Approved: April 7, 2000
Date

MINUTES OF THE HOUSE KANSAS 2000 COMMITTEE.

The meeting was called to order by Chairperson Kenny Wilk at 1:30 p.m. on March 6, 2000 in Room 526-S of the Capitol.

All members were present except:

Committee staff present: Leah Robinson, Legislative Research Department
Jim Wilson, Revisor of Statutes
Janet Mosser, Committee Secretary

Conferees appearing before the committee:
Peggy Hanna, Office of the State Treasurer
Representative Tony Powell
Representative Jim Garner
Mark Behrens, Crowell & Moring, LLP
Robert Levy, Cato Institute
Paul Davis, Kansas Bar Association
Mike Rees, Chief Counsel, Kansas Department of Transportation

Others attending: See attached list.

Chairperson Wilk opened the hearing on **SB 460 - Office of state treasurer, designating certain positions in the unclassified service**.

The fiscal note was distributed.

Peggy Hanna, Office of the State Treasurer, proponent, was recognized to address the committee (Attachment 1).

Questions and discussion followed testimony.

Chairperson Wilk closed the hearing on **SB 460**.

Chairperson Wilk opened the hearing on **HB 3006 - Private attorney retention sunshine act**.

The fiscal note was distributed.

Representative Tony Powell, proponent, was recognized to address the committee (Attachment 2).

Representative Jim Garner, proponent, was recognized to address the committee (Attachment 3).

Mark Behrens, Crowell & Moring, LLP, proponent, was recognized to address the committee (Attachment 4).

Robert Levy, Cato Institute, proponent, was recognized to address the committee (Attachment 5).

Paul Davis, Kansas Bar Association, opponent, was recognized to address the committee (Attachment 6).

Mike Rees, Chief Counsel, Kansas Department of Transportation, opponent, was recognized to address the committee (Attachment 7).

Questions and discussion followed testimony.

Chairperson Wilk closed the hearing on **HB 3006**.

Chairperson Wilk announced that the Subcommittee on Defined Contribution Plan Legislation will meet on Tuesday (March 7) at 1:30 p.m. in Room 526-S.

Chairperson Wilk adjourned the meeting at 3:18 p.m.

The next meeting of the full committee is scheduled for March 8, 2000.

KANSAS 2000 SELECT COMMITTEE GUEST LIST

DATE: 3-6-00

NAME	TITLE	REPRESENTING
Peggy Hanna	Asst. State Treasurer	Ofc of State Treasurer
Paul Davis	Legislative Counsel	Kansas Bar Assn.
John Houlihan	Director of Purchases	Dept of Admin.
Keith Haxton		SEAK
Don Reyer		S.E.A.K
Andy Sanchez	Lobbyist	KAPE

STATE OF KANSAS

Tim Shallenburger

TREASURER

900 SW JACKSON ST, SUITE 201
TOPEKA, KANSAS 66612-1235

TELEPHONE
(785) 296-3171

March 6, 2000

Kansas 2000 Select Committee
House of Representatives
State Capitol Building

RE: Senate Bill 460

Chairman Wilk and Members of the Kansas 2000 Select Committee:

Thank you for the opportunity to submit comments on Senate Bill 460 on behalf of State Treasurer Tim Shallenburger. I am Peggy Hanna, Assistant State Treasurer.

We are requesting changes to the personnel statutes that would allow the Treasurer's office through attrition to transition from a majority of staff in the classified service to a majority of staff in the unclassified service. This would be consistent with other statewide elected officials' offices that are either totally unclassified or mostly unclassified. All positions in the Offices of the Governor, Lieutenant Governor and Secretary of State are unclassified. The majority of the positions in the Offices of the Insurance Commissioner and the Attorney General are unclassified. The Treasurer's office is currently approved for 48.5 FTE of which 12 (including the Treasurer) are in the unclassified service.

At the instruction of the Department of Administration, we currently have placed four staff members in temporary special projects positions that are "backed up" by vacant unfunded classified positions. We were told this was the best method to expand the number of unclassified positions. One of the staff members was on staff when Treasurer Shallenburger took office and three of them are new hires. The positions range from mail clerk to public information officer.

We think the requested change would give the elected official more flexibility in changing the direction of the agency. The change would also add the ability to compensate high performers for creative thinking and above average performance instead of being locked into the pay matrix with its automatic step movements for average work performance. In the long run, it is expected that the agency could work more efficiently with fewer employees, while the employees could be compensated according to their work performance.

Thank you for your attention today and your consideration of these changes.

Kansas 2000 Select Committee
Meeting Date 3-6-00
Attachment 1

STATE OF KANSAS

HOUSE OF REPRESENTATIVES

TONY POWELL
REPRESENTATIVE, 85TH DISTRICT
SEDGWICK COUNTY
7313 WINTERBERRY
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(316) 634-0114

STATE CAPITOL, ROOM 448-N
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TOPEKA

COMMITTEE ASSIGNMENTS
CHAIRMAN: FEDERAL AND STATE AFFAIRS
MEMBER: JUDICIARY
RULES AND JOURNAL
ALEC STATE CHAIR

TESTIMONY IN SUPPORT OF HB 3006 BY REPRESENTATIVE TONY POWELL

Mr. Chairman, it is my pleasure to appear before you today in support of HB 3006, the Private Attorney Retention Sunshine Act. As everyone in this committee is aware, recent events surrounding the actions of the Attorney General have brought to light the serious need for reform of the way the state hires outside counsel. The Attorney General's actions in hiring her former law firm, without competitive bidding, and her subsequent agreement with this firm to not require it provide an accounting of it's hours, clearly demonstrates the need for corrective legislation. You see, while the Attorney General's actions were wrong and showed poor judgement, incredibly, they were not illegal under our present statutes. The truth is, there is virtually no legislation governing the hiring of outside counsel by the Attorney General or other state agencies.

