MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 A.M. on February 22, 2005, in Room 123-S of the Capitol.

All members were present.

Committee staff present:

Mike Heim, Kansas Legislative Research Department Jill Wolters, Office of Revisor of Statutes Helen Pedigo, Office of Revisor of Statutes Nancy Lister, Committee Secretary

Conferees appearing before the committee:

Others attending:

See attached list.

Chairman Vratil opened the meeting.

Final Action:

SB 258 Statutory and legal forms to be set forth by the judicial council

Senator Schmidt moved to recommend the bill favorably, seconded by Senator Allen, and the motion carried.

Final Action:

SB 215 Commercial real estate broker lien act

Chairman Vratil stated that the interested parties have worked to come up with some amendments. The Chairman passed out a balloon amendment and announced that it had been approved by the Commercial Real Estate Brokers and the Kansas Land Title Association, and perhaps others. (Attachment 1) Senator Betts questioned whether the Kansas Bankers Association amendment was part of this. Ms. Kathy Olsen, Kansas Bankers Association (KBA), a guest in the meeting, stated that the KBA amendment was not part of this balloon. Chairman Vratil stated that Committee members have in their file a letter from the KBA and attached to that is a balloon the KBA requested. Chairman Vratil stated that the Commercial Real Estate Brokers indicated to him that they had no problem with the KBA amendment. (Attachment 2)

A motion to adopt the KBA proposed amendment was made by Senator Umbarger, seconded by Senator Donovan, and the motion carried.

A motion to additionally adopt the Kansas Land Title Association proposed amendment was made by Senator Goodwin, seconded by Senator Schmidt, and the motion carried.

A motion was made to recommend favorably the bill as amended. Senator Schmidt moved, seconded by Senator Umbarger, and the motion carried.

Final Action:

SB 161 Immunity from liability for entities for whom offenders perform community service

An amendment proposed by the Kansas Trial Lawyers Association was reviewed, but no motion was offered to adopt the proposed amendment. A motion was made to recommend favorably the bill. Senator Donovan moved, seconded by Senator Schmidt, and the motion carried.

Final Action:

SB147 Increasing general time limitation for actions to five years

CONTINUATION SHEET

MINUTES OF THE Senate Judiciary Committee at 9:30 A.M. on February 22, 2005, in Room 123-S of the Capitol.

Chairman Vratil handed out a balloon amendment submitted by the Attorney General, which resolved some of the concerns the Committee expressed when hearing the bill. (Attachment 3) The amendment is on page two and would add to existing law the sexual offense of "enticement of a child as defined in K.S.A. 21-3509 and amendments thereto". Senator Schmidt moved to approve the amendment, seconded by Senator Umbarger, and the motion carried.

Senator Journey moved to change the statute of limitations stated in the bill, page 2, line 10, from "five" to "three" years. Senator Schmidt clarified that the intent to return to current law, on page 1, those crimes that have a five year statute of limitations, reinserting lines 17-28 and lines 32-42, and Senator Journey concurred, stating his intention was to change only those items with a two year statute of limitations to three years. Senator Journey moved, Senator Betts seconded, but the motion did not carry.

A motion to recommend the bill favorably as amended was made. Senator Schmidt moved, seconded by Senator Umbarger, and the motion carried.

Final Action:

SB 129 Consumer protection; modification or limitation of warranties; workmanlike performance

Chairman Vratil handed out a balloon amendment which contained a definition of "implied warranty of workmanlike performance", which was an issue identified at the hearing. (Attachment 4) Senator Bruce moved to accept the amendment, seconded by Senator Schmidt, and the motion carried. A motion was to made to recommend the bill favorably as amended. Senator Goodwin moved, seconded by Senator Schmidt, and the motion carried.

Final Action:

SB 75 Creating an immunity from liability for claims relating to obesity or weight gain

Chairman Vratil handed out two balloon amendments. The first balloon was submitted by Ron Hein, representing the Kansas Restaurant and Hospitality Association, the Kansas Beverage Association, the Kansas Food Dealers Association, and on behalf of the Obesity Frivolous Lawsuit Coalition. (Attachment 5) The Kansas Trial Lawyers Association (KTLA) has agreed to the balloon. However, the KTLA has submitted a balloon with two additional changes. (Attachment 6)

The KTLA amendment would strike "associated with" on page 1, section (b), line 20, and replace with "arising from". Also, in section (b) the KTLA wants to delete the words "or other generally known condition allegedly caused by or allegedly likely to result". A motion was made to adopt the KTLA amendment. Senator Betts moved, seconded by Senator Journey, but the motion did not carry.

The Kansas Restaurant and Hospitality Association amendment was considered by the Committee, and a motion was made to adopt the amendment. Senator Bruce moved, seconded by Senator Donovan, and the motion carried. A motion was made to recommend favorably the bill as amended. Senator Schmidt moved, seconded by Senator Donovan, and the motion carried.

Chairman Vratil asked the Committee to consider **SB 151** for final action.

Final Action:

SB 151 Crimes of trafficking and aggravated trafficking

<u>A motion was made to recommend the bill favorably. Senator Haley moved, seconded by Senator Bruce, and the motion carried.</u>

Chairman Vratil adjourned the meeting at 10:30 A.M. The next meeting is scheduled for February 23, 2005.



PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

NAME	REPRESENTING
Dan Hermes	Public Saluxica
JIM CHARK	K BA
KEUIN GRAHAM	AG
Debbie Nordling	SELF/ Member Supreme Court Commis
Erick Nordling	SELF
Scott Heilier	KADC
DINA FISK	Konsas Society of Lood Surveyors
Ton PALACE	Puch of KANSAS
John Peterson	Ks Gat Consulting
Leslie Kaufman	Ks Coop Council
Marce Carpurter	RS Chamber
Carlie Olsen	Ks Banhers A=sn
Kein BARare	KTCA-
Jeff Bo Hendery	State Form
Callie Detito	KTLA
Will LARDON	AGE of XAMSAS
Sandy Terract	KOSDV
Paul Or Well	Entern G. SEN, Bruce

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2/22/05

NAME	REPRESENTING
PBrags	KS Sent Comm
BHarney	
JBUHEr	
Wendy Harms	KAPA
Words Moss	KRMCH
Keethy Porter	Ludi cial & Brond
Werdern Harn	KAPA

Session of 2005

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SENATE BILL No. 215

By Committee on Federal and State Affairs

2-8

AN ACT enacting	the commercial real	estate broker lien act
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Be it enacted by the Legislature of the State of Kansas:

Section 1. This act shall be known and may be cited as the commercial real estate broker lien act.

