

Approved 3-20-86
Date

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL & STATE AFFAIRS

The meeting was called to order by REPRESENTATIVE ROBERT H. MILLER at
Chairperson

1:30 a.m./p.m. on March 19, 1986 in room 526S of the Capitol.

All members were present except:

Committee staff present:

Lynda Hutfles, Secretary
Russ Mills, Research
Raney Gilliland, Research
Mary Torrance, Revisor's Office

Conferees appearing before the committee:

Bill Perry, Real Estate Commission
Larry Rickard
Karen McClain, Kansas Association of Realtors

The meeting was called to order by Chairman Miller.

Representative Peterson made a motion, seconded by Representative Sughrue, to approve the minutes of the March 18 meeting. The motion carried.

Chairman Miller called attention to a list of bills which would be voted on later in the meeting. These bills have had either no activity or requests for activity.

Representative Barr made a motion, seconded by Representative Grotewiel, to introduce as a committee bill a proposal to make the ornate box turtle the official state reptile. The motion carried.

SB538 - Real estate recovery revolving fund

Bill Perry, Chairman of the Kansas Real Estate Commission, explained the bill. This bill would authorize the real estate commission to assess each licensed broker & licensed salesperson fees at any time that the balance in the real estate recovery revolving fund is less than \$100,000.

There was discussion of the amount of money that was paid out of the fund last year and Mr. Perry was asked to provide the committee with figures to substantiate the steady increase in the amount being paid out each year.

Hearings were concluded on SB538.

SB539 - Amendments to the Real Estate Brokers & Salespersons' license act

Bill Perry, Chairman of the Kansas Real Estate Commission, explained the bill which makes a number of policy changes in the real estate brokers' & salespersons' License Act. Much of this bill is the result of the new Administrative Procedures Act.

There was discussion as to why there is a laundry list of institutions who can offer courses of instructions, which is added to each year, and not just a blanket statement that courses shall be approved by the Commission.

There was discussion as to why lines 715 and 717, dealing with offering or giving of prizes, gifts or gratuities which are contingent upon a client's listing, purchasing or leasing property, was deleted. It was explained that a federal trade commission ruling ruled that it is a restriction of trade. The Kansas Association of Realtors said they were neutral on this issue. There is also a lawsuit pending on this issue.

The limitation of action section was discussed. Mr. Perry said that if you let a complaint be filed "~~et in finitum~~", the facts will get stale and information hard to find. If someone has a complaint they should bring it within two years.

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.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON Federal & State Affairs
room 526S, Statehouse, at 1:30 a.m./p.m. on March 19, 1986

Larry Rickard, Wichita, expressed his concerns relating to continuing education courses offered by any trade or professional associations approved by the commission. He said he had no qualms with trade or professional associations as long as they have to meet the same criteria that he has to as a proprietary school. He said that as a broker he felt that the offering or giving of prizes does encourage potential problems.

Karen McClain stated that the Senate Committee had appointed a subcommittee on SB539.

Hearings were concluded on SB539.

SB594 - Private right of action

Karen McClain, Kansas Association of Realtors gave testimony in support of the bill which provides that nothing in the Act shall be construed to grant any person a private right of action for damages or to eliminate any right of action pursuant to the statutes. See attachment A.

Bill Perry, Chairman of the Kansas Real Estate Commission, told the committee that they did not look on this bill unfavorably. This is a matter of legislative intent. They are concerned at the possibility of having their disciplinary action determined by the courts. There is a trend toward strict liability in the real estate business. Standard of care could be raised so high that it would be hard for brokers to comply.

Hearings were concluded on SB594.

The Chairman asked if there were any bills on the list referred to earlier that any committee member would like removed. Representative Roe asked that HB2819 be removed from the list.

Representative Aylward made a motion, seconded by Representative Vancrum, to report the following bills adversely: SB20, HB2123, HB2296, HB2398, HB2415, HB2494, HB2637, HB2742, and HB2777. The motion carried.

SB526 - Capitol Area Security

Representative Walker made a motion, seconded by Representative Vancrum, to report SB526 adversely. The motion carried.

SB557 - Transportation of Inmates

Representative Sprague made a motion, seconded by Representative Roy, to report SB557 favorably. The motion carried.

SB558 - Transportation of Inmates; contracts

Representative Vancrum expressed his concerns that adequate liability insurance would be required.

