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 March 15, 2005, in Room 123-S of the Capitol.

All members were present except:
Barbara Allen- excused
David Haley- excused
Dwayne Umbarger- excused

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

Conferees appearing before the committee:
Representative Peggy Mast
Donna Calabrese, Director of Vital Statistics, Kansas Department of Health and Environment
Mike Williams, Detective, Emporia Police Department
Sheriff Randy Rogers, President, Kansas Sheriff's Association
Gene Balloun, Shook, Hardy & Bacon
Mark Baldwin, General Counsel & CFO, Data Systems International
Marlee Carpenter, The Kansas Chamber
Ron Hein, R.J. Reynolds
Callie Denton, Kansas Trial Lawyers Association
Kathy Damron, Phillip Morris

Others attending:
See attached list.

Chairman Vratil opened the meeting and the hearing on **Sub HB 2087**.

Sub HB 2087 Relating to identity theft, identity fraud and vital record fraud

Proponents:
Representative Peggy Mast stated that the bill deals with identify theft and fraud by defining and imposing a sentence for the crime. (Attachment 1)

Donna Calabrese stated that the current statute only addresses the willful making or alteration of certificates and attaches a penalty of a class B misdemeanor, which is not a sufficient measure to deter vital record fraud. **HB 2087** and **HB 2179** were combined together into **Sub HB 2087.** Ms. Calabrese offered a balloon amendment that adds the language necessary to amend K.S.A. 65-2434 with the reference to K.S.A. 21-2830 for vital record fraud prosecution. (Attachment 2) Ms. Calabrese stated that an additional amendment needs to be made to correct a typographical error on page 2, line 18, to change "K.S.A 9-1599" to "K.S.A. 8-1599".

Detective Mike Williams, Emporia Police Department, stated that at the present time, there is no penalty for use of another person's identity if there is no economic benefit. Detective Williams encouraged that the amendment proposed by Ms. Calabrese be passed. (Attachment 3)

Sheriff Randy Rogers, Kansas Sheriff's Association, stated that on behalf of the Association, they are in support of the bill and amendment. The bill would provide a tool that would benefit law enforcement in efforts to protect innocent victims and to hold those that prey on them accountable. (Attachment 4)

Kyle Smith testified on behalf of the Kansas Peace Officers Association, stating the Association urged passage of the bill. The Association's primary concern is the growing problem of identity theft. (Attachment 5)

MINUTES OF THE Senate Judiciary Committee at 9:30 A.M. on March 15, 2005, in Room 123-S of the Capitol.

Written testimony was provided by Craig Kaberline, Kansas Area Agency on Aging. (Attachment 6)

Chairman Vratil closed the hearing on **Sub HB 2087** and opened the hearing on **HB 2152**.

HB 2152 Master settlement agreement for tobacco; appeal bond limitations apply to affiliates of signatory

Proponents:
Eugene Balloun, with Shook, Hardy & Bacon, LLP, stated that the comments he wanted to make were regarding Data Systems International, Inc. (DSI), in Overland Park, Kansas. Data Systems International is a business established in Overland Park for more than 20 years, that employs approximately 200 people, and is involved in the computer hardware and software business. DSI had entered into an employment contract with its president, which was an extremely lucrative contract. Disputes arose concerning the operation of the company, and the president was placed on leave. He then filed a suit against DSI This lawsuit was litigated and, to the surprise of both sides, the district judge entered summary judgement against the company for approximately $6 million dollars. At that point, DSI had a net worth of about $5-$6 million dollars.

Mr. Balloun explained that if an adverse judgement is entered against a defendant, that defendant may or may not post a bond on appeal. If a bond is not posted, that means the judgement creditor is free to start collecting the judgement. DSI sought relief from the court under K.S.A. 60-2103 (d), the supersedeas bond provision. The business was mortgaged to the bank, and they were unable to post a bond. After a series of hearings, a compromise agreement was worked out with the judgement creditor, and the court approved the settlement agreement. Under the terms of the agreement, DSI paid the judgement creditor $125,000 immediately, and $20,000 a month during the pendency of the appeal in lieu of an appeal bond. Mr. Balloun noted that a copy of the Court of Appeals decision and a copy of the District Court Order have been provided to the Committee. (Attachments 7 & 8).

By the time the appeal was heard, the client had paid almost $500,000 in non-refundable payments because it could not post a supersedeas bond. The case was then processed on appeal and the court of appeals reversed the district court's entry of the summary judgment of $6 million, and the case is now back before the district court set for trial.

Mr. Balloun stated that this case fully illustrates the kinds of situations that can arise with businesses in Kansas when they are faced with judgments in Kansas, and the companies or the individuals would not be able to post bonds. He suggested to the Committee that some relief is needed in that respect.

Mark Baldwin, General Counsel & CFO, Data Systems International, stated that regarding the bonding requirements to obtain a supersedeas bond, most insurance companies look at the net worth and book value of the company and allow no more than 20 percent. In this day and age, judgments can be far in excess of $100, million dollars. For companies the size of DSI, with a book value of $5-6 million dollars, it is a challenge of just trying to find a bond to advocate a company's position. It is a fairness issue that needs to be considered as the legislature goes about setting public policy. (Attachment 9)

Marlee Carpenter, The Kansas Chamber, stated that the Chamber respectfully requests that the Committee consider an amendment extending the appeal bond waiver to all businesses in Kansas. Additionally, Ms. Carpenter stated that her written testimony included some suggested language changes and a copy of **HB 2222**, which was introduced during the 2001 Legislative Session, which proposed some limits that defendants may be required to post, based on the judgment, while appealing an adverse judgement. (Attachment 10).

Chairman Vratil stated that he had spoken with Ms. Carpenter and another representative of the Kansas Chamber just the day before, and, as a result, the Chamber has agreed not to propose any amendments to this bill, but to look for another vehicle to add their proposed amendment to. Chairman Vratil's understanding is that this proposed amendment will not be offered to **HB 2152**.

Ron Hein, representing R.J. Reynolds Tobacco Company, stated that the bill originally followed up on 2003 legislation where there was an appeal bond cap, which placed monetary limits on the amount of bond required

to be posted to proceed with an appeal in cases involving tobacco manufacturers who were signatories to the Master Settlement Agreement (MSA). The legislation was designed to help protect the hundreds of millions of dollars paid each year to the 46 states who entered into the MSA. **HB 2152** clarifies the statute to provide such appeal bond protection applicable to appeal of litigation which involves signatories to the MSA. Mr. Hein stated that when there were objections by the Kansas Trial Lawyers Association, and that they were able to work out language that was agreeable to both organizations. Mr. Hein requested the Committee favorably recommend that the bill be passed. (Attachment 11).

Callie Denton, Kansas Trial Lawyers Association (KTLA), stated that KTLA was originally opposed to the bill because they believed it provided an expansion to the appeal bond caps that were intended for the tobacco companies only. They were very agreeable to working on narrowing the provisions to just be a clarification and not an expansion of the appeal bond cap provision. Ms. Denton stated that the bill is very consistent with the legislative intent in 2003, so they now support it. Regarding the Chamber's policy suggestions regarding **HB 2222**, this was a bill that KTLA opposed and would not want to see the provisions added to the bill. (Attachment 12)

Jim Clark, the Kansas Bar Association (KBA), stated that the Association has no position on the proposed legislation. To his knowledge, the only types of cases which would require high appeal bonds are class actions. Congress has preempted class actions in most state cases, so there is probably some good reasons to make changes to the appeal bond statutes, but Mr. Clark recommended changes should be made after an interim study or perhaps after review by the Kansas Judicial Council.

Written testimony was submitted by Kathy Damron, on behalf of Altria Services Corporation, Philip Morris, USA. (Attachment 13)

Chairman Vratil closed the hearing on **HB 2152** and asked the Committee to consider final action on the bill.

Final Action:
HB 2152 Master settlement agreement for tobacco; appeal bond limitations apply to affiliates of signatory

A motion was made to recommend the bill favorably out of Committee. Senator Goodwin moved, seconded by Senator Donovan, and the motion carried. Senator Schmidt requested that his "no" vote be recorded in the minutes.

