be set toward the end of the 90-day window anyway. The proposed language sets the stage for manipulation by the defendant and harm to the public. While the defendant should not be prejudiced by seeking a determination of competency, they should not be rewarded either.

I urge that the House Committee amendments to HB 2312 be deleted from the bill. Thank you for your consideration of this issue.

Sincerely,

Larry T. Solomon by KP.

Larry T. Solomon
Chief Judge, 30th Judicial District

LS:mr

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THE KANSAS CONTRACTORS ASSOCIATION, INC.

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Testimony

By the Kansas Contractors Association before the Senate Judiciary Committee regarding Indemnification --- H 2154
March 24, 2003

Mr. Chairman and members of the Senate 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.

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.

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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.

,udiciary Committee of the Kansas Senate

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.

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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 *Elite Professionals Inc. v. Carrier Corp.* 16 Kan.App.2d 625, 827 P.2d 1195 (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.)

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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 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.

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 24, 2003

TO: Senate 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 projects and private industry projects, which 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.

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3-24-03
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George Barbee, Executive Director • Scott Heidner, Associate Executive Director
300 SW 8th Ave., Third Floor • Topeka, KS 66603-3912 • 785/357-1824 • Fax 785/233-2206 • www.kce.org • gbarbee@kce.org

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.

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

March 21, 2003

Chairman John Vratil
Senate Committee on Judiciary
State Capitol Building – Rm 255-E
Topeka, KS 66612

Chairman John Vratil:

In response to your request for a list of some clients who often require broad indemnification clauses that are not insurable, the following is submitted.

Ratheon	Harrah's
Boeing	SBC
City of Overland Park	WorldCom
City of St. Joseph, Missouri	AT&T
City of Leawood	City of Wichita
BNSF	City of Lawrence
City of Kansas City, Missouri	City of Pittsburg
Coca-cola Bottling company	City of McPherson

Engineering companies performing the design in preparation of construction of a project are quite comfortable signing contracts that indemnify clients for any engineering negligence, errors, acts or omissions and can obtain insurance coverage for such a provision.

Those same companies are not able to obtain coverage for clauses that go beyond the standard of care or reach into express warranties or guarantees.

I look forward to appearing before you at the Judiciary Committee Meeting Monday, January 24.

Sincerely,

George Barbee

George Barbee, CAE
Executive Director

cc: Members of the Senate Judiciary Committee

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

TESTIMONY REGARDING HOUSE BILL No. 2154
Judiciary Committee - Kansas Senate
March 24th, 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

Senate Judiciary
3-24-03
Attachment 8-1

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

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Senator Vratil
Chairman, Senate Judiciary Committee
Statehouse
Topeka, KS 66612

Re: HB 2154 Testimony March 24, 2003

I am requesting the committee support of HB 2154. This bill addresses sole negligence liability, an important issue in today's construction industry.

These clauses have become a major issue in the insurance industry as contractors are now finding it difficult, if not impossible, to find insurance coverage for projects with contract language that shifts all of the owner's risk onto the contractor, even when the owner is negligent.

This bill would simply require that everyone be accountable for their own actions. It should be against public policy to allow a project owner to pass off their sole negligence to a contractor and their subcontractors through contract language.

Forty-two states have said passing sole negligence to another is against public policy, I would encourage you to make Kansas the forty-third state.

Opposition to this bill comes from large, sophisticated project owners who know that liability losses cost them money in increased insurance expenses, working capital, and/or profits. Their in house legal departments have drafted this indemnification language for their sole benefit.

I am enclosing examples of indemnification provision language; these examples have been utilized in the last year in Kansas construction contracts.

I am also including a Railroad Protective (RRP) policy that the state pays the contractor to purchase for the benefit of the railroad. This policy names the railroad as the insured and provides them 2 million per occurrence/6 million aggregate limits to cover potential liability claims. The limits on this RRP far exceed the liability limits of 1 million occurence/2 million aggregate that the State of Kansas requires of contractors on KDOT projects.

With this in mind why would the railroad oppose this bill when they are afforded a significant liability insurance policy to protect their interests?

Thank you for your interest, consideration, and support of this important bill.

Mark Wilkerson
Topeka, KS
785 231 2617

Senate Judiciary
3-24-03
Attachment 9-1

Subcontractor's Indemnification.

6.1 Subcontractor shall defend, indemnify and hold Contractor, Owner, their affiliates, agents and employees harmless from and against all claims, losses, costs and damages, including but not limited to attorney's fees, pertaining to the performance of this Subcontract and involving bodily or personal injury, sickness, disease, death or property damage, including the loss of use of property resulting therefrom but not damage to the Subcontract Work itself, caused in whole or in part by any negligent act or omission of Subcontractor or any of its subcontractors, suppliers, manufacturers, or other persons or entities for whose acts Subcontractor may be liable. This indemnification agreement is binding on Subcontractor, to the fullest extent permitted by law, regardless of whether any or all of the persons and entities indemnified hereunder are responsible in part for the claims, damages, losses or expenses for which Subcontractor is obligated to provide indemnification. This indemnification provision does not negate, abridge or reduce any other rights or obligations of the persons and entities described herein with respect to indemnity. negotiate out of possible

6.2 To the fullest extent permitted by law, in any and all claims against Contractor, Owner, their affiliates, agents or employees, by any employee of Subcontractor, anyone directly or indirectly employed by Subcontractor or anyone for whose acts Subcontractor may be liable, the indemnification obligation under this §6 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

§7. *Compliance with laws.* Subcontractor shall comply fully with the laws, codes, ordinances, rules and regulations of the United States and the municipality, county and state in which the Project is located, and the various departments, boards and agencies thereof having jurisdiction. All labor and material in addition to that shown on, or specified in, the Contract Documents necessary to comply with said laws, codes, ordinances, rules and regulations shall be furnished by Subcontractor without extra charge. Subcontractor agrees to obtain and pay for all permits, licenses, bonds, deposits and official inspections required for the proper and lawful performance of the Subcontract Work and to pay all tap, connection and hook-up fees and charges imposed by governing bodies and utilities in connection with the Subcontract Work except as may be excluded on Schedules A or B. All official inspections shall be scheduled by Subcontractor in a timely manner so as not to cause delay to ensuing operations or the Schedule.