- Sec. 2. As used in the commercial real estate broker lien act:
- (a) (1) "Commercial real estate" means any real estate and any interest therein, except real estate excluded under paragraph (2).
 - (2) "Commercial real estate" shall not include:
- (A) Real estate containing one to four residential units;
- (B) real estate containing single-family residential units such as condominiums, townhouses or homes in a subdivision when sold, leased or otherwise conveyed on a unit by unit basis, even though these units may be a part of a larger building or parcel of real estate containing more than four residential units;
- (C) real estate on which no buildings or structures are located and which is zoned for single-family residential use; or
 - (D) real estate used for agricultural purposes.
- (b) "Compensation" means all amounts to be paid to a broker for services provided under a written agreement including, but not limited to, the broker's commission and any brokerage, management, consulting or other fees.
- (c) "Services" means any act or service for which compensation is paid and the performance of which requires a license under the real estate brokers' and salespersons' license act.
- (d) Words and phrases used in this act, unless provided otherwise have the meanings ascribed thereto in K.S.A. 58-3035, and amendments thereto.
- Sec. 3. (a) Any broker shall have a lien on commercial real estate in the amount of the compensation as agreed upon by the broker and the owner or the owner's agent, if:
- (1) Such real estate is listed with the broker under terms of a written agreement signed by the owner or the owner's agent; and
- (2) the broker or salespersons retained by the broker have provided services that resulted in the procuring of a person or entity ready, willing

John C. Peterson Kansas Land Title Association

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and able to purchase, lease or otherwise accept a conveyance of the commercial real estate as provided by such agreement which were otherwise acceptable to the owner or owner's agent as evidenced by a written agreement signed by the owner or the owner's agent.

- (b) A broker also shall have a lien on such commercial real estate if the broker has a written agreement with a person to represent such person in the purchase, lease or other conveyance to the buyer of such real estate when the broker becomes entitled to compensation pursuant to the written agreement.
- Sec. 4. The notice of any lien filed pursuant to this act shall state the name of the broker claiming the lien, the name of the owner of the real estate, a description of the real estate upon which the lien is being claimed, the amount for which the lien is claimed and the real estate license number of the broker. The notice of lien shall be signed by the broker and the broker shall attest that the information contained in the notice is true and accurate as to the broker's knowledge and belief.
 - Sec. 5. A broker's lien attaches to the commercial real estate when:
- (a) The broker procures a person or entity ready, willing and able to purchase, lease or otherwise accept a conveyance of such real estate upon the terms set forth in the written agreement with the owner or terms otherwise acceptable to the owner or owner's agent, or the broker is entitled to a fee or commission pursuant to a written agreement signed by the owner or the owner's agent; and
- (b) the broker records a notice of the lien in the office of the register of deeds of the county in which the commercial real estate is located and if such lien is filed prior to the actual conveyance or transfer of the commercial real estate subject to such broker's lien.
- Sec. 6. If compensation to a broker is due in installments and a portion of the compensation is due after the conveyance or transfer of the commercial real estate, any claim for a lien for installment payments due after the transfer or conveyance of such real estate may be recorded any time after the transfer or conveyance of the commercial real estate but must be recorded before the date on which the payment is due. Such lien shall be effective as a lien against the commercial real estate only to the extent moneys are still owed to the broker. A single claim for a lien recorded before the transfer or conveyance of the commercial real estate, claiming all moneys due under an installment payment agreement is not valid or enforceable to the extent of the payments due after the transfer or conveyance. The lien attaches for purposes of this paragraph when the claim for lien is recorded.
- Sec. 7. In the case of a lease, the lien must be recorded within 90 days after the lessee takes possession of the property. If written notice of the intention to sign the lease is personally served on the broker entitled

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on behalf of a broker who represented the current owner of the real estate

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to claim a lien at least 10 days before the date of the intended signing of the lease, the claim for lien must be recorded before the date indicated for the signing of the lease. The lien attaches for purposes of this paragraph when the claim for lien is recorded.

Sec. 8. If the broker has a written agreement with a prospective buyer as provided in subsection (b) of section 3, and amendments thereto, the lien attaches when the prospective buyer purchases or otherwise accepts a conveyance or transfer of the commercial real estate and the broker records a notice of the lien within 90 days after the purchase, conveyance or transfer in the office of the register of deeds in the county in which the commercial real estate is located.

Sec. 9. If a lease also includes provisions for a sublease or assignment of lease, the notice of lien must be recorded not later than 90 days after the lessee takes possession of the leased premises. If the transferor personally serves written notice of the intended execution of the lease on the broker entitled to claim a lien at least 10 days prior to the date of the intended execution of the lease, the notice of lien must be recorded before the date indicated in such notice for the execution of the lease. The lien shall attach as of the recording of the notice of lien and shall not relate back to the date of the written instrument.

Sec. 10. If additional compensation is owed to a broker as a result of the exercise of an option to expand the leased premises, the renewal or extension of a lease, the purchase of the property or other transaction pursuant to a written agreement signed by the current owner or tenant, the broker may record its notice of lien at any time after execution of the lease or other written agreement containing such option but not later than 90 days after the occurrence of the transaction for which the additional commission is claimed.

