Approved: April 28, 2010
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Tim Owens at 9:30 a.m. on March 3, 2010, in Room 548-S of the Capitol.

All members were present except:
Senator Derek Schmidt- excused

Committee staff present:
Doug Taylor, Office of the Revisor of Statutes
Jason Thompson, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Lauren Douglass, Kansas Legislative Research Department
Karen Clowers, Committee Assistant

Conferees appearing before the Committee:
Kyle Smith, Kansas Assn. of Chiefs of Police, Kansas Peace Officers, Kansas Sheriffs Assn.
Clay Britton, Assistant Solicitor General, Attorney General's Office
Tom Stanton, Deputy Reno County
Eric Stafford, Associated General Contractors of Kansas, Inc.
Bennie Crossland, Crossland Construction Co., Inc.
Tim Sinclair, President, Pal's Glass Service & Sinclair Masonry
Tim Carpenter, Credit Manager, Western Extralite Co.
Jim Gray, Credit Manager, Broken Arrow Electric Supply, Inc.
Bob Totten, Kansas Contractors Association
Richard Hines, Beachner Construction Co., Inc.
Woody Moses, Kansas Aggregate Producers & Kansas Ready Mixed Association
Mike Murray, Decorative Concrete
John Ossello, Credit Manager, Midway Wholesale

Others attending:
See attached list.

The Committee minutes of February 5 and February 8 were distributed for review. Senator Schodorf moved, Senator Lynn seconded, to approve the Committee minutes of February 5 and February 8. Motion carried.

The Chairman brought to the Committee's attention the fiscal note for **SB 436 - Children in need of care; runaways** and lack of proponents to the bill. There was no objection to passing over the bill and the Committee elected to not open the hearing.

The Chairman opened the hearing on **SB 435 - Criminal procedure; search incident to arrest**.

Kyle Smith appeared in opposition, stating that while the intent of the bill is appropriate, the approach is mistaken. The general rule is that any search conducted without the benefit of a search warrant is presumed to be unreasonable, unconstitutional, and invalid the U.S. Supreme Court has recognized specific, limited exceptions to this rule. This bill is the latest chapter in a long history regarding efforts to codify decisions regarding the "search incident to arrest" exception to the warrant requirement. The Legislature has not attempted to codify any of the other judicially recognized exceptions. Mr. Smith recommended repealing K.S.A. 22-2501 and treat this exception like all other exceptions are treated. (Attachment 1)

Clay Britton spoke in opposition, stating to prevent future conflicts between this statute and constitutional law, and to give law enforcement the tools necessary to discover evidence of crime, the Attorney General's Office strongly recommends repealing the statute. (Attachment 2)

Tom Stanton testified in opposition, indicating the attempt to codify court rulings regarding search issues has been shown to be an unworkable framework for application by law enforcement. The KCDAA proposed reliance on court rulings as they are handed down, otherwise the statue should be left in its current form. (Attachment 3)

Minutes of the Senate Judiciary Committee at 9:30 a.m. on March 3, 2010, in Room 548-S of the Capitol.

The Chairman indicated the hearing would be continued later when Senator Haley can present his testimony.

The Chairman opened the hearing on **SB 469 - Civil procedure, commercial property liens; state construction registry, notice of commencement and notice of furnishings**.

Senator Owens announced the hearing will be continued at a later date to accommodate Senator Haley as the sponsor and proponent of the bill.

The hearing on **SB 469 - Civil procedure, commercial property liens; state construction registry, notice of commencement and notice of furnishings** was opened. Jason Thompson, staff revisor, reviewed the bill.

Eric Stafford testified in support, stating SB 469 is the result of testimony heard last session on SB 292 addressing concerns regarding "notice of furnishing" by suppliers. Interested parties and stakeholders met throughout the year and researched the system currently in use by Utah. The issue of a general contractor paying twice for goods is only going to get worse as the economy suffers and businesses fail. Mr. Stafford encouraged enactment of the bill. (Attachment 4)

Bennie Crossland appeared in support, stating general contractors are required to give owners a completed project free of liens. When remote claimants do not get paid, they file liens which in turn can require the general contractor pay twice for the same work. This legislation brings a fair, simple and equitable solution to this problem and encouraged passage of the bill. (Attachment 5)

Tim Sinclair spoke in favor, stating the construction industry has very little "barrier to entry" requirements. It is possible to start a company with a small investment and build it into a successful enterprise. Unfortunately, not all businesses survive and sometimes leave unpaid bills. Kansas does not have a fair system and all companies should have the responsibility to only sell their product to an entity from whom they believe they will get paid. It is not fair for a 3rd party to take the financial risk for a supplier that they do not even know is supplying materials to a project. **SB 469** makes the lien law system in Kansas fairer for all parties. (Attachment 6)

Tim Carpenter spoke in opposition, stating 2003 HB 2064 addresses this issue and presented several concerns with **SB 469** including:

- The provisions would require suppliers and other remote claimants file a notice of furnishing on every job in the state,
- the bill penalizes the wrong people,
- the majority of distributors are small business owners and would require additional staff ,
- many subcontractors buy material without informing suppliers of its destination, and
- the bill should require the general contractor to provide all information necesary for filing a lien in return for the information they request.

Mr. Carpenter stated this bill will cause construction costs to increase with little return. (Attachment 7)

Jim Grey appeared in opposition, indicating his company will be unfairly harmed by the passage of SB 469. Mr. Grey voiced several concerns including:

- the bill unfairly targets the wrong party,
- the notification requirements unduly burden a remote-claimant,
- an unfair infringement upon the 21-day Notice of Furnishing deadline,
- the subversion of the contractor's contractual right to recover damages arising from the misappropriation of funds that result in a lien, and
- the notice of furnishing in **SB 469** adds no value to the lien process.

Should the bill move forward, the burden of notification should be placed on the contractor, and the sub-contractor should be required to provide a list of suppliers to the contractor. The bill as written tips the scales in favor on the contractor. (Attachment 8)

Bob Totten spoke in opposition, stating this bill is an unnecessary piece of legislation. It excludes highway construction but many of those companies also build other construction projects and their businesses would be affected. Mr. Totten also questioned the cost of the proposed construction registry and the undefined determination of filing fees. This will add costs to a construction project. (Attachment 9)

Richard Hines appeared in opposition, stating if enacted SB 469 will seriously erode and nullify long standing statutory labor and material lien laws and unfairly shift the contractor's responsibilities to subcontractors. It also creates unnecessary expenditures to set up a State Construction Registry System. Present statutory lien law has worked well in protecting all parties and this bill will require a huge amount of filings, jeopardize and encumber statutory lien rights and complicate the law. (Attachment 10)

Woody Moses spoke in opposition stating Kansas has a good lien law structure that spreads the risk in a balanced manner. Lien laws exist for a good reason and **SB 494** will upset the carefully crafted balance between suppliers, subcontractors and contractors. This bill will increase construction costs, create unnecessary paperwork, and lacks a compelling reason for passage. (Attachment 11)

Mike Murray appeared in opposition, stating there should be an even playing field for both commercial and residential projects. Mr. Murray encouraged the legislators to create lien laws that are easy to understand, enforceable, and is fair to all parties at all levels across the State. (Attachment 12)

John Ossello spoke in opposition, indicating several points of concern including:

- limits to which projects the bill applies,
- no indication of fee amounts by the Secretary of State's Office,
- the Notice of Commencement is not required on all jobs and remote claimants may find it difficult to find the correct job name and address, and
- questions regarding Notification of Correction to adversely affected parties.

The bill creates a large amount of extra work to benefit general contractors and urged the Committee to not pass the bill. (Attachment 13)

Written testimony in support of **SB 469** was submitted by:
Dan Morgan, Kansas City Chapter, Associated General Contractors (Attachment 14)
Kathy Olson, Kansas Bankers Association (Attachment 15)
Dean Ferrell, Ferrell Construction of Topeka, Inc. (Attachment 16)

Written testimony in opposition of **SB 469** was submitted by:
Woody Moses, Kansas Cement Council (Attachment 17)

There being no further conferees, the hearing on **SB 469** was closed.

The Chairman reopened the hearing on **SB 435 - Criminal procedure; search incident to arrest**.

Senator Haley provided testimony in support indicating passage of **SB 435** will restore Kansas statutes to the basic constitutional guarantees prohibiting unwarranted searches and seizures. The bill is in response to a recent decision by the Kansas Court of Appeals in *State of Kansas v. Henning & Zabriskie* in 2009. The opinion is attached to the testimony. (Attachment 18)

The next meeting is scheduled for March 4, 2010.

The meeting was adjourned at 10:30 a.m.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Mar 3, 2010

NAME	REPRESENTING
DAN RAMLOW	KS CONTRACTORS ASSN
Rick Hines	Beachner Const Co., Inc.
Bob Totten	Ks Contractors Assoc.
Brian Dempsey	SRS
[illegible]	SRS
Sheri Smiley	Sec. Of State
Jesse Boyer	Sec. of State
Corey Peterson	AGC of KS
Will Lasseer	" " "
Tim Brandon	Franklin Const.
Charles Tupon	Western Energy
[illegible]	Broken Arrow Electric Supply
Tim Carpenter	Western Extralite Company
DAN MORGAN	KC Chapter, AGC
Dan Gibb	KSAG "
Clay Britton	KSAG
Kathy Olsen	KS Bankers Assn.
Joe Molina	KS BAR ASSN

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: March 3, 2010

NAME	REPRESENTING
Bernd Koops	Heim Law Firm / ABC
Chris Glystad	Federico Consulting
John Osselio	Midway Wholesale
KEN DANIEL	TIBA
Martin Hawver	Hawver's Capitol Report
[illegible] Smith	KMHA
Richard Samaniego	Kearney & Assoc.
TOM STANTON	KCDAA
JOHN C. BOTTENBERG	WESTAR
Mark Gleeson	Judicial Branch
Kyle Smith	KACP & KPOA
Martin James	Kansas Attorneys for Conservation

Kansas Association of Chiefs of Police
PO Box 780603, Wichita, KS 67278 (316)733-7301

Kansas Peace Officers Association
PO Box 2592, Wichita, KS 67201 (316)722-8433

Senate Judiciary Committee
Testimony of Kyle Smith
In Opposition to SB 435
March 3, 2010

Chairman Owens and Members of the Committee,

On behalf of the Kansas Peace Officers Association and the Kansas Association of Chiefs of Police, I appear today in opposition to SB 435. The intent of the bill is appropriate, but we feel the approach is mistaken.

The general rule is that any search conducted without the benefit of a search warrant is presumed to be unreasonable, unconstitutional and invalid. The U.S. Supreme Court has recognized specific, limited exceptions to this rule such as exigent circumstances, abandoned property, exposed characteristics, plain view, fleeting vehicles, open fields and inventory.

This bill is just the latest chapter in a long story regarding efforts to codify the U.S. Supreme Court's decisions regarding the 'search incident to arrest' exception to the warrant requirement. For those with long memories, for the majority of the last 14 years there has been a bill in one format or another attempting to get it right. Then last year the Supreme Court again changed the rule and the statute is again out of sync with the law. Frankly, again, the bill totally fails to properly reflect that ruling.

The ironic point to all these futile efforts is that the legislature has not attempted to codify any of the other judicially recognized exceptions, and the problems with this effort aptly demonstrate why. The ebb and flow of court controlled decisions is best suited for training rather than statutory rules. Law enforcement is well aware of the need to keep current on these topics as not only can evidence be suppressed, but civil liability attaches for violating constitutional rights under 42 U.S.C. 1983.

As such, we would recommend a simple solution. Treat this exception like all the others: repeal K.S.A. 22-2501. Law enforcement will get along just fine, bound by the same rules that apply regardless what a statute says, and you can spend more time on more meaningful bills. I would be happy to answer any questions.

Senate Judiciary
3-3-10
Attachment 1

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

STEVE SIX
ATTORNEY GENERAL

120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.KSAG.ORG

Senate Judiciary Committee
SB 435
Assistant Solicitor General Clay Britton
March 3, 2010

Mr. Chairman and members of the committee, thank you for allowing me to provide testimony on behalf of Attorney General Steve Six regarding Senate Bill 435. I am an Assistant Solicitor General responsible for appellate litigation in the office of Attorney General Six. Senate Bill 435 would amend K.S.A. 22-2501 to reflect recent United States Supreme Court and Kansas Supreme Court rulings concerning law enforcement's ability to search for evidence of crime as an incident to arrest.

Senate Bill 435 is an improvement over the status quo, and would make the statute more consistent with current case law; but that is all it would do and it is not enough. To prevent future conflicts between this statute and constitutional law, and to give law enforcement the tools necessary to discover evidence of crime, the Attorney General's Office instead strongly recommends repealing the statute entirely. Only five other states go through the trouble of codifying search incident to arrest rules, and it is time Kansas joins the forty-four other states who are not burdened with such statutes. A repeal is necessary for two main reasons.

First, K.S.A. 22-2501 breeds confusion among law enforcement and jurists alike by adding a layer of potentially more restrictive and inconsistent rules on top of the constitutional rules that ultimately govern search and seizure law. Because K.S.A. 22-2501 exists, every time the Kansas or United States Supreme Court decides a case relating to searches incident to arrest, the law enforcement community must attempt to discern what effect the new case has on the statute, and further litigation will undoubtedly be brought to determine whether K.S.A. 22-2501 is consistent with the new constitutional rule. So while K.S.A. 22-2501 may have been intended to provide guidance and clarity to law enforcement, it actually confuses search incident to arrest rules in Kansas because the statute cannot anticipate the changing shape of Fourth Amendment search and seizure law. It also gives criminals an additional avenue to protract litigation, leaving courts and law enforcement to struggle with the application of K.S.A. 22-2501 when they could be spending those resources on other cases and fighting crime.

Senate Judiciary
3-3-10
Attachment 2

Second, because search and seizure law is ultimately controlled by the federal and Kansas constitutions, a statute concerning search incident to arrest rules can only further restrict the ability of law enforcement to discover evidence of crime. Our state and federal constitutions provide a baseline of rules beyond which law enforcement cannot go; all a statute like K.S.A. 22-2501 can do is further restrict law enforcement's ability to lawfully discover evidence of crime. The Kansas Supreme Court has held that some searches may be illegal under K.S.A. 22-2501, even though constitutional rules would permit them.

