Approved February 25, 1991
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Senator Wint Winter, Jr. at
Chairperson

10:05 a.m./~~p.m.~~ on January 30, 1991 in room 514-S of the Capitol.

All members were present except: Senators Yost and Martin who were excused.

Committee staff present:
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Office of Revisor of Statutes
Judy Crapser, Secretary to the Committee

Conferees appearing before the committee:
Senator Alicia Salisbury
Bud Grant, Kansas Chamber of Commerce and Industry & Kansas Retail Council
Frances Kastner, Kansas Food Dealers' Association, Inc.
Barkley Clark, CheckRite, Inc.
Paul Mohr, Wichita
Shirley Atteberry, Research L & S Investigations and Consulting Co.
Robert Telthorst, Research Information Services
James Clark, Kansas County and District Attorneys Association
Joyce Pernine, CheckRite, Inc.

The Chairman called the meeting to order at 10:05 a.m.

Senator Morris moved to approve the minutes of January 16, 17, 22 and 23 as written. Senator Kerr seconded the motion. The motion carried.

The Chairman opened the hearing for SB 59.

SB 59 - law library in Stafford County.

A letter from Don J. Knappenberger, attorney from St. John, in support of SB 59 was distributed to the committee. (ATTACHMENT 1)

As no additional testimony was offered on SB 59, Chairman Winter explained the bill would add Stafford County to the list of exempt counties for limited court fees designated for law libraries.

Senator Bond moved to recommend SB 59 favorable for passage and to be placed on the Consent Calendar. Senator Feleciano seconded the motion. The motion carried.

Chairman Winter opened the hearing for SB 30.

SB 30 - service charge on worthless checks.

Senator Alicia Salisbury, sponsor of SB 30, explained the bill was introduced as a result of an Attorney General's opinion to correct an unintentional oversight that occurred during passage of legislation in the 1990 Session.

Bud Grant, Kansas Chamber of Commerce and Industry and Kansas Retail Council, testified in support of SB 30. (ATTACHMENT 2)

Frances Kastner, Kansas Food Dealers' Association, Inc., testified in support of SB 30. (ATTACHMENT 3)

Barkley Clark, CheckRite, Inc., testified in support of SB 30 as correcting a problem that should not have developed. This bill would assist businessmen in recovering the costs incurred in someone giving them a worthless check. He added that passage of SB 30 would clarify statutorily what the practice has always been.

Paul Mohr, Wichita attorney, testified in support of SB 30 and suggested amendments. (ATTACHMENT 4)

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:05 a.m./~~p.m.~~ on January 30, 1991.

Shirley Atteberry, Research L & S Investigations & Consulting Co., testified in support of SB 30. (ATTACHMENT 5)

Robert Telthorst, Research Information Services, testified in support of SB 30 with amendments. (ATTACHMENT 6)

James Clark, Kansas County and District Attorneys Association, stood to support passage of SB 30 without amendments.

Joyce Pernine, CheckRite, Inc., rose in support of SB 30 and stated she would agree with those offering amendments to the bill.

This concluded the hearing for SB 30.

The meeting was adjourned.

Date 30 Jan '14

**VISITOR SHEET**
Senate Judiciary Committee

(Please sign)

| Name/Company | Name/Company |
|---|---|
| FRANCES KASTNER | Ks. Food Dealers Assn |
| Shirley A Teberry | Research L+S Investigations |
| Joyce Perrine | CheckRite |
| Chuck Stones | KBA |
| Kathy Taylor | KBA |
| Rod Grant | ICCU |
| Dennis C. Payne III | Brian Payne Ins. |
| Charles Davis | Check Center |
| Paul Mohr | Attorney |
| R.D. Frey | KTLA |
| Paul Shelby | OJA |
| Ron Smith | KBA |
| John Payne | CheckRite |
| Rob Teithorst | Research Information Services, Atty |
| Kay Farley | OJA |
| Charles Ray Cadams | Private Citizen |
| JIM CLARK / KCDAA | |

# DON J. KNAPPENBERGER

ATTORNEY AT LAW

P.O. BOX 245
103 WEST THIRD
ST. JOHN, KANSAS 67576

PHONE
316-549-3895 BUSINESS
316-549-6520 FAX


DEC 28 1990

December 27, 1990

The Honorable Fred Kerr
Senate Majority Leader
State Capitol Building
Topeka, Kansas 66612

Dear Senator Kerr,

I am writing to you as a representative of the Stafford County Bar Association and as Trustee of the Stafford County Law Library. Currently we receive the fees allowed by K.S.A. 20-3129(a), as do all other counties in Kansas, to defer the costs of furnishing a Law Library in the Stafford County Courthouse. We have seen a downturn in the number of cases, particularly traffic cases, prosecuted in Stafford County due to the reassignment of Kansas Highway Patrol troopers. This decrease in traffic cases correspondingly lowers the income that we receive to maintain the Stafford County Law Library. The cost of legal books has skyrocketed over the last few years and we are finding ourselves in a situation in which our reserves will soon be eaten up if we do not take some corrective measures to maintain the quality of the library we have developed. Several counties have exempted themselves from the requirements of K.S.A. 20-3129(a) and have been included in K.S.A. 20-3129(b) regarding the right to charge an additional fee above the one allowed for in K.S.A. 20-3129(a). This is a fee added to the court case of every case filed in the County District Court. We would like to have you introduce a bill in the legislature to amend K.S.A. 20-3129(b) to include Stafford County with the other counties set out in that list. I believe that I have the support of the entire Stafford County Bar Association in regard to this proposed amendment. You might also have received a letter from William E. Goss endorsing this plan. If you could introduce this as an individual bill, then I would be happy to come up and testify regarding this whenever necessary. I trust that we can have this carried over to the House side by our new Representative. Please advise me if you can help us with this project.

