Approved March 14, 1988
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Robert Frey at
Chairperson

10:00 a.m./p.m. on March 3, 1988 in room 514-S of the Capitol.

All members were present except: Senators Frey, Hoferer, Burke, Feleciano, Langworthy, Parrish, Steineger, Winter and Yost.

Committee staff present:
Gordon Self, Office of Revisor of Statutes
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:
Jim Yonally, Kansas Association of Security Alarm Companies
Robert S. Everley, Leawood
Art Weiss, Office of Attorney General
Ron Smith, Kansas Bar Association
George Barbee, Kansas Consulting Engineers
William M. Henry, Kansas Engineering Society
John Young, Land Surveyor
Bruce Miller, Supreme Court Disciplinary Administrator

The chairman reminded the committee of the 8:00 meeting in the morning and again at 10:00 A.M. to take action on bills previously heard.

Senate Bill 679 - Consumer protection act, exclusion of warranties.

Jim Yonally, Kansas Association of Security Alarm Companies, thanked the committee for introducing the bill. He testified this bill is the result of a Supreme Court decision Corral v. Rollins Protective Services Co. Mr. Yonally explained a home was struck by lightening that caused a fire and the alarm did not go off. He explained the Supreme Court ruled the company cannot limit their liability through contract. The bill provides the company can limit their damages. He asked the committee to read Barkley Clark's letter that is attached to written testimony of James D. Gray (See Attachments I).

Robert S. Everley, Leawood, testified he is the owner of a small independent security alarm company. He stated he is in support of the bill. If we are not able to limit our liability in a reasonable fashion as the laws have provided in the past, then our industry in Kansas will no longer be able to provide this needed service. A copy of his handout is attached (See Attachment II).

Art Weiss, Office of Attorney General, appeared in opposition to the bill. He testified, we can't allow any party or industry to pass goods into the market that are not acceptable under ordinary goods. The reason for the limitation for the exclusion is in a warranty. That is a protection afforded to them. That is a protection afforded to them to allow exclusion for shoddy goods. Responding to an alarm call would apply to goods. He asked the bill not be passed. A committee member inquired, do you consider an alarm system to be goods or not? Mr. Weiss replied the actual product, yes. When go out and make a call, it is not goods. You are responsible for the consequential

Senate Bill 679 continued

damages. In response to a question Mr. Weiss said, I think it sets a dangerous precedent to exclude the customer's liability. Next year car dealers will be in here because they have lost a case. The chairman said we have already seen that. Seed dealers and livestock dealers have been in here and run against this same problem of the warranty and have come to the legislature for relief. Mr. Weiss replied, for the actual goods themselves, people are entitled to what they pay for.

Ron Smith, Kansas Bar Association, stated the association does not have a position on this particular bill. It is confusing the way the bill was drafted. The way it is phrased in line 50, I'm not sure to the extent that company or any supplier of goods can exclude a warranty under the UCC provisions. Mr. Smith suggested striking "unlawfully" and insert "except" as in subsection (i) in Section (3).

Senate Bill 690 - Professional negligence action, certificates of consultation.

George Barbee, Kansas Consulting Engineers, appeared in support of the bill. He explained it was not their intent that this be applicable only to our profession. I would not object for other professionals to be included in this bill. This bill is modeled after the certificate of merit statute in California with some changes. We think this would be a good addition to the Kansas Code of Civil Procedure. The bill would be a positive step to ease the burden, in some small way, of our overloaded judicial system. A copy of his statement is attached (See Attachment III).

William M. Henry, Kansas Engineering Society, testified in our view this bill is another measure that would reduce frivolous litigation at the outset of litigation. As we have testified before in this committee the primary concern that engineers have with our current tort system is not necessarily with caps or limitations on actions brought in professional negligence cases but rather our concern is with the expense and time consumed with litigation that is basically nonsubstantive or frivolous in nature. Mr. Henry suggested this legislation apply to any licensed professional in the State of Kansas. A copy of his statement is attached (See attachment IV).

John Young, Land Surveyor, testified he would like to echo the comments of Mr. Henry and Mr. Barbee. In his line of work he is very fortunate to have the opportunity to be exposed to a lot of professions and members of the public. He said there is a tremendous gap in understanding in the professions. He is aware of the potential for litigation simply because of misunderstanding of the fact. He said he feels this will prevent litigation.

