Approved: April 27, 2007
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:35 A.M. on March 20, 2007, in Room 123-S of the Capitol.

All members were present except:
Derek Schmidt arrived, 9:43 A.M.
Dwayne Umbarger- excused
David Haley arrived, 9:50 A.M.

Committee staff present:
Athena Anadaya, Kansas Legislative Research Department
Bruce Kinzie, Office of Revisor of Statutes
Nobuko Folmsbee, Office of Revisor of Statutes
Karen Clowers, Committee Assistant

Conferees appearing before the committee:
Pete Bodyk, Chief, Bureau of Traffic Safety, Kansas Department of Transportation
Bill Miller, American Subcontractors Association
SueAnn Schultz, Government Affairs Chair, Kansas Association of Insurance Agents
Dan Morgan, Builder's Association, Kansas City Chapter, Associated General Contracts
Dan Haake, Owner, Haake Foundations, Inc.
Wyatt Hoch, Coalition to Preserve Freedom of Contract
Shannon Ratliff, Coalition to Preserve Freedom of Contract
Stephen Ware, Professor of Law, University of Kansas, Coalition to Preserve Freedom of Contract

Others attending:
See attached list.

The Chairman opened the hearing on **SB 376--Driving under the influence; habitual violator; administrative hearings; motorized bikes; ignition interlock; impoundment**.

Senator Phil Journey spoke in support, providing information on the development and purpose of the bill. Senator Journey indicated this bill will bring Kansas into compliance with Title 23 USC Section 164 regarding minimum penalties for repeat DUI offenders. This bill would also allow operation of a moped in various situations and the computation of time for requesting hearings, appeals and other legal actions (Attachment 1).

Pete Bodyk appeared in support, indicating Kansas Department of Transportation discovered two provisions in current Kansas statutes that place the State out of compliance with Title 23 USC 164. Enactment of this bill is critical to avoid federal penalties and avert a $7.6 million transfer of federal funds from construction projects to safety programs and hazard elimination projects (Attachment 2).

There being no further conferees, the hearing on **SB 376** was closed.

The hearing on **SB 379--Contracts; indemnification clauses and additional insured requirements in construction contracts void** was opened.

Bill Miller spoke in support, stating the current practice of requiring the sub-contractor to name the owner, general contractor, etc. as "additional insured" on a sub-contractor's insurance policy effectively transfers the risk to the sub-contractor and his insurance company. The additional insured requirement circumvents Kansas anti-indemnity laws, is unfair and needs to be eliminated. Every business, regardless of size, should purchase the limits of insurance required by law to protect the public and the assets of the business (Attachment 3).

SueAnn Schultz appeared in support, stating it is good public policy to require each party to be responsible for their own negligence and supports the continued use of reciprocal indemnification clauses, where each party protects the other from the results of their own negligence. **SB 379** will prohibit companies from circumventing anti-indemnification laws (Attachment 4).

MINUTES OF THE Senate Judiciary Committee at 9:35 A.M. on March 20, 2007, in Room 123-S of the Capitol.

Dan Morgan spoke in favor, indicating the requirement for one party to hold another party harmless from damages caused by that other party's own intentional acts, negligence, or omission is not good public policy (Attachment 5).

Dan Haake spoke as a proponent by sharing his experience involving a fatality accident. He felt the general contractor was able to shift the risk and responsibility to others and eliminates the incentive to provide a safe work environment (Attachment 6).

Ken Daniel spoke in support. He indicated legislation passed in 2004 prohibited the use of indemnity clauses in contracts but large businesses circumvent that law by switching the insurance requirements in contracts. This is an unfair practice and passage of **SB 379** will stop this abusive practice (Attachment 7).

Wyatt Hoch appeared in opposition indicating this bill would restrict the ability of a property owner to contract to become an "additional insured" party under the commercial general liability insurance policy maintained by its construction contractor. The government should not take sides in a non-consumer business transaction (Attachment 8).

Shannon Ratliff spoke in opposition (Failed to provide copy of remarks).

Stephen Ware appeared as an opponent, stating that businesses adjust the prices they charge to reflect the risks they carry and competition forces such adjustments in price. (Attachment 9)

Written testimony on **SB 379** was submitted by:

Ken Keller, Controller, Western Extralite Company (Attachment 10)
Gus Meyer, Rau Construction (Attachment 11)
Corey Peterson, Associated General Contractors of Kansas (Attachment 12)
Chris Wilson, Executive Director, Kansas Building Industry Association (Attachment 13)
Ed Cross, Executive Vice President, Kansas Independent Oil & Gas Association (Attachment 14)

There being no further conferees, the hearing on **SB 379** was closed.

The Chairman called for final action on **SB 366--Traffic citations; method of giving notice of failure to comply**. Senator Vratil reviewed the bill.

Following discussion, Senator Journey moved, Senator Haley seconded, to amend page 1, line 26, to strike the word "or" and insert the word "and". Motion failed.

Senator Bruce moved, Senator Goodwin seconded, to recommend **SB 366** favorably for passage. Motion carried. Senator Journey voted "no" and requested his vote be recorded.

Final action on **HB 2087--Kansas sentencing commission assumes the functions of the state statistical analysis center from the Kansas criminal justice coordinating council**. Chairman Vratil reviewed the bill.

Senator Goodwin moved, Senator Schmidt seconded, to recommend **HB 2087** favorably for passage. Motion carried.

The Chairman called for final action on **HB 2283--Perfection of security interests on certificates of title**. Chairman Vratil reviewed the bill and distributed a balloon amendment proposed by the Kansas Bankers Association (Attachment 15).

Senator Bruce moved, Senator Donovan seconded, to adopt the proposed amendment. Motion carried.

Senator Schmidt moved, Senator Donovan seconded, to recommend **HB 2283**, as amended, favorably for passage. Motion carried.

The meeting adjourned at 10:29 A.M. The next scheduled meeting is March 21, 2007.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3/20/07

NAME	REPRESENTING
Jeff Bo Henborg	PSFS
Mary Ralston	KDOR
Carmen Alldritt	KDOR
Michael McLin	KDOR
Katie Firebaugh	Keamay & Associates
Russell Lesh	KDOT
Chad Giles	KTLA
Helen Pedigo	Sentencing Commission
Brenda Harmon	" "
Kathy Olsen	Ks Bankers Assn
Kyle Smith	KBI
Luke Thompson	KHPA
Willa DeCarter	Am Adoptions
Bill Curtis	Ks Assoc of School Bds
Pete Bodyk	KDOT
Tom Burgess	ASA-NACM
Ken Keller	Western Extralite Co, ASA, NACM
DAN M HAAKE	HAAKE FOUNDATIONS

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Mar 20, 2001

NAME	REPRESENTING
Mike Hutfles	Hutfles Government Relations
Stephen Ware	Coalition to Preserve Freedom of Contract
Shannon Ratliff	Coalition to Preserve Freedom of Contract
Wyatt Hoch	Coalition to Preserve Freedom of Contract
Jim Mang	Spirit AeroSystems
Dan Murray	Federico Consulting
Dan Hermes	KS Ignition Livestock assoc.

