Approved 4-2-91
Date

MINUTES OF THE House COMMITTEE ON Judiciary.

The meeting was called to order by Representative John M. Solbach at
Chairperson

3:30 a.m./p.m. on February 21, 1991 in room 313-S of the Capitol.

All members were present except:

Representatives Douville, Gomez, Scott, Hochhauser, Vancrum and Gregory who were excused.

Committee staff present:

Jerry Donaldson, Legislative Research
Jill Wolters, Office of Revisor of Statutes
Gloria Leonhard, Secretary to the Committee

Conferees appearing before the committee:

Stan Lind, Lobbyist and Counsel Secretary for Kansas Association of Financial Services
Bud Grant, Executive Director of Kansas Retail Council, Kansas Chamber of Commerce and Industry
Jim Maag, Senior Vice President of the Kansas Bankers Association
Elwaine Pomeroy, Lobbyist for the Kansas Collectors Association
Suzanne James, Private citizen of Topeka
Beth Mellies, victim from Johnson County
Juliene A. Maska, Statewide Victims Rights Coordinator from Attorney General's Office
Bud Grant, Executive Director of the Kansas Retail Council, Kansas Chamber of Commerce and Industry
Frances Kastner, Director, Governmental Affairs, Kansas Food Dealers Association

The Chairman called the meeting to order and asked Vice Chair, Representative Everhart, to conduct the meeting as he had another commitment.

The Vice-Chair called for bill requests.

Representative Hamilton requested a bill for Judge Dan Mitchell, Shawnee County, who handles most juvenile matters. The proposed legislation provides that if the juvenile offender committed an act, which if committed by a person 18 or over, and would constitute a Class A or B felony and such juvenile offender is not responding to the programs of the Youth Center, the judge may place such juvenile offender in the custody of the DOC.

Representative Macy made a motion to introduce proposed legislation. Representative Rock seconded the motion. The motion carried.

The Vice-Chair called for hearing on HB 2380, allowance of attorney fees in actions to recover on certain accounts, instruments and contracts.

Stan Lind, Lobbyist and Counsel Secretary for the Kansas Association of Financial Services, which is the state trade association of consumer finance companies in Kansas, appeared in support of HB 2380. Mr. Lind asked that HB 2380 be passed, using the same language as conceptually passed in the House in the 1990 Session in HB 2481, regarding worthless checks.

Mr. Lind said changes requested in HB 2380 are that on Page 1, Line 14, "revolving account" was added and Line 15, "contract for a line of credit" was added. Mr. Lind distributed (Attachment # 1) to show what 37 other states are doing and said the study shows 6 states prohibit attorneys fees. One state is silent. Thirty states permit the assessment of attorneys fees. Mr. Lind said he will submit information from the remaining 13 states along with his written testimony to the committee.

Committee questions followed.

Bud Grant, Executive Director of the Kansas Retail Council, Kansas Chamber of Commerce and Industry, appeared in support of HB 2380. Mr. Grant presented the viewpoint of the "small" business person who is trying to collect past due accounts and has to decide whether to pursue the matter in court, understanding there will be costs for hiring an attorney, or just forget it and write it off as a bad debt.

Committee questions followed.

Jim Maag, Senior Vice President of the Kansas Bankers Association, appeared in support of HB 2380 (See Attachment # 2). Mr. Maag said he would have no problem with using permissive language instead of the word "shall". Mr. Maag said that legal costs for the banking industry in Kansas continue upward, and it is a matter of major concern.

Committee questions followed.

Elwaine Pomeroy, Lobbyist for the Kansas Collectors Association, appeared to comment on HB 2380. Mr. Pomeroy said his association will probably be an opponent but needs further time to review the bill. (Attachment 3)

Mr. Maag said questions he has include: (1) Would this legislation encourage lawsuits? (2) What about other collection expenses? (3) How about collections by other persons than attorneys who do not file lawsuits?

Committee questions followed.

There being no further conferees, the Vice Chair closed the hearing on HB 2380 for this date but said hearing on the bill would be continued on Monday, February 25.

The Vice-Chair called for hearing on HB 2374, victims rights to make a statement in presentence report; address the court at the sentencing hearing; and be informed before plea-bargaining occurs.

Representative Hamilton appeared in support of HB 2374. (See Attachment # 4).
Suzanne James, a private citizen of Topeka, appeared in support of HB 2374. Mrs. James gave testimony from the viewpoint of a victim's family. (See Attachments # 5 and #6).

Beth Mellies, a victim from Johnson County, appeared in support of HB 2374. Ms. Mellies pointed out that it was necessary to hire an attorney, even though she was a victim, that the County Attorney would have been willing to accept a plea-bargain of manslaughter; that her step-son had been charged with two counts of attempted second degree murder; that the step-son was tried as a juvenile and sent to YCAT, from which he escaped; he was then charged with kidnapping and aggravated robbery; that Ms. Mellies worked with the Victim Coordinator in the District Attorney's office in Topeka, who assured there would be no plea-bargaining and a maximum sentence would be sought; a subsequent newspaper article said a plea-bargaining arrangement had been entered into; the aggravated robbery charge was dropped; the DA said he didn't recall his promise of no plea-bargain; the Court Services officer contacted the Mellies' and a Victim's Impact Statement was prepared; that in the second case, the step-son was tried and sentenced as an adult; however, in both cases the victims felt abused by the system, that the defense attorney made various allegations against Ms. Mellies because of her place of work; that some outsiders supported the offender and made harrassing phone calls; that the SRS had received allegations by anonymous call that the victims children weren't being fed and clothes; that anonymous calls were made to Ms. Mellies' office, making various allegations. (Written testimony was not furnished.

Committee questions followed.

Juliene A. Maska, Statewide Victims Rights Coordinator for the Office of the Attorney General appeared in support of HB 2374 (See Attachment # 7).

There were no committee questions.

There being no further conferees, the hearing on HB 2374 was closed.

The Vice-Chair called for hearing on HB 2364, civil remedies for theft.

Bud Grant, Executive Director of the Kansas Retail Council, Kansas Chamber of Commerce and Industry, appeared in support of HB 2364. (See Attachment # 8).

Committee questions followed.

Frances Kastner, Director, Governmental Affairs, Kansas Food Dealers Association, submitted written testimony in support of HB 2364. (See Attachment # 9).

Committee questions followed.

There being no further conferees, the hearing on HB 2364 was closed.

The meeting adjourned at 5:15 P.M. The next scheduled meeting will be February 25, 1991, in room 313-S.

GUEST LIST

COMMITTEE: HOUSE JUDICIARY DATE: 2/21/91

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
JIM CLARK	TOPEKA	K.C.D.A.A.
Elwaine F Pomeroy	Topeka	KS Collectors Assn
PETE HUSTON	TOPEKA	KS COLLECTORS ASSOC
Suzanne James	5345 NW 33rd Topeka, KS. 66618	private citizen
Juliene Maska	Topeka	A.G. office
Nancy Lindberg	Topeka	AG office
Kathy Taylor	Topeka	KBA
Jim Maag	"	"
Stan Lund	K.C.K.S.	KS. Assn. of Financial Services
Lee Mills	Nebraska	Private Citizen
BOB GRANT	TOPEKA	KCCI
KEITH L LANDIS	TOPEKA	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS
LEIGH STARK	LAWRENCE	KU

H JUD
2/21/91
Att. 1

STATE	LAW	ATTORNEY FEES
ALABAMA	SMALL LOAN ACT	Not Permitted
	MINI-CODE	Permitted for closed-end loans where amount financed is over $300 and open-end loans where unpaid balance exceeds $300
ARIZONA	CONSUMER LOAN ACT	Reasonable attorneys' fees assessed and fixed by the court are permitted
	MORTGAGE BANKERS LAW AND INTEREST LAW	Reasonable attorneys' fees after default are permitted, by implication
CALIFORNIA	CONSUMER FINANCE LENDERS LAW	Permitted on loans of $5,000 or more. No Limit. (charges deregulated at $2,500 but charges must be computed as percentage of unpaid balance up to $5,000)
COLORADO	UNIFORM CONSUMER CREDIT CODE	Maximum 15% of unpaid balance if not salaried employee
CONNECTICUT	SMALL LOAN LAW	Not permitted
	SECONDARY MORTGAGE LOAN ACT	Permitted
DELAWARE	LICENSED LENDERS LAW	Permitted
FLORIDA	USURY LAW	Permitted if reasonable. Fee not to exceed 10% of principal will be presumed reasonable
	CONSUMER ACT	Permitted
GEORGIA	INDUSTRIAL LOAN ACT	Permitted
	INTEREST AND USURY ACT	Permitted

HJUD
"Attachment 1"
2/21/91
By Stan Lind

ILLINOIS	MOTOR VEHICLE SALES FINANCE	Reasonable attorneys' fees in collecting the account may be included within the contract
	USURY ACT	Permitted
	CONSUMER INSTALLMENT LOAN ACT	Permitted
	FINANCIAL INSTITUTIONS DEVELOPMENT ACT	Permitted as a general charge if contained within the written agreement
INDIANA	UNIFORM CONSUMER CREDIT CODE	Permitted, except loan with principal balance of $2,700 or less
KANSAS	UNIFORM CONSUMER CREDIT CODE	Not permitted
KENTUCKY	CONSUMER LOAN ACT	Not permitted
	INTEREST AND USURY ACT	Silent
MARYLAND	CREDIT GRANTOR OPEN-END	Permitted
	CREDIT GRANTOR CLOSED-END	Permitted
	CONSUMER LOAN LAW	Permitted. Together (with court costs) not to exceed 15% of the amount due. In addition, on loans originally of $2,000 or less, the court must set the amount of attorney fees.
MASSACHUSETTS	SMALL LOAN LAW	Prohibited
	RETAIL INSTALLMENT SALES SERVICES	Permitted

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MICHIGAN	SECONDARY MORTGAGE LOAN ACT	Not permitted
	REGULATORY LOAN LAW	Not permitted
	CREDIT CARD REGULATION ACT	Not permitted
MINNESOTA	INDUSTRIAL LOAN AND THRIFT COMPANY ACT	Not permitted, except for foreclosure
MISSOURI	CONSUMER FINANCE ACT	Permitted if not handled by a salaried employee and not exceeding 15% of the amount due and payable
	SECOND MORTGAGE LOAN ACT	Permitted if not handled by a salaried employee and not exceeding 15% of the unpaid amount due
MONTANA	RETAIL INSTALLMENT SALES ACT	Permitted. Fee may not exceed 15% of amount due. Court costs and actual and reasonable out-of-pocket collection expenses also permitted.
NEBRASKA	INSTALLMENT LOAN ACT	Silent
NEVADA	INSTALLMENT LOAN AND FINANCE ACT	Permitted, closed-end loans, if the contract so provides. Not authorized, revolving loans.
	MORTGAGE COMPANIES ACT	Permitted where provided by contract
NEW HAMPSHIRE	SECOND MORTGAGE HOME LOANS	Permitted

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NEW JERSEY	RETAIL INSTALLMENT SALES ACT	Permitted for court costs, attorneys fees and expenses of retailing and restoring repossessed goods which are authorized by law; also allows the contract to provide for payment of attorneys fees not exceeding 20% of the first $500 and 10% on any excess of the amount due and payable when referred to an attorney not a salaried employee of the holder of the contract.
	SECOND MORTGAGE LAW	Permitted
NEW MEXICO	SMALL LOAN ACT	Reasonable attorneys fees in proceedings for collection may be charged
	USURY LAW	Reasonable attorneys fees in proceedings for collection may be charged
NEW YORK	LICENSED LENDERS LAW	Not permitted
	LICENSED MORTGAGE BANKERS ACT	Reasonable attorneys fees are permitted as follows: not in excess of 15% of the unpaid debt in the event of default if the mortgage is referred to an attorney who is not an employee for collection.
	RETAIL INSTALLMENT SALES ACT	Not permitted
NORTH CAROLINA	CONSUMER FINANCE ACT	Not permitted
	GENERAL INTEREST LAW	Permitted
OHIO	SMALL LOAN ACT	Not permitted
	SECOND MORTGAGE LOAN ACT	Not permitted