The Private Attorney Retention Sunshine Act brings important accountability and objectivity to the hiring of outside counsel Specifically, this legislation provides four basic reforms to the process of hiring outside counsel:

1) Legislative oversight of contractual arrangements with outside counsel where the fee is expected to be $1 million or more;

2) Provides for competitive bidding of legal services;

3) Requires counsel who are hired on a contingency fee basis to account for the hours worked; and

4) Places a cap on contingency fee arrangements at an effective rate of $1,000 per hour.

These four important reforms, if enacted, would prevent another public spectacle like what has occurred with the Attorney General's hiring of her former law firm. Additionally, I should note that the competitive bidding process set forth in this bill also will ensure that the most qualified firms are hired at a competitive price. Unlike other competitive bidding proposals, this proposal does not require the state to merely hire the cheapest lawyer. The competitive bidding process is essentially a two-step one, where the state agency is first required to choose firms based solely on qualifications, and then those qualified firms must bid for the work on the basis of price. Finally, the oversight provisions contained in this bill allow for important legislative oversight whenever the state undertakes massive litigation such as the

(Continued)

Kansas 2000 Select Committee
Meeting Date 3-6-00
Attachment 2

tobacco litigation. I believe it is important to have legislative input with regard to major multi-state litigation like that engaged in tobacco litigation.

It is crucial that the public have confidence in the process we use in state government to hire outside counsel. Outside counsel should not be chosen upon the basis of personal relationships with state officers, or on the fact that the law firm may have contributed to that state officer's campaign. Law firms should be chosen on the basis of their expertise, experience and value in preforming the legal services required.

I will be happy to stand for questions.

STATE OF KANSAS
HOUSE OF REPRESENTATIVES

TOPEKA ADDRESS
STATE CAPITOL, ROOM 327-S
TOPEKA, KANSAS 66612-1504
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REPRESENTATIVE, ELEVENTH DISTRICT

COFFEYVILLE ADDR
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JIM GARNER
HOUSE DEMOCRATIC LEADER

March 6, 2000

TESTIMONY IN SUPPORT OF HOUSE BILL 3006

OPEN AND COMPETITIVE BIDDING FOR LEGAL SERVICES

Mr. Chairman and Members of the Committee:

Thank you for this opportunity to testify today in support of House Bill 3006 – the private attorney retention sunshine act.

Without doubt, there is a clear and real need for reform in how private legal contract work is handed out by state agencies. Each year large sums of public funds change hands to private law firms for legal services of state agencies. Recent events, particularly the Attorney General's former law firm receiving $27 million for performing legal services for the state, highlight the need for reform.

We must eliminate the opportunity and the appearance of special privilege for the few well connected. An open and competitive bid process is simply good government operation. Because of scandals in the 1970's, we have a law requiring open negotiated bids for engineering and architectural services. See KSA. 75-1250 et seq. and 75-5801 et. eq. There is no reason not to have an open and accountable process for legal services.

House Bill 3006 offers a good process for addressing this problem. It requires an open and competitive bidding process. It allows for pre-qualification for lawyers seeking state work. And it allows for legislative oversight and involvement before state agencies embark on large and costly litigation (legal fees over $1 million). Finally, it requires private attorneys working on contingency fee basis to keep records of their time spent on the case. (This lack of accounting in the tobacco litigation case has raised much concern).

I do wish to note another bill that has been introduced to address this problem. I have co-sponsored House Bill 2892 which would require the Kansas Development Finance Authority to design rules to regulate and create a competitive bid process for all professional and consulting services entered into by state agencies.

This issue was the topic of an extensive report made in a Legislative Post Audit Report in March, 1996. (Review of State Contracting for Consultants and Other Professional and Technical Services.) The language of HB 2892 was amended into HB 2627 by the full House of Representatives on February 23, 2000.

I support, and urge this committee to support, any legitimate and workable solution to bring more openness and accountability to the way legal service contracts are awarded by the state. HB 3006 is definitely such a solution. I urge your favorable consideration of this bill.

Thank you. I would be glad to stand for any questions.

Kansas 2000 Select Committee
Meeting Date 3-6-00
Attachment 3

TESTIMONY OF MARK A. BEHRENS, ESQ.

PARTNER
CROWELL & MORING LLP
WASHINGTON, D.C.
202/624-2675

ON BEHALF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL

BEFORE THE KANSAS SELECT COMMITTEE 2000

MONDAY MARCH 6, 2000

TESTIMONY OF MARK A. BEHRENS, ESQ.
CROWELL & MORING LLP

ON BEHALF OF THE
AMERICAN LEGISLATIVE EXCHANGE COUNCIL

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today before your distinguished Committee about House Bill 3006, the "Private Attorney Retention Sunshine Act."

Background

By way of background, I am a partner in the 220-person law firm of Crowell & Moring LLP in Washington, D.C.[1] I practice in the Firm's Torts and Insurance Practice Group. Most of our practice involves representing defendants in multi-state product liability litigation. We also provide counseling in the prevention of liability exposure. I am co-counsel to the American Tort Reform Association and Vice-Chair (Programs) of the Federalist Society's Litigation Practice Group.[2] I also serve as an Adjunct Professorial Lecturer in Law at The American University, Washington College of Law, where I teach an advanced seminar on tort and products liability law.

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1 For more information about Crowell & Moring LLP, please visit our Internet website, www.crowellmoring.com.

2 For more information, please visit ATRA's Internet website, www.atra.org.

I graduated from Vanderbilt University School of Law in 1990, where I served as Associate Articles Editor of the Vanderbilt Law Review and received an American Jurisprudence Award for achievement in tort law. I received a Bachelor's degree in Economics from the University of Wisconsin-Madison in 1987.

I am testifying today on behalf of the American Legislative Exchange Council ("ALEC"), the nation's largest bipartisan membership association of state legislators, numbering over 3,000. I am Private Sector Co-Chair of ALEC's Civil Justice Task Force. The goal of the Civil Justice Task Force is to restore fairness, predictability, and consistency to the civil justice system.[3]

ALEC's National Task Forces provide a forum for legislators and the private sector to discuss issues, develop policies, and draft model legislation. A model bill drafted by a former Maryland Delegate for ALEC was the springboard for Representative Powell's "Private Attorney Retention Sunshine Act" legislation that we are discussing today. Representative Powell's Bill is a "good government bill" that would help resolve a critical issue facing Kansas today.

