Approved: February 21, 2006
Date

MINUTES OF THE HOUSE INSURANCE COMMITTEE

The meeting was called to order by Chairman Clark Shultz at 3:30 P.M. on February 16, 2006 in Room 527-S of the Capitol.

All members were present except:
Representative Ray Cox- excused

Committee staff present:
Melissa Calderwood, Kansas Legislative Research Department
Terri Weber, Kansas Legislative Research Department
Ken Wilke, Revisor of Statutes Office
Sue Fowler, Committee Secretary

Conferees appearing before the committee:
Bob Vancrum, Service Contract Industry Council, Overland Park, KS
Mark Behrens, Shook, Hardy & Bacon, Washington, DC

Others attending:
See attached list.

Hearing on:

HB 2858: **Service contract - definition**

Proponent:
Bob Vancrum, Service Contract Industry Council, (Attachment #1), presented testimony in support of **HB 2858**.

Hearing closed on **HB 2858**.

Hearing on:

HB 2868: **Enacting the asbestos and silica compensation fairness act**

Proponent:
Mark Behrens, Shook, Hardy & Bacon, (Attachment #2), gave testimony in support of **HB 2868**.

Continued hearing on **HB 2868** on Tuesday, February 21, 2006.

Representative Grant recommended without objection the committee members approve the committee minutes of February 14, 2006.

Meeting adjourned at 5:10 P.M.

Next meeting will be Tuesday, February 21, 2006, at 3:30 P.M., in Room 527-S.

House Insurance Committee
Guest Sign Sheet
Thursday, February 16, 2006

Name	Representing
Lindsey Douglas	Hein Law Firm
William Deer	Federico Consulting
Dominic Kujawa	KTLA
Brad Smoot	AIA
Mike Mikkelson	Enterprise
Scott Heidner	KS Assoc. of Defense Counsel
Bob Vancrum	Service Contract Industry Council
Wendy McFarland	KAPA
Bill Sneed	State Farm
Eric Stafford	AGC of KS
Alex Kotoyantz	P.I.A.
John Peterson	Enterprise Car Rental
Larry Magill	KAIA
Crystal Clydesdale	Rep Carter

Testimony to be House Insurance Committee
by Robert J. Vancrum on behalf of
Service Contract Industry Council, Inc.
February 16, 2006

Dear Chairman Schultz and Honorable Members of the Committee:

Many of you will recall Senate bill 178 of last year that originally came to you as a bill to exempt service contracts on residential property from being regulated as an insurance product. It is our understanding that the National Home Service Contract Association, sought this legislation.

This Committee broadened the legislation (we think wisely so) to cover many other service contracts (such as those on computers and appliances) from being treated as insurance contracts.

The member companies of the Service Contract Industry Council, the group that I represent, is a national trade association whose members together offer approximately 80% of all service contracts sold in the country. Members include companies such as GMAC, Ford, Sears, CNA, GE Financial, etc. SCIC members provide service contracts offering protection of a variety of products including motor vehicles, homes and consumer goods including cell phones and laptop computers. Many of these contracts offer a component of protection referred to as Accidental Damage from Handling, or ADH, ADH only has applicability in the consumer goods area.

Last year in Senate bill 178, while the language defining service contracts appropriately recognized this valuable component of protection for consumers, it limited the protection to instances whereby the ADH resulted from power surges. The two have no logical association in the real world.

In applying the new law to service contracts that have been brought to the attention of the Kansas Insurance Department, the DOI has applied what seemingly is the "letter of the law" and deemed service contracts offering ADH protection on property when the product failure is not associated with power surges to be insurance, and therefore, has held that the company offering such contract would have to be licensed as an insurer. Needless to say our members are very concerned that what set out to be an effort to exclude any service contracts from being regulation as an insurance product, has become a broader problem, and one that we believe was not intended by the legislature.

