Approved: March 25, 2004
Date

MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE

The meeting was called to order by Chairman Don Dahl at 9:00 a.m. on March 16, 2004 in Room 241-N of the Capitol.

All members were present except:
Representative Rick Rehorn- absent

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Norm Furse, Revisor of Statutes
Renae Jefferies, Revisor of Statutes
June Evans, Committee Secretary

Conferees appearing before the committee: Senator Ruth Teichman
Delores Dalke, Hillsboro, Kansas
Ann Christian, Broker/Owner ERA Ann Christian Linda Conderman Real Estate, Manhattan, KS
Bill Yanek, Director of Governmental Relations
Roy Worthington, Manhattan
Tom Palace, Executive Director of the Petroleum Marketers and Convenience Store Association of Kansas

Others attending:
See Attached List.

The Chairman called the meeting to order and opened the hearing on **SB 66 - Title insurance, prohibiting certain actions.**

Staff gave a briefing on **SB 66** stating it was introduced in the 2003 Senate Financial Institutions Committee and passed the Senate last year. There would need to be some technical changes, changing the date in lines 11 and 14 to 2003. On page 8, line 15, not more than 80% replaces the 20% in the current law. Section 2 is new language. The fiscal note prepared by the Division of the Budget indicates passage of the bill will increase the number of title insurance companies the Insurance Department will have to regulate; however, the Department would absorb any cost increase resulting from the bill.

Senator Teichman, a proponent for **SB 66** stated the Senate had been working on the bill last year and a lot during the summer. Saying there had been a lot of amendments, concern and unrest would be an understatement. This summer there were negotiations to try to arrive at a bill acceptable to both sides. They have done a good job trying to get it done. Am asking the committee to listen to the conferees and the agreement made. We are pleased they have come to an agreement and ask that you consider both sides of their testimony.

Delores Dalke, testified as a proponent to **SB 66**, representing the real estate brokers from the average-size counties in Kansas as to how the current controlled business bill affects the consumers in counties of less than 10,000 residents. The current law says that if the county has less than 10,000 residents, it is OK to be a real estate broker and own an interest in a title insurance agency; however, as soon as the population goes over 10,000, then a broker cannot own a title agency. Marion County has a population of 13,300, which makes it not large enough to support two full-time title agencies. If a real estate broker could own an agency as an ancillary business, it could help bring down costs for the consumer (Attachment 1).

Ann Christian, Broker/Owner ERA Ann Christian Linda Conderman Real Estate, testified in support of **SB 66**, stating Manhattan is a community with a population of approximately 47,000 plus an additional student population of approximately 23,000. According to our National Association, for each transaction that we close, our profit is $150. It is very difficult to run a profitable real estate company in our current market.

Two years ago, there was only one title company in Manhattan. The majority of title orders for 145

Realtors in Manhattan went through this company. Then, a second title company owned by a local bank entered the market area. Immediately, the service became better, the attitudes more agreeable and the costs of title insurance and services went down. The consumer and the Realtor benefitted. Competition is good..

There is a proposal for compromise that would allow real estate agents to be a part of the title insurance business. Realtors own title companies in counties with populations less than 10,000 and it works. The Kansas Land Title Association's current President own a title company and is a licensed real estate broker and it works (Attachment 2).

Bill Yanek, Director of Governmental Relations, Kansas Association of Realtors, testified in support of **SB 66**, stating the law prevents real estate brokerages from creating and owning an affiliated title company. The 20% limitation is difficult, if not impossible to meet by requiring a controlled business title company to get 80% of its business from its competitors. Increasingly, consumers are demanding one stop shopping in real estate transactions. Affiliated business arrangements allow for one-stop shopping. Affiliated business arrangements also facilitate the bundling of services and providing of discounts to consumers.

Mr. Yanek listed the items that would be acceptable to the Kansas Association of Realtors as a compromise (Attachment 3).

Written testimony in support of **SB 66** was provided by Chris O'Day, President, Hutchinson Board of Realtors (Attachment 4).

Roy H. Worthington, Legislative Chairman, Kansas Land Title Association, testified on **SB 66,** stating he believed they had reached a compromise late last night with the Kansas Association of Realtors. Am encouraged that approval will be reached within 24 hours from management.

Staff stated there were two technical items on the bill that needed to be addressed. On Mr. Yanek's testimony pages 2 and 3 are turned around in order and the sections need to be renumbered (Attachment 5).

The Chairman stated the hearing would be suspended and would take up at a later date.

The Chairman opened the hearing on **HB 2928 - Motor fuel tax rates and prohibited acts and remedies for certain acts involving sales of motor fuel below cost.**

Thomas M. Palace, Executive Director of the Petroleum Marketers and Convenience Store Association of Kansas, a proponent to **HB 2928**, provided a balloon amendment striking through page 6 and making New Section 5 on page 6 to New Section 1. Section 6 becomes Section 2. Section 3 is repealed and Section 4 is old Section 7. (G) is added to Section 1. The statute of limitations would be the same as in **HB 2330** (Attachments 6 & 7).

Representative Pauls moved and Representative Grant seconded to request a Substitute Bill be drafted with the amendments requested. The motion carried.

Marlee Carpenter, Vice President Government Relations, The Kansas Chamber, provided testimony in opposition of **HB 2928** (Attachment 8).

The meeting adjourned at 10:00 a.m. The next meeting will be March 17, 2004.

COMMERCE AND LABOR COMMITTEE

Date March 16, 2004

NAME	AGENCY
KAREN GEHLE	KS Assn REALTORS
Chris O'Day	Plaza Astle Realty, Inc.
Delores Walke	Real Estate Center, Inc
Tom Krahl	Kansas City Title
Cal Lantis	CB LANTIS & Associates
JOHN GREEN	CB GRIFFITH & BLAIR
CV Cotsoradis	KDA
Tom Palace	PMCA OF KANSAS
BILL YANEK	Ks Assn of REALTORS
Sherry C Diel	KS Real Estate Commission
[illegible]	Senator

REAL ESTATE CENTER, INC.

BUS 620.947.2321

FAX 620.947.5616

116 N Main St.

Hillsboro, KS 67063

My name is Delores Dalke from Hillsboro, which is located in Marion County. I served as President of the Kansas Association of REALTORS® during the year 2003. Today, I am here to represent the real estate brokers from the average-size counties in Kansas as to how the current controlled business bill affects the consumers in our size county.

