Approved: August 3, 2005
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 A.M. on February 2, 2005, in Room 123-S of the Capitol.

All members were present except:
David Haley- excused

Committee staff present:
Jill Wolters, Office of Revisor of Statutes
Helen Pedigo, Office of Revisor of Statutes
Nancy Lister, Committee Secretary

Conferees appearing before the committee:
Ron Hein, R.J. Reynolds
David Remes, Covington & Burling
Derek Crawford, Phillip Morris
Keith Burdick, CFO & Partner, Xcaliber International
Lew Ebert, The Kansas Chamber
Don Patterson, Fisher, Patterson, Sayler & Smith
Jerry Slaughter, KaMMCO
Jim Clark, Kansas Bar Association
Steve Dickerson, Kansas Trial Lawyers Association

Others attending:
See attached list.

Chairman Vratil opened the meeting and called for bill introductions. Shannon Jones, Statewide Independent Living Council of Kansas, requested the introduction of a bill that would amend existing statutes to prohibit discrimination in child custody cases against parents that have disabilities. Senator Betts moved, Senator Bruce seconded, and the motion carried.

Chairman Vratil opened the hearing on **SB 51**.

SB 51 Tobacco settlement agreement; release of funds from escrow

Proponents:
Ron Hein noted he submitted written testimony for the Committee's review and would give his time to speak to Mr. David Remes. (Attachment 1)

David Remes, testifying on behalf of R.J. Reynolds Tobacco Company, stated that the bill was designed to close an unintended loophole in the Tobacco Escrow Statute that Kansas enacted in 1999, as part of the tobacco Master Settlement Agreement (MSA). Mr. Remes provided charts demonstrating the payment gap between what Kansas was projected to receive and what Kansas actually received. (Attachment 2-4) Mr. Remes answered questions from the Committee and explained how the loophole actually worked for non-participating manufacturers.

Derek Crawford, Phillip Morris, stated that this type of bill has been enacted in 39 of 52 Master Settlement Agreement jurisdictions as a result of hard work and support of the National Association of Attorneys General (NAAG). NAAG adopted a resolution urging the enactment of the Allocable Share Amendment to the State Escrow Statutes. Mr. Crawford stated the bill was important in preserving the stability of MSA dollars for Kansas and would have a substantial fiscal impact. (Attachment 5)

Opponent:
Keith Burdick, Xcaliber International, cited a report released by NAAG in 2002, which noted a price increase of $17 per carton by the big companies. As a result, the big companies made it possible for small companies like his to start a business because the small companies do not have a lot of overhead or need high profit margins. Mr. Burdick stated there was a bill introduced in the House (**HB 2946**) last year that would have assessed the same costs as established in the MSA on all cigarettes sold in the state. This bill would have

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

created a truly fair and level playing field but would have had the same consequence as **SB 51** will have, in that it will drive the price of low cost cigarettes up and likely drive sales out of the state. Mr. Burdick stated this legislation is about competition. (Attachment 6)

Chairman Vratil closed the hearing on **SB 51** and opened the hearing on **SB 53**.

SB 53 Expert and opinion testimony

Proponents:
Lew Ebert testified that the Kansas Chamber and members are in support of the bill. Mr. Ebert stated that in a December, 2004, CEO and Business Owner's Poll, 60 percent of the respondents believed that the current litigation system is a deterrent to business growth and 83 percent believed that frivolous lawsuits increase the cost of doing business in the state. Additionally, a November, 2004, Poll of Registered Voters found nearly 65 percent believed the current legal system should be reformed and 61 percent believed that lawsuit reform would contribute to economic growth. (Attachment 7)

Don Patterson stated there are two logical processes- *deductive* and *inductive*- that experts testifying in court use today. Using a *deductive logical process*, the expert identifies a principle which is applied to the facts the expert is purporting, in order to arrive at the conclusion. Under the *Frye* rule, a principle has to be accepted by whatever scientific community that the expert is a member of, and usually applies to one of the sciences: physical, biological or medical. In *Daubert*, the validity of the principle being applied is subject to four factors: has it been tested or is it capable of being tested; has it been peer reviewed and published; what is the rate of error; and has it been accepted in the scientific community. In the *inductive logical process*, there is a testing of a hypothesis where a series of events "A" cause condition "B". The opinion an expert gives reaches a point where it becomes " more likely valid" than "not likely valid". Mr. Patterson stated the problem in Kansas courts is that even though an expert might say a principle is being applied, the expert is not required to identify what it is. Mr. Patterson summarized that the whole purpose of the bill is to stem the tide of unreliable expert testimony, and have a judge do screening first. (Attachment 8)

Jerry Slaughter stated that KaMMCO supports the bill, but requested the Committee add language to the bill so if adopted, it would have no adverse impact on the valildity or effect of the requirements imposed by K.S.A. 60-3412 in medical malpractice liability actions. (Attachment 9) Chairman Vratil clarified with Mr. Slaughter that in the bill on page 2, line 2, after "subsection (b) of K.S.A. 60-456" a comma should be added, the word "and" should be stricken, and the words "and K.S.A. 60-3412 as applicable" should be added.

Written testimony was submitted by Leslie Kaufman, Kansas Cooperative Council and Mary Jane Stankiewicz, Kansas Grain and Feed Association and the Kansas Agribusiness Retailers Association. (Attachments 10 & 11)

Opponents:
Jim Clark stated that the Kansas Bar Association is opposed to the bill. Kansas rules of evidence, although located within the code of civil procedure, are applicable to criminal, domestic and juvenile cases as well. Any extensive revision of the law of evidence should be subjected to further study before any legislative action is taken. (Attachment 12)

Steve Dickerson stated that the Kansas Trial Lawyers Association opposes the bill. The present Kansas rule insures that scientific evidence meets an acceptable level of reliability without placing an impossible burden on state trial judges and state judicial resources. Before any action is taken to adopt the bill, Mr. Dickerson encouraged the Committee to refer the bill to the Kansas Judicial Council, or a like-entity, for study and recommendation. (Attachment 13)

Chairman Vratil adjourned the meeting at 10:30 A.M. The next meeting is scheduled for February 3, 2005.

Continue to route

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2/2/05

NAME	REPRESENTING
[illegible]	[illegible]
Catherine Walberg	KAMMCO
Angela Adams	KAMMCO
[illegible]	KNS
Traci Doering	KAMMCO
[illegible]	OJA
Jeff Bottenberg	State Farm
Steve Dickerson	KTLA
[illegible]	KTLA
Kevin Baker	KTLA
JIM CLARK	KBA
[illegible]	Xcaliber
Keith Burdick	Xcaliber Int'l
[illegible]	KS AG
Jessica Bourgeois	KGC
Ron Hein	RJRT
[illegible]	RJRT
KEVIN WALKER	Heart Ass'n
JOHN C. BOTTENBERG	Philip Morris

J.P. SMALL
Paula Kafka

KOCH INDUSTRIES, INC.
Intern (Wysong)

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2-2-05

NAME	REPRESENTING
Mary Jane Stankiewicz	KGFA/ KARA
Scott Schneider	City of Wichita

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Ronald R. Hein
Attorney-at-Law
Email: rhein@heinlaw.com

Testimony re: SB 51 Allocable Share Legislation
Senate Judiciary Committee
Presented by Ronald R. Hein
on behalf of
R. J. Reynolds Tobacco Company
February 2, 2005

Mr. Chairman, Members of the Committee:

My name is Ron Hein, and I am legislative counsel for R. J. Reynolds Tobacco Company.

R. J. Reynolds supports SB 51. When the tobacco companies entered into the Master Settlement Agreement (MSA) with the 46 states involved in the litigation, a provision was written into the agreement which was designed to insure that the original participating manufacturers (OPMs) who had entered into the agreement would make payments to each of the states involved in the settlement pursuant to the percentage of sales in that state relative to nationwide sales of cigarettes. (The Kansas share is less than 0.9% of nationwide sales.)

Subsequent to the MSA, numerous states, including Kansas, enacted legislation to implement an escrow payment system for tobacco companies which did not enter into the original Master Settlement Agreement, or did not sign on as subsequent participating manufacturers (SPMs). The tobacco companies who have not signed on to the MSA are referred to as non-participating manufacturers (NPMs).

NPMs are using a loophole in the allocable share language of the escrow statute passed by this and other states subsequent to the MSA, by marketing cigarettes in a small number of states, as opposed to nationwide. The net effect of the utilization of this loophole has been to permit NPMs to pay a small fraction of the escrow payment they should be making to a particular state by applying the allocable share percentage applicable to that state even though the percentage of sales of that NPM in that specific state are considerably higher.

Let me give an example. If an NPM produces and distributes half of the cigarettes in Kansas, and half in Missouri, they should have the amount of escrow determined for their total sales, and then pay half of that to Kansas and half to Missouri. They might make that payment, and then use the "allocable share" loophole to seek a refund. Since the Kansas "allocable share" is less than 0.9% of nationwide sales, the NPM will seek a rebate of 99%+ of their escrow payment, even though 50% of their sales are in Kansas.

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Attachment 1

The net effect is that the states are having less payments put into escrow than they should from such NPMs. This also defeats the original intent of the MSA and the original intent of the post-MSA legislation, by permitting NPMs to market their cigarettes at a lower price. This results in the states having less money in escrow, which funds are intended to be used for insuring performance by these NPMs in the event of claims against the states for damages resulting from the acts of the NPMs.

Another effect is that NPMs sell their cigarettes at a cheaper price since they are not making comparable escrow payments. As a result, the market share for NPMs, has increased, thus reducing payments to the states, including Kansas, under the MSA.

The National Association of Attorneys General (NAAG) has recommended states adopt amendments to the post-MSA legislation, using the language in this bill, to close this allocable share loophole. So far 37 of the 46 states who are signatories to the MSA have enacted legislation to close the allocable share loophole, as SB 51 would do.

Some NPMs, who oppose this legislation, have suggested another approach. Their suggestion has numerous flaws, including possibly jeopardizing the MSA and the funds from the MSA for Kansas.

We respectfully request that this committee close this loophole and approve SB 51.

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

TESTIMONY IN SUPPORT OF SB 51: ALLOCABLE SHARE LEGISLATION

David H. Remes
Covington & Burling

on behalf of
R. J. Reynolds Tobacco Company

February 2, 2005

Good morning. My name is David H. Remes. I'm outside counsel to R.J. Reynolds, and I'm here to testify in support of SB 51, the Allocable Share bill.

SB 51 is designed to close an unintended loophole in the Tobacco Escrow Statute that Kansas enacted in 1999 as part of the tobacco Master Settlement Agreement. This loophole enables non-participating manufacturers to promote smoking among children by selling their cigarettes super-cheap, and the loophole is also costing Kansas million dollars a year in reduced tobacco settlement payments.

All 46 states that joined the MSA have enacted the same Tobacco Escrow Statute. Almost all of them have also enacted Allocable Share legislation identical to SB 51. Kansas is one of a handful of states that have not.

The loophole that SB 51 would close lets cigarette manufacturers that do not participate in the Master Settlement Agreement "game the system" and frustrate the intent of the Escrow Statute by selling super-cheap cigarettes.

- Public health authorities say that children are especially price-sensitive when it comes to smoking. If that is correct, then the super-cheap prices the loophole lets NPMs charge promotes smoking among children.

- Super-cheap pricing also allows NPMs to siphon sales from the participating manufacturers. This reduces the state's tobacco settlement payments, because those payments are tied to participating manufacturer sales.

In 1998, when the MSA was signed, NPM sales accounted for **0.5 percent** of the market. Today, they account for **10 percent** of the market, if not more. And the growth of the NPMs relates directly to reduced tobacco settlement payments.

Each year since 2000, Kansas' tobacco settlement payments have been millions of dollars less than projected in 1998, when the MSA was signed. RJR estimates that NPM sales reduced Kansas' tobacco settlement payment by **$6.0 million** in 2004, **$5.5 million** in 2003, and **$5.0 million** in 2002. These are amounts that no state wants to lose, but they are now lost forever. SB 51 will help stanch the flow going forward.

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Attachment 2

Background Detail

The Tobacco Escrow Statute requires NPMs to place funds into escrow each year to assure each MSA state a source of recovery if it should sue them, as the states sued the leading manufacturers in the 1990s. The states brought those suits to recover costs associated with treating smoking-related illnesses, according to NAAG, and otherwise to further the states public health policies, as stated in the MSA.

Under the Tobacco Escrow Statute, each NPM is required to create an escrow account for each MSA state where its cigarettes are sold. The intent of the states when enacting the statute was that each NPM would place ***and hold*** in escrow nationwide the total amount it would have paid the states if it had joined the MSA. This is money that belongs to the NPM, not the state, unless and until the state sues the NPM and recovers.

NPM non-compliance with the Escrow Statute, however, is rampant. Industry analysts report that nationwide over half the NPMs do not comply. NAAG estimates that the MSA states have been forced to bring more than 1,000 suits against NPMs for non-compliance.

NPMs are also exploiting the loophole in the Escrow Statute that SB 51 would close. This loophole allows an NPM to "game the system" by concentrating its sales in one or just a few states. An NPM that does so can get back most of the funds it has placed in escrow. This defeats the purpose of the Escrow Statute.

