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Banking, Commerce and Insurance Committee
March 15, 2011

[LB315]

The Committee on Banking, Commerce and Insurance met at 1:30 p.m. on Tuesday, March 15, 2011, in Room 1507 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB315 AM673. Senators present: Rich Pahls, Chairperson; Beau McCoy, Vice Chairperson; Mark Christensen; Mike Gloor; Chris Langemeier; Dave Pankonin; Pete Pirsch; and Dennis Utter. Senators absent: None. [LB315]

SENATOR PAHLS: Welcome to the Banking, Commerce and Insurance Committee hearing. My name is Rich Pahls. I'm from Omaha, and, believe it or not, we are having a hearing right now. Thank you. The committee will take up the bills as posted today. We only have one, and, again, the following are procedures, so I'm not going to go into much detail today. Why don't I start with having the senators introduce themselves, starting with Senator...? []

SENATOR UTTER: I'm Dennis Utter from District 33. []

SENATOR PANKONIN: Dave Pankonin, District 2. []

SENATOR LANGEMEIER: Chris Langemeier, District 23. []

SENATOR MCCOY: Beau McCoy, District 39. []

SENATOR GLOOR: Mike Gloor, District 35. []

SENATOR CHRISTENSEN: Mark Christensen, District 44. []

SENATOR PAHLS: And Bill Marienau, who keeps us legally correct, and Jan Foster, who makes sure all of the i's are dotted and the t's are crossed. And also, we have pages over here--Tom Kelly from Sutherland and Matt McNally from Norfolk. I think we are ready to begin, Senator. []

SENATOR LANGEMEIER: Good afternoon, Chairman Pahls. My name is Chris Langemeier, C-h-r-i-s. Langemeier is L-a-n-g-e-m-e-i-e-r. First of all, and the committee, I'd like to thank you for the opportunity to have a hearing today on AM510 that I'm offering to LB315 before the committee. As you recall, as the committee debated LB315, the Secretary of State has LB315 in its green copy was about allowing salesmen that form teams to create corporations. That simple. And as you heard in that testimony, the Secretary of State came to us and, as they looked into further discussion on letting teams to create corporations, he, as also chairman of the Nebraska Real Estate Commission, started looking into that. And there was some thought there, and since then we've had a lot of discussion that real estate agents fall under the

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Professional Corporation Act which is kind of a new concept for many real estate agents out there that have brokerage firms back to 1968. So you can imagine how many real estate companies are out there that are mom and pop shops, that have formed an S corporation where, in typical stature in Nebraska, each of the couple owns 50 percent share in their little mom and pop corporation across Nebraska. Well, as we require them to switch over to the professional corporations, only those that have licenses could then be stockholders. So if the wife is the agent, she becomes the sole owner, and the husband is out or vice versa. So what we did is we looked at trying to come up with a way to fix that, and so what AM510 does is excludes real estate agents from being required to be professional corporations. So all the corporations that are out there will be allowed. Now, does it address what (LB)315 was that Senator Pahls introduced, and what was the concern about allowing these teams of salesmen to become corporations? No. We're going to look to introduce an interim study and, hopefully, have that discussion into the future. What we're trying to do with this is to relieve that pressure as the Secretary of State felt some obligation to notify these individuals that the way they formed these corporations might not be correct. What we're doing with AM510 is creating an avenue to allow those corporations to stay in existence just as they are today and not be in violation of any corporate formation laws that are currently on the books. So that's simply what it does. I would ask for your support. I'd like to thank Committee Counsel for his great help in creating this amendment, and we look forward to any questions that might be out there. [LB315]

SENATOR PAHLS: Senator Langemeier, let me ask you a question. In other words, you're telling me if this is going to be...this will resolve the issues in (LB)315 that we need to face now. [LB315]

SENATOR LANGEMEIER: This is trying to resolve the unintended consequences that came about because (LB)315 was introduced. [LB315]

SENATOR PAHLS: Okay. [LB315]

SENATOR LANGEMEIER: It does not address what was in (LB)315, a bill as itself as the committee amendment got set, and that bill just becomes a vehicle. [LB315]

