Approved: 3-23-93
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 10:05 a.m. on February 26, 1993 in Room 514-S of the Capitol.

All members were present except: Senator Bond (excused)

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

Conferees appearing before the committee:

Jennifer Wentz, Deputy Assistant Secretary of State
Ron Smith, Kansas Bar Association
T.C. Anderson, Kansas Society of CPA's

Others attending: See attached list

SB 369 - Enacting the Kansas fictitious name act.

Jennifer Wentz, Deputy Assistant Secretary of State, appeared in support of SB 369 and stated that an assumed name act requires a business to register the various names under which it does business (Attachment 1). Ms. Wentz noted the fiscal impact of this bill would be $231,400 which eventually would be covered by registration fees and suggested it might be considered for interim study due to its fiscal and administrative impacts. Senator Vancrum opposes a fictitious name act in Kansas feeling that it is confusing to persons who wish to obtain exclusive right to a name for which federal trademark registration must be filed.

Ron Smith, Kansas Bar Association, testified in support of SB 369.

SB 355 - Professional responsibility of CPA's in providing professional services.

T. C. Anderson, Kansas Society of CPA's, testified that SB 355 would prevent the holding of CPAs performing accounting, auditing, consulting and other services to financial institutions doing business in Kansas to a greater duty of professional responsibility than required by their professional standards (Attachment 2).

Ron Smith, Kansas Bar Association, proposed an amendment to SB 355 adding attorneys rendering legal service to financial institutions providing they will be governed by current state law (Attachment 3). Senator Emert moved to amend SB 355 to include attorneys. Senator Martin seconded. Motion carried. Senator Ranson moved to recommend SB 355, as amended, favorably for passage. Senator Harris seconded. Motion carried. Senator Feleciano is recorded as voting "no."

Regarding SB 358 on service of process of orders of garnishment by regular mail on which the Committee heard from Walt Scott, no members had a motion on the bill.

Referring to a balloon of SB 289 (Attachment 4) regarding the admissibility of forensic examinations and certificates in court, Senator Parkinson moved to recommend SB 289, as amended, favorably for passage. Senator Brady seconded. Motion carried. Senator Vancrum moved to reconsider the action on SB 289. Senator Martin seconded. Motion carried. Senator Rock moved to further amend SB 289 by deleting the word "specific" on page 2. Senator Harris seconded. Motion carried. Senator Vancrum moved to recommend SB 289, as amended, favorably for passage. Senator Ranson seconded. Motion carried.

The meeting was adjourned at 11:00 a.m. The next meeting is scheduled for March 4, 1993.

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 2-26-93

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Jon Smith	Top	Ks Bar
Paul Shelby	"	OJA
T.C. Anderson	Topeka	KSCPA
Grant Gut	Topeka	Intern
Jenny Bothwell	Topeka	SOS
Kathy Martin	Topeka	SOS
Susan Somers	Topeka	KSCPA
JEFF SONNICH	TOPEKA	KNLSI
BARB HINTON	TOPEKA	POST AUDIT
Lorena Pomeranda	Hays, Ks	Guest
Nancy Lindberg	Topeka	AG office
JIM CLARK	"	KC DAA
Kyle Smith	Topeka	KBI
Richard Gray	Topeka	KAPE

Bill Graves
Secretary of State

2nd Floor, State Capitol
Topeka, KS 66612-1594
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STATE OF KANSAS

Testimony of Jennifer Chaulk Wentz/Legal Counsel
Deputy Assistant Secretary of State

Senate Bill 369
Senate Judiciary Committee
February 26, 1993

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you to testify on Senate Bill 369, which creates what is commonly called an assumed or fictitious name act.

The Kansas Bar Association has adopted a legislative policy calling for such an act and our office is pleased that you agreed to ingroduce this bill. Basically, an assumed name act requires a business to register the various names under which it does business. For example, if ABC, Inc. owned a beauty salon doing business as HairRUs and a lawn service doing business as LawnsRUs, both names would be registered by ABC, Inc. A vast majority of states have some sort of fictitious name act.

