

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 10:05 a.m. on February 25, 1993 in Room 514-S of the Capitol.

All members were present except: All present.

Committee staff present: Michael Heim, Legislative Research Department
Gordon Self, Revisor of Statutes
Sue Krische, Committee Secretary

Conferees appearing before the committee:

Lori Callahan, Kansas Medical Mutual Insurance Co.
Jerry Palmer, Kansas Trial Lawyers Association
Senator Bill Wisdom
Paul Shelby, OJA
Jim Clark, Kansas County and District Attorneys Association
Walter Scott, representing Shawnee County Sheriff's Department

Others attending: See attached list

SB 337 -- Itemized verdicts in actions for personal injury.

Lori Callahan, Kansas Medical Mutual Insurance Company, testified that SB 337 amends the Itemized Jury Verdict Statute to clarify that the verdict form shall not itemize elements of damage for which there is no evidence introduced at trial (Attachment 1). Ms. Callahan stated juries are being confused and misled when faced with a list of items and blanks for amounts on elements of damage for which there was no evidence.

Written testimony in support of SB 337 was submitted by Brad Smoot, Kansas Civil Law Forum (Attachment 2).

Jerry Palmer, Kansas Trial Lawyers Association, appeared in opposition to SB 337 suggesting that a statutory clarification could be accomplished by putting a reference to "in any action for damages for personal injury, the trial court shall instruct the jury only on those items of damages upon which there is some evidence to base an award" into K.S.A. 60-249(a), subsection a and subsection c (Attachment 3). Mr. Palmer does not feel the statute should be restructured incorporating Pattern Instructions for Kansas.

SB 292 - Confidentiality of diversion agreements which terms have been fulfilled.

Senator Wisdom appeared in support of SB 292 amending K.S.A. 22-2911 which deals with district court diversion agreements. Under the bill, the records of fulfilled diversion agreements are to be made available to any prosecutor or court, but not to the general public. Senator Wisdom stated the purpose of the bill is to restore privacy to a person who has successfully fulfilled a diversion agreement.

Paul Shelby, Office of Judicial Administration, appeared in support of SB 292 (Attachment 4). Senator Bond moved to amend SB 292 by deleting the citations in lines 31 and 37 which are no longer valid and to recommend the bill, as amended, favorably for passage. Senator Feleciano seconded. Motion carried.

SB 348 - Diversion agreements involving offenses other than DUI may include stipulation of facts.

Jim Clark, Kansas County and District Attorneys Association, stated SB 348 amends K.S.A. 1992 Supp. 22-2902 to allow the parties to include a stipulation of facts as part of a diversion agreement (Attachment 5). A problem with diversion is that if it is not completed and the case must be prosecuted six months or a year later, the memories of witnesses have dimmed. The effect of SB 348 enhances the use of diversion programs in that, by allowing a stipulation of facts as part of a diversion agreement, a prosecutor is more likely to offer diversion.

William E. Kennedy III, Riley County Attorney, submitted written testimony in support of SB 348 (Attachment 6). Senator Oleen moved that SB 348 be recommended favorably for passage. Senator Bond

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY, Room 514-S Statehouse, at 10:05 a.m. on February 25, 1993.

seconded. Motion carried.

SB 358 - Service of process of orders of garnishment by mail.

Mr. Walter Scott, representing the Shawnee County Sheriff's Department, testified that SB 358 was requested by the Shawnee County Sheriff in an effort to reduce the costs of serving orders of garnishment. SB 358 would allow residential mailing of garnishments in lieu of personal service or certified mail. Senator Emert suggested that residential mail could present a problem because if employers don't receive the notice and don't respond, they may be liable for the judgment. Chairman Moran announced that SB 358 would be put on the agenda for hearing at tomorrow's meeting to give other interested parties an opportunity to testify.

Chairman Moran turned to final action on previously heard bills and Senator Vancrum told the Committee that SRS has estimated the loss of revenue under SB 213, which amends child support statutes to charge a fee on late child support payments, would be \$17,000 per year if 100% of the late fees went to the families. Senator Vancrum moved that SB 213 be recommended favorably for passage. Senator Bond seconded. Senator Petty noted the Committee on Children and Families has been studying the issue of court trustees charging fees and will be introducing a bill regarding the consistency of treatment between the court trustee program and the cases being handled by SRS in order to be in federal compliance. She questioned if SB 213 may be in conflict with those recommendations. In order to further study the effects of SB 213, Senator Vancrum withdrew his motion with the permission of the second, Senator Bond.

