Approved: 3-2-05
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on February 10, 2005 in Room 313-S of the Capitol.

All members were present except:
Michael Peterson- excused
Paul Davis- excused
Tim Owens- excused

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

Conferees appearing before the committee:
Phillip Bradley, Kansas Licensed Beverage Association
Tuck Duncan, Kansas Wine & Spirits Wholesalers Association
Rebecca Rice, Kansas Clubs & Associates
Sandy Barnett, Kansas Coalition Against Sexual & Domestic Violence
Jeff Bottenberg, Kansas Sheriff's Association
Kyle Smith, Kansas Peace Officers Association
Kathy Porter, Office of Judicial Administration

The hearing on **HB 2268 - uniform interstate enforcement of domestic violence protection act**, was opened.

Sandy Barnett, Kansas Coalition Against Sexual & Domestic Violence, appeared in support of the proposed bill which reflects the version agreed upon during the 2004 Legislative Session. She had some ongoing concerns with the registration processing being confusing and would like to delete "domestic violence" from the title of the Act. (Attachment 1)

Representative Pauls pointed out that the word "tribunal" needs to be changed to "court" since the state does not recognize tribunals.

Jeff Bottenberg, Kansas Sheriff's Association, supported the proposed bill but stated that there is some confusion as to when to enforce the protection orders and New Section 5(g) allows for a person to be served more than once. If the orders were entered into the NCIC the sheriffs office would be able to determine if an order has been served or not. (Attachment 2) They also support being responsible for the registration process since they are the ones who would serve the order.

Kathy Porter, Office of Judicial Administration, had concerns with the clerk of the district court maintaining a registry. If it remains in the bill, the legislature needs to make sure that the records are an exception to the Open Records Act.(Attachment 3)

Kyle Smith, Kansas Peace Officers Association, stood in support of the legislation and agrees that the clerk of the district court is not the best person to handle the registry because their office is not opened 24 hours a day.

The hearing on **HB 2268** was closed.

Continued hearing on **HB 2114 - Dram shop law; liquor licensee liability**

Phillip Bradley, Kansas Licensed Beverage Association, appeared before the committee in opposition to the bill and any other bill or amendments which would make liability laws too open in nature. He doesn't believe that it is necessary to have this bill even though there are other states with dram shop legislation. Restaurants spend millions each year on server training and he is one of three who offer this type of program in the state. Most liability applies to the person doing the activity and this proposed bill would be applying the liability

to a third party. The costs of dram shop insurance is linked to the dollar amount of sales of liquor in an establishment requesting the insurance. He stated that 65% of underage drinkers get their alcohol from friends or parents, not the liquor stores or establishments (Attachment 4)

Chairman O'Neal responded that still leaves 35% getting alcohol from another source and that's a huge percentage.

Representative Newton commented that it would be good public policy for servers and establishments to watch their patrons and not serve those who are drunk.

Chairman O'Neal requested information on server training programs offered throughout the state. He was particularly interested in considering a safe harbor provision for those businesses who partake in server training programs.

Mr. Bradley commented that with a safe harbor provision and the suggestions made by Ron Hein the bill would be palatable.

Tuck Duncan, Kansas Wine & Spirits Wholesalers Association, commented that it is counter productive to encourage individuals to be socially responsible for their own actions. The Courts have spoken with their decision in *Ling* and most recently the *Noone* and they could have ruled in favor of the plaintiffs but didn't. (Attachment 5) If the committee feels that the proposed bill should pass then he requested that a cap be placed on damages and that a 6 month or shorter notice provision be added into the bill along with removing the provision that creates liability to a licensee for unknowingly selling or allowing consumption on its premises by a minor. He also suggested that the committee adopt a safe harbor provision that is similar to Texas' provision.

Rebecca Rice, Kansas Clubs & Associates, appeared in opposition to the bill. She was concerned that "incapacitated" was not defined in the bill but simply referenced by statute. She suggested that the word "alcohol" should be changed to "alcoholic liquor" and questioned why cereal malt beverages were not included in the bill. She wondered when the blood alcohol content test was done would it be at the bar or where the accident happened? (Attachment 6)

Written testimony in support of the bill was provided by the DUI Victim Center of Kansas (Attachment 7). Written testimony in opposition of the bill was provided by Kansas Association of Insurance Agents (Attachment 8).

The hearing on **HB 2114** were closed.

The committee meeting adjourned at 5:30 p.m. The next meeting was scheduled for February 14, 2005 at 3:30 p.m. in room 313-S.

KANSAS COALITION AGAINST SEXUAL AND DOMESTIC VIOLENCE
UNITED AGAINST VIOLENCE
220 SW 33rd Street, Suite 100 Topeka, Kansas 66611
785-232-9784 • FAX 785-266-1874 • coalition@kcsdv.org

February 10, 2005

TO: House Judiciary Committee
RE: HB2268
Proponent

Dear Chairman O'Neal and House Judiciary Committee Members:

The Kansas Coalition Against Sexual and Domestic Violence believes that the enforcement of foreign protection orders is a critical link to providing safety to victims of domestic violence and stalking. Victims may relocate to Kansas from another state in an effort to escape the violence. Victims may come here from other states while visiting families or vacationing. Finally, particularly in the border areas of Kansas, victims may work in Kansas but live in another state, thus making enforcement of their protection orders a critical piece of their day to day safety.

Currently, Kansas provides for enforcement of foreign protection orders in several places, including statutes, Attorney General Opinions, and law enforcement training and policies. This piece meal treatment of the issue has resulted in much confusion and inconsistency across the state and, consequently, less safety for victims of domestic violence and stalking. Some officers will not enforce a foreign order that is not listed in the National Crime Information Center's protection order file, though that has never been a pre-requisite for validity of a protection order. Some officers will not enforce an order if it has not somehow come through the county or local law enforcement agency. Some officers believe that if they make a mistake and enforce an order that is not valid, they or their agency will be sued. All of these scenarios lead to situations of great danger for victims of domestic violence and stalking.

It is hoped that the passage of the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act would decrease this confusion and increase the safety of victims protected by orders issued in other states, territories or by Indian Tribes. Having all of the statutory instructions for enforcement of foreign protection orders organized in one place could only help law enforcement agencies and others who are active in the pursuit of safety for victims.

As was ironed out last year during the 2004 Legislative session, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the minor modifications to the Uniform Act included in HB2268 when the state of Nebraska passed the Act. See Neb. Rev. Stat. § 42-932 *et seq.*

Additionally, I would like to point out a couple of on-going issues with HB2268.



House Judiciary
2-10-05
Attachment 1

New Sec. 5. (a) Any individual may register a foreign protection order in this state. To register a foreign protection order, an individual shall present a certified copy of the order to the ~~clerk of the district court in the judicial district~~ *sheriff in the county* where the protection order will be enforced and request that the order be registered with the ~~district court~~ *sheriff.*

(b) Upon receipt of a foreign protection order, the ~~clerk of the district court in the judicial district~~ *sheriff in the county* where the order will be enforced shall register the order in accordance with this section. After the order is registered, the ~~clerk of the district court~~ *sheriff* shall furnish to the individual registering the order ~~and the sheriff of the county where the order will be enforced~~ a certified copy of the registered order.

(c) The ~~clerk of the district court in the judicial district~~ *sheriff in the county* where the protection order will be enforced shall register an order upon presentation of a copy of a protection order which has been certified by the issuing state. A registered foreign protection order that is inaccurate or is not currently in effect must be corrected or removed from the registry in accordance with ~~the law of this state~~ *K.S.A. 60-3112, and amendments thereto.*

(d) An individual registering a foreign protection order shall file an affidavit by the protected individual with the ~~district court in the judicial district~~ *sheriff in the county* where the protection order will be enforced stating that, to the best of the protected individual's knowledge, the order is currently in effect.

(e) A foreign protection order registered under this act may be entered in any existing state or federal registry of protection orders, in accordance with ~~applicable law~~ *K.S.A. 60-3112, and amendments thereto.*

(f) A fee shall not be charged for the registration of a foreign protection order.

(g) No sheriff's department or district court accepting or registering a foreign protection order under this section may notify or require notification of a party against whom the protection order was filed of its filing or registration unless the individual protected by the protection order requests that the sheriff's department or district court do so.

In reviewing the testimony and hearing before this committee last year, I again focused on New Section 5, the discretionary process for registering the protection order in Kansas. While not required, a victim or a respondent may register the foreign protection order in Kansas. HB2268 designates that the protection order be registered with the clerk of the district court in the judicial district where the protection order will be enforced. While choosing the clerk of the district court makes sense if this is a foreign judgment that a party is seeking to have filed in Kansas, it makes less sense in the case of a protection order. The process outlined in New Section 5 is confusing.

