

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Senator Elwaine F. Pomeroy at
Chairperson

10:00 a.m./~~p.m.~~ on February 21, 1983 in room 514-S of the Capitol.

All members ~~were~~ present ~~except~~ were: Senators Pomeroy, Winter, Burke, Feleciano, Gaines, Hein, Hess, Steineger and Werts.

Committee staff present: Mike Heim, Legislative Research Department
Mark Burghart, Legislative Research Department

Conferees appearing before the committee:

Jim Clark, Kansas County and District Attorneys Association
Senator Bert Chaney
Leigh Nichols, Motor Vehicle Manufacturers Association of the U.S., Inc.
Jack Quinlan, Kansas Motor Car Dealers Association
Jeff Southard, Assistant Attorney General

Senate Bill 127 - Making it a crime to commit a felony with a dangerous instrument or deadly weapon.

Jim Clark testified his association supports the concept of the bill. Their view is that the bill as written is ineffective. He reported the state of Michigan has a similar bill that is only for firearms. There is a significant definition in use of firearms in Michigan. The chairman explained the Missouri statute and that it was upheld by the U.S. Supreme Court. During discussion, Mr. Clark suggested consideration be given to a mandatory sentence that is not subject to probation and parole. Committee discussion with him followed.

Senate Bill 199 - The automobile lemon law.

Senator Bert Chaney, the sponsor of the bill, explained his bill to the committee. He reported this bill is a copy of the Connecticut law. He said he feels this bill would help the manufacturers live up to their responsibility. Senator Chaney said a decision was handed down in January by the Kansas Supreme Court which upheld the right of recovery. Committee discussion with him followed.

Leigh Nichols testified his organization does have difficulties with the bill. A copy of his remarks is attached (See Attachment #1). Committee discussion with him followed.

Jack Quinlan testified his organization, throughout the state of Kansas, neither endorses or opposes this bill. A copy of his remarks and a copy of a report of a court case are attached (See Attachments #2, #3). Committee discussion with him followed.

Jeff Southard testified his office is in support of the bill. He stated it is a fairly limited bill that is not much more than what is already in the Kansas law. He explained if you have a break down four times, you can get your money back. He said this bill would help.

Senate Bill 228 - Recording of installment contracts for sale of real estate.

The chairman announced Senator Talkington, the sponsor of the bill, would not be able to testify on his bill today.

The chairman reminded the committee members of the meeting scheduled on adjournment at noon in Room 519-S.

The meeting adjourned.

2-21-85

GUESTS

SENATE JUDICIARY COMMITTEE

NAME

ADDRESS

ORGANIZATION

Jack A. Quinlan

Topeka

KMCDA

LEIGH NICHOLS

OKLA CITY

MOTOR VEHICLE MANUFACTURERS ASSN.

Larry Humes

Lawrence

Staff - Steinger

Nancy Pastola

Topeka

Kansas Co-op Council

Ken G. Yonell

Topeka

SOS

Jim Clark

Topeka

KCDAA

Jim Sullins

Topeka

K.H.C.D.A

GIL BROXTON

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"

~~Walter~~ Jim Jumer

Topeka

KSLL

Jim Mustang

Lawrence

Reg. of Deeds

Aussie Palmer

Leavenworth

Reg. of Deeds

LARRY RHODES

TOPEKA

ACLU

Ron Coches

TOPEKA

KACI

Jim Edwards

Topeka

KACT

Randy Johnson

Topeka

KTNU

Gregg Minton

Law

Steinger

B. Crenshaw

Topeka

CKFD

Phil Chong

Topeka

WIBW

The modern automobile is a highly complex machine made up of some 14,000 parts. The automobile is more complicated than almost any other single item a person owns. It represents the second largest expenditure that most consumers make in their lifetime. Of the 110,000,000 vehicles in use everyday only a small number are not repaired properly and promptly. Provisions are currently in existence to resolve problems with vehicles not repaired satisfactorily.

Every new car buyer receives an owner's manual which spells out the procedure to use when registering a complaint with the manufacturer concerning the vehicle or the vehicle's related service problems. The procedure is simple. The first step is for the consumer to contact the dealer who sold or serviced the vehicle and register the complaint. If the consumer is not satisfied with the dealer's action the consumer may then contact the manufacturer, through the procedures outlined in the owner's manual and request further assistance. The vast majority of all complaints handled through the regular procedures are resolved to the consumer's satisfaction.