House bill 2858 would simply amend the language defining service contracts from last year's bill to delete the power surge limitation, which we believe will finally resolve the issue as it will then accurately describe the contracts in the marketplace, i.e., ones that may either offer protection for failure of a product resulting from a power surge OR from accidental damage from handling.

We have the support of the Kansas Insurance Department, the persons who asked for last year's Senate bill 178, the Property Casualty Insurance Association of America, the NHSCA and other active members of the service contract industry. This would put Kansas in line with nearly 40 other jurisdictions that have held that service contracts which include accidental damage by handling should be exempt from regulation as insurance products.

I would be happy to answer any questions at a later time or provide copies of correspondence endorsing the legislation from any of those entities mentioned above.

TESTIMONY OF MARK A. BEHRENS, ESQ.
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ON BEHALF OF THE
KANSAS CHAMBER OF COMMERCE

IN SUPPORT OF HOUSE BILL 2868, AN ACT CONCERNING ASBESTOS AND SILICA CLAIMS

BEFORE THE KANSAS
HOUSE INSURANCE COMMITTEE

FEBRUARY 16, 2006

TESTIMONY OF MARK A. BEHRENS, ESQ.
SHOOK, HARDY & BACON L.L.P.

ON BEHALF OF THE
KANSAS CHAMBER OF COMMERCE

Mr. Chairman and Members of the Committee, thank you for allowing me to testify in support of H.B. 2868, the Asbestos and Silica Compensation Fairness Act.

Background

I am a partner in the Public Policy Group of Shook, Hardy & Bacon L.L.P.'s Washington, D.C. office. Most of our firm's practice involves representing defendants in multi-state litigation. For over a decade, I have written extensively on subjects involving liability law and civil justice reform, with a heavy focus on asbestos and silica litigation.[1] In addition, I have taught advanced tort law as a member of the adjunct faculty at The American University's Washington College of Law. I received my J.D. from Vanderbilt University Law School in 1990; I served on the *Vanderbilt Law Review* and received an American Jurisprudence

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[1] For asbestos-related articles, see Mark A. Behrens, *State Asbestos and Silica Reform: Past Successes – Future Opportunities?*, 20:19 Mealey's Litig. Rep.: Asbestos 29 (Nov. 2, 2005); *Asbestos Litigation: Momentum Builds for State-Based Medical Criteria Solutions to Address Filings by the Non-Sick*, 20:6 Mealey's Litig. Rep.: Asbestos 33 (Apr. 13, 2005); *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Defer Claims Filed by Non-Sick*, 31 Pepp. L. Rev. 271 (2004); *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 Tex. Rev. L. & Pol. 137 (2001); *Stewardship for the Sick: Preserving Assets For Asbestos Victims Through Inactive Docket Programs*, 33 Tex. Tech. L. Rev. 1 (2001). For silica-related articles, see Mark A. Behrens et al., *Silica: An Overview of Exposure and Litigation in the United States*, 20:2 Mealey's Litig. Rep.: Asbestos 33 (Feb. 21, 2005).

Award in tort law. I received a B.A. in Economics from the University of Wisconsin-Madison in 1987.

I am testifying on behalf of the Kansas Chamber of Commerce, which is an association of more than 10,000 Kansas employers. These employers include small, medium and large businesses that are concerned about the higher costs of doing business in Kansas.

The Need for Asbestos and Silica Litigation Reform

The United States Supreme Court has said that this country is experiencing an "asbestos-litigation crisis." In one recent year, more than 100,000 new cases were filed. At least 322,000 asbestos claims are now pending. Recent studies have shown that up to ninety percent of the claimants who file asbestos claims today have no impairment. The RAND Institute for Civil Justice recently concluded that "a large and growing proportion of the claims entering the system in recent years were submitted by individuals who had not at the time of filing suffered an injury that had as yet affected their ability to perform the activities of daily living." Cardozo Law School Professor Lester Brickman, an expert on asbestos litigation, has said "the 'asbestos litigation crisis' would never have arisen and would not exist today" if not for the claims filed by unimpaired claimants.

