Approved 2-12-90
Date

MINUTES OF THE House COMMITTEE ON Transportation.

The meeting was called to order by Rex Crowell at
Chairperson

1:30 ~~a.m.~~/p.m. on February 8, 1990 in room 519-S of the Capitol.

All members were present except:
Representatives Empson and Lawrence - excused.

Committee staff present:
Bruce Kinzie, Revisor of Statutes
Hank Avila, Legislative Research
Donna Mulligan, Committee Secretary

Conferees appearing before the committee:
Ms. Jeanne Kutzley, Attorney General's Office
Mr. Michael Lechner, Commission on Disability Concerns
Representative Donna Whiteman

The meeting was called to order by Chairman Crowell, and the first order of business was a hearing on HB-2681 requiring certain disclosures by vehicle dealers.

Ms. Jeanne Kutzley, Assistant Attorney General, testified in support of HB-2681. (See Attachment 1)

Committee discussion and questioning followed Ms. Kutzley's remarks.

The hearing on HB-2681 ended.

The next order of business was a hearing on HB-2082 concerning the signing of handicapped parking spaces.

Representative Donna Whiteman distributed testimony in support of HB-2082 from Sgt. F. K. Owston, Hutchinson Police Department, who was not present to testify. (See Attachment 2)

Mr. Michael Lechner, Kansas Commission on Disability Concerns, spoke in opposition to HB-2082. (See Attachment 3)

The hearing on HB-2082 ended.

The minutes of the House Transportation Committee meeting held on February 6, 1990, were approved as written.

The meeting was adjourned at 2:00 p.m.

Rex Crowell
Rex Crowell, Chairman

GUEST LIST

COMMITTEE: Transportation DATE: 2-8-10

PLEASE PRINT

NAME	ADDRESS	COMPANY/ORGANIZATION
Michael Leckner	1430 SW Topeka, Topeka	Commission on Disability Concerns
Martha Gallehan	"	"
Jocanne Odgers	Topeka	Ks. Ind. Auto. Dealers Assn.
Nancy Lindberg	Topeka	AG.
D Dustin Kuntz	AG's Office	Topeka
Charlotte Burden	AG	Topeka
Pamela Mauer	AG	topeka
Tammy Thrasher	AG	Topeka
Roger W Barta	Topeka	T.C.U.
Steven Schmid	Topeka	Kan. Peace Officers
Pam Somerville	TOPEKA	KDOT
Mike Kelley	Overland Park	Yellow Freight
Carl Hill	Topeka	Ks Motor Carriers Assn
Tom Whitaker	Topeka	Ks Motor Carriers Assn
ED DE SOIGNIE	TOPEKA	KS. CONTRACTORS ASSOC

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

TESTIMONY OF
ASSISTANT ATTORNEY GENERAL D. JEANNE KUTZLEY
TO THE COMMITTEE ON TRANSPORTATION

RE: H. B. 2681

February 8, 1990

Mr. Chairman and Members of the Committee:

My name is Jeanne Kutzley, Assistant Attorney General.

Attorney General Stephan offers this bill to stop a specific misleading practice by used car dealers.

Most of us approach the chore of purchasing a car with about the same enthusiasm as a trip to the dentist. We usually feel at a disadvantage dealing with car dealers' representatives. Many people feel they get a better car and a better deal from an individual. Some car dealers have figured out a way around that. It's called "curbstoning."

These car dealers place "blind ads". Those ads may have only a short description of the car and a phone number. One example is attached. The buyer is lead to believe the car belongs to an individual. Some dealers carry the scam further and never actually disclose that the car belongs to a dealer. In the case of the attached ad, an individual placed these

Att. 1

ads, sold the car and never disclosed the dealership connection.

Only if the buyer knew how to read the back of a car title could he or she figure out that the car belonged to a dealership. Since by law the seller has 30 days to provide a title, the buyer might not have any way to discover for 30 days that a dealer was the seller.

In addition, most buyers expect a warranty from a car dealership but not from an individual. If they never know the car belongs to a dealer, they may not know they are afforded the protections of an implied warranty.

