Approved _____
Date

MINUTES OF THE SENATE SUB- COMMITTEE ON JUDICIARY.

The meeting was called to order by Elwaine F. Pomeroy at
Chairperson

9:00 a.m./~~p.m.~~ on April 24, 1984 in room 519-S of the Capitol.

All members ~~were~~ present ~~except~~ were: Senators Pomeroy, Winter, Burke, Feleciano, Gaar, Mulich and Steineger.

Committee staff present: Mary Torrence, Office of Revisor of Statutes
Mike Heim, Legislative Research Department
Craig Lubow, Office of Revisor of Statutes

Conferees appearing before the committee:

Justice David Prager
Jack Dalton, Administrative Procedures Advisory Committee, Kansas Judicial Council
Representative J. Santford Duncan
Professor David Ryan, Administrative Procedures Advisory Committee, Kansas Judicial Council
John Brookens, Kansas Bar Association
Art Griggs, Department of Administration
C. Edward Peterson, Kansas Corporation Commission
Representative Robert Frey
Don Strole, Board of Healing Arts
Pat Baker, Kansas Association of School Boards
James Kaup, League of Kansas Municipalities
Peter Rinn, Social and Rehabilitation Services
Arnold Berman, Department of Human Resources
Ed Schaub, Southwestern Bell Telephone Company
Phil Wilkes, Department of Revenue
Kenneth Wilke, Board of Agriculture

House Bill 2688 - Kansas administrative procedures act.
House Bill 2689 - Act for judicial review and civil enforcement of agency actions.

Justice David Prager chairs the Kansas Judicial Council, which appointed an Administrative Advisory Committee that studied the administrative procedures and appeals procedure utilized for governmental agencies. He stated the problems of administrative agencies and the lack of uniformity in procedures has been with us for a long time. They have proliferated since the 1940s and nothing has been done through the years. The problem kept surfacing all the time, so a committee was appointed consisting of persons representing major agencies, administrators and legislators. The members of the committee were: Jack E. Dalton, Alan F. Alderson, Richard C. Byrd, L. Patricia Casey, Jack Glaves, Charles V. Hamm, John Jandera, C. Fred Lorentz, Brian Moline, David Ryan, John S. Seeber, Representative Santford Duncan and Senator Merrill Werts. Justice Prager stated it is vital to have some system developed to have some orderliness in procedure.

Jack Dalton, a member of the Judicial Council who chaired the committee, presented a slide review of the two bills. He explained the Kansas Administrative Procedures Act is designed to delineate procedure for those involved in administrative agencies, so they can have some uniformity. House Bill 2689 is the judicial review to have some idea how to proceed in court. Mr. Dalton presented his explanation of the two bills section by section from an outline displayed on a screen. He also responded to questions from the committee.

Representative Duncan explained the actions on the bills taken by the House. He explained bascially the House accepted the concept of the act, but they felt they did not want to commit to every single agency at this time. They limited the bill to licensing agencies, however, there is a trailer bill to House Bill 2688. He suggested the committee should also think about including the Kansas Corporation Commission, Health and Environment and Agriculture. He explained this bill applies only to certain state agencies. A copy of a list of state boards that are involved in the trailer bill is attached (See Attachment No. 1).

House Bills 2688 and 2689 continued

The chairman inquired of Jack Dalton his feeling of the procedure with the act being limited to only some state agencies, rather than all state agencies as originally introduced. Mr. Dalton replied, it is a policy question to pass this year. Representative Duncan recommended that the committee amend the trailer bill into House Bill 2688, and remove the sunset date after the trailer bill has been amended into the bill. He also recommended expanding the bill to all licensing state agencies, and he supported the interim study that has been requested by the House Judiciary Committee to look at other agencies to come under House Bill 2688. In response to a question, Representative Duncan replied, they do not want rate cases to go into the district court. They want them to go to the Court of Appeals as they are now. He explained the bill is similar to one that was introduced in the 1983 session. He said the goal is to have administrative procedures for all agencies that do business with the public.

Professor David Ryan explained House Bill 2689 does nothing new in terms of power of the court. He pointed out in House Bill 2688, Section 2 (c), the language is too limiting, and he feels the trailer bill covers more than that. He referred to Section 37, Subsection (b), lines 752 through 756, and noted the language in those lines should be addressed. Art Griggs was recognized, and he suggested on page 21, lines 763 through 765, Section 38, Subsection (b), amending the language to provide for a hearing process in an appeal for an order. Professor Ryan then strongly urged the committee to have a summary procedure available. He also suggested deleting line 755. In House Bill 2689, page 8, Section 18, lines 278 through 279, he explained how de novo is being used in the act and recommended amending in Workers Compensation and the Civil Rights Commission for clarification. The chairman inquired if he had concern that the appeal to the Court of Appeals from the decisions of the corporation commission? Professor Ryan responded, the Court of Appeals does not have time to review the record of a rate case. That is a policy issue for the legislature and should be spelled out in the bill.

John Brookens testified the bar association has supported the concept contained in both of these bills for many, many years. Part of the legislative program is to assist in getting something through the legislature. They feel they would like to get what they can.

Art Griggs addressed the proposed amendments to House Bill 2689 that appear on the balloon copy distributed (See Attachment No. 2). He pointed out in House Bill 2689, the license authorization required by law is a gray area and suggested the occupational licenses need defining to help people understand the procedure. He urged the committee to amend the trailer bill into House Bill 2688. Mr. Griggs also suggested providing the broad discovery authorizations in the bill and the broad authority to issuance of subpoenas. Following his explanation of the suggested amendments, the chairman inquired, if the committee adopts your suggestions and makes your proposed changes in the two bills, can the Department of Administration live with the bills? Mr. Griggs replied, yes.

Ed Peterson testified the corporation commission supports the efforts of the legislature to pass an administrative procedures act, however, the need for clarity will not be satisfied by House Bill 2688 and House Bill 2689 unless a substantial number of changes are made. A copy of his testimony is attached (See Attachment No. 3). He stated there will be a time before all of their practices will comply with this act.

Representative Robert Frey stated the administrative procedures act, as represented by the two bills, would bring about a positive change in the way things are done. It won't make any substantive changes in the law; the idea is to change the procedure

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House Bills 2688 and 2689 continued

and not change the substance in the law. Representative Frey stated there were legitimate concerns shown in the House. He concurs with amending the trailer bill into House Bill 2688. He will request an interim study to add agencies in the future, and he feels the judicial council committee would concur with any of the suggestions the committee has heard.

Craig Lubow passed out copies of the trailer bill and explained the bill covers agencies involving occupational licensing, issuance of permits and certifications. He explained it eliminates the conflict that would otherwise occur with the other procedure. He passed out a copy of a list of the state boards that were excluded from the act (See Attachment No. 4), and a copy of suggested amendments to the bill (See Attachment No. 5). He agreed with the chairman to change the definition in House Bill 2688, and in Section 2, Subsection (c) to amend that definition. During discussion, a committee member requested a list indicating state boards that are not included in the bill.

Don Strole stated the Board of Healing Arts has no problem with either one of the bills. They feel they are following the procedure anyway. He suggested coordinating Senate Bill 507 that was passed this session with House Bill 2688. He explained in House Bill 2688, the procedure to intervene, that people who make complaints to them argue their rights are affected by what they do. He inquired if this bill would require their agency to not allow those persons to intervene? He suggested expanding the procedure to intervene. He said he has no problems with it, but it will make things more complicated; it is a policy question. This provision will not allow them to intervene more easily.