Jim Maag, Kansas Bankers Association, distributed a memorandum on a proposed amendment to SB 125 addressing the issue of the liability level for an inside director/officer or any director holding 25% or more of the bank's stock vs. an outside director (Attachment 7). Senator Martin moved to amend SB 125 by inserting at the beginning of sections 1, 2 and 3 after the period the language "except for persons who are executive officers, an" and by adding the definition of "executive officer" in all three sections. Senator Vancrum seconded. Motion carried. Senator Martin moved to recommend SB 125, as amended, favorably for passage. Senator Vancrum seconded. Motion carried.

The meeting was adjourned at 11:05 a.m. The next meeting will be on adjournment today in Room 254-E.

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE

DATE: 2/25

[illegible]

KaMMCO

KANSAS MEDICAL MUTUAL INSURANCE COMPANY
AND
KANSAS MEDICAL INSURANCE SERVICES CORPORATION

TO: Senate Judiciary Committee
FROM: Lori Callahan, General Counsel
RE: S.B. 337
DATE: February 25, 1993

Kansas Medical Mutual Insurance Company, KaMMCO, is a Kansas domestic, physician-owned, professional liability insurance company formed by the Kansas Medical Society. KaMMCO currently insures over 1,000 Kansas physicians.

KaMMCO supports Senate Bill 337.

When the Kansas Legislature enacted the Itemized Verdict Statute, K.S.A. 60-249a in 1987, it did so in order to have a tool to gain information regarding the amounts juries were awarding for each item of damage which had been proven at trial. Included in that legislation was subsection (c) which stated:

"In any action for damages for personal injury, the trial court shall instruct the jury only on those items of damage upon which there is some evidence to base an award."

This was done so that juries would not be presented with instructions, and thereby, verdict forms which contained items of damage for which there was no evidence. Despite the inclusion of subsection (c), several courts throughout Kansas have ruled that because subsection (a) states that the verdict "shall" be itemized to reflect the amounts awarded for the items listed under section (a), that despite the existence of subsection (c), the verdict form itself must include items of damage for which there was no evidence at trial. Thus, juries are faced with a list of items and blanks next to those items for amounts to be entered for elements of damage for which there was no evidence.

Thus, Senate Bill 337 clarifies that the verdict form shall not itemize elements of damage for which there is no evidence introduced at trial. The language contained in S.B. 337 is found in PIK-Civil 9.01 which lists the elements of personal injury damage for the instruction form. Thus, making the statute consistent with PIK-Civil.

As severity and frequency begin to climb once again in our state, as well as the nation in the area of medical malpractice, it is as important now as ever, to ensure that our tort laws adequately ensure that defendants will be fairly treated and juries will not be misled into awarding damages for which there is no evidence.

KANSAS CIVIL LAW FORUM

A Coalition of Professionals and Businesses
Interested in the Kansas Court System

Brad Smoot, Coordinator
1200 West Tenth
Topeka, Kansas 66604-1291
(913) 233-0016 FAX (913) 233-3518

STATEMENT OF BRAD SMOOT, COORDINATOR
KANSAS CIVIL LAW FORUM
BEFORE THE SENATE JUDICIARY COMMITTEE
CONCERNING 1993 SENATE BILL 337

FEBRUARY 25, 1993

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, I am Brad Smoot, Coordinator of the Kansas Civil Law Forum, a coalition of business and professionals interested in the Kansas civil justice system. Attached, please find a list of our current members.

On behalf of the KCLF membership, I urge you to favorably consider 1993 Senate Bill 337, which amends the current itemized jury verdict statutes. As you know, the concept of itemized jury verdicts was part of the tort reforms enacted a number of years ago and is considered by our members to be of vital importance in creating an opportunity for plaintiffs and defendants to obtain a fair resolution of their disputes in civil proceedings. We do not believe the current language of the statute fully accomplishes its original objectives and is in need of fine tuning.