Chairman Vratil announced to the Committee that he is going to request that the Judicial Council review in more detail **HB 2104**, which deals with a UCC security interest in oil and gas production. Chairman Vratil stated that he had learned that there are more provisions in the UCC which allow for security interests in oil and gas production. He was informed that the problem that is faced by the owners is that the producers refuse to grant security interests, and, therefore, they are seeking an automatic security interest in the oil and gas production.

Chairman Vratil asked the Committee to consider final action on **HB 2168**.

Final Action:
HB 2168 Uniform commercial code; defining a new class of payment instrument, drawn on the customer's account without an authorized signature, called a demand draft

A motion was made to recommend favorably that the bill be passed. Senator Donovan moved, seconded by Senator Bruce, and the motion carried.

Chairman Vratil asked the Committee to consider final action on **HB 2327.**

Final Action:
HB 2327Authority for Juvenile Justice Authority to test offenders for infectious diseases

MINUTES OF THE Senate Judiciary Committee at 9:30 A.M. on March 15, 2005, in Room 123-S of the Capitol.

A motion was made to recommend favorably that the bill be passed. Senator Bruce moved, seconded by Senator Goodwin, and the motion carried.

Chairman Vratil adjourned the meeting at 10:30 A.M. The next meeting is scheduled for March 16, 2005.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3-15-05

NAME	REPRESENTING
Jeff Carmichael	KTLA
Callie J Denton	KTLA
Donna Calabrese	KDHE
Peggy Mast	Rep.
MICHAEL WILLIAMS	EMPORIA POLICE DEPT.
Gene Balloun	Shook, Hardy + Bacon
Mark Baldwin	DSI
Marlee Carpenter	KS Chamber
BILL Brady	K&C
Ron Hein	RJ Reynolds Tobacco
CRAIG KABERLINE	KAA
Kevin Barone	KTLA
Jeff Bottenberg	State Farm / KSA
Jim Mayo	Foulston Siefkin LLP
Kathleen Olsen	KS Bankers Assoc.
BILL MISKELL	JJA
JIM CLARK	KBA
Michael White	KCDAA

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3/15/05

NAME	REPRESENTING
Julia Butler	KSC
Brenda Harmon	KSC
Scott Heidner	Gaches Braden
Lane Wilson	KTA
Jon Palace	PMCA of Kansas
John C. Bottenberg	Philip Morris
Elisa Ramos	intern w/ KNASW
Mike Reecht	Xcaliber
Dan Murray	Federico Consulting
[illegible]	KTLA

STATE OF KANSAS

PEGGY MAST
REPRESENTATIVE, 76TH DISTRICT
765 ROAD 110
EMPORIA, KANSAS 66801
(620) 343-2465

ROOM 446-N CAPITOL BLDG.
TOPEKA, KS 66612
(785) 296-7685

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS

VICE-CHAIR: HEALTH & HUMAN SERVICES
UTILITIES
SOCIAL SERVICES BUDGET

TESTIMONY ON HB 2087
MARCH 15, 2005

Identity theft is definitely not a new term. It is one that we have become very familiar with over the past several years and everyone knows that the problem is getting worse. HB 2087 gives us an opportunity to deal with identity theft and fraud by defining the problem, and placing a sentence on the crime. This bill is needed today to help law enforcement and the judicial system properly deal with the issue and to help protect the citizens of Kansas who are suffering a great deal of economic loss from this problem.

The great thing about this bill is that this committee, while working this issue in the past had the foresight to see that there may be unintended consequences to placing sentences on individuals who, in their youth, are trying to get by with using someone else's ID to drink, or perhaps view material that is intended for mature audiences. This committee has helped by drafting an amendment at that time to make exception for those cases.

With that, I will close and stand for questions.

Senate Judiciary
3-15-05
Attachment 1

KDHE Testimony

Testimony on Substitute House Bill 2087
To
Judiciary Committee
Presented by Donna L. Calabrese
Director, Office of Vital Statistics
Center for Health and Environmental Statistics
Kansas Department of Health and Environment

March 15, 2005

Chairperson Vratil and members of the Judiciary Committee, I am pleased to appear before you today to discuss Substitute House Bill 2087.

House Bill 2087 and House Bill 2179 addressed the related issues of identity theft and identity fraud and vital record fraud. Vital record fraud is often the first step in the process of stealing identity or committing identity fraud. Therefore, the meshing of House Bill 2087 and House Bill 2179 into Substitute House Bill 2087 made perfect sense. It addresses these major issues with a solution that is beneficial to all. In addition, since KDHE does not have the authority to prosecute vital record fraud, it is better addressed in the Criminal Code with a reference included in the Vital Statistics Act. A balloon is attached, adding the language necessary to amend K.S.A. 65-2434 to refer to K.S.A. 21-2830 for vital record fraud prosecution.

It is important to specifically address vital record fraud. Fraudulent use of these records has soared within the past two decades. Federal and state statutes require proof of age, identity, and citizenship through presentation of a certified copy of a vital record for such needs as starting a new job, obtaining HUD housing, obtaining Social Security numbers and benefits, school enrollment, and claiming dependents for tax exemptions. Many other sources require these documents in order to obtain insurance benefits, driver's licenses, obtain a passport, visa, or other government documents. The continued increase in public reliance on certified copies of vital records has created a greater need for these documents. This, in turn, has resulted in increased fraudulent use of these records. The critical nature of vital record fraud is evidenced by the reasons this crime is committed: to commit identity theft; to conceal true identity to elude detection and apprehension by law enforcement (this includes terrorists and drug traffickers); to create fictitious records for the financial gain of benefits from government programs and insurance companies.

The current statute, K.S.A. 65-2434, addresses only the willful making or alteration of certificates and attaches a penalty of a class B misdemeanor. These are not sufficient measures to deter vital record fraud. In order to properly combat criminal use of vital records, the law must address any fraudulent creation, alteration, or use of a vital record plus the penalty must suit the severity of the crime and present a reasonable determent.

According to the Federal Trade Commission's Identity Theft Survey Report of September 2003, there were 10 million victims of identity theft nationwide in 2003 with an average loss of $10,200 each. Every one of the 9/11 terrorists gained passage on the planes using identification obtained with fraudulent vital records. According to the KBI, identity theft of Kansans is growing and they are responding to numerous reports of this crime. In 2004, the Office of Vital Statistics assisted law enforcement with 282 cases of fraud investigations and staff detected an additional 36 attempts. Using new document detection software shared by the Department of Revenue, Office of Vital Statistics staff are identifying 10 to 15 questionable applications weekly.

An example of the financial impact of vital record fraud on this state is the apprehension of Daniel Salas in 1998 in Liberal, Kansas. During a traffic accident, his vehicle's trunk popped open and a law enforcement officer spotted multiple vital record documents which led to the search of his apartment. Hundreds of fraudulent vital record documents were discovered. SRS conducted an investigation into how many of these documents had been used to obtain benefits. They checked the names listed on 830 fraudulent Kansas records and their system hit on 105 of them. Of those, around 55 were provided assistance. Those 55 received assistance of at least $105,000 per month, costing the state a total of $1,200,000 to $2,000,000.

These activities threaten the physical and financial safety of all people and protection of vital records has risen to a matter of national security. The push for recognition of this critical issue includes the new Intelligence Reform Bill, the September 2000 Office of Inspector General's Report, and the National Association for Public Health Statistics and Information System's standards for fraud prevention. We must respond with appropriate laws.

I thank you for the opportunity to appear before the Judiciary Committee and will gladly stand for questions the committee may have on this topic.

Session of 2005

Substitute for HOUSE BILL No. 2087

March 15, 2005

By Committee on Corrections and Juvenile Justice

2-22

AN ACT concerning crimes, punishment and criminal procedure; relating to identity theft, identity fraud and vital records fraud; amending K.S.A. 21-3830 and 65-2434 and K.S.A. 2004 Supp. 21-4018 and repealing the existing sections.

