Approved: March 6, 2001
Date

MINUTES OF THE HOUSE COMMITTEE ON INSURANCE.

The meeting was called to order by Chairperson Rep. Robert Tomlinson at 3:30 p.m. on February 13, 2001 in Room 527-S of the Capitol.

All members were present except: Representative Carlos Mayans

Committee staff present: Bill Wolff, Legislative Research
Ken Wilke, Legislative Revisor
Mary Best, Committee Secretary

Conferees appearing before the committee: Ms. Karen France, Kansas Association of Realtors
Ms. Kathy Greenlee, Kansas Insurance Department
Ms. Deloris Dalke, Hillsboro Real Estate Broker
Mr. Tom Krattli, J. C. Nichols, Inc.
Mr. Erik Sattorius, KC Regional Association of Realtors
Ms. Kathy Olson, Kansas Bankers Association
Mr. Roy Worthington, Kansas Land Title Association

Others attending: See Attached Guest List

Upon calling the meeting to order the Chairman called for a motion to approve the Minutes of January 9, 16, 18. The motion was made by Representative Dreher, seconded by Representative Grant and passed.

The committee was informed that the bill **HB 2209-** Title insurance; requiring certain disclosures and prohibiting certain actions, was being heard today and would be worked one week from today. With this information the Chairman recognized Ms. Karen France, Kansas Association of Realtors. Ms. France gave Proponent Testimony to the committee. A copy of the testimony is (Attachment #1) attached hereto and incorporated into the Minutes by reference. Ms France gave a detailed overview of the bill explaining the bill to the committee. She explained that this bill which describes a title company as a "controlled business", cannot have more than 20% of its business come from its owners. This bill is to prevent business people from owning a title company because the 20% requirement is most difficult, if not impossible to meet. She stated that no real estate broker is going to refer business to another company.

Ms. France continued on to tell the committee that her people would like to remove a portion of the bill and insert some "reasonable guidelines" for these types of title companies. The language being referred to is on page 10 and the new language would begin on page 1, New Section 1, and would be the definition section. Section 2 would then state "....a title company owned by producers of business cannot accept an order for title insurance nor issue either a title commitment or a title policy unless they have done the following....." and she listed the step (5) in her testimony. She then explained that Subparagraph (b) of the New Section 2 "mirrors the anti-tying prohibitions in the federal legislation called the Real Estate Settlement Procedures Act, or RESPA for short." She continued on to explain this paragraph. She continued on with Subparagraphs (c)(d) and (e), as well as New Sections 3,4,5. She then gave a timeline on the bill as it was before this committee was formed with the members sitting now.

Ms. France then continued on with Gramm-Leach-Bliley Act and explained what this Act entails and its impact on the bill. She informed the committee that the Federal Reserve was accepting comments as to whether banks should be allowed to engage in real estate brokerage activities. She explained the consequences if this bill is to remain as it is today and how there would be an uneven playing field and eliminate one of the "lifeboats" if they are to survive the expansion of the banking powers of some of the largest banks in the country. By giving them the ability to create business partnerships in communities, they (her clients) feel they can "rise to the challenge and survive." Ms. France then listed several arguments that they anticipated the opposition might site and her response to these arguments. With this Ms. France stood for questions. A question was posed by Representative Kirk.

Ms. Kathy Greenlee, Kansas Insurance Department, was the next conferee to come before the committee. Ms. Greenlee gave Proponent Testimony to the committee and a copy of the testimony is (Attachment #2) attached hereto and incorporated into the Minutes by reference. Ms. Greenlee gave a more technical overview of the bill to the committee, and stated that they could find no "safe harbor." She stated the federal law "changed the way the individual states regulate the business of insurance." She also informed the committee the Insurance Department issued a formal opinion letter (in the Attachment) acknowledging that Kansas controlled business statute is pre-empted by federal law. The Kansas Insurance Department urges the legislature to repeal K.S.A. 40-2404(14)(f) and supports the consumer protections proposed by the new sections of this bill. Ms. Greenlee included a written overview of Gramm-Leach-Bliley. Ms. Greenlee then stood for questions. Questions were asked by Representatives McCreary, Boston,

Mr. Ross Wagner was the next conferee to offer support to the testimony. Mr. Wagner offered no written testimony. He represented Land America.

Ms. Deloris Dalke, Hillsboro Real Estate Broker, offered Proponent Testimony next. A copy of her testimony is (Attachment #3) attached hereto and incorporated into the Minutes by reference. Ms. Dalke believes the issue is the lack of competition in a community like Hillsboro. She does not feel the consumer is well served by one company and gave an illustration of companies in different areas and their fees. After her explanation she stated she felt a monopoly costs the consumers. Ms. Dalke concluded her testimony and stood for questions. There were none.

The next person to come before the committee was Mr. Tom Krattli, J.C. Nichols, Inc.. Mr. Krattli gave Proponent Testimony to the committee and a copy of the testimony is (Attachment #4) attached hereto and incorporated into the Minutes by reference. Mr. Krattli supported the previous testimony adding, "Because of limits placed on REALTORS by the current Kansas legislation realtors are unable to respond to these demands. These limits have not benefitted the consumers. In counties with only one title company, individuals can pay hundreds of dollars more for their title work than consumers in similar, adjacent counties with multiple title companies. We believe increased competition will benefit consumers via lower prices and better service." Mr. Krattli concluded his testimony supporting the bill and stood for questions. There were none.

Mr. Erik Sartorius, Kansas City Regional Association of REALTORS, gave Proponent Testimony to the committee. A copy of the testimony is (Attachment #5) attached hereto and incorporated into the Minutes by reference. Mr. Sartorius gave much of the same testimony as previously heard. He confirmed the need for "one stop shopping" and the speedy service to the consumer. Mr. Sartorius stood for questions. There were none.

Next before the committee was Ms. Kathy Olson, Kansas Bankers Association, to give Neutral Testimony. A copy of the testimony is (Attachment #6) attached hereto and incorporated into the Minutes by reference. She explained that this prohibition does not apply to real estate transactions taking place in counties with a population of 10,000 or less. She stated that with the passage of Gramm-Leach-Bliley banks would be able to participate in the title insurance business indirectly through a financial subsidiary of the bank. She agreed that it is important that there is in place, meaningful disclosure and anti-tying protections.

Ms. Olson, continued to relate to the committee that the banks feel the " consumer is currently adequately protected when he or she walks into a bank to purchase an insurance product-and will continue to be adequately protected if the insurance product purchased is title insurance. She then summarized the provisions providing protection to consumers purchasing insurance through banks. These points are included in her written testimony. She then discussed her concerns about competition between state-chartered and national chartered banks, disclosures and anti-tying. She also gave her interpretation of the *Barnett* decision and "not being enforceable against a national bank if the law frustrates, hampers, impairs or interferes with the ability of a national bank to exercise its insurance authority under federal law. Applying a dual set of disclosures may prompt a challenge by the OCC as imposing a law that would significantly interfere with a national bank's ability to effectively compete in the title insurance business." With this she stood for question.

Mr. Roy Worthington, Kansas Land and Title Association, was the last conferee to give testimony. A copy of Mr. Worthington's Opponent Testimony is (Attachment #7) attached hereto and incorporated into the Minutes by reference. Mr. Worthington stated that he and his people were against the bill because the 1991 law was upheld by the Kansas Supreme Court and that the "purpose of the law is to stimulate competition by decreasing vertical integration between producers of title business and title insurers." "It is very clear tht since preemption under Gramm-Leach-Bliley applies only to banks, that a state may continue to regulate non-bank entities." He feels the only way to keep the industry competitive and consumer friendly is to restrict the amount of controlled business an affiliated business dealing in title insurance can obtain, thus making title insurance companies compete for all of the public business. He stated a two fold plan for such restrictions. He stated the consumer has little or now interest in the selection process. He also said that regardless of how many controlled companies there are they will not seek our business beyond referrals unless they are force to. He feels after talking with come companies from Minneapolis, that prices have accelerated in the market place since controlled business has taken place and competition has been eliminated.

Mr. Worthington continued to state that disclosures alone do not protect the consumer since their main connection is with the real estate company and title charges are small portion of the costs involved. He did not feel the consumer had the knowledge, time or incentive to become informed shoppers for title insurance, and that they rely on professional real estate people for this information. He feels the existing way of doing business has functioned well for over a decade, promoted competition and consumer friendly title insurance industries. Mr. Worthington stood for questions. Questions were posed by Representatives Edmonds, Grant, and Phelps. Other questions were again fielded to Ms. Greenlee.

With no further testimonies and noone further wanting to speak to the bill the meeting was adjourned. The time was 5:30 p.m.

The next meeting will be February 14, 2001 and will be held at 4:30 p.m. in Room 526-S

HOUSE INSURANCE COMMITTEE GUEST LIST

DATE: Feb 13, 2001

HB 2209

NAME	REPRESENTING
Ann Christian	Concern business owner - KSK
Jeanette Johnson	KAR - Business owner
Erik Sartorius	K.C. Regional Assoc. of Realtors
Ross Wagner	LandAmerica Financial Group
John Dalke	KAR
Delores Dalke	KAR
Lynn Miller	Wichita Area Assn. of Realtors
Steve Johnson	Topeka Assc of Realtors
Debbie Beam	KAR Chairman Govt Affairs
KAREN FRANCE	KAR
Linda J Conderman	KAR
BILL YANEK	KAR
John Green	KAR
TOM KRATTLI	J.C. Nichols Residential
Jeremy Anderson	KS Ins. Dept
Linda DeCoursey	KS Ins. Dept
Marnie Ann Lower	KAHP
Colin Mull	Kathy Damron Assoc
Kathy Sleeder	KS Ins Dept.