Sec. 11. Any action to foreclose a lien to collect additional compensation must be commenced within two years of the date of the transaction on which the additional compensation is claimed. If the property is sold or otherwise conveyed prior to the date on which additional compensation is due, and if the broker has filed a valid notice of lien prior to the sale or other conveyance of the property, the purchaser or transferee shall be deemed to have notice of and shall take title to the property subject to the notice of lien. If a broker claiming additional compensation fails to record its notice of lien for additional compensation prior to the recording of a deed conveying legal title to the property to the purchaser or transferee, such broker may not claim a lien on the property. The provisions of this subsection shall not limit or otherwise affect claims or defenses a broker, owner or other party may have on any other basis, in law or in equity.

Sec. 12. If a claim for a lien has been filed with the register of deeds

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and a condition occurs that would preclude the broker from receiving compensation under the terms of the broker's written agreement, the broker shall record and provide the owner of record a written release or satisfaction of the lien.

Sec. 13. (a) Within 10 days of recording the notice of lien, the broker shall mail a copy of the notice of the lien to the owner of record of the commercial real estate or the agent thereof at the address of the owner stated in the written agreement on which the claim for lien is based. If no address is given, such notice shall be mailed to the address of the real estate on which the claim of lien is based. If the notice of lien is recorded within 10 days prior to closing, the broker is not required to mail or personally serve a copy of the notice of lien. Mailing a copy of the notice of lien is effective when deposited in the United States mail, with postage prepaid.

(b) The broker's lien shall be unenforceable if mailing or service of a copy of notice of lien does not occur at the time and in the matter required by this section. The broker's lien is void if the broker does not record the lien as provided in this act.

- Sec. 14. (a) A broker may enforce a lien attaching against commercial real estate by filing a petition to foreclose such lien in the district court of the county in which such real estate is located. Failure to file such petition within two years of recording a lien shall extinguish such lien. A claim for a lien extinguished pursuant to this section may not be asserted in subsequent proceedings.
- (b) A foreclosure petition shall contain the name of the broker and the broker's license number, the name of the owner or owners of the real estate, a statement of the terms of the contract or agreement on which the lien is based, the date when the contract or agreement was made, a description of the services performed, the amount due and unpaid, a description of the real estate that is subject to the lien and any other facts necessary for a full understanding of the rights of the parties. The plaintiff shall file the action against all known parties who have an interest in such real estate. A foreclosure action for a lien claimed pursuant to this act shall be brought in the manner provided by article 24 of chapter 60 of the Kansas Statutes Annotated, and amendments thereto.
- (c) Any valid prior recorded liens or mortgages shall have priority over a real estate broker's lien.
- Sec. 15. If a broker claiming a lien pursuant to this act fails to file suit to enforce the lien within 30 days after a properly served written demand of the owner, the lien shall be extinguished. Service of such demand shall be by registered or certified mail, return receipt requested, or by personal service.
 - Sec. 16. If a lien filed pursuant to this act has been paid in full or if

the broker fails to institute a suit to enforce the lien within the time provided by section 8, and amendments thereto, the broker shall acknowledge satisfaction or release of such lien in writing upon written demand of the owner within 30 days after such demand.

Sec. 17. The costs of any proceeding brought to enforce a lien filed pursuant to this act, including reasonable attorney's fees, shall be awarded to the prevailing party or parties.

Sec. 18. This act shall take effect and be in force from and after its publication in the statute book.



February 17, 2005

To: Senate Committee on Judiciary

From: Kathleen Taylor Olsen, Kansas Bankers Association

Re: SB 215: Commercial Real Estate Broker Lien Act

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today with regard to SB 215, which would create a new statutory lien for the commissions of commercial real estate brokers.

It has long been the policy of the Kansas Bankers Association to closely monitor the addition of new statutory liens as they potentially are a competing creditor of a lender and may create a blemish on the title of the property owner that unless satisfied, would prevent transfer of the property with clear title.

We are here today, to respectfully request that the Committee consider amending the bill in two areas.

Provisions for the release of the lien. One of our concerns with the bill is that there are no procedures for filing a release of the lien. There is language in both Sections 8 and 14 that indicates a lien will be "extinguished" if no action has been taken to collect the lien as provided in those sections. In addition, Section 16 attempts to address the case where a lien is paid in full or an action to collect the lien is not filed as directed in Section 8.

We would ask that in these circumstances, the broker would record a lien release with the Register of Deeds in the office where the notice of lien was recorded. It is our hope that the mechanics of this would operate similar to K.S.A. 58-2309a, the mortgage release statute. In other words, when the broker no longer has a claim to the property (the broker has been paid in full or the time for taking action to collect the lien has passed), the broker will be responsible for filing a release of the lien, paying the required fee. This would help to ensure that there would be no unwanted blemishes on the title of the property down the road.

The mortgage release statute does contain an incentive – a penalty - to encourage the lender to release the lien within 30 days after such demand of the owner. Such a provision helps to ensure that the lien does actually get released.

Senate Judiciary

Kansas Bankers Association SB 215: Commercial Real Estate Broker Lien Page Two

These amendments appear beginning on line 2, Page 5 of SB 215. These amendments relate to the release of the lien being filed by the broker with the Register of Deeds.

Discharge of Lien Claim. The second amendment we are proposing appears on Line 43, Page 4 of the bill. This section states that if a broker has been paid in full or if he or she fails to take action to collect the lien within the time period provided in the bill, and upon written demand of the owner, the broker will acknowledge satisfaction of the lien. There may be instances where a broker knows that he or she is not going to take action to collect the broker fee. This decision could occur well before the time period for taking such action has expired. In those instances, the broker may be willing to give the property owner or the lender with a security interest in the property a lien waiver or lien subordination to signify that he or she no longer has a claim to the property.

We believe the statute should acknowledge the possibility that something other than payment in full could discharge the lien of the broker. We respectfully request that the Committee consider adding the language suggested in the attached balloon to cover this possibility.

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and a condition occurs that would preclude the broker from receiving compensation under the terms of the broker's written agreement, the broker shall record and provide the owner of record a written release or satisfaction of the lien.