The presence of unimpaired claimants on court dockets and in settlement negotiations diverts legal attention and economic resources away from claimants with severe disabilities. Senior U.S. District Judge Charles Weiner, who managed the federal asbestos docket, explained this problem: "Oftentimes, [asbestos] suits are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer in the future. Filing fees are paid, service costs incurred, and defense files are opened and processed. Substantial transaction

costs are expended and therefore unavailable for compensation to truly ascertained asbestos victims."

For example, consider Johns-Manville, which filed for bankruptcy in 1982. It took six years for the company's bankruptcy plan to be confirmed. Payments to Manville Trust claimants were halted in 1990 and did not resume until 1995. According to the Manville trustees, a "disproportionate amount of Trust settlement dollars have gone to the least injured claimants – many with no discernible asbestos-related physical impairment whatsoever." The Trust is now paying out just *five cents on the dollar* to asbestos claimants. The trusts created through the Celotex and Eagle-Picher bankruptcies have similarly reduced payments to claimants.

For these reasons, lawyers in other states who represent cancer victims have been highly critical of unimpaired claimant filings and have endorsed mechanisms to give trial priority to the truly sick. Here is what some of these lawyers have said:

- ✓ Matthew Bergman, Seattle plaintiffs' lawyer: "Victims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system. . . . [T]he genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims."
- ✓ Peter Kraus, Dallas plaintiffs' lawyer: Plaintiffs' lawyers who file suits on behalf of the non-sick are "sucking the money away from the truly impaired."
- ✓ Mark Iola of the same Dallas firm has said that unimpaired asbestos claimants are "stealing money from the very sick."
- ✓ Steve Kazan of Oakland, California has testified that recoveries by the unimpaired may result in his clients being left uncompensated.
- ✓ Randy Bono, a prominent Madison County, Illinois attorney: "I welcome change. Getting people who aren't sick out of the system, that's a good idea."
- ✓ Terrence Lavin, a former Illinois State Bar President and Chicago plaintiffs' lawyer: "Members of the asbestos bar have made a mockery of our civil justice system and have inflicted financial ruin on corporate America by representing people with nothing more than an arguable finding on an X-ray."

Already, claims filed by the unimpaired have contributed to force over seventy-eight employers into bankruptcy. The bankruptcy process is accelerating due to the "piling on" nature

of asbestos liabilities. For instance, RAND found: "Following 1976, the year of the first bankruptcy attributed to asbestos litigation, 19 bankruptcies were filed in the 1980s and 17 in the 1990s. Between 2000 and mid-2004, there were 36 bankruptcy filings, more than in either of the prior two decades." The large number of major employers that have declared bankruptcy as a result of asbestos litigation reinforces the concern that, unless something is done, sick claimants may face a depleted pool of assets in the future.

Moreover, as the Enron collapse illustrated, bankruptcies represent more than the demise of a business. They can cost employees their jobs and ordinary citizens their retirement savings, as well as have a deep impact on entire communities.

A study by Nobel Prize-winning economist Joseph Stiglitz of Columbia University and two colleagues on the direct impact of asbestos bankruptcies on workers found that bankruptcies resulting from asbestos litigation put up to 60,000 people out of work between 1997 and 2000. Those workers and their families lost up to $200 million in wages, and employee retirement assets declined roughly twenty-five percent.

Another study, which was prepared by National Economic Research Associates, found that workers, communities, and taxpayers will bear as much as $2 billion in additional costs due to indirect and induced impacts of company closings related to asbestos. For every ten jobs lost directly, the community may lose eight additional jobs. The shutting of plants and job cuts decrease per capita income, leading to declining real estate values, and lower federal, state and local tax receipts.

Now, more companies are being ensnarled in the litigation as a result of the large number of asbestos-related bankruptcy filings. One plaintiffs' attorney has described the litigation as an "endless search for a solvent bystander." The *Wall Street Journal* has reported that "the net has

spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." The number of asbestos defendants now includes over 8,500 companies, affecting many small and medium size companies in industries that cover eighty-five percent of the economy. The litigation may cost up to $195 *billion* – on top of the $70 billion spent through 2002.