Bruce Miller, Supreme Court Disciplinary Administrator, stated he had a couple of problems with the bill. He said has hasn't heard any specific concerns as to the need for this bill. He has not heard anybody say they have been wrongfully sued. He said he would like to suggest this bill is repetitious to existing law K.S.A. 60-211 in the state that deals with pleadings. In addition K.S.A. 60-207 deals with liability for frivolous lawsuits. If we had examples for cases that were totally frivolous then perhaps there might be something to this bill. Without such facts I don't see any merit in it. The court

just published a release of professional conduct that prevents frivolous lawsuits brought by an attorney. He referred to line 29 subsection (A), attorney to certify he reviewed the facts of the case to determine what the facts of the case were. Impossible standard; not sure what that means. Trying to put attorney to a trier of fact. The paragraph starting with line 30, you are requiring to do an act that hever would have been necessary, and compounding expenses for no just cause. He said he is concerned with paragraph (e), concerning consultation with experts. This invades the whole area. It has a very, very chilling effect that works no good. As to subsection (f), the civil area is sufficiently covered by the existing statute and by the rules of the supreme court.

Ron Smith, Kansas Bar Association, referred to line 27 and suggested changing the word claims to plaintiff. In subsection (e), discoverability of consultation, might have chilling effect on some actions. Don't think you want to chill that type of expertise. In subsection (e), lines 69 through 72, I have no idea what that does. Seems to provide some kind of immunity. In subsection (h), it appears to be redundant. In subsection (f), this is an inherent power of the court.

A committee member inquired of Mr. Henry, the certificate has to be filed with individual defendant claimed? Mr. Henry replied, yes. The committee member inquired why is this any different at all to have some basis for filing an action? Mr. Henry replied, that is the main issue and that is what Mr. Miller is speaking to. We don't look at the rules first. Maybe it is repetitious to take necessary steps before take the action. The committee member inquired, this basically restates what is current professional conduct on the part of attorneys. Mr. Henry replied, yes. A committee member inquired of Mr. Miller how many times in your position have you had cases brought to you of attorneys disciplined for not doing that? Mr. Miller replied, to his knowledge in the last 10 years, no complaint by any professional covered by this bill. None. The remedy is there.

The meeting adjourned.

A copy of the guest list is attached (See Attachment V).

A copy of testimony from the Kansas Society of Certified Public Accountants is attached (See Attachment VI).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-3-88

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Art Weiss	Topeka	Atty. General's Office
John Young	Lawrence	Ks. Society of Land Surveyors
Jacque Oakes	Topeka	KSLS
Helen Stephens	Topeka	Ks. Soc. Land Surveyors
Lewis Pownall	Lawrence	Intern
PAT BARNES	Topeka	KS. Motor Car Dealers Assn.
John Vacek	Topeka	KSCPA
Steve Everley	KC KS	KASAC
Jim GRAY	KC. KS.	KASAC
Jim Yonally	Overland Park	KASAC
John Robertson	Topeka	Ks. Consulting Engrs.
George Barbee	Topeka	Ks Consulting Engrs
Stan Hazlett	Topeka	Disciplinary Adm. Office
Bruce Miller	Topeka	Disciplinary Administrator
Richard Mason	"	ICTA
Bob Arquilla	"	"
Bill Henry	Topeka	Ks Engineering Society
Janet Stubbs		KBAK
Matt Farrell	Topeka	AP
J. C. Anderson	Topeka	KSCPA
Tom Smith	"	KBA

Att. V

TESTIMONY - MARCH 3, 1988

BY JAMES D. GRAY
GENERAL MANAGER
ADT SECURITY SYSTEMS

As the General Manager for ADT Security Systems, I am representing the largest supplier of electronic alarm service throughout the United States. ADT has been operating in the State of Kansas since the early 1900's providing electronic security systems to both businesses and residents and today we presently protect around 500 homes in the state. ADT is just one of six large companies doing business and there are better than a hundred independent alarm companies also doing business in Kansas. The alarm industry estimates that there are between 9,000 to 10,000 homes with electronic alarm protection in this state today!

As one member of this industry I am petitioning the State of Kansas to change the Kansas Consumer Protection Law to the form it was originally intended and I am in full support of Senate Bill #679 (SEE ATTACHMENT A).

Senate Bill #679 needs to be passed in order to correct the error made when the Supreme Court passed judgement on the Corral vs. Rollins case last year. And I would like to add this correction is with the concurrence of Prof. Barkley Clark whom served as a special advisor to the Kansas legislature back in 1973 when the Kansas Consumer Protection Act was drawn up (SEE ATTACHMENT B). The petition of this legislation is also at the direct invitation of the Supreme Court of Kansas (SEE ATTACHMENT C). I think it's important to point out that our industry, which is better than 100 years old, has been providing our services from coast-to-coast in this country at what we believe are very reasonable costs to the residential user. Our charges commonly range from $15 to $25 per month for monitoring service(s). This service, most simply put, takes place when we receive an alarm signal at an Alarm Receiving Central Station Center, from a residential alarm system user. In the Alarm Receiving Central Station Center we have trained professionals on duty 24-hours a day, seven days a week, and they in turn dispatch the appropriate information to the local authority whom then deal directly with the problem. Therefore, we have become an important adjunct in helping both police and fire departments do their jobs.

