

MINUTES OF THE SENATE COMMERCE COMMITTEE.

The meeting was called to order by Chairperson Karin Brownlee at 8:30 a.m. on February 7, 2003 in Room 123-S of the Capitol.

All members were present except: Senator Brungardt, absent
 Senator Steineger, absent
 Senator Wagle, absent

Committee staff present: April Holman, Legislative Research
 Norman Furse, Revisor of Statutes
 Mitch Rice, Revisor of Statutes
 Jodie Anspaugh, Secretary

Conferees appearing before the committee: Sandy Braden, TIAK
 Allie Devine, Kansas Livestock Association
 Peter Obetz, Kansas Trial Lawyers Association

Others attending: See attached list.

Chairperson Brownlee asked Senator Jordan to chair the meeting, as he is especially interested in tourism issues. Chairperson Jordan welcomed Sandy Braden on behalf of the Travel Industry Association of Kansas. Ms. Braden testified as a proponent to SB 134, because it would limit liability of people who allow the public on their land. (Attachment 1) The Travel Industry Association of America predicts that leisure travel will increase, while business travel will decrease. Many of these travelers are increasingly interested in highway travel, and in visiting small towns and rural areas. Ecotourism allows farmers and ranchers to earn higher profits by replacing and supplementing traditional farm operations with innovative, sustainable on-farm or on-ranch ventures. Ms. Braden referred to the written testimony of Marci Penner, Director of the Kansas Sampler Foundation. (Attachment 2) Ms. Penner is also a proponent of SB 134. She gave many examples of tourist areas in Kansas that are negatively impacted by liability concerns.

Chairperson Jordan welcomed Allie Devine from the Kansas Livestock Association to the committee. Ms. Devine is a proponent of SB 134, but believes that it may be unnecessary, and that the current law already protects farmers. (Attachment 3) She is opposed to any amendments to the bill. Ms. Devine answered questions about her testimony. She explained that farmers are not concerned because they believe that the current law makes them liable, but they are concerned because the insurance companies will not give them a clear answer as to what is covered.

Chairperson Jordan welcomed Peter Obetz from the Kansas Trial Lawyers Association. Mr. Obetz testified in opposition to SB 134. He stressed that he is not opposed to agritourism, but he cannot support this bill and the existing law is sufficient. (Attachment 4) KTLA opposes SB 134 as written because it expands immunity to persons who engage in for-profit horseback riding and other recreational "farming and ranching activities" and who, through their negligence may injure third persons and children. Mr. Obetz answered questions about the issue of negligence.

The meeting was adjourned at 9:25 a.m.

The next meeting is scheduled for February 11, 2003 in room 123-S at 8:30 a.m.

SENATE COMMERCE COMMITTEE

GUEST LIST

DATE: Friday, Feb. 7, 2003

NAME	REPRESENTING
<i>Ally Winger</i>	<i>K. Livestock Assoc.</i>
<i>Sandy Braden</i>	<i>TIAK</i>
<i>Kal Anne Davis</i>	<i>KDOCH</i>
<i>Kim Qualls</i>	<i>KDOCH</i>
<i>Fon Smith</i>	<i>KDOCH</i>
<i>Megan L. Chalfant</i>	<i>Burgess Associates</i>
<i>Pete King</i>	<i>KTLA</i>
<i>Tom Humphreys</i>	<i>KTLA</i>
<i>Barbara J. Conrad</i>	<i>KTLA</i>

**Testimony of Sandy Braden
Gaches, Braden, Barbee and Associates**

On behalf of the Travel Industry Association of Kansas (TIAK)

**Regarding Senate Bill 134
Regarding Agritourism and Ecotourism**

**Submitted to the Senate Commerce Committee
Friday, February 7, 2003**

Senate Commerce Committee

2-7-03
Attachment 1-1

**Testimony of Sandy Braden
Gaches, Braden, Barbee and Associates
On Behalf of the Travel Industry Association of Kansas
In Support of SB134
Friday, February 7, 2003**

Thank you, Senator Brownlee and Committee members, for this opportunity to appear before you in support of SB134. I am Sandy Braden with Gaches, Braden, Barbee and Associates, testifying on behalf of the Travel Industry Association of Kansas (TIAK).

