M I N U T E S

SPECIAL COMMITTEE ON JUDICIARY - A

September 19-20, 1977
Room 532, State House

Members Present

Senator Elwaine Pomeroy, Chairman
Representative Eugene Gastl, Vice-Chairman
Senator Don Allegrucci
Senator Paul Burke
Senator James Francisco
Representative Ward Ferguson
Representative Robert Frey
Representative Joe Hoagland
Representative Neal Whitaker

Staff Present

Art Griggs, Revisor of Statutes Office
Phill Jones, Kansas Legislative Research Department
Paul Purcell, Kansas Legislative Research Department

Morning Session

The meeting was called to order at 10:00 a.m. by the Chairman who introduced Representative Loren Hohman to discuss his bill, H.B. 2107, dealing with the Uniform Land Sales Practices Act amendments. Representative Hohman asked Mr. Ed Nichols, a bond attorney, to discuss the bill.

Proposal No. 35 - Uniform Land Sales Practices Act Amendments

Mr. Nichols testified that the bill refers to a property report which deals with all of the specific financing and engineering information which must be filed with the state. He explained the bill would eliminate the state filing or allow it to not be required when there is a federal filing. He displayed a Federal Housing and Urban Development form and suggested that there is a great deal of duplication. He stated the bill refers to the small developer and pointed out that any extra money spent is passed on to the consumer, and this bill would save money.

The Chairman noted the exemption is for projects of less than 50 lots, and suggested they are not talking about real small developers.

Mr. Dwight Keen, the Securities Commissioner, told the Committee that his office is responsible for the administration and enforcement of the Uniform Land Sales Practices Act as well as the Kansas Securities Act. He stated that there are some significant differences between the Kansas public offering statement and the H.U.D. report although both provide disclosure of information to prospective purchasers so they are aware of all of the restrictions of record. The Kansas statement provides for disclosure of all promised facilities and certain standards and rights the purchaser has after the purchase is made. The Kansas filing provides that encumbered land shall not be accepted for development, whereas H.U.D. merely requires disclosure. Kansas law assures promised improvements whereas H.U.D. merely requires disclosure of the status of such improvements. Kansas law requires that the contract be in recordable form, and provides for a minimum grace period before default but H.U.D. only requires these matters to be disclosed. Mr. Keen stated one of the serious problems is in misleading advertising by developers, and that was one of the reasons for the adoption of the Uniform Act in Kansas. He stated he does not believe the adoption of H.B. 2107 would reduce duplication of effort and cost.

Proposal No. 31 - Mental Illness Statutes

The Chairman asked Mr. Griggs to discuss Proposal No. 31, dealing with the mental illness statutes. Mr. Griggs distributed draft 7 RS 1638 which incorporates the amendments authorized by the Committee at the previous meeting. He called attention to page 2 (7) which deals with medical care facilities. In Section 2 the Committee had directed that the Pennsylvania statutes be reviewed and changes concerning consent be tailored to the Kansas law. Section 3 relates to discharge and Section 4 deals with procedures for admitting individuals by peace officers. Section 5 deals with the same subject but refers to court orders and incorporates language for immunity similar to the Good Samaritan statute. Section 6 deletes language to conform to the previous sections. Senator Allegrucci expressed concern about taking the person to the treatment facilities without a court order and Mr. Griggs stated the motion at the previous meeting had been to make the procedure the same whether or not the court was open.

The Chairman directed the Committee's attention to a memo containing a number of issues raised by Mr. Frank Yeoman at the last meeting. He asked if members wished to discuss any of the issues. He noted that nothing had been done about the 90-day review procedure. Representative Hoagland stated that most patients do not stay as long as 90 days, but that the intent was that there should be a review of the medical records at that time and that probably the patient and the patient's attorney would be requesting that review.

It was moved by Representative Ferguson that Item 4, dealing with counsel, be incorporated into the draft. Motion was seconded by Representative Hoagland and carried.

Representative Whitaker suggested that the criminal insanity matter needs consideration and the Committee will not have time to address that problem. He asked that the Judicial Council or an independent group be requested to undertake a study of the matter. The Vice-Chairman expressed the opinion that the proposed draft goes too far, and moved that the proposed deletions on pages 5 and 7 be reinserted with appropriate changes. Motion was seconded by Senator Allegrucci. There was discussion about the desirability of doing what the motion suggested, and about the alternatives. Upon vote, the motion lost.