Ms. Lori Callahan, General Counsel of KAMMCO, a KCLF member, appears today on behalf of Kansas Civil Law Forum to further explain the reasons for the suggested changes and respond to your questions.

Thank you for your consideration.

SJ
2-25-93
Attachment 2

KCLF MEMBERSHIP LIST - 1993

AIA Kansas
Alderson, Alderson, Montgomery & Newbery
Beech Aircraft Corporation
The Boeing Company
The Coleman Company, Inc.
Glaxo
KPL Gas Service
Kansas Association of Defense Counsel
Kansas Association of Property & Casualty Insurers
Kansas City Power & Light
Kansas Hospital Association
Kansas Medical Mutual Insurance Company
Kansas Medical Society
Kansas Optometric Association
Kansas Railroad Association
Marion Merrell Dow, Inc.
Professional Independent Insurance Agents of Kansas
Puritan Bennett Corporation
Southwestern Bell
Western Retail Implement & Hardware Association

PALMER & LOWRY

ATTORNEYS AT LAW

COLUMBIAN BUILDING
112 W. SIXTH, SUITE 102
TOPEKA, KANSAS 66603-3862
(913) 233-1836

JERRY R. PALMER
KIRK LOWRY
L.J. LEATHERMAN

*CERTIFIED CIVIL TRIAL ADVOCATE
BY THE
NATIONAL BOARD OF TRIAL ADVOCACY

MEMO

TO: SENATE JUDICIARY COMMITTEE

**FROM: KANSAS TRIAL LAWYERS ASSOCIATION
JERRY R. PALMER**

DATE: 3/1/93

RE: S.B. 337

Dear Committee:

The Kansas Trial Lawyers Association is an organization of lawyers primarily interested in the interest of victims of personal injury.

KTLA opposes Senate Bill 337 but feels that if a certain language can be changed that it could be an acceptable form.

UNDERSTANDING OF KAMMCO'S POSITION: KaMMCO indicates that it is concerned only that in a few jurisdictions juries have been instructed on items of damage for which there was no evidence because of an over literal reading by the judges of K.S.A. 60-249(a), the itemized verdict statute. KTLA members have been polled in all three metropolitan areas and no description of this kind was found. All lawyers understand that in the event an item is instructed upon and award is given, without supporting evidence, that the verdict become undefendable on appeal. We certainly recognize there can be a dispute between a plaintiff's attorney and a defendant's attorney (resolved by the court) as to whether or not sufficient evidence was admitted to support an item of damage, but that is a judicial function. Nevertheless, if it is simply a matter of statutory clarification and imposing in both subsection a and subsection c a reference to "in any action for damages for personal injury, the trial court shall instruct the jury only on those items of damages upon which there is some evidence to base an award." We have no objection. That would be a matter of statutory clarification and certainly within the bounds of the legislature's responsibility.

FAX (913) 233-3703

5J
2-25-93
Attachment 3

OUR PRIMARY CONCERN: Our primary concern is the restructuring of the statute which KaMMCO alleges is in line with Pattern Instructions for Kansas 9.01. Clearly it is not. The concept "reasonable certainty" that it would impose on past damages is not embodied in P.I.K. 9.01. It is essentially a judicial function to instruct the jury. It is a legislative function to tell courts what the law is. It is not a legislative function to direct how a jury will be instructed. It is also a bad policy decision to attempt to rewrite Pattern Instructions for Kansas which has such a distinguished authorship of judges exclusively, those from the Supreme Court, the Court of Appeals, and highly competent district court judges.

Black's Law Dictionary defines reasonable certainty in terms which exclude reasonable probability. Reasonable probability on proof in a civil case is the product of more than 100 years of the common law in Kansas dealing with proof in a civil case. Reasonable certainty seems to embody two opposed concepts. We are much more used to the concepts of absolute certainty and reasonable probability. It creates the same kind of confusion as "fresh-frozen" which is described as an oxymoron.

For the foregoing reasons we hope that the Senate Judiciary Committee will, if it decides to credit KaMMCO's concerns, at least review the verdicts they claim to have been so affected that a statutory change is needed. If there is such a finding, then the Committee can direct its attention to better phrasing to accomplish the purpose of indicating that the jury will only be instructed on items of damage upon which there is some evidence, but not indulge in trying to rewrite a P.I.K. instruction with the result that it conflicts with other instructions that would be given to the jury which will result in more confusion and in less justice.