TIAK is an organization formed in 1982 with the purpose of speaking with one voice for the travel industry in Kansas, promoting and supporting all components of the travel industry and travel development field.

TIAK is made up of 120 plus members representing Convention and Visitor's Bureau's, Chamber of Commerce's; Economic Development organizations, attractions, museums, lodging, print advertising media, alliances, bed and breakfast owners and others involved in the tourism industry.

The Travel Industry Association of America (TIA) is predicting that leisure travel will continue to increase, while business travel will decrease. Through the third quarter of 2002, compared to the same time frame of 2001, total leisure travel volume increased 1.9%. And many of the leisure travelers are increasingly interested in highway travel, as well as a strong interest by both domestic and international travelers in outdoor activities, history and culture, as well as visiting small towns and rural areas.

The U.S. Department of Agriculture's (USDA) Natural Resources Conservations Service manages an alternative enterprises program that defines agritourism as "inviting the public onto your farm or ranch" and "a set of activities that occur when people link travel with the products, services and experiences of agriculture.

The U.S. Department of Agriculture's (USDA) National Survey on resource and the environment preliminary findings of agriculture questions indicated, "farm visits" were high in "reasons" for a trip. The reasons included to watch/participate in farm activities; better appreciate where food comes from; pet a farm animal; see orchards, vines, woodland, grazing animals and rural areas in general.

This, along with the ecotourism trend of sustaining or enhancing the geographical character of the place being visited, including bird watching in their natural habitat, are alternative enterprises and agritoursim allow farmers and ranchers to earn

higher profits by replacing and supplementing traditional farm operations with innovative, sustainable on-farm or on-ranch ventures.

One of the difficulties that arise when farmers and ranchers develop tourism opportunities is the issue of liability. Marci Penner, Director of the Kansas Sampler Foundation, has provided written testimony that identifies many Kansas examples of how the issue of liability has hindered the rural community in its effort to implement rural tourism opportunities.

SB134 would expand and define the agritourism and ecotourism opportunities in the state by limiting their liability towards persons entering their land for tourism opportunities described earlier in this testimony.

And the Travel Industry Association of Kansas is supportive of any efforts that this Committee develops to assist in promotion and recognition of agritourism and ecotourism in Kansas, and look forward to working with the Committee in any further discussions of this topic.

Thank you.

**Testimony of Marci Penner
Director, Kansas Sampler Foundation**

**Regarding Senate Bill 134
Relating to Agritourism and Ecotourism**

**Submitted to the Senate Commerce Committee
Friday, February 7, 2003**

Testimony on SB134 before the Senate Commerce Committee
By Marci Penner, Director of the Kansas Sampler Foundation

Chairman Brownlee, thank you for this opportunity to send testimony on behalf of rural communities across the state.

My name is Marci Penner from Inman, Kansas. I am the director of the Kansas Sampler Foundation; a non-profit organization dedicated to helping preserve and sustain rural culture.

Liability is prohibiting two things in rural Kansas: 1) economic development and 2) the ability to preserve and educate others about our rural culture.

Rural communities and those who live in the country are struggling to sustain their lifestyle. To keep our communities alive we MUST make it possible for people to use their land to make an income in ways other than farming and ranching. We need to be an innovative state that gives rural people an opportunity to stay on the land by nurturing their entrepreneurial spirit. There are some great ideas and plans out there but the cost of liability premiums is making it almost impossible to carry out the plans.

Here are the main concerns:

1. Businesses have shut down because of high premiums
2. Events have been cancelled or not even held because of high premiums
3. Events have had to eliminate certain activities because of liability premiums
4. Many events or businesses don't purchase liability insurance because of the high cost and then hope for the best
5. Some events or businesses can't find even find coverage for special Situations even if they were willing to pay high premiums

Here are some examples:

CLOVER CLIFF RANCH, Elmdale. At one time, the Donahue's had a half million dollars worth of investment in four buildings on a small percentage of their acreage in Chase County. The buildings were used as bed-and-breakfasts. They had liability insurance but NO fire protection. Mr. Donahue's fear of losing his land through a liability lawsuit was so great that he paid dearly for liability premiums but was not able to afford other insurances, like fire protection. He may lose his entire investment to fire but feels he has no choice because of the high premiums. He says he just closes his eyes and hopes it will all be OK.