It is my understanding that the district court does not keep a "registry." Should the district court accept this foreign protection order, it is my understanding that that order would be filed, given a Kansas case number, and file stamped with a date and time. In effect, there is no registry to enter it in to, as would be required by HB2268. (See Page 3, lines 22, 24-28, 30, 32-34, 40-41) The district court does not have access to the National Criminal Information Center's Protection Order File (the national registry for protection orders).

When Nebraska passed this Uniform Act, it designated the Nebraska State Patrol as the state agency responsible for the registration of such orders. See Neb. Rev. Stat. § 42-932 *et seq*. My office has contacted the Office of Judicial Administration and the attorney with the Nebraska Coalition Against Domestic and Sexual Violence to seek clarification on how this process works in Nebraska, as well as how it might work in Kansas. I understand that the Office of Judicial Administration also has concerns with New Section 5 and will be making their own suggestions.

It is important to note that in Kansas, the process for registering foreign and domestic protection orders is already outlined in K.S.A. 60-3112. It is the responsibility of the sheriff to enter these orders into the national registry. I am concerned that diverting the process to the district court will cause additional confusion. The Committee could rectify this confusion by (1) omitting New Section 5 (a bracketed and optional section under the Uniform Act), or (2) referencing the sheriff and K.S.A. 60-3112.

Finally, as I did last year, I would encourage the Committee to consider changing the name of this Act. While I do not know how appropriate it is to change the name of a Uniform Act, I believe the name is somewhat misleading. Protection orders do not just address domestic violence. These orders can address sexual violence between intimate partners, sexual or physical abuse of a child, and may also include anti-stalking protection orders that do not necessarily involve an intimate relationship between the parties. Further, some states have separate civil protection orders that specifically address sexual assault, even that perpetrated by a stranger. In Kansas, for example, protection orders would include both Protection from Abuse Act orders and Protection from Stalking Act orders, as well as some restraining orders issued under K.S.A. 60-1601 *et seq*. and K.S.A. 60-901 *et seq*. Our overall desire in supporting the adoption of this Uniform Act is to reduce the confusion that has reigned in Kansas surrounding foreign orders of protection. In order to further that purpose, **I suggest that the words**

**"Domestic Violence" be removed from the title and that the Act simply be called the "Uniform Interstate Enforcement of Protection Orders Act."**

I look forward to working with you and the rest of the committee to provide better protection for victims in Kansas. We support passage of HB2268, with our suggested changes, as an important step toward improving protection for victims of sexual and domestic violence and stalking.

Sandra Barnett
Executive Director

Polsinelli | Shalton
Welte | Suelthaus PC

# Memorandum

**TO:** HONORABLE MICHAEL O'NEAL, CHAIRMAN, HOUSE JUDICIARY COMMITTEE

**FROM:** JEFFERY S. BOTTENBERG, LEGISALTIVE COUNSEL, KANSAS SHERIFFS' ASSOCIATION

**RE:** HB 2268

**DATE:** FEBRUARY 10, 2005

Mr. Chairman, members of the Committee, my name is Jeff Bottenberg, and I am testifying in support of HB 2268 on behalf of the Kansas Sheriffs' Association ("KSA"). The KSA is comprised of approximately 2,100 members, both law enforcement and civilian personnel, that work in county sheriff departments throughout the state.

The KSA supports the intent behind HB 2268. Under current law, a sheriff may not enforce a foreign protective order against someone in this state, unless that order has been recognized and enforced by a Kansas court. Therefore a law enforcement officer is unable to take meaningful enforcement action against a person violating a foreign protective order. HB 2268 would allow foreign protective orders, that comply with due process requirements, to be enforced by Kansas courts, and would also allow a law enforcement officer to fully enforce the order, including charging the respondent with violation of such order if warranted.

HB 2268 also requires a law enforcement officer, if a valid foreign protective order cannot be enforced because it has not yet been served, to inform the respondent of the order and serve the order upon such person. The KSA supports this provision. The KSA does, however, have a problem with subsection (g) of New Section 5, which allows an individual protected by the order to require the sheriff to serve such order. We believe that if the respondent has already been notified of the order, the sheriff should not be required to do so again on the request of the protected individual. The sheriff offices throughout this state are already overworked when it comes to serving civil papers, and we believe that this additional requirement could work a burden on sheriff offices, especially those in larger counties. Therefore, we would request an amendment to this subsection by adding the phrase "and the respondent has not already been notified of such filing or registration." Sheriff offices are able to determine if an order has been

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555 Kansas Avenue, Suite 301
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House Judiciary
2-10-05
Attachment 2

served through the use of NCIC, and therefore they would be able to make a determination at the time of request of whether the person has been notified of the order.

Thank you for allowing me to testify on this bill. Please feel free to contact me if you have any questions.

New Section 5.

(g) No sheriff's department or district court accepting or registering a foreign protection order under this section may notify or require notification of a party against whom the protection order was filed of its filing or registration unless the individual protected by the protection order requests that the sheriff's department or district court do so *and the respondent has not already been notified of such filing or registration.*

JSB:kjb

State of Kansas
Office of Judicial Administration
Kansas Judicial Center
301 SW 10th
Topeka, Kansas 66612-1507 (785) 296-2256

House Judiciary Committee
Testimony Regarding 2005 HB 2268

Thursday, February 10, 2005

Kathy Porter

New Section 5 of HB 2268 would impact the Judicial Branch by requiring the clerks of the district court to accept certified copies of out of state protective orders from persons who wish to have them registered, to enter the orders on a registry, to certify two copies of the registered order, and to give copies of the certified orders to the individual registering the order and the local sheriff. The clerk would also need to remove from the registry foreign protective orders that are inaccurate or no longer in effect.

It is unclear to us what purpose is intended by inserting the clerk of the district court into this registration process. If the intent is that somehow the clerk is to make sure the foreign order is valid, is not inaccurate, and is currently in effect, we question how the clerk would make these determinations other than through inspecting the document itself. The bill provides that the foreign order will go to the sheriff, and the sheriff would be as able to make a determination as to the validity of the document as would be the clerks.

It does not appear that registering a foreign order with the clerk of the district court is intended to make it convenient for respondents who might not have a copy of a foreign order to obtain one. The comments to section 5 of the uniform act provide in part as follows:

> While the management of state registries is purely governed by state law, in implementing a registration system, however, enforcing States should strongly consider keeping these protection orders under seal. The purpose of more effectively protecting victims of domestic violence will be undermined if respondents can use the process of registration to locate the very people who are trying to escape from them.

The comments appear to indicate that the registration system is for the benefit of law enforcement. The comments to section 5 of the uniform act provide that "[a] registration system supplies law enforcement officers and agencies more accurate information, more quickly, about both the existence and status of foreign protection orders and their terms and conditions." It would appear more beneficial to law enforcement to keep the registry within a law enforcement agency, where it would be available 24 hours a day, seven days a week, than it would be to keep the registry within the court system, where it would be available during working hours five a week.

Section 5 of the uniform act refers to registration with "the state agency responsible for registration" or "the agency designated by the state." It would appear that, if the uniform act had anticipated registration with the court, it would have specified registration with the court. Moreover, registration of the order with the clerk of the district court in one county will not mean counties have access to the document. Any registry kept by a clerk of the district court in one county would be specific to that county, and would not be an aggregate registry for the state.

Initial comments to the uniform act state that "[t]he Act does not require individuals seeking the enforcement of a protection order to register or file the order with the enforcing State. The Act does, however, include an optional registration process . . . . The purpose of these procedures is to make it as easy as possible for the protected individual to register the protection order and thus facilitate its enforcement." Taking a copy of a foreign order to the appropriate law enforcement agency would appear to be as easy as taking a copy to the clerk of the district court.

I ask that you simplify the registration process, if it is deemed necessary, by designating a law enforcement agency as the agency deemed responsible for the registration of foreign orders, and that clerks of the district court be removed from this process. Thank you for the opportunity to testify on this bill.

