

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairman John Vratil at 9:35 a.m. on March 24, 2003, in Room 123-S of the Capitol.

All members were present except: Senator Allen (E)

Committee staff present: Mike Heim, Kansas Legislative Research Department
Lisa Montgomery, Office of the Revisor of Statutes
Dee Woodson, Committee Secretary

Conferees appearing before the committee:

Chris Schneider, Assistant District Attorney, Wyandotte County
Kevin Graham, Assistant Attorney General
Kathy Porter, Office of Judicial Administration
Bob Totten, Kansas Contractors Association
John D. Sherwood, Sherwood Construction Co., Wichita
Will Larson, General Counsel, Associated General Contractors of Kansas
George Barbee, Kansas Consulting Engineers
SueAnn Schultz, Vice President & General Counsel, The IMA Financial Group, Inc.
Mark Wilkerson, IMA, Topeka (written only)
John Cassidy, Chief Council for the Kansas Department of Transportation
Trudy Aron, American Institute of Architects
Gus Meyer, Rau Construction Co., Overland Park, KS
Larry Magill, Kansas Association Insurance Agents
Cory Peterson, Associated General Contractors of Kansas (written only)
Chris Wilson, Kansas Building Industry Association (written only)
Woody Moses, Kansas Ready Mix Concrete Association
Roy Farwell, Union Pacific Railroad
John T. Frederick, The Boeing Co. (written only)

Others attending: see attached list

HB 2312 - Time limitations for defendant to be brought promptly to trial

Chairman Vratil opened the hearing on **HB 2312**. Chris Schneider, Assistant District Attorney for Wyandotte County, testified in support of **HB 2312**, and stated that current statute sets specific time limits in which a defendant must be brought to trial, but leaves in confusion the question of what time limits apply when a defendant causes a delay in the trial. He explained how the problem arises in a couple of different ways, i.e. when a defendant fails to appear for trial or a pretrial hearing set after arraignment. He said the same situation arises when the issue of a defendant's competency arises and his or her case is approaching trial. Mr. Schneider explained the legislation, as originally proposed, would give the state 90 days after a defendant was arrested on a bench warrant or after competency had been ascertained to get the defendant brought to trial. He said the House amended the legislation to keep the law the same as it is currently when a case is continued at the last minute because of a question of competency. He requested passage of this legislation, with an amendment to give a set number of days to bring a defendant to trial after competency is determined. (Attachment 1)

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Kevin Graham, Assistant Attorney General, testified as a neutral conferee, and said that the original bill language was designed to provide greater specificity to the courts and attorneys regarding when a criminal trial must take place in cases where certain types of delays occur. He stated that the intent of **HB 2312** was to prevent ambiguity, to help insure defendants are brought to trial in a timely fashion, and to protect the rights of defendants. He explained that the amendments the House Committee adopted may create substantial confusion for criminal justice practitioners, and could actually result in certain criminal defendants being set free without ever standing trial. Mr. Graham stated that the Attorney General would like to see the House Committee amendments to **HB 2312** removed and the bill returned to the original language so that he can once again support the bill. (Attachment 2)

Kathy Porter, Office of Judicial Administration, appeared before the Committee in opposition to **HB 2312** as amended by the House Committee, and submitted a letter from Chief Judge Larry Solomon of the 30th Judicial District, who is President of the Kansas District Judges Association (KDJA). Judge Solomon urged the Committee to delete the House Committee amendments to **HB 2312**. (Attachment 3)

Following brief discussion, the Chairman closed the hearing on **HB 2312**.

HB 2154 - Construction contracts; indemnification agreements

Chairman Vratil opened the hearing on **HB 2154**. Bob Totten, Public Affairs Director for the Kansas Contractors Association, testified in support of **HB 2154**, and said this bill provides that each part should be responsible for their own acts of negligence, and not be allowed by operation of a contract provision to shift their own liability. He stated that Kansas is a comparative negligence state. These types of hold harmless/indemnification provisions operate as a contractual mechanism to shift liability and circumvent state law. (Attachment 4)

John D. Sherwood, Corporate Counsel for Sherwood Construction Co., spoke in favor of **HB 2154**. He said that indemnity clauses have been a long time problem in the insurance, construction, and legal communities. There are 36 states which have similar statutes outlawing indemnification clauses. He stated that it is only fair and equitable to pass this proposed legislation so that each party takes responsibility for its own negligent acts and misdeeds. (Attachment 5)

Will Larson, General Council for the Associated General Contractors of Kansas, testified in support of **HB 2154**. He explained that the bill would outlaw indemnity provisions in constructions contracts which require one part, to indemnify the other party for the others own negligence. These types of indemnity provisions are called exculpatory indemnity clauses. He stated this bill would not affect or outlaw standard indemnity provisions which would, for example, require a contractor to indemnify the owner for the owner's liability for damage caused to others as a result of the contractor's negligence. (Attachment 6)

George Barbee, Executive Director of the Kansas Consulting Engineers, appeared before the Committee to testify in favor of **HB 2154**. He said that contractual indemnification provisions, like other provisions of an agreement between a client and a design professional, establish rights and obligations for the parties and may shift risk from one party to another. He stated this bill would prevent the inequity of some clients demanding that designers accept risk that is far beyond that which is insurable by limiting a

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designer to being held responsible for professional negligence. ([Attachment 7](#))