CASSODAY COUNTRY INN & RANCH, Cassoday. Carl invited guests to live the life of a Flint Hills cowboy with him. Several years ago his liability insurance was \$1,800. He couldn't make a profit when he had to pay that much for liability so he dropped the policy and just hoped nothing would happen.

SANTA FE TRAIL CLUB: Landowners that have Santa Fe Trail ruts on their property statewide are extremely concerned about letting people on their land because of liability concerns.

ELK FALLS. This is a town of 121 struggling to stay alive. Tourism has been their best means of survival. In 1994, the Friends of Elk Falls (a non-profit group) paid \$157 for liability coverage for group tours. Circumstances forced one member of the group, Barry McGuire, to turn the tourism business into a for-profit venture. The liability premium increased to \$1,062 because he became a for-profit. Also, the liability policy only covered group tours and did not cover if a family wanted to stop by to see one of the attractions. Barry has since moved to California because he couldn't make it in Elk Falls. The town lost one of their key assets in Barry.

OXFORD MILL RESTAURANT, Oxford. Several years ago, the Oxford Mill hosted a 3-day arts-and-crafts festival on their property on the river. The liability premium for the show was \$2,000. The owner just closed his eyes the rest of the year and hoped that no one would sue. He has a nature walk along the river and people can tour his generator room.

CASTLE ROCK, Gove County. Many of you have probably seen this dramatic product of Smoky Hill chalk formation erosion. Until the landowner died the public had access to Castle Rock and the nearby badlands. However, the heirs are fearful of losing the land through liability lawsuits and decided to put up a gate to Castle Rock. They have relented for now, however, and there is access but they are still afraid of that one person who could sue and possibly take their land.

KANSAS COWBOY CAMP-OUTS, Red Hills. A Belvidere couple was going to offer an authentic Kansas cowboy experience in the Red Hills. They had landowners willing to allow usage of land -- except for one fear, liability. They were afraid of losing their land in a lawsuit. Because of these fears this business went under. This was a business someone wanted to do because they loved their cowboy heritage. They wanted others to enjoy an authentic outdoor cowboy experience.

PRETTY PRAIRIE RODEO. Several years ago the rodeo had trouble just finding someone to provide them coverage this last year. They didn't find a carrier until two weeks before the event. They had to eliminate their calf scramble and mutton bustin'. They have even more trouble finding coverage for their local festivals. They've had to eliminate mud volleyball. People wouldn't volunteer to be on the Heritage Day committee because they were afraid of being personally liable as members of the planning committee. The liability policy for the rodeo is higher because the policy covers board members, too. Connie has talked to farmers about doing farm tours but she can't even get them to consider it because of liability.

VONADA'S STONE QUARRY, Sylvan Grove. This is a family owned operation in North Central Kansas. The Vonada's couldn't find any one insurance carrier to cover all they do. Some wouldn't provide coverage because Donna taught swimming lessons in an indoor pool. Some wouldn't provide coverage because of the stone quarry tours and stone cutting business. Insurance carriers no longer considered their rural operation a farm. They had to stop doing guided tours of the limestone quarry because of liability. Duane Vonada has a desire to share post rock country with anyone. He could provide such a beautiful opportunity for people to learn about the limestone layers, about the stone cutting craft, about the Smoky Hill region, about the history of his area, about the people of his region but liability has put a wrench into his ability to offer these things.

KANSAS SAMPLER CENTER on the Penner Farm, Inman. For eight years we held a festival on our farm that provided Kansas communities a chance to educate the Kansas public about why they should travel Kansas. On the final year, over 130 communities came to promote and 7,500 people came to see what they had to offer. My Dad goes into a panic a month before the festival so worried about that person out there who could sue him to the point of losing his farm that his great grandfather homesteaded. We have a policy but we are just one of many people statewide who live with the fear through the festival. Our festival parking lot is the alfalfa field. We would love to transport people to the farm with a safe customized tram but the rider to the liability policy was so completely prohibitive that we could not offer this service. If we were able to offer that service it would bring more elderly people to this educational experience.

