Approved: 14 June 1991
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Senator Wint Winter Jr. at 10:05 a.m. on April 3, 1991 in room 514-S of the Capitol.

All members were present except: Senator Feleciano who was excused.

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

Conferees appearing before the committee:
Jeanne Kutzley, Assistant Attorney General
Janet Stubbs, Home Builders Association of Kansas
Chuck Simmons, Kansas Department of Corrections
Ruth Benien, Kansas Trial Lawyers Association
Brad Smoot, Kansas Civil Law Forum
Bob Corkins, Kansas Chamber of Commerce and Industry

Chairman Winter called the meeting to order by opening the hearing on SB 396.
SB 396 - revision of Kansas Consumer Protection Act.

Jeanne Kutzley, Assistant Attorney General, testified in support of SB 396. (ATTACHMENT 1)

This concluded the hearing for SB 396.

The Chairman opened the hearing for HB 2464.
HB 2464 - consumer protection act; door-to-door sales.

Janet Stubbs, Executive Director of the Home Builders Association of Kansas, testified in support of HB 2464. (ATTACHMENT 2)

Jeanne Kutzley, Assistant Attorney General, testified in support of SB 2464.
(see ATTACHMENT 1)

This concluded the hearing for HB 2464.

Chairman Winter opened the hearing for HB 2424.
HB 2424 - arrest of inmates who violate conditions of release.

Chuck Simmons, Kansas Department of Corrections, testified in support of HB 2424.
(ATTACHMENT 3)

As no other conferees appeared, this concluded the hearing for HB 2424.

Chairman Winter called for action on the bills heard.

Senator Martin moved to amend SB 396 into HB 2464. Senator Parrish seconded the motion. The motion to amend carried.

Senator Martin moved to further amend HB 2464 with technical amendments and to recommend favorable as amended. Senator Moran seconded the motion. The motion carried.

Senator Bond moved to recommend SB 396 Be Not Passed as it had been amended into HB 2464. Senator Parrish seconded the motion. The motion carried.

Senator Rock moved to recommend HB 2424 favorable for passage. Senator Bond seconded the motion. The motion carried.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:05 a.m. on April 3, 1991.

Chairman Winter opened the hearing for HB 2397.
HB 2397 - cap on damages in wrongful death actions; jury instructions.

Ruth Benien, Kansas Trial Lawyers Association, testified in support of HB 2397. (ATTACHMENT 4)

Brad Smoot, Kansas Civil Law Forum, testified in opposition to HB 2397. (ATTACHMENT 5)

Bob Corkins, Kansas Chamber of Commerce and Industry, testified in opposition to HB 2397. (ATTACHMENT 6)

This concluded the hearing on HB 2397.

Copies of a suggested amendment to HB 2005 from Chip Wheelen, Kansas Psychiatric Society, was distributed to the Committee. (ATTACHMENT 7)

The meeting was adjourned until 12:00 p.m. on April 3, 1991 in Room 123-S.

Date 3 April 1991
10:00 a.m.

VISITOR SHEET
Senate Judiciary Committee

(Please sign)

Name/Company	Name/Company
Jim Clark / KCDAA	
Janet Stubbs / HBAK	
Matt Truell AP	
Kay Farley / OJA	
David McKune / DOC	
Deanna Kutzley / AG	
Chuck Simmons / DOC	
Ben Cox	
Bob Corkins / KCCI	
Ruth M. Benien / KTLA	
	KCRA
Matt Lynch / Judicial Council	

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
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Testimony of
Assistant Attorney General D. Jeanne Kutzley
On Behalf of Attorney General Robert T. Stephan
Before the Senate Judiciary Committee
RE: Senate Bill 396 and House Bill 2464
April 3, 1991

Mr. Chairman and Members of the Committee:

On behalf of Attorney General Stephan, Senate Bill 396 was drafted as a cleanup of the consumer protection act. The act was passed into law in 1973 and with various amendments and additions, it has become inconsistent and unclear in places. Because HB 2464, as amended, is basically a cleanup of the door to door sales portion of the consumer protection act, the attorney general felt that amending SB 396 into HB 2464 would expedite this important revision of the act.

Most of the changes in SB 396 are such things as making sure terms like "consumer," "person," "buyer," and "supplier" are used consistently and are gender neutral, clarifying definitions, and removing ineffective or confusing language. There are one or two places where more substantial changes have been made based on our experience enforcing the act. For instance, we have added into section one on page one, which says the act is to be construed liberally, a subsection which

Senate Judiciary Committee
4-3-91
Attachment 1

would allow consumers to testify as to oral representations which were made to them in connection with a written contract. This is ordinarily not allowed by a common law called the "parole evidence rule." Many of our complaints involved misrepresentations made to consumers even though there was a written contract. It has been frustrating not being able to help people just because they signed a contract, when it is the supplier who ends up hiding behind the contract which they drafted.

Another change, found in section 6, involves making our service of process section consistent with the recent changes in the code of civil procedure. In section eight, we added language that would allow individual consumers who bring a private action to get attorney fees on appeal. We also included a provision that would give the attorney general notices of appeal so that we can assist parties or lend our expertise with an amicus brief if important issues are appealed.

On behalf of Attorney General Stephan, I ask for your support of Senate Bill 396 as amended into House Bill 2464. Thank you.

S/396/TXTATTY

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Ass'n, Inc. v. Knutson, 239 K. 663, 666, 722 P.2d 1093 (1986).

18. Cited in holding that 60-225 does not authorize ex parte motions for substitutions. Army Nat'l Bank v. Equity Developers, Inc., 245 K. 3, 9, 774 P.2d 919 (1989).

19. Chapter 59 as containing no procedures for notice of contested guardian ad litem fees noted; rules in civil cases apply. In re Guardianship of K.M.W., 13 K.A.2d 640, 645, 777 P.2d 1274 (1989).

20. Defendant's constitutional right to procedural due process as subject to forfeiture for failure to answer timely examined. Bazine State Bank v. Pawnee Prod. Serv., Inc., 245 K. 490, 496, 781 P.2d 1077 (1989).

