

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on March 9, 2005 in Room 313-S of the Capitol.

All members were present except:
Michael Peterson- 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:
Ron Hein, Kansas Restaurant & Hospitality Association
Marlee Carpenter, Kansas Chamber of Commerce
Terry Holdren, Kansas Farm Bureau
Brent Haden, Kansas Livestock Association
Callie Denton, Kansas Trial Lawyers Association
Debbie Riggs, Citizen
Tuck Duncan, Kansas Wine & Spirits Wholesalers Association

The hearing on **SB 75 - creating liability for claims relating to obesity or weight gain**, were opened.

Ron Hein, Kansas Restaurant & Hospitality Association, requested the proposed bill, which is narrowly written. It was based on the National Restaurant Association's Model Act. Kansas Trial Lawyers Association (KTLA) had concerns with the bill as it was originally drafted, but the two groups worked together to address most of their concerns ([Attachment 1](#)).

They are opposed to two proposed amendments by the KTLA:

- striking "associated with" and replacing with "arising from". The term "associated with" is used by the National Academy of Sciences in dealing with medical conditions.
- strike "or other generally known condition allegedly caused by or allegedly". KTLA testified that this language is too broad and would include food additives that could harm a plaintiff. So an agreement was met to remove food additives from the definition of food.

Marlee Carpenter, Kansas Chamber of Commerce, appeared in support of the proposed bill stating that more than 10 states have passed this type of legislation that safeguards companies against attorney's who see the food industry as their next cash cow ([Attachment 2](#))

Terry Holdren, Kansas Farm Bureau, appeared as an proponent of the bill and supported the changes made as the result of compromise with KTLA ([Attachment 3](#)).

Brent Haden, Kansas Livestock Association, stated that most people believe that these types of lawsuits are frivolous but companies are concerned because courts don't always think the same way. ([Attachment 4](#))

Written testimony in support of the bill was provided by:

- Kansas Beverage Association ([Attachment 5](#))
- Kansas Cooperative Council ([Attachment 6](#))
- Petroleum Marketers & Convenience Store Association ([Attachment 7](#))
- Kansas Grain & Feed Association ([Attachment 8](#))

Callie Denton, Kansas Trial Lawyers Association, appeared as an opponent to the bill. Their primary concern is with the number of immunity bills introduced this legislative session, and trying to cut off access to the courts. ([Attachment 9](#))

Chairman O'Neal directed staff to obtain the definitions of: food, additives, & dietary supplements.

The hearing on **SB 75** was closed.

CONTINUATION SHEET

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on March 9, 2005 in Room 313-S of the Capitol.

The hearing on **SB 144 - social host liability**, were opened.

Debbie Riggs, Citizen, told the committee her son was at a home where the parents served alcohol and upon leaving the party wrecked his car and died. There is nothing in state statutes that address civil liability for the parents who served the alcohol to underage drinkers. She wants there to be a deterrent to those who serve alcohol to underage drinkers and wants them to be held responsible. (Attachment 10)

Chairman O'Neal pointed out that if there is a criminal conviction then there would be no insurance coverage under a civil award.

Tuck Duncan, Kansas Wine & Spirits Wholesalers Association, agreed that underage drinking needs to be curbed but didn't believe the proposed bill would have any affect on that. K.S.A. 38-120 already provides for recovery from parents for malicious or willful acts by children. They can recover actual damages in an amount not to exceed \$5,000 and actual medical expenses. (Attachment 11)

The hearing on **SB 144** was closed.

The committee meeting adjourned at 5:00 p.m. The next meeting was scheduled for March 14, 3:30 p.m. in room 313-S.

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Ronald R. Hein
Attorney-at-Law

Email: rhein@heinlaw.com

Testimony Re: SB 75
House Judiciary Committee
Presented by Ronald R. Hein
on behalf of
Kansas Restaurant and Hospitality Association
March 9, 2005

Mr. Chairman, Members of the Committee:

My name is Ron Hein, and I am legislative counsel for the Kansas Restaurant and Hospitality Association. The KRHA is the Kansas professional association for restaurant, hotel, lodging and hospitality businesses in Kansas.

The KRHA requested the introduction of SB 75 in Senate Judiciary, and strongly supports the passage of this legislation. This bill provides in section 1(b) that there shall be no civil liability by any grower, producer, retailer, or other person identified in the bill for a "claim arising out of weight gain, obesity, a health condition associated with weight gain or obesity, or other generally known condition allegedly caused by or allegedly likely to result from the long-term consumption of food." This bill might very well have been called the "Personal Responsibility Act". In fact, at the national level, the U.S. House of Representatives last year passed a similar bill called the "Personal Responsibility in Food Consumption Act." It was passed with overwhelming bi-partisan support, 276 to 139. Similar legislation, titled the "Commonsense Consumption Act," was introduced in the U.S. Senate.

SB 75 is very narrowly written to block particular types of frivolous litigation. It applies only to the claims identified above. SB 75 specifically does not apply to civil liability for what might be known colloquially as "food poisoning" type activities.

The bill also includes good faith exemptions, so that bad actors are still liable for their bad acts. For example, section 1(c) provides that the bill will NOT prohibit actions where there has been a "material violation of an adulteration or misbranding requirement" of state or federal law. The bill also allows civil liability under the provisions of section 1(c)(2), where the claim is based on "any other material violation of the federal food drug and cosmetic act as of the effective date of this act or state law applicable to" the activities set out therein, including manufacturing and marketing. So, if a company misbrands a product, sells adulterated food or intentionally misrepresents a product, the company can still be liable.

The point of this bill is to stop frivolous claims. For example, where an individual makes his own choice of where to eat and how much to eat, as well as a slew of other lifestyle

choices – such as exercise – and then files suit for gaining weight or developing a condition from long-term consumption of food. This bill will provide sufficient protection for Kansas agricultural producers, Kansas restaurants, food dealers, and others in the food production chain who might be a victim of such a suit.

