Approved March 27, 1991
Date

MINUTES OF THE House COMMITTEE ON Insurance.

The meeting was called to order by Representative Turnquist at
Chairperson

3:30 ~~x.m./~~p.m. on Tuesday, March 26, 1991 in room 531 N of the Capitol.

All members were present except:

Representative Helgerson - Excused
Representative Sprague - Excused Representative Wells - Excused

Committee staff present:

Emalene Correll Bill Edds
Chris Courtwright Nikki Feuerborn

Conferees appearing before the committee:

Dick Brock, Insurance Commissioner's Office
Bill Mitchell, Kansas Land Title Association

Others Attending: See List

Representative Sawyer moved for the approval of the minutes for the March 25, 1991, meeting.. Representative Cribbs seconded the motion. Motion carried.

Continued Hearing on HB 2413 - Regulation of Title Insurance

Dick Brock of the Insurance Commissioner's staff, testified before the committee as an opponent of the bill. Following enactment of the original legislation in 1987 regarding certain trade practices of title insurance, the Department started receiving a number of complaints alleging violations of the Kansas Unfair Trade Practices Act by persons offering or receiving special inducements, rebates, or other advantages in the sale or placement of title insurance that are not generally available to others. Investigations ultimately resulted in the issuance of various consent orders and monetary penalties. Rates for title insurance were not subject to rate regulation in 1987 so HB 2599 was introduced and set for enactment of July 1, 1989. A lawsuit ensued and ultimately the Kansas Supreme Court declared the legality of this legislation and the bill was enacted in March of 1991. This bill enacts basic "controlled business" prohibitions and disclosure requirements in the Kansas Unfair Trade Practices Act. The definition of "controlled business" in this bill is used to describe a situation where a person can direct or cause a prospective purchaser to be directed to a title insurance agent or company in which the person making the referral has a financial interest. HB 2413 would disallow "controlled business." Kansas statutes currently contain a provision requiring disclosure of a financial interest and establishes definitive limits on the extent to which the referral or direction of title business from one related entity to another shall be permitted.
Mr. Brock stated that the "controlled business" restriction is in the best interest of the consumer and HB 2413 would not provide this. (See Attachment 1).

Bill Mitchell, Legislative Counsel for Kansas Land Title Association, testified before the committee as an opponent of HB 2413. He gave a history of the bill and the various legislative processes it has been through. Permitting real estate brokers to own or control title insurance for the purpose of directing the business of title insurance is detrimental both to the consumer and competition. The consumer pays unreasonably high premiums and charges, accepts unusually poor service, and accepts faulty title exams. The present law does not prohibit anyone from engaging and competing fairly in the title business. (See Attachment 2).

A discussion by the committee included comments suggesting that since HB 2502 has been declared valid that it be allowed before additional legislation is proposed.

The hearing was declared closed by the chairman.

Representative Campbell moved that "insurer" be struck on Line 16, "that" be struck on Line 17, and "rules and regulations or" be struck on Line 18 of Page 9 of SB 67. Representative Cribbs seconded the motion. Motion carried.

Representative Cribbs moved that SB 67 be passed favorably as amended. It was seconded by Representative Campbell. Motion carried.

Representative Campbell moved for the favorable passage of HB 2590. Representative Cozine seconded the motion. Motion carried.

Representative Neufeld moved for the adoption of the balloon amendment on SB 111. Representative Welshimer seconded the motion. Motion carried. Representative Cribbs moved for favorable passage of the bill as amended. Representative Cozine seconded the motion. Motion carried.

Representative Campbell presented a report from the Subcommittee on HB 2511. (See Attachment 3). A substitute bill will be submitted to the committee for review. Mental health coverage and other mandated illnesses will not be included in the bill as the premiums would not be affordable. However, emergency treatment for mentally ill patients in a general hospital or a full-service psychiatric hospital would be covered in the policy.

Representative Welshimer moved for the acceptance of the report by the Subcommittee on HB 2511. Representative Cribbs seconded the motion. Motion carried.

The meeting adjourned at 5:15 p.m.

GUEST LIST

COMMITTEE: Insurance - House DATE: 3/26

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Bill Sneed	TOPEKA	KIAA
NANCY ZOGLMAN	TOPEKA	BCBS
Dick Brock	"	Ins Dept
R Hueben MD	"	BC/BS
William R. Patterson	Hutchinson	KLTA
Vera Sutton	Topeka	KLTA
PATRICK J. HURLEY	TOPEKA	Guardian Life
ALAN COBB	Wichita	Wichita Hosps
Ken Bahr	Topeka	Ks Hospital Assn.
GARY Robbins	Topeka	KS Opt. Assn
David Hanzlick	Topeka	KS Dental Assn
Pat Braun	Iola	KS Lumbermens
Michelle Lieber	Topeka	John Peterson & Assoc
JOE FURSANIC	TOPEKA	KCA
Steve Dickson	"	"
[illegible]	BC KS	CCTC/AGRI
Mary Spinks	Topeka	Health Benefits Admin.

Testimony By
Dick Brock, Kansas Insurance Department
Before the House Insurance Committee
on House Bill No. 2413
March 7, 1991

The history of House Bill No. 2413 really begins in 1983 when the Kansas law relating to the regulation of certain trade practices in the business or transaction of insurance was amended to include a subsection identifying and defining certain rebates and other inducements in title insurance to be specific and prohibited unfair trade practices.

Following enactment of this legislation, in late 1986 and early 1987, the Department started receiving a number of complaints alleging violations of the Kansas Unfair Trade Practices Act by persons offering or receiving special inducements, rebates, or other advantages in the sale or placement of title insurance that are not generally available to others similarly situated. These allegations were the subject of an extensive investigation by the Insurance Department which ultimately resulted in the issuance of various consent orders and in some cases the assessment of monetary penalties. Subsequently we also sent a bulletin to all title insurers admitted to Kansas cautioning them about some of the practices involved. A copy of that bulletin is attached to my testimony. All of the complaints at that time originated from the same area of the state and drew the attention of the news media which, in turn, generated significant consumer interest. To make what could be a long story shorter, this interest evolved because the special inducements, advantages, rebates or whatever one wants to call them gave consumers the clear impression that if title insurance transactions were lucrative enough to attract this kind of competition it seemed logical to assume that the charges for title insurance were excessive.

It is also important to understand that at this point in time, the rates for title insurance -- unlike the rates for most kinds of property and casualty insurance -- were not subject to rate regulation. As a result, House Bill No. 2955 was introduced during the 1988 legislative session and after a rather circuitous journey through the legislative process,

House Insurance
Attachment 1
March 26, 1991

its provisions were ultimately enacted as a part of Senate Bill No. 489. However, the story doesn't stop there. While persons engaged in the real estate and/or title insurance business generally agreed that a problem existed, they also were very dubious that subjecting title insurance rates to prior approval rate regulation would effectively address the perceived problems. Because of the questions and the apparent willingness of the title insurance industry to work toward a constructive and effective solution, the effective date of the 1988 legislation was delayed to July 1, 1989. The purpose of this delay was to allow the Department and the industry time to develop an alternative to the 1988 legislation prior to the time it became effective.