Pat Baker testified her association is a proponent as the bill stands today. With House Bill 2689, their position was in opposition to the original version which included political subdivisions. They believe school boards do differ from state agencies and should be treated differently. She said their aim has been to keep appellate review of a judicial or quasi judicial nature; their concerns are the inclusion of the discretionary acts of the school boards. They have concerns with areas that deal with federal law concerning the special education provisions. She stated, in summary, the school boards have no objection to House Bill 2689 as it stands now.

James Kaup stated he had no concern with House Bill 2688 and House Bill 2689; they could do a great deal of good for the state. They see a good deal of merit. Mr. Kaup stated the group he represents asked that the political subdivisions be excluded from the act, and the House did delete reference to subdivisions. House Bill 2689, as introduced, was not realistic. They want to have the opportunity to create their own procedures act to educate their people, and then talk about a judicial review process.

Peter Rinn stated SRS has no problem with House Bill 2688. The concerns they have is with House Bill 2689 that are indicated on their handout (See Attachment No. 6). He testified if people want to appeal, they should be able to file an independent action. He explained their proposed amendments. Committee discussion with him followed.

Arnold Berman stated House Bill 2688, as it related to his agency, and as it left the House, would have a minimal effect on his department. If the intent of the legislature is to expand to include all licensing per se, then the potential effect on the department might be greater. He pointed out the agency licenses 15,000 boilers and boiler factories in the state. Mr. Berman said he was happy to see the House amendment that would permit at the discretion of the agency delegation of the authority to some individual or some group of persons. He stated their principal concern with House Bill 2689 is because hundreds of administrative orders of the agency and enforcement judgment actions are taken involving his department every year. They were particularly concerned with the issue of venue; most of the actions would end up in Shawnee County. He pointed out if the appellant is permitted to

House Bills 2688 and 2689 continued

select the venue, this would give his agency very significant workload problems. He pointed out that under the existing language in House Bill 2689, venue for enforcement of judgments, which they engage in hundreds a year, would force his agency to enforce their judgments in all the 104 counties of the state. Mr. Berman stated in House Bill 2689 the de novo review doesn't change anything. He suggested in House Bill 2689, lines 278 and 279, requiring the opportunity for at least quasi de novo review. He noted the language in line 287 gave him considerable problems. Committee discussion with him followed.

Ed Schaub said he had nothing more to add. His concern is in Chapter 66 that would change the appeals for utility cases from corporation commission decisions. Mr. Schaub stated he supports Ed Peterson's amendment.

Phil Wilkes stated he was alarmed and concerned with the language in House Bill 2688 concerning the application of licensing required by law; they are concerned with the truck drivers in license suspension hearings. He suggested the language be made more specific. Mr. Wilkes suggested including vehicle distributors and dealers, which is one of their areas of responsibility. They also license liquor and beer dealers and distributors as well as private clubs and motor vehicle distributors. During committee discussion, the chairman inquired if they had any problem with the vehicle distributors dealers? Mr. Wilkes replied, he hoped the definition amendment would include a specific list; at least that would cut off problems in the future with people wanting to use the administrative procedures act in areas we think it doesn't apply. We want the bill to specify whether it does apply or does not. The chairman noted the amendatory trailer bill will be in House Bill 2688. Mr. Wilkes replied, there is no problem with the record but what concerns him is the application of House Bill 2688 to some other licensing areas that are not included in the laundry list. They want it to be made clear.

Kenneth Wilke stated their concerns have already been addressed. The pesticide applicators have no objection to being included at this time, since there will be an interim study. He suggested, under discovery procedures, when money comes back from their applicants, that money can go back into their fund. They do not have the authority to expend it again for another purpose. He said he brought this before the committee for consideration. He suggested allowing the agencies to create a revolving fund of some sort. A committee member inquired, is it different from the open records act? Mr. Wilke replied, regarding the expenditure have had to make, the actual dollars received back cannot be returned to their fund. This is expenditure that came off budget limitation, and they have large number of requests which result in large amounts of money. The committee member responded, it is a mechanical problem for the agency.

House Concurrent Resolution 5059 - Memorializing Congress and the President to enforce antitrust laws with respect to vertical price fixing.

Representative Sandy Duncan explained the resolution to the committee. Committee discussion with him followed. Copies of his handouts is attached (See Attachments No. 7). He stated this is an important issue for the merchants.

The hearings on House Bills 2688 and 2689 and HCR 5059 were concluded.

House Bill 2688

Following committee discussion, Senator Burke moved to amend the bill to include the list of licensing agencies and the trailer bill as presented to the committee, and to make appropriate amendments; and on page 2, amending the language in Subsection 2. Senator Gaar seconded the motion, and the motion carried. Senator Gaar moved to amend the bill in Subsection (b), on page 21, lines 752 through 756 be deleted; Senator Mulich seconded the motion, and the motion carried. Senator Gaar

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House Bill 2688 continued

moved to amend the bill in Section 38, lines 763 through 765 by deleting the House floor amendment. Senator Burke seconded the motion, and the motion carried. Senator Burke moved to amend the bill by striking lines 820 through 821 in Section 42. Senator Mulich seconded the motion, and the motion carried. Senator Burke moved to amend the bill by coordinating the language in Senate Bill 507 with House Bill 2688. Senator Mulich seconded the motion, and the motion carried.

House Bill 2689

Senator Gaar moved to amend the bill on page 6 by inserting the language in Section 31 of House Bill 2688, making it new Subsection (d) to New Section 13 of House Bill 2689, and repeat the language in Section 31 in House Bill 2688. Senator Mulich seconded the motion, and the motion carried. Senator Gaar moved to amend the bill on page 7 to adopt the proposed amendment by the Department Administration concerning ex parte orders. Senator Mulich seconded the motion, and the motion carried. Senator Mulich moved to amend the bill on page 9 in New Section 20 concerning cost of transcript. Following committee discussion, Senator Gaar moved to amend the bill in line 322 in New Section 20, as proposed by Department of Administration concerning cost of the preparation of the transcript. Senator Mulich seconded the motion, and the motion carried. Senator Burke moved to amend the bill in New Section 28, page 12, concerning the civil service board. Senator Gaar seconded the motion, and the motion carried. Senator Burke moved to amend the bill on page 16 by deleting New Section 31; Senator Mulich seconded the motion, and the motion carried. Senator Gaar moved to amend the bill as proposed by Kansas Corporation Commission in New Section 9 by adopting their language. Senator Burke seconded the motion, and the motion carried. Senator Gaar moved to amend the bill on page 11, line 398, the enforcement section of the act, to provide venue to be in the same county as the order. Senator Burke seconded the motion, and the motion carried. Senator Burke moved to amend the bill on page 8, Section 18, by striking the last part of line 278 and all of 279; Senator Gaar seconded the motion. Senator Burke made a substitute motion to amend the bill in Section 18 to limit de novo and to exempt out the Worker's Compensation and Civil Rights Commission; and in any case where there is a penalty that is being contested that exceeds imprisonment of more than six months or a fine in excess of five hundred dollars. Senator Gaar seconded the motion, and the motion carried. Senator Mulich moved to amend the bill by inserting the provision in House Bill 2688, Section 32, that sets out what the official record is, into Section 20(a) of House Bill 2689. Senator Gaar seconded the motion, and the motion carried. Senator Burke moved to amend the bill by repealing K.S.A. 77-434; Senator Gaar seconded the motion, and the motion carried. Senator Gaar moved to recommend to the full committee the passage of House Bill 2689 as amended; Senator Burke seconded the motion, and the motion carried.

House Concurrent Resolution 5059

Senator Gaar moved to recommend to the full committee the adoption of House Concurrent Resolution 5059; Senator Mulich seconded the motion, and the motion carried.