Sincerely,

Don J. Knappenberger
Attorney at Law
DJK/id

Senate Judiciary Committee
Attachment 1
1-30-91

1-1/1

# 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

SB 30

January 30, 1991

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

Senate Judiciary Committee

by

Bud Grant
Executive Director
Kansas Retail Council

Mr. Chairman and members of the Committee:

My name is Bud Grant, and I appear today in support of SB 30 on behalf of the Kansas Retail Council and the Kansas Chamber of Commerce and Industry.

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.

Senate Judiciary Committee
Attachment 2
1-30-91

The purpose of SB 30 is to clarify any questions which may have arisen as a res of an Attorney General's opinion issued this summer relating to the amount the receiver of a worthless check may charge as a "service charge." This opinion stated that when HB 2581, passed by the 1990 legislature, became law, one of the amendments to the bill limited all service charges to $10. This happened without the understanding of interested parties and without discussion in the committees or on the floor of either house.

SB 30 simply returns us to where we were before HB 2581. While the statutes have defined the amount of the service charge, the court in the case of Merrel v. Research and Data, Inc., No. 49331, stated:

> Where a sign setting forth the fees to be charged on returned checks is conspicuously posted in a place of business so that the person cashing a check or giving a check for merchandise cannot help but see it, there is a presumption of fact that the one giving a check in that place of business saw the sign and asserted to its terms.

The court goes on to say:

> Authorizing the holder of a bad check to demand and receive a service charge of not more than $3 (the statutory amount at that time) in addition to the face amount of the check does not by its terms or by implication prohibit the parties from expressly contracting for a larger service charge. The only limitation on such an express agreement is the common law rule that it may not be unconscionable.

Allowing a person who purchases goods or services to pay by check, as opposed to cash, is a privilege granted by the person offering the goods or services. Should the check prove to be worthless, that person should not be forced to lose money in collecting for the check. The $10 service charge is not enough. The cost of restricted mail and limited personnel time can easily exceed the $10. I urge you to return the law to where it was at this time last year and recommend SB 30 favorable for passage.

589 P.2d 120

No. 49,331

LESLIE MERREL, for himself and all others similarly situated, *Appellant*, v. RESEARCH & DATA, INC., *et al.*, *Appellees*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Giving a Worthless Check—Service Charge Assessed by Business.* Where a sign setting forth the fees to be charged on returned checks is conspicuously posted in a place of business so that a person cashing a check or giving a check for merchandise cannot help but see it, there is a presumption of fact that one giving a check in that place of business saw the sign and assented to its terms.
2. SUMMARY JUDGMENT—*Effect of Silence by Party to Overcome Inferences from Supporting Affidavits.* A party cannot overcome the logical inferences to be drawn from affidavits supporting a motion for summary judgment by remaining silent or relying on his pleadings.
3. CRIMINAL LAW—*Giving a Worthless Check—Threat of Criminal Prosecution to Force Payment—Effect.* Duress inducing a person to perform his exact legal duty does not give him power to avoid his act. Thus coercion exercised through the threat of criminal prosecution affords no grounds for recovering payments made to satisfy a valid and liquidated obligation.
4. SAME—*Giving a Worthless Check—Statutory Service Charge—Contract by Parties for Greater Service Charge.* K.S.A. 21-3707, authorizing the holder of a bad check to demand and receive a service charge of not more than three dollars in addition to the face amount of the check, does not by its terms or by implication prohibit the parties from expressly contracting for a larger service charge. The only limitation on such an express agreement is the common law rule that it may not be unconscionable.
5. SAME—*Giving a Worthless Check—Service Charge Assessed by Business.* A contract whereby the maker of a check agrees to pay a fee of $5.00 plus 10% of the face amount if over $20.00 if the check is returned is not unconscionable.
6. SAME—*Giving a Worthless Check—Service Charge Assessed by Business—Claim of Unjust Enrichment.* In an action by the maker of bad checks to recover under a theory of unjust enrichment fees paid to a collection agency under threat of prosecution it is *held:* the trial court correctly found an express contract to pay the challenged fees, and that there were no factors which would relieve plaintiff of his obligation under the contract. Hence defendants were not unjustly enriched when plaintiff fulfilled that obligation, and the trial court properly rendered summary judgment for defendants.

Appeal from Shawnee district court, division No. 6; TERRY L. BULLOCK, judge. Opinion filed January 12, 1979. Affirmed.

*Steven Rupp* and *Fred W. Phelps*, of Fred W. Phelps, Chartered, of Topeka, for the appellant.

*Robert D. Hecht*, of Scott, Quinlan and Hecht, of Topeka, for the appellees.

Before FOTH, C.J., SPENCER and MEYER, JJ.