The Insurance Department served as a facilitator of this project by creating a title insurance study group for the purpose of considering the development of recommendations that might be a more acceptable and effective alternative than prior approval regulation of title insurance rates. The study group was comprised of the many interests involved in real estate transactions. Realtors, lenders, abstractors, title agents, title companies and others participated. I can't say the results were unanimously endorsed by a majority of those participating but I must say that strenuous objections did not surface until the study group's conclusions entered the legislative arena.

The recommendations developed by the study group called for both administrative actions by the Insurance Department and two legislative proposals. In total there were five components but those directly relevant to House Bill No. 2413 can be described as follows:

1. Adopt a regulation that would add specificity to the current statute (K.S.A. 40-2404(14)) -- the 1983 legislation -- dealing with unfair or special inducements. Such specificity would consist of enumerating various acts and arrangements that would be specifically prohibited. This regulation was developed, is attached, and was

reviewed by the Joint Committee on Administrative Rules and Regulations without objection.

2. Enact basic "controlled business" prohibitions and disclosure requirements in the Kansas Unfair Trade Practices Act. This was accomplished by enactment of House Bill No. 2502 in 1989. This basic enabling legislation was then complemented by necessary definitions and details by means of an administrative regulation. (A copy of which is also attached to my testimony). The "official" definition of the term "controlled business" is contained in the regulation but generally it is used to describe a situation where a person can direct or cause a prospective purchaser to be directed to a title insurance agent or company in which the person making the referral has a financial interest. This obviously is a critical element in your consideration of House Bill No. 2413 because this is the part of the 1989 legislation that would disappear.

Enactment of 1989 House Bill 2502 was itself a legislative adventure. As originally introduced, the bill included a subsection (e) that was the same as Section 2 of House Bill No. 2413. Both simply require or required a disclosure of financial interest. The original bill -- 1989 House Bill No. 2502 -- also contained a subsection (f) which involved a restriction on controlled business transactions but it did not include provisions similar to Section 3 of House Bill No. 2413. However, Section 3 appears to be little more than a reinforcement of the financial interest disclosure requirement in Section 2. As a result, House Bill No. 2413 is, in substance, comparable to 1989 House Bill 2502 except it does not contain the subsection relating to controlled business transactions.

My point in making this comparison is that the provisions relating to controlled business were removed by this committee in 1989 and the bill passed the House without them. The controlled business provisions were

then reinserted by the Senate committee; the bill passed the Senate with both subsections i.e. the disclosure of financial interest and controlled business restrictions in it; and the House concurred with the Senate amendments.

That is the sum and substance of the story about the enactment of our current law. But it doesn't stop there. The law was scheduled to go into effect July 1, 1989 but on June 21, 1989 the Department was temporarily enjoined from administering its provisions by a Shawnee County District Court. Subsequently, suit was filed seeking a permanent injunction, and a declaration of unconstitutionality. A decision to this effect was handed down February 22, 1990. In the meantime, the Insurance Department had been proceeding with the promulgation and adoption of the administrative regulation because, until the February 22, 1990 decision, it was quite conceivable that the temporary injunction could have been lifted at any time. At that point, we would have been faced with the responsibility of enforcing or administering the law and the regulation would facilitate that task. So, the law was in effect -- the regulation was in place but neither had been implemented because of the temporary injunction -- and that was the situation when the law was struck down on February 22, 1990. The Shawnee County District Court decision was, however, appealed to the Kansas Supreme Court which, on January 18, 1991 -- this year -- without dissent reversed the district court decision. Even so, the Supreme Court's action did not trigger enforcement of the law because of the possibility of a request for a rehearing. Such a request was filed on February 7, 1991. Just one week ago today, the Supreme Court issued its order denying the motion for rehearing. Therefore, the 1989 legislation is now in effect -- finally.

Therefore, at this point in time, Kansas statutes effectively contain provisions that will accomplish the same purpose as House Bill No. 2413. In addition, Kansas statutes currently contain a provision which goes beyond that proposed by House Bill No. 2413 by not only requiring

disclosure of a financial interest but, in fact, establishes definitive limits on the extent to which the referral or direction of title business from one related entity to another shall be permitted.

Even though the Department in 1989 was willing to support either a disclosure requirement only or the provisions ultimately enacted, there is no question but what the inclusion of specific restrictions on controlled business transactions is a more certain way to avoid anti-competitive abuses. Since the law is in effect and has passed the test of judicial review, we should not sacrifice a strong law for a weaker one in the absence of a legally valid reason or need to do so. To put it another way, we believe the "controlled business" restriction is in the best interest of consumers and, for that reason, we must oppose House Bill No. 2413.

Finally, there is some question about the way the bill is drafted. As the Revisor's office noted earlier in the session, the 1990 Supplement to the Kansas Statutes currently contain a K.S.A. 40-2404 and a 40-2404b both of which are I think identical except 2404b contains the provisions of 1989 House Bill No. 2502 i.e. a subsection requiring disclosure of financial interest and a subsection restricting controlled business. House Bill No. 2413 would repeal 40-2404b but it does not amend 40-2404. As a result, I don't know if it is or can be a part of the Unfair Trade Practices Act or not. If not, the penalties of the Unfair Trade Practices Act would presumably not apply to violations.

STATE OF KANSAS

KANSAS
INSURANCE DEPARTMENT

420 S.W. 9th
Topeka 66612-1678 913-296-3071

1-800-432-2484
Consumer Assistance
Division calls only

FLETCHER BELL
Commissioner

BULLETIN 1987-11

TO: All Insurance Companies Authorized to Write Title Insurance

IMPORTANT: FOR DISTRIBUTION TO SUPERVISOR(S) OF KANSAS OPERATIONS

FROM: Fletcher Bell
Commissioner of Insurance

SUBJECT: Rebates and Other Inducements in Title Insurance
K.S.A. 40-2404(14)

DATE: April 23, 1987

The purpose of this Bulletin is to advise you that our office is currently investigating several alleged violations of the Kansas Unfair Trade Practices Act, K.S.A. 40-2401 through K.S.A. 40-2414, as defined by the captioned statutory subsection. A copy of K.S.A. 40-2404(14) has been re-produced on the reverse side of this Bulletin and all of your personnel and Kansas agents should be in compliance with the requirements of this statute.

Arrangements where persons offer or receive payments or other inducements, directly or indirectly, in exchange for title insurance referrals could violate K.S.A. 40-2403 as defined by K.S.A. 40- 2404(14) and this office will pursue appropriate administrative action for any violations discovered during the course of our investigation.

Please forward this information to all your Kansas title insurance agents in Kansas and provide your written acknowledgement and understanding of this Bulletin, within thirty (30) days, to Tim Elliott of our Legal Division.

Fletcher Bell
Commissioner of Insurance

40-2404. Unfair methods of co- -etition or unfair and deceptive acts o -actices; certain methods, acts or practices defined as unfair. The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:

(14) *Rebates and other inducements in title insurance.* (a) No title insurance company or title insurance agent, or any officer, employee, attorney, agent or solicitor thereof, may pay, allow or give, or offer to pay, allow or give, directly or indirectly, as an inducement to obtaining any title insurance business, any rebate, reduction or abatement of any rate or charge made incident to the issuance of such insurance, any special favor or advantage not generally available to others of the same classification, or any money, thing of value or other consideration or material inducement. The words "charge made incident to the issuance of such insurance" includes, without limitations, escrow, settlement and closing charges.

