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**ON BEHALF OF THE
AMERICAN TORT REFORM ASSOCIATION**

**SUPPORTING S.B. 105, AN ACT TO AMEND THE INTEREST RATE ON
JUDGMENTS IN CIVIL ACTIONS**

**BEFORE THE KANSAS
SENATE JUDICIARY COMMITTEE**

FEBRUARY 16, 2011

Senate Judiciary

2-17-11

Attachment 2

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Mr. Chairman and Members of the Committee, I am appearing on behalf of the American Tort Reform Association ("ATRA") to express ATRA's support for S.B. 105. Kansas law relating to the interest on civil judgments presently far exceeds prevailing interest rates, placing an undue burden on businesses. This burden is punitive in nature, and imposes a level of punishment unconnected to any specific wrongful conduct which is the traditional lynchpin for punitive recovery. S.B. 105 corrects this unfair result by providing a more reasonable and uniform determination of the annually-adjusted judgment interest rate.

Background

I am an associate in Shook, Hardy & Bacon L.L.P.'s Washington, D.C.-based Public Policy Group. My work focuses primarily on tort law and civil justice system reform; it is generally divided among legislative efforts, appellate litigation, and academic writing. I received my J.D. from Wake Forest University School of Law and my B.S. from the University of Virginia's McIntire School of Commerce.

ATRA's Interest

Founded in 1986, ATRA is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. ATRA believes that the current law in Kansas regarding judgment interest unfairly exceeds prevailing interest rates and imposes a punitive burden on businesses. ATRA believes that S.B. 105 is sound legislation which responds to an imbalance in the civil justice system and promotes fair compensation.

S.B. 105 Would Promote Consistent and Fair Interest on Kansas Judgments

Plaintiffs in Kansas who win favorable verdicts are often entitled to recover interest on the damages they are awarded to account for the time delay in receiving monies owed to them. Such recovery may come in the form of pre-judgment interest (*i.e.* interest from the time a harm is suffered or claimed until the judgment is awarded) or post-judgment interest (*i.e.* interest for the time spent appealing a judgment). The basic reason for this recovery is the “time value of money,” which reflects the notion that getting a dollar today is generally worth more than getting a dollar tomorrow because of a number of factors, for example, inflation.

For over a century, Kansas has statutorily prescribed a rate of interest which may be applied to a civil judgment to compensate for the time value of money. Over time, this annual rate of interest has been changed from a flat rate of 6% to a flat rate of 15% (to reflect market rates in existence around the time of the enacted change), and ultimately to a variable rate based upon a common interest rate benchmark, the Federal Reserve discount rate. Currently, Kansas law states that the judgment interest rate is generally the Federal Reserve discount rate plus an additional 4%. For example, if the prevailing interest rate was 2%, a civil defendant owing pre- or post-judgment interest would, on an annual basis, owe 6%, or triple this amount. Thus, as a practical matter, the defendant would pay a 200% mark-up or premium on the judgment interest annually, which can have effect of overcompensating the plaintiff for the time value of money.

When judgment interest does not fairly reflect the actual time value of money, the excess amount paid in interest essentially acts as a penalty. Because an award of judgment interest is generally unrelated to the merits of a claim or conduct of the parties, the result is a form of punishment that is unconnected to any willful, wonton or reckless misconduct. Such intentional action is traditionally a prerequisite for allowing punitive recovery. Hence, with an unbalanced

and inflated rate of interest on judgments, a case involving a simple and inadvertent breach of contract would give rise to a measure of punitive damages. Conversely, a case in which punitive damages were appropriately awarded based on the defendant's willful misconduct would give rise to a measure of double punishment that is similarly unjust.

The fundamental purpose of S.B. 105 is to more closely place each party in the same position they would have been but for the time spent litigating a matter. A related objective is to not penalize civil defendants merely for asserting their legal rights. S.B. 105 would reduce the potential for Kansas courts to unfairly award damages which are punitive in nature where there is no wrongful conduct, or punishment has already been meted out by the court. It would accomplish this simply by reducing the current, arbitrary 4% rate increase above the Federal Reserve discount rate to a more modest 1% increase. This would ensure that plaintiffs are being fairly compensated for the time value of money, as the rate would remain above the Federal Reserve discount rate (which takes into account inflationary pressures), but that they are not being overcompensated.

S.B. 105 would also provide greater uniformity for judgment interest in Kansas. The state presently has a varied set of rules relating to interest on judgments. While defendants in most cases pay post-judgment interest at a rate equal to the Federal Reserve discount rate plus 4%, in other situations they are required to pay a flat rate of 12% (for limited actions) and 10% (for judgments arising from a duty to support another person). In addition, Kansas allows pre-judgment interest at a 10% rate, though it has been left to the courts to determine when pre-judgment interest should apply. S.B. 105 would simply provide a uniform rate for judgment interest payments.

In addition, S.B. 105 would codify the distinction Kansas courts have made between liquidated and unliquidated damages such that pre-judgment interest is available only for liquidated claims. See *Farmers State Bank v. Prod. Credit Ass'n of St. Cloud*, 755 P.2d 518, 528 (Kan 1988). A liquidated amount is one that is "definitely ascertainable by mathematical computation." *Kansas Baptist Convention v. Mesa Operating Ltd. P'ship*, 898 P.2d 1131, 1142 (Kan. 1995). Unliquidated damages are those that the plaintiff cannot measure at the time of injury, such as future lost income, pain and suffering, and projected medical expenses. S.B. 105 makes clear that pre-judgment interest should not apply to unliquidated damages.

Conclusion

Kansas law should be amended to more fairly tie the rate of judgment interest to the Federal Reserve discount rate, establish a uniform rate for judgment interest, and prohibit pre-judgment interest awards on unliquidated damages. S.B. 105 would achieve these basic objectives and more closely place litigants in the same position they would have been in if payment was received at the time of judgment. It would also not penalize defendants who have resolved to assert their legal rights in court.