Approved April 10, 1985
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Robert Frey (Chairperson) at

10:00 a.m./~~p.m.~~ on March 26, 1985 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~: Senators Frey, Hoferer, Burke, Feleciano, Gaines, Langworthy, Parrish, Steineger, Talkington, Winter and Yost.

Committee staff present:

Mary Torrence, Office of Revisor of Statutes
Mary Sue Hack, Office of Revisor of Statutes
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Janet Stubbs, Home Builders Association of Kansas
Wayne Hundley, Office of Attorney General
Ron Smith, Kansas Bar Association
Everett Willoughby, Kansas State Board of Pharmacy
Ken Schafermeyer, Kansas Pharmacists Association
Ron Hein, Johnson & Johnson
John Wine, Office of Secretary of State

House Bill 2016 - Municipal antitrust liability; immunity.

Janet Stubbs, Home Builders Association of Kansas, testified in opposition to the bill. She testified HBAK supports legislation no more restrictive than that of the federal act. Her organization believes an individual is entitled to recover actual damages. They urge action by this committee to retain injunctive relief to individuals under federal antitrust actions as well as state. They oppose the state granting immunity to municipalities for actions under federal antitrust laws in the eight specific areas designated in the bill. They ask that amendments be made to permit aggrieved individuals access for injunctive relief under federal laws in the eight areas specified and equal treatment under state action, including actual damage provisions in these same eight areas just as are permitted in other actions. A copy of her testimony is attached (See Attachment I).

Wayne Hundley, Office of Attorney General, stated he was not appearing in support or in opposition to the bill. He wanted to point out some things that concern them. He said he is generally supportive of the premise of this type of bill. It could be cost saving matter to a county. They would like to see the state having the same right under federal law, because there are that many more cases and much more guidance in their office to seek conjunctive relief. I think eliminating damages is a good relief. He stated the major problem is these cases are judged on case by case basis. A committee member questioned the language inserted on page 3 of the bill concerning surety. Mr. Hudley replied they would like to see the state excluded from giving surety; I see no reason to require it.

Ron Smith, Kansas Bar Association, stated his association is in support of the intent of the bill. They support the amendments added on the House side, and the bill as currently drafted. A copy of his remarks is attached (See Attachment II).

House Bill 2066 - Scheduling and rescheduling certain substances act.

Everett Willoughby, Kansas State Board of Pharmacy, testified in support of the bill. He stated this bill was requested by the Board of Pharmacy and if enacted will permit the Board to be in compliance with K.S.A. 65-4102. The rescheduling of controlled substances is a yearly occurence

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

House Bill 2066 continued

to ensure that controlled substances are placed in the correct schedule, as defined by the Federal Drug Enforcement Administration. Copies of his testimony and attachments are attached (See Attachment III).

Ken Schafermeyer, Kansas Pharmacists Association, testified the association supports this bill. The passage of HB 2066 would make it easier for pharmacists to comply with the law and easier for the Board of Pharmacy to enforce the law. A copy of his testimony is attached (See Attachment IV).

Ron Hein, Johnson and Johnson, appeared to speak in support of the bill and specifically in support of those provisions rescheduling the drug sufentanil from Schedule I to Schedule II. A copy of his testimony is attached (See Attachment V). The chairman inquired if he agreed with amending in the drug buprenorphine? Mr. Hein replied he had no objection.

The chairman announced John Bottenberg is available to respond to questions.

House Bill 2103 - U.C.C.; priority of security interests; limited liability for dissemination of erroneous information.

John Wine, Office of Secretary of State, appeared to explain the bill. A copy of a memorandum from Jon Josserand, Special Assistant Secretary of State, is attached (See Attachment VI). Mr. Wine stated the bill is making a policy change; no substantive change. Considerable committee discussion followed.

House Bill 2521 - Real estate; barring rights under certain mortgages and deeds of trust.

The chairman explained the bill. Following committee discussion, Senator Gaines moved to report the bill favorably, and placed on the consent calendar. Senator Steineger seconded the motion. The motion carried.

House Bill 2103 - U.C.C.; priority of security interests; limited liability for dissemination of erroneous information.

Following committee discussion, Senator Feleciano moved to amend the bill by striking Section 2. Senator Gaines seconded the motion. Further committee discussion was held.

The motion was pending at time of adjournment.

Copy of guest list attached (See Attachment VII).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-26-85

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
JANET STUBBS	Topeka	HBAK
John Wine	Topeka	Sec. of State
Ken Schafermeyer	"	KS Pharmacists Assoc.
Everett Willoughby	"	Board of Pharmacy
John C. Bottenberg	TOPEKA	Mult.-State Assoc.
[illegible]	Topeka	Johnson & Johnson
JIM McBride	Topeka	United Way
D. WAYNE ZIMMERMAN	TOPEKA	THE ELECTRIC COS ASSOC. OF KS.
Randy Burleson	Columbus	Empire Electric
Jerry Conrad	Topeka	KG&E
Ron Smith	"	Ks Bar Assn
Wayne Hundley	"	AG
Gerry Ray	Olathe	Jo Co Commissioners
HANNES ZACHARIAS	City of Lawrence	City of Lawrence
Mike Slotsky	Lawrence	Intern Sen. [illegible]
SCOTT LAMKERS	OVERLAND PARK	O.P.
Chris McKenzie	Topeka	League of Ks. Mun.
CHARLES BELT	WICHITA	WICHITA C of C

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3-29-85

TESTIMONY BEFORE
SPECIAL COMMITTEE ON SENATE JUDICARY
MARCH 25, 1985
BY
JANET STUBBS
HOME BUILDERS ASSOCIATION OF KANSAS

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

MY NAME IS JANET STUBBS, EXECUTIVE DIRECTOR OF THE HOME BUILDERS ASSOCIATION OF KANSAS.

