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ATTORNEY GENERAL OPINION NO. 89-64

The Honorable Debara K. Schauf
State Representative, Eighty-First District
State Capitol, Room 174-W
Topeka, Kansas 66612

Re: Insurance -- Regulation of Certain Trade Practices
-- Unfair Methods of Competition or Unfair and
Deceptive Acts or Practices; Title Insurance

Synopsis: "Gross operating revenue," as that term is used in 1989 House Bill No. 2502, includes revenue received from transactions other than title insurance. For purposes of determining whether 20% of gross operating revenue received in the previous six months is derived from controlled business, revenue received from transactions involving land sales in counties populated by 10,000 or less is not included.

Since the prohibitions contained in the act do not substantially impair obligations under existing title insurance contracts, the act does not violate the contracts clause of the United States Constitution.

The distinction between counties having a population of 10,000 or less and those having a population of more than 10,000 does not create an impermissible classification.

Finally, the rule-making authority granted by the act does not conflict with the statute granting

rulemaking authority in areas not affected by the act. Cited herein: K.S.A. 40-1111, as amended by L. 1988, ch. 156, § 19; K.S.A. 40-2404 (Ensley 1986); K.S.A. 1988 Supp. 40-2404, as amended by 1989 House Bill No. 2502; K.S.A. 40-2404a; K.A.R. 40-3-43 (Proposed, not yet published); U.S. Const. Art. I, § 10, cl. 1.

* * *

Dear Representative Schauf:

As Representative for the Eighty-First District, you have requested our opinion concerning numerous issues regarding 1989 House Bill No. 2502 which amends K.S.A. 1988 Supp. 40-2404(14) by adding paragraphs (e) through (g).

The issues you raise are as follows:

- 1) Whether the terms, "any producer of title business," "any associate of such producer," and "controlled business," as used in the amendments, are unclear in their meaning and application and therefore void for vagueness;
- 2) whether a title insurer who accepts an order and provides some service to an applicant before the title insurer has any reason to believe the applicant was referred by someone having a financial interest in the title insurer results in a violation of the statute;
- 3) whether "gross operating revenue" as used in subsection (14)(f) refers to revenue received from title insurance only or refers to revenue received from any type of transaction; and, whether this revenue includes all counties or only those counties to which subsection (14)(f) apply;
- 4) whether the prohibitions contained in the act impair obligations under existing contracts in violation of the United States Constitution, Article 1, Section 10;
- 5) whether subsection (14)(f) is unconstitutional since it excludes ". . . transactions involving real estate located in a county that has a population as shown by the last preceding decennial census of 10,000 or less"; and
- 6) whether authorizing the Insurance Commissioner to adopt any necessary regulations expands the Commissioner's authority

beyond the already existing statutory provisions in K.S.A.
40-2404(a).

The relevant portions of 1989 House Bill No. 2502, § 1, state:

"(e) No title insurer or title agent may accept any order for, issue a title insurance policy to, or provide services to, an applicant if it knows or has reason to believe that the applicant 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 to the buyer, seller and lender the financial interest of the producer of title business or associate referring to the title insurance business.

"(f) No title insurer or title agent may accept an order for title insurance business, issue a title insurance policy, or receive or retain any premium, or charge in connection with any transaction if: (i) The title insurer or title agent knows or has reason to believe that the transaction will constitute controlled business for that title insurer or title agent, and (ii) 20% or more of the gross operating revenue of that title insurer or title agent during the six full calendar months immediately preceding the month in which the transaction takes place is derived from controlled business. The prohibitions contained in this subparagraph shall not apply to transactions involving real estate located in a county that has a population, as shown by the last preceding decennial census, of 10,000 or less."

ISSUE I

Your first question is whether certain terms are unconstitutionally vague. While those terms are not defined by the act, the Commissioner of Insurance has proposed K.A.R.