Recently, some asbestos personal injury lawyers have begun to use mass screenings to recruit plaintiffs to file claims alleging exposure to silica. Silica is present in sand, gravel, soil, and rocks. In its natural form, silica is not harmful, but when fragmented into tiny particles (such as through abrasive blasting or in foundry operations), silica can be dangerous if inhaled.

In many instances, plaintiffs' lawyers have filed claims against both asbestos and silica defendants, although leading medical experts agree that it is a medical rarity for someone to have both an asbestos-related and a silica-related impairment. In June 2005, the manager of the federal silica docket recommended that all but one of the 10,000 claims on her docket should be dismissed on remand because the plaintiffs' diagnoses were fraudulently prepared.

Under H.B. 2868, which is based on model legislation (the *Asbestos and Silica Claims Priorities Act*) proposed by the American Legislative Exchange Council ("ALEC"), sick claimants would receive priority and would no longer be forced to wait behind earlier-filing unimpaired claimants. Individuals who cannot demonstrate impairment under objective fair and criteria recognized by the medical community would have their claims preserved, as long as those claims were not barred as of the Act's effective date. In addition, the legislation would curb forum-shopping abuse, stop the improper joinder of dissimilar claims, and abolish punitive damages awards that deplete resources needed to compensate sick claimants.

Reforms similar to H.B. 2868 have been enacted in Ohio, Georgia, Texas, and Florida, and have received the support of the National Association of Insurance Commissioners and National Conference of Insurance Legislators. The Kansas proposal also finds support in reforms adopted by several state courts, and an American Bar Association resolution calling for the enactment of federal asbestos medical criteria legislation. Kansas should adopt H.B. 2868 to promote sound pubic policy in asbestos and silica cases.

H.B. 2868 - The Asbestos and Silica Compensation Fairness Act

I will address the core provisions of the Asbestos and Silica Compensation Fairness Act below in support of passing this bill.

A. Plaintiffs Must Present A Prima Facie Case

The general rule stated in the bill is that physical impairment of the exposed person, to which exposure to asbestos or silica was a substantial contributing factor, shall be an essential element to bring or maintain an asbestos or silica claim. Such a prima facie showing of impairment generally requires a basic core of evidence, including for nonmalignant conditions: evidence that the diagnosing physician has taken an occupational, exposure, medical and smoking history of the exposed person to help ensure that the claimed condition is asbestos-related or silica-related; a sufficient latency period between the date of exposure and the date of diagnosis; evidence that the exposed person has a permanent respiratory impairment; radiological (chest X-ray) or pathological evidence of asbestos-related or silica-related disease; in the case of asbestos-related nonmalignant conditions, pulmonary function test results indicating that the exposed person is impaired; and a finding by the diagnosing physician that the exposed person's impairment was not more probably the result of causes other than asbestos or silica exposure. Claimants alleging asbestos-related or silica-related cancers generally would

need to present evidence that a qualified physician has made a diagnosis of a cancer and that exposure to asbestos or silica was a substantial contributing factor to the condition; a sufficient latency period between the date of exposure and the date of diagnosis; and the diagnosing physician has concluded that the exposed person's impairment was not more probably the result of causes other than asbestos or silica exposure. These procedures are necessary to ensure that proper claims are being litigated timely.

B. Discovery Is Not Allowed Until A Prima Facie Case Is Established

No discovery is permitted until the court concludes that the plaintiff has established a prima facie case. Discovery, in today's litigation environment, often turns into costly, protracted battles that are unnecessary. Fairness dictates that plaintiffs be required to meet a minimum prima facie showing before the parties beginning engaging in costly discovery and using valuable resources that should be directed at providing compensation to sick claimants.