An Alarm Receiving Central Station Center represents a considerable investment not only in manpower but also in the form of capital investment. We use specially configured electronic technology to receive a multitude of electronic signals from each and every alarm user. The building wherein we receive these signals is carefully constructed with security in mind and we have specially designed backup power systems that allow us to operate even if a disaster strikes.

att. I

BY JAMES D. GRAY
GENERAL MANAGER
ADT SECURITY SYSTEMS

We are able to offer this service for these low charges even in light of our investments because we always have been able to limit our liability. We have been able to do this through an agreement with our customers where both parties have agreed that the alarm company is not an insurer. Therefore, our liabilities have been based only on the fees we charge and not the value of the property we are protecting as the insurance industry does. It is not our desire or our wish to be in the insurance business.

The Corral vs. Rollins case presents a fundamental break in the practice of common law, which has been upheld in court case, after court case, throughout America and until the ruling on this case in the State of Kansas. Because we have always been able to limit our liability, our rate structure has simply been based on the service(s) we render plus a fair profit. Therefore, at $15 per month fees, should this bill not pass, our industry must either raise its rates to the point where I believe no one could afford the "peace of mind" protection we offer the homeowner -- or choose to endanger the financial viability of the company by risking a judgement against the company which would cause the company to cease.

I would like to conclude my testimony by saying ADT and everyone else in our industry would prefer to continue to supply this service to the many homeowners in the State of Kansas and that is presently why we are here today. But we must be allowed to return to the same rules we have always operated under in the fine State of Kansas.

Our industry has enjoyed real growth over the recent years. We estimate that there is more than 1,000 people employed in our fast growing industry in the State of Kansas today. I would hate to see any part of our business come to an end over a poor interpretation of the Kansas Consumer Protection Law.

Please help us pass Senate Bill #679 so that our Industry can protect the many homeowners in Kansas who use our services today, and the many more who may choose to use them in the future.

pealed.

Sec. 5. This act shall take effect and be in force from and after its publication in the statute book.

ATTACHMENT A

Session of 1988

SENATE BILL No. 679

By Committee on Judiciary

2-22

AN ACT concerning the consumer protection act; relating to exclusion of warranties; amending K.S.A. 50-627, 50-635 and 50-639 and repealing the existing sections.

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

Section 1. K.S.A. 50-627 is hereby amended to read as follows: 50-627. (a) No supplier shall engage in any unconscionable act or practice in connection with a consumer transaction. An unconscionable act or practice violates this act whether it occurs before, during or after the transaction.

(b) The unconscionability of an act or practice is a question for the court. In determining whether an act or practice is unconscionable, the court shall consider circumstances of which the supplier knew or had reason to know, such as, but not limited to the following:

(1) That the supplier took advantage of the inability of the consumer reasonably to protect the consumer's interests because of the consumer's physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factor;

(2) that, when the consumer transaction was entered into, the price grossly exceeded the price at which similar property or services were readily obtainable in similar transactions by similar consumers;

(3) that, when the consumer transaction was entered into, the consumer was unable to receive a material benefit from the subject of the transaction;

(4) that, when the consumer transaction was entered into, there was no reasonable probability of payment of the obligation in full by the consumer;

(5) that the transaction the supplier induced the consumer to enter into was excessively onesided in favor of the supplier;

(6) that the supplier made a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment; and

(7) that the supplier *unlawfully* excluded, modified or otherwise attempted to limit either the implied warranties of merchantability and fitness for a particular purpose or any remedy provided by law for a breach of those warranties.

Sec. 2. K.S.A. 50-635 is hereby amended to read as follows: 50-635. (a) ~~This article~~ *The Kansas consumer protection act* does not apply to:

(1) A publisher, broadcaster, printer or other person engaged in the dissemination of information or the reproduction of printed or pictorial matter so far as the information or matter has been disseminated or reproduced on behalf of others without actual knowledge that it violated ~~this article~~ *the Kansas consumer protection act*; or

(2) claim for personal injury or death or claim for damage to property other than the property that is the subject of the consumer transaction.

(b) A person alleged to have violated this act has the burden of showing the applicability of this section.

Sec. 3. K.S.A. 50-639 is hereby amended to read as follows: 50-639. (a) Notwithstanding any other provisions of law, with respect to property which is the subject of or is intended to become the subject of a consumer transaction in this state, no supplier shall:

(1) Exclude, modify or otherwise attempt to limit the implied warranties of merchantability and fitness for a particular purpose; or

(2) exclude, modify or attempt to limit any remedy provided by law, including the measure of damages available, for a breach of implied warranty of merchantability and fitness for a particular purpose.