Back | WordPerfect Version | ASCII Version | PDF Version

# UNIFORM INTERSTATE ENFORCEMENT OF DOMESTIC-VIOLENCE PROTECTION ORDERS ACT

**(Last Amended or Revised in 2002)**

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT

IN ALL THE STATES

at its

ANNUAL CONFERENCE

MEETING IN ITS ONE-HUNDRED-AND-ELEVENTH YEAR

IN TUCSON, ARIZONA

JULY 26 - AUGUST 2, 2002

*WITH PREFATORY NOTE and COMMENTS*

Approved by the American Bar Association

Seattle, Washington, February 10, 2003



*This uniform act was developed under grant number SJI-98-N-253 from the State Justice Institute. The points of view expressed are those of NCCUSL, and do not necessarily represent the official position or policies of the State Justice Institute.*

# UNIFORM INTERSTATE ENFORCEMENT OF DOMESTIC-VIOLENCE PROTECTION ORDERS ACT (2002)

**The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act was as follows:**

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3-4

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Copies of this Act may be obtained from:

3-5

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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# UNIFORM INTERSTATE ENFORCEMENT OF DOMESTIC-VIOLENCE PROTECTION ORDERS ACT (2002)

TABLE OF CONTENTS

# DOMESTIC-VIOLENCE PROTECTION ORDERS ACT (2002)

## Prefatory Note

### I. Introduction

The Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act ("the Act") provides a uniform mechanism for the interstate enforcement of domestic-violence protection orders. The need for such a mechanism is founded on the widespread understanding that States have not consistently or effectively enforced domestic-violence protection orders issued by other States. The Act, therefore, has two main purposes. First, it defines the meaning of interstate enforcement in the context of the enforcement of domestic-violence protection orders. Second, it establishes uniform procedures for the effective interstate enforcement of domestic-violence protection orders.

Many States, recognizing the severity of the problems regarding the interstate enforcement of domestic-violence protection orders, have enacted legislation requiring their courts to enforce the domestic-violence protection orders of other States. Many of these statutes, however, while mandating enforcement, are either silent or ambiguous regarding several important questions that must be answered in order to establish an effective system for the interstate enforcement of these orders. The Congress of the United States, as well, has enacted legislation requiring interstate enforcement of domestic-violence protection orders, but this legislation is also silent or ambiguous regarding these important questions.

First, many of the existing statutes do not sufficiently explain the core requirements of interstate enforcement of protection orders. For example, many of the state statutes, and the federal legislation, require courts and law enforcement officers to enforce the orders of other States as if they were the protection orders of the enforcing State. This provision, however, does not answer the question of whether state courts and officers are required to enforce provisions of foreign protection orders that would not be authorized by the law of the enforcing State. This question, and others, must be answered if there is to be effective uniform enforcement of protection orders. Second, many of the existing statutes do not specify the procedures state courts and officers must follow in enforcing foreign protection orders. For example, many of the statutes are silent on whether individuals seeking the enforcement of a protection order must register or file the order with the enforcing State before action can be taken on their behalf. This Act resolves the issues left unanswered in existing legislation and provides a uniform scheme for enforcement of these orders.

**II. The Requirements of Interstate Enforcement** The Act first defines what it means to accord interstate enforcement to domestic-violence protection orders. These orders must be enforced if the issuing tribunals had jurisdiction over both the parties and the matter under the law of the issuing State and if the individuals against whom the order is enforced were given reasonable notice and had an opportunity to be heard consistent with the right to due process. If the order was obtained ex parte, this notice and opportunity to be heard must be provided within a reasonable time.

The Act makes it clear that all the terms of the orders of the issuing States must be enforced, including terms that provide relief that the courts of the enforcing State would lack power to provide. The Act also provides that all protection orders that both recognize the standing of the protected individual to seek enforcement of the order and satisfy the criteria of validity established by the Act must be enforced. In addition, provisions of

protection orders governing custody and visitation matters are enforceable under this Act. Terms that concern support are not. The terms of mutual protection orders which favor of a respondent are also not enforceable if they were not issued in response to a written pleading filed by the respondent and if the issuing tribunal did not make specific findings in favor of the respondent.

### III. Enforcement Procedures

The Act also provides uniform procedures for the interstate enforcement of domestic-violence protection orders. The Act envisions that the enforcement of foreign protection orders will require law enforcement officers of enforcing States to rely on probable cause judgments that a valid order exists and has been violated. The Act, however, provides that if a protected individual can provide direct proof of the existence of a facially valid order, by, for example, presenting a paper copy or through an electronic registry, probable cause is conclusively established. If no such proof is forthcoming, the Act provides that if officers, relying on the totality of the circumstances, determine that there is probable cause to believe that a valid protection order exists and has been violated, the order will be enforced. The individual against whom the order is enforced will have sufficient opportunity to demonstrate that the order is invalid when the case is brought before the enforcing tribunal. Law enforcement officers, as well as other government agents, will be encouraged to rely on probable cause judgments by the Act's inclusion of an immunity provision, protecting agents of the government acting in good faith.

The Act does not require individuals seeking the enforcement of a protection order to register or file the order with the enforcing State. The Act does, however, include an optional registration process. This process permits individuals to register a protection order by presenting a copy of the order to a responsible state agency or any state officer or agency. The copy presented must be certified by the issuing State. The purpose of these procedures is to make it as easy as possible for the protected individual to register the protection order and thus facilitate its enforcement.

## UNIFORM INTERSTATE ENFORCEMENT OF

## DOMESTIC-VIOLENCE PROTECTION ORDERS ACT (2002)

**SECTION 1. SHORT TITLE.** This [Act] may be cited as the Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act.

**SECTION 2. DEFINITIONS.** In this [Act]:

(1) "Foreign protection order" means a protection order issued by a tribunal of another State.

(2 ) "Issuing State" means the State whose tribunal issues a protection order.

3-8

) "Mutual foreign protection order" means a foreign protection order that includes provisions in [illegible] of both the protected individual seeking enforcement of the order and the respondent.

(4) "Protected individual" means an individual protected by a protection order.

(5) "Protection order" means an injunction or other order, issued by a tribunal under the domestic-violence, family-violence, or anti-stalking laws of the issuing State, to prevent an individual from engaging in violent or threatening acts against, harassment of, contact or communication with, or physical proximity to, another individual.

(6) "Respondent" means the individual against whom enforcement of a protection order is sought.

(7) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band that has jurisdiction to issue protection orders.

(8) "Tribunal" means a court, agency, or other entity authorized by law to issue or modify a protection order.

**Comment**

The term "protection order" generally includes only those orders issued under the domestic-violence or family-violence laws of the issuing State and protection orders issued outside of the domestic or family violence context are not enforceable under the provisions of this Act. The Act, however, does provide for the enforcement of orders issued under the anti-stalking statutes of the issuing State. These statutes will frequently be readily identifiable as specifically proscribing stalking. *See e.g.*, Tex. Penal Code Ann. § 42.072 (Vernon 2002). Anti-stalking statutes may also be found in separate provisions of laws regulating a broader range of activity (e.g., harassment); these laws, however, must contain provisions specifically proscribing stalking. *See e.g.*, 18 Pa. Cons. Stat. Ann. § 5504(a.1) (West 2000). The scope of enforceable protection orders is further limited by the provisions of Sections 3(b) and (c). Courts should construe the meaning of domestic-violence, family-violence, or anti-stalking law broadly in order to further the purpose of the Act, the effective interstate enforcement of protection orders; protection orders, for example, issued under the juvenile law of the issuing State should be enforced if they were issued in the domestic or family violence context. In addition, the term "protection order" includes an order modifying a previous order. Thus, a modified order, is enforceable, under the Act, in the same manner as a newly issued order.

The terms "protected individual" and "respondent" refer to the relief sought by the parties in the action brought in the enforcing State. The Act recognizes that neither the protected individual nor the respondent may have been a named party in the action brought in the issuing State; the Act applies to individuals meeting the definition of protected individual or respondent whether they were named in the caption or the body of the protection order. The Act also recognizes that the parties may have been called by different terms, e.g. plaintiff, defendant, petitioner, in the issuing State.

The term "mutual protection orders" refers to protection orders in which an issuing State includes provisions protecting both parties. Enforcement of these foreign protection orders is governed by Section 3(g).

The Violence Against Women Act, 18 U.S.C. Sec. 2265, requires that States accord full faith and credit to tribal protection orders. Like state orders, tribal orders must satisfy the criteria for validity, as defined in

3-9

Section 3(d), in order to qualify for interstate enforcement across state or tribal lines.

The Act uses the term "tribunal," rather than "court," in order to accommodate States that rely upon administrative or other entities to issue or modify protection orders.

