

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 A.M. on February 17, 2005, in Room 123-S of the Capitol.

All members were present except:

Donald Betts- excused

Committee staff present:

Mike Heim, Kansas Legislative Research Department

Jill Wolters, Office of Revisor of Statutes

Helen Pedigo, Office of Revisor of Statutes

Nancy Lister, Committee Secretary

Conferees appearing before the committee:

Phill Kline, Attorney General

Dan Sight, Kansas Association of Realtors

Kathy Olsen, Kansas Bankers Association

John Peterson, Kansas Land Title Association

Others attending:

See attached list.

Chairman Vratil opened the hearing on **SB 181**.

SB 181 Civil actions alleging violations of article 6 of Kansas constitution (education article) heard by three judge panel

Proponent:

General Kline testified in support of the bill. General Kline stated that there are 168 district court judges in Kansas and their jurisdiction is limited to their courtrooms. However, the impact of their decisions on public policy debate may be dramatic as is witnessed by recent school finance litigation. General Kline cited several considerably different court opinions on the same types of issues that occurred within the same time frame of this litigation. While the *Montoy* case was in the district court, the judge issued an opinion that was far reaching and quintessentially rendered local option budgets and local expenditures unconstitutional. At the same time the judge was rendering that opinion and threatening to shut down schools, in the district court in Johnson County, a case that was brought by Wyandotte County public schools against Johnson County, which alleged that local sales tax implemented under the economic development laws of the state and dedicated to the schools, was an unconstitutional delegation of authority for local fund-raising for education. The sales tax in Johnson County is the same approach that was first implemented by the Salina School District. The Salina District had a sales tax in place while the District was a plaintiff in the *Montoy* case. Its interests were in direct contradiction on that particular issue to the rulings in court, while in line with the interests of the Johnson County School Districts and the Johnson County School Case. The Johnson County district court judge ruled in favor of Johnson County and said that local authority is constitutional. So, in essence, we had two conflicting district court judge decisions.

General Kline stated that this example demonstrates the need to have a panel that is more contemplative and more representative in its interpretation of the Constitution. A single court judge should not have the impact that this district court judge had as it relates to school finance. General Kline supports a three-judge panel. **SB 181** preserves the right of appeal to the Kansas Supreme Court and legislative authority.

Chairman Vratil closed the hearing on **SB 181** and opened the hearing on **SB 215**.

SB 215 Commercial real estate broker lien act

Proponents:

Dan Sight, representing the Kansas Association of Realtors, testified in support of the bill. (Attachment 1) Currently, 21 other states have enacted this type of legislation. It is the goal of the National Association of

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MINUTES OF THE Senate Judiciary Committee at 9:30 A.M. on February 17, 2005, in Room 123-S of the Capitol.

Realtors to strengthen the legal rights of Kansas real estate brokers in order to collect commissions in a fair and timely manner. Real estate brokers have no statutory right to a lien on real property. They do have a contractual right to a commission based on a written agreement with the landlords and sellers of property. Mr. Sight stated commercial brokers are often pressed into reducing or negotiating new commissions at the closing table after a contractual amount was agreed upon in the sales process. **SB 215** seeks to provide a broker a way to place a lien on the property, since the value of the property was increased by the broker's efforts. Where this type of legislation has been enacted, the amount of commission law suits have been reduced.

Mr. Sight stated a brokerage claim is based on a written agreement signed by the involved parties. Pressure comes when the people who a broker has earned commission from do not pay because they know the broker cannot afford costly litigation. Most listing agreements call for a lease commission to be paid upon occupancy of the space by a tenant, and upon lease renewals as well. The bill covers this situation. The bill has very specific timing in regards to when a lien may be filed, recorded and released, and it provides protection by making the non-prevailing party pay for the legal fees.

Senator Allen asked about the commission closing on a lease. Mr. Sight stated that there really is no closing in a lease transaction. The tenant signs a lease, moves in on April 1, and the broker's commission is due that date. Sometimes the landlord decides not to pay the commission. Senator Allen questioned how often does this happen. Mr. Sight estimated in at least five percent of the transactions, and more often on lease renewals.