(b) Notwithstanding any provision of law, no action for breach of warranty with respect to property subject to a consumer transaction shall fail because of a lack of privity between the claimant and the party against whom the claim is made. An action against any person for breach of warranty with respect to property subject to a consumer transaction shall not of itself constitute a bar to the bringing of an action against another person.

(c) A supplier may limit the supplier's implied warranty of merchantability and fitness for a particular purpose with respect to a defect or defects in the property only if the supplier establishes that the consumer had knowledge of the defect or defects, which became the basis of the bargain between the parties. In neither case shall such limitation apply to liability for personal injury or property damage.

(d) Nothing in this section shall be construed to expand the implied warranty of merchantability as defined in K.S.A. 84-2-314, *and amendments thereto,* to involve obligations in excess of those which are appropriate to the property.

(e) A disclaimer or limitation in violation of this section is void. If a consumer prevails in an action based upon breach of warranty, and the supplier has violated this section, the court may, in addition to any actual damages recovered, award reasonable attorney's fees and a civil penalty under K.S.A. 50-636, and amendments thereto, or both to be paid by the supplier who caused the improper disclaimer to be written.

(f) The making of a limited express warranty is not in itself a violation of this section.

(g) This section shall not apply to seed for planting.

(h) This section shall not apply to sales of livestock for agricultural purposes, other than sales of livestock for immediate slaughter, except in cases where the seller knowingly sells livestock which is diseased.

(i) This section shall not prohibit an exclusion, modification or limitation of remedy for breach of any warranty applicable to the furnishing of electronic security services, including but not limited to the installing, maintaining, repairing, monitoring of and responding to, equipment installed in connection therewith.

Sec. 4. K.S.A. 50-627, 50-635 and 50-639 are hereby re-

AT CHMENT B

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Washington, D.C. 20052 / The National Law Center

February 13, 1988

Linda Gill Taylor
Gage & Tucker
2345 Grand Avenue
Kansas City, Missouri 64141

Re: Home Protection Services;
Proposed Amendment of
Kansas Consumer Protection Act

Dear Linda:

I appreciate your sending me your proposed language for amendments to the Kansas Consumer Protection Act which would reverse the unfortunate decision of Corral v. Rollins Protective Services Co., 240 Kan. 678 (1987). I think your language hits the target in the middle and properly accepts the Kansas Supreme Court's invitation to resolve this problem legislatively. I write as the person who drafted the language construed in Corral when I was serving as special advisor to the Kansas legislature way back in 1973.

I have carefully reviewed the Corral decision, and I am conviced it is wrong. The court discovers a common law "implied warranty of good workmanship" totally outside the bounds of the UCC. This implied warranty covers providers of services such as the home protection industry. The court then finds that K.S.A. 50-639--the Kansas Consumer Protection Act's attempt to outlaw warranty disclaimers and remedy limits--covers the new common law implied warranty. Since the implied warranty applies, and attempts to limit remedies for its breach are outlawed by K.S.A. 50-639, the alarm company is subject to consequential damages for property loss. I think the Corral decision is wrong because it puts the industry in an impossible "Catch-22" position. The court first holds that liability for negligence and strict tort can be limited by appropriate language in the contract. Such language is not against public policy, nor is it covered by the Kansas Consumer Protection Act. Then it finds that the home protection services are based on "warranty" rather than "tort", so that the KCPA blocks any attempted disclaimers. The decision is wrong because the implied "warranty" discovered by the court is nothing more than negligence carrying a "warranty" rather than a "tort" label. If a supplier of home protection services is allowed to limit liability for

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negligence under the label of "negligence" or "strict tort", there is no earthly reason why it should not also be allowed to limit liability for negligence under the label of "warranty." In this regard, Corral is ultimate form over substance.

The second flaw in the court's reasoning is its conclusion that K.S.A. 50-639 was intended to cover non-UCC warranty claims. As the principal drafter of that provision, I can vouch that it was intended to affect only UCC warranties for the sale of goods, particularly those under K.S.A. 84-2-314 and 84-2-315. A subsequent amendment in 1974, which narrowed the language in 50-639 from "warranty, express or implied, including the warranties of merchantability and fitness for a particular purpose" to "the implied warranties of merchantability and fitness for a particular purpose", makes this point crystal-clear. Common law warranties which might attach to the providing of services were not intended to be touched by 50-639. Unfortunately, the court in Corral ignores this limited scope of 50-639. Finally, the court relies on a Virginia decision, Gill v. Rollins Protective Services Co., 722 F.2d 55 (4th Cir. 1983), which is not really relevant because it involved a consumer protection statute with very different language.