This issue relates to the rapidly emerging practice of government executive branch officials partnering with private personal injury lawyers to sue legal, private industries – such as tobacco companies, gun manufacturers, and lead paint manufacturers.

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[3] For more information, please visit ALEC's Internet website, www.alec.org.

How Did We Get Here?

In recent years a new phenomenon has taken hold that has turned the traditional roles of regulation and litigation upside down: regulation by litigation. Some judges now see their role as being the regulators of society. They believe that the normal political processes of enacting laws have been thwarted by special interests. Some judges have taken it upon themselves to "make things right."

Former Secretary of Labor Robert Reich has recognized precisely what these judges want to accomplish. He observed, "The era of big government may be over, but the era of regulation through litigation has just begun."[4] Regulation through litigation depends in part on a new link between public officials and wealthy, politically influential personal injury lawyers.

In the state Medicaid recoupment lawsuits against tobacco companies, the partnership between governments and private personal injury lawyers was unprecedented, powerful – and lucrative. Ultimately, the litigations resulted in an historic global settlement which included $246 billion in damages and $8.2 billion in fees so far for the private attorneys – most of whom worked on a contingent fee basis.[5]

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4 Robert B. Reich, Regulation is out, Litigation is in, USA TODAY, Feb. 11, 1999, at A15.

5 Elaine McArdle, Trial Lawyers, AGs Creating a New Branch of Government, LAWYERS WEEKLY USA, July 12, 1999, at 3.

The strategy of the attorneys general to pick an industry and go after it through litigation – as opposed to through legislation – results in an end-run around representative government, and has resulted in the *de facto* creation of a fourth branch of government. The attorneys general of the states involved in the tobacco litigation "legislated" by achieving enormous settlements – and they did so with private personal injury lawyers working with them hand in hand. If left unchecked, this alliance will no doubt continue, because these "new style" cases give executives a new revenue source without having to raise taxes. They also give executives the chance to achieve a regulatory objective that the majority of the electorate, as represented by their legislators, do not support.

We already have seen hard evidence of this in the states. Despite the claims of most attorneys general during the tobacco litigation that tobacco was a "unique" situation, and that no lawsuits would be brought against other industries, local governments already have hired private attorneys to sue gun manufacturers in a large number of cities.[6] Rhode Island retained a well-known plaintiffs' firm to assist in an effort to hold former manufacturers of lead paint liable for government health-care costs.[7] Washington State and Missouri are reportedly considering

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6 See generally Victor E. Schwartz & Leah Lorber, Regulation Through Litigation Has Just Begun: What You Can Do To Stop It, Nat'l Legal Center for the Pub. Interest, Nov. 1999.

7 Rhode Island v. Lead Indus. Ass'n website, www.riag.state.ri.us/press/Oct99/101399.html.

similar actions.[8] Rhode Island's Attorney General even has suggested that "going after the latex rubber industry" by way of a big-government lawsuit could recoup "a couple of billion dollars."[9] His suggestion illustrates the entrepreneurial spirit of government officials and their new ally, the contingency fee personal injury bar.

The list may not stop there. Part of the 1998 tobacco settlement included a payment of $50 million into an enforcement fund to be used by the National Association of Attorneys General.[10] While this payment might not be used to fund litigation against other industries, it provides a strong incentive for state attorneys general to attempt to repeat their success with the tobacco settlement. In fact, in June 1999, fifty state attorneys general held a strategy session to discuss future targets.[11] Reports suggest that these targets could include HMOs, automobiles, chemicals, alcoholic beverages, pharmaceuticals, Internet providers, "Hollywood," video game makers, and even the dairy and fast food industries.

This method of legislating is contrary to the system established by our forefathers. Moreover, with the attorneys general working with private attorneys –

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8 See Robert A. Levy, Turning Lead Into Gold, LEGAL TIMES, Aug. 23, 1999, at 21.

9 Letter from Rhode Island Attorney General Sheldon Whitehouse to Idaho Attorney General Alan G. Lance, August 27, 1999.

10 See Samuel Goldreich, Small Farmers Stand Against Big Tobacco's Settlement; $246 Billion Deal Burns Independent Growers, WASH. TIMES, Apr. 26, 1999, at D11.

individuals with interests different from the attorneys general – the overall benefit to the public has become suspect at best.

The Problem: Alliances Between Public Officials and Private Lawyers

In Kansas, as in most jurisdictions, when government entities contract for goods and services, such as construction of buildings or purchase of supplies, the bidding generally is done through an open and competitive process. Federal and state "sunshine" laws ensure that these transactions are above board and result in the best use of taxpayer dollars.

In the state Medicaid recoupment lawsuits against tobacco companies, however, many state attorneys general disregarded such practices and instead, negotiated contingent fee contracts – behind closed doors – with hand-picked private personal injury lawyers. These contracts stipulated that in lieu of a flat or hourly fee, the private lawyers were guaranteed a percentage of any trial judgment or settlement amount. Some contingency fee personal injury lawyers have earned astronomical fees as a result of their contracts with states – sometimes amounts equal to as much as $105,022 an hour per lawyer![12]

(...continued)

11 See Mark Curriden, Fresh Off Tobacco Success, State AGs Seek Next Battle; United Front Puts Businesses on the Defensive, DALLAS MORNING NEWS, July 10, 1999, at 1A.

12 Robert A. Levy, The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza, LEGAL TIMES, Feb. 1, 1999, at 27 (hereinafter "Tobacco Robbery").

Kansas stands as a glaring example of this problem. In 1996, Attorney General Stovall hired her former law partners at Entz & Chanay to serve as local counsel in the State's tobacco lawsuit – without the benefit of competitive bidding or public oversight, and despite the firm's reported lack of expertise in product liability matters.[13] Attorney General Stovall recently testified that she asked her former law firm to take the case "as a favor."[14] That "favor" has now garnered the General's former firm $27 million in legal fees.[15] Because Entz & Chanay was not required to keep detailed billing records, the arbitration panel which set the firm's fees estimated that 10,000 hours of work was performed. Others have argued that the firm did much less work on the case. Regardless, even accepting the arbitration panel's estimate, Entz & Chanay was paid the equivalent of $2,700 per hour for simply acting as local counsel in the State's case.