**SECTION 3. JUDICIAL ENFORCEMENT OF ORDER.**

(a) A person authorized by the law of this State to seek enforcement of a protection order may seek enforcement of a valid foreign protection order in a tribunal of this State. The tribunal shall enforce the terms of the order, including terms that provide relief that a tribunal of this State would lack power to provide but for this section. The tribunal shall enforce the order, whether the order was obtained by independent action or in another proceeding, if it is an order issued in response to a complaint, petition, or motion filed by or on behalf of an individual seeking protection. In a proceeding to enforce a foreign protection order, the tribunal shall follow the procedures of this State for the enforcement of protection orders.

(b) A tribunal of this State may not a enforce a foreign protection order issued by a tribunal of a State that does not recognize the standing of a protected individual to seek enforcement of the order.

(c) A tribunal of this State shall enforce the provisions of a valid foreign protection order which govern custody and visitation, if the order was issued in accordance with the jurisdictional requirements governing the issuance of custody and visitation orders in the issuing State.

(d) A foreign protection order is valid if it:

(1) identifies the protected individual and the respondent;

(2) is currently in effect;

(3) was issued by a tribunal that had jurisdiction over the parties and subject matter under the law of the issuing State; and

(4) was issued after the respondent was given reasonable notice and had an opportunity to be heard before the tribunal issued the order or, in the case of an order ex parte, the respondent was given notice and has had or will have an opportunity to be heard within a reasonable time after the order was issued, in a manner consistent with the rights of the respondent to due process.

(e) A foreign protection order valid on its face is prima facie evidence of its validity.

(f) Absence of any of the criteria for validity of a foreign protection order is an affirmative defense in an action seeking enforcement of the order.

(g) A tribunal of this State may enforce provisions of a mutual foreign protection order which favor a respondent only if:

(1) the respondent filed a written pleading seeking a protection order from the tribunal of the issuing State; and

3-80

) the tribunal of the issuing State made specific findings in favor of the respondent.

*[Legislative Note: While Section 3(b) limits enforcement under this Act to those orders which recognize the standing of a protected individual to seek enforcement of the order, states should consider enacting separate criminal laws providing for the prosecution of individuals who violate the terms of a foreign protection order, including the terms of a criminal order.]*

**Comment**

Subsection (a) implements the core purpose of the Act. Effective interstate enforcement of protection orders is founded on the principle that enforcing States must enforce all the substantive terms of a foreign protection order, including terms that provide relief that a tribunal of the enforcing State would lack power to provide, but for this Act. This provision means that the tribunals of enforcing States must enforce the specific terms of a foreign protection order even if their state law would not allow the relief in question. For example, if the law of the issuing State allows a court's protection order to include terms that concern the payment of a specified and definite sum of money (as opposed to an ongoing support obligation) or the possession of property, e.g., an order giving the protected individual possession of the family automobile, but the law of the enforcing State does not authorize such substantive relief, the tribunal of the enforcing State must enforce the order in its entirety. To give another example, if the law of the issuing State allows protection orders to remain effective for a longer period than is allowed by the enforcing State, the tribunal of the enforcing State should enforce the order for the time specified in the order of the issuing State. In a proceeding to enforce the substantive terms of the foreign protection order, however, the court of the enforcing State shall follow its own procedures.

Subsection (a) provides that any person authorized by the law of the enforcing State to seek enforcement of a protection order may seek enforcement of a valid foreign protection order in the enforcing State. This provision recognizes that States frequently authorize public agencies and officers, such as a local prosecutor, to bring enforcement actions on behalf of a protected individual. The Act, however, in recognizing the importance of these agencies and officers, should not be interpreted to mean that States, and their agencies and officers, are required to bring these actions when possible. This subsection further provides that only protection orders that were issued in response to a complaint, petition, or motion filed by or on behalf of an individual seeking protection can be enforced under this Act; orders issued sua sponte are not enforceable under this Act.

Subsection (b) addresses the problem of the enforcement of protection orders issued by criminal courts. While it is not the purpose of this section to surpass the constitutional restraints against States enforcing the criminal laws of other States or to disturb the normal process of interstate criminal law enforcement, the Act is designed to facilitate the enforcement of orders issued by States which allow the equivalent of civil protection orders to be issued by a criminal court. The principle of law governing the distinction between a criminal and a civil law, as articulated by the Supreme Court of the United States in *Huntington v. Attrill*, 146 U.S. 657 (1892), is that a criminal law vindicates, through punishment, a harm against the public, while a civil law provides a remedy to the individual injured by the wrongful acts of another. A civil protection order, therefore, is one that provides a remedy to an individual fearing harm from another individual; a criminal protection order is one that provides a remedy to the public as a whole, because a public, not an individual, wrong is involved.

3-11

The Act seeks, and is constitutionally authorized, only to provide a mechanism for the enforcement of civil protection orders; therefore, the Act only provides for the interstate enforcement of protection orders if the order of the issuing State recognizes the standing of a protected individual to seek enforcement of the order. (Protection orders procured by a third party acting as the legal representative of the protected individual, such as the guardian of a child or an incompetent adult, recognize these persons' status vis-a-vis the protected individual and satisfy the standing requirement of Section 3(b).) Thus, orders recognizing this standing may be enforced even if they are issued by a criminal court because they operate as civil orders. If, on the other hand, the protection order may only be enforced by criminal sanctions upon the request of the State, then it does not qualify for enforcement under this Act. For example, orders issued by criminal courts that provide for the revocation of bail, probation, or parole upon motion by the State will not qualify for enforcement under this Act. As several States have already done, enforcing States may, and are encouraged, to enact and enforce a separate criminal law providing for the prosecution of individuals who violate a foreign protection order, including, if the State so chooses, the terms of a criminal order. In addition, the respondent may have violated other criminal laws of the enforcing State; the enforcing State may, of course, prosecute the respondent for these violations.

Subsection (c) further defines the scope of enforceable protection orders under the Act. It provides that the provisions of protection orders that govern custody and visitation rights must be enforced. Enforcement of these provisions is essential because, first, the award of custody is often essential for the protection of children from potential violence, and, second, because the protected individual will not seek a safe distance from a threatening individual if custody of a child is jeopardized . These provisions may only be enforced, however, if they were issued in accordance with the jurisdictional requirements for the issuance of all custody and visitation orders, contained, depending on the State, either in the Uniform Child Custody Jurisdiction Act or the Uniform Child Custody Jurisdiction and Enforcement Act, and the federal Parental Kidnaping Prevention Act. This Act, however, does not provide for the enforcement of orders governing custody and visitation rights that are not included in a protection order.

The Act does not provide for the enforcement of orders or provisions of foreign protection orders governing support; these orders or provisions, however, should be enforced under the specific laws governing the issuance, modification, and enforcement of support orders, including, but not limited to, the Uniform Interstate Family Support Act (UIFSA). UIFSA, which has been adopted by every State, establishes a comprehensive and effective statutory scheme for the enforcement of support orders. The Act is consistent with the federal Violence Against Women Act, 18 U.S.C. Sec. 2266(5) (as amended by The Violence Against Women Act of 2000, Pub. L. No. 106-386) which provides that support or custody orders issued pursuant to state divorce or child custody laws are not to be treated as protection orders subject to interstate enforcement.

Subsection(d) requires that, to be valid for the purpose of enforcement under this Act, a foreign protection order must be "currently in effect." This provision includes orders that have been modified; the modified order is the one currently in effect. While the Act requires that a foreign protection order, to be valid, identify the protected individual and respondent, merely technical errors, such as an incorrect spelling of a name, should not preclude enforcement of the order. The question of the validity of an order is a question of law for the court of the enforcing State. Once an order is adjudged valid, the proceeding shall be governed by the established procedures of the enforcing State.

3-12

.e respondent's constitutional right to due process is protected by the opportunity to raise defense ne enforcement proceeding, as provided in subsection (f). If, for example, the respondent was not provided with reasonable notice and opportunity to be heard by the tribunal of the State issuing the protection order, the enforcing tribunal may not enforce the order. Thus, the interstate enforcement of a valid foreign protection order, even without a prior hearing, does not deprive the respondent of any rights to due process because the respondent was provided with reasonable notice and opportunity to be heard when the order was issued.

The enforcement mechanisms established by the Act do not require the presentation by the protected individual of an authenticated copy of the foreign protection order. While States, as required by the Constitution and federal statutes that articulate authentication requirements, including 28 U.S.C. Sec. 1738, must accord properly authenticated foreign judgments full faith and credit enforcement, they may choose to enforce foreign orders they would not be required to enforce under the provisions of the Constitution or other federal law. By adopting this Act, States have chosen to give that extra measure of full faith and credit to foreign protection orders.