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

Section 1. K.S.A. 21-3830 is hereby amended to read as follows: 21-3830. (a) Dealing in false identification documents is reproducing, manufacturing, selling or offering for sale any identification document which:

(1) Simulates, purports to be or is designed so as to cause others reasonably to believe it to be an identification document; and

(2) bears a fictitious name or other false information.

(b) As used in this section, ''identification document'' means any card, certificate or document *or banking instrument including, but not limited to, credit or debit card,* which identifies or purports to identify the bearer of such document, whether or not intended for use as identification, and includes, but is not limited to, documents purporting to be drivers' licenses, nondrivers' identification cards, *certified copies of* birth, *death, marriage and divorce* certificates, social security cards and employee identification cards.

(c) Dealing in false identification documents is a severity level ~~10~~ *9*, nonperson felony.

(d) *Vital records identity fraud related to birth, death, marriage and divorce certificates is:*

(1) Willfully and knowingly supplying false information intending that the information be used to obtain a certified copy of a vital record;

(2) making, counterfeiting, altering, amending or mutilating any certified copy of a vital record:

(A) Without lawful authority; and

(B) with the intent to deceive; or

(3) willfully and knowingly obtaining, possessing, using, selling or furnishing or attempting to obtain, possess or furnish to another for any purpose of deception a certified copy of a vital record.

(e) Vital records identity fraud is a severity level 9, nonperson felony.

(f) The prohibitions in subsections (a) and (b) do not apply to:

(1) A person less than 21 years of age who uses the identification document of another person to acquire an alcoholic beverage, as defined in K.S.A. 9-1599, and amendments thereto;

(2) a person less than 18 years of age who uses the identification documents of another person to acquire:

(A) Cigarettes or tobacco products, as defined in K.S.A. 79-3301, and amendments thereto;

(B) a periodical, videotape or other communication medium that contains or depicts nudity;

(C) admittance to a performance, live or film, that prohibits the attendance of the person based on age; or

(D) an item that is prohibited by law for use or consumption by such person.

(g) This section shall be part of and supplemental to the Kansas criminal code.

Sec. 2. K.S.A. 2004 Supp. 21-4018 is hereby amended to read as follows: 21-4018. (a) Identity theft is knowingly and with intent to defraud for ~~economic~~ *any* benefit, obtaining, possessing, transferring, using or attempting to obtain, possess, transfer or use, one or more identification documents or personal identification number of another person other than that issued lawfully for the use of the possessor.

(b) ''Identification documents'' ~~means the definition~~ as *has the meaning* provided in K.S.A. 21-3830, and amendments thereto.

(c) Identity theft is a severity level ~~7~~ *9*, ~~person~~ *nonperson* felony.

(d) *Identity fraud is:*

(1) Willfully and knowingly supplying false information intending that the information be used to obtain an identification document;

(2) making, counterfeiting, altering, amending or mutilating any identification document:

(A) Without lawful authority; and

(B) with the intent to deceive; or

(3) willfully and knowingly obtaining, possessing, using, selling or furnishing or attempting to obtain, possess or furnish to another for any purpose of deception an identification document.

(e) Identity fraud is a severity level 9, nonperson felony.

(f) This section shall be part of and supplemental to the Kansas criminal code.

Sec. 3. K.S.A. 65-2434 is hereby amended to read as follows: 65-2434. ~~(1) Any person who willfully makes or alters any certificate, certified copy thereof or abstract provided for in this act, except in accordance with the provisions of this act, shall be guilty of a class B misdemeanor.~~

~~(2)~~ *(a)* Any person who knowingly transports or accepts for transportation, a dead body located in this state to a location outside the boundaries of this state without an accompanying permit issued in accordance with the provisions of K.S.A. 65-2428a, shall be guilty of a class C misdemeanor. (c)

~~(3)~~ *(b)* Except where a different penalty is provided in this section, any person who violates any of the provisions of this act or neglects or refuses to perform any of the duties imposed upon such person by this act, shall be fined not more than $200.

Sec. 4. K.S.A. 21-3830 and 65-2434 and K.S.A. 2004 Supp. 21-4018 are hereby repealed.

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

(b)

Vital records fraud related to birth, death, marriage and divorce certificates shall be prosecuted pursuant to K.S.A. 21-3830, and amendments thereto.

IDENTITY THEFT

Ref: House Bill No. 2087
2-15-05

Presented by:
Deputy Chief Michael Williams
Emporia Police Department

Definition: "Identity Theft is knowingly and with intent to defraud for *economic benefit*, obtaining, possessing, transferring, using or attempting to obtain, possess, transfer or use, one or more identification documents or personal identification number of another person other than that issued lawfully for the use of the possessor."

* * * At the present time, there is **no penalty** for use of another person's identity if there is no economic benefit.

Proposal: The proposed change would include the ". . . intent to defraud for *any benefit, including but not limited to economic benefit* . . . "

K.B.I Statistical Data	From 2002 to 2003	Up **305%**
	From 2003 - 2004	Up **504%**

The internet continues to be the preferred means to access information used to obtain false documents such as drivers licenses, social security cards, birth certificates and identity cards. This in itself is not against the law. These documents are in turn used to obtain employment, commit forgery, obtain prescriptions, health services and various other illegal activities.

Senate Judiciary
3-15-05
Attachment 3

Federal Trade Commission Stats on

IDENTITY THEFT

In 1999 the FEDERAL TRADE COMMISSION was tasked with keeping track of consumer complaints on IDENTITY THEFT

Since 1999 Consumer Complaints on Identity Theft have topped the list each year. 42% of all complaints filed are for identity theft. In 2002 the complaints numbered 404,000 and jumped to 526, 740 in 2003. The FTC receives 4200 calls and e-mails each week on identity theft.

A break down of the complaints received indicates :

33% CREDIT CARD FRAUD
21% UTILITY SERVICES OR TELECOMMUNICATIONS
17% BANK FRAUD
8% FRAUDULENT CHECKS
4% ACCOUNTS OPENED AT BANKS
5% ELECTRONIC WIRE TRANSFERS
6% OBTAINING LOANS
8% GOVERNMENT BENEFITS OR DOCUMENTS (SS CARD, DRIVERS LICENSE)
11% EMPLOYMENT

AGE GROUPS

28% 18-29
25% 30-39
21% 40-49
13% 50'S
10% 60'S

AWARENESS FACTOR

59% IMMEDIATE
22% WITHIN 6 MONTHS
15% UNAWARE FOR 2 YEARS

THE FACT ACT (Fair and Accurate Credit Transactions Act) was passed in April 2003 which, in part, makes it mandatory for law enforcement to take reports of Identity Theft. In addition in provides the public with the availability to receive a free credit report each year.

New York Daily News - http://www.nydailynews.com

Thefts Net plenty of info on you

THE ASSOCIATED PRESS
Saturday, March 12th, 2005

If you're wondering what information database companies have on you, you're not alone.

It's a question on many minds now that two information giants, ChoicePoint and LexisNexis, have disclosed that criminals sneaked into their computer networks and accessed personal data on more than 170,000 Americans.

To find out just what these companies have, an Associated Press reporter bought dossiers on herself from both, spending less than $30.

A curious customer looking at both reports would find out everything from her sister-in-law's brother's name to her party affiliation (undeclared). But they wouldn't learn that she is married.

The reports are rich with information that are by no means complete - nor are they always accurate.

But it had her name, date of birth and Social Security number. It listed bankruptcies, real estate and corporate affiliations (none, none and none).

It listed current and former addresses and phone numbers, as well as those of neighbors. Her husband is listed as a neighbor.

Both LexisNexis (whose database is called Accurint) and ChoicePoint got one of those addresses wrong, giving her the same address on both E. 105th St. and W.105th St. in Manhattan. She only lived on the West Side.

Accurint's list of her possible relatives was brief and dead-on - in distinct contrast to ChoicePoint, whose 200-person list of possible relatives, while rich with celebrities, was largely inaccurate, listing possible relatives who are really no relation.