By using the loophole to get most of its escrow deposit back, an NPM can sell its cigarettes at prices far below the prices of cigarettes of manufacturers that have joined the MSA. Thus the NPMs can undermine the policy of the state to reduce smoking by children and can reduce the state's tobacco settlement payments by millions of dollars a year.

SB 51

SB 51 would close the unintended loophole in the Tobacco Escrow Statute. It would ensure that an NPM not only ***place*** into escrow the amount it would have paid the states if the NPM had joined the MSA, but also ***hold*** that amount in escrow, which was the states' intent in enacting the Escrow Statute. SB 51 would thus ensure that the Escrow Statute works as intended, and thereby protect the state and state policies.

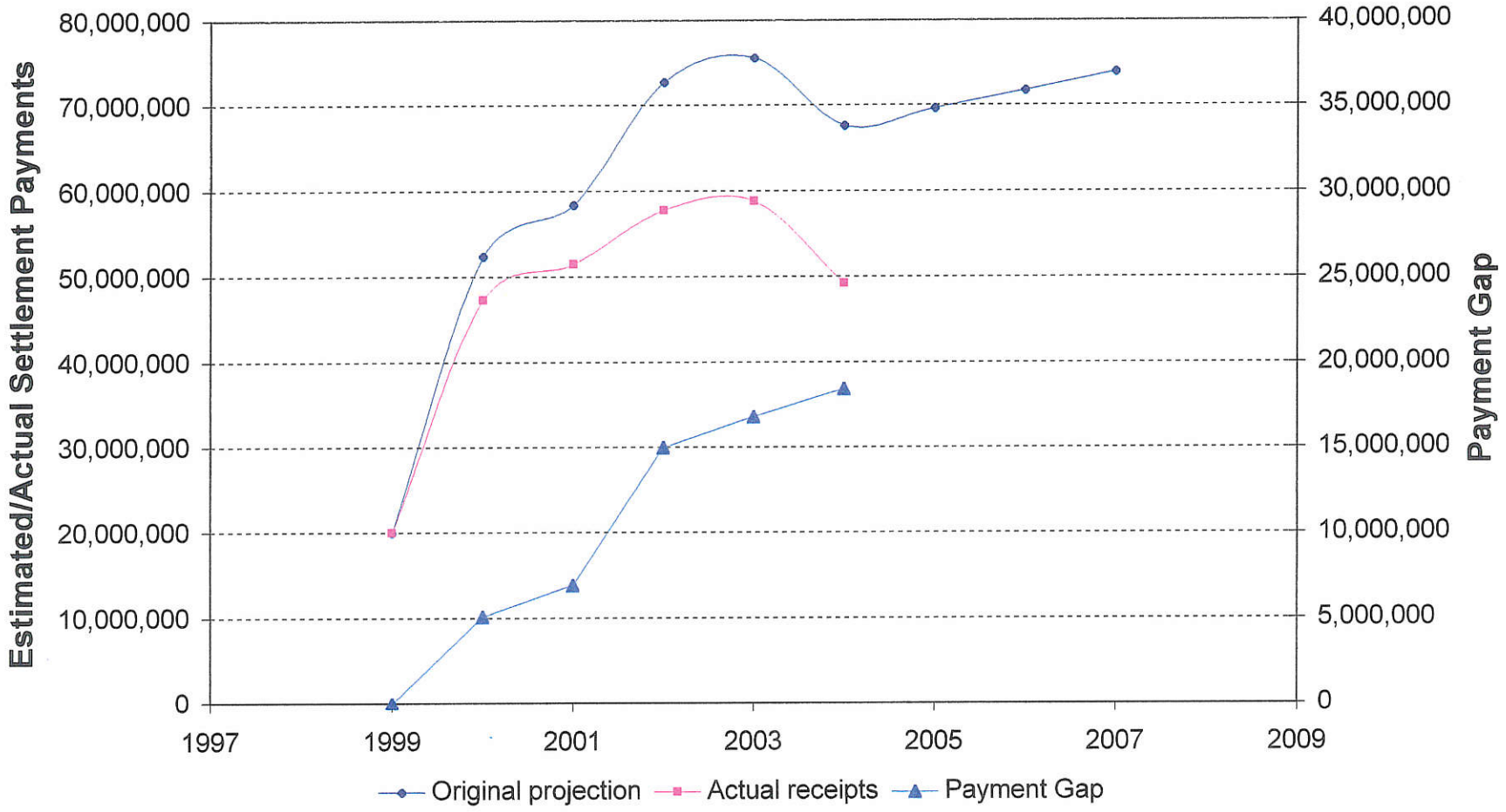
For these reasons, we urge you to approve SB 51.

Thank you.

Submitted by
David Remes

Senate Judiciary
2-2-05
Attachment 3

MSA Original Schedule of Payments vs. Actual Receipts
State of Kansas



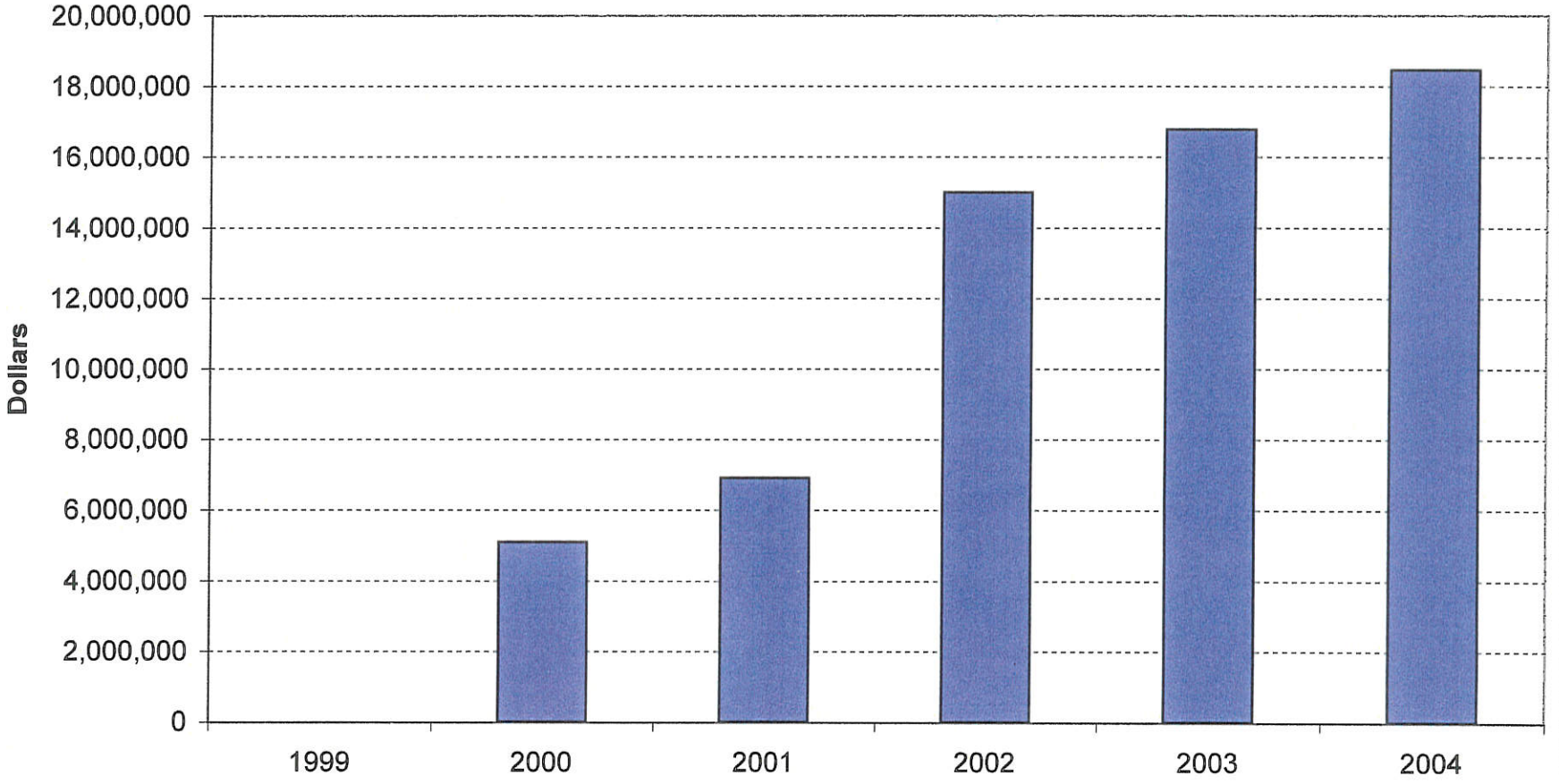
Source: Settlement Agreement, Industry payment data

Submitted by
DAVID REMES

Senate Judiciary
2-2-05
Attachment 4

Master Settlement Agreement: Payment Gap

State of Kansas



Source: Settlement Agreement, Industry payment data

TO: Member of Senate Judiciary Committee
FROM: Derek Crawford, Government Affairs, Altria
RE: Support for Senate Bill 51
DATE: February 2, 2005

Mr. Chairman and members of the Senate Judiciary Committee, thank you for allowing me the opportunity to testify in support of Senate Bill 51 which closes an unintended loophole in the Master Settlement Agreement (MSA).

This measure is one which has been enacted in 39 of the 52 MSA jurisdictions thanks to the hard work and support of the National Association of Attorneys General. As the white paper attachment to my testimony states, the NAAG has adopted a resolution urging the enactment of the so-called Allocable Share Amendment (SB 51 in Kansas) to the State Escrow Statutes.

We appreciate the time and interest the Kansas Legislature has invested in this matter and others that have occurred in the MSA since its inception. We recognize the tight fiscal situation facing Kansas and other states and see this measure as an important one in preserving the stability of MSA dollars to the state.

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Attachment 5

THE ALLOCABLE SHARE AMENDMENT

The National Association of Attorneys General has adopted a resolution urging the enactment of the so-called Allocable Share Amendment to the State Escrow Statutes. This legislation, which has already been enacted in 39 of the 52 MSA jurisdictions, is essential to permit the MSA and the Escrow Statutes to function as intended. This legislation is expected to be considered in 2005 in all of the jurisdictions that have not yet adopted it and, in accordance with the Resolution, NAAG urges its enactment.

The issue: The tobacco Master Settlement Agreement of November 23, 1998 ("MSA") settled litigation brought by the States against the major tobacco companies. It imposed important public health restrictions on the advertising, promotion and marketing of cigarettes by Participating Manufacturers and it required Participating Manufacturers to make annual payments to the States to compensate the States for a portion of the health costs imposed on the States by cigarette smoking. The fundamental principle of the MSA was that cigarette companies should bear at least a portion of the costs imposed on the States by the sale of their products.

The States recognized that these public health restrictions and payment obligations, imposed on Participating Manufacturers, would create unfair competitive advantages for companies that did not join the MSA and hence were not subject to the public health requirements and did not make payments to the States to compensate them for health care costs imposed by their cigarettes. Accordingly, each of the States enacted an Escrow Statute requiring companies that declined to join the MSA to establish and fund an escrow account. The required per-cigarette escrow deposit is in an amount approximately equal to the per-cigarette annual payment of a Participating Manufacturer, and the deposits are held in escrow for 25 years. The escrow statute was intended to do two things:

- to provide a resource to ensure that a company could not simply impose the costs attributable to smoking on the States and become judgment-proof before the State could obtain a judgment in compensation for the health care costs imposed by that company, and;

-to prevent companies that do not join the MSA from enjoying an unfair competitive advantage over companies that were making payments to the States and observing the public health restrictions of the MSA.

The problem: As drafted and originally enacted by the MSA States, the Escrow Statutes contained a loophole that, under certain circumstances, virtually nullifies the purposes for which they were designed. Although the Statutes required Non-Participating Manufacturers ("NPMs") to make per-cigarette escrow deposits approximately equal to the per-cigarette MSA payment amounts of Participating Manufacturers, the loophole permitted those NPMs that concentrate their sales in only a few States to receive a release (the "Allocable Share Release") of virtually everything they deposited within a few days. Thus, the loophole permitted NPMs to avoid keeping

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any significant amount of money in escrow. As a result, the States did not have security for a claim against such companies and such companies enjoyed a windfall opportunity to increase their sales at the expense of the States, the companies participating in the MSA and those NPMs that do not concentrate their sales in only a few States.

As such companies have increased their sales, the number of cigarettes sold outside the public health restrictions of the MSA has sharply increased. Cheap cigarettes, attractive to youth smokers, have flooded the market, undercutting the essential purposes of the MSA. In 1997, the number of cigarettes sold nationwide by companies that did not join the MSA was less than 2 billion. In 2003, such companies sold 32.7 billion cigarettes. Moreover, the States received no MSA payments for cigarettes sold by companies that did not join the MSA. In 2003, the States would have received over $650 million more had those 32.7 billion cigarettes been sold by companies subject to the MSA.