FOTH, C.J.: Defendants Research and Data, Inc., and its president Leland W. Atteberry are in the business of collecting bad checks on behalf of merchants who engage their services. They endeavor to collect the face amount of the checks, plus a fee of $5.00 per check and ten percent of the face amount of those over $20.00. They do this in large part by writing letters threatening the makers with prosecution if the checks and fees are not paid. Upon collection defendants retain the fees as their compensation, remitting the face amount of the checks to the merchants.



In the summer of 1974 plaintiff wrote a number of insufficient fund checks to Topeka merchants. After receiving a series of defendants' letters plaintiff paid some of his bad checks and the corresponding fees to defendants, and then brought this action. His petition was originally framed as a class action in three counts: blackmail, outrage, and unjust enrichment. It sought punitive as well as actual damages. At a discovery conference, however, he dropped both tort claims, leaving only the claim of unjust enrichment as to the fees paid to and retained by defendants. On that claim the trial court rendered summary judgment for defendants, and plaintiff appeals.

The trial court's decision was based in large part on a finding that plaintiff had expressly contracted to pay the fees in question. The correctness of this finding is plaintiff's first point on appeal, and in our view is the controlling issue.

The trial court found as a matter of fact that "[i]n each of such merchants' business establishment[s] there was posted in a conspicuous place a sign indicating that a $5.00 charge would be made on all 'returned checks'." It concluded as a matter of law:

"Under the facts of this case, the merchants posted their sign announcing to the public that a charge of $5.00 would be made on returned checks. Plaintiff was not compelled to do business with these merchants nor was he compelled to pay by check. Further, and most importantly, he was not compelled to give the merchant, an unlawful, insufficient fund check. By doing so the Court finds that he accepted the merchants' terms as clearly stated in their posted notices thereby contracting to pay the charge set out."

Plaintiff challenges the finding and conclusion on the ground that there is a question of fact as to whether he agreed to the charges which cannot properly be resolved on summary judgment. He points to the absence of proof that he actually saw the signs and thereby assented to their terms.

The finding was based on a series of uncontradicted affidavits which had been duly served on plaintiff's counsel and filed in the

case. These affidavits, made by the defendant Atteberry and the managers of the various businesses which had accepted plaintiff's checks, stated that all the signs were so placed that a person cashing a check or giving a check for merchandise "could not help but see the sign." These assertions, made under oath, raised a presumption of fact that plaintiff saw the signs when he presented his checks. To overcome the logical inference to be drawn from the affidavits and thus raise an issue of material fact so as to preclude summary judgment plaintiff was required to present some rebutting evidence, such as a statement under oath that he did *not* see the signs. He could not, as he did, remain silent or rely on his pleadings. *Stovall v. Harms,* 214 Kan. 835, 838, 522 P.2d 353 (1974); *Ebert v. Mussett,* 214 Kan. 62, Syl. ¶ 3, 519 P.2d 687 (1974); *Meyer, Executor v. Benelli,* 197 Kan. 98, Syl. ¶ 1, 415 P.2d 415 (1966).

On the basis of defendants' uncontradicted affidavits the trial court was fully justified in finding that plaintiff, when giving the checks, agreed to the merchants' conditions and agreed to pay the specified fees upon dishonor.

In his second point plaintiff argues that he should recover the fees because they were paid under the coercion of defendants' threats to prosecute.

He offers no authority for the proposition that a debtor who pays a debt legally due can recover the amount paid because the payment was coerced. The authorities he does cite deal with the coerced settlement of an unliquidated or disputed claim; *e.g., Thompson v. Niggley,* 53 Kan. 664, 35 Pac. 290 (1894), where a mortgage was given under coercion to settle a tort claim; *Williamson v. Ackerman,* 77 Kan. 502, 94 Pac. 807 (1908), where a father gave a mortgage to settle an embezzlement claim against his son. In those cases it was held that the coercive effect of threats of prosecution, resulting in the creation of the obligation, was a good defense and made the obligation unenforceable. As the trial court noted, some doubt is cast on the proposition that the threat of prosecution is *per se* coercive by the decision in *Western Paving Co. v. Sifers,* 126 Kan. 460, 268 Pac. 803 (1928). We need not decide that question, however, and decide this case on the assumption that defendants' letters were coercive.

As previously discussed, the obligation here was already incurred and was liquidated before the coercion was applied; *i.e.,*



plaintiff had expressly contracted to pay the fees. Hence our only question is whether the threats voided the contract and required defendants to repay the amounts paid to satisfy it. We find no Kansas cases directly in point, but the general rule is set forth in the Restatement of Contracts § 495 (1932):

"Where the duress of one party induces another to enter into a transaction, the nature of which he knows or has reason to know, *and which he was under no duty to enter into,* the transaction is voidable against the former and all who stand in no better position, subject to the qualifications stated in § 499.

"*Comment:*

"*a. Duress inducing a person to perform his exact legal duty does not give him power to avoid his act;* but where a claim is unliquidated or the subject of an honest dispute, even a reasonable settlement induced by duress is voidable.

. . . .

"*Illustrations:*

. . . .

"*1. A has a claim against B for $100. The debt is liquidated and undisputed. By duress A coerces B to pay him the debt. The transaction cannot be avoided.*" (Emphasis added.)