§8. *Payments by Subcontractor.* Subcontractor agrees to (i) meet all of its Project payrolls promptly and in such manner as to cause no delay or interruption of its Subcontract Work, (ii) comply strictly and promptly with all agreements pertaining to the payment of welfare and other fringe benefits incidental to the Subcontract Work, (iii) comply strictly with the unemployment statute of the state in which the Project is located as to the keeping of records, making of reports and payment of Unemployment Compensation taxes or contributions, (iv) pay in full and when due for all materials, equipment and other property or services provided by it in the Subcontract Work, all of which materials, equipment and other property shall be unconditionally owned by Subcontractor and free of the lien of any third party, (v) pay all royalties and license fees which may be due on the inclusion of any patented materials in the Subcontract Work and (vi) apply all funds received by it in payment of the Subcontract Amount to the payment of the costs of labor, material, equipment and other property or services furnished by it and not to divert said funds to the payment of like costs on other projects so long as there remains unpaid any costs, incurred or to be incurred, in full performance of this Subcontract. Subcontractor agrees to keep all necessary records to evidence its compliance with these obligations and to make them available for inspection by Contractor upon request. Contractor may also contact Subcontractor's material suppliers and subcontractors to verify payment status of accounts relating to this Subcontract. In the event a subcontractor or supplier, at any tier, of Subcontractor files a claim or lien against the Project, Subcontractor shall within three (3) days after receipt of written notice from Contractor, provide to Contractor a recorded copy of a lien release or lien discharge bond which legally removes the claim or lien from the Project premises. Subcontractor shall indemnify and hold Contractor and Owner harmless from any and all loss, damage or expense, including attorney's fees, arising out of or relating to any such claim or lien.

§9. *Taxes.* Subcontractor agrees to be liable for and pay all local, state and federal taxes, assessments and charges pursuant to any and all local, state and federal enactments, rules and regulations, present and future, in connection with payroll and/or withholding taxes and social security legislation and regulations, incurred by reason of the Subcontract Work. In the event that law, or any rule or regulation thereunder, is or has been passed requiring Contractor to pay, either directly or indirectly, any such tax, charge, assessment, payroll and/or F.I.C.A. tax or contribution, by reason of Subcontractor's employees, or should any such law, rule or regulation direct Contractor to collect the same, or make Contractor liable for the collection or payment of the same, Subcontractor shall fully and completely make all payments therefor. Subcontractor shall also be responsible for the payment of all sales, use, gross receipts, business privilege and other similar taxes incurred in connection with the Subcontract Work. Subcontractor shall indemnify and hold Contractor harmless from any and all such taxes, charges, assessments, payroll and/or F.I.C.A. taxes and contributions.

CITY OF TOPEKA

submission as required by paragraph 6.25.2 and Engineer has given written approval of each such variation by a specific written notation thereof incorporated in or accompanying the Shop Drawing or sample approval; nor will any approval by Engineer relieve Contractor from responsibility for errors or omissions in the Shop Drawings or from responsibility for having complied with the provisions of paragraph 6.25.1.

6.28. Where a Shop Drawing or sample is required by the Specifications, any related Work performed prior to Engineer's review and approval of the pertinent submission will be the sole expense and responsibility of Contractor.

Continuing the Work:

6.29. Contractor shall carry on the Work and adhere to the progress schedule during all disputes or disagreements with Owner. No Work shall be delayed or postponed pending resolution of any disputes or disagreements, except as permitted by paragraph 15.5 or as Contractor and Owner may otherwise agree in writing.

Indemnification:

6.30. To the fullest extent permitted by Laws and Regulations Contractor shall indemnify and hold harmless Owner and Engineer and their consultants, agents and employees from and against all claims, damages, losses and expenses, direct, indirect or consequential (including but not limited to fees and charges of engineers, architects, attorneys and other professionals and court costs) arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom and (b) is caused in whole or in part by any negligent act or omission of Contractor, any Subcontractor, any person or organization directly or indirectly employed by any of them to perform or furnish any of the Work or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder or arises by or is imposed by Law and Regulations regardless of the negligence of any such party.

6.31. In any and all claims against Owner or Engineer or any of their consultants, agents or employees by any employee of Contractor, any Subcontractor, any person or organization directly or indirectly employed by any of them to perform or furnish any of the Work or anyone for whose acts any of them may be liable, the indemnification obligation under paragraph 6.30 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Contractor or any such Subcontractor or other person or organization under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

6.32. The obligations of Contractor under paragraph 6.30 shall not extend to the liability of Engineer, Engineer's consultants, agents or employees arising out of the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, design or specifications.

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CITY OF ATCHISON

Documents unless CONTRACTOR has in writing called ENGINEER's attention to each such variation at the time of submission as required by paragraph 6.25.3 and ENGINEER has given written approval of each such variation by specific written notation thereof incorporated in or accompanying the Shop Drawing or Sample approval; nor will any approval by ENGINEER relieve CONTRACTOR from responsibility for complying with the requirements of paragraph 6.25.1.

6.28. Where a Shop Drawing or Sample is required by the Contract Documents or the schedule of Shop Drawings and Sample submissions accepted by ENGINEER as required by paragraph 2.9, any related Work performed prior to ENGINEER's review and approval of the pertinent submittal will be at the sole expense and responsibility of CONTRACTOR.

Continuing the Work:

6.29. CONTRACTOR shall carry on the Work and adhere to the progress schedule during all disputes or disagreements with OWNER. No Work shall be delayed or postponed pending resolution of any disputes or disagreements, except as permitted by paragraph 15.5 or as OWNER and CONTRACTOR may otherwise agree in writing.

6.30. *CONTRACTOR's General Warranty and Guarantee:*

6.30.1. CONTRACTOR warrants and guarantees to OWNER, ENGINEER and ENGINEER's Consultants that all Work will be in accordance with the Contract Documents and will not be *defective*. CONTRACTOR's warranty and guarantee hereunder excludes defects or damage caused by:

6.30.1.1. abuse, modification or improper maintenance or operation by persons other than CONTRACTOR, Subcontractors or Suppliers; or

6.30.1.2. normal wear and tear under normal usage.