If this statute remains on the books, this committee will have to consider another amendment the next time a new constitutional rule is announced, which can be quite often in Fourth Amendment jurisprudence. In the meantime, law enforcement and prosecutors will have continued to struggle with the interaction between K.S.A. 22-2501 and the constitutional rules that ultimately trump any search and seizure statute. Instead, the legislature can save itself, the courts, and law enforcement the trouble by repealing the statute entirely. The Attorney General's Office strongly recommends that the Committee amend SB 435 to repeal K.S.A. 22-2501 and send it to the Senate for passage.

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Senate Judiciary Committee
March 3, 2010

TESTIMONY ON SENATE BILL 435

Submitted by Thomas R. Stanton
Deputy Reno County District Attorney
Past-President, Kansas County and District Attorneys Association

Senator Owens and Members of the Committee:

Thank you for the opportunity to testify regarding Senate Bill 435. The intent of this Bill is to codify the holdings in *Arizona v. Gant*, 129 S.Ct. 1710, 556 U.S. ___ (April 21, 2009), and *State v. Henning*, 289 Kan. 136, 209 P.3d 711 (2009). The bill suggests that the proper action to be taken is to change the word "a" to "the," thus conforming to those rulings. However, it is the position of the Kansas County and District Attorneys Association that the proper remedy in this situation is the repeal of K.S.A 22-2501.

The attempt to codify court rulings regarding search issues has been shown to be an unworkable framework for application by law enforcement. Each time the federal or state appellate courts modify some aspect of search and seizure law, law enforcement officers must react quickly to that change. A statutory codification of the previous law then becomes unworkable, at least until the legislature can react to the new rulings of the courts. We propose that it would be best to rely on the rulings of the courts as they are handed down, rather than to attempt to rely on a very static statutory framework to guide the actions of law enforcement.

There are many other aspects of constitutional search and seizure law that do not rely on statutory codification that work well. Examples are inventory searches, searches based on emergency circumstances, and probable cause searches. None of these areas of the law are codified, yet law enforcement officers are well trained on the parameters of such searches. When changes occur in these areas of the law, officers are immediately trained on those searches, and the law, as handed down by the appellate courts, is followed. We believe this is the best approach to guiding the actions of law enforcement officers in the field. The KCDAA recommends the repeal of K.S.A. 22-2501 for these reasons.

I would add that should this body determine that the repeal of the statute is not the best course of action; the KCDAA believes SB 435 as written should be passed to accurately reflect the decisions in *Gant* and *Henning*. I would be happy to stand for any questions from the committee.

Senate Judiciary
3-3-10
Attachment 3

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 469

March 12, 2010

By Eric Stafford, Associated General Contractors of Kansas, Inc.

Mister Chairman and members of the committee, my name is Eric Stafford. I am the Director of Government Affairs for the Associated General Contractors of Kansas. 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).

The AGC of Kansas supports Senate Bill 469 and asks that you recommend it favorably for passage.

Last year this committee heard testimony on SB 292 which created new notification requirements for suppliers to commercial construction projects. In last year's bill, in order to have lien rights, a supplier would send a notice of furnishing through certified mail to the general contractor, only if that contractor filed a notice of commencement with the county register of deeds and posted the notice at the jobsite. Last year's opponents stated that sending these notices through certified mail would be costly, time consuming and extremely burdensome. The goal of SB 292 was not to create undue burden, but to protect ALL parties of a construction project by notifying the general contractor that they are on a job.

The committee directed the interested parties to get together and AGC immediately called a meeting to discuss the need for these notices. At that meeting in March, opponents directed AGC toward the state of Utah which has established the State Construction Registry website dedicated to handle the filing of the notice of commencement and notice of furnishing electronically, versus the paper system. This concept remedies most all the concerns stated by opponents during last year's hearing.

Throughout 2009, AGC researched the Utah system, its background, implementation and other details necessary to establish a similar system in Kansas. Last year's opponents were conceptually on board with this proposal to the extent that they asked for this system to be expanded to residential construction. However, due to strong pushback from the residential industry, it was agreed it would be best to start first with commercial construction and expand to residential at a later time once the system was up and running.

The issue facing the industry today of a general contractor "paying twice" for goods or services is only going to get worse as the economy suffers and businesses fail. If the general contractor knows who is providing goods or services on a construction project, ones in which they have no contract, they can ensure that those parties are paid in a timely manner the first time.

Again, the AGC of Kansas respectfully requests that you recommend SB 469 favorably for passage.
Thank you for your consideration.

Senate Judiciary
3-3-10
Attachment 4

Session of 2010

SENATE BILL No. 469

By Committee on Ways and Means

1-27

AN ACT concerning civil procedure; relating to remote claim liens on commercial property; establishing the state construction registry; amending K.S.A. 60-1103, 60-1110 and 60-1111 and repealing the existing sections.

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

New Section 1. As used in sections 1, 2, 3, 4 and 5, and amendments thereto:

(a) ''Authorized person'' means any individual authorized by an original contractor, subcontractor or remote claimant to act on their behalf.

(b) ''Construction'' means furnishing labor, equipment, material or supplies for the improvement of a new or pre-existing structure which is not constructed for use as a single-family residence or multi-family residence of four units or less. ''Construction'' does not include highways, roads, bridges, dams or turnpikes.

(c) ''Notice of commencement'' means a notice filed by an original contractor with the state construction registry providing the information required to be given pursuant to section 2, and amendments thereto.

(d) ''Notice of furnishing'' means a notice from a subcontractor or remote claimant that is filed prior to the recording of a mechanic's lien and which is required to be filed pursuant to section 3, and amendments thereto.

(e) ''Original contractor'' means any contractor who has a contract directly with the owner. ''Original contractor'' may include more than one contractor and be referred to as a general contractor.

(f) ''Owner'' shall include the trustee, agent or spouse of the owner.

(g) ''Remote claimant'' means a subcontractor to a subcontractor, also referred to as a sub-subcontractor, as well as people who supply materials to subcontractors. Remote claimants have no contract directly with the original contractor.

(h) ''Secretary'' means the secretary of state.

(i) ''State construction registry'' means ~~a~~ system created pursuant to

Insert: "an electronic web-based"

section 4, and amendments thereto, for the purposes of filing and maintaining notifications by original contractors, subcontractors and remote claimants required pursuant to sections 2 and 3, and amendments thereto.

(j) ''Subcontractor'' means any person who furnishes labor, equipment, materials or supplies pursuant to a contract directly with an original contractor.

Insert: "7"

New Sec. 2. (a) Prior to, but no later than ~~15~~ calendar days after commencement of physical construction work at the project site, any original contractor may file a notice of commencement with the state construction registry created pursuant to section 4, and amendments thereto. The purpose of the notice of commencement is to notify other persons who are working on the project, including, but not limited to, subcontractors or remote claimants that the project has started and to give information as to the name and address of the owner, the original contractor, and the description of the project.

(b) The notice of commencement shall include the following:

(1) The name and address of the owner of the project contracting for the construction or improvement.

(2) The name and address of any original contractor.

~~*(3) The name, address and contact information of the owner.*~~

~~(4)~~*(3)* The legal description of the real property or the street address, city, state, county and zip code of the real property on which the construction or improvement is to be made.

~~(5)~~*(4)* A brief description of the construction or improvement to be performed on the property.

~~(6)~~*(5)*The date the owner first executed a contract with an original contractor for the construction or improvement.

~~(7)~~*(6)* The name and address of the person preparing the notice of commencement.

~~(8)~~*(7)* The following statement:

''To remote claimants, subcontractors or suppliers: Take notice that labor or work is about to begin on or materials are about to be furnished for an improvement to the real property described in this notice. Any remote claimant or subcontractor may preserve such claimant's lien rights

by filing a notice of furnishing with the State Construction Registry, which serves as notice to the original contractor or contractors, within 21 days of furnishing labor, equipment, materials or supplies to this project.''

(c) The notice of commencement shall be deemed sufficient if filed in the form and manner prescribed by the secretary of state.

(d) The original contractor may take protective measures by either making direct payments or payments by joint check to remote claimants to ensure that the remote claimant is paid.

New Sec. 3. (a) If any original contractor has filed a notice of commencement with the state construction registry pursuant to section 2, and amendments thereto, concerning a project for which a subcontractor or remote claimant has furnished labor, equipment, materials or supplies, such subcontractor or remote claimant shall file a notice of furnishing with the state construction registry created pursuant to section 4, and amendments thereto, in order to preserve their lien rights for construction subject to this act.

(b) The notice of furnishing shall include the following:

~~(1) The name and address of the original contractor.~~

~~(2)~~*(1)* The name and address of persons with whom the remote claimant or subcontractor has contracted concerning the project at the time of filing.

~~(3)~~*(2)* The name, address, telephone number, fax number and e-mail address of the subcontractor or remote claimant.

~~(4) The legal description or address, city, state, county and zip code of the real property on which the construction or improvement is to be made.~~

~~(5)~~*(3)* A brief description of the construction or improvement to be performed on the project.

(c) The notice of furnishing shall be deemed sufficient if filed in the form and manner prescribed by the secretary of state.

(d) ~~If a notice of commencement has not been filed with the state construction registry, a subcontractor or remote claimant may not file a notice of furnishing with the state construction registry.~~

(e) Nothing in this act shall expand or create any additional rights of

Insert: "(4) The unique project number assigned by the state construction registry."

Insert: "A notice of furnishing shall not be filed with the state construction registry if an original contractor has not filed a notice of commencement with the state construction registry at the time of furnishing labor, equipment, materials or supplies."

a person to claim a lien pursuant to K.S.A. 60-1103, and amendments thereto, or to file a claim under a bond furnished pursuant to K.S.A 60-1110 or K.S.A. 60-1111, and amendments thereto.

(f) If any original contractor has filed a notice of commencement with the state construction registry pursuant to section 2, and amendments thereto, concerning a project for which a subcontractor or remote claimant has furnished labor, equipment, materials or supplies, a lien for the furnishing of labor, equipment, materials or supplies by such subcontractor or remote claimant pursuant to K.S.A. 60-1103, and amendments thereto, for construction subject to this act, may be claimed only if the subcontractor or remote claimant filed a notice of furnishing with the state construction registry within 21 calendar days of the date of furnishing any such labor, equipment, materials or supplies. If the subcontractor or remote claimant does not file within such time period, the subcontractor or remote claimant may file at a later date. ~~**In such event, the subcontractor or remote claimant's lien rights will only be effective from the date of the filing of the notice of furnishing.**~~

Insert: "In such event, the subcontractor or remote claimant's lien rights will only be effective for labor, equipment, materials or supplies furnished on or after the date of the filing of the notice of furnishing."

New Sec. 4. (a) The secretary shall implement and maintain the state construction registry. When any provision of this act requires any notice to be filed with the state construction registry, the notice shall be filed in the form and manner prescribed by the secretary.

(b) A notice of commencement shall contain the information prescribed in section 2, and amendments thereto.

(c) A notice of furnishing shall contain the information prescribed in section 3, and amendments thereto.

(d) Any notice filed with the state construction registry shall be signed by an authorized person. The fact that a person's signature appears on such notice shall be prima facie evidence that such person is authorized to sign the notice on behalf of the original contractor, subcontractor or remote claimant and that the notice is subscribed by the person as true, under penalty of perjury.

Insert: "(g) If materials are delivered prior to the filing of a notice of commencement, the remote claimant or subcontractor shall not file a notice of furnishing. However, if that supplier delivers materials to the same project after the filing of a notice of commencement, then a notice of furnishing shall be filed."

"(h) If a subcontractor or remote claimant has furnished labor, equipment, materials or supplies and is required to file a notice of furnishing pursuant to section 3, only one notice of furnishing is required per project."

(e) Upon receipt of any notice, and upon tender of the required fees, the secretary shall certify that the notice has been filed in the office of secretary of state by endorsing upon the notice the word ''filed'' and the date and hour of its filing. This endorsement is the ''filing date'' of the notice and is conclusive of the date and time of its filing in the absence of actual fraud. The secretary shall thereupon record the endorsed notice in the state construction registry~~.~~

Insert: "and assign a unique project number."

~~(f)~~*(g)* The secretary shall adopt rules and regulations prescribing the form and manner of filing any notice required to be filed with the state construction registry and fixing the fees to be charged and collected under this section.

Insert: "(f) Whenever any notice of commencement or notice of furnishing to be filed with the secretary of state under any provision of this act has been so filed and is inaccurate in any respect or was defectively or erroneously executed, such notice of commencement or notice of furnishing may be corrected by filing with the secretary of state a notice of correction of such notice of commencement or notice of furnishing. The notice of correction shall specify the inaccuracy or defect to be corrected, shall set forth the portion of the notice of commencement or notice of furnishing in corrected form and shall be executed and filed as required for a notice of commencement or notice of furnishing. The notice of correction shall be effective as of the date the original notice of commencement or notice of furnishing was filed, except as to those persons who are substantially and adversely affected by the correction, and as to those persons the notice of correction shall be effective from the filing date."

~~(g)~~*(h)* The secretary of state shall remit all moneys received from fees and charges under this section, and amendments thereto, to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the information and services fee fund of the secretary of state.

Sec. ~~5~~ *6.* K.S.A. 60-1103 is hereby amended to read as follows: 60-1103. (a) *Procedure.* Any ~~supplier~~, *remote claimant or* subcontractor, *as defined in section 1, and amendments thereto,* or other person furnishing labor, equipment, material or supplies, used or consumed at the site of the property subject to the lien, under an agreement with the contractor, subcontractor or owner contractor may obtain a lien for the amount due in the same manner and to the same extent as the original contractor except that:

Insert: "Sec. 5. The provisions of sections 1 through 4, and amendments thereto, shall apply to projects that commence physical construction work at the project site on or after July 1, 2011. The provisions of sections 1 through 4, and amendments thereto, shall not apply to projects that commence physical construction work at the project site prior to July 1, 2011."

(1) The lien statement must state the name of the contractor and be filed within three months after the date supplies, material or equipment was last furnished or labor performed by the claimant;

(2) if a warning statement is required to be given pursuant to K.S.A. 60-1103a, and amendments thereto, there shall be attached to the lien statement the affidavit of the supplier or subcontractor that such warning statement was properly given; ~~and~~

(3) a notice of intent to perform, if required pursuant to K.S.A. 60-1103b, and amendments thereto, must have been filed as provided by that section~~.~~*; and*

(4) a notice of furnishings, if required pursuant to section 3, and amendments thereto, must have been filed as provided by that section.