60-206. Time, computation and extension. The following provisions shall govern the computation and extension of time:

(a) *Computation; legal holiday defined.* In computing any period of time prescribed or allowed by this chapter, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday. "Legal holiday" includes any day designated as a holiday by the congress of the United States, or by the legislature of this state. When an act is to be performed within any prescribed time under any law of this state, or any rule or regulation lawfully promulgated thereunder, and the method for computing such time is not otherwise specifically provided, the method prescribed herein shall apply.

(b) *Enlargement.* When by this chapter or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the judge for cause shown may at any time in the judge's discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under subsection (c) of K.S.A. 60-250, subsection (b) of K.S.A. 60-252, subsections (b), (e) and (f) of K.S.A. 60-259 and subsection (b) of K.S.A. 60-260, and amendments thereto, except to the extent and under the conditions stated in them.

(c) *Unaffected by expiration of term.* The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action pending before it.

(d) *For motions — affidavits.* A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the judge. Such an order may for cause shown be made on *ex parte* application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and except as otherwise provided in subsection (d) of K.S.A. 60-259, and amendments thereto, opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at the time of hearing.

(e) *Additional time after service by mail.* Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon such party and the notice or paper is served upon such party by mail, three days shall be added to the prescribed period.

History: L. 1963, ch. 303, 60-206; L. 1988, ch. 207, § 1; L. 1988, ch. 206, § 1; L. 1988, ch. 208, § 1; July 1.

Law Review and Bar Journal References:

"Survey of Kansas Law: Taxation," Sandra Craig McKenzie and Virginia Ratzlaff, 33 K.L.R. 71, 90 (1984).

CASE ANNOTATIONS

24. Where last day of period for trial falls hereunder, statute applicable to agreement on detainers (22-4401 et seq.). State v. White, 234 K. 340, 673 P.2d 1106 (1983).

25. When notice of school board's decision not to rehire is mailed, time for appeal begins and three-day extension for service by mail applies. Atkinson v. U.S.D. No. 383, 9 K.A.2d 175, 178, 675 P.2d 917 (1984).

26. Subsection (e) applicable where notice not to renew teacher's contract under 72-5443 submitted by mail. Atkinson v. U.S.D. No. 383, 235 K. 793, 799, 684 P.2d 424 1984).

27. Excusable neglect is nebulous term not susceptible to exact definition; must be determined on case-by-case basis. Bank of Whitewater v. Decker Investments, Inc., 238 K. 308, 315, 710 P.2d 1258 (1985).

28. Time periods i
Court Rule 141. Mun
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29. Subsection (b) c
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Tobin Constr. Co. v.
P.2d 278 (1986).

30. Cited; ten-day
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Cooperative Ass'n v.
551 (1986).

31. Cited; circumst
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Schroeder v. Urban, 2

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33. Cited; petition
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34. Effect of Kansas
of appeal in federal
Co., 845 F.2d 1062 (

35. Cited where ad
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U.S.D. No. 440, 244

36. Cited in holdin
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Developers, Inc., 245

37. Chapter 59 as
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TESTIMONY

SENATE JUDICIARY COMMITTEE

HB 2464

APRIL 2, 1991

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

My name is Janet Stubbs, Executive Director of the Home Builders Association of Kansas, appearing in support of HB 2464.

Attached to my statement is a November 21, 1990, letter from Mr. Barkley Clark to Mr. Greg Meredith, a Hutchinson attorney regarding a client of Mr. Meredith's and the circumstances surrounding the dispute between a homeowner and Meredith's client.

Also attached is a copy of K.S.A. 50-640 and I refer the Committee to the definition section, (c)(1) in which "Door-to-door sale" is defined.

We ask the Committee to alleviate the problem, as discussed, by recommending HB 2464 for passage.

Senate Judiciary Committee
4-3-91
Attachment 2

LAW OFFICES

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November 21, 1990

VIA FAX - 316/662-2160

Greg Meredith, Esq.
BRANIME, CHALFANT & HILL
Box 2027
Hutchinson, Kansas 67504

Re: Door-to-Door Sales

Dear Greg:

In line with our phone conversation yesterday, I have reviewed the door-to-door sale problem we discussed. You indicated that your client is a construction company which fixed a homeowner's roof after providing an estimate and having the customer sign a contract. The roof required repair as a result of a hail storm last spring. The homeowner called your client on the phone and requested that they come out to examine the roof, provide an estimate, and bid on the job. Your client followed their request. The contract was not signed in your client's place of business, but on the premises of the homeowner. No attempt was made to provide a door-to-door three-day rescission notice. Subsequently, after the work was completed and the homeowner was billed, the parties got into a dispute concerning the job. As a result of nonpayment, your client placed a mechanics lien on the property, pursuant to Kansas statute. In response, the homeowner is claiming that he does not have a duty to pay anything for the roofing job because he had a right to cancel under K.S.A. 50-640.

After a close review of the statute and its legislative history, I have concluded that we do have a serious problem. The term "door-to-door sale" is defined at K.S.A. 50-640(c)(1) to include a sale of services with a purchase price of $25 or more, "in which the seller or the seller's representative personally solicits the sale, <u>including those in response to or following an invitation by the buyer</u>, and the buyer's agreement to offer or purchase is made at a place other than the place of business of the seller." (Emphasis added.) That definition is quite broad, and would seem to cover this case, even though your client simply responded to an invitation by the homeowner.

There are five exclusions from the general definition, the only one of which that would seem to apply is subsection (E).