6.30.2. CONTRACTOR's obligation to perform and complete the Work in accordance with the Contract Documents shall be absolute. None of the following will constitute an acceptance of Work that is not in accordance with the Contract Documents or a release of CONTRACTOR's obligation to perform the Work in accordance with the Contract Documents:

6.30.2.1. observations by ENGINEER;

6.30.2.2. recommendation of any progress or final payment by ENGINEER;

6.30.2.3. the issuance of a certificate of Substantial Completion or any payment by OWNER to CONTRACTOR under the Contract Documents;

6.30.2.4. use or occupancy of the Work or any part thereof by OWNER;

6.30.2.5. any acceptance by OWNER or any failure to do so;

6.30.2.6. any review and approval of a Shop Drawing or Sample submittal or the issuance of a notice of acceptability by ENGINEER pursuant to paragraph 14.13;

6.30.2.7. any inspection, test or approval by others; or

6.30.2.8. any correction of *defective* Work by OWNER.

Indemnification:

6.31. To the fullest extent permitted by Laws and Regulations, CONTRACTOR shall indemnify and hold harmless OWNER, ENGINEER, ENGINEER's Consultants and the officers, directors, employees, agents and other consultants of each and any of them from and against all claims, costs, losses and damages (including but not limited to all fees and charges of engineers, architects, attorneys and other professionals and all court or arbitration or other dispute resolution costs) caused by, arising out of or resulting from the performance of the Work, provided that any such claim, cost, loss or damage: (i) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom, and (ii) is caused in whole or in part by any negligent act or omission of CONTRACTOR, any Subcontractor, any Supplier, any person or organization directly or indirectly employed by any of them to perform or furnish any of the Work or anyone for whose acts any of them may be liable, regardless of whether or not caused in part by any negligence or omission of a person or entity indemnified hereunder or whether liability is imposed upon such indemnified party by Laws and Regulations regardless of the negligence of any such person or entity.

6.32. In any and all claims against OWNER or ENGINEER or any of their respective consultants, agents, officers, directors or employees by any employee (or the survivor or personal representative of such employee) of CONTRACTOR, any Subcontractor, any Supplier, any person or organization directly or indirectly employed by any of them to perform or furnish any of the Work, or anyone for whose acts any of them may be liable, the indemnification obligation under paragraph 6.31 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for CONTRACTOR or any such Subcontractor, Supplier or other person or organization under workers' compensation acts, disability benefit acts or other employee benefit acts.

6.33. The indemnification obligations of CONTRACTOR under paragraph 6.31 shall not extend to the liability of ENGINEER and ENGINEER's Consultants, officers, directors, employees or agents caused by the professional negligence, errors or omissions of any of them.

Survival of Obligations:

6.34. All representations, indemnifications, warranties and guarantees made in, required by or given in accordance with...

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MAR 0 6 2003

☐ OWNERS AND CONTRACTORS PROTECTIVE LIABILITY DECLARATIONS
☒ RAILROAD PROTECTIVE LIABILITY DECLARATIONS

PRIOR POL. NO. NEW

POLICY NUMBER 2D8-54-45

Policy Period From: 3-15-03 To: 3-15-04
(12:01 AM Standard Time at Your Mailing Address Shown Below)

Named Insured KANSAS CITY SOUTHERN RAILWAY

Mailing Address 427 W 12TH KANSAS CITY, MO 64105-1403

The Named Insured is ☐ Individual ☒ Corporation ☐ Partnership ☐ Joint Venture ☐ Other

Producer INSURANCE MANAGEMENT ASSOCIATES - TOPEKA KS #7426
1631 S TOPEKA BLVD
PO BOX 1537
TOPEKA KS 66601-1537

EMC Insurance Companies

☒ Employers Mutual Casualty Company
☐ EMCASCO Insurance Company
☐ Union Insurance Company of Providence
☐ Dakota Fire Insurance Company
☐ Illinois EMCASCO Insurance Company
☐ EMC Property & Casualty Company
☐ Hamilton Mutual Insurance Company
(Coverage Provided by the Company Designated ☒ Above)

LIMITS OF INSURANCE

Aggregate Limit ..... $ 6,000,000.

Each Occurrence Limit ..... $ 2,000,000.

SCHEDULE

Classification	Code No.	Premium Base	Rate	Advance Premium
STATE OR FEDERAL HIGHWAY PROJECTS	40013	446,600	37.049	16,546 MP

TOTAL ADVANCE PREMIUM $ 16,546.

OWNERS AND CONTRACTORS PROTECTIVE LIABILITY

Designation of Contractor
Mailing Address
Location of Covered Operations

RAILROAD PROTECTIVE LIABILITY

Description of Operations GRADING IN ASPHALT SURFACING ON US [redacted] HIGHWAY [redacted] COUNTY, KS

Job Location [redacted]

Designated Contractor [redacted]

Mailing Address [redacted]

Name and Address of Involved Governmental Authority or Other Contracting Party KANSAS DEPARTMENT OF TRANSPORTATION, TOPEKA KS

Forms Applicable (Forms shown on the Common Declarations are not applicable to this Section) IL0021 (11-85), CG0035 (7-98) CG0059 (9-99), CG2642 (7-98), CG2877 (8-87)

Audit Period: (Annual unless otherwise indicated): ☐ Semi-Annually ☐ Quarterly ☐ Monthly

Issue Date

Form CG7002 (Rev. 10-01)

AGENT COPY

9-5

RAILROAD PROTECTIVE LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy, the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverage **A.**

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" occurs during the policy period; and

(2) The "bodily injury" or "property damage" arises out of acts or omissions at the "job location" which are related to or are in connection with the "work" described in the Declarations.

c. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages assumed in a contract or agreement that is a "covered contract".

c. Completed Work

"Bodily injury" or "property damage" occurring after the "work" is completed. The "work" will be deemed completed at the earliest of the following times:

(1) When all the "work" called for in the "contractor's" contract has been completed.

(2) When all the "work" to be done at the "job location" has been completed.