We wanted to use our farm to educate Kansans about Kansas. The thing that is keeping us from developing certain programs is liability. We wanted to offer hayrack rides along our tree-lined drainage ditch, through a cornfield and to the adjoining McPherson Valley Wetlands. At this point we can't do this because of prohibitive premiums. We can't risk our family farm to liability yet there is so much we could offer to Kansans using our farm as a resource.

BLACKSMITH SHOP, Durham. Tom Donahue restored a blacksmith shop as a hobby. People wanted to come in and see what he had done or watch him at work. He wanted to share his place except he couldn't afford to buy liability because this is just a hobby for him. He was scared that someone would sue him and take away his dream.

TAD PIERSON, McPherson. Tad wanted to provide the public the opportunity to see Kansas's back roads in the back of a wheat truck. Insurance companies didn't know what to do with a request like this and those that did required an exceptionally high premium. This was a unique venture and would have provided an experiential way to have an authentic experience in Kansas. Tad has since left the state due to this issue.

DAVE BROWN'S WELDING SHOP, Morland. Dave is a farmer and has an oil patch welding shop. But he also created wonderful sculptures and had them in the shop. He finally stopped inviting people into the shop when he checked on liability rates, which only escalated his concerns. This attraction is no longer available in Morland.

STAFFORD COUNTY FLOUR MILL, Hudson. Al offers tours of the mill and shows where and how they package flour. To my knowledge, this is the only mill in the state that offers this tour. He doesn't have a liability policy for this. He says he's not going to let fear of being sued keep him from sharing something he loves and wants others to know about. Other mills would like to offer tours but are completely fearful of the liability consequences.

FALL RIVER CANOE, Eureka. The radiator shop in downtown Eureka provided canoes for those who wanted to 'run' the river. They didn't carry a liability policy and were always worried about what could happen.

THE BREAKS, Cheyenne County. Local tourism advocates would love to have a rim drive of the Breaks but landowners are hostile about it, primarily because of potential lawsuits. What a shame. This is one of the most beautiful sights in Kansas.

LCL BUFFALO RANCH, Clifton. Lester Lawrence says as long as he doesn't charge people to see his buffalo his general policy for one million dollars is sufficient.

HISTORICAL COMPLEX, western Kansas. A museum director and her board have to consider whether to eliminate special events because of the high premiums. Anything that involves movement: machinery, animals, or transportation, either requires an unreasonably high premium. They are faced with either not having the event or closing their eyes to the risk and just doing it.

People know they need liability insurance and are willing to pay but it must be within a reasonable range. I would like to send my strongest support for Bill No. 134. I've long said that money isn't always the answer. Sometime it's just a matter of removing the barriers and giving us the chance to work and earn our way. Lots of people have very intriguing ideas about how to share their part of Kansas with visitors and to also educate Kansans about their state. We just need some insurmountable barriers removed. I wish I could be there to look each of you in the eye and thank you for presenting this bill. Passing this bill would be an effective and innovative solution for improving the economy of Kansas.

Thank you.



Since 1894

Testimony

To: Senate Commerce Committee

From: Allie Devine, Vice President and General Counsel

Subject: Senate Bill 134

Good morning. My name is Allie Devine. I am representing the Kansas Livestock Association (KLA). KLA is a trade organization that represents all segments of the livestock industry and has over 6,000 members.

We appreciate the opportunity to comment on SB 134. KLA has been supportive of efforts by landowners to capture more income through recreational use of land. It appears that this bill is designed to broaden the activities that receive protection from liability. We support efforts to broaden liability protection.

However, we are concerned that this bill may confuse the courts by adding another activity. It is our understanding that the original recreational use statute was designed to give broad protections by defining "recreational purpose" to include the listed items and further stating that the list is not limited by using the term "but not limited to".