The best part of the court's decision in Corral is its awareness, at the end of the opinion, that alarm companies should not be held to be insurers of property, and that "[i]f alarm companies are to be excepted from the provisions of the [Kansas Consumer Protection Act], such must be done by the legislature and not the courts." The Kansas Supreme Court has issued a clear invitation to the legislature to overrule its decision in Corral, and that is precisely what your language does. It would amend K.S.A. 50-639 by adding a new subsection (i) reading as follows:

> This section shall not prohibit an exclusion, modification or limitation of remedy for breach of any warranty applicable to the furnishing of electronic security services, including but not limited to the installing, maintaining, repairing and monitoring of, and responding to, equipment installed in connection therewith.

The only additions I would suggest are: (1) Change the word "article" to "act" in 50-635, to make it clear that the exclusions listed in that section apply to cases under 50-639 as part of the Kansas Consumer Protection Act. Use of the word "article" rather than "act" was a simple reference error which needs to be corrected. (2) Add

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the word "unlawfully" before "excluded" in 50-627(b)(7), to make it clear that valid disclaimers and remedy limits, such as those involving services outside the scope of 60-639, cannot be considered to be unconscionable trade practices under 50-627.

In sum, I applaud your acceptance of the Supreme Court's invitation to go to the legislature for relief. This is good legislation. It overturns the questionable holding in Corral and allows freedom of contract in this area. As I mentioned to you over the phone, I would be delighted to come to Topeka to testify in support of the amendment. I always jump at the chance to return to Kansas anyway.

Let me know if you have any further questions.

Sincerely,

Barkley Clark

Barkley Clark
Professor of Law

BC:bc

upon the negligence theory her damages may be limited to $250. Because we cannot say which theory was the basis of the jury's verdict, the judgment must be vacated and the case remanded for a new trial. [Citations omitted.] Upon a new trial, we suggest that separate verdicts, as to negligence on the one hand and the statutory cause of action on the other, are appropriate." pp. 58-59.

We conclude the trial court erred in granting summary judgment upon the claim of an alleged violation of the KCPA.

We are not unmindful of the impact this decision may have upon firms such as Rollins, which are attempting to provide a useful, and in many cases, essential service to the public at a reasonable cost. Alarm companies should not be held to be insurers of the property of their customers for the nominal fees they charge for their services. However, it is not for this court to create exceptions to our consumer protection act which are not clearly contained therein. K.S.A. 50-623 requires that the act be liberally construed to, among other things, "protect consumers from unbargained for warranty disclaimers" and "to protect consumers from suppliers who commit deceptive and unconscionable practices." If alarm companies are to be excepted from the provisions of the Act, such must be done by the legislature and not by the courts.

The judgment of the trial court granting summary judgment upon Corral's claims of breach of implied warranty and violation of the Kansas Consumer Protection Act is reversed; the judgment granting summary judgment and partial summary judgment on the other claims is sustained and the case is remanded for further proceedings.

Robert S. Everley
DELTA SECURITY, Inc.
P.O. Box 6532
Leawood, Kansas 66206

3 March 1988

TO: Senate Judiciary Committee

Referance: Senate Bill No. 679

I am the owner of a small independant security alarm company, located in Leawood, Johnson County, Kansas. My company serves small businesses and residential customers in the local Kansas City area. I have been in business for the past two and 1/2 years.

I provide my customers with local sounding fire and burglar alarm systems as well as systems that are monitored on a twenty four hour basis. I am just one of some 150 small to medium sized alarm companies in the state of Kansas. We as a whole provide security and peace-of-mind to approximately 10,000 residential customers and about 8,000 commercial businesses. Our industry is a growing industry and every year more and more people are comming to us for the services that we are able to provide.

I'm here in support of Senate Bill No. 679. I think that I can speak for many of my colleagues when I say that the Amendment to the K.S.A. Sections 50.627, 50.635, and 50.639, that this Bill provides, is necessary for our ability to continue to provide security services in the State of Kansas.

A precidence was set that was very damageing to our industry when the Supreme Court of Kansas entered its decision in the Corral vs. Rollins Protective Services Co., 240-Kan-678 (~~1987~~ 1987). In that finding the Court stated that even though it was sympathetic to the alarm companies ability to limit its liability, there was nothing the Court could do, given the statutory language. The Court did however state that "If alarm companies are to be excepted from the provisions of the Act, such must be done by the legislature and not by the Courts."

