JUDICIARY SUBCOMMITTEE ON CIVIL PROCEDURES

Senator Richard Rock, Chairman

February 25 - 26, 1992

SB 359 - repealing article 6 of the uniform commercial code regarding bulk transfers.

PROPONENTS

John McCabe , National Conference of Commissioners on Uniform State Laws (NCCUSL) (ATTACHMENT 1)
Judge Larry McClain, Johnson County District Court (ATTACHMENT 2)
William Lawrence, University of Kansas School of Law

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATIONS: recommend favorable for passage.

SB 360 - enacting the uniform fraudulent transfer act.

PROPONENTS

John McCabe , NCCUSL (ATTACHMENTs 3 and 4)

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATIONS: no action taken.

SB 622 - UCC, negotiable instruments, lost, destroyed or stolen checks.

PROPONENTS

John McCabe, NCCUSL (ATTACHMENT 5)

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATIONS: recommend favorable for passage.

SB 623 - enacting the uniform transfer of litigation act.

PROPONENTS

John McCabe , NCCUSL (ATTACHMENT 6 and 7)

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATIONS: recommend favorable for passage.

SB 624 - enacting the uniform statutory rule against perpetuities.

PROPONENTS

John McCabe , NCCUSL (ATTACHMENT 8, 9, 10 and 11)

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATIONS: recommend favorable for passage.

SB 625 - enacting the Uniform Simultaneous Death Act.

PROPONENTS

John McCabe , NCCUSL (ATTACHMENT 12)

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATIONS: recommend favorable for passage.

SB 615 - tort claims act, definition of community service work.

PROPONENTS

Gary Stotts, Secretary of the Kansas Department of Corrections (ATTACHMENT 13)

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATIONS: recommend favorable for passage.

SB 627 - required vote on merger or consolidation agreements.

PROPONENTS

Larry Magill, Independent Insurance Agents of Kansas and the Professional Insurance Agents of Kansas (ATTACHMENT 14)
Brendon Webb, Office of the Kansas Secretary of State

OPPONENTS

SUBCOMMITTEE RECOMMENDATIONS: recommend favorable for passage.

SB 685 - notification of refund provisions required before telemarketing fraud provisions of consumer protection act inapplicable.

PROPONENTS

Mark Stafford, Office of the Attorney General (ATTACHMENT 15)

OPPONENTS

Eva Powers, MCI Telecommunications (ATTACHMENT 16)
Mike Reecht, AT&T (ATTACHMENT 17)
Bob Storey, Dehart & Darr Associates, Inc/Direct Marketing Association (ATTACHMENT 18)

SUBCOMMITTEE RECOMMENDATIONS: awaiting action until conferees can meet to agree on amendatory language.

SB 626 - crimes involving piracy of recordings and nondisclosure of source of recordings.

PROPONENTS

Senator Dave Kerr

OPPONENTS

SUBCOMMITTEE RECOMMENDATIONS: recommend favorable for passage.

A Few Facts About
REVISED ARTICLE 6 OF THE UNIFORM COMMERCIAL CODE

PURPOSE: To provide states with the option of repealing or revising current Article 6 of the UCC.

ORIGIN: Completed by the Uniform Law Commissioners in 1989.

STATE ADOPTIONS OF REVISED UCC6:

California
Hawaii
Oklahoma
Utah

STATE REPEALS OF UCC6:

Arkansas
Colorado
Illinois
Louisiana
Minnesota
Montana
Nebraska
Nevada
Oregon
Wyoming

INTRODUCTIONS TO REPEAL UCC6:

Kentucky
Maine
New Mexico
Pennsylvania
Wisconsin

INTRODUCTIONS TO REVISE UCC6:

For any further information regarding the revised Article 6 of the Uniform Commercial Code, please contact John McCabe or Katie Robinson at 312-915-0195.

(2/1/92)

Civil Procedure Subcommittee
February 25/26, 1992
Attachment 1

Why states should repeal Article 6 of the Uniform Commercial Code

Bulk sales laws were originally drafted in response to a fraud perceived to be common around the turn of the century: a merchant would acquire his stock in trade on credit, then sell his entire inventory ("in bulk") and abscond with the proceeds, leaving creditors unpaid.

Article 6 was drafted as a response to this "bulk sale risk." It imposes several duties on the buyer in bulk, including the duty to notify all creditors of the impending bulk transfer. It also requires compliance even when there is no reason to believe that the seller is conducting a fraudulent transfer. The Article imposes strict liability for noncompliance. Failure to comply with the provisions render the transfer ineffective, even when the buyer has complied in good faith.

