

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:35 a.m. on Wednesday, January 28, 2004, in Room 123-S of the Capitol.

All members were present.

Committee staff present:

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

Conferees appearing before the committee:

Senator Derek Schmidt  
Bob Totten, Public Affairs Director for the Kansas Contractors Association  
Dale Glenn, Government Affairs Chair, American Institute of Architects (written)  
Larry Magill, Kansas Association of Insurance Agents  
John Cassidy, Office of Chief Council, Kansas Department of Transportation  
Tom Swenson, Kansas Consulting Engineers

Others attending:

See Attached List.

Chairman Vratil called for bill introductions. Roger Tarbutton, Assistant County Counselor, Johnson County, on behalf of the Kansas Association of Counties, the County Counselors Association of Kansas, and the Board of County Commissioners of Johnson County, requested two bills. The first bill would correct statutory defects relating to the collection of delinquent personal property taxes. The second bill would require notice to the County Treasurer prior to the conduct of a Uniform Commercial Code sale. (Attachment 1)

Senator O'Connor moved to introduce the two bills, seconded by Senator Umbarger, and the motion carried.

Kevin Fowler, Kansas Healthcare Association, asked that a bill be introduced to amend the Adult Care Home Licensing Act relating to the use of inspection reports and repealing the existing section. (Attachment 2) Senator Goodwin moved to introduce the bill, seconded by Senator O'Connor, and the motion carried.

Bill Yanek, Kansas Association of Realtors, requested introduction of legislation creating a "broker's lien" on commercial real estate defined generally as all real estate other than property containing one to four residential units. He said the lien would be effective only if the contract for services is in writing and signed by both the broker or the broker's agent and the owner or the owner's agent. (Attachment 3)

Senator O'Connor made a motion to have the bill drafted and introduced as a Committee bill, seconded by Senator Donovan, and the motion carried.

**SB 324 - Concerning appellate jurisdiction of the supreme court**

Chairman Vratil opened the hearing on **SB 324**. Senator Schmidt testified on **SB 324**, which he is co-sponsoring with Senator Vratil. He stated that the most important public policy issue facing the 2004 Legislature and the Governor is how to overhaul financing of Kansas' public schools. He stated that the broad sweep and direct language of the Shawnee County District Court's decision, coupled with the judge's refusal to allow an immediate appeal from his preliminary order, have impeded efforts to accomplish school finance reform. Senator Schmidt said he believed that the impediment would remain in place until the Kansas Supreme Court reviewed the District Court's ruling and provided a final ruling on what the Kansas Constitution requires of the Legislature.

Senator Schmidt stated **SB 324** would amend K.S.A. 60-2102 to create a new, temporary, narrowly targeted ground for immediate appeal to the Supreme Court from any preliminary or final decision of a

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MINUTES OF THE SENATE JUDICIARY COMMITTEE at 9:35 a.m. on Wednesday, January 28, 2004 in Room 123-S of the Capitol.

District Court when that court holds any statute unconstitutional as a violation of Article 6 of the Kansas Constitution. He added the new provision would sunset July 1, 2006. He concluded that there was no reason to wait until July or August to commence the appeal. (Attachment 4)

Senator O'Connor asked why a sunset date of 2006. Senator Schmidt explained the proposal contemplates an appeal being lodged within 30 days after the effective date of the act assuming both houses move swiftly and the Governor signs the bill into law.

Senator O'Connor inquired if the co-sponsors had visited with the Attorney General on this matter. Chairman Vratil stated that he visited with the Attorney General, and was assured that, if the law permitted the Attorney General to appeal the decision, he would appeal it as quickly as possible. The Chair said that he visited again with the Attorney General the day before this hearing, and he was anticipating a letter from the Attorney General giving the same assurance to the Committee members as he received. As of Committee time, the letter had not arrived.

Committee discussion continued with further clarifications about the appeal process, the preliminary order, and the burden the judge has placed on taxpayers of Kansas.

Chairman Vratil closed the hearing on **SB 324**.