The current law says that if the county has less than 10,000 residents, it is OK to be a real estate broker and own an interest in a title insurance agency; however, as soon as the population goes over 10,000, then a broker cannot own a title agency.

An example of what happens is as follows: In Marion County, there is one title agency with no competition. We find that our clients are paying from 20 – 25% more for title insurance than what they would if they were purchasing it from a title agency in a county with competition. In addition, our clients do not receive credit for their previous policy, no matter when the title company issued it, for either a sale or a refinance. In addition, a closing fee for a loan is $200.00 to the title agency in comparison to $150.00 in an adjoining county that has competition.

Marion County has a population of 13,300, which makes it not large enough to support two full-time title agencies. If a real estate broker could own an agency as an ancillary business, it could help to bring down costs for the consumer.

It is ironic that I could move a few miles to Chase County or Morris County and open a title agency as well as a real estate brokerage.

Please consider the elimination of this law that costs our consumers a great deal of money. The current law is anti-consumer.

REALTOR®

Comm Labor
3-16-04
Atch #1

ERA Ann Christian Linda Conderman Real Estate

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Manhattan, KS 66502
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E-Mail: ERA@flinthills.com

Ann Christian
Broker / Owner

March 16, 2004

Testimony to the Commerce and Labor Committee

Ann Christian, Broker/Owner
ERA Ann Christian Linda Conderman Real Estate
1430 Poyntz Avenue
Manhattan, KS 66502

Dear Committee Members,

My name is Ann Christian, Broker/Owner of ERA Ann Christian Linda Conderman Real Estate in Manhattan, Kansas. Our firm consists of eleven licensed agents and four full time employees. Manhattan is in a community with a population of approximately 47,000 plus an additional student population of approximately 23,000. According to our National Association, for each transaction that we close, $150.00 is our profit. It is very difficult to run a profitable real estate company in our current market. In Manhattan, in order to offset operating costs, Broker/Owners must sell real estate and stay very productive.

Two years ago, there was only one title Company in our community. The majority of title orders for 145 Realtors in Manhattan went through this company. Then, a second title company owned by a local bank entered our market area. Immediately, the service became better, the attitudes more agreeable and the costs of title insurance and services went down. The consumer and the Realtor benefited. Competition is good.

It is time that we change the law. Consumers need more choices and the real estate brokerages need the ability to expand their businesses as the banks have done. Affiliations of real estate companies and title companies are happening all over the United States. Kansas is one of the few remaining States that restricts our industry from owning or affiliating with a title company. Affiliation will allow both the real estate broker and the title company to keep their doors open. This is an antiquated law. The opponents fear that their businesses will be adversely affected. Our industry feels that the opportunity for joining forces has merit for all.

On behalf of the small real estate business owners in Kansas, we ask that you look seriously at our lobbyist, Bill Yanek's proposal for compromise that would allow us to be a part of the title insurance business. Realtors own title companies in counties with populations less than 10,000 and it works. The Kansas Land Title Association's current President owns a title company and is a licensed real estate Broker and it works. It works in Missouri and it can work in Kansas. Please vote in favor of passage of this bill.

Sincerely,

Ann Christian

Ann Christian
Broker/Owner ERA Ann Christian Linda Conderman Real Estate

Comm+Labor
3-16-04
Atch # 2

KANSAS
Association of REALTORS®
SOLD on Service

TO: **HOUSE COMMITTEE ON COMMERCE AND LABOR**

FROM: **Bill Yanek, Director of Governmental Relations**

DATE: **March 16, 2004**

RE: **Senate Bill 66 – Repealing the Kansas Affiliated Business Law**

K.S.A. § 40-2404(14) (e) and (f), The Kansas Controlled Business Law, prohibits a title agency (in a county with a population of more than 10,000) from doing business with a consumer if that would cause the agency to derive more than 20% of its revenue from a controlled business source. Controlled business sources are entities that have an ownership interest in the agency.

Impact on REALTORS®: The law prevents real estate brokerages from creating and owning an affiliated title company. The 20% limitation is difficult, if not impossible to meet by requiring a controlled business title company to get 80% of its business from its competitors.

Impact on consumers: Increasingly, consumers are demanding one stop shopping in real estate transactions. Affiliated business arrangements allow for one-stop shopping. Affiliated business arrangements also facilitate the bundling of services and providing of discounts to consumers.

The timeline below depicts the changes to the Kansas affiliated business marketplace since the Kansas Affiliated Business Law passed in 1989.

1989 - Kansas passes its controlled business limitation.

1992 - HUD promulgates controlled business arrangement (CBA) disclosure form (these forms must be provided prior to any referral to the controlled business title agency).

1996 - Congress requires CBA form disclosure be acknowledged in writing.

1996 - HUD strengthens regulation of conditions under which controlled business arrangements are permissible.

2001 - Kansas Department of Insurance rules that federal depository institutions are not subject to the statute.

2004 - Nationally, less than 10 states still prohibit affiliated title businesses. Missouri, Nebraska, Colorado, and Oklahoma do not prohibit affiliated title businesses.

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Comm. Labor
3-16-04
Atch #3

The version of Senate Bill 66 before this committee passed the Senate by a vote of 34 to 4, with 2 senators not voting. The essence of the amended SB 66 changes the current controlled business limitation requiring 80 % of an affiliated title company's gross operating revenue to come from outside the affiliation to only 20%. The House Insurance Committee ultimately tabled SB 66 as amended.

Since the 2003 legislative session, both the KLTA and KAR have worked toward potential common ground and compromise. The Kansas Association of REALTORS® would like to publicly thank Senator Ruth Teichman and Representative Patricia Lightner for mediating several meetings between the KLTA and KAR.

Additionally, although we realize that numerous KAR and KLTA members worked behind the scenes at forging a possible compromise, there were a core group of individuals who have brought us to the brink of a compromise. KAR particularly appreciated the efforts of the 2004 KLTA President Polly Epting, Lee Taylor, and Roy Worthington.

As I testify before you today, I believe that we are on the brink of a KLTA and KAR compromise on this issue.

The following items would be accepted by KAR as a compromise SB 66:

1. The effective date of this bill would be January 1, 2005.

2. Additional disclosures will be required as set forth in 1998 House Bill 2692 (see pages 4-6).

3. A 70/30 affiliated business restriction will apply to all counties above 10,000 population.

4. The measurement of affiliation business restriction percentages will be based on closed title orders (rather than revenue) and annual reports to the Department of Insurance and underwriters would confirm compliance.