The solution: Once it became clear that the Escrow Statutes contained a loophole that nullified their basic purpose, the States moved to close the loophole by developing and enacting legislation, the Allocable Share Amendment. The Allocable Share Amendment does not affect the amount an NPM has to place into escrow, but it prevents such companies from enjoying the windfall releases they previously received. Under the statute as amended, NPMs are required to put into escrow, and keep in escrow, the same amount per-cigarette that Participating Manufacturers pay to the States. NPMs retain an advantage in that they get the interest on the funds in escrow on a current basis and get a return of the funds if the State does not settle with them or obtain a judgment against them within twenty-five years.

Status of the legislation: The legislation has passed in 39 of the 52 MSA jurisdictions. Several of the jurisdictions in which it has not yet passed are those in which NPMs have most successfully taken advantage of the loophole and in which the beneficiaries of the loophole have the greatest political influence.

Talking Points

The loophole undercuts the public health purposes of the MSA.

Companies that do not join the MSA are not bound by the public health restrictions on their advertising, marketing, and promotion. Many of them engage in promotional practices that would be prohibited if they were part of the MSA. The number of cigarettes that are sold outside of such restrictions has grown by 1700% since the MSA was signed, largely as a result of this loophole.

The amendment will have a positive impact on public health.

Studies have repeatedly demonstrated that kids' demand for cigarettes is more price-sensitive than adults'. By ensuring that NPM cigarette prices include some of the cost burden imposed on the State, this amendment will help discourage another generation of minors from becoming addicted to cigarettes. Moreover, the amendment

will preserve the public health gains of the MSA by ensuring that NPMs – who are not subject to the marketing and advertising restrictions in the MSA – are not provided an unfair competitive advantage.

The loophole costs the States hundreds of millions of dollars every year.

Enactment of the proposed change to the Model Act is necessary to avoid hundreds of millions of dollars in losses to the States' tobacco payments under the MSA. NPMs that get a windfall because of the loophole make no payments to the States and their sales displace sales by companies that do make such payments. Moreover, NPMs that get a windfall because of the loophole do not have to comply with the public health requirements of the MSA. The loophole gives companies an incentive to stay out of the MSA and it deprives the States of hundreds of millions of dollars in payments.

The loophole deprives the States of the protection the Escrow was designed to provide and disadvantages Participating Manufacturers.

Participating Manufacturers under the MSA make payments to the States based on their nationwide sales. For 2004, the payment is about 2 cents per cigarette. The States share in the payments in accordance with fixed percentages, known as Allocable Shares.

By contrast, under each State's Model Statute, NPMs make escrow deposits *only* on their cigarettes sold in that State. The deposits are designed to be the same as the payments that would be made on an equivalent number of cigarettes under the MSA if the NPM had become a Participating Manufacturer. The loophole that this legislation seeks to close gives some NPMs (those that concentrate their sales in only a few States) an immediate release of nearly all of those deposits. Ironically, the more concentrated an NPM's sales are in a particular State, the greater the release to that NPM, and the fewer the funds that are available to protect the State.

Most States have Allocable Shares of two percent or less. Under the current law, consider an NPM that sells 100 million cigarettes—all of them in a state whose allocable share of MSA payments is two percent. Under the current statute, that NPM would be entitled to an immediate release of all but two percent of its escrow deposit. Under this example, the NPM would put $2 million in escrow, but it would get back $1.96 million immediately, leaving only $40,000 in escrow. This is not enough to ensure that the State can recover the full and appropriate amount if it should bring an action for the damage done by the cigarettes the NPM sold there. Moreover, it gives the NPM an unfair advantage over Participating Manufacturers and other NPMs who sell the identical number of cigarettes in that State. Such manufacturers must pay the full $$2 million to the States.

As a result the States lose money and are left unprotected, the NPM gets an unfair advantage, and companies have a disincentive to join the MSA. Instead of creating a "level playing field," NPMs are rewarded for staying out.

The problem is real and not theoretical.

The problem is very real. In many States, NPMs received back nearly everything they put into escrow. For example, in 2003 NPMs sold 2.3 billion cigarettes in Kentucky, which has an Allocable Share of 1.76%. Thirty-one NPMs made escrow deposits totaling $40,140,496, but of this amount $35,676,224.59 was released from escrow, pursuant to the release provisions of the Escrow Statute, leaving only $4,496,691, about 11.2%, on deposit as potential compensation for the Commonwealth of Kentucky. Thus, the amount left in escrow to protect Kentucky in the event it brings an action against an NPM for the health care costs imposed by its cigarettes in Kentucky is far less than what was intended to be in escrow. Kentucky was left unprotected and the companies that enjoyed the releases gained a large competitive advantage over other companies. To deal with this problem, Kentucky passed the Allocable Share Amendment.

The allocable share loophole was not intended by the drafters of the MSA.

The drafters of the MSA did not intend to create an escrow obligation that was meaningless. Their intention was just to ensure that NPMs would not have to pay more than Participating Manufacturers. They did not appreciate how the language they used did something different. Nothing in the history of the MSA or the escrow statutes indicates an intention to create a privileged class of NPMs essentially immune from any meaningful escrow deposit obligation.

There was no intention to provide special protection for "regional" companies.

Some NPMs claim they are somehow entitled to a special benefit because they chose to be "regional" companies. The drafters of the MSA had no intention to give a special exemption to "regional" NPMs. Their intention was to treat all NPMs equally, not to prefer some over others. So-called "regional" NPMs that concentrate their sales in a few States benefit the most from the allocable share loophole. They keep less in escrow than companies that sell the same total number of cigarettes but spread them across more States.

Regional NPMs don't benefit the regions in which they sell.

"Regional" NPMs impose disproportionate harm on the States they sell in. The more cigarettes they sell in those States, the more harm they impose but, perversely, the more they concentrate their sales in those States less they have to keep in escrow because of the Allocable Share Loophole. The Allocable Share Loophole creates exactly the wrong incentive: it encourages companies to concentrate their sales, impose health care costs on one or two States, and leave nothing in escrow to protect those States against the health care costs they have dumped on the States.

The amendment protects NPMs from ever having to put in escrow more than what Participating Manufacturers pay under the MSA.

The amendment ensures that an NPM would never have to keep in escrow any more than the amount a Participating Manufacturer would have to pay under the MSA if it sold the same number of cigarettes. In other words, in the above example where the NPM sells 100 million cigarettes in a State, the NPM under the amendment would receive a release if its escrow deposit exceeded what would have been its MSA payment on these 100 million cigarettes.

The loophole disadvantages many small companies.

NPMs argue that the loophole is necessary to protect small companies, but in fact it hurts small cigarette companies. There are almost fifty companies that are Participating Manufacturers. Most of them are small companies. Many of the NPMs are much larger than most Participating Manufacturers. Dozens of small companies support this bill. The loophole is particularly disadvantageous to small companies that join the MSA, choosing to comply with the public health restrictions in the MSA and to make payments to the States.

It is not unfair to insist that all companies that sell cigarettes should bear a portion of the costs their cigarettes impose on the States.

Some NPMs claim that the Escrow Statute is unfair because, unlike the companies that were originally sued by the States, the NPMs "did nothing wrong" – i.e. they did not deceive the public about the health consequences of their products. The truth is that any cigarette, regardless of manufacturer, will have negative health consequences and costs, some of which are eventually borne by the States. Only five of the nearly 50 Participating Manufacturers in the MSA were sued by the States. Nevertheless, all of the Participating Manufacturers have agreed to abide by the public health restrictions in the MSA and to compensate the States for a portion of the health care costs their products impose on the States. It is wrong to let certain NPMs, whose products are equally addictive and deadly, enjoy a windfall and endanger the public health by taking advantage of this loophole.

The Allocable Share Amendment is legally valid.

The constitutionality of the State Escrow Statute has been upheld by the courts. For example, in Star Scientific Inc. v. Beales, 278 F.3d 339 (4th Cir.), cert. denied, 123 S.Ct. 93 (2002), the Fourth Circuit Court of Appeals held that Virginia's statute was constitutional under the Equal Protection, Due Process, and Commerce Clauses. In one case, a court in New York has issued a preliminary injunction against New York's allocable share amendment. The State did not have an opportunity to present evidence on why the amendment was necessary. The court erroneously believed that the State was acting simply to protect the major manufacturers. When that case is actually tried and the facts are presented to the court, the State fully expects the amendment to be upheld.

The alleged difference in tax deductibility of MSA payments versus Escrow payments does not justify keeping the Allocable Share Loophole.

NPMs who want to keep the loophole in place argue that if they have to make real Escrow payments they will be disadvantaged because they won't be able to deduct them for Federal income tax purposes, whereas Participating Manufacturers can deduct the payments they make under the MSA. First of all, it isn't true that NPMs cannot enjoy the benefits of tax deductibility for escrow payments. Some NPMs have found ways to structure their transactions to provide for deductibility. But if the escrow deposits are found not to be deductible, it is because, unlike the Participating Manufacturers, who make actual payments to the States and irrevocably lose the money they pay, the NPMs retain the right to get their escrow deposits back and earn interest while the money is in escrow. Even if there is a distinction in federal income tax deductibility, this difference does not justify retaining the Allocable Share Loophole.

Passing the amendment will NOT jeopardize a State's MSA payments.

Companies that want to maintain an unfair competitive advantage may try to scare States with misinformation so that they can continue to profit by exploiting the loophole in the current statute. In fact, the only parties that could make such a challenge are parties to the MSA, and those of them that make the preponderance of the payments have already signed letters of assurance that the amendment will not affect the salutary effect and the status of the Model Escrow Statutes. States that enact the amendment will simply be ensuring that NPMs who sell in their States make escrow deposits as originally intended.

The amendment will have a positive fiscal impact on every State.

The amendment costs nothing to implement and will lessen the administrative burden on State Attorneys General and Revenue offices. In addition, once a critical mass of states enacts the legislation, the decline in MSA revenue due to the loophole in the Escrow Statutes will stop and States should recapture some of the MSA revenue that has been lost.

STATES IN WHICH THE ALLOCABLE SHARE AMENDMENT IS EXPECTED TO BE CONSIDERED IN 2005

Arkansas
Kansas
Missouri
Nevada
New Jersey
North Carolina
North Dakota
South Carolina
Virginia

American Samoa
District of Columbia
Guam
Virgin Islands

TESTIMONY BY KEITH BURDICK
BEFORE THE SENATE JUDICIARY COMMITTEE
ON BEHALF OF XCALIBER INTERNATIONAL
REGARDING SENATE BILL 51

FEBRUARY 2, 2005

Good Morning Mr. Chairman and members of the committee:

My name is Keith Burdick and I am the Chief Financial Officer and a Partner of Xcaliber International, LTD., LLC. The company is located in Pryor, Oklahoma and we manufacture tobacco products. We began operations in the fall of 2001 and sold our first product in the spring of 2002. We are a non participating manufacturer (NPM) under the terms of the Master Settlement Agreement (MSA). We were not in business when the MSA was signed in November of 1998.

I appear before you today in opposition to SB 51.

SB 51 would be a major change to the original qualifying Escrow Statute (exhibit T of the MSA). This change would require NPMs to deposit monies above and beyond the allocable share amount that the State of Kansas agreed to under the MSA. Kansas Allocable share amount is .8336712% of the national total. The allocable share amount is what all other participating manufacturers pay and what non-participating manufacturer are paying under the original Escrow Statute. (We pay exactly the same percentage to Kansas as the participating manufacturers pay, but we pay into an Escrow account. That is the only difference.)

Legislation like SB 51 has passed in many other states which will be mentioned by the proponents. Big tobacco and National Association of Attorneys General (NAAG) will also tell you that there is a "loophole "that needs to be closed. The only "loophole" I see is that the original Escrow Statute allows us, NPMs, the freedom to price our products how we want versus being in the agreement and having to "price-fix" along with the other "output cartel" members *. Lawsuits have been filed in 6 of those states with 11 more state lawsuits is the "works". In two of those states (New York and Oklahoma) courts have issued temporary retraining orders enjoining the implementation of the new legislation. NPMs have successfully argued that this legislation causes irreparable harm and is in violation of the Sherman Act (anti-trust). I encourage you to not pass SB 51 until the courts have concluded its assessments on this issue. It would keep Kansas from having to spend the time and money to defend a lawsuit.

Currently there are remedies available to and are being used effectively by the Kansas Attorney General against an NPM should it fail to make proper payment to escrow or maintain a sufficient level of dollars in escrow. The Kansas Attorney General can declare a NPM product as contraband and force the product be pulled from the shelf. The same penalties and remedies do NOT exist in this state should an OPM or SPM not make its MSA payments.

Allocable share legislation is unnecessary and will only cause the price of 4th tier cigarettes to increase, which is exactly what big tobacco wants. It will not produce additional revenues to the state and will likely have the unintended consequence of driving cigarette purchases across state lines, which will hurt revenue for the State of Kansas.

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HB 2946 was introduced last year in the House Appropriations Committee. I testified on that piece of legislation. It would have assessed the same costs as established in the MSA on all cigarettes sold in the state regardless whether those cigarettes were manufactured by an OPM, SPM or NPM. Money from the sale of NPM products would go to the state rather than into escrow. OPMs and SPMs would have been given a credit or offset for money paid into the MSA. This type of legislation would have created a truly fair and level playing field. The revenue impact was estimated to be between $13-$17 million. It would, however, have the same consequence as SB 51 in that it would drive the price of a low cost cigarette up and likely drive sales out of the state. The costs to big tobacco was ZERO if HB 2946 would have had passed. This type of legislation would have treated all manufacturers equally and fairly. Big tobacco did not support that legislative proposal.