These types of lawsuits have been filed in other states, though I am not aware of any suits specifically filed in Kansas at this point. Thus far, judges have not been receptive to these suits. The KRHA believes we should not wait until litigation is filed in this state.

Section 1(f) provides for a stay of discovery during the time the motion to dismiss is being decided, unless the judge orders otherwise pursuant to that section. The costs of discovery will be avoided while the judge rules on the motion to dismiss. In this way, defendants will not be forced to expend substantial funds to retain counsel and to fight these lawsuits in court.

This legislation is modeled after the National Restaurant Association model act. As of January 2005, 14 states have enacted this or similar legislation, and numerous others have introduced them for consideration this year. We believe that this legislation is the most appropriate of the various versions that have been offered or enacted, and sets the most sound policy for handling cases of this nature.

A number of associations in Kansas support this legislation. Please see the attached list for those who have asked to be listed. Some or all of them may testify as well.

At the Senate Judiciary Committee hearing, the Kansas Trial Lawyers Association (KTLA) raised concerns about this bill. As a result several representatives of the Associations listed on the attached sheet and the KTLA met, and ultimately we facilitated agreed to amendments to SB 75. Those amendments were adopted by the Senate Judiciary Committee.

However, the KTLA had two other proposed amendments which we rejected. These amendments were presented to the Senate Judiciary Committee, but they were not adopted by that committee. I have set out their proposed amendments and our objections to those amendments below. In the event that they offer these amendments again, we would strongly urge the committee to reject the amendments, as they were rejected by the Senate Judiciary Committee.

The two KTLA amendments which we and the Senate Judiciary Committee rejected are as follows:

1. Section 1(b). KTLA wants to strike “associated with” on page 1, line 21-22, and replace with “arising from”. Our response is that the term “associated with” is the term used by the National Academy of Sciences (NAS) in dealing with medical conditions. The NAS guidelines will assist judges and the parties to litigation to determine medical

March 9, 2005

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conditions associated with obesity. "Arising from" language will require additional factual discovery and judicial determination to establish in any given case that a condition actually "arose from" the weight gain or obesity. For instance, although the NAS recognizes that high blood pressure is "associated with" obesity, in order to use the defense of this act, the defendant would have to "prove" that the high blood pressure "arose from" the obesity and did not "arise from" other causes. We strongly oppose this proposed KTLA amendment.

2. Also in Section 1(b), the KTLA wants to strike "or other generally known condition allegedly caused by or allegedly". At the hearing, they testified that such language is so broad as to include food additives that could harm a plaintiff. As noted in amended version of the bill, we agreed to remove food additives from the definition of food. However, the KTLA still wants to remove the language above so that the bill will ONLY apply to civil liability for a suit where there is weight gain or obesity. We oppose that amendment because we are equally concerned about frivolous lawsuits that allege that long term consumption of food causes other medical conditions. (A good example of our concern here is a lawsuit alleging that long term consumption of red meat causes heart failure; or long term consumption of movie theater popcorn causes arteriosclerosis.) The language in SB 75 only applies to "generally known conditions", so there still would be liability for hidden or unknown conditions. The KTLA was unable to give us, in our opinion, a good example of how this provision could be interpreted to apply beyond the types of examples we cited. They indicated that they generally oppose immunity, and are afraid there **might** be a situation which might occur if that language is not removed, but could not give us specifics.

The Coalition feels that we have made a good faith effort to respond to all of the concerns raised by the KTLA. We agreed to a number of their proposed amendments which were ultimately agreed to by both sides and incorporated in the bill as amended. We do not agree to the two additional amendments set forth above, which the KTLA may offer and which we obviously oppose and respectfully request be defeated.

Thank you very much for permitting me to testify, and I will be happy to yield to questions.

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Explanation of Agreed to Amendments to SB 75

In Section 1(b), the KTLA wanted to strike “or other generally known condition allegedly caused by or allegedly”. At the hearing on SB 75, they testified that such language is so broad as to include food additives that could harm a plaintiff. We agreed to remove from the definition of “food” “a food additive” as defined in the federal food, drug, and cosmetic act. (See balloon amendment at page 1, line 42.)

The KTLA wanted to initially remove “federal or state law” on page 1, line 32, and replace it with “FDA”, which I interpreted to mean the “federal food, drug and cosmetic act”. We agreed to that amendment. Later, the KTLA requested to reinsert “or state law” and to add “as of the effective date of this act” after “food, drug, and cosmetic act”. We agreed to that new request as well.

The KTLA was concerned that “single instance of consumption” on page 1, line 42 is not defined. We proposed striking that clause and inserting “of food” so there is no reference to the “single instance”. The KTLA was satisfied with such amendment.

The KTLA wanted to remove or rewrite subsection 1(e) which requires pleading with particularity. Since this is the section that requires the plaintiff to establish the basis for an exception to subsection 1(b) pursuant to subsections 1(c)(1) or (2), we felt that it was appropriate for the plaintiff to indicate the statutes being violated or the nature of the material violation of the food, drug, and cosmetic act, so we want to preserve that subsection. We also note that K.S.A. 60-209(b) requires “in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be state with particularity”. To restate that requirement in subsection 1(e) does not hurt and makes it clear in this law what the plaintiff must aver. The KTLA responded favorably to our amendment and agreed not to proceed with their proposed amendment.

Also in subsection 1(e), the KTLA was concerned about the language “intent to deceive or injure” on page 2, line 15. Our response was to delete that and the surrounding language and just to substitute language that makes it clear that if the plaintiff is suing pursuant to subsection 1(c)(2), the plaintiff must “state with particularity facts sufficient to support a reasonable inference that the individual requirements in subsection (c)(2) have been satisfied”. The KTLA responded favorably to our amendment and agreed to accept our amendment in lieu of their original proposed amendment.

The KTLA wanted to remove subsection (f) on page 2, which provides for a stay of discovery. They wanted to use existing civil procedure motions to stay discovery. We opposed the removal of the stay of discovery provision, and noted that the judge is still

March 9, 2005

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given the power refuse to stay discovery if “the court finds upon the motion of any party that discovery is necessary to preserve evidence or to prevent undue prejudice to that party.” The KTLA agreed not to delete that provision.