Even in states like Maryland, where Attorney General Curran properly sought and received gubernatorial approval to enter into a contingency fee agreement with a private personal injury attorney (and Baltimore Orioles owner) Peter Angelos, the deal created controversy from the outset. General Curran initially agreed to pay Mr. Angelos 25 percent of any recovery by Maryland. In the

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13 See Scott Rothschild, Lawmakers Accuse Attorney General of "Cronyism", WICHITA EAGLE, Jan. 25, 2000.

14 Id.

15 See John L. Peterson, Attorneys for Kansas Collect $55 Million In Tobacco Case, Stovall's Ex-Firm Expects $27 Million, KANSAS CITY STAR, Feb. 1, 2000, at B1.

end, Maryland was to receive approximately $4 billion of the national settlement, which would have entitled Mr. Angelos to more than $1 billion in fees under his contract. But, before the settlement was final, Mr. Angelos persuaded the Maryland legislature to change substantive law – by abolishing all the affirmative defenses the tobacco industry could raise. In return for ensuring a victory for Mr. Angelos and essentially eliminating any "contingency" in the State's case – the Maryland legislature reduced Mr. Angelos's contingency fee to 12.5 percent of any settlement or recovery.

Mr. Angelos did not agree with the legislature's action and now he has refused to submit his fee request to arbitration. Instead, he placed a lien on the first payment Maryland received from the tobacco industry in order to recoup what he believes is the percentage owed to him. Thus, even in Maryland, where there is a process for hiring private attorneys, the process did not go far enough to adequately protect the public.

The government's use of private personal injury lawyers to do the public's legal work is relatively new and will not stop with the tobacco litigation. It is a practice that raises troubling questions and creates several fundamental public policy problems.[16]

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16 See generally Victor E. Schwartz & Leah Lorber, Secret Government Deals With Private Lawyers: Shining Light on an Unsound Trend, LEADER'S PROD. LIAB. L. & STRETEGY, Feb. 2000, at 4.

First, governments and private contingency fee attorneys are guided by conflicting goals and principles. Attorneys general take oaths to the United States Constitution and the constitutions of their states. Their overriding duty is to fairly and impartially serve the best interests of the public. This duty is imperative in light of the government's unique ability, in narrowly defined circumstances, to use coercive power against private citizens.[17] As the Supreme Court of the United States explained more than sixty years ago, an attorney for the state "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."[18]

In contrast, private contingency fee personal injury attorneys are motivated by profit – plain and simple. Their inclination is to push the law into new and uncharted territory to obtain the maximum recovery – regardless of whether the legal principles advocated benefit society as a whole. The fee controversy in Maryland is an excellent example of the system gone awry.

Second, in the public official/private attorney alliance there is a strong potential for fraud and abuse. At a minimum, the partnership can raise the appearance of impropriety. Again, Kansas serves as an apt illustration of this problem. In addition to accepting the case which resulted in a "jackpot" fee award, Entz & Chanay performed other "favors" for General Stovall during her campaign.

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17 See Levy, Tobacco Robbery, at 29.

18 Berger v. United States, 295 U.S. 78, 88 (1935).

First, Entz & Chanay's basement housed Ms. Stovall's Attorney General campaign. In addition to housing her campaign, Entz & Chanay also contributed money to her campaign effort.[19]

Texas also serves as an example. In 1996, then-Texas Attorney General Dan Morales hired five firms to file his state's tobacco litigation. Four of these firms together had contributed nearly $150,000 in campaign contributions to Morales from 1990 to 1995.[20] The tobacco settlement awarded the lawyers 15 percent of the State's $15.3 billion recovery – about $2.3 billion, which ultimately was increased by an arbitration panel adjudicating the fee dispute to $3.3 billion.[21] Such blatant preferential treatment by Morales of firms that supported him politically creates, at the very least, the appearance of impropriety.

Recently, in Washington State, the State's antitrust chief, Jon Ferguson, announced that he was leaving his post to join the private Seattle law firm of Chandler, Franklin & O'Bryan to work on a class action lawsuit against the tobacco industry. Ferguson and the Chandler firm's Steve Berman led Washington State's lucrative lawsuit against the tobacco companies. When asked why he was leaving his post to go work for the firm that handled the State's case, Mr. Ferguson

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19 See John L. Peterson, Payment for Law Firm Draws Fire; Hearing Continues in Case Involving Tobacco Litigation, KANSAS CITY STAR, Feb. 17, 2000.

20 See Levy, Tobacco Robbery, at 27.

21 See Bruce Hight, Lawyers give up tobacco fight, AUSTIN AMERICAN-STATESMAN, Nov. 20, 1999, at A1.

succinctly explained: "Steve Berman got $50 million and I got a plaque."[22] Apparently, Mr. Ferguson also had a very good job waiting for him at the firm.

Even in Maryland, where ostensibly the Attorney General conducted an open bidding process, the lawyer who was awarded the contract – Mr. Angelos – is someone who has made generous political contributions. The award of the tobacco contract to Mr. Angelos could lead some to speculate that the bidding process, while fair on paper, was "rigged" in his favor.

Third, even in cases where such contracts are legitimately negotiated, private multi-million or –billion dollar agreements between contingency fee personal injury lawyers and attorneys general may not result in the selection of the best person at the best cost. Once again Kansas serves as an example of this problem. General Stovall's selection of her former firm was at the expense of another Kansas firm, Hutton & Hutton.[23] Hutton & Hutton specializes in large product liability cases and representatives of the firm claim that they were hired by General Stovall during an April 1996 meeting after which the firm and the State began contract negotiations.[24] The parties exchanged a number of drafts, but were apparently

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22 For the record, WASH. POST., Feb. 14, 2000, Wash. Bus., at 35.

