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TO: **SENATE JUDICIARY COMMITTEE**

FROM: **SARAH E. WARNER**
KANSAS ASSOCIATION OF DEFENSE COUNSEL

RE: **SB 199**

DATE: **JANUARY 18, 2018**

Mr. Chairman, members of the Committee, my name is Sarah Warner. I am submitting this testimony as the immediate past president and legislative chair of the Kansas Association of Defense Counsel (KADC). KADC is a statewide non-profit organization of Kansas lawyers who devote a substantial part of their practice to the civil defense of litigated cases, with a membership of approximately 235 attorneys. The goal of KADC is to enhance the knowledge and improve the skills of defense lawyers, elevate the standards of trial practice, and work for the administration of justice.

KADC supports S.B. 199 because it removes financial impediments from Kansas small businesses, allowing them to appeal erroneous judgments that they believe are not based on the law or the facts.

By way of background, Kansas law recognizes that defendants who are facing an adverse judgment have a right to appeal their case to a reviewing court. As attorneys who defend clients in civil litigation, KADC members can attest that there are many types of error that would cause defendants to seek appeals of the underlying judgment in a case. Perhaps the district court misapplied the law, or went outside the contours of the law to reach its decision. Perhaps the judgment is not supported by the facts, or evidence was wrongly admitted or excluded, coloring the jury's decision.

A defendant's decision to file an appeal does not by itself stay any attempt to collect the underlying judgment, however, even if that judgment is erroneous. Instead, in order to stop any collection efforts on a judgment while a case is pending on appeal, the defendant must file a "supersedeas bond," commonly referred to as an "appeal bond."

Under existing Kansas law, this means that in order to prevent collection on a judgment before an appellate court has had the opportunity to review the soundness of that decision, a

defendant must ordinarily—within two weeks of the judgment being entered—post a bond for the *entire amount of the judgment*, often plus anticipated interest and costs of appeal.

These bonds can be prohibitively expensive, either because a person or small business is posting its own assets, or, what is more often the case, because the defendant must purchase the bond from a surety and make payments on that premium. The existence and size of these bonds can fundamentally change the defendant's ability to appeal a judgment, even if the defendant has good reason to believe the judgment should be reversed.

Particularly in the case of a small business, the company itself will often lack sufficient funds to self-finance a bond and will thus need to turn to third parties. This is not an easy task and can be as time-consuming and complex as multitier financing. Compound these tasks with the timing of the bond requirement—that a business must secure this financing within 14 days of a judgment being entered, including any time spent determining interest or other costs that a plaintiff argues must be included—and a business may be faced with the decision whether it can appeal an erroneous decision at all, or whether it must consider other options, such as bankruptcy, layoffs, or dissolution.

S.B. 199 recognizes the impact the bonding requirement has on a defendant's right to appeal. This legislation strikes an appropriate balance between this important right—the right to appeal—and the plaintiff's interest in recovering a judgment if it is upheld on review. In particular:

- The bill continues to allow all defendants to apply to the court for a bond amount lower than the full amount of the judgment when the judgment exceeds $1,000,000 and the bond will cause the defendant to suffer undue hardship or deny the right to appeal. See S.B. 199, sec. 1(d)(2)(A)(ii) (maintaining requirement in K.S.A. 60-2103(d)(2)(A)(ii)).

- The bill adds additional protections for small businesses, capping the bond that a small business must post in order to stay execution of a judgment on appeal at $1,000,000. See S.B. 199, sec. 1(d)(2)(C)(ii). This amount provides both protection and certainty for a small business, allowing such companies to make informed decisions about the costs of appeal and the availability of appeal bonds, so it can weigh the benefit of an appeal.

- The bill caps the entire supersedeas bond for any defendant at $25,000,000.[1] KADC is not aware of any judgment pending in Kansas courts in excess of $25,000,000, but the bonding requirements on such a judgment would be devastating indeed.

KADC's members often represent businesses not only in civil defense, but in commercial litigation generally. We recognize that by placing a cap on supersedeas bonds, S.B. 199 might create some concern about the ability of plaintiff businesses to collect judgments if they are

[1] KADC notes that S.B. 199, as written, contains an extra zero in the $25,000,000 bond cap provision in Section 1(d)(2)(C)(i). KADC is confident this is a typo and will be revised out of the bill, but nevertheless want to bring it to the Committee's attention.

affirmed on appeal. We believe, however, that these concerns do not outweigh the importance of the appeal right itself. The Kansas Legislature has created a statutory right and process by which defendants who are subject to an adverse judgment can have that judgment reviewed by a higher court. Mechanisms that discourage defendants from exercising that right, or that force small businesses to choose between their right to appeal and their ability to keep their doors open, are inconsistent with the legislature's recognition of the crucial role of appeals in the judicial process. And the bond cap does not prevent plaintiffs who are ultimately successful from collecting on those judgments if they are affirmed.

Even the most sophisticated analysis of the odds of reversing an adverse judgment on appeal is worthless if Kansas's bonding requirement precludes an appeal. Knowing what it may cost to appeal an adverse judgment can be just as critical as getting an informed sense of what the exposure is with respect to the judgment itself.

Finally, Kansas is one of the few states remaining that presently does not have a cap on appeal bonds for general litigation. S.B. 199 would bring our state in line with the majority of states and would underscore the importance of a preserving a defendant's right to appeal.

In short, S.B. 199 facilitates fair and accurate litigation outcomes that ultimately are resolved on the merits of the case—not on whether the party facing an adverse judgment can afford the bond to allow an appeal.

Thank you for the opportunity to submit this testimony. I would be glad to help with any information needed moving forward. KADC thanks the Committee for considering this important legislation and urges passage of S.B. 199.