AS YOU ARE PROBABLY AWARE, CONGRESS PASSED THE "LOCAL GOVERNMENT ANTI-TRUST ACT OF 1984" IN THE FINAL HOURS OF ACTIVITY ON OCTOBER 11. THIS PROHIBITS RECOVERY OF MONETARY DAMAGES, BOTH TREBLE AND ACTUAL.

ALTHOUGH YOU MAY HAVE ALREADY BEEN PRESENTED WITH MORE BACKGROUND INFORMATION ON THIS SUBJECT THAN YOU EVER WANTED TO HEAR, I URGE YOU TO BE REMINDED OF THE FACT THAT ALTHOUGH CONGRESS WAS THE OBJECT OF AN INTENSIVE LOBBYING EFFORT BY CITIES AND COUNTIES, THEY REFUSED TO REMOVE THE RIGHTS OF A PRIVATE PARTY TO INJUNCTIVE RELIEF. THEY ALSO REFUSED TO MAKE THE ACT ENTIRELY RETROACTIVE.

I WANT TO STRESS THE FACT THAT THE NATIONAL ASSOCIATION OF HOME BUILDERS DID NOT SUPPORT THE TREBLE DAMAGE PROVISION WHICH CONGRESS HAS NOW REPEALED IN THE FEDERAL LAW. HOWEVER, NAHB AND HBAK SUPPORT THE AWARDING OF ACTUAL DAMAGES TO AN AGGRIEVED PARTY FOR THE DAMAGE CAUSED BY ANTICOMPETITIVE DECISIONS, INCLUDING THOSE WHICH ARE MADE UNDER THE CLOAK OF ZONING LAWS.

SOME 23 STATES' ATTORNEY GENERALS, INCLUDING THE KANSAS ATTORNEY GENERAL, FILED AMICUS BRIEFS ON THE SIDE OF COMMUNITY COMMUNICATION CO., INC. IN THE BOULDER CASE. THEIR SUPPORT REFLECTED A STRONG BELIEF IN THE EFFECTIVENESS AND IMPORTANCE OF ANTITRUST LAWS. MOREOVER, THEY SHARED CHIEF JUSTICE BURGER'S FEELING THAT LOCAL GOVERNMENTS SHOULD ENJOY NO SPECIAL SHIELD FROM THESE LAWS WHEN THEIR ACTIONS WARRANT SCRUTINY.

EXAMPLES GIVEN BY PROPONENTS OF HB 2016, DURING PREVIOUS HEARINGS, MIGHT LEAVE THE IMPRESSION THAT SUITS FILED AGAINST GOVERNMENT UNITS ARE FRIVILOUS OR LACKING IN MERIT. IT HAS BEEN IMPLIED THAT LOCAL OFFICIALS ARE SUBJECT TO HARASSMENT SUITS BY DEVELOPERS AND OTHERS TO OBTAIN A DESIRED DECISION FROM GOVERNMENT UNDER THE THREAT OF COSTLY AND TIME CONSUMING ANTI-TRUST SUITS. I AM NOT HERE TO PRESENT YOU WITH DOCUMENTATION OF FACTS THAT

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THIS HAS NOT OCCURRED, AND I DO NOT BELIEVE THAT PROOF HAS BEEN PRESENTED THAT SUCH HAS OCCURRED. HOWEVER, I WOULD SUBMIT THAT A DEVELOPER WHO MUST WORK WITH A GOVERNING BODY ON A REGULAR BASIS IS NOT GOING TO RUN THE RISK OF ALIENATING THOSE INDIVIDUALS WITH A FRIVILOUS LAWSUIT WHICH WILL AT THE SAME TIME COST HIM THOUSANDS OF DOLLARS TO INITIATE.

KEEP IN MIND THAT IN ORDER TO FILE A SUIT, THE PLAINTIFF IS ALSO SUBJECT TO THE EXPENSE OF AN ANTITRUST ATTORNEY AND THE TIME CONSUMING FACT FINDING TO OBTAIN THE HIGH DEGREE OF PROOF REQUIRED TO SHOW THE EXISTENCE OF AN ILLEGAL CONSPIRACY. THE BURDEN OF PROOF FALLS UPON THE PLAINTIFF.