5. Penalty language: "The failure of a title insurer or title agent to comply with the requirements of this section shall be, at the discretion of the commissioner, grounds for the suspension or revocation of a license or other disciplinary action, with the commissioner able to mitigate any such disciplinary action if the title insurer or title agent is found to be in substantial compliance with competitive behavior as defined by HUD Statement of Policy 1996-2" (see pages 7-9). The commissioner shall adopt any regulations to carry out the provisions of this act."

6. KAR will agree to work in conjunction with the KLTA to remedy any ambiguity in provisions of the Kansas Real Estate License Law that could possibly be interpreted to prohibit licensed title agents from obtaining a real estate brokerage license in all counties.

7. The responsible party with regard to the real estate licensee ownership in an affiliated title company will be the supervising broker. This is the person whom the Kansas Real Estate Commission recognizes as the responsible party with regard to the real estate Brokerage business. This would preclude a joint venture from being formed at the agent level without the approval and involvement of their current real estate supervising broker.

The Kansas Association of REALTORS® believes that the time is now for the KLTA and KAR to put this issue behind us and allow our members to engage in the affiliated business marketplace. The Kansas Association of REALTORS® urges that you pass SB 66 as amended with the above compromise.

3-3

~~[As Amended by House Committee of the Whole]~~

As Amended by House Committee

Session of 1998

HOUSE BILL No. 2692

By Committee on Insurance

1-22

AN ACT relating to title insurance; requiring certain disclosures and prohibiting certain practices; amending K.S.A. 1997 Supp. 40-2404 and repealing the existing section.

~~*Be it enacted by the Legislature of the State of Kansas:*~~

New Section 1. As used in [this act], unless the context otherwise requires: sections 3 through 6, and amendments thereto

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

(b) "Financial interest" means any direct or indirect interest, legal or beneficial, where the holder thereof is or will be entitled to 1% or more of the net profits or net worth of the entity in which such interest is held. Notwithstanding the foregoing, an interest of less than 1% or any other type of interest shall constitute a "financial interest" if the primary purpose of the acquisition or retention of that interest is the financial benefit to be obtained as a consequence of that interest from the referral of title business.

(c) "Person" means any natural person, partnership, association, cooperative, corporation, trust or other legal entity.

(d) "Producer of title business" or "producer" means any person, including any officer, director or owner of 5% or more of the equity or capital or both of any person, engaged in this state in the trade, business,

~~violates the provisions of this section, or any title insurer or title agent who accepts an order for title insurance knowing that it is in violation of this section, in addition to any other action which may be taken by any regulatory authority having jurisdiction, shall be liable to the purchaser of such title insurance in an amount equal to the premium for the title insurance.~~

~~(e)~~ (d) Nothing in this act shall prohibit any producer of title business or associate of such producer from referring title business to any title insurer or title agent of such producer's or associate's choice, and, if such producer or associate of such producer has any financial interest in the title insurer, from receiving income, profits or dividends produced or realized from such financial interest, so long as:

(1) Such financial interest is disclosed to the purchaser of the title insurance in accordance with section 2;[4]

(2) the payment of income, profits or dividends is not in exchange for the referral of business; and

(3) the receipt of income, profits or dividends constitutes only a return on the investment of the producer or associate.

(e) Any producer of title business or associate of such producer who violates the provisions of this section, or any title insurer or title agent who accepts an order for title insurance knowing that it is in violation of this section, in addition to any other action which may be taken by the commissioner of insurance, shall be subject to a fine by the commissioner in an amount equal to five times the premium for the title insurance and, if licensed pursuant to K.S.A. 58-3034, *et seq.*, and amendments thereto, shall be deemed to have committed a prohibited act pursuant to K.S.A. 58-3602, and amendments thereto, and shall be liable to the purchaser of such title insurance in an amount equal to the premium for the title insurance.

New Sec. 3.[5] Any title insurer or title agent that is a competitor of any title insurer or title agent that, subsequent to the effective date of this act, has violated or is violating the provisions of this act, shall have a cause of action against such title insurer or title agent and, upon establishing the existence of a violation of any such provision, shall be entitled, in addition to any other damages or remedies provided by law, to such equitable or injunctive relief as the court deems proper. In any such action under this subsection, the court may award to the successful party the court costs of the action together with reasonable attorney's fees.

New Sec. 4.[6] The commissioner shall also require each title agent to provide core title services as required by the real estate settlement procedures act.

3-5

occupation or profession of:

(1) Buying or selling interests in real property;

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

(3) Acting as broker, agent, representative or attorney for a person who buys or sells any interest in real property or who lends or borrows money with such interest as security.

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

New Sec. 4 (a) No title insurer or title agent may accept any title insurance order or issue a title insurance policy to any person if it knows or has reason to believe that such person was referred to it by any producer of title business or by any associate of such producer, where the producer, the associate, or both, have a financial interest in the title insurer or title agent to which business is referred unless the producer has disclosed **in writing** to the person so referred the fact that such producer or associate has a financial interest in the title insurer or title agent, **the nature of the financial interest and a written estimate of the charge or range of charges generally made by the title insurer or agent for the title services. Such disclosure shall include language stating that the consumer is not obligated to use the title insurer or agent in which the referring producer or associate has a financial interest and shall include the names and telephone numbers of not less than three other title insurers or agents which operate in the county in which the property is located. If fewer than three insurers or agents operate in that county, the disclosure shall include all title insurers or agents operating in that county. Such written disclosure shall be signed by the person so referred and must have occurred prior to any commitment having been made to such title insurer or agent.**

~~New Sec. 3.~~ ~~(a)~~ (b) No producer of title business or associate of such producer shall require, directly or indirectly, as a condition to selling or furnishing any other person any loan or extension thereof, credit, sale, property, contract, lease or service, that such other person shall purchase title insurance of any kind through any title agent or title insurer if such producer has a financial interest in such title agent or title insurer.

(c) No title insurer or title agent may accept any title insurance order or issue a title insurance policy to any person it knows or has reason to believe that the name of the title company was preprinted in the sales contract, prior to the buyer or seller selecting that title company.

~~(b) Any producer of title business or associate of such producer who~~

3-6

SHAM AFFILIATED BUSINESS TESTS

HUD has developed three separate areas of inquiry when evaluating affiliated business arrangements to determine whether or not the company is a sham. A. HUD will examine whether the company is performing core services for which it assumes liability. B. HUD will examine the structure of the company to determine whether it has been set up as a truly independent business. C. HUD will examine the ownership interest of each of the owners to determine whether their ownership return is in proportion to their ownership interest in the company and whether each owner bears a risk of success or failure of the company.