The recommended language would make it a per se violation of the Kansas Consumer Protection Act if the dealer does not disclose that the car is sold by a dealer.

The question has come up whether language should be added to require disclosure that a vehicle is being sold on consignment by a dealer. After considerable research it appears that some opinions are already in place which may regulate that consignment sale.

In Attorney General's Opinion 86-25 (copy attached), Attorney General Stephan stated that a licensed dealer in motor vehicles may also be licensed to act as a broker for such vehicles, and solicit sales for vehicles delivered to him on consignment. A broker would be a supplier under the Kansas Consumer Protection Act and any sale he solicits would be subject to the Act. The implied warranty of merchantability would attach to the sale of a vehicle by a broker.

On June 12, 1989, Director of the Division of Vehicles Thomas W. Skinner issued a letter opinion (copy attached) which stated "this letter is to serve notice to all brokers that commencing immediately, with inventory on hand, all brokers must appear in the chain of title."

These two opinions are available to dealers in the Dealers & Salespersons Handbook & Licensing Requirements.

While neither of these opinions have the force and effect of law, they are both generally considered very persuasive when the issue comes up in court.

It would appear that if a vehicle dealer selling a car on consignment follows the opinions already in place, the buyer will receive notice that the dealer is the seller (through the dealer's name appearing on the back of the title) and that the buyer will receive the implied warranty of merchantability.

Our office has received no consumer complaints to date of problems with dealers refusing implied warranties on consignment sales.

Although Attorney General Stephan is not offering language to require disclosure of consignment sale, he would certainly not oppose it if this committee feels it would clarify these non-binding opinions.

Attorney General Stephan urges you to approve this bill in its present form.

ATTORNEY GENERAL OPINION NO. 86-25

The Honorable
State Representative
Capitol Building
Topeka, Kansas 66612

Re: Monopolies and Unfair Trade — Consumer Protection — Disclaimer or Limitation of Warranties.

Uniform Commercial Code — Sales — Implied Warranty of Merchantability

Synopsis: A licensed dealer in motor vehicles may also be licensed to act as a broker for such vehicles, and solicit sales for vehicles delivered to him on consignment. Such a broker is accordingly a supplier under the Kansas Consumer Protection Act (KCPA), K.S.A. 50-623 et seq., and any sale which he solicits is subject to the act. An implied warranty of merchantability attaches to the sale of any good when the seller is a merchant in goods of that kind, pursuant to the Uniform Commercial Code, K.S.A. 84-2-104, 84-2-314. If the sale is also a consumer transaction under the KCPA, such implied warranty cannot be disclaimed. Therefore, the implied warranty of merchantability may not be disclaimed by a broker of motor vehicles, and any label or sticker which is required to be displayed by the Federal Trade Commission must reflect the existence of the warranty, and may not identify the transaction as an "As Is" sale. Cited herein: K.S.A. 50-623; 50-624; 50-627; 50-639; 84-2-104; 84-2-314; 84-2-316; L. 1976, ch. 236, §1; 16 C.F.R. §455.

* * *

Dear:

You have requested our opinion concerning the scope of the Kansas Consumer Protection Act, K.S.A. 50-623 et seq., and the Uniform Commercial Code provisions regarding the implied warranty of merchantability, K.S.A. 84-2-314. Specifically, you have inquired whether a sale of a used vehicle through a licensed broker constitutes a consumer transaction, and whether the broker may display a statement to buyers in the vehicle with the notation "As Is -- No Warranties."

A consumer transaction is defined by the Kansas Consumer Protection Act (hereinafter KCPA), which states in relevant part at K.S.A. 50-624(c):

> " 'Consumer transaction' means a sale, lease, assignment or other disposition for value of property or services within this state . . . to a consumer or a solicitation by a supplier with respect to any of these dispositions." (Emphasis added.)