In addition, in recent years, particularly with regard to the enforcement of domestic relations orders, the federal government has employed the power granted to it by Article IV, Sec. 1 of the Constitution of the United States to prescribe the manner in which States give full faith and credit to the acts, records, and proceedings of other States to require States to enforce foreign orders in circumstances in which States have traditionally been reluctant to render such enforcement. For example, the federal Parental Kidnaping Prevention Act, 28 U.S.C. Sec. 1738A, requires greater interstate enforcement of child custody orders and the federal Personal Responsibility and Work Opportunity Reconciliation Act, 110 Stat. 2105 (1996), requires that States, in order to facilitate the enforcement of support orders, adopt the provisions of the Uniform Interstate Family Support Act. The Violence Against Women Act extends the principle of these laws to the subject of the interstate enforcement of domestic-violence protection orders.

Subsection (g), adapted from the federal Violence Against Women Act, 18 U.S.C. Sec. 2265(c), addresses the enforcement of mutual foreign protection orders, which contain provisions protecting both the protected individual and the respondent. Provisions of a mutual foreign protection order issued in favor of the respondent will not be enforced without proof that the respondent filed a written pleading seeking a protection order. If a respondent can prove that he or she made a specific request for relief and that the issuing tribunal made specific findings that the respondent was entitled to the requested relief, the protection orders will be enforced against the protected individual.

In order to facilitate the interstate enforcement of foreign protection orders, States should strongly consider requiring tribunals that issue protection orders to state clearly that these orders are entitled to interstate enforcement under both federal and state law. Such enforcement would also be greatly facilitated if issuing States provided each protected individual with a certified copy of the protection order. In addition, States should consider adopting a standard certification or confirmation form stating the protection order issued by their tribunals satisfies the criteria of validity articulated in subsection (d), thus qualifying the protection order for interstate enforcement. Use of the following certification form is recommended.

_____ (Name), : IN THE _____COURT OF

Plaintiff : _____ (County/Judicial District)

: _____ (State/Territory)

vs. : CIVIL ACTION - LAW

: PROTECTION/RESTRAINING ORDER

_____ (Name), :

Defendant : Docket No. _____, 200____

Certification of Protection/Restraining Order

It is hereby certified that the attached is a true and correct copy of the order entered in the above-captioned action on _____ (date) and that the original of the attached order was duly executed by the judicial authority whose signature appears thereon. The order expires on _____ (date).

The order is: [ ] a civil protection/restraining order

OR [ ] a criminal protection/restraining order, that recognizes the standing of the plaintiff to seek enforcement of the order

It is further certified that:

(a) the issuing court determined that it had jurisdiction over the parties and the subject matter under the laws of _____ (state or Indian tribe).

(b) the defendant was given reasonable notice and had opportunity to be heard before this order was issued; or if the order was issued ex parte, the defendant was given notice and had opportunity to be heard after the order was issued, consistent with the rights of the defendant to due process.

(c) the order was otherwise issued in accordance with the requirements of the Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act, and the Violence Against Women Act, 18 U.S.C. § 2265.

For custody and visitation orders:

3-16

the order was issued in accordance with the requirements of the Uniform Child Custody Jurisdiction Act or the Uniform Child Custody Jurisdiction and Enforcement Act of this state/territory and is consistent with the provisions of the Parental Kidnaping Prevention Act. 28 U.S.C. § 1738A.

The attached order shall be presumed to be valid and enforceable in this and other jurisdictions.

Signature of Clerk of Court or other authorized official: _____

Judicial District: _____ Address _____

Phone: _____ Fax: _____ Date: _____

Seal:

**SECTION 4. NONJUDICIAL ENFORCEMENT OF ORDER.**

(a) A law enforcement officer of this State, upon determining that there is probable cause to believe that a valid foreign protection order exists and that the order has been violated, shall enforce the order as if it were the order of a tribunal of this State. Presentation of a protection order that identifies both the protected individual and the respondent and, on its face, is currently in effect constitutes probable cause to believe that a valid foreign protection order exists. For the purposes of this section, the protection order may be inscribed on a tangible medium or may have been stored in an electronic or other medium if it is retrievable in perceivable form. Presentation of a certified copy of a protection order is not required for enforcement.

(b) If a foreign protection order is not presented, a law enforcement officer of this State may consider other information in determining whether there is probable cause to believe that a valid foreign protection order exists.

(c) If a law enforcement officer of this State determines that an otherwise valid foreign protection order cannot be enforced because the respondent has not been notified or served with the order, the officer shall inform the respondent of the order, make a reasonable effort to serve the order upon the respondent, and allow the respondent a reasonable opportunity to comply with the order before enforcing the order.

(d) Registration or filing of an order in this State is not required for the enforcement of a valid foreign protection order pursuant to this [Act].

**Comment**

The enforcement procedures in subsections (a) and (b) rely on the sound exercise of the judgment of law enforcement officers to determine whether there exists probable cause to believe that a valid foreign protection order exists and has been violated. These procedures anticipate that there will be many instances in which the protected individual does not have, or cannot, under the circumstances, produce a paper copy of the foreign protection order. Subsection (a) establishes a per se rule for determining probable cause of the existence of an order. If the protected individual presents, whether by providing a paper copy (which need not be certified) of a protection order or through an electronic medium, such as access to a state registry of orders, proof of a facially valid order, the order should be enforced. In determining whether there is proof of a facially valid order, a law enforcement officer, where possible, may, and, indeed, should, search, using an

electronic or other medium, a state or federal registry of orders.

Subsection (b) concerns the circumstance in which the protected individual cannot present direct proof of the protection order. In this situation, law enforcement officers are expected to obtain information from all available sources, including interviewing the parties and contacting other law enforcement agencies, to determine whether there is a valid protection order in effect. If the officer finds, after considering the totality of the circumstances, that there is probable cause to believe that a valid foreign protection order exists and has been violated, he or she should enforce the order. This probable cause determination must meet the constitutional standards for determining probable cause. If it is later determined that no such order was in place or the order was otherwise unenforceable, law enforcement agencies, officers, or other state officials will be protected by the immunity provision of Section 6 for actions taken in good faith.

Subsection (c) provides that if a law enforcement officer discovers in the course of a probable cause investigation that the respondent has not been notified of the issuance of or served with an otherwise valid foreign protection order, the officer must then inform the respondent of the terms and conditions of the protection order and make a reasonable effort to serve the order upon the respondent. The respondent must be allowed a reasonable opportunity to comply with the order before the order is enforced.

Subsection (d) makes clear that, if a State either adopts its own process for the registration or filing of foreign protection orders or adopts the process provided in Section 5, the State shall not require the registration or filing of a foreign protection order for enforcement.

**[SECTION 5. REGISTRATION OF ORDER.**

(a) Any individual may register a foreign protection order in this State. To register a foreign protection order, an individual shall:

(1) present a certified copy of the order to [the state agency responsible for the registration of such orders]; or

(2) present a certified copy of the order to [an agency designated by the State] and request that the order be registered with [the agency responsible for the registration of such orders].

(b) Upon receipt of a foreign protection order, [the agency responsible for the registration of such orders] shall register the order in accordance with this section. After the order is registered, [the responsible agency] shall furnish to the individual registering the order a certified copy of the registered order.

(c) [The agency responsible for the registration of foreign protection orders] shall register an order upon presentation of a copy of a protection order which has been certified by the issuing State. A registered foreign protection order that is inaccurate or is not currently in effect must be corrected or removed from the registry in accordance with the law of this State.

(d) An individual registering a foreign protection order shall file an affidavit by the protected individual stating that, to the best of the protected individual's knowledge, the order is currently in effect.

(e) A foreign protection order registered under this [Act] may be entered in any existing state or federal

3-16

gistry of protection orders, in accordance with applicable law.

(f) A fee may not be charged for the registration of a foreign protection order.]

**Comment**

This section is bracketed because States may prefer to use their existing systems of registration to register foreign protection orders. While a protected individual is not required to register a valid foreign protection order in order for it be enforced, it is highly desirable that States provide an optional registration process. A registration system supplies law enforcement officers and agencies more accurate information, more quickly, about both the existence and status of foreign protection orders and their terms and conditions. An enforcing State may facilitate the collection and dissemination of this information either by establishing a central registry or by providing a process by which information regarding registered orders is distributed to law enforcement officers and agencies across the State.

While the management of state registries is purely governed by state law, in implementing a registration system, however, enforcing States should strongly consider keeping these protection orders under seal. The purpose of more effectively protecting victims of domestic violence will be undermined if respondents can use the process of registration to locate the very people who are trying to escape from them. In addition, the federal Violence Against Women Act, as amended by the Violence Against Women Act of 2000 (Pub. L No.106-386), prohibits States that provide for the registration or filing of orders from, without the permission of the individual registering or filing the order, notifying other States of the registration or filing of the order.

