Approved: April 30, 2004
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 a.m. on Monday, March 8, 2004, in Room 123-S of the Capitol.

All members were present except:
Senator David Haley (A)
Senator Dwayne Umbarger (E)
Senator Kay O'Connor - Arrived 9:48 a.m.

Committee staff present:
Mike Heim, Kansas Legislative Research Department
Jill Wolters, Office of the Revisor Statutes
Helen Pedigo, Office of the Revisor Statutes
Dee Woodson, Committee Secretary

Conferees appearing before the committee:
Representative Paul Davis
Judge Christel E. Marquardt
Senator David Adkins
Janet Schalansky, Secretary of SRS
Professor James Concannon, Washburn University
Gene Balloun, Attorney
Lou Ebert, President & CEO, Kansas Chamber
Brad Smoot, Kansas Civil Law Forum

Others attending: See attached list.

HB 2618 - Terms of office of court of appeals judges six years, from current four years

Chairman Vratil opened the hearing on **HB 2618**. Representative Paul Davis testified in favor of his proposed bill. He stated he felt the terms of office for all appellate judges in Kansas ought to be congruent. He explained a minor amendment made to the bill in the House Judiciary Committee would not take affect immediately for those judges on the Court that are standing for retention in the upcoming election. (Attachment 1)

Judge Christel Marquardt spoke in support of **HB 2618**, and stated that the bill was supported by the Kansas Court of Appeals, the Kansas District Court judges, and the Kansas Supreme Court. Judge Marquardt included with her written testimony data from the U.S. Department of Justice which showed that the terms of office for judges on other state's Courts of Appeals range from 6 years to lifetime appointments. (Attachment 2)

Brief Committee discussion and questions followed.

Chairman Vratil distributed copies of SB 19 which passed the Senate 39-1, last session, and explained that the 2003 bill proposed to increase the retirement age for Appellate Court judges from 70 to 75. He said the bill was stalled in the House last session. He asked for the Committee to consider amending SB 19 into **HB 2618** when the it worked **HB 2618**. The Chairman asked the members to study SB 19 for future consideration. (Attachment 3)

Having no other conferees to appear on **HB 2618**, Chairman Vratil closed the hearing.

SB 489 - State Child Death Review Board; prescribing duties regarding injury to or death of a child under certain circumstances

Chairman Vratil opened the hearing on **SB 489**. Senator David Adkins testified in support of the proposed legislation. He explained that the bill would amend statutes of the State Child Death Review Board (SCDRB) by requiring referral of cases of a child death or near fatality to the SCDRB within 30 days of the injury or death when the death is the result of child abuse or neglect. The bill clarifies that cases would be referred when the death occurred on or after January 1, 2001, the child is a ward of the

State, or has at any time been determined to be a child in need of care. Senator Adkins' concern was with the "disclosure of records law" which is not useful when a death or near death situation occurs. He said that Missouri has taken the federal mandate and used it, at the discretion of its Chief of the Child Protective Agency, to release those records.

Senator Adkins stated that he wanted the Brian Edgar case to be included in this legislation. He said the idea was to conduct a Legislative Post Audit type approach with SCDRB auditing the records, determining what happened, making specific findings of fact, and making specific recommendations on what should be changed. Senator Adkins explained that Attorney General Kline's office was working hard to craft compromise language to address this issue, and it should be released shortly with the support of Representative Landwehr, and himself. He advised the Chairman that the best chance for resolving this issue was to wait until the compromise language was identified. Then, Senator Adkins would forward that work product to the Committee for further consideration. (no written testimony submitted)

Following Committee questions and discussion, the Chair recognized Secretary Janet Schalansky, Social and Rehabilitation Services (SRS), to testify as a neutral conferee on **SB 489**. Secretary Schalansky testified that SRS supports openness and oversight by SCDRB, and also the access to and full review of records by SCDRB. She stated that SRS recommended limiting the scope of the bill to children who had been wards of the state within three years prior to the child's death or near fatality. Secretary Schalansky submitted a balloon amendment covering SRS's recommendation. (Attachment 4)

Following brief discussion and questions, the Chairman closed the hearing on **SB 489**.

HB 2764 - Class actions, appeal from certification of class

Chairman Vratil opened the hearing on **HB 2764**. Professor James Concannon, Washburn University, testified in support of the proposed legislation which gives the Court of Appeals discretion to permit an immediate appeal, prior to final judgment, of a trial court order certifying, or refusing to certify, an action to proceed as a class action. He stated he firmly believed that, absent compelling reasons, the Kansas rules of civil procedure should mirror the Federal Rules of Civil Procedure. (Attachment 5)

Professor Concannon explained that **HB 2764** incorporates the 1987 technical amendments that did not involve substantive changes. It does not incorporate the December, 2003, amendments. He concluded that this bill would bring Kansas law into greater conformity with Federal Rule 23.

Committee questions and discussion followed.

Gene Balloun, Attorney, testified in favor of **HB 2764**. He explained the bill adopts the provisions of Federal Rules of Civil Procedure 23(f), but does not take away any appellate rights. He said it adds an additional provision for interlocutory appeal. He added that **HB 2764** provides an additional avenue of appeal leading to early resolution of class certification issues which will benefit litigants, judges, attorneys, and the public. (Attachment 6)

Lew Ebert, Kansas Chamber, spoke in support of **HB 2764** because conforming Kansas' civil procedure Rule 23(f) to the federal rule allows a more efficient use of the Chamber's member's legal resources. Mr. Ebert concluded that implementation of this rule in no way restricts any party's access to due process or their day in court. (Attachment 7)

Brad Smoot, Kansas Civil Law Forum, submitted written testimony in support of **HB 2764**. (Attachment 8)

There being no other conferees to appear before the Committee, the Chair closed the hearing on **HB 2764**.

Final Action on:
HB 2764 - Class actions, appeal from certification of class

Chairman Vratil announced that since this bill passed the House on a vote of 125 to 0, it appeared to be non-controversial. The Chair called for discussion and final action.

MINUTES OF THE SENATE JUDICIARY COMMITTEE at 9:30 a.m. on Monday, March 8, 2004, in Room 123-S of the Capitol.

Senator Donovan moved to pass **HB 2764** out favorably, seconded by Senator Betts, and the motion carried.

Minutes for the January 29 and February 2, 2004 meetings were presented for approval. Senator Donovan moved to approve the minutes as written, seconded by Senator Schmidt, and the motion carried.

Chairman Vratil adjourned the meeting at 10:30 a.m. The next scheduled meeting is Tuesday, March 9, 2004.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Mon., March 8, 2004

NAME	REPRESENTING

None Signed.

PAUL DAVIS
REPRESENTATIVE, 46TH DISTRICT
1101½ MASSACHUSETTS
LAWRENCE, KANSAS 66044
(785) 749-1942

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STATE OF KANSAS

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: TAXATION
TRANSPORTATION
JUDICIARY

LEGISLATIVE TESTIMONY
HOUSE BILL 2618

March 8, 2004

TO: CHAIRMAN JOHN VRATIL AND MEMBERS OF THE SENATE JUDICIARY COMMITTEE

FROM: REPRESENTATIVE PAUL DAVIS

Chairman Vratil and Members of the Committee:

I come before the Senate Judiciary Committee to voice my support for House Bill 2618. Currently, judges on the Kansas Court of Appeals serve four (4) year terms while justices on the Kansas Supreme Court serve six (6) year terms. It is my belief that the terms of office for all appellate judges in Kansas ought to be congruent. Therefore, I requested the introduction of House Bill 2618 to make the terms of office for Court of Appeals judges six (6) years. When you examine the terms of office for appellate court judges across the country, the four (4) year terms that Kansas Court of Appeals judges serve are the shortest of any judges in the country.