In summary, I want to emphasize the following points relative to this legislation;

1) It was not part of the original MSA provisions, but has been added to try a run companies like mine out of business.

2) Some SPMs pay nothing or very little to Kansas.

3) It puts no additional dollars into state funds.

4) It forces companies like mine to put more money in escrow than manufacturers that are a party to the agreement, even though we have not been in violation or been accused of wrongful conduct that was alleged in the suit leading up to the MSA settlement.

5) It creates a very "unlevel" playing field, to the benefit of big tobacco.

6) There are remedies available and are being used by your State if an NPM defaults on their escrow payment unlike in the case of an OPM or SPM where the State does not have recourse if an OPM or a SPM defaults on its payment to MSA.

7) The resultant increase in price caused by SB 51 will likely have the unintended consequence of driving sales of low price cigarettes across state lines or others means of purchase.

8) It will result in litigation similar to what has occurred in New York, Oklahoma and four other States.

I request that you not pass SB 51.

* *see NY lawsuit "Freedom Holdings Vs NY AG Spitzer"*

Legislative Testimony

SB 53

Wednesday, February 2, 2005

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

THE KANSAS CHAMBER

The Force for Business

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Chairman Vratil and members of the Committee;

The Kansas Chamber and its over 10,000 members support passage of SB 53. Last session, the Kansas Chamber advocated for class action reform that conformed Kansas law with Federal Rule of Evidence 23 concerning class action lawsuits. The changes requested in SB 53 are similar, conforming Kansas law to federal law pertaining to the admissibility of technical and scientific testimony.

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.

SB 53 changes the standard by which expert evidence is allowed in the court room. The federal "Daubert" standard, which has been in place for over 10 years and imposes a more stringent standard, requiring the judge to be the gatekeeper of expert evidence, making the determination as to whether the evidence should or should not be admitted.

The federal rule was adopted to weed out so-called "junk science" from federal courtrooms. Allowing so-called "junk-science" in the courtroom has had major nationwide impact. Contrary to the findings of previous court decisions, it is now an accepted scientific fact that silicone breast implants do not cause systematic disease and there is no connection between the drug Bendectin and birth defects. Nevertheless, juries awarded plaintiff's millions of dollars in award settlements based on the expert testimony presented at these trials.

The perception that Kansas is lagging behind the rest of the country by implementing an expert evidence admissibility standard patterned after Rule 702 is correct. Over 30 states have either adopted through the courts the federal "Daubert" standard or have enacted Federal Rule of Evidence 702. I have attached a chart that shows that there is a clear trend toward adoption of an expert evidence admissibility standard that is patterned after Daubert and Rule 702. Kansas has a progressive legal system, but this is an example of where more can be done.

We urge this committee to recommend favorably SB 53. Thank you for your time and I will be happy to answer any questions.

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 commerce and trade organizations. The Chamber represents small, medium and large employers all across Kansa

Senate Judiciary
2-2-05
Attachment 7

STATES WHOSE HIGHEST COURT HAS ADOPTED DAUBERT STANDARDS OR SIMILAR FACTORS:

State	**Citation**
Alaska	State v. Coon, 974 P.2d 386 (Alaska 1999)
Arkansas	Prater v. State, 820 S.W.2d 429 (Ark. 1991)(adopting similar factors prior to Daubert)
Colorado	People v. Shreck, 22 P.3d 68 (Colo. 2001) (declining to mandate a list of factors, but using Daubert factors as illustration of factors to consider for reliability determination)
Connecticut*	State v. Porter, 698 A.2d 739 (Conn. 1997)
Delaware	Nelson v. State, 628 A.2d 69 (Del. 1993)(adopting similar factors)
Hawaii	State v. Vliet, 19 P.3d 42 (Haw. 2001)(citing Daubert factors with favor although declining to specifically adopt Daubert)
Indiana	Steward v. State, 652 N.E.2d 490 (Ind. 1995)(finding Daubert helpful but not controlling)
Iowa	Hutchison v. American Family Mutual Ins. Co., 514 N.W.2d 882 (Iowa 1994)(stating references to Daubert fit with broad interpretation of Iowa Rule 702)
Kentucky	Mitchell v. Commonwealth, 908 S.W.2d 100 (Ky. 1995)
Louisiana	Independent Fire Ins. Co. v. Sunbeam Corp., 755 So. 2d 226 (La. 2000)
Maine	State v. MacDonald, 718 A.2d 195, 198-9 (Me. 1998)(citing Daubert with approval)
Massachusetts	Commonwealth v. Lanigan, 641 N.E.2d 1342 (Mass. 1994)
Michigan	State v. Davis, 348 N.W.2d 269 (Mich. 1955); see also Anton v. State Farm Mut. Auto., 607 N.W.2d 123 (Mich. Ct. App. 1999)
Mississippi	Mississippi Transp. Com'n v. McLemore, 863 So. 2d 31 (Miss. 2003)
Missouri	State Bd. of Registration for Healing Arts v. McDonagh, 123 S.W.3d 146 (Mo. 2003)(standard set out in Missouri's evidence statute "is very similar to that initially adopted by

State	Citation
	the federal courts in *Daubert* and set out in FRE 702")
Montana	Barmeyer v. Montana Power Co., 657 P.2d 594 (Mont. 1983)(adopting similar factors prior to Daubert)
Nebraska	Schafersman v. Agland Coop, 631 N.W.2d 862 (Neb. 2001)
New Hampshire	State v. Cavaliere, 663 A.2d 96 (N.H. 1995); State v. Hungerford, 697 A.2d 916 (N.H. 1997)
New Mexico	State v. Alberico, 861 P.2d 192 (N.M. 1993)
North Carolina	State v. Goode, 461 S.E.2d 631 (N.C. 1995) (citing Daubert and using Daubert-like factors to determine reliability); but see Howerton v. Arai Helmet, 597 S.E.2d 676, 690 (stating that North Carolina's "approach is decidedly less mechanistic and rigorous than the 'exacting standards of reliability' demanded by the federal approach")
Ohio	Miller v. Bike Athletic Co., 687 N.E.2d 735, 744 (Ohio 1998)
Oklahoma	Christian v. Gray, 65 P.3d 591 (Okla. 2003)
Oregon	State v. O'Key, 899 P.2d 663 (Or. 1995)
Rhode Island	DiPetrillo v. Dow Chemical Co., 729 A.2d 677, 686 (R.I. 1999)
South Carolina	State v. Jones, 259 S.E.2d 120 (S.C. 1974) (adopting similar factors prior to Daubert)
South Dakota	State v. Hofer, 512 N.W.2d 482 (S.D. 1994)
Tennessee	McDaniel v. CSX Transp., Inc., 955 S.W.2d 257 (Tenn. 1997)(adopting similar factors)
Texas	E.I. duPont de Nemours and Company, Inc. v. Robinson, 923 S.W.2d 549 (Tex. 1996)(adopting Daubert-like factors from Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992))
Utah	State v. Crosby, 927 P.2d 638 (Utah 1996)(adopting Daubert-like factors from State v. Rimmasch, 775 P.2d 388 (Utah 1989))
Vermont	State v. Brooks, 643 A.2d 226 (Vt. 1993)
West Virginia	Wilt v. Buracker, 443 S.E.2d 196 (W. Va. 1993)

State	Citation
Wyoming	Springfield v. State, 860 P.2d 435 (Wyo. 1993)

* States marked with an asterisk (*) have adopted Daubert or similar factors in the absence of a state rule modeled after Federal Rule 702.

Submitted by
DONALD PATTERSON

former deputy sheriff claiming she was a "qualified individual with a disability" under ADA was a "direct threat" to herself and others was held to be relevant and admissible. McKenzie v. Benton, 388 F.3d 1342 (10th Cir. 2004).

11. RELIABILITY

This is the requirement that has occupied the attention of most writers on the subject of expert testimony. It is treated separately because it is the major issue of admissibility.

II. RELIABILITY OF THE EXPERT OPINION

Both Kansas and the Federal Evidence Code have addressed the issue. K.S.A. 456 (b) and (d) shown above under paragraph 4. Fed. R. Evid. 702 and 703 provide:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.
>
> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived buy or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Note that facts are required for the expert's opinion. What facts? The code is silent. Presumably, the facts required are those needed to apply known and

well acceptable principles or facts sufficient to justify are inference of causation. They would have to be relevant to the ultimate fact to be determined.

Once it is established that the opinion includes subject matter not known by the ordinary juror, and is a proper subject of expertise, that subject must be identified by the court and the witness qualified within it. He must have *knowledge* gained either by education, study, or experience. This is a judgment call by the trial court. McKee v. City of Pleasanton, 242 Kan. 649, 750 P.2d 1007 (1988) *supra*; Bacon v. Mercy Hospital of Fort Scott, 243 Kan. 303, 308-09, 756 P.2d 416 (1988) *supra*. In Kansas and Alfred v. Caterpillar, *supra*, under the Federal Code, the clear implication of both sets of courts is that if he is required to have knowledge, he must *use* it to arrive at an admissible opinion. However the courts that actually analyze the content of opinion to determine if knowledge was actually used are few and far between. Federal Courts have two editions of *Reference Manual On Scientific Evidence* provided by Federal Judicial Center, but it is practically never cited. Do they read it? Who knows? It was cited in the December 6, 2004 decision of the Tenth Circuit, Bitler v. A. O. Smith Corp., 391 F.3d 1114 (10th Cir. 2004). That is the first time it has been referenced in a published circuit court opinion in this author's experience.

The list of potential experts can include architects, engineers, failure analysis experts, physicians, toxicologists, epidemiologists, economists, and handwriting experts and any other person having knowledge of the relevant subject matter an ordinary juror does not have. If indeed such an expert is required to use his knowledge the law requires him to have, the common element by which their reliability can be evaluated is deductive logic. At least in the Federal code opinion is not admissible because of the *ipse dixit* of the expert. It is arguable under the state law it is admissible if the expert says his opinion is admissible. Smith v Milfeld, 19 Kan. App.2d 252, 256, 869 P.2d 748 (1993). This should require the expert to identify the principle he is applying, and his

statement of it, possibly in the form of mathematical relationships or statistical principles, and the facts required to apply his principle must be identified. Rule 702 clearly contemplates the use of deductive logic by an expert in arriving at a reliable opinion. The expert is required to identify the principle or principles he is using and the facts required for its application to arrive at an admissible opinion, at least if his opinion involves the physical sciences.

However this is not the end of the analysis. Many opinions, usually causation, involve an inductive process by which particular facts and observations are used to form an inference of the ultimate fact, usually causation. In the Federal system it is used to form an otherwise unestablished principle of "general causation" before it is applied to a given case. Hollander v Sandoz Pharmaceutical Corp., 289 F.3d 1193, (10th Cir. 2002). This step is not observed in Kansas because it is "pure opinion." Kuhn v Sandoz Pharmaceuticals Corp. 270 Kan. 443, 14 P.3d 1170 (2000) Consequently, any analysis of tests of reliability are to be applied must consider both deductive analysis and inductive analysis.

The dividing line between inductive and deductive logic is somewhat artificial and certainly not clearly defined. A logical inference always assumes there is an order of natural laws of nature and even human beings that are uniform, whether or not they are known. An inference based upon human experience in which the occurrence of a certain series of events may result in a defined consequence is premised upon the uniformity of t he laws of nature, and the uniformity of some aspects of human nature. This universal order could be thought of as a major premise and the inferential conclusion of minor premise justifying a deductive analysis. You will find, however, that the primary logical process of an expert in arriving at a conclusion, is either inductive or deductive. The classification will be made upon whatever process seems to be paramount in the manner in which an expert arrives at a conclusion. The Frye test was

described and applied in State v. Washington, 229 Kan. 47, 53-54, 622 P.2d 986 (1981) as follows:

> The general test for determining the admissibility of a new scientific technique was enunciated in *Frye v. United States,* 54 App.D.C. 46, 293 F. 1013 (1923). Simply stated, *Frye* requires that, before a scientific opinion may be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field. Thus, according to the *Frye* standard, if a new scientific technique's validity has not been generally accepted or is only regarded as an experimental technique, then expert testimony based upon its results should not be admitted into evidence. *Reed v. State*, 283 Md. 374, 391 A.2d 364 (1978).
>
> *Frye v. United States,* 54 App. D.C. 46, was cited with approval in *State v. Lowry*, 163 Kan. 622, 629, 185 P.2d 147 (1947). *Frye* and *Lowry* both involved the admissibility of the results of a lie detector examination. The *Frye* test has been accepted as the standard in practically all of the courts of this country which have considered the question of the admissibility of new scientific evidence. The *Frye* test has been utilized by courts in their consideration of the admissibility of paraffin tests (*Brooke v. People*, 139 Colo. 388, 339 P.2d 993 [1959]); medical testimony regarding the cause of birth defects (*Puhl v. Milwaukee Automobile Ins. Co.*, 8 Wis.2d 343, 99 N.W.2d 163 [1959]); breath analysis devices designed to test for intoxication (*People v. Morse*, 325 Mich. 270, 38 N.W.2d 322 [1949]); truth serum injections (*State v. Linn,* 93 Idaho 430, 462 P.2d 729 [1969]); blood tests (*People v. Alston*, 79 Misc.2d 1077, 362 N.Y.S.2d 356 [1974]); neutron activation analysis (*State v. Stout*, 478 S.W.2d 368[Mo. 1972]); Nalline tests for detection of narcotics use (*People v. Williams*, 164 Cal. App.2d Supp. 858, 331 P.2d 251 [1958]); ink identification tests (*United States v. Bruno,* 333 F.Supp. 570 [E.D.Pa. 1971]); and hypnotism (*People v. Busch*, 56 Cal.2d 868, 16 Cal. Rptr. 898, 366 P.2d 314 [1961]). The Kansas cases have consistently rejected the results of lie detector tests when offered in evidence for the purpose of establishing the guilt or innocence of one involved in crime. *State v. McCarty,* 224 Kan. 179, 578 P.2d 274 (1978); *State v. Stafford*, 213 Kan. 152, 162, 515 P.2d 769

(1973); *State v. Hemminger,* 210 Kan. 587, 595, 502 P.2d 791 (1972); and *State v. Lowry*, 163 Kan. 622.