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OKLAHOMA	UNIFORM CONSUMER CREDIT CODE	Principal balance must be more than $2,500. Fees may not exceed 15% of the unpaid debt and referral must be to an attorney not a salaried employee.
OREGON	CONSUMER FINANCE ACT	Permitted if attorney is not licensee's salaried employee
PENNSYLVANIA	CONSUMER DISCOUNT COMPANY ACT	Permitted
	SECONDARY MORTGAGE LOAN ACT	Permitted
RHODE ISLAND	SMALL LOAN LAW	Permitted
	SECONDARY MORTGAGE LOAN ACT	Permitted for foreclosures; maximum is $750 unless the court awards a greater amount
	INTEREST AND USURY	Permitted
SOUTH CAROLINA	CONSUMER PROTECTION CODE (REVOLVING CREDIT)	Reasonable fees not to exceed 15% and referral to an attorney not a salaried employee
	CONSUMER PROTECTION CODE (CLOSED-END CREDIT)	The agreement may not provide for payment of reasonable attorneys' fees in excess of 15% and referral to an attorney not a salaried employee
TENNESSEE	INDUSTRIAL LOAN AND THRIFT COMPANIES ACT	Permitted
TEXAS	RETAIL INSTALLMENT SALES ACT	Reasonable fees are permitted provided referred to independent attorney

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attachment #1-5

VIRGINIA	MORTGAGE LENDERS AND BROKERS LAW (OPEN-END)	Permitted by general real estate sections for real estate loans, but not clear as to application to revolving loans. Law is silent as to non-real estate open-end loans
	MORTGAGE LENDERS AND BROKERS LAW (CLOSED-END REAL ESTATE)	Permitted
WASHINGTON	INDUSTRIAL LOAN ACT	Not permitted
WEST VIRGINIA	INDUSTRIAL LOAN ACT	Not permitted
	CONSUMER CREDIT AND PROTECTION ACT	Not permitted
WISCONSIN	MOTOR VEHICLE SALES FINANCE AND CONSUMER ACT	Not permitted

SGR\LEG\ATTYFEES
February 1991

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2-21-91
attachment # 1-6

The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

February 21, 1991

TO: House Committee on Judiciary

FROM: James S. Maag, Senior Vice President
Kansas Bankers Association

RE: HB 2380

Mr. Chairman and members of the Committee:

Thank you for the opportunity to appear before the Committee on the provisions of HB 2380. As drafted, the bill would allow the prevailing party in any action to collect on a variety of accounts, notes, bills, negotiable instruments, or contracts for a line of credit or contract relating to the purchase of goods or merchandise or for labor or services, to recover attorney fees.

Banks are usually involved with attorney fees in connection with collection matters on delinquent promissory notes, both secured and unsecured. Many states allow such notes to contain a particular clause allowing the recovery of attorney fees by the bank if a suit is necessary to recover on the note. In fact, the Uniform Commercial Code, adopted by Kansas and every other state, does provide that the first item to be paid out of the proceeds from a sale of collateral is "reasonable attorneys' fees and legal expenses incurred by the secured party" unless such action is prohibited by other state law. Therefore, it would appear that under Kansas law, it is possible to allow attorney fees in connection with loans secured by personal property. However, this twentieth-century uniform law is pre-empted in Kansas by a nineteenth-century law first adopted in 1876 (K.S.A. 58-2312) which prohibits a bank from contracting for the payment of attorney fees in **any** note, bill of exchange, bond or mortgage.

Kansas, by prohibiting clauses in loan transactions for attorney fees is, in effect, placing a restriction on freedom of contract between parties. K.S.A. 58-2312 has been strictly construed by the courts on the grounds that attorney fees provisions in debt instruments are against Kansas public policy. However, there are currently some 75 Kansas statutes which allow for attorney fees. I would direct the Committee's attention to an article from the Kansas Bar Journal (Fall, 1984) by Ron Leslie in which he gives a Kansas historical perspective on the recovery of attorney fees.

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Attachment # 2
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Office of Executive Vice President • 1500 Merchants National Building
Eighth and Jackson • Topeka, Kansas 66612 • (913) 232-3444
FAX (913) 232-3484

That article lists the numerous sections of the statutes which have allowed for recovery of attorneys fees in certain circumstances. It should also be noted that under the Kansas Uniform Consumer Credit Code a bank which violates any provisions of the Code can be sued by the debtor and the debtor can recover attorney fees. However, such action by a **creditor** under the Consumer Credit Code is expressly prohibited.

The law as it exists in Kansas is grossly unfair to the creditor and is one factor which all creditors must consider when determining what interest rates can be charged by the institution.

We truly believe that it is time for the legislature to review this antiquated law and, in light of the legislative actions over the past years concerning the awarding of attorney fees, adopt the provisions contained in HB 2380. We appreciate very much the opportunity to appear on this important matter.

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Recovery of Attorney Fees—An Historical Perspective

By Ron Leslie

Trial lawyers and general practitioners are frequently asked by clients whether attorney fees can be recovered in litigation. The answer to that question is affirmative in a surprising, and increasing, number of cases.

The passage of K.S.A. 60-2007 by the 1982 Kansas Legislature called the attention of the trial bar to the subject of recovery of attorney fees in contested litigation. That statute, of course, provides for the possible assessment of attorney fees by the trial court against a party when the party's attorney asserts a claim or defense "without a reasonable basis in fact and not in good faith." An attorney may also be held personally liable if the court finds that the attorney knowingly and not in good faith asserted a claim or defense. While the content of that rule is similar to Disciplinary Rule 7-102 of the Code of Professional Responsibility, K.S.A. 60-2007 has added new and more immediate sanctions against lawyers and parties who file cases without substantial merit. However, that statute is merely the latest in a long line of legislative enactments providing for recovery of attorney fees in contested litigation under certain circumstances.

The purpose of this article is to examine the history of the recovery of attorney fees in litigated cases in Kansas, and to give trial lawyers and general practitioners an overview of the current status of the law in the field.

The following topic areas are excluded:

a) Where the litigant attempting to recover fees is a governmental agency. For example, K.S.A. 22-3901 *et seq* sets out certain categories of common nuisances which may be abated upon a complaint by the Attorney General or a county attorney. K.S.A. 22-3904 (3) mandates that the court award a reasonable fee to the prosecuting attorney in the event of a judgment for the state.

b) Where attorney fees are sought under Federal law.

c) Where the amount an attorney can charge his own client is subject to the approval of the court. The most common example is K.S.A. 59-1717, providing that an attorney who has represented the administrator or executor of a decedent's estate must have his or her fees approved by the court.

COMMON LAW RULE

Much of our common law traces its antecedents to the English common law. Under English common law, the prevailing party normally must pay the attorney fees of both parties. However, American courts have generally held that attorney fees are not recoverable absent statutory authorization. Furney, *Recovery of Attor-*

neys Fees in Kansas, 18 W.L.J. 534 (1979).

Kansas departed from the English rule very early in its history. In *Swartzell v. Rogers*, 3 Kan. 374 (1866), the primary issue was whether attorney fees should be assessed as part of the costs of the case. The court denied plaintiff's request for fees and stated: "That matter is conclusively settled by statutory enactment." The court also raised an interesting argument—the policy of the law should not be that the more doubtful plaintiff's claim is, the more exposure the defendant should have for plaintiff's attorneys fees. As we shall soon see, this policy argument has been given little weight by the Kansas Legislature in the intervening years.

In 1872, *Stover v. Johnnycake*, 9 Kan. 367 (1872) gave additional emphasis to the developing rule of Kansas. In that case the Kansas Supreme Court held that a judgment for attorney fees would not be allowed in litigation unless stipulated for or unless expressly allowed by statute.

While some jurisdictions have, on occasion, created an exception to the American rule in cases of bad faith or fraud, Kansas has not recognized this exception. The general rule has been routinely followed, with only the following exceptions:

In *Columbia Knickerbocker Trust Co. v. City of Atchison*, 93 Kan. 302, 144 Pac. 222 (1914) the court allowed recovery of fees in a mandamus action wherein citizens of the City of Atchison filed suit to compel officers of the City to levy a tax for the payment of defaulted bonds issued by the City. Even this allowance was based on a statutory authorization that stated that plaintiff in a mandamus action could recover damages and costs. The court evidently reasoned that attorney fees were an element of costs.

In *Barten v. Turkey Creek Watershed Joint District No. 32*, 200 Kan. 489, 438 P.2d 732 (1968), plaintiff sought mandamus against a watershed district to force the holding of an election on a method of financing a plan of improvement. The court reaffirmed its earlier ruling, held that the action on the part of the board in refusing to hold an election was unreasonable, and allowed damages and attorney fees to plaintiff.

Kansas has also allowed recovery absent statutory authorization where an attorney has, through services to the attorney's client, created a fund in which others besides the attorney's client will share.

Kansas has also allowed recovery

About the Author

RONALD L. LESLIE *earned his J.D. in 1965 from the University of Kansas where he was on the editorial staff of the Kansas Law Review. He is a partner in Hess, Leslie, and Brown of Hutchinson, a firm engaged in general practice. He is a member of the Reno County, Kansas, and American Bar Associations, and is a past president of the Reno County Bar Association.*

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absent statutory authorization where an attorney has, through services to the attorney's client, created a fund in which others besides the attorney's client will share. In *Quesenbury v. Wichita Coca Cola Bottling Company*, 229 Kan. 501, 625 P.2d 1129 (1981), the court ruled that plaintiff's attorney is entitled to a fee on the insurer's subrogated portion of settlement proceeds recovered for property damage.

HISTORICAL TRENDS

The Kansas Legislature has steadily eroded the Kansas common law rule. Seventy-five statutes were found allowing recovery of attorney fees in litigation, usually at the discretion of the trial judge. An analysis of these statutes shows three trends.

First, the Kansas Legislature has sought to add emphasis to rights that it has deemed of particular importance by means of attorney fee provisions. Early in the state's history, before transportation and communication facilities were highly developed, the Legislature responded to factors arising within Kansas. In the twentieth century, however, as Kansas became an integral part of the national economy and political system, many of the enactments have been responses by the Kansas Legislature to national conditions.

Prior to 1910, nearly all legislative enactments addressed to recovery of attorney fees were concerned with some aspect of agriculture, reflecting the agrarian nature of the Kansas economy. For example, the Legislature's first venture into this area, in 1868, concerned the subject of partition fences. The duty to erect or maintain a partition fence between adjoining landowners was enforced by recovery of attorney fees provisions, as was the assessment of damages by appointed fence viewers. (K.S.A. 29-303, 29-305, 29-310 and 29-404). The general practicing attorney will rarely, if ever, see a case involving partition fences today.

Other early attorney fee provisions were concerned with such matters as the liability of railroads for failure to pay full value for death of livestock (K.S.A. 66-296), liability of one controlling a canal or reservoir who charged more for use of the water than the county commissioners allowed (K.S.A. 42-389), and against a purchaser of grain who defrauded the seller concerning the actual weight of the grain (K.S.A. 83-140).

As Kansas began the process of shifting to a mixed agricultural and industrial economy, the first attorney fee enactment governing employer-employee relations came into law in 1897. K.S.A. 44-117 prohibited blacklisting by any employer who would seek to prevent a former employee from regaining work, and K.S.A. 44-119 provided that an employer found liable under 44-117 would also be liable for the employee's attorney fee.