A. Core Service Considerations

HUD's examination of core services is a two step process. HUD will determine whether the Affiliated Business performs generally all of the core services with some limited exceptions. If the company does, it will qualify for the exemption under §8(c)(1)(B) for payments for services actually performed. If it does not, HUD will examine the company under §8(c)(2) to determine if the fees received by the Affiliated Business are commensurate with the services actually performed. In effect, the Affiliated Business will qualify under §8(c)(2) if it receives a reduced fee for reduced services. The core services that must be satisfied are as follows:

For Mortgage Companies: (HUD Statement of Policy 1999-1)

1. Does the Affiliated Business collect information from the borrower including financial information (tax returns and bank statements), verifications of employment and verifications of deposit?
2. Does the Affiliated Business educate the prospective borrower to determine the maximum mortgage the borrower can afford and educate and advise the borrower in the financing process including describing various loan products and demonstrating how closing costs and payments may vary under each?
3. Does the Affiliated Business provide disclosures (truth in lending, GFE and others) and assist the borrower in understanding and clearing credit problems?
4. Does the Affiliated Business order appraisals, inspection and/or engineering reports and determine whether the property is located in a flood zone?
5. Does the Affiliated Business participate in the loan closing?

✓ **For Title Companies:** (HUD Statement of Policy 1996-2)

1. Does the Affiliated Business actually determine the insurability of the title being examined based on relevant law and title insurance underwriting principles?
2. Does the Affiliated Business prepare and issue the title commitment disclosing the status of the title and identifying the conditions which must be met before a policy will be issued?
3. Does the Affiliated Business actively clear underwriting objections and take steps to satisfy the conditions which must be met to issue the policy?
4. Does the Affiliated Business issue the title policy?

5. Does the Affiliated Business handle the closing or settlement of the transaction in markets where such services are customarily part of the payment or retention of the insurer?

B. HUD's Ten Structural Considerations

HUD has provided Affiliated Businesses with ten elements which it will consider in determining whether the company is a truly independent business. HUD has stated that the failure to meet any one element will not necessarily result in a determination that the Affiliated Business is a sham company. Rather, HUD will balance all of the elements against one another and against specific facts to determine whether the company is a sham. Whether a Affiliated Business can fail to meet more than one element and still pass scrutiny with HUD is unclear. Those elements are as follows:

1. Is the Affiliated Business properly capitalized and does it have net worth typical for the industry?
2. Is the Affiliated Business staffed by its own employees (as opposed to shared or loaned employees from its parent-provider company)?
3. Does the Affiliated Business manage its own affairs or is it subject to control by its parent-provider company?
4. Does the Affiliated Business have office space separate from its parent-provider company?
5. Does the Affiliated Business provide substantial services, incur the risks and receive the rewards from the business?
6. Does the Affiliated Business provide substantial services for which it receives a fee (as opposed to contracting out those services)?
7. Does the Affiliated Business contract out its services to the parent-provider company?
8. Does the Affiliated Business which contracts with its parent-provider company for services pay a fee that reasonably relates to those services?
9. Does the Affiliated Business actively compete for business in the market place (as opposed to relying on the parent-provider company for referrals)?
10. Does the Affiliated Business send business exclusively to the parent-provider company?

C. Capital, Dividend and Ownership Interest Considerations

An Affiliated Business which passes HUD scrutiny with respect to core services and its structure as an independent business can still encounter RESPA violations in the manner in which it structures the ownership interest of the owners of the Affiliated Business. Failure to pass any one of the ownership interest tests set forth below will result in a violation of §8(b) which prohibits the giving or accepting of any fee, kickback or other thing of value in exchange for a referral.

1. Has each participant in the Affiliated Business invested its own capital in the business, or has it received a "loan" from the parent-provider company? In HUD's

view, a loan would constitute a thing of value given in exchange for the participant's referrals.

2. Has the participant received an ownership interest in the Affiliated Business based on the fair value of the participant's contribution, or is it based on the referrals which that participant is expected to provide? Providing a participant who contributes 10% of the capital with more than a 10% ownership interest in the company, would constitute a thing of value given in exchange for the participant's referral.
3. Are dividends or distributions made in proportion to ownership interest? Dividends or distributions that reflect the amount of business referred by the participant would constitute a fee given in exchange for the participant's referral in violation of RESPA. Providing a high rate of return for a minimal investment and minimal risk of loss would also constitute a fee given in exchange for a participant's referrals.
4. Are the ownership interests free from tie-ins to referrals? Or have there been adjustments to ownership interest based on the amount of business referred in violation of RESPA? For example, a participant may have had a 10% ownership interest this year, but only referred 5% of the business. An adjustment to that participant's ownership interest for the next year reducing it to 5% would be a violation of RESPA. A right to buy-out participants based on a failure to provide sufficient referrals would also constitute a RESPA violation.

CAUTIONARY NOTE: It is rare that the business plan and/or organizational documents prepared with respect to affiliated business arrangements contain per se violations of RESPA and attorneys will provide opinions letters that the affiliated business, as presented in such documents, does not violate RESPA, but with significant qualification such as a statement to the effect, "assuming that the business is operated in conformity with the documents reviewed ...". There is good reason for this caveat. HUD does not limit its review to business plans and organizational documents, but reviews the actual workings of the day to day operation. It has imposed significant fines and penalties in cases where day to day operations have varied from the business plan and organizational documents where such variations constituted RESPA violations. Prospective participants in affiliated business arrangements are urged to have their own attorney review the business plan, the organization documents and, from time to time, the actual day to day workings of the affiliated business.

This document is for informational purposes only and does not constitute, nor is it intended to constitute, lega advice to you. Consult with your own attorney if you have questions or concerns about RESPA's effect on any particular affiliated business with which you are considering affiliating.

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PLAZA ASTLE REALTY, INC.
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March 12, 2004

The Honorable Donald Dahl
Chairman, House Committee on Commerce & Labor
The Capitol Building
300 SW 10th Ave., Room 281-W
Topeka, KS 66612

Dear Rep. Dahl:

Please join the Kansas Association of REALTORS® and me in supporting Senate Bill 66, which would eliminate the current Kansas Controlled Business Law.