Chairman Vratil stated that the commission may be worth a few thousand dollars, but the process of suing to be paid the commission may cost tens of thousands of dollars, so the financial equities are not there to bring a lawsuit. Chairman Vratil stated that the bill was proposed last year, initiated in the House. The House passed it by a substantial majority, but when it came to conference committee, the conference committee discovered some problems, and the committee asked the interested parties to rework the bill during the summer, and they have done that.

Kathy Olsen, Kansas Bankers Association (KBA), offered two amendments. The first amendment would require a broker to record a lien release with the Register of Deeds in the county where the notice of lien was recorded. The second amendment was regarding line 43, page 4 of the bill. It would require a broker who knows that he or she is not going to take action to collect a brokerage fee, to give the property owner or the lender with a security interest in the property a lien waiver or lien subordination to signify that he or she no longer has a claim to the property. Ms. Olsen also stated that the KBA believes the statute should acknowledge the possibility that something other than payment in full could discharge the lien of the broker. The KBA requested that the Committee consider adding the language suggested in the attached balloon amendment to cover this possibility. (Attachment 2)

Opponent:

John Peterson, representing the Kansas Land Title Association (KLTA), expressed opposition to the bill stating that the KLTA felt that the proposal may result in erroneous liens being filed by brokers, which would needlessly encumber real estate. (Attachment 3) Additionally, brokers with a contract may sue an owner for up to five years. Mr. Peterson stated that he believed this bill was an improvement over the bill from last year. He suggested changes on page 2, lines 25 and 27 to strike, "and if," and replace with, "so long as", and on line 32, in talking about installments, "conveyance of the commercial estate," proposed to insert, "on behalf of a broker who represented the current owner of the real estate". This would prevent the situation under an installment payment of the fees, an innocent buyer or owner would get the blame for a second or third payment that the seller had not paid to his broker, that he might not even know about. On page 3, line 7, where it states, "the lien attaches when the prospective buyer purchases or otherwise accepts a conveyance or transfer," better verbiage would be, "the lien attaches when the prospective buyer takes title to or otherwise accepts a conveyance or transfer." Mr. Peterson agreed to provide a balloon amendment that included the proposed changes to the bill.

Senator Allen asked for clarification regarding item three on the attachment. Chairman Vratil summarized, if a seller has an agreement with the broker for payment of commission and the seller disputes that the seller owes the commission to the broker, if that dispute arises before the closing of the transaction, a lien must be

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filed. In order to foreclose that lien, the broker would have to file a lawsuit or the seller would have to pay the commission. If the dispute doesn't arise until after the closing, the lien could be filed and a lawsuit would have to be filed to foreclose that lien. In either event, the non-prevailing party in litigation would have to pay attorneys fees.

Neutral:

Suzanne Simon, the Registrar of Deeds for Wabunsee County, representing the Register of Deeds Association, was neutral on the bill.

Chairman Vratil closed the hearing on **SB 215** and asked the Committee to consider final action on **SB 181**.

Final Action:

SB 181 Civil actions alleging violations of article 6 of Kansas constitution (education article) heard by three judge panel

Senator Donovan clarified that the panel would be appointed by the chief justice. Senator Goodwin questioned where the salaries would come from for the panel. Chairman Vratil stated that the judges are paid by the state now, so the state would continue to pay their salaries. A motion was made to recommend the bill favorably for passage. Senator O'Connor moved, seconded by Senator Donovan, and the motion carried.

Chairman Vratil asked the Committee to consider final action on **SB 72**.