In the early 1930's, as the Great Depression deepened its hold on the nation, financial institutions began to encounter difficulties. The Legislature responded by making it unlawful for an insurance company to unjustly refuse to pay the full amount of a just claim. If the insured recovered judgment against the insurance company, the court was authorized to award attorney fees to the insured. (K.S.A. 40-256).

In the 1930's and early 1940's, the nation began enacting various components of the modern welfare state. In 1943, Kansas joined that trend by adopting its worker's compensation law. As part of its package of laws, the Legislature adopted K.S.A. 44-512(a), providing that an employer failing to pay compensation to an in-

jured worker when due could be assessed attorney fees by the court.

In the early 1970's a wave of consumerism swept the country. This was motivated, in part, by President Johnson's Great Society. Kansas, again responding to national trends, adopted a number of consumer rights provisions with attorney fees components. For example, K.S.A. 16A-5-201 provides that if the Uniform Consumer Code is violated by the creditor, the consumer shall be awarded damages and reasonable attorney fees.

The second trend clearly discernible is that the Legislature has adopted attorney fees provisions with increasing frequency in recent years.

The second trend clearly discernible is that the Legislature has adopted attorney fees provisions with increasing frequency in recent years.

In fact, 47 of the 75 statutes analyzed were passed after 1960. Thirty of them were passed in the 1970's and early 1980's, more than all the attorney fee statutes enacted from the founding of the state through 1950.

The third historical trend is apparently, in part, a response to the second trend. The Legislature, over the years, has done much by way of enactment of attorney fee provisions to encourage individuals to enforce rights favored by the Legislature. Kansans have accepted the invitation to seek judicial determination of their claims all too frequently.

The Legislature has responded to the increasingly litigious nature of Kansas citizens by passing a number of statutes imposing sanctions, including attorney fees, for actions which courts consider frivolous or which serve to cause delays. For example, in 1963, K.S.A. 60-256(g) was enacted, providing that if affidavits were presented in bad faith or for the purpose of delay in a summary judgment proceeding, the court might award reasonable attorney fees to the other party. Many other sections of the code of civil procedure adopted in 1963 contained similar provisions with respect to various aspects of discovery. The logical culmination of this trend was the passage of K.S.A. 60-2007, which encompasses all civil cases and applies to all components of such cases.

PRESENT STATUTORY LAW

An analysis is now presented of the current status of the statutory law with respect to recovery of attorney fees in Kansas. This section is intended to be a helpful reference guide for the general practitioner. The analysis is, of course, no substitute for a detailed examination of an applicable statute by counsel.

The statutory enactments can be categorized as follows: civil procedure, consumer rights, domestic relations, insurance companies, labor relations, motor vehicles, public utilities and common carriers, railroads, real estate, and unfair commercial practices. In addition, eight statutes appear to be isolated enactments, and therefore have been placed in a miscellaneous category by the writer.

For ease of reference the ten major categories are presented in alphabetical order, followed by the miscellaneous category. The statutes within each section are presented in the sequence in which they are found in Kansas Statutes Annotated.

1. Civil Procedure.

Statute	Date	Description
60-211	1982	Attorney willfully signs pleading without good grounds.
60-230	1963	Failure of a party to attend a deposition.
60-237	1963	Failure to allow discovery.
60-256(g)	1963	Use of affidavits in bad faith in summary judgment proceeding.
60-721	1978	Answer to a garnishment contraverted without good cause.
60-905(b)	1963	Posting of a bond to cover damages and attorney fees for a temporary injunction.
60-910(b)	1963	Motion to vacate permanent injunction not in good faith.
60-2007	1982	Court determines that an action, pleading, or component of a case was frivolous in nature.
61-1713	1969	Refusal to admit truth of facts or genuineness of documents under limited actions procedures.
61-2709	1979	To an appellee successful on an appeal from a small claims decision.

2. Consumer Rights.

16a-5-201	1973	Consumer Credit Code violated by creditor.
16a-5-203	1973	Disclosure provisions of the Consumer Credit Code violated by the creditor.
50-634	1973	Supplier found guilty under the Consumer Protection Act, or where the consumer has brought a groundless action.
50-639	1973	Supplier disclaims implied warranties under Consumer Protection Act.
50-715	1973	Reporting agency willfully fails to comply with the provisions of the Fair Credit Reporting Act.
50-716	1973	Reporting agency negligently fails to comply with the provisions of the Fair Credit Reporting Act.

3. Domestic Relations.

38-131	1971	Visitation rights by grandparents are denied.
38-1103	1970	Complaining witness in a paternity case prevails and has been represented by private counsel.
38-1307	1978	Moving party has selected a clearly inconvenient forum under the Uniform Child Custody Jurisdiction Act.

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38-1308	1978.....	Jurisdiction under the uniform act declined by reason of conduct of the petitioner.
38-1315	1978.....	A party violates a custody decree of another state, making it necessary to enforce the decree in this state under the uniform act.
60-1610	1963.....	Fees to either party in a divorce action.
4. Insurance.		
40-256	1931.....	Insurance company refuses without just cause to pay a claim.
40-908	1927.....	Insurance company insuring against fire, tornado, lightning, or hail fails to pay insured.
40-1517	1927.....	Mutual hail insurance company fails to pay insured.
40-2004	1949.....	Unauthorized or foreign insurer fails to pay claim.
5. Labor Relations		
44-119	1897.....	Employer blacklisting.
44-831	1975.....	Right to work provisions violated.
6. Motor Vehicles.		
40-3111(b)	1974.....	Insurance company fails to make timely payments on P.I.P. benefits.
60-2006	1969.....	Automobile negligence case involving damages of less than $750.00
7. Public Utilities and Common Carriers.		
17-1917	1974.....	Failure of a public utility to move lines when requested.
66-176	1923.....	Utility or common carrier violating regulatory laws.
8. Railroads.		
66-165	1901.....	Unauthorized charges.
66-203	1905.....	Failure to supply railroad cars.
66-233	1885.....	Damages caused by fire.
66-259	1893.....	Failure to give bill of lading.
66-266	1898.....	Causing death to cattle in transit.
66-269	1905.....	Failure to allow owners or agents to accompany shipments of livestock.
66-296	1874.....	Death of livestock.
66-305	1911.....	Failure to pay damages upon demand.
66-310	1885.....	Refusal to build fence.
66-318	1909.....	Shipment delays.
66-522	1907.....	Confiscation or diversion of coal.
9. Real Estate.		
26-509	1972.....	Jury award exceeds appraisers' award in condemnation.

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29-303	1868.....	Party failing to rebuild partition fence.
29-305	1868.....	Failure to erect or maintain assigned part of partition fence.
29-310	1868.....	Failure to divide land where a partition fence should be built.
29-404	1868.....	Failure to repair a partition fence.
55-202	1909.....	Failure to release an oil and gas lease within 60 days of forfeiture.
58-2257	1941.....	Failing to return real estate document in possession to rightful possessor.
58-2309a	1971.....	Failure to release mortgage when required.
58-3410	1973.....	Under Marketable Record Title Act against one slandering title to real estate.
60-1003(c)	1963.....	Against owners of land in a partition action.

10. Unfair Commercial Practices.

17-1268	1967.....	Selling securities in violation of law.
16-720(b)	1972.....	Pawn brokers refusing to redeliver stolen property on presentation of proper evidence of ownership.
34-229	1931.....	Surety on a warehouseman's bond fails to pay on demand.
41-701(4)	1974.....	Suppliers of alcoholic liquor, beer, or cereal malt beverage who fix the resale price.
50-108	1897.....	Against those involved in unlawful trusts, agreements, or other combinations in restraint of trade.
50-130	1899.....	Injunction violated relating to illegal futures dealings.
50-137	1887.....	Grain dealers and buyers who unlawfully agree to pool prices.
50-505	1957.....	Unfair practices involving dairy products.
50-801	1973.....	Violations of any section of Chapter 50 of Kansas Statutes Annotated.
58-3316(a)	1967.....	Selling subdivided lands in violation of the Uniform Land Sale Practices Act.
65-741	1961.....	Violation of dairy regulatory laws.
83-121e	1963.....	Using inaccurate or false weighing devices.
83-140	1905.....	Grain dealer underweighing grain.
84-7-601	1965.....	Bailee losing a warehouse receipt or bill of lading.

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11. Miscellaneous.		
16-207(d)	1975	Lenders exceeding the maximum interest rate.
22-2518	1974	Unlawful interception of wire and oral communications.
40-3114	1977	Against employers, doctors, and hospitals, for failure to furnish required information to insurers.
42-389	1891	Requiring that illegal consideration be paid as a condition to a right to obtain water.
44-512a	1943	Against an employer failing to pay compensation to an injured workman when due under the worker's compensation law.

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59-1504	1975.....	In favor of any person named in a Will or Codicil who defends it, or prosecutes any proceedings in good faith and with just cause, for the purpose of having it admitted to probate, whether successful or not, or any person who successfully opposes the probate of any Will or Codicil. Also in favor of any heir-at-law or beneficiary under a Will who, in good faith and for good cause, successfully prosecutes or defends any other action for the benefit of the ultimate recipients of the Estate.
60-2604	1963.....	Amercement against a sheriff or court clerk failing to perform an official duty.
74-7311	1978.....	In favor of a claimant under the Crime Victims Reparations Act.

CONCLUSIONS

What can we expect from the Kansas Legislature in the future in the area of recovery of attorney fees? History tells us that two of the trends previously discussed may safely be projected into the future.

It is likely that national political and economic trends will continue to be reflected in enactments of the Kansas Legislature. History shows us that the Legislature, often responding to national trends, will continue providing for recovery of attorney fees in selected areas of particular concern.

It is also likely that the trend for an increasing number of such legislative enactments will continue. Nearly every session of the Kansas Legislature produces further attorney fee enactments.

The third trend, however—sanctions against harassing and delaying tactics—seems to have been laid to rest. The revisions of K.S.A. 60-211 and the passage of K.S.A. 60-2007 now encompass all issues in civil cases where there was no substantial basis for filing suit, raising a particular defense, or where delaying tactics were used in the conduct of litigation.

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Just as the previous section sets forth the rules governing collection of third-party obligations, so does this section authorize physical repossession of tangible collateral. The Kansas version of this section does not vary from the 1972 Official Text. The creditor can achieve repossession in three ways: (1) the debtor can turn over the collateral voluntarily; (2) the creditor can use self-help to recover the collateral so long as there is no "breach of the peace;" and (3) the creditor can obtain the collateral "by action," i.e., a writ of replevin under K.S.A. 60-1005 or 60-1006.

There is no constitutional prohibition against self-help repossession because seizure of the goods by the creditor alone (or through an agent) does not involve sufficient "state action" to trigger the Fourteenth Amendment. Benschoter v. First Nat'l Bank of Lawrence, 218 K. 144, 542 P.2d 1042 (1975). However, this does not mean that notice prior to repossession will not be required in some cases. For example, in Klingbiel v. Commercial Credit Corp., 439 F.2d 1303 (10th Cir. 1971) the secured party was held guilty of conversion because the security agreement appeared to require notice prior to repossession, and none was given. Similarly, a line of judicial decisions holds that the secured party may be liable for repossessing without prior notice after establishing a pattern of accepting late payments. See, e.g., Lee v. Wood Products Credit Union, 551 P.2d 446 (Ore. 1976). Finally, the Kansas Uniform Consumer Credit Code imposes a duty on the secured creditor to give notice of the consumer's right to cure a default caused by a missed installment; failure to give the statutory notice of right to cure triggers liability for attorney's fees. K.S.A. 16a-5-110, 16a-5-111 and 16a-5-201(8). Moreover, failure to give the UCCC notice of right to cure might well trigger liability in conversion, as well as the minimum civil penalty found in 84-9-507(1). See D.E.B. Adjustment Co. v. Cawthorne, 623 P.2d 82 (Colo. App. 1981).