**HB 2154 -Construction contracts; indemnification agreements**

Chairman Vratil opened the hearing on **HB 2154**. Bob Totten, Kansas Contractors Association, Inc., testified in support of the proposed bill. He explained how he and Pat Hubbell, representing the railroads, worked out an agreement over concerns raised during a previous hearing held in the House Judiciary Committee. Mr. Totten explained the bill resulted from concerns over who was responsible for risk when a contractor was hired by Kansas Department of Transportation, and the project involved the railroad. He added that, in the agreement the two parties hammered out this summer, the railroads are assured their risk is mitigated as railroad liability insurance will be required before a contractor can do work on or adjacent to railroad property. (Attachment 5)

Chairman Vratil distributed copies of the agreed to language between the contractors and railroads, and the proposal is to amend **HB 2154** with this language. The Chair explained the changes as set out in bold type on the proposed written amendment, and stated the amendment would be a stand alone provision on the legislation. (Attachment 6)

Dale Glenn, American Institute of Architects, submitted written testimony in support of **HB 2154**. (Attachment 7)

Larry Magill, submitted written testimony on behalf of the Kansas Association of Insurance Agents in support of **HB 2154**. (Attachment 8)

John Cassidy, Office of Chief Counsel, Kansas Department of Transportation (KDOT), appeared before the Committee testifying in favor of **HB 2154**. He stated his written testimony was related primarily to the original bill and not to the amendment. He explained that KDOT spent numerous hours in recurring contract negotiations with railroad owners who wish to force KDOT into incorporating indemnification clauses into KDOT's contracts. He said it was KDOT's view that such indemnification provisions are neither a fair nor proper method of risk allocation, and KDOT has not acceded to the demand for such indemnification clauses in its contracts. He included with his written testimony a sample of an indemnification Clause. (Attachment 9) Mr. Cassidy told Committee members that Kansas contractors have expressed to KDOT their inability to assume the risk of the railroad owner's negligence. He added that KDOT understood 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.

Mr. Cassidy testified that 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. He said there were some inconsistencies in the new language read by the Chairman relates to a deed, lease or

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easement, license or other instrument which is not part of a construction contract and that includes any instrument granting the right to enter upon the property. KDOT wants to make sure the Committee and the Legislature are aware the effect this will have on KDOT's agreement with the railroad. Mr. Cassidy stated that KDOT would be much more comfortable if there was some assurance that the amendment be broad enough to cover the agreement between KDOT and the railroad. (Attachment 9)

Brief questions and discussion followed clarifying Boeing's previous concerns about the bill, and the subject of insurance and indemnification. Chairman Vratil explained that the peanut of the bill was to declare as void against public policy any indemnity agreement where the indemnitee is indemnified against the indemnitee's own negligence. He communicated that in the past the railroad, in order to protect itself, insisted that KDOT and ultimately the general construction contractor indemnify the railroad for the railroad's own negligence. The Chairman clarified that **HB 2154** would indemnification practice.

Chairman Vratil asked Pat Hubbell, lobbyist for the railroads, if he had any added comments or clarifications. Mr. Hubbell briefly explained the railroads' side of the issue.

Tom Swenson, representing the Kansas Consulting Engineers, submitted written testimony in support of **HB 2154**. (Attachment 10)

Having no opponents present to testify on **HB 2154**, Chairman Vratil closed the hearing.

The Committee adjourned at 10:15 a.m. The next scheduled meeting is January 29, 2004.

# SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Weds, Jan. 28, 2004

NAME	REPRESENTING
<i>Matt Damm</i>	KHCA
<i>Mike Bernick</i>	KHCA
<i>Cindy Luxem</i>	KHCA
<i>Tom Fowler</i>	<i>Frieden Haynes &amp; Foley</i>
BILL YANEK	KS Assn of REALTORS
<i>SueAnn Schney</i>	IMA
<i>Will Larson</i>	<i>Assoc. Gen. Contractors of Kan.</i>
LARRY MAGILL	KS. ASSN OF INS AGENTS
<i>COREY PETERSON</i>	<i>ASSOCIATED GENERAL CONTRACTORS OF KS</i>
<i>Danielle Klee</i>	<i>Johnson County Gov</i>
<i>DELEBY SMITH</i>	USD 501
<i>Deisee Axt</i>	USA # 500
<i>Michael White</i>	KCDAA
<i>Patrick Hubbell</i>	KS Railroads
<i>Bill Guy</i>	SFFF
<i>Bob Tolan</i>	<i>K9 Contractors</i>
DALE P. GLENN	AIA KANSAS
<i>Scott Heidner</i>	<i>KS Consulting Engineer</i>
<i>John Frederick</i>	<i>Boeing</i>

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Wed., Jan. 28, 2004

NAME	REPRESENTING
Paul Yonally	NARI
KEN WATKINS	NART-
LEROY D. ALSUP	
TERRY HOLDREN	KS FARM BUREAU
Charlie Kellner	Hein Law Firm
Brenda Harmon	KSC
David Cwe	HOMELESS CORE HOME
John Cassidy	KDOT
JAMES CHARIC	KS BAR ASSOC
Jeff Bo Hoke	Sto & Horn
Bud Smoot	KCLF
Kathy Porten	Judicial Branch
Bob Vancrum	<del>KS</del> USD 229; Greater KC Chamber
Wes Ashton	Overland Park Chamber
Christy Martin	KBIA
Wendy [unclear]	KAPA - Kemca