3-3

Kansas Sheriffs Association

P.O. Box 1853
Salina, Kansas 67402-1853
785-827-2222
Fax 785-827-5215

Chairman and Committee Members,

I am Randy Rogers, President of the Kansas Sheriff's Association. I come before you today in support of House Bill 2087, Identity Theft. As I am sure many of you are aware of the problem surrounding identity theft and have heard the horror stories from victims. Identity Theft continues to be a problem and will be in the future. While we have made wonderful advancements in technology and computers, so have criminals. With the advancements in technology it seems as though it has become so easy to obtain personal information of persons and then use the information to obtain documents and assume their identity for criminal purposes. This legislation as a tool that will benefit law enforcement in our efforts to protect innocent victims and to hold those that prey on innocent victims accountable. Thank you for your time and consideration.

Randy L. Rogers
President
Kansas Sheriff's Association

Senate Judiciary
3-15-05
Attachment 4

Kansas Peace Officers Association

Testimony in Support of Substitute for HB 2087
Before the Senate Judiciary Committee
Kyle G. Smith
On behalf of the Kansas Peace Officers Association
March 15, 2005

Chairman Vratil and Members of the Committee,

On behalf of the Kansas Peace Officers Association we would urge your passage of HB 2087. While sections 1 and 3 have merit and been amended on, our primary concern is the growing problem of identity theft. Normally thought of as a means of committing fraud, identity theft can have other motives and other victims than just the financial ones.

Whether the intent is to gain access to restricted information, hide a terrorist or 'merely' to destroy an ex-spouses credit rating, the harm to society and the victim can be devastating, regardless of the amount of dollars lost. Even in a financially motivated case of identity theft, the person whose identity has been stolen can be as much or more of a victim than the merchant or institution who suffered the economic loss. Loss of credit rating, legal expenses, embarrassment, difficulty in getting loans and employment frequently are experienced by the person whose identity was usurped – even though some other 'victim' suffered the loss of 'economic benefit'. One of our best special agents was almost not hired because our background check revealed extensive problems – all of which turned out to be the result of identity theft.

Identity theft is probably the fastest growing crime in Kansas and we need to keep our law updated to meet this evolving threat.

Thank you for your attention and I would be pleased to stand for any questions.

Senate Judiciary
3-15-05
Attachment 5

THE
KANSAS
AREA AGENCIES
ON AGING
ASSOCIATION

Meeting the Needs of Older Kansans

1720 SW TOPEKA BOULEVARD • TOPEKA, KS 66612 • 785-235-8734 • FAX - 785-235-8747

To: Senate Judiciary Committee
From: Craig Kaberline, Executive Director, Kansas Area Agencies on Aging Association
Date: March 15, 2005

Testimony in Support of House Bill 2087

Chairman Vratil and members of the committee, I appreciate the opportunity to provide written testimony regarding House Bill 2087. My name is Craig Kaberline and I am the executive director of the Kansas Area Agencies on Aging Association (K4A). K4A's mission is to work to improve services and supports for all older Kansans and their caregivers. K4A represents all eleven Area Agencies on Aging (AAA) who provide information and coordinate services for seniors in all 105 counties of Kansas.

The Kansas Area Agencies on Aging Association asks for your support of House Bill 2087. Anyone can become a victim of identity theft; no one is exempt because of age, gender, race or socio-economic status. This crime impacts everyone from Kansas children to Kansas seniors. Last year I had the chance to attend FBI training on identity crimes. At this training they talked about situations where individuals had taken documents and information from various sources including your trash; the mail, phone scams; children's school and medical records; adults employment records; social services agencies serving those of all ages; and even theft of information from those who had died. This information is not necessarily used by the person taking the information, sometimes this information is gathered by "pretexters."

Pretexting is the practice of getting your personal information under false pretenses. Pretexters sell your information to people who may use it to get credit in your name, or get identification using your name. The theft of ones information can have long and lasting effects. It's difficult to predict how long the effects of identity theft may linger. That's because it depends on many factors including the type of theft, whether the thief sold or passed your information on to other thieves, whether the thief is caught, and problems related to correcting your credit report.

It is time these practices become a crime in Kansas.

We thank you for your commitment to serving older Kansans. We ask for your support of House Bill 2087.

Submitted by Eugene Balloun

NOT DESIGNATED FOR PUBLICATION

No. 89,890

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

KENNETH L. SAATHOFF,
Appellee,

v.

DATA SYSTEMS INTERNATIONAL, INC.,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; JOHN P. BENNETT, judge. Opinion filed February 13, 2004. Reversed and remanded.

J. Eugene Balloun and *Michael S. Cargnel*, of Shook, Hardy & Bacon, L.L.P., of Overland Park, for appellant.

James D. Oliver, of Foulston Siefkin LLP, of Overland Park, and *Michael G. Norris* and *Donald R. Whitney*, of Norris, Keplinger & Hillman, L.L.C., of Overland Park, for appellee.

Before GREEN, P.J., MARQUARDT and MALONE, JJ.

Per Curiam: This case arises from a breach of an employment agreement. Data Systems International, Inc. (DSI) appeals the district court's order granting summary judgment in favor of its former president, Kenneth L. Saathoff. DSI claims that summary judgment should have been denied based upon material issues of fact.

DSI is a computer software company which was founded in 1979 by Michael J. McGraw. McGraw became the sole shareholder of DSI in 1989. Saathoff began working at DSI in 1986 and eventually was named president of the company in 1993. In June 1995, Saathoff and DSI entered into an employment agreement. A "phantom stock" interest was incorporated into the agreement to the effect that Saathoff would receive 25% of the net sale proceeds if DSI was ever sold.

In 1998, a company called "Percon" presented an offer to purchase DSI for $54 million. Had the sale gone through, Saathoff stood to make $13.5 million due to his 25% phantom stock interest in DSI. McGraw, who was the only actual shareholder at the time, prevented the sale to Percon.

Following the failed sale to Percon, McGraw decided to buy out Saathoff's 25% interest in DSI and a new employment agreement was entered into in 1999. This is the employment agreement at issue. At the same time, a separate agreement was entered into

whereby the 1995 employment agreement was terminated upon payment of $7.5 million from DSI to Saathoff. This "termination of employment agreement" was signed by all parties, and Saathoff does not dispute that he received $7.5 million as a buy out of the 1995 agreement. It is DSI's contention that the $7.5 million payment fully redeemed the phantom shares.

Section 5 of the 1999 employment agreement provided for the payment of $6 million to Saathoff, structured as a series of "retention bonuses," with $2 million to be paid to Saathoff for each year he stayed on as president until May 31, 2002. Saathoff claimed on summary judgment that the $6 million in retention bonuses, *plus* the $7.5 million, was the actual buy out of the phantom stock.

Much of the current dispute revolves around the district court's interpretation of Section 10 of the 1999 employment agreement. Section 10 is entitled "Termination of Employment." Under Section 10.a, "Termination for Cause" was defined as:

> "(i) any act of personal dishonesty taken by Saathoff in connection with his responsibilities as President of DSI that is intended to result in substantial personal enrichment of Saathoff; (ii) the conviction of a felony committed with the intent of injuring DSI's reputation; or (iii) habitual failure to come to work, other than for customarily excused absences, for personal illness or other reasonable causes."

Section 10.d of the agreement defined DSI's obligations in the case of a "Termination Not for Cause." If DSI terminated the agreement without cause, DSI agreed to the following terms:

> "(i) DSI will pay Saathoff's base compensation for the remainder of the term of this agreement in monthly installments, and DSI will pay $240,000 to Saathoff in lieu of Saathoff's base compensation under the Supplemental Employment Agreement.
>
> (ii) DSI will pay Saathoff's accrued but unpaid incentive compensation through the termination date.
>
> (iii) *DSI will pay Saathoff any unpaid retention bonus amounts set forth in Section 5 hereof on the termination date.*" (Emphasis added.)