The meeting adjourned.

4-24-04

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Roger Brodburn	Topeka	Kan Bar Assn
Roger W Lovett	Topeka	KCCR
Pete Rios	Topeka	SRS
Carol Foreman	Topeka	SRS
Jerry Conrad	"	KCoE
A. Berman	"	DHR
John Collins	"	DofA
Floyd W. Woodburn	"	"
John Spurgeon	Lawrence	Budget
Ed Peterson	Topeka	KCC
L. Stanton	Topeka	Northern Natural Gas
Don Stumbo	Topeka	Rd of Healing Arts
William Lumard		KS. Tel. Assn.
Kenneth M. Wilke	Topeka	Ks. Board of Agriculture
Phil Wilkes	"	Dept. of Revenue
Denise Kuhn	Topeka	OIA
David Prager	Topeka	Judicial Council
BILL PERDUE	"	KPL/GAS SERVICE
Ed Schaub	"	SWBT
Roy D. Shenkel	"	KePL.
D. WAYNE ZIMMERMAN	TOPEKA	THE ELECTRIC COs ASSOC. OF KS
Peter Sclanck	Lawrence	University of Kansas
MARTIN WISNESKI	LAWRENCE	KU
David Ryan	209 Washburn law School, Topeka	Jud. Council

4-24-84

Attach. #1

Chapter	Article	Page # in Initial Draft Set #1 – Licensing	Board Involved
1	3	1-2	Accountants
12	20	3	Public Television/Cable Board
39	9	3-9	Adult Care Homes
47	8	9-10	Veterinary Examiners
47	10	10-14	Public Livestock Markets
58	28	14-15	Abstracters
58	30	15-20	Real Estate Commission
65	11	21-23	Nursing
65	14	23-30	Dental
65	15	30-31	optometry
65	16	31-36	Pharmacy
65	17	36-41	Embalmers
65	18	41-45	Barbers
65	19	45-46	Cosmetology
65	20	46-48	Podiatry
65	28	48-56	Healing Arts
65	29	56-57	Physical Therapists
65	30	57-59	Air Quality Control Board
74	53	59-60	Psychologists
74	58	60-61	Hearing Aids
74	70	61-65	Technical Professions
75	53	65	Social Workers

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tempts to exhaust administrative remedies.

(c) A petition for judicial review of agency action other than a rule and regulation or order is not timely unless filed within 30 days after the agency action, but the time is extended:

(1) During the pendency of the petitioner's timely attempts to exhaust administrative remedies; and

(2) during any period that the petitioner did not know and was under no duty to discover, or did not know and was under a duty to discover but could not reasonably have discovered, that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this act.

New Sec. 14. (a) A petition for judicial review ~~must~~ shall be filed with the clerk of the court.

(b) A petition for judicial review ~~must~~ shall set forth:

(1) The name and mailing address of the petitioner;

(2) the name and mailing address of the agency whose action is at issue;

(3) identification of the agency action at issue, together with a duplicate copy, summary or brief description of the agency action;

(4) identification of persons who were parties in any adjudicative proceedings that led to the agency action;

(5) facts to demonstrate that the petitioner is entitled to obtain judicial review;

(6) the petitioner's reasons for believing that relief should be granted; and

(7) a request for relief, specifying the type and extent of relief requested.

New Sec. 15. (a) A petitioner for judicial review shall serve a copy of the petition by first-class mail or personal delivery upon the agency head or on any other person or persons designated by the agency head to receive service.

(b) The agency shall give notice of the petition for judicial review to all other parties in any adjudicative proceedings that led to the agency action.

New Sec. 16. (a) Unless precluded by law, the agency may

(d) Service of orders shall be governed by section 31 of the Kansas administrative procedures act.

(For informational purposes, the section 31 incorporated by reference above reads as follows:

Sec. 31. Service of an order ~~shall be made~~ or notice shall be made upon the party and the party's attorney of record, if any, by delivering a copy of the order ~~to the party~~ or notice to the person to be served or by mailing a copy of the order or notice to the ~~party at the party's~~ person at the person's last known address. Delivery of a copy of an order or notice means handing the order ~~to the party~~ or notice to the person or leaving the order ~~at the party's~~ or notice at the person's principal place of business or residence with a person of suitable age and discretion who works or resides therein. Service shall be presumed if the presiding officer, or a person directed to make service by the presiding officer, makes a written certificate of service. Service by mail is complete upon mailing. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or order and the notice or order is served by mail, three days shall be added to the prescribed period.)

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grant a stay on appropriate terms or other temporary remedies during the pendency of judicial review.

(b) A party may file a motion in the reviewing court, during the pendency of judicial review, seeking interlocutory review of the agency's action on an application for stay or other temporary remedies.

(c) If the agency has found that its action on an application for stay or other temporary remedies is justified to protect against a substantial threat to the public health, safety or welfare, the court may not grant relief unless it finds that:

(1) The applicant is likely to prevail when the court finally disposes of the matter;

(2) without relief the applicant will suffer irreparable injury;

(3) the grant of relief to the applicant will not substantially harm other parties to the proceedings; and

(4) the threat to the public health, safety or welfare relied on by the agency is not sufficiently serious to justify the agency's action in the circumstances.

(d) If subsection (c) does not apply, the court shall grant relief if it finds, in its independent judgment, that the agency's action on the application for stay or other temporary remedies was unreasonable in the circumstances.

(e) If the court determines that relief should be granted from the agency's action on an application for stay or other temporary remedies, the court may remand the matter to the agency with directions to deny a stay, to grant a stay on appropriate terms or to grant other temporary remedies, or the court may issued an order denying a stay, granting a stay on appropriate terms or granting other temporary remedies. As used in this subsection, "appropriate terms" may include requirement of a bond.

(f) Except as otherwise authorized by rule of the supreme court, the court shall not issue ex parte orders pursuant to this section.

New Sec. 17. A person may obtain judicial review of an issue that was not raised before the agency, only to the extent that:

(a) The agency did not have jurisdiction to grant an adequate remedy based on a determination of the issue;

(b) the agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding ~~in substantial compliance with this act~~; or

(4) a relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.

New Sec. 20. (a) Within 30 days after service of the petition for judicial review, or within further time allowed by the court or by other provision of law, the agency shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action, consisting of any agency documents expressing the agency action, other documents identified by the agency as having been considered by it before its action and used as a basis for its action and any other material ~~described in this act~~ required by law as the agency record for the type of agency action at issue, subject to the provisions of this section.

(b) If part of the record has been preserved without a transcript, the agency shall prepare a transcript for inclusion in the record transmitted to the court, except for portions that the parties stipulate to omit in accordance with subsection (c).

(c) By stipulation of all parties to the judicial review proceedings, the record may be shortened, summarized or organized.

(d) The court may tax the cost of preparing transcripts and copies for the record against a party who unreasonably refuses to stipulate to shorten, summarize or organize the record.

(e) Additions to the record pursuant to section 19 ~~must~~ shall be made as ordered by the court.

(f) The court may require or permit subsequent corrections or additions to the record.

New Sec. 21. (a) Except to the extent that this act or another statute provides otherwise:

(1) The burden of proving the invalidity of agency action is on the party asserting invalidity; and

(2) the validity of agency action ~~must~~ shall be determined in accordance with the standards of judicial review provided in this section, as applied to the agency action at the time it was taken.

(b) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.

(c) The court shall grant relief only if it determines any one or

and upon receipt of payment of the cost of preparation of the transcript,

Except as otherwise ordered by the court, the cost of the preparation of the transcript shall be borne by the appellant.

necessary to adapt them to those proceedings.

