

KANSAS CONTRACTORS ASSOCIATION

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Testimony

By the Kansas Contractors Association before the Senate Commerce Committee
regarding SB 93—the Lien Construction Registry

February 12, 2013

Madame Chairman and members of the Committee, I am Bob Totten, Executive Vice President for the Kansas Contractors Association. Our organization represents over 300 companies who are involved in the construction of roads, bridges, dams, highways, stand alone parking lots, work on oil and gas leases, water treatment facilities and other construction projects in Kansas and the Midwest. Our association has been representing construction interests since 1923.

Today, I come to you in opposition of SB 93. Our members wholeheartedly agree this is an unnecessary piece of legislation and is just another example of the government intruding into an area that is not necessary.

Although this bill excludes highway construction from its requirements, I must remind you that many of our members are builders of other projects outside highway work and when the economy takes a dip, highway contractors will sometime go into

other areas of construction just to keep people employed. That's one of the reasons our members are concerned with this legislation.

When this subject was initially brought up, I got many emails from my members telling me all about the last time their company faced a problem when it came to liens. What I learned about this is that almost every contractor has a lien story but interestingly enough it is not some thing that happens that often. I mean some of the stories are 4 to 6 years old but along with this litany of stories, the basic admonition is "don't change the lien laws." We understand what the rules are now and they are there for a purpose and adding another layer of paperwork is not needed.

In the minds of our members, this proposal is really just a shift in risk. Moving the risk of a project onto a sub contractor or vendor. We don't believe that is the appropriate way to handle a construction project. It is our belief that when a company decides to manage a project, it is his/her responsibility to know what is going on in regards to that project. If necessary, a construction company should hire enough people to "birddog" the job so that there are no surprises at the end.

Our members are also concerned with the addition of employees with the Secretary of State's office. While KDOT is reducing its staffing from 3,210 people in 1990 to about 2600 now, why would the state consider adding more people in another agency. It is actions like this that cause government to grow when the problem should be corrected on the private side in the first place.

This makes our association members wonder why we need to add more costs to a construction project with another government filing fee. We thought the aim of our leaders was to reduce the size of government and to conserve the costs to the public but

this appears to go in the wrong direction to solve a problem that doesn't exist. Even Governor Brownback has indicated that he doesn't favor the ever expanding size of state government and this to us is a way of expanding government.

You are being led to believe that this a problem but I am not sure that is the case. I have attached to my testimony a graph that shows the lien filings in Shawnee county. If you look at it, the filings of liens in Shawnee county peaked in 2006 and if this was such an issue you would assume the filing of liens would have increased. This is the information from the 4th largest county in the state...I can only assume this is typical statewide. And from what I understand the bulk of these lien filings in Topeka dealt with residential contractors and not commercial builders....so if the state is so interested in rectifying a situation that is not a problem, residential builders should also be included in this legislation.

We have large members and small members...and the smallest members or sub contractors don't always pay attention to the system, as well as they should...and we are fearful that by missing the 21 day deadline, there will be many subs who won't be paid. They should have a need to file a lien but because they missed the deadline they won't be able to and then the prime contractor will say "you didn't file so you are out of luck. That does not seem fair.

That has happened to some of our contractors in another state. In one instance...the sub contractor failed to file his lien right and when it came time to pay him, the general knew the sub had no lien right and he just said "too bad". And the sub had to eat about \$45,000 because of his mistake even though the prime knew the work had been done and in a correct fashion. The subcontractor could have filed a lawsuit on the issue but

