

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 A.M. on February 10, 2005, in Room 123-S of the Capitol.

All members were present except:

Derek Schmidt- excused

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:

Edward P. Cross, Executive Vice President, Kansas Independent Oil and Gas Association

Stanley Jackson, Senior Vice President, Insurance Planning, Inc.

Kathy Olsen, Kansas Bankers Association

Matthew Goddard, Vice President, Heartland Community Bankers Association

William Larson, General Counsel to Associated General Contractors of Kansas

Woody Moses, Managing Director of the Kansas Ready Mixed Concrete Association

Others attending:

See attached list.

Chairman Vratil opened the meeting. There were no bill introductions.

Chairman Vratil opened the hearing on **SB 97**.

**SB 97--Bill by Financial Institutions and Insurance Construction contracts; indemnification agreements**

Proponents:

Ed Cross testified on behalf of the Kansas Independent Oil and Gas Association in support of the bill. The bill amends K.S.A. 2004 Supp. 16-121 to include oil and gas exploration and production activities in the definition of a construction contract. Mr. Cross stated that the bill augments last year's **HB 2154** which addressed indemnification provisions for construction contracts along with other railroad issues. The bill would disallow any hold harmless or indemnification agreement that called for a contractor to protect the operator if a claim of negligence were made against the operator. Mr. Cross stated the Association's goal is to make the Master Service Agreement what it started out being, and to eliminate what is above and beyond what the basic agreement did. (Attachment 1)

Stanley Jackson, testified on behalf of Insurance Planning, Inc., and stated that the one asked to assume the risk has the insurance and if there is a loss, then the premium goes up. (Attachment 2)

Chairman Vratil stated that the bill is basically **HB2154** that the Governor signed into law last year, with the oil and gas industry added to it. They are asking for the same treatment as the railroad industry received in the House bill. Additionally, the Small Truckers Association is asking for the same treatment. Chairman Vratil stated he intends to ask for an interim study on whether the public policy of Kansas should permit one party to indemnify another party for that other party's negligence.

Chairman Vratil closed the hearing on **SB 97** and opened the hearing on **SB 112**.

**SB 112--Materialman's liens; priority of claims; property under construction**

Proponents:

Kathleen Taylor Olsen, representing the Kansas Bankers Association, stated she brought a guest, Dennis Hadley of the Dennison State Bank in Holton, in case there were questions. The bill amends several statutes relating to the priority of materialman's liens. K.S.A. 60-1101 establishes the basis for determining priority of claims against property under construction. The requested change in lines 30-32, page 1, states that materialmans' liens are measured from the date that the earliest unpaid lien holder begins work on a property,

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and not the date work began by a party who has been paid in full. The second change also establishes the priority date for all other lien holders. Ms. Olsen stated that a recent court case, *Mutual Savings Association vs. Res/Com Properties*, cast doubt on the reliability of K.S.A. 60-1101. The court decision indicated that the priority date for all subsequent lien holders under the law could be established by a contractor or subcontractor who has been paid in full and no longer has a claim on the property, and that work that is not visible can establish the priority date for all other subsequent lien holders under the law. (Attachment 3)

Ms. Olsen stated that the intention of the bill is to ensure that improvements to a property are visible. A contractor should not be able to stick a sign in the ground, perform no work, and yet, because of the sign, be considered as having established visible work on the premise.

Chairman Vratil questioned whether an alternative should be to allow anyone that provides labor, equipment or supplies to a job site to file a simple one-page notice of lien with the Register of Deeds. That would then be considered public notice to the world, including any lender, that the lender may have reason to be concerned about a potential lien on the property. Ms. Olsen said that is what happens in Nebraska, and might solve the problem.

Senator Bruce cited K.S.A.60-1103 (A) which reads “ Any supplier, sub-contractor or any other person furnishing labor, equipment, materials or supplies, used or consumed at the sight of the property subject to lien, under agreement with the contractor, or sub-contractor or owner contractor may obtain a lien for the amount due in the same manner and to the same extent as the original contractor.” He questioned if there still would be some conflict, because that is what the court relies on to place liens subsequent after the mortgage has been placed, and that was how sub-contractors leapfrog ahead in front of the mortgage as the first unsatisfied lien holder. Ms. Olson stated that it was her understanding that by amending K.S.A. 60-1101, which is the contractors sub-section, also affects K.S.A. 60-1103. Ms. Olsen stated she would have the attorneys review this.

Senator Bruce gave another scenario of a contractor that comes in, does work, perhaps the site runs out of money so they get a mortgage on the project. The lending institution comes in, sees the concrete is poured, and they go ahead and pay off the first contractor, then other contractors come in later. Senator Bruce was concerned that the understanding would be that the other subcontractors would go ahead of the first mortgage. Ms. Olsen stated that currently, and what happened in the *Mutual* case was, the lending institution paid off the contractor that came before the mortgage lender, the lender obtained a lien assignment, and the court said that everyone still gets to piggyback relief off of the original lien because the lender didn't get a lien waiver. In fact the lender needed to obtain lien waivers from everyone. Senator Bruce asked if this would only come into play if the first contractor was unsatisfied, or whether he was paid or not. Ms. Olsen stated that this is the problem. The norm is that before a mortgage is given, any work done prior to the mortgage being effective is paid for, so that there are no prior liens and the institution lending the money is the first lien holder.

Matthew Goddard, testifying on behalf of the Heartland Community Bankers Association, stated the *Mutual* case upset the long-term understanding of the law as it relates to priority of materialman's liens. Additionally, the *Mutual* Case clouded the issue of what is “lienable” work, and identified seven standards of what constitutes lienable work. (Attachment 4)

### Opponents:

William Larson, representing the Associated General Contractors of Kansas (AGC), testified that the AGC opposes the bill. The AGC takes the position that the amendments proposed to the lien laws are not necessary, that there are existing ways for financial institutions to protect themselves when financing a project. (Attachment 5)

Woody Moses stated that he represents three different organizations and asked the Committee to review the written testimony submitted on behalf of the Kansas Ready Mixed Concrete Association, Kansas Aggregate Producers Association, and the Kansas Cement Council. (Attachments 6-8)

Clinton Patty testified on behalf of the Kansas Aggregate Producers Association and the Kansas Ready Mixed Concrete Association. Mr. Patty stated that the Associations are opposed to the bill because it seeks to

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substantially change the state's lien laws, depriving subcontractors of substantial protections guaranteed mostly to small businesses. The bill would be overturning what the Kansas Supreme Court established in the *HAZ-Mat* case. Section 2, under K.S.A. 60-1103, causes problems by changing the verbiage. If a project goes bad and there is not enough money to pay everyone, the sub-contractors should be higher up in the lien sequence, as they are not in a position financially to absorb the loss if their liens are not paid. (Attachment 9)

Chairman Vratil asked whether Mr. Patty and the Associations would react favorably to a proposal which would require a contractor or sub-contractor to file a one-page notice of lien with the Register of Deeds, indicating the description of the project, the date labor and materials were first supplied, and an estimate of the value of the goods and services. Mr. Patty stated that they are not without sympathy for the Bankers and other lien holders in the state and believe something could be worked out without unraveling thirty years of lien laws. Chairman Vratil suggested that the interested parties present get together and try to work out something that will be acceptable to all parties, and perhaps explore the method that Nebraska is using.

Testimony in opposition to the bill was provided in writing from Gus Rau Meyer, President, Rau Construction Company. (Attachment 10)

Chairman Vratil adjourned the meeting at 10:30 A.M. The next meeting is scheduled for February 14, 2005.