Consumers who still remain dissatisfied have the option to use independent dispute resolution systems which manufacturers and some dealer associations have established. There is no charge to the consumer for these services and they are easily accessible, timely and avoid expensive litigation. In the unlikely situation that dispute resolution cannot resolve the problem a consumer may commence an action

at law either under common law, state Uniform Commercial Code provisions or under Federal Magnusson-Moss warranty provisions.

In view of presently available remedies which are less expensive to consumers than litigation, we believe new legislation is unnecessary. It's reasonable to expect that expenses incurred by manufacturers from increased litigation may be passed on to consumers.

This type of legislation could lead to an over-reaction both on the part of the vehicle repair persons and consumers. If a consumer brings a vehicle into the repair shop with a carburetor problem, and this proposed legislation is in effect, then the tendency on the part of the mechanic may be to replace the entire carburetor rather than attempt to make a more minor, less expensive repair. This would be done to insure that the vehicle is repaired within the specified number of attempts. Also, this new legislation could increase the number of repair visits on the part of the general public. This cumulative increase of repair visits could lead to increased costs to consumers.

The proposed legislation could discourage manufacturers from increasing warranty time and mileage limitations at a time when most consumers have been responding favorably to the increased length of their warranties.

Equity and reason demand that manufacturers should not be burdened with the sole responsibility for errors beyond their control. This would happen if legislation were enacted which immunizes dealers from any liability even when their acts in performing or failing to perform repairs cause or contribute to a service problem. Imposing such vicarious

liability upon the manufacturers is of questionable constitutional validity and certainly an unwise public policy. Problems may have been aggravated by communications difficulties between the consumer and the dealer service personnel. Unless legislation specifically requires that the manufacturer be directly notified of a consumer's on-going problems, the manufacturer may not have an opportunity to repair the automobile before being required to replace the vehicle or refund the purchase price.

The Motor Vehicle Manufacturers Association member companies strongly believe that consumer satisfaction is their number one priority. Our member companies are extremely competitive. Solving warranty problems quickly and efficiently is in their best interest. Each manufacturer is fully aware that a disappointed consumer will look elsewhere.

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Statement Before the
SENATE JUDICIARY COMMITTEE

Regarding SB 199

February 21, 1983

Mr. Chairman and members of the Committee. I am Jack Quinlan, Legislative Counsel for the 415 member Kansas Motor Car Dealers Association.

The Kansas Motor Car Dealers Association neither endorses or opposes this bill, but rather we appear before you today for informational purposes.

At present under current Kansas law, consumers have several remedies by which they may seek restitution from a manufacturer if the consumer feels that the product purchased is substandard.

First of all, agencies such as the Better Business Bureau have formed informal third-party arbitration panels which review consumer complaints against manufacturers. Recently, General Motors endorsed the Better Business Bureau program as their formal third-party arbitration panel. We understand that Ford and Chrysler either currently have a similar system or are in the process of forming such a system.

Additionally, the Kansas Motor Car Dealers Association Board of Directors voted at their December 6, 1982, meeting, to implement an AUTOCAP program in Kansas. AUTOCAP stands for Automotive Consumer Action Program, and is also a third-party arbitration panel. The panel will consist of 6-8 members with at least 50% of the members being from the general public with absolutely no ties with the automotive industry. Currently, American Motors and 16 import manufacturers, including Honda, Nissan (Datsun), and Toyota, formally endorse

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the AUTOCAP program as their official third-party arbitration mechanism for their customer's warranty and product-liability complaints. At present, there are 44 state and local AUTOCAP programs in operation with several others, including Kansas, scheduled to begin operation by early summer. Also, it is our understanding that General Motors, Ford Motor Company, Chrysler Corporation, and Volkswagen of America are considering endorsing the AUTOCAP program as well as their own programs. The national AUTOCAP Office is hopeful of receiving these endorsements in the near future.

One thing we would like to point out about the AUTOCAP program is that it is binding only on the dealer and/or manufacturer. It is not binding on the consumer. Any decision rendered by the panel which the consumer does not agree with can be further pursued by the consumer. Dealers or Manufacturers participating in the program are bound to honor the decision of the panel.