(b) Owner contractor is defined as any person, firm or corporation who:

(1) Is the fee title owner of the real estate subject to the lien; and

(2) enters into contracts with more than one person, firm or corporation for labor, equipment, material or supplies used or consumed for the improvement of such real property.

(c) *Recording and notice.* When a lien is filed pursuant to this section, the clerk of the district court shall enter the filing in the general index. The claimant shall (1) cause a copy of the lien statement to be served personally upon any one owner, any holder of a recorded equitable interest and any party obligated to pay the lien in the manner provided by K.S.A. 60-304, and amendments thereto, for the service of summons within the state, or by K.S.A. 60-308, and amendments thereto, for service outside of the state, (2) mail a copy of the lien statement to any one owner of the property, any holder of a recorded equitable interest and to any party obligated to pay the same by restricted mail or (3) if the address of any one owner or such party is unknown and cannot be ascertained with reasonable diligence, post a copy of the lien statement in a conspicuous place on the premises. The provisions of this subsection requiring that the claimant serve a copy of the lien statement shall be deemed to have been complied with, if it is proven that the person to be served actually received a copy of the lien statement. No action to foreclose any lien may proceed or be entered against residential real property in this state unless the holder of a recorded equitable interest was served with notice in accordance with the provisions of this subsection.

(d) *Rights and liability of owner.* The owner of the real property shall not become liable for a greater amount than the owner has contracted to pay the original contractor, except for any payments to the contractor made:

(1) Prior to the expiration of the three-month period for filing lien claims, if no warning statement is required by K.S.A. 60-1103a, and amendments thereto; or

(2) subsequent to the date the owner received the warning statement,

if a warning statement is required by K.S.A. 60-1103a, and amendments thereto.
The owner may discharge any lien filed under this section which the contractor fails to discharge and credit such payment against the amount due the contractor.

(e) Notwithstanding subsection (a)(1), a lien for the furnishing of labor, equipment, materials or supplies on property other than residential property may be claimed pursuant to this section, and amendments thereto, within five months only if the claimant has filed a notice of extension within three months since last furnishing labor, equipment, materials or supplies to the job site. Such notice shall be filed in the office of the clerk of the district court of the county where such property is located and shall be mailed by certified and regular mail to the general contractor or construction manager and a copy to the owner by regular mail, if known. The notice of extension shall be deemed sufficient if in substantial compliance with the form set forth by the judicial council.

Sec. ~~6~~7. K.S.A. 60-1110 is hereby amended to read as follows: 60-1110. *(a)* The contractor or owner may execute a bond to the state of Kansas for the use of all persons in whose favor liens might accrue by virtue of this act, conditioned for the payment of all claims which might be the basis of liens in a sum not less than the contract price, or to any person claiming a lien which is disputed by the owner or contractor, conditioned for the payment of such claim in the amount thereof. Any such bond shall have good and sufficient sureties, be approved by a judge of the district court and filed with the clerk of the district court. When bond is approved and filed, no lien for the labor, equipment, material or supplies under contract, or claim described or referred to in the bond shall attach under this act, and if when such bond is filed liens have already been filed, such liens are discharged. Suit may be brought on such bond by any person interested but no such suit shall name as defendant any person who is neither a principal or surety on such bond, nor

contractually liable for the payment of the claim.

(b) If any original contractor has filed a notice of commencement concerning a project for which a subcontractor or remote claimant has furnished labor, equipment, materials or supplies, no subcontractor or remote claimant may file a claim under a payment bond obtained and executed pursuant to this section, unless such subcontractor or remote claimant has filed a notice of furnishing required pursuant to section 3, and amendments thereto. As used in this subsection, terms have the meanings provided by section 1, and amendments thereto.

Sec. ~~7~~*8*. K.S.A. 60-1111 is hereby amended to read as follows: 60-1111. (a) *Bond by contractor.* Except as provided in this section, whenever any public official, under the laws of the state, enters into contract in any sum exceeding $100,000 with any person or persons for the purpose of making any public improvements, or constructing any public building or making repairs on the same, such officer shall take, from the party contracted with, a bond to the state of Kansas with good and sufficient sureties in a sum not less than the sum total in the contract, conditioned that such contractor or the subcontractor of such contractor shall pay all indebtedness incurred for labor furnished, materials, equipment or supplies, used or consumed in connection with or in or about the construction of such public building or in making such public improvements.

A contract which requires a contractor or subcontractor to obtain a payment bond or any other bond shall not require that such bond be obtained from a specific surety, agent, broker or producer. A public official entering into a contract which requires a contractor or subcontractor to obtain a payment bond or any other bond shall not require that such bond be obtained from a specific surety, agent, broker or producer.
(b) *Filing and limitations.* The bond required under subsection (a) shall be filed with the clerk of the district court of the county in which such public improvement is to be made. When such bond is filed, no lien shall attach under this article. Any liens which have been filed prior to the filing of such bond shall be discharged. Any person to whom there is due any sum for labor or material furnished, as stated in subsection (a),

or such person's assigns, may bring an action on such bond for the recovery of such indebtedness but no action shall be brought on such bond after six months from the completion of such public improvements or public buildings.

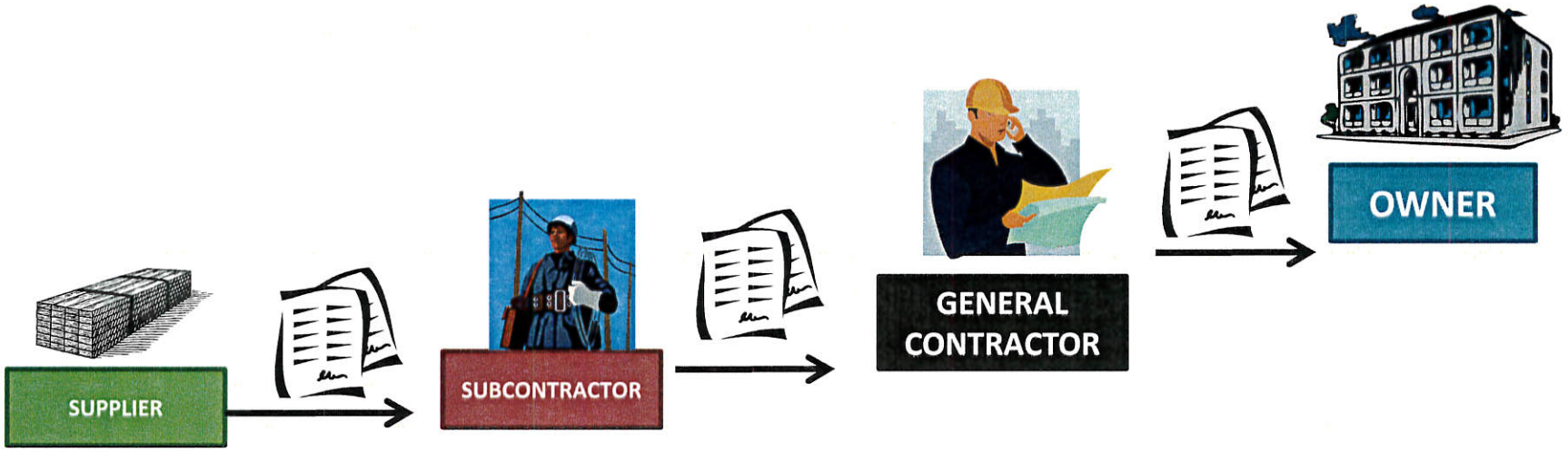
(c) In any case of a contract for construction, repairs or improvements for the state or a state agency under K.S.A. 75-3739 or 75-3741, and amendments thereto, a certificate of deposit payable to the state may be accepted in accordance with and subject to K.S.A. 60-1112, and amendments thereto. When such certificate of deposit is so accepted, no lien shall attach under this article. Any liens which have been filed prior to the acceptance of such certificate of deposit shall be discharged. Any person to whom there is due any sum for labor furnished, materials, equipment or supplies used or consumed in connection with or for such contract for construction, repairs or improvements shall make a claim therefor with the director of purchases under K.S.A. 60-1112, and amendments thereto.

(d) If any original contractor has filed a notice of commencement concerning a project for which a subcontractor or remote claimant has furnished labor, equipment, materials or supplies, no subcontractor or remote claimant may file a claim under a public works bond obtained and executed pursuant to this section, unless such subcontractor or remote claimant has filed a notice of furnishing required pursuant to section 3, and amendments thereto. As used in this subsection, terms have the meanings provided by section 1, and amendments thereto.

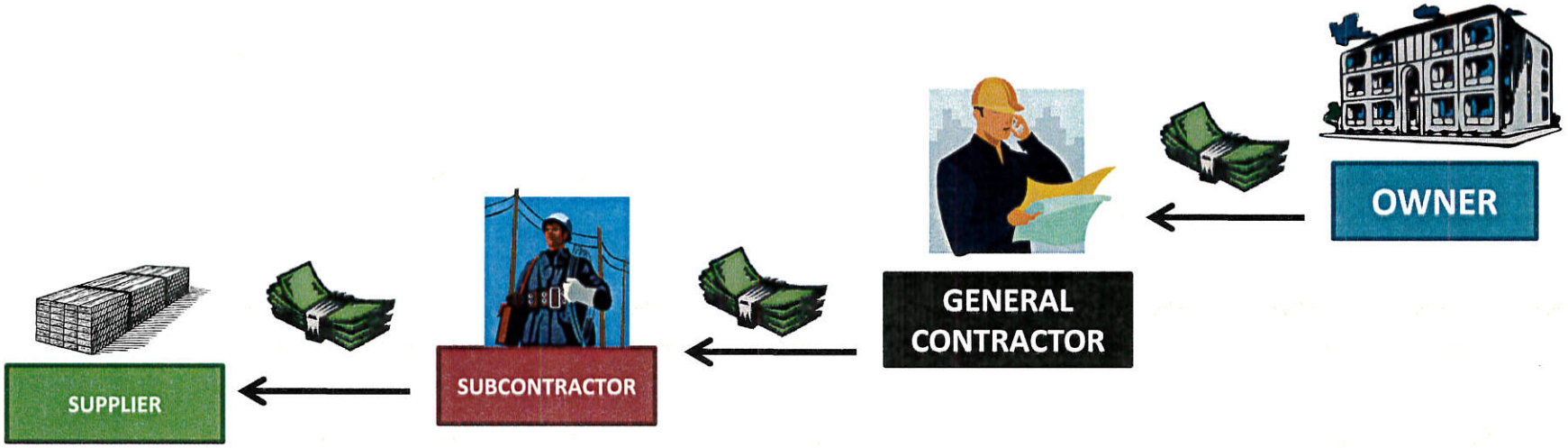
Sec. ~~8~~*9*. K.S.A. 60-1103, 60-1110 and 60-1111 are hereby repealed.

Sec. ~~9~~*10*. This act shall take effect and be in force from and after July 1, 2011, and its publication in the statute book.

How Material is Billed

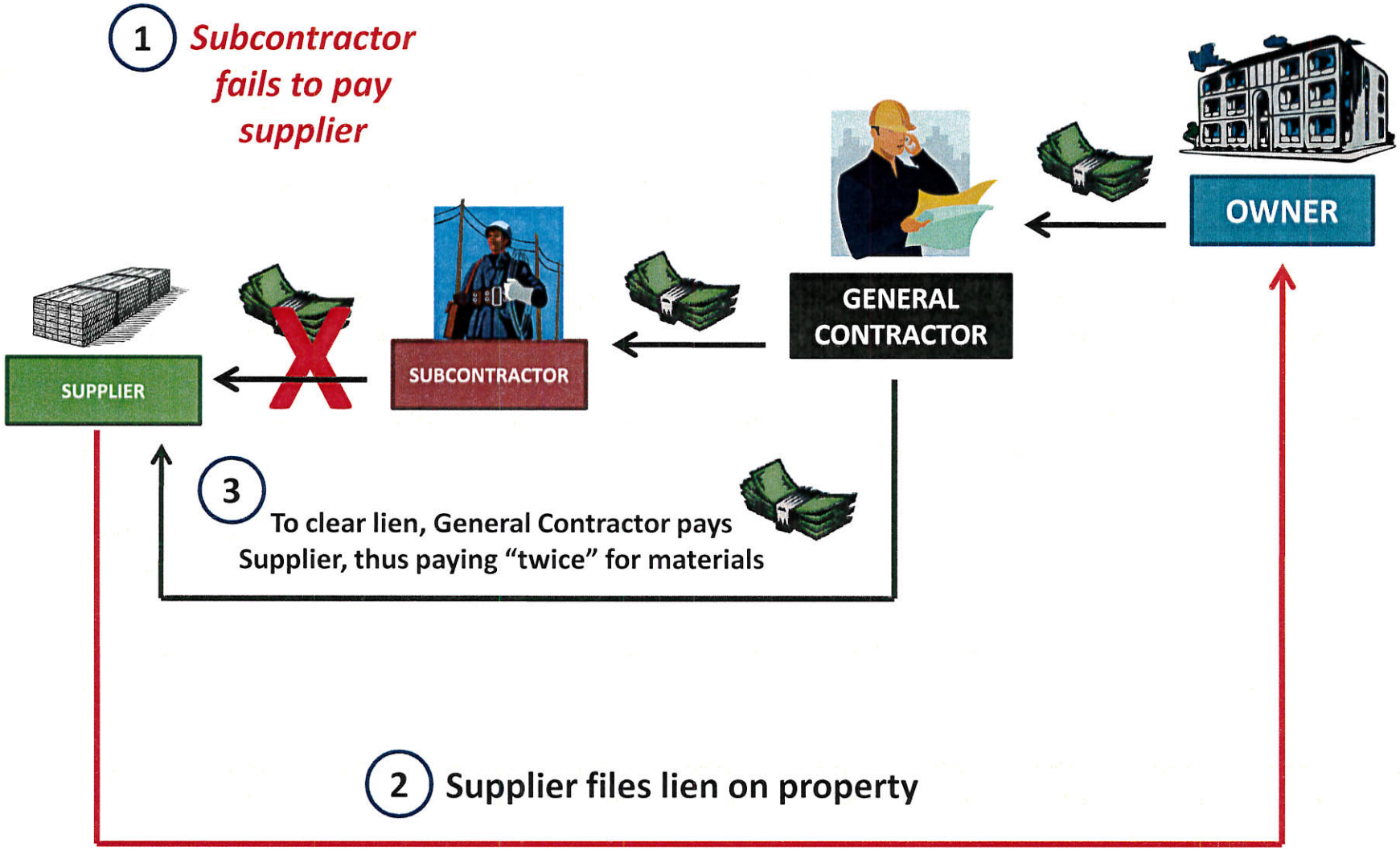


How Invoices are Paid



4-12

Potential Scenario



How Would the SCR Help?