The court made it clear this was a judicial determination. The test was not reliable simply because the expert said it was. The "principle" applied is that one group of facts or the result of a test of certain facts is positive proof of a fact that is an element of the plaintiff's civil case or an element of a crime or criminal defense. This deductive analysis was further applied to DNA testing in Smith v. Deppish, 248 Kan. 217, 238-39, 807 P.2d 144 (1991) as follows:

> DNA print testing and the process of RFLP analysis have been recognized as reliable, have gained general acceptance in the scientific community, involve scientifically and professionally established techniques, and, thus, meet the criteria for admissibility under the *Frye* standard. While DNA print testing and the process of RFLP analysis meet the standard of general acceptance in the scientific community and thus are admissible on that basis, such test results may be inadmissible on grounds of relevancy or prejudice as well as under traditional challenges to admissibility of evidence such as contamination of sample or chain of custody questions. *State v. Ford,* 301 S.C. 485, 392 S.E.2d 781, 784 (1990).
>
> We agree with the trial court that: (1) the experts' testimony in this case established that there is sufficient acceptance of DNA profiling; (2) Lifecodes' techniques and procedures are accepted by the scientific community; (3) the DNA profiling evidence was admissible; and (4) Smith did not establish that the amendments to the reports affected the reliability of Lifecodes' procedures. The trial court did not abuse its discretion by admitting the results of DNA testing into evidence.

The content of the Frye decision was further described in Kuhn v. Sandoz Pharmaceuticals Corp., 270 Kan. 443, 454-55, 14 P.3d 1170 (2000) as follows:

> *Frye* requires that before expert scientific opinion may be received into evidence, the basis of the opinion must be shown to be generally accepted as reliable within the expert's particular scientific field. If a new scientific technique's validity has not

> been generally accepted or is only regarded as an experimental technique, then expert testimony based upon the technique should not be admitted. *Canaan*, 265 Kan. At 848. In *State v. Washington*, 229 Kan. 47, 54, 622 P.2d 986 (1981), we identified the purpose of the *Frye* test:
>
> "'*Frye* was deliberately intended to interpose a substantial obstacle to the unrestrained admission of evidence based upon new scientific principles. . . . Several reasons founded in logic and common sense support a posture of judicial caution in this area. Lay jurors tend to give considerable weight to "scientific" evidence when presented by "experts" with impressive credentials. We have acknowledged the existence of a '" . . . misleading aura of certainty which often envelopes a new scientific process, obscuring its currently experimental nature."'" (Quoting *People v. Kelly*, 17 Cal. 3d 24, 31-32, 130 Cal.Rptr. 144, 549 P.2d 1240 [1976]).

Whether or not Daubert applies here or in any other evidentiary question in Kansas is in doubt. It was strongly rejected in Armstrong v. City of Wichita, 21 Kan.App.2d 750, 907 P.2d 923 (1995).

This by its terms identifies criteria by which the reliability of a deductive analysis is to be determined.

Justice Blackmun in Daubert v Merrell Dow Pharm. Inc., 509 U.S. 579, 125 L.Ed 2d 469, 113 S.Ct. 2786 (1993) made it clear that the four identified criteria of reliability applied to an inductive process where no known scientific principle is being applied. These are (1) whether a theory or technique has been or can be tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the techniques known or potential rate of error; and (4) whether a particular technique or theory has gained general acceptance in the relevant scientific community. These are non-exclusive standards. Daubert, 509 U.S. 579, 593-94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). In footnote 11 he made it clear that if the expert is applying known scientific principles that have been accepted, such as thermodynamics the court should take judicial notice of

them and not apply the factors of reliability he suggests to a purely inductive process. Not much will be gained by inquiring into the rate of error, general acceptance, peer review or publication of Newton's laws of motion, Mechanics of Materials, Pascal's principles of hydraulics, Boyle's law of gasses, or the basics of electric circuitry, and the usual subjects in an engineering curriculum. Deduction gives a result that is fairly constant and certain. Inductive logic gives a result usually in terms of probability. If a court is not familiar with formal logic, a good primer is *Logic For Lawyers: A Guide to Clear Legal Thinking.* Most courts and lawyers would benefit by reading it. It was written by Judge Aldisert, formerly of the Third Circuit before he retired.

With Frye directed toward the reliability of a deductive analysis, and Daubert directed toward reliability of an inductive analysis, the law of each evidentiary system must be considered with respect to both Deduction and Induction.

A. Deduction

1. KANSAS.

In Evans v. Provident Life & Accident Insurance Company, 15 Kan.App.2d 97, 803 P.2d 1033 (1990), a psychiatrist from the Menninger Foundation in Topeka, gave an opinion that an insured of the defendant committed suicide. His opinion was based upon a technique he described as "psychological autopsy" and the question of whether or not the insured committed suicide was rejected. The Court of Appeals approved submitting to the jury the issue of whether the insured committed suicide, but would not allow Dr. Modlin to testify to the ultimate fact. The case was appealed to the Supreme Court which held that it did not pass on the question of whether "psychological autopsy" is admissible under Frye. 249 Kan. 248, 259-60, 815 P.2d 550 (1991). But in syllabus paragraph 11, the court held that discretion was not abused by the trial court in refusing to allow Dr. Modlin to opine that based upon "psychological

autopsy" the insured committed suicide. Frye was not mentioned. Prior to the Daubert decision, the Tenth Circuit Court of Appeals, in Head v. Lithonia Corp., 881 F.2d 941, (10th Cir. 1989) in a case where a lighting fixture fell and struck the plaintiff on the head, the expert attempted to connect an injury with that event on a diagnostic technique called a "topographical brain mapping". The court held that the technique did not meet the Frye test and the opinion was excluded.

The Frye rule continues to prevail in Kansas. The Frye rule was clearly applied in Smith v. Deppish, *supra*, applied in State v. Washington, *supra*, and approved for the purpose of testing deductive analysis, but held as inapplicable to inductive analysis in Kuhn. The wide variety of judicial applications of the Frye test was cataloged by the court in Kuhn, 270 Kan. 460-61. The catalog includes a number of decisions of the Kansas Supreme Court.

A slight departure from Frye was made to permit evidence of a test, or procedure recognized as authoritative if accepted as reliable by a significant minority of experts in the significant field. Douglas v. Lombardino, 236 Kan. 471, 693 P.2d 1138 (1985).

These decisions appear to be consistent with and comparable to those decisions excluded on the ground they include an erroneous legal standard or nothing more than a personal standard of the testifying expert. Jones v. Hittle Service, Inc., 219 Kan. 627, 632-33, 549 P.2d 1383 (1976); Garst v. General Motors, 207 Kan. 2, 23, 484 P.2d 47 (1971); Fountain v. Se-Kan Asphalt Services, Inc., 17 Kan.App.2d 323, 837 P.2d 835 (1992).

2. FEDERAL.

Justice Blackmun, in footnote 6, of the Daubert opinion, observed that the Frye decision had been replaced by the congressionally enacted rules of evidence an in particular Rule 702, which was quoted in the form in which it existed in 1993. In federal court, Frye is no longer the test of reliability of a deductive analysis, but the clear implication of the reference to Rule 702 and in particular

footnote 11, indicated the court could take judicial notice of generally accepted scientific rules. The reliability of a deductive analysis is to be tested by Rule 702 itself. Rule 702 including its 2000 amendment reads as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The rule by its terms is not applicable to an inductive analysis which does not involve the identification of reliable principles and methods and their application to the facts of the case deductively. Rule 702 implies a syllogistic process by which the applicable principles and methods constituting "knowledge" required of an expert become the major premise, the facts of the case the minor premise, and the conclusion or opinion of the expert is a matter of logical deduction. The Daubert criteria of reliability do not apply to these principles at all, but apply to induction only as will be seen in the following discussion. *See*, footnote 11 of the Daubert opinion.

Federal court cases fall into a number of groups. There are several where expert testimony is rejected because the principles being applied by the expert are never identified beyond "my education and experience" thereby reducing the question to an inductive analysis. The court then applies the Daubert factors to the inductive analysis to reject the testimony on that ground. Examples are Wills v. Amerada Hess Corp., 379 F.3d 32 (2nd Cir. 2004); (Seaman's death was allegedly caused by his exposure to toxic omissions aboard vessels upon which he served. Neither an inductive analysis nor deductive analysis of reliability was wholly dependent upon Daubert). Gate keeping reliability tests are to be applied to all opinions where the subject matter is beyond the ken of the ordinary juror.

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). In Wills, the court observed first of all that expert testimony was required to prove causation, an essential element to the plaintiff's case. The experts based their opinion of causation on the "on cogene theory" which the expert admitted to be "controversial" rather than the "dose response theory" that suggests toxins are carcinogenic only when a person is exposed to concentrations over and above a specified threshold level. The court then applied amended Rule 702 and found that the experts did not apply any "reliable principles and methods" thereby subjecting it to the Daubert standards of reliability for an opinion reached upon induction. Reliability was rejected on that ground also. Similar decisions on similar grounds are Ammons v. Aramark Uniform Services, Inc., 368 F.3d 809 (7th Cir. 2004); Hall v. United Insurance Co. of America, 367 F.3d 1255, 1261-62 (11th Cir. 2004). *See also*, Vargas v. Lee, 317 F.3d 498, 501 (5th Cir. 2003) where the plaintiff fell in the defendant's store and contended the fall caused fibromyalgia. The opinion was rejected with the Fifth Circuit observing "while the medical profession has made significant advances in the diagnoses and treatment of fibromyalgia, experts have recognized that the evidence that trauma actually causes fibromyalgia is 'insufficient to establish causal relationships'." This was followed with a quotation from a textbook on rheumatology.

Another good example in the medical field is Domingo ex rel. Domingo v. T.K., 289 F.3d 600 (9th Cir. 2002). Following the insertion of a hip prosthesis by malleting it into the correct position until it fit, plaintiff's expert opined the process caused fat embolism syndrome (FES). The plaintiff's expert, an orthopedic surgeon, had his own "principle of causation" based upon four propositions: (1) intermediary events such as reaming, inserting a prosthesis and malleting are likely to produce fat emboli due to increases in the intermediary pressure and other causes; (2) surgeons recognize the risk of FES from increase in fat emboli, and therefore seek out techniques to minimize the production of fat

emboli; (3) an increase in any of the facts that contribute to the production of fat emboli necessarily increases the risk of FES; and (4) the only applicable aspect of Domingo surgery was the length of time spent in malleting. Based on these, he concluded the length of time spent in malleting was the cause of plaintiff's FES. The court appointed an expert who did not agree this was a recognized reliable "principle" upon which to base an opinion of causation. The court then stated that causation is not established by *ipse dixit* of the expert.

Another group of decisions involve an expert who gives an opinion based upon Newton's laws of motion, laws of physics, strength and mechanics of materials, and chemistry, and the usual subjects found in an engineering curriculum. Among these are accident reconstruction. In Babcock v. General Motors Corp., 299 F.3d 60 (1st Cir. 2002) the question was whether or not a seat belt failed, but was unnoticed by the user because of a "false latching". It appeared to be latched when it was not. The opinion was admitted pursuant to Rule 702. After the expert carefully articulated all of the facts needed to support his conclusion under the applicable laws of physics, strength and mechanics of materials, and his own inspection of the evidence used by the plaintiff, he arrived at his opinion by deduction. The only mention of Daubert was that inquiry into the identification of principles and their application was that Daubert mandated an inquiry into methodology, deduction.

J.B. Hunt Transport, Inc. v. General Motors Corp., 243 F.3d 441 (8th Cir. 2001) was a third party action against General Motors claiming the vehicle General Motors manufactured was not crash worthy because of the seat design and cushion system it used. The expert described himself as a "foamologist". The court held that this was not a recognized methodology or scientific principle and excluded the opinion. An opinion based upon mechanics of materials and psychics was held to be a reliable principle and the expert had the facts required

for its application so that his deductive opinion was admissible in White v. Ford Motor Co., 312 Fd.3 998, 1007 (9th Cir. 2002).