Our office receives calls on a daily basis that range from sole proprietors asking "Where can I register my business name" to entrepreneurs wanting to check on the availability of a name before starting a new business. These calls illustrate that businesses generally want to have as much information as is possible when picking their business names. On the other hand, more government paperwork and fees are rarely appreciated. It is clear that deciding whether to enact a fictitious name act is a decision that needs careful consideration.

Because this is the first time the Kansas business and legal communities have given the issue serious consideration, we ask that Section 10 of the bill be amended to make the act take effect January 1, 1995. As much as the bill appeals to us, time will be needed to educate the public. Additionally, the fiscal and administrative impact that this bill will have on our office makes January 1, 1995 a more realistic date by which a good registration system may be in place.

The Secretary has also asked me to point out that we estimate the fiscal impact of this bill to be $231,400. We anticipate that this money would be repaid to the general fund as registrations are filed. Because of the fiscal, administrative and educational impacts, you may want to consider the bill as one of the topics selected for interim study.

Thank you. I would be happy to stand for questions.

SJ
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Attachment 1

Kansas Society of
Certified Public Accountants

400 CROIX / P.O. BOX 5654 / TOPEKA, KANSAS 66605-0654 / 913-267-6460 / FAX 913-267-9278

February 26, 1993

Chairman Moran, members of the Committee.

My name is T. C. Anderson, Executive Director of the Kansas Society of Certified Public Accountants.

Lawsuits are surfacing across the country in which those federal agencies charged with watchdogging troubled or failed financial institutions are attempting to hold CPAs and other professionals to a higher standard than the duty of professional responsibility established for a particular profession.

I hope the Committee will take favorable action would on SB 355 which would prevent the holding of CPAs performing accounting, auditing, consulting and other services to financial institutions doing business in Kansas to a greater duty of professional responsibility than required by their professional standards. Louisiana passed such legislation in 1991.

Briefly, let me explain the need for this legislation.

One major provider of CPA liability insurance has shared claim information with me. They report six possible actions against Kansas CPA firms are on file relative to financially troubled financial institutions. No claim has been made against the insured CPA firms at this time and we don't know if any will. We do know, however, in five of the six instances the CPAs had issued a going concern audit report or disclaimed an opinion.

In one case the going concern report had been issued for seven years prior to the institution being placed under the control of the FDIC. In another case five years; three years in another; and in two instances one year. However, those were first time audits.

SJ
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Attachment 2

The sixth possible action resulted from a situation where the Kansas firm did the audit for four years and issued an unqualified opinion. The out-of-state firm which replaced our Kansas CPAs issued the same type of report for three more years before the OTS began to investigate.

In addition, those Kansas CPA firms doing financial institution audits are finding their liability insurance costing more or in some cases non-existent.

A liability plan administered by Rollins Burdick Hunter imposes a 15 to 25 percent surcharge on the premium to those firms doing financial institution audits and the plan administered by Jamison and Company excludes troubled financial institutions from coverage.

If our firms violate Generally Accepted Auditing Standards or Generally Accepted Accounting Principles, they clearly should be held accountable. If they don't, they should not. Banking regulators almost always bring their cases against professionals under state law. Our request would make it clear that if you're covered by a statute on day one, someone can't come back on day 200 and say you committed malpractice based on a duty of care you didn't know you had.

This provision hopefully will prevent regulators from holding CPAs responsible for activities that had nothing to do with providing accounting services to financial institution clients. Just maybe when the FDIC, RTC or OTS want to blame professionals for business deals that went bad, they'll think twice if it's in Kansas.

Thank you and I'll be happy to stand for questions.

ACCOUNTING TODAY, January 4, 1993

Ernst's S&L Lapses Added To Disaster

By Ken Rankin

WASHINGTON — Accountants at Ernst & Young engaged in a series of improper auditing practices that contributed to the collapse of several large Federally-insured savings and loans during the 1980s, officials at the Office of Thrift Supervision charged.