Contractor knows who the Remote Claimants (suppliers or subs of subs) are on a project, therefore, can make contact to ensure payments are being made to Remote Claimants.

CROSSLAND
CONSTRUCTION COMPANY, INC.
833 S.E. Avenue • P.O. Box 45
Columbus, Kansas 66725
tel 620.429.1414
fax 620.429.1412

Testimony of Bennie Crossland
Senate Judiciary Committee
March 3, 2010
Senate Bill 469

Mr. Chairman and Members of the Committee,

My name is Bennie Crossland, President of Crossland Construction Company of Columbus, Kansas. We are a family owned and operated business with offices in Columbus, KS, Rogers, AR, Tulsa, OK, Prosper, TX and Wichita, KS. Crossland currently employs over 680 people. I have been in the General Contracting business for 30 years and am a past President of AGC of Kansas. I am currently a National Director of AGC of America, and a Board Member of AGC of Kansas.

I come to you today with a problem which exists in our industry. This problem greatly affects the risk General Contractors take in building a project. This problem points out an inequity in the law which puts unnecessary risk on General Contractors.

The Problem

When a General Contractor takes a job, he issues subcontracts and purchase orders to subcontractors and suppliers for portions of the work he needs help in supplying. In turn, the subcontractors and suppliers hire subcontractors (sub of a subcontractor) and suppliers to help them perform the portion of the work they have contracted with the General Contractor to perform.

The General Contractor pays the subcontractors and suppliers with whom he has a direct contract and in turn, they pay their subs and suppliers. We call these remote claimants (people who do NOT have a direct relationship with the General Contractor). The problem arises when the subcontractor and suppliers (the ones who DO have a direct contract with the General Contractor) fail to pay their downstream subs and suppliers

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(remote claimants). The General Contractor has no idea which companies have been hired by the subcontractors.

The General Contractor is required to give the owner a project free of liens. When remote claimants do not get paid, they file liens or claims on payment bonds. In order for the General Contractor to deliver to the owner a clean project lien free, he is forced to pay the remote claimants for work he has already paid his subcontractor or supplier for previously. In essence, the General Contractor pays twice for the same work. Under current law, the remote claimants have little risk. They know if the job has a payment bond or if the General Contractor is reputable, they will get paid. Suppliers will rarely check a subcontractor's credit if a bond payment is in place.

Some of you are asking what happened to the subcontractor. In most instances he has disappeared or gone bankrupt, leaving the General Contractor with a big mess.

General Contractors today try all different kinds of methods to prevent this from happening. We ask for a list of subcontractors' subs and suppliers up front. We check with these remote claimants before each payment to our subs to ensure they are getting paid. The problem is when you have a bad sub or supplier, they will shift purchasing places often without informing the General Contractor. The first time he knows there is a problem is when the new supplier shows up demanding payment from the General Contractor, or he files a lien or bond claim.

The Solution

The good news is that the legislation before you today brings a fair, simple and equitable solution to this problem. This legislation before you requires two simple notifications. The first is required of the General Contractor. It is called a Notice of Commencement. This simple notice states who the Owner is, who the General Contractor is, contact information for the Owner and General Contractor, location of the property and the date of the Contract. The Notice also lets all subcontractors and remote claimants know work is about to begin on this site and they must file a one-time Notice of Furnishing within 21 days of supplying material, labor, equipment or supplies to this job in order to preserve their lien rights. If no Notice of Commencement is filed, no Notice of Furnishing is required.

How It Works

The General Contractor records this Notice within seven (7) days of starting work by filing with the Electronic Construction Registry, an electronic website operated by the Secretary of State's office. The remote claimants (people who have no direct contract with the General Contractor) are then required to file a Notice of Furnishing.

The purpose of the Notice of Furnishing is to let the General Contractor know this person or company is supplying goods and services to his job. It helps the General Contractor know who these people are and to contact them so he can pay them.

- The Notice of Furnishing contains the name, address and contact information of the remote claimant, the date(s) he supplied materials on the job, to who he supplied the goods (subcontractor or supplier) and a brief description of the construction or improvement to be performed on the project.
- The Notice of Furnishing (filed electronically) allows the General Contractor to take protective measures to make sure the remote claimant is paid.
- The Notice of Furnishing is to be served only if the General Contractor has filed a Notice of Commencement.
- The Notice of Furnishing must be filed within 21 days of supplying material, labor, equipment or supplies to a jobsite or the remote claimant will lose his lien or payment bond rights.
- The Notice of Furnishing is sent electronically to the General Contractor.
- The Notice of Furnishing is a one-time notice. If the remote claimant misses the 21 days period required by the Notice of Furnishing, he may submit a Notice of Furnishing later but loses his lien rights up to the date of the late filing.

We have worked with our opponents for the past year on an Electronic Construction Registry and tried to listen to their concerns, but have been unable to come to agreement.

- Electronic Filing is easy and fast
- Electronic Filing is cost effective

These simple Notices level the playing field for a General Contractor and remote claimants. It will reduce liens being filed and ensure subs of subcontractor and suppliers of subcontractors get paid.

Many states such as Alabama, Arizona, California, District of Columbia, Florida, Georgia, Iowa, Louisiana, Maine, Massachusetts, Michigan, Mississippi, New Mexico, New York, North Carolina, Ohio, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, and Wyoming have Notice of Furnishing or Pre-lien Notices required. I ask you to join the ranks of these states in making lien laws fair by supporting this legislation.

Again, I respectfully request that the committee to support Senate Bill 469 and report it favorably for passage.

1957 N. MOSLEY WICHITA, KANSAS 67214 BUS: (316) 265-2915 FAX: (316) 265-2092 www.palsglass.com www.sinclairmasonry.com

Testimony of Tim L. Sinclair

Senate Judiciary Committee

March 3, 2010

Senate Bill 469

Mr. Chairman and Members of the Committee:

My name is Tim L. Sinclair, Owner/President of Sinclair Masonry, Inc. and Pal's Glass Service, Inc. of Wichita, KS. Our companies are primarily Subcontractors in the commercial construction industry. We work all over the nation outreaching as far as Oregon, Rhode Island, Georgia, Texas, Nebraska along with the majority of our work in the Kansas/Oklahoma region. We currently employ over 200 people. I have worked as a Supplier, Subcontractor and/or General Contractor for over 23 years. I am currently on the Board of AGC of Kansas representing the Specialty Contractors which are primarily Subcontractors and Suppliers, and also serve on AGC of America's Specialty Contractor's national board.

I come to you today as a member of the construction industry. I grew up in the construction industry and can remember the "typical" construction worker was not looked upon as a person that was "successful," and my dad worked in construction. Our thoughts as kids were that construction workers were the guys that must not be able to find anything else to do so they just work in construction. This has changed somewhat over the past 30 years. As an industry we have made great strides since then improving our image. Now the "typical" construction worker is more educated, successful, established and career-oriented.

The industry has advanced in several categories including technology, education, speed, competition, and quality, to name a few. But our industry still gets a lot of negative press due to companies going out of business that creates a "ripple" effect that impacts several entities including bankers, owners, general contractors, subcontractors, suppliers, and families. The construction industry has very little "barrier to entry" requirements. This is good and bad. The good part is that somebody like me can start a company with only $5,000 and build it into whatever is desired, in our case, over $13,000,000 in Revenues in 2009. We always want the entrepreneur to be successful for the many benefits their business creates. The bad news is that not all businesses survive and sometimes they leave unpaid bills.

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When we first started Sinclair Masonry and Pal's Glass we had to prove our financial stability with our suppliers. We were on COD (Cash on Delivery) with many of them until we could prove to them that they will get paid. All of our suppliers, then and now, do a very thorough job of making sure that we are solvent and that they will be able to get paid. The majority of our suppliers provide materials all over the country, have 1000's of customers and have told me that the State of Kansas has the some of the most lenient lien laws that they have ever seen. They are not used to having the freedom of doing nothing on their end to make sure that they get paid, which is exactly what our laws allow. In Kansas, any supplier can supply materials to anybody, without any preventive measures and be assured they are going to get paid by filing a lien within 90 or 120 days. THIS IS NOT A FAIR SYSTEM.

Any and all companies should have the responsibility to only sell their product to an entity from whom they believe they will get paid. If they don't know for sure that they are going to get paid via credit and invoicing, they should demand COD. It is not fair for a 3rd party, ie General Contractor to take the financial risk for a supplier that they do not even know is supplying materials to the project.

I encourage you to help advance the construction industry by the passing SB 469 out favorably. This will help prevent the "ripple" effect upon the next company going out of business. Senate Bill 469 makes the lien law system in Kansas a fairer one for all parties.

WESTERN EXTRALITE COMPANY
DISTRIBUTORS OF QUALITY ELECTRICAL AND VOICE/DATA PRODUCTS
1470 Liberty • Kansas City, MO • 64102

March 1, 2010

To: The Senate Judiciary Committee

RE: SB 469

Senator,

I am writing you in regard to SB 469. I am the Credit Manager for Western Extralite Company. The purpose of my letter is to encourage you to vote against SB 469. Western Extralite Company is a supplier of electrical and datacomm products to the construction industry. We have multiple locations, with eight locations in Kansas with approximately sixty Kansas employees and would definitely be negatively affected by this proposed legislation.

I have listed below several concerns as it relates to this bill:

1. There is already a bill in place to address this issue. HB 2064 was passed into law in 2003 and it provides a notice of intent to file a lien provision when extending the mechanic lien rights an additional 60 days. This should be more than sufficient to the contractor that there is the potential of a problem. The provisions of SB 469 would require suppliers and other remote claimants file a notice of furnishing on every job in the state. This is an unfair, time-consuming, and an expensive administrative burden to assess on suppliers.

2. If passed into law, SB 469 is penalizing the wrong people. This would reduce the lien rights of the material supplier that has performed their duty and deserves to be paid for their material. They are not at fault for the subcontractor not performing their duty and should not be punished for the wrong doing of others.

3. The majority of distributors are small businesses and SB 469 would force most to add staff in order to address what is essentially a commercial issue and that would not be productive for anyone. SB 469 is an unfunded mandate on small business with little value to the general community.

4. Many times subcontractors will buy material without informing about its destination. The notice of commencement provisions would in fact add more expense by forcing all material suppliers in the state to pay someone to continually monitor the registrar of deeds in each county to which they may supply goods or services or risk losing their lien rights.

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WESTERN EXTRALITE COMPANY
DISTRIBUTORS OF QUALITY ELECTRICAL AND VOICE/DATA PRODUCTS
1470 Liberty • Kansas City, MO • 64102

5. There is also the question of how often does this problem occur. Do we really need more legislation for a problem that can be resolved with a little due diligence on the part of the general contractor? As stated before HB 2064 addresses this problem and construction costs are already high enough.

6. For the sake of fairness, if this SB 469 moves forward, it should be amended to require the general contractor to provide all information necessary for filing a lien in return for the information they request. All subcontractors should be contractually required to provide a list of all suppliers to the general contractor who in turn would be required to mail via certified mail the notice of commencement that has been file stamped by the secretary of state. This would include the name and address of the owner, the legal description of the property where the project is located and all bonding information necessary to file a bond claim on public or bonded job. Also, that is when the time clock should start for the 21 days suppliers have to file their notice of furnishings.

Liens laws are extremely important in the industry but SB 469 will cause more harm than good. It will increase the administrative work of the suppliers while providing little positive in return. At the end of the day, all in the community will pay because construction costs will go up. It is essentially a tax on the entire community. I would appreciate your vote against SB 469.

Thank you.

Sincerely,

Tim Carpenter
Credit Manager

BROKEN ARROW ELECTRIC SUPPLY, INC,
428 SE Fleetway Drive
Lees Summit, MO 64081
Phone (816)525-9600 Fax (816)525-9684

March 1, 2010

The Senate Judiciary Committee

RE: SB 469

Senator:

With regard to SB 469, I am writing today to compel you to vote against SB 469. Broken Arrow Electric Supply, Inc. is a supplier of lighting and electrical components used in new and existing construction projects. My company routinely supplies materials to sub-contractors working in the state of Kansas. It is my belief that my company (and industry) will be unfairly harmed by the passage of this bill.

Among my areas of concern:

- SB 469 unfairly targets the wrong party. The unpaid supplier is entitled to recovery or compensation for materials that were installed at, and add value to, the job site. The sub-contractor should be held accountable, not the supplier.

- The notification requirements of SB 469 would unduly burden a remote-claimant. If enacted, additional resources and funds would be required to continually monitor county records in every county and to pay filing fees on every single job in the State. These costs ultimately will be passed on to the construction industry, thereby increasing costs to the community. This legislation overwhelmingly benefits the Contractor, yet the remote-claimant is made to assume the administrative and financial burden of their protection.

- Section 2-a provides that a contractor may file his notice up to 15 days after "commencement of physical construction work". What if a remote-claimant has already supplied materials prior to the filing of this notice? As indicated in Section 3-d, a remote-claimant is not allowed to file a Notice of Furnishing prior to the filing of the Notice of Commencement by the contractor. This unfairly infringes upon the 21-day Notice of Furnishing deadline in Section 3(f), effectively reducing it to as little as 6 days in some cases.

- If the sub-contractor fails to pay a remote-claimant, the contractor has a contractual basis to recover damages arising from the misappropriation of funds that result in a lien. This

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bill seeks to subvert that remedy. Given the time-constraints in filing the Notice of Furnishing outlined above, it will provide an additional defense to void, or avoid, part or all of a remote-claimants valid lien, with no consequence to the sub-contractor.

- HB2064, enacted in 2003, allows a supplier to file a Notice of Extension to Lien Rights in the appropriate county within 90 days of last providing materials. This filing provides for an additional 60 days to a remote-claimants lien rights - during which time the debt is typically resolved between the parties. This filing and associated mailings already provide for adequate notification to the general contractor of a remote-claimants intent to file a lien. The notice of furnishing required in SB469 adds no value to the lien process.