The KTLA expressed concerns, also expressed by Sen. Vratil at the hearing, regarding the retroactivity of subsection (g) on page 2. Although we believe the provision is arguably appropriate because we do not believe there is a property right to bring the particular claims being protected by this proposed legislation, we have agreed to remove the retroactivity.

The KTLA had, as I understand it, suggested we could have the effective date of the act occur on the date of publication in the Kansas Register rather than upon publication in the statute books, and we have both agreed to that.

We have proposed the insertion of a severability clause, and the KTLA has agreed to that.

Kansas Beverage Association

Kansas AgriBusiness Retailers Association

Kansas Farm Bureau

The Kansas Chamber

Kansas Cooperative Council

Kansas Food Dealers Association

Kansas Grain and Feed Association

Kansas Livestock Association

Kansas Pork Association

Kansas Restaurant and Hospitality Association

Kraft Foods North America, Inc.

National Federation of Independent Business

Petroleum Marketers and Convenience Store Association of Kansas

Legislative Testimony

SB 75

Wednesday, March 9, 2005

**Testimony before the Kansas House Judiciary Committee
By Marlee Carpenter, Vice President of Government Affairs**

Chairman O'Neal and members of the Committee;

The Kansas Chamber and its over 10,000 members support passage of SB 75. Passage of this measure will help curb frivolous lawsuits against food manufacturers and producers. This is a solid first step in ensuring that class actions lawsuits are not filed against the food industry and consumers take personal responsibility for the decisions that they make.

In our December 2004 CEO and Business Owner's Poll, 60% of the 300 respondents believe that our current litigation system is a deterrent to business growth and 83% believe that frivolous lawsuits increase the cost of doing business in the state. Our November 2004 poll of Registered Voters found the same firmly held belief. Nearly 65% of those participating believe that our current legal system should be reformed and 61% believe that lawsuit reform will contribute to economic growth.

Passage of SB 75 would help protect many Kansas businesses and industries from frivolous lawsuits that are a reality in today's society. More than 10 state's have passed this type of legislation that safeguards companies against attorney's who see the food industry as their next cash cow.

We urge this committee to recommend favorably SB 75. Thank you for your time and I will be happy to answer any questions.



**THE KANSAS
CHAMBER**

The Force for Business

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The Kansas Chamber, with headquarters in Topeka, is the statewide business advocacy group moving Kansas towards becoming the best state in America to do business. The Kansas Chamber and its affiliate organization, The Kansas Chamber Federation, have more than 10,000 member businesses, including local and regional chambers of and trade organizations. The Chamber represents small, medium and large employers all across Kansas.

House Judiciary
3-9-05
Attachment 2

PUBLIC POLICY STATEMENT

HOUSE COMMITTEE ON JUDICIARY

Re: SB 75—Prohibiting claims based on weight gain or obesity.

March 9, 2005
Topeka, Kansas

Testimony by:
Terry D. Holdren
KFB Governmental Relations

Chairman O'Neal and members of the House Judiciary Committee, thank you for the opportunity to appear before you today. I am Terry Holdren and I serve as the Local Policy Director—Governmental Relations for Kansas Farm Bureau. KFB is the state's largest general farm organization representing more than 40,000 farm and ranch families through our 105 county Farm Bureau Associations.

As recently as 2002, our members, in conjunction with other farmers and ranchers across the state produced over 2 million bushels of grain and nearly 8 million head of cattle and hogs, adding nearly \$9 billion to the economy of the state of Kansas. Those products—considered the safest and most affordable supply of food in the world—have increasingly become a target as more and more Americans eat too much without a proper perspective regarding nutrition and exercise.

The US Surgeon General reported recently that 61% of Americans are either overweight or obese. Those individuals are at risk to develop diabetes, heart disease and/or cancer among several other potentially negative health consequences caused by being overweight. Likewise, in recent years novel theories have begun to emerge that seek to expand tort liability to include those health conditions related to weight gain or obesity. Specifically, the suits have alleged that providers of food have misled the public by promoting the idea that their products have greater nutritional value than they actually do, thereby encouraging patrons to overindulge. Secondly, they claim that providers should be held liable for offering "super-sized" meals that cause innocent customers to be duped into consuming more than nutritionally required.

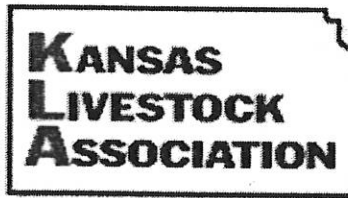
A 2003 Gallup poll found that nine of ten Americans believe it is wrong to hold producers and providers of safe and properly prepared food liable for obesity related health problems. The members of Kansas Farm Bureau agree and have adopted policy supporting tort reform measures including prohibiting claims based on weight gain, obesity, or related conditions caused by consumption of food.

Since we last appeared before the committee in support of this concept, much work has been done. In our opinion, SB 75 is today a much better bill than HB 2233 which you heard earlier this session. We have worked with opposing parties to address their concerns where we could; tightening language to address conditions that may arise from single instance of consumption, and to address concerns about additives that may result in health conditions. And, while we may not be in total agreement, we are hopeful that our efforts will also address any concerns that the committee might have raised.

In conclusion, eating habits, good and bad, are a matter of personal choice and responsibility. It is not the place of law to protect us from our own excesses. KFB asks that you carefully consider SB 75 and act favorably on this important protection for producers and providers of food.

Thank you.

Kansas Farm Bureau represents grass roots agriculture. Established in 1919, this non-profit advocacy organization supports farm families who earn their living in a changing industry.



TESTIMONY

To: House Judiciary Committee
Representative Mike O'Neal, Chairman

From: Brent Haden, Assistant Counsel
Kansas Livestock Association

Date: March 9, 2005

Re: SB 75, Obesity Lawsuit Immunity

The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing over 6,000 members on legislative and regulatory issues. KLA members are involved in many aspects of the livestock industry, including seed stock, cow-calf and stocker production, cattle feeding, grazing land management and diversified farming operations.