Representative Frey asked if the bill should not provide for application to be made as soon as the court is open for business. The Chairman agreed that 59-2911 should probably be amended to do this, but that it should apply in both instances whether or not the court is open. Representative Frey offered a conceptual motion to draft what had been discussed. Motion was seconded by Senator Allegrucci. Mr. Griggs asked for a clarification of the motion, and the Chairman explained that whether or not the court is open and whether it is a person or a peace officer, application must be made as soon as the court is open. After discussion, the motion carried.

Proposal No. 36 - Initiative and Referendum

The Chairman asked Mr. Griggs to discuss Proposal No. 36, and a proposed draft was distributed. Mr. Griggs explained that this would authorize initiated constitutional amendments. He stated that one question had arisen as to whether requiring 10 percent of the signatures in 75 counties would violate "one man--one vote" but that he had discussed it informally with Mr. John Martin of the Attorney General's office and he was unaware of any such problem.

Lavina McDonald, Assistant Secretary of State, called attention to the fact that re-numbering might become disordered because now you are limited to one amendment in each article and this bill says one or more articles may be amended as long as the subject matter is the same. Representative Frey stated he opposed the concept. The Chairman stated he thought the Committee had provided for 75 counties instead of 75 percent of the counties. It was moved by Senator Burke and seconded by Representative Whitaker that the draft be amended to read "75 counties" instead of "75 percent" of the counties. Motion carried.

It was moved by Senator Burke that the draft as amended, be recommended for introduction. Motion was seconded by Senator Francisco and carried.

Afternoon Session

Proposal No. 33 - Court Costs

The Chairman said that Mr. Donald L. Zemites who was scheduled to appear, had called to say he was unable to be present. Mr. Griggs explained that he had wanted to appear to explain a situation which had occurred where a case was set and

when he could not produce his main witness at a specific time the action was dismissed and costs were assessed against the client for storage fees for exhibits, freight fees for getting exhibits to the court house, the other party's expenses of bringing witnesses, motel expenses and time away from work. It was Mr. Zemites' belief that the court did not have the power to do this, but the other attorney cited provisions in 60-2001 which establishes docket fees.

Mr. Richard Schultz, Shawnee County Court Administrator, explained that it is his view that those who use the justice system should pay for it more than they are currently doing. He noted that Mr. Olander and Mr. Reardon were present and that neither they nor he wished the training funds jeopardized, but he pointed out that the statutes provide for fifty cents to be added onto certain (juvenile, mental illness and traffic) cases for this purpose, whereas in criminal cases the statutes say that fifty cents shall be deducted from the docket fee, which reduces the amount to the county. Because of the complications in bookkeeping, Mr. Schultz proposed that all should be handled the same way, but that it would be preferable to have the fee added on. He explained that already they have bookkeeping requirements for judges' retirement, recording fees, and the district attorneys' training fund, and with larger jurisdictions bookkeeping is becoming more complicated.

Mr. Olander told the Committee that they had attempted to get the money by a direct appropriation and this was an alternate solution. He urged that the Committee not go back to a direct appropriation although he agreed he is aware of the problem the fifty cents deduction causes. Regarding another matter, Mr. Schultz stated that K.S.A. 28-140 says the District Court Clerk shall post the filing fees in an appropriate place, and there can be a $3.00 per day fine if they are not so posted. He suggested that since nobody knows exactly where the filing fees are to be posted the statute should be repealed. With regard to court costs, he explained that whatever is assessed for costs or docket fees it is impossible to be fair to everyone. He stated a $35.00 docket fee is not nearly sufficient, and pointed out that in Chapter 60 there are at least 15 types of probate matters, five different types of juvenile offenses, and five or more limited actions with no regular routine fee for the type of cases. He distributed a list of various fees and suggested some changes.

The Chairman asked if Mr. Schultz is familiar with S.B. 456 which deals with fees and costs, and which was introduced at the request of the Judicial Council. Mr. Schultz stated he would need to review the bill before commenting.

Mr. Schultz stated that costs stay with the county and that fines go to the state but that costs do not begin to pay for the cost of operation and, in fact, amount to about one-third, and that includes clerical help, probation people, judges, sheriff's department, operation of the jail, etc. He stated this money goes into county funds and that the county operates under a tax lid.

Joyce Reeves, Chief Deputy Clerk, and Lillian Underwood, Chief Deputy Clerk in the Probate Section, confirmed Mr. Schultz's remarks.

The Chairman asked if they had heard comments about jury compensation and Mr. Schultz stated they get the comments beforehand, and that people do not want to serve for such small compensation but that County Commissioners will not pay more than $10.00. He noted that the $5.00 witness fees and 13¢ mileage must also be paid for from fee receipts.