Sec. 13. (a) Within 10 days of recording the notice of lien, the broker shall mail a copy of the notice of the lien to the owner of record of the commercial real estate or the agent thereof at the address of the owner stated in the written agreement on which the claim for lien is based. If no address is given, such notice shall be mailed to the address of the real estate on which the claim of lien is based. If the notice of lien is recorded within 10 days prior to closing, the broker is not required to mail or personally serve a copy of the notice of lien. Mailing a copy of the notice of lien is effective when deposited in the United States mail, with postage

(b) The broker's lien shall be unenforceable if mailing or service of a copy of notice of lien does not occur at the time and in the matter required by this section. The broker's lien is void if the broker does not

record the lien as provided in this act.

Sec. 14. (a) A broker may enforce a lien attaching against commercial real estate by filing a petition to foreclose such lien in the district court of the county in which such real estate is located. Failure to file such petition within two years of recording a lien shall extinguish such lien. A claim for a lien extinguished pursuant to this section may not be asserted in subsequent proceedings.

- (b) A foreclosure petition shall contain the name of the broker and the broker's license number, the name of the owner or owners of the real estate, a statement of the terms of the contract or agreement on which the lien is based, the date when the contract or agreement was made, a description of the services performed, the amount due and unpaid, a description of the real estate that is subject to the lien and any other facts necessary for a full understanding of the rights of the parties. The plaintiff shall file the action against all known parties who have an interest in such real estate. A foreclosure action for a lien claimed pursuant to this act shall be brought in the manner provided by article 24 of chapter 60 of the Kansas Statutes Annotated, and amendments thereto.
- 36 Any valid prior recorded liens or mortgages shall have priority over 37 a real estate broker's lien.
 - Sec. 15. If a broker claiming a lien pursuant to this act fails to file suit to enforce the lien within 30 days after a properly served written demand of the owner, the lien shall be extinguished. Service of such demand shall be by registered or certified mail, return receipt requested, or by personal service.

Sec. 16. If a lien filed pursuant to this act has been paid in full or if

or otherwise discharged.

1 2	the broker fails to institute a suit to enforce the lien within the time provided by section 8, and amendments thereto, the broker shall seknowly	and section 14
3	edge satisfaction or release of such lien in writing upon written demand	record the
4	Of the owner within 30 days after such demand	
5	Sec. 17. The costs of any proceeding brought to enforce a lien filed	in the office of the register of deads
6	pursuant to this act, including reasonable attorney's fees, shall be awarded to the prevailing party or parties	of the country in which the communication
7	to the prevailing party or parties.	real estate is located.
8	Sec. 18. This act shall take effect and be in force from and after its	real estate is located.
9	publication in the statute book.	

Balloon amendment to SB 147, as proposed by the Attorney General

Session of 2005

SENATE BILL No. 147

By Committee on Judiciary

1-31

AN ACT concerning the limitation of actions; relating to increasing gen-10 eral time limitation; amending K.S.A. 2004 Supp. 21-3106 and re-11 pealing the existing section. 12 13 Be it enacted by the Legislature of the State of Kansas: 14 Section 1. K.S.A. 2004 Supp. 21-3106 is hereby amended to read as 15 follows: 21-3106. (1) A prosecution for murder may be commenced at 16 17 (2) Except as provided by subsections (7) and (9), a prosecution for 18 any of the following erimes must be commenced within five years after its commission if the victim is less than 16 years of age: (a) Indecent 19 20 liberties with a child as defined in K.S.A. 21-3503 and amendments 21 thereto; (b) aggravated indecent liberties with a child as defined in K.S.A. 22 21-3504 and amendments thereto; (e) enticement of a child as defined in K.S.A. 21-3509 and amendments thereto; (d) indecent solicitation of a 23 24 child as defined in K.S.A. 21-3510 and amendments thereto; (c) aggra-25 vated indecent solicitation of a child as defined in K.S.A. 21-3511 and 26 amendments thereto; (f) sexual exploitation of a child as defined in K.S.A. 27 21-3516 and amendments thereto; or (g) aggravated incest as defined in K.S.A. 21-3603 and amendments thereto. 28 29 $\frac{-(3)}{(5)}$ Except as provided in subsection $\frac{(9)}{(5)}$, a prosecution for any 30 crime must be commenced within 10 years after its commission if the 31 victim is the Kansas public employees retirement system. 32 (4) Except as provided by subsections (7) and (9), a prosecution for rape, as defined in K.S.A. 21-3502 and amendments thereto, or aggra-33 34 vated criminal sodomy, as defined in K.S.A. 21-3506 and amendments 35 thereto, must be commenced within five years after its commission. 36 (5) Except as provided in subsection (0), a prosecution for any crime 37 found in the Kansas medicaid fraud control act must be commenced 38 within five years after its commission. 39 (6) Except as provided by subsection (9), a prosecution for the crime 40 of arson, as defined in K.S.A. 21-3718 and amendments thereto, or ag-41 gravated arson, as defined in K.S.A. 21-3719 and amendments thereto, must be commenced within five years after its commission. 42 (7) (a) Except as provided in subsection (9) (5), a prosecution for

[enticement of a child as defined in K.S.A. 21-3509 and amendments thereto]

SB 147

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-any offense provided in subsection (2) or a sexually violent offense as defined in K.S.A. 22-3717, and amendments thereto, must be commenced within the limitation of time provided by the law pertaining to such offense or one year from the date on which the identity of the suspect is conclusively established by DNA testing, whichever is later.