The scope of this broad definition seems self-evident. Whenever property or services are conveyed for value to a consumer, or when a supplier solicits patronage by a consumer, a consumer transaction has occurred. As stated in the 1973 Kansas Comment, "The only requirement is that the transaction involve a 'consumer'." It is apparent that the legislature meant to include two types of transactions in this definition. The first is a disposition for value of property or services, and the second is a solicitation by a supplier to a consumer for such dispositions.

Within the first category, a consumer transaction occurs between the owner of the vehicle and the broker. The service rendered involves the marketing of the automobile, or its exposure to the buying public. Value is conferred on the broker in the commission by which he or she is compensated for the service.

Under the second defined category (i.e. solicitations), a consumer transaction occurs between the broker and the buyer if the broker is a "supplier" under the KCPA. K.S.A. 50-624(i) states:

> "Supplier means a manufacturer, distributor, dealer, seller, lessor, assignee, or other person who, in the ordinary course of business, solicits, engages in or enforces consumer transactions, whether of not dealing directly with the consumer." (Emphasis added.)

The term supplier is not limited in the ordinary sense of the word, as evidenced by this broad statutory definition. The legislative intent is clear that the coverage of the KCPA goes beyond sales. An indication of this was provided in 1976, when K.S.A. 50-623 was amended by striking the word "sales" to read:

> "to protect consumers from suppliers who commit deceptive and unconscionable practices; . . ." L. 1976, Ch. 236, §1.

It is our opinion that the transaction between a buyer and a broker falls within the solicitation category of the definition of consumer transaction.

This result is consistent with the express legislative purpose of the KCPA, which is enunciated in K.S.A. 50-623:

> "This act shall be construed liberally to promote the following policies: . . . (b) to protect consumers from suppliers who commit deceptive and unconscionable practices; (c) to protect consumers from unbargained for warranty disclaimers; . . ."

When a consumer enters onto a used car lot, he relies upon the knowledge and expertise of the dealer in advising him as to the relative merits of the vehicles he examines. The legal status of a particular vehicle (i.e. owned by the dealer or brokered by the dealer on behalf of another) may not be disclosed to a consumer, and probably is not of particular importance even if disclosed. Rather, the consumer's decision whether to enter into a transaction regarding that particular vehicle will be influenced by the solicitations he receives from the dealer, and it is consistent with the KCPA to include dealers who act as brokers within the coverage of the law.

Your second inquiry concerns the potential liability of a dealer-broker for warranty disclaimers which may be made on a vehicle which he or she sells on a consignment basis. You also express concerns that consumers may be misled into thinking they have implied warranty rights when in fact such rights may not apply. Under the so-called Used Car Rule of the Federal Trade Commission (16 C.R.F. §455), sales of used cars must be accompanied by a window sticker which informs the buyer that the vehicle is either sold "As Is," with implied warranties only, or with express warranties. While the FTC has interpreted the Used Car Rule to apply to dealers who sell cars on consignment, you request our opinion as to the applicability of the KCPA and a section of the Uniform Commercial Code (K.S.A. 84-2-314) to such sales as well.

The Uniform Commercial Code (UCC) defines a merchant as follows:

> " 'Merchant' means a a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." (Emphasis added.) K.S.A. 84-2-104.

The implied warranty of merchantability (K.S.A. 84-2-314) attaches to goods sold by a seller who is a merchant regarding goods of that kind. While K.S.A. 84-2-316 allows the warranty to be excluded, such exclusions are void for consumer transactions. K.S.A. 50-639.

In our opinion, a dealer-broker in used cars falls within the definition of merchant underscored in the statute. Our opinion in this regard is consistent with the holding in Powers v. Coffeyville Livestock Sales Co., Inc., 665 F.2d 311 (10th Cir. 1981). In Powell it was held that since the auctioneer regularly sold merchandise of a particular kind, he "[held himself] out as having the knowledge and skill to conduct such sales." 665 F.2d at 312. As he was thus a merchant, though generally acting as an agent for another, using traditional agency principles an auctioneer could be liable for breach of implied warranty or merchantability.

