

Approved \_\_\_\_\_

2/7/86  
Date

MINUTES OF THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS

The meeting was called to order by Senator Edward F. Reilly, Jr. at  
Chairperson

11:00 a.m./~~noon~~ February 5, 1986 in room 254-E of the Capitol.

All members were present ~~except~~

Committee staff present:

J. Russell Mills, Jr., Legislative Research  
Emalene Correll, Legislative Research  
Mary Torrence, Assistant Revisor of Statutes  
June Windscheffel, Committee Secretary

Conferees appearing before the committee:

Karen McClain, Kansas Association of Realtors  
Gene Yockers, Kansas Real Estate Commission

The Minutes of the Meeting of February 4, 1986, were approved as amended on a motion by Senator Morris. It was seconded by Senator Arasmith.  
Motion carried.

The first conferee was Karen McClain, of the Kansas Realtors Association. (Attachment 1) She presented three suggestions concerning proposed amendment to the Kansas Real Estate Brokers and Salesmen Act. The first one was proposed by Ms. McClain; the second by Senator Morris; and the third one by Mr. Gerald L. Goodell, Counsel for the Kansas Association of Realtors.

Ms. McClain also referred to copies of the opinion from Mr. Goodell relating to the amendment. (Attachment 2) It concerns the 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.

Mr. Gene Yockers was the next conferee. Mr. Yockers, Director of the Real Estate Commission, presented his remarks concerning SB538, real estate recovery revolving fund, and SB539, concerning real estate brokers' and salespersons' license act, to the Committee. (Attachment 3)

The Chairman asked Staff to prepare a memorandum concerning the real estate fee fund and the revolving fund and to do do a balloon on the changes proposed in the other bill.

Senator Morris moved that at the recommendation of the Revisor's Office that the terminology concerning the proposed amendment to the Kansas Real Estate Brokers and Salesmen Act read: "Nothing in this act shall be construed to grant to any person a private right of action for damages or eliminate any right of action pursuant to other statutes or at common law." Seconded by Senator Martin. Motion carried.

The Chairman announced that the Committee will meet tomorrow.

The meeting was adjourned.



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

PROPOSED AMENDMENT TO THE KANSAS REAL ESTATE BROKERS AND SALESMEN ACT

"NOTHING IN THIS ACT SHALL BE CONSTRUED TO GRANT TO ANY PERSON A PRIVATE RIGHT OF ACTION FOR DAMAGES OR TO ENFORCE THE PROVISIONS OF THIS ACT OR THE REGULATIONS ISSUED UNDER THIS ACT."

"NOTHING IN THIS ACT SHALL BE CONSTRUED TO GRANT TO ANY PERSON A PRIVATE RIGHT OF ACTION FOR DAMAGES INDEPENDENT OF ANY OTHER RIGHT OF ACTION PURSUANT TO STATUTE OR COMMON LAW."

"NOTHING IN THIS ACT SHALL BE CONSTRUED TO GRANT TO ANY PERSON A PRIVATE RIGHT OF ACTION FOR DAMAGES OR ELIMINATE ANY <sup>delete</sup> OTHER RIGHT OF ACTION PURSUANT TO OTHER STATUTES OR AT COMMON LAW."

Sen. Fed. & State Affairs  
2/5/86 Attachment 1

LAW OFFICES OF  
GOODELL, STRATTON, EDMONDS & PALMER  
TWO FIFTEEN EAST EIGHTH AVENUE  
TOPEKA, KANSAS 66603

AREA CODE 913-233-0593

GERALD L. GOODELL  
WAYNE T. STRATTON  
ROBERT E. EDMONDS  
ARTHUR E. PALMER  
H. PHILIP ELWOOD  
HAROLD S. YOUNGENTOB  
CHARLES R. HAY  
PATRICK M. SALSBUURY  
MARLA J. LUCKERT  
LES E. DIEHL  
THOMAS L. BELL  
DAVID E. BRUNS  
MARTA FISHER LINENBERGER

January 2, 1986

J  
2/5/86  
Attachment #2

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

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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.