When the House Judiciary Committee considered the bill, one minor amendment was made to the bill. The amendment states that the six (6) year terms will not take affect immediately for those judges on the Court that are standing for retention in the upcoming election. Unfortunately, the original bill would have had the unintentional effect of forcing two judges on the Court of Appeals to retire earlier than they would have had to retire if the current four (4) terms were left in place and the bill was not passed.

The House Judiciary Committee unanimously endorsed this amendment and the entire bill. I hope that you will also look upon House Bill 2618 favorably. With that said, I would be happy to entertain any questions.

Senate Judiciary
3-8-04
Attachment 1

Department of Justice
Office of Justice Programs

Bureau of Justice Statistics

State Court Organization 1998

Courts and judges
Judicial selection and service
Judicial branch
Appellate courts
Trial courts
The jury
The sentencing context
Court structure

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

State Court Organization 1998

By David B. Rottman
Carol R. Flango
Melissa T. Cantrell
Randall Hansen
Neil LaFountain

A joint effort of
Conference of State Court Administrators
and National Center for State Courts

June 2000, NCJ 178932

Table 5. Terms of Appellate Court Judges

	Length of term	Selection of chief justice/judge	Term of office for chief justice/judge	Chief justices/judges—can th succeed themselves?
Alabama				
Supreme Court	6 years	Popular election	6 years	Yes
Court of Criminal Appeals	6 years	Court selection	Indefinite	Yes
Court of Civil Appeals	6 years	Seniority	Indefinite	Yes
Alaska				
Supreme Court	10 years	Court selection	3 years	No
Court of Appeals	8 years	Supreme court, chief justice appointment	2 years	Yes
Arizona				
Supreme Court	6 years	Court selection	5 years	Yes
Court of Appeals	6 years	Court selection	1 year	Yes
Arkansas				
Supreme Court	8 years	Popular election	8 years	Yes
Court of Appeals	8 years	Supreme court, chief justice appoints	4 years	Yes
California				
Supreme Court	12 years	Gubernatorial appointment	12 years	Yes
Courts of Appeal	12 years	Gubernatorial appointment	12 years	Yes
Colorado				
Supreme Court	10 years	Court selection	Indefinite	Yes
Court of Appeals	8 years	Supreme court, chief justice appoints	At pleasure	Yes
Connecticut				
Supreme Court	8 years	Legislative appointment[1]	8 years	Yes
Appellate Court	8 years	Supreme court's chief justice appoints	Indefinite	Yes
Delaware				
Supreme Court	12 years	Gubernatorial appointment	12 years	Yes
District of Columbia				
Court of Appeals	15 years	Judicial nominating commission appointment	4 years	Yes
Florida				
Supreme Court	6 years	Court selection	2 years	Yes
District Courts of Appeal	6 years	Court selection	2 years	Yes
Georgia				
Supreme Court	6 years	Court selection	4 years	No
Court of Appeals	6 years	Rotate by seniority	2 years	Yes
Hawaii				
Supreme Court	10 years	Judicial Selection Commission nominates, governor appoints with consent of senate	10 years	Yes
Intermediate Court of Appeals	10 years	Judicial Selection Commission nominates, governor appoints with consent of senate	10 years	Yes
Idaho				
Supreme Court	6 years	Court selection	4 years	Yes
Court of Appeals	6 years	Supreme court, Chief Justice appointment	2 years	Yes
Illinois				
Supreme Court	10 years	Court selection	3 years	Yes
Appellate Court	10 years	Court selection	1 year	Yes

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Legend: ~ = Not Applicable, N/S = None stat

Table 5. Terms of Appellate Courts Judges

	Length of term	Selection of chief justice/judge	Term of office for chief justice/judge	Chief justices/judges—can they succeed themselves?
Indiana				
Supreme Court	Initial = 2 yrs Retention = 10 yrs	Judicial nominating commission appointment	5 years	Yes
Court of Appeals	Initial = 2 yrs Retention = 10 yrs	Chief judge by full court selection	3 years	Yes
Tax Court	Initial = 2 yrs Retention = 10 yrs	–	–	–
Iowa				
Supreme Court	8 years	Court selection	8 years or duration of term	Yes
Court of Appeals	6 years	Court selection	2 years	Yes
Kansas				
Supreme Court	6 years	Rotation by seniority	Indefinite	Yes
Court of Appeals	4 years	Supreme court appointment	Indefinite	Yes
Kentucky				
Supreme Court	8 years	Court selection	4 years	Yes
Court of Appeals	8 years	Court selection	4 years	Yes
Louisiana				
Supreme Court	10 years	Seniority	Duration of service	Yes
Courts of Appeal	10 years	Seniority	Duration of service	Yes
Maine				
Supreme Judicial Court	7 years	Gubernatorial appointment	7 years	Yes
Maryland				
Court of Appeals	10 years	Gubernatorial appointment	Indefinite	Yes
Court of Special Appeals	10 years	Gubernatorial appointment	Indefinite	Yes
Massachusetts				
Supreme Judicial Court	Until age 70	[2]	To age 70	–
Appeals Court	Until age 70	[2]	To age 70	–
Michigan				
Supreme Court	8 years	Court selection	2 years	Yes
Court of Appeals	6 years	Appointed by supreme court	2 years	Yes
Minnesota				
Supreme Court	6 years	Popular election	6 years	Yes
Court of Appeals	6 years	Gubernatorial appointment	3 years	Yes
Mississippi				
Supreme Court	8 years	Seniority	Duration of service	Yes
Court of Appeals	8 years	Appointment by Supreme Court Chief Justice	4 years	Yes
Missouri				
Supreme Court	12 years	Court selection	2 years	Yes[3]
Court of Appeals	12 years	Court selection	2 years[4]	Yes
Montana				
Supreme Court	8 years	Popular election	8 years	Yes
Nebraska				
Supreme Court	More than 3 years for first election; every 6 years thereafter	Gubernatorial appointment from judicial nominating commission	Duration of service	Yes
Court of Appeals	More than 3 years for first election; every 6 years thereafter	IAC by majority vote; upon ratification of selection by Supreme Court	2 years as presiding	Yes