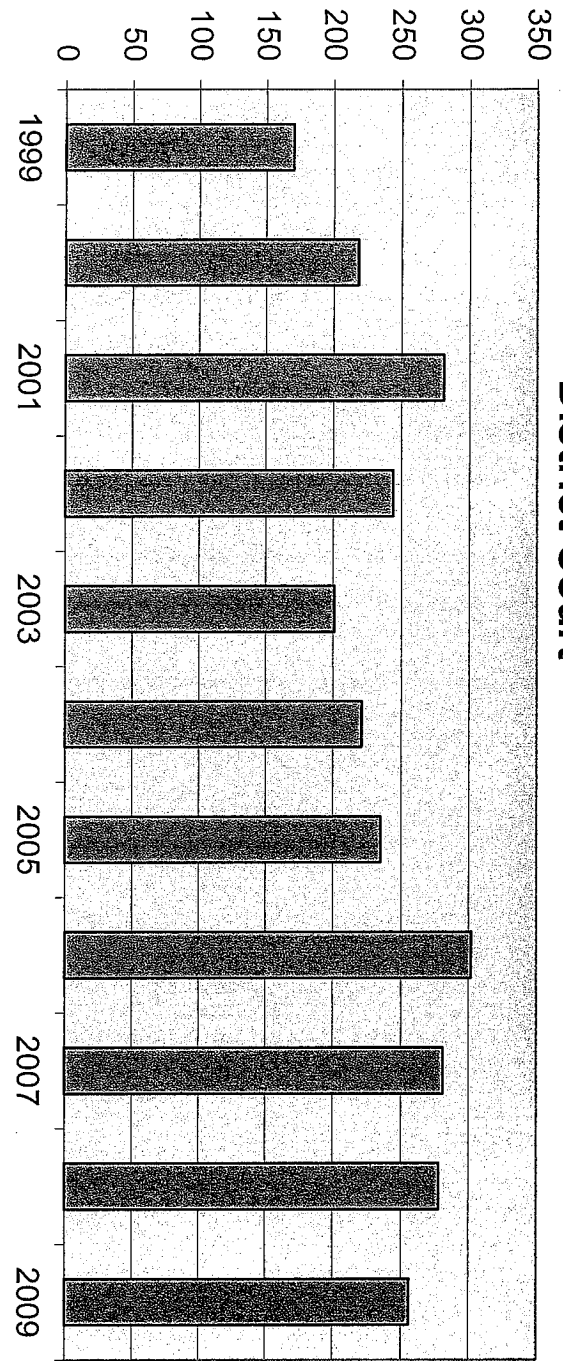
considering the time and trouble, it was not worth the effort.

Bottom line, our members question whether the alleged benefits and reasons for this proposed registry requirement in any way justify the adverse public policy. This measure has been studied for years and was referred to the Kansas Judicial Council and the recommendation from that group after 18 months was that they couldn't find a solution.

The sponsors of this measure have indicated that the registry is being set up because some times general contractors don't always know who is providing material on a project. And our basic question is "why not"? Our members believe that if a company has a project underway, they should make sure they knew exactly what was happening on their job. That is the way our members conduct their efforts on highway work, so we are unclear why that doesn't happen with the commercial building trade.

Thank you once again for the time you have made for our concerns to be heard and I will be glad to try and answer question when the time is appropriate.

Liens Filed in Shawnee Co. District Court



■ Liens Filed

"The person named in this notice is providing labor or materials or both in connection with improvements to your residence or real property. Chapter 572 of the Code of Iowa may permit the enforcement of a lien against this property to secure payment for labor and materials supplied. You are not required to pay more to the person claiming the lien than the amount of money due from you to the person with whom you contracted to perform the improvements. You should not make further payments to your contractor until the contractor presents you with a waiver of the lien claimed by the person named in this notice. If you have any questions regarding this notice you should call the person named in this notice at the phone number listed in this notice or contact an attorney. You should obtain answers to your questions before you make any payments to the contractor."

Priority of Lien—Mechanic's liens have priority over each other according to the order of filing. They take priority over garnishments of the owner without regard to date of filing of lien claim. Mechanic's liens filed within 90 days of completion shall be preferred to all others which may attach to or upon any building or improvement and to the land upon which it is situated, except liens of record prior to the time of original commencement of the claimant's work or improvements. However, construction mortgage liens shall be preferred to all mechanic's liens of claimants who commenced their particular work or improvement subsequent to the date of the recording of the construction mortgage lien.

Public Improvements—See Chapter 14.

Lien for Improvement of Oil or Gas Well—The mechanic's lien statute is applicable to labor and materials furnished in connection with gas and oil wells or pipelines. Liens do not attach to realty, but only to lease, wells, buildings, appurtenances, and pipelines.

Statutory Citation—Code of Iowa, Chapter 572.

KANSAS

Who May Claim—Any person furnishing labor, equipment, material or supplies used or consumed in the improvement of real property under a contract with the owner or trustee, agent or spouse of the owner.

How Claimed—(a) **Contractor**. Contractor shall file a verified statement showing the name of the owner, the name and address sufficient for service of process of the claimant, a description of the real property and a reasonably itemized statement and the amount of the claim.