PROVING AN ANTITRUST VIOLATION AGAINST A GOVERNMENTAL ENTITY IS LIKELY TO BE A MORE FORMIDABLE TASK THAN MAKING A CASE FOR A PRIVATE PERSON'S VIOLATION OF THE ANTITRUST LAWS. MOST LOCAL GOVERNMENT ACTIONS IN THE LAND USE CONTEXT WILL BE SUBJECTED TO A "RULE OF REASON" ANALYSIS, WHICH ALLOWS THE MUNICIPALITY TO ARGUE THAT ITS ACTION IS FAIRLY DEBATABLE, RATHER THAN TREATED AS A "PER SE" VIOLATION. GENERALLY, COURTS CONFINE THE ASSESSMENT OF PRIVATE PARTY CONDUCT UNDER THE RULES OF REASON STANDARD TO AN EXAMINATION OF CERTAIN ECONOMIC VARIABLES AND WILL NOT TAKE INTO CONSIDERATION THE SOCIAL GOOD THAT MIGHT BE DERIVED FROM THE CHALLENGED ACTIVITIES. BUT LANGUAGE IN LAFAYETTE AND BOULDER INTIMATES THAT, WHERE GOVERNMENT ACTIVITIES ARE INVOLVED, THE RULE OF REASON ANALYSIS MAY BE BROADENED TO ENCOMPASS NON-ECONOMIC CONSIDERATION, SUCH AS THE PUBLIC WELFARE.

CONSEQUENTLY, UNLESS A DEVELOPER CAN SHOW THAT AN ANTICOMPETITIVE PURPOSE WAS CENTRAL TO MUNICIPAL LAND USE ACTIVITY THAT BENEFITS THE DEVELOPER'S COMPETITORS, THE MUNICIPAL CONDUCT IS LIKELY TO SURVIVE AN ASSAULT UNDER STATE LAW. AT THE SAME TIME, IN ORDER TO HAVE "STANDING" TO CONTEST THE MUNICIPAL ACTION, THE DEVELOPER MUST SHOW MORE THAN THE MERE THREAT OF COMPETITIVE HARM TO HIS PROJECT; A CONCRETE INTEREST, SUCH AS PROXIMITY TO THE COMPETITOR'S PROPERTY, IS NECESSARY. SEE, E.G., WESTBOROUGH MALL V. CITY OF CAPE GIRARDEAU, 693 F.2D 733 (8TH CIR. 1982), CERT. DEN. 51 U.S.L.W. 3837 (MAY 24, 1983).

IN STAUFFER V. TOWN OF GRAND LAKE, NO. 80-A-752, (D. C. COLO. 1980) THE PLAINTIFF BROUGHT SUIT OVER A DECISION OF THE TOWN BOARD AND PLANNING COMMISSION TO RE-ZONE HIS PROPERTY (PARCEL "A") FROM MULTI-FAMILY TO SINGLE-FAMILY USE. IMMEDIATELY PRIOR TO THE TIME OF THIS DECISION, ACCORDING TO THE COMPLAINT, THE TOWN HAD BEEN IN THE PROCESS OF NEGOTIATING WITH THE PLAINTIFF TO ACQUIRE A SEPARATE PARCEL OF HIS PROPERTY (PARCEL "B") FOR USE AS A MUNICIPAL THEATER AND PARK. AGAIN ACCORDING TO THE COMPLAINT, THE TOWN PROPOSED AN EVEN TRADE OF PROPERTY HELD BY IT FOR THE HOLDING OF THE PLAINTIFF, EVEN THOUGH THE

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PLAINTIFF'S PARCEL WAS APPRAISED AT $228,276.00 AND THAT OF THE TOWN AT $77,640.00. AT THE JUNE 12, 1980 MEETING OF THE PLANNING COMMISSION, HELD TO CONSIDER THE ZONING OF PARCEL A, THE PLAINTIFF WAS TOLD THAT IF HE DID NOT AGREE TO THE "EVEN TRADE" OFFER WITH RESPECT TO PARCEL B, PARCEL A WOULD BE ZONED SINGLE-FAMILY, LOW-DENSITY RESIDENTIAL, THUS DESTROYING ITS INTENDED USE. THIS THREAT WAS IGNORED, AND THE ZONING MAPS WHICH HAD BEEN AVAILABLE FOR PUBLIC INSPECTION WERE ALTERED TO REFLECT THE SINGLE-FAMILY USE AND THEN APPROVED BY THE TOWN BOARD.

IN DENYING A MOTION TO DISMISS THE PLAINTIFF'S ANTITRUST CLAIM AS HAVING NO LEGAL BASIS, JUDGE ARAJ OF THE UNITED STATES DISTRICT COURT FOR COLORADO REASONED THAT THE COLORADO ZONING STATUTES DID SET FORTH A STATE POLICY TO DISPLACE COMPETITION WITH REGULATION, AND THAT THE STATE SUPERVISES THIS POLICY SUFFICIENTLY TO CONFER AN EXEMPTION FROM ANTITRUST LIABILITY FOR ZONING DECISION MADE IN LINE WITH STATE LAW. HOWEVER, IN THE VIEW OF JUDGE ARAJ, THE AUTOMATIC EXEMPTION FROM LIABILITY WAS NOT APPROPRIATE IN THIS CASE, SINCE THE COMPLAINT ALLEGED THAT THE GRAND LAKE ZONING OFFICIALS HAD ACTED "WITH THE AIM OF OBTAINING THE PLAINTIFF'S PROPERTY FOR MUNICIPAL DEVELOPMENT AND ENHANCING THE COMPETITIVE POSITION OF THE TRUSTEES". AS THE JUDGE REASONED "THE COLORADO LEGISLATURE DID NOT FORSEE, CONTEMPLATE, OR INTEND THAT ZONING OFFICIALS WOULD USE THEIR LEGISLATIVE AUTHORIZATION TO PROMOTE THEIR OWN INTEREST AND ECONOMIC BENEFIT".