Johnson County, Kansas

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## BOARD OF COUNTY COMMISSIONERS

### Request for Bill Introduction

before the

### Senate Judiciary Committee

January 28, 2003

Mr. Chairman and Members of the Committee:

Good Morning ladies and gentlemen. My name is Roger Tarbutton. I am an Assistant Johnson County Counselor. I am appearing on behalf of the Kansas Association of Counties, the County Counselors Association of Kansas, and the Board of County Commissioners of Johnson County. As you are aware, local taxing authorities are facing serious budgetary shortfalls. A major source of revenue received by counties, municipalities, and school districts, is derived from personal property taxes. However, as a result of serious statutory defects, it has become increasingly difficult to collect delinquent personal property taxes. Therefore, the KAC, CCAK and Johnson County propose for your consideration certain amendments to the personal property tax collection statutes. These amendments are summarized as follows:

1. The current personal property tax lien statutes are confusing and transactional in nature contributing to factual disputes. To lend greater certainty and predictability to the tax collection process, it is proposed that the statutes be amended to allow for the attachment of a personal property tax lien on a date certain each year, similar to the attachment of real estate tax liens on November 1 of each year. The attachment of personal property tax lien on a specific date would also aid with the collection of personal property taxes that are involved in bankruptcy proceedings.
2. In addition, substantial personal property tax revenues are lost each year due to the lack of effective notice being provided to County Treasurers prior to the sale of collateral under the Uniform Commercial Code. Under the current statutes, the County Treasurer seldom becomes aware that property subject to a lien for delinquent personal property taxes is to be sold at a UCC sale until long after the property has been disposed of and all proceeds distributed. Requiring notice to the County Treasurer prior to the conduct of a UCC sale and payment of any outstanding personal property taxes from the proceeds would be of great assistance in the collection of such taxes.

On behalf of the KAC, CCAK and Johnson County, I would like to thank you for your careful consideration of these proposals.

Senate Judiciary

1-28-04  
Attachment 1

## Proposed Personal Property Tax Lien and UCC Article 9 Legislation

New Section 1. (a) On January 1 of each year, a tax lien shall attach to personal property to secure the payment of all personal property taxes, penalties, charges and interest ultimately imposed on all property for such year, whether or not the taxes are imposed in the year the lien attaches, and such lien shall continue until such taxes and penalty, charges and interest which may have accrued thereon, shall be paid in full.

(b) The tax lien on personal property imposed pursuant to subsection (a) is a lien in solido and attaches to all taxable personal property that the property owner owns on January 1 of the year the lien attaches and shall be in preference to all other claims against such property whether or not such claims existed before attachment of the tax lien. The tax lien shall remain on the property and any person taking possession of the property does so subject to the lien. The one owing such tax shall be liable civilly to any person taking possession of such property for any taxes owing thereon: *Provided, however*, if the property is sold in the ordinary course of retail trade it shall not be liable in the hands of the purchasers: *Provided, further*, that no personal property which has been sold or transferred in any manner after it has been assessed shall be liable for the tax in the hands of the transferee after the expiration of five years from the time such tax became originally due and payable.

(c) The tax lien provided by this section is perfected immediately on attachment and requires no further action for its perfection.

(e) Whether or not a tax lien provided by this section takes priority over a tax lien of the United States is determined by reference to federal law. In the absence of applicable federal law, a tax lien provided by this section takes priority over a tax lien of the United States.

Sec.2. K.S.A. 79-2020 is hereby amended to read as follows: 79-2020. If any owner of personal property surrenders or transfers such property to another after the date such property is assessed and before the tax thereon is paid, whether by voluntary repossession or any other voluntary act in reduction or satisfaction of indebtedness, then the taxes on the personal property of such taxpayer shall fall due immediately, and a lien shall attach to the property so surrendered or transferred, and shall become due and payable immediately. Such lien shall be in preference to all other claims against such property. The county treasurer, after receiving knowledge of any such surrender or transfer, shall issue immediately a tax warrant for the collection thereof and the sheriff shall collect it as in other cases. ~~The lien shall remain on the property and any person taking possession of the property does so subject to the lien. The one owing such tax shall be liable civilly to any person taking possession of such property for any taxes owing thereon, but the property shall be liable in the hands of the person taking possession thereof for such tax. If the property is sold in the ordinary course of retail trade it shall not be liable in the hands of the purchasers. No personal property which has been transferred in any manner after it has been assessed shall be liable for the tax in the hands of the transferee after the expiration of three years from the time such tax originally became due and payable.~~