GOODSELL, STRATTON, EDMONDS & PALMER

Mr. James W. Mayer

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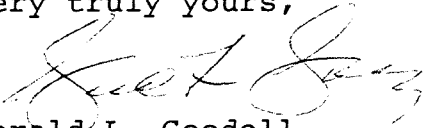
January 2, 1986

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

5/5/86  
Attachment #3

February 5, 1986

Mr. Chairman and members of the Committee:

My name is Gene Yockers, and I represent the Kansas Real Estate Commission in the matter of Senate Bills 538 and 539.

Senate Bill 539

Section 1, 58-3035

(a) "Advance listing fee" has been redefined so that newspaper advertising is not the only advertising media that is excluded from licensure requirements.

(c) and (d) define "branch broker" and "branch office." These terms have been used in regulation 86-3-6a for many years but are not defined by statute.

(e) "Broker" definition has been expanded just slightly, by moving language contained in deleted #7 below into the broker definition, and by adding "purchaser, lessor or lessee" as principals for whom a broker may act.

(e)(9) "Advance listing fee" is defined in (a); unnecessary language is stricken from (9).

(e)(11) Language is added to this subsection so that "providing lists" would not be more restrictive than publications of such information under advance listing fee.

(h) Clean-up language. An individual is either licensed as a broker or as a salesperson. "Associate broker" is defined in subsection (b).

(j) "Association" has been added to bring the statute more in line with the way some agencies are doing business. This conforms to subsection (b) of K.S.A. 58-3042.

(l) Clean-up. English.

(m) "Supervising broker" is another term used in the act and regulation which has not been defined. Reference 58-3047 and regulation 86-3-6a.

Section 2, 58-3038. The new language in subsection (b) was omitted when the act was amended in 1980. It allows partnerships, associations or corporations to sue for compensation.

Section 3, 58-3039.

(a) Gives the Commission the authority to require applicants to file their application with the testing service for screening.

(c) Revision pertains to qualification of broker applicants who have not been licensed as salespersons for two years.

(d) The four-month filing time requirement has been a source of continued confusion for candidates. This is an attempt to clarify the intent since the Commission allows candidates to retake only the failed portion of the two-section test.

Section 4, 58-3040. The new language was simply omitted from SB-107 last year and should have been included to allow waiving of pre-license education for salesperson candidates, as well as broker candidates, who qualify by reciprocity.

Section 5, 58-3043. Here we are trying to utilize the same language as in K.S.A. 58-3050(2). The section you are looking at pertains to considerations in granting a license, while 58-3050(2) in Section 10 provides for revocation or other disciplinary action against a licensee.

Section 6, 58-3044. Clean-up. Passing an examination is not applicable to renewal of a license.

Section 7, 58-3045.

(b) The new language requires renewal applications to be filed 30 days before the expiration date. Licenses are renewed on a staggered basis, with a group renewing every two months. This will allow the staff time to process applications and print licenses by the effective date of the new license. When applications are not due until the expiration date, it is impossible to print new licenses on a timely basis.

(d) This subsection is deleted. The administrative procedure act provides for a licensee to continue operating under the previous license until final action by the agency and the time for seeking judicial review has passed.

Section 8, 58-3046a.

(a) and (d) Gives the Commission the option of requiring pre-license education to be a prerequisite to taking the examination, in which case evidence of completion would be furnished to the testing service instead of being filed at the time of application for license.

(d)(3) Clean-up language. Clarification.

(f) The added language is to ensure statutory authority for regulation 86-1-12.

(h)(4) Gives the Commission the authority to approve some higher quality courses relating to real estate that we currently are unable to approve because they do not come under subsection (h).

Section 9, 58-3047.

(b), (c), (d) and (e) Set out responsibilities of branch brokers, in line with the definition in Section 1. The time period of 10 days is currently provided by regulation 86-3-15. The last sentence of (e) provides for reissuance of license when the branch broker or supervising broker of an office is changed.

Section 10, 58-3050.

(a)(2) Provides same language as for consideration in granting a license. Reference Section 5, 58-3043.

(c) Provides for a statute of limitations. A similar provision was repealed when the administrative procedure act was passed.

Section 11, 58-3056. Unnecessary language is deleted because the Commission will be the complainant in all cases and would pay the costs of any hearings not assessed against the licensee or applicant. Subsections (a) through (c) set out costs applicable to administrative hearings in contrast to civil proceedings.

Section 12, 58-3060.

(a) Deals with primary office of resident broker, as well as non-resident broker.