The Chairman inquired as to the status of the District Court Personnel Study. Mr. Jones explained that the consultant has sent out questionnaires to the nonjudicial personnel regarding salaries, fringe benefits, etc., and there is apparently no uniformity with regard to job duties, training, etc. He stated the report will be completed by the end of the month and there will be a presentation to the Ways and Means Committee. If there is anything that would be beneficial to the study of court costs, it would be brought to the Judiciary Committee's attention.

It was moved by Representative Whitaker that S.B. 456 be amended by striking the $3.00 charge on page 2, line 007 for action dismissed. Motion was seconded by Senator Burke and lost.

It was moved conceptually by Senator Burke that line 021 on page 3 have an addition to the effect that where a person is found innocent after trial or the case is dismissed he should not be assessed court costs. Motion was not seconded.

The Chairman asked if the Committee wanted to repeal the posting of fees as suggested by Mr. Schultz. It was moved by Representative Hoagland and seconded by Representative Frey that this be done. Motion carried.

After discussion it was the consensus that nothing further should be done with S.B. 456. The Chairman suggested the repealer could be put in another bill.

Proposal No. 35 - Uniform Land Sales Practices Act Amendments

The Chairman inquired what the Committee wished to do regarding Proposal No. 35. Representative Frey stated the Commissioner had convinced him that no action should be taken on the subject and moved that a negative report be made. The motion was seconded by Representative Whitaker. Representative Ferguson offered a substitute motion that no recommendation be made, and this motion was seconded by Representative Gastl. Upon vote the substitute motion lost. The original motion then carried.

Proposal No. 32 - Department of Justice

The Chairman requested discussion on Proposal No. 32, and explained that conferees had been heard -- Don Hoffman from the Attorney General's office and some agency attorneys -- and that the Committee had considered a summary of a report prepared by the National Association of Attorneys General. Senator Burke stated it had been the consensus that there was some merit in the bill, but there was concern that when individuals are assigned to a department, loyalties may still lie someplace else and that whether a Department of Justice is needed is just a matter of different philosophies.

Representative Frey stated there should be opportunities to consider other alternatives for handling legal matters for agencies.

The Chairman noted that the charge to the Committee was not tied to any particular bill and the study could be as broad as the Committee desired. Senator Burke asked if other states have a cabinet structure where the Attorney General is appointed and the Chairman stated he knew of no other state where this was the case.

After discussion, it was moved by Representative Frey that the Committee make no recommendation. The motion was seconded by Representative Hoagland. Senator Francisco offered a substitute motion that S.B. 223 be recommended favorably. The motion was seconded by Senator Allegrucci. Upon vote the substitute motion failed, and the original motion was passed. Senator Francisco asked to be recorded as voting in opposition to the adoption of the original motion.

Senator Burke made comments about the letter from the Wichita City Commission and suggested that such a subject might be studied by a blue ribbon panel. It was moved by Representative Whitaker and seconded by Senator Burke that the Judicial Council be requested to study the matter. Representative Frey stated he did not like the idea of delegating to some other group what the Committee is supposed to be doing. Upon vote, motion carried with Representative Frey voting no.

The Chairman inquired when members might be able to meet in October, and October 17 and 18 were designated the next meeting dates.

September 20, 1977
Morning Session

Proposal No. 29 - Product Liability

The meeting was reconvened and the Chairman noted that the subject to be considered was Proposal No. 29 - Product Liability. He requested Mr. Larry Sanford to resume discussion at the point reached at the time of adjournment at the previous meeting.

Mr. Sanford asked members to look at proposed bill No. 5, and explained that the bill would prohibit evidence relating to changes or advancements in technology after the date of manufacture.

Representative Ferguson inquired about inserting the words "caused damage to the plaintiff" in Section 1(a)(1). Mr. Sanford stated that such a change would mean the manufacturer would be continuously responsible for upgrading a project as new techniques were learned, and would never be free of that responsibility. He expressed the opinion that consideration should be given only to whether or not a product was defective at the time of manufacture and whether it met the necessary requirements of knowledge available at that time.

Mr. Don Vasos of the K.T.L.A. stated that the proposal fails to recognize what the law is at the present time. He stated that current law focuses on the date

of sale and this bill shifts it to the date of design. He felt it gave no incentive to upgrade a product and would be bad policy.

Mr. Dudley Smith, K.B.A., stated that 60-451 already provides that precautionary measures taken after the fact is not admissible evidence. He suggested that if such a proposal is passed, evidence could not be given to prove the change was made the next day and that the plans were available prior to that time.