New Sec. 27. Decisions on petitions for civil enforcement are reviewable by the appellate ~~court~~ courts as in other civil cases.

Sec. 28. K.S.A. 60-2101 is hereby amended to read as follows: 60-2101. (a) The court of appeals shall have jurisdiction to hear appeals from district courts, except in those cases reviewable by law in the district court and in those cases where a direct appeal to the supreme court is required by law. The court of appeals also shall have jurisdiction to hear appeals from administrative decisions where a statute specifically authorizes an appeal directly to the court of appeals from an administrative body or office. In any case properly before it, the court of appeals shall have jurisdiction to correct, modify, vacate or reverse any act, order or judgment of a district court to assure that any such act, order or judgment is just, legal and free of abuse. Appeals from the district court to the court of appeals in criminal cases shall be subject to the provisions of K.S.A. 22-3601 and 22-3602, and ~~any~~ amendments thereto, and appeals from the district court to the court of appeals in civil actions shall be subject to the provisions of K.S.A. 60-2102, and ~~any~~ amendments thereto.

(b) The supreme court shall have jurisdiction to correct, modify, vacate~~,~~ or reverse any act, order~~,~~ or judgment of a district court or court of appeals in order to assure that any such act, order or judgment is just, legal~~,~~ and free of abuse. An appeal from a final judgment of a district court in any civil action in which a statute of this state or of the United States has been held unconstitutional shall be taken directly to the supreme court. Direct appeals from the district court to the supreme court in criminal cases shall be as prescribed by K.S.A. 22-3601 and 22-3602, and ~~any~~ amendments thereto. Cases appealed to the court of appeals may be transferred to the supreme court as provided in K.S.A. 20-3016 and 20-3017, *and amendments thereto*, and any decision of the court of appeals shall be subject to review by the supreme court as provided in subsection (b) of K.S.A. 20-3018, *and amendments thereto*, except that any party may appeal from a final decision of the court of appeals to the supreme court, as a

New Sec. 28. Subject to the provisions of this section, the act for judicial review and civil enforcement of agency actions shall be applicable to appeals from orders of the civil service board. In any such appeal, the civil service board shall not be a named party to the proceedings. Parties to such appeals shall be (a) the aggrieved employee, former employee or applicant; (b) the state agency that took the action that was appealed to the civil service board; and (c) any party the district court permits to intervene in the district court action. An order of the civil service board may be affirmed, reversed or modified by the district court on appeal. Applications for a stay or other temporary remedies shall be to the state agency that took the action that was appealed to the civil service board.

4-24-84

Attach. #3

TESTIMONY ON HOUSE BILL 2688 AND HOUSE BILL 2689

BEFORE SENATE JUDICIARY COMMITTEE

ON BEHALF OF KANSAS CORPORATION COMMISSION

C. EDWARD PETERSON
ASSISTANT GENERAL COUNSEL

APRIL 24, 1984

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#3

TESTIMONY ON HB 2688 AND HB 2689

THE CORPORATION COMMISSION SUPPORTS THE EFFORTS OF THE LEGISLATURE TO PASS AN ADMINISTRATIVE PROCEDURES ACT. ALL AGENCIES WOULD BENEFIT FROM A LEGISLATIVE STATEMENT OF PROCEDURAL GUIDELINES. A PROPERLY DRAFTED ADMINISTRATIVE PROCEDURES ACT WOULD OFFER THE ADVANTAGES OF UNIFORMITY AND CLARITY WHICH ARE NEEDED. HOWEVER, THE NEED FOR CLARITY WILL NOT BE SATISFIED BY HB 2688 AND HB 2689 UNLESS A SUBSTANTIAL NUMBER OF CHANGES ARE MADE.

RELATIVE TO HB 2689 THE CORPORATION COMMISSION HAS ONLY ONE CONCERN; AN AMBIGUITY IN THE BILL MAY ALTER THE PROCEDURE FOR APPEALING RATE CASE DECISIONS OF THE COMMISSION. AS YOU MAY RECALL, A FEW YEARS AGO THE LEGISLATURE CHANGED THE PROCEDURE FOR APPEALING UTILITY RATE CASES DIRECTLY TO THE COURT OF APPEALS. THIS DIRECT APPEAL HAS WORKED WELL FOR ALL PARTIES BY ASSURING QUICK, FINAL APPELLATE DECISIONS AND BY ELIMINATING FORUM SHOPPING AMONG THE DISTRICT COURTS. ALL OTHER DECISIONS OF THE COMMISSION ARE APPEALED TO DISTRICT COURT. HB 2689 MAY ELIMINATE THIS ARRANGEMENT AND RETURN JURISDICTION OVER RATE CASE APPEALS TO THE DISTRICT COURTS. THIS RESULT CAN BE AVOIDED BY AMENDING SECTION 9 TO ELIMINATE THE AMBIGUITY THIS SECTION PRESENTS WHEN COMPARED WITH OTHER SECTIONS OF HB 2689. A SUGGESTED AMENDMENT IS ATTACHED TO THIS TESTIMONY. THE PROPOSED AMENDMENT ATTEMPTS TO MAKE CLEAR THAT WHERE CURRENT STATUTES AUTHORIZE APPEALS DIRECTLY TO THE COURT OF APPEALS, THE STATUTUES WILL CONTROL AND NOT BE SUPERCEDED

BY SECTION 9. THIS PROVISION IS CONSISTENT WITH OUR UNDERSTANDING OF THE ORIGINAL INTENT OF THE HB 2689 AS EXPRESSED IN SECTIONS 3, 6 AND 28.

TURNING TO HB 2688, THE ADMINISTRATIVE PROCEDURES ACT, THE COMMISSION PERCEIVES MANY MORE PROBLEMS THAT MUST BE RESOLVED TO MAKE THIS BILL WORKABLE. ALSO, ATTACHED TO THIS TESTIMONY IS A LIST OF SPECIFIC RECOMMENDATIONS; RATHER THAN REVIEW EACH, I WOULD LIKE TO SHARE A FEW GENERAL OBSERVATIONS WHICH PROMPTED THE RECOMMENDATIONS.

HB 2688 WILL CAUSE A GREAT DEAL OF CONFUSION WITHIN AN AGENCY LIKE THE KCC IF THE APPLICATION OF HB 2688 CONTINUES TO BE LIMITED TO LICENSING. (THE COMMISSION BELIEVES THE INTENT OF SECTION 2(C) IS TO LIMIT THE APPLICATION OF HB 2688 TO LICENSING FUNCTION; HOWEVER, THIS SECTION NEEDS TO BE CLARIFIED TO AVOID EXTENSION OF THE ACT TO UTILITY FRANCHISE AND CERTIFICATION PROCEEDINGS.) AMONG THE DIVERSE FUNCTIONS PERFORMED BY THE KCC ARE THE FUNCTION OF LICENSING OF MOTOR CARRIERS AND OIL AND GAS OPERATORS. CURRENTLY, THESE FUNCTIONS ARE PERFORMED IN THE SAME MANNER AS ANY OTHER KCC FUNCTION PURSUANT TO THE COMMISSIONS RULES AND REGULATIONS FOR PRACTICE AND PROCEDURE. UNDER 2688, THE KCC WILL BE REQUIRED TO DEVELOP A SEPARATE PROCEDURES FOR LICENSING MOTOR CARRIERS AND OIL AND GAS OPERATORS. THUS, THE COMMISSION WILL HAVE TWO PROCEDURES RATHER THAN ONE. THESE ADDITIONAL PROCEDURAL REQUIREMENTS SEEM TO CONFLICT WITH RECENT EFFORTS TO LESSEN PROCEDURAL REQUIREMENTS FOR GAINING ENTRY INTO THE MOTOR CARRIER BUSINESS.