Good afternoon. My name is Brent Haden, and I serve as Assistant Counsel for the Kansas Livestock Association. I am here today representing KLA and asking for your support and passage of SB 75.

KLA is joining with the other food producers and sellers here today to ask this body to help prevent frivolous obesity lawsuits in Kansas. We believe it is important that the state of Kansas, as a net food exporter and America's bread basket, take affirmative steps now to shield its food producers, processors and sellers from economically destructive lawsuits in which plaintiffs will seek to shift the consequences of their own actions onto the backs of Kansas ranchers, workers and businesses.

The fundamental question addressed by this bill is one of personal responsibility, and of who should bear the burden for actions that cause obesity and its attendant health problems. It is the belief of our members, and indeed the belief of 85% of Americans, that the burden of the costs and consequences of obesity should be borne by each individual, as each individual has the most control over whether they are obese or not. Every individual may choose to eat or not eat, to exercise or not exercise. No one is forced to do either, or to refrain from either, and therefore the responsibility for these choices should lie with the individual.

Conversely, to allow obese individuals to sue farmers, ranchers, wholesalers or retailers for the costs associated with their own obesity unfairly places the burden of an individual's behavior upon people who have no control over whether an individual is overweight or not. Ranchers, farmers and the rest of the food production and preparation chain cannot police the consumption habits of individuals, even if they were inclined to. As such, the food producers and sellers of this state should not be forced to bear the responsibility for costs and consequences associated with these choices.

Of course, to most the above statement is mere common sense. In fact, some would say that the proposition that individuals, and not food producers and sellers, should be responsible for their own weight is so self-evident that SB 75 is an unnecessary piece of legislation. However, we believe that in light of recent developments this legislation is warranted to protect the whole chain of food production and preparation from economically devastating lawsuits.

While to date no obesity suit has been successfully litigated, the last three years have seen a concerted national effort by trial lawyers and self-anointed food police groups to undermine consumer confidence in the safety practices and ethics of food producers and sellers. This is troubling because the current campaign against food producers and sellers parallels past campaigns waged against other types of products. In several of those campaigns, plaintiffs were able to win large verdicts after several years of defeat, during which they continued to lay the groundwork for victory by attacking the ethics of the industries in question and using mass media to create pockets of willing juries throughout the country.

If obesity suits were ever successful, Kansas, as a net food exporter, would disproportionately feel the effects because so much of Kansas' economy is tied to food production and preparation. Furthermore, Kansas food producers and sellers would be damaged economically if courts in Kansas would even entertain an *unsuccessful* lawsuit because the food producer or seller would be forced to hire attorneys to defend itself in court. Similarly, if obesity lawsuits were allowed to proceed in Kansas there is a possibility that food producers and sellers would settle these cases, regardless of their merit, to avoid the litigation costs involved in a successful defense. Such a development would prove a further drag on the state's economic health.

For the above reasons, our members believe that passage of SB 75 is imperative for the protection of Kansas' economy. If obesity suits are allowed to go forward, successfully or unsuccessfully, the farmers, ranchers and food-service entities so crucial to Kansas' economic health would suffer. However, this body has before it an opportunity to protect the ranchers, farmers and food-service businesses of Kansas by nipping frivolous obesity lawsuits in the bud. SB 75 would protect Kansas' critical food production and preparation businesses by preventing individuals from saddling food producers and sellers with the costs of their own actions, and would in turn protect Kansas' economy. We urge you to vote for this bill, and look forward to working with you. Thank you.

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Ronald R. Hein

Attorney-at-Law

Email: rhein@heinlaw.com

**Testimony Re: SB 75
House Judiciary Committee
Presented by Ronald R. Hein
on behalf of
Kansas Beverage Association
March 9, 2005**

Mr. Chairman, Members of the Committee:

My name is Ron Hein, and I am legislative counsel for the Kansas Beverage Association (KBA), the state trade association for beverage bottling companies operating in Kansas. Previously the Kansas Soft Drink Association, the KBA changed their name to more truly reflect the membership and the products made, which include carbonated diet and regular soft drinks, bottled waters, isotonic drinks, juice, juice drinks, sports drinks, dairy-based beverages, teas, and other beverages.

The KBA strongly supports the passage of SB 75. Fourteen states have passed this legislation, which we believe will help insure that Kansas does not have the types of lawsuits relating to obesity and other health conditions associated with long term consumption of food that have occurred in other states. In addition, the U.S. House of Representatives passed legislation along these lines last year and called it the "commonsense consumption act". It is possible that Congress will enact such legislation this year with regards to actions in federal court.

This bill provides for no civil liability for obesity claims or other medical condition claims arising from long term consumption of food. It provides exemptions to this general prohibition of liability if food producers, such as the bottlers who are members of the KBA, act in violation of state or federal law. Food additives are not included within the definition of food.

This legislation originally was basically the National Restaurant Association model act. The American Beverage Association also has a model act which is arguably stronger than this act, but the KBA understands that the Kansas Restaurant and Hospitality Association requested this bill. The bill was amended with amendments proposed by the Kansas Trial Lawyers Association (KTLA) and negotiated with and agreed to by the KRHA. The KBA supports the bill with those agreed to amendments. The KTLA proposed two other amendments which the KBA specifically opposes. The KRHA will address those issues.

Thank you very much for permitting me to submit this written testimony, and I will be happy to yield to questions.

House Judiciary
3-9-05
Attachment 5



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House Judiciary Committee

March 9, 2005
Topeka, Kansas

SB 75 – immunity from liability claims for weight gain.

Chairman O'Neal and members of the Committee, thank you for the opportunity to share comments on behalf of the Kansas Cooperative Council in support of SB 75. I am Leslie Kaufman and I serve the Kansas Cooperative Council as Government Relations Director. The Council includes more than 223 cooperative business members. Together, they have a combined membership of nearly 200,000 Kansans.