On June 14, 2000, McGraw informed Saathoff that McGraw was resuming operational control of DSI, and McGraw testified that Saathoff was forced to take a "paid leave of absence." DSI argues on appeal that this move was taken due to "Saathoff's lack of diligent performance." DSI provided the district court with evidence that Saathoff had performed his duties in an inadequate manner following the 1999 employment agreement. Some of DSI's allegations included charges that Saathoff habitually failed to come to work; failed to devote all of his business time, attention, skill, and efforts to the diligent performance of his duties; allowed DSI to suffer a significant deterioration of financial stability between February 1999 and June 2000; and inappropriately sought and received

reimbursement from DSI for personal expenses. Despite the fact that Saathoff was suspended on June 14, 2000, the first $2 million retention bonus, due on June 15, 2000, was paid in full to Saathoff.

On July 26, 2000, about 6 weeks after being placed on paid leave of absence, Saathoff wrote a letter to McGraw giving notice of his voluntary termination under Section 10.e of the 1999 employment agreement. This section stated:

> "*Voluntary Termination*. Saathoff may voluntarily terminate employment under this Agreement upon 60 days' written notice to DSI; *provided, however, that notwithstanding any other provision of this agreement, if DSI materially alters Saathoff's duties or responsibilities without his prior consent, a termination by Saathoff then shall be deemed to be a termination not for cause by DSI and the provisions of paragraph 10.d above shall apply . . . .*" (Emphasis added.)

According to Saathoff, his paid leave of absence "materially altered" his job duties and responsibilities without his consent. Thus, pursuant to Section 10.e, Saathoff claimed that his voluntary termination was a termination not for cause, which entitled Saathoff to full and immediate payment of his unpaid retention bonuses.

This lawsuit was initiated on November 17, 2000, when DSI failed to pay Saathoff the nearly $5 million which would have been due pursuant to Section 10.d of the

employment agreement. On February 23, 2001, 3 months after the lawsuit was filed, DSI sent a letter to Saathoff which claimed to terminate Saathoff "for cause, based on [Saathoff's] habitual failure to come to work and other reasonable causes."

Saathoff filed a motion for summary judgment, claiming the evidence was undisputed that his job duties and responsibilities had been materially altered by DSI and, pursuant to Section 10.e of the employment agreement, Saathoff was entitled to voluntarily terminate his employment and still receive the unpaid retention bonuses. The district court granted Saathoff's motion and awarded Saathoff $4 million for the retention bonuses, $690,000 for base compensation, and $180,360.85 for attorney fees and costs. After judgment was entered, DSI filed a motion to alter or amend in order to add counterclaims against Saathoff. DSI's motion was denied.

This timely appeal follows.

> "'Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact.

> In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. [Citation omitted.]'" *Mitchell v. City of Wichita*, 270 Kan. 56, 59, 12 P.3d 402 (2000) (quoting *Bergstrom v. Noah*, 266 Kan. 847, 871-72, 974 P.2d 531 [1999]).

Since this case involves a written employment agreement, some general rules of contract construction should be considered. The primary rule when interpreting a written contract is to ascertain the intent of the parties. *Marquis v. State Farm Fire & Cas. Co.*, 265 Kan. 317, 324, 961 P.2d 1213 (1998).

> "An interpretation of a contractual provision should not be reached merely by isolating one particular sentence or provision, but by construing and considering the entire instrument from its four corners. The law favors reasonable interpretations, and results which vitiate the purpose of the terms of the agreement to an absurdity should be avoided. [Citation omitted.]" *Johnson County Bank v. Ross,* 28 Kan. App. 2d 8, 10-11, 13 P.3d 351 (2000).

DSI initially claims that the district court erred in granting summary judgment when issues of fact existed on whether Saathoff committed a "first in time material breach" of the employment agreement, thereby excusing performance by DSI. DSI has

compiled an extensive list of allegations which purport to show that Saathoff breached his duties under the employment agreement prior to June 14, 2000. These "first in time material breaches" are the essence of DSI's claim that Saathoff cannot enforce the "voluntary termination" provision of the employment agreement.

The district court's order granting summary judgment acknowledged that DSI had "presented controverted facts alleging that Mr. Saathoff breached the agreement prior to June 14, 2000." However, the district court concluded that "none of these controverted facts are material." The district court determined that Saathoff had voluntarily terminated the agreement pursuant to Section 10.e before DSI asserted the "for cause" justification. Under a strict reading of the employment agreement, the district court concluded that Saathoff was entitled to the unpaid retention bonuses, even though DSI may have had grounds to terminate Saathoff for cause.

Kansas law has long recognized that a claimant must demonstrate his or her own performance (or willingness to perform) under a contract to present a viable claim for breach of contract. See PIK Civ. 3d 124.01-A (defining "plaintiff's performance or willingness to perform in compliance with the contract" as an essential element to a beach of contract claim). See also *Commercial Credit Corp. v. Harris*, 212 Kan. 310, 313, 510 P.2d 1322 (1973) (establishing performance of claimant as a prima facie element for breach of contract claim); *In re Estate of Johnson*, 202 Kan. 684, 692, 452 P.2d 286

(1969) (noting each party "'must perform the terms and conditions of that agreement before he or she can claim the benefits to be derived therefrom'").

No Kansas case is directly on point to our facts. In *Gassman v. Evangelical Lutheran Good Samaritan Society, Inc.*, 261 Kan. 725, 933 P.2d 743 (1997), the plaintiff claimed she was wrongfully terminated by her employer. During discovery, the employer uncovered evidence, a theft committed by the plaintiff, which would have justified her termination pursuant to the employment handbook. Based upon this evidence, the district court granted summary judgment in favor of the employer. The Kansas Supreme Court held that an employee is not entitled to any relief in a wrongful termination case if the employer can establish "after-acquired evidence" sufficient for termination. 261 Kan. 725, Syl. ¶ 1. If the court finds that there is no issue of material fact as to the evidence, then the court may rule upon the defense as a matter of law. Otherwise the issue should be submitted to the jury. See 261 Kan. at 730-32.

Gassman is distinguishable from the facts of this case. However, the case is instructive because it stands for the proposition that in an employment termination case, an employee is not entitled to recover if evidence establishes that the employee committed acts, prior to termination, which would have otherwise justified termination. It does not even matter when these acts are discovered. A factual dispute on this evidence should be resolved by the jury.

In *Stroud v. Cessna Aircraft Co., Inc.*, 1995 WL 333124 (D. Kan. 1995) (unpublished opinion), the federal district court addressed the issue of whether sales commissions were recoverable on sales which were finalized after Stroud left the employment of Cessna. Cessna claimed that the commissions were not recoverable due to Stroud's breach of his duty of loyalty resulting from his decision to start up a competing business. The federal court determined that summary judgment could not be granted to Cessna as a result of Stroud's alleged breach of his employment contract. The court held: "[W]hether Stroud's [decision to start a competing business] is so material a breach of his employment contract that it justifies Cessna's withholding of his sales commissions is surely a matter for the jury to determine." *Stroud* at *8. Likewise, other states have noted that an employee's material breach of his or her employment contract can excuse an employer from further performance under the contract. See *Healey v. Mutual Life Ins. Co.*, 2001 WL 533759 at *3 (Mass. App. 2001) (unpublished opinion).

Here, DSI presented evidence that Saathoff habitually failed to come to work for the last year he was on the job. Saathoff disputed this evidence. Had this fact issue been resolved in favor of DSI, it would have been justified to terminate Saathoff for cause, which would have relieved DSI from paying further retention bonuses. According to the district court, this did not matter because Saathoff had voluntarily terminated the agreement after his duties were "materially altered."

The fundamental problem in upholding the district court's grant of summary judgment is its potentially unjust result. By construing the voluntary termination provision separate from the rest of the agreement, the district court has potentially rewarded an individual for his breach of contract and punished a company which decided to conduct an investigation prior to terminating the employment of its president.

Consider the following hypothetical. Saathoff is accused of embezzling from the company. The board of directors launches an internal investigation and suspends Saathoff with pay until the investigation is completed. Saathoff immediately writes a letter of voluntary termination, claiming that his duties have been materially altered, and demands his unpaid retention bonuses. Pursuant to the district court's ruling, Saathoff would be eligible to receive nearly $5 million in compensation, even though issues of fact existed on whether Saathoff committed embezzlement.