(3) When that part of the "work" done at the "job location" has been put to its intended use by you, the governmental authority or other contracting party.

This exclusion does not apply to "bodily injury" or "property damage" resulting from the existence of or removal of tools, uninstalled equipment or abandoned or unused materials.

d. Acts Or Omissions Of Insured

"Bodily injury" or "property damage", the sole proximate cause of which is an act or omission of any insured other than acts or omissions of any of "your designated employees". This exclusion does not apply to injury or damage sustained at the "job location" by any of "your designated employees" or employee of the "contractor", or by any employee of the governmental authority or any other contracting party (other than you) specified in the Declarations.

d. Pollution

Due to the discharge, dispersal, seepage, migration, release or escape of "pollutants" excluded under Exclusion **f.** Pollution, Coverage **A.**

SUPPLEMENTARY PAYMENTS – COVERAGE A

We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

1. All expenses we incur.
2. All costs taxed against the insured in the "suit".
3. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay or deposited in court the part of the judgment that is within the applicable limit of insurance.
4. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
5. Expenses incurred by the insured for first aid administered to others at the time of an accident, for "bodily injury" to which this insurance applies.
6. All reasonable expenses, incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to $250 a day because of time off from work.
7. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

These payments will not reduce the limits of insurance.

SECTION II – WHO IS AN INSURED

1. You are an insured.
2. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers and directors.
3. Your stockholders are insureds, but only with respect to their liability as stockholders.
4. Any railroad operating over your tracks is an insured.

SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
   a. Insureds;
   b. Claims made or "suits" brought; or
   c. Persons or organizations making claims or bringing "suits".
2. The Aggregate Limit is the most we will pay for the sum of all damages because of all "bodily injury", all "property damage" and all "physical damage to property".
3. Subject to **2.** above, the Each Occurrence Limit is the most we will pay for the sum of all damages because of all "bodily injury", all "property damage" and all "physical damage to property" arising out of any one occurrence.
4. Subject to **3.** above, the payment for "physical damage to property" shall not exceed the lesser of:
   a. The actual cash value of the property at the time of loss; or
   b. The cost to repair or replace the property with other property of like kind or quality.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV – CONDITIONS

A. The following Conditions apply to Coverages **A** and **B:**

1. Assignment

Assignment of interest under this Coverage Part shall not bind us unless we issue an endorsement consenting to the assignment.

2. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

3. Cancellation

a. You may cancel this policy by mailing or delivering to us advance written notice of cancellation.

b. We may cancel this policy by mailing or delivering to you, the "contractor" and any involved governmental authority or other contracting party designated in the Declarations, at the respective mailing addresses last known to us, written notice of cancellation at least 60 days before the effective date of cancellation.

c. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.

b. To sue us on this policy unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial; but we will not be liable for damages that are not payable under the terms of this policy or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

2. Duties In The Event Of Occurrence, Claim Or Suit

a. You must see to it that we are notified as soon as practicable of an occurrence which may result in a claim. To the extent possible, notice should include:

(1) How, when and where the occurrence took place;

(2) The names and addresses of any injured persons and witnesses; and

(3) The nature and location of any injury or damage arising out of the occurrence.

b. If a claim is made or "suit" is brought against any insured, you must:

(1) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Separation Of Insureds

Except with respect to the Limits of Insurance this insurance applies:

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

C. The following Conditions apply to Coverage B only:

1. Appraisal

If you fail to agree with us on the value of the property, or the amount of loss, either you or we may make written demand for an appraisal of the loss within sixty (60) days after proof of loss is filed. In this event, each party will select a competent appraiser. The two appraisers will select a competent and impartial umpire. The appraisers will state separately the value of the property and the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

a. Pay its chosen appraiser; and

b. Bear the other expenses of the appraisal and umpire equally.

If we submit to an appraisal, we still retain our right to deny the claim.

2. No Benefit To Bailee

No person or organization, other than you, having custody of the property will benefit from this insurance.

3. Insured's Duties In The Event Of A Loss

You must:

a. Protect the property, whether or not the loss is covered by this policy. Any further loss due to your failure to protect the property shall not be recoverable under this policy. Reasonable expenses incurred in affording such protection shall be deemed to be incurred at our request; and

b. Submit to us, as soon after the loss as possible, your sworn proof of loss containing the information we request to settle the loss and, at our request, make available the damaged property for examination.

9-8

12. "Suit" means a civil proceeding in which damages because of "bodily injury" or "property damage" to which this insurance applies are alleged. "Suit" includes:
    a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
    b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.
13. "Work" means work or operations performed by the "contractor" including materials, parts or equipment furnished in connection with the work or operations.
14. "Your designated employee" means:
    a. Any supervisory employee of yours at the "job location";
    b. Any employee of yours while operating, attached to or engaged on work trains or other railroad equipment at the "job location" which are assigned exclusively to the "contractor"; or
    c. Any employee of yours not described in **a.** or **b.** above who is specifically loaned or assigned to the work of the "contractor" for the prevention of accidents or protection of property.

9-9

COMMERCIAL GENERAL LIABILITY
CG 00 59 09 99

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AMENDMENT OF INSURING AGREEMENT – KNOWN INJURY OR DAMAGE AND INSPECTIONS AND SURVEYS CONDITION

This endorsement modifies insurance provided under the following:

RAILROAD PROTECTIVE LIABILITY COVERAGE PART

A. Paragraph **1. Insuring Agreement** of **Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any occurrence and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverage **A.**

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" occurs during the policy period;

(2) The "bodily injury" or "property damage" arises out of acts or omissions at the "job location" which are related to or are in connection with the "work" described in the Declarations; and

(3) Prior to the policy period, no insured listed under Section **II** – Who Is An Insured and no employee authorized by you to give or receive notice of an occurrence or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized employee knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Section **II** – Who Is An Insured or any employee authorized by you to give or receive notice of an occurrence or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Section **II** – Who Is An Insured or any employee authorized by you to give or receive notice of an occurrence or claim:

(1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

9-10

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

KANSAS CHANGES – BINDING ARBITRATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART
UNDERGROUND STORAGE TANK POLICY

If we and the insured do not agree whether coverage is provided under this Coverage Part for a claim made against the insured, both parties may, by mutual consent, agree in writing to arbitration of the disagreement.