STATE OF KANSAS

SENATOR PHILLIP B. JOURNEY
STATE SENATOR, 26TH DISTRICT
P.O. BOX 471
HAYSVILLE, KS 67060

STATE CAPITOL—221-E
300 S.W. 10TH AVENUE
TOPEKA, KANSAS 66612
(785) 296-7367
E-mail: journey@senate.state.ks.us

TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS

VICECHAIR: SPECIAL CLAIMS AGAINST THE STATE (JOINT), VICECHAIR
MEMBER: HEALTH CARE STRATEGIES
JUDICIARY
PUBLIC HEALTH AND WELFARE
TRANSPORTATION

CORRECTIONS AND JUVENILE JUSTICE OVERSIGHT (JOINT)

Testimony in Support of Senate Bill 376
Before the Senate Judiciary Committee
March 19th, 2007

It is a privilege and an honor to have the opportunity to address the Senate Judiciary Committee and offer comments and support of Senate Bill 376.

Senate Bill 376 is a compilation of two previous bills drafted by myself and modification of current state statutes requested by the Kansas Department of Transportation. In an effort to accurately explain the moving parts in Senate Bill 376, I will proceed through the bill by sections.

Section 1 of the bill amends K.S.A. 8-235 prohibiting all individuals convicted of driving under the influence contrary to K.S.A. 8-1567 or 8-1567a from operating any motor vehicle including a motorized bicycle. The National Highway Traffic Safety Administration recently informed the Kansas Department of Transportation that current statutes placed the state out of compliance with Title 23 USC Section 164. The federal code requires minimum driver's license penalties for repeat DUI offenders. Under Section 164, as enumerated in a memorandum provided to the Kansas Department of Transportation from the United States Department of Transportation, National Highway Traffic Safety Administration or NHTSA, Section 164 requires that a state must provide a mandatory minimum one-year hard license suspension to all repeat offenders. My interpretation of that section of the United States code requires this hard license suspension on offenders who receive a second or subsequent DUI and does not apply to first life-time offenders. I believe we could modify this section of the bill appropriately to make that accommodation. While in the current drafting of the legislation, it applies to all convictions regardless of the number of occurrences in an individual's lifetime. Current Kansas statutes in 8-286 prohibit individuals who have been declared habitual violators due to convictions of three serious moving violations in a five-year period from operating a moped for that three-year revocation. This revocation can occur for convictions of traffic misdemeanors other than DUI such as no proof of insurance; driving while suspended; vehicular homicide; making a false affidavit, required by the terms of Chapter 8 of the Kansas Statutes; using a false or fictitious name on a certificate of title or other fraud in such application for title; any crime punishable as a felony where a motor vehicle is used in the perpetration of that crime, and failing to stop at the scene of an accident. Three convictions of a combination of those violations trigger the provisions of the habitual violator sections of the Kansas code.

Section 2 of the act modifies 8-286 to allow the operation of a moped except after conviction of a DUI.

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Attachment 1

Section 3 modifies 8-287 to allow the operation of a moped except for the conviction of a DUI.

K.S.A. 8-288 is amended in Section 4 allowing the operation of a moped even while their licenses are restricted pursuant to that statute.

Senate Bill 376 amends K.S.A. 8-1020. In Section 5, it replicates the original SB35 of the 2007 session making the provisions of K.S.A. 60-206 and amendments thereto define the computation of time to determine if the request for an administrative hearing to the Department of Revenue was filed in a timely manner. Such hearings may be requested by any individual served with a Department of Revenue form DC27. Failure to file such request results in the automatic suspension of driving privileges for a period of up to the remaining time the Kansan has left in this world. SB 35 passed the Senate 40-0, and the House Judiciary Committee found another purpose for it.

There is no substantive change in the rights, privileges, or duties of the Department of Revenue or the drivers in these administrative actions other than to bring the hearing request requirement into line with other time limits for requesting hearings, appeals, or other legal action in Section 5. Enactment of Senate Bill 376 will help create a consistent statutory structure that will improve the administration of justice and the quality of due process in Kansas jurisprudence.

Section 6 continues the modifications of Kansas statutes pursuant to the original sections of Senate Bill 35.

Section 7 amends K.S.A. 8-1567 the DUI statute enacting further requirements imposed upon the State of Kansas by NHTSA requiring on Page 14 that upon a second or subsequent conviction for a DUI, the court must order all motor vehicles owned or leased by the defendant to be equipped with an ignition interlock device, or be impounded, or be immobilized for a period of two years. It also requires the defendant to pay all costs associated with the ignition interlock device, towing impoundment storage fees for immobilization costs. It does allow the defendant to retrieve his personal property from the motor vehicle and requires the impoundment of a leased vehicle until the term of that lease is expired. It has been made readily apparent that over $7 million dollars in federal highway funds will be withheld from Kansas should we fail to enact those sections of this legislation required by NHTSA. I recognize the tremendous cost and inconvenience this will cause defendants and the courts at both the district and municipal levels in the State of Kansas. I was asked to compile this legislation as the original vehicle intended to be used for rectifying this deficiency in Kansas statutes which was inadvertently allowed to become dormant on the calendar with the passing of Turnaround.

Respectfully submitted,

Senator Phillip B. Journey
State Senator 26th District

KANSAS
DEPARTMENT OF TRANSPORTATION

Kathleen Sebelius, Governor
Deb Miller, Secretary

http://www.ksdot.org

TESTIMONY BEFORE
SENATE JUDICIARY COMMITTEE

REGARDING SENATE BILL 376
DUI issues; ignition interlock; license for motorized bicycles; computation of time

March 19, 2007

Mr. Chairman and Committee Members:

I am Pete Bodyk, Chief of the Bureau of Traffic Safety. On behalf of the Kansas Department of Transportation (KDOT), I am here to provide testimony in support of Senate Bill 376.

While reviewing Kansas legislation to determine any impacts on federal funding requirements, the National Highway Traffic Safety Administration (NHTSA) discovered two provisions in current Kansas statutes that place the state out of compliance with 23 USC 164 (minimum penalties for repeat offenders for driving under the influence). Since the state is currently non-compliant, legislation must be passed as soon as possible to avoid federal penalty. SB 376 will address this issue and bring Kansas into compliance with federal requirements.

If state legislation is not passed to correct these provisions, the penalty imposed will be a $7.6 million transfer of federal funds in FY 2008 from construction projects to safety programs, or hazard elimination projects. This transfer would continue each year that Kansas remains non-compliant and jeopardize completion of the CTP, among other projects.

KDOT supports passage of SB 376. Thank you for your time, I will gladly stand for questions.