The law prohibits a title agency (in a county with a population of more than 10,000) from doing business with a consumer if that would cause the agency to derive more than 20% of its revenue from a controlled business source. This, essentially, prohibits all Reno County real estate licensees from owning all or part of a title company in the state. Why should real estate brokerages in counties of less than 10,000 population be regulated differently?

The Kansas Association of REALTORS®, as well as other REALTORS® in Hutchinson and I, believe this is an unfair regulation of our business. The Kansas Legislature does not regulate the percentage of store-brand food items sold in a grocery store. The Kansas Legislature does not require Hambelton-LaGreca Chevrolet in Hutchinson to sell or service a certain number of Fords during the year. And the Kansas Legislature should not deny me the right to have an ownership interest in a title insurance company.

Additionally, the elimination of this law would allow more competition among title companies assuring real estate buyers and sellers receive the best prices for their title policies, and the best customer service in the closing process. REALTORS® rely on our reputations for our livelihood, and we are constantly searching for ways to make the buying or selling process more convenient, less costly, and the highest quality. According to a 2002 survey from the Real Estate Service Providers Council, 82 percent of homebuyers favor one-stop shopping for real estate services because they provide the most convenience to the consumer at the lowest cost. Other business entities are allowed to own and enter our business and get paid a fee for referring business to us. A prime example is Lending Tree, advertising on television for consumers to call so they can find the "right" Realtor® for them! Many third party companies charge Realtors® a fee for referring business to us.

I hope you will join me in support of SB66, both in the Commerce and Labor Committee and on the floor of the Kansas House of Representatives. If you have questions, please do not hesitate to contact me at 620-662-0576.

Sincerely,

Chris O'Day

Chris O'Day
President
Hutchinson Board of REALTORS®

REALTOR® MLS

Comm & Labor
3-16-04
Atch # 4

KANSAS LAND TITLE ASSOCIATION
434 N. MAIN
WICHITA, KS 67202

PRESENTATION TO HOUSE COMMERCE COMMITTEE

RE: Testimony in Opposition to Senate Bill 66

DATE: March 16, 2003

THE KANSAS LAND TITLE ASSOCIATION OPPOSES SENATE BILL 66 FOR THE FOLLOWING REASONS:

FUNDAMENTAL ISSUE: DOES OWNERSHIP OF TITLE COMPANIES BY REAL ESTATE BROKERS CREATE PUBLIC POLICY CONCERNS THAT NECESSSITATE STATE REGULATION BEYOND THAT PROVIDED BY FEDERAL LAW.

CONTROLLED BUSINESS IN THE TITLE INSURANCE INDUSTRY RESULTS WHEN A PRODUCER OF TITLE BUSINESS, SUCH AS A REALTOR, OWNS AN AFFILIATED TITLE COMPANY AND HAS THE ABILITY AND FINANCIAL INCENTIVE TO REFER TITLE BUSINESS TO THAT COMPANY.

THE KANSAS LAND TITLE ASSOCIATION BELIEVES THAT STATE 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.

1. The current law, K.S.A. 40-2404 (14) (e) and (f), is part of the Kansas Unfair Trade Practices Act and was passed in 1989 to resolve significant problems involving controlled business title insurance companies existing at that time.

The current law was passed to ensure that a title company owned by a realtor would actively compete in the marketplace for title insurance beyond that referred to it by the realtors owning the title company.

2. The current law is an extension of the federal Real Estate Settlement Procedures Act (RESPA) 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 anything of value for the referral of business. **The federal law clearly allows the states to be more**

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restrictive in the regulation of title insurance and real estate settlement services than the federal law.

In fact, HUD may not construe provisions of state law that impose more stringent limitations on controlled business arrangements as inconsistent with RESPA so long as they give more protection to consumers and/or strengthens competition.

3. **The Kansas controlled business law provides more protection than RESPA.** For example, RESPA does not apply to loans on property of 25 acres or more and exempts loans primarily for business, commercial or agricultural purposes, while there is no such exemption under the Kansas law.

Another example is that RESPA allows an employer to pay an employee for a referral activity. Therefore a real estate brokerage company can provide a financial inducement to an office supervisor to refer business to the broker's captive title company, but if an independent title company tried to give that supervisor a referral fee to obtain business, the independent title company could be subject to prosecution for violating RESPA. The Kansas law prevents such arrangements.

4. In 1991 the **law was upheld by the Kansas Supreme Court** - the court indicated that "purpose of the Unfair Trade Practices Act is to prevent unfair methods of competition and unfair or deceptive acts or practices in the business of insurance." The **"purpose of the law is to stimulate competition by decreasing vertical integration between producers of title business and title insurers."**

Additionally, the Kansas Attorney General Phill Kline upheld the current law in Opinion No. 2003-14, dated April 7, 2003.

5. **Realtors do not want banks to enter the real estate brokerage business, a position that has been supported by the American Land Title Association.** Realtors are concerned about **"conflicts of interest"** and **"unfair competitive environments"** that will result if banks are allowed to sell real estate. The realtors further argue that competition would be reduced as **banks gobble up real estate companies,** and that the **cost to consumers would unnecessarily increase.**

These arguments of "conflict of interest", "unfair competitive environments" and "consumer price concerns" apply to realtors having a financial interest in a title insurance company.

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 TITLE INSURANCE AGENCY 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 need for the present restriction on controlled business is due to the following unique nature of title insurance, i.e.:

   a. **in a controlled business marketplace, the consumer loses the ability to obtain the disinterested judgment of the real estate professional;**
   b. the placement of title insurance services is made by the real estate agent, who is in a **"fiduciary relationship" with the consumer and to whom the consumer looks for disinterested advice. If a realtor has a financial incentive to direct his client's title business to his broker's title company, is there a conflict of interest?**

2. **There is little incentive for the controlled business company to reduce rates or to improve policy coverage or service in order to attract business, because its business is "guaranteed" as a result of referrals.** If controlled business title insurance 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. **Controlled business companies will eliminate price and service from the equation when selecting a title company.**

3. Many federal and state studies over the years have concluded that the growth of controlled business arrangements has created serious competitive and conflict of interest problems that adversely affect the interests of consumers. An example of two those studies are set forth below:

   - A U.S. Department of Justice study concluded that while RESPA closed the front door to rebates and kickbacks, **the affiliated business arrangement may ultimately cause a problem worse than outright kickbacks.** Instead of receiving a kickback, the realtor will receive a corporate dividend and reverse competition will result since the affiliate's decision as to whom it chooses to underwrite its

policies would be based on how much it would receive as compensation, not how much the policy will cost the consumer;

- 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...."**

4. **Disclosures:** While important, disclosures required by the federal RESPA law are virtually meaningless if no state regulation of controlled business is required. In fact the disclosures set forth in the Senate Bill 66 do not require the consumer to acknowledge the disclosure by signing it, nor require that the disclosure be made prior to any commitment having been made to the affiliated title company, nor provide for a range of charges generally made for title services, nor provide for any penalties. The consumer tends to rely on the recommendations or referrals of real estate professionals in the transaction. With all the forms required to be signed by sellers and buyers of real estate, another disclosure form will be meaningless to the consumer.