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The term "door-to-door sale" does not include a sale in which "the buyer has initiated the contract [contact] and specifically requested the seller to visit the buyer's home for the purpose of repairing or performing maintenance upon the buyer's personal property." (Emphasis added.) In your case, although the buyer initiated the contact and specifically requested that your client visit his home to bid on the roofing job, the visit was not for the purpose of repairing "personal property" but was instead for the purpose of repairing his real property. Although the term "personal property" is not defined in K.S.A. 50-640, that section is part of the Kansas Consumer Protection Act, which runs from K.S.A. 50-623 to 50-642. See, in particular, K.S.A. 50-642. As such, the general definitions found in the KCPA (K.S.A. 50-624) apply to the home solicitation sale provision. In particular, K.S.A. 50-624(g) defines "property" to include real estate, goods and intangible personal property. In other words, a statutory distinction seems to be drawn between personal property and real estate. This point is emphasized by use of the phrase "real property" in other parts of K.S.A. 50-640, such as subsection (c)(F). Therefore, failure of the legislature to use the broader term "property" or "real or personal property" in section (c)(E) seems to bring back within the scope of the statute sales of services performed on real estate even though the buyer has initiated the contact and specifically requested the seller to visit his home for the purpose of repairing the real estate. A technical argument could be made that use of the term "personal property" rather than "goods" was intended to include real estate, but this argument is highly artificial and would probably fail.

Nor does it appear that the reference to "personal property" in subsection (c)(E) was a drafter's error. Both the definition of "door-to-door sale" and the exclusions are taken directly from federal law. The FTC's Trade Regulation Rule that contains the same coverage is found at 16 C.F.R. Part 429. The upshot seems to be that anyone performing services on real estate can avoid the rule only if: (1) the agreement is signed at the seller's place of business, or (2) the "emergency" exception applies and the seller signs the required waiver. In sum, it appears to me that, based on the plain language of the statute, the transaction you describe is a "door-to-door sale" within the scope of the three-day rescission rule set forth in K.S.A. 50-640.

Given the likelihood of coverage, what can your client now do? Do we have any arguments that the homeowner does not have the legal right under the Kansas statute to cancel the contract and not pay anything in return? I think we have two such arguments. First, we can argue that, although K.S.A. 50-640(a) establishes a consumer's right to cancel, it is subsection (b) that provides the remedy. Subsection (b) makes failure to give the three-day

cancellation notice a deceptive trade practice under K.S.A. 50-626. In turn, a court could award civil penalties under K.S.A. 50-636. However, these remedies are exclusive. If the notice is not given, the consumer does not have a right to cancel. Limiting the consumer's right to suing for a deceptive trade practice is parallel to the federal law after which the Kansas provision is modeled. See 16 C.F.R. 429. The weakness of this argument is that the language of K.S.A. 50-640(a) is somewhat broader than the FTC Trade Regulation Rule, and subsection (a) might be construed as creating a right of cancellation independent of the deceptive trade practice theory under subsection (b). There have been no cases on this point, so we are in unchartered territory.

The second argument is stronger. Although the final paragraph of the Kansas Comment to K.S.A. 50-640 suggests that a seller who has already performed services forfeits the value of those services, this Comment was placed in the statute books in error. You will note that it refers to subsection (d)(3), a subsection which was never included in the Kansas version of the statute. In fact, this Comment was taken from the Comment to § 2.505(3) of the original uniform version of the Consumer Credit Code. That subsection provided that, if a seller has performed services prior to cancellation, the seller is entitled to no compensation. It is significant that this remedy was never included as part of the Kansas statute, or the FTC rule for that matter. I would argue that this omission was deliberate and that the Kansas legislature intended not to impose such a severe penalty for failure to give notice of the right of cancellation.

In fact, I think you can strongly argue that, although the homeowner has the right to cancel the contract and eliminate the contractor's profit, your client still has a right to collect the fair market value of the services it provided, along with the mechanics lien to enforce that right. We have an analogy here in the form of the three-day right to rescind under Truth-in-Lending, 15 U.S.C. 1635. There is strong case law under Truth-in-Lending to the effect that the homeowner must always pay the reasonable value of the work performed, even if he never receives the cancellation notice. For representative cases, see Smith v. Capital Roofing Company of Jackson, Inc., 622 F. Supp. 191 (S.D. Miss. 1985); Rudisell v. Fifth Third Bank, 622 F.2d 243 (6th Cir. 1980) (court conditions rescission on homeowner's payment of fair market value of siding placed on house); Etta v. Seaboard Enterprises, Inc., 674 F.2d 913 (D.C. Cir. 1982); and Powers v. Sims & Levin, 542 F.2d 1216 (4th Cir. 1976).

A Kansas court might be particularly willing to limit the homeowner's remedy in this way, given the fact that the transaction here is not the typical high-pressure home solicitation sale at

SHOOK, HARDY & BACON

which the statute is aimed. In fact, in the only Kansas case dealing with the statute, Moore v. R.Z. Sims Chevrolet-Subaru, Inc., 241 Kan. 542 (1987), the Kansas Supreme Court made the following significant comment:

> Kansas Comment 1973 to K.S.A. 50-640 makes it clear that the main target of the statute is the home solicitation sale. In such circumstances, a person may be quietly watching his or her television set, answer the unexpected door bell, and within 30 minutes have signed up for ten years of dancing lessons. The statute gives the gullible consumer an opportunity to consider and reflect upon such a purchase and cancel the same if desired. 241 Kan. at 553.

That language from the Kansas Supreme Court suggests that a Kansas court should be limited in framing remedies for violation of the statute in situations which do not raise the kind of evil the legislature was intending to eliminate. Therefore, although your case seems to fall within the four corners of the statute, I think you have an excellent chance at least to recover for the fair market value of the roof improvement job. In a similar vein, a Kansas court would probably limit any civil penalty which might be imposed under K.S.A. 50-636.

In light of these findings, my strong suggestion would be to work out a settlement with the homeowner, something in the neighborhood of the fair market value of the roofing job. I also think that your case suggests the need to get some relief for home contractors from the Kansas legislature. I hope this adequately answers your questions. If you have any further questions, please let me know.