Final Action:

SB 72 Worthless checks, more than once in a seven-day period, increased penalty

Chairman Vratil noted that the bed space impact report for fiscal year 2006 was 2-3 fewer prison admissions, and in 2015, 2-4 fewer prison admissions. Senator Umbarger asked for clarification that persons who "make right" the worthless checks would not be subject to felony charges. Senator Journey stated that under the current statute, the person who receives the bad check, sends a registered letter that tells the writer that he or she has 21 days to pick it up. If the check is not made right in that time, criminal intent is presumed. However, it is still a rebuttable presumption. The intent of the law is to give people the opportunity to make a worthless check good. Senator Donovan clarified that the bill has nothing to do with someone writing a check and then stopping payment on the check.

Chairman Vratil noted that there was a small technical correction. The revisors have been advised. On page 2, line 21, the first comma should be deleted. A motion was made to recommend the bill favorably with the technical correction amendment made. Senator Bruce moved, seconded by Senator Umbarger, and the motion carried.

Chairman Vratil adjourned the meeting at 10:30 A.M. The next meeting is scheduled for February 18, 2005.



Testimony in Support of
Senate Bill 215
February 17, 2005
The Senate Judiciary Committee
Chairman John Vratil

Honorable Chairman Vratil and members of the Committee:

I am Dan Sight. I am the owner of Sight Commercial Realty, Inc., in Overland Park, KS. I have a real estate broker's license in Kansas and Missouri and have practiced commercial real estate for the past 21 years. I am the immediate past President of the Kansas Association of REALTORS®, and here today representing the association.

I am speaking today in favor of SB 215. Currently, 21 other States have enacted this type of legislation. It is the goal of our National Association of REALTORS® to strengthen the legal rights of Kansas real estate brokers in order to collect commissions, in a fair and timely manner.

Commercial real estate brokers are unlike other professionals who also add value to real estate -- such as architects, surveyors, builders, electricians, bricklayers and suppliers of materials -- real estate brokers have no statutory right to a lien on real property.

Commercial real estate brokers have a contractual right to a commission based upon his/her written agreement with landlords or sellers of property. So while a broker can pursue an unpaid commission, he would have to pursue it through long and costly litigation, with no guarantee that the party owing the commission will have the cash or assets sufficient to satisfy the broker's claim years later.

Commercial brokers are often pressed into reducing or negotiating new commissions at the closing table -- something we believe is grossly unfair after a contractual amount has been agreed upon during the sales process.

So, it makes sense then, to seek a means by which a broker can place a lien on the property, since the value of the property has been increased by the broker's efforts.

Included in the other 21 states that have enacted this type of legislation is both Illinois and Missouri. According to the real estate associations in those states, the amounts of commission lawsuits have been reduced. The purpose of the lien law is to prevent lawsuits, not encourage them.

-more-



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Testimony in Support of
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The brokerage claim must be based on a written agreement, signed by the involved parties. Once sellers/landlords know brokers can file a lien notice, not paying the commissions is risky.

Why is this a hot topic? It's simple economics. Companies facing harder times are unwilling to pay the brokerage fees they're contractually obligated to pay. It would be really helpful to the smaller brokerage firms. The pressure comes when the people who owe an earned commission don't pay because they know the broker can't afford the time and expense of litigation.

This can happen with a sale of a building or a broker doing a lease in a building. Most listing agreements call for a lease commission to be paid upon occupancy of the space by a tenant. Many times those agreements call for commissions to be paid upon lease renewals as well. This bill covers that situation as well.

This law has very specific timing in regards to when a lien can be filed, recorded and released. It has protection for all parties by making the prevailing party pay for all legal fees.

^{NON-}
The Kansas Association of REALTORS® believe this bill is worthy of your consideration and support. Thank you very much for your time. I would gladly answer any questions you might have.



February 17, 2005

To: Senate Committee on Judiciary

From: Kathleen Taylor Olsen, Kansas Bankers Association

Re: SB 215: Commercial Real Estate Broker Lien Act

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today with regard to **SB 215**, which would create a new statutory lien for the commissions of commercial real estate brokers.

It has long been the policy of the Kansas Bankers Association to closely monitor the addition of new statutory liens as they potentially are a competing creditor of a lender and may create a blemish on the title of the property owner that unless satisfied, would prevent transfer of the property with clear title.