Our members are concerned with the overall business climate in Kansas and increased costs of doing business. The KCC has adopted policy language supporting changes in regulatory systems and in our judicial system that eliminate unnecessary regulation, encourage business development and promote growth in the Kansas economy. Helping ensure food producers and processors are protected from frivolous lawsuits is another way the state can assist the state's food production sector.

Several members of our association can benefit from the protection proposed in SB 75. Cooperative businesses and their owner-members are involved in food production at every point from the farm to the dinner table. Our grain handling and farm supply cooperatives are owned by the farmers and ranchers that grow our basic

commodities. They provide seed and inputs at the start of the process and storage and marketing once the crop is harvested. Cooperative members are also involved in processing, distribution and retail sales.

Food safety is an important component in cooperative food handling enterprises. Various types of protections and state and federal oversight are intermingled in the processes. Food products, their ingredients, or their processors that meet current health and safety standards should not be held liable for an individuals over-indulgence.

It is simply not reasonable to hold a food producer/processor responsible for an individual's lack of moderation. Even nature's most basic life sustaining fluid, water, is dangerous in excessive quantities. This truth was reemphasized earlier this year by the tragic death of a young fraternity pledge that, as part of a hazing ritual, was forced to drink too much water in too short of a time period.

Too often, it seems human nature to overlook personal short-comings and try and shift blame where it really does not belong. This bill can help protect the food industry from becoming an unfair scapegoat for an individual's, or society's, weight problem.

As such, we respectfully encourage this committee to act favorably on SB 75. Should you have any questions or comments regarding our position or this statement, please feel free to contact me. Thank you for your consideration.

Leslie Kaufman
Government Relations Director
Kansas Cooperative Council
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House Judiciary Committee

March 9, 2005
Topeka, Kansas

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MEMO TO: House Judiciary Committee
FROM: Thomas M. Palace, Executive Director of the Petroleum Marketers and
Convenience Store Association of Kansas
DATE: February 8, 2005
RE: Comments on SB 75

Mr. Chairman and members of the House Judiciary Committee:

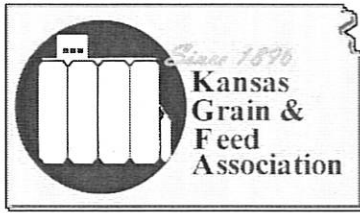
My name is Tom Palace and I am the Executive Director of the Petroleum Marketers and Convenience Store Association of Kansas (PMCA), a statewide trade association that represents over 300 independent petroleum marketers, gasoline retailers and convenience store owners throughout Kansas.

I appreciate the opportunity to present comments as a proponent of SB 75 in its current form.

Convenience stores throughout Kansas have the potential of being named in a lawsuits blaming us that we were/are the cause of obesity. In this litigious society, people jump at the opportunity to sue for any reason. People have many choices when they enter a store to purchase food. Convenience stores should not be held liable for a person's weight gain if that person decides to purchase a Snickers bar as opposed to a granola bar. Most, if not all products sold in convenience stores have consumer protection notices on the wrappers for people to be advised as to what they are eating. Current labeling (nutritional content) laws guarantee that when a person chooses to buy a consumable product that he or she is well aware as to what the calorie content or nutritional value is, the manufacturing segment has done its duty. It is wrong to attribute a person's weight and health problems to the consumption of specific foods. Legislation like SB 75 should bar claims arising out of obesity or weight gain, regardless of the legal theory that a customer gained weight or has become obese because a fad-laden product was available to him or her. Consumption of the product is his or her personal decision, not the business practices of a specific retailer.

Society is always looking for a convenient scapegoat. People have to take responsibility for their own volition, their own choices or actions. If we want to get to the heart of the issue, we need to go to the source (manufacturer) to stop making products that make people obese.

Mr. Chairman and committee members, I urge your support of SB 75.



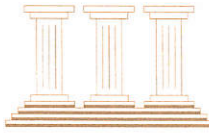
STATEMENT OF THE
KANSAS GRAIN & FEED ASSOCIATION
AND THE
KANSAS AGRIBUSINESS RETAILERS ASSOCIATION
SUBMITTED TO THE
HOUSE JUDICIARY COMMITTEE
IN SUPPORT OF SENATE BILL 75
REP. MIKE O'NEAL, CHAIRMAN
MARCH 9, 2005

KGFA & KARA MEMBERS ADVOCATE PUBLIC POLICIES THAT ADVANCE A SOUND ECONOMIC CLIMATE FOR AGRIBUSINESS TO GROW AND PROSPER SO THEY MAY CONTINUE THEIR INTEGRAL ROLE IN PROVIDING KANSANS AND THE WORLD THE SAFEST, MOST ABUNDANT FOOD SUPPLY.

Chairman O'Neal and members of the House Judiciary Committee, I am Duane Simpson testifying on behalf of the Kansas Grain and Feed Association (KGFA) and the Kansas Agribusiness Retailers Association (KARA). The KGFA is a voluntary state association with a membership encompassing the entire spectrum of the grain receiving, storage, processing and shipping industry in the state of Kansas. KGFA's membership includes over 950 Kansas business locations and represents 99% of the commercially licensed grain storage in the state. KARA's membership includes over 700 agribusiness firms that are primarily retail facilities that supply fertilizers, crop protection chemicals, seed, petroleum products and agronomic expertise to Kansas farmers. KARA's membership base also includes ag-chemical and equipment manufacturing firms, distribution firms and various other businesses associated with the retail crop production industry. On behalf of these organizations, I am testifying in support of Senate Bill 75.

SB 75 is a common sense piece of legislation that prevents trial attorneys from filing frivolous lawsuits against our industry for damages due to obesity related health issues. It seems ridiculous that someone could regularly eat Big Macs, become obese and then file a lawsuit against McDonald's for damages. Unfortunately, those lawsuits have already been filed in other states. In addition, they could file a lawsuit against the livestock producers, the farmer who grew the corn fed to the cattle, and maybe even the agribusiness who sold fertilizer to that farmer. Grain elevators that buy and sell wheat in Kansas could face claims due to the high-carb content of bread.