- (b) For purposes of this section, "DNA" means deoxyribonucleic acid.
- (8) (4) Except as provided by subsection (9) (5), a prosecution for any crime not governed by subsections (1), (2), or (3), (4), (5), (6) and (7) must be commenced within two five years after it is committed.
- $\frac{(9)}{(5)}$ The period within which a prosecution must be commenced shall not include any period in which:
 - (a) The accused is absent from the state;
- (b) the accused is concealed within the state so that process cannot be served upon the accused;
 - (c) the fact of the crime is concealed;
- (d) a prosecution is pending against the defendant for the same conduct, even if the indictment or information which commences the prosecution is quashed or the proceedings thereon are set aside, or are reversed on appeal;
- (e) an administrative agency is restrained by court order from investigating or otherwise proceeding on a matter before it as to any criminal conduct defined as a violation of any of the provisions of article 41 of chapter 25 and article 2 of chapter 46 of the Kansas Statutes Annotated which may be discovered as a result thereof regardless of who obtains the order of restraint; or
- (f) whether or not the fact of the crime is concealed by the active act or conduct of the accused, there is substantially competent evidence to believe two or more of the following factors are present: (i) The victim was a child under 15 years of age at the time of the crime; (ii) the victim was of such age or intelligence that the victim was unable to determine that the acts constituted a crime; (iii) the victim was prevented by a parent or other legal authority from making known to law enforcement authorities the fact of the crime whether or not the parent or other legal authority is the accused; and (iv) there is substantially competent expert testimony indicating the victim psychologically repressed such witness' memory of the fact of the crime, and in the expert's professional opinion the recall of such memory is accurate and free of undue manipulation, and substantial corroborating evidence can be produced in support of the allegations contained in the complaint or information but in no event may a prosecution be commenced as provided in this section later than the date the victim turns 28 years of age. Corroborating evidence may include, but is not limited to, evidence the defendant committed similar

acts against other persons or evidence of contemporaneous physical manifestations of the crime. "Parent or other legal authority" shall include but not be limited to natural and stepparents, grandparents, aunts, uncles 4 or siblings.

(10) (6) An offense is committed either when every element occurs, 5 or, if a legislative purpose to prohibit a continuing offense plainly appears, 7 at the time when the course of conduct or the defendant's complicity 8 therein is terminated. Time starts to run on the day after the offense is 9

10 (11) (7) A prosecution is commenced when a complaint or information is filed, or an indictment returned, and a warrant thereon is delivered to the sheriff or other officer for execution. No such prosecution shall be 13 deemed to have been commenced if the warrant so issued is not executed 14 without unreasonable delay.

15 Sec. 2. K.S.A. 2004 Supp. 21-3106 is hereby repealed.

16 Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

SENATE BILL No. 129

By Committee on Judiciary

1-28

AN ACT concerning consumer protection; relating to warranty modification or limitation; workmanlike performance; amending K.S.A. 2004 Supp. 50-639 and repealing the existing section.

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

Section 1. K.S.A. 2004 Supp. 50-639 is hereby amended to read as follows: 50-639. (a) Notwithstanding any other provisions of law, with respect to property which is the subject of or is intended to become the subject of a consumer transaction in this state, no supplier shall:

(1) Exclude, modify or otherwise attempt to limit the implied warranties of merchantability as defined in K.S.A. 84-2-314, and amendments thereto, and fitness for a particular purpose, as defined in K.S.A. 84-2-315, and amendments thereto, or the implied warranty of workmanlike performance; or

(2) exclude, modify or attempt to limit any remedy provided by law, including the measure of damages available, for a breach of implied warranty of merchantability and, for a breach of fitness for a particular pur-

pose, or for a breach of workmanlike performance.

(b) Notwithstanding any provision of law, no action for breach of warranty with respect to property subject to a consumer transaction shall fail because of a lack of privity between the claimant and the party against whom the claim is made. An action against any supplier for breach of warranty with respect to property subject to a consumer transaction shall not, of itself, constitute a bar to the bringing of an action against another person.

(c) A supplier may limit the supplier's implied warranty of merchantability and fitness for a particular purpose with respect to a defect or defects in the property only if the supplier establishes that the consumer had knowledge of the defect or defects, which became the basis of the bargain between the parties. In neither case shall such limitation apply to liability for personal injury or property damage.

(d) Nothing in this section shall be construed to expand the implied warranty of merchantability as defined in K.S.A. 84-2-314, and amendments thereto, to involve obligations in excess of those which are appropriate to the property.

PROPOSED AMENDMENT SENATOR VRATIL February 21, 2005 Senate Judiciary

(b) For the purposes of this section, "implied warranty of workmanlike performance" means that in every written or oral contract for work or services, the supplier of such work or services has a duty to perform such work or services diligently and in a manner consistent with that level of care, skill, practice and judgment ordinarily exercised by other suppliers in performing work or services of a similar nature under similar conditions in the locale where such work or services are performed.

(and re-letter the remaining subsections.)

HEIN LAW FIRM, CHARTERED

5845 SW 29th Street, Topeka, KS 66614-2462 Phone: (785) 273-1441 Fax: (785) 273-9243

Ronald R. Hein Attorney-at-Law Email: rhein@heinlaw.com

February 21, 2005

Sen. John Vratil, Chairman Senate Judiciary Committee 300 SW 10th Street 522-S Topeka, KS 66612

Re: SB 75 Obesity Frivolous Lawsuit

Dear Sen. Vratil:

As I informed you last Friday, I have negotiated with representatives of the Kansas Trial Lawyers Association on behalf of the Obesity Frivolous Lawsuit Coalition to discuss the KTLA's concerns about SB 75. They provided proposed amendments, we responded agreeing to some and proposing ways to address the others. Both sides have agreed to several proposed amendments. However, there are two KTLA amendments which we cannot agree to.

I have attached a copy of balloon amendments which we have agreed to. I have attached a narrative that describes in greater detail those amendments if you or your committee desire to review the background on those amendments.