We are here today, to respectfully request that the Committee consider amending the bill in two areas.

Provisions for the release of the lien. One of our concerns with the bill is that there are no procedures for filing a release of the lien. There is language in both Sections 8 and 14 that indicates a lien will be "extinguished" if no action has been taken to collect the lien as provided in those sections. In addition, Section 16 attempts to address the case where a lien is paid in full or an action to collect the lien is not filed as directed in Section 8.

We would ask that in these circumstances, the broker would record a lien release with the Register of Deeds in the office where the notice of lien was recorded. It is our hope that the mechanics of this would operate similar to K.S.A. 58-2309a, the mortgage release statute. In other words, when the broker no longer has a claim to the property (the broker has been paid in full or the time for taking action to collect the lien has passed), the broker will be responsible for filing a release of the lien, paying the required fee. This would help to ensure that there would be no unwanted blemishes on the title of the property down the road.

The mortgage release statute does contain an incentive – a penalty - to encourage the lender to release the lien within 30 days after such demand of the owner. Such a provision helps to ensure that the lien does actually get released.

Senate Judiciary

Kansas Bankers Association
SB 215: Commercial Real Estate Broker Lien
Page Two

These amendments appear beginning on line 2, Page 5 of **SB 215**. These amendments relate to the release of the lien being filed by the broker with the Register of Deeds.

Discharge of Lien Claim. The second amendment we are proposing appears on Line 43, Page 4 of the bill. This section states that if a broker has been paid in full or if he or she fails to take action to collect the lien within the time period provided in the bill, and upon written demand of the owner, the broker will acknowledge satisfaction of the lien. There may be instances where a broker knows that he or she is not going to take action to collect the broker fee. This decision could occur well before the time period for taking such action has expired. In those instances, the broker may be willing to give the property owner or the lender with a security interest in the property a lien waiver or lien subordination to signify that he or she no longer has a claim to the property.

We believe the statute should acknowledge the possibility that something other than payment in full could discharge the lien of the broker. We respectfully request that the Committee consider adding the language suggested in the attached balloon to cover this possibility.

1 and a condition occurs that would preclude the broker from receiving
2 compensation under the terms of the broker's written agreement, the
3 broker shall record and provide the owner of record a written release or
4 satisfaction of the lien.

5 Sec. 13. (a) Within 10 days of recording the notice of lien, the broker
6 shall mail a copy of the notice of the lien to the owner of record of the
7 commercial real estate or the agent thereof at the address of the owner
8 stated in the written agreement on which the claim for lien is based. If
9 no address is given, such notice shall be mailed to the address of the real
10 estate on which the claim of lien is based. If the notice of lien is recorded
11 within 10 days prior to closing, the broker is not required to mail or
12 personally serve a copy of the notice of lien. Mailing a copy of the notice
13 of lien is effective when deposited in the United States mail, with postage
14 prepaid.

15 (b) The broker's lien shall be unenforceable if mailing or service of
16 a copy of notice of lien does not occur at the time and in the manner
17 required by this section. The broker's lien is void if the broker does not
18 record the lien as provided in this act.

19 Sec. 14. (a) A broker may enforce a lien attaching against commercial
20 real estate by filing a petition to foreclose such lien in the district court
21 of the county in which such real estate is located. Failure to file such
22 petition within two years of recording a lien shall extinguish such lien. A
23 claim for a lien extinguished pursuant to this section may not be asserted
24 in subsequent proceedings.

25 (b) A foreclosure petition shall contain the name of the broker and
26 the broker's license number, the name of the owner or owners of the real
27 estate, a statement of the terms of the contract or agreement on which
28 the lien is based, the date when the contract or agreement was made, a
29 description of the services performed, the amount due and unpaid, a
30 description of the real estate that is subject to the lien and any other facts
31 necessary for a full understanding of the rights of the parties. The plaintiff
32 shall file the action against all known parties who have an interest in such
33 real estate. A foreclosure action for a lien claimed pursuant to this act
34 shall be brought in the manner provided by article 24 of chapter 60 of
35 the Kansas Statutes Annotated, and amendments thereto.