Sec. 3. K.S.A. 79-2109 is hereby amended to read as follows: K.S.A. 79-2109. If any owner of personal property after the date as of which personal property is assessed and before the tax thereon is paid, shall sell all of a class of the same to any one person, the tax for that year

~~shall be a lien upon the property so sold, and shall at once become due and payable, and the county treasurer shall at once issue a tax warrant for the collection thereof, and the sheriff shall forthwith collect it as in other cases. The property so sold shall be liable in the hands of the purchaser for such tax, but in the event that a purchaser shall pay the tax or any part thereof or, if said property be seized and sold for such tax the seller thereof, shall be civilly liable to the purchaser for the amount of the taxes the purchaser has paid or the amount of taxes due on the property so seized; but if the property be sold in the ordinary course of retail trade it shall not be so liable in the hands of the purchasers.[\*]~~

Sec. 4. K.S.A. 79-2110 is hereby amended to read as follows: K.S.A. 79-2110. If any person in this state, after his or her personal property is assessed and before the tax thereon is paid, shall sell all of the same to any one person, and not retain sufficient to pay the taxes thereon, the tax for that year shall ~~be a lien upon the property so sold, and shall at once become due and payable, and the county treasurer shall at once issue a tax warrant for the collection thereof, and the sheriff shall forthwith collect it as in other cases. The one owing such tax shall be civilly liable to any purchaser of such property for any taxes he or she owes thereon, but the property so purchased shall be liable in the hands of the purchaser or purchasers for such tax:~~ *Provided, however, if the property be sold in the ordinary course of retail trade it shall not be so liable in the hands of the purchasers: Provided further, That no personal property which has been transferred in any manner after it has been assessed shall be liable for the tax in the hands of the transferee after the expiration of three years from the time such tax became originally due and payable.*

Sec. 5. K.S.A. 84-9-611 is hereby amended to read as follows: K.S.A. 84-9-611. (a) **Notification date.** In this section, notification date means the earlier of the date on which:

- (1) A secured party sends to the debtor and any secondary obligor an authenticated notification of disposition; or
- (2) the debtor and any secondary obligor waive the right to notification.

(b) **Notification of disposition required.** Except as otherwise provided in subsection (d), a secured party that disposes of collateral under K.S.A. 2002 Supp. 84-9-610 and amendments thereto shall send to the persons specified in subsection (c) a reasonable authenticated notification of disposition.

(c) **Persons to be notified.** To comply with subsection (b), the secured party shall send an authenticated notification of disposition to:

(1) The debtor;

(2) any secondary obligor; ~~and~~

(3) *The County Treasurer of any county in which the collateral disposed of is located or to the knowledge of the secured party after reasonable investigation was located within the current or previous three calendar years; and*

~~(3)~~ (4) if the collateral is other than consumer goods:



(A) Any other person from which the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral;

(B) any other secured party or lienholder that, 10 days before the notification date, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:

(i) Identified the collateral;

(ii) was indexed under the debtor's name as of that date; and

(iii) was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date; and

(C) any other secured party that, 10 days before the notification date, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in K.S.A. 2002 Supp. 84-9-311(a) and amendments thereto.

(d) **Subsection (b) inapplicable: perishable collateral; recognized market.** Subsection (b) does not apply if the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market.

(e) **Compliance with subsection (c)(3)(4)(B).** A secured party complies with the requirement for notification prescribed by subsection (c)(3)(4)(B) if:

(1) Not later than 20 days or earlier than 30 days before the notification date, the secured party requests, in a commercially reasonable manner, information concerning financing statements indexed under the debtor's name in the office indicated in subsection (c)(3)(4)(B); and

(2) before the notification date, the secured party:

(A) Did not receive a response to the request for information; or

(B) received a response to the request for information and sent an authenticated notification of disposition to each secured party or other lienholder named in that response whose financing statement covered the collateral.

Sec. 6. K.S.A. 84-9-615 is hereby amended to read as follows: K.S.A. 84-9-615.