Legend: – = Not Applicable

Table 5. Terms of Appellate Court Judges

	Length of term	Selection of chief justice/judge	Term of office for chief justice/judge	Chief justices/judges—can they succeed themselves?
Nevada				
Supreme Court	6 years	Rotation	2 years	5
New Hampshire				
Supreme Court	Until age 70	Gubernatorial appointment with approval of elected executive council	Until age 70	~
New Jersey				
Supreme Court	7 years, followed by tenure	Gubernatorial appointment with consent of senate	Duration of service	Yes
Superior Court, Appellate Division	Annual assignment by Chief Justice[6]	Designation by Chief Justice	At the pleasure of the Chief Justice	~
New Mexico				
Supreme Court	8 years	Court selection	2 years	Yes
Court of Appeals	8 years	Court selection	2 years	Yes
New York				
Court of Appeals	14 years	Gubernatorial appointment from judicial nominating commission	14 years	Yes
Supreme Court, Appellate Divisions	5 years or duration	Gubernatorial appointment from judicial screening commission	Duration of service	Yes
North Carolina				
Supreme Court	8 years	Popular election	8 years	--
Court of Appeals	8 years	Supreme court, chief justice appointment	At the pleasure of the chief justice of the Supreme court	~
North Dakota				
Supreme Court	10 years	Selection by the judges of the supreme and district courts	5 years or until term expires, whichever occurs first	Yes
Ohio				
Supreme Court	6 years	Popular election	6 years	Yes
Courts of Appeals	6 years	Selected by Judges of District	Calendar year	Yes
Oklahoma				
Supreme Court	6 years	Court selection	2 years	Yes
Criminal Appeals	6 years	Court selection	2 years	Yes
Court of Civil Appeals	6 years	Court selection	1 year	Yes
Oregon				
Supreme Court	6 years	Court selection	6 years	Yes
Pennsylvania				
Supreme Court	10 years	Rotation by seniority	Duration of term	~
Superior Court	10 years	Court selection	5 years	No
Commonwealth Court	10 years	Court selection	5 years	No
Rhode Island				
Supreme Court	Life	Gubernatorial appointment from the judicial nominating commission	Life	~
South Carolina				
Supreme Court	10 years	Legislative election	10 years	Yes
Court of Appeals	6 years	Legislative election	6 years	Yes
South Dakota				
Supreme Court	8 years	Court selection	4 years	Yes
Tennessee				
Supreme Court	8 years	Court selection	4 years	Yes
Courts of Appeal	8 years	Court selection	1 term	Yes
Court of Criminal Appeals	8 years	Court selection	1 term	Yes

1-6

Legend: ~ = Not Applicable, N/S = None state

Table 5. Terms of Appellate Courts Judges

	Length of term	Selection of chief justice/judge	Term of office for chief justice/judge	Chief justices/judges—can they succeed themselves?
Texas				
Supreme Court	6 years	Partisan election	6 years	Yes
Court of Criminal Appeals	6 years	Partisan election	6 years	Yes
Courts of Appeals	6 years	Partisan election	6 years	Yes
Utah				
Supreme Court	Initial = 3 yrs; Retention = 10 yrs	Court selection	4 years	Yes
Court of Appeals	Initial = 3 yrs; Retention = 6 yrs	Court selection	2 years	Yes[7]
Vermont				
Supreme Court	6 years	Gubernatorial appointment from judicial nominating commission with consent of senate	6 years	Yes
Virginia				
Supreme Court	12 years	Seniority	Indefinite	–
Court of Appeals	8 years	Court selection	4 years	Yes
Washington				
Supreme Court	6 years	Court selection	4 years	Yes
Courts of Appeals	6 years	Presiding chief judge by court selection; however, position rotates among the 3 divisions; chief judge by division judges	1 year for presiding judge and 2 years for chief judge	Not the presiding judge
West Virginia				
Supreme Court	12 years	Rotation by seniority	1 year	No
Wisconsin				
Supreme Court	10 years	Seniority	Until declined	–
Court of Appeals	6 years	Supreme court appointment	3 years	Yes
Wyoming				
Supreme Court	8 years	Court selection	At the pleasure of the court	–
Federal				
U.S. Supreme Court	Life	Nominated and appointed by the President with advice and consent of Senate	Life	–
U.S. Courts of Appeals	Life	Seniority[8]	7 years or until age 70	No
U.S. Court of Veterans Appeals	15 years	Nominated and appointed by president with advice and consent of Senate	15 years	Yes

FOOTNOTES:

Connecticut:
[1]Governor nominates from candidates submitted by Judicial Selection Commission.

Massachusetts:
[2]Chief Justice, in the appellate courts, is a separate judicial office from that of an Associate Justice. Chief Justices are appointed, until age 70, by the Governor with the advice and consent of the Executive (Governor's) Council.

Missouri:
[3]Selection is typically rotated among the judges.
[4]Two years in western and southern districts; one year in eastern district.

Nevada:
[5]Not immediately; later, as part of rotation.

New Jersey:
[6]All Superior Court judges, including Appellate Division judges, are subject to gubernatorial reappointment and consent by the senate after an initial 7-year term.

Utah:
[7]Presiding judge can serve no more than two successive terms.

Federal:
[8]The chief judge is the active circuit judge who is senior of those judges who (1) are 64 years or under, (2) have served for one or more years as a circuit judge, and (3) have not served previously as chief judge. Per 28 U.S.C. § 45(a).

Legend: – = Not Applicable

Testimony before the Kansas Senate Judiciary Committee
on House Bill No. 2618
Monday, March 8, 2004, at 9:30 a.m.
by
The Honorable Christel E. Marquardt,
Judge on the Kansas Court of Appeals

Even though K.S.A. 20-3006 has been amended in recent years to add judges to the Kansas Court of Appeals in order to accommodate the large caseload handled by our court, the term of office for judges on the Kansas Court of Appeals has been 4 years since the court was established in 1975. Since that time, the work of the Kansas Court of Appeals has changed dramatically.

House Bill 2618, as amended, is supported by the Kansas Court of Appeals, the Kansas district court judges, and to the best of my knowledge, the Kansas Supreme Court.

The data from the United States Department of Justice, (a copy of which is attached to these remarks), although certainly not controlling on our legislature, shows that the terms of office for judges on other states' courts of appeals range from 6 years to lifetime appointments:

16 states have 6 year terms

10 states have 8 year terms

7 states have 10 year terms

2 states have 12 year terms

1 state has a 14 year term

1 state has a 15 year term

1 state has lifetime appointment

Members of the Missouri Court of Appeals serve 12 year terms. There are 11 states that do not have courts of appeals. Kansas is the only state that limits its court of appeals to 4 year terms. It is the shortest term for any court of appeals in the nation.

Almost all of the states have the same term of office for their court of appeals as their supreme court. Our Supreme Court justices serve 6 year terms. It should also be noted that federal judges in Kansas and elsewhere have lifetime appointments. You probably are aware that federal Judge Brown in Wichita is in his mid-90's and is still carrying an almost full caseload. He has a

wonderful mind and is respected by the lawyers who appear before him.

When I presented my comments on this bill to the House Judiciary Committee, along with an amendment, there were no negative comments or suggestions. When the bill was presented to the full House, Representative Loyd who is on the Judiciary Committee spoke against the bill saying that there should be an evaluation system for judges. Unfortunately, Representative Loyd was not present when the bill was presented to the Judiciary Committee.

Even though the issue of judicial evaluation does not bear directly on this legislation, you should be aware of the fact that our court is concerned about the fact that the public has almost no knowledge about the competency of appellate judges, especially since they are asked to vote in our retention elections. We believe that voters should be informed. I chair a committee for our court that is working on an evaluation system for appellate judges. This includes reviewing what other states have done in the area of performance standards. In the future, we plan to ensure that the public has an informed basis for their votes.

We need input from our Supreme Court, the public, the bar associations and

legislators on the criteria that should be used, who should be doing the ratings, and the group that should conduct the process.

Also, this bill is very personal for me because when I attended law school, I was a non-traditional student with 4 rather young sons. I was sworn in as a lawyer at the age of 39. This meant that my years of building credibility in the profession were considerably fewer than my fellow students by about 15 years. This also meant that I came to the bench at a time, and because of a change in the method of accruing retirement, I will never be able to earn the maximum retirement benefit that my younger colleagues have already attained. Passage of the bill as amended will allow me to credit 2 more years of earnings that I do not have under the current statute. Please note that I am not advocating any changes in the retirement for judges.