BUREAU OF TRAFFIC SAFETY
Pete Bodyk., Chief
Dwight D. Eisenhower State Office Building
700 S.W. Harrison Street; Topeka, KS 66603-3745 • (785) 296-3756 • Fax: (785) 291-3010
TTY (Hearing Impaired): (785) 296-3585 • e-mail: publicinfo@ksdot.org • Public Access at North Entrance of B

BUILDING ERECTION SERVICES COMPANY

15585 S. KEELER • P.O. BOX 970 • OLATHE, KANSAS 66051-0970
(913) 764-5560 • FAX (913) 764-2317

March 20, 2007

ChairpersonVratil; Vice-Chairperson Bruce, and committee members:

My name is Bill Miller. I am here representing the American Subcontractors Association and myself as a subcontractor. The American Subcontractors Assoc. represents subcontractors in Eastern Kansas and Western Missouri that do work and supply materials throughout Kansas. I am here to testify in favor of SB-379

The primary issue is the contractual requirement to list multiple individuals and entities as additional insureds on the auto and general liability policies of all parties in the contract chain due to the flow down provisions that are in virtually every contract. This forces the lowest party in the chain to be liable for all of the claims against the parties above, regardless of who is responsible.

This additional insured requirement circumvents the anti-indemnity law that was passed in Kansas in 2004. The net result is higher premiums for the lower tier contractors and clean loss runs for those that should be liable for losses that they or their agents cause. There is no incentive to maintain a safe jobsite if someone else is paying all of the claims that result from unsafe conditions. The subcontractor is not the controlling contractor and in the case of expansion or renovation of existing facilities, the general contractor has no control over the plant operations.

The typical additional insured language requires defense should a claim be made or a suit be filed against the upper tier contractor. This cost reduces the available coverage by the amount of the cost of litigation and even if the defense is successful, it counts as a loss and the deductible applies

.

A major pitfall for many who do not understand the language that is peculiar to the insurance industry is that they unwittingly sign contracts that have insurance limits or extended coverage's that are either not available or cost prohibitive. In some instances, the policy renewal date is in the midst of a project term and coverage that was in effect in one policy period is no longer available in the next. The worst case is when an unwitting subcontractor signs a contract agreeing to additional insure someone only to find out too late that his insurance company denies coverage required by the terms of the contract and the subcontractor has self insured the loss.

We believe that every one should be responsible for their own actions and the acts of their agents and employees. The only legitimate additional insured requirements should be for vicarious liability and for the actual employers of employees that fall under statutory employee or borrowed servant doctrine where the employees are under the direction and control of someone other than the employer.

MEMBER PCI PRECAST/PRESTRESSED CONCRETE INSTITUTE

SUBCONTRACTORS THE HEARTBEAT OF CONSTRUCTION AMERICAN SUBCONTRACTORS ASSOCIATION

AISC AMERICAN INSTITUTE OF STEEL CONSTRUCTION INC. FOUNDED 1921 Certified Steel Erector

METAL BUILDING CERTIFIED

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Attachment 3

If we can enact legislation that makes everyone responsible for their own claims and the claims caused by those for whom they are responsible, we could reduce liability insurance costs and likely have safer construction sites which would in turn reduce the cost of work comp insurance as well.

The latest development is the requirement by the insurance companies that upper tiers force lower tiers to additional insure them for losses that they themselves cause. This is a condition of the cost of their premiums. We believe that the Legislature should establish the rules that govern the terms and conditions of the insurers that do business in this state. This latest requirement also increases the limits that each subcontractor must purchase to satisfy the upper tiers requirements that are also dictated by the insurance companies. It is no surprise that the insurance companies are enjoying record profits in excess of 50% last year.

Other states have passed this same law to stop this abusive risk transfer including the State of Oklahoma. A nearly identical bill is on the Governor of Colorado's desk and he has promised to sign it.

We believe that every business, regardless of size, should purchase the limits of insurance required by law to protect the public. Any other coverage should be for their own protection with limits that they feel necessary to protect their assets. We **do not** believe that the bottom line of the corporations that oppose this Bill will be adversely affected if they are forced to purchase their own insurance.

There is no fiscal downside for the State of Kansas that will result from the passage of this Bill.

William R. Miller
President
Midwest Crane & Rigging
Building Erection Services Co.
Greater Kansas City American Subcontractors Assoc.

Kansas Association of Insurance Agents

Testimony on Senate Bill 379
Before the Senate Judiciary Committee
By SueAnn Schultz, Government Affairs Chair
March 20, 2007

Thank you mister Chairman and members of the Committee for the opportunity to appear today in support of Senate Bill 379 amending the current "Contractors Indemnification" statute. My name is SueAnn Schultz and I'm representing the Kansas Association of Insurance Agents today as their Government Affairs Chair. I am also on KAIA's Board of Directors and am General Counsel for IMA, the state's largest independent agency with five offices in the Midwest. I was personally involved as well as our agency in advocating for the original HB 2154 that passed in 2004.

KAIA has approximately 543 member agencies and branches throughout the state and our members write approximately 70% of the commercial insurance in Kansas including workers compensation. Our members are free to represent many different insurance companies.

We support the basic provision in K.S.A. Supp. 16-121 that makes it against public policy to transfer one party's negligence to another party. In addition, we support expanding on the protection given to contractors several years ago to prohibit requirements to name another party as an additional insured to pick up coverage for their own negligence.

Our association and IMA supported House Bill 2154 in the 2003 session that ultimately passed in 2004 outlawing indemnification clauses in construction contracts where one party attempted to force the other to assume their negligence. Essentially, our association believes it is good public policy to require each party be responsible for their own negligence. For that same reason we support the continued use of reciprocal indemnification clauses, where each party protects the other from the results of their own negligence. And with the passage of HB 2154, Kansas joined approximately 37 states that have enacted similar legislation for contractors.

Bills Encourage Safety and Loss Prevention

If the purpose of tort law is to encourage safe behavior and avoid injury by holding people liable for the injuries they cause, then it makes sense that that encouragement needs to be directed at the party taking the action or failing to act causing injury. To force someone else to assume that burden provides no incentive for the party "in control" to either stop doing the harmful activity or to eliminate the dangerous condition.

Economic Leverage Shouldn't Be the Determining Factor

Almost universally we are talking about situations where the party being required to assume another's negligence is at an economic disadvantage, in the negotiations, to the one making the request. Generally it is very large corporations who have the legal and risk management staff to attempt to shift liability for their actions to any other party and away from themselves. This has obvious cost saving advantages to the largest companies who demand these clauses and are

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Attachment 4

often self-insured. Any liability for their negligence they can force on smaller businesses is a direct, dollar-for-dollar savings to their self-insured program.

But even if they are not self-insured, it protects their loss experience (and potential premium credits) with their own insurer, saves them potential deductible costs and protects their liability insurance limits.

Additional Insured Prohibition

SB 379 adds a prohibition on contract provisions requiring a party to name the other party as an additional insured for the other party's own negligence. Without this companion prohibition, companies simply do an "end run" around the anti-indemnification language and accomplish the same transfer of their negligence through the additional insured avenue.

One problem with naming entities as additional insured is that the insurance company has not had an opportunity to inspect and loss control the risk, has not been given underwriting information including information about exposures and prior losses and does not have a good picture of the risk they are being asked to assume. In the absence of a prohibition on naming additional insureds, it would make sense for the legislature to mandate that before a company could demand to be named as an additional insured, they be required to provide all this background information and submit to loss control engineering.