Sincerely,

Barkley Clark

Barkley Clark

BC:ved

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goods under K.S.A. 84-2-314. To be effective, such a disclaimer must be "conspicuous" (K.S.A. 84-1-201 (10)) and may not be unconscionable (K.S.A. 84-2-719). Although there are many Kansas cases giving effect to warranty disclaimers (see, *e.g., Allen v. Brown*, 181 K. 301, 310 P.2d 923 (1957)), the Kansas Supreme Court has evidenced sympathy with consumers whose installment contracts contain fine-print disclaimer provisions. See *Steele v. J. I. Case Co.*, 197 K. 554, 419 P.2d 902 (1966). Under subsection (*a*) (1), a supplier may disclaim neither express nor implied warranties. This does not greatly change the law with respect to the implied warranty of fitness for a particular purpose (K.S.A. 84-2-315) or an express warranty (K.S.A. 84-2-313); a supplier may avoid these warranties simply by not making them, but if he does make them he should abide by them. With respect to the implied warranty of merchantability, however, sales of a product "as is," "with no warranty express or implied," or with an express warranty "in lieu of all other warranties express or implied," are precluded except as provided in subsection (*c*).

2. Another provision often appearing in boiler plate forms is one which limits the remedy a consumer has for breach of an express warranty. Subsection (*a*) (2) prohibits any exclusion or modification of the remedies the consumer otherwise has at law. Nothing, of course, prohibits a supplier from giving additional remedies, such as replacement or repairs. These, however, may not displace the other remedies found in the UCC and elsewhere. Under the UCC (K.S.A. 84-2-719 (3)), limiting consequential damages for personal injury is *prima facie* unconscionable; subsection (*a*) (2) extends this concept to remedy limitations generally.

3. Subsection (*b*) eliminates once and for all the concepts of "vertical" and "horizontal" privity. "Vertical privity" has in some states precluded a warranty suit by a consumer against a manufacturer or distributor with whom he had no direct contractual relationship in the purchase of a defective product. Since the Kansas Supreme Court has already eliminated any such barrier by judicial decision (*Chandler v. Anchor Serum Co.*, 198 K. 571, 426 P.2d 82 (1967)), this subsection does not substantially change present Kansas law. "Horizontal privity" has in some states precluded a warranty suit against a seller by any plaintiff other than the immediate purchaser of a defective product; for example, bystanders who are injured by the product have been barred from a warranty action because of the absence of any contractual relationship. Under the Kansas version of the UCC (K.S.A. 84-2-318), a seller's warranty extends "to any natural person who may reasonably be expected to use, consume, or be affected by the goods and who is injured in person by breach of the warranty." This broad language has eliminated most "horizontal privity" barriers to claimants injured by defective products. Subsection (*b*) would carry the UCC approach one step further to include suits brought by bystanders who suffer property or economic loss as a result of a defective product. For example, under this subsection, the owner of a parked car which is damaged by another parked car whose handbrake was defective could sue the dealer, distributor or manufacturer without the barrier of "privity." Such a claimant would be a third party beneficiary of the implied warranty of merchantability which arose as a reslt of a prior consumer sale.

4. Subsections (*c*) and (*d*) establish realistic limitations on a supplier's laibility for breach of warranty. Under subsection (*c*), a supplier may disclaim implied warranties (except with respect to personal injury or property damage) if he can establish that the consumer had actual knowledge of a defective condition which became the basis of the bargain. This provision is intended to cover sales of "marked down" or "irregular" goods which are sold "as is" and where the consumer is aware of the defective condition; disclaimers in such sales will of course often be reflected in lower prices. Subsection (*d*) makes it clear that the concept of implied warranty is a relative one: A 1949 Ford is not unmerchantable simply because if requires more maintenance than a new car. Similarly, this section is not intended of itself to give rise to implied warranties which otherwise may not exist under the law at the present time, *e.g.*, an implied warranty in the sale of real estate.

5. In interpreting this section on warranty disclaimers, careful attention should be given to the related definitions of "merchantable" and "warranty" under section 50-624.

Law Review and Bar Journal References:

"The New Kansas Consumer Legislation," Barkley Clark, 42 J.B.A.K. 147, 191, 192 (1973).

Landlord-tenant implied warranty of habitability, 22 K.L.R. 666, 682 (1974).

Consumer protection in Tenth Judicial District, William P. Coates, Jr., 44 J.B.A.K. 67, 71, 72 (1975).

"U.C.C.—Limitations on Personal Injury Damages for Breach of Warranty," 14 W.L.J. 714 (1975).

"Torts: Strict Liability in Tort and Assumption of Risk," William T. Kilroy, 15 W.L.J. 503 (1976).

Strict liability in tort as adopted in Kansas, 25 K.L.R. 462, 467, 468 (1977).

"Lemon Aid for Kansas Consumers," Barkley Clark, 46 J.B.A.K. 143, 144, 147, 149 (1977).

"Recovery of Attorney Fees in Kansas," Mark A. Furney, 18 W.L.J. 535, 560 (1979).

"Survey of Kansas Law: Consumer Law," John C. Maloney, 27 K.L.R. 197, 208 (1979).

"Housing Defects: Homeowner's Remedies—A Time for Legislative Action," William J. Fields, 21 W.L.J. 72, 87, 88 (1981).

CASE ANNOTATIONS

1. Referred to; action to recover on implied warranty; application of commercial code; contract upheld. Christopher and Son v. Kansas Paint and Color Co., 215 K. 185, 215 P.2d 709. Modified, 215 K. 510, 511, 525 P.2d 626.

2. Mentioned in case holding notice requirement of 84-2-607 applicable only where ordinary buyer-seller relationship exists. Carson v. Chevron Chemical Co., 6 K.A.2d 776, 784, 635 P.2d 1248 (1981).

3. Section does not allow supplier to use limited express warranty to exclude implied warranties of merchantability and fitness. Stair v. Gaylord, 232 K. 765, 766, 771, 659 P.2d 178 (1983).

50-640. Door-to-door sales; cancellation; required disclosurers; notice of cancellation; definition. (a) *Consumer's right to cancel.* Except as provided in subsection (c) (1) (C), in addition to any right otherwise to revoke, a consumer has the right to cancel a door-to-door sale made within this state until midnight of the third business day

2-6/9

after the day on which the consumer signs an agreement or offer to purchase which includes the disclosures required by this section.

(b) *Required disclosures.* In connection with any door-to-door sale made within this state, it constitutes an unfair and deceptive act or practice within the meaning of K.S.A. 50-626, and amendments thereto, for any seller to:

(1) Fail to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, Spanish, for example, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in boldface type of a minimum size of 10 points, a statement in substantially the following form:

"YOU THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT."