I respectfully ask that you pass House Bill 2618 with the amendment. Thank you for your time and consideration of my request.

U.S. Department of Justice
Office of Justice Programs

Bureau of Justice Statistics

State Court Organization 1998

Courts and judges
Judicial selection and service
Judicial branch
Appellate courts
Trial courts
The jury
The sentencing context
Court structure

2-5

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

State Court Organization 1998

By David B. Rottman
Carol R. Flango
Melissa T. Cantrell
Randall Hansen
Neil LaFountain

A joint effort of
Conference of State Court Administrators
and National Center for State Courts

June 2000, NCJ 178932

2-6

Table 5. Terms of Appellate Court Judges

	Length of term	Selection of chief justice/judge	Term of office for chief justice/judge	Chief justices/judges—can th succeed themselves?
Alabama				
Supreme Court	6 years	Popular election	6 years	Yes
Court of Criminal Appeals	6 years	Court selection	Indefinite	Yes
Court of Civil Appeals	6 years	Seniority	Indefinite	Yes
Alaska				
Supreme Court	10 years	Court selection	3 years	No
Court of Appeals	8 years	Supreme court, chief justice appointment	2 years	Yes
Arizona				
Supreme Court	6 years	Court selection	5 years	Yes
Court of Appeals	6 years	Court selection	1 year	Yes
Arkansas				
Supreme Court	8 years	Popular election	8 years	Yes
Court of Appeals	8 years	Supreme court, chief justice appoints	4 years	Yes
California				
Supreme Court	12 years	Gubernatorial appointment	12 years	Yes
Courts of Appeal	12 years	Gubernatorial appointment	12 years	Yes
Colorado				
Supreme Court	10 years	Court selection	Indefinite	Yes
Court of Appeals	8 years	Supreme court, chief justice appoints	At pleasure	Yes
Connecticut				
Supreme Court	8 years	Legislative appointment[1]	8 years	Yes
Appellate Court	8 years	Supreme court's chief justice appoints	Indefinite	Yes
Delaware				
Supreme Court	12 years	Gubernatorial appointment	12 years	Yes
District of Columbia				
Court of Appeals	15 years	Judicial nominating commission appointment	4 years	Yes
Florida				
Supreme Court	6 years	Court selection	2 years	Yes
District Courts of Appeal	6 years	Court selection	2 years	Yes
Georgia				
Supreme Court	6 years	Court selection	4 years	No
Court of Appeals	6 years	Rotate by seniority	2 years	Yes
Hawaii				
Supreme Court	10 years	Judicial Selection Commission nominates, governor appoints with consent of senate	10 years	Yes
Intermediate Court of Appeals	10 years	Judicial Selection Commission nominates, governor appoints with consent of senate	10 years	Yes
Idaho				
Supreme Court	6 years	Court selection	4 years	Yes
Court of Appeals	6 years	Supreme court, Chief Justice appointment	2 years	Yes
Illinois				
Supreme Court	10 years	Court selection	3 years	Yes
Appellate Court	10 years	Court selection	1 year	Yes

Legend: ~ = Not Applicable, N/S = None stat

Table 5. Terms of Appellate Courts Judges

	Length of term	Selection of chief justice/judge	Term of office for chief justice/judge	Chief justices/judges—can they succeed themselves?
Indiana				
Supreme Court	Initial = 2 yrs Retention = 10 yrs	Judicial nominating commission appointment	5 years	Yes
Court of Appeals	Initial = 2 yrs Retention = 10 yrs	Chief judge by full court selection	3 years	Yes
Tax Court	Initial = 2 yrs Retention = 10 yrs	–	–	–
Iowa				
Supreme Court	8 years	Court selection	8 years or duration of term	Yes
Court of Appeals	6 years	Court selection	2 years	Yes
Kansas				
Supreme Court	6 years	Rotation by seniority	Indefinite	Yes
Court of Appeals	4 years	Supreme court appointment	Indefinite	Yes
Kentucky				
Supreme Court	8 years	Court selection	4 years	Yes
Court of Appeals	8 years	Court selection	4 years	Yes
Louisiana				
Supreme Court	10 years	Seniority	Duration of service	Yes
Courts of Appeal	10 years	Seniority	Duration of service	Yes
Maine				
Supreme Judicial Court	7 years	Gubernatorial appointment	7 years	Yes
Maryland				
Court of Appeals	10 years	Gubernatorial appointment	Indefinite	Yes
Court of Special Appeals	10 years	Gubernatorial appointment	Indefinite	Yes
Massachusetts				
Supreme Judicial Court	Until age 70	[2]	To age 70	–
Appeals Court	Until age 70	[2]	To age 70	–
Michigan				
Supreme Court	8 years	Court selection	2 years	Yes
Court of Appeals	6 years	Appointed by supreme court	2 years	Yes
Minnesota				
Supreme Court	6 years	Popular election	6 years	Yes
Court of Appeals	6 years	Gubernatorial appointment	3 years	Yes
Mississippi				
Supreme Court	8 years	Seniority	Duration of service	Yes
Court of Appeals	8 years	Appointment by Supreme Court Chief Justice	4 years	Yes
Missouri				
Supreme Court	12 years	Court selection	2 years	Yes[3]
Court of Appeals	12 years	Court selection	2 years[4]	Yes
Montana				
Supreme Court	8 years	Popular election	8 years	Yes
Nebraska				
Supreme Court	More than 3 years for first election; every 6 years thereafter	Gubernatorial appointment from judicial nominating commission	Duration of service	Yes
Court of Appeals	More than 3 years for first election; every 6 years thereafter	IAC by majority vote; upon ratification of selection by Supreme Court	2 years as presiding	Yes

Legend: – = Not Applicable

Table 5. Terms of Appellate Court Judges

	Length of term	Selection of chief justice/judge	Term of office for chief justice/judge	Chief justices/judges—can they succeed themselves?
Nevada				
Supreme Court	6 years	Rotation	2 years	[5]
New Hampshire				
Supreme Court	Until age 70	Gubernatorial appointment with approval of elected executive council	Until age 70	–
New Jersey				
Supreme Court	7 years, followed by tenure	Gubernatorial appointment with consent of senate	Duration of service	Yes
Superior Court, Appellate Division	Annual assignment by Chief Justice[6]	Designation by Chief Justice	At the pleasure of the Chief Justice	–
New Mexico				
Supreme Court	8 years	Court selection	2 years	Yes
Court of Appeals	8 years	Court selection	2 years	Yes
New York				
Court of Appeals	14 years	Gubernatorial appointment from judicial nominating commission	14 years	Yes
Supreme Court, Appellate Divisions	5 years or duration	Gubernatorial appointment from judicial screening commission	Duration of service	Yes
North Carolina				
Supreme Court	8 years	Popular election	8 years	--
Court of Appeals	8 years	Supreme court, chief justice appointment	At the pleasure of the chief justice of the Supreme court	–
North Dakota				
Supreme Court	10 years	Selection by the judges of the supreme and district courts	5 years or until term expires, whichever occurs first	Yes
Ohio				
Supreme Court	6 years	Popular election	6 years	Yes
Courts of Appeals	6 years	Selected by Judges of District	Calendar year	Yes
Oklahoma				
Supreme Court	6 years	Court selection	2 years	Yes
Criminal Appeals	6 years	Court selection	2 years	Yes
Court of Civil Appeals	6 years	Court selection	1 year	Yes
Oregon				
Supreme Court	6 years	Court selection	6 years	Yes
Pennsylvania				
Supreme Court	10 years	Rotation by seniority	Duration of term	–
Superior Court	10 years	Court selection	5 years	No
Commonwealth Court	10 years	Court selection	5 years	No
Rhode Island				
Supreme Court	Life	Gubernatorial appointment from the judicial nominating commission	Life	–
South Carolina				
Supreme Court	10 years	Legislative election	10 years	Yes
Court of Appeals	6 years	Legislative election	6 years	Yes
South Dakota				
Supreme Court	8 years	Court selection	4 years	Yes
Tennessee				
Supreme Court	8 years	Court selection	4 years	Yes
Courts of Appeal	8 years	Court selection	1 term	Yes
Court of Criminal Appeals	8 years	Court selection	1 term	Yes