SENATOR PAHLS: Okay. So you're telling me then this is going to be the vehicle. (LB)315, the rest of that we will have perhaps a study on the rest of it. [LB315]

SENATOR LANGEMEIER: We'll look to do an interim study this summer. I'll introduce it if you're willing to do that as committee chair... [LB315]

SENATOR PAHLS: Yes. [LB315]

SENATOR LANGEMEIER: We will look to address that issue this summer, what was in

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(LB)315 and dealing with teams and their ability to get paid in a form that's not directly through a licensed agent. [LB315]

SENATOR PAHLS: So this is the new LB315. [LB315]

SENATOR LANGEMEIER: Correct. [LB315]

SENATOR PAHLS: Okay. Thank you. Senator Pankonin. [LB315]

SENATOR PANKONIN: Thank you, Senator Pahls. Senator Langemeier, just so I understand it. So are we exempting these type of businesses that...I guess from the language, I don't...what are we doing here? I mean, I understand the issue; I understand the problem. But how do we...what are we saying here? [LB315]

SENATOR LANGEMEIER: It is exempting real estate brokers from being considered professional corporations in forming of a corporation. [LB315]

SENATOR PANKONIN: And so they don't have any filing requirements with the Secretary of State then? [LB315]

SENATOR LANGEMEIER: It would allow you to, as an agent...let's say I'm a new broker, and I want to form tomorrow. Let's say this passes today, and tomorrow I want to form. It would allow me to form as an S corp, a C corp, a professional corp. It's taking away the mandatory requirement that I'd be a professional corp. [LB315]

SENATOR PANKONIN: Okay. [LB315]

SENATOR LANGEMEIER: So I could form under anything, whatever I choose to form under. [LB315]

SENATOR PANKONIN: And have the filing requirements per... [LB315]

SENATOR LANGEMEIER: Same filing requirements, everything the same. What was discovered after the discussion on (LB)315 was, as the light bulb came on and said, you know, all these brokers out there that have corporations, they really need to convert to become professional corporations. And that's easy to do, but it has some unintended consequences. For an example, you take a corporation that's owned by husband and wife, and the husband is the agent. They're both 50 percent owners in that real estate agent (sic: agency), because they're a married couple, and that's the way they'd like to do their business. Well, if they're required to go over to become a professional corp, then she's out, because a professional corp can only have stockholders that are licensed agents. So, example, CBS Home Real Estate right now is a corporation, as a corporation that's owned by Berkshire Hathaway...actually, it's a C corporation owned

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by Berkshire Hathaway. So if CBS Home has to go back and convert over to be a PC corporation, it can't be owned by Berkshire Hathaway, because the only stockholders that can be owners have to be licensed agents. Now, there's another whole other realm out there that's a liability issue that right now if something happens in the corporation, you can sue back to a C corporation, or you can sue back to an S corporation, and it stops. If they convert over to a PC, then that lawsuit can go through the PC and go back to the owner itself, and that's not necessarily the biggest issue of all this. Yes, that's a drawback, but the question is, is a real estate agent that has to go sit...to be a salesman, has to go sit through two 30-hour classes and pass a test. And a broker then has to either do two years or you sit through two more classes. So you sit through four weeks of classes; you pass a test to be a broker. Is that at a level to be a professional that you would say a doctor, a lawyer has? Probably not. [LB315]

SENATOR PANKONIN: Follow-up question would be, okay, you talked about it this past...today, and what happens tomorrow if you're forming anew. So, for those people you just mentioned that are already operating under a corporate umbrella of some kind, then what are their options then if this passes? [LB315]

SENATOR LANGEMEIER: They could just stay like they are. No changes. [LB315]

SENATOR PANKONIN: Or convert to another form if they want to? [LB315]

SENATOR LANGEMEIER: They could still...well, you can convert today... [LB315]

SENATOR PANKONIN: You could do that anyway, sure. [LB315]

SENATOR LANGEMEIER: We would take the "mandatoryness" of requiring them to go from whatever they are to a PC. [LB315]