Williston concurs:

"One who had misappropriated money or property, and who was, therefore, under a civil as well as criminal liability, made restitution. Under such circumstances, even though there was unquestionable duress, the debtor if compelled to pay the exact amount of a liquidated debt, cannot be allowed to recover the payment because in making the payment he has done no more than he was legally bound to do.

"The situation is legally different where the debtor is compelled to transfer property in satisfaction of his civil liability, or to pay a fixed sum to satisfy a claim of uncertain amount, from what it is where the payment exacted is the exact amount of a liquidated debt, since in the former case the parties are attempting an accord and satisfaction, not exactly fulfilling an existing obligation." 13 Williston on Contracts § 1615 (3d ed. 1970).

See also 70 C.J.S., Payment § 146; 66 Am. Jur. 2d, Restitution and Implied Contracts § 98.

The Kansas cases cited above apply that part of the rule which voids obligations incurred under coercion where the claim is unliquidated or disputed. The other side of the rule is applicable here; coercion affords no grounds for recovering payments made to satisfy a liquidated obligation or, as Williston puts it, "exactly fulfilling an existing obligation."

The reason for such a rule rests in the time honored doctrine of avoiding a multiplicity of suits. If in this case it were held that plaintiff could recover the fees paid because of the coercion, the

result would be an unpaid contractual obligation. In a lawsuit against him to collect the fees he would have no defense. Economy of the judicial system forbids such a result.

Plaintiff also contends that, because the underlying instrument was a negotiable instrument, he could in no event be liable for more than the face amount of the checks. The argument ignores the express contract to pay fees in case of dishonor, as discussed above.

It also ignores the import of K.S.A. 21-3707, our bad check law, which expressly authorizes the holder to write the maker of a bad check demanding the face amount plus a service charge of not more than $3.00. Failure of the maker to pay both the check and service charge raises a presumption that the check was given with intent to defraud. Two things may be said about the statute. First, it is a clear legislative recognition of a holder's right to recover more than the face amount of the check, even in the absence of a specific agreement—thus demolishing plaintiff's argument that the face amount is the maximum recoverable. Second, that statute is part of the criminal code, and contains nothing which by its terms or by implication limits the right of the parties to enter into a specific contract such as we have here. *Cf. State v. Haremza,* 213 Kan. 201, 515 P.2d 1217 (1973).

The trial court recognized that the fee contracted for might in some cases be so large as to be unconscionable, but found no element of unconscionability here. We agree. The fees charged seem quite modest just for the letter writing involved, not to mention the unexpected bookkeeping and inconvenience of having what was intended as a cash transaction involuntarily turned into the extension of credit. The fees were not even arguably unconscionable. *Cf. Wille v. Southwestern Bell Tel. Co.,* 219 Kan. 755, 757-60, 549 P.2d 903 (1976).

In summary, we hold that the trial court correctly found an express contract to pay the challenged fees, and that there were no factors which would relieve plaintiff of his obligation under the contract. Hence defendants were not unjustly enriched when plaintiff fulfilled that obligation, and the trial court properly rendered summary judgment for defendants. In view of our holding on those issues, we do not reach the question of whether plaintiff had unclean hands. Neither, of course, do we pass on the legality or propriety of defendants' conduct or their possible liability therefor in tort.

Affirmed.



588 P.2d 953

No. 49,620

STATE OF KANSAS, *Appellee,* v. FRANK MIESBAUER, *Appellant.*

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Arrest—Commission of Misdemeanor outside Presence of Law Enforcement Officer.* Under the provisions of K.S.A. 22-2401, a valid arrest may be made of a person for the commission of a misdemeanor outside the presence of the law enforcement officer when that officer has probable cause to believe that person has committed the offense and may cause injury to himself or others or damage to property unless immediately arrested.
2. SAME—*Driving Vehicle Under Influence of Alcohol—Probable Cause to Arrest When Offense Not in Officer's View.* Where a law enforcement officer has probable cause to believe that a person has been driving a motor vehicle while under the influence of intoxicating liquor and may continue to do so with possible injury to himself or others or damage to property, he may immediately arrest that person, even though the offense was not committed in the presence of that officer.
3. SAME—*Motion in Limine—Purpose.* The purpose of a motion *in limine* is to prevent the eliciting of evidence concerning irrelevant and highly prejudicial matters.
4. EVIDENCE—*Lay Witness Testimony as to Defendant's Behavior—Admissibility.* The fact that lay witnesses could not with expertise differentiate between behavior due to injury and behavior due to intoxication affects the weight to be given and not the admissibility of the observations and the opinions of those witnesses.
5. CRIMINAL LAW—*Bill of Particulars—Effect of Defendant's Failure to Request.* Where the defendant was aware prior to trial that a discrepancy would exist between the time of the offense as stated in the complaint and the testimony of the witnesses, and could have requested a bill of particulars, he may not thereafter claim prejudice by reason of his failure to do so.
6. SAME—*Prosecutor's Failure to Disclose Evidence to Defendant—When Reversal of Conviction Required.* To justify a reversal of a conviction for failure to disclose evidence, the evidence withheld must be clearly and unquestionably exculpatory and the withholding of the evidence must be clearly prejudicial to the defendant.
7. SAME—*Driving While under the Influence of Alcohol—Sufficiency of Evidence Test.* Where the sufficiency of the evidence to support a conviction of driving while under the influence of intoxicating liquor is challenged, the test on appeal is whether the evidence, when viewed in the light most favorable to the State, is sufficient to form the basis of a reasonable inference of guilt.