- As a reaction to this legislation, I would be reluctant to supply any materials at all until I have a file-stamped copy of the notice of furnishing. Given the lead-time required for special-order materials required on most projects, this will result in lengthy delays in obtaining materials which will likely cause delays in the entire construction process.

- In the interest of fairness, if this legislation moves forward it should be amended to require that the burden of notification be placed on the contractor. The sub-contractor should be required to provide a list of suppliers to the contractor. The contractor would then send notice, by certified mail to each supplier, of their Notice of Commencement with all pertinent legal, ownership and bond information.

- While the proponents of SB469 state that the bill will reduce liens being filed and prevent the contractor from paying twice for the same work, nothing in this bill supports that claim. There is still nothing to keep the sub-contractor from simply running off with the money. Many contractors successfully avoid liens by requiring supplier lien waivers from the sub-contractor before releasing their draw check. Sadly, most contractors do not even take the time to obtain this information. This legislation could be avoided entirely with a little due diligence on the contractor's part.

Lien law exists for good and equitable reason. This bill unfairly tips the scales in favor of the contractor. It will increase construction costs and delays, create unnecessary paperwork and costs, and lacks a compelling reason for passage. I would appreciate your vote against SB469.

Sincerely,

Jim Gray
Credit Manager
Broken Arrow Electric Supply, Inc.

KANSAS CONTRACTORS ASSOCIATION

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Great Bend, Kansas

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Kansas City, Kansas

Testimony

By the Kansas Contractors Association before the Senate Judiciary Committee

regarding SB 469—the Lien Construction Registry

March 3, 2010

Mr. Chairman and members of the Committee, I am Bob Totten, Public Affairs Director for the Kansas Contractors Association. Our organization represents over 300 companies who are involved in the construction of dams, highways and water treatment facilities in Kansas and the Midwest.

Today, I come to you in opposition of Senate Bill 469. Our members wholeheartedly agree that this is an unnecessary piece of legislation and is just another example of the government intrusion into an area that is not necessary.

Although this bill excludes highway construction from its requirements, I must remind you that many of our members are builders of water treatment facilities and other construction projects and it would affect their businesses even though their main business is normally in the construction of roads and bridges.

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When this subject was brought up, I got many emails from my members telling me all about the last time their company faced a problem when it came to liens. Their basic response was don't change the lien laws. They are there for a purpose and if you change it, then we will never get paid.

Right now, our members have a mountain of paperwork to fill out…from EPA concerns to EEO documents…and it must be done for every job. Having another unnecessary filing just to reserve the right to file a lien has most of our members just about metaphorically speaking " foaming at the mouth".

The reason a general contractor takes on a job it is because he or she thinks they can manage the job better than the next person and because of that he/she gets more or less a management fee.

In our minds, this new proposal is really a shift in risk. Moving the risk of a project onto a sub contractors or vendor. We don't believe that is the appropriate way to handle a construction project. It starts a project with a bad taste in your mouth if the first thing you get is a notice that indicates a lien may be filed against you. In some instances, the filing to reserve your lien right may occur even before a sub contractor actually provides a service on a job. In essence it says: I know I am going to have problems on this job so I have to reserve the right to file a lien because the general contractor has a history of not paying his bills. That just doesn't seem right.

In the discussions I have been involved in when the issue has been discussed, I have not gotten a clear picture of what this construction registry is going to cost. I initially heard a figure around $50 thousand would be needed for startup and then I was told the startup costs would be folded into the fees associated with the filings. The filing fees

are not clear in any of the documentation I have seen except that the Secretary of State will determine the fees.

In addition, our members are questioning the need to add more costs to a construction project with another government filing fee. We thought the aim of Kansas was to reduce the size of government but this appears to go in the wrong direction to solve a problem that doesn't exist.

We have large members and small members…and the smallest members or sub contractors don't always pay attention to the system, as well as they should…and we are fearful that by missing the 21 day deadline, there will be many subs who won't be paid. They will have a need to file a lien but because they missed the deadline they won't be able to and then the prime contractors will say "you didn't file to reserve your lien right so you are out of luck. That does not seem fair.

These small contractors aren't big enough to file a lawsuit to regain their status or payments in court and so the small guys will just have to foot the bill for a problem that is inherently the responsibility of the prime.

Bottom line, our members question whether the alleged benefits and reasons for this proposed registry requirement in any way justify the adverse public policy and equitable reasons for not requiring such a policy.

The sponsors of this measure have indicated that the registry is being set up because sometimes general contractors don't always know who is providing material on a project. And our basic question is "why not"?

In addition, , the Act would appear to jeopardize folks that supply material and

subcontractors who legitimately provided materials on a project from being able to file a lien for services based on the difficulties of complying with the proposed registry requirements.

Thank you once again for the time you have made for our concerns to be heard and I will be glad to try and answer question when the time is appropriate.

WRITTEN TESTIMONY OF RICHARD L. HINES
ON BEHALF OF
BEACHNER CONSTRUCTION CO., INC.
(A KANSAS CONSTRUCTION CONTRACTOR/SUBCONTRACTOR)

Beachner Construction Co., Inc. (hereinafter Beachner) strongly opposes Senate Bill No. 469. If enacted, we believe the Bill would:

(1) Seriously erode and nullify the very public policy reasons that resulted in long standing statutory labor and material lien laws.

(2) Unfairly shift the contractor's present legal responsibilities on construction projects for maintaining records and insuring payments are made for labor, material, supplies and to subcontractors. Instead, the Bill mandates new responsibilities to the Secretary of State and would require additional expenditures to initiate and maintain the "state construction registry". Every supplier and subcontractor (including those contracting directly with the contractor) would be required to file (and pay for) a "notice of furnishing" within 21 days after the contractor's notice of commencement. Otherwise, suppliers and subcontractors would lose all their statutory lien rights and possible claims against bonds on public works projects. The adverse consequences and disadvantages of the Bill versus the present law far outweigh any questionable alleged benefits which construction contractors might receive by passage of the Bill

I. Public Policy and Statutory Liens.

Although the present statutory lien laws for labor and material were codified in 1963 under Chapter 60, Article 11; previous statutes long prior to that date granted statutory lien rights for labor and material provided on construction projects. Countless Kansas cases have explained the public policy reasons why Kansas and almost all other states have provided for statutory liens. As far back as 1929, the Kansas Supreme Court explained the public policy reasons for protecting suppliers and subcontractors by stating:

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> The general theory underlying lien statutes is that labor, material and supplies which are devoted to the construction of an improvement to realty, whether building, oil-and-gas well, or whatnot, add an actual value to the property, and in consequence the property may justly be bound as security to pay for contributions enhancing its value. *Given v. Campbell*, 127 Kan 378, 380 (1929).

In other words, states have adopted statutory liens based on the cardinal principle that the owner of the real estate on which the lien is claimed has received a benefit or advantage by reason of the services rendered or materials or supplies furnished. Consequently, since this service has provided an enhancement to the value of the real estate, a lien can be filed against the real estate in order to receive just compensation in the event that the contractor or owner fails to pay for the supplies or labor.

As a practical matter, this statutory lien procedure has worked out very well in the past. Under the present law (K.S.A. 60-1103) suppliers and subcontractors have three months after the supplies, material, equipment or labor are last performed on the construction project in which to file a lien statement. Generally, suppliers and subcontractors submit their bill to the contractor within thirty days after the supplies or services are provided. In the vast majority of situations (probably in excess of 99% of the time), the submitted bill is paid promptly and there is no need for the supplier or subcontractor to do anything else. If the contractor or subcontractor is having cash flow problems, the ninety day time period allows the bill to be submitted to the owner of the construction project for payment. On most extended construction projects, the contractor is paid in installments on at least a thirty day basis for work completed minus a retainage of five to ten percent. However, if the contractor or subcontractor fails to make timely payment to its suppliers or the contractor fails to make timely payment to the subcontractor, the present ninety day time period for filing a statutory lien

allows sufficient time for the supplier or subcontractor to file a statutory lien against the construction project. Also, on public works projects the supplier or subcontractor can notify the bonding company under the public works bond for payment. Generally, just the notice that there might be a possibility of filing a statutory lien or making a claim against a public works bond will insure payment on valid claims without actually having to file the statutory lien.

Senate Bill No. 469 abrogates this long standing efficient and practical procedure. In fact, passage of this Bill would probably result in the most substantive far reaching changes in labor and material lien law in the history of this state. Under the proposed Bill, all suppliers, subcontractors, and suppliers to subcontractors would be forced to file a "notice of furnishing" within 21 days after providing any services on the construction project. While in almost all cases, the supplier or subcontractor will probably be paid, failure to file would mean losing any right to file a statutory lien within three months or making a claim against the bond on public works projects in the event payment is not made. Many small suppliers will likely lose their statutory lien rights either by not understanding the procedure or their belief that their small bill (which in most cases they believe will be paid anyway) does not justify the hassle of having to locate the project on the registry and then going to the expense and effort of filing a "notice of furnishing." In fact, most suppliers presently provide supplies to contractors and subcontractors without even knowing what construction project uses their supplies. Previously, unless the supplier was not paid within a reasonable time, the supplier did not have to determine where supplies were used unless it became necessary to actually proceed with filing a statutory lien.

II. The Bill Transfers the Contractor's Present Legal Responsibilities to Other Parties. It Places Additional and Unnecessary Responsibilities on Suppliers and Subcontractors, the State Government Through the Secretary of State and Requires

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Additional and Unnecessary Expenditures to Set Up a State Construction R egistry System.

Under present construction contract law, the construction owner hires and enters into an agreement with the contractor to car ry out the construction project. The contractor may elect to carry out all the work itself or the contractor may elect to enter into agreements with one or more subcontractors to carry out part or all of the construction project. Regardless, the contract or still receives the payments. The contractor is still responsible for insuring the subcontractors carry out their part of the project. He is responsible for insuring suppliers of both the contractor and any subcontractors, as well as subcontractors of subcontractors, are paid. In agreeing to act as contractor, part of hi s compensation paid by the construction owner, is to insure these management responsibilities. In the event a supplier or subcontractor is not paid, it can file a statutory lien. The construction owner can then withhold money owed the contractor to insure the supplier or subcontractor is paid or make a claim against the required bond on a public works project.

Apparently, the proponents of Senate Bill No. 469 want to transfer the contractor's responsibilities to other parties. The alleged public policy reason for doing this is because the general contractor may not always know who is providing supplies on a project. Consequently the "notice of furnishing" will supposedly notify the contractor. However, all suppliers to the general contractor and all subcontractors to the general contractor will be required to file a "notice of furnishing" within 21 days of furnishing or they will lose their statutory lien and right to claim against a bond. These suppliers that deal directly with the contractor will probably constitute the great majority of required filers under the Bill. However, a contractor certainly cannot contend it is necessary that these suppliers file because it was unaware of the suppliers when the contractor was the very one that solicited and actually ordered the supplies. The rationale for the Bill makes no

sense concerning suppliers and subcontractors dealing directly with the contractor. The Bill sets up an unnecessary legal hurdle and jeopardizes the supplier's statutory lien rights for no logical reason. While suppliers to a subcontractor may be more remote, the contractor chose to subcontract out part of the work rather than do that part of the project and should continue to bear the management responsibility of insuring subcontractor suppliers are paid rather than p assing the responsibility to a state agency registry.

In conclusion, Beachner strongly believes the proposed Bill has numerous flaws and disadvantages that greatly offset the minor benefits that a general contractor might receive. Present statutory lien law has worked quite well in protecting all parties (the owners, contractors, suppliers and subcontractors) without the necessity of state government hav ing to become involved by setting up and administering an elaborate registry system. Contractors have the responsibility of insuring suppliers and subcontractors are paid rather than transferring that responsibility and avoid ing statutory li ens by passing responsibility back to the suppliers and subcontractors to have to initially file notices every time they provide a service. The Bill will require a huge amount of filings, jeopardize and encumber suppliers statutory lien rights, and increase and complic ate the law by setting up an unnecessary registry system administered by a state agency.

Thank you for listening to our concerns.

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KRMCA Kansas Ready Mixed Concrete Association

KAPA Kansas Aggregate Producers' Association

TESTIMONY

Date: March 3, 2010

By: Woody Moses, Managing Director
Kansas Aggregate Producers' Association
Kansas Ready Mixed Concrete Association

Regarding: Senate Bill 469, An act concerning liens; relating to supplier's liens

Before: The Senate Committee on Judiciary

Good morning Mr. Chairman and Members of the Committee:

My name is Woody Moses, Managing Director of the Kansas Aggregate Producers' Association and the Kansas Ready Mixed Concrete Association. The Kansas Aggregate Producer's Association (KAPA) and the Kansas Ready Mixed Concrete Association (KRMCA) is a state wide trade association comprised of over 170 members located or conducting operations in all 165 legislative districts in this state, providing basic building materials to all Kansans. And as such have a vital interest in lien law as without them we could not make a living. I appreciate the opportunity to appear before you today to express our opposition regarding SB 469.

Over the course of many years we, as a state, have crafted a good lien law structure and while sometime creaking it seems to function just as it was intended by spreading risk in a balanced manner. SB 469 seeks to upset the carefully crafted balance by shifting the risk from one group (general contractors) to another (subcontractors and suppliers). Ironic, as general contractors profess to make a living out of accepting risk, which justifies their existence. It is even more ironic, as the contractor already enjoys automatic lien protection, pursuant to K.S.A. 60-1101. Yet they seek to limit those of others.

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Lien laws have existed in North America for over 400 years and in all 50 states for a good reason, to establish a framework whereby real property can be improved by fairly assigning the risks and providing a means whereby the fruits of one's labor may be recovered. After all, unlike a refrigerator or automobile, our product becomes a part of the real property and is impossible to recover. It is the faith in our lien law that allows our industry to furnish products to a construction project. SB 469 significantly reduces our chances to recover by 86% as it essentially reduces the time to file a lien from a potential 150 days to 21. If approved working under SB 469 will more resemble going to a casino than furnishing a job.

In short, we urge this committee to reject SB 469 as its passage would:

- Unfairly shifts risk to our industry by reducing the amount of time to file a lien from a potential 150 days to 21 days,
- Raise construction costs as producers will be forced to raise prices to compensate for the additional risk,
- Or in the alternative require payment prior to delivery,
- Layers on additional requirements to an already complicated lien law in effect creating a fourth lien law in addition to the current three,
- Basically contrary to our economic system by legislating in the free market,
- Creates even more uncertainty in an already uncertain marketplace, and
- Lacks a compelling reason for passage.