IN WHITWORTH V. PERKINS, THE COURT CONSIDERED AN ALLEGATION THAT THE DEFENDANTS HAD ENGAGED IN EXCLUSIONARY ZONING WITH THE INTENTION OF PREVENTING THE PLAINTIFFS FROM STARTING A RETAIL LIQUOR BUSINESS THAT WOULD HAVE COMPETED WITH THE INTEREST OF CERTAIN MEMBERS OF THE TOWN BOARD. THE COURT OF APPEALS HELD THAT THIS CONDUCT SHOULD NOT BE ACCORDED AUTOMATIC IMMUNITY SIMPLY BECAUSE IT WAS TAKEN UNDER THE "CLOAK" OF THE STATE ZONING STATUTES.

IN THESE CASES, ONLY THE MOST EGREGIOUS CONDUCT BY GOVERNMENTAL OFFICIALS HAVE BEEN HELD TO FORM THE BASIS OF ANTITRUST ACTIONS.

THE ARGUMENT IS ALSO MADE THAT THE COSTS OF SUCH SUITS WILL BE PASSED ON TO TAXPAYERS. THIS IS NO DIFFERENT, OF COURSE, THAN IN THE PRIVATE CONTEXT WHERE THE COSTS OF CORPORATE ANTITRUST LITIGATION ARE PASSED ON IN THE FORM OF HIGHER PRICES TO CONSUMERS. SIMILARLY, TAXPAYERS MUST ULTIMATELY PAY FOR OTHER TYPES OF LITIGATION AGAINST LOCAL GOVERNMENT, SUCH AS PERSONAL INJURY SUITS AND CONTRACT CLAIMS. THE IMPORTANT POLICY REASONS BEHIND THE ANTITRUST LAW SHOULD NOT BE NEGATED BY THE FACT THAT COSTS WILL BE BORNE IN SMALL PART BY INDIVIDUAL MEMBERS OF THE PUBLIC.

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AS AN EMPLOYER, I AM RESPONSIBLE FOR THE ACTIONS OF MY EMPLOYEE ACTING ON MY BEHALF. SHOULD WE TAXPAYERS NOT BE RESPONSIBLE FOR THE ACTIONS OF OUR EMPLOYEES, THE OFFICIALS WHICH WE ELECTED?

PROPONENTS OF AUTOMATIC ANTITRUST IMMUNITY MAINTAIN THAT THE ACTIVITIES OF LOCAL GOVERNMENT WILL BE CHILLED BY THE PROSPECT OF ANTITRUST LIABILITY. HOWEVER, WE MUST REALIZE THAT ACTIVITIES OF LOCAL GOVERNMENTS HAVE CHANGED OVER THE YEARS. SOME ARE MORE AGGRESSIVE IN THOSE ACTIVITIES IN COMPETITION WITH PRIVATE INDUSTRY.

AS THE DECISION IN WHITWORTH AND STAUFFER INDICATE, EFFECT OF THE ANTI-TRUST LAW WILL BE TO DETER THE USE OF PUBLIC OFFICE FOR PURELY PRIVATE GOALS OR TO EXTORT A UNIQUE ADVANTAGE FOR A LOCAL UNIT OF GOVERNMENT FUNCTIONING IN IT'S PROPRIETARY CAPACITY. THE CHILLING OF SUCH ACTIVITIES WOULD BE A SALUTARY RESULT OF PRESERVING THE ANTITRUST REMEDY.

ANTITRUST LIABILITY SHOULD CAUSE LOCAL GOVERNMENTS TO TAKE STEPS TO REDUCE THEIR LIABILITY, WHICH WE SEE AS A POSITIVE EFFECT.

FOR A CITY TO SCRUTINIZE ITS ACTIONS FOR RESTRICTION OR DISPLACEMENT OF COMPETITION BY IMPLEMENTING COMPLIANCE PROCEDURES SHOULD RESULT IN A FAIRER DECISION CREATED BY MORE RESPONSIBLE AND AWARE GOVERNMENT OFFICIALS.

THE UNITED STATES SUPREME COURT POINTED OUT THAT THESE LAWS "ARE AS IMPORTANT TO THE PRESERVATION OF ECONOMIC FREEDOM IN OUR FREE ENTERPRISE ECONOMIC SYSTEM AS THE BILL OF RIGHTS IS TO THE PROTECTION OF OUR FUNDAMENTAL PERSONAL FREEDOMS". UNITED STATES VS. TOPCO ASSOCIATES, 402 U.S. 596 (1972).