SENATOR PANKONIN: Okay. So, the existing ones are in better shape, too. Yeah. [LB315]

SENATOR LANGEMEIER: Yeah. Keep everybody that's formed since 1968 just like they are. [LB315]

SENATOR PANKONIN: Thank you. [LB315]

SENATOR PAHLS: Seeing no more questions, thank you. [LB315]

SENATOR PANKONIN: Senator Utter had one. [LB315]

SENATOR PAHLS: Oh, I'm sorry, Senator Utter. [LB315]

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SENATOR UTTER: Senator Langemeier, have you prioritized this? [LB315]

SENATOR LANGEMEIER: No. [LB315]

SENATOR UTTER: Have you got a vehicle to get it to the floor? [LB315]

SENATOR LANGEMEIER: I would, depending on how your vote goes and your thought in the testimony be consent calendar as a gutted amendment to a bill. [LB315]

SENATOR PAHLS: Thank you, Senator. You going to stay around for closing? [LB315]

SENATOR LANGEMEIER: Yeah. [LB315]

SENATOR LANGEMEIER: Okay. Thank you. Proponents. [LB315]

KENT ROBERT: Good afternoon, Chairman Pahls. My name is Kent Robert, R-o-g-e-r-t, and I'm here today on behalf of the Omaha Area Board of Realtors. We already had a hearing on this, and I apologize for asking to come back today for a few minutes, but a little background on why we are here. When we discovered, as Senator Langemeier did a good job talking to you about, we discovered this issue that's developed over the past, almost four decades, actually, on the formation of certain types of corporations for brokerages in Nebraska. We may have not come to a conclusion on what we originally wanted to do in (LB)315, but in discussions with Senator Langemeier and the Secretary of State and myself, we decided that it might be a little more urgent to fix the problem, at least for now about how we deal with all these corporations that are formed, possibly in conflict with the current statutes. And so, in my conversations with the Speaker on doing that, we're actually amending a different piece of statute than the original bill did, so he requested we come back here and have another hearing just to follow along with what the Constitution requires us to do. But Senator Langemeier did a great job in explaining what we're after. We understand that we're not quite there yet on what the original intentions were for LB315, and we're going to ask the committee to look at this over the summer. And maybe the entire real estate act along with the Professional Corporation Act, as well, to make sure that that's the way we want to do it. Those laws are, oh, 40, 50 years old, and maybe we want to change those over...since time has changed, both the industries have changed, and how we're doing about it. The issue in real estate law is a little different than other professional organizations under current statute is that we actually have two levels. We have a broker, and we have an agent. And the broker, which requires just a little more experience, a little more education, and a little more money to pay for the license, basically, they're responsible for everything that the agents do. And when Senator Langemeier talked about liability, it is a scary sort of situation where myself as the owner of a brokerage, has some agents, and my home and my personal assets could be at risk for something that an agent does below me. I don't think we have any problem

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saying things that I do as a broker and things that an agent does as an agent would make them personally responsible, but to have the broker be responsible on a personal level for things that agents do makes people pretty nervous in terms of, would you want Warren Buffett coming down here and being concerned about him being sued for something that an agent did at CBS Home, because of no limited liability, which in a professional corporation is where you're at. So that's what we're looking for. We want to patch that up for now and then come back and study the entire process over the summer. But I'll answer any questions you have. [LB315]

SENATOR PAHLS: Seeing no questions, thank you for your testimony. [LB315]

KENT ROBERT: Thanks to Mr. Marienau for working with us on this, and thank you, Senator Pahls. [LB315]

SENATOR PAHLS: Any more proponents? [LB315]

PAT OHMBERGER: (Exhibit 1) Good afternoon. Thank you, Senator Pahls, Chair, and the committee. I am Pat Ohmberger, P-a-t O-h-m-b-e-r-g-e-r, and I am here as the 2011 president for the Nebraska Realtors Association. I am here to testify in support of LB315, as amended. In December, we were made clear that some of our members were not doing business...conducting business as they should, according to the law, and so we are supporting this bill as amended, and, hopefully, this will bring a solution to where the brokerage firms need to be on that and support, according to what Kent just explained and Senator Langemeier just explained. And then we would also like to do the interim study. We'd like to request the interim study to be done on the salespersons' original part of LB315. [LB315]