But today, changes in the business and legal contexts in which sales are conducted have made regulation of bulk sales unnecessary. Creditors are better able to make informed decisions about whether to extend credit. Changes in technology have enabled credit reporting services to provide fast, accurate, and more complete credit histories at relatively small cost.

Creditors also have greater opportunity to collect their debts. The adoption of state long-arm statutes and rules have greatly improved the possibility of obtaining personal jurisdiction over a debtor who flees to another state.

And creditors no longer face the choice of extending unsecured credit or no credit at all. Retaining an interest in inventory to secure its price has become relatively simple and inexpensive under Article 9 of the UCC - adopted in 49 states. If a bulk sale is fraudulent and the buyer is a party to the fraud, creditors have remedies under the Uniform Fraudulent Transfer Act.

There is no evidence that in today's economy, fraudulent bulk sales are frequent enough, or engender credit losses significant enough, to require regulation of all bulk sales, including the vast majority that are conducted in good faith.

The Uniform Law Commissioners, therefore, encourage those states that have enacted Article 6 to repeal it.

CHAMBERS OF:
LARRY McCLAIN
DISTRICT JUDGE
DIVISION NO. 10

DISTRICT COURT OF KANSAS

TENTH JUDICIAL DISTRICT
JOHNSON COUNTY COURTHOUSE
OLATHE, KANSAS
66061

SANDRA KING
ADMINISTRATIVE ASSISTANT
(913) 791-5463

February 7, 1992

Senator Wint Winter, Jr.
Second District - Douglas County
737 Indiana
Box 189
Lawrence, Kansas 66044

Re: Repeal of the Bulk Sales Act

Dear Senator Winter:

I assume from your memo to Senator Burke that you have an interest in repealing the Bulk Sales Act. To my knowledge I have handled the only two bulk sales cases which have been filed in Johnson County during the last 6 1/2 years. I am sure there have been other cases throughout the State, but I am unaware of any. Because of this experience I may be able to provide to the Legislature some specifics as to how the Act operates in specific cases. I would be more than willing to share this information. Please feel free to contact me if I can be of any assistance to the Legislature in considering this item.

I know how busy you are at this time so my written response to this correspondence is expected. Thanks for your consideration.

Respectfully,

Larry McClain
Larry McClain
Judge of the District Court

LMc/s

Civil Procedure Subcommittee
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Attachment 2

1/1

UNIFORM FRAUDULENT TRANSFER ACT

When we say a person "owns" something, we tend to think in all or nothing terms. Whatever a person owns is at that person's disposal - to sell, to give, to abandon, or to pledge as security for a debt. But relationships between people over property are never so simple or so unqualified. A creditor-debtor relationship, for example, may materially change an owner's power over the property owned. A mortgage, clearly, restricts what an owner may do with mortgaged real estate. The creditor has legally protected rights in the real estate securing the debt. Under Article 9 of the Uniform Commercial Code, secured creditors, also, obtain rights in collateral that are protected.

A less clear category, but important to the maintenance of credit, is that of the unsecured creditor-debtor relationship in which the debtor manipulates property to defeat the creditor's interest solely for that purpose and for no other. Perhaps the debtor foresees insolvency and tries to conceal property that a creditor might use to satisfy the debt. Perhaps the debtor never intends to satisfy the debt and manipulates property to make himself judgment-proof. Should the creditor be without recourse, and should the debtor's rights to deal with property be unrestricted in these kinds of cases?

The National Conference of Commissioners on Uniform State Laws (ULC) proposed the Uniform Fraudulent Conveyance Act (UFCA) in 1918 as an answer to that question. It was created to supersede the Statute of 13 Elizabeth which was enacted in some form by many states, and which introduced the concept of the fraudulent conveyance into the law of every American jurisdiction, with or without enactment. The UFCA was adopted in twenty-six states, and its provisions were incorporated into the Federal Bankruptcy Act.

In 1984, this 1918 Act was revised and renamed the Uniform Fraudulent Transfer Act (UFTA). The intent of the UFTA is the same as the UFCA - it classifies a category of transfers as fraudulent to creditors and provides creditors with a remedy for such transfers. The fundamental remedy is the recovery of the property for the creditor. Why a new Act at this time? The terminology of the UFCA had become considerably archaic, and needed to be modernized. The Bankruptcy Reform Act of 1978 changed the federal law on fraudulent transfers in significant ways, and made it imperative to reconsider state law. And creditor-debtor relationships have changed and become more complicated, so that the whole issue of fraudulent transfers needed rethinking. In 1984, the UFTA is ready to promote the modernization of this subject area of law.

