

MINUTES

SPECIAL COMMITTEE ON JUDICIARY

August 25-26, 2003
Room 313-S—Statehouse

Members Present

Senator John Vratil, Chairperson
Representative Michael O'Neal, Vice Chairperson
Senator Greta Goodwin, Ranking Minority Member
Senator Barbara Allen
Representative Marti Crow
Representative Peggy Long-Mast
Representative Bill Mason
Representative Rick Rehorn
Representative Daniel Williams

Staff Present

Jerry Ann Donaldson, Kansas Legislative Research Department
Mike Heim, Kansas Legislative Research Department
Dennis Hodgins, Kansas Legislative Research Department
Jill Wolters, Kansas Revisors of Statutes Office
Theresa Kiernan, Kansas Revisors of Statutes Office

Conferees

Michelle Clayton, National Conference of Commissioners on Uniform State Laws
Chris Biggs, Kansas Securities Commissioner
Kathy Diehl, Compliance Officer, Securities Commission
Rick Fleming, General Counsel, Securities Commission
David Brant, Central National Bank
Philip Paschang, Greater Kansas City Chapter of Financial Planners
Jim Reardon, Greater Kansas City Chapter of Financial Planners
Sandy Praeger, Kansas Insurance Commissioner
Roger Walter, Topeka Attorney
Larry Magill, Kansas Association of Insurance Agents
Amy Lee, Security Benefit Life
Jim Hall, American Council of Life Insurers
Von Edman, Kansas Association of Insurance and Financial Advisors
Kathy Olsen, Kansas Bankers Association
Julene Miller, Office of Kansas Attorney General
Sandy Jacquot, League of Kansas Municipalities
Henry Couchman, Unified Government of Wyandotte County/Kansas City, Kansas
Bob Longino, Director, Division of Alcoholic Beverage Control
Tuck Duncan, Kansas Wine and Spirits Wholesalers Association

Rebecca Rice, Kansas Beer Wholesalers Association
Amy Campbell, Kansas Association of Beverage Retailers
Phillip Bradley, Kansas Licensed Beverage Association
Tom Palace, Petroleum Marketers and Convenience Store Association of Kansas

**Monday, August 25
Morning Session**

**Topic No. 1—Kansas Uniform Securities
Act—Review of HB 2347—Changes to
the Kansas Uniform Securities Act**

Michelle Clayton, National Conference of Commissioners on Uniform State Laws, explained how the uniform act was drafted. She explained key provisions including the ability of regulators from different states to work together, no exemptions from the fraud provisions, and an investor protection program. Two states, Oklahoma and Missouri, have adopted the Act without adding variable annuities to the definition of security ([Attachment 1](#)).

Federal law includes variable annuities as a security, and the Uniform Law Commission supports the addition of this to the uniform act, but they have left it up to each state to determine what is appropriate. She believes that states will follow what they are currently doing when it comes to the definition of security.

Vice Chairperson O’Neal informed the Committee that the House Judiciary Committee studied the Uniform Securities Act last session and did not have any problem with it except whether to include or not include variable annuity as a security. He reminded the Committee that SB 110, which was the penalty provisions of the Act, was passed last session.

Rick Fleming, General Counsel, Kansas Securities Commissioner’s Office, stated that HB 2347 reflects amendments that were agreed to by interested parties. He provided the Committee with an analysis of the current law and the Uniform Securities Act ([Attachment 2](#)). He said the most significant changes were as follows:

- change in the exclusion of banks from the definition of “broker-dealer”;
- exemption for sales to “institutional investors”;
- definition of a security with regard to treatment of investment contracts, variable annuities, limited liability companies, and viaticals;
- exemption for fixed income securities;
- loophole for sales from Kansas to out-of-state investors;
- failure to include broader authority to reject applicants due to bad character, financial irresponsibility, etc.; and
- a shorter statute of limitations with regard to civil liability.

He said the Securities Commissioner has developed a few more amendments which they would like the Committee to consider (Attachment 3) including:

- clean up language due to drafting errors;
- amendments to make the penalty provisions in the Uniform Act mirror those passed in SB 110; and
- compromise amendments between the Securities Commissioner, Securities Industry Association, and Uniform Law Commission.

There was concern expressed by both the Committee and Mr. Fleming regarding the shortened tolling provisions in the bill.

The Committee recessed from noon to 1:30 p.m.

Afternoon Session

Sandy Praeger, Kansas Insurance Commissioner, reminded the Committee that the Insurance Department has been proceeding with its own rules and regulations with regard to variable annuities. The National Association of Insurance Commissioners has not adopted their model rules. Kansas will adopt the model rules unless they are less strict than those already adopted.