Some of you may remember that KAIA appeared last year as an opponent on a similar bill, SB 338, banning the naming of additional insureds. Our concern then was that it might be the only avenue to find completed operations coverage for a general contractor. After extensive meetings last session with all the interested proponents, we came to the conclusion that it was more important to support the general principal that it is against public policy to shift your negligence to another and that the marketplace had, or would, deal with completed operations coverage for generals under the generals' own coverage.

Other Means Exist

None of these bills would prohibit a requirement that a contractor provide either an "Owners & Contractors Protective Policy" or a "Railroad Protective Policy". Both are designed to provide separate coverage for the owner or the railroad on construction projects. This allows the insurance company to underwrite the risk and it protects the "downstream" parties own policy limits and loss experience.

We encourage the Committee to pass SB 379 out favorably. We would be happy to answer questions or provide additional information.

TESTIMONY BEFORE THE
SENATE JUDICIARY COMMITTEE
REGARDING SENATE BILL 379
BY DAN MORGAN, REPRESENTING
THE BUILDERS' ASSOCIATION AND THE KANSAS CITY CHAPTER, AGC
MARCH 20, 2007

Thank you, Mr. Chairman, and members of the committee. My name is Dan Morgan. I am director of governmental affairs for the Builders' Association and also the Kansas City Chapter of Associated General Contractors of America. I appreciate the opportunity to appear before you this morning in support of Senate Bill 379. The Builders' Association and Kansas City Chapter, AGC represent more than 1,050 general contractors, subcontractors and suppliers engaged in the commercial and industrial building construction industry throughout central and western Missouri and portions of northeast Kansas. More than half of our members are located in the Kansas City area and are either domiciled in Kansas or perform work in the state.

Three years ago the Kansas Legislature approved legislation (HB 2154) that renders any provision in a construction contract that requires one party to hold another party harmless for damages caused by that other party's own negligence void, unenforceable and against public policy. If adopted, as we hope it will be, Senate Bill 379 would likewise render void and unenforceable any provision in a construction contract that requires one party to hold another party harmless from damages caused by that other party's own "intentional acts or omissions". We certainly believe that such provisions ought to be against public policy.

We also believe that any provision in a construction contract that requires one party to provide liability coverage to another party as an "additional insured" for that other party's own negligence or intentional acts or omissions ought to be void and unenforceable. Our support for the "additional insured" provisions of the bill is somewhat guarded because insurance industry representatives have provided mixed views as to whether the elimination of additional insured provisions could result in "gaps in coverage" for some contractors. That said, we trust that the insurance industry would quickly step in and provide adequate coverage if such gaps were to occur. We urge your support for Senate Bill 379 and respectfully ask that it be recommended favorably from your committee. Thank you very much.

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Attachment 5

DAN HAAKE

Haake FOUNDATIONS, INC.

March 20, 2007

Re: Senate Bill No. 379
Testimony From Dan M. Haake,
President Of Haake Foundations

Chairman John Vratil, Vice Chairman Terry Bruce and Committee Members,

I am here today to voice my support of this Bill and would like to offer you a few of my thoughts. I am not an expert on insurance contracts and endorsements, however I do have thirty years of experience trying to understand these endorsements and how they apply to my business. Then take that information, mesh it together with contracts for work (such as AIA Form A401-1997) from General Contractors, trying to understand their provisions of "Additional Insured Status" for Owners, Architects and General Contractors which extends my limits to include them.

Each year I sit down with my insurance agent and discuss the risk associated with my work, mix in the value of what I am not willing to risk and come up with limits of coverage that I need to purchase. My agent then brings up the additional insureds I add to my policy and now I have a limit amount that is not what I need or what I want but what I think I can afford. Reality is that I am insuring others for deeds not necessarily connected to me and generally out of my control.

Four years ago I had a fatal accident on one of my jobs, workers compensation insurance protected myself, the General Contractor and the Owner but when a wrongful death law suit was brought against the excavation contractor, the Owner and General Contractor were looking to me for protection under the additional insured provisions of my general liability policy. The outcome of that situation was worked out, however I realized that the risk of adding others to my policy where I do not have the ability to manage it properly is a receipt for disaster.

Finally the practice of transferring risk on a project to others is bad for business and should be against public policy.

Sincerely,

Dan M. Haake

10029 E. 63RD TERRACE

RAYTOWN, MISSOURI 64133

816•737•2954

Senate Judiciary
3-20-07
Attachment 6

Midway Sales & Distributing, Inc. d/b/a
MIDWAY WHOLESALE
Topeka • Salina • Lawrence • Manhattan • Elwood • Kansas City • Wichita

TESTIMONY TO THE SENATE JUDICIARY COMMITTEE
SB 379

March 20, 2007
Kenneth Daniel, Topeka

Kenneth L. Daniel is an unpaid volunteer lobbyist who advocates for Kansas small businesses. He is publisher of KsSmallBiz.com, a small business e-newsletter and website. He is C.E.O. of Midway Wholesale, a business he founded in 1970. Midway has seven Kansas locations and 110 employees.

Mr. Chairman and Members of the Committee:

Today I am speaking on behalf of the Topeka Independent Business Association as well as for my own company, Midway Wholesale, and thousands of other small business owners across Kansas.

I strongly urge you to support Senate Bill 379.

I've been working on this issue for three years with representatives of all aspects of the construction industry except building owners. "Except building owners" is a very important point, because it is their fault that this extremely unfair situation has become the norm in the construction industry.

Midway Wholesale is both a supplier and a subcontractor to the construction industry. In fact, more than 99% of our volume is with contractors and subcontractors. We are long-time supplier members of the Associated General Contractors and of seven local homebuilders' associations in Kansas.

It pains me greatly to advocate for measures which impinge on private contracts, but we have reached the point where the unfairness to those of us at the "bottom of the food chain" has reached an unbearable level. I see no way for the situation to correct itself. In fact, it continues to get worse and worse.

P.O. Box 1246 • 218 SE Branner Street • Topeka, KS 66601-1246 • (785) 232-4572 • Fax (785) 357-7
www.midwaywholesale.com

In 1970, when I started Midway Wholesale, the documents we had to accept from purchasers of our products and services were simple, straightforward, and fair. Over the years, more and more conditions and "boilerplate" have been added to those documents until today they are so biased in favor of those above us on the food chain that we are left only with a choice between high risks or no sale. We call this the "tyranny of the boilerplate".

There is also the "tyranny of the checkbook", where the weaker party is always "wrong" until they agree to the stronger one's conditions.

Virtually all of our customers are highly honorable and treat us fairly even though the documents don't require it. Unfortunately, there are always a few bad actors up the food chain who use the "tyranny of the boilerplate" and the "tyranny of the checkbook" to unfairly keep our money.

We are not a party to the contracts between building owners and contractors. However, our money is used to leverage and finance those contracts. Some of these contracts are <u>completely</u> financed with subcontractor and supplier money.

A couple of years ago, this legislature outlawed "indemnity clauses" in contracts that forced the liability for the bad acts of others down to us. In a nutshell, those clauses made those of us who are "low on the food chain" pay for the bad acts of those higher up.

To circumvent that law, big businesses merely switched the insurance requirements in contracts to accomplish the same dumping of liability down to us.