Subsection (a) provides that any person, including a potential respondent, may register foreign protection orders. This reason behind this provision is to ensure that all parties have the opportunity to provide relevant information to the State. Orders, for example, may be modified with custody arrangements. Subsection (a) also requires that a person seeking to register a foreign protection order must present a certified copy of that order. The copy must be a writing on paper, thus exempting this requirement from the provisions of the Uniform Electronic Transactions Act.

Subsection (c) provides that if the State has registered orders that are no longer in effect or are inaccurate, these orders must be removed from the registry or, in the case of error, corrected. The precise method of how state and federal registries manage their registries, including the deletion of inaccurate information, is governed by each government's law regarding the management of records.

If an order is registered under this section, the individual who registered the order is expected to inform the enforcing State of any modifications to the registered protection order.

**SECTION 6. IMMUNITY.** This State or a local governmental agency, or a law enforcement officer, prosecuting attorney, clerk of court, or any state or local governmental official acting in an official capacity, is immune from civil and criminal liability for an act or omission arising out of the registration or enforcement of a foreign protection order or the detention or arrest of an alleged violator of a foreign protection order if the act or omission was done in good faith in an effort to comply with this [Act].**Comment**

States may, if they wish, substitute their own immunity provisions, so long as law enforcement officers, agencies, or other officials involved in the registration or enforcement of foreign protection orders, under the immunity scheme chosen, are not dissuaded from enforcing such orders because of the fear of potential liability. This immunity provision includes States, state and local governmental agencies, and all state and local government officials acting in their official capacity in order to prevent those seeking the imposition of criminal and civil liability for acts or omissions done in good faith in an effort to comply with the provisions of this Act from circumventing this immunity provision. The necessity for a generous immunity provision for the enforcement of foreign protection orders does not preclude state and local governments from using personnel and other internal sanctions in order to prevent and punish actions that, in the absence of this immunity provision, would have rendered the government agencies, officers, or officials civilly or criminally liable.

**SECTION 7. OTHER REMEDIES.** A protected individual who pursues remedies under this [Act] is not precluded from pursuing other legal or equitable remedies against the respondent.

**Comment**

This section clarifies that the protection orders enforced under the Act are not the only means of protection available to victims of domestic violence. Other legal remedies, such as tort actions and criminal prosecution, are left undisturbed by this Act.

**SECTION 8. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

**SECTION 9. SEVERABILITY CLAUSE.** If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

**Comment**

While the Congress of the United States has, in recent years, in the field of domestic relations, repeatedly invoked its power under the Full Faith and Credit Clause of Article IV of the Constitution to prescribe the manner in which States afford full faith and credit to the judgments of other States, the Supreme Court of the United States has not authoritatively decided whether Congress may use this power to require States to enforce foreign orders which are not final, and, thus, have not been traditionally afforded full faith and credit. It is, thus, possible that the provision of the federal Violence Against Women Act requiring interstate enforcement of domestic-violence protection orders will be held unconstitutional. One of main purposes of this Act is to provides a mechanism for the interstate enforcement of domestic-violence protection orders that does not rely on any federal mandate; by enacting this Act, States are exercising their independent authority

recognize and enforce foreign orders that they would not otherwise be required to enforce under Constitution. Thus, if the Violence Against Women Act is eventually found unconstitutional, interstate enforcement of domestic-violence protection orders should continue under this Act.

Conversely, if the federal mandate is held to be constitutionally valid, it is possible that courts may conclude that, in some areas, the federal legislation requires greater enforcement than that provided by this Act. In this case, this subsection provides that if one or more provisions of the Act are declared invalid, those provisions of the Act that are severable from those declared invalid should be given effect.

**SECTION 10. EFFECTIVE DATE.** This [Act] takes effect on ..... .

**SECTION 11. TRANSITIONAL PROVISION.** This [Act] applies to protection orders issued before [the effective date of this [Act]] and to continuing actions for enforcement of foreign protection orders commenced before [the effective date of this [Act]]. A request for enforcement of a foreign protection order made on or after [the effective date of this [Act]] for violations of a foreign protection order occurring before [the effective date of this [Act]] is governed by this [Act].

**Comment**

The provisions of this Act apply to all requests for enforcement of foreign protection orders, both continuing and newly filed, made on or after its effective date. In addition, the provisions of this Act apply to the enforcement of foreign protection orders issued before the effective date of this Act and to requests for enforcement of foreign protection orders in which the alleged violation took place before the effective date of the Act.

Application of the Act in these circumstances does not constitute an unconstitutional ex post facto law because, under the principles of the Full Faith and Credit Clause of the Constitution of the United States, valid foreign protection orders should have always been entitled to interstate enforcement. As stated by the Supreme Court of the United States in *Weaver v. Graham*, 450 U.S. 24, 28 (1981), an ex post facto law is a law that imposes a punishment for an act that was not punishable at the time the act was committed or imposes additional punishment to that originally prescribed. Enforcement, under the Act, of a preexisting order does not punish acts that were not punishable at the time the acts were committed; the order, as soon as it was entered, subjected the respondent to punishment upon its violation. The laws of the enforcing States also prescribed, before enforcement under this Act, the amount of punishment imposed for the violation of protection orders. The Act, therefore, does not effect a substantive change in the law regarding the enforcement of foreign protection orders; respondents should have always been aware that protection orders issued by States are subject to interstate enforcement. This Act only ensures that States carry out their constitutional responsibility to enforce these orders.

Kansas
Licensed
Beverage
Association

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Tom Intfen

*Secretary/Treasurer*
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Testimony on HB 2114, Wednesday, February 9, 2005
House Judiciary Committee

Chairman O'Neal and Members of the Committee,

I am Philip Bradley representing the Kansas Licensed Beverage Assn., a group of men and women, in the hospitality industry, who own and manage bars, clubs, restaurants, hotels and catering services where beverage alcohol is served. Thank you for the opportunity to testify today.

**We oppose HB-2114.**

- We oppose Dram shop type laws and unnecessary liability laws. We practice responsible service and are already accountable for our own actions, but should not be answerable for the actions of others, outside our control.

We support efforts to reduce the accidents and casualties happening in our state. Millions of dollars and thousands of man hours are expended on our side, the "supply" side, of this equation to accomplish these goals. We work with the ABC to educate, train and promote compliance and responsible practices. We have a training program certified by the ABC for Kansas. Our Techniques of Alcohol Management (TAM) program is nationally recognized as a leader in server training. We have conducted over 100 training sessions in the last 2 years. This represents training of over 2300 individuals. Since we started training in 1996, we have certified over 4500 servers. We believe that education is the single most useful tool in reducing alcohol-related incidents. We cooperate with KABR and KRHA to assure that training is available to all. We do all this with no cost to the state.

If we operate our business in a legal and responsible manner, we should not be held accountable for, nor could we control the actions of individuals after they leave. We train our servers to follow responsible practices and to comply with all Kansas statutes and regulations. We can, and do, determine if they appear intoxicated, incapacitated or disorderly and if so we refuse service. This is the current law. We do not fight the keys out of an individuals hands but I have called the Police on a person I believed was unsafe. We voluntarily work with taxi and transit companies to make sure that our patrons have alternatives. We are professional hospitality employees.

House Judiciary
2-10-05
Attachment 4

It is impossible for us to control whether our patrons consume alcohol in their vehicle after they leave, before they arrive or if they medicate themselves. It is impossible for us to determine if they have social or psychological problems that represent a threat to themselves or to others.

This legislation absolves individuals of personal responsibility. That is a dramatic departure from traditional Kansas values. It would require bartenders and waitresses – including restaurants, country clubs, caterers, lobby bars and temporary permit holders - to be responsible for controlling not only the consumption of their patrons but also requires the licensees, bartenders and waitresses to somehow control the actions of patrons after the patron leaves. This simply continues the national trend of "blaming someone else" for individual weaknesses and poor-judgment. *The only absolute defense against being sued is to not serve alcohol.* I hope that is not the intent of this bill.

Evidence from other states indicates that insurance premiums dramatically increase after dram shop liability laws are adopted. Most small establishments cannot pay the increase so they "go bare" and do not carry liability insurance. In some states because people have had to cancel their insurance, the legislature has THEN adopted legislation requiring liability insurance to ensure large recoveries. This has the effect of putting even more small businesses out of business just to ensure "deep pockets" in personal injury lawsuits.