2-9

Legend: ~ = Not Applicable, N/S = None state

Table 5. Terms of Appellate Courts Judges

	Length of term	Selection of chief justice/judge	Term of office for chief justice/judge	Chief justices/judges—can they succeed themselves?
Texas				
Supreme Court	6 years	Partisan election	6 years	Yes
Court of Criminal Appeals	6 years	Partisan election	6 years	Yes
Courts of Appeals	6 years	Partisan election	6 years	Yes
Utah				
Supreme Court	Initial = 3 yrs; Retention = 10 yrs	Court selection	4 years	Yes
Court of Appeals	Initial = 3 yrs; Retention = 6 yrs	Court selection	2 years	Yes[7]
Vermont				
Supreme Court	6 years	Gubernatorial appointment from judicial nominating commission with consent of senate	6 years	Yes
Virginia				
Supreme Court	12 years	Seniority	Indefinite	–
Court of Appeals	8 years	Court selection	4 years	Yes
Washington				
Supreme Court	6 years	Court selection	4 years	Yes
Courts of Appeals	6 years	Presiding chief judge by court selection; however, position rotates among the 3 divisions; chief judge by division judges	1 year for presiding judge and 2 years for chief judge	Not the presiding judge
West Virginia				
Supreme Court	12 years	Rotation by seniority	1 year	No
Wisconsin				
Supreme Court	10 years	Seniority	Until declined	–
Court of Appeals	6 years	Supreme court appointment	3 years	Yes
Wyoming				
Supreme Court	8 years	Court selection	At the pleasure of the court	–
Federal				
U.S. Supreme Court	Life	Nominated and appointed by the President with advice and consent of Senate	Life	–
U.S. Courts of Appeals	Life	Seniority[8]	7 years or until age 70	No
U.S. Court of Veterans Appeals	15 years	Nominated and appointed by president with advice and consent of Senate	15 years	Yes

FOOTNOTES:

Connecticut:
[1]Governor nominates from candidates submitted by Judicial Selection Commission.

Massachusetts:
[2]Chief Justice, in the appellate courts, is a separate judicial office from that of an Associate Justice. Chief Justices are appointed, until age 70, by the Governor with the advice and consent of the Executive (Governor's) Council.

Missouri:
[3]Selection is typically rotated among the judges.
[4]Two years in western and southern districts; one year in eastern district.

Nevada:
[5]Not immediately; later, as part of rotation.

New Jersey:
[6]All Superior Court judges, including Appellate Division judges, are subject to gubernatorial reappointment and consent by the senate after an initial 7-year term.

Utah:
[7]Presiding judge can serve no more than two successive terms.

Federal:
[8]The chief judge is the active circuit judge who is senior of those judges who (1) are 64 years or under, (2) have served for one or more years as a circuit judge, and (3) have not served previously as chief judge. Per 28 U.S.C. § 45(a).

2-10

Legend: – = Not Applicable

Session of 2003

SENATE BILL No. 19

By Committee on Judiciary

1-15

AN ACT concerning retirement and pensions; relating to the retirement system for judges; mandatory retirement; amending K.S.A. 20-2608 and repealing the existing section.

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

Section 1. K.S.A. 20-2608 is hereby amended to read as follows: 20-2608. (a) Any judge may retire upon reaching age 65 or ~~commencing July 1, 1993, age 65 or~~ age 62 with the completion of 10 years of credited service or the first day of the month coinciding with or following the date that the total of the number of years of credited service and the number of years of attained age of the judge is equal to or more than 85 and upon making application *for retirement* to the board~~, and~~. Any judge upon reaching age ~~70~~ 75 shall retire~~, and~~. Upon retiring, each such judge *as described in this subsection* shall receive retirement annuities as provided in K.S.A. 20-2610 and amendments thereto~~, except, that when any incumbent judge attains the age of 70, such judge may, if such judge desires, finish serving the term during which said judge attains the age of 70~~.

(b) Notwithstanding the provisions of subsection (a), any judge who is otherwise eligible to retire may retire upon reaching age 60 and, having total years of service of not less than 10 years, and upon making application to the board. Any such judge who retires on and after July 1, 1993, and prior to attaining the age of 62 shall receive a retirement annuity pursuant to K.S.A. 20-2610 and amendments thereto based upon the normal retirement age of 62 reduced by an amount equal to the product of (1) such annual retirement annuity payable had the judge retired on the normal retirement date, multiplied by (2) the product of .2% multiplied by the number of months' difference, to the nearest whole month, between the judge's attained age at the time of retirement and age 62.

(c) Notwithstanding the provisions of subsection (a), on or after July 1, 1993, any judge who is otherwise eligible to retire may retire upon reaching age 55 with the completion of 10 years of service, and upon making application to the board. Any such judge who retires prior to attaining the age of 62 pursuant to this subsection shall receive a retirement annuity pursuant to K.S.A. 20-2610 and amendments thereto based upon the normal retirement age of 62 reduced by an amount equal ~~to~~

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the total of: (1) (A) The product of such annual retirement annuity payable had the judge retired on the normal retirement date, multiplied by (B) the product of .6% multiplied by the number of months' difference, to the nearest whole month, between the member's attained age at the time of retirement and age 60; and

(2) for any judge who retired on or after July 1, 1993, the product of such annual retirement annuity payable had the judge retired on the normal retirement date, multiplied by 4.8%.

The provisions of this subsection apply to any judge who retires before the age of 62 and has attained age 55 but has not attained age 60, with the completion of 10 years of service.

Sec. 2. K.S.A. 20-2608 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

SESSION OF 2003

SUPPLEMENTAL NOTE ON SENATE BILL NO. 19

As Recommended by Senate Committee on Judiciary

Brief*

SB 19 raises the mandatory retirement age for judges to 75 years of age.

Background

The bill was requested by the Office of Judicial Administration (OJA). A representative of OJA said the current retirement age which allows judges who reach age 70 to continue until the end of his or her term is somewhat of a lottery. The current retirement age is dependent upon the birth date and term commencement. The mandatory retirement age can vary from age 70 to age 76. SB 19 would establish a uniform retirement age for all judges.

The bill has no fiscal impact.

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*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at http://www.kslegislature.org/klrd

Kansas Department of

Social and Rehabilitation Services

Janet Schalansky, Secretary

Senate Judiciary Committee
March 08, 2004

SB 489 - Review of Child Deaths

Office of the Secretary
Janet Schalansky, Secretary
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Kansas Department of Social and Rehabilitation Services
Janet Schalansky, Secretary

Senate Judiciary Committee
March 08, 2004

SB 489 - Review of Child Deaths

Senator Vratil and members of the committee, I am Janet Schalansky, Secretary of Social and Rehabilitation Services (SRS). Thank you for the opportunity to appear today to discuss the provisions of SB 489. This bill amends statutes of the State Child Death Review Board (SCDRB) by requiring referral of cases of a child death or near fatality, to the SCDRB within 30 days of the injury or death of the child when the death is the result of child abuse or neglect. The bill further clarifies cases will be referred when the child's death occurred on or after January 1, 2001, the child is a ward of the State, or has at any time been determined to be a child in need of care. SRS supports many components of this bill.