PROPONENTS HAVE STRESSED THE PROBLEMS WITH LABILITY INSURANCE FOR UNITS OF GOVERNMENT. DOES THIS PROBLEM STILL EXIST MINUS A PROVISION PERMITTING TREBLE DAMAGES?

HBAK SUPPORTS LEGISLATION NO MORE RESTRICTIVE THAN THAT OF THE FEDERAL ACT, AND BELIEVES AN INDIVIDUAL IS ENTITLED TO RECOVER ACTUAL DAMAGES. WE URGE ACTION BY THIS COMMITTEE TO RETAIN INJUNCTIVE RELIEF TO INDIVIDUALS UNDER FEDERAL ANTITRUST ACTIONS AS WELL AS STATE.

WE OPPOSE THE STATE GRANTING IMMUNITY TO MUNICIPALITIES FOR ACTIONS UNDER FEDERAL ANTITRUST LAWS IN THE EIGHT SPECIFIC AREAS DESIGNATED IN HB 2016.

OPPONENTS MAINTAIN THEIR BASIS FOR OPPOSITION TO PERMITTING ACCESS TO FEDERAL ACTIONS IS EXPENSE AND TIME DELAY TO THE UNITS OF GOVERNMENT DUE TO THE CROWDED COURT DOCKETS OF THE FEDERAL DISTRICT COURTS AND THE DISTANCE THESE COURTS MAY BE LOCATED FROM THE LOCATION OF THE DISPUTE.

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I URGE THE MEMBERS OF THIS COMMITTEE TO CONSIDER THAT THE EXPENSE OF TRAVEL TO THE PLAINTIFF WILL BE EQUAL TO THAT OF THE MUNICIPALITY AND THE EXPENSE SUFFERED BY EXTENSIVE TIME DELAYS MEANS GREAT EXPENSE TO A DEVELOPER WHO MAY HAVE GREAT AMOUNTS OF MONEY INVESTED IN A PROJECT ON WHICH HE WILL BE PAYING INTEREST DURING THE WAIT FOR RESOLUTION OF THE PROBLEM. THEREFORE, SERIOUS CONSIDERATION TO THE VARIOUS RAMIFICATIONS WILL BE GIVEN BEFORE A DECISION IS MADE TO GO TO FEDERAL COURT.

HOWEVER, I WOULD SUBMIT THAT THE MUNICIPALITY MIGHT PREFER A DECISION ON A DISPUTE BY A LOCAL COURT THAN THAT OF A COURT REMOVED FROM THE LOCAL INFLUENCE.

IN CONCLUSION, IT IS THE VIEW OF HBAK THAT CONGRESS GAVE EXTENSIVE CONSIDERATION TO ALL THE ARGUMENTS WHICH HAVE BEEN PRESENTED AT THE STATE LEGISLATIVE LEVEL ON THIS ISSUE AND THEY REFUSED TO DENY INDIVIDUALS ACCESS FOR INJUNCTIVE RELIEF.

THE KANSAS LEGISLATURE IS BEING ASKED TO END THE ABILITY OF INDIVIDUALS TO SEEK FEDERAL JUDICIAL REVIEW OF THE MUNICIPALITIES ACTIONS. IT FURTHER PROHIBITS MONETARY DAMAGE AWARDS IN THESE 8 AREAS UNDER STATE ACTIONS WHILE PERMITTING NOT ONLY ACTUAL DAMAGE AWARDS BUT TREBLE AWARDS IN OTHER AREAS NOT EXEMPTED ELESEWHERE.

THE LANGUAGE CONTAINED IN HB 2016 RELATING TO RETROACTIVITY IS TAKEN FROM THE FEDERAL ACT AND IS NOT OPPOSED BY HBAK.

HB 2016 HAS PROVIDED THE COURT THE ABILITY TO IMPOSE A SURETY BOND TO COVER DAMAGES AND ATTORNEY FEES, IF THE INJUNCTION IS DENIED, WHICH IS MORE THAN PROVIDED BY CONGRESS AND IS AN ADDED EXPENSE TO THE PLAINTIFF.

IT WAS BECUASE OF THESE POINTS THAT THE HOUSE COMMITTEE STRONGLY RECOMMENDED PERMITTING ATTORNEY FEES FOR THE PLAINTIFF IN THE 8 AREAS UNDER STATE ACTIONS.

WE ASK THAT AMENDMENTS BE MADE TO PERMIT AGGRIEVED INDIVIDUALS ACCESS FOR INJUNCTIVE RELIEF UNDER FEDERAL LAWS IN THE EIGHT AREAS SPECIFIED AND EQUAL TREATMENT UNDER STATE ACTIONS, INCLUDING ACTUAL DAMAGE PROVISIONS IN THES SAME 8 AREAS JUST AS ARE PERMITTED IN OTHER ACTIONS.