Respectfully submitted,

JERRY R. PALMER

JRP/sd

cc: Richard Mason

SENATE BILL NO. 292
SENATE JUDICIARY COMMITTEE
February 25, 1993

Testimony of Paul Shelby
Assisant Judicial Administrator
Office of Judicial Administration

Senator Moran and Members of the Committee:

Thank you for the opportunity to appear before you today to discuss the Judicial Branch's position on Senate Bill No. 292. The bill amends K.S.A. 22-2911, a section of the statutes which deals with district court diversion agreements.

Normally court records are open to the public; however, whenever a statute requires the records to be confidential, our courts will seal the records and open them only on court order or as directed by statute. By this bill, the records of fulfilled diversion agreements are to be made available to any prosecutor or court, but not to the general public.

The Bureau of Investigation and the Division of Vehicles will continue to keep records of whether a person under a diversion agreement did or did not fulfill the terms of the diversion agreement. You may want to note that the citations in lines 31 and 38 are no longer valid.

The purpose of closing court records to the public is to reward a person who has successfully fulfilled a diversion agreement by restoring a small degree of privacy. A person who has worked to demonstrate rehabilitative action would be spared the inconvenience of the public having unrestricted access to details of the diversion agreement.

We support passage of this bill. Thank you.

5J
2-25-93
Attachment 4

OFFICERS

Wade M. Dixon, President
John J. Gillett, Vice-President
Dennis C. Jones, Sec.-Treasurer
Randy M. Hendershot, Past President



DIRECTORS

William E. Kennedy
Nanette L. Kemmerly-Weber
Julie McKenna
Paul Morrison

Kansas County & District Attorneys Association

827 S. Topeka Blvd., 2nd Floor • Topeka, Kansas 66612

(913) 357-6351 • FAX (913) 357-6352

EXECUTIVE DIRECTOR, JAMES W. CLARK, CAE • CLE ADMINISTRATOR, DIANA C. STAFFORD

Testimony in Support of Senate Bill No. 348

The Kansas County and District Attorneys Association appears in support of SB 348, in fact we requested the bill from the Senate Judiciary Committee. The bill appears in exactly the same form as SB 734, which was introduced by this committee in the 1992 Session, and which passed the Senate 39 - 0, but died in House Judiciary Committee.

The purpose of the bill is simple: it amends K.S.A. 1992 Supp. 22-2902 to allow (not require) the parties to include a stipulation of facts as part of a diversion agreement. The concept is not new, having been included as part of the legislative effort to crack down on DUI offenders back in 1982, L. 1982, Ch. 144, Sec. 7.

The policy of diversion is not new, having existed at least informally since biblical times with the admonition of "Go ye, and sin no more". A more formal system of diversion was adopted by the Kansas Legislature in 1978, to attempt to adopt a more uniform, and possibly less discriminatory, system of diversion, K.S.A. 22-2906 et seq. At the request of the Legislature, the Legislative Post Audit Committee conducted a performance audit report of diversion programs in 1985 and presented it to the Legislature in August of 1986. In that year, nearly 11,000 diversions were granted in the jurisdictions studied (80% of the counties and 23 cities with more than 10,000 population). Of the 8620 adult diversions, 5640 were for DUI, 320 were for other traffic offenses, and 1575 were for criminal offenses. More importantly, the average cost of a diversion case was only \$105. Besides the cost factor, there is the obvious saving in court docketing time, and, since most offense that are diverted fall into the presumptive sentencing categories, a saving in community corrections and court service officers case load. The benefit to a defendant is obvious. If the diversion program is completed, there is no criminal record. This effect is different than in DUI diversions, which count as a first offense.

There are two current problems with diversion: supervision, and proving the case should the agreement fall through. Where the population is mobile, and the memories of witnesses dim over time, without a stipulation of facts, the case is very difficult to prosecute six months or a year later. The effect of SB 348 enhances the use of diversion programs in that by allowing a stipulation of facts, as part of a diversion agreement, a prosecutor is more likely to offer diversion.