Mr. Sanford proceeded to discuss bill No. 6, explaining that it proposed to exclude from the strict liability area actions which allege defects in design and failure to warn and place these actions within the negligence area.

The Chairman inquired if Section 1(a) restates the current law or if it is an expansion. Mr. Sanford replied that 1(a) and (b) is current law.

Mr. Vasos stated there is no question but that 1(a) and (b) are a restatement, but the proposed bill takes away practically everything, and appears to say that a seller is not liable. He pointed out there is an increase in the use of rental equipment and that one has the right to expect such rented equipment to be maintained and that this bill would remove current safeguards.

Mr. Smith stated the K.B.A. is opposed to this bill because it would eliminate strict liability in tort. He stated the effect is opposite to what it purports to do.

Mr. Sanford told the Committee that bill No. 7 modifies the current law and establishes a comparative fault system which would apply in all liability cases except negligence actions. He pointed out an error in section 1(c) in the last line where the word should be "unreasonable." He also discussed the comparative negligence concept.

Mr. Vasos stated he feels this bill is the most vicious in the entire package, and suggested that a revision of the comparative negligence statute is beyond the scope of the study. He is against establishing a comparative fault system, because it would increase the filing of litigation.

Mr. Smith observed that he did not think the part relating to the employer is any different than it is presently; that he thinks the courts take into consideration the employer's negligence, and that the employer's right to recoup by way of Workmen's Compensation has no interplay. He suggested that under this proposal the court would be giving inconsistent instructions. Further, he suggested definitions concerning alterations do not belong here; that by passing a pure comparative negligence act there would be an increase in cases; and that the bill would adversely affect insurance rates.

Mr. Sanford explained that bill No. 8 provides that a seller will not be liable for damages caused by defects which the seller is not aware of and if he was not required to inspect the product to ascertain any defect.

The Chairman inquired how (a) is limited to the seller and does not include the manufacturer because he, too, is a seller. Mr. Sanford stated that the bill refers to the seller and no definition has been provided but it might be proper and that it is the intent to include only the retailer while (b) applies to the manufacturer.

Mr. Vasos noted a decision had been made long ago that the manufacturer was liable for a defective product and that the seller was likewise liable if he knowingly sold a defective product. He suggested (b) implies a duty to inspect and asked who is in a better position to inspect the product -- the manufacturer, the seller, or the consumer?

Mr. Smith stated a problem may arise with this bill because in some of the previous proposals there was a limitation to strict liability cases and this bill is not limited to strict liability. He stated he does not feel this excludes the seller where there are obvious defects. He said that sometimes it is not possible to determine who the manufacturer was but the injured consumer would know only the seller, and therefore, this bill would mean a consumer has no case if he could not find out who the manufacturer was. He noted that sometimes there is no recourse but to go to the seller and that such a procedure could be abused.

The Chairman inquired if it could be provided that the manufacturer, if known, must bear the cost of defending the seller. Mr. Smith agreed that this would provide some relief and there are cases where the manufacturer agrees to insure and indemnify his distributor and then the seller does not have to buy insurance, although he was not certain insurance companies could be forced to sell this kind of insurance.

Mr. Sanford explained that bill No. 9 makes the collateral source rule (as in medical malpractice) applicable to personal injury, death, and property damage cases.

Mr. Vasos suggested that the medical malpractice statutes have not been sufficiently tested to determine whether or not application in these cases would be appropriate, and there is not sufficient experience to know yet if it will affect the cost and availability of insurance.

Senator Francisco stated he felt the jury has a right to know about payments which have been previously made by the defendant; that sometimes the manufacturer may have given a family living and medical expenses, and this should be admissible.

Mr. Smith stated he has no particular objection to the bill although he did not think the proposal would affect the availability or cost of insurance. He stated he would have no objection to such disclosure as mentioned but there are dangers both ways and this might be one which would prejudice a jury into thinking the manufacturer was admitting liability and awarding a larger amount.

With regard to bill No. 10, Mr. Sanford explained it establishes installment payment provisions such as was adopted as part of the medical malpractice act, and which would protect the plaintiff as well as keep a manufacturer from going bankrupt.

Senator Pomeroy noted that the provision in the medical malpractice act was to protect the fund and was not for either of these other purposes.

Mr. Vasos testified that provisions for installment payments occur all the time, but that this bill does apply to every action for damages and includes all the courts. He suggested the interest statute might be a problem.

Mr. Smith noted he had heard no testimony that there was any problem in paying judgments in Kansas, nor that any manufacturer had experienced problems in this area and therefore sees no need for such legislation.