(2) Fail to furnish each buyer, at the time he or she signs the door-to-door sales contract or otherwise agrees to buy consumer property or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and be easily detachable, and which shall contain in 10-point boldface type the following information and statements in the same language, Spanish, for example, as that used in the contract:

NOTICE OF CANCELLATION
(Enter date of transaction)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY PROPERTY DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY, IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE PROPERTY AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE PROPERTY AVAILABLE TO THE SELLER, AND IF THE SELLER DOES NOT PICK SUCH PROPERTY UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE PROPERTY WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE PROPERTY AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE PROPERTY TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM,

TO _____
(Name of Seller)

AT _____
(Address of Seller's Place of Business)

NOT LATER THAN MIDNIGHT OF

_____
(Date)

I HEREBY CANCEL THIS TRANSACTION. _____ _____
(Date) (Buyer's Signature)

(3) Fail, before furnishing copies of the "notice of cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business

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day following the date of the transaction, by which the buyer may give notice of cancellation.

(4) Include in any door-to-door sale contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this section including specifically his or her right to cancel the sale in accordance with the provisions of this section.

(5) Fail to inform each buyer orally, at the time he or she signs the contract or purchases the property or services, of his or her right to cancel.

(6) Misrepresent in any manner the buyer's right to cancel.

(7) Fail or refuse to honor any valid notice of cancellation by a buyer and within ten (10) business days after the receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

(8) Negotiate, transfer, sell, or assign any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the property or services were purchased.

(9) Fail, within ten (10) business days of receipt of the buyer's notice of cancellation, to notify the buyer whether the seller intends to repossess or to abandon any shipped or delivered property.

(c) *Definitions.* For the purposes of the section the following definitions shall apply:

(1) Door-to-door sale. A sale, lease, or rental of consumer property or services with a purchase price of twenty-five dollars ($25) or more, whether under single or multiple contracts, in which the seller or the seller's representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller. The term "door-to-door sale" does not include a transaction:

(A) Made pursuant to prior negotiations in the course of a visit by the buyer to a retail business establishment having a fixed permanent location where the property is exhibited or the services are offered for sale on a continuing basis; or

(B) In which the consumer is accorded the right of rescission by the provisions of the consumer credit protection act (15 USCS 1635) or regulations issued pursuant thereto; or

(C) In which the buyer has initiated the contract and the property or services are needed to meet a bona fide immediate personal emergency of the buyer, and the buyer furnishes the seller with a separate dated and signed personal statement in the buyer's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the sale within three (3) business days; or

(D) Conducted and consummated entirely by mail or telephone; and without any other contact between the buyer and the seller or its representative prior to delivery of the property or performance of the services; or

(E) In which the buyer has initiated the contract and specifically requested the seller to visit the buyer's home for the purpose of repairing or performing maintenance upon the buyer's personal property. If in the course of such a visit, the seller sells the buyer the right to receive additional services or property other than replacement parts necessarily used in performing the maintenance or in making the repairs, the sale of the additional property or services would not fall within this exclusion; or

(F) Pertaining to the sale or rental of real property, to the sale of insurance or to the sale of securities or commodities by a broker-dealer registered with the securities and exchange commission.

(2) Consumer property or services. Property or services purchased, leased, or rented primarily for personal, family, or household purposes, including courses of instruction or training regardless of the purpose for which they are taken.

(3) Seller. Any person, partnership, corporation, or association engaged in the door-to-door sale of consumer property or services.

(4) Place of business. The main or per-

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manent branch office or local address of a seller.

(5) Purchase price. The total price paid or to be paid for the consumer property or services, including all interest and service charges.

(6) Business day. Any calendar day except Sunday, or the following business holidays: New year's day, Washington's birthday, memorial day, independence day, labor day, Columbus day, veterans' day, thanksgiving day, and Christmas day.

History: L. 1973, ch. 217, § 18; L. 1974, ch. 230, § 6; L. 1976, ch. 236, § 9; July 1.

KANSAS COMMENT, 1973

1. A consumer has a right to cancel a home solicitation sale pursuant to subsection (*a*). The notice of cancellation must be in writing, given to the seller at the address stated in the agreement signed by the buyer, and given prior to midnight of the third business day after the day the buyer signs an agreement or offer to purchase which complies with subsection (*b*). These are the only formal requirements of the act with respect to the buyer's concellation. This right to cancel is new to Kansas law.

Although the act does not require that a notice of cancellation be mailed, it is assumed that this will be the normal method of cancellation. Notice of cancellation is given at the time of mailing. The risk of non-receipt of a mailed notice of cancellation is placed on the seller, but the buyer has the burden of proving that the notice was properly mailed.

Goods and services are frequently sold to a buyer at his home because of an emergency. Common examples are emergency repairs to broken water pipes, furnaces, appliances and the like. Since such transactions may come within the definition of home solicitation sales, sellers may be reluctant to perform services or deliver goods before expiration of the 3-day cancellation period. Application of the right to cancel to emergency situations would have the undesirable effect of seriously deterring sellers from performing in time to deal with emergencies. Subsection (*a*) (5) therefore provides that the buyer may not cancel a sale if the stated conditions are met. The word "emergency" is not defined; the intention of the subsection is to protect the seller who in good faith relies on the statement of the buyer that an emergency exists and who performs immediately at the request of the buyer.

The right to cancel provided by subsection (*a*) is not exclusive. It in no way affects the right that the buyer may have independent of the act to revoke an offer to purchase which has not been accepted by the seller, or to rescind because of fraud, duress, breach of warranty or other causes.

2. The 3-day period for cancellation does not begin to run until the buyer signs a written agreement or offer to purchase complying with subsection (*b*). To comply, the agreement or offer must contain the date on which the buyer actually signs it and the caption and statement required by subsection (*b*) (2). Under subsection (*b*) (3), the seller may use forms prescribed by the Federal Trade Commission in any statute, rule or regulation which becomes effective at the federal level; compliance with the federal form is compliance with this section. The purpose of subsection (*b*) (3) is of course to avoid duplication and overlap.