Insurance Commissioner Praeger has instituted a Fraud Unit to investigate allegations of illegal sale of variable annuities. This year they have closed 13 cases and have opened another seven. She believes that the current staff is adequate and able to handle all variable annuity issues (Attachment 4).

Chris Biggs, Kansas Securities Commissioner, informed the Committee that the Uniform Act needs to be passed, with or without variable annuities included. Kansas has a history of strong security laws and is a leader in this area. As the Commissioner, he wants to preserve what is currently Kansas law and add the Uniform Act to it. He was also concerned with the statute of limitations in both the criminal and civil proceedings.

He said that a variable annuity was a security in how it operates. He did not believe that it should be a dual regulation between the Insurance Department and the Securities Commissioner. Most people who sell variable annuities already have a securities license (Attachment 5).

Kathy Diehl, Compliance Officer, Kansas Securities Commissioner's Office, told two stories about people who had put their retirement in a variable annuity because they were guaranteed a 6 percent return and ended up losing their money. She stated that senior citizens are the ones who are most likely to be taken by someone selling these products (Attachment 6).

David Brant, former Kansas Securities Commissioner, provided the Committee with correspondence on the issue of variable annuities and why it is important for them to be considered securities (Attachment 7).

Jim Reardon, Topeka, introduced Philip Paschang, both of the Greater Kansas City Chapter of Financial Planners, who said that variable annuities are a wonderful tool for investing. He said,

however, that there are agents in the field who could not pass a test to sell one. They supported including variable annuities in the bill ([Attachment 8](#)).

Roger Walter, Topeka Attorney, encouraged the Committee to proceed cautiously because the effect of passing the bill will be to repeal the current Kansas Securities Act and replace it with a “uniform” act, thereby altering 50 years of case law. He was concerned with adding “investment contract” to the definition of security. Currently, interests in limited liability companies (LLCs) are considered securities only if they meet the Howey test. The new bill includes all interests in LLCs as security ([Attachment 9](#)).

Rick Fleming agreed that interests in LLCs would be a security under the new act, but exemptions would apply as long as they did not sell more than 25 per year.

Larry Magill, Kansas Association of Insurance Agents, was concerned because it would cause insurance agents to get another license and add a second layer of regulations. He sees the variable annuity issues as a solution looking for a problem. He has confidence that the Insurance Department will provide an appropriate suitability test ([Attachment 10](#)).

Amy Lee, Security Benefit Life Insurance Company, stated that the inclusion of a variable annuity as a security is inconsistent with Kansas law. She said that complaints are up the last several years due to the current economic conditions of the United States, but as the market rises, the complaints will go down ([Attachment 11](#)).

Jim Hall, American Council of Life Insurers, provided the Committee with copies of resolutions that were passed by American Legislative Exchange Council and National Conference of Insurance Legislators opposing including variable annuities as a security. He also provided a status of variable contracts under other state securities and insurance laws ([Attachment 12](#)).

Von Edman, Kansas Association of Insurance and Financial Advisors, said the current law provides adequate monitoring of variable annuities and that those who sell these investments do not need another layer of regulations. Most agents build relationships with clients and in those situations, there usually are no complaints ([Attachment 13](#)).

Kathy Olsen, Kansas Bankers Association, was concerned with the definition of “broker/dealer” as proposed in the bill. She requested an amendment which would include “or trust company” page 2, on line 10, so they would be consistent with the definition of broker/dealer ([Attachment 14](#)).

The Committee meeting adjourned at 5:00 p.m.

Tuesday, August 26 Morning Session

Topic No 2—Review of Kansas Liquor Control Act

Theresa Kiernan, Revisor of Statutes Office, gave an overview of Kansas’ Liquor Control Act and cereal malt beverage (CMB) laws ([Attachment 15](#)). The major difference between the two is that local units of government have the primary duty to enforce the cereal malt beverage laws.

Dennis Hodgins, Kansas Legislative Research Department, provided a history of major changes in the Liquor Act and CMB laws starting with the 1880's and ending with current legislation allowing courts to order the impoundment of a vehicle ([Attachment 16](#)).

Mike Heim, Kansas Legislative Research Department, reviewed home rule powers about the issue of local units. County home rule is granted by statute whereas the city home rule powers are contained in the Kansas Constitution. Therefore, the state can restrict a city's home rule powers only as permitted by the Constitution. The Legislature is able to limit county home rule powers in the area of alcoholic liquor and CMB regulations by adding one or more exception to the county home rule statute. If the Legislature wants to preempt all local action by a city regarding the sale of alcohol, it must pass a uniform law and clearly state that no local action is permitted in this area (Attachment 17).