We welcome the opportunity this hearing provides to clarify exactly what the insurance industry believes the affect of this statute is. A similar bill was introduced last year and we were unable to determine who or what entity felt that the current law did not fully protect these activities. We have been unable to pinpoint whether this statute offers real protection and if not why not. Our review of the case law indicates that the courts have upheld the statute and it has been used as a successful defense to liability. Again, if we are misled, we hope this hearing will provide an opportunity to clarify the breath of protection for landowners.

Finally, we want to oppose amendments that would lessen the protections now offered. Again, we support broad protection and do not want to see those protections lessened or removed.

Again, thank you for the opportunity to outline our support for the intentions of the bill and raise our concerns.

Senate Commerce Committee

2-7-03

Attachment 3



KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Members of the Senate Commerce Committee

FROM: Peter Obetz, Legislative Vice President-Elect
Kansas Trial Lawyers Association

RE: 2003 SB 134

DATE: February 7, 2003

Chairman Brownlee and members of the Senate Commerce Committee: thank you for the opportunity to submit comments on 2003 SB 134. I am Peter Obetz, a Leawood attorney and I appear before you today on behalf of the Kansas Trial Lawyers Association. KTLA is a statewide, nonprofit organization of lawyers who represent consumers and advocate for the safety of families and the preservation of the civil justice system. We appreciate the opportunity to offer comments regarding SB 134.

KTLA opposed the concept of expanding immunity under the Recreational Use Statute (K.S.A. 58-3201 and K.S.A. 59-3202) when it was proposed during the 2002 session (SB 607). We worked with members of the Senate Agricultural Committee to draft an amendment that would clarify the immunity extending to land owners under the Kansas Recreational Use Statute. The Senate Agriculture Committee approved the amending language and voted to recommend the bill favorable for passage. The amending language, which also amends K.S.A. 58-3206 is critical to preserve the common law tradition of land owner immunity for invitees for recreational purposes, without extending that immunity to value-added services. KTLA again recommends that amendment to SB 134.

KTLA opposes SB 134 as written because it expands immunity to persons who engage in for-profit horseback riding and other recreational "farming and ranching activities" and who, through their negligence may injure third persons and children. While KTLA does not oppose encouraging "the development of agritourism an ecotourism opportunities" in Kansas we do oppose expansion of these activities at the cost of allowing for-profit recreational enterprises to operate negligently without regard to the resulting injury to Kansas citizens, both adult and children.

KTLA specifically opposes inclusion of new Section 2 (C), which provides that "horseback riding . . . and recreational farming and ranching activities" be added to the recreational use immunity.

While appearing to be a slight modification in language it significantly modifies the intent of the immunity granted in 58-3201 and 3202 in both its 1965 enactment and 1988 modifications.

Terry Humphrey, Executive Director

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Senate Commerce Committee

2-7-03
Attachment 4-1

The Council of State Government “model acts”¹ on which the Kansas Act was based and other similar state recreational use statutes provide that “owners, those persons with a fee interest in recreational and agri-based land,” will have immunity for the “natural state” of the land. The statutes generally apply to owners and grant them immunity for injuries while engaging in activities on the property.

Most courts in determining the type of premises immunized from liability provided by recreational use statutes, have determined they are intended to only apply to non-residential, rural or semi-rural property where sports and recreation activities enumerated in the statute are conducted not to the activity itself. (i.e. The immunity does not apply to the activity.)²

The Recreational Use Statutes, (RUS's) were not intended to extend immunity to the commercial activities which are provided by landowners on that land. To the extent there is immunity it should be limited to natural condition and not extended to the activity itself.

It must be pointed out that the Kansas Supreme Court has only reviewed the application of the immunity granted in K.S.A. 58-3201, et seq. on one occasion. The case *Bingaman v. Kansas City Power & Light Company*, 1 F3d 976 (1993). The case involved KCP&L being immune for their intake manifold causing an undertow which killed Mr. Bingaman. There have been no reported cases of farmers being protected by the Kansas Recreational Use Statute.

The addition of horseback riding and recreational ranching activities changes the nature of this immunity. Innocent third parties will not be protected when vendors provide faulty equipment.

The addition of the activities listed in SB 134 are martially different than “hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and historical archeological, scenic or scientific sights. The previously listed activities are all consistent in that they are traditional outdoor activities which do not contemplate the owner of the land supplying anything in addition to providing the location of the activity.