MANY OF THE TIME LIMITS CONTAINED IN HB 2688 MAY NOT BE WORKABLE. OUR EXPERIENCE SUGGESTS THAT SOME OF THE NOTICE REQUIREMENTS ARE TOO SHORT TO ALLOW FOR REASONABLE NOTICE IN SOME CIRCUMSTANCES. ON THE OTHER HAND, THE TIME ALLOCATED FOR NOTICE OF A DECISION TO TAKE JUDICIAL NOTICE OF AN ITEM OF EVIDENCE IS TOO LENGTHY, AND IF APPLIED TO RATE CASES, IT WOULD MAKE VERY DIFFICULT THE COMMISSION'S TASK OF RENDERING RATE DECISIONS WITHIN 240 DAYS. WE SUBMIT THAT THE TIME PERIODS PRESCRIBED IN HB 2688 NEED TO BE CAREFULLY EXAMAINED TO ASSURE THAT THEY ARE WORKABLE IN THE CONTEXT OF THE PERFORMANCE OF SPECIFIC AGENCY FUNCTIONS. IN SOME INSTANCES IT APPEARS THAT SOME OF THE REQUIREMENTS OF HB 2688 ARE NOT WORKABLE AT THE KCC.

FINALLY, THE COMMISSION SUGGESTS THAT HB 2688 BE AMENDED TO INCLUDE MORE SPECIFIC EVIDENTIARY RULES AND STANDARDS. THE COMMISSION BELIEVES THAT IT IS PREFERABLE FOR AGENCIES TO FOLLOW THE RULES OF EVIDENCE WITH LIBERAL EXCEPTIONS AS OPPOSED TO THE VAGUE STANDARDS SUGGESTED BY SECTION 24. A SECOND, MORE-SPECIFIED STATEMENT SHOULD BE INCLUDED AUTHORIZING THE USE OF PREFILED TESTIMONY IN ADMINISTRATIVE PROCEEDINGS AND PRESCRIBING MINIMAL STANDARDS OF FAIRNESS FOR THE USE OF PREFILED MATERIALS.

IN SUMMARY, THE COMMISSION BELIEVES THAT HB 2688 AND HB 2689 CAN BE FASHIONED INTO A WORKABLE ADMINISTRATIVE PROCEDURES ACT, BUT A SUBSTANTIAL AMOUNT OF CHANGE IS REQUIRED BEFORE THE BILLS WILL BE WORKABLE. THE CHANGES SUGGESTED BY THE COMMISSION ARE NECESSARY TO AVOID CONFUSION AND TO ASSURE UNIFORMITY IN KCC PROCEDURES.

#3

Suggested Amendments to HB 2688

Section 6(b) should be amended to specify the type of notice required and length of the minimum period within which to provide notice.

Section 7 should be amended to read:

> "This act shall take effect on July 1, 1985, and does not govern adjudicative proceedings pending on that date. Subject to Section 3, this act governs all state agency adjudicative proceedings ~~commenced~~ filed after that date..."

Section 24(a) should be amended to require the use of established rules of evidence while conferring upon the presiding office the authority to liberally allow exceptions.

Section 24(d) should be amended by adding at the end thereof:

> "State agencies may prescribe by rule and regulation reasonable time limits for prefiling written testimony and supporting exhibits."

Section 24(f) should be amended by striking the last sentence. The sentence requires that parties be notified before any action is taken based in whole or in part upon "judicial notice". This requirement may impose substantial and undue delays in administrative proceedings.

Amend Section 25 by adding at the end:

"For purposes of this section only, the terms party or participant do not include the staff of a state agency."

This amendment would allow agency heads to utilize staff for information. The Commissioners at the KCC do not have adequate personnel staffing to evaluate all issues. Therefore, communication between the Commissioners and Staff is imperative. These communications currently must comply with the open meetings law; we see no compelling reason for imposing additional notice requirements that will make such communications unduly burdensome.

Amend Section 26(d) to read:

"Findings of fact shall be based ~~exclusively upon evidence of record~~ on substantial and competent evidence contained in the record in the adjudicative proceeding and on matters officially noticed in that proceeding.

The amended language reflects the evidentiary standard in Kansas case law for judicial review of administrative decisions.

Amend Section 26(g) by adding at the end:

"shown . , or unless a specific period is otherwise provided by statute.

This change would preserve the current 240-day deadline for rendering rate case decisions.

#2

PROPOSED AMENDMENT TO H.B. 2689

AMEND NEW SECTION 9 BY ADDING AT THE END THEREOF:

(c) THIS SECTION SHALL NOT ALTER THE JURISDICTION OF THE COURT OF APPEALS TO HEAR APPEALS WHERE A STATUTE SPECIFICALLY AUTHORIZES AN APPEAL DIRECTLY TO THE COURT OF APPEALS FROM AN ADMINISTRATIVE BODY OR OFFICE.

attach. # 4

Sections Excluded

Bill Wolf

c. 72, Art. 43 – Vocational Schools

Art 44 – Vocational education

Art. 49 – Proprietary

C. 2 Nursery dealer licenses (Art. 21)

C. 41 Private clubs

C. 74, Art. 5 – State Board of Agriculture

Art. 6 – State Corporation Commission

Art. 9 – Worker's Compensation cases

Art. 11 – Board of Nursing – certification of programs

Art. 15 – Optometry – non-licensure actions of board.

Art. 24 – Board of tax appeals

Art. 26 – Board of Water resources.

Art 33 – Fish and game

Art. 45 – Parks and recreation

Art. 49 – Retirement Systems

Art 56 – Law enforcement training – certification of officers

C. 65, Art 34 – Hazardous waste

Ch. 75, Art. 29 – Kansas Civil Service Act.

Public utilities and Motor carriers (Ch. 66)

C. 65, Art 48 – Health Facilities

C. 65, Art. 40 – alcohol treatment facilities

C. 65, Art. 1 – Water Supply & sewage

C. 65, Arts. 6, 7, & 8 – Food, dairys, & Cosmetics

Motor vehicles & Drivers licenses

Atch. 4

attach. #5

Delete §12-2011 from trailer bill.

Add amendments to :

ch. 36, Art. 5 – Lodging establishments and Food service

ch. 65, Art. 43 – Ambulance Service operators

ch. 65, Art. 45 – operators of water supply systems Wastewater Meeting

ch. 17, Art. 12 – Brokers (Securities)

Ch. 39; Art. 9 – Adult care homes

ch. 65, Art. 42 – Mental Health Technicians

ch. 82a, art. 14 – Weather modification projects

ch. 40, art. 2 – Insurance (Stock) agents

ch. 2, art. 24 – Pest control

ch. 8, art. 24 – Vehicle distributors/dealers

Ch. 75, art. 7b – Private investigators

ch. 65, art. 4 – Hospitals

ch. 82a, art. 12 – Water well contractors

ch. 65, art 5 – Maternity hospitals/homes

Atch. 5

4. 4-84

Attach. #6

STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES

House Bill 2689

The State Department of Social and Rehabilitation Services would raise the following concerns in regard to HB 2689 as amended by the House Committee of the Whole.

1. The definition of "agency action" ought to be deleted since it was stricken from both amended versions of HB 2688.

2. The Kansas act concerning administrative regulations already provides for a methodology to challenge the validity of agency regulations (declaratory judgment action, K.S.A. 77-434). The department would ask the question whether the validity of an administrative regulation should be challenged through the administrative appeals process. Our previous experience has been that persons who are serious about challenging administrative regulations will file declaratory judgment actions; and persons who are not so serious will raise such issues during the course of an administrative appeal.