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UFTA creates a right of action for any creditor against any debtor and any other person who has received property from the debtor in a fraudulent transfer. A fraudulent transfer occurs when a debtor intends to hinder, delay, or defraud a creditor, or transfers property under certain conditions to another person without receiving reasonably equivalent value in return. But not all such transfers are fraudulent to every creditor.

UFTA distinguishes between present and future creditors, and specifies the kinds of transfers that are fraudulent to each of the two categories of creditors. Both present and future creditors may recover property when there is a transfer with intent to defraud. Both may recover when a transfer is made without receiving reasonably equivalent value when the result is to make the debtor's assets unreasonably small in relation to the business or transaction in which the debtor is engaged or about to be engaged. Also, present and future creditors can both recover when a debtor transfers property without receiving reasonably equivalent value when intending to incur debts beyond the ability to pay.

Present creditors, however, can recover property when it is transferred by a debtor to another person without receiving reasonably equivalent value if the debtor is insolvent or becomes insolvent as a result of the transfer. A transfer to an "insider" without receiving reasonably equivalent value when the debtor is insolvent, is also fraudulent to present creditors. The term "insider" is defined, and is someone with a special relationship to the debtor. Examples are relatives or business partners (when the debtor is a partner). To be liable, an "insider" must have reasonable cause to believe that the debtor is insolvent.

The fundamental relief for a creditor when there is a fraudulent transfer is recovery of the property from the person to whom it has been transferred. UFTA allows "avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim...." Whatever is necessary to obtain the property is provided for, including attachment, injunctive relief, appointment of a receiver, or "any other relief the circumstances may require." If the creditor has reduced the claim to a judgment, the court may levy execution against the recovered assets. This means that the property can be sold to satisfy the amount of the judgment.

Much of the UFTA resembles the UFCA, its predecessor. What, then, are some of the differences? (A more detailed comparison is available from the ULC.) To begin with, the term "transfer" taken from the Federal Bankruptcy Act replaces the term "conveyance." UFCA uses the term "fair consideration" instead of "reasonably equivalent value." "Reasonably equivalent value" does not include the element of good faith as "fair consideration" does, and is more sharply defined than "fair consideration" is in the UFCA. UFTA overcomes the problem raised in the case of

Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980), a case that jeopardized mortgage foreclosure sales. Under UFTA, a properly conducted foreclosure sale is not a fraudulent transfer, notwithstanding the fact that it does not recover an amount somewhat near the actual market value of the property. The concept of the "insider" is new in the UFTA. UFTA provides for defenses of transferees and for a statute of limitations. Both issues are not addressed in the UFCA.

The Uniform Fraudulent Transfer Act continues the concept of a civil action for transfers fraudulent to creditors first created in the Statute of 13 Elizabeth, and comprehensively continued in the Uniform Fraudulent Conveyance Act. The new Act takes into account the considerable development in both law and practice in creditor-debtor relationships since 1918. The ULC hopes that it will be adopted uniformly in all states.

WHY STATES SHOULD ADOPT

THE UNIFORM FRAUDULENT TRANSFER ACT

Are we only as good as the extent to which we honor our obligations? Many would argue for this proposition. And when our obligations are financial, the argument is reinforced by law. It is to this proposition that the Uniform Fraudulent Transfer Act is addressed. If we have acquired debt we should not be able to manipulate our assets so that creditors will be deprived of their value when we default on our debt. We should not be able to plan an artificial insolvency by transferring assets to others against the interests of our creditors.

The Uniform Fraudulent Transfer Act works as a deterrent, preventing such transgressions against obligations incurred, and provides creditors with a remedy when debtors transfer or hide assets that would otherwise be available to satisfy legitimate debts.

While the issue of obligation is preeminent, the economic issue is no less important. Credit is essential to the economic life of this country. Consumer credit, commercial credit, secured and unsecured credit enter into our lives, everyday. Credit remains available so long as those who extend it are given certain assurances about their rights at default. The Uniform Fraudulent Transfer Act provides assurances to creditors that help make credit available to all of us.