Nothing in this section or elsewhere in Article 9 defines the term "breach of the peace." The courts are left with that job. The leading Kansas case is Benschoter v. First Nat'l Bank of Lawrence, supra, where the court held that "stealth" does not constitute a breach of the peace. On the other hand, there are cases holding that a secured creditor accompanied by the sheriff, leaving the impression that a court order has been issued when in fact it hasn't, is a breach of the peace because of the misrepresentation which is created. Stone Mach. Co. v. Kessler, 463 P.2d 651 (Wash. App. 1970). Forced entry into the debtor's premises would almost certainly be considered a breach of the peace, and the UCCC expressly so provides for consumer repossessions. K.S.A. 16a-5-112. A wise creditor will back off and get a writ of replevin rather than trying to repossess over active debtor or third-party protest. There are also numerous cases involving the "golden glove compartment," where the creditor repossesses a motor vehicle but fails to make sure that all the other personal property of the debtor has been removed.

The provisions in this section concerning assembly of collateral and rendering equipment unusable were not found in pre-UCC Kansas law. This can be a handy tool for the foreclosing creditor. The leading judicial decision illustrating the utility of the tool is Clark Equip. Co. v. Armstrong Equip. Co., 431 F.2d 54 (5th Cir. 1970), cert. denied 402 U.S. 909 (1971).

Once repossession has occurred (through replevin or self-help), the duty of the secured party to take reasonable care of the collateral under K.S.A. 84-9-207 arises, just as it does from the moment a pledgee takes possession of the collateral prior to default.

Statutory Reference:

Former K.S.A. 58-307.

Research and Practice Aids:

Chattel Mortgages⇐162.
Pledges⇐53 et seq.
Sales⇐479.
C.J.S. Chattel Mortgages § 183 et seq.
C.J.S. Pledges § 52 et seq.
C.J.S. Sales § 597 et seq.
Vernon's Kansas U.C.C.—Howe & Navin, 84-9-503.
Retaking possession of property sold under conditional sales contract. Am. Jur. 1st ed., Sales § 938 et seq.
Effect of taking of possession of goods subject to trust receipt. Am. Jur. 1st ed., Trust Receipts § 10.

Law Review and Bar Journal References:

U.C.C. remedies upon default of security agreement discussed in "Survey of Kansas Law: Secured Transactions," Gerald D. Haag, 21 K.L.R. 107, 114 (1972).
Constitutionality of self-help repossession discussed in "The New Kansas Consumer Legislation," Barkley Clark, 42 J.B.A.K. 147, 151 (1973).
Changes in repossession law under the UCCC discussed in "The New Kansas Consumer Legislation," Barkley Clark, 42 J.B.A.K. 147, 197 (1973).
"Summary Repossession, Replevin, and Foreclosure of Security Interests," Thomas V. Murray, 46 J.B.A.K. 93, 98, 100 (1977).
Applicability of implied waiver doctrine to article 9 transactions, "Uniform Commercial Code: Farm Creditor Protection," Brian McMahill, 18 W.L.J. 199 (1978).
"Survey of Kansas Law: Secured Transactions," J. Eugene Balloun, 27 K.L.R. 301, 303 (1979).

CASE ANNOTATIONS

1. Self-help repossession provisions not violative of due process; no state action present; subrogation entitlement. Benschoter v. First National Bank of Lawrence, 218 K. 144, 145, 147, 148, 149, 150, 151, 152, 154, 155, 542 P.2d 1042.
2. Cited in holding enforceable lien existed between original parties; no action for damages for breach of contract when damage not a result of such breach. Kansas State Bank v. Overseas Motosport, Inc., 222 K. 26, 28, 29, 563 P.2d 414.
3. Voluntarily surrendered secured property not obtained through "legal process"; tax lien does not attach to buyer of same. Robbins-Leavenworth Floor Covering, Inc. v. Leavenworth Nat'l Bank & Trust Co., 229 K. 511, 514, 515, 516, 625 P.2d 494.
4. Secured creditor sale of collateral not in "commercially reasonable manner"; test; deficiency not barred. Westgate State Bank v. Clark, 231 K. 81, 86, 642 P.2d 961 (1982).

84-9-504. Secured party's right to dispose of collateral after default; effect of disposition. (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the article on sales (article 2). The proceeds of disposition shall be applied in the order following to

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(a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article.

History: L. 1965, ch. 564, § 396; L. 1975, ch. 514, § 34; Jan. 1, 1976.

OFFICIAL UCC COMMENT

Prior Uniform Statutory Provision:

Section 6, Uniform Trust Receipts Act; Sections 19, 20, 21, and 22, Uniform Conditional Sales Act.

Purposes:

1. The Uniform Trust Receipts Act provides that an entruster in possession after default holds the collateral with the rights and duties of a pledgee, and, in particular, that he may sell such collateral at public or private sale with a right to claim deficiency and a duty to account for any surplus. The Uniform Conditional Sales Act insisted on a sale at public auction with elaborate provisions for the giving of notice of sale. This section follows the more liberal provisions of the Trust Receipts Act. Although public sale is recognized, it is hoped that private sale will be encouraged where, as is frequently the case, private sale through commercial channels will result in higher realization on collateral for the benefit of all parties. The only restriction placed on the secured party's method of disposition is that it must be commercially reasonable. In this respect this section follows the provisions of the section on resale by a seller following a buyer's rejection of goods (Section 2-706). Subsection (1) does not restrict disposition to sale: the collateral may be sold, leased, or otherwise disposed of—subject of course to the general requirement of subsection (2) that all aspects of the

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dollars ($500), together with a reasonable attorney's fee for preparing and prosecuting the action. The plaintiff in such action may recover any additional damages that the evidence in the case warrants. Civil actions may be brought under this act before any court of competent jurisdiction, and attachments may be had as in other cases.

(e) The mortgagee or assignee of a mortgagee entering satisfaction or causing to be entered satisfaction of a mortgage under the provisions of subsection (a) shall furnish to the office of the register of deeds the full name and last known post office address of the mortgagor or the mortgagor's assignee. The register of deeds shall forward such information to the county clerk who shall make any necessary changes in address records for mailing tax statements.

History: L. 1971, ch. 189, § 1; L. 1980, ch. 163, § 1; July 1.

Law Review and Bar Journal References:

"Recovery of Attorney Fees in Kansas," Mark A. Furney, 18 W.L.J. 535, 544, 546, 547 (1979).

CASE ANNOTATIONS

1. Applied; title insurance companies held liable for punitive damages for failure to exercise care in disbursing purchaser's funds. Ford v. Guarantee Abstract & Title Co., 222 K. 244, 264, 553 P.2d 254.

58-2310. Same; application to mortgages heretofore paid. K.S.A. 58-2309 shall be construed so as to apply to mortgages heretofore paid, but not discharged of record: *Provided*, That if the residence of the holder of such mortgage can be ascertained, no action shall be brought until demand is made in accordance with said section; but such demand need not be in writing, and will be excused if the residence of the holder of such mortgage cannot, with due diligence, be ascertained.

History: L. 1889, ch. 175, § 2; March 6; R.S. 1923, 67-310.

58-2311. Same; joinder of actions. In any action commenced in the district court to recover damages under the provisions of this act, the plaintiff may unite with such claim a cause of action to cancel the mortgage and remove the cloud from the title; and if plaintiff recovers damages in such action, he or she shall be entitled to a further judgment canceling such mortgage and quieting the title to the mortgaged premises; and where personal service of summons cannot be had on the defendant or defendants within this state, judgment canceling such mortgage may be rendered in the action upon proof of due service by publication, or upon due personal service obtained out of this state.

History: L. 1889, ch. 175, § 3; March 6; R.S. 1923, 67-311.

58-2312. Stipulation for attorney's fees void. Hereafter it shall be unlawful for any person or persons, company, corporation or bank, to contract for the payment of attorney's fees in any note, bill of exchange, bond or mortgage; and any such contract or stipulation for the payment of attorney's fees shall be null and void; and that hereafter no court in this state shall render any judgment, order or decree by which any attorney's fees shall be allowed or charged to the maker of any promissory note, bill of exchange, bond, mortgage, or other evidence of indebtedness by way of fees, expenses, costs or otherwise: *Provided*, That in all existing mortgages wherein no amount is stipulated as attorney's fees, not more than eight percent on sums of two hundred and fifty dollars or under, and not more than five percent on all sums over two hundred and fifty dollars, shall be allowed by any court as attorney's fees: *And provided further*, That this act shall not apply to existing mortgages wherein any sum has been stipulated as attorney's fees.

History: L. 1876, ch. 77, § 1; March 1; R.S. 1923, 67-312.

Cross References to Related Sections:

Contracts and promises, see ch. 16.

Research and Practice Aids:

Hatcher's Digest, Mortgages § 161.

Attorney's fees, Kansas Practice Methods § 1247.

Execution of mortgage note, attorney fees, Kansas Practice Methods § 297.

Law Review and Bar Journal References:

Secured transactions under UCC, J. Eugene Balloun, 5 W.L.J. 192, 215 (1966).

Impact of the Uniform Consumer Credit Code upon Kansas, Barkley Clark, 18 K.L.R. 277, 291 (1970).

Prohibition against provision allowing creditor to collect attorney fees on promissory note, does not change law hereunder, Barkley Clark, 42 J.B.A.K. 147, 199 (1973).

"Recovery of Attorney Fees in Kansas," Mark A. Furney, 18 W.L.J. 535, 538, 543, 544, 545 (1979).

"The U.C.C.C. and Real Estate Financing: A Square Peg in a Round Hole," Thomas L. Griswold, 28 K.L.R. 601, 614 (1980).

CASE ANNOTATIONS

1. Provisions in bond which violate this section

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COMMENTS CONCERNING HOUSE BILL #2380

I am Elwaine F. Pomeroy, appearing on behalf of Kansas Collectors Association, Inc. On behalf of the Kansas Collectors Association, I would respectfully request the committee to either schedule further hearings on this bill or permit us to submit written testimony at a later date concerning our position on this proposed legislation.

The bill was introduced on Monday, and first appeared in the House Calendar on Tuesday. Copies of the bill were obtained and distributed by mail and by fax to members of the Association on Wednesday. We have not had the opportunity to receive adequate feedback from our members in time to formulate a position for the hearing on Thursday.

Please understand that I am not being at all critical of the scheduling of the hearing; as a former chair of the Senate Judiciary Committee, I fully understand the workload of the Judiciary Committees, and the difficulties in scheduling hearings for all of the numerous bills assigned to the Judiciary Committee. I am simply asking for leave of the committee to present our position at a later date, and to request the committee not to take immediate action on this bill.

I would point out that the statute being repealed by this bill, K.S.A. 58-2312 has been a part of Kansas law since it was originally passed in 1876, one hundred and fifteen years ago. There are important public policy considerations to be taken into account before this legislation is passed.

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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: FEDERAL & STATE AFFAIRS
GOVERNMENTAL ORGANIZATION
JUDICIARY

February 21, 1991

TO: HOUSE JUDICIARY COMMITTEE

RE: H.B. 2374

FROM: Joan M. Hamilton, 51st Representative
Chairperson, Subcommittee on Sentencing, Corrections and Parole, A.G.'s Task Force on Victims' Rights

I speak to you today with three hats on: 1) Representative; 2) Chairperson for Subcommittee listed above; and 3) former prosecutor and parole members having worked with over 500 victims and/or victims' families.