**Application of proceeds of disposition; liability for deficiency and right to surplus.** (a) **Application of proceeds.** A secured party shall apply or pay over for application the cash proceeds of disposition under K.S.A. 2002 Supp. 84-9-610, and amendments thereto, in the following order to:

(1) The reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for by agreement and not prohibited by law, reasonable attorney fees and legal expenses incurred by the secured party;

(2) *The County Treasurer of any county in which the collateral disposed of is located or was located in any prior taxable year in satisfaction of all outstanding personal property tax liens imposed pursuant to Section 1. In the event the proceeds are payable to two or more counties*

*and are insufficient to satisfy all tax liens, the proceeds shall be prorated among the counties based upon the relative amount of the tax liens held by each county;*

~~(2)(3)~~ the satisfaction of obligations secured by the security interest or agricultural lien under which the disposition is made;

~~(3)(4)~~ the satisfaction of obligations secured by any subordinate security interest in or other subordinate lien on the collateral if:

(A) The secured party receives from the holder of the subordinate security interest or other lien an authenticated demand for proceeds before distribution of the proceeds is completed; and

(B) in a case in which a consignor has an interest in the collateral, the subordinate security interest or other lien is senior to the interest of the consignor; and

~~(4)(5)~~ a secured party that is a consignor of the collateral if the secured party receives from the consignor an authenticated demand for proceeds before distribution of the proceeds is completed.

(b) **Proof of subordinate interest.** If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder does so, the secured party need not comply with the holder's demand under subsection (a)~~(3)(4)~~.

(c) **Application of noncash proceeds.** A secured party need not apply or pay over for application noncash proceeds of disposition under K.S.A. 2002 Supp. 84-9-610, and amendments thereto, unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner.

(d) **Surplus or deficiency if obligation secured.** If the security interest under which a disposition is made secures payment or performance of an obligation, after making the payments and applications required by subsection (a) and permitted by subsection (c):

(1) Unless subsection (a)~~(4)(5)~~ requires the secured party to apply or pay over cash proceeds to a consignor, the secured party shall account to and pay a debtor for any surplus; and

(2) the obligor is liable for any deficiency.

(e) **No surplus or deficiency in sales of certain rights to payment.** If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes:

(1) The debtor is not entitled to any surplus; and

(2) the obligor is not liable for any deficiency.

(f) **Calculation of surplus or deficiency in disposition to person related to secured party.** The surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this part to a transferee other than the secured party, a person related to the secured party, or a secondary obligor if:

(1) The transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor; and

(2) the amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

(g) **Cash proceeds received by junior secured party.** A secured party that receives cash proceeds of a disposition in good faith and without knowledge that the receipt violates the rights of the holder of a security interest or other lien that is not subordinate to the security interest or agricultural lien under which the disposition is made:

- (1) Takes the cash proceeds free of the security interest or other lien;
- (2) is not obligated to apply the proceeds of the disposition to the satisfaction of obligations secured by the security interest or other lien; and
- (3) is not obligated to account to or pay the holder of the security interest or other lien for any surplus.

Sec. 7. K.S.A. 84-9-621 is hereby amended to read as follows: K.S.A. 84-9-621.

**Notification of proposal to accept collateral.** (a) **Persons to which proposal to be sent.** A secured party that desires to accept collateral in full or partial satisfaction of the obligation it secures shall send the secured party's proposal to:

(1) Any person from which the secured party has received, before the debtor consented to the acceptance, an authenticated notification of a claim of an interest in the collateral;

*(2) The County Treasurer of any county in which the collateral is located or to the knowledge of the secured party after reasonable investigation was located within the current or previous three calendar years; and*

~~(2)~~(3) any other secured party or lienholder that, 10 days before the debtor consented to the acceptance, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:

(A) Identified the collateral;

(B) was indexed under the debtor's name as of that date; and

(C) was filed in the office or offices in which to file a financing statement against the debtor covering the collateral as of that date; and

~~(3)~~(4) any other secured party that, 10 days before the debtor consented to the acceptance, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in K.S.A. 2002 Supp. 84-9-311(a) and amendments thereto.

(b) **Proposal to be sent to secondary obligor in partial satisfaction.** A secured party that desires to accept collateral in partial satisfaction of the obligation it secures shall send its proposal to any secondary obligor in addition to the persons described in subsection (a).

Kevin Fowler  
Kansas Healthcare  
Assoc.

SENATE BILL No. \_\_\_\_\_

AN ACT relating to adult care homes; concerning the use of inspection reports; amending K.S.A. 39-935 and repealing the existing section.