(b) No insured named in a title insurance policy or contract nor any other person directly or indirectly connected with the transaction involving the issuance of the policy or contract, including, but not limited to, mortgage lender, real estate broker, builder, attorney or any officer, employee, agent representative or solicitor thereof, or any other person may knowingly receive or accept, directly or indirectly, any rebate, reduction or abatement of any charge, or any special favor or advantage or any monetary consideration or inducement referred to in paragraph (a) of this section.

(c) Nothing in this section shall be construed as prohibiting:

(i) The payment of reasonable fees for services actually rendered to a title insurance agent in connection with a title insurance transaction;

(ii) the payment of an earned commission to a duly appointed title insurance agent for services actually performed in the issuance of the policy of title insurance; or

(iii) the payment of reasonable entertainment and advertising expenses.

(d) Nothing in this section prohibits the division of rates and charges between or among a title insurance company and its agent, or one or more title insurance companies and one or more title insurance agents, if such division of rates and charges does not constitute an unlawful rebate under the provisions of this section and is not in payment of a forwarding fee or a finder's fee.

History: L. 1955, ch. 247, § 4; L. 1972, ch. 189, § 3; L. 1981, ch. 190, § 4; L. 1983, ch. 158, § 1; July 1.

10-3-42. Title insurance; unfair inducements; prohibited acts. (a) As used in this regulation:

(1) "Title entity" means a title insurance company, title insurance agent, title insurance agency or any other organization directly involved in the sale, underwriting, or servicing of title insurance.

(2) "Producer of title business" means any natural person, firm, association, organization, partnership, business trust, corporation, or other legal entity engaged in this state in the trade, business, occupation, or profession of:

(A) buying or selling interests in real property;

(B) making loans secured by interests in real property; or

(C) acting as broker, agent, representative, or attorney of natural persons or other legal entities that buy or sell interests in real property or that lend money with such interests as security.

(b) The following acts constitute rebates or unlawful inducements in the marketing of title insurance on property located in this state:

(1) The disbursement, on behalf of a customer or prospective customer, of funds prior to the actual deposit thereof with the escrow or closing agent;

(2) disbursement of escrow funds before the conditions of the escrow have been met;

(3) making a charge for any title commitment which does not have a reasonable relation to the cost of production of the commitment or is less than the minimum fee or charge for the type of policy applied for, as set forth in the agent's filed schedule of fees and charges. This provision does not apply where a title commitment is furnished in good faith in furtherance of a bona fide sale, purchase or loan transaction which for good reason is not consummated;

(4) paying a producer of title business to make an inspection of property;

(5) any transaction in which any person receives, or is to receive, securities of the title entity at prices below the normal market price, or bonds or debentures which guarantee a higher than normal interest rate, whether or not the consummation of the transaction is directly or indirectly related to the number of escrows or title orders coming to the title entity through the efforts of such person;

(6) charging a subdivision discount rate which is not applicable in the particular transaction because the volume required to qualify for the discount includes ineligible lots or parcels;

(7) paying for, or offering to pay for, the cancellation fee, the fee for the preliminary title report or other fee on behalf of any producer of title business before or after inducing such producer of title business to cancel an order with another title entity;

(8) giving, receiving or guaranteeing, or offering to give, receive or guarantee, either directly or indirectly, any loan with any producer of title business, regardless of the terms of the note or guarantee;

9) guaranteeing, or offering to guarantee, the performance of escrow services or any other undertaking by any producer of title business;

10) providing, or offering to provide, either directly or indirectly, a "compensating balance" or deposit in a lending institution either for the express or implied purpose of influencing the extension of credit by such lending institution to any producer of title business, or for the express or implied purpose of influencing the placement or channeling of title insurance business by such lending institution;

11) paying for, or offering to pay for, the fees or charges of an outside professional including but not limited to an attorney, engineer, appraiser, or surveyor whose services are required by any producer of title business to structure or complete a particular transaction;

12) providing, or offering to provide, without reasonable charge non-title services including but not limited to escrow services, computerized bookkeeping, forms management, computer programming, or any similar benefit to any producer of title business;

13) furnishing, or offering to furnish, without reasonable charge all or any part of the time or productive effort of any employee of the title entity including but not limited to office manager, escrow officer, secretary, clerk or messenger to any producer of title business. However, messenger service normally provided by a title entity in the ordinary course of its title insurance business shall not constitute a violation of this provision;

(14) paying for, or offering to pay for, all or any part of the salary of an employee of any producer of title business;

(15) paying for, or offering to pay for, the salary or any part of the salary of a relative of any producer of title business which payment is in excess of the reasonable value of work performed by such relative on behalf of the title entity;

(16) paying, or offering to pay, any fee to any producer of title business for making an inspection or appraisal of property unless the fee bears a reasonable relationship to the services performed;

(17) paying for, or offering to pay for, services by any producer of title business which services are required to be performed by the

oducer of title business or title agency in his or her capacity as a real estate or mortgage broker or salesman or agent including but not limited to the drafting of documents that are required for the initiation of an escrow;

(18) furnishing or offering to furnish, paying for or offering to pay for, furniture, office supplies, telephones, facsimile machines, computer and other business equipment or automobile to any producer of title business, or paying for, or offering to pay for, any portion of the cost of renting, leasing, operating or maintaining any of the aforementioned items;

(19) paying for, furnishing, or waiving, or offering to pay for, furnish, or waive, all or any part of the rent for space occupied by any producer of title business;

(20) renting, or offering to rent space:

(A) from any producer of title business that does not serve a necessary purpose;

(B) at a rental rate which is excessive when compared with rental rates for comparable space in the geographic area; or

(C) paying, or offering to pay, rent based in whole or in part on the volume of business generated by any producer of title business;

(21) furnishing or offering to furnish, paying for or offering to pay for any economic opportunity, gift, gratuity, special discount, favor, hospitality, or service to any producer of title business having an aggregate value of $25 or more in any calendar year where a purpose of the donor is to influence any producer of title business in the placement of channeling of title insurance business. Hospitality in the form of incidental food and beverages are presumed not to be given to influence such producer of title business in the placement or channeling of title insurance business except when a particular transaction is conditioned thereon;

(22) paying for, or offering to pay for, money prizes or other things of value for any producer of title business in any kind of a contest or promotional endeavor. This prohibition applies whether or not the offer or payment of a benefit relates to the number of title orders placed or escrows opened with a title entity or group of such entities;

(23) paying for, or offering to pay for, any advertising for the benefit of the title entity through any advertising medium, the end result of which is the substantial subsidization of a product, service or publication used by, or published or printed by or for the benefit of, any producer of title business, building or financing businesses or any association or group of such persons. In determining whether there has been a violation of this subsection "substantial subsidization" will exist whenever 50 percent or more of the advertising revenue or printing costs, whichever is less, of any pamphlet, program, announcement, register, directory, index, book, brochure, periodical, newsletter, bulletin, information sheet or printed matter of any kind intended for distribution or circulation is paid for by one or more title entities;

(24) paying for, or furnishing, or offering to pay for or furnish, any advertising effort made in the name of, for, or on behalf of, any producer of title business through any advertising medium, whether or not the advertising is used, or is intended to be used, in connection with the promotion, sale or encumbrance of real property;