Afternoon Session

Proposal No. 29 (continued)

Mr. Sanford resumed his presentation with bill No. 11, and explained it is a compromise bill which increases the burden of proof necessary to recover punitive damages, and suggested that if punitive damages are allowed clear and convincing evidence should be required. Further, he stated there should be insurance available for punitive damages, although insurance companies may not think so.

Mr. Vasos explained his basic concern is that legislation such as this does not address the insurance problem, and further, there has been no evidence that the punitive damages concept has been abused in Kansas.

Mr. Smith stated the Bar Association is opposed to this proposal and it would not affect the liability insurance premiums. He agreed that the law should be stronger in this area and also that there could be abuses in the system.

Mr. Sanford explained that bill No. 12 would prohibit loan or guarantee agreements which sometimes allow insurors to escape payment for injuries. He stated he was not aware of any individual case in Kansas, but has heard that some carriers have loaned money to individuals to pursue a case against someone else with the understanding that if they recover they will repay the amount advanced.

Mr. Vasos stated he would agree with the proponents on this issue although he has not had any experience with such a case. He suggested this kind of activity would probably promote litigation.

Mr. Smith testified that the Bar Association has no objection to this proposal and to allow these kinds of agreements could only cause more problems and this proposal would prohibit them.

Mr. Griggs explained redrafts one through four which were prepared in accordance with Committee instructions at the previous meeting. With regard to draft No. 4, Mr. Griggs stated he was not sure whether a motion was made, but some instructions were offered and he had drafted in accordance with those instructions. However, upon a review of the minutes there had been no formal motion.

The Chairman inquired if the Committee wished to consider each proposal separately or in a package.

Representative Hoagland suggested that all 12 of the bills represent the general philosophy embodied in S.B. 176 and S.B. 209 and H.B. 2007. He stated that even the proponents agree these proposals will not have an impact on insurance rates or the availability of insurance. He suggested it would be helpful to wait to see what the impact is in the states which have enacted similar legislation. He stated there are serious defects in the drafting of the proposals. He moved that the Committee make negative recommendations on the 12 bills and look at comparative fault v. comparative negligence; chain of control; the problem of cost and availability of insurance; and the establishment of a state fund similar to that established by the medical malpractice statutes. The motion was seconded by Senator Allegrucci.

Senator Burke expressed disappointment that after so much time and effort had gone into these matters, this should be the result. He stated that, notwithstanding opposition by certain groups, if this attitude prevails in all of the states, the situation will never improve.

Representative Whitaker stated he had been present during all of the time of the study and feels that an approach such as this motion takes is ignoring the problem. He said that if there are flaws in the drafts the Committee should take the time to correct them.

Senator Francisco expressed the opinion that product liability is one of the major problems in the state, and that he had felt when the Committee commenced the study it would be possible to come up with solutions. He stated he felt it would be better to look at each bill individually, and that for the Committee to do nothing is to shirk responsibility.

The Chairman agreed that he shared concern in not dealing with the matters individually, but it does have the effect of allowing more time for other matters which possibly can be resolved. He suggested that if the motion passes, the Committee should devote time to trying to approach some of the areas mentioned in the motion.

Senator Allegrucci stated he, too, had sat through the hearings and his opposition to the bills is the result of no pressure from any group; and that time after time he had heard that the price of insurance had skyrocketed or that insurance simply was not available at all, and that he has heard nothing that seems to supply an answer to these problems.

Senator Burke asked the Committee if there were any of the bills which might be salvaged by changing some wording. The Chairman noted he had heard little opposition to No. 12. Representative Hoagland stated he opposed that bill on the ground that there is no indication that there has ever been such an agreement in Kansas, and further that the language may cover other agreements such as convenants not to sue.

There was continuing discussion concerning the motion and the various proposals. Upon vote, the motion carried with Senator Burke, Senator Francisco, and Representative Whitaker voting in opposition.

Representative Hoagland suggested it would be appropriate to ask the Insurance Commissioner to meet with the Committee to discuss a pooling arrangement. He asked if it would be possible to get from the courts how many lawsuits have been filed, the awards, attorney fees, etc., in this area.

The Chairman said he could ask the Judicial Administrator if it would be possible to get this information. He asked staff to invite to the next meeting the Insurance Commissioner, the Judicial Administrator, and anyone else who might have information.

Senator Francisco asked for information on the procedure for filing a minority report, and notified members that he expected to file such a report.

Staff was directed to request two one-day meetings in November.

There being no further business, the Chairman adjourned the meeting at 4:50 p.m.

Prepared by Paul Purcell

Approved by Committee on:

December 16, 1977
Date

PP/aem