Appeal from McPherson District Court; CARL B. ANDERSON, JR., associate judge. Opinion filed January 12, 1979. Affirmed.

*Jack O. Bowker* of MacDonald, Bowker & Kaufman, of McPherson, for the appellant.

*Robert F. Stover,* assistant county attorney, *Tim R. Karstetter,* county attorney, and *Curt T. Schneider,* attorney general, for the appellee.

# Kansas Food Dealers' Association, Inc.

2809 WEST 47th STREET SHAWNEE MISSION, KANSAS 66205
PHONE: (913) 384-3838


January 30, 1990



SENATE JUDICIARY COMMITTEE
**SUPPORTING SB 30**


EXECUTIVE DIRECTOR
JIM SHEEHAN
Shawnee Mission


I am Frances Kastner, Director of Governmental Affairs for the Kansas Food Dealers Association. We represent the retailers, wholesalers and distributors of food products. I want to thank you for your early consideration of SB 30.

As you know, ALL the cost of doing business is figured into the price of any goods or service. Among the major costs in the grocery store business is theft of all sorts -- bad checks, shoplifting, shopping carts, internal theft etc. At various times we have asked for legislative assistance in addressing those major concerns. You heard our pleas that the honest consumers were paying for the bad check costs, and passed the bill allowing the court to set a minimum $100 in damages (or up to triple the amount of the check with a maximum of $500), plus collection costs etc.

We appreciated your consideration of our problem, and at the same time understood the frustrations encountered by business people who did not have that same recourse when they were given an insufficient fund check for pre-existing debts. Throughout the campaign to include others who could use the "triple-damage bad check bill" we held firm to our stance to not oppose any bill that would benefit the honest Kansan if it did NOT change the intent of the original law.

We relied upon the conferees to present data which would not weaken that law, and from conversations with numerous legislators and conferees, we believe they were as surprised as we were with the interpretation of HB 2581, passed in 1990. With that thought in mind, we worked with Senator Salisbury, and those involved with the original measure, to amend the statutes to correctly reflect the intent of HB 2581.

We believe that SB 30 will accomplish our goal and respectfully ask your favorable consideration. I appreciate your early hearing on this matter, and with passage of SB 30 and the publication in the Kansas Register, I hope we will be have fully spelled out the intent of HB 2581.

Senate Judiciary Committee
Attachment 3
1-30-91

Frances Kastner

232-3310

3-1

LAW OFFICE OF

Paul J. Mohr

130 E. Murdock
P.O. Box 3886
Wichita, Kansas 67201
(316) 267-0261

January 3, 1991

Senator Winton A. Winter, Jr.
502 First National Bank Tower
P.O. Box 189
Lawrence, Kansas 66044

Re: Amendment of K.S.A. 60-2610

Dear Senator Winter:

I represent a client in Wichita, Kansas who collects checks for various clients which include Dillons, Pizza Hut, the Municipal Court of Wichita, etc. As you may, or may not be aware the number of insufficient funds checks or checks written on accounts that are closed has become epidemic. These businesses in Kansas are losing hundreds of thousands of dollars as a result.

It is my understanding that K.S.A. 60-2610 was originally passed to take some of the pressure off of the district attorney's offices across Kansas and also provide an adequate means of recourse for the holder of the bad checks.

Having filed numerous cases pursuant to K.S.A. 60-2610 and having seen how the District Courts are interpreting it and the way in which our Kansas Attorney General interpreted the statute with regard to service charges causes me great concern. I believe that for the statute to be an adequate tool to either collect insufficent funds checks or to act as a deterent for the passing of insufficient funds checks, some amendments to the statute must be made.

I have enclosed the statute with the proposed amendments. My explanation of the proposed amendments is as follows:

1. Line 22, the addition of "incurred court and service costs and the costs of collection, including but not limited to reasonable attorney fees." The courts have been allowing incurred court and service costs and costs of collection and reasonable attorney fees as part of a Judgment under this section as a result of the language in Subsection (c). However, I believe that it is important to also include this language in the first section of this statute so that it is clear that these costs and fees are allowed.

Senate Judiciary Committee
Attachment 4
1-30-91

4-1/7

2. Line 28, changing the word "commencing" the action to "filing" the action. Some attorneys make the argument that the action is not commenced technically until service of process is made. However, obviously the filing fee and attorney fees have been incurred and therefore, "filing" would be a better word to use so that it is clear that the court costs and fees would be paid after that time.

3. Line 34, changing the language that restricted mail is defined by "K.S.A. 60-103 and amendments thereto" "to restricted mail as defined by subsection (g)" which would read that: "restricted mail means mail which carries on its face endorsements' restricted mail' and 'deliver to addressee only.'" This new definition is important in that it saves significant postage costs for the delivery of restricted mail.

4. Line 43, again changing commencement to "filing".

5. Second page, line 1, changing the word "Judgment" to "hearing". This change is important because in my opinion the word Judgment would allow the Defendant to sit through an entire trial before tendering the amounts under subsection (c) to satisfy the claim. It seems to me that it would be much more efficient for the courts and everyone involved that the Defendant be required to tender the amounts under subsection (c) as satisfaction of the claim prior to a "hearing". This would eliminate the possibilty of using court time and attorney time to sit through an entire trial and then have the Defendant tender an amount to satisfy the claim.