C. Joinder of Plaintiffs Is Reserved For Proper Circumstances

Courts may not consolidate claims seeking to recover for injuries allegedly caused by asbestos and silica unless the parties are in the same household. This strengthens the current permissive joinder rule that allows joinder of plaintiffs if their claims arise out of the same transaction, occurrence, or series of transactions and occurrences, and if questions of law or fact are common to all persons. *See* K.S.A. 60-220.

The stronger provision of the Asbestos and Silica Compensation Fairness Act is necessary to ensure that claimants and defendants receive individualized justice rather than being part of a courtroom Cuisinart. Some courts that have been inundated with asbestos and silica claims have tried judicial shortcuts to move the dockets at a faster pace. One technique particularly unfair to the litigants is to join disparate claims for trial, either in mass

consolidations or in clusters. People with serious illnesses are often lumped together with claimants having no illness at all. Defendants have no real ability to defend the cases, and are forced to settle, regardless of the merits of the individualized claims.

For example, a mass trial in West Virginia in 2002 involved claims by approximately 8,000 individuals against 259 defendants. The plaintiffs worked at hundreds of different job sites located in a number of states over a period that spanned the better part of six decades. They allegedly dozens of different circumstances of exposure and several different diseases. It is apparent that the West Virginia courts assumed that the mass trial process, coupled with potentially massive punitive damages liability, would force the defendants to settle. In that regard, the plan worked as the court appeared to intend. Eventually, all but one of the defendants settled for reportedly huge sums of money.

Ironically, even well-intended consolidations have turned out to be fools' gold. Instead of clearing dockets, mass consolidations actually invite the filing of more claims. As mass tort expert Francis McGovern of Duke Law School has explained:

> Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.

One West Virginia trial court judge involved in that state's litigation ruefully acknowledged this fact. He said: "I will admit that we thought that [a mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases." Plaintiffs should only be able to join in asbestos and silica cases if they are members of the same household. This rule will ensure that claims are properly adjudicated.

D. Cases May Only Be Brought In Appropriate Venues

A plaintiff may bring a claim for an asbestos or silica related injury in any county in which the plaintiff is domiciled or the county in which the plaintiff had substantial cumulative exposure occur, which was a substantial contributing factor to the injury. The court may decline to hear the case if it is more properly adjudicated in another jurisdiction. Under current Kansas law, plaintiffs have their option of bringing cases against corporations in a number of different venues, including where "the cause of action arose," "where the defendant's registered office is located," and in the county where the plaintiff resides if "the defendant is transacting business" in that county when the petition is filed. *See* K.S.A. 60-604. In the event there are multiple defendants, as there often are with asbestos and silica cases, the plaintiff may pick the most desirous venue as the venue analysis does not concern all defendants, but only the defendant chosen by the plaintiff for the analysis. *See* K.S.A. 60-608. This process runs the risk of having to change venues on multiple occasions.

For example, if plaintiff selected venue in Wyandotte County because one defendant was located in Wyandotte County and then that defendant was later released from the case, the case "shall be transferred" to a proper county upon motion by any party. *See* K.S.A. 60-608. Plaintiff can then pick another venue and the process may be repeated.

The venue provision in the Asbestos and Silica Compensation Fairness Act is a logical solution. It allows plaintiff to file the action in the county where the substantial cumulative exposure occurred (similar to where the cause of action accrued in K.S.A. 60-604) or in the county where the plaintiff is domiciled.

Venue reform legislation has already been enacted in Alabama, Florida, Georgia, Mississippi, South Carolina, Texas, and West Virginia, among other states. Kansas would be well served by the venue provisions in the Asbestos and Silica Compensation Fairness Act.

E. Innocent Sellers Are Protected

H.B. 2868 additionally provides protection for innocent sellers. This provision is needed to address the unfairness of imposing "strict" liability upon small business product sellers who neither participate in the design process for products they sell, nor create warnings or instructions for a product. Rarely is the seller required to pay the judgment. This approach generates substantial, unnecessary legal costs, which are passed on to consumers in the form of a "tort tax."