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

Section 1. K.S.A. 39-935 is hereby amended to read as follows: K.S.A. 39-935. (a) Inspections shall be made and reported in writing by the authorized agents and representatives of the licensing agency and state fire marshal, and of the county, city-county and multicounty health departments as often and in the manner and form prescribed by the rules and regulations promulgated under the provisions of this act. Access shall be given to the premises of any adult care home at any time upon presenting adequate identification to carry out the requirements of this section and the provisions and purposes of this act, and failure to provide such access shall constitute grounds for denial or revocation of license. A copy of any inspection reports required by this section shall be furnished to the applicant, except that a copy of the preliminary inspection report signed jointly by a representative of the adult care home and the inspector shall be left with the applicant when an inspection under this section is completed. This preliminary inspection report shall constitute the final record of deficiencies assessed against the adult care home during the inspection, all deficiencies shall be specifically listed and no additional deficiencies based upon the data developed at that time shall be assessed at a later time. An exit interview shall be conducted in conjunction with the joint signing of the preliminary inspection report.

(b) The authorized agents and representatives of the licensing agency shall conduct at least one unannounced inspection of each adult care home within 15 months of any previous inspection for the purpose of determining whether the adult care home is complying with applicable statutes and rules and regulations relating to the health and safety of the residents of the adult care home. The statewide average interval between inspections shall not exceed 12 months.

(c) Every adult care home shall post in a conspicuous place a notice indicating that the most recent inspection report and related documents may be examined in the office of the administrator of the adult care home. Upon request, every adult care home shall provide to any person a copy of

1 the most recent inspection report and related documents, provided the  
2 person requesting such report agrees to pay a reasonable charge to cover  
3 copying costs.

4 *(d) The results of an inspection or survey of an adult care home that is*  
5 *conducted under this chapter or in accordance with the regulations,*  
6 *guidelines, and procedures issued by the United States secretary of health*  
7 *and human services under Titles XVIII and XIX of the "Social Security*  
8 *Act," 49 Stat. 620 (1935), 42 U.S.C. 301, as amended, including any*  
9 *statement of deficiencies and all findings and deficiencies cited in the*  
10 *statement or report, shall be used solely to determine the adult care*  
11 *home's compliance with licensure, certification or program participation*  
12 *requirements, with this chapter or another chapter of the Kansas Statutes*  
13 *Annotated.*

14 *(1) For purposes of this paragraph, "results of an inspection or*  
15 *survey" shall include any and all documents prepared by any officer,*  
16 *employee or agent of the State of Kansas during the course of or*  
17 *otherwise in connection with any inspection, survey or investigation*  
18 *of any licensed adult care home that is conducted to determine*  
19 *compliance with licensing, certification or program participation*  
20 *requirements under any provision of state or federal law.*

21 *(2) The results of an inspection or survey, including any written*  
22 *report or statement of deficiencies, and the findings and deficiencies*  
23 *cited in that report or statement shall not be used in any court or in*  
24 *any action or proceeding that is pending in any court and are not*  
25 *admissible in evidence in any action or proceeding unless that action*  
26 *or proceeding is an appeal of an administrative action involving*  
27 *licensure, certification or program participation requirements under*  
28 *state or federal law or is an action by any officer or agency of the*  
29 *state to enforce this chapter or another chapter of the Kansas Statutes*  
30 *Annotated. Nothing in this section prohibits the results of an*  
31 *inspection or survey, including any written report or statement of*  
32 *deficiencies, or the findings and deficiencies cited in that report or*  
33 *statement from being used in a criminal investigation or prosecution.*

34 Section 2. K.S.A. 39-935 is hereby repealed and superceded in its entirety  
35 by this act.

36  
37 Section 3. This act shall take effect and be in force from and after its  
38 publication in the Kansas register.



**TO: SENATE JUDICIARY COMMITTEE**

**FROM: BILL YANEK, DIRECTOR OF GOVERNMENTAL RELATIONS**

**DATE: JANUARY 28, 2004**

**RE: KANSAS ASSOCIATION OF REALTORS® BILL INTRODUCTION REQUEST**

The Kansas Association of REALTORS® respectfully requests introduction of legislation that would create a "broker's lien" on commercial real estate (defined generally as all real estate other than property containing one to four residential units).

The lien would be effective only if the contract for services is in writing and signed by both the broker or the broker's agent and the owner or the owner's agent. A lien may be obtained for either the sale or lease of real estate. The amount of the lien is limited to the amount due the broker pursuant to the terms of the written contract and does not include amounts due the broker after conveyance of the property. The lien would be perfected when the broker becomes entitled to a fee or commission under the terms of the contract and has met the statutory requirements creating a commercial real estate broker's lien.



**785.267.3610**  
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Senate Judiciary  
1-28-04  
Attachment 3

Capitol Office

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Topeka, Kansas 66612  
(785) 296-7398

District Office

304 North Sixth Street  
P.O. Box 747  
Independence, Kansas 67301  
(620) 331-1800



**Senator Derek Schmidt**  
**15th District**

Committee Assignme.