6. Page 3, line 23, here I am proposing that we change our definition of "worthless check" to a definition as used by the State of Missouri. The Missouri definition eliminates the requirement of showing an intent to defraud which under Kansas law is all but impossible to prove and which we have the anomaly under Kansas law of having a presumption of "intent to defraud" under the criminal statute, but no presumption of "intent to defraud" under the civil statute. This in effect means that it is harder to prove a "worthless check" under the civil statute than under the criminal statute. The Missouri statute is simple, but fair in that it contemplates the fact the issuer of a "worthless check" has as a practical matter many notices that he has issued an insufficient funds check. Therefore, the Missouri statute provides essentially a "worthless check" is

a check that is not honored within 14 days after a restricted delivery demand has been sent to him and which remains unpaid.

7. Page 3, line 34, defines "service charge". It changes the definition of "service charge " to mean $10.00 or any reasonable amount that is posted in the business or establishment by the receiving party." The reason for this change is that any business will tell you that $10.00 does not begin to cover their costs for an insufficient funds check. As an example the Municipal Court of Wichita posts a $30.00 service charge. Under the statute itself the restricted delivery notice is going to cost in the neighborhood of $4.00 and therefore, you have a situation that if the issuer decides to pay the check and service charge after the notice, the business is going to be receiving maybe $5.00 or $6.00 for all of the time and inconvenience the insufficient funds check has caused and the labor of trying to get the check paid. Historically, in Kansas the law has been under the criminal statute that if a reasonable service charge is posted in the establishment, then there is an implied contract the issuer of the check has agreed to pay the posted service charge. As a practical matter many merchants that I am aware of are very concerned about the amount of this service charge and try to hold it to as low an amount as possible so that they do not alienate their clientele. I believe that using the language "reasonable amount" will protect the public from any overreaching by merchants and at the same time provide merchants with the ability to set a "reasonable amount" as a service charge to cover their costs.

I want to emphasize that a new definition of "worthless check" is completely fair to the insufficent funds check writer and is much more fair to the merchant. To give you an example of how many opportunities the check writer has to take care of the check prior to paying any penalities under the statute I would like to outline the following:

1. The check writer receives in almost every case a notice from his bank advising him that a check has not cleared as a result of insufficient funds.

2. When the check writer receives his monthly statement from the bank, the monthly statement will show that the check did not clear.

3. In the case of my check collecting client, when they receive the check they issue a written notice the same day they

receive the check advising the check writer that the check has been received as an insufficient funds check and that it and it's service charge may be paid.

4. My client sends a second written notice advising the check writer that the check and service charge may be paid.

5. My client sends a restricted delivery notice pursuant to the statute advising the check writer, the check and service charge may be paid.

6. In addition to the above, my client attempts to contact the check writer by phone and in most cases does contact the check writer by phone and advises them that the check has not been paid and asks that the check and service charge be paid.

As you can see, a check writer in one way or the other and in many instances, in multiple ways receives notice that he has issued an insufficient funds check or a check that has not cleared. Without adequate recourse, many of the businesses that I communicate with look upon the issuance of an insufficient funds check and checks on accounts that are closed as nothing more than legalized stealing. To make a merchant or check collection company jump through all of the hoops required by statute, (The check remains unpaid), and then require them to prove "intent to defraud" is not fair or reasonable.

I would greatly appreciate it if you would consider these proposed changes and initiate a bill in the Judiciary Committee that would make these amendments. If I can be of any help or if you would like me to testify regarding these changes, please give me a call. I cannot begin to tell you how important these amendments are to my clients or to my fellow attornies who collect checks.

This statute is good law. It addresses a very significant problem for all Kansas businesses. Amending the statute can make it an effective tool.

Thank you for your consideration and attention to this matter.

Yours very truly,

Paul J. Mohr

Paul J. Mohr

PJM/db
enclosure

4-4/7

AN ACT concerning worthless & insufficient checks: amending KSA 60-2610 and repealing the existing section.

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

Section 1. K.S.A. 1989 Supp. 60-2610 is hereby amended to read as follows: 60-2610. (a)if a person gives a worthless check, as defined by subsection (g), the person shall be liable to the holder of the check for the amount of the check, *plus an amount equal to the greater of the following: (1) Damages equal to three times the amount of the check but not exceeding the amount of the check by more than $500; or (2) $100

*incurred court and service cost and the costs of collection, including but not limited to reasonable attorney fees,

(b) The amounts specified by subsection (a) shall be recoverable in a civil action brought by or on behalf of the holder of the check only if: (1)Not less than 14 days before ~~*commencing~~ the action, the holder of the check made written demand on the maker or drawer for payment of the amount of the check and the incurred service charge; and (2) the maker or drawer failed to tender to the holder, prior to ~~*commencement~~ of the action, an amount not less than the amount demanded. The written demand shall be sent by restricted mail, as defined by *K.S.A. 60-103 and amendments thereto, to the person to be given notice at such person's address as it appears on such check, draft or order or to the last known address of the maker or drawer and shall include notice that, if the money is not paid within 14 days, triple damages in addition to an amount of money equal to the sum of the amount of the check, the incurred court costs, service charge and the costs of collection, may be incurred by the maker of drawer of the check

* filing

* the filing

* subsection (g)

(c) Subsequent to the ~~*commencement~~ of an action under this

* filing

4-5/7

section but prior to the *~~judgment~~ | * hearing of the court, the defendant may tender to the plaintiff as satisfaction of the claim, an amount of money equal to the sum of the amount of the check, the incurred court costs, service charge and the costs of collection including but not limited to reasonable attorney fees.