36 (c) Any valid prior recorded liens or mortgages shall have priority over
37 a real estate broker's lien.

38 Sec. 15. If a broker claiming a lien pursuant to this act fails to file
39 suit to enforce the lien within 30 days after a properly served written
40 demand of the owner, the lien shall be extinguished. Service of such
41 demand shall be by registered or certified mail, return receipt requested,
42 or by personal service.

43 Sec. 16. If a lien filed pursuant to this act has been paid in full or if

or otherwise discharged,

1 the broker fails to institute a suit to enforce the lien within the time
2 provided by section 8, and amendments thereto, the broker shall acknowl
3 ~~edge~~ satisfaction or release of such lien in writing upon written demand
4 of the owner within 30 days after such demand
5 Sec. 17. The costs of any proceeding brought to enforce a lien filed
6 pursuant to this act, including reasonable attorney's fees, shall be awarded
7 to the prevailing party or parties.
8 Sec. 18. This act shall take effect and be in force from and after its
9 publication in the statute book.

and section 14

record the

in the office of the register of deeds
of the county in which the commercial
real estate is located.

KANSAS LAND TITLE ASSOCIATION
8621 E. 21ST NORTH
SUITE 150
WICHITA, KS 67206

Submitted by
John Peterson

February 17, 2005

To: John Vratil, Chairman
Senate Judiciary Committee

Re: Senate Bill 215 – Commercial Real Estate Broker Lien Act

Dear Chairman:

The Kansas Land Title Association requests the committee defeat Senate Bill 215 for the following reasons:

1. This proposal is far too complicated and may result in erroneous liens being filed by brokers which will needlessly encumber real estate; we already see erroneous mechanic's liens filed by contractors and subcontractors who do not use knowledgeable real estate attorneys, the result being that real estate is encumbered wrongfully to the detriment of sellers and buyers, but encumbered nonetheless;
2. Brokers already have judicial remedies available to seek payment of a disputed commission. Why should real estate brokers have an ability to file liens not available to others involved in commercial disputes? In a lease situation, a judgment can be obtained and a garnishment action taken to receive lease payments to the extent of any judgment rendered.
3. Question? What happens if a broker claims a commission is owed by a seller, and the seller disputes this claim, and the broker files a lien? The buyer, who is not responsible for paying the commission, may be adversely affected by having his purchase delayed, a subsequent refinance delayed on account of the lien being filed, and/or find his title subsequently encumbered by a lien that does not involve the buyer.
4. Section 3(b) indicates that a buyer's broker can have a lien on the real estate being purchased. Section 8 says that such a lien attaches when the prospective buyer "purchases or otherwise accepts a conveyance or transfer of the commercial real estate". Does the term "purchase" mean that the lien can attach after the contract is signed? Such an interpretation would permit a buyer's broker to file a lien on the seller's real estate after only the real estate purchase agreement is signed – if the sale subsequently falls apart, the seller ends up with a lien filed on his real estate for a real estate commission he does not owe.
5. Section 6 permits a lien to be filed after the conveyance of the real estate if the commission is to be paid in installments. This will allow a lien to be filed against the buyer's real estate for a commission payment not owed by the buyer – the buyer ends up with a lien filed on his real estate which may adversely affect his ability to refinance or sell his real estate.
6. This act would make it far too easy for liens to be filed unilaterally by a broker and without the advice and expertise of an attorney, the result being erroneous liens which encumber real estate to the detriment of sellers and buyers. Unlike mechanic's liens, no value has been added to the real estate as a result of improvements made.

The Kansas Land Title Association believes that real estate brokers already have adequate judicial remedies to enforce the payment of disputed real estate commissions.

Sincerely,

Kansas Land Title Association

Roy H. Worthington
Chairman, Legislative Committee

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Attachment 3