(25) paying for or furnishing, or offering to pay for or furnish, any business form to any producer of title business other than a form regularly used in the conduct of the title entity's business;

(26) giving of trading stamps, cash redemption coupons or similar items to any producer of title business;

(27) advancing or paying into escrow, or offering to advance or pay into escrow, any of the title entity funds;

(28) buying from or selling to, or exchange with, or offering to buy from or sell to, or exchange with, any producer of title business, shares of stock, promissory notes or other securities in any title entity or any other business concern owned by, or affiliated with, a title entity, regardless of the price or relative value except for purchases or exchanges made through a general public offering. This prohibition also applies to the furnishing, or offer to furnish, legal or other professional services by any title entity to any producer of title business or group of persons to assist such producer(s) of title business in the formation of a title entity. The burden will be placed on any existing title entity that invests in a title entity formed by one or more of such producer(s) of title business to show that such investment does not represent a benefit coming within the prohibition of this subsection; or

(29) charging, contracting or offering to contract with any producer of title business to perform services for which the title entity is making a charge either directly or indirectly. (Authorized by K.S.A. 40-103 and 40-2404a; implementing K.S.A. 40-2404(14) as amended by L. 1989, Ch. 139, Sec. 1; effective Oct. 23, 1989.)

40-3-43. Title insurance; controlled business; definitions; requirements. For purposes of section 1, subsection (14)(e) and (f) of 1989 House Bill 2502, these terms shall have the following meanings:

(a) "Producer of title business" or "producer" means any natural person, firm, association, organization, partnership, business trust, corporation, or other legal entity engaged in this state in the trade, business, occupation, or profession of:

(1) buying or selling interests in real property;

(2) making loans secured by interests in real property; or

(3) acting as broker, agent, representative, or attorney of natural persons or other legal entities that buy or sell interests in real property or that lend money with such interests as security.

(b) "Associate" means any firm, association, organization, partnership, business trust, corporation, or other legal entity organized for profit in which a producer of title business is a director, officer, or partner, thereof, or owner of a financial interest; the spouse or any relative within the second degree by blood or marriage of a producer of title business who is a natural person; any director, officer, or employee of a producer of title business or associate; any legal entity that controls, is controlled by, or is under common control with a producer of title business or associate; and any natural person or legal entity with whom a producer of title business or associate has any agreement, arrangement, or understanding or pursues any course of conduct the purpose or effect of which is to evade the provisions of this section.

(c) "Financial interest" means any direct or indirect interest, legal or beneficial, where the holder is or will be entitled to one percent or more of the net profits or net worth of the entity in which such interest is held. Notwithstanding the foregoing, an interest of less than one percent or any other type of interest shall constitute a "financial interest" if the primary purpose of the acquisition or retention of that interest is the financial benefit to be obtained as a consequence of that interest from the referral of title business.

(d) "Refer" or "referral" means to direct or cause to be directed, or to exercise any power or influence over the direction of title business whether or not the consent or approval of any other person is sought or obtained with respect to the referral.

(e) "Gross operating revenue" means the total revenue received by a title insurer, title agent or title agency from application of the rates, premiums and charges filed or required to be filed pursuant to 1989 House Bill No. 2497, Sec. 1 (d)(2) in connection with providing title insurance or other services on real estate transactions involving properties located in counties in Kansas that have a population, as shown by the last preceding decennial census, in excess of 10,000.

(f) "Controlled business" means any portion of a title insurer's or title agent's business in this state that was referred by any producer of title business or by any associate of such producer, where the producer of title business, the associate, or both, have a financial interest in the title insurer or title agent to which the business is referred. (Authorized by K.S.A. 40-103, 1989 HB 2502, Sec. 1 (14)(g); implementing 1989 HB 2502, Sec. 1 (14)(e) and (f); effective, T-40-7-27-89, July 27, 1989; amended Sept. 11, 1989.)

Mitchell

PRESENTATION TO HOUSE INSURANCE COMMITTEE

RE: House Bill 2413

DATE: March 7, 1991

In the 1988 Session of the Kansas Legislature, a member of this committee noted that problems were developing in the Title Insurance industry and that the Insurance Commissioner's office should take steps to further regulate the industry. A Bill was passed regulating the Title Insurance Business with a July 1, 1989 effective date, the purpose of which was to allow, a detailed study of Title Insurance which the Insurance Department would form and in essence "chair". During the Spring of 1988 the study group was formed composed of practically all segiments of the Title Insurance industry including lenders, realtors, attorneys, abstractors, title insurers and underwriters all of which were assisted by staff personnel of the Insurance Department, and the Kansas and American Land Title Associations. The American Land Title Association had been addressing the problems of the title insurance industry for many years, particulary the problems with "Controlled Business", which the Study Committee ultimately solved by suggesting that a statute be passed by the 1989 Legislative in essence regulating Controlled Business which the 1989 Session did - by passing House Bill 2502 adding sub-paragraphs (e), (f) and (g) to Sub Section 14 of K.S.A. 40-2404 (b). After the 1989 passed House Bill 2502:

1. House - 122 Yeas, 2 Nays
2. Senate - 39 Yeas, 0 Nays,

Two opponents of the bill, Guardian Title Company, a California Company involved with Sears and Wichita Title Associates, Inc., a group of realtors in Wichita filed a case seeking a temporary injunction alleging that the Kansas Legislature passed an Unconstitutional Bill and a declaratory judgment that the law was vague, violated the Separation of Powers doctrine and arbitrary, and permanently enjoying the Commissioner of Insurance from enforcing HB2502, eventually the case was heard by the Kansas Supreme Court, Judge Abbott delivered the unanimous opinion of the court on January 18, 1981, a copy of the full opinion being attached here for your information and leisurely study.

In essence, the Supreme Court upheld the constituality of House Bill 2502 on all points. However, some points are very interesting and I must note them for your benefit:

1. The insurance commissioner is charged with regulating a huge, complex industry, and to require explicit, definitive statutes would severly impede, if not make impossible, the regulation of the insurance industry.

House Insurance
March 26, 1991
Attachment 2

2. We live in an increasingly complex society. To expect the legislature to have the time and expertise to deal with minute details statutorily is not realistic.

3. Standards may be implied from the statutory purpose. The statutory purpose is set forth in K.S.A. 40-2401, as follows:

> "The purpose of this act is to regulate trade practices in the business of insurance . . . by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined."

4. The modern trend, which we ascribe to, is to require less detailed standards and guidance to the administrative agencies in order to facilitate the administration of laws in areas of complex social and economic problems.

5. "The purpose of the Unfair Trade Practices Act is to prevent unfair methods of competition and unfair or deceptive acts or practices in the business of insurance. The purpose of (14) (e) and (f) is to <u>stimulate competition</u> by decreasing vertical integration between producers of title business and title insurers."

All during these proceedings some reference has been made that the regulation of Controlled Business would put someone "out of business". This is not correct - any title company may compete - just like any other title company - however, they must compete fairly and they must not engage in any unfair or deceptive acts or practices in the business of insurance. Rebating in any form, directly or indirectly, has always been an unfair trade practice - as it is in most business. Controlled Business has been studied by many groups:

1. United States Department of Justice 1977 Report.

2. Michigan Insurance Commission 1977 study.

3. Congress of the United States in its studies of Real Estate Settlement Procedures Act (RESPA).

4. American Land Title Association

5. Kansas Insurance Commission 1988 study.

All have found that Controlled Business needs attention, and regulation because:

A. Permitting real estate brokers to own or control title insurance for the purpose of directing the business of title insurance is detrimental both to the consumer and competition. Because, the consumer:

1. Pays unreasonably high premiums and charges.

2. Accepts unusually poor service, or

3. Accepts faulty title exams.

So the anti-competitive nature of the arrangement is obvious and widely acknowledged. Its effect on the title insurance industry and consumers can only be harmful.