23 See Scott Rothschild, Lawmakers Accuse Attorney General of "Cronyism", WICHITA EAGLE, Jan. 25, 2000.

24 See Jim McLean, Wichita Firm: Snub Cost $1 Billion, CAP.-J., Feb. 18, 2000.

unable to come to an agreement.[25] While some may chalk it up to sour grapes, Hutton & Hutton has criticized Entz & Chanay's handling of the Kansas suit and claims that they could have recovered an additional $1 billion for Kansas.[26] If so, that is something that might be avoided in the future if such contracts were subject to open and competitive bidding.

Further, different, less costly attorney fee arrangements could be negotiated by government officials if marketplace open bargaining becomes the norm and if better oversight is instituted by states. Moreover, instead of paying up to 25 or 33 percent of an award or settlement to contingency fee attorneys, government officials could use that additional money for the public's benefit. Put plainly, these are deals that will benefit from being negotiated out in the public light. At issue are benefits for the State and its taxpayers. It is imperative that the cost to the State be fair.

Finally, the deals between attorneys general and private personal injury lawyers have spawned bitter fee disputes. These disputes have occurred in Kansas, Maryland, Florida, Texas, and other states.[27] As has become apparent from the fee dispute in Kansas, these controversies force government officials to waste taxpayer

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25 See id.; John L. Petterson, Payment for Law Firm Draws Fire; Hearing Continues In Case Involving Tobacco Litigation, KANSAS CITY STAR, Feb. 17, 2000, Pg. B3.

26 See id.

27 See Scott Shane, Judge to Rule on Dispute Over Legal Fees, BALTIMORE SUN, Dec. 10, 1999, at 2B; Levy, Tobacco Robbery, at 29; Bruce Hight, Lawyers give up tobacco fight, at A1.

dollars, divert their attention from other matters, or engage in unnecessary litigation. The potential for such costly fee disputes would be reduced if attorney fee agreements were made with greater public oversight.

A Workable Solution

Kansas has a system whereby public contracts are awarded only after open, competitive bidding. But it has become clear from the problems that have arisen from the State's tobacco lawsuit that the current system does not work for contracts for legal services. A sound solution to this problem has been proposed by Representative Powell. His Bill, House Bill 3006, the "Private Attorney Retention Sunshine Act," would do the following:

1. The Bill will create legislative oversight of large contingent fee agreements – those in excess of $1 million.

2. The Bill will provide Kansas taxpayers the opportunity to comment on the terms of such agreements at public hearings.

3. The Bill requires that when the Attorney General contracts with contingent fee attorneys to work on behalf of the State, those attorneys keep records of the time they spend on any work done on behalf of the State.

4. Finally, the Bill caps the hourly rate for any contingent fee attorney working for the State at $1,000 per hour. This would prevent another

outcome like the one we saw in the tobacco litigation in Kansas and other states.

The Bill would not prohibit the Attorney General from hiring outside counsel, either on an hourly or contingent fee basis. The Attorney General would still be free to utilize whichever arrangement he or she believes would be the most appropriate for the State in a given circumstance.

Other states have considered and passed legislation similar to Representative Powell's Bill. In fact, "attorney retention sunshine" legislation was adopted in both states that considered it last year – Texas and North Dakota. This year, legislation has been introduced in Florida in addition to Representative Powell's Bill in Kansas.

Conclusion

House Bill 3006, the "Private Attorney Retention Sunshine Act," provides a sound solution to the problems Kansas has experienced in the wake of the State's tobacco litigation. The Bill makes good public policy sense. I urge you to enact it now. Thank You.

STATEMENT

of

Robert A. Levy, Ph.D., J.D.
Senior Fellow in Constitutional Studies
Cato Institute
Washington, D.C.

Testifying on Behalf of the
American Legislative Exchange Council

before the

Kansas Legislature
Select Committee 2000

March 6, 2000

Larger Implications of the Tobacco Settlement

Mr. Chairman, distinguished members of the Committee:

My name is Robert A. Levy. I am a senior fellow in constitutional studies[1] at the Cato Institute, a pubic policy research foundation located in Washington, D.C. I would like to thank the committee for inviting me to testify on the larger implications of the tobacco settlement, in the context of House Bill No. 3006, the private attorney retention sunshine act. My testimony is submitted on behalf of the American Legislative Exchange Council.

First, some background: The Medicaid recovery lawsuits that precipitated the Master Settlement Agreement (MSA) were created out of whole cloth by states filling the dual and conflicting roles of lawmaker and plaintiff. Florida set the pattern by enacting a new statute that stripped tobacco companies of their traditional rights and put in their place a shockingly simple rule of law: The state needed money; the industry had money; so the industry gave and the state took. Under the new regimen, Florida, and the other states that modeled their lawsuits after Florida's, could sue tobacco companies directly, without stepping into the injured party's shoes. By abrogating the industry's affirmative defenses, including assumption of risk,[2] states could collect from the industry even if the illness was the smoker's own fault. If a smoker happened to be a Medicaid recipient, individual responsibility was out the window. The same tobacco

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[1] A biographical sketch is attached.

[2] Fla. Stat. Ann. § 409.910(1) (Supp. 1994) ("assumption of risk and all other affirmative defenses normally available to a liable third party are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources").

company selling the same product to the same person resulting in the same injury was, magically, liable not to the smoker but to the state. Liability thus hinged on a smoker's Medicaid status, a happenstance totally unrelated to any misdeeds by the industry.

Further, in order to assure victory in court, the attorneys general asked that the requirement for proof of causation be expunged. Instead of having to show that a Medicaid recipient smoked and that his smoking was the cause of his illness, the states would only have to produce generalized statistics indicating that certain diseases are more prevalent among smokers than nonsmokers.[3]

A handful of private attorneys – later to be hired at contingency fees ranging from 10 to 30 percent of the recovered damages – were responsible for the novel legal theorizing that became the Florida statute and the model for other states.[4] Those members of the plaintiffs' bar were, in effect, government sub-contractors with financial incentives geared to the magnitude of their conquest. They were driven by the likelihood of a huge payoff while, at the same time, they served as prosecutors – a role in which their overriding objective was supposedly to seek justice.