40-3-43 which, if adopted, would supply definitions to the terms in question. In testimony before the House Committee on Insurance, March 2, 1989, conferee Dick Brock of the Kansas Insurance Department, explained the historical background of title insurance regulation in Kansas, and explained the conclusions of a title insurance study group which had recommended the bill. One of the recommendations was that definitions and details be provided through administrative regulations. Subsection (14)(g) of the bill states that the "commissioner shall adopt any regulations necessary to carry out the provisions of this act." The proposed regulation states:

"(a) For purposes of this regulation, these terms shall have the following meaning:

(1) 'Producer of title business' or 'producer' means any natural person, firm, association, organization, partnership, business trust, corporation, or other legal entity engaged in this state in the trade, business, occupation, or profession of:

(A) buying or selling interest in real property;

(B) making loans secured by interests in real property; or

(C) acting as broker, agent, representative, or attorney of natural persons or other legal entities that buy or sell interests in real property or that lend money with such interests as security.

(2) '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) As used in section 1, subsection (14)(f) of 1989 House Bill No. 2502, the term 'controlled business' shall mean any portion of a title insurer's or title agent's business in this state that was referred by any producer of title business or by any associate of such producer, where the producer of title business, the associate, or both, have a financial interest in the title insurer or title agent to which the business is referred." Proposed K.A.R. 40-3-43 (not yet published or adopted).

In City of Wichita v. Hughes, 12 Kan.App.2d 621 (1988), the court stated the test for vagueness:

"A statute which forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess as to its meaning and differ as to its application is violative of due process. At its heart, the test for vagueness is a common-sense determination of fundamental fairness.
State v. Kirby, 222 Kan. 1, 4 (1977)."

The terms in question, as defined in the proposed regulation, are not such that the average person has to guess as to their meaning. Therefore, these terms are not void for vagueness.

ISSUE II

Your question regarding a title insurer who accepts an order and provides a service before there is a reason to believe the referring party has a financial interest in the insurer is answered by the language of the statute. Subsection (14)(e)

sets out certain prohibitions or restrictions of a title insurer or agent "[i]f it knows or has reason to believe that the applicant was referred . . ." (emphasis added) by someone having a financial interest in the title insurer. This prohibition is not directed toward those who do not know and have no reason to believe the referral came from a person having a financial interest in the insurer or agent. Additionally, the prohibition does not apply if the producer has disclosed to the buyer, seller and lender the fact of the financial interest.

ISSUE III

Your third question involves the scope of "gross operating revenue." Subsection 14(f) prohibits a title insurer or agent from engaging in a transaction if such transaction will constitute controlled business, and twenty percent or more of the previous six months gross operating revenue is derived from controlled business. As previously noted, proposed K.A.R. 40-3-43 defines controlled business as business in this state.

The term "gross operating revenue" as used in 1989 House Bill No. 2502 does not refer to only revenue from title insurance. The plain language of the statute suggests that the phrase refers to total revenue from any type of transaction. The use of plain language in a statute, when appropriate to the obvious purpose of the statute, is a primary tool of construction, and such words should be given their ordinary meaning. Hunter v. Haun, 210 Kan. 11 (1972), Syl. ¶

1. If the legislature intended gross operating revenue to include only revenue from title insurance, it could have articulated that intent in the statute. The prohibition in subsection 14(f) does not apply to transactions involving real property located in counties having a population of 10,000 or less. The question is raised whether gross operating revenue includes revenue only from counties in which the prohibitions apply. The gross operating revenue of counties that the statute exempts is not to be applied in determining the percent of gross operating revenue constituting controlled business. The statute explicitly excludes these from the prohibitions.

ISSUE IV

Your fourth question is whether the act impermissibly impairs the obligation of existing contracts. You state:

"If a title insurance policy has already been issued under a 'controlled business' transaction, and the title insurer or agent hereafter derives 20 percent or more of gross operating revenue from such controlled business, the existing policy could no longer be 'issued' or 'serviced' under the provisions of the amendment."