The two concerns still unresolved are as follows:

- 1. Section 1(b). KTLA wants to strike "associated with" on page 1, line 20, and replace with "arising from". Our response is that the term "associated with" is the term used by the National Academy of Sciences (NAS) in dealing with medical conditions. The NAS guidelines will assist judges and the parties to litigation to determine medical conditions associated with obesity. We strongly oppose this proposed KTLA amendment.
- 2. Also in Section 1(b), the KTLA wants to strike "or other generally known condition allegedly caused by or allegedly". At the hearing, they testified that such language is so broad as to include food additives that could harm a plaintiff. As noted in the attachment, we agreed to remove food additives from the definition of food. However, the KTLA still wants to remove that language so that the bill will ONLY apply to civil liability for a suit where there is weight gain or obesity. We oppose that amendment because we are equally concerned about lawsuits that allege that long term consumption of food causes other medical conditions. (A good example of our concern here is a lawsuit alleging that long

term consumption of red meat causes heart failure.; or long term consumption of movie theater popcorn causes arteriosclerosis.) The language in SB 75 only applies to "generally known conditions", so there still would be liability for hidden or unknown conditions. The KTLA was unable to give us, in our opinion, a good example of how this provision could be interpreted to apply beyond the types of examples we cited. They indicated that they generally oppose immunity, and are afraid there **might** be a situation which might occur if that language is not removed, but could not give us specifics.

The Coalition feels that we have made a good faith effort to respond to all of the concerns raised by the KTLA. We have agreed with the proposed KTLA amendments requested by the KTLA, negotiated with us, and agreed to by both sides. We do not agree to the two additional amendments set forth above, which the KTLA may offer and which we obviously oppose and respectfully request be defeated

I would be happy to walk through the amendments with which we have agreed briefly, and to address the two unagreed proposed amendments on Monday morning if you desire.

Sincerely,

Ronald R. Hein

Legislative Counsel

Kansas Restaurant and Hospitality Association

Kansas Beverage Association

Kansas Food Dealers Association

and on behalf of the Obesity Frivolous Lawsuit

Coalition

cc: Senate Judiciary Committee Members, with Attachments: Obesity Frivolous Lawsuit Coalition members, with Attachments:

SB 75 Agreed to Amendments to meet KTLA Objections

Session of 2005

SENATE BILL No. 75

By Committee on Judiciary

1-21

AN ACT concerning civil procedure; relating to immunity from liability for claims relating to weight gain or obesity.

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

Section 1. (a) This section shall be known and may be cited as the obesity frivolous lawsuit act.

- (b) Except as provided in subsection (c), a manufacturer, producer, packer, distributor, carrier, holder, seller, marketer, or advertiser of a food (as defined in Section 201 (f) of the federal food, drug and cosmetic act (21 U.S.C. 321 (f)) as of the effective date of this act), or an association of one or more such entities, shall not be subject to civil liability for any claim arising out of weight gain, obesity, a health condition associated with weight gain or obesity, or other generally known condition allegedly caused by or allegedly likely to result from long-term consumption of food.
- (c) Subsection (b) shall not preclude civil liability where the claim of weight gain, obesity, health condition associated with weight gain or obesity, or other generally known condition allegedly caused by or allegedly likely to result from long-term consumption of food is based on:
- (1) A material violation of an adulteration or misbranding requirement prescribed by statute or rules and regulations of this state or of the United States and the claimed injury was proximately caused by such violation; or
- (2) any other material violation of federal or state law applicable to the manufacturing, marketing, distribution, advertising, labeling or sale of food, provided that such violation is knowing and willful and the claimed injury was proximately caused by such violation.

(d) As used in this section:

(1) "Claim" means any claim by or on behalf of a natural person, as well as any other claim lawfully asserted by or on behalf of such person.

(2) "Generally known condition allegedly caused by or allegedly likely to result from long-term consumption" means a condition generally known to result or reasonably likely to result from the cumulative effect of consumption, and not from a single instance of consumption.

(3) "Knowing and willful" means that: (A) The conduct constituting

of food

of food. For the purposes of this definition only, the term "food" shall not include a food additive (as defined in Section 201(s)) of the federal, food, drug and cosmetic act (21 U.S.C. 321(s)) as of the effective date of this act.

food, drug, and cosmetic act as of the effective date of this act

the

the violation was committed with the intent to deceive or injure consumers or with actual knowledge that such conduct was injurious to consumers; and (B) the conduct constituting the violation was not required by state, federal, or local laws, rules and regulations, resolutions or ordinances.

- (e) In any action exempted under subsection (c), the complaint initiating such action shall state with particularity the following: The statute, rules and regulations or other law of this state or of the United States that was allegedly violated; the facts that are alleged to constitute a material violation of such statute or rules and regulations, and the facts alleged to demonstrate that such violation proximately caused actual injury to the plaintiff. In any action exempted under subsection (c) (2), in addition to the foregoing pleading requirements, the complaint initiating such action shall state with particularity facts sufficient to support a reasonable inference that the violation was with intent to deceive or injure consumers or with the actual knowledge that such violation was injurious to consumers.
- (f) In any action exempted under subsection (c), all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss unless the court finds upon the motion of any party that discovery is necessary to preserve evidence or to prevent undue prejudice to that party. During the pendency of any stay of discovery pursuant to this subsection, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations, including electronically recorded or stored data, and tangible objects that are in the custody or control of such party and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the code of civil procedure.
- (g) The provisions of this section shall apply to all covered claims pending on July 1, 2005 and all claims filed thereafter, regardless of when the claim arose.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

filed after the effective date of this act,

Kansas Register

the individual requirements i

subsection (c) (2) have bee

satisfied.

The provisions of this act are severable. If any portion of this act is declared unconstitutional or the application of any part of this act to any person or circumstance is held invalid, the remaining portions of the act and their applicability to any person or circumstance shall remain valid and enforceable. Sec. 3.

Explanation of Agreed to Amendments to SB 75

In Section 1(b), the KTLA wanted to strike "or other generally known condition allegedly caused by or allegedly". At the hearing on SB 75, they testified that such language is so broad as to include food additives that could harm a plaintiff. We agreed to remove from the definition of "food" "a food additive" as defined in the federal food, drug, and cosmetic act. (See balloon amendment at page 1, line 42.)

The KTLA wanted to initially remove "federal or state law" on page 1, line 32, and replace it with "FDA", which I interpreted to mean the "federal food, drug and cosmetic act". We agreed to that amendment. Later, the KTLA requested to reinsert "or state law" and to add "as of the effective date of this act" after "food, drug, and cosmetic act". We agreed to that new request as well.