Julie Hummel — Federico Consulting

HOUSE INSURANCE COMMITTEE GUEST LIST

DATE: _____

NAME	REPRESENTING
Mary Rogge	KLTA
Kathy Olsen	Kansas Bankers Assn
Chuck Stones	"
John Peterson	KLTA
Hayden St. John	Lawyers Title of Topeka
BILL Brady	KLTA
Steve Wilkin	KLTA
Chris St. John	Lawyers Title of Topeka
R. WORTHINGTON	KLTA
Matthew Goddard	HCBA

Kansas Association of REALTORS®

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TELEPHONE 785/267-3610 • 1-800-366-0069
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TO: MEMBERS OF THE HOUSE INSURANCE COMMITTEE

FROM: KAREN FRANCE, DIRECTOR OF GOVERNMENTAL AFFAIRS

DATE: FEBRUARY 13, 2001

RE: HB 2209, TITLE INSURANCE

Thank you for the opportunity to testify. On behalf of the Kansas Association of REALTORS®, I ask for your support of HB 2209.

First, I would like to provide you with a short summary of the bill. The current law provides that a "controlled business" title company, which is generally described as a company which is owned by persons in a position to produce business for that title company, i.e., a real estate licensee, or a banker or mortgage broker, cannot have more than 20% of its business come from its owners. Its real effect is to prevent business people like my members from owning a title company because the 20% requirement is very difficult, if not impossible to meet. A real estate broker is not going to refer title business to their competitors.

We would like to remove that portion of the bill and replace it with some reasonable guidelines for these types of title companies. The language that is to be stricken is on page 10 of the bill. The new language begins on page 1, New Section 1. This is a definitional section. These definitions are actually already in place in rules and regulations.

New Section 2 says that a title company owned by producers of business cannot accept an order for title insurance nor issue either a title commitment or a title policy unless they have done the following steps:

1. Disclose the existence and the nature of the financial interest to the consumer in writing.
2. Provide a written estimate of the charges or range of charges made for the services to be rendered.
3. Inform the consumer that they are not obligated to utilize this title company.
4. Disclose the names and telephone numbers of at least 3 other title insurers that operate in the county. (If there are less than three, then the names and numbers of all of the other title companies in the county must be provided to the consumer.)
5. Have the consumer sign the disclosure.

Subparagraph (b) of New Section 2 mirrors the anti-tying prohibitions in the federal legislation called the Real Estate Settlement Procedures Act, or RESPA for short. This paragraph prohibits a producer of title business from making it a condition for a consumer to use the title company they own before the title insurance producer extends credit, grants a loan, or sells a property.

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FEB 13, 2001
Att #1

Subparagraph (c) prohibits an affiliated title entity from issuing a policy when they know that the name of the title company was pre-printed in the sales contract. This mirrors a RESPA prohibition, as well

Subparagraph (d) states that a producer of title business and their associates can only receive compensation in the form of income, profits, or dividends from the affiliated title company if:

1. The financial interest has been appropriately disclosed to consumers;
2. The compensation is not in exchange for referral of business; and
3. The compensation is based on the return of the investment of the producer.

Subparagraph (e) is the penalty section. It provides that a title insurer who violates this law can be fined by the Insurance Commissioner in an amount equal to five times the amount of the premium collected from the consumer, in addition to any other remedies available to the Commissioner. Additionally, a title insurer who violates the statute is liable to the purchaser for the full amount of the premium collected.

New Section 3 is what we call the "rat out your competitor" provision. This section is an unusual remedy in that it gives a competitor of an affiliated entity the legal standing to go to court and get injunctive relief in the event they can prove that an affiliated entity has violated this law. Without this provision, competitors would be unable to enforce the law or get any judicial relief. The successful party to this litigation would be awarded court and attorney fees.

New Section 4 reiterates another provision of RESPA, in that it requires an affiliated company to provide the core title services required by RESPA. This is to prevent the creation of sham title entities.

New Section 5 gives rule and regulation making authority to the Insurance Commissioner's office.

Since I believe that none of you were here when this legislation was passed, I would like to give you a brief overview of what has brought us here today. I have attached a copy of the timeline on the back of my testimony.

Ladies and Gentlemen, the Congressional passage of the Gramm-Leach-Bliley Act has created a whole new playing field for those of us involved in banking, insurance, securities and real estate. As the Insurance Commissioner's legal counsel will testify today, the Congress has pre-empted the existing Kansas statute as it applies to banks and it has placed Kansas title insurance companies and real estate brokerages in a very precarious position.

The impact of this ruling is significant. If the Kansas law cannot be enforced against title companies that are owned by banks, then, in effect, the existing law only applies to title agencies owned by real estate licensees. The Chief Legal Counsel for the Commissioner of Insurance has concluded that if the Federal Reserve grants real estate brokerage powers to banks as is currently being considered, then the statute couldn't be applied to those title agencies owned by a real estate brokerage, which is owned by a bank. This leaves the law applying only to real estate brokerages that are not owned by a bank. This kind of unequal application of the law raises serious questions about the violation of the equal protection clause of the United States Constitution.

We had hoped that the title industry would join us in support of this bill today, because we are all in the same boat. The passage of the Gramm-Leach-Bliley Act has dropped the fences that used to divide all of these industries. Depending upon how we look at it, our existing businesses are either in competition with each other, or we are partners. If you do not pass this legislation and repeal this law, you have put us at a competitive disadvantage and may very well prevent us from creating the very partnerships that we need to survive.

As we speak, the Federal Reserve is accepting comments as to whether they should allow banks to engage in real estate brokerage activities. The comment period ends March 6. The opponents here

today will criticize us by pointing out that we are opposing this move by the banks to get into real estate because we are afraid of competition, yet we are coming to you today, asking to get into their business.

To a certain degree, they are correct. The NATIONAL ASSOCIATION OF REALTORS® is opposing the proposed rule and is encouraging our members to do so as well. You can understand our members' fear of having to compete against Chase Manhattan, Wells Fargo and the other large banks of America. But the truth is that we are, in all likelihood, going to lose this battle. The Congressional passage of the Gramm-Leach-Bliley Act set the tone for wide-open competition in and amongst all of our industries. That tone will, by most experts' opinions continue into the Federal Reserve and The Treasury. Just as the title industry has feared us getting in their business, we fear banks getting in ours. But, ultimately, it doesn't matter what we fear. Clearly, the Congress was unconcerned with all of our fears. They have set something in motion that we are only beginning to understand.

One thing we do understand is this: The Congress has pre-empted the state from applying this Kansas law to bank-owned title companies. When the Federal Reserve grants real estate brokerage powers to banks, this Kansas controlled business law cannot be enforced against title companies that are owned by banks who own real estate brokerages. Therefore, the law will only apply to our members who are not owned by banks, if they are in counties with populations of less than 10,000. Does this sound like good public policy?

If this law is allowed to stay on the books, you will have eliminated one of the "lifeboats" our members and your local title agents and banks may have if we are to survive this expansion of the banking powers of some of the largest banks in the country. It appears that, ironically enough, the one way that we Kansas companies will be able to survive is for us to partner with each other--a small bank, a title insurance agency and real estate brokers might be able to provide a viable alternative to consumers to turn to in the event they don't want to deal with the Chase Manhattan and Wells Fargo-size banks.

While it might be very scary at first when the big start getting bigger, if you give us the ability to create the business partnerships in our communities, we believe that we can rise to the challenge and survive. However, if you leave us out there, competing against banks that own real estate brokerages and title companies, then our home-grown, multi-generation Kansas businesses are not going to make it.

That is why we are here this year.

The opponents of this bill will present some of the same arguments today, which influenced the legislators to enact the original legislation in 1989. The stated rationale for the legislation that was given at the time legislation was passed indicated that the legislation was needed in order to protect consumers. But the real drive behind the legislation was a move to protect so called "independent" title companies from competition. This occurred because one of these title companies, which had been created in an effort to provide better, faster service to customers, grabbed nearly 25% of the market share in Wichita. Rather than stepping up to the plate of competition in the marketplace and matching the quality and speed of the delivery of title services this new title company, they came to the legislature and got legislation passed to put their competition out of business. Wouldn't a lot of other companies like to have their competition legislated out of business? Once the new law went into effect and the affiliated business title company was forced to dissolve, the two big market players in Wichita raised their rates 50-60%, depending upon the service offered.

We would like to review some of the information that was presented to the legislature when this legislation was passed in 1987 and is appearing this year in constituent letters to legislators. We would like to correct the inaccuracies.

Argument # 1

Home buyers and sellers have little familiarity with title insurance service providers, are not knowledgeable shoppers and accordingly, are willing to accept the recommendations of the producers of the title business and the producer of the title business has a powerful incentive to refer his client's business to the title company in which he has a financial interest, even if other title companies offer better service, policy coverage and/or rates; the selection of the affiliated business title insurance company may not be in the best interests of the consumer when a collateral benefit flows from the title company to the producer to the title business.