Thank you for your time and attention, I will be happy to respond to any questions at the appropriate time.

Decorative
CONCRETE SUPPLY

March 3, 2010

To the Senate Judiciary Committee

RE; Comments on Senate Bill No. 469

Thank you Mr. Chair and members of the committee for providing me time to present my comments on SB 469. My name is Mike Murray and I am the owner of Murray Decorative Concrete Supply located in Shawnee, Kansas.

As a lifelong citizen of Kansas I have concerns about lien laws, and how they pertain to the construction industry in our state. As an ex contractor and now a material supplier for the construction industry I find laws set by our government to be lacking or unfair to the construction supply industry.

What I do see are laws that are confusing and many times require the services of an attorney

Our speed limit is 70 on our major highways wouldn't it be easier if our lien laws could be that direct?

I would like to see a longer time frame for said filing as well as an even playing field for both commercial and residential projects.

As of now most jobs are not paid until 60 plus days have passed when calls are made many times the answer will be "we have not been paid from the owner" or maybe "the invoices were misplaced or lost"; with the short time frame we already have in place many times we wait too long in order to work with customers and avoid costly lawsuits

As of now our state has too many variables which in turn make it difficult for contractors and suppliers to fully understand laws put in place by our state government.

I would hope that our representatives could begin to work harder to help make these laws easy for the construction industry a perfect example is our sales tax; local, out of state, different cities are all charged at different rates while this makes for more revenue for the state it also serves as a accounting nightmare, failure of our state to provide a equal and fair lien law program is also a nightmare for us.

Laws should be equally enforced and governed for a new home in Hays Kansas as well as a skyscraper in Wichita

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Decorative
CONCRETE SUPPLY

As of now many contractors are from out of state and just don't care about us.

I would like to offer one example in 1998 I began a job on a Joe's Crab Shack in Olathe Kansas with an out of state contractor against my better judgment I began the job without a signed contract letting the general contractor know that I would be on another job out of town for 8 days to which we were previously committed.

Before leaving we dug and poured all footings on the project, upon return the contract had been amended and I would not sign it in that contract language. I presented a bill for the work preformed and was bluntly told you will not be paid I stated I would file a lien and was told go ahead we don't care. So having this tool is important.

While working as a concrete contractor in the 80s I had this happen to me on a residential home also while liens were filed attorneys used loop/holes to avoid payment and remove the lien.

Do I want our state to do my work? Absolutely not! Nor do I want the state to work for general contractors as SB 469 would allow. But I do want elected representatives too look at our business in a fair and even way. It would be much easier if laws were the same for all, and please believe me no one wants to file liens or burn bridges during good times or in the times we are now experiencing but when the need does arise it needs to be easy for the citizens of Kansas

While Kansas has done outstanding work and is far ahead of other states I feel we should put laws in place that are fair to a large supplier in Kansas City or a small remodel contractor in Dodge City. I urge you to reject SB 469 and work on lien laws that fairly assign risk to all parties. If all parties have the risk then all parties will work to get the issues resolved.

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

Testimony Senate Bill No. 469
Judiciary Committee
By John Ossello, Midway Wholesale
March 3, 2010

Mr. Chairman and Members of the Committee:

I am John Ossello Vice President of Midway Wholesale. Midway Wholesale is a building material supplier with 8 locations in Kansas and would most often be a "Remote Claimant" in regards to Bill No. 469.

Opposing Points:

1. Limits which projects fall under the bill (Page 1, section b) – by limiting the definition of construction to exclude single-family residences or multi-family residence of four units or less and excluding roads, bridges, dams and turnpikes the number of general contractors and jobs affected would be a small number. Also the general contractors that have projects that fall under the Bill are under no obligation to use the new filings mentioned in it.
2. Secretary of State offices set the procedures and pricing of the State Constructions Registry (page 3, New Sec. 2, section c & page 4, New Sec. 4, sections a through h) – Secretary of State office will try to set up the registry to be self funding in a short period of time and with the small amount of projects included in the Bill the Secretary of State offices can't give an indication of fee amounts for any of the filings associated with Bill No. 469. Fees are especially difficult to calculate since it is a voluntary system for the general contractors.
3. Remote Claimant finding a particular job in the Construction Registry – Since a Notice of Commencement isn't required on all jobs a Remote Claimant may find it extremely difficult for sub contractors to give the correct job name and addresses needed to locate a particular job in the registry. An example is a sub contractor buying material from a remote claimant for the "XYZ Construction job in Topeka". Sub contractor employee doesn't know the address and in the State Construction Registry XYZ Construction has three jobs in Topeka. Plus the sub contractor employee has the name wrong the job was actually for XYZ Building Contractors job in Topeka. Take this scenario for a remote claimant that has 8 stores in Kansas and 5,000 sub contractor customers each doing multiple jobs. If all jobs had to have a Notice of Commencement at least a remote claimant would know a job should be in the registry somewhere and could demand more information from the sub contractor such as the unique project number assigned by the State Construction Registry (referred to on page 3, New Sec. 3, Insert 4).
4. Notice of Correction (page 5, New Sec. 4, Insert f) – Once a Notice of Correction is filed how would the party named as adversely affected be notified of the correction? A remote claimant or Sub Contractor wouldn't have a reason to go back and look for corrections made by a general contractor since the remote claimant and sub contractor are only required to file one Notice of

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www.midwaywholesale.com

Furnishing for the entire job no matter how many times they furnish material or labor (page 4, New Sec. 3 insert g).

5. This bill creates one more hurdle to jump for remote claimants and sub contractors in order to collect money once a situation has gone bad. The jobs which fall under this new bill most often involve one general contractor and a few to a couple hundred remote claimants and sub contractors depending on the size of the project. The bill benefits a small number of general contractors and creates a couple hundred obstacles per job because of the extra work involved for the remote claimants and sub contractors filing a Notice of Furnishing.
6. It seems we are drafting a piece of legislation in order to create a quick list of names, addresses and phone numbers for general contractors to indentify the parties involved on a particular job they are overseeing. This list of parties should be something they already know because they are in charge of the job. I could come up with a way for the general contractors to gather all the information needed to pay the parties on their job without legislation.

I urge the committee to defeat Senate Bill 469.

KANSAS CITY CHAPTER *Chartered in 1934*
ASSOCIATED GENERAL CONTRACTORS OF AMERICA

720 Oak Street, Kansas City, Missouri 64106
Phone: (816) 531-4741 • Fax: (816) 531-0622
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Don Greenwell, *Executive Director*

WRITTEN TESTIMONY TO THE SENATE JUDICIARY COMMITTEE
IN SUPPORT OF SENATE BILL 469

Dan Morgan
Kansas City Chapter, Associated General Contractors
March 3, 2010

Thank you, Chairman Owens, and members of the committee. My name is Dan Morgan. I am the past president of the Kansas City Chapter, Associated General Contractors (AGC) and currently serve as the association's governmental affairs consultant in Kansas. I do appreciate the opportunity to submit this written testimony in support of Senate Bill 469. The Kansas City Chapter, AGC represents nearly 100 general contractors and 50 associate subcontractor and supplier members engaged in the commercial and industrial building construction industry throughout portions of Missouri and northeast Kansas. Nearly two-thirds of our members are located in the Kansas City area and are either domiciled in Kansas or perform work in the state. We are a sister chapter to the AGC of Kansas and we join them in support of this bill.

SB 469 authorizes the secretary of state to establish an online state construction registry for the purpose of filing and maintaining notifications by original contractors, subcontractors and remote claimants. Its use would establish transparency regarding all parties involved in non-residential building construction projects in Kansas so that all are properly paid and so that unjust "double payments" and unnecessary liens can be avoided. Fees associated with the use of the registry would offset administrative costs incurred by the secretary of state.

Liens may be filed against owners' property by unpaid general contractors, subcontractors and suppliers due to such owners' failure to pay for all or part of the labor and/or materials involved in the construction or improvements performed on their property. Liens may also be filed by unpaid subcontractors or suppliers even though owners have paid their general contractors. In other instances, both owners, who have paid their general contractors, and their general contractors, who have paid their subcontractors and suppliers, are caught unaware and are very adversely impacted when liens are placed on owners' property by so-called "remote lien claimants". Remote claimants include subcontractors' sub-subcontractors and material suppliers.

When a lien is filed by a remote claimant, the owner is impacted because the lien clouds title to the property even though the owner has already paid for the amounts claimed. The owner's general contractor is very adversely impacted because the general contractor must intercede on behalf of the owner and the general contractor is often forced to pay twice for the labor and/or materials that are the basis of the claim. The unexpected cost can be substantial. An online construction registry would address this unfair result by making owners and general contractors aware of potential remote lien claimants so that owners and general contractors can ensure that these sub-subcontractors and suppliers to subcontractors are paid, through joint checks for example. Such a registry would also provide owners with knowledge of all their general contractors' first tier subcontractors so that steps can be taken to ensure that they are paid as well.

Certainly a state construction registry would benefit owners and general contractors in the state. Because the registry would provide real transparency as to all involved in a building project, we believe that first tier subcontractors and suppliers and lower tier sub-subcontractors and suppliers would all benefit as well because all would be provided a new level of assurance that they will be paid and paid in timely fashion. In short, an online construction registry would provide a very accessible, economical and transparent way to ensure that all parties involved in non-residential building construction in Kansas are properly paid. Importantly, its use would also prevent the unfairness of having to pay twice for labor and materials and should result in a reduction in the number of lien filings in the state. I thank you for your consideration of our position on this important bill and respectfully ask that SB 469 be recommended favorably by the Judiciary Committee.

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Kansas Bankers Association

March 3, 2010

To Senate Committee on Judiciary

From: Kathleen Taylor Olsen, Kansas Bankers Association

Re: SB 469: State Construction Registry

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to present written testimony today in support of **SB 469**, which would create a State Construction Registry – an electronic filing registry for general contractors, subcontractor and remote claimants who potentially could claim a lien on real estate for work performed or supplies delivered.

The KBA was invited to participate in a meeting held this fall regarding this idea. At that meeting we expressed support for a registry that would allow interested parties – including a lender with a security interest in the underlying real property – to better identify all potential claims which could become liens on that real property.

Unpaid subcontractors or remote claimants have the ability to file a statutory lien on the property where work was performed or supplies were delivered. These such liens can become problematic for the property owner as they become clouds on the title to the property. The KBA supports any measure that can help all parties to know who and how many potential claims are out there. It is much easier and quicker to check off whose potential claim has been satisfied on the way to a clear title for the commercial property owner if there is some assurance that all parties have been identified.

It is our understanding that this bill would not affect a subcontractor's or remote claimant's right to collect payment for services rendered through a civil cause of action. In other words, the subcontractor or remote claimant may lose the right to put a lien on the property by not filing a Notice of Furnishing under this act, but will not lose the right to collect payment for work performed or services rendered by suing the general contractor and/or the property owner.

This bill **does** provide an additional tool by which the property owner and general contractor can assure that all parties due and owing for work performed or supplies rendered are paid and thereby, help keep all parties from having the costs of time and money associated with such an action.

Thank you for your time and consideration of this important matter. We would respectfully request that the Committee consider acting favorably with regard to **SB 469**.

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FERRELL
CONSTRUCTION
OF TOPEKA, INC.

WRITTEN TESTIMONY PRESENTED TO THE SENATE COMMITTEE

ON JUDICIARY

RE: SB 469

MARCH 3, 2010

BY

DEAN F. FERRELL

Mr. Chairman and Members of the Committee

My name is Dean Ferrell, President and Owner of Ferrell Construction of Topeka, Inc. I am also a past President of the AGC of Kansas. My company specializes in commercial building construction.

I am writing to express my support of SB 469, regarding electronic lien notification requirements for second tier subcontractors and suppliers. Through the years, much effort has been exerted to assure that laws are in place to protect vendors and subcontractors, even general contractors, when the entity they are doing business with fails to pay them, or is slow in making payment.

These laws have served us well, but there has always been an inherent gap that, in some cases, leaves the general contractor ("original" contractor, as defined by SB 469) at risk. That gap occurs when a general contractor has paid his subcontractor for services rendered without the knowledge that the subcontractor is failing to pay its subcontractors or suppliers (referred, to as remote, or second tier, claimants). Since the remote claimants are allowed, by law, to take an extended period of time before they actually file a lien, the offending first tier subcontractor may have already been paid in full by the time the lien is filed. In order to keep a project "lien free", more often than not, the original contractor is left "holding the bag". By this, I mean paying for the same work twice, without a sound means to recoup the loss.

This problem can be eliminated, or at least improved, if the original contractor could just know who all the "potential" remote claimants are – ahead of time. There is no way to police who is <u>not</u> being paid unless the subcontractor informs us who all its vendors are. Unfortunately, as you can imagine, "financially strapped" subcontractors will never provide us with a complete list.

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3-3-10
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It would help immensely if the second tier vendors would keep us informed that one of our subcontractors is struggling to pay them, or not paying them at all. If we only knew, we could work out "joint check" arrangements, or something similar. Some do alert us to potential problems, but quite honestly, most don't. Most will wait until the end of their statutory time period is nearing to contact us, or they just simply file the lien – at the last moment – without advanced notice to us. In some cases, it may be too late for us to take action to protect our interests. We may have already paid the subcontractor too much.

I understand the dilemma that a second tier subcontractor or supplier faces. They are very hesitant to "make waves" for their customer (our subcontractor). Many subcontractors take great offense if their supplier makes direct contact with the original contractor about slow payments. They are hesitant to do anything to jeopardize their relationship with the struggling subcontractor, and there is always hope that it is only a temporary problem. And, I'm sure that it is always in the backs of their minds that the lien laws will protect them. I'm sure that many don't realize that in some cases, the general contractor is the one that ends up being penalized.

Just recently, our company has experienced a situation wherein the excavating subcontractor on a Ferrell Construction project had been receiving payments for work completed; however, he was <u>not</u> in turn, reimbursing his vendors. By the time we realized this, it was too late. The excavator had "bolted" from the jobsite, leaving us "holding the bag" – to pay those vendors and to complete the work he had been responsible for. It appears our exposure could be in the $25,000 to $35,000 range. In difficult economic times these types of circumstances will only multiply.