(b) and (c) Changes compatible with new definitions for supervising and branch brokers.

(d) Provides a cross-reference to 58-3047 as to how notice is to be given.

(e) Exempts certain brokers from office requirements. An associate broker or broker whose license is deactivated should not maintain an office. Brokers associated with corporations, partnerships or associations do not maintain offices separate from the supervising broker.

Section 13, 58-3061.

(a) Ties back to 58-3060. Provides that a trust account may be in an adjoining state with the written permission of the



Commission. The last sentence, pertaining to interest-bearing trust accounts, is currently in regulation 86-3-17, which will be revoked when the bill becomes statute!

(b) Reorganizes this subsection, makes it more descriptive, and deletes existing (d) and (e).

(d) The new language is now in regulation 86-3-16, which will be revoked.

(e) Clean-up language.

(f) Provides exemptions to the requirement to maintain a trust account, basically the same as exemptions to office requirements. This section also gives the Commission the authority to determine if a broker needs to maintain a trust account and take on the added expense of maintaining a trust account!

(g) All new language to clarify the provisions now contained in 58-3062(c)(5) and (6), which are deleted in Section 14.

(h) Gives the broker a method of determining whether or not an earnest money dispute exists and disbursing trust funds after certain conditions are met.

Section 14, 58-3062.

(a)(12) Deletes existing provision prohibiting licensees from giving prizes, gifts or gratuities which are contingent upon a client's listing, purchasing or leasing real estate. Similar provisions in other jurisdictions are being challenged as unconstitutional and by the Federal Trade Commission as being restraint of trade.

(a)(14) Clarifies that the provision does not cover listing agreements.

(a)(17) Existing provision is deleted; it is covered in new (14).

(a)(19) Simply requires licensees to disclose any interest they may have in real estate they are buying or leasing, as well as any interest in real estate they are selling.

(a)(23) Better language.

(c)(5) and (6) Existing provisions deleted; explained in comments on subsection (g), 58-3061, Section 13.

Senate Bill 538

Section 1, 58-3066. The statute currently provides for assessment when the balance in the recovery fund is less than \$100,000 on July 1 of any year. The amendment provides for immediate assessment at any time the balance is less than \$100,000. There is no change in the amount of the assessment, \$10 for brokers and \$5 for salespersons. However, the amendment provides for immediate assessment instead of at the next renewal date. Since we are on two-year, staggered licensing, it would take two years to complete the assessment under present statute. If a licensee does not pay the assessment within 30 days, the amendment provides for suspension of license until it is paid.

The section also deletes the provision for transfers from the real estate fee fund to the recovery fund and provides instead for assessments to be credited directly to the recovery fund. Fees paid to reinstate licenses suspended under the section are handled the same as all other licensure fees; i.e., credited to the state general fund and the real estate fee fund.

Section 2, 58-3067. Subsection (d) changes "transferred" to "credited" to coincide with the amendment in Section 1.

Section 3, 58-3068.

(a)(1) The amendment stipulates violation of specific provisions of the license act as a basis for a claim on the fund, rather than any violation of the act.

(b)(2) Provides that a claim may be made within two years after the date of final judgment, rather than requiring a claim to be made within two years from the time the act occurred.

(c)(2) Brokers and salespersons cannot make a claim for recovery. Language is added in this subsection to include partnerships, associations and corporations whose partners, members, officers and employees are licensed.

(d) Deletes provision which is considered unenforceable in that a licensee may not know at the time the action is commenced that recovery will be sought. Regulation 86-3-15 requires licensees to report all litigation involving the sale of real estate. Reporting by restricted mail is not necessary.

Section 4, 58-3069. Subsection (c) provides for attorney fees to be within the \$15,000 limitation per transaction.

Section 5, 58-3070. The new language provides for attorney fees incurred in defending the fund to be paid out of the fund instead of the Commission's operating budget.

Section 6, 58-3072. New language provides for a licensee repaying the fund to pay interest at the statutory judgment rate in effect at the time judgment was rendered, instead of at 6%.

Section 7, 58-3074. Provides for depositing of funds and crediting to the real estate fee fund and real estate recovery revolving fund as discussed under Section 1.

Section 8, 74-4206. The amendment makes this section compatible with 58-3070.