By analogy, a broker is similarly situated. The dealer-broker regularly selling used vehicles holds himself out as having knowledge and skill to conduct sales of automobiles, i.e. a merchant. He may therefore by liable for breach of implied warranties, under the UCC, unless such are disclaimed. However, as noted above, such disclaimers are prohibited in the KCPA for consumer transactions.

As noted previously, brokers are "suppliers" under the KCPA. The act makes two references to supplies disclaiming implied warranties. K.S.A. 50-627 provides in part:

> "(a) No supplier shall engage in any unconscionable act or practice in connection with a consumer 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:
>
> . . . .
>
> "(7) that the supplier excluded, modified or otherwise attempted to limit either the implied warranties or merchantability and fitness for a particular purpose or any remedy provided by law for a breach of those warranties." (Emphasis added.)

K.S.A. 50-639 states in part:

> "(a) Notwithstanding any other provisions of law, with respect to property which is 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 . . . ." (Emphasis added.)

An exception to this rule is provided in subsection (c), which states:

> "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 knoweldge 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." (Emphasis added.)

This exception, as noted in the 1973 Kansas Comment, is a realistic limitation on a supplier's liability. However, the supplier is given the burden of showing knowledge by the consumer, with the exception intended for sales where the defects are the basis for discounting the price of the item. It is not intended to be a license for "as is" sales in all circumstances. In our opinion, brokers may not sell vehicles "as is" as a general practice.

We perceive strong policy reasons supporting this result. The public protection afforded by the KCPA would be seriously eroded by allowing this exception to its applicability. This point is best illustrated by a hypothetical. Assume that a dealer-broker (DB) sells a new vehicle to a customer (C), and that C has an older car he wishes to use as a trade-in for the purchase of the new vehicle. If DB takes title to the trade-in and puts the vehicle on his lot, he will obviously be liable for the implied warranties under the KCPA should it be sold to another consumer. If, however, he were able to put that trade-in on his lot "as is" in his capacity as a broker, he could easily defeat the KCPA by not taking title to the trade-in. Instead, C would retain title to the car, and DB, as a broker, could still put the car on his lot. A purchaser of the vehicle would be unaware of DB's liabilities. While we do not infer or suggest that this practice is used by broker-dealers, the illustration is helpful to show the need to keep the scope and coverage of the KCPA intact.

In conclusion, a licensed dealer in motor vehicles may also be licensed to act as a broker for such vehicles, and solicit sales for vehicles delivered to him on consignment. Such a broker is accordingly a supplier under the Kansas Consumer Protection Act (KCPA), K.S.A. 50-623 et seq., and any sale which he solicits is subject to the act. An implied warranty of merchantability attaches to the sale of any good when the seller is a merchant in goods of that kind, pursuant to the Uniform Commercial Code, K.S.A. 84-2-104, 84-2-314. If the sale is also a consumer transaction under the KCPA, such implied warranty cannot be disclaimed. Therefore, the implied warranty of merchantability may not be disclaimed by a broker of motor vehicles, and any label or sticker which is required to be displayed by the Federal Trade Commission must reflect the existence of the warranty, and may not identify the transaction as an "As Is" sale.

Very truly yours,

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Jeffrey S. Southard
Deputy Attorney General

RTS:JSS:crw

6-12-89

Re: Vehicle brokers required to appear in chain of title

Dear Sirs:

A review of the vehicle dealer statutes by the Department of Revenue's legal staff has determined that brokers must appear in the chain of title.

K.S.A. 8-2410 (a) (22) prohibits both dealers and brokers from selling or causing to be sold, exchanged or transferred any vehicle or mobile home and not showing a complete chain of title.

This letter is to serve notice to all brokers that commencing immediately, with inventory on hand, all brokers must appear in the chain of title.

The certificate of title must be filled out by the broker in the same manner as a vehicle dealer. A Manufacturer's Certificate of Origin cannot be assigned or reassigned unless the broker is franchised for that brand.

Brokers must also be registered with the Division of Taxation, Business Tax Bureau, to collect and remit sales tax.

Enclosed is a sample title showing how to fill in the assignment and reassignment. If you need further assistance, please contact either myself or Marcus Woods, at (913) 296-3626.