A number of my colleagues an I got together and consulted legal council to act on the Courts invatation. We also contacted Mr. Barkley Clark of George Washington University who was the origional drafter of the Kansas Consumer Protection Act currently in use. He gave us his input as to how the language of the Act should be ammemded. A brief of his recommendation has been provided to you in a letter that was previouslly handed out to this committee.

In brief, the ruling of the Supreme Court in it's decision, was that the alarm company could be held libel for the cost of the goods or items that the alarm system was to protect. This in fact makes us the insurer of the goods.

Att. II

Our industry for years has provided security protection to all price ranges of property and goods. For this service we charge a fair price for installation of the system, and a small monthly charge to service the system and/or provide someone at a central monitoring station to act on any alarm signals the system sends to it. These charges are based on the services we are providing and not on the value of the property being protected. Thus a home or business valued at 40-50 thousand dollars would cost no more on a monthly basis than would a 500 thousand dollar home. Generally this charge is in the range of 15 to 25 dollars per month for the monitoring service.

Without the provisions provided in this Bill we are not able to limit our liability. General Law throughout the years has upheld in many cases that the contractual limitations are a necessary and fair way of conducting business, if certain guidelines are followed. This bill will correct any improprieties that currently exist in the Kansas Consumer Protection Act.

If we are not able to limit our liability in a reasonable fashon as the laws have provided in the past, then our industry in Kansas will no longer be able to provide this needed service. The small business person such as myself could not afford to even start a security business without extremelly large sources of capital, most of which would be used to pay outrageous insurence policies. Those of us who already have a business would think twice about continueing to do business in the state of Kansas.

I ask that this Judiciary Committee study the BILL, and recommend it be passed by the Legislature of this State.

Sincerely,

Robert S. Everley

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February 13, 1988

Linda Gill Taylor
Gage & Tucker
2345 Grand Avenue
Kansas City, Missouri 64141

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Proposed Amendment of
Kansas Consumer Protection Act

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I have carefully reviewed the Corral decision, and I am conviced it is wrong. The court discovers a common law "implied warranty of good workmanship" totally outside the bounds of the UCC. This implied warranty covers providers of services such as the home protection industry. The court then finds that K.S.A. 50-639--the Kansas Consumer Protection Act's attempt to outlaw warranty disclaimers and remedy limits--covers the new common law implied warranty. Since the implied warranty applies, and attempts to limit remedies for its breach are outlawed by K.S.A. 50-639, the alarm company is subject to consequential damages for property loss. I think the Corral decision is wrong because it puts the industry in an impossible "Catch-22" position. The court first holds that liability for negligence and strict tort can be limited by appropriate language in the contract. Such language is not against public policy, nor is it covered by the Kansas Consumer Protection Act. Then it finds that the home protection services are based on "warranty" rather than "tort", so that the KCPA blocks any attempted disclaimers. The decision is wrong because the implied "warranty" discovered by the court is nothing more than negligence carrying a "warranty" rather than a "tort" label. If a supplier of home protection services is allowed to limit liability for

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the word "unlawfully" before "excluded" in 50-627(b)(7), to make it clear that valid disclaimers and remedy limits, such as those involving services outside the scope of 50-639, cannot be considered to be unconscionable trade practices under 50-627.

In sum, I applaud your acceptance of the Supreme Court's invitation to go to the legislature for relief. This is good legislation. It overturns the questionable holding in Corral and allows freedom of contract in this area. As I mentioned to you over the phone, I would be delighted to come to Topeka to testify in support of the amendment. I always jump at the chance to return to Kansas anyway.

Let me know if you have any further questions.

Sincerely,

Barkley Clark

Barkley Clark
Professor of Law

BC:bc

AMENDMENT OF THE KANSAS CONSUMER PROTECTION ACT

Consisting Of

Adding new subsection (i) to K.S.A. § 60-639;
Changing "article" to "act" in K.S.A. § 50-635(a)(1);(b)
and
Adding "unlawfully" to K.S.A. § 50-627(b)(7)

K.S.A. § 50-639(i)

(i) This section shall not prohibit an exclusion, modification or limitation of remedy for breach of any warranty applicable to the furnishing of electronic security services, including but not limited to the installing, maintaining, repairing, and monitoring of, and responding to, equipment installed in connection therewith.

K.S.A. § 50-635

(a) This act does not apply to:

(1) A publisher, broadcaster, printer or other person engaged in the dissemination of information or the reproduction of printed or pictorial matter so far as the information matter has been disseminated or reproduced on behalf of others without actual knowledge that it violated this act, or

(2) claims for personal injury or death or claim for damage to property other than the property that is the subject of the consumer transaction.

(b) A person alleged to have violated this act has the burden of showing the applicability of this section.

K.S.A. § 50-627

(b)(7) that the supplier unlawfully excluded, modified or otherwise attempted to limit either the implied warranties of merchantability and fitness for a particular purpose or any remedy provided by law for breach of those warranties.