SRS supports openness and oversight by the SCDRB. We can not protect children in isolation but are dependent upon the support of the communities we serve. Openness will enhance understanding of the challenges and complexities of child protection, foster care and adoption. We also believe openness tends to increase efficiency and accountability for all branches of government. The challenge is to carefully balance openness with the privacy of individuals involved in a child welfare case.

The proposed legislation requires the SCDRB to issue a report concerning the case within 60 days of case referral. The report is to incorporate findings regarding the death or injury, the extent to which child abuse or neglect contributed to the death or injury; what policies and procedures, rules and regulations, and actions or failure to act, by any State agency or agent or employee or contractor of the State contributed to the death and injury to the child; and what changes in public policy should be enacted to prevent any similar death or injury to a child in the future.

SRS currently provides information on child deaths to the SCDRB. SRS supports access to and full review of records and the investigative review by the SCDRB. Because the Attorney General has oversight of the SCDRB, SRS has been engaged in dialogue with the Attorney General's Office on this same concept of an independent investigation of child deaths, when the child has been in state custody.

The Department supports a report of findings and recommendations, with a suggestion the report be focused on the system and recommendations for system improvements. To ensure the privacy of vulnerable individuals, SRS suggests parties noted in the report be provided an opportunity to obtain a court order to prevent the disclosure of any or all records.

To ensure compliance with federal regulations, the Department has requested an opinion on SB 489 from the Administration for Children and Families (ACF). Although ACF is still in the process of reviewing the proposed legislation, the preliminary feedback is SB 489 does not violate federal regulations.

SRS would like to recommend a change to the time frame provisions of this bill. As noted, the bill as written, requires reporting a child death or near fatality for any child who has "at any time" been determined to be a child in need of care. We suggest limiting the scope to children who had been a ward of the state within three years prior to the child's death or near fatality. Please see the attached balloon.

Thank you for the opportunity to present. I would be happy to stand for questions.

Session of 2004

SENATE BILL No. 489

By Committee on Ways and Means

2-10

AN ACT concerning children and minors; pertaining to death or injury under certain circumstances; amending K.S.A. 22a-243 and 38-1508 and K.S.A. 2003 Supp. 38-1507 and repealing the existing sections.

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

New Section 1. (a) Notwithstanding any other provision of law, the following type of case shall be referred to the state child death review board by the department of social and rehabilitation services within 30 days of the injury or death of the child as a result of child abuse or neglect: on or after January 1, 2001, whenever child abuse or neglect contributed to, or is suspected to have contributed to, a child's death or near fatality and such child is a ward of the state or ~~at any time has been determined to be a child in need of care~~.

had been a ward of the state within three years prior to the child's death or near fatality.

(b) For the purposes of this section, "near fatality" means any injury which results in a critical or serious medical condition as certified by a person licensed by the state board of healing arts to practice medicine and surgery.

(c) (1) For each case referred to the child death review board pursuant to subsection (a), the state child death review board shall collect from any state agency or any contractor thereof any and all of the following records or documents:

(A) Adoption records, including investigative notes, if any; and

(B) any child in need of care records, if any.

(2) It shall be the duty of each state agency and any contractor thereof to cooperate with and provide any requested records and documents, including investigative notes, to the state child death review board within the time period set by the board.

(3) All records and documents, including investigative notes received by the state child death review board pursuant to this subsection shall remain confidential to the extent allowed by law during the pendency of the board's investigation.

(d) (1) Except as provided in paragraph (2), within 60 days after the date any case is referred to the state child death review board, the board shall issue a report, approved by the board, concerning the case. The report shall contain the following:

TESTIMONY BY JAMES M. CONCANNON
PROFESSOR OF LAW
WASHBURN UNIVERSITY SCHOOL OF LAW
SENATE JUDICIARY COMMITTEE - HB 2764
MARCH 8, 2004

My interest in House Bill 2764 comes from 31 years of teaching courses in Appellate Practice and Civil Procedure at Washburn Law School. This bill adopts verbatim as K.S.A. 60-223(f) the 1998 Amendment that added subsection (f) to Federal Rule of Civil Procedure 23, following six years of study by the Federal Rules Advisory Committee. It gives the Court of Appeals discretion to permit an immediate appeal, prior to final judgment, of a trial court order certifying, or refusing to certify, an action to proceed as a class action.

Some background about appeals is essential. Appeals in civil cases ordinarily are not permitted until there is a final decision in the case. K.S.A. 60-2102(a)(4); 28 U.S.C. 1291. The primary rationales for the final judgment rule are that (1) allowing piecemeal appellate review of the multitude of rulings a judge makes during the course of a lawsuit would undesirably delay the termination of the case and (2) many appeals may be avoided if the party who lost the particular ruling ends up winning the case.

However, delaying appeal until final judgment is not always desirable because some pretrial rulings may affect a party's rights irreparably or cause substantial expense or prolonged delay. Thus, the Legislature has provided for interlocutory appeals, prior to final judgment, in a number of instances. For example, K.S.A. 60-2102(a)(2) permits an immediate appeal, as a matter of right, from an order granting or denying a preliminary injunction. If immediate appeal is not allowed, there can never be effective review of such an order since it is lasts only until a final judgment is entered. As another example, the legislature elected in K.S.A. 60-2102(a)(3) to permit an immediate appeal of right of an order finally resolving a question under the Constitution, even though the order does not terminate the entire case. Other portions of K.S.A. 60-2102(a) (1)-(3) and other statutes permit interlocutory appeals of right of other orders.

In addition, K.S.A. 60-2102(b), which is identical to 28 U.S.C. 1292(b), permits discretionary appeal, rather than appeal of right, of certain other interlocutory orders. The trial judge has discretion to decide that a particular order is important enough to the outcome of the case to justify immediate appeal if it involves a controlling question of law as to which there is a substantial ground for difference of opinion. Even when the trial judge makes that determination, appeal is still not of right but the Court of Appeals has independent discretion to decide whether to allow immediate appeal.

Rulings certifying or refusing to certify a class action are almost never appealable prior to final judgment under current Kansas law, and the same was true in federal courts until 1998. They aren't final decisions under K.S.A. 60-2102(a)(4). *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). Denial of class certification in an action seeking an injunction is not immediately appealable as the denial of a preliminary injunction [see K.S.A. 60-2102(a)(2)]. *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978). Discretionary review under K.S.A. 60-2102(b) rarely is possible, either because the issue of certification does not involve a

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controlling question of law or because the trial judge refuses, in his or her discretion, to certify the question for immediate appeal. Occasionally, appellate courts have entertained original actions in mandamus to review class certification, but these cases are rare.

However, there will be some cases in which immediate appeal of class certification rulings might be especially helpful. For example, in what is described as the "death knell" situation, the individual claim of a plaintiff who is denied class certification may be so small that the plaintiff cannot afford the litigation expense of continuing the individual claim to final judgment. In what is called the "reverse death knell" situation, an order granting class certification may, as a practical matter, induce a defendant to settle rather than incur the costs of defending a class action and the risk of potentially ruinous liability, even though plaintiff's probability of success on the merits is small. Subsection (f) responds to concerns of these types by giving the Court of Appeals discretion to permit interlocutory appeal when it is appropriate.