Documents released by OTS in the wake of E&Y's massive $400 million settlement of those charges allege a long-standing pattern of auditing and accounting standards violations by both of the firm's predecessors — Ernst & Whinney and Arthur Young.

According to the government's complaint, E&Y accountants responsible for auditing a number of failed S&Ls repeatedly violated generally accepted accounting principles and experienced "systemic problems" in complying with generally accepted auditing standards.

As a result of these GAAP and GAAS failures, Ernst & Young's S&L and loan holding company clients were able to "misrepresent and omit material facts" in their reports to Federal banking regulators, OTS charged.

"As a consequence, the savings associations, the savings and loan holding companies and the Federal insurance fund have suffered actual losses in excess of $150 million," the government's complaint said.

Federal regulators attributed some of the allegedly improper auditing practices to inexperience and lack of training for many of the accountants assigned to these S&L audits.

GAAP & GAAS Violations

In a formal notice outlining the government's charges, OTS alleged several major areas of professional standards violations by Ernst & Young ranging from improper recognition of income to a failure to require "material and necessary" disclosures of transactions.

Within those broad problem areas, OTS detailed a dozen separate claims for relief against E&Y, each one illustrated with specific examples of GAAP and GAAS violations during the firm's audits of four failed thrifts:

- Vernon Savings and Loan of Dallas;
- Denver's Silverado Banking S&L;
- Western Savings Association of Phoenix; and
- Irvine, Calif.-based Lincoln Savings and Loan.

According to OTS, there are four areas Ernst & Young went wrong:

1) Improper recognition of income due to improper accounting for losses.

- Improper Joint Venture Loss Accounting — by E&Y predecessor Ernst & Whinney during the firm's audit of Silverado's 1984 and 1985 financial statements.
- Failing to Provide Adequate Allowances for Loan Losses — during Arthur Young's audits of Vernon S&L during the early 1980s.
- Placing Unwarranted Reliance on Appraisals — in connection with E&W's Silverado audit, as well as AY's audits of Vernon and the Western Savings Association.

2) Improper recognition of income from transactions.

- Improper Recognition of Income from Purported Sales of Real Estate — in connection with the audit of Lincoln S&L's 1986 and 1987 financial statements by Arthur Young.
- Improper Accounting for Exchanges of Assets — during that same Lincoln audit.
- Improper Accounting for Acquisition, Development and Construction Arrangements — during AY's 1983, 1984 and 1985 audits of Vernon.
- Improper Recognition of Loan Fee Income — in Vernon's audited financial statements.
- Improper Accounting for Mergers and Business Combinations — again during Arthur Young's audits of the Vernon S&L.

3) Failure to disclose transactions in audited financial statements when disclosure was material and necessary

- Failure to Disclose Transactions with Related Parties — in connection with AY's audit of the Western Savings Association during the mid-1980s.
- Failure to Disclose Transactions with Major Customers — during the audit of Lincoln's 1987 financial statements.
- Accounting for Troubled Debt Restructuring — which was conducted improperly by AY in connection with the firm's audit of Western Savings.

4) Failure to conduct audits in accordance with the requirements of generally accepted accounting practices.

- Repeated GAAS Noncompliance — by both Arthur Young and Ernst & Whinney during the audits of Silverado, Western and Vernon.

Terms of the Deal

- $271,760,000 in cash to the Federal Deposit Insurance Corporation to resolve the government's claims against the firm.
- An additional cash settlement of $128,240,000 to the Resolution Trust Corporation.
- A "consent cease and desist order" with the Office of Thrift Supervision obliging E&Y to provide additional training and experience in relevant areas to all auditors assigned to insured depository institutions.
- A separate OTS requirement that the firm establish special new internal quality controls and external third party reviews of the work of audit partners.
- An agreement by E&Y to comply with professional standards and to provide documentation and heightened review of accounting decisions in "sensitive areas."
- A series of additional Federal orders requiring the firm to perform audits according to accepted standards, to undertake additional professional training of its auditors, to base audit decisions on competent evidential matter and to ensure the personal review, approval and signing of audits by E&Y partners.
- An agreement prohibiting two former E&Y partners (Jack Atchison and Edward F. Flaherty) and one current partner (George Derr) from performing work for insured financial institutions in the future.