Office of the Secretary
Robert C. Harder
296-3271
April 24, 1984

Att. 6

4-1-84

BURLINGTON COAT FACTORY

Attach. #7

ROUTE 130 NORTH
BURLINGTON, N. J. 08016
(609) 386-3314

FACT SHEET
"Lack of Enforcement by FTC and Justice Department"
Regarding Antitrust Laws especially Retail Price-Fixing"

a. Miller, Chairman of FTC and Baxter Former Assistant Attorney General for Antitrust have testified before Congress and made public pronouncements that they believe that retail price-fixing is alright in some cases and that they will decide whether or not to pursue any retail price-fixing cases.

b. Baxter filed an Amicus brief with the U.S. Supreme Court in Spray-rite Services vs. Monsanto, asking the court to use this case as a basis to reverse or modify the existing rule, making illegal price-fixing an automatic violation.

c. Baxter was refused permission, by the President's Cabinet Council to submit legislation to change the existing rule.

d. The number of price-fixing attempts has increased dramatically because of pressure on suppliers by Department store chains.

e. April 5, 1983, report by FTC Commissioner Pertschuk to U.S. Senator Lautenberg indicates that FTC and Justice Department have not prosecuted any retail price-fixing cases in the last two years.

f. June 22, 1983 - Congressman Dingell's Subcommittee staff on Oversight and Investigation issued report that FTC not only has policy of non-enforcement, but Miller blocks efforts to investigate.

g. Department Store Chains advertise or have news articles letting manufacturers know that if they continue doing business with discounters, they will cease buying from them.

h. U.S. Senator Warren Rudman (R - N.H.) and Sam Nunn (D - GA) with 51 co-sponsors submit SJ105 calling on enforcement of antitrust laws by Federal officials.

i. Major lawsuits by retailers against price-fixers increasing - October 1983 - Burlington Coat Factory sued Esprit de Corp and Federated Kids-R-Us sued General Mills, Izod and Federated and separate lawsuit against Absorba Inc. and Federated; K-Mart sued Rachael Perry.

j. Congressman James Florio (D - NJ) and bi-partisan contingent submit HJ389 - companion to Rudman/Nunn resolution.

k. Senator Rudman successfully attached language to Continuing Resolution (financing government operations for additional year) which eliminates funds from Justice Department and Federal Trade Commission to try to reverse or modify existing rule on retail price-fixing being an automatic violation.

Atch. 7

l. HR3222 - Commerce, Justice and Statte Appropriation passed and signed by the President contains language similar to K.

m. HR2912 - Justice Authorization Bill passed Judiciary Committee unanimously with language in Section 14 dealing with issue of non-enforcement and judicial attempts to circumvent will of Congress.

n. S1714 - FTC Authorization Bill passed in Committee with language in Section 13 dealing with issue of non-enforcement and judicial attempts to circumvent will of Congress. Additionally, the FTC would be required to submit twice a year a report, to the Committee, on its enforcement activities.

o. Supreme Court heard oral arguments December 5th on Spray-Rite Services vs. Monsanto, 45 State Attorney Generals, Numerous Trade Associations, members of Congress and Burlington Coat Factory all filed briefs against Monsanto (charged with price-fixing at lower and appellate levels) and Justice Department.

p. December 1983 - National Association of Attorney Generals pass resolution calling for Federal enforcement of antitrust laws on vertical price-restraint (retail price-fixing).

q. House and Senate Committees held hearings in February 1984 raising issue with FTC and Justice Department policies on enforcement.

r. Numerous states move resolutions calling for President and Congress to seek enforcement of antitrust laws on vertical price-restraint (retail price-fixing).

#7

United States Senate

COMMITTEE ON APPROPRIATIONS

WASHINGTON, D.C. 20510

Dear Colleague:

We are offering an amendment to H.R. 3222, the State, Justice, Commerce Appropriations Bill, which would stop efforts by officials in the Department of Justice to overturn or alter present law which prohibits price-fixing at the retail level. The efforts are contrary to settled case law and recent legislation passed by Congress. Our amendment would maintain the status quo and would give Congress time to reconsider the issue if it should choose to do so. It would implement, in part, a provision contained in Senate Joint Resolution 105, which currently has 51 cosponsors (list attached).

There is no argument concerning the current status of the law. The Supreme Court, since 1911, has consistently held that resale price maintenance is a per se violation of the Sherman Act. This construction was affirmed by Congress in 1975 when the Miller-Tydings Act and the McGuire Act were repealed. Those laws, referred to as the illegitimate children of the depression, enabled states to pass "fair trade" laws. "Fair trade" laws permitted manufacturers to set the retail prices of their products, thereby eliminating price competition at the retail level. When the laws were repealed in 1975, studies supporting repeal showed that consumers in states with "fair trade" laws were forced to pay prices 20 to 30 percent higher than consumers in states without "fair trade" laws. Studies also showed that there were higher rates of business failures in states with "fair trade" laws and that repeal would help to lower prices, create more efficient distribution systems, and enhance the business climate. Therefore, in the interest of competition at the retail level, Congress outlawed "fair trade" laws and reimposed the per se prohibition on resale price maintenance.

Despite the recent Congressional action and settled case law, Assistant Attorney General William Baxter, who is in charge of the Department of Justice Antitrust Division, has publicly pronounced his opposition to the law. In fact, during joint hearings before the State, Justice, Commerce Appropriations Subcommittee and the Senate Committee on Small Business, Mr. Baxter indicated that he does not intend to enforce the law. Furthermore, Mr. Baxter and the Solicitor General have filed briefs in the Supreme Court, ostensibly on behalf of the United States, in an attempt to eliminate the per se ban on resale price maintenance.

#7

These actions by Mr. Baxter are clearly contrary to his duties to enforce the law. Furthermore, they show a clear intent to ignore the role of Congress in the issue. The amendment we are offering would halt nonlegislative activities designed to change the law. It is supported by the National Association of Attorneys General, the National Federation of Independent Business, the Consumer Federation of America, the Small Business Legislative Council, the Association of General Merchandise Chains, the National Mass Retailing Institute, the National Consumers League, the Consumers Union, the National Association of Catalog/Showroom Merchandisers, and the Food Marketing Institute.

We invite you to cosponsor our amendment. Feel free to contact any one of us individually or have your staff contact one of the following: Phil Ward of Senator Rudman's office (4-3324), Alan Chvotkin of Senator Nunn's office (4-8497), or Bob Dotchin of Senator Weicker's office (4-8494).

Sincerely,

Sam Nunn

Warren B. Rudman

#7

Cosponsors

Senate Joint Resolution 105

Republicans	Democrats
Rudman	Nunn
Weicker	Baucus
Gorton	Bingaman
Chafee	Bradley
Cohen	Exon
D'Amato	Ford
Heinz	Glenn
Humphrey	Kennedy
Mattingly	Lautenberg
Percy	Melcher
Quayle	Metzenbaum
Stafford	Proxmire
Wilson	Tsongas
Boschwitz	Zorinsky
Kassebaum	Huddleston
Hawkins	Moynihan
Specter	Hart
Jepsen	Bumpers
Durenberger	Burdick
Lugar	Sasser
Packwood	Dixon
Mathias	Pryor
	Riegle
	DeConcini
	Dodd
	Johnston
	Bentsem
	Chiles
	Mitchell
	Leahy

U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, D.C. 20515

#7

MEMORANDUM

DATE: June 22, 1983

TO: The Honorable John D. Dingell, Chairman, Subcommittee on Oversight and Investigations; and the Honorable James J. Florio, Chairman, Subcommittee on Commerce, Transportation and Tourism

FROM: Staff, Subcommittee on Oversight and Investigations

RE: The FTC and Resale Price Maintenance: The Failure of Majority Rule

Resale price maintenance is one form of price fixing. The practice violates Section 1 of the Sherman Act which prohibits contracts, combinations, or conspiracies in restraint of trade.[1] It, therefore, also violates Section 5 of the Federal Trade Commission Act.[2] Resale price maintenance is a form of "vertical" restraint of trade; that is, it concerns an unlawful combination not between direct competitors, but between manufacturers and distributors to limit the prices at which the manufacturers' goods will be sold. These agreements may be express -- as in contracts between a manufacturer and its retail outlets which specify the price at which the manufacturers' goods may be sold -- or they may be implied from the circumstances, as where a manufacturer distributes "suggested" price lists and then enforces them through various means.