RESPONSE:

One of the basic tenets of the free enterprise system that our economy thrives upon is that competition is always in the best interest of the consumer. The more title companies the consumer has to choose from, the more competitive the rates are likely to be. A real estate broker's livelihood depends on repeat business from buyers and sellers over a long period of time. An agent is not going to refer business to title agents who offer poor service, reduced policy coverage or higher rates and thus put their long term real estate professional reputation at risk.

Argument # 2

Studies have shown that fees charged by affiliated business companies usually start out at or below the competitive market and then rise in excess of competitive prices when a significant portion of the market is captured; the inevitable effect of the widespread growth of affiliated business arrangements is to increase the prices paid by consumers for title insurance services.

RESPONSE:

Where are these studies? They have yet to be produced by the opponents. On the contrary, in 1992, Paul Anton of Anton Financial Economics, Inc. researched the prices for typical settlement services in the Twin Cities area of Minneapolis and St. Paul Minnesota. Their survey sample included 16 firms that together operated 77 offices in the Twin Cities area, representing 70% of the title insurance offices in the marketplace. The sample included all eight firms in the market that operated five or more office locations. It included five firms that were part of affiliated business arrangements and 11 which were not. The research indicated that the affiliated businesses did not charge significantly higher prices for services. Of the 16 firms surveyed, affiliated businesses placed fifth, sixth, seventh, thirteenth and sixteenth from the top in terms of list prices. In fact the prices at the affiliated firms were somewhat lower, on average. Even after making adjustments for the volume done by the various offices (some of the entities surveyed had many more locations and handled many more transactions than others did in the sample) the results indicated that the independent firms tended to charge roughly $13 more for the settlement services. (Paul Anton, "Economic Issues Relating to the Title Industry in Minnesota: Would Further Regulation be Helpful?, p. 6-8, Appendix A)

Argument #3

Independent title companies face an almost insurmountable obstacle in competing for the business

controlled by the producers of title business, creating unfair competition. In a free and competitive consumer-oriented market, prices are restrained by competition, however there is no incentive for the affiliated business company to reduce rates or improve policy coverage or service in order to attract business, because it's business is guaranteed as a result of referrals from the producers of title business

RESPONSE:

The idea that there is competition in the title industry today is only a myth. Take a look at the real estate section of your local newspaper. Do you ever see ads for title insurance agencies? Our members advertise, lenders advertise, homeowners insurance companies advertise. Title companies don't compete for consumers by distinguishing themselves in the marketplace; they compete by going to the producers of business--our members and lenders--to get them to refer business. This would be no different if our members owned title companies.

Additionally, when the Congress passed Gramm-Leach-Bliley, it did so on the premise that the consumer would not be negatively impacted upon when they dropped the fences between the industries.

Argument # 4

The consumer loses the ability to obtain the disinterested judgment of the real estate professional as to which title company will best serve his interest.

RESPONSE:

The best interests of the consumer are served when they receive the service that they seek in a convenient format, at a price that is competitive. Everywhere in the marketplace we see businesses adjusting to consumer demand for value and convenience. A prime example is the advent of grocery "super stores" whereby grocery stores do not merely sell groceries but also contain branch banks, dry cleaners, post offices, pharmacies and even McDonald's restaurants. In the fast changing real estate market, we see consumers demanding the same things--value and convenience. The consumer would be better served to be able to get brokerage, title and closing services under one roof, rather than having to deal with multiple individuals, making multiple phone calls in order to complete a transfer of real estate.

The Lexecon study concluded, "Critics of incentive compensation for referrals to affiliated business arrangement affiliates claim that such payments induce persons, in whom consumers have invested their trust, to make referrals that are not in the best interest of their customers. In particular, they allege that the affiliate's prices are higher and service quality lower than those provided by independent firms. Higher prices only benefit a firm if it does not lose its current and future customers. Diversified companies that develop a reputation for high prices or poor service will tend to sell less of all of the services they offer."

Argument # 5
Title insurance underwriting standards drop and losses occur because the producer/owners of the affiliated business title companies require real estate closings to occur, when prudent title industry standards would require a delay in closing to resolve title problems. The producer of the title business, having a financial interest in the title insurance company may face a definite conflict between his own interest in receiving a commission from a completed sale and the consumer's interest in receiving a clear and unencumbered title.

RESPONSE:
Again, a real estate broker's livelihood depends on repeat business from buyers and sellers over a long period of time. An agent is not going to refer business to title agents who offer poor service, reduced policy coverage or higher rates and thus put their long term real estate professional reputation at risk. Additionally, an affiliated business title company must have underwriters insure their title policies. Underwriters would not continue to write for affiliated title companies who provide shoddy title work. There has been no evidence presented that affiliated title companies have any more title claims than independent title companies.

SUMMARY:

The future of homegrown Kansas real estate brokerages, title agencies and banks is at risk. Passage of HB 2209 will allow our businesses to create the partnerships that can keep us viable. The pressure for the packaging of real estate services is going to become more intense as the fences between industries are torn down via the implementation of Gramm-Leach-Bliley. The current 20% limitation puts businesses and consumers at a disadvantage in meeting the demands of the new economy.

The state of Kansas was the first state to adopt the 20% limitation. We ask that Kansas now be the first state to remove these artificial percentage limitations completely.
Thank you for the opportunity to testify.

Kansas Controlled Business Arrangement Legislation Timeline

1986 Legislation introduced by a Representative re: requiring the regulation of title insurance rates. KLTA opposes. Final version has 1 year delayed effective date in order to allow time for Insurance Commissioner to study the issue.

Study group appointed and worked during the summer. Made up of representatives of: many title companies, the Home Builder's Association of Kansas, the Kansas Association of REALTORS® (KAR), and the Kansas Real Estate Commission. Topic began to turn from regulating rates to "doing something about CBA's". The Committee was divided into subcommittees to study various aspects of title issues. The report of the Subcommittee KAR served on specifically said that CBA's were all right as long as there was full disclosure to consumers of the ownership interest.

The initial draft of the full committee report recommended passage of legislation with the 20% restriction. KAR sent a written dissent to that portion of the report. After that, KAR was no longer notified of Committee meetings.

1987 CBA legislation introduced in two bills. One provision required disclosure; the other contained the 20% restriction.

Since it was a House bill, it was heard first in House Financial Institutions and Insurance Committee. KAR was able to get the 20% restriction removed from the bill during committee discussion. The bill went to the floor of the House for debate without the 20% restriction and was passed by the full House on a 123-2 vote.

The bill was sent to the Senate Financial Institutions and Insurance Committee, where a Senator at the request of a representative of the "independent" title companies got the 20% put back in the bill. The bill passed the Senate with the 20% provision in the bill.

When it was sent back to the House, the Chairman of the House Committee told the full House that the Senate amendments were "minor" and recommended concurring in the Senate amendments, which the House did on a vote of 122 to 3. The Governor signed the bill into law in that form.

Wichita Title Associates (WTA) filed for an injunction against the Insurance Department to prevent enforcement of the new statute and asking that it be ruled unconstitutional on the basis of the Equal Protection Clause and/or that the statute was unconstitutionally vague. KAR filed an amicus brief in the case. WTA won at the trial court level.

1988 Court of Appeals overturns district court decision. CBA's forced to close their doors in Kansas.

1991 KAR gets corrective legislation introduced. Killed in House Committee.

1996 KAR gets new corrective legislation introduced. Committee hearings were held, no action taken.

1998 Corrective legislation passes House with 93 votes. Senate hearings never completed.

Kathleen Sebelius
Commissioner of Insurance
Kansas Insurance Department

TESTIMONY

TO: House Insurance Committee

FROM: Kathy Greenlee, General Counsel

RE: House Bill 2209

DATE: February 13, 2001

I appear today on behalf of the Kansas Insurance Department in support of House Bill 2209. The Kansas Legislature has been asked in recent years to consider repealing the Kansas controlled business statute. This year, however, is different. In November of 1999, the President signed a new federal law known as the Gramm-Leach-Bliley Act. That federal law changed the way individual states regulate the business of insurance.

Two weeks ago, on February 1st, the Kansas Insurance Department issued a formal opinion letter recognizing that the Kansas controlled business statute, K.S.A. 40-2404(14)(f) is pre-empted by federal law. I have attached a copy of that opinion letter and a brief summary of key Gramm-Leach-Bliley sections. I want to review both of those documents with you.

We strongly urge the legislature to repeal K.S.A. 40-2404(14)(f). You will find on the last page of House Bill 2209, the proposed repeal of this language. We also support the consumer protections proposed by the new sections of this bill.

House Comm on Ins.
February 13, 2001
Attachment #2

420 SW 9th Street
Topeka, Kansas 66612-1678

785 296-3071
Fax 785 296-2283

Consumer Assistance Hotline
1 800 432-2484 (Toll Free)

Text of K.S.A. 40-2404(14)(f)

(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.

Text of K.A.R. 40-3-43(f)

(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.