Representative Sprague made a motion, seconded by Representative Vancrum, to have appropriate language drafted which would authorize the Secretary of Corrections to promulgate rules and regulations. The motion carried.

Representative Ramirez made a motion, seconded by Representative Sughure, to report SB558 favorably as amended. The motion carried.

HB2980 - Death Penalty

Representative Roenbaugh made a motion, seconded by Representative Gjerstad, to strike sections 25, 26, 27, & 28. The motion carried.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON Federal & State Affairs,
room 526S, Statehouse, at 1:30 a.m./p.m. on March 19, 1986

Representative Roenbaugh made a motion, seconded by Representative Eckert, to report HB2980 favorably as amended. The motion carried.

Representative Vancrum made a motion, seconded by Representative Long, to introduce as a committee bill a proposal which exempts from the Torte Claims Act claims arising from court ordered community service type activities. The motion carried.

The meeting was adjourned.



Executive Offices:
3644 S. W. Burlingame Road
Topeka, Kansas 66611
Telephone 913/267-3610

TO: HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE
FROM: KAREN MCCLAIN, DIRECTOR, GOVERNMENTAL AFFAIRS
DATE: MARCH 19, 1986
SUBJECT: SB 594

On behalf of the Kansas Association of REALTORS®, I am here to ask you to pass SB 594 favorably.

The effect of the bill is to prevent the Kansas Real Estate Brokers' and Salespersons' License Act from being used as the basis of a private cause of action against real estate agents.

The issue was raised due to a case out of Wyandotte County, where the purchasers of residential real estate sued the seller and broker for damages for misrepresentation. The court, in its jury instructions, and the jury, in their ruling, acted on the basis that the Kansas Real Estate Broker's and Salespersons' Act could be used as a private cause of action against an agent, in and of itself. In its jury instructions, the court quoted K.S.A. 58-3062(a)(31) of the license law, which states that, "No licensee shall fail to disclose, or ascertain and disclose, to any person with whom the licensee is dealing, any material information which relates to the property with which the licensee is dealing and which such licensee know or should have known."

This is the first time that provisions of the License Law have been utilized directly by a court in a suit by a private citizen against a licensee and, therefore, sets a dangerous precedent for any provision of the License Law to be used by attorneys in private causes of action.

We know that the standard of "knew or should have known" is a negligence standard which can be and is used against all professionals, whether they are

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GOODELL, STRATTON, EDMONDS & PALMER

TWO FIFTEEN EAST EIGHTH AVENUE

TOPEKA, KANSAS 66603

AREA CODE 913-233-0593

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PATRICK M. SALSBUARY
MARLA J. LUCKERT

LES E. DIEHL
JO E. JENKINS
THOMAS L. BELL
DAVID E. BRUNS

August 29, 1985

Mr. James W. Mayer
Executive Vice President
Kansas Association of REALTORS
3644 SW Burlingame Road
Topeka, Kansas 66611

Re: Kansas Real Estate Brokers and
Salesmen Act, Private Cause of Action
for Damages

Dear Jim:

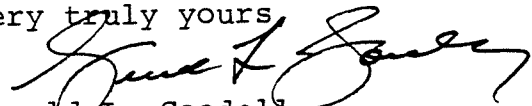
This will acknowledge your letter of August 26, 1985, requesting my opinion as to whether or not the Association should seek legislation during the 1986 session of the Kansas legislature to prohibit anyone from maintaining a private cause based solely upon alleged violations of the Kansas Real Estate Brokers and Salesmen Act.

In Stevens v. Jayhawk Realty Co. 9 Kan. App. 2d 338 (affirmed by the Kansas Supreme Court in 236 Kan. 90), there is unfortunate language which could arguably impose a private cause of action based upon violation of the act. The precise issue is now before the Court of Appeals in Billy G. Johnson v. Geer Real Estate Company, Court of Appeals No. 84-57649-A.

I do not know whether or not the Court of Appeals will hand down its decision before commencement of the 1986 legislature. The decision may or may not be favorable in view of the language of the decision in Stevens v. Jayhawk Realty Co. I am concerned that the Court may reaffirm Stevens or simply ignore that issue since other issues were raised.

For this reason, I would recommend that the Kansas Association of REALTORS seek legislation amending the Kansas Real Estate Brokers and Salesmen Act to specifically provide that it does not form the basis of a private cause of action. The purpose of the act would be for the regulation of the real estate sales profession by a state board. Of the two suggestions, I would prefer Item 2. If you have any further questions, please let me know.