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1 15 U.S.C. § 1.

2 15 U.S.C. § 45.

#7

In either case, once the elements of an agreement have been found, the courts have condemned this form of price fixing as a per se violation of the Sherman Act.[3] The significance of this legal categorization is that this type of conduct is barred without the need for an elaborate economic analysis of its effects.

Not all who study the laws against resale price maintenance agree that the conduct should be illegal per se. There is a dispute whether this form of price fixing is always harmful to competition. Indeed, some scholars now argue that, in some circumstances, resale price maintenance actually enhances competition by making marketing more efficient. The debate focuses over whether, in light of these purported efficiency enhancing characteristics, the law should continue to treat resale price maintenance as a per se offense and to preclude consideration of its economic justification.

This report will not deal with the merits of the dispute, but will assess what has happened to resale price maintenance law enforcement at the Federal Trade Commission in light of it. In a letter response to Chairman Dingell's February 17, 1983 request, Commission Chairman Miller supplied enforcement statistics that permit a comparative evaluation of his administration's enforcement in resale price maintenance in contrast to that of his predecessors'.

The data contradict Chairman Miller's assertion in testimony delivered on March 8, 1983. before the Subcommittee on Commerce, Transportation, and Tourism that the Federal Trade Commission "continues to bring RPM cases". They also contradict his representation that resale price maintenance enforcement was as limited during the tenure of his immediate predecessor, Michael

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3 The leading case is Dr. Miles Medical Co. v. John D. Park & Sons, Co. 220 U.S. 373 (1911). In Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1977), the Supreme Court stated:

> "The per se illegality of [vertical] price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy [than does nonprice vertical restrictions].... Furthermore, Congress recently has expressed its approval of a per se analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of the individual states. Consumer Goods Pricing Act of 1975, Pub. L. 94-145 (1975), amending 15 U.S.C. § 45(a). No similar expression of Congressional intent exists for nonprice restrictions." (443 U.S. at 51, n. 18)

(Footnote continued)

#7

Pertschuk, as during Mr. Miller's tenure.

However, the number of Commission "complaints" issued alone is never fully descriptive of its enforcement activity. Reference to the Exhibits to this report shows a substantial number of investigations which led to 16 final consent decrees, that achieved the same effect as final litigated orders during the 1977 through 1979 period mentioned by Chairman Miller in his testimony. In sum, our inquiry has revealed the following:

1. The Commission's current law enforcement activity in the area of resale price maintenance has dramatically declined as compared to the previous two Chairmen's administrations.

2. The Commission has not been presented with and has not approved a single formal resale price maintenance adjudicative complaint since Chairman Miller came to the agency in October 1981.

3. The Commission has provisionally approved only one new resale price maintenance consent agreement since Chairman Miller arrived, the substance of which was completed in the previous administration.

4. Chairman Miller's Bureau of Competition has refused to approve virtually every staff request to upgrade resale price maintenance investigations presented to it from preliminary to formal status.

5. Despite the fact that a majority of the Commission adheres to the view that the agency should prosecute resale price maintenance as a per se violation of law, Chairman Miller has effectively stymied that majority view through his power to appoint and remove the Bureau of Competition's Director, to dictate its enforcement program, and even through his exercise of the power to put a matter "on hold" to forestall a Commission vote.

These conclusions rest upon a review of the available indicators of Commission enforcement activity, both public and nonpublic. There are two essential sources of hard information: formal Commission actions and staff investigations. We consider each in turn.

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[3](continued)

The Court's most recent opinions have only underscored the per se illegality of resale price maintenance. Rice v. Norman Williams Co., 50 U.S.L.W. 5052 (U.S. July 1, 1982); Arizona v. Maricopa County Medical Society, 50 U.S.L.W. 4687 (U.S. June 18, 1982); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

#7

Winter Meeting
Honolulu, Hawaii
December 5-9, 1983

RESOLUTION

VI

IN SUPPORT OF PER SE RULE
AGAINST RESALE PRICE MAINTENANCE

WHEREAS, in 1890 Congress enacted the Sherman Act to prohibit "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations. . ."; and

WHEREAS, the United States Supreme Court has repeatedly held that vertical price restraints are per se violations of the Sherman Act; and

WHEREAS, consumers are injured by vertical price fixing conspiracies that raise retail consumer prices and infringe upon retailers' rights to compete freely, and consumers benefit from vigorous price competition at the retail level;

WHEREAS, the Attorneys General of 45 states have made their views known by filing a brief amicus curiae in the case of Monsanto Co. v. Spray-Rite Corp., now pending before the United States Supreme Court, expressing their strong opposition to efforts by the Justice Department to eliminate the per se rule against resale price maintenance or vertical price fixing; and

WHEREAS, the Attorneys General have a vital interest in this case and other such attempts to weaken the antitrust laws in that, as chief law enforcement officers of their states, they are charged with enforcing their respective states' antitrust laws and certain of the federal antitrust laws, and therefore the Attorneys General have a crucial interest in seeing that these laws are applied in a manner consistent with the underlying Congressional policy and with decades of Supreme Court precedent; and

WHEREAS, the Attorneys General believe that the social, political, as well as economic considerations underlying the Sherman Act mandate the continued application of the per se rule to resale price maintenance and seventy years of consistent application of the per se rule reflects the Court's due regard for the policy considerations underlying the Sherman Act's purpose of preserving economic opportunity and unfettered competition in all sectors of the economy and at all levels of distribution; and

WHEREAS, Continuing Resolution, H.J. Res. 413, which was passed by both houses of Congress and signed into law by President Reagan, prohibits the Department of Justice or FTC from using any of the appropriated funds to alter or overturn the per se prohibition against resale price maintenance;

NOW THEREFORE BE IT RESOLVED, that the National Association of Attorneys General:

1. Expresses its strong support of the per se prohibition against resale price maintenance or vertical price fixing;

2. Believes that any change in the scope or application of the per se rule should be made, if at all, by Congress, and after a thorough airing of the issues at public hearings;

3. Commends United States Senators Slade Gorton, Warren Rudman, Robert Stafford, and Jeff Bingaman for their efforts to bring such legislation to the floor of the Senate for consideration by the entire Senate; and

BE IT FURTHER RESOLVED, that the National Association of Attorneys General authorizes its General Counsel to transmit these views to the Administration, the Congress, and other interested individuals.

#7

In an article written by James P. Melican and printed in the Antitrust Law Journal in March, 1980, James P. Melican made this point. The information came largely from court records around the country and was prepared at the request of the Council of the Section of Antitrust Law of the American Bar Association.

Mr. Melican concluded that antitrust litigation is more likely to be protracted (therefore more expensive) than other types of litigation.