The main goal in joining a local retailer is usually to help the plaintiff "forum shop" for a verdict-friendly state court, not to secure compensation for the plaintiff. First, joinder of the innocent retailer often defeats "diversity-of-citizenship" jurisdiction, under which a case can be removed to and heard in a fair federal forum. Second, joinder of the innocent seller – from whom the plaintiffs never really seek or recover damages at trial – may allow venue to be placed in a county that otherwise has nothing to do with the dispute between the plaintiff and the manufacturer.

Product sellers should be subject to liability only if they are directly at fault for a harm (e.g., misassembled the product or failed to convey appropriate warnings to customers), unless the manufacturer of the product is insolvent or not subject to jurisdiction in the state. The Kansas legislature recognized this principle when it enacted K.S.A. 60-3306. K.S.A. 60-3306, part of the Kansas Products Liability Act, has language similar to the innocent seller provision of the Asbestos and Silica Compensation Fairness Act and also protects innocent sellers.

A product seller fair treatment law would not affect a plaintiff's ability to receive compensation. The legislation would make sure that injured consumers would be able to pursue recovery from the product seller if recovery could not be obtained from the manufacturer. Approximately one-half of the states have enacted product seller fair treatment laws, and none have been repealed. The provision in H.B. 2868 for innocent sellers is logical and consistent with the legislatures previous passage of K.S.A. 60-3306.

F. Punitive Damages Are Prohibited

H.B. 2868 additionally provides a prohibition of punitive damages in asbestos and silica cases, which is consistent with steps taken by other state courts and legislatures. Some courts, including the manager of the federal asbestos docket and the manager of the New York City asbestos litigation, have already chosen to defer, sever, or stay punitive damages claims in asbestos cases so that more resources are available to compensate the truly sick. Indeed, there is a real need to ensure that compensatory damages are paid before punitive damages drain the available sources of funds. Moreover, multiple punitive damages awards for the same course of conduct is likely in violation of constitutionally protected due process rights.

Legislative reforms can reduce the threat of punitive damages being abused as a "wild card" to force inflated settlements. As one federal district judge wrote, "[b]arring successive punitive damages awards against a defendant for the same conduct would remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution of the damage claims of many thousands of injured plaintiffs." Kansas, showing its progressive proactive thinking, has already placed a limitation on the amount of punitive damages that can be awarded in most cases and strictly prohibited punitive damages in others. *See* K.S.A. 60-3701;

K.S.A. 60-3702. Further, in 2005, Florida abolished punitive damages in asbestos and silica cases altogether.

Kansas Values Support Passing This Legislation

The long and valued tradition of protecting the rights of Kansas citizens through proactive legislation will be continued and bolstered by the passage of this bill. There is absolutely no sense in waiting for an onslaught of the litigation before passing this legislation. Although Kansas has not historically seen a number of cases involving asbestos and silica, this legislation can help preserve that record. The silica litigation demonstrated that the asbestos litigation can take new shapes and even appear in new jurisdictions. Passage of this bill will go a long way in preventing the type of asbestos crisis that has already been seen in many courts around this county.

This legislation is also needed to protect Kansas businesses and citizens. Asbestos litigation has already caused more than seventy-eight companies to file for bankruptcy. Bankruptcy is bad for everyone. Bankruptcy may result in lost jobs, lost investments and lost pensions. Bankruptcy also leaves current and potential claimants, including citizens of Kansas, without the possibility of full recovery. There is simply no need to wait for Kansas companies to start going bankrupt and Kansas citizens to be left with less than complete recovery for their injuries before this legislation is passed.

Conclusion

By adopting H.B. 2868, Kansas would not be alone in recognizing the importance of safeguarding its businesses and citizens from asbestos and silica litigation. Similar reforms have been enacted in Ohio, Texas, Georgia and Florida. Kansas should do the same. Thank you.

State Legislation/Court Orders To Address Unimpaired Asbestos Claimant Filings