5. Minnesota, a state having no restrictions on controlled business, has seen tremendous acceleration in title insurance and settlement service costs in the Minneapolis area since 1987, the year after two large brokerage companies entered the title business. **Such costs in Minnesota have increased 35% from 1987 to 2002, compared to a 3% increase in Kansas City during the same time period. (See Exhibit "A")**

6. **"One Stop Shopping"**, which is talked about so much in the real estate settlement industry, really **results in "No Shopping"** because the consumer is directed to the controlled business title company by the realtor having a financial incentive to do so. Because the title insurance and settlement services are only a small part of a complicated and involved real estate sale process, which is not well understood by the consumer, the consumer defers to the recommendation of the realtor **(see Exhibit "B" attached which is a Commentary from April 15, 2000 Condell Private Letter, and which refutes the benefits to the consumer of "One Stop Shopping")**

Competition issues:

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

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.

- lots of competition now between title companies - 23 companies doing business in Johnson Co., 1 of which is a bank controlled business company; 10 companies in Leavenworth Co.; 13 companies in Sedgwick Co., 1 of which is a bank controlled business company; 4 companies in Shawnee Co.; 3 companies in Riley County, 1 of which is a joint venture with a bank; 15 companies in Wyandotte Co.

- according to the latest Kansas Land Title Association directory, 48 counties have more than 1 title company; 62 counties are under 10,000 population and are exempt from the law;

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

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

3. Independent title companies realize the enormous competitive problems posed when a real estate broker can offer incentives to have title business referred to that broker's captive title company.

4. 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 from their partners.**

Reverse competition results when a marketplace is dominated by a controlled business title company, and actually competition decreases as independent title companies cannot compete for business and are forced to close their doors.

5. Since realtors can only receive a return on investment, they will need to affiliate themselves with existing title companies - form cartels in larger markets. For example, brokers "buy into" a 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. In 2001, the Real Estate Service Providers Council, Inc. (RESPRO) reported that 38 states had controlled business insurance legislation that placed a percentage cap on the amount of referrals a captive title insurance company can receive from a controlled business arrangement.

For example:

	Percentage Limitation on Controlled Business
Alaska	50%
Arizona	25%/50%
California	50%
District of Columbia	25%
Connecticut	20%
Idaho	25%/50%
Indiana	25%
New Jersey	25%/50%
New Mexico	50%
North Dakota	25%
Tennessee	40%
Utah	33%
Wyoming	25%

Nebraska permits the denial of a license if the applicant has obtained it for the purpose of writing controlled business and if total commissions from controlled business sources exceed 10% of total commissions from all business sources, it is presumed the license was obtained primarily for the purpose of writing controlled business.

Utah's law contains a complete prohibition on affiliated/controlled business where the expectation of financial profit resulting in whole or in part from the affiliated/controlled business is a substantial factor in the decision to have a financial interest in the title company by the producer of the title insurance business.

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 than 50 percent of its closed title orders from controlled business sources.

Efforts to Compromise:

The Kansas Association of Realtors has introduced bills in 1991, 1995, 1996, 1998, and 2001 to repeal the current law without success.

The Kansas Land Title Association does not object to realtor(s) engaging in/having financial interests in a title insurance/settlement services business, provided that such controlled business arrangement remain competitive with independent title companies and the consumer is protected from increased prices.

This year the Kansas Land Title Association and the Kansas Association of Realtors have held four (4) meetings and had numerous discussions outside of those meetings, in an attempt to reach a compromise position on controlled business.

The Kansas Land Title Association has offered compromises which will allow realtor owned title companies to operate as legitimate companies competing in the marketplace in accordance with HUD requirements. These compromises permit realtor owned title companies to obtain a substantial percentage of their business from controlled business sources, while only requiring a small percentage of outside business. In fact, HUD recently required several Tennessee controlled business companies to obtain 40% of their business from outside sources. The compromises offered by the Kansas Land Title Association allow the title insurance industry in Kansas to remain competitive and ensure that the consumer will not be subject to prices dictated by a controlled business marketplace.

If the Kansas Association of Realtors will not accept a compromise position, the Kansas Land Title Association requests that you defeat Senate Bill 66.

Respectfully submitted by,

Roy H. Worthington
Legislative Chairman
Kansas Land Title Association

The cost of Affiliated Business Arrangements ?

	Minneapolis		Minneapolis after reissue	
	1987	2002	1987	2002
Mortgage Closing fee	200	250	200	250
Name Search	15	30	15	30
Plat Drawing	40	60	40	60
Lenders and Owners Policy	***690***	***845.5***	***480***	***578.7***
Abstract Update	70	150	70	150
Assessment Search	25	30	25	30
Sellers Closing Fee	160	250	160	250
Totals	1200	1615.5	990	1348.7

	Kansas City, Kansas		Kansas City, Kansas after reissue	
	1987	2002	1987	2002
Mortgage Closing fee	150	200	150	200
Name Search				
Plat Drawing				
Lenders and Owners Policy	***925***	***1005***	***619***	***681***
Abstract Update				
Assessment Search				
Sellers Closing Fee	100	0	100	0
Totals	1175	1205	869	881

1987 was selected because mid way through 1986 the two largest brokers in Minneapolis decided to enter the title business. Standard title rates in Minneapolis increased 35% versus 3 % in Kansas City. Reissue rates increased 36% in Minneapolis versus 1% in Kansas City.

EXHIBIT "A" 5-8

COMMENTARY

Another Perspective

Something once thought to be a way to lower costs to consumers is now thought to actually increase them. What happened?

Back in 1992 those who advocated the one-stop advantages of controlled business arrangements were certain there would be monetary benefits to consumers. In addition to extra convenience they'd see lower prices, lower by as much as 10%, it was claimed. Not only would consumers like the idea of a single source for all settlement-related services, the arguments went, they'd also benefit from the efficiencies certain to result when a large array of products and services were offered at a single store.