Discretionary appeals under subsection (f) differ from discretionary appeals under K.S.A. 60-2102(b) in two important respects. First, subsection (f) eliminates the trial judge's ability to block immediate appeal by declining to certify the order for appeal. Only the Court of Appeals has to be persuaded to permit the appeal. Second, appeal is not restricted to orders involving a controlling question of law. The Court of Appeals is given what the Federal Rules Advisory Committee described as "unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting of a petition for certiorari."

The amendment does not contemplate that immediate appeal will be routinely allowed. The Federal Rules Advisory Committee cited a Federal Judicial Center study supporting the view that "many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings." The Committee opined that permission to appeal would most likely be granted "when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely to be dispositive of the litigation."

We have slightly more than five years experience in the federal courts with the new rule. The federal circuits have differed at least slightly in the guidelines they have adopted for the exercise of discretion and a few have differed more from the others. The Second Circuit has said the "standards of Rule 23(f) [would] rarely be met,"while the Eleventh Circuit has been more expansive. All circuits permit review of unsettled legal issues about class certification that are both important to the litigation and important in themselves and might otherwise escape review. Previously, fundamental legal issues regarding class actions often were not resolved by appellate courts because of the large portion of class actions that settled. Thus, Rule 23(f) will permit the appellate court to give greater guidance to trial judges about class certification. Most circuits recognize the propriety of appeal in death knell and reverse death knell cases, although most require in addition an initial demonstration of some significant weakness in the class certification decision or at least a substantial showing that it is questionable. Some courts recognize as a separate category instances in which the certification order appears manifestly erroneous under governing legal standards. The Kansas Court of Appeals can be expected to adopt standards for exercising its discretion from the federal cases it considers to be the most persuasively reasoned.

Those who opposed Federal Rule 23(f) did so on several grounds: that it would increase litigation costs and delay in properly certified class actions; that existing mechanisms for discretionary interlocutory appeal in 28 U.S.C. 1292(b) [K.S.A. 60-2102(b)] or review by mandamus were sufficient for those cases genuinely requiring immediate review; that defendants would abuse the rule by constantly appealing orders granting class certification; and that the rule's lack of guidance about when appeals should be permitted gave appellate courts too much discretion, risked divergent standards among the circuits, and might result in broader appellate review that did not accord the trial judge's decision the deference it deserved. The latter concern is a legitimate one. As one writer put it, "The line between helpful guidance and noxious interference by an appellate court in the proper sphere of the trial court is indeed a narrow one." Kenneth S. Gould, *Federal Rule of Civil Procedure 23(f): Interlocutory Appeals of Class Action Certification Decisions*, 1 J. APP. PRAC. & PROCESS 309 (1999). This concern prompted a response in the Federal Advisory Committee Note that while the trial judge has no veto of an appeal, the trial judge's order often will provide cogent advice on the factors that bear on the decision whether to permit appeal by identifying probable benefits and costs of doing so.

There does not appear to have been a flood of appeals under Rule 23(f). Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), A Good Rulemaking*, 69 TENN. L. REV. 97 (2001). A review of the first 40 reported decisions under Rule 23(f), through August, 2002, published in Note, *A Discussion of the Interlocutory Review of Class Certification Orders Under Federal Rule of Civil Procedure 23(f)*, 51 DRAKE LAW REVIEW 151 (2002), shows 31 of the 40 were attempts by defendants to appeal orders certifying classes. In all, 22 of the class certifications were reversed, 5 were affirmed and in four cases the court declined to allow appeal. None of the nine refusals of class certification for which appeal was sought were reversed; six orders were affirmed and appeal was denied in the other three cases. Of course, the study included only reported decisions and many Rule 23(f) decisions, particularly those refusing to permit appeal, likely will not be published. Nevertheless, the study does suggest Rule 23(f) will more frequently benefit defendants than plaintiffs. This is not inherently troubling, however, if trial judges in the reversed cases in fact applied incorrect standards in making the class certification decision, perhaps because of the previous lack of appellate guidance, and if trial court decisions certifying class actions based upon incorrect standards previously were more likely to escape appellate review because of the reality of settlement in such cases.

At least three other states have conformed their class action rules to Rule 23(f): New Mexico, Georgia, and Vermont. In some other states, such as Minnesota, Texas, Alabama and North Dakota, Rule 23(f) is not needed to permit interlocutory appeals regarding class certification, either because of provisions giving appellate courts discretion in all cases to hear interlocutory appeals or making class certification orders appealable of right or by interpretations of the state's final decision rule that are broader than those followed in Kansas and federal courts.

I firmly believe that, absent compelling reasons, the Kansas rules of civil procedure should mirror the Federal Rules of Civil Procedure and in the area of class actions there are no issues unique to Kansas that create compelling reasons. This bill also incorporates the 1987 technical amendments that did not involve substantive changes. It does not incorporate the December, 2003 amendments. However, it would bring Kansas law into greater conformity with Federal Rule 23 and I support it.

TESTIMONY OF J. EUGENE BALLOUN
PRACTICING ATTORNEY
SHOOK, HARDY & BACON L.L.C.

SENATE JUDICIARY COMMITTEE – HB 2764
MARCH 8, 2004

I am commenting on House Bill 2764 as a lawyer who has practiced in the Kansas courts for more than 45 years. During the course of my practice, which has principally involved commercial and other types of litigation, I have been involved in numerous cases in the Kansas Court of Appeals and the Kansas Supreme Court. Few Kansas lawyers have appeared in more appellate cases. During the course of my practice, I have been directly involved in more than 100 cases before the Kansas appellate courts. While I am a past president of the Kansas Association of Defense Counsel, I am appearing today on my own behalf.

House Bill 2764 adopts the provisions of Federal Rules of Civil Procedure 23(f) as an amendment to K.S.A.60-223. This provision allows the Court of Appeals discretion to permit an immediate appeal of a trial court order that has certified or refused to certify a class action.

An important fact concerning HB 2764 is that it does not take away any appellate rights that currently exist. It simply adds an additional provision for interlocutory appeal. Presently, K.S.A. 60-2102(b) permits a discretionary appeal of certain interlocutory orders. In such cases, the trial judge must determine that the order is important enough to justify an interlocutory appeal because it involves a "controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation…" However, even that finding does not insure an

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interlocutory appeal. The Court of Appeals still has discretion to decide whether or not to allow the interlocutory appeal.

As Professor Concannon has explained in his testimony, rulings certifying or refusing to certify a class action are rarely appealable under K.S.A. 60-2102(b). Certification issues ordinarily do not involve a controlling question of law, and thus no appeal is granted.

There are many cases in which an immediate appeal of class certification rulings would be helpful to everyone involved. These types of cases have been aptly described by Professor Concannon. I want to again emphasize that this amendment would not take away any appellate rights that currently exist. It would supplement them by allowing the appellate court, in its discretion, to allow an interlocutory appeal of class certification issues. Under HB 2764, the trial judge would not play a role in the determination of whether or not an interlocutory appeal would be allowed, as does the judge in interlocutory appeals requested under K.S.A. 2102(b).

Professor Concannon discussed the *Drake Law Review* article, which analyzed the first 40 reported decisions under Federal Rules of Procedure 23(f), the provision that would be adopted by HB 2764. Most of those appeals involved cases where the trial court had certified a class, the defendant appealed, and the class certification ruling was reversed. Likewise in cases where the trial judge refused to certify a class, none of the plaintiffs were successful in obtaining class certification on appeal. One could interpret this information to claim that interlocutory appeals more frequently benefit defendants than plaintiffs.