Kathleen Sebelius
Commissioner of Insurance
Kansas Insurance Department

February 1, 2001

Mr. Michael Lochmann
Stinson, Mag & Fizzell
1201 Walnut Street
Kansas City, MO 64106-2150

RE: Federal Preemption of K.S.A. §40-2404(14)(f)

Dear Mr. Lochmann:

You requested on behalf of Gold Banc Corporation, Inc. ("Gold Banc") our opinion regarding whether or not the federal law known as the Gramm-Leach-Bliley Act, P.L. 106-102, November 12, 1999, preempts K.S.A. §40-2404(14)(f). For the reasons set forth below, we believe K.S.A. §40-2404(14)(f) is preempted.

Proposed Joint Venture

Gold Banc is a bank holding company headquartered in Leawood, Kansas. It owns three banks and one savings bank and operates 67 branches in four states. Gold Banc also engages, through its non-bank subsidiaries, in various nonbanking financial activities that are permitted to be engaged in by bank holding companies, such as securities brokerage activities. Gold Banc is a registered "financial holding company" as defined in Section 4(p) of the Federal Bank Holding Company Act of 1956, as amended, 12 U.S.C. §1841(p).

Gold Banc is interested in entering into a joint venture, through one of its financial subsidiaries, with a subsidiary of a title insurance company ("Title Co."). Under the proposal, Gold Banc's financial subsidiary (which is not a subsidiary of a depository institution) would own 75% and a subsidiary of the Title Co. would own 25% of a Kansas limited liability company ("JVCo"). JVCo would in turn be the sole member of another Kansas limited liability company that would operate as a title insurance agency ("Title Agency"). The Title Agency will become a licensed title insurance agency in Kansas and, possibly, other states. See attached: Proposed Joint Venture Structure.

The Title Agency intends to offer its services to the public generally, including but not limited to, persons who are customers of Title Agency's bank and non-bank affiliates. Existing customers of its affiliates, such as mortgage loan customers of Gold

420 SW 9th Street
Topeka, Kansas 66612-1678

913 296-3071
Fax 913 296-2283

☎ Consumer Assistance Hotline
1 800 432-2484 (Toll Free)

Banc's subsidiary banks, would be told of the availability of Title Agency's products and services. No customer would be required to obtain title insurance from Title Agency as a condition to obtaining a product or service from any Gold Banc affiliate.

Kansas Controlled Business Law

K.S.A. §40-2404(14)(f) is commonly referred to as a "controlled business" law. It states that:

> 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.

The Kansas controlled business law was adopted in 1989 at the recommendation of the Kansas Insurance Department and with the support of various interested parties. Kansas Insurance Department officials testified that they were concerned about anti-competitive activities, inadequate consumer disclosure, and vertical integration of the real estate industry. The Insurance Commissioner had convened a title insurance study group for the purpose of considering a variety of title insurance concerns. The proposed legislation was largely an outgrowth of that study group review. See minutes of the House Insurance Committee, March 2, 1989, regarding HB2497 and HB2502.

Shortly after the legislature passed House Bill 2502, the Kansas Insurance Department adopted regulation K.A.R. 40-3-43. According to subsection (f) of that regulation, 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.

Thus, since 1989, it has been illegal for a title insurance agent to receive in excess of 20% of its operating revenue from customers referred by a producer of title business that has a financial interest in the title insurance agent. The law was challenged and upheld by the Kansas Supreme Court in 1991. *Guardian Title Co. v. Bell*, 248 Kan. 146 (1991).

Gramm-Leach-Bliley Act

I. Section 104(d)(2)(A) Preemption

The Gramm-Leach-Bliley Act (the "GLBA") creates a new type of financial entity known as a "financial holding company." Section 103(a) of the GLBA amends Section 4 the Bank Holding Company Act of 1956, 12 U.S.C. § 1843, by adding a new subsection (k). New Section 1843(k)(1) states that a financial holding company may engage in any activity, and may acquire and retain the shares of any company engaged in any activity, that the federal reserve board determines to be financial in nature or incidental to such financial activity. New Section 1843(k)(4) itemizes the activities that are considered to be financial in nature. Subparagraph (B) of Section 1843(k)(4) includes "insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing, in any State."

Gold Banc, which is a financial holding company, proposes to enter into a joint venture that will form and operate a title insurance agency. Before proceeding, however, Gold Banc seeks clarification as to the status of the Kansas controlled business law in the face of several possible GLBA preemptions.

Section 104 of the GLBA describes in complex fashion the operation of state law in regulating the business of insurance. For purposes of analyzing the Kansas controlled business statute, Section 104(d)(1) states:

> Except as provided in paragraph (3), and except with respect to insurance sales, solicitation, and cross marketing activities, which shall be governed by paragraph (2), no State may, by statute, regulation, order, interpretation, or other action, prevent or restrict a depository institution, or an affiliate thereof from engaging directly or indirectly, either by itself or in conjunction with an affiliate, or any other person, in any activity authorized or permitted under this Act and the amendments made by this Act.

The exceptions found in Section 104(d)(3) of the GLBA cover insurance activities other than sales. Those exceptions are not relevant to our analysis since the Kansas controlled business statute addresses the matter of sales, in the form of gross operating revenue. The exceptions found in Section 104(d)(2) of the GLBA address insurance sales, solicitation and cross-marketing activities and are critical to our analysis. Section 104(d)(2)(A) states:

> In accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County N.A. v. Nelson*, 517 U.S. 25 (1996), no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an

2-5

affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity.

Although the Section 104(d)(2)(A) standard is rigorous, Section 104(d)(2)(B) provides certain exceptions:

> Notwithstanding subparagraph (A), a State may impose any of the following restrictions, or restrictions that are substantially the same as but no more burdensome or restrictive than those in each of the following clauses.

These listed exceptions are commonly referred to as the thirteen safe harbors.

We have examined the thirteen safe harbors and find none that protect a controlled business statute such as K.S.A. §40-2404(14)(f). The Kansas statute effectively prohibits a title agency from generating more than 20% of its operating revenue from customers of a financial affiliate. Such a prohibition is not protected by any of the GLBA safe harbors.

In our opinion, K.S.A. §40-2404(14)(f) prevents or significantly interferes with the ability of a depository institution or affiliate to engage in title insurance sales. Therefore, by operation of federal law, K.S.A. §40-2404(14)(f) is preempted by Section 104(d)(2)(A) of the GLBA.

II. Section 304 Deference

The drafters of the GLBA foresaw inevitable conflicts between federal and state law. Section 304 of the GLBA spells out the dispute resolution process for regulators. In the event of a regulatory conflict between a state regulator and a federal regulator regarding insurance issues, the federal or state regulator may seek judicial review by the United States Court of Appeals for the circuit in which the state is located or in the United States Court of Appeals for the District of Columbia Circuit. According to Section 304(e), "The court shall decide a petition filed under this section based on its review on the merits of all questions presented under State and Federal law, including the nature of the product or activity and the history and purpose of its regulation under State and Federal law, without unequal deference."

III. Section 104(d)(2)(C) Limitations

Section 104(d)(2)(C) of the GLBA contains two additional limitations. According to Section 104(d)(2)(C)(i), the "without unequal deference" standard of Section 304(e) does not apply to statutes regarding sales or crossmarketing activities if the statute was adopted prior to September 3, 1998 and is not protected by one of the thirteen safe harbors found in Section 104(d)(2)(B). The Kansas controlled business statute was adopted in 1989 and is not protected by one of the thirteen safe harbors.

Therefore, if K.S.A. §40-2404(14)(f) were presented to a federal court for review, the "without unequal deference" standard would not apply.

The second limitation found in Section 104(d)(2)(C) of the GLBA addresses the issue of nondiscrimination. State statutes may be saved from federal preemption if they meet the nondiscrimination standards set forth in Section 104(e) of the GLBA. However, according to Section 104(d)(2)(C)(ii), those nondiscrimination standards do not apply to statutes regarding sales enacted prior to September 3, 1998 that are not protected by one of the thirteen safe harbors. Since the Kansas statute was adopted in 1989 and is not protected by one of the safe harbors, the nondiscrimination standards found in Section 104(e) of the GLBA do not apply.

IV. Section 104(c)(1) Preemption

Section 104(c) of the GLBA addresses the ability of a state to regulate depository institutions and their affiliates. It states:

> Except as provided in paragraph (2), no State may, by statute, regulation, order, interpretation, or other action, prevent or restrict a depository institution, or an affiliate thereof, from being affiliated directly or indirectly or associated with any person, as authorized or permitted by this Act or any other provision of Federal law.

Section 104(c)(2) governs affiliations between depository institutions and insurers. The provisions of this paragraph address a state regulator's ability to take action and review proposed acquisitions and changes in control of domestic insurers. None of these exceptions address controlled business statutes.

K.S.A. §40-2404(14)(f) does not explicitly prevent or restrict a depository institution or affiliate from owning a title insurance agency. However, the operating revenue restrictions of the Kansas controlled business statute are a disincentive to such affiliation. Since we have already concluded that K.S.A. §40-2404(14)(f) is preempted by Section 104(d)(2)(A) of the GLBA, we reserve judgment on whether or not the statute is also preempted by the anti-affiliation standard set forth in Section 104(c)(1) of the GLBA.