SENATOR PAHLS: Okay. It's been noted. Any questions? Thank you for your testimony, Pat. [LB315]

PAT OHMBERGER: Thank you. [LB315]

SENATOR PAHLS: Any more proponents? Any opponents? Anyone in the neutral? [LB315]

JOHN GALE: (Exhibit 2) Chairman Pahls and members of the Banking, Commerce and Insurance Committee, I'm John Gale, J-o-h-n G-a-l-e, Secretary of State for the state of Nebraska. I'm circulating what I call prepared testimony. I don't intend to read that, but, hopefully, it would become part of the record in this proceeding. I'm just going to do some brief summary of this and answer any questions that the committee might have. But one of my core duties is to administer the laws of the state, providing for business entity formation, of which there are many. I also, by law, serve as permanent Chair of the Nebraska Real Estate Commission, and my duties make me responsible as well for

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the enforcement of our real estate licensing act. I appear before you to testify in a neutral capacity regarding Senator Langemeier's proposed amendment to LB315. This amendment would be a substitute for the original substance of LB315. During my testimony before this committee on LB315, I testified in a neutral capacity, but with considerable reservations and resistance to the provisions of that proposal, since it was addressing an exemption for all real estate licensees under real estate law. I was particularly concerned of how that bill would impact my duties, both as Secretary of State being responsible for enforcement of the business entity laws, and at the same time, how it was going to impact the state real estate law in my capacity as Chairman of the Real Estate Commission. So, I've been trying to walk a very narrow path in figuring out how this compromise comes together, and how it serves the public interest for the state of Nebraska. You are the policymakers; you make the policy in the state, and I'm a constitutional officer, and my duty as an executive is to enforce them until you change the law otherwise. The Professional Corporations Act was passed in 1969, and the intent of that act was to hold professional licensee personally responsible for their conduct whether it's doctors or lawyers or dentists or certified public accountants or real estate agents. There's never been an exemption to that law since 1969, and all of those licensed professionals were considered to be responsible to that act and to conduct themselves accordingly. Well, why does that act make any difference from any other act like what we call business corporation. The difference is that a professional corporation, a licensee, remains personally responsible for the conduct of their profession. We license them as a state; we give them an opportunity to practice as a limited number of people, saying that they have a high degree of competence, a high degree of integrity, a high degree of knowledge to conduct the various very exacting professions that they practice. And, as a result, they should be personally responsible. So, under a professional corporation, that is their personal responsibility. Now, we have some 7,000 real estate agents in the state of Nebraska. We have some 8,000 lawyers. We probably have some 8,000 doctors, probably 3,000 or 4,000 more other licensed professionals like CPAs, so we're probably looking at something in the range of 15,000 to 20,000 licensed professionals who, since 1969, have been told that they can conduct themselves in a variety of ways, but they cannot shelter themselves from liability by becoming a business corporation, and that's the difference. In a business corporation, you have no personal liability. So, I had several reasons I resisted LB315. I understood the intent, Senator Pahls, the intent was to help create an exemption for a certain limited percentage of realtors, the nature of whose practice has changed from maybe a more professional to a more of a business manager. But the way it was written, it really would have attempted to exempt all 7,000 of the real estate licensees from the Professional Corporation Act, even though I know that was not the intent of Senator Pahls. We have studied this proposed amendment of Senator Langemeier very, very closely, and it deals with, I think, a much more limited number of people than the prior testimony I've heard. It exempts designated brokers. You know, if you look at the real estate law, there are several different categories of realtors. A designated broker is one category, and that's the individual who's the point man for whatever business they work