One party cannot force the other party into arbitration.

However, if both parties agree to arbitrate, by mutual consent, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, both parties must request that selection be made by a judge of a court having jurisdiction. Each party will:

1. Pay the expenses it incurs; and
2. Bear the expenses of the third arbitrator equally.

Unless both parties agree otherwise, arbitration will take place in the county in which the address shown in the Declarations is located. Local rules of law as to procedure and evidence will apply.

A decision agreed to by two of the arbitrators will be binding.

9-11

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

KANSAS CHANGES – CANCELLATION AND NONRENEWAL

This endorsement modifies insurance povided under the following:

RAILROAD PROTECTIVE LIABILITY COVERAGE PART

A. The following is added to the CANCELLATION Condition (Section IV):

(f) If this policy has been in effect for 90 days or more, or if it is a renewal of a policy we issued, we may cancel this policy only for one or more of the following reasons:

(1) Nonpayment of premium;

(2) This policy was issued because of material misrepresentation;

(3) You or any other insured violated any of the material terms and conditions of this policy;

(4) Unfavorable underwriting factors, specific to you, exist that were not present at the inception of this policy;

(5) A determination by the insurance commissioner that continuation of coverage could place us in a hazardous financial condition or in violation of the laws of Kansas; or

(6) A determination by the insurance commissioner that we no longer have adequate reinsurance to meet our needs.

B. The following is added and supersedes any condition to the contrary:

NONRENEWAL

1. If we decide not to renew this policy, we will mail or deliver written notice of nonrenewal, stating the reasons for nonrenewal, to you, the "contractor" and any involved governmental authority or other contracting party designated in the Declarations at least 60 days prior to the expiration of the policy.

2. Any notice of nonrenewal will be mailed or delivered to you the "contractor" and any involved governmental authority or other contracting party designated in the Declarations, last mailing address known to us. If notice is mailed, proof of mailing will be sufficient proof of notice.

9-12

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 SENATE JUDICIARY COMMITTEE

REGARDING HOUSE BILL 2154 RELATING TO CONSTRUCTION CONTRACTS INDEMNIFICATION PROVISIONS

March 24, 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 another 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.

KDOT has spent numerous hours in recurring contract negotiations with railroad owners who wish to force KDOT into incorporating these indemnification clauses into KDOT's contracts. It is KDOT's view that such indemnification provisions are neither fair nor a proper method of risk allocation and KDOT has not acceded to the demand for such indemnification clauses in its contracts. (See attached example.)

Contractors in the State of Kansas have expressed to KDOT their inability to assume the risk of the railroad owner's negligence. It is KDOT's understanding that the majority of Kansas contractors do not have sufficient assets to absorb the costs incurred by another party's negligence, especially another party over which the contractor has no control.

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3-24-03
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As the insurance industry testified before the House Judiciary Committee earlier this session, the market will not assume the risk of loss under these conditions. Furthermore, any additional costs generated by this contractual shifting of liabilities on KDOT projects will ultimately be borne by the taxpayers of the State of Kansas. Contractors unable to assume the risk would refrain from bidding on KDOT projects, thus reducing the bidding pool and the probability of obtaining the lowest responsible bid. Those contractors who choose to bid will include some, perhaps arbitrary, amount in their bid price to account for the potential liability. This additional amount would increase the contract price and thus the price that Kansas taxpayers would have to pay for projects.

KDOT supports passage of HB 2154 in its current form. Any amendments to limit application of HB 2154 to instances of sole or gross negligence or that would more narrowly define construction contracts or projects would be opposed by KDOT.

Sample of

INDEMNIFICATION CLAUSE

submitted by KDOT

Contractor further agrees, at its expense, in the name and on behalf of Railway, that it shall adjust and settle all claims made against Railway, and shall, at Railway's discretion, appear and defend any suits or actions of law or in equity brought against Railway on any claim or cause of action arising or growing out of or in any manner connected with any liability assumed by Contractor under this Agreement for which Railway is liable or is alleged to be liable. Railway shall give notice to Contractor, in writing, of the receipt of dependency of such claims and thereupon Contractor shall proceed to adjust and handle to a conclusion such claims, and in the event of a suit being brought against Railway, Railway may forward summons and complaint or other process in connection therewith to Contractor, and Contractor, at Railway's discretion, shall defend, adjust, or settle such suits and protect, indemnify, and save harmless Railway from and against all damages, judgments, decrees, attorney's fees, costs and expenses growing out of or resulting from or incident to any such claims or suits.

AIA Kansas
A Chapter of The American Institute of Architects

March 24, 2003

TO: Senator Vratil and Members of Senate Judiciary Committee

FROM: Trudy Aron, Executive Director

RE: **SUPPORT FOR HB 2154**

Good Afternoon, Senator Vratil 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 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 pass HB 2154 favorably. I'll be happy to answer any questions you may have. Thank you.

Executive Director
Trudy Aron, Hon. AIA, CAE
aron@aiaks.org

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3-24-03
Attachment 11-1

700 SW Jackson, Suite 209
Topeka, KS 66603-3757
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TESTIMONY BEFORE THE SENATE
JUDICIARY COMMITTEE

ARGUMENTS FOR RESTRICTIONS
TO INDEMNIFICATION CLAUSES
BY GUS RAU MEYER
MARCH 24, 2003

My name is Gus Meyer, President of Rau Construction Company in Overland Park. Rau was founded in 1870, and is a mid-size General Contractor working on commercial, retail, office and historic rehabilitation projects. I am also Chairman of the Builders Association, an organization that represents nearly 450 general contractor, subcontractor and supplier members who are engaged in commercial and industrial building construction in Kansas. I am here to urge your support of House Bill 2154. This legislation would render unenforceable indemnification provisions in construction contracts that require the promisor (contractor) to hold harmless, indemnify, or defend the promisee (owner) or others against liability for damages caused by the promisee's own negligence.