For the reasons stated above, SB 469 makes sense. Since the "up front" notification to a web site by remote claimants would be required by law, there would be no pressure by the subcontractors (their customers) to keep them from making this notification. Most importantly, this would allow the general contractor to better monitor the payment histories of its subcontractors.

The establishment of an electronic, web-based registry, as established in this bill, is an efficient solution to the stated problem. It is my understanding that the Secretary of State's office has endorsed this concept and has determined that it will be budget neutral to the taxpayers of Kansas.

In closing, I feel this is a fair bill to all involved parties. I urge you to support passage of SB 469. Thank you.

KANSAS CEMENT COUNCIL

800 SW Jackson St., Ste. 1408
Topeka, KS 66612
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TESTIMONY

Date: March 3, 2010

By: Woody Moses, Managing Director
Kansas Cement Council

Regarding: Senate Bill 469, An act concerning liens; relating to supplier's liens

Before: The Senate Committee on Judiciary

Good morning Mr. Chairman and Members of the Committee:

My name is Woody Moses, representing the Kansas Cement Council. The Kansas Cement Council is composed of the three cement mills operating in Southeast Kansas. I appreciate the opportunity to appear before you today to express our opposition regarding SB 469.

Over the course of many years we, as a state, have crafted a good lien law structure and while sometime creaking it seems to function just as it was intended by spreading risk in a balanced manner. SB 469 seeks to upset the carefully crafted balance by shifting the risk from one group (general contractors) to another (subcontractors and suppliers). Ironic, as general contractors profess to make a living out of accepting risk, which justifies their existence. It is even more ironic, as the contractor already enjoys automatic lien protection, pursuant to K.S.A. 60-1101. Yet they seek to limit those of others.

Lien laws have existed in North America for almost 400 years and in all 50 states for a good reason, by fairly assigning the risks and providing a means whereby the fruits of one's labor may be recovered. After all, unlike a refrigerator or automobile, our product becomes a part of the real property and is impossible to recover. It is the faith in our lien law that allows our industry to furnish products to a construction project. SB 469 significantly reduces our chances to recover by 86% as it essentially reduces the time to file a lien from a potential 150 days to 21. If approved working under SB 469 will more resemble going to a casino than furnishing a job.

In short, we urge this committee to reject SB 469 as its passage would:

- Unfairly shifts risk to our industry by reducing the amount of time to file a lien from a potential 150 days to 21 days,
- Raise construction costs as producers will be forced to raise prices to compensate for the additional risk,
- Or in the alternative require payment prior to delivery,
- Layers on additional requirements to an already complicated lien law in effect creating a fourth lien law in addition to the current three,
- Basically contrary to our economic system by legislating in the free market,
- Creates even more uncertainty in an already uncertain marketplace, and
- Lacks a compelling reason for passage.

Thank you for your time and attention, I will be happy to respond to any questions at the appropriate time.

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STATE OF KANSAS

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SENATE CHAMBER

DAVID B. HALEY
SENATOR
FOURTH DISTRICT
WYANDOTTE COUNTY

March 3, 2010

SB 435 CRIMINAL PROCEDURE ; SEARCH INCIDENT TO ARREST

To: Hon. Tim Owens, Chair; Hon. Derek Schmidt, Vice-Chair & Members of the
SENATE COMMITTEE ON JUDICIARY

Mr. Chair and Fellow Members of the Committee, **Thank you** for hearing testimony on SB 435. This bill, by changing one word ("a" to "the"), restores to our statutes basic constitutional guarantees prohibiting unwarranted searches and seizures.

By authorizing specificity over generic, SB 435 provides protection accorded under the Fourth Amendment and Section 15 of the Kansas Constitution Bill of Rights, as observed by the Kansas Supreme Court in the majority opinion reversing the Kansas Court of Appeals in State of Kansas v. Henning & Zabriskie last summer (2009). (Although I was quoted as being a "Representative" on page 6, I believe the remainder of the opinion is on point.)

I have attached a copy of the opinion to my written testimony and would be pleased to stand for questions at the appropriate time.

Thank you again.

COMMITTEE ASSIGNMENTS
ASSESSMENT & TAXATION
JUDICIARY REAPPORTIONMENT
PUBLIC HEALTH & WELFARE

haley@senate.state.ks.us

JOINT COM
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CORRECTION
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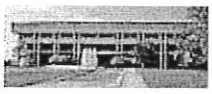

IN THE SUPREME COURT OF THE STATE OF KANSAS

Nos. 98,118

98,119

STATE OF KANSAS,

Appellant,

v.

RANDY L. HENNING,

Appellee,

and

KELLY K. ZABRISKIE,

Appellee.

SYLLABUS BY THE COURT

1. The appellate standard of review for a question of statutory interpretation or construction is unlimited. An appellate court's most fundamental guideline is that the intent of the legislature governs if that intent can be ascertained. Thus, an appellate court's first task is to discern the legislature's intent through the statutory language it employs, giving ordinary words their ordinary meaning. When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read the statute to add something not readily found in it. An appellate court need not resort to statutory construction. It is only if the statute's language or text is unclear or ambiguous that the court moves to the next analytical step, applying canons of construction or relying on legislative history construing the statute to effect the legislature's intent.

2. As a general rule, criminal statutes must be strictly construed in favor of the accused. Nevertheless, this rule of strict construction is subordinate to the rule that judicial interpretation must be reasonable and sensible to effect legislative design and intent.

3. When the legislature has revised an existing law, an appellate court presumes that a change in meaning was intended.

4. The Kansas appellate courts interpret Section 15 of the Kansas Constitution Bill of Rights to provide the same protection from searches and seizures as the Fourth Amendment to the federal Constitution.

5. A statute is presumed constitutional and all doubts must be resolved in favor of its validity. If there is

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any reasonable way to construe a statute as constitutionally valid, a court must do so. Courts not only have the authority, but also the duty, to construe a statute in such a manner that it is constitutional, if the same can be done within the apparent intent of the legislature in passing the statute.

6. The current wording of K.S.A. 22-2501(c) would permit a search of a vehicle incident to an occupant's or a recent occupant's arrest, even if the purpose of the search is not focused on uncovering evidence only of the crime of arrest. K.S.A. 22-2501(c) is thus facially unconstitutional under the Fourth Amendment to the federal Constitution and under Section 15 of the Kansas Constitution Bill of Rights.

Review of the Court of Appeals in *State v. Henning*, 38 Kan. App. 2d 706, 171 P.3d 660 (2007). Appeal from Lyon district court; MERLIN G. WHEELER, judge. Judgment of the Court of Appeals reversing and remanding to the district court is reversed. Judgment of the district court is affirmed. Opinion filed June 26, 2009.

Timothy L. Dupree, assistant county attorney, argued the cause, and *Marc Goodman*, county attorney, and *Paul J. Morrison*, attorney general, were with him on the briefs for appellant.

Don W. Lill, of Emporia, argued the cause and was on the brief for appellee Randy L. Henning.

Monte L. Miller, of Monte L. Miller, Chtd., of Emporia, argued the cause and was on the briefs for appellee Kelly K. Zabriskie.

The opinion of the court was delivered by

BEIER, J.: These consolidated appeals focus on the meaning and constitutionality of K.S.A. 22-2501(c), a part of the Kansas statute on searches incident to arrest. We hold that the United States Supreme Court's recent decision in *Arizona v. Gant*, 556 U.S. ___, 173 L. Ed. 2d 485, 129 S. Ct. 1710 (2009), controls in this case and that it compels us to strike down K.S.A. 22-2501(c) as unconstitutional.

Factual and Procedural Background

There is no material dispute on the relevant facts.

Defendant Randy Henning came to the attention of Deputy Sheriff Patrick F. Stevenson when they crossed paths one morning at an Emporia convenience store. Stevenson believed that there was an outstanding warrant for Henning's arrest and radioed a dispatcher. When the dispatcher confirmed the existence of a warrant, Stevenson left the store and asked Henning to step out of the passenger side of the car he had just entered. Defendant Kelly Zabriskie was sitting in the driver's seat. Once Stevenson confirmed Henning's identity, he arrested and handcuffed him.

Stevenson then searched the car while Henning stood on a sidewalk 5 feet to 7 feet from the front of the car. Zabriskie stood beside Henning during the search. Stevenson determined that the car was registered to Henning but insured by Zabriskie. In the car's closed center console, Stevenson found a flashlight case. Inside the case, he discovered a clear glass pipe, a syringe, and two Q-tips. The clear glass pipe appeared to contain drug residue; the residue was later tested and identified as amphetamine. After finding this evidence, Stevenson placed Zabriskie under arrest for possession of drug paraphernalia.

Defendants moved to suppress. On hearing, Stevenson testified that he searched the car "[b]ecause the Kansas statute had changed to be able to search for items after an arrest, fruits of a crime, and that law had taken [effect] July 1st. [T]his was July 6th and . . . [Henning] had been in that vehicle and the law

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also stated that I could search the vehicle where I made an arrest out of."

Stevenson was referring to a one-word change made in K.S.A. 22-2501(c) by the 2006 legislature. Since 1970, when the statute was enacted, it had provided:

"When a lawful arrest is effected a law enforcement officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of

(a) Protecting the officer from attacks;

(b) Preventing the person from escaping; or

(c) Discovering the fruits, instrumentalities, or evidence of *the* crime." (Emphasis added.)

During the 2006 legislative session, the statute was first repealed and then revived with a change that took effect on July 1, 2006. The new subsection (c) has since read: "Discovering the fruits, instrumentalities, or evidence of *a* crime." (Emphasis added.)

Stevenson's testimony also made clear that, at the time he searched defendants' car, he had no expectation that he would find evidence of any particular crime committed by any particular person:

"Q: [Zabriskie's attorney] So what crime were you looking for fruits of[,] evidence of?"

"A: [Stevenson] Of any crime.

"Q: None in particular just a crime, any crime?

"A: I recall being trained that on the 1st, July, 2006 the Kansas statute changed to be able to fruit - to search for fruits of a crime.

"Q: A crime and I'm asking you what crime in particular were you searching.

"A: I don't know until I find it, sir."

In each of the defendants' cases, the district judge held that Stevenson's search was unconstitutional. Our Court of Appeals consolidated the State's appeals in the two cases and then reversed and remanded. We granted defendants' petition for review.

We address two questions in the following order: (1) What was the significance of the legislature's 2006 change of "the" to "a" in subsection (c) of the statute? and (2) Is the current statute constitutional?

Replacement of "The" with "A"

The appellate standard of review for a question of statutory interpretation or construction is unlimited. See *State v. Storey*, 286 Kan. 7, 9-10, 179 P.3d 1137 (2008). Our most fundamental guideline is that the intent of the legislature governs if that intent can be ascertained. See *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007). Thus, our first task is to discern "the legislature's intent through the statutory language it employs, giving ordinary words their ordinary meaning." *State v. Stallings*, 284 Kan. 741, 742, 163 P.3d 1232 (2007).

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"When a statute is plain and unambiguous, we do not speculate as to the legislative intent behind it and will not read the statute to add something not readily found in it. We need not resort to statutory construction. It is only if the statute's language or text is unclear or ambiguous that we move to the next analytical step, applying canons of construction or relying on legislative history construing the statute to effect the legislature's intent." *In re K.M.H.*, 285 Kan. 53, 79, 169 P.3d 1025 (2007).

See also *State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275 Kan. 763, 769, 69 P.3d 1087 (2003).

As a general rule, criminal statutes must be strictly construed in favor of the accused. Nevertheless, this rule of strict construction is subordinate to the rule that judicial interpretation must be reasonable and sensible to effect legislative design and intent. *State v. Paul*, 285 Kan. 658, 662, 175 P.3d 840 (2008). When the legislature has revised an existing law, we presume that a change in meaning was intended. *State v. McElroy*, 281 Kan. 256, 263, 130 P.3d 100 (2006).

"A" is often referred to as an indefinite article, while "the" is denominated a definite article. See Garner's Modern American Usage 1, 785 (2nd ed. 2003). The word "a" is "used as a function word before singular nouns when the referent is unspecified." Merriam Webster's Collegiate Dictionary 1 (11th ed. 2003). "A" can also mean "any." Merriam Webster's Collegiate Dictionary 1. "The" is "used as a function word to indicate that a following noun or noun equivalent is definite or has been previously specified by context or by circumstance." Merriam Webster's Collegiate Dictionary 1294.

In *State v. Anderson*, 259 Kan. 16, 910 P.2d 180 (1996), this court examined a vehicle search incident to arrest and explicitly considered the specificity denoted by the use of "the" in the earlier version of K.S.A. 22-2501(c).

In *Anderson*, a police officer took the driver of a car into custody after a traffic stop and license check turned up an arrest warrant. The driver was handcuffed and situated in the back seat of the officer's car; a front-seat passenger was asked to step out. The officer then searched the car, uncovering drug evidence. The passenger was then arrested. *Anderson*, 259 Kan. at 17-18.

Writing for a unanimous court, then Chief Justice Kay McFarland first observed: "The search of the vehicle was *purely and solely* a search incident to arrest. There is no evidence of or claim made that probable cause was present for the search." *Anderson*, 259 Kan. at 19. Chief Justice McFarland then reviewed the language of K.S.A. 22-2501 and addressed the State's argument that the statute had been intended to codify federal law enunciated in *Chimel v. California*, 395 U.S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 2034, *reh. denied* 396 U.S. 869 (1969), and should be read as co-extensive with the later United States Supreme Court ruling in *New York v. Belton*, 453 U.S. 454, 69 L. Ed. 2d 768, 101 S. Ct. 2860, *reh. denied* 453 U.S. 950 (1981).

In *Chimel*, the Court had held that a search of an arrestee's entire house could not be justified under the Fourth Amendment; "[t]he search here went far beyond [defendant's] person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area." *Chimel*, 395 U.S. at 768.

In *Belton*, the search at issue was conducted in the passenger compartment of a car after four occupants were removed from the car, placed under arrest, searched, and separated from each other. Drug evidence was found in the defendant's jacket on the back seat. In that case, the Court held that the scope of a constitutional search incident to arrest was broad enough to include the interior of the car. *Belton*, 453 U.S. at 460. As Chief Justice McFarland noted in *Anderson*, the *Belton* decision also expressly denied

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that its holding altered "'the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.' *Belton*, 453 U.S. at 460 n.3." 259 Kan. at 22.