Section 10.e of the employment agreement must be construed with the rest of the agreement to avoid an unreasonable result. It should have been left to the factfinder to determine which party initially breached the contract. "Whether a contracting party's refusal to perform was because of a genuine claim that a condition precedent failed is a question for the finder of fact . . . . [Citation omitted.]" *Source Direct, Inc. v. Mantell,* 19 Kan. App. 2d 399,407, 870 P.2d 686 (1994). Since evidence was presented that Saathoff committed a first in time material breach of the agreement, DSI should have been allowed

to convince the factfinder that its refusal to make the Section 10.d payments was due to Saathoff's breach of the agreement as a whole. Accordingly, the district court erred in granting summary judgment in favor of Saathoff.

As an alternative issue, DSI claims that the district court erred in granting summary judgment when a material issue of fact existed regarding whether Saathoff's duties were "materially altered" as a result of the suspension.

Section 10.e of the employment agreement provided that "if DSI *materially alters* Saathoff's duties or responsibilities without his prior consent," then Saathoff may voluntarily terminate the employment agreement and still be entitled to receive his unpaid retention bonuses. The agreement provided no definition for the term "materially alters."

DSI contends that a "temporary suspension pending an investigation" was never intended by the parties to justify Saathoff's voluntary termination or to trigger the Section 10.d payments. The record contains evidence that Saathoff's compensation, benefits, and rank were not altered while he was suspended. In fact, as of January 1, 2001, Saathoff was still listed as president of DSI.

On the other hand, McGraw acknowledged that Saathoff's duties had been "entirely taken away" and Saathoff could exercise none of his responsibilities as president. However, McGraw insisted in his deposition that he had always hoped to bring Saathoff back if the investigation exonerated Saathoff of wrongdoing. Saathoff challenges the sincerity of McGraw's testimony, but on summary judgment the evidence must be viewed in favor of the party defending the motion.

Saathoff's job duties were clearly altered as a result of the suspension. However, the suspension was considered *temporary*. The temporary paid leave of absence may or may not have been seen by the factfinder as a material alteration of duties and responsibilities, especially since this term is not defined in the agreement. Since reasonable minds could differ as to whether Saathoff's duties and responsibilities were materially altered, summary judgment should have been denied for this reason as well.

The final issue is whether the district court abused its discretion when it denied DSI's motion to alter or amend its answer after summary judgment was granted.

> "'A trial court is given broad discretionary power under K.S.A. 60-215 to permit or deny the amendment of pleadings, and its actions will not constitute reversible error unless it affirmatively appears that the amendment allowed or denied is so material it affects the substantial rights

7-13

of the adverse party.'" *Clevenger v. Catholic Social Service of the Archdiocese of Kansas City*, 21 Kan. App. 2d 521, 524, 901 P.2d 529 (1995) (quoting *Rowland v. Val-Agri, Inc.*, 13 Kan. App. 2d 149, Syl. ¶ 1, 766 P.2d 819 [1988]).

"[A]bsent a clear abuse of discretion, the trial court's order will not be disturbed on appeal. [Citations omitted.]" *Kinell v. N.W. Dible Co.*, 240 Kan. 439, 444, 731 P. 2d 245 (1987).

Final judgment was entered on October 24, 2002. On October 28, 2002, DSI filed a motion for leave to amend its pleadings in order to bring two counterclaims against Saathoff for breach of contract and breach of his fiduciary duty. Under the circumstances, the district court did not abuse its discretion by denying DSI's motion. However, since this case is being remanded for further proceedings, DSI may renew its motion, if it so desires, to be considered by the district court on its merits.

Reversed and remanded for further proceedings.

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

Submitted by
Eugene Balloun

KENNETH L. SAATHOFF Plaintiff, v. DATA SYSTEMS INTERNATIONAL, INC. Defendant.	)	Case No. 00 CV 07216 Division 18

ORDER STAYING EXECUTION OF THE JUDGMENT PENDING APPEAL AND APPROVING ALTERNATIVE SECURITY

COMES NOW on this 17th day of December, 2002, the Motion for Stay and Approving of Alternative Security of Defendant Data Systems International, Inc. ("DSI"). Plaintiff is represented by his counsel Michael G. Norris of Norris, Keplinger & Herman, L.L.C., and DSI is represented by its counsel J. Eugene Balloun of Shook, Hardy & Bacon, L.L.P. DSI brings its motion pursuant to K.S.A. 60-262(d) and 60-2103(d). On November 14, 2002, the Court entered its Interim Order in this matter. By mutual agreement of the parties, the Court hereby vacates its Interim Order and enters in its place the following:

IT IS THEREFORE BY THE COURT ORDERED that DSI's Motion for Stay and Approving of Alternative Security is granted in accordance with the parties' agreement and as set forth below. A stay of execution pending final disposition of DSI's appeal is hereby granted on the judgment previously entered by this Court on October 24, 2002, on the condition that within five (5) business days of this Order DSI pay Plaintiff the sum of $125,000.00. In addition, DSI shall on or before the 1st of every month, beginning January 1, 2003, pay Plaintiff an additional $20,000.00. The monthly payments shall continue throughout the term of this stay.

By agreement of the parties, DSI is not entitled to, and waives any claim for, a credit, offset, or reimbursement of these monies that it pays to the plaintiff regardless of the outcome of the appeal.

The stay of execution granted herein shall be effective until a final order has been rendered by the appellate courts under the following additional conditions:

(1) DSI shall not pay a bonus or dividend to Mr. McGraw or any member of his family except ordinary bonuses (not to exceed $200,000 in the aggregate in any one fiscal year) granted to Mr. McGraw's sons in their capacity as DSI employees (this condition does allow DSI to continue its quarterly payments of $250,000 to Mr. McGraw, on the condition such payments are credited against the loan by Mr. McGraw to DSI, and are applied by Mr. McGraw to his loan from American Sterling Bank);

(2) DSI shall not redeem any of Mr. McGraw's shares of stock;

(3) Mr. McGraw shall not transfer any stock;

(4) DSI shall not increase Mr. McGraw's compensation;

(5) DSI shall not close a contract of sale or transfer of any of its assets, or transfer ownership of its proprietary software, except in the ordinary course of business;

(6) DSI shall make no new financial commitments or expenditures for capital improvements or additions in connection with its business in excess of $500,000, without this Court's approval;

(7) DSI shall not pay any debts in whole or part except to trade creditors in the ordinary course of business and debt obligations as set forth on the financial statements furnished to Plaintiff;

8-2

(8) DSI shall provide Plaintiff with complete and accurate financial statements, including audited statements, detailing DSI's performance as such statements become available; and

(9) These conditions shall remain in effect during the term of the stay, and violation of any of the conditions will be grounds for Plaintiff moving for dissolution of the stay.

IT IS THEREFORE BY THE COURT FURTHER ORDERED that all monies in the interest bearing escrow account established by this Court's November 14, 2002 Interim Order shall be paid by the Clerk of the District Court to DSI as quickly as possible.

BY THE COURT IT IS SO ORDERED.

John P. Bennett

JOHN P. BENNETT, DISTRICT JUDGE

APPROVAL:

Michael G. Norris
Norris, Keplinger & Herman, L.L.C.
ATTORNEY FOR PLAINTIFF

JEB by Mike Call

J. Eugene Balloun
Shook, Hardy & Bacon L.L.P.
ATTORNEY FOR DEFENDANT

Testimony of Mark L. Baldwin, Chief Financial Officer & General Counsel, Data Systems International, Inc., (headquartered in Overland Park, Kansas) before the Kansas Senate Judiciary Committee, in support of an amendment to House Bill 2152, or alternatively introduction of new legislation to amend 60-2103(d).

(Supersedeas Bond Reform)

Tuesday March 15, 2005

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today before your distinguished Committee in support of an amendment to House Bill 2152, or alternatively to request the development of new bill to protect the right to an appeal in civil cases.