I have previously written all the members of this committee, and appreciate the response I have received from several of you. Ordinarily we would not ask the legislature to get involved in matters that involve private contracts, but this legislation addresses an issue that addresses in issue that is starting to have a negative effect on all reaches of the construction industry.

For many years, the majority of contracts have been fair to all parties involved. Typically using standardized contracts written together by all parties involved does this. One of the most recognized versions of these contracts is the AIA Contract. Written by the American Institute of Architects, with input from contractors, users, insurance companies and other groups. These contracts have utilize the following indemnification clause:

> To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architects consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, rising out of or resulting from performance of the Work, providing that such claim, damages, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused by a party indemnified hereunder.

In addition, this contract also stipulates:

> This obligation of the Contractor shall not extend to the liability of the Architect, the Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, design or specifications, or (2) the giving of or the failure to give directions or instructions by the Architect, the Architect's consultants, and the agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage.

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TESTIMONY BEFORE THE SENATE
JUDICIARY COMMITTEE

ARGUMENTS FOR RESTRICTIONS
TO INDEMNIFICATION CLAUSES
BY GUS RAU MEYER
MARCH 24, 2003

In recent years, some Owners have started changing these indemnification clauses in the standard form contracts, using their own custom contracts. As time progresses, more and more Owners are taking up this practice. One of these modifications we encountered several years ago was written like this:

> To the fullest extent permitted by law, Contractor agrees to indemnify, protect, defend and hold harmless the Owner, Architect, Owner's lenders, if any, and each of the aforementioned parties' respective affiliated companies, partners, successors, assigns, heirs, legal representatives, devises, officers, directors, shareholders, employees and agents (herein collectively "Indemnitees") for, from and against all liabilities, claims, damages, losses, liens, fines, penalties, costs, causes of action, suits, judgments and expenses (including court costs, attorneys' fees, and costs of investigation), of any nature, kind or description of any person or entity directly or indirectly arising out of, caused by, or resulting from (in whole or in part) (1) the work performed hereunder or any part thereof, (2) this Contract, or (3) any act or omission of Contractor, and Subcontractor, anyone directly or indirectly employed by them, or anyone that they control or exercise control over (herein collectively "Liabilities"). <u>The obligations of Contractor under this indemnification shall apply to Liabilities even if such Liabilities arise from or are attributed to the negligence of any Indemnitees.</u>

Again, this is just one sample of an indemnification an Owner is using. There are numerous other samples, some of which are even more outrageous. Such indemnification provisions are so unfair and onerous that they ought to be declared to be against the public policy of the state.

Most troubling is that following this unfair shift of liability, more and more insurance companies exclude coverage. Contractors are then forced to put their companies on the line and take their chances. Of course, this puts employees and their employees' families at risk as well.

As an example of what could happen if an indemnification like this was in a contract, I look at what possibly is the first lawsuit filed against Rau Construction on a construction issue in our 133 year history. It currently is in litigation and involves two buildings by a national hotel chain. That organization build several hundred hotels across the country in the late 1990's using the same basic design, all drawn by one the same architectural firm. They now feel there is a problem with the EIFS exterior system they called for in their plans and specifications, and are suing all the Contractors who built these hotels, as well the EIFS installer and manufacturer. As part of the suit against the General Contractor, the plaintiff is claiming we are responsible since we allowed the building to be built per their plans and specification knowing what they called for was a defective product. As I said, this is lawsuit is currently in litigation and it is yet to be proven even if this product was defective, let alone why we are responsible since we built the building per their plans and specifications.

TESTIMONY BEFORE THE SENATE
JUDICIARY COMMITTEE

ARGUMENTS FOR RESTRICTIONS
TO INDEMNIFICATION CLAUSES
BY GUS RAU MEYER
MARCH 24, 2003

What would have happened if there was an indemnification clause similar to the one above in our contract? My supposition is that this Owner would only need to make a claim to us saying he and/or his architect made a mistake in specifying the exterior system and since we have indemnified them against their own mistakes which has caused damage and loss we need to replace the whole exterior system on all these projects.

The above example is only one of a multitude of scenarios that could unfold in a construction contract. The possible items that an Owner could want covered are limitless. From errors in judgment that the Owner makes, to willful misconduct. That is why these indemnification clauses are so outrageous.

Contractors are at a serious economic disadvantage in negotiating such clauses out of owners' contracts, particularly in soft markets such as we are currently experiencing. Compounding upon the effects of the soft construction market is the tumultuous insurance market we are also experiencing. Insurance has either increased significantly in cost, or in some cases, no longer possible to obtain. In order to maintain our insurance, Rau Construction has submitted to our insurance carrier any indemnification clause that is not the standard AIA clause for their review and approval. Clauses with onerous language are contested and a contract is not signed unless the clause is modified. Speaking from practical experience. Not all contractors are as diligent as Rau Construction is in fighting these clauses. Many contractors do not have the expertise to be able to review and understand the impact of the "legalese" written in these contracts.

All parties should be responsible for their own negligence. These new indemnification provisions defy common sense as well as ethical business practices. We will appreciate your support on HB 2154 and this important issue. Thank you for your thoughtful consideration.

Testimony on House Bill 2154
Before the Senate Judiciary Committee
By Larry Magill
Kansas Association of Insurance Agents
March 24, 2003

Thank you mister Chairman and members of the Committee for the opportunity to appear today in support of House Bill 2154 that prohibits indemnification clauses requiring the contactor to assume another's negligence. My name is Larry Magill and I'm representing the Kansas Association of Insurance Agents. We have approximately 550 member agencies and branches throughout the state and our members write approximately 70% of the commercial insurance in Kansas including workers compensation. Our members are free to represent many different insurance companies.

One area of concern raised by a member involves oil and gas service contracts that require the oil well servicing companies to indemnify the oil company for the oil company's negligent injury of servicing company employees.

An example would be a servicing company employee who is injured on the job and collects under the servicing company's workers compensation. The employee then sues the oil company, possibly for an unsafe work site or some other alleged negligence. The oil company demands that the servicing company defend them and pay any judgment under the terms of their contract but the servicing company has no coverage under their workers compensation policy. It has already paid the injured worker's claim and the employer's liability is not designed to protect against this contractual liability in addition to paying the statutory benefits.