5J
2-25-93
Attachment 5

WILLIAM E. KENNEDY III
RILEY COUNTY ATTORNEY

GABRIELLE M. THOMPSON
BARRY R. WILKERSON
MICHAEL B. KEARNS
Assistant Riley County Attorneys



Carnegie Building, Second Floor
105 Courthouse Plaza
Manhattan, KS 66502-0106

THOMAS K. KILGORE
Victim/Witness Coordinator
KATHIE "KATE" SCHLEGEL
Diversion Officer

913/537-6390
FAX 537-6334

TESTIMONY FOR PROPOSED AMENDMENT TO K.S.A. 22-2909 et seq,
SUBMITTED BY WILLIAM E. KENNEDY III, RILEY COUNTY ATTORNEY
APPROVED BY KANSAS COUNTY AND DISTRICT ATTORNEYS ASSOCIATION

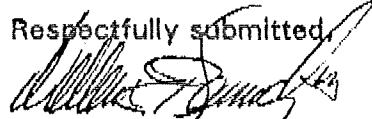
(Generally approved by the Kansas Legislature last year, but you ran out of time)

The purpose of this amendment is to permit a prosecutor and a criminally accused to contract to acknowledge the accused's part in a crime in the event that the accused fails to fulfill the conditions of the diversion. (The concept is already present in the DUI Statute, the difference being that in the DUI Statute, the criminal acknowledgement is mandatory, whereas in the proposed amendment the acknowledgement is permissive.) The rationale behind the amendment is that prosecutors will be encouraged to permit diversions, thus lowering court time and prosecution time, and defendants, having admitted their criminal activity will be positively encouraged to succeed at the diversion that they have asked to be granted if the amendment becomes law.

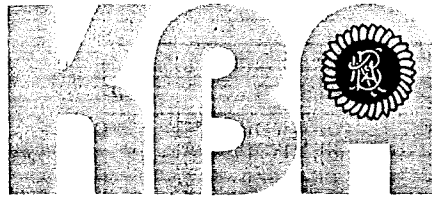
The problem with the situation as it currently exists is that although prosecutors seem to have the authority to request such admission, the wording in the DUI Statute to the effect that they must have this admission coupled with the constitutional requirement that the State prove its case beyond a reasonable doubt, leads some people to conclude that prosecutors do not have this authority as the statute exists now. If prosecutors do not have this authority, and they grant a diversion, and then perhaps six months after signing a diversion a court determines that the defendant has not followed the terms of the diversion, many times witnesses are gone or memories have failed, evidence has been returned to victims, and the prosecution who entered the diversion in good faith is stopped. By comparison if the amendment is approved, then the State and victim lose nothing by the delay.

Note that successful completion of a diversion under the present proposed statute is not treated as a conviction as a DUI is, but as an acquittal, thus successful completion of a criminal diversion cannot be used by the prosecution to overcome the presumption of probation. For that reason, it is reasonable to assume that passage of this bill will to some extent lower the prison population, and does carry out the legislature's evident mission to handle all but the most serious crimes at the lowest possible level.

Thank you for your consideration.

Respectfully submitted,

William E. Kennedy III
Riley County Attorney

5J
2-25-93
Attachment 6



The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

February 24, 1993

TO: Senate Judiciary Committee
RE: SB 125 - Director and Officer Liability


One more time! Attached to this memo are three items: a copy of SB 125, a proposed amendment, and a chart. The amendment attempts to address the issue raised by Senator Vancrum concerning the liability level for an inside director/officer or any director holding 25% or more of the bank's stock vs. an outside director.

KBA does not oppose the adoption of such an amendment, but three points should be noted: (1) It would create problems for bank boards in making policy decisions since some directors would obviously have more liability than others; (2) It would create a circumstance unique to bank directors since no other corporate directors have these restrictions; (3) There is, to our knowledge, only one other state (Nebraska) which creates this split standard for bank directors.

Also attached is a chart which attempts to show which negligence standard would have to be proven in order for a bank regulatory agency to recover monetary damages from an officer or director of a bank (1) under present circumstances or if SB 125 does not pass (columns B and C); (2) if SB 125 passes without the attached amendment (columns D and E); (3) if SB 125 passes with the attached amendment (columns F and G).