This bill was the result of a subcommittee composed of Det. Randy Murphy from the K.C., Ks. police department and a husband of a kidnapped and killed wife, Ken Christian from Overland Park, Ks. who is a businessman and also the father of a son who was killed in an armed robbery/murder case, and myself. We have all served on the Task Force since it started and have heard from hundreds of victims and families who have been through the criminal system and voiced their frustrations. This bill SHOULDN'T BE NECESSARY - ONE WOULD ASSUME IT IS JUST PUBLIC RELATIONS OR POLICY TO ALLOW THESE COURTESYS, BUT IT DOESN'T WORK THAT WAY ----- SO WE ARE ASKING YOU TO ALLOW VICTIMS AND FAMILIES THIS SMALL REQUEST THROUGH **H.B. 2374.**

The main change is the addition of the new Sec. 3 on page 2. This requires the D.A.s and County Attorneys to INFORM the victims and/or families of victims of crimes against persons, sexual offenses, and crimes against the family of their plea negotiations **BEFORE THEY TAKE PLACE.** This allows the victims to know what is happening before they read it in the paper, or hear it on the news. The Subcommittee members actually wanted a CONSENT element, but it was suggested we start with INFORMATION. The prosecutor can continue to proceed with their case, but at least the victims or families could go to other sources (i.e. special prosecutors) if they were not satisfied with the negotiations. It would also make the prosecutors more accountable for their over-charging, plea bargains, and dismissals. I will let two families tell you about their actual experiences in regards to this-----I've heard hundreds of horror stories, but time only allowed for me to get two brave women. Their cases are so severe--yet

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they lived through the trauma of the system. What must less serious cases go through?

When County and District Attorney's use the excuse that they are unable to do this because of caseload and time, it should carry no weight. These Kansans deserve, at least, a bit of the justice we afford defendants. In the NEW LANGUAGE ADDED TO (4) (a) on Page 2 --- we just want victims and/or families to have an opportunity to address the court personally **if they request.** Presently, it is discretionary with the Court, yet we afford the opportunity for the defendant.

Lastly, we are asking that the victim impact statement become an important part of the pre-sentence investigation by requiring the C.A. and D.A.'s to assist the court officers in getting the statement into the file. Presently, the statements are merely sent to the victims, and depending on the court service officer, no follow-up is even attempted.

WITH THE POSSIBILITY OF THE ADOPTION OF THE SENTENCING COMMISSION GUIDELINES, victims will be losing some of the rights afforded them by the Legislature in past years. These courtesys will aid them in the fight for some voice in the criminal system, though they realize they have no rights.

Please pass this H.B. out of committee favorably. Thank you.

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Fe. .ry 21, 1991

TESTIMONY IN SUPPORT OF A BILL TO EXTEND CRIME VICTIMS' RIGHTS

My name is Suzanne James. I live at 5345 N. W. 33rd Street here in Topeka. I am a Topeka native. On December 4, 1989, my parents Nancy and Lester Haley, aged 69 and 87 and their neighbor, Mrs. B. Horne, aged 67, were kidnapped at gunpoint while checking on the welfare of another elderly neighbor, Mrs. Ida Mae Dougherty. They were driven to a remote area just inside Douglas County where Tyrone Baker, aged 19, held a gun to their heads. Mrs. Horne persuaded Baker to leave the scene which permitted her to escape into the woods to seek help. A few minutes later, my parents were kidnapped again, driven further east into Douglas County stuffed in the trunk of a compact car. They were then marched through barbed wire fences and an overgrown field full of rocks toward the partially intact northern wall of an abandoned stone house where they were summarily executed. Their murders were slow and agonizing and they watched each other die. Both of them were first shot in the neck. My mother was then shot through the heart while Les was fatally shot in the liver. They both bled to death. Their bodies were not found until the next day, December 5. Mrs. Dougherty's body was found the following day in another location in Douglas County. She was suffocated to death by duct tape which had been wrapped many times around her head. Her attacker burned her several times before killing her. My mother's appearance was so mutilated by the bullet through her neck and face that she was nearly unrecognizable to me when I first saw her body at the funeral home.

Tyrone Baker stands convicted of some of these crimes and is facing trial in Lawrence on the remainder of the charges. Testimony in his Shawnee County conviction revealed that on the day of Mrs. Dougherty's murder, December 3, 1989, he told his accomplice that he wanted to be a

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te ist so he coula ll people. I am here today o testify in favor of a bill to further extend the rights of crime victims and survivors. Because thusfar Baker has been tried and convicted on only half of the charges, I am restricted from being as candid as I would like because our courts have determined that the rights of the accused to a "fair trial" de facto transcend full expression of First Amendment rights by crime victims and survivors.

The criminal justice system, like the defendants and criminals it prosecutes, needs to be held accountable for its decisions. If my experiences with the system are typical, I can tell you that it is a system that often ignores common courtesy as well as common sense. As Tyrone Baker's defense attorney said last June: "Trials are not about victims." I think this statement eloquently illustrates just how far off course the entire criminal justice system has floundered. Are the people we elect and appoint to represent us insensitive clods who don't have their priorities well-ordered? I think not. What I have observed is that the the system is critically underfunded to perform its responsibilities, and that one of the unfortunate byproducts of inadequate funding is the further victimization of crime victims and survivors.

In lieu of massive funding increases which while emminently desirable are highly unlikely, the Legislature can best advance the dignity and rights of victims by requiring prosecuting attorneys to notify crime victims and/or survivors of their rights under Kansas statute and by extending those rights so that victims have significant input into the disposition of their cases. We require our police to inform suspects of their rights at arrest and I think that a compassionate society could at least do the same for crime victims by advocating our rights with the same enthusiasm we exhibit in protecting the rights of criminal defendants.

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.he conclusions . e reached about the crimi. justice system and how, by extension, our society treats victims are ones which I hope you will listen carefully to. The adversarial nature of the system has evolved into cynical gamesmanship where expediency rules; where defense counsels routinely attempt to further victimize victims to exonerate their clients; where the goal of the defense attorney is to free both the innocent as well as the guilty by any means necessary including legalized harassment of victims and survivors; where the rights of the accused assume such premminence that the rights of crime victims and survivors are all but negated; and where prosecuting attorneys view victims as impediments to case load management.

The best way I can think of to describe the ongoing aftermath of experience with the crimes themselves and the criminal justice system would be to have each of you imagine your worst nightmare and then imagine being unable to wake up from it for several years. A person cannot experience what we have without profound changes occurring at very fundamental levels in our perceptions of the world.
of the world

Baker's Shawnee County conviction will not make him parole eligible for 50 years. If convicted in Douglas County he could well serve additional 50 years in prison. In January of 1990, however, the District Attorneys of Shawnee and Douglas County and the Public Defender concluded that a plea bargain which would incarcerate Baker for 30 years was appropriate punishment for probably the most vicious and brutal crime spree in the history of Shawnee County. The proposed plea bargain would have effectively ignored one murder, five kidnappings, and several other lesser charges.

Jim Flory, the District Attorney of Douglas County, called me on a

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Fr afternoon in J. ary of 1990 to notify me ι . the above-mention plea bargain had been negotiated. He told me that the final decision was his and Mr. Gene Olander's, Shawnee County District Attorney, but that as a courtesy he was notifying me so that I could pass it on to Mrs. Horne and the surviving children of the Haleys and Mrs. Dougherty. I told him that my initial reaction to the plea bargain was to reject it categorically and that I believed other family members would as well. I intuitively felt, based on the tenor of the conversation, that this plea bargain was all but signed, sealed, and delivered and that notifying us was a mere legal techniciality.

After discussing the proposed plea bargain with other family members who also vehemently objected to it and after discussions some of us had with the two District Attorneys that afternoon, it became clear that the only way to prevent the plea bargain from becoming reality was to invoke the Kansas statute allowing victims to hire a Special Prosecutor and to make public the plea negotiations. At considerable psychological and financial cost, Baker is facing 21 more years of imprisonment than he would have received under the plea bargain and, if convicted in Douglas County, could have his sentence further lengthened. The principal reason we were initially given in January of 1990 for the plea bargain was that no judge in Eastern Kansas would sentence a young, first-time offender for more than 30 years regardless of the horrific nature of the crimes. It is interesting that two very experienced District Attorneys could have been so wrong in assessing judges.

In order to exert pressure to stop what we regarded as a ludicrously cheap sentence, we went public with the plea bargain. We were very grateful that the Topeka area community responded so strongly by letting the prosecuting attorneys know that it strongly supported our position.

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During Baker's preliminary hearing last February, the District Attorney failed to include a crucial portion of testimony from a police detective in his closing arguments which resulted in the dismissal of an easily provable robbery charge against Baker. Despite our protests, he adamantly refused to refile the charges. In retrospect, the robbery charge proved unnecessary but at the time it seemed foolish to give away any charge against Baker.Nevertheless, our adamant objections to its dismissal failed to change the District Attorney's mind.

We are fortunate that Kansas statutorily recognizes that victims have a few rights but these laws are, however, but a good beginning. Victims, and especially victims of violent crimes, MUST have significant input into the disposition of their case. I recognize that plea bargains are, as a practical matter, frequently necessary to expedite the criminal justice process but I also believe that victims should ultimately have the right to petition the Court against such plea bargains both in adult and juvenile criminal cases. The surviving family members of these crimes are unanimous in our conviction that justice would not have been served in either jurisdiction in which Baker was charged had it not been for the intervention of the Special Prosecutor, Mr. Pedro Irigonegaray.

That crime victims and survivors should be forced to retain private counsel in the pursuit of justice commensurate with the crimes which were committed is the ultimate insulting irony of the system. In a perfect society, I suppose, crime victims should be accorded at least as many rights as the accused. The reality, I'm afraid, is that victims have only the rights accorded them by the limited statutes of this state. Victims often become pawns in the agendas of defense and prosecuting attorneys alike. We can be ig-

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no. by the prosecut who view us as obstacles clearing their calendars and by defense counsels who see us as fair game if they think slandering victims will acquit their clients. What I find particularly offensive is that any accusation can leveled against a victim within the immunity of a courtroom and the victim is prohibited from seeking legal recourse.

Let me be more specific. In addition to losing my parents, I lost my job as a direct result of these crimes. I've acquired legal debts. In an open courtroom, and therefore with no recourse, I have been publicly accused of jury tampering, being in contempt of court, perjury, witness tampering, illegally obtaining confidential information, and attempting to bribe law enforcement officers. It was also hinted that the family members who hired Mr. Irigonegaray were conspiring to deny Baker due process. Privately we have been called a "bunch of rich white racists" who are obsessed with persecuting a young black man. I have received unusual phone calls and mail, and I was accosted twice by some of Baker's friends after his sentencing last August.

Shortly before Christmas, the Shawnee County District Attorney requested that the Haley, Dougherty, and Horne families pay for a portion of Tyrone Baker's trial!

I would like to all of you to to understand just a little of the frustrations we've all experienced as victims. Not one single court date relating to this case has transpired as originally scheduled. Attorneys on both sides have routinely been granted postponements for such reasons as vacations, to attend professional conferences in Miami and Hawaii, to attend to personal business, and to ensure that Baker exercises the full spectrum of his constitutional rights. I say that justice delayed is justice denied for both defendants and for victims. Legislatures and the courts need to fully reevaluate the

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cr. al justice syst. because it routinely assau. s the sensitivities and violates the civil rights of victims in its zeal to protect the rights of the accused. I would contend that speedy trials should be guaranteed to victims as well as criminal defendants and such rights be enforced for both parties.

While I cannot go into detail, it is likely that the Baker case will go on for several months and perhaps years before and if he is tried in Douglas County for the murder of my parents. The system has, in my opinion, gotten out of hand.

Let me share with you my experience with the Crime Victims Compensation Board. The estate executors for my parents received a total of $4,000 which, while deeply appreciated and gratefully received, paid for less than one-third of the cost of their funerals.

Of all of the Haley and Dougherty children, I am the only resident of Kansas. One non-resident family member submitted a claim to the Crime Victims Compensation Board and received full reimbursement for time lost from work as well as counseling fees. Another non-resident family member received reimbursement for counseling fees. I submitted a claim for lost income and counseling fees directly related to these crimes and was arbitrarily denied any compensation beyond those already paid to the estates for burials with no explanation from the Board.