SueAnn Schultz, Vice President and General Counsel for The IMA Financial Group, Inc., testified in favor of **HB 2154** as it represents fair and reasonable legislation ensuring that each party bear responsibility for their own acts of negligence. She gave examples of liability shifting that is currently taking place. ([Attachment 8](#))

Mark Wilkerson, IMA, Topeka, submitted written testimony in support of HB 2154. ([Attachment 9](#))

John Cassidy, Chief Counsel for the Kansas Department of Transportation (KDOT), spoke in support of **HB 2154**. He said that KDOT has spent numerous hours in recurring contract negotiations with railroad owners who wish to force KDOT into incorporating these indemnification clauses into KDOT's contracts. He stated that it is KDOT's view that such indemnification provisions are neither fair nor a proper method of risk allocation, and KDOT has not acceded to the demand for such indemnification clauses in its contracts. Mr. Cassidy added that it is KDOT's understanding that the majority of Kansas contractors do not have sufficient assets to absorb the costs incurred by another party's negligence, especially another party over which the contractor has no control. ([Attachment 10](#))

Trudy Aron, Executive Director of the American Institute of Architects in Kansas, testified in favor of **HB 2154**. She said the bill was good public policy. It says that one cannot pass one's own negligence to someone else. She stated that architects, engineers, and contractors each insure themselves for their own actions, but should not be asked to shoulder risks for which they have no responsibility or control. Ms. Aron reiterated that the bill was good public policy. ([Attachment 11](#))

Gus Meyer, President of Rau Construction Company in Overland Park and Chairman of the Builders Association, testified in support of **HB 2154**. He stated that this legislation would render unenforceable indemnification provisions in construction contracts that require the promisor (contractor) to hold harmless, indemnify, or defend the promisee (owner) or others against liability for damages caused by the promisee's own negligence. He said these new indemnification provisions defy common sense as well as ethical business practices. ([Attachment 12](#))

Larry Magill, representing the Kansas Association of Insurance Agents, spoke in favor of **HB 2154**. He pointed out that if these types of indemnity agreements are allowed to stand, they will undermine the exclusive remedy of the Workers Compensation Act through the "back door". ([Attachment 13](#))

Corey Peterson, Executive Vice President of the Associated General Contractors of Kansas, Inc., submitted written testimony in support of **HB 2154**. ([Attachment 14](#))

Chris Wilson, Government Affairs Director of Kansas Building Industry Association, submitted written testimony in support of **HB 2154**. ([Attachment 15](#))

Woody Moses, Managing Director of the Kansas Aggregate Producers' Association and the Kansas Ready Mixed Concrete Association, testified as a neutral party on **HB 2154**. He stated that as an association their members have not taken a position on **HB 2154**, but if the committee considers it good public policy,

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his association urges consideration of the submitted amendment attached to his written testimony. He explained the amendment would expand the definition of construction contracts to clearly include subcontracts and purchase orders. (Attachment 16)

Roy Farwell, General Attorney for the Union Pacific Railroad, testified in opposition to **HB 2154**. He stated that the bill will not result in the gains envisioned by the proponents and will end up having adverse consequences. He said that indemnity against one's own negligence is the principle upon which liability insurance is founded. Mr. Farwell testified that the Kansas courts have rejected indemnity clauses in certain specific abusive cases, such as those involving vast disparity of bargaining power, but have otherwise held that, when fairly bargained for, they do not violate public policy. He said the bottom line is that it does not make sense for a railroad, or any party, to be forced to permit contractors onto their property without the ability to insist that the contractors bear the responsibility for accidents that would not have occurred but for their presence. (Attachment 17)

John Frederick, Government Relations Manager for The Boeing Company, submitted written testimony in opposition of **HB 2154**. (Attachment 18)

Committee discussion and questions regarded worker's compensation issues, that railroad workers are not covered by the Workers Compensation Act but the Federal Employers Liability Act, why the railroads don't purchase their own insurance, what the approximate cost of insurance is for contractors, and that insurance policies are available .

Chairman Vratil announced that he does not intend to work this bill this session, but does not intend to let this issue die. He said that this bill presents a significant issue of public policy for the Legislature. It also presents another issue of public policy which is even more significant. It asks the Legislature to get involved in specifying what provisions can and cannot be placed inside contracts. Chairman Vratil stated that heretofore the Legislature has not shown significant inclination to get involved in matters between private contracting parties, and he thinks that is a good thing for the most part. He explained that he wants to give the interested parties in this issue the opportunity to resolve their own problem over the next year and before the commencement of the 2004 legislative session. The Chairman intends to work with KCCI and some other parties to convene a meeting among all the interested parties to give them an opportunity to arrive at a satisfactory solution; one that would be satisfactory to both the owners as well as the contractors. The Chair said that he would suggest to those parties that the solution they would arrive at will probably be much better than the solution the Legislature arrives at, because the Legislature's solution will be a win or lose solution for the parties. He encouraged the interested parties to enter into those discussions in good faith. Chairman Vratil stated that he will coordinate at least the initial meeting, and then let the KCCI take it from there. He told the Committee members that was his intention with respect to this bill this session. He clarified that if the parties are not able to arrive at a satisfactory solution, the bill will be alive next year and he assured everyone that it would be taken up then for final action on this bill.

The meeting adjourned at 10:32 a.m. The next scheduled meeting is March 25, 2003.

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