As we have stated from the outset of the consideration of this bill, "deep pockets" law suits by federal agencies against outside directors are making it more and more difficult to find and retain qualified individuals who are willing to assume the risks faced by bank directors in today's harsh regulatory environment. The passage of SB 125 would show that Kansas still has some control over how the banking industry in this state will be regulated. Failure to pass this legislation will perpetrate a real inequity since directors of national banks will continue to be more vulnerable to regulatory retaliation than directors of state-chartered banks where the stockholders have adopted a resolution to limit the liability of their directors.

Please contact me, Kathy Taylor or Chuck Stones (232-3444) if you have questions about any of this information.


James S. Maag
Senior Vice President

SJ

2-25-93

Office of Executive Vice President • 1500 Merchants National Building
Eighth and Jackson • Topeka, Kansas 66612 • (913) 232-3444
FAX (913) 232-3484

Attachment 7



SENATE BILL No. 5

By Committee on Judiciary

1-29

8 AN ACT concerning liability of officers and directors of certain fi-
9 nancial institutions.

10

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

12 Section 1. An officer or director of a bank or national banking
13 association shall have no personal liability to the bank, association
14 or its stockholders, for any other person for monetary damages for
15 breach of duty as an officer or director, except that such liability
16 shall not be eliminated for: (a) Any breach of the officer's or director's
17 duty of loyalty to the bank, association or its stockholders; (b) acts
18 or omissions which constitute willful or gross and wanton negligent
19 breach of the officer's or director's duty of care; (c) acts in violation
20 of K.S.A. 9-910, 9-911 or 9-912 and amendments thereto; or (d) any
21 transaction from which the officer or director derived an improper
22 personal benefit except that the monetary liability shall not exceed
23 the amount of such benefit.

24 Sec. 2. An officer or director of a savings and loan association,
25 federal savings association or federal savings bank shall have no
26 personal liability to the savings and loan association, federal savings
27 association or federal savings bank or its members or stockholders,
28 or any other person, for monetary damages for breach of duty as an
29 officer or director, except that such liability shall not be eliminated
30 for: (a) Any breach of the officer's or director's duty of loyalty to the
31 association or bank, its members or stockholders; (b) acts or omissions
32 which constitute willful or gross and wanton negligent breach of the
33 officer's or director's duty of care; (c) acts in violation of K.S.A. 17-
34 5811 and 17-5812 and amendments thereto; or (d) any transaction
35 from which the officer or director derived an improper personal
36 benefit, except that the monetary liability shall not exceed the
37 amount of such benefit.

38 Sec. 3. An officer or director of a credit union shall have no
39 personal liability to the credit union or its members, or any other
40 person, for monetary damages for breach of duty as an officer or
41 director, except that such liability shall not be eliminated for: (a)
42 Any breach of the officer's or director's duty of loyalty to the credit
43 union or its members; (b) acts or omissions which constitute willful

Amend SB 125 as follows: On page 1, in line 12, by inserting the following after the period: Except for persons who are executive officers, as defined in Section 2, or persons having power to vote 25% or more of any class of the voting shares of a bank or national banking association

Sec. 2 "Executive officer" means the chairperson of the board, the president, each vice president, the cashier, the secretary and the treasurer of a bank or national banking association, unless such officer is excluded by resolution of the board of directors or by the bylaws of the bank or national banking association from participation in the policymaking functions of the bank or national banking association, and the officer does not actually participate in the policymaking functions of the bank or national banking association.

Chart 125

7-4

	A	B	C	D	E	F	G
1	Type of bank	Current Negli-	Current Negli-	Negligence	Negligence	Negligence	Negligence
2		ence Standard	gence Standard	Standard for	Standard for	Standard for	Standard for
3		for Directors	for Officers	Directors If	Officers if	Directors if	Officers if
4				SB 125 Passes	SB 125 Passes	SB 125 Passes	SB 125 Passes
5				without	without	with	with
6				proposed	proposed	proposed	proposed
7				amendment	amendment	amendment	amendment
8							
9	State bank	gross	simple	gross	gross	gross for those	simple
10	using UCC					owning less	
11	resolution					than 25%	
12							
13	State bank	simple	simple	gross	gross	gross for those	simple
14	not using					owning less	
15	UCC resolution					than 25%	
16							
17	National bank	simple	simple	gross	gross	gross for those	simple
18						owning less	
19						than 25%	