(d) If the trier of fact determines that the failure of the defendant to satisfy the dishonored check was due to economic hardship, the court may waive all or part of the damages provided for by this section, but the court shall render judgment against defendant for not less than the amount of the dishonored check, the incurred court costs, service charge and the costs of collection, including but not limited to reasonable attorney fees.

(e) Any amount previously paid as restitution or reparations to the holder of the check by its maker or drawer shall be credited against the amount for which the maker or drawer is liable under subsection (a).

(f) Conviction of giving a worthless check or habitually giving a worthless check, as defined by K.S.A. 21-3707 and 21-3708 and amendments thereto, shall not be a prerequisite or bar to recovery pursuant to this section.



4-6/7

(g) As used in this section,

*(1) ~~"Giving a worthless check: means the making drawing, is suing or delivering or causing or directing the making, drawing issuing or delivering of any check, order or draft on any bank, credit union, savings and loan association or depository for the payment of money or its equivalent: (A) With intent to defraud or in payment of a preexisting debt; and (B) which is dishonored by the drawee because the maker or drawer had no deposits in or credits with the drawee or has not sufficient funds in, or credits with, the drawee for the payment of such check, order or draft in full upon its presentation~~.

*~~(2)"Service charge: means the dollar charge authorized by sub-section (2) of K.S.A. 21-3707 and subsection (1) (e) (iii) of K.S.A. 16a 2-2501, and amendments thereto~~.

*"Worthless check" means any check, draft or order for the payment of money upon any bank, savings and loan association, credit union, or other depository, financial institution, person, firm or corporation, which is not honored because of lack of funds or credit to pay or because of not having an account with the drawee and the person making, uttering, drawing, or delivering the check fails to pay the amount for which such check, draft or order was made plus the service charge in cash to the holder within 14 days after notice and written demand for payment is made as set out in subsection (b)

(2) "Restricted mail" means mail which carries on its face the endorsements "restricted mail" and "deliver to addressee only."

* (3) "Service charge" means ten dollars or any reasonable amount that is posted in the business or establishment by the receiving party.



4-7/7

RESEARCH L & S INVESTIGATINOS & CONSULTING CO.
6336 SE 53, Tecusmeh,Ks 66542.
Phone (913) 379-5369.
Shirley M. Att3berry.
(Formerly Research & Data Inc)

January 30, 1991

To: KANSAS SENATE JUDICIARY.1991 Session.

RE: Senate Bill 30. Penalities for Insufficient Fund Checks and ervice Charges.

I am speaking in favor of Senate Bill 30 which would note the "SERVICE CHARGE" definition to be changed to read "UP TO $10, or MORE UPON PROOF OF A WRITTEN NOTICE POSTED CONSPICUOUSLY". which is in Sect 1, KSA 1990 Supp 16a=2=501 amended in "e" (iii, (iv), AND Sec 2.2,(g),(2).

The 1990 amendments to this 16a 2-501 left a question as to whether a business could charge more than"$10" service charge on returned checks. This additional wording would help to clarify the service charges.

There is no way that a business can collect most of the INSUFFICIENT FUND CHECKS for just a cost of $10, as the expenses are far greater. Many times the costs of collection are far greater than the face amounts of the checks and many times the costs as well as the checks are NEVER recovered.

Stiffer penalities are a definite deterant to crimes and Insufficient checks.Many bad check writers, teenagers, those incarcerated and others that have committed crimes have told me that STIFFER PENALITIES is a deterant to crimes.

There should NOT be a SPECIFIC amount of service charge noted, for there is NO STOPPING in the amount of rise in the cost of living. Minimun wages will be raised again--which is mandatory.. Every time there has been a raise in minimun wage,there have been increasing costs in all variety of workings of business, from labor,paper, machinary, to postage, etc.

Some examples of increasing costs:

POSTAGE: First class:1975 was 8¢; 1985- 22¢, Now to be 29¢. 276% increase.

CERTIFIED MAIL: 1977 it was $1.58; 1985 - $3.12; now $4.40. A 359% increase..

LABOR: In 1974 $2.20 to $2.90 was pretty good clerical help.
1985, $3.35 was minimun wage. It is going to $4.40 and this is the bottom of the work force. Your trained workers will be getting more.

PHONE "INFORMATION" services are up to 50¢ per inquiry.(A necessary tool).

ADDRESS CORRECTIONS: used to be 10¢, and are now 30¢. (A necessary tool).

BANKS: They used to NOT charge their client-victim for the return of bad checks to that client victim.. Now, and since 1984 and 1985, some banks in Topeka charge the store victim 50¢ to $3.00 for each returned check. But the banks also charge their Insufficient Fund check writer customer up to $15 for each check the bank returned --on his (the check writer) account, each time it is run thru his bank. If the check is run thru twice, as many are, that is $30 the bank charges the Insufficient Fund check wrtier,and the BANK is NOT OUT ANY MONEY for the face amount of the check--just the small handling time.