Unfortunately, the threat for these lawsuits is all too real. Everyone involved in food production, from the farm to the fork, should be protected from these frivolous lawsuits. Individuals are responsible for what they eat. If they are incapable of self-control, they have no one but themselves to blame. We urge the members of the committee to support SB 75. Thank you for your consideration.



KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Chairman Mike O'Neal
Members of the House Committee on Judiciary

From: Callie Jill Denton on behalf of the Kansas Trial Lawyers Association

Date: March 9, 2005

RE: **SB 75**

Mr. Chairman and Members of the House Committee on Judiciary, I appear today on behalf of the Kansas Trial Lawyers Association to testify on SB 75. KTLA is a statewide, nonprofit organization of lawyers who represent consumers and advocate for the safety of families and the preservation of the civil justice system. We appreciate the opportunity to present written and oral testimony on SB 75. KTLA is neutral on SB 75 but has several policy considerations to bring to the attention of the Committee, and we respectfully request an amendment.

SB 75 provides complete immunity for food producers and sellers from claims arising out of weight gain, obesity, or a health condition associated with weight gain or obesity, or other generally known condition allegedly caused by or allegedly likely to result from the long-term consumption of food. There are exceptions for material violations of adulteration or misbranding requirements or any other violation of federal or state law related to the manufacturing, marketing, distribution, advertising, labeling or sale of food.

KTLA stands firmly resolved in our opposition to lawsuits without merit. At the same time, we are concerned with immunity provisions that could be broadly construed, and potentially extend beyond the original purpose. For these reasons, we worked with the proponents of the bill, particularly the National Restaurant Association, to craft amendments that narrowly focus the bill's immunity provisions, and we thank the proponents for their partnership. Together, KTLA and the proponents have been successful in crafting consensus language but for two remaining issues. KTLA respectfully requests that the Committee consider our concerns and adopt the attached balloon amendments.

SB 75 as written creates two levels of immunity. The first is immunity for claims arising out of weight gain, obesity, or a health condition associated with weight gain or obesity. KTLA has accepted the first level of immunity as very narrow. However, the second layer of immunity extends more broadly and would not require the condition of obesity to be present for immunity to attach. KTLA believes there is no reason to extend broad

Terry Humphrey, Executive Director

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E-Mail: triallaw@ink.org

House Judiciary
3-9-05
Attachment 9

immunity to the entities outlined in the bill for “other generally known conditions allegedly caused by or allegedly likely to result from the long term consumption of food”, for the following reasons:

- **No lawsuits filed.** KTLA is not aware of any lawsuits filed in Kansas—or anywhere in the nation—where there have been damages alleged for health conditions caused by the consumption of food that are not related to obesity.
- **Other states have rejected the language.** Other states that have chosen to enact obesity immunity laws have not extended a second layer of immunity for “other generally known conditions”. These states include Idaho, Florida, Illinois, Louisiana, South Dakota, and Washington.
- **Broader than the title of the bill.** The second layer of immunity is much broader than the title of the bill “The obesity frivolous lawsuit act” because it will extend immunity to situations where obesity is not the basis of or one of the elements of the plaintiff’s claim.
- **Distinguishable from “obesity”.** By passage of this bill, the Committee seeks to establish a policy that people that get fat must be accountable for the actions that made them fat and they will have no redress against the producers/sellers of the food that made them fat. “Other generally known conditions” are not as visible as obesity—a person can have high blood pressure or heart disease and may not be aware until their health is significantly damaged. In this way, obesity is distinguishable from “other generally known conditions”.
- **No duty on the producers/sellers to disclose.** SB 75 as amended does not increase the duties owed by producers/sellers to inform their customers of the healthful and nonhealthful aspects of the food they sell (such as requiring restaurants to disclose caloric and nutritional information to help patrons understand the specific nutritional value of the foods they are consuming). Instead, the proponents rely solely on the fact that plaintiffs must know nutritional information because it is available from other sources (“generally known”). Many times restaurants advertise menu items as “Atkins-Friendly” or “Heart Healthy” yet by asking for immunity the proponents are not willing to be accountable for these statements.
- **Unclear how it would apply to “other” foods.** Many meal replacement foods and shakes are being marketed as appropriate to individuals seeking a weight change. These foods occupy a curious niche and can include dietary supplements intended to promote weight loss or weight gain. It is unclear whether under the federal law these products are considered a “food” or “dietary supplement”. The safety of the long-term consumption of these substances is unclear and federal regulation of “dietary supplements” is minimal.

KTLA emphasizes that the bill under consideration constitutes a broad immunity clause and should be advanced only with the greatest consideration. Kansas citizens have a constitutional right to access the judicial branch of the government to seek redress, and the Legislature should act to protect this right. Immunity limits access to the courts and as a result is appropriate in only the very narrowest of situations. KTLA supports the civil justice system which includes courts, juries, and attorneys and we believe that our judicial system provides an appropriate check against lawsuits without merit. In 2003 only 6% of the cases filed were tort/personal injury cases, and of those that went to trial the majority (58%) were motor vehicle accidents. Another 17% were medical malpractice. KTLA believes that this is evidence that the Kansas court system is working and the Legislature should exercise extreme caution in enacting immunity provisions.

Thank you for the opportunity to provide you with these policy considerations. KTLA respectfully requests that our amendments be adopted if the bill is passed by the committee.

SENATE BILL No. 75

By Committee on Judiciary

1-21

10 AN ACT concerning civil procedure; relating to immunity from liability
11 for claims relating to weight gain or obesity.

12
13 *Be it enacted by the Legislature of the State of Kansas:*

14 Section 1. (a) This section shall be known and may be cited as the
15 obesity frivolous lawsuit act.

16 (b) Except as provided in subsection (c), a manufacturer, producer,
17 packer, distributor, carrier, holder, seller, marketer, or advertiser of a food
18 (as defined in Section 201 (f) of the federal food, drug and cosmetic act
19 (21 U.S.C. 321 (f)) as of the effective date of this act), or an association
20 of one or more such entities, shall not be subject to civil liability for any
21 claim arising out of weight gain, obesity, a health condition associated
22 with weight gain or obesity, or other generally known condition allegedly
23 caused by or allegedly likely to result from long-term consumption of
24 food.