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for...that person is the point man responsible for all real estate activities in that business whether that business is a partnership or whether it's a professional corporation, whether it's an LLC, that is the person with the ultimate responsibility for the conduct of real estate in that business. Then you have associate brokers and you have salespersons. Now, I point out this distinction, because it is different from lawyers or doctors or dentists, because they're all treated the same by license law. A doctor is a doctor regardless of their specialty or their subspecialty. A lawyer is a lawyer whether they're a transaction lawyer or a trial lawyer or a defense lawyer or prosecutor. And so, as a licensee, they're all treated the same. Real estate law has these different staggered categories, and of the 7,000 real estate agents, there are about 584 that are designated brokers; 184 of those are not affected by this amendment, because they work for LLCs which is allowed by law, or they're professional corporations which is allowed by law. So you get down to about 400 designated brokers who are either working for a business corporation or they own a business corporation. Now, the odd thing is that this practice has developed over a long period of years without really the knowledge or study of any of us, that real estate designated brokers have predominately become employed by business corporations or they own business corporations. So it put them outside of the law, in a sense, in the conduct of the business, because they no longer had personal liability which this legislator said they should have if they're going to be a professional licensee. So, this particular category designated brokers is exempted from the Professional Corporations Act, and exempted from the Business Corporation Act as it is written. And basically, I'm supportive of that concept, because I do think designated brokers are a category unto themselves, entirely different from associate brokers or the salespeople who are the ones who have the direct ongoing day-to-day contact with the customers, and they're the ones most likely to make the mistake that's going to be made. And so, to further exempt further categories of real estate agents, of course, will be something I would probably strongly resist, but it does need to be studied and considered in its entirety in terms of the various categories of professionals covered by that act, whether any further real estate agents should be exempt from the Professional Corporation Act, what responsibility they have if they are exempt from that act, how those laws all tie together. So, it's kind of a clash between the two hats that I wear as administrator of the business entity law and Chairman of the Real Estate Commission. And I also would urge that we have an interim study, so that this whole area can be examined and really thoroughly studied. One of the hesitations I have is that ordinarily, when there is major legislation being proposed, it comes through the state Realtors Association and their legislative committee, and usually comes to the Nebraska Real Estate Commission, and both groups study it and study it together, and usually have some sense of unanimity or difference in how that bill proceeds. Neither LB315 nor this amendment to LB315 has received that kind of vetting. It's come straight to the Legislature, and so all of us who are involved have had to really scramble to try to make sense out of what we're doing, where we're going, and what the facts are. But in this particular instance, I think that it's a practical reality that exempting designated brokers doesn't do damage to the public

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interest. It recognizes the existing status of most of them today, and it still holds the associate brokers and the salespeople professionally liable for their conduct. And that was my principal concern with (LB)315. So, with that, I support the advance of the amendment, but I also strongly urge that an interim study be conducted, allowing the various realtor associations and my office of Secretary of State to participate in that study. Thank you. [LB315]

SENATOR PAHLS: Okay. Any questions? I want to thank you for your due diligence, because we do want to pass legitimate bills out of this committee. And I appreciate your helping that being done. Thank you. [LB315]

JOHN GALE: Thank you, Senator. Thank you. [LB315]

SENATOR PAHLS: Any more in the neutral? Senator, I think the floor is yours. [LB315]

SENATOR LANGEMEIER: Not to drag this on any longer, Chairman Pahls, I just want to give you one example is, is I as a designated broker sell real estate. I have errors and omissions insurance. My errors and omissions insurance cost me \$75 a year, so it kind of tells you what kind of liability versus a doctor that's paying thousands of dollars for liability insurance. If I screw up, even though I am a designated broker, they're still going to come back on me. The way this works is whoever screws up on, it goes back on them. If it's a salesman, then it goes back on their broker. If it's me individually, they still come back to me. And so there is that ability to have something rectified if there is a problem out there, but I think this holds a lot of our corporations that are doing business the way they're supposed to be doing business, and they always have since 1968. I would ask for your support of the amendment and the bill. Thank you. [LB315]

SENATOR PAHLS: Senator, I have a question. Since you're using yourself as an example, have that many people had to come back on you? [LB315]

SENATOR LANGEMEIER: None yet. [LB315]

SENATOR PAHLS: I expected that. Thank you (laughter). That closes...any other questions? Okay, thank you, Senator. That closes the hearing today. Like to go into exec session. [LB315]