* Underlining indicates amendatory language.

3-3-88

KANSAS CONSULTING ENGINEERS

GEORGE BARBEE, EXECUTIVE DIRECTOR
810 MERCHANTS NATIONAL BANK
8TH & JACKSON
TOPEKA, KANSAS 66612
PHONE (913) 357-1824

STATEMENT

DATE: March 2, 1988

TO: SENATE JUDICIARY COMMITTEE

FROM: George Barbee, Executive Director
Kansas Consulting Engineers

RE: SB-690

Mr. Chairman and members of the committee my name is George Barbee and I am the Executive Director of the Kansas Consulting Engineers.

I am here today in support of SB-690 which I will refer to as the certificate of merit statute. First, let me explain where this concept came from, then what it provides for and finally share with you a recent study regarding the effectiveness of the certificate of merit statute in California.

Representative Phil Kline read about this a few weeks ago in a national newsletter distributed to consulting engineers. The news article mentioned that a California professional liability case had been dismissed because an attorney had failed to file a certificate of merit. Representative Kline made some inquiries and was sent a copy of section 411.35 of the California Code of Civil Procedure which provides some protection from unfounded or speculative malpractice actions.

It was discovered that the law requires in every action, including a cross complaint for damages or indemnity arising out of professional negligence of an architect, landscape architect, engineer or surveyor, that the attorney shall file a certificate of merit stating, in summary, one of the following:

- The attorney has reviewed all the facts in the case and has consulted with a qualified design professional, who is not a party to the contemplated action, as to the merits of the case and, in the opinion of the attorney, there is "reasonable and meritorious" cause for the filing.

Att. III

- That obtaining the required consultation would impair the filing of the action prior to the expiration of statute of limitation (in which case the required consultation may be delayed).

- That the attorney has made three unsuccessful, "good-faith" attempts to secure the required consultation.

I have to point out that SB-690 does not exactly follow the California model we suggested in that it does not refer to cross complaints. There may be a valid reason for admitting the cross complaint provision but we felt the difference should be pointed out.

The bill continues by requiring that one certificate shall be filed for each defendant based on a written statement of facts presented to the consultant.

The bill also provides that no certificate is required if the attorney intends to rely solely on the doctrine of "res ipsa loquitur", as the basis for the malpractice suit.

SB-690 also departs from the California law in that the name of the consultant may be disclosed and sanctions may be imposed on the attorney for not complying with the provisions of the act.

The California law recently went through a sunset review and was re-enacted. In preparation for this review a study was conducted by Ralph Andersen & Associates to determine the effect of the act and to report the findings in a comprehensive manor. After surveying almost 1300 architects, engineers, landsurveyors, defense attorneys, plaintiffs attorneys, and insurance companys, the Andersen analyst determined the certificate of merit requirement has had a "damping" effect on filings by potential plaintiffs.

In the executive summary the findings and conclusions were:

1. Fewer malpractice suits are filed against design professionals as a result of the certificate of merit law.

2. More malpractice lawsuits against design professionals are dismissed as a result of the law.

3. The law has resulted in fewer jury trials.

4. The law is generally complied with, and non-compliance appears to be related more to ignorance of the statute than to willful disregard of the law.

5. Design professionals support the certificate of merit law and demonstrate that support thru their willingness to consult on the merits of potential malpractice litigation.

6. Costs of the consultation required under the law are not significant.

7. There is overwhelming support for retention of the law among those directly involved in design malpractice litigation.

8. There are opportunities to improve the law to better serve its intended purposes.

The suggestion that there are opportunities to improve the law was researched and the suggested amendments for improvement have been incorporated in SB-690 regarding discoverability and sanctions.

We think this would be a good addition to the Kansas Code of Civil Procedure. While I am told that prudent attorneys will review the facts of the case and have their witnesses lined up before filing, too often that is not the case I have made inquiries of some members of Kansas Consulting Engineers and have received examples of cases where they were named and subsequently dismissed from lawsuits on a motion for summary judgment.

I am informed by some attorneys that the Kansas laws on comparative negligence often cause the joining of as many defendants as possible for the purpose of spreading the comparative negligence. When a design professional is named in a lawsuit that he or she should not be named in, it is very expensive to get out. Often times the cost of defense to get out of the case can lead to several thousands dollars. That usually is within the deductible of their professional insurance policy if, in fact, the professional carries that coverage.

This law would require that someone licensed in the same discipline would have looked at the facts of the case and made a determination as to whether there was merit. That step does not seem to be an imposition on attorneys that are now making a prudent review of the facts of the case. SB-690 would be a positive step to ease the burden, in some small way, of our overloaded judicial system and we urge you to report SB-690 favorable for action.