Very truly yours,


Gerald L. Goodell

GLG:mph

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MARTA FISHER LINENBERGER

January 2, 1986

Mr. James W. Mayer
Executive Vice President
Kansas Association of REALTORS
3644 SW Burlingame Road
Topeka, Kansas 66611

Re: Responsibility of Licensed Real Estate
Brokers and Salespersons to Customers
under Kansas Case Law without regard to
the Prohibitions contained in K.S.A.
58-3062

Dear Jim:

As per your request and the request of your Director of Governmental Affairs, I will summarize in this letter general responsibilities of Kansas real estate brokers and salespersons to their customers to demonstrate there is no need for allowing a private cause of action under K.S.A. 58-3062.

The provisions of K.S.A. 58-3062 are contained in the Real Estate Brokers and Salespersons License Act, K.S.A. 58-3034 through 3075. Under the Act, the State has mandated certain basic requirements in order to be licensed as a broker or a salesperson. The Act requires mandatory continuing education and disciplinary proceedings in the event of violations of any provisions of the Act after a hearing before the State Commission. The provisions of K.S.A. 58-3062 set forth some 31 individual prohibited acts which justify disciplinary proceedings by the State Real Estate Commission after a due process hearing.

Any customer of a broker or salesperson may file a verified complaint against a licensee under K.S.A. 58-3050 stating the charges against a licensee with reasonable definiteness. The licensee is authorized to file an answer to assert any defenses. The charges would be one of the prohibited acts contained in K.S.A. 58-3062. In my opinion, the legislature, in adopting the provisions of K.S.A. 58-3062 did not intend to create the separate private cause of action for damages which could be maintained in the District Court against the licensee in addition to the disciplinary proceedings maintained under the Real Estate Brokers and Salespersons Act. The Act does, however, provide for

January 2, 1986

the real estate recovery revolving fund where customers may make a claim for recovery where they have been injured by a professional or dishonest act by a licensed real estate broker, salesperson or their employees, and a recovery cannot be had from the person committing the act. First National Bank of Girard v. Coykendall, 8 Kan. App. 2d 636.

The existing Kansas case law provides for a private cause of action by principals who have been injured by negligence, fraudulent or intentional acts committed by the real estate broker or salesperson. Such private causes of action under case law would allow recovery for substantially all of the various prohibited acts outlined in K.S.A. 58-3062 without regard to the provisions of K.S.A. 58-3062.

In summary, the real estate broker and salesperson, under case law, is subject to the following duties and liabilities to their principal:

1. The real estate broker is bound to act with utmost good faith towards his principal and to keep him informed of facts affecting his interests.
2. A real estate broker or salesperson who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from acting in reliance upon it is subject to liability to the other for damages incurred by him by his justifiable reliance upon the misrepresentation.
3. A real estate broker or salesperson who may conceal or by other action intentionally prevents another from acquiring material information about the property is subject to liability to the other for damages incurred as though the broker had stated the non-existence of the matter that the other was thus prevented from discovery.
4. A real estate broker or salesperson who supplies false information for the guidance of others, in a real estate transaction is subject to liability for damages caused to them by the justifiable reliance upon the information if the broker or salesperson fails to exercise reasonable care or confidence in obtaining or communicating the information.
5. A real estate broker or salesperson generally in acting as an agent is required to exercise reasonable diligence and effort under the circumstances of the particular factual situation existing at the time and is liable for damages caused by such negligence. Stevens v. Jayhawk Realty Co. 9 Kan. App. 2d 338 (Affirmed 236 Kan 90; George v. Bolen-Williams, Realtors, 2 Kan. App.2d 385; Nordstrom v. Miller, 227 Kan. 59; Sippy v. Cristich, 4 Kan.

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Mr. James W. Mayer

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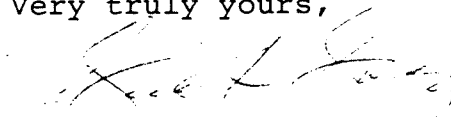
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In my opinion, the following numbered paragraphs from K.S.A. 58-3062 would fall within the general principles of case law concerning the liability of a broker or real estate sales person:

(1), (2), (4), (6), (7), (9), (10), (11), (13), (15), (16),
(17), (18), (19), (20), (21), (22), (23), (24), (25), (28),
(30), and (31)

Please advise if you require any more detailed explanation concerning the statements set forth above.

Very truly yours,



Gerald L. Goodell

GLG:mph