V. Section 303 Title Insurance

Section 303 of the GLBA directly addresses the sale and underwriting of title insurance by national banks, state banks and their affiliates. National banks are prohibited from underwriting or selling title insurance, except that a national bank may sell title insurance as an agent in states where state banks are authorized by statute to sell title insurance as agents. Section 304(c) grandfathers national bank and subsidiary title insurance activities that were lawful prior to the passage of the GLBA. Nothing in Section 303 prohibits a subsidiary or affiliate of a financial holding company from selling title insurance.

Nationwide Implications

The Kansas controlled business statute is not unique. In researching the issues presented herein, we obtained a 1997 list of controlled business statutes compiled by the American Land Title Association. Although slightly outdated, this list clearly demonstrates that the questions presented by Gold Banc are national in scope. We also contacted attorneys for the National Association of Insurance Commissioners ("NAIC"). In addition to confirming our preemption analysis, NAIC counsel directed us to the Title Insurance Agent Model Act, adopted by the NAIC in October 1995. The controlled business provisions found in Section 6 of the Model Act conflict with the "prevent or significantly" interfere standard set forth in Section 104(d)(2)(A) of the GLBA. Since we are the first state insurance regulator to determine that the GLBA preempts our controlled business statute, we will share our analysis with other state departments of insurance and with the NAIC.

Conclusion

In 1989, the Kansas Insurance Department expressed concern for Kansas consumers who purchase title insurance. Part of the statutory solution developed by our predecessors is now preempted by federal law. Yet, our concern for the consumers of this state is as great now as it was then. As this marketplace changes, we believe it important to safeguard the consumer by implementing meaningful disclosure and anti-tying protections. We intend to meet with representatives from the real estate, title insurance and financial services industry for the purpose of analyzing how best to amend our controlled business statute.

Based on the analysis presented above, we conclude that Section 104(d)(2)(A) of the GLBA preempts K.S.A. §40-2404(14)(f). Accordingly, we will not require that Title Agency comply with K.S.A. §40-2404(14)(f).

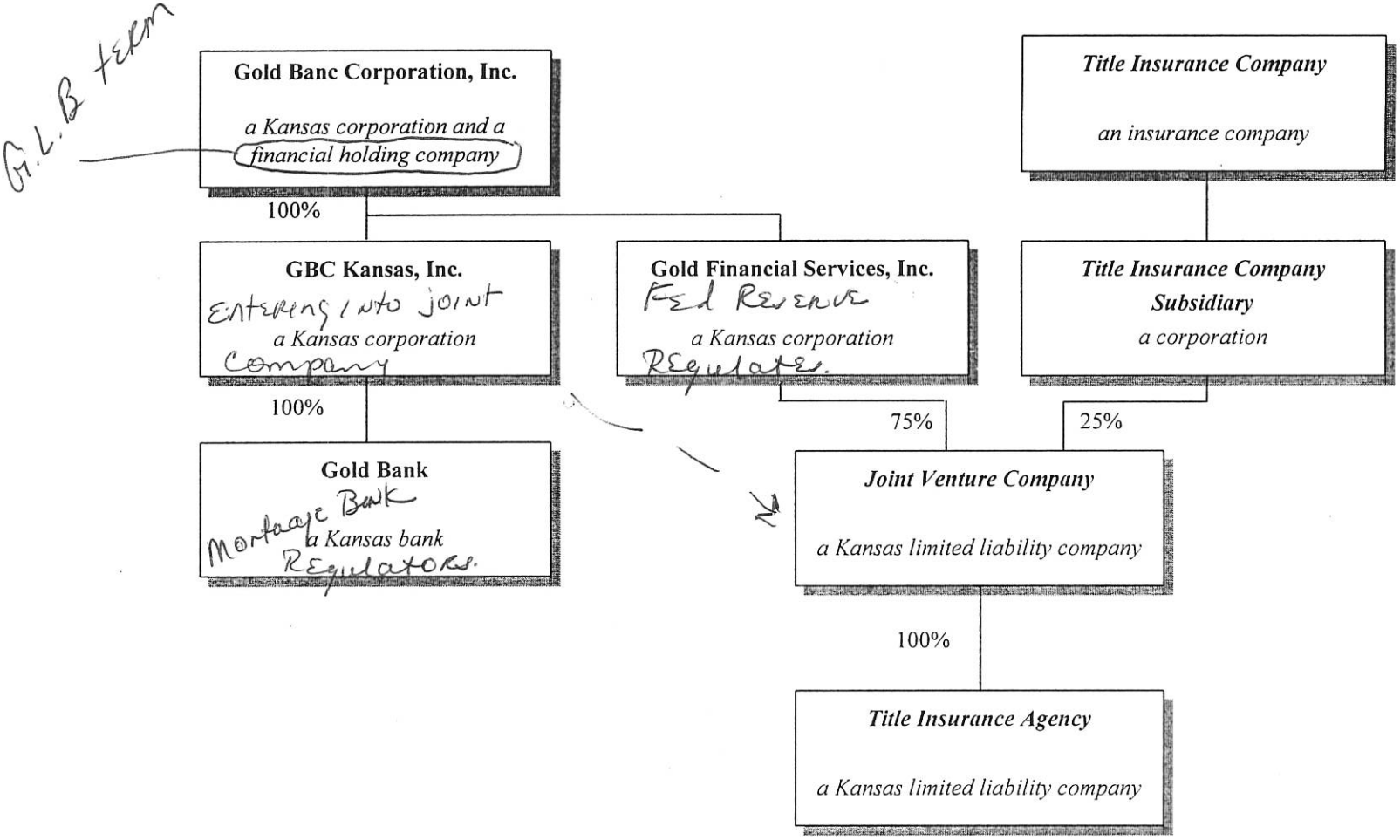
Sincerely,

Kathy Greenlee

Kathy Greenlee
General Counsel

EXHIBIT A

PROPOSED JOINT VENTURE STRUCTURE



Kathleen Sebelius
Commissioner of Insurance
Kansas Insurance Department

Overview of Gramm-Leach-Bliley

by Kathy Greenlee, General Counsel
February 13, 2001

Basic Structure

1. The Financial Services Modernization Act of 1999 (Gramm-Leach-Bliley Act) became federal law on November 12, 1999. As it moved through Congress, the Act was known as S. 900 and H.R. 10.

2. The Act breaks down barriers among the banking, insurance and securities industries.

3. There are two ways for banks, insurance companies, and securities firms to take advantage of the Act's new freedom to expand into new products and services:

   (a) Become a financial holding company, which is a special type of bank holding company that includes non-bank affiliates such as insurers and securities companies, or

   (b) Expand the current activities of a national bank chartered and supervised by the Office of the Comptroller of the Currency (OCC) into additional areas permitted by the Act.

4. A financial holding company may engage in any activity that the federal reserve board determines to be financial in nature or incidental to financial activity.

5. The Act itemizes those activities that are considered to be financial in nature. The list covers a wide variety of banking, insurance and securities activities. The insurance-related activites include "insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing, in any State." GLBA Section 103(a).

6. The Act specifically addresses state laws that govern insurance sales, solicitation and cross-marketing activities.

104(d)

7. "No state may, by statute, regulation, order, interpretation, or other action, **prevent or significantly interfere** with the ability of a depository institution, or **an affiliate** therefore, to engage, directly or indirectly, either by itself or in

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conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity." GLBA Section 104(d)(2)(A). (my emphasis)

8. GLBA also provides some exceptions regarding sales, solicitation or cross marketing laws. Those exceptions are commonly refered to as the "thirteen safe harbors."

9. If a statute is protected by one of the safe harbors, the statute does not have to meet with "prevent or significantly interfere" test and is saved from GLBA preemption.

10. In addition to addressing sales, GLBA also covers affiliations. The Act states that "No State may, by statute, regulation, order, interpretation, or other action, **prevent or restrict** a depository institution, or an affiliate thereof, from **being affiliated** directly or indirectly or associated with any person, as authorized or permitted by this Act or any other provision of Federal law." GLBA Section 104(c)(1). (my emphasis)

Kansas Preemption

11. Gold Banc is a Kansas mortgage bank and a financial holding company.

12. Gold Banc, through a joint venture, will own a title agency.

13. Gold Banc title agency wants to sell title insurance to Gold Banc mortage bank customers.

14. The Kansas controlled busines statute, K.S.A. 40-2404(14)(f), places a cap on the amount of operating revenue that Gold Bank title agency may receive from Gold Bank mortgage bank customers. The statutory cap is 20%.

15. On February 1, 2001, the Kansas Insurance Department issued a formal opinion to Gold Banc, indicating that the Kansas controlled business statute is preempted by Gramm-Leach-Bliley. Thus, we will not require that Title Agency comply with K.S.A. 40-2404(14)(f).

16. The Kansas controlled business statute "prevents or significantly interferes" with the ability of an affiliate of a depository institute to be engaged in the business of insurance.

17. None of the 13 safe harbors of GLBA apply to our controlled business statute.

18. Gold Banc also contends that the Kansas controlled business statute prevents or restricts the affiliation of the title agency with a depository institution.

Status of Kansas Law

19. The Kansas Insurance Department cannot enforce the controlled business statute against any title agency that is affiliated with a depository institution, which is defined by federal law to include any bank or savings association.

20. If K.S.A. 40-2404(14)(f) is not repealed, the Kansas Insurance Department could technically enforce the statute against title agents not affiliated with banks.