The KTLA was concerned that "single instance of consumption" on page 1, line 42 is not defined. We proposed striking that clause and inserting "of food" so there is no reference to the "single instance". The KTLA was satisfied with such amendment.

The KTLA wanted to remove or rewrite subsection 1(e) which requires pleasing with particularity. Since this is the section that requires the plaintiff to establish the basis for an exception to subsection 1(b) pursuant to subsections 1(c)(1) or (2), we felt that it was appropriate for the plaintiff to indicate the statutes being violated or the nature of the material violation of the food, drug, and cosmetic act, so we want to preserve that subsection. We also note that K.S.A. 60-209(b) requires "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be state with particularity". To restate that requirement in subsection 1(e) does not hurt and makes it clear in this law what the plaintiff must aver. The KTLA responded favorably to our amendment and agreed not to proceed with their proposed amendment.

Also in subsection 1(e), the KTLA was concerned about the language "intent to deceive or injure" on page 2, line 15. Our response was to delete that and the surrounding language and just to substitute language that makes it clear that if the plaintiff is suing pursuant to subsection 1(c)(2), the plaintiff must "state with particularity facts sufficient to support a reasonable inference that the individual requirements in subsection (c)(2) have been satisfied". The KTLA responded favorably to our amendment and agreed to accept our amendment in lieu of their original proposed amendment.

The KTLA wanted to remove subsection (f) on page 2, which provides for a stay of discovery. They wanted to use existing civil procedure motions to stay discovery. We opposed the removal of the stay of discovery provision, and noted that the judge is still given the power refuse to stay discovery if "the court finds upon the motion of any party that discovery is necessary to preserve evidence or to prevent undue prejudice to that party." The KTLA agreed not to delete that provision.

The KTLA expressed concerns, also expressed by Sen. Vratil at the hearing, regarding the retroactivity of subsection (g) on page 2. Although we believe the provision is arguably appropriate because we do not believe there is a property right to bring the particular claims being protected by this proposed legislation, we have agreed to remove the retroactivity.

The KTLA had, as I understand it, suggested we could have the effective date of the act occur on the date of publication in the Kansas Register rather than upon publication in the statute books, and we have both agreed to that.

We have proposed the insertion of a severability clause, and the KTLA has agreed to that.

MEMORANDUM

To:

Chairman John Vratil

Members of the Senate Committee on Judiciary

From:

Callie Jill Denton on behalf of the Kansas Trial Lawyers Association

Date:

February 21, 2005

RE:

SB 75

On behalf of the Kansas Trial Lawyers Association, I appreciate the opportunity to provide the Committee with information on SB 75.

KTLA has worked with the proponents of the bill, particularly the National Restaurant Association, to attempt to reach a compromise, and we'd like to thank the proponents for their efforts. Together we have been successful in crafting consensus language but for two remaining issues. KTLA respectfully requests that the Committee adopt KTLA'S suggested amendments as follows:

Section 1 (b). Except as provided in subsection (c), a manufacturer, producer, packer, distributor, carrier, holder, seller, marketer, or advertiser of a food (as defined in Section 201 (f) of the federal food, drug and cosmetic act (21 U.S.C. 321 (f)) as of the effective date of this act), or an association of one or more such entities, shall not be subject to civil liability for any claim arising out of weight gain, obesity, or a health condition associated with arising out of weight gain or obesity, resulting or other generally-known condition allegedly caused by or allegedly likely to result-from the long-term consumption of food.

KTLA's first concern is the language "associated with" vs. "arising out of". We request that "arising out of" be adopted because we believe it is clearer.

KTLA's second concern is the language "or other generally known condition allegedly caused by or allegedly likely to result". KTLA respectfully requests that this language be deleted.

Senate Judiciary

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SB 75 as written creates two levels of immunity. The first is immunity for claims arising out of weight gain, obesity, or a health condition associated with weight gain or obesity. KTLA has accepted the first level of immunity as very narrow. However, the second layer of immunity extends more broadly and would not require the condition of obesity to be present for immunity to attach. KTLA believes there is no reason to extend broad immunity for "other generally known conditions" to the entities outlined in the bill for the following reasons:

- ➤ <u>No lawsuits filed.</u> KTLA is not aware of any lawsuits filed in Kansas—or anywhere in the nation—where there have been damages alleged for health conditions caused by the consumption of food that are not related to obesity.
- Other states have rejected the language. Other states that have chosen to enact obesity immunity laws have not extended a second layer of immunity for "other generally known conditions"—these states include Idaho, Florida, Illinois, Louisiana, South Dakota, and Washington.
- > Broader than the title of the bill. The second layer of immunity is much broader than the title of the bill "The obesity frivolous lawsuit act" because it will extend immunity to situations where obesity is not the basis of or one of the elements of the plaintiff's claim.
- ➤ <u>Distinguishable from "obesity".</u> By passage of this bill, the Committee seeks to establish a policy that people that get fat must be accountable for the actions that made them fat and they will have no redress against the producers/sellers of the food that made them fat. "Other generally known conditions" are not as visible as obesity—a person can have high blood pressure or heart disease and may not be aware until their health is significantly damaged. In this way, obesity is distinguishable from "other generally known conditions".
- No duty on the producers/sellers to disclose. By passage of this bill, the Committee is not increasing the duties owed by producers/sellers to inform their customers of the healthful and nonhealthful aspects of the food they sell (such as enacting a companion law that requires restaurants to disclose caloric and nutritional information to help patrons understand the specific nutritional value of the foods they are consuming). Instead, the proponents rely solely on the fact that plaintiffs must know nutritional information because it is available from other sources ("generally known"). Many times restaurants advertise menu items as "Atkins-Friendly" or "Heart Healthy" yet by asking for immunity the proponents are not willing to be accountable for these statements.