Further, a check of the annual reports of Guardian Title, Inc., the California affiliate of Sears and Coldwell Banker and Wichita Title Associates reveals that they can both compete in a fair manner for the title business. Wichita Title Associates had over $60,000.00 in the Bank and Guardian Title Company showed a shareholders equity of almost $1,000,000 with earnings of about $200,000 according to their last Annual Reports filed with the Secretary of State. Both of these companies were incorporated and admitted to do business in the state of Kansas in 1988. As a matter of fact both companies elected to get into business while the legislature and the study committee were resolving the problems the 1988 session of the Kansas Legislature posed in the study.

In closing, I must emphasize that the present law does not - DOES NOT - prohibit anyone from engaging and competing fairly in the title business. It merely lets them compete fairly with the independent title companies who have been competing fairly and with a high degree of professionalism for many years. Our Supreme Court stated it quite well as noted above:

> "The purpose of the Unfair Trade Practices Act is to prevent unfair methods of competition and unfair or deceptive acts or practices in the business of insurance. The purpose of (14) (e) and (f) is to stimulate competition by decreasing vertical integration between producers of title business and title insurers".

Thank you for your time and courteous attention.

William L. Mitchell
Legislative Counsel
Kansas Land Title Association

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 64,936

GUARDIAN TITLE COMPANY and
WICHITA TITLE ASSOCIATES, INC.,
Appellees,

v.

W. FLETCHER BELL, as Commissioner
of Insurance of the State of Kansas,
Appellant.

SYLLABUS BY THE COURT

1.

The constitutionality of a statute is presumed and all doubts must be resolved in favor of its validity.

2.

It is the court's duty to uphold the statute under attack, if possible, rather than defeat it, and, if there is any reasonable way to construe the statute as constitutionally valid, that should be done.

3.

In determining constitutional challenges for vagueness, greater leeway is afforded statutes regulating business than those proscribing criminal conduct.

4.

A common-sense determination of fairness is the standard for determining whether a statute regulating business is unconstitutional for vagueness, *i.e.*, can an ordinary person exercising common sense understand and comply with the statute? If so, the statute is constitutional.

5.

Interpretation of a statute is a question of law, not a question of fact.

6.

If the statute gives fair notice to those subject to the statute, the fact that academic questions might be posed over the statute's meaning will not defeat the statute's validity.

7.

In construing statutes, the legislative intention is to be determined from a general consideration of the entire act.

8.

The several provisions of any act, *in pari materia*, must be construed together with a view of reconciling and bringing them into workable harmony and giving effect to the entire statute if it is reasonably possible to do so.

9.

A strict application of the separation of powers doctrine is inappropriate today in a complex state government where administrative agencies exercise many types of power, and where legislative, executive, and judicial powers are often blended together in the same administrative agency.

10.

Where flexibility in fashioning administrative regulations to carry out statutory purpose is desirable in light of complexities in the area sought to be regulated, the legislature may enact statutes in a broad outline and authorize the administrative agency to fill in the details.

11.

In determining whether a statute regulating an administrative agency sets standards definite enough to pass the separation of powers test, the character of the administrative agency is important.

12.

Standards to guide an administrative agency in application of a statute may be implied from the statutory purpose.

13.

Less detailed standards and guidance to the administrative agencies are acceptable in areas of complex social and economic problems.

14.

Under the least strict level of scrutiny, legislation does not violate the equal protection clauses of the United States and Kansas Constitutions so long as it is reasonably (or rationally) related to a legitimate State interest.

Appeal from Shawnee district court; FRED S. JACKSON, judge. Opinion filed January 18, 1991. Reversed.

Louis F. Eisenbarth, of Sloan, Listrom, Eisenbarth, Sloan & Glassman, of Topeka, argued the cause, and *Derenda J. Mitchell* and *Jeffrey W. Jones*, of the same firm, and *Timothy G. Elliott*, special assistant attorney general, Kansas Insurance Department, were with him on the briefs for appellant.

Phillip A. Miller, of Watson, Ess, Marshall & Enggas, of Olathe, argued the cause, and *Steven B. Moore*, of the same firm, was with him on the brief for appellees.

Thomas D. Kitch and *David G. Seely*, of Fleeson, Gooing, Coulson & Kitch, of Wichita, were on the brief for *amicus curiae* Kansas Association of Realtors.

Donald Patterson and *Steve R. Fabert* of Fisher, Patterson, Sayler & Smith, of Topeka, were on the brief for *amicus curiae* Kansas Land Title Association.

The opinion of the court was delivered by

ABBOTT, J.: This is a title insurance law case in which the trial court held K.S.A. 1989 Supp. 40-2404b(14)(f) and (g) unconstitutional.

Section 2404b prohibits unfair methods of competition and deceptive acts or practices in the insurance industry. In 1989 House Bill No. 2502 added subparagraphs (e), (f), and (g) to subsection 14 of K.S.A. 40-2404b. Subparagraph (e) was not challenged,

but needs to be considered in determining whether (f) and (g) are unconstitutional.

The subparagraphs provide:

"(e) No title insurer or title agent may accept any order for, issue a title insurance policy to, or provide services to, an applicant if it knows or has reason to believe that the applicant was referred to it by any producer of title business or by any associate of such producer, where the producer, the associate, or both, have a financial interest in the title insurer or title agent to which business is referred unless the producer has disclosed to the buyer, seller and lender the financial interest of the producer of title business or associate referring the title insurance business.

"(f) No title insurer or title agent may accept an order for title insurance business, issue a title insurance policy, or receive or retain any premium, or charge in connection with any transaction if: (i) The title insurer or title agent knows or has reason to believe that the transaction will constitute *controlled business* for that title insurer or title agent, and (ii) 20% or more of the gross operating revenue of that title insurer or title agent during the six full calendar months immediately preceding the month in which the transaction

takes place is derived from *controlled business*. The prohibitions contained in this subparagraph shall not apply to transactions involving real estate located in a county that has a population, as shown by the last preceding decennial census, of 10,000 or less.

"(g) The commissioner shall adopt any regulations necessary to carry out the provisions of this act." (Emphasis added.)

The Insurance Commissioner then adopted K.A.R. 40-3-43 (1990 Supp.), which provides, in part:

"(f) 'Controlled business' means any portion of a title insurer's or title agent's business in this state that was referred by any producer of title business or by any associate of such producer, where the producer of title business, the associate, or both, have a financial interest in the title insurer or title agent to which the business is referred."

Guardian Title Company and Wichita Title Associates, Inc., (petitioners) filed this case seeking a temporary injunction against Fletcher Bell, Commissioner of Insurance, (respondent) arguing that House Bill 2502 was unconstitutional. They also sought a declaratory judgment that subparagraphs (f) and (g) were

unconstitutional and sought a permanent injunction against their enforcement.