So I urge you to report this bill favorably. I urge you to explore all the ramifications of crimes against people, especially violent crimes. I ask you to remember that it could have been your elderly parents who were so cruelly mutilated and then murdered by an unrepentant sociopath. I ask you to help make the criminal justice system a little more compassionate toward those it seeks to serve. I ask this committee and this legislature to extend all possible rights to crime victims, including victims of juvenile crime, by passing this

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bi. .nd by drafting . .itional legislation. We mu. make the criminal justice system accountable for its decisions. Judges should know in advance of a plea bargain hearing what the victim's wishes are. Prosecuting attorneys, defense attorneys, and judges should be required to read Victim Impact Statements. Notice of plea bargains and requests for Victim Impact Statements must be legally documented and they should be in the hands of judges sufficiently in advance of hearing dates to ensure they are thoroughly read. The bottom line is that victims and survivors of violent crimes must be accorded a larger role in the decision-making processes about their cases. I would also challenge this body to investigate what I consider to be randomly selective criteria for receiving compensation from the Crime Victims Compensation Board.

When all is said and done, however, nothing any of us can collectively do or say will resurrect a single murder victim or provide lasting solace to those of us left behind to deal our feelings and with what too often appears as an unsympathetic criminal justice system. But we - and specifically you our elected representatives - can be the architects of more enlightened and civilized treatment of crime victims. We can start by passing the bill currently under consideration. We can continue by rejecting any recommendations from those who would reform criminal sentencing guidelines that would diminish the small body of statutes currently pertaining to crime victims'rights. Victims - especially those victims like my parents and Ida Mae Dougherty who can no longer speak for themselves - need an advocate. Surviving victims need an equalizer.

I have appended a copy of my Victim Impact Statement that I submitted prior to Tyrone Baker's sentencing in Shawnee County. If you have time, I ask you to read and consider its contents be-

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Thank you for the opportunity to give testimony today about this important bill.

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VICTIM IMPACT STATEMENT

More than anything else, it is my hope that the Court considers the cold-blooded, premeditated brutality of Tyrone Baker's crimes and delivers a sentence appropriate for the worst crime spree to have occurred in this area within memory. The damage Baker has inflicted on surviving family members is psychologically incalculable, the damage to his murder victims obviously irreversible, and this victim's impact statement can't begin to convey the sorrow and anguish I've felt in recent months.

I ask the Court to recognize that it is impossible for me to confine this statement strictly to the crimes which Baker was convicted of in Shawnee County even though I understand his sentencing will reflect only the Shawnee County convictions.

District Attorney Gene Olander was absolutely correct when he asserted that Baker terrorized my parents - so much so, in fact, that according to his death certificate Les suffered a heart attack as he lay dying from his gunshot wounds. The sight of my mother, lying nearly unrecognizable in her casket with her face even in death still so horribly distorted by primal terror and a bullet wound that it was cosmetically irreparable, has left a grotesquely hideous final image of someone I loved very much immutably frozen inside my memory forever.

Not only did Baker torture and terrorize his three murder victims before killing them, he mutilated my mother.

Baker has transformed my life from the tasks of everyday living into an ongoing nightmare that most recently manifested itself as a trial defense predicated on Stephen King-like psychobabble (the good 'he' and the bad 'him'), Ninja Turtles (the sewer rat playmate), and TV ads for the new rollercoaster at Worlds of Fun (the half-man, half-dog creature with the piercing red eyes). To have suffered such an evil and cruel loss and then be subjected to seemingly endless legal delays, the Machiavellian manueverings of a desperate defense counsel, and the grisly details of torturous deaths nearly transcended my capacity for self-control. Each one of us has paid an immeasurably high price for Baker's crimes and during the course of the judicial process. If his conviction was a victory, it was pyrrhic; for we have sustained far greater losses than he.

The most gratifying scene I have ever witnessed was a handcuffed Tyrone Baker leaving the courtroom - his arrogant grin dissolving into whatever destiny awaits this contemptuous kidnapper and killer of three elderly, defenseless people.

With all due respect to the Court, no one but the surviving victims of murder can fully appreciate and understand precisely how such crimes affect surviving family members. Thoughts and feelings that would seem, in any other circumstances, bizarre and abnormal become somehow natural and healthy - and positively essential to sanity. Before this happened, I could have neither predicted nor believed many of the uncharacteristic thoughts and feelings I've had in recent

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No words exist that can adequately express the array of feelings I have experienced since December 4, 1989. For months I felt an unrelenting rage toward Baker and Lisa Pfannenstiel and, during that time, the word rage even seemed pallid in comparison to what I actually was feeling. The words I write for this statement can not begin, therefore, to convey the breadth and depth of the emotions they attempt to describe.

The trial as ritual, I discovered, did much to stimulate the recovery process for which I am thankful. Listening to the detailed reconstruction of the chain of events created an emotional microcosm of the actual experience which however painful served a therapeutic purpose. The guilty verdict somehow freed many of my darker thoughts and anxieties.

This reaction was a stark contrast to many of the pretrial proceedings and peripheral events that I learned via the media that often left me feeling ambushed.

While the extensive publicity generated by these kidnappings and murders did not require us to talk to the media, all of us agreed from the beginning that we wanted the community to know just how horrendous these crimes were. We did not, however, want to say or do anything publicly that might create undue pretrial prejudice or cause a change of venue. The issues of whether victims should have to relinquish a portion of their first amendment rights and be prevented from learning the contents of pretrial motions in order to preserve a defendant's right to a 'fair' trial need to be reassessed. Charges filed against a defendant, pretrial motions, and pretrial hearings should always be open to the public. Sealing public documents could be a dangerous precursor of closed trials and secret transcripts under the misguided notion that open documents and proceedings deny a defendant a fair trial and harm his appeal rights.

As the elected spokesperson of the Haley and Dougherty families, I have had largely positive experiences with the media. Their reporting has been generally accurate and they have treated all of us with courtesy and compassion. It has been an uphill battle, however, to persuade one reporter that we are not wealthy people bent on expending unlimited financial resources on Baker's prosecution. The relationship with the media hasn't been entirely painless. A local TV reporter, who has since left her station, wanted to send a camera crew to my home as we waited for word of our parents' fate. Understandable electronic journalism in this age of instantaneous communication, perhaps, but the idea of someone wanting to televise the worst and most private moments of my life seemed cruelly invasive at the time. The same station replayed <u>ad nauseum</u> a helicopter video of Les' body, lying on the ground where he died, his shirt blood-stained from a bullet wound. Each time I saw that I cried, so I quit watching that TV station. In the days immediately after the murders, I resembled a moth flirting with the flame. I was at once attracted to and repelled by media reports because, for a few days, I received more timely information from them than from the authorities who were busy with their investigation.

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As spokesperson represented a convenient get for the libe[illegible]s public accusations made by Tyrone Baker's defense attorney - allegations which had he made outside the immunity of the courtroom would result in a lawsuit. Victims are fair game in the pursuit of an acquittal, and those who speak out run a very real risk of subjecting themselves to slander and further victimization. Our criminal justice system meticulously shields defendants from abusive treatment by carefully defining and guarding their constitutional rights. No such guarantees exist for victims.

To have three such precious people ripped away during the holidays is the bitterest of ironies. The spectres of terror and murder will cast sharply painful shadows over the Thanksgiving and Christmas seasons for the rest of my life. I have asked myself so many times how any human being could have committed such unspeakably barbaric crimes against three such kind and caring people. There are many explanations, but no answers.

On the other hand, the enormous capacity for love and support that so many people have demonstrated is a source of sustaining comfort. Several days had elapsed after the murders before I became aware of how profoundly these crimes had touched this community. I am still overwhelmed by the concern and thoughtfulness expressed by so many. The wounds have have not yet healed, but the kindnesses will be long remembered.

The detectives, Jerry Young in particular, and other officers of the Topeka Police Department deserve special recognition for the compassion and sensitivity they extended. I am convinced that the dangerous nature of their jobs and the superb psychological training they receive combine to create a unique empathic understanding of victim trauma. I am indebted to them.

I have despaired about the random inequities of living and dying and have paused to reconsider the direction of my own life. Perhaps I came within ten minutes of my own kidnapping and death. Perhaps had I stayed just ten minutes longer visiting with my mother I might have been able somehow to have prevented their murders. The enigma of who lives and who dies surpasses my understanding.

After eight months, I continue to feel an acute sense of grief, horror, and pain that time has done little to ease. I am still angry - angry with Baker for killing my parents, angry with Baker's family for not committing their then minor child to the State Hospital as recommended, and angry about some of the treatment I've received from the criminal justice system. In April chamber proceedings, in Judge Buchele's court, Ron Wurtz indicated that Tyrone "ran" after Memorial Hospital recommended his immediate admission to the Topeka State Hospital. He did not "run". His family, his physicians, and this state failed to hospitalize an individual who was even then metamorphosing into a mass murderer.

Coping has been, for me, a matter of emotional survival. Recovery is an uncharted, winding path full of unexpected obstacles. There are no quick fixes, no simple solutions. Putting things back together is unfolding as an unsolicited do-it-yourself kit that arrives C.O.D. with no instruction manual and no return address. I didn't order it, I don't understand how to do it, I can't return

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i' nd it cost too . Mostly, though, coping coming to terms wi the heart's relu..ance to accept the unacceptable.

The clinical shock that ensued after the murders was unique to my experience. I can only describe it as an emotional and sensory overload that is simultaneously mercifully muted and cruelly vivid. I felt laid open from end to end, utterly vulnerable, and totally helpless. In many ways, it was like being a small child again - completely dependent on those around you and powerless to control your environment. I was told gruesome, awful things one after another, day after day until I began filing them away for future examination rather than dealing with them at the time. It was as if a circuit breaker had kicked in to protect me from too much reality. But one of the realities was that arrangements needed to be made and details needed attending to, and as the only local resident family member, most of them defaulted to me. There was both lasting comfort and exquisite pain in performing the tasks that were some of the last gifts I could give.

I have needed therapy to help me manage my feelings of horror and revulsion about the details of the kidnappings and sadistic murders of my mother and stepfather. Losing loved ones to the savagery committed by Tyrone Baker is to be violated in the most fundamental of ways; invaded every way but physically and then robbed of one's most valued possession - my peace and mind. Tyrone Baker diminished a very important part of me when he so ruthlessly destroyed my mother and stepfather. At times, no place large enough has existed to put all the relentless anger and lingering grief. But to dwell in an emotional whirlpool of rage and sorrow, powerlessness and frustration, horror and fear, impoverishes both the spirit and the flesh, and I am determined to set myself free. Tyrone Baker will not control my life.

My life has dramatically changed since December 4, 1989. I now have sleep disturbances that I never had previously. It is often difficult to fall and remain asleep. I occasionally awake from nightmares - wet from perspiration, heart pounding, and so afraid that someone may be in the house that I am compelled to get and check armed with a loaded gun. Sometimes when I enter the house I feel uneasy and feel as if I must search it. I am suspicious of unusual noises, of our dog barking in the middle of the night, and of other routine events that never bothered me before.

Since December 4, 1989, I have cried more often than in the sum total of my adult life. Usually it's some small memory or reminder of my mother and stepfather but sometimes the cause is a mental replay of the terror and and agonizing pain they suffered prior to and during their cruel executions. The imagery and the reality of the events surrounding the murders intrude into my thoughts often and usually without conscious volition. When this occurs, I feel an adrenaline surge. My heart races, my senses become more acute, and it's as if I'm there at the murder scene. My therapist diagnoses this reaction as Post Traumatic Stress Syndrome, and we are working to eliminate it. Before December 4, PTSD and its accompanying symptoms were things I'd only read about. Now I have it and it's real to me.