There weren't any examples cited or studies offered showing that any such thing was going to happen, but that didn't seem to matter. Regulators came to believe what they were urged to believe, even though many thoughtful people argued that just the opposite would result, that once a firm got control of a customer it was much more likely to charge him more rather than less.

It is now eight years later and the idea of one-stop shopping has gained a great deal of ground. Virtually every metropolitan area has its realtor-owned and lender-owned multi-stores offering brokerage services, mortgages, title services, appraisals, and other things. No one is claiming that costs to the consumer are any lower. As a matter of fact, profit squeezes in the real estate brokerage business have created just the opposite effect. Brokers are now charging extra for a host of minor tasks they have always done gratis. This in addition to what they are making on title insurance—and the usual hefty real estate brokerage commissions.

And now a new perspective on the effect of affiliated business arrangements is beginning to enter the debate. Congress and a number of state legislatures are considering legislation that would sharply rein in and regulate predatory practices engaged in by so-called "high cost mortgage" lenders, those who make mortgages to credit-impaired borrowers in exchange for a high interest rate and higher other fees. As the mortgage lending business has increasingly moved towards credit scoring, the need for such sub-prime lending channels has increased.

Most high-cost lenders are fair and honest business people, but some are not. So legislators are creating special regulations to prevent abuses.

Guess what? In doing so, these legislators see immediately that where lenders operate affiliated ancillary services they have special and not too visible opportunities to gouge borrowers. That AfBAs, by their nature, deprive borrowers of the comparisons they need to shop wisely. That interest rates and loan fees can be made to look attractively low while aggressive overcharging for title, credit, document prep, etc, can recoup it all for the lender, and more.

An early perspective urged AfBAs as a way to reduce costs to consumers. A new perspective understands them to be, as many feared, exactly the opposite. ❖

THIS ISSUE'S HIGHLIGHTS

VISIT OUR WEBSITE AT WWW.CONDELL.COM

EXHIBIT "R" 5-9

PMCA
of Kansas

MEMO TO: House Commerce Committee
FROM: Thomas M. Palace, Executive Director of the Petroleum Marketers and Convenience Store Association of Kansas
DATE: March 16, 2004
RE: HB 2928

Mr. Chairman and members of the House Commerce Committee:

My name is Tom Palace and I am the Executive Director of the Petroleum Marketers and Convenience Store Association of Kansas (PMCA), a statewide trade association that represents over 300 independent petroleum marketers and convenience store owners throughout Kansas.

We appreciate the opportunity to appear before you as a proponent of sections 5-7 of HB 2928.

I have included in my testimony my previous testimony for HB 2330. HB 2928 includes several minor changes that are the result of previous testimony made by opponents to the bill and committee suggestions. They are:

1. Page 6, line 20-21. We put this language in based on comments made by the opponents.
2. Page 6, line 29. In previous testimony we included credit card fees as part of our definition of cost. However, after reviewing the bill it was not clear that the term "fees" included credit card fees. We wanted to make it clear that cost included credit card fees.
3. Page 7, line 39-40. We inserted this language to make sure that the secretary of agriculture had the ability to adopt rules and regulations to implement this act.
4. Page 7 line 41. Section 2 amends the Petroleum Inspection Fee Fund (PIFF) into the bill. The fund was established in 1996 by the petroleum industry and the Department of Agriculture, Division of Weights and Measures (W&M) uses the money generated by this fund to do quality and quantity testing of fuel pumps and meters. The enforcing arm of HB 2928 is W&M, and this provision allows W&M to use funds from this account to enforce this program in addition to costs associated with regulating motor fuel dispensing devices.

Mr. Chairman, these are the changes that were made to HB 2330. The major change to this bill is the inclusion of the Petroleum Inspection Fee Fund to be used to offset the fiscal note that may affect this legislation. All other changes were made in accordance with testimony given back in January.

This committee was supportive of passing this legislation out earlier in the session and we urge your support to do so today.

Thank You

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PMCA
of Kansas

MEMO TO: House Commerce Committee
FROM: Thomas M. Palace, Executive Director of the Petroleum Marketers and Convenience Store Association of Kansas
DATE: January 27, 2004
RE: HB 2330

Mr. Chairman and members of the House Commerce Committee:

My name is Tom Palace and I am the Executive Director of the Petroleum Marketers and Convenience Store Association of Kansas (PMCA), a statewide trade association that represents over 300 independent petroleum marketers and convenience store owners throughout Kansas.

We appreciate the opportunity to appear before you as a proponent to HB 2330.

I want to commend and thank Representatives Doug Patterson and Tom Holland for their efforts to get this bill in front of this committee today.

The Problem

The practice of selling motor fuel "below cost" has but one goal: the elimination of competition. The evolution of the "big box retailers" or discount retailers its taking its toll on the small independent gas station marketer that has served his community for years. The consumer has long been the benefactor of price wars, over-supply of gasoline, an inflation-proof commodity and now the "big box" retailer. In today's environment, consumers chase price, and discount retailers use gasoline as a "loss leader" to get more people into their stores to purchase other items that have higher profit margins. Independent marketers can show you that the competition they face comes down to gasoline being sold at 2-10 cents below cost. A small retailer cannot compete for long with that kind of pricing. In many cases, a retailer is unable to even purchase fuel at the price their competitor is charging.

Below cost selling of gasoline has occurred for years, and is usually specific in nature and ongoing in certain areas. I would be remiss if I did not say that some of our PMCA members have been guilty of lowering the price of fuel occasionally to gain more market share. But they do not and cannot continue this practice over an extended period of time. Discount pricing also occurs at grand openings, on anniversaries and customer appreciation days. We have accounted for the special "promotional" days in the bill, but limit how long they can be permitted. However, since the big box retailers have added fuel pumps at their sites, special promotions appear more and more often on a prolonged period of time and such activity affects almost every county in the state...or will when a discount retailer comes to town. This problem is exacerbated when competing on the borders of Kansas. Border marketers are currently hampered by an 8

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cent disparity in cost in both Missouri and Oklahoma on gasoline. Marketers must make difficult decisions on pricing because on the Kansas side they not only compete with the discount retailers, but they also have to contend with the 8 cent disadvantage due to lower fuel tax rates in neighboring states.