These tactics are being used by the biggest of big businesses, big insurance companies, and a handful of large insurance agencies that specialize in contractor insurance.

Senate Bill 379 will help stop that abuse.

STANDARD TERMS AND CONDITIONS

Definitions: "FXFE" refers to FedEx Freight East, Inc. "Contractor" refers to the vendor designated on the first page of this Agreement. "Facility" means the place where the Services will be performed, as designated on the first page of this Agreement. "Services" means the services that the parties contract for under the terms of this Agreement. "Statement of Work" means the itemized description of services attached to this Agreement and incorporated into this Agreement by reference. "Agreement" means this Facilities Services Agreement.

1. **SCOPE OF THE SERVICES.** Contractor shall furnish all material, labor and supervision needed to perform the Services in a good, workmanlike manner in accordance with accepted standards for like services.

2. **FEE.** As consideration for Contractor's performance of the Services, FXFE shall pay Contractor the maximum fee (the "Fee") set forth on the first page of this Agreement. FXFE shall pay the Fee in installments as follows: Once each accounting period specified in the "ACCOUNTING INFORMATION" section of the first page of this Agreement, Contractor may submit an invoice to FXFE for that portion of the Fee allocable to the Services that Contractor performed during the preceding accounting period. The portion of the Fee allocable to the Services that Contractor must perform during any accounting period will be set forth on a schedule that the parties attach to this Agreement or, in the absence of such an attachment, will be equal to the product achieved by multiplying (i) the quotient achieved by dividing the Fee by the total number of days between the Commencement Date and the Completion Date, as those dates are designated on the first page of this Agreement, by (ii) the number of days in that accounting period during which this Agreement is in force. Within 30 days after FXFE's receipt of each of the invoices that Contractor submits, FXFE shall pay Contractor the amount reflected in that invoice that Contractor has properly included in accordance with the foregoing.

3. **COMPLIANCE WITH LAWS.** Contractor shall secure and pay for all permits and licenses necessary for the proper performance of the Services. In addition, Contractor shall comply with all local, county, state and federal laws, ordinances, rules, regulations, orders and codes applicable to the Services.

4. **TAXES.** The Fee includes, and Contractor is solely responsible for paying, all taxes, excises, duties and assessments arising out of, or connected with, Contractor's performance of the Services.

5. **SAFETY AND SECURITY.** Contractor shall take all necessary precautions in the performance of the Services to ensure the safety of all persons and property. Contractor must comply with all security rules at the Facility and, at FXFE's request and subject to applicable laws, must cooperate with FXFE in the investigation of any of Contractor's employees suspected of theft or other wrongdoing while in or about the Facility.

6. **INSURANCE.** (a) At all times during the performance of the Services, Contractor shall maintain in force the insurance described below in the amounts and with the endorsements specified below in this Section 6. None of the requirements as to types, limits or FXFE's approval of the insurance coverages that Contractor must maintain in force during the performance of the Services will limit, qualify or quantify in any manner the liability and obligations Contractor assumes under this Agreement or that applicable law would otherwise impose on Contractor. The insurance that Contractor must maintain in force includes:

Workers' Compensation:	
(a) State	Statutory
(b) Applicable Federal (e.g. Longshoremen's)	Statutory
(c) Employer's Liability	$500,000.00
Commercial General Liability (Including Premises—Operations; Independent Contractor's Protective; Broad Form Property Damage; and Products and Completed Operations to be maintained for three (3) years after final payment):	
Combined Single Limit	$500,000.00
Comprehensive Automobile Liability:	
Combined Single Limit	$300,000.00

Any additional form of insurance that any governmental entity having jurisdiction over the Facility may require or that FXFE may reasonably require.

(b) Each insurance policy that Contractor maintains in accordance with the requirements of this Section 6 must be written as a primary policy and not contributing with, or in excess of, any insurance coverage that FXFE maintains. Each insurance policy that Contractor maintains in accordance with the requirements of this Section 6 must be written by insurance companies licensed to do business in the state where the Facility is located, must be in form and substance satisfactory to FXFE, and must contain an endorsement requiring the delivery of written notice to FXFE at least 30 days in advance of the date on which the insurer intends any cancellation, termination or change to become effective. Each liability insurance policy that Contractor maintains in accordance with the requirements of this Section 6 must name FXFE and its officers, directors and employees as additional insureds. Prior to commencement of the Services, Contractor shall furnish to FXFE certificates of insurance reflecting that each policy that the terms of this Section 6 requires is in force and that Contractor has paid the premium for the policy in full. At least 15 days in advance of the expiration of the term of each policy that Contractor maintains in accordance with the requirements of this Section 6, Contractor shall provide to FXFE a certificate evidencing the renewal of the policy. Certificates issued with respect to contractual liability insurance must specifically acknowledge the provisions of Section 7. Each certificate that Contractor furnishes must be in the form of ACORD Form 25-S or such other form as FXFE may approve.

(c) Contractor waives and releases, to the extent of the proceeds that are or would be payable to it in respect of the policies of property insurance that it maintains in force with respect to its property, any and all rights of recovery, claim, action or cause of action that it may now or later have against FXFE or FXFE's agents, officers and employees by virtue of any loss or damage that may occur to its property, including, without limitation, the equipment used in the performance of the Services, regardless of cause or origin, including, without limitation, the negligence of FXFE or any of its representatives, agents, or employees.

BEFORE THE KANSAS SENATE JUDICIARY COMMITTEE
Senator John Vratil, Chairman

TESTIMONY of WYATT HOCH
ON SENATE BILL 379
Presented on behalf of the Coalition to Preserve Freedom of Contract
March 20, 2007

MR. CHAIRMAN AND MEMBERS OF THE SENATE JUDICIARY COMMITTEE:

I am Wyatt Hoch, a partner with the law firm Foulston Seifkin LLP in Wichita, Kansas. My law practice includes more than twenty years of experience with the construction industry, including the drafting of construction contracts and trial of claims and disputes arising from the construction industry. I am here today to offer testimony on behalf of a coalition of companies that employ several thousand Kansans and that have deep concerns with Senate Bill 379.

This bill would restrict the ability of a property owner, from homeowners to large corporations, to contract to become an additional insured party under the commercial general liability insurance policy maintained by its construction contractor. Insurance provisions are common and accepted commercial contract terms, and are widely used in construction contracts as well as commercial real estate leases and franchise agreements. Contracting parties in Kansas should continue to be allowed to allocate risks among themselves to fit the particular transaction. This bill would impair parties' ability to do so.

Additional-insured endorsements simply insure the parties' allocation of risk.

Senate Bill 379 would all prohibit a contracting party from purchasing an "additional insured" endorsement to its liability insurance policy. The insurance market long ago developed "additional insured" coverage (extending coverage to someone other than the policyholder) in response to an identified need in the marketplace.

The cost of the additional insured provision is known and can be included in the cost of the contract. The contracting party can buy the coverage either on a blanket basis for an entire year's worth of contracts, or on an individual contract basis. The cost of that additional premium can be included in any proposal, bid or contract. The ultimate cost of paying for the liability will fall on an insurer with sophisticated underwriting practices who has priced the coverage based upon its assessment of the risk. Additional insured coverage comes with a duty to defend which is broader than typical indemnity coverage. This is especially important for small businesses and non-profits which may not be able to afford the costs of liability litigation.