Since December 4, 1989, I have experienced periods of disconcerting bouts of irritability, short temper, impatience, and sudden

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Since December 4, 1989, I have lost more than 30 pounds. While not entirely unwelcome, the weight loss is due to a general loss of appetite. Since December, I have suffered several stress-related illnesses, including depression. Both my physician and my therapist have advised that sickness and depression are often normal byproducts of traumatic stress, but they are not normal for me.

Since December 4, 1989, nearly all of my family relationships have suffered immense strain. Some have been repaired and others never will be. Tragedy brought out the worst in some family members and the best in others.

Since December 4, 1989, my ability to concentrate and to motivate myself have been substantially impaired. My attention span, while improving, is still considerably less than what it was before December 4. Though I have had short periods of low motivation and inability to concentrate before, they have only lasted a few days. This has persisted for several months. As a sales representative, low motivation and an inability to concentrate are particularly alarming problems.

I lost my principal employment as a result of these crimes. Two weeks after the murders, my employer gave me only two alternatives: resignation or disability. The third and implicit alternative was termination. I persuaded them to wait until January so that I could have more time to assess my situation. By mid-January, it became clear that business I had lost was largely unsalvageable and, as the lesser of three evils, I involuntarily chose resignation. Because my work requires long term scheduling, I don't expect to be able to work full time again until after the proceedings in Douglas County are finished. Attached to this statement is an addenda which provides specific insurance and financial loss information to date as requested.

Since December 4, 1989, I have developed an interest in self-protection. I purchased and registered a handgun and have practiced to improve my shooting skills. Before this year, I had never fired a handgun nor felt any need to learn.

One of the inheritances left by murder is watching all of one's character flaws and psychological defects surface for everyone to inspect. But it is also an opportunity to put some of them to rest.

In addition to having been victimized by Baker and Pfannenstiel, I feel nearly as victimized by the criminal justice system. While I am grateful that I live in a state which recognizes that victims do have some rights, the system in its overexuberant pursuit of protecting the rights of the accused often disregards the rights, assaults the sensibilities, and insults the intelligence of victims.

Some members of this community have suggested that we are rich, white racists determined to persecute Tyrone Baker because he is black. Still others have insisted that the police arrested the wrong person, that Tyrone is innocent, and that we the family members have overlooked the crimes committed by his white friends

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in order to prosecute Baker. Racism is an easy charge to make and difficult to disprove. Those who have leveled these charges, I suspect, neither know us personally nor understand the legal ramifications involved in Pfannenstiel's plea bargain. They don't understand, or choose not to, that filing charges against Baker's white friends would have effectively eliminated crucial testimony. Baker's attorney made some veiled and not so veiled references to these untrue and unfair accusations during pretrial and trial proceedings in an attempt to villify the victims to gain sympathy for his client.

Such charges are yet another example of how defense attorneys perversely put victims on trial for the purpose of destroying their credibility and reputations in an attempt to confuse the real issues or to achieve a perceived advantage. Total disregard for the rights of the innocent is just a means to an end that is to be tolerated so that the accused can fully exercise the spectrum of their constitutional rights. The criminal justice system encourages these despicable tactics by continuing to allow them. My experience with this system has taught me that the rights of the accused transcend those of any other citizen, especially victims. The rights of the one abrogate the rights of many and that it's acceptable to yell "fire" in a crowded theater as long as the one doing the yelling has already been accused of a crime.

This is not justice.

While I understand that plea bargains are often necessary to keep the criminal justice system afloat, the Tyrone Baker case was categorically <u>not</u> one of those cases. To have been forced to hire a special prosecutor to ensure a trial further compounded my anger and added to my frustration. It seems to me that the concept of due process should apply equally to victims. Competent special prosecutors are not inexpensive. My husband and I will have paid four times for the trials of Tyrone Baker - twice publicly via our taxes and and twice privately for Mr. Irigonegaray's invaluable services. Despite the financial hardship, I haven't regretted for a single moment retaining Mr. Irigonegaray, but I am angry that it was necessary in order to get Baker brought to trial.

This narrative describes a few of the most obvious changes in my life, but there are other, more subtle ones that have to do with my perceptions of safety and trust. I doubt that these will ever be the same again. Probably the harshest adjustment, though, is having to think about my mother and stepfather in the past tense interwoven with Baker's legacy of terror and murder.

The crimes Baker committed mirror the rapidly metasticizing cancer of random and unnecessary brutality - inspired by abuse of drugs and alcohol, dysfunctional homes, and our cultural infatuation with violence. If our homes and social agencies can no longer protect society from this multiplying group of angry young people, then only law enforcement and the criminal justice system stand between the citizentry and criminal anarchy. Heinous crimes perpetrated by young people should be punished just as severely as the crimes themselves and concern for public safety warrant. Baker's age, therefore, should be deemed irrevelant at sentencing.

Trial testimony established that Baker **wanted** someone in the

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h they burglariz He planned to kill. He w d to kill.

The fact that to date Baker has shown no remorse for his atrocities ought to, I think, merit a stiffer sentence than would ordinarily be levied. Baker's use of the insanity defense afforded him through his attorney the opportunity to express remorse, yet they chose not to. Any contrition Baker may offer at his sentencing hearing will be, I believe, for the self-serving purpose of sentence moderation, not because he feels remorse about his crimes.

Tyrone Baker is not a first-time offender; it was simply the first time he'd been apprehended as an adult. Preliminary hearing and trial testimony clearly linked Baker with an experienced group of thieves who burglarized cars and mobile homes. He frequently carried a gun which was presumably concealed. He has a juvenile record and is well known on Topeka boulevard for street fighting.

I conducted my own inquiry about Baker's background and character. Here are some of the items I discovered:

1. As an student at Robinson Middle School, Baker frequently instigated fights and consistently bullied other students. One parent told me she withdrew her son from the school after Tyrone threatened him.

2. During this same time period, Tyrone's mother warned clients of her house cleaning service never to let Tyrone in their homes if she wasn't with him.

3. Baker withdrew from Topeka High School in his sophomore year for exactly 30 days. He enrolled in Olathe where he was expelled on his fourth day of classes for threatening and verbally abusing a female teacher.

4. Within a week after the murders, Tyrone's mother confided in a fellow churchmember that the reason they had made Tyrone move out of their home was because he had developed a fascination with a gun and they were more frightened than ever of him.

While I'm unqualified to render a valid psychiatric opinion, I do believe sufficient evidence exists to argue that Baker may be sociopathic in addition to or instead of a being paranoid schizophrenic. Schizophrenia, and paranoid schizophrenia in particular, seldom if ever manifests itself before middle adolescence. Yet Baker has an extensive history of violence and intimidation.

It is also curious that in <u>every</u> psychiatric history, the <u>only</u> persons reporting psychologically aberrant behavior are family members and two friends. I question the reliability of people who claim to see demonic visions and believe their descriptions should be discounted. What the majority of witnesses reported was a psychologically normal individual engaged in criminal activity. A psychiatric diagnosis can be only as accurate as data gathered to formulate it, and I remain skeptical of the accuracy of the case history information provided by members of his family other highly suggestible individuals.

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The physical symptoms described by witnesses when Baker allegedly enters a delusional state are also consistent with epileptic petite mal seizures. Despite the fact that Baker was hospitalized for 30 days, there was no evidence introduced during the trial that indicated that he'd ever received a thorough neurological examination.

It is also interesting to note that Baker has told three different stories about his involvement in these crimes. At the time of his arrest and prior to the reading of his Miranda rights, he told Detective Listrom that the police had the wrong man and that he sure hoped they would catch the right person. He also made a similar statement to Dr. Modlin. He told Dr. Parks, however, that he couldn't remember what happened. During his lengthy psychiatric evaluation, I'm told he bragged to other jail inmates about how he'd fooled the system.

Baker further reveals his character when, after learning that Pfannenstiel is pregnant, suggests that she return to her father's home - after having discussed the merits of breaking in and robbing him.

Sociopathy and paranoid schizophrenia are not mutually exclusive conditions. The information available to me unequivocally portrays Baker as a textbook sociopath. Sociopathy is classified as a character disorder while paranoid schizophrenia is a behavior disorder but they share one thing in common: neither is curable and paranoid schizophrenia is progressive. I ask the Court to disregard the question of mental illness as a mitigating factor when determining Baker's sentence and to consider only the nature and consequences of his crimes and testimony about his general behavior.

I contend that the principal responsibility of the state and, by extension, the criminal justice system is to protect the safety of its citizens. Sentencing and parole guidelines must reflect this responsibility. Within statutory parameters, sentencing should also reflect not only the severity of the crimes but the consequences of the crimes as well. To sentence or parole criminals based on their needs, characteristics, and potential rather than on the protection of society clearly elevates the perceived welfare of the guilty above the welfare of the innocent.

Here are my recommendations to the Court and to the Department of Corrections for Baker's sentencing and disposition:

1. <u>That Baker receive maximum consecutive sentencing for all crimes for which he was convicted.</u> There are no legitimate mitigating factors. This individual must <u>never</u> be given the opportunity to kill again.

2. That Baker be fined the maximum amount under the law for his crimes and that the Crime Victims Compensation Board receive an amount equal to their disbursements to victims in this case and that the balance of any prison earnings be paid to surviving victims.

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3. That Baker b manded to Larned for lon rm, comprehensive psychiatric and neurological eval-uation and that he receive, if indicated, appro-priate treatment.

4. That upon his discharge from Larned, he be re-manded to the maximum security area in the Hutch-inson correctional facility to serve the remaind-er of his sentence.

5. That if Baker is diagnosed as a result of long-term psychiatric observation at Larned as being paranoid schizophrenic that he be required under supervision to take, if prescribed, appropriate anti-psychotic medication for the duration of his sentence.

6. That Baker, if diagnosed as paranoid schizophren-ic at Larned, be required to attend group therapy sessions at his correctional facility for the dura-tion of his sentence.

7. That the Court disregard any eleventh hour remorse Baker may manufacture at his sentencing hearing in an attempt to get his sentence reduced.

Because my work takes me into high schools, I have been made keenly aware of the tremendous interest Baker's case has generated with area high school students. Perhaps people do not learn from the mistakes of others, but if only some can, the Court has an opportunity to use the media coverage of this case to send a a clear message to all citizens and especially the younger ones that our legal system holds every sane person responsible for their behavior.

One of the similarities shared by Pfannenstiel and Baker is the desire both have to deny responsibility for their behavi-or. While I suppose most criminals deny responsibility, their de-nials are also symptomatic of an alarming trend in our society in which nobody is ever responsible for their bad behavior. Some-one or something else external is always responsible - the drugs, alcohol, devil, war, mental illness, poor parenting, abuse, etc. are responsible for antisocial behavior. Mea culpa? No way.

A decisive sentence would deliver a powerful message to the contrary.

I appreciate this opportunity to express the many facets of the impact Baker's crimes have had on my life. This entire experi-ence which has yet to conclude has been a series of excruciating painful steps, including the preparation of this statement. I hope it's worth it.

Thank you.

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Sincerely,

cc: The Hon. Judge Fred Jackson
The Hon. Robert Stephan
Mr. Pedro Irigonegaray
Kansas Department of Corrections

Suzanne James
5345 N. W. 33rd Street
Topeka, Kansas 66618
(913) 286-0332
July 31, 1990

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attachments
#6-10

Su e James

VICTIM IMPACT STATEMENT ADDENDA

Insurance Information

Carrier: Prudential Custom Care (Southwestern Bell)

Control Number: 47448

I. D. Number: 512-26-8928

Out-of-pocket deductible through 7-31-90: $100.00 (incomplete)

Financial Losses

Loss of gross income for Suzanne James through 7-31-90: $13,000. (incomplete)

Loss of gross income for my husband, Myrlen James, who did not receive his salary during the week of the murders: $866. (complete)

Prorated cost of special prosecutor through 4-5-90: $5120. (incomplete)

Reimbursed Expenses

From the Victims Compensation Board to the Estate of Nancy C. Haley for funeral and burial expenses: $2,000.