Sincerely,

Thomas W. Skinner, Director
Division of Vehicles

KC:plm

ng stove. 841-4500 eves. 842-1974
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43-1011 or

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REFER-
HOOD. 4

4 BR, 2½ bath home for sale or rent in Indian Hills neighborhood. CA, fenced yard, deck, FP, garage, DW. W/D & refrig. avail. Low $60's or $650/mo. 843-8347.

Homes - Suburban 255

Dabinawa Lakefront Home with 3 BR's & 2 baths, 2 FP (1 with woodstove), 9% assumable loan. $75,900. Extra garden lot avail.
1-796-6978

JUST LISTED
Beautiful country estate 8 miles N. of Lawrence. Traditional 2 story house sits in oak grove overlooking 22 acre lake. Over 3,300 sq. ft. Tennis court. Stables. Observation turret. Truly unique. Low 200's. Call Pat Flavin, Calvin Eddy Kappelman Real Estate.
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NEW TO MARKET! SPECTACULAR VIEW, EXECUTIVE ESTATE. 5 acres. Great room. Gourmet kitchen & Hearth room. Deluxe master suite. Florida room. Greenhouse. Walkout level. KC COMMUTER SPECIAL. $249,000.

MINUTES WEST. Joel Fritzel ranch. Spacious rooms. Bay window off breakfast/kitchen area. Formal living/dining. Master suite. 8'x35' deck to enjoy 4.9 secluded acres. $127,000.
CHRIS CHAPIN 749-4090
543 Lawrence Ave. 841-7283.

Homes-Out of Town 256

COUNTRY COMFORT
20 wooded acres with 10 yr. old house. Call me for location & features. Catherine Mowery GRI, 842-1364.
Al Haverty Real Estate
802 Mass. 843-0321

Gill

12'x53' Mobile Home, 2 BR, full bath, AC, 2 sheds, new carpet, excellent cond. 842-7563.

14x65' Liberty, CA, shed, refrig., stove, good shape. Buy for $125/mo. plus $95 lot rent in nice park. 749-1500.

1972 BROADMOOR MOBILE HOME. 12' x 65'
2 BR 1-273-9282

1973 Crestline. 2 BR. Price Reduced! Excellent cond.
1-316-237-4522

1979 Bonnavilla, extremely nice, well kept, 14'x70', energy efficient model. 2 BR, 2 bath, CA, W/D hookups, DW, garbage disposal, some built-ins. 1 owner. Call 841-3958, 6 p.m.-11 p.m.

1981 Mobile Home. 14x80. Must see to appreciate. 876-2601.

RECREATION

Boats - Motors 271

15' Chrysler with Trailer
Excellent cond. $700
913-755-2424

16' Success Run About Motor Boat with 110 Mercury outboard motor. Like new. $4,600. 842-1426.

19' Deep V, 165 hp, merc. IO, all new, $3,600.
842-3099

1978 Ozark ski boat, 140 in-/out, custom trailer included. Call 843-8933.

1988 Kawasaki 650 SX
Jet ski
$3,000 843-9030

* 2 JET SKIS *
CHEAP
Good condition. 841-5677.

Sporting Goods 274

Handguns/Longarms

New & unclaimed shotguns, rifles, pistols & revolvers. Many to choose from

silver white interior, must sell. Best offer, call Bud after 5 p.m., 842-6689.

1980 CHEVY CHEVETTE
83,000 miles. $800.
841-3648

1980 Dodge Omni 4 dr., AC, auto. Runs great. Under $2,000. Contact Craig, Tony's Nissan, 842-0444.

1980 Mercury Monarch - Low miles, 4 door, 6 cyl automatic, air, good tires. Call Brad Hunt at Laird Noller Motors, 843-3500.

1981 Ford Escort GLX Wagon. Loaded, 4 spd., AC, low miles, excellent cond. Must sell. $1,250 or best offer. [redacted]-2131.