As to subparagraph (f), the trial court found that it violates the Due Process Clause of the United States Constitution and the Due Process and Equal Protection Clauses of the Kansas Constitution, Kansas Bill of Rights § 18 and Kansas Bill of Rights § 1, and that subparagraph (g) violates the constitutional requirement of separation of powers found in Article 2, Section 1 of the Kansas Constitution. The trial court also permanently enjoined the Insurance Commissioner from enforcing subparagraph (f) and any regulations promulgated by the Commissioner relating to K.S.A. 1989 Supp. 40-2404b(14)(f).

In enjoining enforcement of the provisions, the trial court found that there is no statutory or judicial definition of the term "controlled business" and that there is no technical meaning of the term that is commonly understood by persons in the title insurance industry in Kansas. The trial court found it significant that legislation in numerous other states has used the phrase "controlled business" and that most other states

have provided an expansive definition of "controlled business."

The trial court also concluded that the subparagraphs in issue lack sufficient standards to satisfy principles of nondelegation under article 2, § 1 of the Kansas Constitution and that the legislature cannot delegate to an administrative agency the task of defining an unconstitutionally vague term, because to do so violates the separation of powers doctrine (Kan. Const. art. 2, § 1). In addition, the trial court held that the classification in subsection (14)(f) exempting counties of 10,000 or less from the bill's prohibitions violates the equal protection clause because it is not rationally related to any legitimate state purpose.

1. Vagueness Argument

The constitutionality of a statute is presumed and all doubts must be resolved in favor of its validity. Before the statute may be struck down, it must clearly appear the statute violates the constitution. It is the court's duty to uphold the statute under attack, if possible, rather than defeat it, and, if there is any

reasonable way to construe the statute as constitutionally valid, that should be done. *State v. Huffman*, 228 Kan. 186, Syl. ¶ 1, 612 P.2d 630 (1980).

Most challenges against statutes for vagueness are against criminal statutes. With a criminal statute,

> "[t]he test to determine whether a criminal statute is unconstitutional by reason of being vague and indefinite is whether its language conveys a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice. A statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process." *State v. Meinert*, 225 Kan. 816, Syl. ¶ 2, 594 P.2d 232 (1979).

K.S.A. 1989 Supp. 40-2404b is not a criminal statute, although it is penal in nature because K.S.A. 1989 Supp. 40-2407 provides that the commissioner may levy penalties against companies engaging in practices prohibited by section 40-2404b. The same standard is not applied, however, when the statute regulates a business as is applied when the statute is criminal or is regulating a constitutionally protected interest such as

free speech. In *In re Brooks*, this court said, "In determining constitutional challenges for vagueness, greater leeway is afforded statutes regulating business than those proscribing criminal conduct." *In re Brooks*, 228 Kan. 541, 544, 618 P.2d 814 (1980) (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 31 L. Ed. 2d 110, 92 S. Ct. 839 [1972]).

A common-sense determination of fairness is the standard for determining whether a statute regulating business is unconstitutional for vagueness, *i.e.*, can an ordinary person exercising common sense understand and comply with the statute? If so, the statute is constitutional. *Harris v. McRae*, 448 U.S. 297, 311 n.17, 65 L. Ed. 2d 784, 100 S. Ct. 2671, *reh. denied* 448 U.S. 917 (1980).

In order to determine if this statute is vague, this court is called upon to interpret the statute, because if there is a valid interpretation of the statute, there is no reason to declare it unconstitutional. Interpretation of a statute is a question of law, not a question of fact. Here, the only persons subject to the statute are title insurers and

title agents. If the statute gives fair notice to those subject to the statute, the fact that academic questions might be posed over the statute's meaning will not defeat its validity. See *Communications Ass'n v. Douds*, 339 U.S. 382, 412-13, 94 L. Ed. 2d 925, 70 S. Ct. 674, *reh. denied* 339 U.S. 990 (1950).

The trial court found that this statute is vague because "controlled business," as used in subparagraph (f), is not expressly defined. Respondent suggests that subparagraph (e) defines "controlled business" as business which has been referred to the title insurer or title agent by a producer of title business who also has a financial interest in the title insurer or agency receiving the referral.

The fundamental rule of statutory construction is that the purpose and intent of the legislature governs when the intent can be ascertained from the statute. "In construing statutes, the legislative intention is to be determined from a general consideration of the entire act." *State v. Adee*, 241 Kan. 825, 829, 740 P.2d 611 (1987). In order to construe one part of a statute, it is permissible to look at other parts of it. "The

several provisions of an act, *in pari materia*, must be construed together with a view of reconciling and bringing them into workable harmony and giving effect to the entire statute if it is reasonably possible to do so." *Easom v. Farmers Insurance Company*, 221 Kan. 415, Syl. ¶ 3, 560 P.2d 117 (1977).

In this case, subparagraph (e) sets forth the requirements applicable when a customer is referred to a title insurer by one having a financial interest in the title insurer--the financial interest must be disclosed. Then, the other major part of the amendment to the act, subparagraph (f), goes on to set forth prohibitions against some, but not all, transactions that would constitute "controlled business."

These two parts are compatible if "controlled business" is defined as referred business by one who has a financial interest in the title insurer. Subparagraph (e) sets forth general requirements for such transactions. Subparagraph (f) sets forth specific limits. It is not surprising that the two major parts of a bill amending a statute would both refer to the same subject.

The testimony heard by House and Senate committees supports the conclusion that "controlled business" in subparagraph (f) is defined by subparagraph (e). Dick Brock, of the Insurance Department, testified to the House Committee on Insurance in favor of the bill. He testified that the Department had been studying complaints about persons offering or receiving special inducements, rebates, and other advantages in the sale or placement of title insurance that is not generally available to others similarly situated, causing increased costs to consumers. (Testimony by Dick Brock before the House Insurance Committee, March 2, 1989.) One of the proposals reached by the study group was to enact the prohibitions contained in subparagraphs (e), (f), and (g) limiting controlled business which, he said, generally meant "a situation where a person can direct or cause a prospective purchaser to be directed to a title insurance agent or company in which the person making the referral has a financial interest."

Testimony against portions of the bill also supports the proposition that "controlled business" means referrals by one having a financial interest. These witnesses obviously realized the meaning of subparagraph

(f). See, *e.g.*, Testimony of Karen McClain France, Kansas Association of Realtors, before the House Insurance Committee, March 2, 1989, attachment 6, p. 2.

The minutes of the Senate Financial Institutions and Insurance Committee reveal express statements by legislators showing their concerns and what they hoped to accomplish with the bill. One senator said the problem with the controlled business situation is that it is "anti-competitive--the title companies try to steer customers to the title company they own and they have no incentive to look out for the consumer." Minutes of the Senate Committee on Financial Institutions and Insurance, March 23, 1989.

Petitioners argue that constitutional requirements are not satisfied by looking at legislative history to overcome a vagueness argument. This statute does not apply to the average citizen. It applies to a heavily regulated industry that has specialized knowledge of the industry and its terms. Obviously, different states have defined "controlled business" differently, but with a common theme.

We also believe the vagueness argument cannot be completely separated from the separation of powers argument that is addressed later in this opinion. If the statute is not as clear and concise as one would like it to be, but gives sufficient guidance so as not to violate the separation of powers doctrine, then the regulation eliminates any question as to the meaning of a "controlled business."