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This economic issue leads directly to the issue of uniformity. The availability and the health of the credit mechanism require national standards. The principles of the old Uniform Fraudulent Conveyance Act became applicable to every person in every state because it was incorporated into the Federal Bankruptcy Act. Much of what is in the newer Fraudulent Transfer Act duplicates the Bankruptcy Reform Act of 1978. Uniformity has become not only a question of law between states, but also between state and federal law. Without uniformity, credit becomes less available, and the credit mechanism is less reliable. To avoid confusion and expense, the same rules must apply throughout the country. Public expectations are the same in every state and jurisdiction.

Associated with the issue of uniformity is the issue of modernity. The original Fraudulent Conveyance Act, which the Fraudulent Transfer Act replaces, was promulgated in 1918. Changes in federal bankruptcy law, in creditor-debtor relations in general, even in the rules governing the conduct of lawyers, make it clear that a modernization is overdue. The Uniform Fraudulent Transfers Act answers that immediate need.

Uniform Commercial Code Section 3-312

In 1991, the Uniform Law Commissioners adopted new Section 3-312 as an amendment to revised Article 3 of the Uniform Commercial Code. Section 3-312 establishes a claim procedure for obtaining payment of a certified, cashier's or teller's check that is lost, stolen or destroyed. A claimant asserts a claim to the obligated bank that includes a specific "declaration of loss." It states that the check is lost and not recoverable, that the claimant is an appropriate party to the check, and that the loss of possession was not because of a transfer by the declarer or a lawful seizure. Falsifying a declaration of loss is perjury. If the obligated bank receives the claim, it must pay the claim unless it has already paid the check. If the check is later presented by a person who qualifies as a holder in due course, the claimant is obligated to refund the claimed amount to the bank or pay the holder in due course.

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UNIFORM TRANSFER OF LITIGATION ACT

A summary.....

Much litigation in the United States arises from interstate conduct. People do business across state lines. Because Americans travel, they may be injured in states that are not their domiciles or residences, and those who cause injury do not necessarily do so in their domiciles or residences. The result is that lawsuits can be and are frequently brought in more than one jurisdiction. Also, sometimes a lawsuit filed only in one jurisdiction might be better adjudicated in another.

There are doctrines that allow a court in one state to decline to take jurisdiction in favor of the courts of another jurisdiction. A court may decline to take jurisdiction because the forum is inconvenient for the particular litigation, for example. But no state court, generally, has the authority to transfer litigation to a court in another state, or to a federal court. No state court, generally, has the authority to accept litigation transferred by a court of another state, or a federal court.

There is no inherent reason, based in the U.S. Constitution, for state courts to be deprived of such authority. And there are very great arguments rooted in notions of fairness and efficiency for state courts to have these authorities. Litigation that sprawls across state lines is frequently messy and expensive enough that any ability to consolidate litigation in one place would be an improvement over multiple litigation. And courts can better serve the interests - be fairer to - litigants if they have the ability to cooperate in consolidating litigation in the place where the facts and evidence can best be presented. If we can reduce costs and more fairly serve litigants, we probably ought to take the necessary steps to do so.

Fortunately, the solution is not difficult to obtain. All that is required is adop-

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tion in every state of the **Uniform Transfer of Litigation Act (UTLA)**, promulgated by the Uniform Law Commissioners in 1991.

UTLA provides the appropriate court (normally the trial level court) with the dual authority, first, to transfer litigation to a court in another state (or a federal court) and, second, to receive litigation transferred to it from a court in another state (or a federal court). **UTLA** allows a court to transfer litigation, whether or not it has jurisdiction over the person or the subject matter of the litigation. It can accomplish the transfer only if the court in the other jurisdiction consents to the transfer and if the court of the other jurisdiction can exercise that jurisdiction. A court, under **UTLA**, may accept litigation from a court in another jurisdiction only if it can exercise jurisdiction over the person and subject matter.

No court is forced either to transfer litigation to the court of another jurisdiction or to accept litigation that the court of another jurisdiction wants to transfer. To transfer or receive are matters for the discretion of the court. A transfer may be made if it serves "the fair, effective, and efficient administration of justice and the convenience of the parties and witnesses." This is the only limitation upon the discretion of the court in deciding whether to transfer or not to transfer specific litigation. A court may refuse to accept litigation from the court of another state on any grounds. It is required, only, to state the grounds for refusal when it does refuse.