Theresa Kiernan discussed the district court case of *State of Kansas v. The Unified Government of Wyandotte County/Kansas City, Kansas*, in which the city argued that the Liquor Control Act was not uniformly applicable to all cities and therefore any or all portions are subject to charter ordinance. The state argued that before a city could charter out of a statute, the statute must be applicable to cities, state law reserves the area of liquor control exclusively to the state, the issue of liquor control is a matter of statewide concern making it not applicable to cities and alternately the law is applicable uniformly to all cities in the state.

The district court ruled that since the Act was not uniform in regard to cities, that cities had the authority under the Home Rule Amendment to charter out from the statutory ban on Sunday sales of alcohol. The court also noted that the Legislature has the last word and may prohibit the use of home rule authority by making the Liquor Control Act uniformly applicable to all cities. Current legislation to do so remains in conference committee and since the close of the 2003 Legislative Session several other cities have voted to allow Sunday and holiday sales (Attachment 18).

Vice Chairperson O'Neal told the Committee in no uncertain terms that the real issue is not the uniformity of the Liquor Control Act but rather the home rule authority of cities.

Julene Miller, Deputy Attorney General, informed the Committee that oral arguments before the Kansas Supreme Court will take place in December in regard to the Sunday sales case and that the normal time line for the Supreme Court's ruling could be sometime by the end of the 2004 Session. She suggested that the Legislature might want to make the Liquor Control Act uniform regardless of what the Court rules (Attachment 19).

Tuck Duncan, Kansas Wine and Spirits Wholesalers Association, said that in 1947 the state passed the Liquor Control Act with the intent that the state regulate the manufacture and distribution of alcoholic beverages in the state. The Legislature provided that the state, not the cities, would regulate and license those who sell and those who possess liquor. He did not believe that the State Constitution had given cities the power to regulate those areas (Attachment 20).

Sandy Jacquot, League of Kansas Municipalities, stated that the reason the Legislature passed a home rule provision for cities was because it was spending 40 percent of its time each session addressing special legislation for cities (Attachment 21). She commented that the League does not have an opinion on Sunday sales, but supports home rule powers of cities.

Henry Couchman, Unified Government of Wyandotte County/Kansas City, Kansas, explained that it is difficult for liquor businesses to compete with Missouri when they allow Sunday and holiday sales. Cities should be able to determine the days and times when liquor can be sold while allowing the state to regulate other aspects of the industry (Attachment 22).

Bob Longino, Director, Division of Alcoholic Beverage Control, provided the Committee with a list of cities that have chartered out of Sunday and holiday sales, a list of potential issues that could arise if cities continue to use home rule with regard to the Liquor Control Act, and charts showing the active Off-Premise and On-Premise licenses in each county (Attachment 23). While the Division of Alcoholic Beverage Control has the authority to take licenses away in instances where a business

does not follow the Act, it cannot do so in Wyandotte County because of a restraining order that is in place.

The Committee praised Mr. Longino for his years of service to the state and the professionalism he brought to the office.

Rebecca Rice, Kansas Beer Wholesalers Association, said that in 1998 the Legislature attempted to recodify the Liquor Control Act and it did not pass. The Kansas Legislative Research Department has reminded many legislative committees that the Act was not uniform and therefore subject to home rule.

She said that the Kansas Beer Wholesalers Association has been granted permission to file an amicus brief in the current Sunday sales case and will support the action of the Unified Government of Wyandotte County. They believe that the Unified Government of Wyandotte County acted in a lawful manner (Attachment 24).

Amy Campbell, Kansas Association of Beverage Retailers, stated that the issue at hand was whether or not the state is going to retain the control of alcohol in the state. In order to do so, the Act must be uniform. Her association supports Sunday and holiday sales but it should not be limited to just those cities who charter out (Attachment 25).

Phillip Bradley, Kansas Licensed Beverage Association, supported the Legislature making the Act uniform and said that the bill proposed last legislative session should be passed (Attachment 26).

Tom Palace, Petroleum Marketers and Convenience Store Association of Kansas, expressed concern about convenience stores along the border not being competitive because they cannot sell beer on Sundays like those in the neighboring states.

Staff furnished the Committee with the *Final Report and Recommendations of the Kansas Liquor Law Review Commission*, which made 50 recommendations which would change the structure and operation of the Kansas liquor industry (Attachment 27).

The Committee adjourned.

Prepared by Cindy O'Neal
Edited by Mike Heim

Approved by Committee on:

October 14, 2003