3. Under subsection (*c*) (1), the 10-day period during which the seller must tender to the buyer any payments and any evidence of indebtedness runs from the time the sale has been cancelled, *i. e.*, from the time the buyer delivers a written notice of cancellation to the seller or deposits the notice in a mailbox.

Under subsection (*c*) (2), if the seller took a trade-in as part of a home soliciation sale which has been cancelled he must tender the goods traded in. The risk of loss of damage to the goods rests with the seller. If he cannot tender the goods in substantially as good condition as when received, the buyer may elect to take in cash the trade-in allowance fixed by the parties in the contract. This provision is designed to protect the buyer where goods traded in have not been tendered or have been damaged. In such a case he is given an election to sue either for return of the goods or for the trade-in allowance.

As a means of assuring compliance by the seller, subsection (*c*) (3) provides that the buyer may retain possession of any goods delivered to him by the seller with respect to a sale cancelled under subsection (*a*) (1) until the seller complies with his obligations under subsection (*c*). While in possession of the goods the buyer has a lien as security for his claim against the seller.

4. Subsections (*d*) (1) and (2) state the obligations of the buyer in the case of a cancelled home solicitation sale. To protect the buyer from the seller who may seek to impose an obligation on the buyer by unreasonable delays in demanding delivery of the goods the seller must demand possession within a reasonable time and 30 days is presumed to be a reasonable time. Goods not demanded within a reasonable time become the property of the buyer without obligation to pay for them. To protect the seller the section imposes on the buyer a duty to take reasonable care of the goods while they are in his possession. Except for this duty of care, under subsection (*d*) (2) the goods delivered under a home solicitation sale are at the seller's risk both prior to and after cancellation by the buyer; a buyer may cancel a sale after destruction of the goods without his fault if the destruction occurred during the 3-day cancellation period.

With respect to home solicitation sales involving the sale of services it is not possible to restore the parties to their original positions if services have been performed prior to cancellation. Subsection (*d*) (3) discourages a seller from performing any services during the 3-day cancellation period by requiring him to act entirely at his own risk.

Law Review and Bar Journal References:

"The New Kansas Consumer Legislation," Barkley Clark, 42 J.B.A.K. 147, 190 (1973).

Consumer protection in Tenth Judicial District, William P. Coates, Jr., 44 J.B.A.K. 67, 71 (1975).

"A New Kansas Approach to an Old Fraud," consumer protection, Polly Higdon Wilhardt, 14 W.L.J. 623, 634 (1975).

50-641.

History: L. 1973, ch. 217, § 19; Repealed, L. 1974, ch. 230, § 7; July 1.

50-642. Citation of act. This act may be cited as the Kansas consumer protection act.

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STATE OF KANSAS

DEPARTMENT OF CORRECTIONS
OFFICE OF THE SECRETARY
Landon State Office Building
900 S.W. Jackson—Suite 400-N
Topeka, Kansas 66612-1284
(913) 296-3317

Joan Finney
Governor

Steven J. Davies, Ph.D.
Secretary

To: Senate Judiciary Committee

From: Steven J. Davies, Ph.D.
Secretary of Corrections

Subject: House Bill 2424

Date: April 3, 1991

The Department of Corrections supports the passage of House Bill No. 2424 amending K.S.A. 75-5217 relating to inmates who violate the conditions of their release. Specifically, the bill would clarify how delinquent time lost on parole is computed for persons who have violated the conditions of their release.

This bill clarifies the current language of K.S.A. 75-5217 regarding assessment of delinquent time lost on parole and is consistent with the practice of the Department in the computation of time lost for parole violators. Passage of HB 2424 would have no fiscal impact on the State, but would enhance the Department's ability in training and instruction of Department officials who have the responsibility for computing delinquent time for parole violators by clarifying when an individual's sentence while on parole tolls and resumes as currently provided for by K.S.A. 75-5217.

Delinquent time lost on parole is that period of time which will not be credited towards service of the offender's sentence. HB 2424 clarifies the four types of parole violator situations and the corresponding delinquent time that is to be assessed in each case.

Scenario number 1 which involves the arrest of a parole violator in the State of Kansas is found in HB 2424 on page 2 at lines 28 through 35. The delinquent time lost in this situation is identical to that provided in the stricken language of HB 2424, page 2, at lines 17 through 22.

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HB 2424, however, clarifies the delinquent time lost in the event the parolee has been authorized to be in another state and has not absconded from supervision. This scenario is addressed in HB 2424, page 2 at lines 36 through page 3 line 1. In scenario number 2, since the parolee's presence in the other state is lawful, the parolee will be treated in the same manner as a parolee that has been placed under supervision in Kansas, and the delinquent time assessed against that individual will be identical to the assessment made in scenario number 1.

In scenario number 3, which is set out on page 3, lines 1 through 10, a parolee that is unlawfully in another state and arrested for new criminal charges arising out of the other state, will not have his or her Kansas sentence resume running until the sentence imposed in the other state is completed and he or she is available to be returned to Kansas.

Scenario number 4 involves the arrest of a parolee in another state solely on a parole violation warrant with no criminal prosecution pending in the other state. This scenario is set out in HB 2424 at page 3, lines 10 through 18. In this case, since the parolee is not being subjected to another state's prosecution and incarceration, the parolee is available for return to Kansas upon his or her arrest and the Kansas sentence would again begin to run when the parolee is arrested regardless of whether the presence of the parolee in the other state was authorized or not.

The amendment of K.S.A. 75-5217 as proposed in HB 2424 will clarify when delinquent time ceases and will treat parolees whose supervision has been undertaken by another state in the same manner as parolees under supervision in Kansas, which is consistent with the Department's interpretation of the current version of K.S.A. 75-5217.

SJD:TGM/pa

KANSAS
TRIAL LAWYERS ASSOCIATION
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(913) 232-7756 FAX (913) 232-7730

TESTIMONY
OF THE
KANSAS TRIAL LAWYERS ASSOCIATION
BEFORE THE
SENATE JUDICIARY COMMITTEE

March 29, 1991

HB 2397 - Wrongful Death

Thank you for the opportunity to speak with you and your committee on behalf of the Kansas Trial Lawyers Association in support of HB 2397.