Agriculture (Chairman)  
Legislative Post Audit (Chairman)  
Judiciary  
Natural Resources  
Elections and  
Local Government

Message Only (800) 432-3924  
During Session  
e-mail: schmidt@senate.state.ks.us

**Testimony in Support of Senate Bill 324**  
**Expediting the Appeal of the School Finance Ruling**  
**Presented to the Senate Judiciary Committee**  
**By Senator Derek Schmidt**

**January 28, 2004**

Chairman Vratil, members of the committee, thank you for the opportunity to appear today in support of Senate Bill 324.

The most important public policy issue facing the 2004 legislature and the governor is how to overhaul the financing of our public schools.

Unfortunately, our efforts to build consensus on how to proceed in that effort have been undercut by the preliminary order issued by the Shawnee County District Court. To be blunt, the broad sweep and direct language of the District Court decision – coupled with the judge's refusal to allow an immediate appeal from his preliminary order -- have impeded our efforts to accomplish school finance reform. That's because the issue has become the propriety and correctness of the judge's order rather than the issue being how best to fix school finance.

I believe that impediment will remain until the Kansas Supreme Court reviews the district court's ruling and gives us a final ruling on what the Kansas Constitution requires us to do. Only then can we rationally determine a plan of action that addresses the constitutional requirements. To do otherwise would be to gamble perhaps \$1 billion taxpayer dollars on the hope that we can divine the Supreme Court's ultimate opinion. That sort of read-the-tea-leaves approach seems to me an irresponsible way to set both education and fiscal policy.

For that reason, I have joined with you, Mr. Chairman, in crafting Senate Bill 324. This bill would amend K.S.A. 60-2102 to create a new, temporary, narrowly targeted ground for immediate appeal as of right to the Supreme Court from any preliminary or final decision of a district court that holds any statute of this state unconstitutional as a violation of Article 6 of the Kansas Constitution. This new provision would sunset July 1, 2006.

In short, this bill would create a new path for immediate appeal of the District Court's decision.

There is no reason to wait until July or August to commence the appeal that everybody knows is coming. Delay serves no purpose. But delay does a disservice to the children who are educated in our schools, to the parents who love them, to the professionals who work in public education, and to the communities confronted with uncertainty about the future of their public schools.

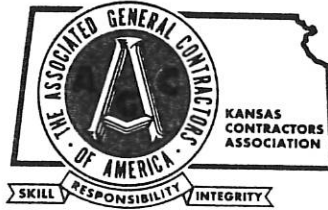
For that reason, I hope this committee – and the entire legislature – will move quickly to enact this legislation and move this process forward.

I would be glad to stand for questions.

Senate Judiciary

1-28-04  
Attachment 4

THE KANSAS CONTRACTORS ASSOCIATION, INC.



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Testimony

By the Kansas Contractors Association  
before the Senate Judiciary Committee

January 28, 2004

Mr. Chairman and members of the 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 tell you of some good news in regard to HB 2154. We have an agreement on this measure. As many of you recall, this bill first was heard in the House and passed that body 121-2. When it came to this committee, the contractors and about 10 other groups testified in favor of this bill in a 50-minute hearing held last Winter. One group opposed the measure, the railroads; and over the summer, your chairman, Pat Hubbell and I worked out an agreement over the concerns raised in that hearing.

Senate Judiciary  
1-28-04  
Attachment 5



I have attached a revised bill to my testimony in hopes that you will approve the compromise.

For those that don't remember, this bill came about due to concerns over who was responsible for risk when a contractor was hired by KDOT and it involved the railroad. Prior to this measure, the railroads believed the contractors should be responsible for anything associated with the construction project whether it was the contractor's fault or the railroads.

This position seemed unfair to the contractors. Our association felt the contractors should be responsible for their own negligence and the railroads should be responsible for their negligence.

In the agreement we hammered out this summer, the railroads are assured their risk is mitigated as railroad protective liability insurance will be required before a contractor can do work on or adjacent to their property.

I am pleased with this compromise and urge you to approve what we have agreed. I stand for questions.

**AMENDED HOUSE BILL No. 2154**

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 an 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, or other improvement to real property, including any moving, demolition or excavation; **provided, however, that no deed, lease, easement, license or other instrument granting an interest in or the right to possess, enter upon or use real property shall be deemed a construction contract even if the instrument includes the right to design, construct, alter, renovate, repair or maintain improvements on such real property.**

(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 other agreement **(including but not limited to a right of entry)** 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 act shall not be construed to affect or impair the contractual obligation of a contractor or owner to provide railroad protective insurance or general liability insurance.**

(d) 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.