Because an insurance company accepts the exposure, the issue is not whether risk will be allocated but to whom. The ultimate liability will be paid by a company in the business of managing risk. The question is just which insurance company pays, and the answer to that question does not make a difference for purposes of PUBLIC policy. *This point explains why practically NO states have outlawed additional insured provisions that cover the negligence of the additional insured.*

Finally, a prohibition against additional insured insurance would actually *raise* rather than eliminate a barrier to entry or continuing business for the small, undercapitalized contractor. The inability to allocate risk arising from the contractor operations will be reflected in either (i) a reduction in the amount the owner is willing to pay for the service, because the owner must allocate a part of its transaction cost to the risk of problems arising from the contractor's operations; or (ii) the owner's unwillingness to hire a contractor or carrier with poor safety record, uncertain financial wherewithal, or both – opting instead for contracts with out-of-state (and therefore not subject to the Kansas prohibition) contractors who can and will include the additional insured requirement in their insurance portfolio.

Additional insured contract terms *promote*, not violate, public policy.

Contracting parties in Kansas should continue to be allowed to allocate risks among themselves to fit a particular transaction. This bill would impair parties' ability to do so. Many other contractual provisions, like limits on liability or limits on consequential damages, have the same effect of allocating risk and liability by contract. Risk allocation is a legitimate and often necessary part of the package of services that a premises owner needs to obtain in order for a transaction to make sense from a business standpoint.

Freedom of contract dictates preserving flexibility for arrangements that real-world business circumstances have produced. This is not a business-to-consumer contract negotiation setting where "take-it-or-leave-it" contracts (contracts of adhesion) might sometimes leave the retail customer in a no-win situation. Rather, these terms arise in the context of *agreements* negotiated between sophisticated business entities that are fully capable of protecting their interests. Businesses are always free to decline contracts that contain commercial terms (including risk allocation and insurance requirements) they do not want to accept or to negotiate alternative terms.

When one considers the kinds of contracts that *do* violate public policy, it is clear that these contract terms are nothing like gambling contracts, contracts in restraint of trade, or contracts to perform an illegal act. Even when compared to a covenant not to compete, there is no arguable similar harm to third parties that arises from enforcement of additional insured endorsements. Rather, these are standard contract provisions that businesses have for decades routinely included in all kinds of contracts.

Conclusion

In summary, government should not take sides in a non-consumer business transaction. The allocation of risk in a business transaction is not a fairness issue, but rather a commercial issue. Less than a handful of states have adopted measures restricting additional insured endorsement provisions, and Kansas should not go down that path.

Thank you very much for your time and attention this afternoon.

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Legislative Testimony
Presented on behalf of the Coalition to Preserve Freedom of Contract
Before the Senate Judiciary Committee
Sen. John Vratil, Chairman
March 20, 2007

MR. CHAIRMAN AND MEMBERS OF THE SENATE JUDICIARY COMMITTEE:

My name is Stephen Ware. I am a professor of law at the University of Kansas. I have been a lawyer since 1991 and a law professor since 1993. Contract law is one of my specialities and I regularly teach contract law at KU.

I am here today, not on behalf of KU, but on behalf of the Coalition to Preserve the Freedom of Contract. I have long been deeply impressed by the importance of contractual freedom, and I formed my own views on the topics discussed at this hearing prior to being contacted by the Coalition, so I appreciate the opportunity to express those views in this forum.

Like insurance generally, indemnification and additional-insured provisions are simply ways to form legally-binding contracts that allocate risk. In particular, these provisions are often used in contracts between businesses to allocate the risk of loss due to liability to a third party, such as an employee on the job.

All other things being equal, any business can be expected to prefer a contract that allocate risks to somebody else rather than one that allocates risks to that business. But all other things are not equal. Businesses can and do adjust the prices they charge to reflect the risks they carry. Competition among businesses can be expected to force such adjustments.

I know that the prices of the goods I buy reflect the liability risks borne by those who build and operate the facilities that produce those goods. As a consumer, I do not care whether particular risks are borne by contractors engaged in construction, manufacturers who own the relevant premises or any other type of business. How they allocate risks and prices among themselves is for them to decide. But, as a student of economics, I am confident that they will make those allocation choices most efficiently if left to themselves. In other words, I am confident that leaving those allocation choices to the free market will result in lower prices for consumers like me.

I am confident that enacting Senate Bill 379 will have the ultimate effect of raising prices. Therefore, I see this bill as naked special-interest legislation. I see it as an attempt by members of a particular industry to use the political process to enrich themselves at the expense of the general public.

In sum, I believe the Legislature ought not to regulate the agreements by which businesses allocate risks among themselves. I believe that preserving freedom of contract in this area will do a better job of allocating risk to the party who ought to bear that risk and do a better job of fostering the efficiency and low prices that are truly in the public interest.

Thank you very much for your time and attention.

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March 19, 2007

Mr. Chairman:

I want to thank you and your committee for the opportunity to speak in support of SB 379. I'm Ken Keller, controller of Western Extralite Company with locations in Topeka, Lawrence, Leavenworth, Manhattan, Lenexa and various locations in Missouri. I also represent the American Subcontractors Association, the Electric League of Missouri and Kansas, with a membership of 325, and the NACM Credit Professional Alliance, with a membership of 560, plus other interested organizations. Western Extralite Company sells electrical supplies to the construction industry.

Three years ago, the Kansas Legislators wisely passed a bill that eliminated hold harmless and indemnification agreements from construction contracts. Without question, this was good and necessary legislation that prohibited owners and general contractors from unfairly transferring risk from those in control of

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the contract to the sub-contractors. This was an enormous step forward in leveling the playing field between the owner, the general contractor and sub-contractors and sometimes the supplier.

It failed, however, to solve the problem entirely. What it didn't cover will be eliminated by SB 379, that being the current practice of requiring the subcontractor to name the owner, the general contractor and others as additional insured on his insurance policies. This effectively transfers the risk to the subcontractor and his insurance company making them responsible for claims for problems out of their control.

This is indeed unfair and needs to be eliminated just as hold harmless and indemnification was three years ago. We must level the playing field and make each party to the contract responsible for their own actions. I urge your support of SB 379.

Kenneth R. Keller,

Western Extralite Company,

(816) 421-8404

TESTIMONY BEFORE THE SENATE
JUDICIARY COMMITTEE

ARGUMENTS FOR SB 379 - RESTRICTIONS
TO INDEMNIFICATION CLAUSES
BY GUS RAU MEYER
MARCH 20, 2007

My name is Gus Meyer, President of Rau Construction Company in Overland Park. Rau was founded in 1870, and is a mid-size General Contractor working on commercial, retail, office and historic rehabilitation projects. I am here to urge your support of Senate Bill 379. This legislation would render unenforceable indemnification provisions in construction contracts that require the promisor (contractor) to hold harmless, indemnify, or defend the promisee (owner) or others against liability for damages caused by the promisee's own negligence or intentional acts; and to be required to provide insurance as an "additional insured" for their own negligence or intentional acts.