But consider what would have happened in each of those cases in which class certification was eventually denied. Had there been no interlocutory appeal, all parties, and especially the plaintiffs, as well as their counsel, would have been in the position of proceeding with discovery, trial, and judgment, devoting their time and resources to that effort. Yet they would have been proceeding with the risk that the appellate court could (and did) ultimately rule that a class should not have been certified. This would be a tremendous waste of judicial resources.

Actual cases illustrate the waste of judicial resources that can be brought about by improper class certification. Several years ago, a state court in Florida certified a statewide class of 700,000 cigarette smokers and allowed a class action case to proceed against various tobacco manufacturers. (*Liggett Group Incorporated v. Engle,* 853 So. 2nd 434, May 21, 2003, District Court of Appeal of Florida) After a year-long trial, the jury ultimately entered a very large verdict against the defendants. On appeal, the Court of Appeals ruled that the case was not suitable for a class action, and decertified the class. More than one year had been expended by the court, the parties, their attorneys, and the jury in deciding the merits of a case when in fact it was never suitable for a class action in the first place. Such a result is not to the advantage of either plaintiffs or defendants, and certainly not the courts and the public.

Such a result could also occur in Kansas at any time. For example, several years ago, an action was filed in which the plaintiffs requested the court to declare a class of "all citizens of the State of Kansas who have purchased and smoked cigarettes . . . ." *Emig v. American Tobacco Co.*, 184 F.R.D. 379 (D. Kan 1998). The case was decided by the Federal Court, which refused

to certify a class. Although interlocutory appeal was available under the Federal Rules, the plaintiffs did not pursue an appeal.

Imagine what would have happened had this action been filed in a Kansas state court with a judge holding the same views as did the trial judge in Florida. This would have resulted in a class certification, a lengthy trial similar to what occurred in Florida, and an eventual reversal by the Court of Appeals ruling that a class should not have been certified. These types of expensive and time-consuming results can be avoided by the simple mechanism of an interlocutory appeal.

I understand that some plaintiff-oriented groups oppose interlocutory appeal in class action suits. It is true that if a trial court certifies a class, the defendants are frequently pressured into making settlements. However, experience (as reflected in the *Drake Law Review* study) has shown that many of such class actions are improperly certified, and would be so held on appeal. I suggest that pressuring defendants into making settlements because of fear of possible class-action verdicts is not a worthwhile, social goal. Also, not all defendants would yield to the temptation of a company-saving settlement, and would proceed with the litigation. As in the *Engle* case, the eventual ruling that the case was not a proper class action would then mean that judicial resources had been expended when they could have been saved. The public and courts are best served by an early determination of whether a case should proceed as a class action.

Questions have been raised concerning whether or not the enactment of House Bill 2764 would cause a delay in the proceedings in a class action case as a result of the interlocutory

appeal. In my opinion, if there is delay, that is a preferable alternative to allowing the case to proceed, be tried, and later be decertified. The latter of course would not only be time consuming, but much more expensive. However, an interlocutory appeal would not necessarily delay any discovery or other proceedings in the case. Section 1(f) specifically provides:

> An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Therefore, in each case, either the court of appeals or the district judge could determine whether or not it would be in the best interest of all parties and the court to either stay proceedings, or go forward with them.

In summary, in my opinion, a procedure for interlocutory appeal, at the discretion of the appellate court, will benefit both plaintiffs and defendants. It does not eliminate any appellate rights that currently exist. HB 2764 does provide for an additional avenue of appeal that would lead to early resolution of class certification issues. This will benefit litigants, judges, attorneys and the public.

Legislative Testimony

SB 2764

Monday, March 8, 2004

Testimony before the Kansas Senate Judiciary Committee
By Lew Ebert, President and CEO

THE KANSAS CHAMBER

The Force for Business

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Chairman Vratil and members of the committee:

Good morning, my name is Lew Ebert, President, of the Kansas Chamber. Reducing the cost of doing business while growing jobs in Kansas is the Chamber's primary goal. Our members are generally concerned about the cost of litigation. Improving the efficiency of our courts and reducing the costs of litigation helps us achieve this goal. House Bill 2764 is legislation that makes good business sense, good legal sense and is good public policy for all parties involved in litigation.

The Kansas Chamber supports this bill because conforming Kansas's civil procedure rule 23 (f) to the federal rule allows a more efficient use of our member's legal resources.

Conforming Kansas's civil procedure to the federal rule 23 is important for two additional reasons.

First, it is a proven rule protecting all parties' access to the judicial process. The Federal Rules Advisory Committee studied this issue for six years before it was enacted in the federal courts. In addition, it has been the rule of federal courts now for another 6 years. We can all agree this rule has had a thorough vetting.

Second, this bill would enhance judicial efficiency. Certifying a class can be a central deciding factor in a case. Allowing an interlocutory appeal of a class certification decision can prevent the courts from holding lengthy trials only to have them overturned on appeal due to a faulty class certification. Implementation of this rule in no way restricts any party's access to due process or their day in court.

Thank you for your time and consideration of this proposal.

The Kansas Chamber is the statewide business advocacy group, with headquarters in Topeka. It is working to make Kansas more attractive to employers by reducing the costs of doing business in Kansas. The Kansas Chamber and its affiliate organization, The Kansas Chamber Federation, have nearly 7,5(regional chambers of commerce and trade organizations. The Chamber employers all across Kansas.

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KANSAS CIVIL LAW FORUM

A Coalition of Professionals and Businesses
Interested in the Kansas Court System

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Statement of Brad Smoot
Coordinator
Kansas Civil Law Forum
Regarding 2004 House Bill 2764
Senate Judiciary Committee
March 8, 2004

Mr. Chairman and Members:

On behalf of the members of the Kansas Civil Law Forum (KCLF), I am pleased to present written comment in support of 2004 House Bill 2764. The KCLF is an affiliation of business and professional associations interested in the Kansas civil justice system. A listing of our most recent membership is attached to this statement for your reference.

As various conferees will elaborate, H 2764 will bring to the Kansas courts a useful tool for managing often complex and expensive class action litigation. It will replace Kansas law with a new procedure for the prompt appeal of the certification of the class by the trial court judge, a fundamental element to any class action lawsuit. The federal court system and several states have adopted the use of interlocutory appeals of the district courts class certification with great success.

Frankly, we cannot see a downside to this proposal. It is truly a waste of taxpayer dollars, plaintiff and defendant resources, as well as the time and talents of litigants' counsel and the Kansas courts to have class certifications overturned following lengthy discovery and trial of the underlying case. H 2764 remedies this problem by allowing the appellate courts to approve or disapprove the class before trial.

While the opportunity for appeal of the class certification is a valuable improvement, it is not likely to dramatically change the course of events in most cases. Many certifications will not be appealed and in many cases that are, the Court of Appeals will not grant the appeal. In other words, adoption of the federal rule will affect only a few cases, but when it does, the result will be improved judicial efficiency and the delivery of civil justice more promptly and at less cost.

For these reasons, we urge you to bring Kansas class action lawsuit procedures in line with federal practice by adopting H 2764, thus allowing the interlocutory appeal of the class certification by the district court. Thank you for consideration of our views.

Senate Judiciary
3-8-04
Attachment 8

KANSAS CIVIL LAW FORUM

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