The general liability policy excludes liability for claims of employees and for most contractual liability. In addition, some carriers are using specific employer's liability exclusions to be attached to the general liability policy that makes the lack of coverage even more emphatic. One such exclusion is attached to my testimony.

If these types of indemnity agreements are allowed to stand, they will undermine the exclusive remedy of the workers compensation act through the "back door".

I'm pleased to introduce Sue Ann Schultz, Vice President and General Counsel for IMA Financial Group, with their home office in Wichita. They are our largest member and insure a significant number of contractors and other businesses in the state.

She will explain our concerns with construction contracts that require the contractor to assume the negligence of the owner. We would be happy to provide additional information or answer questions for the committee.

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

EMPLOYERS' LIABILITY EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART

EMPLOYERS' LIABILITY/OBLIGATIONS TO EMPLOYEES

This insurance does not apply:

1. To any liability or obligation for which any "insured", or any company as its insurer, may be held liable under:
   a. workers' compensation;
   b. unemployment compensation;
   c. disability benefits;
   d. under any similar laws; and
2. To any liability or obligation for which any "insured", or any company as its insurer, may be held liable to any person or entity, including any other "insured", as a result of "bodily injury" to any employee sustained in the course of employment or supervision by an "insured"; or
3. To any liability of any "insured" arising out of any claim by the spouse, child, parent, or sibling of the employee of any "insured" arising out of "bodily injury" to an employee of the nature specified in 1 or 2 above; or
4. To any liability of any "insured" to defend, indemnify, share payments or damages with, or repay anyone on account of any obligation arising out of "bodily injury" to any employee of the nature specified in 1 or 2 above.

This exclusion shall be effective regardless of whether the liability or obligation is asserted directly or indirectly against any "insured" as an employer, contractor, subcontractor, third party defendant, or in any other capacity.

This exclusion shall be effective regardless of any severability clause in an underlying policy or any similar clause therein which provides that the insurance is severable as to each "insured" or that each "insured" is to be treated as if it were the only "insured" under the policy.

All Other Terms and Conditions Remain Unchanged.

AGC of KANSAS

Building a Better Kansas Since 1934

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

March 23, 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. This is obviously a matter of importance across the nation as Kansas is one of only a few states that do not currently have some form of anti-indemnification statute.

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

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KANSAS
BUILDING INDUSTRY
ASSOCIATION, INC.

SENATE JUDICIARY COMMITTEE
SENATOR JOHN VRATIL, CHAIR
March 24, 2003
H.B. 2154

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

My name is Chris Wilson, and I am the Government Affairs Director of Kansas Building Industry Association. On behalf of KBIA, I would like to express our support of H.B. 2154, which would make construction contract provisions requiring an indemnitor to indemnify an indemnitee against the indemnitee's negligence.

KBIA is the professional trade association of the state home building industry, with approximately 1800 members. We believe that it is good public policy to prohibit one contracting party from requiring that another party indemnify the first party for his own negligence. We see this kind of provision being required by insurance companies, who want their insureds to try to eliminate their liability or place liability with those the insureds contracts with, to the extent of the law. It should be against public policy for companies to try to force others to shift liability from where it would legitimately rest.

KBIA appreciates the opportunity to express our support of H.B. 2154.

Senate Judiciary
3-24-03
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KRMCA **KAPA**

Kansas Ready Mixed
Concrete Association

Kansas Aggregate
Producers' Association

TESTIMONY

By the
Kansas Ready Mixed Concrete Association
Kansas Aggregate Producers' Association

Before the
Senate Judiciary Committee

Regarding HB 2154

March 24, 2003

Chairman Vratil, and members of the committee, my name is Woody Moses, Managing Director of the Kansas Aggregate Producers' Association, and the Kansas Ready Mixed Concrete Association. The Kansas Aggregate Producers' Association (KAPA) and The Kansas Ready Mixed Concrete Association (KRMCA) is a statewide trade association comprised of over 250 members and one of the few industries to be represented in every county of this state.

We thank you for the opportunity to come before you with our comments regarding HB 2154. HB 2154 would establish a state policy governing the use of indemnification clauses in constructions contracts. As an association our members have not taken a position on HB 2154 as appropriate or inappropriate public policy. However, should this committee consider it good public policy, we urge your consideration of the attached amendment. The purpose of which is to expand the definition of construction contracts to clearly include subcontracts and purchase orders. Our member companies primarily engage in the subcontracting or supply of construction services and/or materials generally covered by the type of contracts discussed in this legislation. In our opinion it only makes common sense to include all entities involved in the construction process.

Once again, thank you for allowing us to present our comments.

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Session of 2003

HOUSE BILL No. 2154

By Committee on Insurance

2-3

AN ACT concerning construction contracts; relating to indemnification provisions.

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

Section 1. (a) When used in this section:

(1) "Construction contract" means a contract or agreement for the design, construction, alteration, renovation, repair or maintenance of a building, structure, highway, road, bridge, water line, railroad right of entry, sewer line, oil line, gas line, appurtenance, appliance or other improvement to real property, including any moving, demolition or excavation under a construction contract.

(2) "Damages" means personal injury damages, property damages or economic loss.

(3) "Indemnification provision" means a covenant, promise, agreement or understanding in connection with a construction contract that requires the promisor to hold harmless, indemnify or defend the promisee or others against liability for damages.

(b) An indemnification provision in a construction contract or entered into in connection with a construction contract which requires the indemnitor to indemnify the indemnitee for the indemnitee's negligence is against public policy and is void and unenforceable.

(c) This section applies only to indemnification provisions entered into after the act takes effect.

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

KRMCA- KAPA Proposed Amendment

[, subcontract, purchase order]

16-2
16

SENATE JUDICIARY COMMITTEE
HOUSE BILL 2154

ROY FARWELL
Union Pacific Railroad Company

My name is Roy Farwell. I live and work in St. Louis, Missouri. I am employed by Union Pacific Railroad Company as in-house counsel with the title General Attorney at its regional Law Department in St. Louis, Missouri. In that capacity, I have responsibility for most general legal matters of Union Pacific in the states of Kansas, Missouri and Illinois, and a significant amount of that involves contract issues.