We feel that the AUTOCAP or any third-party mediation panel will fairly resolve disputes of this type, and would also point out that SB 199 contains language in Section 1, (f), that requires a consumer to follow such arbitration procedure if one has been established by the manufacturer.

The Kansas Motor Car Dealers Association also feels that sufficient protection exists under the Kansas Consumer Protection Act and the Kansas Uniform Commercial Code so that any consumer who feels that they have a defective vehicle can seek remedy under those acts.

Should this Committee and this Legislature feel it necessary to enact SB 199 or similar legislation, we would like to ask for certain amendments to the bill as it is currently written.

Attached to this written statement is a balloon indicating our suggested amendments. These amendments would clear up what we feel to be some problem areas in interpretation as well as areas which we feel should be addressed or specified.

I will briefly, with your permission, review these recommended amendments:

On line 0022, following the word "vehicle," strike the comma and insert "normally used for personal, family, or household purposes," and on line 0023 following "transferred" insert "for the same purposes."

We feel this change is necessary as it limits this act to the "family" car. We can see problems on the horizon if this act included commercial vehicles. The normal abuse a commercial vehicle, such as a large truck, is subjected to on a daily basis, could cloud a complaint to the degree that it might be impossible to determine if the defect was a manufacturer's defect, normal wear and tear, or abuse by the owner. The change in line 0023 is technical so that the sentence conforms with the amendment on line 0022.

On line 0044, we would ask that the word "new" be deleted, and in its place inserted, "comparable."

This change is necessary, in our view, to specify what type of replacement vehicle is to be provided. With the word "new" it is conceivable that someone who has a Chevrolet Chevette, for example, could be awarded or demand a Chevrolet Caprice in exchange. Of course, there is a vast difference in these two cars, and this would be unfair to the manufacturer replacing the vehicle.

On line 0068 we would suggest striking "calendar" and inserting "business" to allow the manufacturer, its agent or authorized dealer more time to make the necessary repairs or adjustments.

On line 73, following "disaster.," we would suggest that a new sentence be added reading: "In no event shall the presumption herein provided apply against a manufacturer unless the manufacturer has recieved prior direct notification from or on behalf of the consumer and an opportunity to cure the defect alleged."

This is a point of clarification. We feel that the consumer should have the responsibility to contact the manufacturer directly informing them of the defect and giving the manufacturer ample opportunity to cure the defect, if one actually exists. It is possible that a problem might occur with a vehicle which a dealer, especially a smaller-dealer, might not be able to correct, but that would be correctable if the factory had the opportunity to have one of their service representatives work on the problem.

On line 0077, following "established;" we would suggest inserting "or participates in" and on line 0078 striking "in all respects" and inserting "substantially."

This allows the manufacturer to endorse a program such as AUTOCAP rather than having to form their own specific program.

Inserting new subsection (g) to read as follows: "Any action brought under this act shall be commenced within six months following (1) expiration of the express warranty term or (2) one year following the date of original delivery of the motor vehicle to the consumer, whichever is the earlier date."

This is simply a statute of limitations whereby the consumer must begin any action within the prescribed time.

Mr. Chairman and members of the Committee. We hope that if you decide Kansas needs this legislation, you will amend SB 199 to conform with the above.

Thank you for your time and attention, and I will be happy to attempt to answer any questions you may have.

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SENATE BILL No. 199

By Senator Chaney

2-9

0017 AN ACT concerning motor vehicles; automobile warranties;
0018 commonly called the lemon law.

0019 *Be it enacted by the Legislature of the State of Kansas:*

0020 Section 1. (a) As used in this act:

0021 (1) "Consumer" means the purchaser, other than for purposes
0022 of resale, of a motor vehicle, any person to whom such motor
0023 vehicle is transferred during the duration of an express warranty
0024 applicable to such motor vehicle, and any other person entitled
0025 by the terms of such warranty to enforce the obligations of the
0026 warranty; and

0027 (2) "motor vehicle" means a passenger motor vehicle which
0028 is sold in this state.

0029 (b) If a new motor vehicle does not conform to all applicable
0030 express warranties, and the consumer reports the nonconformity
0031 to the manufacturer, its agent or its authorized dealer during the
0032 term of such express warranties or during the period of one year
0033 following the date of original delivery of the motor vehicle to a
0034 consumer, whichever is the earlier date, the manufacturer, its
0035 agent or its authorized dealer shall make such repairs as are
0036 necessary to conform the vehicle to such express warranties,
0037 notwithstanding the fact that such repairs are made after the
0038 expiration of such term or such one-year period.