21. The purpose of GLBA is to remove barriers between bank, insurance companies and securities firms. As more of those firms merge or otherwise affiliate, more title agencies will be covered by the GLBA preemption and will not be subject to the Kansas controlled business statute.

22. The Kansas Insurance Department supports repeal of K.S.A. 40-2404(14)(f).

23. The Kansas Insurance Department also supports adequate consumer protections and disclosure requirements, as contemplated by GLBA.

Real Estate Center, Inc.

116 NORTH MAIN ST. • HILLSBORO, KANSAS 67063 316/947-2321 • FAX 316/947-5616

Thank you for this opportunity to speak to you about the Title Insurance Industry.

My name is Delores Dalke, President of the Real Estate Center, Inc. in Hillsboro, Kansas. Hillsboro is located in Marion County, a county of approximately 13,500 residents.

I believe the issue before us today is competition rather the lack thereof in a community like ours.

Please understand that I personally do not wish to own a title company. We have a title company in Marion County that does a good job and I also consider them personal friends of mine.

I believe the consumers are not well served when there is only one company. Let me illustrate what I am speaking of. I called title companies in Harvey, McPherson and Dickinson Counties all of which are served by more than one company. The purpose of my call was to verify what title insurance would cost in each of these counties. I also inquired what the title company would charge for closing a sales transaction in each of the counties to compare to what our consumers have to pay in Marion County. I asked for a title policy for a $100,000 transaction without any mortgage coverage. This coverage can be purchased in McPherson County for $401.00 with a closing fee of $175.00 for a tot of $576.00. In Harvey County the charges are $498.00 with a closing fee of $100.00 for a total of $598.00. The costs in Dickinson County are $450.00 with a closing fee of $100.00 for a total of $550.00. Now to Marion County with no competition, the title policy is $500.00 with a $200.00 closing fee for $700.00.

Because my business also includes closing on 2nd mortgages (consumer loans) we use quite a number of certificates of title. In Marion County these cost $150.00. To assist the consumer we have found an attorney from out of county that will come in and do them for $120.00 and they are completed in 48 hours. We normally have to wait up to a week to get these certificates if we order them through the only title company in Marion County.

Please consider what a monopoly costs the consumer.

REALTOR®

House Commerce
February 13, 2001
Attachment # 3

3-1

J.C. NICHOLS
RESIDENTIAL

www.jcnichols.com

J.THOMAS KRATTLI
SENIOR VICE PRESIDENT
CHIEF FINANCIAL OFFICER

February 13, 2001

I am here today to testify in favor of HB 2209. Thank you for that opportunity.

One of the realities of today's real estate market is the demand from customers for "one stop shopping." Because of limits placed on REALTORS by the current Kansas legislation we are unable to respond to these demands. These limits have not benefited the consumers. In counties with only one title company, individuals can pay hundreds of dollars more for their title work than consumers in similar, adjacent counties with multiple title companies. We believe increased competition will benefit consumers via lower prices and better service.

Allowing REALTORS to provide title services does not endanger the consumer. The federal Real Estate Settlement Procedures Act (RESPA) strictly governs REALTORS ownership of affiliated businesses. It requires full disclosure of any ownership interest to the consumer, the prices for any affiliated service, and the fact that the consumer is not required to use the affiliated business. Additionally it prohibits broker/owners from demanding agents use the affiliated company, and from paying a fee or commission for the referral of business. (see attached disclosure currently used in Missouri).

Real estate sales persons are independent contractors. They are paid on a commission basis. Their long-term success is predicated on repeat and referral business. They won't risk their client's real estate transaction, their good name and the possibility of future business by referring business to a poorly run in-house title business. In order to earn that business affiliated businesses must provide superior service at competitive prices.

I urge you to support this legislation and ask that you vote in favor of HB 2209.

Sincerely,

Tom Krattli

Tom Krattli
Senior Vice President
Chief Financial Officer

TK:mw

Attachment

House Comm on Ins.
Feb. 13, 2001
Attach # 4

RESIDENTIAL SALES
EXECUTIVE OFFICE
7500 College Boulevard
Suite 100
Overland Park, KS 66210
(913) 469-8300 Office
(913) 469-1003 Fax

NOTICE OF REAL ESTATE BROKERAGE AND TITLE INSURANCE RELATIONSHIP

(Affiliated Business Disclosure)

J.C. Nichols Residential is acting as a Real Estate Broker involving the undersigned sellers. Kansas City Title, Inc. – An Affiliated Company – may be performing services for the undersigned seller for closing and title services.

YOU ARE HEREBY NOTIFIED THAT J.C. NICHOLS RESIDENTIAL, INC. OWNS KANSAS CITY TITLE, INC.

Kansas City Title, Inc. will, for normal compensation paid directly to Kansas City Title, Inc., provide title insurance and closing services in connection with the sale of your home. The normal range of fees you may expect to pay for closing services is $225 - $275, and $50 - $100 for document preparation. Please see the Kansas City Title, Inc. rate chart on the back of this disclosure for the cost of title insurance.

J.C. Nichols Residential, Inc. sincerely recommends Kansas City Title, Inc. because they will provide quality service, convenience to you, and competitive title and closing costs. It is important that you understand that J.C. Nichols Residential, Inc. may benefit financially from your choice of Kansas City Title, Inc.. *However, the sales associate of J.C. Nichols Residential, Inc. will receive no financial benefit from your choice of Kansas City Title, Inc.*

You are under no obligation to use Kansas City Title, Inc.. THERE ARE FREQUENTLY OTHER SETTLEMENT SERVICE PROVIDERS AVAILABLE WITH SIMILAR SERVICES. YOU ARE FREE TO SHOP AROUND TO DETERMINE THAT YOU ARE RECEIVING THE BEST SERVICES AND THE BEST RATE FOR THESE SERVICES.

I (we) hereby acknowledge receipt of this notice and understand its contents.

Date: _____

_____
Seller

_____
Seller

Kansas City Regional Association of REALTORS®

6910 W 83RD St, Suite 1 Overland Park, KS 66204 913-381-1881 fax 913-381-4656
www.kcrealtorlink.com * e-mail: jcbr@kcrealty.org
6700 Corporate Dr, Suite 100 Kansas City, MO 66210 816-242-4200 fax 816-242-4212
www.kcboardofrealtors.org * e-mail: mkcbr@mkcbr.com

Testimony of Erik Sartorius
Governmental Affairs Director
Before the
House Insurance Committee
Regarding
House Bill 2209 Title Insurance Limitations

February 13, 2001

The Kansas City Regional Association of REALTORS® strongly supports House Bill 2209, which would remove an arbitrary limit placed on real estate companies and their ability to own affiliated businesses.

The limits placed on real estate companies' ownership of title companies have not been beneficial to consumers. Many counties in the state have but one title company, and the result has been consumers often paying hundreds of dollars more for their title work than consumers in adjacent counties.

Not only does the law harm the choice of consumers, it infringes on the ability of REALTORS to participate in the economy like all other citizens. REALTORS believe in the free market system, making our living in it every day. If we provide good service and value to our clients, we remain in business.

The arbitrariness of current law has been compounded by a recent opinion from the Kansas Insurance Commissioner's office. They have opined that, in response to a bank's inquiry as to the effect of the Gramm-Leach-Bliley federal banking reform on state law, that banks cannot be held to the state limitations on owning title companies. This leaves REALTORS as the sole group treated differently.

Allowing Realtors to provide title services does not endanger consumers. REALTORS' ownership of affiliated business already is strictly governed under the federal Real Estate Settlement Procedures Act (RESPA). The law imposes harsh penalties, including treble damages, fines, and even imprisonment against those who ignore its requirements.

One must also consider the relationship between real estate brokers and agents. Real estate agents are independent contractors, not employees of the broker with whom they are affiliated. Should brokers own title companies, they could not demand that agents use the affiliated title company, nor could they pay a fee or commission for the referral of title business. Under RESPA, REALTORS must disclose any ownership interest in an affiliated business, the prices for any affiliated service, and the fact that a customer is not required to use the affiliated business to receive needed services.

Perhaps most significant in this discussion is the consideration of customer service. As independent contractors, REALTORS must provide customers good service if they wish to receive repeat business or referrals from past clients. As such, agents will not risk clients' real estate transactions for the sake of using their broker's affiliated title company. More importantly, real estate license law says that REALTORS shall have a duty and obligation to "promote the interests of the *client* with the utmost good faith, loyalty and fidelity" (K.S.A. 58-30,106 emphasis added).

One of the realities of today's real estate marketplace is the demand from consumers for "one stop shopping." They want a transaction to proceed with as little delay and difficulty as possible, while also receiving great service and reasonable prices. REALTORS want to respond to these demands, but are stymied by current law from doing so. The Kansas City Regional Association of REALTORS® calls on the legislature to allow consumers greater choice and REALTORS the ability to compete in the free market. We respectfully seek your support of this legislation.

House Commerce
Feb 13, 2001
Attach #5

The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

February 13, 2001

TO: House Committee on Insurance

FROM: Kathleen Taylor Olsen, Kansas Bankers Association

RE: HB 2209: Title Insurance Disclosures

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today to express some concerns we have with portions of HB 2209 which requires certain disclosures and prohibits certain practices as it relates to title insurance.