What is worse, contingency fee contracts were awarded without competitive bidding to attorneys who often bankrolled state political campaigns.[5] In Mississippi, attorney general Mike Moore selected his number one campaign contributor, Richard Scruggs, to lead the Medicaid recovery suit.[6] In Texas, then-attorney general Dan Morales chose five firms for the state's multibillion-dollar tobacco litigation; four of the five firms contributed a total of nearly $150,000 to Morales from 1990 to 1995.[7]

In West Virginia, tobacco defendants successfully challenged the state's contingency fee contract.[8] Attorney general Darrell McGraw had hand-picked six lawyers, without competitive bidding, and declined to specify his selection criteria.[9] He did say, however, that "the State and

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[3] Fla. Stat. Ann. § 409.910(9)-(9)(a) (1995) ("In any action brought under this subsection, the evidence code shall be liberally construed regarding the issue[] of causation [which] may be proven by use of statistical analysis").

[4] See Michael Orey, "Fanning the Flames," American Lawyer, April 1996.

[5] Carolyn Lochhead, "The Growing Power of Trial Lawyers," The Weekly Standard, September 23, 1996, p. 21.

[6] Ibid. at 22.

[7] Ibid. at 23.

[8] McGraw v. American Tobacco Co., Civ. No. 94-C-1707 (Cir. Ct. Kanauha County, Nov. 29, 1995).

[9] Jack Deutsch, "McGraw Supporters May Profit from Suit," Charleston Daily Mail, August 18, 1994, p. 1B.

her citizens stand only to benefit. The State has no exposure. There are no lawyer hourly fees. There are no costs. The taxpayers are thus fully protected."[10] He could have propounded a similar argument if the state were to hire private lawyers to prosecute criminal cases, and only pay for convictions. But defendants as well as taxpayers must be protected. The Supreme Court reminds us that an attorney for the state "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."[11]

The Medicaid suits fashioned by state attorneys general and their allies in the private bar retroactively eradicated settled legal doctrine and denied due process to a single industry selected more for its financial resources and current public image than for its legal culpability. If tobacco companies were the only victims of the MSA, that would be bad enough; but the unhappy prospect is yet more incursions by states with an insatiable appetite for social engineering – states that seems to have abandoned the principles of free choice and personal responsibility in favor of regulatory mandates and absolution for the consequences of our acts.

Tobacco was merely the first and easiest victim. Guns came next. Quite a different dynamic is at work in the city and county litigation against gun makers. With a piddling $1.5 billion in annual revenues, that industry will not yield the same treasure trove as the tobacco behemoths whose domestic and worldwide sales are $50 billion and $300 billion, respectively. But that is not a problem, because the real goals of the gun suits are twofold: first, to bypass the legislative process which, despite the recent scourge of high-profile multiple killings, has been remarkably unreceptive to gun control measures; and second, to chalk up one more victory for the trial lawyers, thus demonstrating to future fat cat defendants that groundless legal theories are good enough when the coercive power of multiple government entities is arrayed against an unpopular industry.

The gun suits are not intended to go to trial. In fact, the threat by the U.S. Department of Housing and Urban Development to coordinate litigation by 3,200 public housing authorities, on top of the claims filed by 30 cities and counties, points toward a settlement, not a trial. HUD Secretary Andrew Cuomo and his acolytes understand well that the smallish gun industry cannot afford to defend itself – even against unfounded suits – in the face of such overwhelming firepower. A Wall Street Journal story emphasized that very point: "As with the municipal suits, one filed on behalf of housing authorities would be groundbreaking and certainly not a sure bet to succeed in court. But a suit by a large group of housing authorities could [exhaust] gun companies' resources in pretrial maneuvering – by making demands for documents concerning industry distribution practices in hundreds or thousands of localities."[12] No better than thinly veiled blackmail.

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[10] McGraw v. American Tobacco Co., Civ. No. 94-C-1707, Memorandum in Opposition to Defendants' Joint Motion to Prohibit Prosecution of Action Due to Plaintiff's Unlawful Retention of Counsel (Cir. Ct. Kanauha County).

[11] Berger v. United States, 295 U.S. 78, 88 (1935).

[12] Paul M. Barrett, "HUD May Join Assault on Gun Makers," Wall Street Journal, July 28, 1999, A3.

The common threads that link tobacco and gun litigation have also surfaced in the current spate of suits against HMOs. Start with a friendless industry. Then attempt to redress the industry's perceived misbehavior by enacting remedial legislation. When the legislature resists, find a cadre of smart, unprincipled contingency fee lawyers who are willing to champion flawed legal theories in order to extort money from, or compel "better" conduct by, the wayward industry. Next step: sue – preferably as a class action in one or more states known to be sympathetic to plaintiffs. After judges rightly dismiss, or juries reject, one private lawsuit after another, bring in the big guns from the public sector. Procure local, state, or federal officials to threaten the industry with bogus claims in as many jurisdictions as possible. The rest is relatively easy. Announce your settlement terms and wait for the industry to cave.

Right around the corner could be similar suits against alcohol, coffee, chocolate, diet drinks, dairy products, red meat, fast food, sugar, sporting equipment, cars – you name it. Proposals from supposedly intelligent people in positions of responsibility include grading foods for their fat content, taxing them proportionately, and using the tax revenues for public bike paths and exercise trails.[13]

When decisions about the products we choose to consume are entrusted to government officials, the loss of personal freedom is inescapable. Once we relegate such choices to the state, we should not be surprised by pernicious side effects, including a flourishing black market exploited by organized crime. We never seem to learn. California, Maryland, Michigan, and New York hike their cigarette taxes and the result is rampant smuggling – not just from low-tax neighboring states, but from military bases, Indian reservations, even exports to Mexico that are smuggled back into the United States.[14] After Canada raised its excise tax, smuggled cigarettes accounted for an estimated 30 to 50 percent of consumption; so Canada was forced to lower the tax to keep smuggled cigarettes away from children.[15]

It does not take a rocket scientist or a surgeon general to know that the MSA will inevitably foment illegal dealings dominated by criminal gangs hooking underage smokers on an adulterated product freed of all constraints on quality and price that competitive markets usually afford. The destructive effect on our nation's health – lamentable but not surprising – will undoubtedly be accompanied by an ever more expanding and intrusive government. The war on tobacco will likely produce no better results than our endless war on drugs, or Prohibition before that. Instead of forays into South American countries to destroy their coca fields, we could find ourselves combing the back roads of North Carolina hunting down tobacco farmers.