0039 (c) If the manufacturer, or its agents or authorized dealers,
0040 are unable to conform the motor vehicle to any applicable ex-
0041 press warranty by repairing or correcting any defect or condition
0042 which substantially impairs the use and value of the motor
0043 vehicle to the consumer after a reasonable number of attempts,
0044 the manufacturer shall replace the motor vehicle with a ~~new~~
0045 motor vehicle or accept return of the vehicle from the consumer

normally used for personal, family, or household purposes,

for the same purposes

comparable

0046 and refund to the consumer the full purchase price including all
 0047 collateral charges, less a reasonable allowance for the con-
 0048 sumer's use of the vehicle. Refunds shall be made to the con-
 0049 sumer, and lienholder if any, as their interests may appear. A
 0050 reasonable allowance for use shall be that amount directly at-
 0051 tributable to use by the consumer prior to the first report of the
 0052 nonconformity to the manufacturer, agent or dealer and during
 0053 any subsequent period when the vehicle is not out of service by
 0054 reason of repair. It shall be an affirmative defense to any claim
 0055 under this act (1) that an alleged nonconformity does not sub-
 0056 stantially impair such use and value or (2) that a nonconformity is
 0057 the result of abuse, neglect or unauthorized modifications or
 0058 alterations of a motor vehicle by a consumer.

0059 (d) It shall be presumed that a reasonable number of attempts
 0060 have been undertaken to conform a motor vehicle to the appli-
 0061 cable express warranties, if (1) the same nonconformity has been
 0062 subject to repair four or more times by the manufacturer or its
 0063 agents or authorized dealers within the express warranty term or
 0064 during the period of one year following the date of original
 0065 delivery of the motor vehicle to a consumer, whichever is the
 0066 earlier date, but such nonconformity continues to exist or (2) the
 0067 vehicle is out of service by reason of repair for a cumulative total
 0068 of 30 or more ~~calendar~~ days during such term or during such
 0069 period, whichever is the earlier date. The term of an express
 0070 warranty, such one-year period and such thirty-day period shall
 0071 be extended by any period of time during which repair services
 0072 are not available to the consumer because of war, invasion,
 0073 strike, fire, flood or other natural disaster.

0074 (e) Nothing in this act shall in any way limit the rights or
 0075 remedies which are otherwise available to a consumer under any
 0076 other law.

0077 (f) If a manufacturer has established an informal dispute
 0078 settlement procedure which complies in all respects with the
 0079 provisions of title 16, code of federal regulations part 703, as from
 0080 time to time amended, the provisions of subsection (c) of this
 0081 section concerning refunds or replacement shall not apply to any
 0082 consumer who has not first resorted to such procedure.

business

In no event shall the presumption herein provided apply against a manufacturer unless the manufacturer has received prior direct notification from or on behalf of the consumer and an opportunity to cure the defect alleged.

or participates in

substantially

(g) Any action brought under this act shall be commenced within six months following (1) expiration of the express warranty term or (2) one year following the date of original delivery of the motor vehicle to a consumer, whichever is the earlier date.

SB 199

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0083 Sec. 2. This act shall take effect and be in force from and
0084 after its publication in the statute book.

and does become surety for the landowner for other of his debts, on the agreement of the landowner that he will deed to the other certain lands to secure him for the debts, money loaned, money paid and obligations incurred, becomes an equitable mortgagee of the lands agreed to be conveyed from the time of making such agreement. (Following *Fitzgerald v. Fitzgerald*, 97 Kan. 408, Syl. 1, 155 Pac. 791 [1916].)

5. When parties enter into a contract for the sale of real estate pursuant to which the seller retains legal title as security for the purchase price and all of the beneficial incidents of ownership pass to the buyer, the seller has no greater rights than he would possess if he had conveyed the property and taken back a mortgage, and the buyer becomes the 'owner' when the beneficial interest passes to him. (Following *Roberts v. Osburn*, 3 Kan. App. 2d 90, Syl. 5, 589 P.2d 985 [1979].)

6. While a discharge in bankruptcy under the Bankruptcy Act of 1898 will prevent the bankrupt from being personally liable on a dischargeable debt, the debt itself is not extinguished and a creditor holding a security interest in exempt property may look to that property for satisfaction of the debt.