Article 1, section 10 (The Contract Clause) of the United States Constitution prohibits states from passing laws which alleviate the commitment of one party to a contract or interfere with the enforcement of the contract.

The Kansas Supreme Court stated the test for determining whether state law violates the contract clause in Federal Land Bank of Wichita v. Bott, 240 Kan. 624 (1987).

Initially, the state law must, in fact, operate as a substantial impairment of a contractual relationship. If a statute creates a substantial impairment, it must be justified by a significant and legitimate public purpose. Finally, the adjustment of the contracting parties' rights and responsibilities must be based upon reasonable conditions and of a character appropriate to the public purpose justifying the legislation's adoption. 240 Kan. at 634.

The amendment does not substantially impair an obligation of existing contracts of the insurers. Subsection (14)(f) limits the amount of controlled business a title insurance company may do under the stated circumstances. This includes a prohibition against accepting an order for insurance business, issuing a policy, and receiving or retaining a premium or charge connected to such a transaction. There is no language in the statute which attempts to reach back in time to effect title insurance business already conducted. Situations may arise in which an agreement now in existence provides for referrals in the future by one having a financial interest in the title insurer or title agent. Violations of the prohibition in subsection 14(e) would be avoided through proper disclosure. In Blue Cross and Blue Shield of Kansas City v. Bell, 798 F.2d 1331 (10th Cir. 1986), the court affirmed the district court judgment that K.S.A. 40-2,103 does not offend the contract clause. The district court had found that the new law in question involved regulation which was essentially the same as that applicable to other insurance

policies previously regulated. Blue Cross and Blue Shield of Kansas city v. Bell, 596 F.Supp. 1053, 1059 (D.Kan. 1984). Because the regulation of insurance for consumer protection is a valid exercise of police power which is not obliterated by the contract clause, it appears that any impairment of contracts which might arise out of 1989 House Bill No. 2502 is not substantial. Therefore, the statute does not constitute an impermissible impairment of an existing contractual right.

ISSUE V

Your fifth question is whether the statute is unconstitutional by limiting the prohibitions to transactions involving land located in counties with a population of more than 10,000. In Attorney General Opinion No. 88-95, we stated that the 1988 amendments to K.S.A. 40-1111 did not involve an unconstitutional classification by regulating certain title insurance rates in counties having a population of more than 150,000. The amendment did not appear arbitrary, fictitious, or wholly without a substantial basis. See State ex rel. v. Russell, 119 Kan. 266, 268 (1925). Likewise, we are unable to say that 1989 House Bill No. 2502 creates an arbitrary or fictitious classification.

ISSUE VI

Finally, you ask whether the rulemaking authority granted in subsection (14)(g) conflicts with K.S.A. 40-2404a. Subsection (14)(g) allows the commissioner to promulgate rules and regulations which relate to 1989 House Bill No. 2502, § 1. However, the rulemaking authority established by K.S.A. 40-2404a pertains to K.S.A. 40-2404 (Ensley 1986). Without subsection (14)(g), it is questionable whether the commissioner would have rulemaking authority to breath life into the amendments to K.S.A. 1988 Supp. 40-2404, given the language of K.S.A. 40-2404a.

In conclusion, it is our opinion that 1989 House Bill No. 2502 is not constitutional. The prohibitions of subsection (14)(e) regarding financial interests of a referring party do not apply if the title insurer or agent does not know or has no reason to know of the financial interest.

"Gross operating revenue" includes revenue received from transactions other than title insurance. For purposes of determining whether 20% of gross operating revenue received in

the previous six months is derived from controlled business, revenue received from transactions involving land sales in counties populated by 10,000 or less is not included. Since the prohibitions contained in the act do not substantially impair obligations under existing title insurance contracts, the act does not violate the contracts clause of the United States Constitution. The distinction between counties having a population of 10,000 or less and those having a population of more than 10,000 does not create an impermissible classification.

Finally, the rule-making authority granted by the act does not conflict with the statute granting rulemaking authority in areas not affected by the act.

Very truly yours,


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