By adding the listed activities and granting immunity to negligent service providers who may “have a financial interest” in the land, the state would excuse careless behavior of operators and sacrifice the safety of all Kansans while leaving injured people who are innocent of fault to deal with their injuries and the financial burdens on their own. This, of course, also comes at the possible expense of Kansas taxpayers. If such immunity is granted the SB 134 puts Kansans at risk while immunizing those who profit by providing inadequate safety equipment or poorly trained staff.

The modifications to SB 134 significantly change the legislative intent of the original recreational use statute in which the immunity flows from the natural state of the land which is

¹ *Scheck v. Houndaille Construction Materials Inc.*, 121 N.J. super 335, 297 A2D17; see Sec. 24 Am. Jur. Premises Liability (Kansas Recreational Use Act).

² *Ratcliffe v. Mandeville*, 502 SO.2d 566; see also *Odor v. Chase Manhattan Bank*, 138 N.J. super, 464, 351 AD2d 389 (recreational use statue applied to frozen pond on land owned by an estate for which defendant/bank was trustee came within the term premises to which the state recreational use statute applied.

an appropriate and in fact codification of the common law. Most commentators acknowledge that the recreational use statute has been said to codify tort principles that are universally recognized in common law jurisdictions with regard to duties owed by owners and occupiers of property to those who come upon such property merely if licensees to use it for outdoor recreational purposes.³ In essence the statutory scheme treats all persons entering for recreational purposes as “trespassers” in that the landowner is liable only for malicious and willful acts committed against such persons. The introduction of commercial activities is a significant departure from that original purpose and existing common law. SB 134’s modification to existing law complicates the issue of whether the injury was caused by a condition of the land, or caused by the horses or other equipment provided by vendors. This is a significant departure from the existing public policy and tort law in the State of Kansas and therefore opposed by the Kansas Trial Lawyers Association.

We encourage you to oppose the bill as written and to maintain the integrity of the purpose of enactment of the original Kansas Recreational Use Statute in 1965 protecting farmers from hunters and fishermen who they opened their land to for the recreational purposes. Tampering with this, expanding it to commercial enterprises, would cause the courts to re-examine the recreational use statute expansion into commercial enterprises and away from the land’s natural use. We encourage you to adopt the attached amendment. The amending language is critical to preserving the common law tradition of land owner immunity for invitees for recreational purposes, without extending that immunity to value-added services.

Without Sec. 3(c) amending K.S.A. 58-3206:

- the bill extends immunity to value-added services. For example, without the amending language, if a steam engine exploded during an “Old Settlers Day” demonstration injuring or killing the viewers, the steam engine owner would be immune from responsibility; and,
- we remove the incentive to ensure safe commercial enterprises in Kansas;

If the amendment clarifying K.S.A. 58-3206 [Sec. 3 (c)] is altered or deleted, KTLA urges you to oppose the bill. Thank you for the opportunity to express our opposition to SB 134 and ask that you adopt the attached amendment.

³ *Crawford v. Consumer Power Company*, 108 MI App. 232, 310 NW 2d 343.

KTLA Proposed Amendments
2003 Senate Bill 134 regarding modifications to
Kansas Recreational Use Act. K.S.A. 58-3206

KANSAS STATUTES ANNOTATED
CHAPTER 58.--PERSONAL AND REAL PROPERTY
ARTICLE 32.--LAND AND WATER RECREATIONAL
AREAS

58-3206. Same; nonapplication of act to certain liabilities.

Nothing in this act limits in any way any liability which otherwise exists: (a) For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

(b) For injury suffered in any case where the owner of nonagricultural land charges the person or persons who enter or go on the nonagricultural land for the recreational use thereof, except that in the case of nonagricultural land leased to the state or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section.

History: L. 1965, ch. 559, § 6; L. 1988, ch. 198, § 3; July 1.

(c) for injury received on agricultural land incidental to the use of the land on which a commercial or business enterprise of any description is being carried on; except that leasing agricultural land for recreational purposes shall not be considered to be a business or commercial enterprise.