KTLA is also concerned by the fact that the language is a broad immunity clause. Kansas citizens have a constitutional right to access the judicial branch of the government to seek redress, and the Legislature should act to protect this right. Immunity limits access to the

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courts and as a result is appropriate in only the very narrowest of situations. KTLA supports the civil justice system which includes courts, juries, and attorneys and we believe that our judicial system provides an appropriate check against lawsuits without merit. In 2003 only 6% of the cases filed were tort/personal injury cases, and of those that went to trial the majority (58%) were motor vehicle accidents. Another 17% were medical malpractice. KTLA believes that this is evidence that the Kansas court system is working and the Legislature does not need to enact broad immunity clauses.

Thank you for the opportunity to provide you with these policy considerations. KTLA respectfully requests that our language be adopted if the bill is passed by the committee.

Amendments proposed by the Kansas Trial Lawyers Association Senate Judiciary Committee February 21, 2005

SENATE BILL No. 75

AN ACT concerning civil procedure; relating to immunity from liability for claims relating to weight gain or obesity.

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

Section 1. (a) This section shall be known and may be cited as the obesity frivolous lawsuit act.

- (b) Except as provided in subsection (c), a manufacturer, producer, packer, distributor, carrier, holder, seller, marketer, or advertiser of a food (as defined in Section 201 (f) of the federal food, drug and cosmetic act (21 U.S.C. 321 (f)) as of the effective date of this act), or an association of one or more such entities, shall not be subject to civil liability for any claim arising out of weight gain, obesity, or a health condition associated with arising out of weight gain or obesity, resulting or other generally known condition allegedly caused by or allegedly likely to result-from the long-term consumption of food.¹
- (c) Subsection (b) shall not preclude civil liability where the claim of weight gain, obesity, health condition associated with weight gain or obesity,
- or other generally known condition allegedly caused by or allegedly likely to result from long-term consumption of food is based on:
- (1) A material violation of an adulteration or misbranding requirement prescribed by statute or rules and regulations of this state or of the United States and the claimed injury was proximately caused by such violation; or
- (2) any other material violation of federal food, drug, and cosmetic act in effect as of the effective date of the act or state law applicable to

the manufacturing, marketing, distribution, advertising, labeling or sale

of food, provided that such violation is knowing and willful and the

¹ Shaded area indicates language that KTLA and the proponents of HSB 75 were not able to reach consensus upon.

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- (d) As used in this section:
- (1) "Claim" means any claim by or on behalf of a natural person, as well as any other claim lawfully asserted by or on behalf of such person.
- (2) "Long term consumption of food" Generally known conditionallegedly caused by or allegedly likely to result from long-term-consumption" means a condition generally known to result or reasonably likely to result from the cumulative effect of consumption, and not from a single instance of consumption. For purposes of this definition only, "food" shall not include a food additive (as defined in Section 201(s)) of the federal food, drug and cosmetic act (21 U.S.C. 321(s).
- (3) "Knowing and willful" means that: (A) The conduct constituting the violation was committed with the intent to deceive or injure consumers
- or with actual knowledge that such conduct was injurious to consumers;
- and (B) the conduct constituting the violation was not required by state, federal, or local laws, rules and regulations, resolutions or ordinances.
- (e) In any action exempted under subsection (c), the complaint initiating
- such action shall state with particularity the following: The statute, rules and regulations or other law of this state or of the United States that was allegedly violated; the facts that are alleged to constitute a material
- violation of such statute or rules and regulations, and the facts alleged
- to demonstrate that such violation proximately caused actual injury to the plaintiff. In any action exempted under subsection (c) (2), in addition
- to the foregoing pleading requirements, the complaint initiating such action shall state with particularity facts sufficient to support a reasonable inference that the violation was with intent to deceive or injure
- consumers or with the actual knowledge that such violation was injurious
- to consumers the individual requirements in subsection (c) (2) have been satisfied.

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dismiss unless the court finds upon the motion of any party that discovery

is necessary to preserve evidence or to prevent undue prejudice to that

party. During the pendency of any stay of discovery pursuant to this subsection, unless otherwise ordered by the court, any party to the action

with actual notice of the allegations contained in the complaint shall treat

all documents, data compilations, including electronically recorded or stored data, and tangible objects that are in the custody or control of such

party and that are relevant to the allegations, as if they were the subject

of a continuing request for production of documents from an opposing

party under the code of civil procedure.

(g) The provisions of this section shall apply to all covered claims filed after the effective date of the act pending on July 1, 2005 and all claims filed thereafter, regardless of when the claim arose.

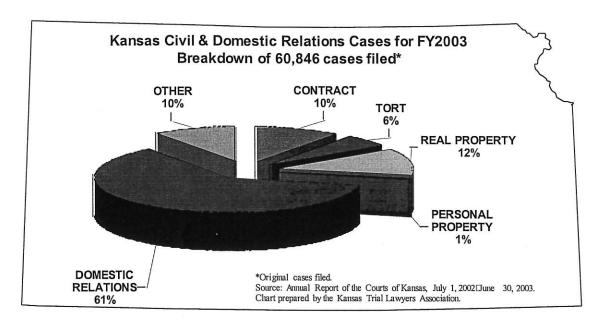
Sec. 2. This act shall take effect and be in force from and after its publication in the statute book Kansas Register.

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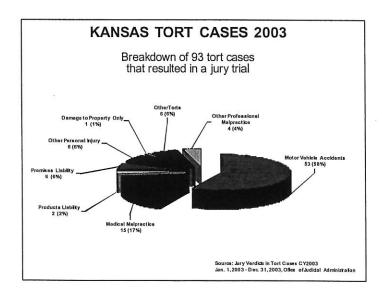
REALITY CHECK

There is no "litigation crisis" in Kansas

Only 6% of cases filed in Kansas are torts.



- √ Only 6% of cases filed in Kansas are torts, or personal injury cases.
- √ 93 tort cases were decided by juries in 2003, down from 112 cases in 2002 and 135 cases in 2003.
- √ More than half of all tort cases involve auto accidents.
- √ The median award in 2003 was \$23,416.
- √ Punitive damages were awarded in only 3 cases in 2003. All 3 cases involved auto accidents.



Check Your Facts Before You Change the Law