SKIP TRACING involves more time other than just contacting the check writer.

I have worked at Research & Data Inc for 30 years.One of our main functions was collections of returned checks. MOST collections don't just "WALK IN THE DOOR" to pay without contacting them.Enclosed is a summary of "HOW CHECKS ARE PAID"

No one is asked to give a check in payment of merchandise and especially he is NOT asked to give a WORTHLESS CHECK. Being short of money or "poor" is no excuse and for NOT paying the check and not having to pay the penality.Many businesses are POOR from having taken many returned checks.

Senate Judiciary Committee
Attachment 5
1-30-91

5-1/2

To: Kansas Senate Judiciary Committee. 1991 Session
From Shirley Atteberry

WORK & COSTS OF CHECK COLLECTIONS thru Research & Data Inc several years ago.

The total of 253 checks collected within a 4 day period thru Research & Data Inc. Noted is number of letters and phone contacts made before checks were paid.

| WHEN PAY within weeks worked : | LETTER ONLY. | LETTER + PHONE. | TOTAL CKS COLLECTED & % | % PD ACCUM. | WORK AVERAGE to COLLECT. |
|---|---|---|---|---|---|
| 1st week. 1 letter written. | 14 cks pd. | + 20 cks pd. | = 34 cks, 13.4% | (13.4%.) | 1-L, 3-P. |
| 2nd week. 2 letters written. | 3 cks pd. | +26 cks pd. | = 29 cks,11.4% | (24.8%) | 2-L, 7P |
| 3rd week. 3 letters written. | 2 cks pd, | + 38ckspd | = 40 ck,15.8%. | (40.6%) | 3L, 12P |
| 4th week. 4 letters written. | 1 ck pd + | 19 cks pd | = 20 cks.8%. | (48.6%) | 4L, 17P. |
| (Of the total of 253 checks paid in this 4 days, 48.6 % were paid within 1 month work) | | | | | |
| 5th week. 5 letters now written. | 2 cks pd. | + 42 cks pd | = 44 cks,17.3% | (65.9%) | 5L, 22 P |
| 6th week | 0 pd, | 6 cks pd | = 6 cks, 2.3%, | (68.2%) | 5 L, 25 P. |
| 7th week | 0 | 15 cks pd | = 15 cks. 6% | (74.2%) | 5L, 48P |

By the end of the 2nd month of collection work, 74.2% of the 253 cks were paid.

An additional 18.7% took ad additional 10 months and more letter writing and phone contacts, and some door knocking was done.
An additional 7.1% had been worked for 1-3 years and some were paid thur reports to the District Attorney,also.Time on reports to the D.A. are not included above.

Note: "L" = letter; "P"= phone contacts. The "P" phone contacts does NOT include SKIP TRACING WHICH INVOLVES QUITE A BIT OF TIME.

Similar costs above are also on the UNCOLLECTED checks--where NO money is recovered to pay the above costs of collections. We had an approximate 70% to 80% collection rate depending on the location and type of business.

---

In recent years, too many laws have been made regulating various kinds of businesses. But many of these laws are made by people who do NOT know the workings of the various businesses. As a result, some of these regulations mess up other regulations, so that the workings of the businesses are totally upset. Some of the regulations can NOT work because other regulations have made them unworkable.

We still have a very definite interest in CRIME PREVENTION. CRIME can affect most everyone in various ways. Especially important. is our young people knowing there are better and more productive ways to life.

Thank you for the opportunity to speak my views.

Shirley Atteberry

Shirley Atteberry

5-2/2

TESTIMONY SUMMARY IN FAVOR OF S.B. 30
January 30, 1991

By: Robert M. Telthorst
Attorney at Law
President, Research Information Services
5709 SW 21st
Topeka, KS 66604
272-8794

1. SB 30 is a matter of preventative law. Lawsuits regarding same are imminent because standing case law and Attorney General's opinion have different interpretations of K.S.A. 1990 Supp. 16a-2-501 with regard to the amount of insufficient check service charge a merchant may assess.

2. Those in favor of SB 30 favor Supreme Court interpretation of current law, i.e. what was supposed to have been a cash transaction for a merchant has been, for the merchant, involuntarily turned into a credit transaction. The resulting costs to the merchant may include his bank service charges, his employee time to reconcile accounting for bad checks and his cost to collect the same. A $10.00 return check charge does not go very far to cover that amount of labor.

3. The problem of returned checks is enormous, ~~Checkrite of Eastern Kansas~~ processes approximately 5,000.00 bad checks per month in Shawnee County, hundreds a month filter down to just my law office for collection. That translated to a lot of lost dollars for a lot of merchants, when and if the checks are collected, the merchants are due reimbursement for those losses.

Senate Judiciary Committee
Attachment 6
1-30-91

6-1/2

4. Mail order merchants need a provision in SB 30 to allow them to charge for insufficient checks since the "posting language" does not fit their circumstances.

5. "Proof of written notice" language in SB 30 sounds like it requires proof of posting notice before the charge can be made. Who is the proof directed to? How to be proven? Seems better to eliminate the proof language and simply require posting in a conspicuous place.

6. Page 5 of SB 30 paragraph (A) "intent to defraud ". Bill should be written so intent can be established by proving check was returned by financial institution unpaid for reasons other that stop payment.