Another good example of a deductive analysis that rejected the principle being applied by an expert is Truck Insurance Exchange v. Magnetek, Inc., 360 F.3d 1206 (10th Cir. 2004). The issue was the cause of a fire in an area surrounded by wood, the flash point (point of ignition) of which was 400 degrees. The plaintiff could not articulate any clear reason why that temperature was reached, but opined that wood could erupt into flame on a theory called pyrolysis which posits that wood can catch fire at temperatures below 400 degrees if it is exposed to such temperatures over a long enough period of time. He then attempted to eliminate other possible sources of fire in a process similar differential diagnosis in the medical field, which has been approved. The court rejected his theory on the ground the theory was unreliable and made assumptions about the temperature of the ballasts that were not supported by the evidence, c*iting* Mitchell v. Gencorp. Inc., 165 F.3d 778, 781 (10th Cir. 1999) which was an inductive analysis decision. Even if differential diagnosis applied, the expert still had to show what he contended was a possible cause, but his theory of pyrolysis was the only means by which he could do it, and the latter was held to be a theory that was unreliable and unaccepted in the relevant scientific community. Truck Insurance Exchange, 360 F.3d at 1213. Decisions that refer to "Daubert" now exist well into five figures. There is no attempt here to analyze all of them.

C. Induction

1. KANSAS.

Daubert was rejected by the Kansas Supreme Court without qualification in Armstrong v. City of Wichita, 21 Kan.App.2d 750, 907 P.2d 923 (1995).

The Kansas Court of Appeals in Smith v. Milfeld, 19 Kan.App.2d 252, 256, 869 P.2d 748 (1993) went farther and held that no judge should ever question or challenge the methodology of a qualified expert, and an expert, if qualified, is

free to say whatever he pleases including the *ipse dixit* statement of reliability of his own opinion as long as he is found to be qualified in the relevant field of knowledge. This specific language found at 19 Kan.App.2d 256 is as follows:

> Further, our Supreme Court has stated that once the trial court has determined that a witness is qualified to testify as an expert witness, "the court cannot regulate the factors or mental processes used by the expert in reaching his opinion or conclusion in the case." *Pope v. Ransdell,* 251 Kan. 112, 123, 833 P.2d 965 (1992). The court also noted the "factors and mental processes used by the expert 'can only be challenged by cross-examination testing the witness' credibility.'" 251 Kan. At 123. In the present case, the trial court "recognize[d] that if called, Dr. Jacobson would be found qualified, based on his education and experience, to testify regarding whether defendants' handling of plaintiff's surgery was a deviation from standard of care." The trial court's refusal to admit the testimony implicitly challenges the factors and mental processes used by Jacobson.

In other words, a judge should abdicate from all gate keeping responsibility. Even more astounding is the decision in Kuhn v. Sandoz Pharmaceuticals Corp., 270 Kan. 443, 14 P.3d 1170 (2000). The case involved a question of whether or not a drug manufactured by the defendant, Parlodel, taken for the purpose of preventing post partum lactation caused or contributed to the plaintiff's death, the immediate cause of which was elevated blood pressure, proteinuria and hyperreflexia which in turn increased peripheral and intracranial pressures in the patient which in turn perciptated the cerebral edema and its consequences, such as stroke. The court recognized a standard medical methodology of differential diagnosis defined as "the determination of which of two or more diseases with similar symptoms is the one from which the patient is suffering by a systematic comparison and contrasting of the clinical findings". The opinion of causation by the plaintiff's expert was based purely upon inductive reasoning. The court used the term "pure opinion" which it characterized "an expert opinion developed from inductive reasoning based on the expert's own

experience, observation, or research." 270 at 456-57. Under Daubert analysis, the suggested tests of reliability were used first to determine general causation, which in a sense creates the principle to be ultimately applied deductively in a given case to reach a conclusion. Hollander v. Sandoz Pharmaceuticals Corp., 289 F.3d 1193 (10th Cir. 2002). This step was bypassed in Kuhn at 270 Kan. 464 on the ground that it is not covered in PIK Civ. (3d) 104.101 and Southgate Bank v. Fidelity Deposit Co. of Maryland, 14 Kan.App.2d 454, 459, 794 P.2d 310 (1990).

The court next held that since this was "pure opinion" based upon inductive logic, the Frye test does not apply. In fact, no test applies. The court concluded at 270 Kan. 455 "our review of these four inquiries lead to the conclusion that plaintiff's expert causation testimony is not subject to the Frye test. Our conclusion moots the need to reach a detailed discussion of differential diagnosis." The court held that Frye applied only to testimony involving scientific methods and procedures, but not "pure opinion". The expert was qualified by his "experience and observations over many years and the extensive literature on the subject" which led him to conclude that the repressed memory phenomenon existed in some patients referring to an Arizona decision. If the expert's knowledge and experience is to be used as a factual predicate, he did not identify what it was nor was he required to. A rule similar to Fed. R. Evid. 702 would require this disclosure, but K.S.A. 60-456 and 457 apparently do not. He could simply say in effect "I am very smart. I have a lot of degrees, I used to teach at a university. My opinion is reliable because I say so. Trust me." That opinion appears to be admissible. The decision of the trial court non-suiting the plaintiff for failure of proof was reversed. Clearly absent from the opinion is any criteria by which the reliability of an inductive inference is to be judged. If there is none, the common fallacy of (*post hoc ergo propter hoc)* is not a fallacy in the state of Kansas in spite the fact that it is recognized as an unacceptable logical

fallacy in the entire western world other than Kansas. *See, Aldisert, "Logic for Lawyers, a Guide to Clear Legal Thinking"* pages 143, 139-99, 216-17. This is referred to as fallacy of "false cause". It is an inference that one event is the cause of another event merely because the first event occurs earlier than the other than the second event and the second event is therefore was caused by the first. Nothing in the Kuhn opinion prohibits an expert from basing his opinion upon the logical fallacy of *post hoc ergo propter hoc*. His opinion is reliable because he says so – his own *ipse dixit*. In Hollander v. Sandoz Pharmaceuticals, Corp., 289 F.3d 1193 (10th Cir. 2002) a case with identical facts, but with a different set of experts who testified essentially the same as the plaintiff's experts in Kuhn, held opposite to Kuhn and non-suited the plaintiffs. The Eighth and Eleventh Circuits agree with the Tenth. Glastetter v. Novartes Pharm. Corp., 252 F.3d 986 (8th Cir. 2001), Rider v. Sandoz Pharmaceutical Corp., 295 F.3d 1194 (11th Cir. 2002).

Kuhn was followed by Dieker v. Case Corp., 276 Kan. 141, 73 P.3d 133 (2003) in which the Court of Appeals was reversed. The Court of Appeals opinion was reported at 30 Kan.App.2d 751, 48 P.3d 5 (2002). This was an economic loss case in which a Case Tractor was destroyed by fire while being used. The plaintiff's theory was that Case left a fitting lose on the valve body of a parking brake in the feeder house which allowed hydraulic oil to leak during the operation of the combine. The leaking oil saturated chaff, but accumulated in the area of the valve body which ultimately prevented heat generated by the valve and/or solenoids connected to the valve from dissipating properly resulting in a fire that destroyed the combine. However, the expert did not know the flash point of whatever material ignited. Neither was there any quantification of the heat generated from the source he opined. The Court of Appeals held that these facts and some other detailed facts left an analytical gap that could not support an inference of causation and was subject to the fallacy of *post hoc ergo propter hoc*. The Court of Appeals believed Kansas still recognized that fallacy. The Court of

Appeals was reversed with the court concluding that this was nothing other than perfectly admissible differential diagnosis – the elimination of other possible causes. The court held that other possible testimony of the expert, Pfeiffer, was "within the scope of his special knowledge, skill, experience, or training", but did not specify what it was. The court also held that the expert really did not have to employ differential diagnosis. The court said: "circumstantial evidence can serve as proof of the elements of the theory of liability by a preponderance of the evidence even though other reasonable theories are not excluded by such evidence." Mays v. Ciba-Geigy Corp., 233 Kan. 38, 53-54, 661 P.2d 348 (1983) (which held for the defendant on failure of proof and defect and causation). Differential diagnosis is a form of circumstantial evidence that justifies an inference even though an analytical gap separates the observed facts from the conclusion. Analytical gaps in the inductive process apparently do not prevent admissibility in Kansas.

Kuhn and Dieker, however, must be tempered with Cunningham v. Riverside Health Systems, Inc., 33 Kan.App.2d 1, 99 P.3d 133 (2004) in which the plaintiff claims that her leg was broken by hospital personnel in the process of getting her situated into her hospital bed and moving her leg which had been the object of medical attention. The court held first of all that whether or not the conduct of the hospital personnel was a departure from the requisite standard of care was a proper subject of expert testimony. Her expert stated that medical x-rays proved the hospital's conduct caused the injury because post surgery x-rays showed no fracture of the femur while x-rays taken after the negligent act detected a fracture. Oddly enough, this was rejected because it was held to be an example of the *post hoc* fallacy.

We appear to have two decisions which hold that an expert's opinion subject to the *post hoc ergo propter hoc* fallacy are perfectly admissible and one

decision holding that the fallacy prevents admissibility. We have a judicial cafeteria! "Take your pick."

2. FEDERAL RULE.

Rules 702, 703, 704, and 705, do not deal with this type of analysis. Daubert does. Daubert definitely articulates four criteria by which the reliability of an inductive inference is measured, at least in scientific and technical subjects. That inductive inference is usually causation. It should also be observed that Justice Blackmun had a peculiar meaning of the term "scientific". He referred to that process by which scientific information is first suspected, then tested, developed, verified, falsified, until it is subsequently accepted by the field with which it falls. At that time it becomes "technical". This is made apparent at 125 L.Ed.2d 843 by his extensive reference to Karl Hempel, *Philosophy of Natural Science* in which he states "statements constituting a scientific explanation must be capable of empirical test" and Karl Popper, *Conjectures in Refutations: the growth of scientific knowledge in which a "criteria of the scientific status of the theory is its falsifyability or refutability or testability*". An excellent resource for determining how scientific knowledge is developed and eventually accepted, and the standards applied by scientists in an inductive process by which an inductive inference can be deemed reliable in the scientific field is *Judging Science. Scientific Knowledge In The Federal Courts*, by Kenneth R. Foster and Peter W. Huber.

No attempt will be made to analyze or even categorize the decisions that apply, the Daubert decision, which now number into four digits. Five brief observations will be made. First, it has been applied very effectively to measure the reliability of an inductive inference. This is illustrated by Hollander v. Sandoz Pharmaceuticals Corp., 289 F.3d 1193 (10th Cir. 2002) the facts of which are identical with and specifically observed as such in the opinion as Kuhn v. Sandoz Pharmaceuticals Corp., 270 Kan. 443, 14 P.3d 1170 (2000) in which the result

was the opposite. Another case that is an excellent illustration of this application is Mitchell v. Gen Corp, Inc., 165 F.3d 778, 780 (10th Cir. 1999).

Second, a recent decision of the Tenth Circuit, Bittler v. A. O. Smith Corp., 391 F.3d 1114 (10th Cir. 2004) applied the Daubert factors to a differential diagnosis in a non-medical setting. The court applied it to an alleged defective gas valve as the cause of a gas explosion. (391 F.3d 1114 (10th Cir. 2004). A number of decisions have applied the Daubert criteria to the medical technique of differential diagnosis. Clausen v. N/V New Carissa, 339 F.3d 1049 (9th Cir. 2003), and Goebel v. Denver and Rio Grande Western R.Co., 346 F.3d 987 (10th Cir. 2003). The process was described in Kudabeck v. Kroger Co., 338 F.3d 856, 860 (8th Cir. 2003) as follows: "in performing a differential diagnosis, a physician begins by 'ruling in' all scientifically plausible causes of the plaintiff's injury. The physician then 'rules out' the least plausible causes of injury until the most likely cause remains". *Citing* Glastetter v. Novartis Pharm. Corp., 252 F.3d 986, 989 (8th Cir. 2001).

Third, the Tenth Circuit in Bittler, actually cited the federal judicial Center R*eference Manual on Scientific Evidence*, in footnote No. 4. A good illustration of the fact that Daubert applies only to an inductive inference is suggested by the table of contents of both the first and second edition which are appended at the rear of this article.

Fourth, the Daubert criteria for evaluating the reliability of an inductive inference is no longer limited to "scientific" subjects, but now applies to all experts in all fields of expertise. An opinion is reliable as long as the witness uses the same rigor in arriving at the opinion of a case that experts in the same field use in making similar decisions in their respective professions. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Precisely what this vigor is might have to be established by the witness, but as in "reasonably relied upon" we will have to wait to see if the witness himself is free

to identify the content of such "vigor" or whether it must be developed by independent evidence. This abrogated the decision of the Tenth Circuit in Compton v. Suburu of America, Inc., 82 F.3d 1513 (10th Cir. 1996) when the Tenth Circuit failed to recognize that "technical, scientific, or other specialized knowledge" are three adjectives in the *disjunctive* that modify one word, "knowledge".