Explanation of Financial Losses

In mid-January, I was forced to submit an involuntary resignation because of a lack sales production. Normally, 60%-80% of my spring semester business is booked in December. I had been able to schedule 5 fund raisers for spring prior to the murders. Of these 5, three changed companies because the organization sponsors were sure I'd be unavailable. My monthly gross compensation amounted to approximately $2,000. and I have been unemployed as of 7-31-90 for six and one-half months.

The good news is that I have an agreement with another company to begin full-time employment when all legal proceedings are concluded.

When I can itemize a summary of complete financial losses I will submit a claim to the Crime Victims Compensation Board no later than December 1, 1990.

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STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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

ROBERT T. STEPHAN
ATTORNEY GENERAL

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CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

Testimony of
Juliene A. Maska
Statewide Victims Rights Coordinator
Before the House Judiciary Committee
RE: House Bill 2374
February 21, 1991

Attorney General Robert T. Stephan has asked that I speak to you today about House Bill 2374.

In February 1988, Attorney General Stephan formed a 50-member Victims' Rights Task Force. The purpose of the task force was, and still is, to insure that the rights and needs of Kansas crime victims are not neglected.

The Victims' Rights Task Force continues to look at the needs of crime victims. The task force asked that House Bill 2374 be introduced and seeks your support. This bill would enhance the rights of crime victims.

Many times, victims are not sent a victim impact statement or no one explains the purpose of the statement. Since the prosecutor works with the victim throughout the trial process and provides victim assistance, we believe the county/district attorney's office would be a logical place for assisting court services with the victim impact statement.

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Attachment #7

Crime Victims should be allowed the opportunity to address the judge before sentencing. This bill would give the victim the right to tell the judge how the crime has affected him or her.

Also, concerning crimes against persons, new section 3 of the bill would allow victims to be aware of the criminal case dismissal. When plea bargaining takes place, the victim should be made aware of the negotiations before they begin. Victims should be informed as to what is happening to the criminal case before decisions that would affect that case take place.

Your support for House Bill 2374 would strengthen rights for crime victims in Kansas.

HJUD
2-21-91
attachment
#7-2

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

500 Bank IV Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321

A consolidation of the
Kansas State Chamber
of Commerce,
Associated Industries
of Kansas,
Kansas Retail Council

HB 2364

February 21, 1991

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

House Committee on Judiciary

by

Bud Grant
Vice President

Mr. Chairman and members of the Committee:

My name is Bud Grant, Executive Director of the Kansas Retail Council, a major division of the Kansas Chamber of Commerce and Industry. I appreciate the opportunity to appear before you today in support of HB 2364.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

HJUD
2-21-91
Attachment #8

We are all familiar with shoplifting, the old five-finger discount. It's up there with speeding and tax cheating as a way to beat the system with little risk. It's America's fastest growing, most expensive crime. This year, shoplifters will make off with more, far more, than the James gang, Bonnie and Clyde, and all the other bank robbers in the 200 years of American history. The FBI estimates that in Kansas shoplifters annual heists will exceed $250 million and nationally, between $24 and $39 billion.

Who shoplifts? Anyone. There are professionals with hidden pockets and false bottom packages. But most of the shoplifters are run-of-the-aisle amateurs. Teenagers on a dare. Senior citizens on a fixed income. Poor people. Rich people. Celebrities. Politicians. Athletes. Diplomats. Nine in every ten have the money or credit card to pay for the item they steal.

When do they do it? All the time, but especially at Christmas. About 45 percent of all shoplifting losses occur during the holidays, and the impact of shoplifting can be devastating to retailers and to all of us. Kansas residents are negatively impacted in at least three ways:

1. **Higher consumer prices** - merchants are forced to raise retail prices to cover their increase in cost of doing businesses (i.e. loss of merchandise, working capital and cost of security) placing the financial burden ultimately on the honest consumer.
2. **Overburdened criminal justice system** - many apprehended novice shoplifters and dishonest employees are referred to the already overcrowded system (police, courts, corrections). This results in the need for more tax revenue to pay for a continual expansion of the system.
3. **Lost tax revenues** - merchandise lost to theft is not converted to profit in the form of sales for the retailer. As a result, millions in tax revenues are lost. Again, the honest tax payer must bear the financial burden of runaway theft.

Civil recovery provides advantages to the retailer, the legal system and consumers in the fight against rising retail theft.

HJUD
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#8-2

By holding offenders financially accountable for their theft activity, three benefits are gained:

1. **A strong deterrent** to future theft is provided (particularly in the case of juveniles) since most household budgets cannot afford to pay $150 every time an individual is apprehended for stealing cash or merchandise.
2. **An overall reduction of criminal dockets** permitting police, prosecutors, judges and correctional/probation authorities to focus on more violent or serious crimes. Unless an apprehended shoplifter or dishonest employee is violent or gives a merchant reason to believe they are habitual offenders, most retail theft cases will be handled by letters of civil demand rather than routed through the criminal justice system.
3. **Apprehended offenders help defray the tremendous cost** of theft (and resulting security efforts) experienced by all merchants. This savings is passed on to the consumer in the form of competitive pricing.

One of the earliest surviving accounts of shoplifting was written in 1597; it described the different kinds of "lifts" operating in Elizabethan England. A 1698 Act of Parliament defines shoplifting as "the crime of stealing goods privately out of shops," and prescribes death for violators. Kansas retailers are not ready to make that suggestion as yet.

Civil recovery is an easy to use remedy for retailers that combines the benefits of deterrence, repayment of lost revenues and an easing of the case loads of an overburdened criminal justice system. At present, 37 states have specific civil recovery statutes, and seven more are seriously considering similar legislation.

I urge your favorble consideration of HB 2364 and I would be pleased to attempt to answer questions.

HJUD
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#8-3

SUMMARY OF CIVIL RECOVERIES LAWS

STATE	STATUTE	APPLIES TO MINORS	ACTUAL DAMAGES	RETAIL VALUE OF MERCHANDISE	ADDITIONAL PENALTY	COURT COST	ATTY'S FEES
AK	9.65.1100	YES	YES	TO $1000	$100-$200	**	YES
AZ	12.691	YES	YES	YES	$100	**	**
CA	490.5(b)(c)	YES	NO	IF NOT SALABLE	$50-$500	YES	YES
CO	13-21-107.5	YES	YES	**	$100-$250	**	**
FL	772.11	NO	$200+	**	**	YES	YES
GA	51-10-6	NO	YES	YES	>OF $150 OR 2 x DAMAGES	YES	YES
HI	663A2	YES	YES	IF NOT SALABLE	SEE 1	YES	**
ID	48-701,702	YES	NO	YES	$100-$250	YES	YES
IL	16A-7	YES	YES	ACTUAL DAMAGES RETAIL VALUE	$100-$1000	YES	YES
IN	34-4-30-1	NO	YES	**	ACTUAL x 3	YES	YES
LA	9.2799.1	NO	NO	IF NOT SALABLE	$50-$500	**	**
MA	231:85G, 85R½	YES	YES	**	ADULTS $50-$500	**	**
MI	600-2953	YES	NO	SEE 2	SEE 2	SEE 2	SEE 2
MN	332-51	YES	NO	IF NOT RECOVERED	>OF $50 OR VALUE OF MERCHANDISE	**	**
MT	27-1-718	YES	YES	MANDATORY: TO $500	RETAIL VALUE MERCHANDISE	**	**
NE	24-523	YES	YES	YES	NO	YES	YES
NV	598.033.035	YES	YES	YES	$100-$250	YES	YES
NH	644:17a	NO	SEE 3	NO	NO	NO	NO
NM	30-16-21	NO	NO	IF NOT RECOVERED OR DAMAGED	$100-$250	YES	YES
NC	1-538.2	YES	YES	SEE 4	SEE 4	**	YES
ND	51-21-05	YES	NO	YES	TO $250	YES	YES
OH	2307.60/61	YES	YES	YES	SEE 5	YES	YES
OR	30.875	YES	YES	TO $500	$100-$250	**	**
TN	39-3-1124	YES	NO	IF NOT RECOVERED	NO	YES	YES
TX	ART. 1	YES	YES	**	ADULTS TO $1000 CT. AWARDS	YES	YES
UT	78-11-15	YES	NO	YES	$100-$500	YES	YES
VA	18.2-104.1	NO	NO	IF NOT RECOVERED	COST OF PROSECUTION	**	**
WA	4.24.230	YES	YES	TO $1000 JUV. TO $500	$100-$200	**	**
WY	61-3A-5	NO	SEE 6	IF NOT SALABLE	SEE 6	YES	YES
WI	943.51	NO	YES	IF NOT RECOVERABLE OR NOT SALABLE	TO 3 x RETAIL PLUS ACTUAL	YES	YES

1 **HAWAII:** ADDITIONAL PENALTY ON WRITTEN DEMAND, $75 CIVIL SUIT PENALTY OF $50 TO $500.

2 **MICHIGAN:** RETAIL VALUE OF MERCHANDISE IF NOT RECOVERED OR NOT SALABLE ADDITIONAL PENALTY ON WRITTEN DEMAND: 10 x RETAIL VALUE OF THE MERCHANDISE, BUT NOT LESS THAN $40 AND NO MORE THAN $100. CIVIL SUIT, PENALTY OF $200 PLUS REASONABLE COSTS NOT GREATER THAN $50.

3 **NEW HAMPSHIRE:** ONLY DAMAGES AVAILABLE+COST OF EMPLOYEES WAGES FOR ARRAIGNMENT AND PROSECUTION.

4 **NORTH CAROLINA:** RETAIL VALUE OF MERCHANDISE CALCULATED AS FULL VALUE IF DESTROYED. LOSS OF VALUE IF RECOVERED DAMAGED. ADDITIONAL PENALTY OF 3 x ACTUAL OR CONSEQUENTIAL DAMAGES.

5 **OHIO:** ADDITIONAL PENALTY OF THE GREATER OF $200 OR 2 x ACTUAL DAMAGES. OHIO IS THE ONLY STATE IN WHICH NON-PAYMENT OF CIVIL DEMAND MAY RESULT IN THE INITIATION OF CRIMINAL PROCESS.

6 **W. VIRGINIA:** ACTUAL DAMAGES ARE ALLOWED BUT STATUTE SPECIFICALLY STATES THAT MERCHANT MAY NOT RECOVER THE COST OF PROCESSING THE CASE.

HJUD
2-21-91
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8-4

**Statute silent on provisions indicated

KANSAS FOOD DEALERS ASSOCIATION

EXECUTIVE DIRECTOR
JIM SHEEHAN
Shawnee Mission

February 21, 1991

HOUSE JUDICIARY COMMITTEE

SUPPORTING HB 2364

I regret that a conflict kept me from appearing before your Committee supporting HB 2364.

As Director of Governmental Affairs for the Kansas Food Dealers I speak for the retailers of food products throughout the state of Kansas and their suppliers.

Many of you have heard me say over the past years that we are in favor of ANY measure which would help reduce the cost of doing business for Kansas retailers. Shoplifting, as well as internal theft, is a major cost to our members and we wholeheartedly support HB 2364.

Whenever a merchant has the opportunity to seek civil damages for the cost of stolen items (whether goods, services, or cash) it helps reduce one element in the broad term "cost of doing business". That in turn can lower the prices paid by the honest customer.

As we read the bill it would permit anyone to use the provisions in this bill, making it a consumer issue that will benefit all Kansans.

We respectfully request that you recommend HB 2364 favorably for passage.

Frances Kastner

Frances Kastner, Director
Governmental Affairs, KFDA

HJUD
2-21-91
Attachment # 9

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