HB 2397 would raise the existing cap on nonpecuniary damages in wrongful death actions from $100,000 to $250,000. K.S.A. 60-19a01 and 19a02 limit damages for pain and suffering disability and disfigurement on personal injury actions to $250,000. We believe that since the legislature and the courts have determined a $250,000 cap on similar damages for those who are injured is proper and constitutional, then certainly the cap on damages in cases involving a death should be no less than $250,000.

As you know, K.S.A. 60-1903 permits the heirs of a decedent to bring an action for damages against a person or entity whose wrongdoing caused the decedent's death. Damages allowed are specified as (1) nonpecuniary, (2) expenses for the care of the deceased caused by the injury, and (3) pecuniary damages.

Nonpecuniary damages generally are described as those damages for mental anguish, suffering, and bereavement. It is the emotional loss sustained by the surviving heirs.

The wrongful death statute was recodified in 1963, and a limit of $25,000 for all damages was established. In 1967, it was raised to $35,000 and then to $50,000 in 1970.

In 1975, nonpecuniary damages were identified separately and capped at $25,000. Finally, the nonpecuniary damage cap was last raised in 1984 to $100,000.

There are several reasons we believe this bill should be enacted. I have already described how it is a matter of fairness when contrasted with the caps on personal injuries.

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You know that members of the Kansas Trial Lawyers Association have never favored limitations on the power of the jury to decide damages, but the reality is the legislature has passed a $250,000 cap and the Supreme Court has upheld it. In other words, lawmakers and the Court have determined $250,000 is an acceptable limit on noneconomic damages.

An inconsistency now exists with the $250,000 cap on personal injury actions and $100,000 cap on wrongful death actions. Who can say the losses suffered as a result of a death are any less than the suffering of a bodily injury?

An important distinction must be made as to who shares in any compensation awarded by a court or jury in wrongful death cases. Distinctive from a personal injury loss, compensation for wrongful death extends to all heirs at law who have sustained a loss. That means one payment up to a maximum of $100,000 may be awarded, regardless of the number of heirs entitled to compensation. Please do not misinterpret the statute as allowing a maximum payment of $100,000 to each heir sustaining a loss, as contrasted with a personal injury action where the entire award for noneconomic loss goes to the single injured victim.

Of the states bordering Kansas, only Colorado caps recovery for nonpecuniary damages, and it is $250,000 (which may be raised to $500,000 by the judge under certain circumstances). As best we can determine, only four states nationally have <u>any</u> cap on nonpecuniary damages in wrongful death actions. Kansas is obviously in the minority. Thus, the bill we are proposing this morning is quite modest.

HB 2397 is eminently fair and will allow more appropriate awards to be made for the survivors of some Kansans who have lost a loved one due to another's negligent action. Furthermore, it eliminates inconsistency in the law for awards of nonpecuniary damages.

We encourage you to act favorably on HB 2397. Thank you.

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KANSAS CIVIL LAW FORUM

A Coalition of Professionals and Businesses Interested in the Kansas Court System

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STATEMENT OF BRAD SMOOT, COORDINATOR
KANSAS CIVIL LAW FORUM
BEFORE THE SENATE JUDICIARY COMMITTEE
CONCERNING 1991 HOUSE BILL NO. 2397
April 3, 1991

Mr. Chairman and Members:

Thank you for this opportunity to appear regarding 1991 House Bill No. 2397. I appear on behalf of the Kansas Civil Law Forum, formerly known as the Kansas Coalition for Tort Reform. Our membership includes numerous businesses, professionals and their associations. A partial listing of our membership is attached to the prepared statement for your reference.

On behalf of these members we appear today in opposition to H-2397 which would amend K.S.A. 1990 Supp. 60-1903 to increase the liability exposure for non-economic damages in wrongful death cases from $100,000 to $250,000. (There are no statutory limits on actual economic losses in either personal injury or wrongful death cases.) Proponents of this amendment attempt to justify this 150% increase by comparing wrongful death actions to personal injury cases. While, at first glance, this comparison may have a certain appeal, I trust the committee will agree that it is a classic case of "comparing apples and oranges".

To begin with, the legal history of wrongful death actions is markedly different from that of personal injury actions. Under common law there was no right to recover for wrongful death. This cause of action has been created exclusively by statute while the exposure and costs associated with it have expanded radically in the last 100 years. Originally, recovery by beneficiaries was limited to actual economic losses. It was later expanded to include emotional (non-economic) damages within statutory caps. Later, caps were lifted completely for economic losses (1975) and caps on non-economic losses were generously increased 400% to $100,000 in 1984.

In addition, it is important to remember that personal injury actions and wrongful death actions attempt to compensate different plaintiffs and different injuries. In personal injury claims we compensate the actual victim for any pain and suffering, disfigurement and disability. In wrongful death actions, the heirs are compensated for their emotional losses. Of course, actual economic damages in both cases are ..

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unlimited and frequently result in multi-million dollar judgments for plaintiffs, their families and their counsel.

Moreover, the survivorship statute permits heirs to also recover for any pain and suffering prior to death even when that period of time is a matter of minutes. See Ingram v. Howard-Needles-Tanner & Bergendoff, 234 Kan. 289, 627 P.2d 1083 (1983). In the recently-decided Lieker v. Gafford case, which upheld the $100,000 wrongful death cap, the deceased's heirs recovered full economic damages and non-economic damages for both the personal injuries of the deceased and the statutory $100,000 maximum for wrongful death. In all, plaintiffs were awarded more than $2.3 million dollars. (See attached list of damages available to plaintiffs.)

Although no amount of money can replace a loved one, between full compensation for economic losses and the frequent opportunity for heirs to collect on both wrongful death and survival claims, it would appear that plaintiffs can be fairly compensated under current Kansas law.