As many of you are aware, while banks have had limited insurance authority for some years, banks have been effectively kept out of the title insurance business because of Kansas' controlled business law. KSA 40-2404(14)(f) makes it illegal for a title insurance agent to receive in excess of 20% of its operating revenue from customers referred to the agent by a producer of title business that has a financial interest in the title insurance agent. This prohibition does not apply for transactions involving real estate located in a county with a population of 10,000 or less.

With the passage of the Gramm-Leach-Bliley Act in 1999, and the issuance of the opinion by the Kansas Insurance Department from Kathy Greenlee, General Counsel, dated February 1, 2001, banks will be able to participate in the title insurance business not directly, but through a financial subsidiary of the bank.

In Ms. Greenlee's opinion, concern is expressed in the conclusion that as we enter this new world of inter-mingled financial services, it is important that there is in place, meaningful disclosure and anti-tying protections. We could not agree more. It is very important to the future success of the financial service industry that the consumer be adequately informed and protected from coercion.

Our concerns with this bill lie in the fact that we believe that the consumer is currently adequately protected when he or she walks into a bank to purchase an insurance product – and will continue to be adequately protected if the insurance product purchased is title insurance. Many of the concerns addressed in this bill have already been addressed in banking rules and regulations which are currently being enforced by state and federal banking regulatory agencies.

The following is a brief summary of provisions providing protection to those consumers who purchase insurance products from a bank:

~ **Anti-tying provisions**. Tying the availability of credit from a bank to the purchase of insurance offered by the bank is illegal by federal law (12 USC 1972). The law prohibits a bank from requiring a customer to obtain credit, property or services as a prerequisite to obtaining any other credit, property or services. Banking regulators must enforce this law and they do so through regular bank examinations.

House Comm on Ins
February 13, 2001
ATTACH # 6

800 SW Jackson Suite 1500 • Topeka, Kansas 66612-1265 • (785) 232-3444 FAX (785) 232-3484
email kbaoffice@ink.org

~ **Disclosures**. Both state and federal banking agencies have focused on the issue of making certain customers understand that their decision to buy insurance products sold within or around bank premises is independent of the need for bank services.

In 1996, the Office of the Comptroller of the Currency (OCC) stated in Advisory Letter 96-8 that *"...the bank should take steps necessary to make clear to its customer that the bank's decisions with respect to the loan application are independent of the customer's decision of where to obtain insurance. For example, to avoid the impression that a linkage exists between the bank's credit decision and the customer's choice of insurance seller, the customer should also be clearly and unambiguously informed that he or she need not purchase insurance from the bank, its subsidiary, an affiliate or any particular unaffiliated third party, that the insurance is available through brokers or agents other than the bank, and that the customer's choice of insurance provider will not affect the bank's credit decision or credit terms in any way. These disclosures should be provided when the bank first informs a customer that insurance required in connection with a loan is available from the bank, a subsidiary, affiliate or unaffiliated third party selling insurance on bank premises".*

These disclosures have been required to be given at least orally, and the OCC Letter goes on to state that banks should consider giving the disclosures in writing and obtaining a signed acknowledgement from the customer, at or prior to the insurance sale, indicating that the customer understands the disclosures.

As of April 1, 2001, all of the federal banking agencies will officially require banks to give these disclosures orally and in writing before the completion of any sale of an insurance product. The rule will also require written acknowledgement from the consumer that disclosures were received.

It is clear that the concerns presented by this bill are being addressed within the banking industry and are being enforced by the banking regulators. We would ask the Committee if there is really a need for two sets of disclosures to apply only when the title insurance product is purchased from a bank's financial subsidiary? We hope you will agree that the concerns of this bill are being sufficiently addressed as far as the banking industry is concerned and we respectfully request that you resist applying another set of disclosures to our industry.

In conclusion, we would offer one final thought to the Committee for consideration. The Gramm-Leach-Bliley Act (GLBA) codified a United States Supreme Court ruling that allows states to regulate insurance sales by national banks only if doing so would not prevent or significantly interfere with the national bank's exercise of its insurance powers (*Barnett Bank of Marion County, NA v. Nelson* (517 US 25 (1996)). Specifically, Section 104(d)(2) of the GLBA states:

> In accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County NA v. Nelson* , 517 US 25 (1996), no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity.

In the past, the OCC has interpreted the *Barnett* decision to mean that a state law generally would not be enforceable against a national bank if the law frustrates, hampers, impairs or interferes with the ability of a national bank to exercise its insurance authority under federal law (OCC Advisory Letter 96-8, dated October 8, 1996). Applying a dual set of disclosures may prompt a challenge by the OCC as imposing a law that would significantly interfere with a national bank's ability to effectively compete in the title insurance business.

Maintaining a competitive balance between the state-chartered and national-chartered banks of this state is a constant concern. If such a challenge were launched by the OCC and they were successful on behalf of national banks, we would certainly have put state-chartered banks at a competitive disadvantage.

There is a point of saturation when promoting effective disclosure to consumers. Again, we encourage the Committee to consider that adequate disclosures are already being given by the banking industry and to resist requiring another level of similar disclosures.

Joint Release

Office of the Comptroller of the Currency
Board of Governors of the Federal Reserve System
Federal Deposit Insurance Corporation
Office of Thrift Supervision

FOR IMMEDIATE RELEASE

December 4, 2000

AGENCIES ADOPT CONSUMER PROTECTION RULES FOR INSURANCE

The federal bank and thrift regulatory agencies today announced final consumer protection rules for the sale of insurance products by depository institutions. The final rule published in today's *Federal Register* implements section 305 of the Gramm-Leach-Bliley Act. As required by the statute, the agencies consulted with the National Association of Insurance Commissioners (NAIC).

The rule is effective on April 1, 2001.

The Act directs the agencies to publish rules that apply to retail sales practices, solicitations, advertising or offers of insurance.

The final rule applies to any depository institution or any person selling, soliciting, advertising, or offering insurance products or annuities to a consumer at an office of the institution or on behalf of the institution. The following disclosures are required, except to the extent the disclosure would not be accurate:

(1) The insurance product or annuity is not a deposit or other obligation of, or guaranteed by, the depository institution or its affiliate;

(2) The insurance product or annuity is not insured by the Federal Deposit Insurance Corporation or any other agency of the United States, the depository institution or its affiliate;

(3) In the case of an insurance product or annuity that involves an investment risk, there is investment risk associated with the product, including the possible loss of value; and

(4) The depository institution may not condition an extension of credit on the consumer's purchase of an insurance product or annuity from the depository institution or from any of its affiliates, or on the consumer's agreement not to obtain, or a prohibition on the consumer from obtaining, an insurance product or annuity from an unaffiliated entity.

These disclosures must be made orally and in writing before the completion of the sale of an insurance product or annuity or, in the case of paragraph (4) above, at the time the consumer applies for an extension of credit. The disclosures may be made electronically if the consumer affirmatively consents provided the consumer can retain or later obtain the disclosures by

-more-

printing or storing them electronically, such as by downloading. The rule also requires written acknowledgement from the consumer that disclosures were received. Disclosures made electronically can be acknowledged electronically or in paper form by the consumer. The final rule makes additional adjustments for transactions by mail and by telephone.

The location of insurance sales and payment of referral fees is also addressed in the final rule. To the extent practicable, a depository institution must keep insurance and annuity sales activities physically segregated from the areas where retail deposits are routinely accepted from the general public. In addition, bank employees may refer a consumer who seeks to purchase an insurance product or annuity to a qualified salesperson. The referral fee may be no more than a one-time, nominal fee that does not depend on whether the referral results in a transaction.

Persons who sell insurance products or annuities must be qualified and licensed under applicable state insurance licensing standards.

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PRESENTATION TO HOUSE INSURANCE COMMITTEE

DATE: February 13, 2001

RE: House Bill 2209

FROM: Kansas Land Title Association
Roy E. Worthington, Legislative Chairman

THE KANSAS LAND TITLE ASSOCIATION **OPPOSES HOUSE BILL 2209 AS INTRODUCED** FOR THE FOLLOWING REASONS:

FUNDAMENTAL ISSUE: DOES OWNERSHIP OF TITLE COMPANIES BY BANKS, REAL ESTATE BROKERS, AND OTHER PRODUCERS OF TITLE BUSINESS CREATE PUBLIC POLICY CONCERNS THAT NECESSITATE STATE REGULATION BEYOND THAT PROVIDED BY FEDERAL LAW?

1. The current law, K.S.A. 40-2404 (14) (e) and (f), was passed in 1989 and its provisions are derived from Model Title Code approved by the National Association of Insurance Commissioners. The current law is the result of a 1988 study group formed by the Kansas Department of Insurance to study a significant problem involving controlled business title insurance companies existing at the time, which were detrimental to the healthy functioning of competition in the title insurance industry.

2. The current law is an extension of the federal Real Estate Settlement Procedures Act passed in 1974 to help eliminate abuses in the real estate settlement services industry - specifically prohibiting the payment or receipt of fees, kickbacks, rebates or any thing of value for the referral of business.

3. Current law - does not prevent anyone from entering the title business - but if entered, must compete for "public business." Current law upheld by the legislature in 1991, 1995, 1996 and 1998.