With *Chimel* and *Belton* as backdrop, Chief Justice McFarland then concluded that the original language of K.S.A. 22-2501(c), *i.e.*, which used "the" rather than "a," may "be more restrictive than prevailing case law on the Fourth Amendment would permit, but this does not alter the plain language of the statute." *Anderson*, 259 Kan. at 22.

"*Belton* may expand the scope of the constitutionally permissible search of a vehicle but not the permissible purpose of the search. . . .

. . . .

". . . The statute sets out three purposes for which . . . searches [incident to arrest] may be made, and a search wholly under the statute must be for one of the purposes set forth therein. By the searching officer's own testimony, none of the three statutory purposes was his purpose in conducting the search." 259 Kan. at 23-24.

Anderson thus held that K.S.A. 22-2501(c) permitted a law enforcement officer to search a car or truck incident to an occupant's or a recent occupant's arrest, for the purpose of uncovering evidence to support *only* the crime of arrest. 259 Kan. at 23. That case, like this one, arose from a vehicle search incident to arrest, but the core of the ruling would apply whenever a search of any space incident to arrest has been justified solely on the basis of subsection (c) of K.S.A. 22-2501; it would have to be limited to the purpose of uncovering evidence of *the* crime of arrest.

Both the legal presumption that arises from the fact that our legislature traded "the" for "a" in subsection (c) of K.S.A. 22-2501 and the distinctions in the definitions and usage of "a" and "the" demonstrate that some sort of change was intended in 2006. But that is as far as "the plain language" of the current statute will take us. The ordinary meaning of the very ordinary "a" can indicate "a particular" person, place, or thing, albeit one not previously mentioned, or it can indicate "any" person, place, or thing. This duality leads us to conclude that the current text of the statute is ambiguous, requiring consultation of legislative history, employment of canons of construction, and review of other background considerations to divine the meaning of the text. In short, we must move from statutory interpretation to construction. See *State v. Paul*, 285 Kan. 658.

K.S.A. 22-2501(c)'s legislative history demonstrates that the 2006 change from "the" to "a" may have been, at least in part, responsive to our holding 10 years earlier in *Anderson*.

The legislature first looked at amending K.S.A. 22-2501 in 2004, when it considered H.B. 2541. House J. 2004, p. 967. The House Corrections and Juvenile Justice Committee heard testimony from Kyle G. Smith, Director of Public and Governmental Affairs for the Kansas Bureau of Investigation. Smith opined that K.S.A. 22-2501(c), as interpreted in *Anderson*, limited officers' search capabilities and led to confusion. He urged legislators to change "the" in subsection (c) of the statute to "a," arguing that *Belton* established that no arrestee's constitutional rights would be infringed by such a change in the wording or in law enforcement practice. Minutes, House Corrections and Juvenile Justice Comm., February 2, 2004. Randall L. Hodgkinson, Deputy Appellate Defender, also testified on H.B. 2541. He voiced his concern that H.B. 2541 would encourage questionable arrests so that law enforcement could gain access to vehicles. Minutes, House Corrections and Juvenile Justice Comm., February 2, 2004. No further action to amend K.S.A. 22-2501 took place in 2004. Minutes, House Corrections and Juvenile Justice Comm., February 2, 2004.

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In 2005, the House proposed H.B. 2261, a bill that would have repealed K.S.A. 22-2501 entirely. House J. 2005, p. 230. Again, the House Corrections and Juvenile Justice Committee heard testimony. Jared S. Maag, Deputy Attorney General of the Criminal Litigation Division, testified that only six states, including Kansas, had codified the procedure for a search incident to arrest. He asserted that such codification "only [bred] conflict with prevailing case law." Minutes, House Corrections and Juvenile Justice Comm., February 14, 2005. Maag also discussed *Belton* and *Thornton v. United States*, 541 U.S. 615, 158 L. Ed. 2d 905, 124 S. Ct. 2127 (2004). Maag explained that in *Thornton*, a plurality of the Court, applying *Belton*, permitted a search of a car even though its occupant had already left it when he made contact with a law enforcement officer. Minutes, House Corrections and Juvenile Justice Comm., February 14, 2005. Smith also testified in 2005, on behalf of the KBI and the Kansas Peace Officers Association. This time, however, he asked the Committee to repeal K.S.A. 22-2501 rather than amend it. Minutes, House Corrections and Juvenile Justice Comm., February 14, 2005. The Committee also heard from R. Michael Jennings, legislative chair of the Kansas County and District Attorneys Association. Jennings also requested amendment of K.S.A. 22-2501 to permit officers making an arrest of a vehicle's occupant to search the passenger compartment of that vehicle for evidence of "any" crime. Minutes, House Corrections and Juvenile Justice Comm., February 14, 2005. Hodgkinson testified against the 2005 proposal. His testimony was essentially similar to that he had given in 2004. Minutes, House Corrections and Juvenile Justice Comm., February 14, 2005.

The House voted 101 to 21 in favor of H.B. 2261. House J. 2005, p. 282. The Senate Judiciary Committee heard testimony from Maag and Smith, Minutes, Senate Judiciary Comm., March 17, 2005; but it reverted to amendment rather than repeal and changed "the" in subsection (c) to "a," Senate J. 2005, p. 383. Realizing that the change undermined the holding of *Anderson*, Representative David Haley opposed the amendment, stating:

"By adopting a warrantless search incident to *any* crime and not to a *specific* crime, this Legislature attempts to shred the Constitutional protections against unwarranted searches or seizures and erodes the bases for probable cause.

"The result, if this bill becomes law, will allow 'fishing expeditions' for what will then become admissible evidence for any crime and not necessarily the base allegation. 'A crime' in the bill should read '*the* crime.'

"The notion is absurd and, I predict, will be found unreasonable under state and/or federal constitutional mandates." Senate J. 2005, p. 396.

Although the Senate passed the bill to amend the statute, no change in K.S.A. 22-2501(c) survived in the final version of the bill. House J. 2005, pp. 1025-27. Senate J. 2005, pp. 836-38.

During the 2006 legislative session, the House, Senate, and Governor approved a repeal bill, S.B. 366. House J. 2006, p. 2184; Senate J. 2006 pp. 2102-03. However, a later Conference Committee amended a subsequent bill, S.B. 431, to revive and amend K.S.A. 22-2501, again changing "the" to "a" in subsection (c). Minutes, House Conference Comm., May 5, 2006. S.B. 431 was subsequently approved by the House, Senate, and Governor. House J. 2006, p. 2333; Senate J. 2006, pp. 1966, 2104. The record is silent on legislative reasoning.

K.S.A. 22-2501(c)'s legislative history does not definitively explain whether the legislature meant for its amendment of the statute to allow search of a space surrounding or recently surrounding an arrestee only for evidence of "a particular" actual crime or "any" merely imagined crime or something in between. It also does not tell us whether the officer conducting the search need possess any particular level of suspicion or probable cause. Although the language appears to move toward *Belton*, the legislature's

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rejection of outright repeal in favor of amendment may indicate that it wished to retain some restrictions in excess of those demanded by United States Supreme Court case law. It is clear that at least certain members of the legislature were actually aware of the potential constitutional dimension of their choice of article in K.S.A. 22-2501(c). In addition, our construction of the statute is guided by the general presumption that the legislature acts with full knowledge of existing law. See *State v. Anderson*, 281 Kan. 896, 912, 136 P.3d 406 (2006).

Under these circumstances, we believe we can safely say that the legislature at least intended to undercut our holding in *Anderson*. We thus rule here that K.S.A. 22-2501(c)'s current wording would permit a search of a space, including a vehicle, incident to an occupant's or a recent occupant's arrest, even if the search was not focused on uncovering evidence only of the crime of arrest. We need not further define K.S.A. 22-2501(c)'s current parameters because *Arizona v. Gant*, 556 U.S. ___, 173 L. Ed. 2d 485, 129 S. Ct. 1710 (2009) leaves those parameters without legal effect.

Constitutionality

The State and Zabriskie correctly agree that our standard of review on the constitutionality of statutes is unlimited. We interpret Section 15 of the Kansas Constitution Bill of Rights to provide the same protection from searches and seizures as the Fourth Amendment to the federal Constitution. See *State v. Wood*, 190 Kan. 778, 788, 378 P.2d 536 (1963). Thus, regardless of whether the statute is challenged under the federal or the state Constitution, we consider ourselves bound by United States Supreme Court precedent. Further,

"[a] statute is presumed constitutional and all doubts must be resolved in favor of its validity. If there is any reasonable way to construe a statute as constitutionally valid, the court must do so. This court not only has the authority, but also the duty, to construe a statute in such a manner that it is constitutional, if the same can be done within the apparent intent of the legislature in passing the statute." *Martin v. Kansas Dept. of Revenue*, 285 Kan. 625, 629-30, 176 P.3d 938 (2008).

In *Gant*, officers, acting on an anonymous tip, knocked on the front door of a suspected drug house and asked to speak to its owner. Defendant Rodney Joseph Gant answered the door, identified himself, and explained that the owner was away. Officers left and "conducted a records check [on Gant], which revealed that Gant's driver's license had been suspended and there was an outstanding warrant for his arrest for driving with a suspended license." *Gant*, 556 U.S. at ___.

Officers returned to the house later that evening, arresting a man for providing a false name and a woman for possessing drug paraphernalia. "Both arrestees were handcuffed and secured in separate patrol cars when Gant arrived" in his car. 556 U.S. at ___. An officer called out to Gant. Gant got out of his car, shut the door, and approached the officer. The officer arrested Gant 10 feet to 12 feet from his car, handcuffed him, and placed him in the back of a patrol car. An officer then searched Gant's car, discovering a bag of cocaine in the pocket of a jacket on the backseat. The officer admitted at the suppression hearing that he conducted the search only "[b]ecause the law says we can do it." 556 U.S. at ___.

The Court's analysis first returned to *Chimel*'s rule and rationale.

"In *Chimel*, we held that a search incident to arrest may only include 'the arrestee's person and the area "within his immediate control" – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.' That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that

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an arrestee might conceal or destroy. [Citation omitted.] If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply. [Citation omitted.]" *Gant*, 556 U.S. at ___.

That the Court chose to begin with *Chimel* is significant for at least two reasons.

First, in doing so, it limited *Belton* and rejected cases from other courts that have interpreted it broadly to scale back the general *Chimel* rule. The Court expressly stated that *Belton* "considered *Chimel*'s application to the automobile context" and observed that its holding was "based in large part on our assumption 'that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach."'" *Gant*, 556 U.S. at ___. The Court unambiguously reaffirmed that *Chimel*'s reasoning remains the go-to rubric. It "continues to define the boundaries of the [search-incident-to-arrest] exception"; if one of the exception's two purposes cannot be served by a search, the exception cannot save the search, under the Fourth Amendment. *Belton* did not create an exception to the exception to be invoked every time law enforcement wants to search a vehicle in the vicinity and from which the arrestee has emerged. Rather, *Belton* merely applied *Chimel* to the unique set of circumstances before the Court.

The Court's return to the first principles of *Chimel* is also significant because it set up without compelling reinforcement of our court's *Anderson* interpretation of the pre-2006 version of K.S.A. 22-2501(c). *Gant*'s equation of purpose and scope deviated somewhat from the *Anderson* discussion, but it arrived at the same ultimate destination: To have a valid search incident to arrest, when there is no purpose to protect law enforcement present, the search must seek evidence to support the crime of arrest, not some other crime, be it actual, suspected, or imagined. In the vehicle context, "in many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains . . . evidence [relevant to the crime of arrest.]" *Gant*, 556 U.S. at ___.

In *Gant*, the Court recognized, Gant was in no position to reach into his car to access a weapon or to destroy or conceal evidence of the crime of arrest. This contrasted with the defendant in *Belton*, where there had been four arrestees and a lone officer with one set of handcuffs. Gant had already been secured in a patrol car, and there were several officers at the scene. There was a real threat in *Belton* that the defendant or another arrestee could reach into the vehicle. That threat was nonexistent in *Gant*.

The Court also observed:

"Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance, *Michigan v. Long*, 463 U.S. 1032 (1983), permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is 'dangerous' and might access the vehicle to 'gain immediate control of weapons' [Citation omitted.] [And] "[i]f there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 798, 820-21 (1982), authorizes a search of any area of the vehicle in which the evidence might be found[, allowing] searches for evidence relevant to offenses other than the offense of arrest[.]" *Gant*, 556 U.S. at ___.

The Court thus held that Gant's search was unreasonable under the Fourth Amendment because Gant was secured and could not reach the passenger compartment; and it was unreasonable to believe the vehicle contained evidence of Gant's offense of arrest, *i.e.*, driving with a suspended license.

Factually, this case is more similar to *Gant* than to *Belton* but, analytically, a factual comparison is unnecessary. There is no dispute that there was no warrant to search the car. A recognized exception to

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the Fourth Amendment's warrant requirement must apply, see *State v. Thompson*, 284 Kan. 763, 776, 166 P.3d 1015 (2007); or the search was invalid and the evidence it uncovered appropriately suppressed by the district court judge. When a search is challenged, the State bears the burden of demonstrating that it was lawful. See *State v. Ibarra*, 282 Kan. 530, 533, 147 P.3d 842 (2006). The State's only argument here is that the search of the car was a proper search incident to the arrest of Henning under K.S.A. 22-2501(c). (Zabriskie, although out of the car and standing near Henning during the search, had not yet been arrested herself.) Even more specifically, the State's only argument, based as it must be on the testimony of Stevenson, is that the search depended upon the recently amended and newly effective language of K.S.A. 22-2501(c), which, as we have discussed above, considerably broadened its scope and exceeded the purposes allowed for such searches under the *Chimel* rule. As Stevenson noted, his training was up-to-the-minute and told him he was permitted to search the car not only for evidence of the crime of arrest but for evidence of another crime or crimes.

Gant expressly disapproved of this approach:

"To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception–a result clearly incompatible with our statement in *Belton* that it 'in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.' [Citation omitted.]. . . [T]he. . . *Chimel* rationale authorizes police to search only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." 556 U.S. at ___.

In view of *Gant*, we are compelled to strike down the current version of K.S.A. 22-2501(c) as facially unconstitutional under the Fourth Amendment and Section 15 of the Kansas Constitution Bill of Rights. The district court judge was right to be suspicious of the statute's wording; its breadth cannot be reconciled with the narrowness of the search and seizure concept it was meant to codify, not automatically in a vehicle context nor in the context of any other area within immediate control of an arrestee.

The district court is affirmed. The Court of Appeals is reversed.

END