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[13] E. Katherine Battle and Kelly D. Brownell, Confronting a Rising Tide of Eating Disorders and Obesity: Treatment vs. Prevention and Policy, 21 Addictive Behaviors 755-65 (1996). Dr. Brownell is director of the Yale Center for Eating and Weight Disorders.

[14] Dwight R. Lee, Will Government's Crusade Against Tobacco Work? (St. Louis: Center for the Study of American Business, Washington University, 1997), pp. 2-4.

[15] Ibid., p. 4.

Improved health for our children is an objective that no reasonable person could disapprove. But make no mistake, dollars and cents – not health issues – are the driving force behind the tobacco settlement. When their own money is on the line, both federal and state governments opt for financial health over smokers' health. Facing illness claims by military personnel to whom the U.S. government had dispensed cigarettes free of charge, Veterans Affairs secretary Jesse Brown told the former soldiers to pay their own freight for having chosen to smoke.[16] When sued by a prisoner who was denied a nicotine patch for the habit he developed in a Florida jail, the state pleaded that it was no more responsible for his purchase of cigarettes than for his "buying a candy bar at the canteen."[17] If that principle renders the government immune from liability, it renders private companies immune as well.

To secure the liberty of all citizens, we must resolutely defend and protect our least popular citizens, including the tobacco companies. Disputes between private parties cannot be resolved in secret negotiations involving defendants who have the boot of government resting on their necks, state attorneys general who seek to replenish their Medicaid coffers without fiscal discipline, contingency fee lawyers who wield the sword of the state while retaining a financial interest in the outcome, and advocacy groups that have subordinated the rule of law to their health concerns, however well-intentioned.

Legislatures would do well to heed the advice of former U.S. Sen. George McGovern, who knew firsthand the ravages of addiction, having lost his daughter to alcoholism. Sen. McGovern points to "those who would deny others the choice to eat meat, wear fur, drink coffee or simply eat extra-large portions of food." He cautions that "the choices we make may be foolish or self-destructive [but] there is still the overriding principle that we cannot allow the micromanaging of each other's lives.... [W]hen we no longer allow those choices, both civility and common sense will have been diminished."[18]

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[16] Bill McAllister, "Smoking by GIs Raises Liability Issue at the VA," Washington Post, April 24, 1997, p. A1.

[17] Waugh v. Singletary, Case No. 95-CVC-J-20 (D. Fla., July 11, 1995).

[18] George McGovern, "Whose Life Is It?" New York Times, August 14, 1997, p. A35.

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Constitutional law
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Bob Levy joined Cato in 1997 after 25 years in business. He is an Adjunct Professor at the Georgetown University Law Center, a director of the Institute for Justice, and a trustee of The Objectivist Center. Bob received his Ph.D. in business from the American University in 1966. That year he founded CDA Investment Technologies, Inc., a major provider of financial information and software. Bob was chief executive officer of CDA until 1991. He then returned to college and earned his J.D. in 1994 from the George Mason University, where he was chief articles editor of the law review. The next two years he clerked for Judge Royce C. Lamberth on the U.S. District Court in Washington, D.C., and for Judge Douglas H. Ginsburg on the U.S. Court of Appeals for the District of Columbia Circuit. Among Bob's publications are a book, dozens of articles on investments and, more recently, numerous papers on law and public policy.

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LEGISLATIVE TESTIMONY

March 6, 2000

TO: Chairman Kenny Wilk and Members of the House 2000 Select Committee

FROM: Paul Davis, Legislative Counsel

RE: House Bill 3006

Chairman Wilk and Members of the Committee:

My name is Paul Davis and I am appearing before you today on behalf of the Kansas Bar Association to oppose the enactment of House Bill 3006. While the goal of ensuring that the State of Kansas has an open and fair process for awarding legal contracts has merit, we believe that this legislation is not the proper solution.

This bill would require a state agency to conduct a competitive bidding process when it desires to enter into a contract for legal services. This process requires a state agency to select at least two qualified law firms based upon rules and regulations developed by the secretary of administration. The firms then submit their bids and the firm that makes the lowest hourly rate bid or lowest total cost bid ***must*** be awarded the contract. Furthermore, the bill requires legislative review of legal contracts that amount to more than $1 million.

Competitive bidding is often defined in different ways. Part of the definition of competitive bidding in this bill is a requirement that the lowest bid be accepted. The Kansas Bar Association opposes the enactment of any law that requires the awarding of legal services contracts by the State of Kansas or any other governmental entity on the basis of the lowest bid. Choosing the lowest bidder seems to make sense, but it may not always be the best deal for the State, both financially and as a whole.

Kansas 2000 Select Committee
Meeting Date 3-6-00
Attachment 6

Most contracts for legal services that the State of Kansas enters into are contracts where the attorney or law firm bills the State on an hourly basis for their time spent on the case. Very few contracts are entered into where the attorney or law firm receives a flat fee for representing the State. Furthermore, it is an extremely rare circumstance to have an attorney or law firm represent the State on a contingency basis. Under this legislation, if Law Firm A bid for a contract with an hourly rate of $90 and Law Firm B bid for the same contract with an hourly rate of $95, Law Firm A would receive the contract because they are the lowest bid. However, because of its experience and expertise, Law Firm B may be able to perform the legal work required under the contract in 50 hours while it takes Law Firm A 75 hours to perform the same legal work.

This is an example of how there are many considerations that the State should take into account when entering into a contract for legal services. Binding them to accepting the low bidder doesn't allow other considerations to receive the attention they deserve. Proponents of this legislation will undoubtedly argue that these considerations can receive the attention they deserve when the state agency reduces the number of attorneys or law firms to two or more for the competitive bidding process. However, no two attorneys or law firms are exactly alike. There are always differences that the State or any other client ought to be able to consider, in addition to cost.