7. Where a mortgage is given to secure a debt specifically named, the security will not ordinarily be extended to cover debts subsequently incurred unless they be of the same class or character and so related to the primary debt secured that the assent of the mortgagor can be inferred. (Following *Emporia State Bank & Trust Co. v. Mounkes*, 214 Kan. 178, Syl. 5, 519 P.2d 618 [1974].)

8. In the absence of clear evidence of a contrary intention, a mortgage containing a dragnet type provision will not be extended to cover subsequent advances or loans unless they be of the same kind and quality or relate to the same transaction or series of transactions or unless the document evidencing the same refers to the mortgage as providing security therefor. (Following *Emporia State Bank & Trust Co. v. Mounkes*, 214 Kan. 178, Syl. 6, 519 P.2d 618 [1974].)

BLACK V. DON SCHMID MOTOR, INC.
SEDGWICK DISTRICT COURT
JUDGE JAMES V. RIDDEL, JR.
AFFIRMED
OPINION BY SCHROEDER, C.J.
29 PAGES — NO. 53,947

DIGEST: Plaintiff purchased an automobile which developed persistent problems that remained unrepaired despite five trips to the dealership within five months of purchase. Plaintiff sued Schmid to revoke acceptance for breach of express and implied warranties. Schmid filed a third-party action against its seller, Peugeot Motors of America, Inc. The jury found plaintiff entitled to revoke acceptance and recover the purchase price as well as consequential damages. The court awarded plaintiff attorney's fees under the Magnuson-Moss Federal Warranty Act, 15 U.S.C. § 2301 *et seq.* The jury found Peugeot not liable to Schmid for any part of the judgment. Defendant appeals.

HELD

1. Under the Uniform Commercial Code the purchaser of a motor vehicle who seeks to enforce a revocation of his acceptance pursuant to K.S.A. 84-2-608 must establish (1) the nonconformity of the vehicle, (2) the needs and circumstances of the purchaser, and (3) that the nonconformity in fact substantially impairs the value of the vehicle to the purchaser.

2. In an action where the purchaser of a motor vehicle seeks to enforce the revocation of his acceptance of a vehicle, the nonconformity of the vehicle, the needs and circumstances of the purchaser, and substantial impairment of value of the vehicle to the purchaser are all issues to be determined by a trier of fact.

3. A seller's repeated failure to repair defects in a vehicle may constitute a nonconformity which substantially impairs the value of the vehicle to the purchaser, entitling him to seasonably revoke acceptance of the vehicle pursuant to K.S.A. 84-2-608.

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4. To establish a breach of the implied warranty of merchantability under 84-2-314(2)(c) a buyer must prove first, the ordinary purpose of the type of goods involved, and second, the particular goods sold were not fit for that purpose. Kansas case law has interpreted this to mean that the buyer must show the goods were defective and the defect existed at the time of the sale.

5. A breach of implied warranty may be proved by circumstantial evidence.

6. A pretrial order should be liberally construed to cover any possible legal or factual theories that might be embraced in its language.

7. Under K.S.A. 60-251(b) where no objection is made to an instruction it becomes the law of the case unless clearly erroneous.

8. Where damages result from the seller's failure or refusal to repair goods rather than from any manufacturing defect in the goods, the seller's right to indemnity against the manufacturer for breach of warranty is barred.

9. Error cannot be predicated on the refusal to give an instruction when its substance is adequately covered in other instructions. If the instructions properly and fairly state the law as applied to the facts in the case when considered as a whole, and if the jury could not reasonably be misled by them, the instructions should be approved on appeal.

10. The determination whether the probable effect of an instruction has been to mislead the jury and whether the error has been prejudicial so as to require reversal depends upon all the circumstances of the case, including a consideration of all the evidence.

11. An award of attorney's fees to a prevailing party under the Magnuson-Moss Federal Warranty Act, 15 U.S.C. § 2310 (d)(2), is within the discretion of the trial court.

**APPRAISAL REPORTS
OF
CLOSELY-HELD BUSINESS
INTERESTS**

For the following Purposes:

- Estate Tax
- Employee Stock Ownership Trusts
- Litigation Involving Breach of Fiduciary Duty
- Transactions Between Trustee, Employer, and Trust
- Divorce Settlements
- Buy-Sell Agreements
- Acquisitions and Sales

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