4. In 1991 the **law was upheld by the Kansas Supreme Court -** court indicated that "purpose of 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 the law is to stimulate competition by decreasing vertical integration between producers of title business and title insurers."**

5. The Gramm-Leach-Bliley Act, a federal law permitting banks to

House Common Ins.
February 13, 2001
Attachment # 7

engage in the sale of title insurance, provides that states may regulate banks in the sale of title insurance but may not have a law which "prevents or significantly interferes with" a bank's ability to sell insurance. However, the parameters of what constitutes "prevention or significant interference" are far from clear and must be resolved through litigation.

There is presently an Ohio case on appeal to the 6th Circuit Court of Appeals which involves banks suing for preemption of a controlled business law and that decision should help clarify what is "significant interference." Some authorities believe that a state law must incapacitate an entity's ability to sell insurance to be preempted.

Given the public policy issues surrounding the regulation of title insurance, at the very least the legislature and the Department of Insurance should wait on the appellate decision before ruling on the present law.

It is very clear that since preemption under Gramm-Leach Bliley applies only to banks, that a state may continue to regulate non-bank entities.

Further, the Real Estate Settlement Procedures Act (RESPA) is still effective and permits states to be more restrictive in the regulation of title insurance and real estate settlement services than required by federal law.

Certainly an argument can be made that a state law having a restriction on the amount of controlled business an affiliated title insurance company can obtain would not prevent or significantly interfere with the company's ability to conduct business.

THE KANSAS LAND TITLE ASSOCIATION FIRMLY BELIEVES THAT REGULATION IS NECESSARY WHEN A CONFIDENTIAL RELATIONSHIP EXISTS BETWEEN TWO PARTIES AND IN THAT RELATIONSHIP ONE OF THE PARTIES HAS THE ABILITY TO REFER THE OTHER PARTY TO PURCHASE A PRODUCT OR SERVICES FROM A COMPANY IN WHICH THE REFERRING PARTY HAS A FINANCIAL INTEREST AND STANDS TO GAIN A FINANCIAL RETURN AS THE-RESULT OF THE REFERRAL.

AND THE ONLY WAY TO KEEP THE TITLE INSURANCE INDUSTRY COMPETITIVE AND CONSUMER FRIENDLY IS TO HAVE A RESTRICTION ON THE AMOUNT OF CONTROLLED BUSINESS AN AFFILIATED BUSINESS TITLE INSURANCE COMPANY CAN OBTAIN, THEREBY REQUIRING THAT ALL TITLE INSURANCE COMPANIES COMPETE FOR PUBLIC BUSINESS.

THE NEED FOR SUCH REGULATION IS TWO FOLD:

Consumer Issues:

1. the consumer does not understand that title insurance can be shopped around for the best price and service, like property insurance, life insurance and the purchases of other consumer goods;

2. that the placement of title insurance services is usually made not by the consumer but by a "producer of title business", such as a real estate agent, who is in a "fiduciary relationship" with the consumer and to whom the consumer looks for disinterested advice; duties of a realtor under existing license law: "to promote the interests of the client with the utmost good faith, loyalty and fidelity." **If realtor has a financial incentive to direct his client's title business to his broker's title company, is there a conflict of interest?**

3. The sale of title insurance by affiliated business companies is recognized in Kansas as potentially involving methods of unfair competition or unfair or deceptive acts or practices.

4. The 1989 minutes of the Kansas Senate Financial Institutions and Insurance Committee reveal express statements by legislators - "problem with controlled business is that it is anti-competitive - the producers of title business try to steer customers to the title company they own and they have no incentive to look out for the consumer."

5. Controlled business in the title insurance industry is not new. It has appeared in other states and in each case has been met with varying degrees of state regulation. The United States Department of Justice in its 1977 report entitled The Pricing and Marketing of Insurance indicated the following: "To sum up the major evils of controlled title companies, where a real estate settlement producer is able to direct the purchaser of title insurance to a particular title company and at the same time that producer owns the title company, the purchaser is likely to end up (1) paying unreasonably high premiums, (2) accepting unusually poor service, or (3) accepting faulty title examinations and policies from the controlled title company."

6. A 1981 study performed for the Department of Housing and Urban Development by Peat, Marwick, Mitchell & Company, stated the following: " … a fundamental characteristic, generally referred to as **reverse competition,** serves to create a market in which traditional economic principles of a competitive market do not apply. **Since the consumer has no significant role in the**

selection process, there is little incentive to keep prices low or otherwise be concerned about the consumer ...."

Competition issues:

1. The proponents of the bill indicate that the present law restricts competition and free enterprise.

- lots of competition now between independent title companies - 18 companies in Johnson Co. - 6 companies in Leavenworth Co. - 13 in Wyandotte - 7 companies in Sedgwick Co.

- according to latest Kansas Land Title Association directory, 50 counties have more than 1 title company

- all are independent and compete against one another based on price and service - realtors can select the company offering the best price and service for the client.

- proponents indicate that nearly one-half of Kansas counties have only 1 title company; in fact there are 62 COUNTIES UNDER 10,000 POPULATION which are already exempted from the law.

2. In effect, the purpose of the present law is to encourage controlled business title companies to compete for "public business" and not to just service "captured consumers."

3. Competitive prices and service for the consumer can only be forged in a competitive marketplace - **controlled business title companies, regardless of how many, will not compete with one another unless they are forced to seek out business beyond referrals.**

4. If controlled business title companies only service "captured consumers" and are not competing with other title companies for business, then the consumer will be subject to non-competitive prices.

MINNESOTA HAS NO REGULATIONS ON CONTROLLED BUSINESS IN TITLE INS. INDUSTRY.

KANSAS LAND TITLE ASSOCIATION HAS SPOKEN WITH REPRESENTATIVES OF OLD REPUBLIC NATIONAL TITLE INS. CO. AND FIRST AMERICAN TITLE INSURANCE IN MINNEAPOLIS - 2 LARGE REALTORS (BURNET AND EDINA REALTY - BOTH OWN TITLE COMPANIES AND HAVE LARGE SHARE OF REAL ESTATE MARKET IN MINNEAPOLIS AREA - ALSO OTHER CONTROLLED BUSINESS COMPANIES AFFILIATED WITH OTHER BROKERS, LENDERS, ETC.

VIEW IS THAT PRICES HAVE ACCELERATED IN THE MARKET PLACE SINCE CONTROLLED BUSINESS TOOK HOLD AND THAT COMPETITION BASED ON SERVICE HAS BEEN ELIMINATED. INDEPENDENT TITLE COMPANIES ARE EXCLUDED FROM COMPETING FOR THE BUSINESS!

A FEDERAL CLASS ACTION LAWSUIT HAS BEEN FILED BY 2 ST. PAUL MINNESOTA RESIDENTS IN MINNESOTA **ALLEGING THAT CONTROLLED BUSINESS TITLE COMPANIES OFFER FEES THAT ARE NOT THE LOWEST IN THE MARKET AND THAT REAL ESTATE PROFESSIONALS ARE BREACHING FIDUCIARY DUTIES TO THEIR CLIENTS.** ANOTHER ALLEGATION OF THE SUIT IS THAT THE FIRMS VIOLATE FEDERAL RULES REGARDING KICKBACKS AND MINNESOTA LAWS REGARDING DIRECTING OF BUSINESS, INTERFERENCE WITH CONTRACTUAL RELATIONS BETWEEN REALTORS AND CLIENTS, UNFAIR AND DECEPTIVE TRADE PRACTICES AND UNJUST ENRICHMENT.

THE IMPORTANT CONCEPT TO UNDERSTAND IS THAT CONTROLLED BUSINESS COMPANIES DO NOT COMPETE WITH ONE ANOTHER,-THEREFORE THE NUMBER OF COMPANIES DOES NOT EQUATE TO COMPETITION.

5. Since producers of title business can only receive a return on investment, they will need to affiliate themselves with existing title companies - form cartels in larger markets (i.e. several large brokers "buy into" an existing title company - title company becomes a controlled business title company and is guaranteed the business of the investing brokers - title company wants to make as much money as before - brokers want a return on investment - prices go up - consumer pays increased prices.

6. At least 26 other states have controlled business insurance legislation of various forms. Some states, such as Oregon prohibit lenders from acting as title agents when the lender is the lienholder due to conflict of interest issues. All at least recognize the potential problem of a controlled marketplace in various forms of insurance. For instance, California's law requires that any applicant for title insurance indicate the applicant's intent to actively compete in the marketplace for title insurance in each county in which the applicant seeks to or does conduct business. The failure to do so will constitute grounds for denial of the license. Further, the company must demonstrate that its business conduct will not involve reliance for more than 50 percent of its closed title orders from controlled business sources.

7. Disclosures alone do not protect the consumer, because consumers generally purchase title insurance only in connection with a real estate transaction and since title related charges are a small portion of the costs involved, consumers do not typically have the knowledge, time, or incentive to become effective

shoppers for title insurance. Rather, they tend to rely on the recommendations or referrals of those real estate professionals in the transaction. With all the forms required to be signed by a seller and buyer of real estate, another disclosure form will be largely meaningless to the parties involved.

The existing controlled business has functioned very well for over a decade and has helped promote a very competitive and consumer friendly title insurance industry.

The Kansas Land Title Insurance requests that you defeat House Bill 2209.

Respectfully submitted by,

Roy H. Worthington
Legislative Chairman
Kansas Land Title Association