25 (c) Subsection (b) shall not preclude civil liability where the claim of
26 weight gain, obesity, health condition associated with weight gain or obe-
27 sity, or other generally known condition allegedly caused by or allegedly
28 likely to result from long-term consumption of food is based on:

29 (1) A material violation of an adulteration or misbranding require-
30 ment prescribed by statute or rules and regulations of this state or of the
31 United States and the claimed injury was proximately caused by such
32 violation; or

33 (2) any other material violation of *the federal food, drug and cos-*
34 *metic act as of the effective date of this act* or state law applicable to
35 the manufacturing, marketing, distribution, advertising, labeling or sale
36 of food, provided that such violation is knowing and willful and the
37 claimed injury was proximately caused by such violation.

38 (d) As used in this section:

39 (1) "Claim" means any claim by or on behalf of a natural person, as
40 well as any other claim lawfully asserted by or on behalf of such person.

41 (2) "Generally known condition allegedly caused by or allegedly likely
42 to result from long-term consumption of food" means a condition gen-
43 erally known to result or reasonably likely to result from the cumulative

Amendments Proposed by the
Kansas Trial Lawyers Association
House Judiciary Committee
March 9, 2005

Section 1 (b). Except as provided in subsection (c), a manufacturer, producer, packer, distributor, carrier, holder, seller, marketer, or advertiser of a food (as defined in Section 201 (f) of the federal food, drug and cosmetic act (21 U.S.C. 321 (f)) as of the effective date of this act), or an association of one or more such entities, shall not be subject to civil liability for any claim arising out of weight gain, obesity, or a health condition arising out of weight gain or obesity, resulting from the long-term consumption of food.

Section 1 (d) (2). "Long term consumption of food" means the cumulative effect of consumption of food. For the purposes of this definition only, the term "food" shall not include a food additive (as defined in Section 201(s)) of the federal food, drug and cosmetic act (21 U.S.C. 321(s)) as of the effective date of this act.

h-15

1 effect of consumption, and not from a single instance of consumption of
2 ~~food. For the purposes of this definition only, the term "food" shall~~
3 ~~not include a food additive (as defined in Section 201(s)) of the~~
4 ~~federal food, drug and cosmetic act (21 U.S.C. 321(s)) as of the~~
5 ~~effective date of this act.~~

6 (3) "Knowing and willful" means that: (A) The conduct constituting
7 the violation was committed with the intent to deceive or injure consum-
8 ers or with actual knowledge that such conduct was injurious to consum-
9 ers; and (B) the conduct constituting the violation was not required by
10 state, federal, or local laws, rules and regulations, resolutions or
11 ordinances.

12 (e) In any action exempted under subsection (c), the complaint ini-
13 tiating such action shall state with particularity the following: The statute,
14 rules and regulations or other law of this state or of the United States
15 that was allegedly violated; the facts that are alleged to constitute a ma-
16 terial violation of such statute or rules and regulations, and the facts al-
17 leged to demonstrate that such violation proximately caused actual injury
18 to the plaintiff. In any action exempted under subsection (c) (2), in ad-
19 dition to the foregoing pleading requirements, the complaint initiating
20 such action shall state with particularity facts sufficient to support a rea-
21 sonable inference that ~~the violation was with intent to deceive or injure~~
22 ~~consumers or with the actual knowledge that such violation was injurious~~
23 ~~to consumers~~ **the individual requirements in subsection (c)(2) have**
24 **been satisfied.**

25 (f) In any action exempted under subsection (c), all discovery and
26 other proceedings shall be stayed during the pendency of any motion to
27 dismiss unless the court finds upon the motion of any party that discovery
28 is necessary to preserve evidence or to prevent undue prejudice to that
29 party. During the pendency of any stay of discovery pursuant to this sub-
30 section, unless otherwise ordered by the court, any party to the action
31 with actual notice of the allegations contained in the complaint shall treat
32 all documents, data compilations, including electronically recorded or
33 stored data, and tangible objects that are in the custody or control of such
34 party and that are relevant to the allegations, as if they were the subject
35 of a continuing request for production of documents from an opposing
36 party under the code of civil procedure.

37 (g) The provisions of this section shall apply to all covered claims
38 ~~pending on July 1, 2005 and all claims filed thereafter~~ **filed after the**
39 **effective date of this act**, regardless of when the claim arose.

40 Sec. 2. **The provisions of this act are severable. If any portion**
1 **of this act is declared unconstitutional or the application of any**
2 **part of this act to any person or circumstance is held invalid, the**
3 **remaining portions of the act and their applicability to any person**

- 1 *or circumstance shall remain valid and enforceable.*
- 2 **Sec. 3.** This act shall take effect and be in force from and after its
- 3 publication in the ~~statute book~~ **Kansas register**.

Good morning committee members.

For those of you that do not know me, my name is Debbie Riggs. November 20, 2001 my then 17 year old son, Paul was drinking alcohol at a home where the parents were present.

They chose to turn a blind eye to to the 35-40 kids coming and going with alcohol on their persons.

Leaving the party at 10:00 PM, Paul hit a tree head on and died 3 weeks later, never regaining consciousness. Paul made a choice and it cost him his life.

After 2 years of hard work, April 16, 2004 Kansas Governor, Kathleen Sebelius signed into law KSA-4102, new section 4. Simply put those who host parties for young persons shall be held criminally responsible for not supervising such gatherings and eliminate alcohol consumption by these young persons.

This law became effective July 1, 2004. Numerous police departments and prosecutors have seen dramatic results. The amount of arrests has shed light on how serious this problem has been.

The State of Kansas has attracted a wake up call across this nation, thanks to your hard work and persistence.