1981 Mercury Zephyr Wagon. 6 cyl., AT, AC, FM, cruise, clean. Call DOUG FRANCO at 843-3500. Laird Noller Motors.

1982 Ford Escort 4 dr. wagon, runs great, $2,000. 1979 Mercury Monarch, interior & exterior good condition, $1,500. 841-3691.

1983 Buick Century 4 dr., V6, AT, many extras, excellent cond. Call after 6 p.m. 841-2375.

1983 Chrysler E class, 4 dr., PS, PB, AT, AM/FM, PW, 70,000 miles, no rust, no damage, very clean. $3,350. 841-0207.

* 1983 FORD ESCORT *
4 dr., stick, good tires, excellent cond. $1,175 or best offer. [redacted]-2131.

1983 Mercury Capri, clean, AT, sunroof. Great student car, can finance. Chuck at Tony's Nissan, 842-0444.

1984 Lincoln Mark VII
This one has everything including a sunroof. Local trade-in. Call Don Payne at 843-3500. Laird Noller Ford.

1984 Mercury Lynx - Low miles - 4 spd. Rear defrost, stereo, $3,900. Call Brad Hunt at Laird Noller Motors, 843-3500. 1-9

1985 Escort GL wagon

Sgt Owston
Did it

HUTCHINSON

POLICE DEPARTMENT
LAW ENFORCEMENT CENTER
210 WEST FIRST AVE. 67501

February 7, 1990

Donna L. Whiteman
Minority Whip
Representative 102nd District
Reno County
Statehouse
Topeka, Kansas 66612

Dear Rep. Whiteman:

I would like to express my regret of not being able to attend the scheduled hearing for House Bill #2082, that is to be held at 3:30 P.M. on 8th of February, 1990 and would like to offer the following comments:

I would like to express the Hutchinson Police Department's support of this bill in raising the minimum fine to $50 and maximum of $200 as stated in the bill. We feel this is something that has long been needed as it has become our experience that the handicap parking has been constantly abused by people who do not have the proper placards or tags for their vehicles and also others who have no respect for the handicap and take their chances and park in handicap stalls prohibiting the use of these stalls by those who have a legitimate and legal right to park there. I feel the only way to stop this is to increase the fines sufficiently so it will possibly deter people from parking in these stalls.

Respectfully submitted,

HUTCHINSON POLICE DEPARTMENT
Jack L. Heidebrecht, Chief of Police

Sgt. F. K. Owston
Detective, Traffic Investigations

FKO:or

Att. 2

KANSAS DEPARTMENT OF HUMAN RESOURCES

COMMISSION ON DISABILITY CONCERNS
1430 S.W. Topeka Boulevard, Topeka, Kansas 66612-1877
913-296-1722 (Voice)●913-296-5044 (TDD)●561-1722 (KANS-A-N)

Mike Hayden, Governor

Ray D. Siehndel, Acting Secretary

February 8, 1990

TESTIMONY IN OPPOSITION TO HB 2082

Presented by Michael Lechner, Executive Director

We are opposed to HB 2082 because it would require a minimum fine of $50 for parking illegally in slots reserved for people with disabilities. While the intent of this measure is commendable, it has been our experience that judges are more likely to uphold fines of $15 to $25 for violations rather than higher fines. We believe that more people will have their parking tickets nullified if the minimum fine is set at $50. The present statutes governing parking fines set up a framework in which the punishment fits the infraction. We think that the establishment of a $50 minimum fine will be regarded as excessive by judges.

The basis for our objection to including additional language on signs designating such slots is that this modification will require present signage to be replaced. If someone without a permit or disability tag parks in a slot marked by a sign without

Att. 3

this additional language, they would not be guilty of a violation. Requiring the modified signs will prove to be a disincentive to both business operators who presently have legally marked slots and to enforcement officers who will be called only to find that they cannot issue a citation to a vehicle that would have been otherwise illegally parked.

While the current situation is not perfect, we are of the opinion that existing statutes are adequate and that increased education will alleviate much of the difficulty that may be experienced. In other words, we think it is working well enough that it need not be fixed.

Thank you for your consideration of these remarks.