Thank you for allowing us to present our views and I would be glad to stand for questions.

3-3-88

Kansas Engineering Society, Inc.

627 S. Topeka, P.O. Box 477
Topeka, Kansas 66601 (913) 233-1867

Testimony for the Senate Judiciary Committee
March 3, 1988

Mr. Chairman, members of the committee I am Bill Henry, the Executive Vice President of the Kansas Engineering Society and I appear before you today in support of S.B. 690.

The more than 900 engineer members of the Kansas Engineering Society appreciate the attention this committee has given to our concerns in the past, particularly your most recent support of the screening panel measure which was eventually enacted by the 1987 Legislature.

In our view, S.B. 690 is another measure that would reduce frivolous litigation at the outset of litigation.

S.B. 690 is a Kansas version of a California statute which requires a certificate of consultation be filed by the attorney in any action for damages or indemnity arising out of the issue of professional negligence of an architect, landscape architect, engineer or land surveyor, whom are licensed under the provisions of article 70 of chapter 74 of the Kansas Statutes Annotated.

The members of the Society feel that this statute would compliment K.S.A. 60-211 which deals with liability for frivolous claims. Secondly, the bill would enact into law the current procedures that are followed by most attorneys when examining a situation to determine if there is a valid basis for a cause of action.

As we have testified before in this committee the primary concern that engineers have with our current tort system is not necessarily with caps or limitations on actions brought in professional negligence cases but rather our concern is with the expense and time consumed with litigation that is basically non-substantive or frivolous in nature. Although we currently have statutes which allow for recourse in the case of frivolous litigation, the standard is so high that success in seeking retribution against a frivolous plaintiff or litigator is quite limited.

In essence, S.B. 690 would require that an attorney review the facts of the case and also consult with at least one expert in the area of practice of the defendent whose professional competence is being questioned in the particular action.

The bill also allows some flexibility in the situation where an attorney faces a difficult time in getting an action on file based upon the running of the statute of limitations on a particular case. In lines 41 et seq., the attorney is

Att. IV

allowed to forego the requirement of a certificate where such a certificate cannot be obtained in the necessary time to keep the action viable. This section further does require however, within sixty days of filing the petition, that a certificate would have to be filed of record.

There is further flexibility in that an attorney who makes a good faith effort to obtain the consultation required and after three seperate good faith attempts to obtain such opinions and where none of those individuals contacted agreed to such consultation, the attorney may proceed in any event.

Finally, at line 79, (g) the proposed legislation would allow that the failure to file a certificate would be grounds for a motion to dismiss.

In addition, there is some real substance in lines 81 through 84 because the trial court is given the power to order a party to pay any reasonable expenses including attorneys' fees, where another party has failed to comply with the provision of the proposed statute.

The Kansas Engineering Society feels that this statute is a good basis to work from but feels two changes would be appropriate in S.B. 690 as proposed.

First, as a result of our Supreme Courts' action on the constitutionality of the medical malpractice collateral source rule, we feel that the bill could be expanded to apply not only to the licensed personnel as set out in section 1 but to any profession licensed by the state of Kansas. In other words this same certificate could apply to malpractice allegations brought against attorneys, accountants or other individuals licensed by the state of Kansas in their respective practices.

Secondly, in the draft of the California legislation there are provisions that the certificate of consultation would apply to cross claims filed by defendants as well. We feel that this is only equitable, based upon the fact that a defendant in an action could easily have the same tendency to fire with a shotgun technique to bring in other parties who clearly have no basis for being in a lawsuit. As legal counsel and members of the bar the members of this committee are surely familiar with this technique that is utilized in some cases to attempt to reduce the comparative liability of the primary defendent.

We feel that the certificate of consultation is a reasonable and fair handed approach to deterring litigation that does not belong in our courts. We hope the committee will recommend it favorable for passage.

Respectfully submitted,

William M. Henry
Executive Vice President
Kansas Engineering Society

3-3-88

Kansas Society of
Certified Public Accountants

FOUNDED OCTOBER 17, 1932

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

March 3, 1988

Honorable Robert G. Frey
Chairman, Senate Committee on Judiciary
State Capitol
Topeka, Ks 66612

Dear Senator Frey:

After reviewing SB 690 regarding civil actions; technical professions; professional negligence, the Kansas Society would ask that consideration be given to expanding the scope of the bill to cover all professions covered by the professional corporation act.

It would appear that SB 690 could prevent the hasty filing of law suits for professional negligence.

Thank you for your consideration of this request.

Sincerely,

T. C. Anderson
Executive Director

TCA:sc

cc: Committee Members

Att. VI