Ordinarily I would not ask the legislature to get involved in matters that involve private contracts, but this legislation addresses an issue that is starting to have a negative effect on all reaches of the construction industry, as well as many other industries

For many years, the majority of contracts have been fair to all parties involved. Typically using standardized contracts written together by all parties involved does this. Language form some of these contracts we have utilized include the following indemnification clause:

> To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architects consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, rising out of or resulting from performance of the Work, providing that such claim, damages, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused by a party indemnified hereunder.

In addition, this contract also stipulates:

> This obligation of the Contractor shall not extend to the liability of the Architect, the Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, design or specifications, or (2) the giving of or the failure to give directions or instructions by the Architect, the Architect's consultants, and the agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage.

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TESTIMONY BEFORE THE SENATE
JUDICIARY COMMITTEE

ARGUMENTS FOR SB 379 - RESTRICTIONS
TO INDEMNIFICATION CLAUSES
BY GUS RAU MEYER
MARCH 20, 2007

In recent years, some indemnification clauses we have seen in Contracts has changed, and Owner have started using their own custom contracts. As time progresses, more and more Owners are taking up this practice. One of these modifications we encountered several years ago was written like this:

> To the fullest extent permitted by law, Contractor agrees to indemnify, protect, defend and hold harmless the Owner, Architect, Owner's lenders, if any, and each of the aforementioned parties' respective affiliated companies, partners, successors, assigns, heirs, legal representatives, devises, officers, directors, shareholders, employees and agents (herein collectively "Indemnitees") for, from and against all liabilities, claims, damages, losses, liens, fines, penalties, costs, causes of action, suits, judgments and expenses (including court costs, attorneys' fees, and costs of investigation), of any nature, kind or description of any person or entity directly or indirectly arising out of, caused by, or resulting from (in whole or in part) (1) the work performed hereunder or any part thereof, (2) this Contract, or (3) any act or omission of Contractor, and Subcontractor, anyone directly or indirectly employed by them, or anyone that they control or exercise control over (herein collectively "Liabilities"). The obligations of Contractor under this indemnification shall apply to Liabilities even if such Liabilities arise from or are attributed to the negligence of any Indemnitees.

Again, this is just one sample of an indemnification an Owner is using. There are numerous other samples, some of which are even more outrageous. Such indemnification provisions are so unfair and onerous that they ought to be declared to be against the public policy of the state.

Most troubling is that following this unfair shift of liability, more and more insurance companies exclude coverage for these clauses. This in turn has caused Owners to write into their Contracts language requiring specific insurance covering these indemnification clauses. As insurance companies balk at providing coverage, Contractors are then forced to put their companies on the line and take their chances. This puts employees and their employees' families at risk as well.

As an example of what could happen if an indemnification like this was in a contract, I look at what possibly is the first lawsuit filed against Rau Construction on a construction issue in our 133 year history. It was litigation involving two buildings by a national hotel chain. That organization built several hundred hotels across the country in the late 1990's using the same basic design, all drawn by one the same architectural firm. They felt there is a problem with the EIFS exterior system they called for in their plans and specifications, and are suing all the Contractors who built these hotels, as well the EIFS installer and manufacturer. As part of the suit against the General Contractor, the plaintiff is claiming we are responsible since we allowed the building to be built per their plans and specification knowing what they called for was a defective product.

TESTIMONY BEFORE THE SENATE
JUDICIARY COMMITTEE

ARGUMENTS FOR SB 379 - RESTRICTIONS
TO INDEMNIFICATION CLAUSES
BY GUS RAU MEYER
MARCH 20, 2007

What would have happened if there was an indemnification clause similar to the one above in our contract? My supposition is that this Owner would only need to make a claim to us saying he and/or his architect made a mistake in specifying the exterior system and since we have indemnified them against their own mistake which has caused damage and loss we need to replace the whole exterior system on all these projects.

The above example is only one of a multitude of scenarios that could unfold in a construction contract. The possible items that an Owner could want covered are limitless. From errors in judgment that the Owner makes, to willful misconduct. That is why these indemnification clauses are so outrageous.

Contractors are at a serious economic disadvantage in negotiating such clauses out of owners' contracts, particularly in periods of soft markets such as we appear to be entering again. Compounding upon the effects of the soft construction market is the tumultuous insurance market we recently experienced. Insurance has either increased significantly in cost, or in some cases, no longer possible to obtain. In order to maintain our insurance, Rau Construction has submitted to our insurance carrier any indemnification clause that is not the standard AIA clause for their review and approval. Clauses with onerous language are contested and a contract is not signed unless the clause is modified. Speaking from practical experience. Not all contractors are as diligent as Rau Construction is in fighting these clauses. Many contractors do not have the expertise to be able to review and understand the impact of the "legalese" written in these contracts.

All parties should be responsible for their own negligence. These new indemnification provisions defy common sense as well as ethical business practices. Requiring them to be backed up by insurance, which sometimes is impossible to obtain makes this situation even worse. We will appreciate your support on SB 397 and this important issue. Thank you for your thoughtful consideration.

AGC of KANSAS
Building a Better Kansas Since 1934
200 SW 33rd St. Topeka, KS 66611 785-266-4015

TESTIMONY OF
ASSOCIATED GENERAL CONTRACTORS OF KANSAS
BEFORE SENATE COMMITTEE ON JUDICIARY
SB 379

March 20, 2007

By Corey D Peterson, Associated General Contractors of Kansas, Inc.

Mister Chairman and members of the committee, my name is Corey D Peterson. I am the Executive Vice President of the Associated General Contractors of Kansas, Inc. The AGC of Kansas is a trade association representing the commercial building construction industry, including general contractors, subcontractors and suppliers throughout Kansas (with the exception of Johnson and Wyandotte counties).

AGC of Kansas supports the objective of SB 379, but feels the bill should include all contracts and not single out the construction industry. If this bill is deemed to be fair for the construction industry, it should be fair for all industries and vice versa. If the content of SB 379 is deemed not fair for all, AGC is concerned why such a law would then be imposed specifically on one industry.

AGC of Kansas members are directly impacted by these bills on two levels. Subcontractor members are being asked to name general contractors as an "additional insured." While general contractors may ask subcontractors to name them as an additional insured, they are at the same time being asked to name owners as additional insured.

AGC fully supports the concept of one being responsible for their own actions and agrees it is not fair to require one to put their future insurability at risk because of the actions of another over which they have no control.

However, the issue of additional insured coverage (or lack thereof) has provided some uncertainty within the construction industry and apparently by the insurance industry as well. The subject of additional insured clauses has been discussed on the national level for several years. These discussions between general and subcontractor organizations and the insurance industry have yet to provide clear recommendations on how best to proceed.

AGC of Kansas has held numerous meetings with its members, other industry groups and insurance companies on this subject as well. As a result of these meetings, it is AGC of Kansas' understanding that adequate insurance should be available for all industry members, even if additional insured provisions were made against public policy. Some uncertainty remains, however, as to how the insurance industry will react to this and whether general contractors would continue to have complete coverage for their risk exposure.