BACKGROUND

By way of background, I am the Chief Financial Officer & General Counsel of Data Systems International, Inc., a software and technology company founded by Michael J. McGraw in 1979 and headquartered in Overland Park, Kansas. DSI employs over 200 people worldwide with a majority based in Kansas. I joined the company in July, 2000 shortly after the owner of the company had re-asserted operational control in light of a significant deterioration in the financial condition of the company. The President of the company was placed on paid administrative leave while the owner assessed the extent of the issues the company was facing. An employment agreement existed between DSI and the president that provided for acceleration of all amounts due under the agreement in the event his duties were substantially diminished. The President claimed that the act of placing him on paid administrative leave constituted termination under the agreement and filed suit demanding the immediate payment of approximately $4.5 million. The company aggressively disputed the claim contending that he had failed to perform under the agreement.

The case proceeded through initial phases of discovery and the company continued work on restoring its financial strength. Unfortunately, 9/11 and the collapse of the technology sector further compounded the challenges for the owner and the remaining management

team. On April 15, 2002 the district court entered a summary judgment in favor of the plaintiff. The decision stunned management and legal counsel. In its weakened financial condition the company could not obtain a supersedeas bond to appeal this unfortunate ruling nor did it have the ability to satisfy the judgment. The company's assets were pledged as collateral and lender's aggressively sought to minimize their risks in light of the summary judgment. The company was convinced that the ruling would be overturned on appeal, but without the ability to prevent the plaintiff from executing on the judgment and disrupting business operations, an appeal was pointless. The plaintiff aggressively pressed for satisfaction judgment, knowing full well the financial condition of the company was precarious. The company sought advice from legal experts in the bankruptcy field, although the owner was very concerned that a filing would be the demise of the company.

Legal counsel for the company offered one slim possibility, that being to seek permission from the district court to waive the supersedeas bond requirement pending appeal or to craft an alternative security arrangement under K.S.A. § 60-2103(d). The district court was reticent to exercise its authority since little guidance could be found under the statute or in Kansas case law. Extensive testimony was given as to the company's financial condition and the unfair result that would occur if the company was not allowed to pursue its appeal. The plaintiff sought compensation for the delay and ultimately agreed to $125,000 initially and $20,000 per month pending the appeal. Even it the appeal was successful, the amounts paid would be non-recoverable. By the time the appeal had been heard, reversed, appealed to the Kansas Supreme Court and denied further review, the company had paid $485,000 for the right to be heard in addition to costs and attorney's fees.

The company prevailed in overturning the initial summary judgment and "earned" the right to have the case heard before the citizens of the Great State of Kansas. The price paid was dear and the trial on the merits is still to come, but the outcome was right. The company was extremely fortunate to have the skills of a uniquely talented lawyer and a district court judge who was willing to exercise his authority without legal precedent, even though he believed that he had made the right legal decision in the entry of the

summary judgment. Without this unusual combination of skills, fortitude and ability to make payments, it is quite likely that I would not be addressing you today.

The concepts of due process and fairness require an open discussion of what the appropriate public policy should be in requiring the posting of a supersedeas bond for the right to have your case reviewed by a higher court. The traditional argument that the requirement of posting a bond guarantees payment prevents the losing party from wasting assets during the pendency of the appeal can be addressed simply by the courts. The non-appealing party can petition the court in the event that such conduct occurs. In our facts, the plaintiff was no more or less secure by the "financial arrangement" that was approved in lieu of a bond. Rather, the plaintiff received a windfall. Many states are re-examining their bonding statutes, most with an eye towards capping the amount of the bond at $25 million to $100 million. That type of relief is of no value to the smaller appellant or company such as DSI.

CONCLUSION

Most insurance and bonding companies will not issue a bond in excess of 20% of a company's net worth. In today's litigious environment and large jury awards, this limit is often exceeded, making it impossible for the small business to obtain an appeal bond. [For example, a company with a net worth of $500,000 typically could not get a bond in excess of $100,000.] K.S.A. § 60-2103(d), starts down the right path in acknowledging that a supersedeas bond is not an absolute requirement for appeal and that the district court does have the requisite authority to fashion alternative security. However, further guidance from the Kansas legislature is essential to creating a fair and equitable process for citizens and businesses in Kansas to be fairly heard. My personal preference would be to waive the supersedeas bond requirement altogether. I believe that adequate safeguards already exist with the courts to address situations where the appellant has bad motives for seeking an appeal. Alternatively, I would like to see the courts provided with a clear guideline of the circumstances that allow for waiver of the supersedeas bonding requirement. Thank you.

Legislative Testimony

HB 2152

March 15, 2005

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

THE KANSAS CHAMBER

The Force for Business

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Mr. Chairman and members of the committee:

I am Marlee Carpenter with the Kansas Chamber of Commerce. We are here in support of HB 2152, appeal bond waivers.

HB 2152 addresses appeal bond waivers for signatures to the master tobacco settlement and their affiliates. We would respectfully request this committee consider an amendment extending the appeal bond waiver to all businesses in Kansas.

HB 2222 was introduced during the 2001 Legislative Session which proposes to change current law regarding appeal bonds by limiting the amount of bond a defendant must post while appealing an adverse judgment. This bill, which I have attached to my testimony, requires a defendant to post an appeal bond in the amount of $1 million if the judgment rendered exceeds $1 million but is less than $100 million, and a bond not to exceed $25 million if the judgment is more than $100 million. In addition we would request additional language is added to subsection (d) that states:

> The court may fashion an order in lieu of a supersedes bond which equitably provides security for the judgment creditor but is not unduly burdensome to the judgment debtor, and may include restrictions on the use of assets, payment of dividends, increases in salaries, and similar provisions.

Amending HB 2152 and extending the appeal bond provisions would allow businesses to appeal decisions and be guaranteed their right to due process.

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 Chamber Federation, have more than 10,000 member businesses, including local and regional chamb and trade organizations. The Chamber represents small, medium and large employers all across Kan

Senate Judiciary
3-15-06
Attachment 10

Session of 2001

HOUSE BILL No. 2222

By Representative T. Powell

1-30

AN ACT relating to placing limitations on supersedeas bonds; amending K.S.A. 60-3004 and K.S.A. 2000 Supp. 60-2103 and repealing the existing sections.

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

Section 1. K.S.A. 2000 Supp. 60-2103 is hereby amended to read as follows: 60-2103. (a) *When and how taken.* When an appeal is permitted by law from a district court to an appellate court, the time within which an appeal may be taken shall be 30 days from the entry of the judgment, as provided by K.S.A. 60-258, and amendments thereto, except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subsection commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: Granting or denying a motion for judgment under subsection (b) of K.S.A. 60-250, and amendments thereto; or granting or denying a motion under subsection (b) of K.S.A. 60-252, and amendments thereto, to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under K.S.A. 60-259, and amendments thereto, to alter or amend the judgment; or denying a motion for new trial under K.S.A. 60-259, and amendments thereto.

A party may appeal from a judgment by filing with the clerk of the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this chapter, or when no remedy is specified, for such action as the appellate court having jurisdiction over the appeal deems appropriate, which may include dismissal of the appeal. If the record on appeal has not been filed with the appellate court, the parties, with the approval of the district court, may dismiss the appeal by stipu-

lation filed in the district court, or that court may dismiss the appeal upon motion and notice by the appellant.

(b) *Notice of appeal.* The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from, and shall name the appellate court to which the appeal is taken. The appealing party shall cause notice of the appeal to be served upon all other parties to the judgment as provided in K.S.A. 60-205, and amendments thereto, but such party's failure so to do does not affect the validity of the appeal.

(c) *Security for costs.* Security for the costs on appeal shall be given in such sum and manner as shall be prescribed by a general rule of the supreme court unless the appellate court shall make a different order applicable to a particular case.