Although the amendments to section 40-2404b would have been clearer if an express definition of "controlled business" had been included, when read together, subparagraphs (e) and (f) of section 14 indicate a legislative intent to limit business which has been referred to the title insurer or title agent by a producer of title business who also has a financial interest in the title insurer or agency receiving the referral. Thus, the trial court erred in holding subparagraph (f) unconstitutionally vague.

2. Separation of Powers

Petitioners argue that the trial court erred in holding that subparagraphs (f) and (g) violate the

separation of powers doctrine because they lack sufficient standards to govern the rulemaking power of the insurance commissioner. Having determined subparagraph (f) not to be vague, and finding that it therefore provides sufficient guidance to the agency to carry out the directives of (g), this issue is moot. However, we believe a discussion of applicable law to be worthwhile because to some extent this issue cannot be divorced from the vagueness issue. We live in an increasingly complex society. To expect the legislature to have the time and expertise to deal with minute details statutorily is not realistic.

In the case of *In re Sims*, 54 Kan. 1, 11, 37 Pac. 135 (1894), this court said that in its judgment a strict application of the separation of powers doctrine is inappropriate today in a complex state government where administrative agencies exercise many types of power and where legislative, executive, and judicial powers are often blended together in the same administrative agency.

In the 97 years that have passed since *In re Sims*, this court has consistently stated that an

absolute separation of powers is neither practical nor possible. *State, ex rel. Schneider, v. Bennett,* 219 Kan. 285, 288, 547 P.2d 786 (1976); see *State, ex rel., Taylor v. Railway Co.,* 76 Kan. 467, 474, 92 Pac. 606 (1907), *aff'd* 216 U.S. 262, 54 L. Ed. 472, 30 S. Ct. 330 (1910).

What is required is that a statute express the law in general terms and delegate the power to apply it to an executive agency under standards provided by the legislature. *Wesley Medical Center v. McCain,* 226 Kan. 263, 270, 597 P.2d 1088 (1979). This has been the fundamental rule since early statehood. See *Coleman v. Newby,* 7 Kan. 82, 89 (1871).

Where flexibility in fashioning administrative regulations to carry out statutory purpose is desirable in light of complexities in the area sought to be regulated, the legislature may enact statutes in a broad outline and authorize the administrative agency to fill in the details. *Nicholas v. Kahn,* 62 A.D.2d 302, 306, 405 N.Y.S.2d 135 (1978), *modified* 47 N.Y.2d 24, 416 N.Y.S.2d 565, 389 N.E.2d 1086 (1979).

2292

In testing a statute for adequacy of standards, the character of the administrative agency is important. See *Warren v. Marion County*, 222 Or. 307, 314-15, 353 P.2d 257 (1960). Here, we are dealing with the insurance commissioner, an expert in regulation of the insurance industry, with a large staff and paid consultants available. The insurance commissioner is charged with regulating a huge, complex industry, and to require explicit, definitive statutes would severely impede, if not make impossible, the regulation of the insurance industry. What is a sufficient standard must necessarily vary somewhat according to the complexity of the area sought to be regulated. See *Senior Citizens League v. Department of Social Secur.*, 38 Wash. 2d 142, 161, 228 P.2d 478 (1951); *Quesenberry v. Estep*, 142 W. Va. 426, 95 S.E.2d 832 (1956).

Standards may be implied from the statutory purpose. *People v. Wright*, 30 Cal. 3d 705, 713, 180 Cal. Rptr. 196, 639 P.2d 267 (1982). Here, the statutory purpose is set forth in K.S.A. 40-2401, as follows:

> "The purpose of this act is to regulate trade practices in the business of insurance . . . by defining, or providing for the

> determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined."

Here, the legislative purpose for the statute is evident.

The modern trend, which we ascribe to, is to require less detailed standards and guidance to the administrative agencies in order to facilitate the administration of laws in areas of complex social and economic problems. See *Kalbfell v. City of St. Louis*, 357 Mo. 986, 993, 211 S.W.2d 911 (1948); *Ward v. Scott*, 11 N.J. 117, 93 A.2d 385 (1952); *City of Utica v. Water Control Bd.*, 5 N.Y.2d 164, 182 N.Y.S.2d 584, 156 N.E.2d 301 (1959). See also Pierce, Shapiro & Verkuil, Administrative Law & Process, § 3.4.5 (1985).

We conclude that subparagraph (f) gives sufficient standards to govern the rulemaking power of the insurance commissioner; thus, the legislature did not violate the separation of powers doctrine.

3. Equal Protection

Subparagraph (f) exempts from its prohibition those "transactions involving real estate located in a county that has a population . . . of 10,000 or less." The trial court found that this classification was not rationally related to the purpose of the statute and, therefore, violated the equal protection clause of the Kansas Constitution.

The first step in an equal protection analysis is to determine what level of scrutiny applies. The classification in K.S.A. 1989 Supp. 40-2404b(14)(f) is based on geography and population--counties with populations of less than 10,000 are exempted from part (f). Here, because no "suspect classification" or "quasi-suspect" classification has been set forth and because no fundamental rights are at issue, the least strict level of scrutiny is appropriate. Under the least strict level of scrutiny, legislation is valid so long as it is reasonably (or rationally) related to a legitimate state interest. *F. Arthur Stone & Sons v. Gibson*, 230 Kan. 224, 227, 630 P.2d 1164 (1981). The United States Supreme Court has said:

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 425-26, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961).

See *Brown v. Wichita State University*, 219 Kan. 2, 13, 547 P.2d 1015 (1976).

When a statute is under judicial review, it is the constitutionality of the statute, not the wisdom of the legislature in enacting it, that is at issue. *Caban v. Mohammad*, 441 U.S. 380, 392 n.13, 60 L. Ed. 2d 297, 99 S. Ct. 1760 (1979). The fact that the legislative response to a perceived societal evil is not a perfect response is not a sufficient reason to strike down a statute. See *Dandridge v. Williams*, 397 U.S. 471, 501, 25 L. Ed. 2d 491, 90 S. Ct. 1153, *reh. denied* 398 U.S. 914 (1970).

The purpose of the Unfair Trade Practices Act is to prevent unfair methods of competition and unfair or

deceptive acts or practices in the business of insurance. K.S.A. 1989 Supp. 40-2404b. The purpose of (14)(e) and (f) is to stimulate competition by decreasing vertical integration between producers of title business and title insurers.

There are obvious reasons for the exception provided in part (f). In less populated counties, there is a limited market for title insurance and, generally, there will be only two title insurers and in the smaller counties only one. In order to survive in the less populated county, the title insurer is generally tied to another financial entity. This exception promotes the availability of title insurance in these counties. If one of the agents is removed from competition, there would generally be no competition in a county having a population of less than 10,000 people and, in those counties having only one title insurance agent, there would be no title insurance available. The very nature of the title insurance business is such that, generally, it is not economically feasible for an agent for a title insurance company to cross county lines. There is a rational basis for this classification.

As in all cases, one can argue that the drawn line is arbitrary. The legislature is not required to draw a perfect line and can always later refine the one it has drawn if circumstances warrant it.