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HB 2016
Senate Judiciary Committee
March 26, 1985

Mr. Chairman. Members of the Senate Judiciary Committee. I am Ron Smith, and I am Legislative Counsel for KBA. We represent over 4,200 Kansas attorneys.

What cities want from this legislation is limited immunity from anti-trust litigation. Balanced against that need is the important concept of judicial review. Checks and balances are important. KBA's Executive Council looked at HB 2016 on February 8th, after the House amendments were added. Our Executive Council draws a distinction between for-profit corporations or individuals, and municipalities, especially in the interests these competitors have with each other. Ultimately, the person who pays for a municipal government's legal bills is the taxpayer. Therefore, we support the intent of the bill to limit actual, punitive or treble damages and attorneys fees.

Amendments were added on the House side the intent of which is to keep injunctive relief, which retains judicial oversight of city government decisions. KBA believes this is an appropriate amendment, and supports it.

There is some concern that the language of the bill doesn't allow injunctive relief in federal district court. I'm not going to render an opinion in that regard. However, let me point out that the same relief is available to a plaintiff in state court, where the costs of such litigation is often less than federal court where all parties do not have to travel to Topeka, Wichita or Kansas City.

There is concern that local state judges might be biased. If that is the case, SB 38 that you passed is setting up some informal procedures for disqualification of such judges, and the administrative judge of the district can always assign another district judge from "out-of-county" to hear the injunctive proceedings.

KBA supports the amendments, and the bill as currently drafted.

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Kansas State Board of Pharmacy

503 KANSAS AVENUE, SUITE 328
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STATE OF KANSAS

JOHN CARLIN
GOVERNOR

EVERETT L. WILLOUGHBY
EXECUTIVE SECRETARY

LYNN E. EBEL
BOARD ATTORNEY

TO: Members of the Senate Committee on Judiciary

DATE: March 26, 1985

RE: House Bill 2066

Chairman Frey, Members of the Committee, my name is Everett Willoughby, Executive Secretary of the Kansas State Board of Pharmacy. I wish to thank the Committee for allowing me to appear to present evidence that House Bill 2066 is in the interest of the public health and welfare, and to urge its passing.

HB 2066 is a bill requested by the Board of Pharmacy, which, if enacted, will permit the Board to be in compliance with Kansas Statute Annotated 65-4102, a copy of which is in your file. The rescheduling of controlled substances is a yearly occurance to insure that controlled substances are placed in the correct schedule, as defined by the Federal Drug Enforcement Administration.

Controlled substances are placed in different schedules according to their potential for abuse. A Schedule I drug has a high potential for abuse and no accepted medical use. A Schedule II drug has a high potential for abuse but does have an accepted medical use. Schedule III has an accepted medical use with a lower potential for abuse than a Schedule II drug, and so on down through Schedule IV and V. The higher the assigned number, the lower the potential for abuse.

The Board of Pharmacy is charged with the responsibility of administering the Uniform Controlled Substances Act; therefore, to insure compliance with the statute and to fulfill our obligation of administering the Act, it is necessary that we monitor and enforce the same list of controlled substances as the Federal Drug Enforcement Administration.

The fiscal impact would be negligible, and the passage of House Bill 2066 is in the best interest of the public health and welfare.

ELW:arb
EW

Attch. III
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3- 21-85

STATE LEGISLATIVE RESCHEDULING OF BUPRENORPHINE - POSITION PAPER

Buprenorphine is a potent analgesic drug which is used to provide relief to patients suffering from moderate to severe pain. Buprenorphine is approximately 30 times more potent than morphine, thus requiring far less active drug ingredient to produce the equivalent analgesic effect (i.e. 0.3 milligrams of buprenorphine provides pain relief equivalent to 10 milligrams of morphine). This potency differential results in a drug which is far safer to use than morphine. For example, the use of therapeutic doses of morphine is associated with a relatively high incidence of respiratory depression. Respiratory depression, if not detected and treated, can result in severe injury or death. Contrastingly, buprenorphine, while as effective as morphine, produces little clinically significant respiratory depression.

Although morphine, one of the most effective analgesics currently available, and buprenorphine are comparably effective, an injection of buprenorphine will produce an analgesic effect which lasts significantly longer than that obtained with an injection of morphine. This temporal measurement of a drug's efficacy is commonly referred to as its "duration of action". In the case of morphine, studies have shown that its duration of action is approximately 4 hours. By comparison, buprenorphine's duration of action has been demonstrated to be approximately 6 hours. The difference in duration of action means that patients suffering from pain would require fewer injections of buprenorphine than morphine. This can be of particular clinical importance to those patients suffering chronic pain such as cancer and burn patients.