Now, we need stricter laws and stiffer deterrents for parents and procurers for this continued tolerance. Our youth are still finding themselves in situations where they or someone they know has been maimed, died, taken someone else's life, or forever only being allowed to finish their young lives in nursing homes.

Don't dismiss the fact the Kansas is on the map combating this serious problem.

We do not want to open a series of frivolous lawsuits or a debate on dram shop.

SB, 114 should be designed as a civil action for the victims of persons convicted of the criminal law. If a person is convicted of the criminal law should they not be subject to civil liability on behalf of the victims in the extreme circumstances I have outlined?

Currently, jail shock time for offenders, misdemeanor charge probation, a fine or mandatory classes, according to judicial discretion are 1 step we have successfully made.

If a parent, homeowner or procreant is found guilty of this crime, should they not be subject to civil liability on behalf of the victims?

It is beyond my comprehension that this is not available in our state, but under current law, there is no civil statute.

Paul's hospital bills exceeded 480, 00.00 dollars. His funeral and interment were 10,000. Dollars. There is no amount of money that can compensate for the loss of a child. Again, I will state there is no the current laws we have allow victims any recovery for out of pocket

money. So, we get a loan, sell possessions, or maybe file bankruptcy to rid ourselves of the debts. Would you be mad? Would you ask your lawmakers why convicted criminal should not be held civilly responsible should they choose not to supervise young persons consuming alcohol?

I'm mad. Our family happened to be fortunate to have health insurance, a small savings account and minor compensation from auto insurance...

Should your child have a party, would you supervise these 13-17 year olds with the prospect of criminal conviction and God forbid, civil action in the event a child is injured? Don't kid yourselves if you think KSA 4102 cured it. There is no cure all. But, if you faced the possibility of losing that which you have worked so hard for would you the pay attention? Face it people, Money rules the minds of those who think that wealth is their ultimate claim in society.

I implore you to search within yourselves. Should SB144 pass thru this committee?

YES! KSA 4102 should not stand alone. Let us go one step further. Show our country that Kansas will continue to battle the problem of underage drinking, on behalf of our youth, our future. Parental approval is escalating and must stop.

Walter Heller states "Rise above principle and do what is right". We can not become what we need to be by remaining what we are.

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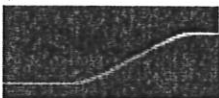
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To: Judiciary committee members

Cc:

Bcc:

Subject: sb144 headed your way

Dear Committee member,

My name is Debbie Riggs and just before turnaround, the Senate passed SB144 and it is headed to you. This bill originated as a type of Dram Shop which was NOT my intent. When I came to Topeka to testify I was shocked at the way the bill was then written and introduced. I testified with numerous Lobbyists in attendance that Dram Shop was not the issue here but rather civil action in the event K.S.A 2004 supp. 21-3610c caused a conviction of the parties vilating the law.

Yes, after much debate with lawyers and the Kansas Trial lawyer association, Kansas has no civil recourse as outlined above. You may know the above law as "Pauls Law" according to the media. I can only ask that you look upon this favorably and get it on the floor for vote. I would be more than happy to testify if you want me to if it will clear up any questions you might have regarding intent. Please feel free to contact me via E-mail or W 913-681-7600, or cell 913-515-5279. I believe this will add to parental decisions on hosting with a larger deterrent than just shock time in jail. I look forward to hearing from you and or seeing you. Thank you for your time, Debbie Riggs

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10-3

LENEXA

Party-host charge

A late-night car crash led Lenexa police to a teenage drinking party and charges against the homeowner for hosting the gathering.

John R. Gannon, 43, was charged Monday in Johnson County District Court with violating the Kansas social-hosting law. The misdemeanor charge carries a jail sentence of up to six months.

Lenexa police were called to the area late Saturday night after a teen driver's car went off the road and ran into the front steps of a house. Officers were told of a party allegedly going on at Gannon's house in the 17800 block of West 83rd Terrace.

After obtaining a search warrant, police entered the home and found about 15 youths inside, including Gannon's 16-year-old daughter, according to Lenexa police.

Several of the teens admitted that they had been drinking, and police said reports would be sent to the juvenile division of the Johnson County District Attorney's Office for review.

Gannon was arrested and taken to the county jail. A judge set a \$1,000 bond.

— Tony Rizzo and Richard Espinoza

Kansas Wine & Spirits
Wholesalers Association

To: House Judiciary Committee
From: R.E. "Tuck" Duncan
RE: SB 144



SB 144 would create a civil cause of action for an aggrieved party against a person who has been convicted of violating the crime of unlawfully hosting minors consuming alcoholic liquor or cereal malt beverages. Aggrieved party means a person who sustains damages as a consequence of the acts or conduct of a minor but does not include the minor or any person aiding or abetting in the procurement of the residence or land used.

We do not believe this new civil cause of action is necessary.

Current law provides in certain circumstances for the recovery from parents for certain acts of children. KSA 38-120 provides: Recovery from parents for malicious or willful acts by certain children; limitations. Any person receiving bodily injury or any person, partnership, corporation, political subdivision or other entity whose property has been damaged or destroyed shall be entitled to recover damages in an appropriate action at law in a court of competent jurisdiction from the parents of any child, living with the parents, who maliciously or willfully injured such person or damaged or destroyed such property while under the age of 18 years. Such recovery shall be limited to the actual damages in an amount not to exceed \$5,000, in addition to taxable court costs, unless the court or jury finds that the malicious or willful act of such minor causing such injury, damage or destruction is the result of parental neglect, in which event the \$5,000 limitation does not apply. Recovery under this section for bodily injury shall be limited to actual medical expenses. History: L. 1959, ch. 203, § 1; L. 1965, ch. 275, § 1; L. 1978, ch. 156, § 1; L. 1995, ch. 257, § 5; July 1.

Also, upon a conviction of K.S.A. 2004 Supp. 21-3610c restitution is available. This new civil cause of action only adds the potential for punitive damages which are uninsurable.

Therefore, we do not believe this bill is needed and we would suggest that there may be other better ways for the legislature to deter underage drinking activities. *Thank you for your attention to these matters.*