Source: OTS

2-3

Amendment to SB 355 (underlined language)

Section 1. Unless otherwise agreed in writing, attorneys licensed to practice law in this state and their firms, including employees thereof, acting in the course and scope of providing legal services to financial institutions authorized to do business or doing business in the state of Kansas, and certified public accountants, licensed in accordance with article 3 of chapter 1 of the Kansas Statutes Annotated, and their firms, officers, directors, agents, servants and employees, while acting in the course and scope of providing accounting, auditing, consulting and other professional services to financial institutions authorized to do business or doing business in the state of Kansas, shall have no greater duty of professional responsibility to the institution, its shareholders, depositors, customers, creditors or insurers than that required of attorneys under state law, and, for certified public accountants by generally accepted accounting principles (GAAP) and generally accepted auditing standards (GAAS) as provided by K.A.R. 74-5-202 and 74-5-203 and amendments thereto.

Sec. 2. * * * * *

In the title, by broadening the title to include attorneys

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Attachment 3

Session of 1993

SENATE BILL No. 289

By Committee on Judiciary

2-11

AN ACT concerning admissibility of forensic examinations and certificates.

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

Section 1. (1) In any hearing or trial, a report concerning forensic examinations and certificate of forensic examination executed pursuant to this section, shall be admissible in evidence if the report and certificate are prepared and attested by a criminalist or other employee of the Kansas bureau of investigation, Kansas highway patrol or any laboratory of the federal bureau of investigation, federal postal inspection service, federal bureau of alcohol, tobacco and firearms or federal drug enforcement administration.

(2) Upon the request of any law enforcement agency, ~~the laboratory employee~~ performing the analysis shall prepare a certificate. ~~This employee~~ shall sign the certificate under oath and shall include in the certificate an attestation as to the result of the analysis. The presentation of this certificate to a court by any party to a proceeding shall be evidence that all of the requirements and provisions of this section have been complied with. This certificate shall be sworn to before a notary public or other person empowered by law to take oaths and shall contain a statement establishing the following: The type of analysis performed; the result achieved; any conclusions reached based upon that result; that the subscriber is the person who performed the analysis and made the conclusions; the subscriber's training or experience to perform the analysis; ~~and~~ the nature and condition of the equipment used. When properly executed, the certificate shall, subject to the provisions of subsection (3) and notwithstanding any other provision of law, be admissible evidence of the results of the forensic examination of the samples or evidence submitted for analysis and the court shall take judicial notice of the signature of the person performing the analysis and of the fact that such person is that person who performed the analysis.

(3) Whenever a party intends to proffer in a criminal or civil proceeding, a certificate executed pursuant to this section, notice of an intent to proffer that certificate and the reports relating to the analysis in question, including a copy of the certificate, shall be

or any law enforcement officer or other person who is certified by the department of health and environment as a breath test operator as provided by K.S.A. 65-1,107 et seq. and amendments thereto

such person as provided in subsection (1)

Such person

; and the certification and foundation requirements for admissibility of breath test results, when appropriate

Attachment 4
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conveyed to the opposing party or parties within 20 days of arraignment, if a criminal proceeding or at least 20 days before a civil proceeding begins. An opposing party who intends to object to the admission into evidence of a certificate shall give notice of objection and the grounds for the objection within 10 days upon receiving the adversary's notice of intent to proffer the certificate. Whenever a notice of objection is filed, admissibility of the certificate shall be determined not later than two days before the beginning of the trial. A proffered certificate shall be admitted in evidence unless it appears from the notice of objection and specific grounds for that objection that the conclusions of the certificate, including the composition, quality or quantity of the substance submitted to the laboratory for analysis or the alcohol content of a blood or breath sample will be contested at trial. A failure to comply with the time limitations regarding the notice of objection required by this section shall constitute a waiver of any objections to the admission of the certificate. The time limitations set forth in this section shall not be relaxed except upon a showing of good cause.

specific

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.