Fifth, there is a warning. Some courts with apparent lack of understanding between the difference of inductive and deductive logic will continue to attempt to insert square pegs in round holes by applying the *Daubert* criteria to a deductive logical process. Tenbarge v. Ames Taping Tools Systems, Inc., 128 F.3d 656 (8th Cir. 1997) (Summary judgment of the trial court reversed on the ground that the four factors of Daubert by which reliability of the inductive process was measured were inapplicable because the defendant, not the plaintiff, under local Missouri law had the burden of eliminating other equally probable causes. Missouri law overruled Daubert!) Moore v. Ashland Chemical, 126 F.3d 679 (5th Cir. 1997) in which the court made the astounding observation that the Daubert factors were limited to the deductive process described by the court as "hard science" or "Newtonian science" or knowledge obtained, tested and confirmed through the "scientific method" and was already scientifically accepted. This is totally negated by footnote 11 of the Daubert opinion. There are many others, but these are only examples.

This concludes a summary of the law expert testimony under both Frye and Daubert.

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KaMMCO

KANSAS MEDICAL MUTUAL INSURANCE COMPANY

To: Senate Judiciary Committee

From: Jerry Slaughter
Executive Vice President

Re: SB 53; Concerning expert witness testimony

Date: February 2, 2005

The Kansas Medical Mutual Insurance Company (KaMMCO) appreciates the opportunity to appear today in support of SB 53, which amends K.S.A. 60-456 and 60-457 relating to the testimony of expert witnesses. KaMMCO, which was formed by and is affiliated with the Kansas Medical Society, is the largest medical malpractice insurer of physicians and hospitals in the state of Kansas.

Juries and other triers of fact often must rely on scientific, technical, and specialized evidence to assist them in reaching a verdict in a lawsuit. While scientific, technical, or other specialized knowledge may be helpful to the trier of fact, juries often have no way to evaluate the reliability and relevancy of such expert evidence. The amendments to K.S.A. 60-456 and K.S.A. 60-457 appear designed to allow into evidence only expert testimony that is reliable and relevant to a particular lawsuit.

In addition, the changes to K.S.A. 60-456 and K.S.A. 60-457 would impose an express gatekeeping function on the judge by requiring the judge to hold a pretrial hearing upon motion of either party to determine whether the witness qualifies as an expert and to determine whether the expert testimony satisfies the requirements of the new subsection (b) of K.S.A. 60-456. The proposed changes to K.S.A. 60-456 appear to make K.S.A. 60-456(b) identical to the Federal Rule of Evidence 702 regarding the testimony by experts. Similarly, the new section (3) to K.S.A. 60-457 mirrors Federal Rule of Evidence 703. The proposed changes may also have the effect of allowing Kansas courts to apply the rules set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999) in ruling on the admissibility of expert testimony. These United States Supreme Court decisions make clear that expert opinions should not only be relevant but also reliable.

We would like to make certain that the proposed legislation would not adversely impact K.S.A. 60-3412, which imposes additional requirements for experts who testify in medical malpractice liability actions. Under K.S.A. 60-3412, in any medical malpractice liability action in which the standard of care is at issue, no person shall qualify as an expert on such issue unless at least 50% of such person's professional time, within the two-year period preceding the incident giving rise to the action, is devoted to actual clinical practice in the same profession in which the defendant is licensed.

Endorsed by the Kansas Medical Society

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Senate Judiciary
2-2-05
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Consequently, we would respectfully request the Committee add language to this bill which clarifies that the changes in SB 53, if adopted, would have no adverse impact on the validity or effect of the requirements imposed by K.S.A. 60-3412 in medical malpractice liability actions. We have attached our suggested amendments that would make it clear that the action of the legislature on SB 53 will not be construed to invalidate the provisions of K.S.A. 60-3412.

KaMMCO Proposed Amendments

Session of 2005

SENATE BILL No. 53

By Committee on Judiciary

1-19

AN ACT concerning the code for civil procedure; relating to evidence; expert and other testimony; amending K.S.A. 60-456 and 60-457 and repealing the existing sections; also repealing K.S.A. 60-458.

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

Section 1. K.S.A. 60-456 is hereby amended to read as follows: 60-456. (a) If the witness is not testifying as an expert ~~his or her~~, *the* testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clearer understanding of ~~his or her~~ *the* testimony *of the witness*.

~~(b) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness.~~ *If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods and (3) the witness has applied the principles and methods reliably to the facts of the case.*

(c) Unless the judge excludes the testimony ~~he or she~~, *the judge* shall be deemed to have made the finding requisite to its admission.

(d) Testimony in the form of opinions or inferences otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact.

Sec. 2. K.S.A. 60-457 is hereby amended to read as follows: 60-457. *(a) If a witness is not testifying as an expert, then* the judge may require that a witness before testifying in terms of opinion or inference be first examined concerning the data upon which the opinion or inference is founded.

(b) If a witness is testifying as an expert, then upon motion of a party, the court may hold a pretrial hearing to determine whether the witness

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qualifies as an expert and whether the expert's testimony satisfies the requirements of subsection (b) of K.S.A. 60-456 and K.S.A. 60-458, and amendments thereto. The court shall allow sufficient time for a hearing. The court shall rule on the qualifications of the witness to testify as an expert and whether or not the testimony satisfies the requirements of subsection (b) of K.S.A. 60-456 and K.S.A. 60-458, and amendments thereto. Such hearing and ruling shall be completed no later than the final pretrial conference contemplated under subsection (d) of K.S.A. 60-216.

New Sec. 3. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing or trial. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible into evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial effect.

Sec. 4. K.S.A. 60-456, 60-457 and 60-458 are hereby repealed.

Sec. 5. This act shall take effect and be in force from and after its publication in the statute book.

458, and

and K.S.A. 60-3412 as applicable,

New Sec. 4. Nothing in this act shall be construed to affect the applicability of K.S.A. 60-3412 in medical malpractice liability actions.

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KANSAS COOPERATIVE COUNCIL
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Senate Judiciary Committee

February 2, 2005
Topeka, Kansas

SB 53 – admissibility of expert testimony.

Chairman Vratil and members of the Committee, thank you for the opportunity to share comments on behalf of the Kansas Cooperative Council in support of SB 53. I am Leslie Kaufman and I serve the Kansas Cooperative Council as Governmental Relations Director. The Council includes more 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 the increased costs of doing business. The KCC has adopted policy language supporting changes in the regulatory systems and in our judicial system that eliminate unnecessary regulation, encourage business development and promote growth in the Kansas economy. Reforming the evidentiary standard Kansas uses regarding the admissibility of "expert" testimony in a civil proceeding is one tool for helping to enhance the business climate here in Kansas.

Many members of our association can benefit from the changes proposed in SB 53, but probably none more than our grain storage and agribusiness supply members. The very nature of their enterprises and the products they deal with have been targets for all sorts of criticism – not always founded in sound, scientific fact.

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It is difficult enough to challenge these often emotional claims in the press or even before the legislature. In a court proceeding, where justice is in the balance, there should be assurances that evidence allowed before a jury is credible and founded in reliable principles and methods. SB 53 will establish that type of procedure in Kansas.

As you know, this is not a novel idea or new concept. Over thirty states have adopted this type of process for admitting expert testimony as have the federal courts. It is time Kansas does the same. As such, we respectfully encourage this committee to act favorably on SB 53. Thank you.

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STATEMENT OF THE

KANSAS GRAIN & FEED ASSOCIATION

AND THE

KANSAS AGRIBUSINESS RETAILERS ASSOCIATION

SUBMITTED TO THE

SENATE JUDICIARY COMMITTEE

REGARDING

SENATE BILL 53

FEBRUARY 2, 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.

816 SW Tyler, Topeka KS 66612 – 785-234-0461 - Fax: 785-234-29

Senate Judiciary
2.2.05
Attachment 11

Good morning, Chairman Vratil and members of the Senate Judiciary Committee. I am Mary Jane Stankiewicz and this testimony is on behalf of the Kansas Grain and Feed Association and the Kansas Agribusiness Retailers Association.

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 agricultural 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 53.

Our members conduct research and handle chemicals on a regular basis. A significant amount of this work is with the hope of producing better and more productive commodities. However, almost all of these projects deal with a variety of issues that can be controversial and raise a number of questions. However, the reality of the chemicals and products are not in the sphere of common knowledge of the average person and therefore, it is not appropriate that they should determine if a person is truly an expert and the evidence that is being presented is founded in sound science.

Therefore, before a juror listens to an expert's testimony we would prefer that the judge determines if the testimony is credible and rooted in sound science. Over 30 other states have adopted the federal standard or have enacted Federal Rule of Evidence 702.

We urge the Senate Judiciary committee to pass SB 53 favorably out of the committee.

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Testimony in Opposition to

SENATE BILL NO. 53

Presented to the Senate Judiciary Committee
February 2, 2003

The Kansas Bar Association appears in opposition to **SB 53,** an attempt to revise the settled law of Kansas, which is based on the Frye test, by replacing it with a conglomeration of federal rules of evidence, as interpreted by federal court decisions.

Any such extensive revision of the law of evidence should not be undertaken without careful consideration of its ramifications. While I am confident that proponents of the measure have studied the issues carefully, they have no doubt viewed them from the business perspective. There are others that should be considered as well. For example, the Kansas rules of evidence, although located within the code of civil procedure, are applicable to criminal, domestic and juvenile cases as well.

The Kansas rules of evidence have not been written in concrete. They have been studied and recodified over the years, not in response to specific amendments of individual statutes, as this bill does, but through a systemic study, such as those provided by the Judicial Council. Any further changes to the rules of evidence, even those included in **SB 53**, should at least be subject to such a study before any legislative action.

James W. Clark
KBA Legislative Counsel

Senate Judiciary
2-2-05
Attachment 12

SB 53

AN ACT concerning the code of civil procedure; relating to evidence; expert and other testimony

Basic Overview of SB 53: Changes the code of civil procedure regarding expert testimony. The changes would conform the Kansas rule to the Federal Rules of Evidence, Rule 702. Section 2 of the bill provides procedures to challenge witnesses testifying as experts and witnesses testifying as non-experts.

Proposed Section 1 (b)[1]. - Would replace the current stringent standard[2] with a more flexible and widely accepted standard on facts an expert may use to form an opinion. The amended version of Section 1(b) allows experts to rely only upon facts personally observed, facts in the record, and perhaps facts which would be admissible if offered by the party. The proposed amended version of Section 1(b) would allow opinions by experts if they met three criteria:

(1) the testimony is based upon sufficient facts or data,

(2) the testimony is the product of reliable principles and methods, and

(3) the witness has applied the principles and methods reliably to the facts of the case.

Section 2 (a) - Would allow a judge to require a non-expert witness, prior to testifying in the presence of the jury, to be questioned regarding the data from which the witness bases his or her opinion or inference.

Section 2 (b)- Would allow a party to file a motion for a pretrial hearing to determine if a witness qualifies as an expert witness under proposed Section 1(b)(see in Footnote 1). The court would have discretion in granting this pretrial hearing.

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1 **Proposed Section 1(b)**- If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods and (3) the witness has applied the principles and methods reliably to the facts of the case.

2 **Current Section 1(b)**- If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness.

January 31, 2005

Submitted by
STEVE DICKERSON

SENATE COMMITTEE ON JUDICIARY
Senator John Vratil, Chairman

SENATE BILL 53
February 2, 2005

I. INTRODUCTION.

My name is Steve Dickerson and I am appearing today on behalf of the Kansas Trial Lawyers Association. KTLA always welcomes the opportunity to appear before your committee when it considers and works legislation affecting consumers' legal interests.

KTLA firmly opposes SB 53, and its radical alteration of the Kansas evidence code. I want to share specific reasons why the bill is ill-advised, especially at this time. Before I do, it is instructive to have some context for your consideration of the bill.

II. BACKGROUND.

Every jurisdiction, including every state and the federal judiciary has its own codes (or rules) of procedure and evidence. These codes govern the filing, processing, trial and appeal of all legal actions, Although each state's codes deal with topics and issues common to every state, these codes vary, sometimes significantly, from jurisdiction to jurisdiction.

Kansas enacted its code of civil procedure in 1963, and its code of criminal procedure in 1969. Our evidence code, which broadly applies to both civil and criminal cases, was enacted in 1963 with the new code of civil procedure.

K.S.A. 60-456, the Kansas evidence rule for expert and other opinion testimony, was enacted in 1963 as part of our evidence code. This rule of evidence has very capably performed for over 40 years, and literally stood the test of time with flying colors. It has never been amended because no amendment was or is necessary. Since its enactment we now have over 130 case decisions, mostly Supreme Court decisions, that have construed the rule and fine-tuned its application in Kansas trials.

Some years before our evidence code was enacted the Kansas Supreme Court, like many other state supreme courts, adopted the so-called *Frye* standard for the admission of scientific evidence. See *State v. Lowry,* 163 Kan. 622, 629, 185 P.2d 147 (1947). The standard emanated from the federal case of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which dealt with the admissibility of opinions derived from the use of the precursor to the polygraph.