(b) **Subcontractor**. Subcontractors shall file within three months a statement setting forth the name of the contractor, the supplier's affidavit that the warning statement was properly given (if required) and a notice of intent to perform (if required).

(c) **Residential Subcontractor**. Claimant, except if claim is for less than \$250, must give a written warning statement to the owner of residential property (residential property is defined as owner-occupied preexisting structure of two-family units or less) containing substantially the following:

"Notice to owner: (name of supplier or subcontractor) is a supplier or subcontractor providing materials or labor on Job No. ____ at (residence address) under an agreement with (name of contractor). Kansas law will allow this supplier or subcontractor to file a lien against your property for materials or labor not paid for by your contractor unless you have a waiver of lien signed by this supplier or subcontractor. If you receive a notice of filing of a lien statement by this supplier or subcontractor, you may withhold from your contractor the amount claimed until the dispute is settled."

(d) **Notice of Intent to Perform**. A lien for the furnishing of labor, equipment, materials or supplies for the construction of new residential property may be claimed after the passage of title to such new residential property to a good faith purchaser for value only if the claimant has filed a notice of intent to perform prior to the recording of the deed effecting passage of title to such new residential property. Such notice shall be filed in the office of the Clerk of the District Court of the county where the property is located.

The notice of intent to perform shall contain substantially the following statement:

NOTICE OF INTENT TO PERFORM

I (name of supplier, subcontractor or contractor) of (address of supplier, subcontractor or contractor) do hereby give public notice that I am a supplier, subcontractor or contractor or other person providing materials or labor on property owned by (name of property owner) and having legal description as follows:

Where Filed—Office of Clerk of District Court of the county in which the land is located.

When to Be Filed—Contractor's statement shall be filed within four months after the last material furnished or labor performed. Subcontractor must file three months from last material furnished or last labor performed.

Service of Copy of Notice—Only subcontractor (furnishing labor or material) need serve on owner written notice of filing aforesaid statement. Upon filing, the clerk of the district court shall enter the filing in the general index. The claimant shall (1) serve a copy of the lien statement personally upon any one owner and any party obligated to pay the lien, for service within the state; or (2) outside the state, mail a copy of the lien to any one owner of the property and to any party obligated to pay; or (3) if the address of any one owner of such party is unknown and cannot be ascertained with reasonable diligence, post a copy of the lien statement in a conspicuous place on the premises. Service is deemed made if proven that the person received notice.

Duration of Lien—One year from filing lien, but where promissory note given one year from maturity.

Filing Fee—\$5 for filing lien or notice of intent to perform.

Contents of Notice of Lien—See paragraph 2 above.

Extent of Lien—A mechanic's lien attaches to the property improved for labor, equipment, material or supplies furnished, and for the cost of transporting the same.

The owner of any land affected by such lien shall not become liable to any subcontractor for any greater amount than he contracted to pay the original contractor, except for payments to the contractor made prior to the expiration of the three-month period for filing lien claims provided no warning statement is required. If a warning is required, owner's liability extends to any payment made subsequent to the receipt of the warning statement.

Priority of Lien—Liens (for labor and material under contract) shall be preferred to all other encumbrances attaching to such property subsequent to the commencement of the furnishing of labor, equipment, material or supplies at the site of the property. When two or more liens attach to the same improvement, priority is accorded to the earliest unsatisfied lien.

Public Improvements—See Chapter 14.

Lien for Improvement of Oil or Gas Well—Lien claimed must be filed with the Clerk of the District Court of the county where the land is located within six months after the material or labor was furnished or performed. Such liens are preferred to all other liens and suit shall be brought within six months from filing.

Assignments—All claims for mechanic's liens and rights of action to recover are assignable.

Statutory Citation—Kansas Statutes, Chapter 60, §§60-1101 to 60-1110.

KENTUCKY

Who May Claim—Any person performing labor or furnishing material for erecting, altering or repairing any house, building or other structure, or for any fixture or machinery therein or for excavating or in any manner for improving real estate, by contract with or the written consent of owner, contractor, subcontractor, architect or authorized agent. A person who performs labor or furnishes materials to a lessee relating to oil, gas or other minerals shall have a lien on the leasehold for the entire interest of the lessee.

How Claimed—(a) **Contractor**. The claimant must file a statement of lien in the office of the County Clerk of the county in which the building is situated, within six months after he ceases to perform labor or furnish materials. The statement shall require the name and address of the claimant, the amount due, a