AMENDED HOUSE BILL No. 2154

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

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Senate Judiciary

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Attachment 6

January 28, 2004



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Overland Park  
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Wichita  
Jason Van Hecke, AIA  
Wichita  
Kyle Wedel, AIAS  
Manhattan

TO: Senator Vratil and Members of Senate  
Judiciary Committee

FROM: Dale Glenn, AIA, Government Affairs Chair

RE: **SUPPORT FOR HB 2154**

Good Morning, Senator Vratil and members of the Committee. I am Dale Glenn, a principal in the Lawrence architectural firm of GLPM and Chair of the Government Affairs Committee 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  
aron@aiaks.org

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

Senate Judiciary  
1-28-04  
Attachment 7

**Testimony on House Bill 2154  
Before the Senate Judiciary Committee  
By Larry Magill  
Kansas Association of Insurance Agents  
January 28, 2004**

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".

Another more recent example is the Insurance Services Office (ISO) new "additional named insured" and "definition of insured contract" filings in Kansas. ISO is the country's largest rating and insurance forms body. They recently filed an amended Additional Insured endorsement for the Commercial General Liability policy that clarifies that the additional insured is not covered for their sole negligence. In addition, they filed an Amendment of Insured Contract Definition to clarify that there was no coverage under the contractual liability for the additional insured's sole negligence. Thus, even if a contract requires that the owner be named as an additional insured on the contractor's GL policy, there will not be coverage for the owner's sole negligence.

Senate Judiciary  
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Attachment 8

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.

Do keep in mind that this issue is broader than just construction contracts and includes a lot of other contractual relationships. Our association does support the amendment supported by the Kansas Contractors Association. We would be happy to provide additional information or answer questions for the committee. We urge you to adopt the agreed amendment and pass the bill with a favorable recommendation.

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.

# KANSAS

DEPARTMENT OF TRANSPORTATION  
DEB MILLER, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

## TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE

### REGARDING HOUSE BILL 2154 RELATING TO CONSTRUCTION CONTRACTS INDEMNIFICATION PROVISIONS

January 28, 2004

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, and yet extends far enough to fully address the problems confronting KDOT and contractors throughout the State. Please note that the proposed legislation does not prohibit all indemnification provisions. Instead, the proposed legislation prohibits only those indemnification provisions that require one party to be liable for damages caused by the other party's negligence. Accordingly, an owner cannot hold a contractor liable for damages caused by the owner's negligent acts, and contractors cannot hold subcontractors liable for damages caused by the contractor's negligence.

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.

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 State of Kansas. Contractors



January 28, 2004

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 the Kansas taxpayers would have to pay for the 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 would be opposed. Furthermore, any amendments that would more narrowly define construction contracts or projects, or that would exclude the type of agreements entered into between KDOT and railroad owners, would be opposed by KDOT.

9-2

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.



Affiliated with:

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

January 28, 2004

TO: Senator Vratil and Members of the  
Senate Judiciary Committee

FROM: Tom Swenson  
Principal, TranSystems Corporation and  
Member Firm, Kansas Consulting Engineers

RE: Support for HB2154

Good morning Chairman Vratil and members of the Senate Judiciary committee. I am Tom Swenson and I appear before you as a Principal with TranSystems Corporation and a member of the Kansas Consulting Engineers (KCE). KCE is an association of professional engineering firms that provide design and other services for various private and public infrastructure projects.

The contractual agreements used on these projects include provisions for a whole range of responsibilities, including indemnification in the event of injury, loss or damage. Typical contract provisions obligate a design professional to indemnify the client for damages that result from a negligent act, error, or omission on the part of the design professional. We accept that responsibility and insurance is available to help us manage that risk.

As you now know, some parties attempt to shift responsibility for their own negligence onto design professionals through the contractual agreement. Obligating a design professional to accept responsibility for the actions of the client or another party represents real and substantial risk to the owners and employees of the design firm as any claims made under such provisions are uninsurable.

Engineering firms are not seeking any favorable treatment and will continue to accept responsibility for their own actions. We do, however, want a level playing field with respect to liability in a contractual agreement. HB 2154 provides that fairness and represents sound public policy. KCE urges you to support HB 2154.

Thank you for this opportunity and I would be glad to answer any question you may have.

Scott Heidner, Executive Director

300 SW 8th Ave., Third Floor • Topeka, KS 66603-3912 • 785/357-1824 • Fax 785/233-2206

Senate Judiciary

1-28-04

Attachment 10