This is borne out by the fact that in 1979, 27 percent of the private cases on file had been pending for 3 years or more as contrasted with slightly more than 12 percent for private cases generally. Furthermore, he stated one interesting and disquieting statistic - the number of private antitrust cases which have been pending 3 years or more had increased by 58 percent since 1977.

A total of 212 private antitrust cases went to trial in 1979 in the study area. The jury trials lasted 4 days or longer 88 percent of the time, compared with 25 percent of bench trials which lasted 4 days or longer.

According to Mr. Melican 13 of the 212 cases took more than 20 days to try. One case alone took 226 days. Putting it another way, in the test area, antitrust cases accounted for less than 2 percent of all civil cases tried to a

conclusion last year, but they represented 23 percent of the total number of cases which took 20 days or longer to try, and in terms of trial days, they were an even more significant factor, 34 percent.

Furthermore, the duration of private antitrust cases from filing to disposition also compared unfavorably to civil cases generally. Ten percent of the total number of private antitrust cases closed during 1979 took more than 52 months -- 4-1/2 years -- from filing to disposition.

Moreover, complex antitrust litigation has lasted even longer than most antitrust cases. ACI's case would be complex in all probability.

Therefore, it is disturbing that one study indicated that in most complex cases studied, the pre-trial stage lasted from two to four years.

#7

Read this before you decide whether you want to do business with us.

Van Heusen, 417, Hennessy, Baccarat, Baracuta, Cricketeer, Cricketeer Tailored Woman, Crestmark, Country Britche

#7

As a manufacturer, we deem an off-price retailer to be one whose manner of display, service to customers, fashion advertising and pricing policies are not compatible with how we want our brands marketed.

If you cheapen our brand, we won't sell to you.

Van Heusen, 417, Hennessy, Baccarat, Baracuta, Cricketeer, Cricketeer Tailored Woman, Crestmark, Country Britc

#1

As a manufacturer, we prefer to see our high-quality goods properly serviced by our customers. They will be able to perform such services only if these same goods are not sold by retailers who sell solely on a price basis; and who therefore cannot afford to provide the service, advertising and merchandising which only retailers who do not sell solely off-price can afford.

As a retailer, we will maintain the same standards in determining which brands we buy. We will thoroughly investigate the distribution and management policies of each of our important resources. Unless we are satisfied with the integrity and sincerity of management's attitude towards distribution, that resource will be terminated.

Phillips-Van Heusen Corporation

~offrey Beene (clothing/furnishings), Cachàrel • Harris & Frank, Hamburger's/Kennedy's, Juster's, Rices Nachmans

#7

As a retailer, we will not consider as a resource any manufacturer whose current goods or staples are found in any significant quantity in off-price retailers. We will no longer carry any national brand or designer from any supplier who cannot control and restrict his distribution to stores that we consider compatible with ours.

If you cheapen your brand, we won't buy from you.

Phillips-Van Heusen Corporation

y Beene (clothing/furnishings), Cacharel • Harris & Frank, Hamburger's/Kennedy's, Juster's, Rices Nachmans

Editorials

CHAPTER 11: NO WAY TO BARGAIN

The rough weather buffeting the airline industry should surprise nobody, least of all airline management or unions. The storm was blown up by the winds of competition, following the deregulation of the industry, and nobody ever claimed that competition always means smooth sailing—or, in this case, flying (page 98). Airlines face a painful adjustment period, particularly as management struggles to cut labor costs sharply and unions stubbornly resist.

Few precedents exist to guide either management or labor leaders through this transition, but so far neither side has shown much flexibility. Though unions have made concessions, they reject the deep cuts in wages and benefits that may be required. Management rightly insists that labor costs must now reflect marketplace realities. Yet attempts to use Chapter 11 of the bankruptcy law as a battering ram to knock down existing labor contracts, as Continental is doing and Eastern may try to do, can only escalate what would be inevitable conflicts in any case. And the airlines, following the example of such companies as Wilson Foods Corp. and Manville Corp., are pushing the bankruptcy laws even closer to the breaking point.

This trend raises some disturbing questions. Labor disputes are traditionally settled in this country by collective bargaining. If bankruptcy can be used solely as an escape hatch from high labor costs, where does that leave the extensive body of federal labor law? Courts recognize that contracts of all kinds can be abrogated in bankruptcy, but what standards must a company in bankruptcy meet to tear up a labor agreement? The law on both these points is unsettled, and lengthy litigation seems likely. The courts should tie bankruptcy more firmly to a company's financial condition and, in the case of the airlines, send issues such as labor problems back to the bargaining table.

A NEW STRANGLEHOLD ON EXPORTS

At a time when the U. S. vitally needs to step up its exports, the Reagan Administration cannot decide whether it wants a trade policy that promotes or hobbles sales abroad. Last fall, President Reagan backed off his abortive attempt to put pressure on foreign subsidiaries and licensees of U. S. companies to keep them from selling equipment and technology for the Soviet Union's natural gas pipeline. A few weeks ago, he quietly lifted the ban former President Jimmy Carter had imposed on selling pipe-laying machinery to the Soviets, a ban, it turned out, that had simply let a Japanese producer grab the market. But now, despite these moves toward easing export restrictions, the Administration is proposing to reverse direction.

The Pentagon and the Commerce Dept.'s office of export controls want to place 17 types of oil and gas equipment and technology under tight "national security" export restrictions. Once again, U. S. trade competitiveness and political relations with its allies are in jeopardy.

The new proposals are designed to back up U. S. demands that its allies agree to place similar restrictions on those items—an agreement that would be administered by the Paris-based coordinating committee that administers export controls. The idea is that the U. S. must set the example, and strengthen its negotiating hand with allies, by first putting its own manufacturers in an export straitjacket. Yet this tactic repeatedly failed in the past, when Europe and Japan refused to follow Washington's lead and moved in to fill the market vacuum created by self-imposed U. S. export curbs.

U. S. allies have a basically different attitude toward trade with the Soviets in oil- and gas-related technology, as last year's confrontation over the Soviet gas pipeline showed. U. S. industry will be the only loser, once again, if the U. S. refrains from selling equipment that the Soviets can obtain from other suppliers. The cumbersome licensing procedures will also hinder exports to friendly nations. If the Administration persists in attempting to impose such policies, the result, once again, may be to weaken rather than strengthen allied cooperation in dealing with the Soviets.

'FAIR TRADE' LAWS SHOULD STAY DEAD

Discount stores are familiar features of the retail scene these days. But it was not always so, and consumers whose memories reach back to the 1950s remember their pleasure at finding no-frills outlets selling brand-name merchandise—everything from phonograph records to major appliances—at well below the manufacturers' "suggested" list prices. Lots of manufacturers, though, fought hard to defend "fair trade" and keep their products out of the hands of the upstart discounters. In 1975, Congress yielded to consumer preference and gave discounting its blessing by forcing all states to abide by the 1911 Supreme Court ruling that under the Sherman Act fair trade price fixing was illegal.

The Reagan Administration's Justice Dept. is asking the Supreme Court to reinstate fair trade, now called resale price maintenance (page 84). This is a bad idea. The nation's consumers, as well as many manufacturers themselves, ought to hope that the court will reject it.

William F. Baxter, Justice's antitrust chief, says that dealers have to be guaranteed high profit margins to entice them to offer extra services. Yet offering a merchant the profit to pay for a service is no guarantee that he will use the money for that purpose. Further, if customers really want the services—enough to pay for them—they will buy from outlets savvy enough to offer them.

Baxter makes other points, but all such arguments are essentially a rehash of those heard in earlier years. Discount stores have proved their efficiency and value. Fair trade should not be revived, even under a different name.