I am here to speak in opposition to House Bill 2154. In my work I have significant dealings with indemnity and insurance issues involved in the types of contracts covered by the language of the Bill. In my opinion, the Bill will not result in the gains envisioned by the proponents and will end up having adverse consequences, for which reasons the Bill should not be passed.

Indemnity against ones one's own negligence is not a foreign concept to our legal system or our daily lives. It is the principle upon which liability insurance is founded. While it may need to be examined in certain instances, the general idea itself is sound and has benefits that would be sorely missed if this Bill were enacted. The Kansas courts have rejected indemnity clauses in certain specific abusive cases, such as those involving vast disparity of bargaining power, but have otherwise held that, when fairly bargained for, they do not violate public policy.

In a commercial setting, there are valid reasons why private parties should be permitted to

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negotiate and secure indemnity provisions even involving a party's own negligence. A primary purpose of indemnification provisions in construction or any other type of agreements is to serve to simplify the allocation of liability in the event of an accident. Increasingly in this complex world, when there is an accident the injured party can assert legal theories of liability against multiple defendants. Under the existing comparative law provisions, the defendants must sort out whether or not the 49 percent rule applies to them and what their respective shares of the fault might be. This results in wide swings of potential liability, which are totally unforeseeable to the parties going into the project. It enhances the likelihood for litigation by making it more difficult for these defendants to settle either with the injured party or amongst themselves without having to go to court.

By permitting contractual agreements to establish the allocation of fault in commercial transactions, these problems are avoided. The parties know going in to the project what their responsibilities will be and can base their commercial decisions upon those potential risks. In addition, the parties reduce the potential cost of litigation over their shares of comparative fault. Based on this, I believe that this Bill has the potential of increasing litigation.

Rather than promoting fairness the Bill would often result in just the opposite. Frequently, the basis of liability against the indemnified party may be secondary to and derivative from the fault of the indemnifying party. In our industry, a railroad can easily be found negligent based on the acts of a contractor and this situation occurs with some frequency. For example a contractor working near the tracks may create a safety hazard that injures a railroad employee by

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leaving equipment or debris too close to the track. The injured railroad employee can bring a negligence lawsuit against the railroad under the Federal Employer=s Liability Act, our substitute for Workers Compensation, under the theory that the railroad negligently breached its non-delegable duty to provide a safe place to work by failing to notice and remedy this hazard. Since nearly all FELA cases are permitted to go to a jury under the Supreme Court rulings and the FELA's lenient standards of negligence and causation, there is a significant possibility that the railroad could be found liable for the full extent of the injured party=s damages. The railroad would then have to attempt to recover what it could from the contractor for something that was basically the contractor=s fault to begin with. By permitting the parties to allocate the liability through indemnity provisions, this type of result is avoided. In situations such as this, it is not unfair for an indemnity provision to require that the contractor be responsible for the full liability. The Bill would outlaw this type of provision.

The railroad is frequently put in situations like this, because much railroad construction is done at remote locations, which are difficult for the railroad to inspect and police. In these situations, it is frequently the contractor who has the most control over and presence at the work site. In our current agreements we provide the contractors with detailed safety specifications so that they know what to do to maintain a safe work site near our operations. However, the railroad, as the land owner, can easily be alleged to be at fault for nearly any accident. It is often said in our business that it is a poor plaintiff's attorney who cannot find a way to allege negligence against a railroad if one is within sight. As such, since railroads are viewed as deep pockets and easy marks by some juries, they frequently end up having to pay for situations that

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were primarily within the control of the contractor. The parties should be permitted to enter into indemnity contracts to address these situations. The Bill would preclude that.

The bottom line is that it does not make sense for a railroad, or any party, to be forced to permit contractors onto their property without the ability to insist that the contractors bear the responsibility for accidents that would not have occurred but for their presence. In the case of the railroad industry, these situations arise most typically in two contexts. The first is when railroad needs work to be done for its own benefit, such as specialized grading work on its embankments. In this situation, a contractor has the ability to add the insurance cost (to cover the indemnity) to its bid or simply reject the work. Since this is work the railroad needs to have done, the railroad will then have to decide whether or not to attempt to do the work with its internal forces, or make concessions necessary to have the outside contractor perform the needed work. This is classic business negotiating and should not be discouraged.

The second situation is when the motivating factor is an outside third party, such as a public road authority or utility. Here the contractor comes onto the railroad=s property for the benefit of a third party not the railroad. In this situation, the railroad typically asks only that it not be exposed to any costs or liability that it would not otherwise have had to incur. If unable to insist on this, the railroads would likely be less willing to permit contractors onto their property in this situation. This in turn would require more condemnation proceedings and other such litigation to resolve. Moreover there would be no cost savings in this situation arising from this Bill. If the purpose of the Bill is to require that the railroads go out to every construction site and perform more thorough inspections prior to the project and more thorough policing during the

project, it will significantly add to the cost of these public or third party projects.

Based on the above, the railroad industry does not believe that House Bill 2154 will achieve the aims desired by its proponents and should be defeated.

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March 20, 2003

To: The Honorable John Vratil, Chairman
The Honorable Edward Pugh, Vice Chairman
The Honorable Barbara Allen
The Honorable Les Donovan
The Honorable Greta Goodwin
The Honorable Mark Gilstrap
The Honorable David Haley
The Honorable Kay O'Connor
The Honorable Lana Oleen
The Honorable Derek Schmidt
The Honorable Dwayne Umbarger

Subject: **HB 2154, Construction Contracts Relating to Indemnification**

Enclosed is a written statement from The Boeing Company regarding HB 2154, concerning construction contract indemnification provisions. Thank you for allowing Boeing to offer its perspective on this bill and to explain why it cannot support it.

If you have any questions, please feel free to contact Bill Jarrell, Boeing Government Relations Director–Central Region, or myself.

John T. Frederick
Government Relations Manager
The Boeing Company

Enclosure

Senate Judiciary
3-24-03
Attachment 18-1

Senate Judiciary Committee

March 24, 2003

House Bill No. 2154

Mr. Chairman and members of the Senate 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.