A remaining concern is that litigation expenses are likely to rise, as each insurance carrier (owner, general contractor and potentially several subcontractors) will likely be made party to any lawsuit that arises due to a claim at a construction jobsite and each insurance company would be required to defend these claims.

AGC of Kansas respectfully requests that SB 379 be amended to cover all contracts and not single out the construction industry and that the amended bill be recommended for passage. Thank you for your consideration.

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STATEMENT OF KANSAS BUILDING INDUSTRY ASSOCIATION

TO THE SENATE JUDICIARY COMMITTEE

SENATOR JOHN VRATIL, CHAIR

REGARDING S.B. 379

MARCH 20, 2007

Chairman Vratil and Members of the Committee, I am Chris Wilson, Executive Director of Kansas Building Industry Association (KBIA). KBIA is the statewide trade and professional organization of the home building industry. We appreciate your hearing of S.B. 379 and the opportunity to submit comments in support of this bill.

The Legislature has already adopted policy for the state that a contractor should be liable for their own negligence and that contractual clauses attempting to hold a party liable for another's negligence are against public policy. KBIA concurs in this policy.

S.B. 379 is needed to carry out the policy of the state, since some companies have required companies with which they contract to add them as an additional insured to their insurance policies, in effect holding a company liable for the other party's own negligence.

We appreciate that the Senate has passed this legislation before and ask you to again forward this bill to the House for consideration.

CHRISTINA M. WILSON, Executive Director
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Testimony to Senate Judiciary Committee
Senate Bill 379
An Act concerning construction contracts; relating to indemnification provisions and additional insured parties

Edward P. Cross, Executive Vice President
Kansas Independent Oil & Gas Association

March 20, 2007

Good morning Chairman Vratil and members of the committee. I am Edward Cross, Executive Vice President of the Kansas Independent Oil & Gas Association (KIOGA). KIOGA is a 1,400 member trade association representing the interests of the independent oil and gas industry in Kansas. KIOGA expresses our opposition and concerns surrounding Senate Bill 379.

Indemnification provisions are used in our industry in many instances to define responsibility in cases where liability may be difficult to determine. When a well is drilled the operator of that well typically enters into a contract with a drilling contractor to provide drilling services under a standard form contract developed by the International Association of Drilling Contractors (IADC). The IADC contract establishes responsibility for property damages based on whether or not the well is on a footage or on a daywork basis at the time of the incident. If a well is on footage the well is being drilled at the time and the incident is likely to be the result of an equipment failure which is the contractor's problem. If it is on daywork the incident is likely to be the result of downhole conditions which is the operator's problem. In fact, the real cause of the incident may never be known as the problem has occurred under the earth's surface. The parties grant the indemnification provisions as an accommodation to avoid litigation time and expense in determining who the negligent party might be and the degree of negligence involved.

Often indemnification provisions are used to protect the contracting parties from the claims of each other's employees. In recent years we have seen an increase in what is known as an "action over claim". In certain instances an injured employee of a contractor might seek damages for workers compensation from his employer, the contractor, and damages from liability from the operator alleging unsafe work conditions. In most of these instances the accident would be at a remote location and it is unlikely to find an impartial witness who could testify as to the true conditions at the time. Because of this uncertainty many operators and contractors enter into agreements which indemnify one another for the claims of the respective employees. A reduction in uncertainty lowers the costs of doing business for both parties.

The prevalence of the action over claim is the cause of many of the indemnity provisions in contracts and the requirements of many contractors to have their subcontractors name them as additional insured. If an injured employee of a subcontractor engages a personal injury lawyer he may be advised to pursue his remedies against the subcontractor through the workers compensation system and go after the contractor as well. This gives the employee a "second bite at the apple" which is not what was intended under the workers compensation statutes. Hence, the contractors are trying to correct by contract the problems in a tort system that is broken. It would be better to fix the tort system by outlawing the action over claim than to de-legitimize the contractual solution to that problem.

In recent years most of the insurance carriers offering coverage to our industry have encouraged or insisted operators enter into master service agreements (MSAs) with certain contractors to establish the relationships between the parties. These MSAs typically contain indemnification provisions and may call for one party to name another as additional insured. Should the State enact legislation stating that indemnification provisions are contrary to public policy, this could negatively impact the availability and pricing of insurance.

Some have complained about MSAs saying that they are too one-sided. Others complain that they are complicated and un-uniform. To address these complaints KIOGA has formed a task force containing operators, contractors, insurance executives and attorneys and has developed a model form MSA which would be acceptable to contractors and operators. An operator or contractor could adopt it or modify it to meet their particular needs and would not need to analyze every provision once familiar with the form. We believe that an industry solution serves us better than legislative action.

In summary, I see indemnification provisions as being a good thing as they establish responsibility by contract rather than through litigation. The relationships between parties have developed through negotiations by using contract language which has been developed over decades. Disturbing those traditional relationships would be detrimental to our industry and would not serve the interests of the State.

KBA proposal

remains in such dealer's possession and at such dealer's established or supplemental place of business for the purpose of sale. Upon the sale of any such manufactured home or mobile home, the dealer immediately shall deliver to the purchaser or transferee the certificate of title issued by the other state, properly endorsed and assigned to the purchaser or transferee, together with an affidavit executed by the dealer setting forth:

(1) That the dealer warrants to the purchaser or transferee and all other persons who claim through the purchaser or transferee that, at the time of the sale transfer and delivery by the dealers, the manufactured home or mobile home was free and clear of all liens, mortgages and other encumbrances, except those otherwise appearing on the title;

(2) the information shown on the title relating to all previous assignments, including the names of all previous titleholders shown thereon; and

(3) that the dealer has the right to sell and transfer the manufactured home or mobile home.

Sec. 3. K.S.A. 2006 Supp. 84-9-311 is hereby amended to read as follows: 84-9-311. (a) **Security interest subject to other law.** Except as otherwise provided in subsection (d), the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to:

(1) A statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt K.S.A. 2006 Supp. 84-9-310(a) and amendments thereto;

(2) any certificate-of-title law of this state covering automobiles, trailers, mobile homes, boats, farm tractors, or the like, which provides for a security interest to be indicated on the certificate ~~as a condition or result of perfection~~. *Such security interest shall be deemed perfected upon the mailing or delivery of the notice of security interest to the appropriate state agency, or the delivery of the documents appropriate under any such law to the appropriate state agency and tender of the required fee ~~for or~~ acceptance of the documents by the state agency, as prescribed in K.S.A. 8-135 ~~and 58-4204~~, and amendments thereto*; or

(3) a certificate-of-title statute of another jurisdiction which provides for a security interest to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the property.

(b) **Compliance with other law.** Compliance with the requirements of a statute, regulation, or treaty described in subsection (a) for obtaining priority over the rights of a lien creditor is equivalent to the filing of a financing statement under this article. Except as otherwise provided in subsection (d) and K.S.A. 2006 Supp. 84-9-313 and 84-9-316(d) and (e)

and tender of the required fee

as prescribed by K.S.A. 8-135(5) and 58-4204(g) and amendments thereto

to

(6) and 58-4204(i)

Senate Judiciary
3-20-07
Attachment 15