We continue to work with Law enforcement and our communities to improve ourselves and our service.

As always we are available for questions. Thank you for your time.

Dr. Philip B. Bradley
Executive Director

**Supporting Information**

**What is the KLBA?**
The Kansas Licensed Beverage Association is a non-profit group of men and women licensed to serve beverage alcohol in the state of Kansas. We are small business owners who formed to educate ourselves about this industry and in the process help the public to understand as well. We represent the interests of over 3000 establishments, the women and men who as a part of their business hold a license for on premise alcohol service. We are the restaurants, hotels, clubs, bars, breweries, vineyards and caterers you frequent and enjoy. We are in the hospitality business. We advocate safe responsible consumption and are training our servers to practice these principals.

## SIGNS OF INTOXICATION

No two individuals react to alcohol exactly the same way. No rule of thumb, no technique and no serving of food is enough by itself. There is no substitute for knowing the signs of visible intoxication and watching for them constantly. No one sign is evidence in itself. Quick recognition of the symptoms will assist both with the initial decision to serve/sell or not serve/sell, as well as intermediate decisions to prevent on-site intoxication. Among some of the symptoms are:

1. Loud speech
2. Bravado, boasting
3. Overly animated or entertaining
4. Boisterous
5. Overly-friendly to other guests and employees
6. Drinking alone
7. Drinking too fast
8. Ordering doubles
9. Careless with money
10. Buying rounds for strangers or the house
11. Annoying other guests and employees
12. Complaining about prices
13. Complaining about drink strength or preparation
14. Argumentative
15. Aggressive or belligerent
16. Obnoxious or mean
17. Making inappropriate comments about others
18. Crude behavior
19. Inappropriate sexual advances
20. Foul language
21. Making irrational statements
22. Depressed, sullen
23. Crying, moody
24. Radical changes in behavior
25. Speaking loudly, then quietly
26. Drowsiness
27. Bloodshot, glassy eyes
28. Lack of focus and eye contact
29. Slurred speech
30. Difficulty remembering
31. Rambling conversation
32. Slow response to questions
33. Spilling drinks
34. Trouble making change
35. Difficulty handling money
36. Difficulty lighting a cigarette
37. Lighting more than one cigarette
38. Letting a cigarette burn
39. Clumsy, uncoordinated
40. Difficulty standing up
41. Unusual gait
42. Stumbling
43. Bumping into things
44. Swaying, staggering
45. Unable to sit straight in a chair
46. Can't find mouth with glass
47. Falling down
48. Mussed hair
49. Disheveled clothing
50. Falling asleep

a. Safe Harbor
   i. Texas---Under the Texas Alcohol and Beverage Code, the "safe harbor" defense provides that the actions of an employee shall not be attributable to an employer if (1) the employer requires its employees to attend a commission-approved seller training program; (2) the employee actually has attended such a training program; and (3) the employer has not directly or indirectly encouraged the employee to violate such law.

# Kansas Wine & Spirits Wholesalers Association

To: House Judiciary Committee
From: R.E. "Tuck" Duncan
Kansas Wine & Spirits Wholesalers Association

On December 17, 2005 the Kansas Supreme Court declined to review the decision of the Kansas Court Appeals in *Noone v. Chalet of Wichita.* In that case the Court of Appeals determined that:

"1. The Kansas Court of Appeals is duty bound to follow Kansas Supreme Court precedent unless there is some indication that the court is departing from its previous position.

2. The vendor of alcohol at a bar who sells alcoholic beverages to an obviously intoxicated patron for consumption on the premises incurs no civil liability when the intoxicated patron causes death or injury to others in a subsequent automobile accident."

*In Ling v. Jan's Liquors*, 237 Kan. 629, 703 P.2d 731 (1985), and the line of cases decided since *Ling*, the Kansas Supreme Court discussed the history of dram shop liability in Kansas and the various public policy concerns involving drunk drivers. The Supreme Court noted there was no redress allowed under common law against sellers or providers of intoxicating liquors, "either on the theory that the dispensing of the liquor constituted a direct wrong or that it constituted actionable negligence." 237 Kan. at 635. ***In the Supreme Court's view, the proximate cause of any injury was the act of the purchaser in drinking the alcohol and not that of the vendor in selling it.*** 237 Kan. at 635.

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House Judiciary
2-10-05
Attachment 5

The Supreme Court had a recent opportunity to revisit its prior cases and as recently as 60 days ago chose not to. Since the enactment of the Kansas Liquor Control Act and the repeal of prohibition in Kansas there has bee no Dram Shop law. We find it most ironic that at a time when tort reform tops the agenda of many in the various states and at the federal level this generally cautious legislature would contemplate expanding the law by creating a new cause of action.

Enactment of a Dram Shop Act is counter productive to encouraging individuals in being socially responsible and in taking responsibility for their own acts.. Beverage alcohol is a lawful product, and when used in moderation has been found to be beneficial to one's health. We should not enact a law that will basically crate a new tax on this industry by increasing their insurance premiums … a cost that will be passed onto the consumer.

If it be the Legislatures determination to enact such a law it must include:

~ Caps on damages,

~ 6 month or shorter notice provisions,

~ and should remove the provision that creates liability to a licensee for unknowingly selling or allowing consumption on its premises by a minor.

The consumer should take responsibility for their own actions and not churn their irresponsibility to others. *Thank you for your attention to and consideration of these matters.*

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# REBECCA RICE
ATTORNEY AT LAW

Testimony Presented to
the House Judiciary Committee
re: HB 2114

by Rebecca Rice, Legislative Counsel
Kansas Clubs and Associates
February 9, 2005

Thank you, Mr. Chairman, for allowing me to appear in opposition to HB 2114. My name is Rebecca Rice and I appear before you today on behalf of the Kansas Clubs and Associates, an organization of on-premise liquor licensees and associates.

There is something incongruous about hearing testimony one day on a bill that grants immunity from liability for purveyors of certain consumables and hearing testimony on a bill the next day that specifically imposes liability on purveyors of *different* consumables. Especially when the bill granting immunity - according to one conferee - is referred to as "The Personal Responsibility" bill.

The argument I have brought many times to this committee in response to dram shop legislation is: Adults must be *personally responsible* for their own acts.

Liquor licensees are responsible for their own acts. If they serve a consumer a *tainted* drink causing illness, the licensee will be held personally responsible. If a licensee's employee spills a scalding coffee drink on a patron, the licensee will be held personally responsible. This legislation, however, moves away from personal responsibility holding a third party – the licensee - responsible for the acts of the consumer. That's odd. Perhaps due to limited abilities, I can identify only one comparable liability theory: agency - holding a principal responsible for the acts of his agent. The similarities between that legal principle and this legislation are few, however.

Last year, comments were made in the hearing that the proposed imposition of liability is no different than the current liability for a mechanic who causes damage due to faulty repairs or for a doctor who harms his patient. I respectively disagree.

I am unable to determine the similarity between the liability imposed by this legislation and liability for medical malpractice or automobile injury. Both examples given involve the direct action of a tortfeasor that directly caused injury. Because of the negligent act, injury will occur. The harm may not be immediate but the negligently performed surgery resulting

malpractice – by definition - caused injury as will the bad brake job - either physical or monetary. The same is not true for the liquor licensee that serves an "incapacitated" person.

The licensee is not committing a "traditional" act of negligence. That is why common law *did not* impose liability. Common law has been referred to as the *common sense of the community, crystallized and formulated by our ancestors*. Utilizing common sense - common law expected a patron to know when "enough was enough" and to stop consuming at that point. It held the patron personally responsible. Common law stood for the precept that the patron makes the choice to consume, knows the possible ramifications of consuming and therefore, makes the decision to accept the consequences for the consumption. This legislation repudiates those tenets.

Current Litigation

Although dire warnings were issued last year regarding almost certain court imposition of dram shop liability, the previous Supreme Court decisions denying dram shop liability were upheld. Despite these dire warnings, the Supreme Court refused to consider the Court of Appeals decision that denied liability for the claim arising out of Wichita.[i] which - apparently - was the cause for last year's concern However, the Supreme Court has a pending case involving dram shop liability[ii]. This case is from Douglas County and involves a fraternity and the University of Kansas as defendants. We request that this committee continue the tradition of taking no action that might affect a pending court case. Especially when such action could open the door for imposing liability on public universities for the social activities that occur within on-campus residence facilities.

While this legislation appears to limit liability to liquor licensees, committee members should assume that almost immediately upon creation of this new source of liability, the court will be asked to begin interpretation of this legislation. Increasing the liability beyond this committee's intention is not improbable.