In 1986, a well-reasoned article appeared in the Kansas Trial Lawyers own journal and concluded:

> "The legislature's increase in the limit on non-pecuniary damages dramatically improves recovery possibilities in all cases. Further, the liberal attitudes courts have taken with survival actions and pecuniary damages, allows claimants to overcome prior legal restrictions on recovery. For years the barriers to relief in wrongful death cases have been artificial legal restrictions and limitations. Now most of those obstacles are gone."

In summary, we believe an increase in the wrongful death damage cap is unnecessary. Moreover, there is no reason for the non-economic damage caps in personal injury and wrongful death claims to be identical since each attempts to compensate a different victim for different injuries. And since personal injury claims are frequently tried and compensated together with wrongful death claims, we have no reason to believe the current legal framework is unfair to heirs and beneficiaries. Finally, we believe that such a drastic increase in the wrongful death caps will have an adverse affect on businesses and consumers who must ultimately pay the costs of the tort liability system.

Thank you for your time and attention.

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1991 Kansas Civil Law Forum Members

Kansas Medical Society

Kansas Railroad Association

Southwestern Bell

Kansas Hospital Association

Boeing

Kansas Optometric Association

Pharmaceutical Manufacturers Association

Kansas Association of Defense Counsel

KPL Gas Service

The Coleman Company

Beech Aircraft Corporation

Puritan-Bennett Corporation

Kansas Insurance Industry (2 memberships)

TRADITIONAL CLAIMS FOR DAMAGES IN WRONGFUL DEATH CASES (PER K.S.A. 60-1901 et seq.) WITH ACCOMPANYING PERSONAL INJURY ACTION ON BEHALF OF DECEASED (SURVIVORSHIP ACTION) PER K.S.A. 60-1801 et seq. (See also PIK § 9.01 et seq.)

I. Personal Injuries

a. Economic Damages (unlimited)

Medical care (past & future)
Hospitalization (past & future)
Loss of time or income (to date & future)
Aggravation of pre-existing ailments

b. Non-Economic Damages (limited)

Pain & suffering
Disabilities
Disfigurement
Mental anguish

c. Loss or Impairment of Services (Loss of Consortium)

II. Property Damages

Cost of repairs not to exceed value (difference in FMV) (unlimited)
Loss of use (unlimited)

III. Wrongful Death

a. pecuniary losses (unlimited)

1. loss of service, attention, marital care, parental care, advice and protection

2. loss of education, physical, moral training and guidance

3. loss of earnings

4. expense for care of deceased prior to death and funeral expenses

b. non-pecuniary (limited)

1. survivor's mental anguish, bereavement, loss of society, loss of companionship

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 2397

March 29, 1991

KANSAS CHAMBER OF COMMERCE AND INDUSTRY
Testimony Before the
Senate Judiciary Committee
by
Bob Corkins
Director of Taxation

Mr. Chairman and members of the Committee:

My name is Bob Corkins, representing the Kansas Chamber of Commerce and Industry, and I thank you for the opportunity to express our opposition to HB 2397 and its proposed increase in the maximum recoverable non-pecuniary damages in wrongful death actions.

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.

The Chamber maintains that there is no quantifiable justification for permitting an increase in these awards. Such awards are, in practice, provided to compensate for

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emo al losses sustained by survivors of the decedent in question -- losses upon w. no monetary value can be placed.

Nor do we believe there is merit to a theoretical, equity-based rationale for increasing these awards. Clearly, the emotional and physical damages sustained by surviving victims of negligence are greater than the non-economic losses to those victims' families (or to the surviving family members, should the victim die), thus validating the current verdict cap distinction from other tort actions.

Consequently, this proposal would increase the liability exposure of Kansas businesses for no justifiable reason. Not only could businesses be forced to pay higher awards for wrongful death cases in which they are directly implicated, they could be forced to pay higher premiums for liability insurance despite a clean litigation history.

KCCI therefore urges you to reject this proposal.

Thank you for your time and consideration.

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~~ical, mental or emotional needs of the child would be better served if parental rights are terminated. Any such statement by a physician shall explain the nature, frequency and duration of medical care rendered to the child and notwithstanding the provisions of K.S.A. 60-427 and amendments thereto, shall explain the reasons for making such statement. The court shall consider any such statement provided in this section only if the physician making such statement is subject to cross-examination.~~

~~(d)~~ (c) In addition to the foregoing, when a child is not in the physical custody of a parent, the court, in proceedings concerning the termination of parental rights, shall also consider, but is not limited to the following:

(1) Failure to assure care of the child in the parental home when able to do so;

(2) failure to maintain regular visitation, contact or communication with the child or with the custodian of the child;

(3) failure to carry out a reasonable plan approved by the court directed toward the integration of the child into the parental home; and

(4) failure to pay a reasonable portion of the cost of substitute physical care and maintenance based on ability to pay.

In making the above determination, the court may disregard incidental visitations, contacts, communications or contributions.

~~(d)~~ ~~(e)~~ (d) The rights of the parents may be terminated as provided in this section if the court finds that the parents have abandoned the child or the child was left under such circumstances that the identity of the parents is unknown and cannot be ascertained, despite diligent searching, and the parents have not come forward to claim the child within three months after the child is found.

~~(e)~~ ~~(f)~~ (e) The existence of any one of the above standing alone may, but does not necessarily, establish grounds for termination of parental rights. The determination shall be based on an evaluation of all factors which are applicable. In considering any of the above factors for terminating the rights of a parent, the court shall give primary consideration to the physical, mental or emotional condition and needs of the child. **If presented to the court and subject to the provisions of K.S.A. 60-419, and amendments thereto, the court shall consider as evidence testimony from a ~~licensed health care professional~~ expressing an opinion ~~which explains the nature, frequency and duration of health care~~ relating to the physical, mental or emotional condition and needs of the child.**

Sec. 2. K.S.A. 38-1583 is hereby repealed.

drafted by Chip Wheelen
Kansas Psychiatric Society
4/1/91

person licensed to practice medicine and surgery, a licensed psychologist, or a licensed social worker

The court shall consider any such testimony only if the licensed professional providing such testimony is subject to cross-examination.

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