(d) *Supersedeas bond. (1)* Whenever an appellant entitled thereto desires a stay on appeal, such appellant may present to the district court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. *Subject to paragraph (2),* the bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and to satisfy in full such modification of the judgment such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the sheriff or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed after notice and hearing at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay. When an order is made discharging, vacating, or modifying a provisional remedy, or modifying or dissolving an injunction, a party aggrieved thereby shall be entitled, upon application to the judge, to have the operation of such order suspended for a period of not to exceed 10 days on condition that, within such period of 10 days such party shall file a notice of appeal and obtain the approval of such supersedeas bond as is required under this section.

(2) (A) If an appellant appeals from any form of judgment based on any legal theory and seeks a stay of enforcement during the period of

appeal, and:

(i) The judgment exceeds $1,000,000 in value but is less than $100,000,000 in value, the supersedeas bond shall not exceed $1,000,000.

(ii) The judgment equals or exceeds $100,000,000 in value, the supersedeas bond shall not exceed $25,000,000.

(B) If the appellee proves by a preponderance of the evidence that the appellant bringing the appeal is purposefully dissipating or diverting assets outside of the ordinary course of its business for the purpose of avoiding ultimate payment of the judgment, the court may enter such orders as are necessary to stop the dissipation and diversion of assets, including a requirement that the appellant post a bond in the full amount of the judgment.

(C) A bond shall not be found insufficient under any other provision of law due to limits imposed under this subsection.

(D) Nothing in this section shall be construed to prohibit a court from setting a supersedeas bond in a lower amount as may be otherwise required by law or for good cause shown.

(e) *Failure to file or insufficiency of bond.* If a supersedeas bond is not filed within the time specified, or if the bond filed is found insufficient, and if the action is not yet docketed with the appellate court, a bond may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file a bond may be made only in the appellate court.

(f) *Judgment against surety.* By entering into a supersedeas bond given pursuant to subsections (c) and (d), the surety submits such surety's self to the jurisdiction of the court and irrevocably appoints the clerk of the court as such surety's agent upon whom any papers affecting such surety's liability on the bond may be served. Such surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the judge prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if such surety's address is known.

(g) *Docketing record on appeal.* The record on appeal shall be filed and docketed with the appellate court at such time as the supreme court may prescribe by rule.

(h) *Cross-appeal.* When notice of appeal has been served in a case and the appellee desires to have a review of rulings and decisions of which such appellee complains, the appellee shall, within 20 days after the notice of appeal has been served upon such appellee and filed with the clerk of the trial court, give notice of such appellee's cross-appeal.

(i) *Intermediate rulings.* When an appeal or cross-appeal has been timely perfected, the fact that some ruling of which the appealing or cross-appealing party complains was made more than 30 days before filing of

the notice of appeal shall not prevent a review of the ruling.

Sec. 2. K.S.A. 60-3004 is hereby amended to read as follows: 60-3004. (a) If the judgment debtor shows the district court that an appeal from the foreign judgment is pending or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated, upon proof that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was rendered.

(b) If the judgment debtor shows the district court any ground upon which enforcement of a judgment of any district court of this state would be stayed, *including the ground that an appeal will be taken, is pending or the time for taking appeals is not yet expired,* the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment which is required in this state *subject to the provisions of subsection (d) of K.S.A. 60-2103, and amendments thereto.*

Sec. 3. K.S.A. 60-3004 and K.S.A. 2000 Supp. 60-2103 are hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

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

Testimony re: HB 2152
Senate Judiciary Committee
Presented by Ronald R. Hein
on behalf of
R. J. Reynolds Tobacco Company
March 15, 2005

Mr. Chairman, Members of the Committee:

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

In the 2003 session, the Kansas legislature approved legislation relating to the appeal (or supersedeas) bond that placed monetary limits on the amount of bond that was required to be posted to proceed with an appeal in cases involving tobacco manufacturers who were signatories to the Master Settlement Agreement ("MSA") or a successor of one of these signatories. The bond cap of $25 million set out in that law was designed to help protect the hundreds of millions of dollars that are paid each year to the 46 states who entered into the MSA. The legislation is designed to help protect those funds by ensuring that such signatories are not forced into bankruptcy by exorbitant appeal bonds.

HB 2152 clarifies the statute to provide such appeal bond protection is applicable to appeal of litigation which involves signatories to the MSA. Initially the bill was introduced using "affiliates" of the signatories to the MSA. When the Kansas Trial Lawyers Association (KTLA) objected to the bill's original wording, we were able to negotiate language that is agreeable to both of us. To give an example of why we seek this legislative clarification, if the parent company of an MSA signatory is sued, and is unable to post the appeal bond, their assets (including the assets of the signatory manufacturer) could be attached and or liquidated to pay the bond. This could result in the MSA signatory, being unable, either temporarily or possibly permanently, to make their regular MSA payments to Kansas and the other states MSA states.

Thirty two states have adopted an appeal bond cap. Five additional states do not require an appeal bond. Ten of the states that have passed an appeal bond cap for signatories to the MSA have passed legislation to address the problem addressed by this bill.

On behalf of RJRT, I respectfully request the Committee approve HB 2152 with the recommendation that it be passed.

Thank you for permitting me to testify, and I would be happy to yield to any questions.

Senate Judiciary
3-15-05
Attachment 11

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Chairman Vratil and Members of the Senate Committee on Judiciary

From: Callie Jill Denton for the Kansas Trial Lawyers Association

RE: HB 2152

Date: March 15, 2005

Chairman Vratil and members of the Senate Committee on Judiciary, my name is Callie Jill Denton and I appear before you today on behalf of the Kansas Trial Lawyers Association. KTLA is a statewide, nonprofit organization of lawyers that represents consumers and advocates for the safety of families and the preservation of the civil justice system. We appreciate the opportunity to present written and oral testimony in support of HB 2152 as amended by the House.

When the underlying law was passed in 2003, the Legislature gave special consideration to signatories of the master settlement agreement by enacting appeal bond caps that were strictly limited to the tobacco industry. HB 2152 as amended by the House offers further clarification that the appeal bond caps would not apply to cases that are unrelated to signatories of the tobacco Master Settlement Agreement.

KTLA is supportive of the bill as amended by the House because we believe the amendments embrace the original intent of the Legislature in limiting appeal bond caps to the tobacco industry. The amendments represent the hard work and compromise between KTLA and the Tobacco Master Settlement Agreement signatory companies to craft a bill that offers clarification but not expansion. Any extension of the appeal bond caps to entities or industries beyond the scope of the signatories to the Master Settlement Agreement would go far beyond the original intent of the Legislature, and KTLA strongly opposes such an expansion.

We respectfully ask that the original intent of the Legislature be considered, as well as the work of the parties in crafting consensus language, and that HB 2152 as amended by the House be passed without further amendment.

Terry Humphrey, Executive Director

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Senate Judiciary
3-15-05
Attachment 12

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Damron

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1100 Mercantile Bank Tower
800 SW Jackson Street

Topeka, Kansas 66612-2205

Testimony supporting HB 2152

Tuesday, March 15, 2005
On behalf of
Altria Services Corporation
Philip Morris, USA

Chairman Vratil and Members of the Committee:

I am Kathy Damron testifying on behalf of Altria Services Corporation, Philip Morris, USA. We are strongly in support of House Bill 2152 as adopted by the Kansas House. This language is the work product of countless hours of discussion and negotiation among the attorneys representing the MSA companies and members of the Kansas Trial Lawyers Association. It is a work product that both parties now support and it is for that reason we would respectfully ask that those interested in broadening the applicability of the appeal bond seek another avenue for that policy consideration.

This measure, and the policy it embodies, stems from legislation generated in this committee two years ago. Then SB 42 was passed by the legislature and enacted by the governor limiting the appeal bond that would have to be posted in a case involving a tobacco manufacturer that has signed the Master Settlement Agreement (MSA) to $25 million. We did not have the language that is now desired and embodied in HB 2152 which would allow successors to the MSA that same appeal bond cap. The measure before the committee adds that clarification. Thank you for your consideration of this measure and we would seek your favorable consideration of the bill.

Senate Judiciary
3-15-05
Attachment 13