Prior to its approval by the Food & Drug Administration, buprenorphine was placed in Schedule II by the Federal Drug Enforcement Administration (DEA), thus enabling the drug to be imported for the purpose of conducting clinical investigations in the United States. Following approval of buprenorphine by the Federal Food & Drug

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Administration, the DEA proposed that buprenorphine be placed in Schedule V. As a result of objections filed by the patent holder, Reckitt & Colman Limited, a request for a hearing was granted by the DEA. After extensive hearings, at which testimony of some of the worlds leading experts in the areas of drug use and abuse were presented, the Administrative Law Judge rendered his decision that buprenorphine should not be scheduled. The DEA administrator subsequently overruled the Administrative Law Judge, recommending a Schedule V classification. The classification of buprenorphine as a Schedule V drug reflects an extremely conservative position on the part of the DEA. By way of comparison, it has been demonstrated that the abuse potential of buprenorphine is, at worst, no greater than that of nalbuphine and butorphanol, pharmacologically similar analgesic drugs which are not subject to DEA control in the U.S. The lack of control of these drugs has not resulted in reports of significant abuse in the United States. It is reasonable to anticipate that buprenorphine will experience a similar track record when introduced in the United States.

The passage of a legislative amendment placing buprenorphine in Schedule V would bring the State controlled substances act into conformance with the laws of the vast majority of states which routinely adopt the scheduling decisions of the Federal government. It would not be inconsistent with the scheduling decision of any other state. Such an amendment would update the state law to incorporate the recent determinations of the federal agencies which are expert in the area of drug abuse. Furthermore, such an amendment would provide patients who experience severe pain, such as pain from cancer, an extremely powerful yet unusually safe pain relieving medicine, while at the same time providing for more than adequate control for the protection of the public.

0574V

Attch. III

PROPOSED COMMITTEE REPORT ON HOUSE BILL NO. 2066

On page 11, after line 777, by inserting:

"Sec. 5. K.S.A. 1984 Supp. 65-4113 is hereby amended to read as follows: 65-4113. (a) The controlled substances or drugs, by whatever official name, common or usual name, chemical name or brand name designated, listed in this section are included in schedule V~~;~~.

(b) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation containing the following narcotic drug or its salts:

Buprenorphine..9064

(c) Any compound, mixture or preparation containing limited quantities of any of the following narcotic drugs which also contains one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) Not more than 200 milligrams of codeine or any of its salts per 100 milliliters or per 100 grams~~;~~.

(2) Not more than 100 milligrams of dihydrocodeine or any of its salts per 100 milliliters or per 100 grams~~;~~.

(3) Not more than 100 milligrams of ethylmorphine or any of its salts per 100 milliliters or per 100 grams~~;~~.

(4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit~~;~~.

(5) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams~~;~~.

(6) Not more than .5 milligram of difenoxin (9168) and not less than 25 micrograms of atropine sulfate per dosage unit.";

Also on page 11, by renumbering sections 5 and 6 as sections 6 and 7; in line 778, by striking "and" and inserting a comma; in line 779, before "are", by inserting "and 65-4113";

In the title, in line 19, by striking "and 65-4111" and inserting ", 65-4111 and 65-4113";

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onstruction of worf "sale"; possession for heroin sale. State v. Collazo, 1 654, 658, 574 P.2d 214.

7. Conviction hereunder reversed; rights under warrantless clause of Fourth Amendment violated. State v. Dean, 2 K.A.2d 64, 574 P.2d 572.

8. Contention statute unconstitutional without merit; conviction of possession of marihuana with intent to sell sustained. State v. Luginbill, 223 K. 15, 21, 574 P.2d 140.

65-4102. Board of pharmacy to administer act; authority to control; report to chairmen of judiciary committees. (a) The board shall administer this act and may adopt rules and regulations relating to the registration and control of the manufacture, distribution and dispensing of controlled substances within this state. All rules and regulations of the board shall be adopted in conformance with article 4 of chapter 77 of the Kansas Statutes Annotated and the procedures prescribed by this act.

(b) Annually, the board shall submit to the speaker of the house of representatives and the president of the senate a report on substances proposed by the board for scheduling, rescheduling or deletion by the legislature with respect to any one of the schedules as set forth in this act, and reasons for the proposal shall be submitted by the board therewith. In making a determination regarding the proposal to schedule, reschedule or delete a substance, the board shall consider the following:

(1) The actual or relative potential for abuse;

(2) the scientific evidence of its pharmacological effect, if known;

(3) the state of current scientific knowledge regarding the substance;

(4) the history and current pattern of abuse;

(5) the scope, duration and significance of abuse;

(6) the risk to the public health;

(7) the potential of the substance to produce psychological or physiological dependence liability; and

(8) whether the substance is an immediate precursor of a substance already controlled under this article.

(c) The board shall not include any nonnarcotic substance within a schedule if such substance may be lawfully sold over the counter without a prescription under the federal food, drug and cosmetic act.

(d) Authority to control under this section does not extend to distilled spirits, wine, malt beverages or tobacco.

History: L. 1972, ch. 234, § 2; L. 1974, ch. 258, § 2, July 1.

65-4103. Nomenclature. The controlled substances listed or to be listed in the schedules in section 5, 7, 9, 11 and 13 [65-4105, 65-4107, 65-4109, 65-4111 and 65-4113] are included by whatever official, common, usual, chemical, or trade name designated. [L. 1972, ch. 234, § 3; July 1.]

65-4104. Substances included in schedule I; tests for determining. The board shall place a substance in schedule I if it finds that the substance: (1) Has high potential for abuse; and

(2) has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision. [L. 1972, ch. 234, § 4; July 1.]