OVERVIEW OF HB 2330

1. HB 2330 was introduced in the House Commerce Committee during the 2003 Legislative Session. Representatives Doug Patterson and Tom Holland are the sponsors.

2. HB 2330 states that no marketer or retailer of motor fuel shall sell or offer for sale, by posted price or indicating meter, motor fuel at a price below cost.

3. Included in the bill are special exceptions when below cost selling does not apply: grand openings, sales made to introduce a new or remodeled business, sales made during special promotions (customer appreciation, anniversary) which cannot exceed three days per calendar quarter, or sales made in good faith to meet an equally low retail price.

4. Cost is defined as: (1) product cost and actual freight or transportation cost plus applicable taxes and fees, (2) If actual product and freight figures are unavailable, "cost"means the invoice price or the average of the *three lowest terminal prices posted by supplier* on the day at the terminal from which the most recent supply of motor fuel delivered to the retail location was acquired as published by a nationally recognized petroleum price reporting service; plus actual freight charges equal to or *offered from a common carrier for hire designated for the terminal from which the most recent supply of motor fuel delivered to the retail location* plus applicable taxes and fees pursuant to federal, state and local law, and *(3) credit cards fees.*

5. Kansas Division of Weights and Measures (W/M) will be the primary enforcement arm. A marketer can make a formal complaint to Weights and Measures, and if W/M/ has reason to believe that a marketer or retailer has violated this act, they can demand that such marketer or retailer raise their price. Within 10 business days, the marketer or retailer is required to submit all records and documentation to W/M determine if a violation has occurred.

   -W/M has the authority to "red tag," (take pumps out of service) if a marketer or retailer does not comply with the act.

   -If it is determined that the act has been violated, W/M shall notify the attorney general and provide all documentation to that office.

6. The attorney general may bring an action, to obtain a declaratory judgment, obtain a restraining order against a marketer, recover any penalty provided by the act, and recover reasonable expenses and investigation fees of the division of W/M and the attorney general.

7. Violation of the act shall render the violator liable for a payment of a civil penalty in the sum of $5,000 for each violation (sale).

Opposition

There is a misconception that if passed this law will increase prices (see study in packet). This law states only that you cannot sell gasoline below your actual "hard" costs. It is very unlikely that any retailer that has a product that equates to 65% of their gross receipts could stay in business by selling the product at cost...let alone under cost.

Federal Anti-Trust Laws for "predatory pricing" currently on the books have not been effective in halting motor fuel sales made below the acquisition cost. When using these predatory pricing laws, the court must prove "intent to harm" which is virtually impossible short of having an informant who can show proof that a company is literally trying to put another company out of business.

The Federal Trade Commission (FTC) has weighed in on this issue several times. In a letter (see attached) to New York Governor George Pataki, the FTC stated "during the past two decades, a growing body of empirical economic research has assessed the impact of state 'sales below cost' laws on retail gasoline prices. Most studies find these laws raise gasoline prices or leave them unchanged. Some suggest that the laws raise retail gasoline prices by one or two cents per gallon. One study currently in draft form finds that these laws increase gasoline prices initially and lower them in subsequent years, but it is not clear whether these findings meet economists' customary standards for statistical significance. Many of the studies suffer from methodological problems that make it unclear whether they are measuring the impact of sales below cost laws or something else. The most carefully-controlled study, conducted by a senior economist in the FTC's Bureau of Economics, found that the laws had no effect on retail prices."

Fiscal Note

We have been told that there is a fiscal note with this bill. The Department of Agriculture Division of Weights and Measures (W/M) is currently checking fuel pumps for quality and quantity testing, a plan PMCA initiated in 1996. W/M inspects retail fuel outlets to determine that fuel pumps are releasing the proper amount of gallons purchased, and the division tests the quality of the fuel for proper octane levels. Retail marketers are paying for this through the Petroleum Inspection Fee Fund (PIF). The fund generates approximately $860,000 annually. Of this amount, $250,000 goes directly to the general fund, leaving what is left to run the program.

W/M has stated they need approximately 2 employees and $106,000 to run the fair marketing enforcement program. We have been told that there is approximately $60,000 left over that goes unused per year based on agreements with outside contractors to conduct the quality and quantity sampling. Without knowing how many below cost complaints the division will receive, we cannot justify at this early juncture two additional employees to run this program. PMCA would rather use the available resources and come back at a later date to determine if an increase in the

PIF would be needed.

Will This Bill Solve The Problem

Mr. Chairman and committee members, this legislation is not geared toward keeping a marginal marketer in business. It does not guarantee a profit for ineffective retailers. It will, however, stop the most horrendous cases of below cost selling and gives the small marketer the opportunity to compete.

Big box or hypermarket retailers are here to stay. What this bill proposes is to make sure there is a counterbalance, providing competitive pricing and a ready supply of fuel to Kansas Consumers.

PMCA urges your support of HB 2330 as amended.

THE KANSAS CHAMBER

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Legislative Testimony

HB 2928

March 16, 2004

Written Testimony before the Kansas House Commerce and Labor Committee
By Marlee Carpenter, Vice President Government Relations

Chairman Dahl and members of the Committee:

The Kansas Chamber of Commerce and its affiliate the Kansas Retail Council (KRC), representing over 700 retailers in the state of Kansas, is entering written testimony today to oppose HB 2928. The Kansas Chamber and the Kansas Retail Council are dedicated to economic growth and job creation.

HB 2928 would impose another mandate on how Kansans must conduct their businesses. HB 2928 would drive up the cost of gasoline for the state's business consumers in addition to consumers in general. Governor George Pataki (R-NY) and former Governor Don Sundquist (R-TN) both vetoed similar legislation in their respective states citing higher gasoline prices at the pump for consumers.

Anti-competitive below-cost pricing is illegal under the federal antitrust laws. Federal law is adequate and Kansas does not need another state level bureaucracy to govern the cost of gasoline.

The Kansas Chamber and the Kansas Retail Council believe that passage of this legislation would lead to higher gasoline prices, encourage inefficient practices and do noting to protect small independent dealers. We oppose HB 2928 and urge the committee to not act on the bill.

The Kansas Chamber is the statewide business advocacy group, with headquarters in Topeka. It is working to make Kansas more attractive to employers by reducing the costs of doing business in Kansas. The Kansas Chamber and its affiliate organization, The Kansas Chamber Federation, have nearly 7,500 member businesses, including local and regional chambers of commerce and trade organizations. The Chamber represents small, large and medium sized employers all across Kansas.

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