Guardian argues that *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987), stands for the proposition that geographical classifications are, by nature, violative of equal protection. We disagree. In *Smith*, this court held that the state indigent criminal defense system violated equal protection. Under the system, attorneys from less populated areas were required to donate their services to a greater extent than attorneys living in the more populated areas. The holding in *Smith*, however, was that under the facts there at issue, there was no basis for that classification.

Here, there is a rational basis for the classification adopted by the legislature. Thus, the exception for less populated counties does not violate equal protection.

Reversed.

REPORT OF SUBCOMMITTEE ON HOUSE BILL NO. 2511

At its meeting on March 22, the Subcommittee concluded there is little interest in creating a risk plan that covers only catastrophic insurance. The Subcommittee did conclude that a substitute for H.B. 2511 that creates a risk plan that differs substantially from any now in existence should be recommended. The Subcommittee proposal would offer third-party coverage for a limited range of health care services through an accident and health risk pool, and would require providers of health care and carriers to bear a part of the cost of subsidizing health insurance for those who must turn to the risk plan for accident and health insurance coverage.

The following are policy issues addressed by the Subcommittee and the Subcommittee recommendations thereon.

Who Participates in the Risk Plan (Association)

1. All insurers or fraternal benefit societies that provide accident and health insurance in Kansas.

2. Mutual nonprofit medical or surgical corporations.

3. HMOs.

4. Municipal group funded pools.

5. Self-insured plans not exempt under ERISA.

Who is Eligible To Apply for Coverage Under the Risk Plan

1. Persons who have been Kansas residents for at least six months prior to making application for coverage under the plan; and

2. whose health insurance has been involuntarily terminated, other than for nonpayment of premium; or

3. who have been rejected by two carriers because of health conditions; or

4. who will be accepted by a carrier for coverage but who have been quoted a rate in the first two years of operation of the plan that is more than 150 percent greater than the rate available through the plan and, in succeeding years, a rate in excess of the rate established for the plan in an amount set by the board of the Association created to offer coverage through the plan; or

5. who will be accepted for coverage by a carrier but with a permanent exclusion of a preexisting disease or condition.

Who is Not Eligible for Coverage Under the Plan

1. Persons who are eligible for Medicare or Medicaid.

2. Persons who have been terminated from the plan within the past 12 months.

House Insurance
March 26, 1991
Attachment 3

3. Persons whose lifetime benefits under the plan exceed the lifetime maximum benefits under the plan.

4. Persons who are eligible for public or private programs that provide or indemnify for health services.

5. Persons who have access to accident and health insurance through an employer sponsored group or self insured plan.

Health Services to be Covered Under the Plan

1. Only the services of persons licensed to practice medicine and surgery (MD and DO) medically necessary for the diagnosis or treatment of illnesses and health conditions; the services of advanced registered nurse practitioners who hold a certificate of qualification from the Board of Nursing to practice in an expanded role or physicians assistants acting under the direction of a responsible physician when such services are provided at the direction of a person licensed to practice medicine and surgery; and licensed dentists issued a certificate of qualification by the Board of Dental Examiners to practice oral surgery as a dental specialty for procedures that would otherwise be performed by a person licensed to practice medicine and surgery.

2. Limited services provided in a general hospital or ambulatory surgical center as such terms are defined in K.S.A. 65-425. (Emergency care, surgery, and treatment of acute episodes of illness or disease as defined in the plan.)

3. Prescription drugs and controlled substances, including a mandatory 50 percent coinsurance on outpatient prescriptions and mandatory coinsurance as established by the plan on inpatient drugs.

4. Medically necessary diagnostic laboratory and x-ray services as limited by the plan.

5. The provisions of K.S.A. 40-2,100 through 40-2,105, 40-2,114, 40-2209, and K.S.A. 1990 Supp. 40-2,102, 40-2229, 40-2230, and New Section 3 of Chapter 162, 1990 *Laws of Kansas*, shall not apply to the plan operated under such legislation.

6. Appropriate cost control measures, including but not limited to, preadmission review, case management, utilization reviews, and exclusions or limitations with respect to treatment and services, shall be established as a part of the plan.

Premiums, Deductibles, and Copayments

1. Premiums shall be established in the first two years the plan is in operation in an amount that is estimated by the Association to cover claims that may be made against the plan and the expenses of operating the plan.

2. In succeeding years, the premiums for coverage issued by the plan must be reasonable in terms of the benefits provided, the risk experience of the plan, and the expense of operating the plan.

3. Separate premiums may be established based on age, sex, and geographic location of the insured.

4. The plan may offer applicants optional deductibles and copayments or combinations thereof as determined by the board of directors, but at least one option must provide for a minimum deductible of $5,000.

5. Any coverage offered by the plan shall require coinsurance (copayment) for each service covered by the plan and such coinsurance shall not be subject to a stop loss provision. The plan may provide that the percentage or the dollar amount of coinsurance is reduced at such point as the insured has expended a specified sum in the form of coinsurance.

6. Each option for coverage under the plan shall contain a deductible in an amount set by the plan.

7. Coverage under the plan shall be subject to a lifetime maximum of $500,000.

8. Plan coverage in the first two years of plan operation shall exclude charges or expenses incurred during the first 12 months of coverage for a condition that manifested itself in the six months prior to an application for coverage under the plan or for which medical advice, treatment, or care was recommended or received in the six months prior to application to the plan. In succeeding years, exclusion of preexisting conditions shall be as determined by the board except that no exclusion shall exceed 12 months.

Provider Reimbursement

Providers who provide services to persons covered under the plan or who are reimbursed for services provided to persons covered under the plan shall be reimbursed for such services at the rate the State of Kansas reimburses such providers for services under the medical assistance program operated by the state under Title XIX of the Social Security Act (Medicaid).

Assessments on Plan Participants

1. Carriers who are required to participate in a plan to make coverage available to high-risk applicants for accident and health insurance shall be assessed for any initial costs associated with developing and implementing the plan not covered by state appropriations. Such initial assessments shall not be subject to a premiums tax offset.

2. The Association may assess carriers required to participate in the plan to pay any costs and losses incurred by the plan that are not covered by premiums and investments or state appropriations as set out in the law. Eighty percent of any assessment made against a participating carrier may be offset against the premiums or similar tax liability of the carrier in the next year in which a tax is due.

3. No assessment incurred in the first two years of operation of the plan shall be subject to the tax offset authorized by the law.

Insurance Commissioner–Duties

1. The Commissioner shall assist the carriers who are required by law to participate in a plan to offer accident and health insurance in establishing the plan.

2. Any plan established hereunder shall be subject to approval by the Commissioner as to compliance with the law.

3. Should the carriers required by law not establish a plan within the time required by law, the Commissioner shall establish a plan that complies with such law.

Other Issues

Any substitute bill must include provisions relating to the creation of an Association, the powers and duties of an Association and the board of directors thereof, provision for administration of the plan, and other technical matters. Such provisions can be drawn from the prototypes set out in H.B. 2511, the NAIC model act, and the plan proposed by the Commissioner of Insurance.

Additionally, the substitute bill should contain a listing of health conditions that are not covered by the plan created under the legislation.

The Subcommittee recommends that the substitute bill also contain a provision that would transfer $1 million from the EDIF to a special fund created by the bill for state support for the risk plan that would be created by the bill.

Representative Kent Campbell,
Subcommittee Chairman

Representative Melvin Neufeld

Representative Galen Weiland

91-329/EC