Definitions

***Incapacitated***: *Incapacitated* is not defined but merely referenced by statute. Although the referenced statute has not caused undue problems for licensees because the enforcement is limited to situations where incapacity is obvious, the lack of specificity could become very problematic with this legislation. The statute was originally adopted in 1949 when "incapacitated" had a different "everyday" meaning than today. The legislature could not have anticipated breath tests, .08 and ADA. Other states have chosen: "significantly uncoordinated physical action or significant physical dysfunction" (Missouri); "intoxication that creates a clear danger to the patron and others" (Texas). I am concerned that the lack of a narrow definition, the standard will be a moving target with each district court establishing it's own.

***That was a foreseeable consequence of the negligent service*** : This phrase seems nebulous. What does it include: spousal abuse?; armed robbery?; interference with a roommates ability to study for exams?; date rape?; medical malpractice?; legal malpractice? Every bad result that occurs within some undetermined time-frame – even intentional torts – could be considered a "foreseeable consequence". With no parameters, the definition of

"damages" may grow exponentially. There are damage parameters for an act of malpractice. There are damage parameters for negligently repairing brakes. There must be a direct nexus between the damages and the negligence. This phrase creates no such limits because the patron might have caused the damage whether or not he was "incapacitated". Perhaps the alcohol gave the patron greater "courage" to commit "date rape". Perhaps not. It seems that an excuse is today's favorite way to explain bad behavior. This will give another reason to claim: "It wasn't my fault."

For all of the above, we respectfully request the committee reject this bill and report it unfavorably.

Thank you for allowing me to present our reasons for opposing HB 2114.

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**41-715. Sale of liquor to incapacitated or intoxicated person; penalties.**
(a) No person shall knowingly sell, give away, dispose of, exchange or deliver, or permit the sale, gift or procuring of any alcoholic liquor to or for any person who is an incapacitated person, or any person who is physically or mentally incapacitated by the consumption of such liquor.
(b) Violation of this section is a misdemeanor punishable by a fine of not less than $100 and not exceeding $250 or imprisonment not exceeding 30 days, or both.
**History:** L. 1949, ch. 242, § 78; L. 1963, ch. 267, § 1; L. 1965, ch. 277, § 8; L. 1985, ch. 173, § 1; July 1.

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[i] Brenda L. Noone, As Heir-At-Law Of James Noone, Deceased, Appellee, V. Chalet Of Wichita, L.L.C., Appellant, And James D. Segraves, Individually, Appellee. Case No. 91,095

[ii] James Bland, Individually And As Heir At Law And Personal Representative Of The Estate Of Felicia Bland, Deceased; And Michaela Renee Rodriquez, Through Her Guardian And Conservator Tiburcio J. Reyes, Jr., Individually And As Heir At Law Of Felicia Bland, Deceased, Appellants, V. Sean M. Scott; Dana Rieke; Lawrence H. Rieke; Barrett A. Bottemuller; The University Of Kansas; The Fraternity Of Phi Gamma Delta, Inc.; Phi Gamma Delta House Corporation; And Phi Gamma Delta Chapter House Association, Appellees. Case No. 90402.

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February 9, 2005

**TO:** Michael O'Neal, Chairman
Kansas House Judiciary Committee

**RE:** HB 2114 – Dram Shop Law

Dear Chairman O'Neal,

The **DUI Victim Center of Kansas** was founded in Wichita in 1987 resulting from a DUI crash that killed a local woman and her unborn child that same year. The drunk driver had been served in a licensed establishment for several hours before driving on our streets. Since our beginning over 18 years ago, there are those in Kansas and even in Wichita who say they have never heard of this agency. However, more than 500 DUI crash victims and their families throughout Kansas are receiving services each year from our many volunteers and small staff. Our DUI Victim Panels present to more than 3,000 court ordered DUI and underage drinking offenders annually throughout Kansas.

As Founder, President/CEO of the **DUI Victim Center of Kansas**, I testify to you that the majority of our more serious crashes – fatality and life altering injury – result from an individual being irresponsibly served an alcohol liquor/cereal malt beverage while in a licensed establishment. Most recent, we have noticed an increase in persons leaving these establishments and running over pedestrians in the parking lot and then dragging them to death with their vehicles. Drunk driving is a serious crime and it is time Kansas recognized the responsibility of the server in these crimes.

House Bill 2114 will place a responsibility on the server that will result in more responsible licensed establishments in our state. Since founding the **DUI Victim Center of Kansas** in 1987, I have seen a Dram Shop Law placed before our legislators several times. Each time they have not brought this to law. Since 1987, I have seen thousands of individuals and families destroyed by irresponsible serving of alcoholic liquor/cereal malt beverages. It is not the responsible server that is being placed on notice. Unfortunately, there are many who are not responsible regarding their serving to the public. These are the licensees who must be held accountable for the tragic outcome that occurs following their serving.

I strongly support House Bill 2114 for the citizens of Kansas and encourage the passing of this bill through your committee. The **DUI Victim Center of Kansas** will actively participate with Kansas MADD in every stage of the process to assist your efforts in bringing this bill to law in our state.

Sincerely,
**DUI Victim Center of Kansas, Inc.**

Mary Ann Khoury

Mary Ann Khoury,
President/CEO



House Judiciary
2-10-05
Attachment 7

**Testimony on HB 2114**
**Before the House Judiciary Committee**
**By Larry Magill**
**Kansas Association of Insurance Agents**
**February 9, 2005**

Thank you mister Chairman and members of the committee for the opportunity to provide comments today in opposition to HB 2114 that creates what it commonly referred to as dram shop liability in Kansas. My name is Larry Magill and I represent the Kansas Association of Insurance Agents. We have approximately 425 member agencies across the state and another 125 branch offices that employ a total of approximately 2,500 people. Our members write roughly 70% of the business property and liability insurance in Kansas.

HB 2114 creates a new cause of action for trial lawyers to pursue, not just in automobile accidents, but any time someone is hurt or there is property damage and there's an allegation that alcohol was a contributing factor.

According to information that the KLBA gave the Committee last year that they found on Rough Notes website, Kansas is among 13 states that currently do not have dram shop liability. There are another 21 states where moderate liability is imposed, 10 states with strict liability and 6 states with special requirements. Thus the liability varies all over the board. According to a conversation with the Insurance Services Office (ISO) today, they dropped their A-D classification system in favor of numerical ratings from 1-10 with 1 being states with no dram shop act and 10 being states with "strict" dram shop acts. They classify about 10 states at each end of the scale and the rest in between. Kansas would be a 1. MADD claims that there are only 9 states that do not impose dram shop liability.

In Kansas, many businesses do not choose to carry liquor liability since our supreme court has said that establishments selling liquor do not have liability for their customers' actions. If a business does buy the coverage on the chance that they would be the case that overthrows the Supreme Court decision and to cover defense costs if someone chooses to pursue a claim despite our supreme court rulings. The cost in Kansas is quite low compared to a state with dram shop liability. In other words, Kansas' rates reflect our law and our claims experience. According to one wholesaler member of ours, Kansas' current liquor liability rates are 30-40% less than Missouri, who has a very limited dram shop law, and 80% less than Iowa who has a full dram shop act.

HB 2114 would change all that. Most likely businesses would be forced to buy the coverage from non-admitted carriers, if they choose to buy it. Non-admitted carriers are not subject to the Kansas Insurance Department's oversight of rates, claims practices or virtually anything else and are not covered by the guarantee fund if the carrier becomes insolvent. In other words, they are the high-risk, high-cost marketplace.

We urge you to oppose the bill for the following reasons:

- While the burden of proof is on the plaintiff to show that the establishment served them,

House Judiciary
2-10-05
Attachment 8

memories can be faulty and it is virtually impossible for retailers to prove someone did not purchase liquor from them.

- There are no standards for "incapacitated", either mentally or physically—its safe to say that anytime there's a bad result (injuries) the person was "incapacitated" but short of a breathalyzer test and "walking the line" every time a drink is ordered, the retailers can't defend themselves. It is quite likely that bars would need to prohibit anyone from getting a drink for someone else since they might be hiding the fact that the other person is "incapacitated". A standard like "obviously, physically inebriated" would be a clearer standard.
- This bill makes the retailer pay for someone else's actions—the customer who bought and consumed the alcohol.
- Even if the retailer is found innocent, the costs of defense will be significant

The current law places the burden on the person who consumes the alcohol to act responsibly. We encourage you not to create a new cause of action and leave present law in place and not act favorably on HB 2114. We would be happy to answer questions or provide additional information at the Committee's request.