In *Frye*, the court adopted a relatively rigorous and specific test that excluded all scientific evidence except that which had achieved "general acceptance" in the field of which it is a part. If a new scientific technique's validity generally has not been accepted as reliable or is only regarded as an experimental technique, then expert testimony based

on its results should not be admitted into evidence under *Frye*. The *Frye* standard continues to apply in Kansas and other states.

In 1975 the federal rules of evidence were enacted into law and became the "evidence code" for federal courts. The federal rules of evidence are not applicable or controlling in state courts, although some states have modeled their evidence codes after the federal rules of evidence.

In 1993 the U. S. Supreme Court announced its controversial decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which dealt with the admissibility of expert testimony under Rule 702 of the federal rules of evidence. Bear in mind that the federal rules of evidence are inapplicable in Kansas state courts, and that federal caselaw construing these federal rules (like *Daubert*) is similarly inapplicable to Kansas.

In *Daubert*, the court held that Rule 702 had superseded *Frye* and that *Frye* was no longer controlling in the federal courts. More specifically, the court determined that scientific evidence should now be subject to a reliability analysis that was different from the "general acceptance" test set forth in *Frye*.

After *Daubert*, the U. S. Supreme Court decided two other cases that variously, and sometimes described as excessively, elaborated on the *Daubert* decision. See *General Electric Co. v. Joiner,* 522 U. S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U. S. 137 (1999). These three cases, *Daubert, Joiner* and *Kumho*, are widely referred to as the *Daubert* trilogy of cases.

Since the decision was announced, legal commentators and scholars have been harshly critical of *Daubert's* rigid and excessively mechanical formula; the difficult, even unrealistic burdens it places on trial judges; and the complex, expensive hearings that inevitably result. See, for example, 68 Mo. L. Rev. 1 (2003) (*Daubert* has left the law of expert witnesses confused and in a state of dysfunction).

III. THE *DAUBERT* SCHEME IS FLAWED AND SHOULD BE REJECTED FOR KANSAS.

K.S.A. 60-456, and related Kansas caselaw, have become a fundamental part of the jurisprudence of this state. Judges and lawyers alike know and understand rule, and our judges routinely and responsibly make preliminary decisions concerning the qualifications of experts to testify and the proper scope of their testimony.

Whenever such a longstanding, sound, stable feature of the law like K.S.A. 60-456 is gutted and rewritten, as SB 53 seeks to do, it is a momentous development that will inevitably create confusion and turmoil in our courts and trials. No such development should be initiated thoughtlessly or to accommodate special interests.

There are many compelling reasons why this bill should never be enacted and they include the following:

1. "If It Isn't Broken, Don't Fix It." There is no credible basis to argue or conclude that Kansas district courts are experiencing any problems in considering or admitting expert or other opinion testimony in civil or criminal trials. Similarly, it would border on absurd to claim that our Kansas trial judges are irresponsibly admitting expert testimony or that flawed expert testimony is undermining the integrity of trials in our state courts. It is not happening and there is no legitimate outcry that it is.

To the contrary, judges and lawyers are familiar with K.S.A. 60-456 and there are few, if any, problems in interpreting and applying the rule at trial. Absent compelling indications that 60-456 is flawed or not working, it would be foolhardy to scrap the rule. Again, I respectfully submit that there are no such indications and no sense of the Kansas judiciary or bar that 60-456 is broken.

2. Making Piecemeal Changes To An Integrated Code Carries Risks. Kansas adopted its present evidence code in 1963, and modeled it after a uniform code of evidence. Kansas has never expressed any inclination to adopt the federal rules of evidence, and, of course, has not done so. The Kansas evidence code is an integrated system. That is, our rules of evidence are designed to work together to insure the fair, orderly presentation of evidence at every trial.

SB 53 aims to piecemeal graft one or more of the federal rules of evidence, and a novel non-federal rule of evidence (Section 2[b]), onto the Kansas evidence code. The adage that "everything affects everything else" comes to mind. The piecemeal, selective adoption of new or different rules onto our established, integrated evidence code risks disturbing the balance and uniformity of the code itself. This tangible risk of an unintended consequence should be vigilantly guarded against. Rejection of SB 53 entirely neutralizes this risk.

3. The Current Trend in State Courts Is Clearly Against Adopting *Daubert*.

There is a clear trend in state courts against the *Daubert* scheme. The primary theme of these repudiations is that whatever, if any, benefits *Daubert* may bring is overwhelmed by its imposition of greater burdens on under-resourced and over-stretched state court systems.

Gauging the adoption of the *Daubert* scheme by state courts is challenging and inexact for many reasons. For example, some states have adopted or stated some measure of approval of *Daubert*, but have rejected all or part of *Joiner* and *Kumho*. Other states have taken a lukewarm position, recognizing that the *Daubert* scheme may be considered by courts, but is not controlling.

One of the most recent analyses of this issue concluded that only nine states, a distinct minority of states, had either explicitly or implicitly adopted "all" of the *Daubert*

trilogy, and noted that in one of the nine states the issue had not yet been addressed or ruled on by the state's supreme court. 44 Jurimetrics 351 (2004). The author also reported that as many as an additional eighteen states may have staked out a position "consistent with" *Daubert*, but this calculation relied on an admittedly over-broad definition of "consistent with." For example, it encompassed states that had only acknowledged *Daubert* as instructive and states that had rejected all or part of *Joiner* and *Kumho*. Many of these states were already using the federal rules of evidence as their evidence code before *Daubert* emerged, so their *Daubert* tendencies are not particularly remarkable under the circumstances.

Interestingly, the author stated that "North Carolina has adopted both *Daubert* and *Kumho*," and included North Carolina in the foregoing group of eighteen states. As explained below, North Carolina is most certainly not a *Daubert* state.

The fact of the matter is that in the last few years, the Supreme Courts of Illinois, Arizona and North Carolina have joined those of California, New York, Florida, Pennsylvania, Michigan, New Jersey, and many other states, in rejecting *Daubert*. Kansas should stay its course, and sensibly avoid getting embroiled in the *Daubert* controversy.

4. The North Carolina Experience Spurning *Daubert*. The recent experience in North Carolina helpfully reinforces our perspective. Apparently because its evidence code patterns the federal rules of evidence, many surveys of which states have adopted a *Daubert* approach, and which have not, have mistakenly included North Carolina in the *Daubert* column.

The recent decision by the North Carolina Supreme Court in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004), unequivocally sets the record straight and makes the point that North Carolina is not a *Daubert* state and does not want to be a *Daubert* state. The following quotes from the *Howerton* opinion are both pertinent and enlightening:

> "This case initially presents us with the question of whether North Carolina has adopted the federal standard under *Daubert v. Merrell Dow Pharmaceuticals* for ruling on the admissibility of expert testimony under North Carolina Rule of Evidence 702. The Court of Appeals held that we have impliedly done so and Arai argues that we should now expressly do so. For the reasons stated below, we reject both of these contentions."
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> " . . . we are not satisfied that the federal approach offers the most workable solution to the intractable challenge of separating reliable expert opinions from their unreliable counterparts, of distinguishing science from pseudoscience, or of discerning where in this 'twilight zone' a 'scientific principle or discovery crosses the line between the experimental and

demonstrable stages.'"

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". . . our challenge is to define a standard of admissibility that does not create more problems than it solves and that does not raise more questions than it answers."

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"One of the most troublesome aspects of the *Daubert* 'gatekeeping' approach is that it places trial courts in the onerous and impractical position of passing judgment on the substantive merits of the scientific or technical theories undergirding an expert's opinion. We have great confidence in the skillfulness of the trial courts of this state. However, we are unwilling to impose upon them an obligation to expend the human resources required to delve into complex scientific and technical issues at the level of understanding necessary to generate with any meaningfulness the conclusions required under *Daubert*."

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" . . . we are concerned that trial courts asserting sweeping pre-trial 'gatekeeping' authority under *Daubert* may unnecessarily encroach upon the constitutionally mandated function of the jury to decide issues of fact and to assess the weight of the evidence."

* * *

" . . . given the serious implications of these concerns, we believe that on balance the North Carolina law . . . establishes a more workable framework for ruling on the admissibility of expert testimony under North Carolina Rule of Evidence 702. Long before *Daubert* was decided, North Carolina had in place a flexible system of assessing the foundational reliability of expert testimony, the practicability of which is evidenced by the case law. Within this system, our trial courts are already vested with broad discretion to limit the admissibility of expert testimony as necessitated by the demands of each case. Requiring a more complicated and demanding rule of law is unnecessary to assist North Carolina trial courts in a procedure which we do not perceive as in need of repair. We therefore expressly reject the federal *Daubert* standard upon which both the trial court and the Court of Appeals erroneously based their respective rulings. North Carolina is not, nor has it ever been, a *Daubert* jurisdiction."

The reasoning and rationale of the highest court in North Carolina are compelling and persuasive. Like North Carolina, Kansas should painstakingly steer clear of the *Daubert* quagmire.

5. Kansas Does Not Need *Daubert* Mini-Trials. If you are not a judge, lawyer or

court worker regularly dealing with civil or criminal trials, you may not have a good appreciation for the burdens on the judiciary that this bill creates and the North Carolina Supreme Court alluded to. Section 2(b) of the bill mandates that the court conduct a pretrial hearing to rule on the qualifications of expert witnesses and the admissibility of their testimony.

You should first know that there is no federal rule of evidence comparable to Section 2(b) of SB 53, and the architect of the bill is trying to codify atypical language. However, the reality is that since the *Daubert* case was decided in 1993 a cottage industry has blossomed in the federal courts over *Daubert* issues. The testimony of most expert witnesses is challenged by the opposing party and the federal district judges regularly engage in so-called *Daubert* hearings.

These hearings are typically accompanied by voluminous briefing materials and literally turn into elaborate mini-trials which can last days or weeks. There are now lawyers who specialize in this exercise. There are also "experts on experts" who specialize in testifying at *Daubert* mini-trials on whether contested expert evidence should be admitted. There are now even providers of legal support services whose business is dedicated to trying to keep track of the ever-increasing accumulation of often divergent *Daubert* decisions, most of which are generated by federal courts. Appeals in the federal system are no less driven and consumed by *Daubert*-related issues.

These *Daubert* proceedings are time-consuming and a monumental drain on everyone's time and resources. It makes little sense to subject our state judges and litigants, and the precious, finite resources of our state courts, to these enormous burdens and expenses. Doing so would fly in the face of the express purpose of the Kansas code of civil procedure "to secure the just, speedy and inexpensive determination of every action or proceeding." See K.S.A. 60-102.

6. Warning: Proceed With Caution . K.S.A. 60-456 is so important to the administration of justice in this state that it should never be changed rashly or impulsively. To my knowledge, SB 53 has never undergone a thoughtful analysis by the Kansas judiciary, Kansas bar or any other interested, nonpartisan entity, and such an analysis should be done at a bare minimum before enactment of the bill is seriously contemplated.

The analysis should address at least two issues. First and foremost, should 60-456 be changed at all? That is, are there really sound policy or administrative reasons to change the Kansas rule and approach? Do the identified reasons for change legitimately outweigh the inevitable turmoil and burdens that change will bring?

Second, if a change is truly worthy of consideration or warranted, how should it be accomplished? Should the Kansas rule of evidence be scrapped and a new rule or rules of evidence be enacted? If one or more of the federal rules of evidence governing testimony by experts are substituted for 60-456, which rules should be adopted? Similarly, what part of the burgeoning case law interpreting these federal rules should be recognized

in Kansas? Do we really want Kansas courts lockstep beholden to federal caselaw which can turn on a dime, and be inconsistent from federal circuit to federal circuit for years before the U.S. Supreme Court may decide to take or accept a case and resolve the inconsistency?

This essential, in-depth examination process has not been engaged in this instance with this bill, and certainly should be if this bill advances. In fairness, an in-session legislative committee with a busy, diverse agenda and limited time is probably not ideally suited to conduct such an analysis.

If this committee has any interest in this bill, the Kansas Judicial Council may be the best place for it to go for review and evaluation. As you probably already know, the Judicial Council is a statutorily created entity whose mission is "to improve the administration of justice by continuously studying the judicial system and related areas of law, by recommending changes when they are considered appropriate, and by preparing publications which further this mission." The Judicial Council, which includes a broad cross-section of the Kansas legal community uses specialized advisory committees to study proposals like SB 53. Most importantly, the far-reaching changes to a stable system portended by this bill should only be embraced after thoughtful, informed examination.

IV. CONCLUSION.

The present Kansas rule insures that scientific evidence meets a minimum, acceptable level of reliability without placing an impossible burden on state trial judges and state judicial resources. The Kansas approach is firmly rooted in sound law, balanced and capable of being sensibly and efficiently applied at trial. It has well-served the interests of justice in this and many other states for decades.

The changes mandated by SB 53 are unneeded and unwise. Kansas should stand firm with an ever-growing number of states and refuse to adopt the controversial *Daubert* scheme.

If this committee is reluctant for whatever reason to outright reject SB 53, which we urge it to do, the bill should be referred to the Kansas Judicial Council or a like-entity for analysis. Rushing to enactment without responsibly gathering and assessing the informed views and input of the judiciary and bar would disserve the legal community and Kansans alike, and risk tangible harm to criminal and civil justice in this state. Thank you for your consideration.