65-4105. Substances included in schedule I. (a) The controlled substances listed in this section are included in schedule I and the number set forth opposite each drug or substance is the DEA controlled

3-6-85

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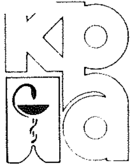

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KENNETH W. SCHAFERMEYER, M.S., CAE
PHARMACIST
EXECUTIVE DIRECTOR

STATEMENT TO THE SENATE JUDICIARY COMMITTEE

MARCH 26, 1985

SUBJECT: HOUSE BILL 2066 REGARDING RESCHEDULING OF CONTROLLED SUBSTANCES.

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

My name is Ken Schafermeyer and I am Executive Director of the Kansas Pharmacists Association, an organization representing 1,000 practicing pharmacists in the State of Kansas. I appreciate the opportunity to address you today on House Bill 2066. The Kansas Pharmacists Association supports this bill and urges your approval.

According to the Kansas Uniform Controlled Substances Act, the authority for scheduling and rescheduling controlled substances lies with the Legislature (K.S.A. 65-4102). The Federal Uniform Controlled Substances Act is administered by the Drug Enforcement Administration (DEA). Since Kansas attempts to keep in agreement with the Federal Act, a bill to schedule or reschedule controlled substances is required almost every year. This year, however, you have an unusually large number of changes in the Controlled Substances Act. All of these changes would be in agreement with the Federal Act.

Passage of House Bill 2066 would make it easier for pharmacists to comply with the law and easier for the Board of Pharmacy to enforce the law. This bill was passed in the House by a vote of 122 to 0.

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Attch. IV

This is an important bill and I hope that this Committee will recommend passage and that the bill will be placed on the Consent Calendar. Thank you very much.

Attch. IV

3-26-85

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232-7263

PRESENTATION TO
SENATE JUDICIARY COMMITTEE
MARCH 26, 1985
RE: H.B. 2066

Mr. Chairman, Members of the Committee:

My name is Ron Hein, and I am legislative counsel for Johnson and Johnson. I appear today to speak in support of H.B. 2066, and specifically in support of those provisions rescheduling the drug sufentanil from Schedule I to Schedule II.

Sufentanil, is marketed by Janssen Pharmaceutica as the brand name drug SUFENTA*. On March 20, 1984, the Drug Enforcement Administration of the Dept. of Justice proposed rescheduling sufentanil from Scheudle I to Schedule II, and on May 25, 1984, sufentanil was so rescheduled. (See Attachment A).

Such rescheduling at the Federal level keeps sufentanil classified as a narcotic substance subject to the stringent controls provided for Schedule II drugs, but permits the use of the drug pursuant to the Controlled Substances Act since its medical uses have now been clearly documented and demonstrated.

Sufentanil is a primary anesthetic agent and is also used as an anesthetic adjunct. It is injected intravenously, and, like many anesthetics, should be administered only by persons specifically trained in the use of intravenous anesthetics and management of the respiratory effects of this and other such drugs.

The State Board of Pharmacy does not have the power to reschedule this or other drugs during the time that the Legislature is not in session. Although this drug has been legalized for marketing as a Schedule II drug at the Federal level, it is not currently legal to market the drug in the State of Kansas due to the Schedule I classification still in effect here.

SUFENTA has been able to be marketed for almost a year in most of the other states in the nation, but the patients, pharmacists, and physicians in the State of Kansas have been denied access to this new anesthetic agent during that time. Although Johnson and Johnson does have concerns about the current rescheduling mechanism used in Kansas, we are not here today to argue the merits or demerits of forcing Kansas citizens to be denied access to new medical treatments and discoveries until such time as the Legislature has had an opportunity to meet and change the law.

I would urge your support of H.B. 2066 and I thank you very much for hearing my comments today.

* Registered Trademark of Janssen Pharmaceutica, Inc.

3/26/85
Attch. V

3-26-85

M E M O R A N D U M

To: Representative David Heinemann
From: Jon Josserand, Special Assistant Secretary of State
Date: February 4, 1985

Re: HB 2103 - Uniform Commercial Code

Section two of HB 2103 contains conforming language to make K.S.A. 84-9-407 conform with K.S.A. 84-9-411 and 84-9-412.

Because this amendment is a "conforming" amendment, we thought it was similar to the conforming amendment necessary in 84-9-312. As you know, the 1984 HB 2490 was enacted to change the purchase money security interest filing period from 10 to 20 days but but inadvertently missed amending one section of law.

When the 1983 Legislature enacted Substitute for Senate Bill 7 (commonly referred to as "central filing"), language was placed in the bill to specify the liability of the state and county filing offices. While this language was placed in two sections of SB 7, it appears that one section was inadvertently missed.

The language contained starting at line 118 in HB 2103 is identical to language which is currently contained in 84-9-411 amd 84-9-412 which are adjacent to 84-9-407 and which also pertain to information requests performed under the U.C.C. We do not believe this is a policy question but is one of conforming the language of the various sections.

3/26/85
Attach. VI