Many private businesses and governmental entities don't require a low bid to be accepted as part of their competitive bidding process. This allows other considerations to be taken into account while still providing for an open process. The Kansas Bar Association views competitive bidding in general as a healthy process so long as there is not a requirement that the low bid be accepted. However, I do want to point out one possible consequence of adopting such a process. Simply put, the competitive bidding process may often take time that the State doesn't have. There may often be deadlines that require the normal court process to be interrupted by the need for a state agency to go through a lengthy competitive bidding process. Any consideration of enacting a competitive bidding process should allow some type of bypass for certain circumstances.

The Kansas Bar Association supports an open and fair process for the awarding of legal services contracts but we believe enactment of this legislation will tie the hands of

state agencies by not allowing them to fully consider all the factors necessary in hiring legal counsel. For these reasons, we respectfully request that you not recommend favorable passage of House Bill 3006.

STATE OF KANSAS

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TESTIMONY BEFORE HOUSE KANSAS 2000 SELECT COMMITTEE

REGARDING HOUSE BILL 3006 ESTABLISHING RULES FOR COMPETITIVE BIDDING OF LEGAL SERVICES

March 6, 2000

Mr. Chairman and Committee Members:

I am Mike Rees, Chief Counsel for the Kansas Department of Transportation. On behalf of the Department, I am here today to testify on House Bill 3006 regarding establishing rules for competitive bidding of legal services.

HB 3006 establishes rules for competitive bidding of legal services, constraints regarding $1,000,000 contracts, and specifies reporting requirements for contingent fee contracts. The Department is neutral as to the last two items but raises questions concerning the competitive bidding provision.

This bill requires that legal services for a state agency be obtained through a competitive bidding process. It in effect establishes a modified competitive bidding process as some form of selection is contemplated prior to the selection of "at least two firms" from which the hire is made. The ultimate impact of the bill is unclear as it delegates certain authority to the Department of Administration which remains unknown. In addition, the language used creates an uncertainty as to its intent or application.

HB 3006 states that an agency, "....shall select at least two qualified law firms based upon the law firm's experience with similar litigation, expertise, and size [if size is a factor]." The primary difficulty with this statement is that it assumes the existence of litigation. It requires the selection of a firm with experience in "similar litigation." This is highly subjective as no two cases are the same and only the most general "similarities" may exist. In addition, this language leaves open the question of when the procedure applies. By its terms, it would require compliance only when litigation was involved leaving open many other situations where legal services are sought.

The impetus for competitive bids for legal services is not made known, so it remains a matter of speculation. It is likely, however, that it did not come from those of us responsible to provide counsel to the respective agencies. Thus, to put the matter in a real life context the following is offered.

Towards the peak of the Comprehensive Highway Program, it was clear that this Office could not handle all the condemnation work without additional staff. Headcount was at a premium and the idea of privatization prevalent, so a search was initiated for firms that could be used on an ongoing basis. The concept was to have two firms geographically separated who would undertake condemnation proceedings while working directly with the Bureau of Right of Way, the Design Department, and the field engineer. This Office retained overall control particularly in regard to settlements, decisions to try appeals, and questions of trial strategy or policy issues. The process has worked extremely well, and the relationships established are themselves of large value.

An example will illustrate this point. Recently a landowner appeal was set for trial. The court appointed appraisers had set compensation at $180,000. Our trial appraiser valued the taking at $45,000. The landowner's evidence reflected a value of $640,000. The Department's trial counsel reviewed with me the particulars of the case, and the decision was made to proceed to trial. Within several days of trial, the landowner began "negotiating" for a settlement. The $640,000 demand dropped to $400,000. Trial counsel and I considered the possibilities and rejected the offer. The landowner then reduced the demand to $320,000. Once again it was discussed and rejected. Further reductions to $250,000 and then walk away were presented. The last was seriously considered given the exposure but in the end it was decided to go to trial. The jury awarded the landowner $150,000, thus, resulting in a net recovery of $30,000.

The point to be made from this is that the kind of strategy and risk taking involved could not have occurred but for the relationship with our hired counsel. Having worked with him on many cases, a level of trust in his assessments has been established. He has learned to cut through the maze of information and provide only that necessary for decision making. The effective use of outside counsel demands that this relationship exist. If it does not either an independent review is necessary, which defeats the purpose of hiring counsel, and the risk of misjudgment rises dramatically.

A second example arises from a different set of circumstances. The Department had scheduled the construction of a Maintenance Facility in Wichita. The location was on right-of-way currently owned by the Department. In pursuing approval through the zoning process, the project hit a dead end. The planning commission voted unanimously to deny the application. The Department had the option of proceeding outside local authority on the basis of its immunity. This was rejected, and the decision was made to appeal to the County Commission.

Lawyers do not only research, offer opinions, and litigate; they also use their skills, experience, and contacts to produce results. Outside counsel was called on to assist in persuading the Board that the project should go forward. Representation in this regard is appropriate but it is also subtle and unstated. This Office worked with local counsel in providing information and bringing pressure to bear through other quarters. In the end, the attempt was successful as a favorable vote was obtained from the Board. The effort saved the Department the cost of acquiring new land and retained an ideal location for our facility. The choice of counsel in this particular case was critical and was the single largest factor in the results achieved.

It should be noted that the Office of Chief Counsel has successfully employed competitive selection of counsel. The Department's operations give rise to a large number of relatively small claims arising from damage to our facilities. In some respects, the effort to obtain reimbursement for these items is similar to collection work. However, due to a number of factors, it is necessary that an attorney oversee the collections. An Request for Proposal (RFP) was put out and responded to by both law firms and collection concerns, and after negotiations a law firm was selected. The arrangement has worked extremely well to the benefit of the Department. Thus, it is not argued that competitive arrangements have no place in the business of obtaining services but rather the process be used only where appropriate.

In summary, the Kansas Department of Transportation does not support this legislation.