These are the fundamental principles that **UTLA** serves. The Act provides, also, for all necessary orders to make and receive transfers and for the necessary record keeping by these courts. The objective is to simplify that which is otherwise more complicated, expensive, and difficult for litigants. Fairness and efficiency are the dual purposes that **UTLA** serves.

Although **UTLA** permits transfer to and receipt of litigation by a state court from a federal court, there is no authority, currently, for federal courts to make such a transfer. Thus, the federal component of these rules will not be effective until Congress adopts similar rules for the relevant federal courts.

Founded in 1892, the National Conference of Commissioners on Uniform State Laws is a confederation of state commissioners on uniform laws. Its membership is comprised of 300 practicing lawyers, judges, and law professors who are appointed by each of the 50 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands to draft uniform and model state laws and work toward their enactment.

RECEIVED FEB 1 1992

RESOLUTION IX

In Support of the Uniform Transfer of Litigation Act

WHEREAS, in 1988 the Conference of Chief Justices concluded that under appropriate circumstances the administration of justice will be promoted by the transfer of civil actions between the states in order to achieve a more convenient venue or to marshal in a single forum multi-party litigation pending in two or more states; and

WHEREAS, in 1988, the Conference of Chief Justices adopted a resolution which provided in part that the Conference of Chief Justices endorses the drafting by the National Conference of Commissioners on Uniform State Laws of a proposed Uniform Interjurisdictional Transfer Act which would authorize, with the consent of the transferee court, the transfer of a civil action or part thereof between courts of different states or from federal to state courts, and

WHEREAS, in response to this 1988 resolution the National Conference of Commissioners on Uniform State Laws drafted and approved for enactment in all the states a Uniform Transfer of Litigation Act.

NOW, THEREFORE, BE IT RESOLVED, that the Conference of Chief Justices approves the principles imbedded in the Uniform Transfer of Litigation Act; and

BE IT FURTHER RESOLVED, that the Conference of Chief Justices urges the House of Delegates of the American Bar Association at its February 1992 midyear meeting to approve the Uniform Transfer of Litigation Act; and

BE IT FURTHER RESOLVED, that the Conference of Chief Justices urges each state legislature to approve the Uniform Transfer of Litigation Act.

Proposed by the State-Federal Relations Committee of the Conference of Chief Justices at the Fifteenth Midyear Meeting in Jackson, Mississippi, on January 30, 1992.

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A Few Facts About
THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES

PURPOSES: To conform the rule against perpetuities to its original purpose of preventing perpetual trusts without defeating reasonable trusts; and to minimize and simplify perpetuity litigation as much as possible.

ORIGIN: Completed by the Uniform Law Commissioners in 1986. Amended in 1990 by adding section 1(e). Became part of Uniform Probate Code in 1990 and of Uniform Act on Intestacy, Wills, and Donative Transfers in 1991.

ENDORSED BY: House of Delegates of American Bar Association, on unanimous recommendation of the Council of the ABA Section of Real Property, Probate and Trust Law

Board of Regents of American College of Trust and Estate Counsel (unanimous)

Board of Governors of American College of Real Estate Lawyers (unanimous)

Joint Editorial Board for Uniform Probate Code (unanimous)

Leading scholars, including Gregory S. Alexander (Cornell), Olin L. Browder, Jr. (Michigan), Verner F. Chaffin (Georgia), Mary Louise Fellows (Minnesota), Edward C. Halbach, Jr. (Cal. Berkeley), Thomas L. Jones (Alabama), Sheldon F. Kurtz (Iowa), John H. Langbein (Yale), Allan F. Smith (Michigan), Robert A. Stein (Minnesota), and Richard V. Wellman (Georgia).

STATE ADOPTIONS:

California *	Massachusetts	New Jersey *
Colorado *	Michigan	North Dakota *
Connecticut	Minnesota	Oregon
Florida	Montana	South Carolina
Georgia	Nebraska	
Indiana *	Nevada	

For further information, please contact Lawrence W. Waggoner, Hutchins Hall, University of Michigan Law School, Ann Arbor, MI 48109-1215, telephone 313-763-2586, or John M. McCabe or Katie Robinson, NCCUSL, 676 North St. Clair St., Suite 1700, Chicago, IL 60611, telephone 312-915-0195.

* 1991 Adoptions

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WHY STATES SHOULD ADOPT THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES

The idea of reforming the common law rule against perpetuities has been percolating since the late 1940s. Various reform measures were advanced during this early period, but none was able to attract more than four or five enactments. At long last, the reform process has produced a statutory reform measure that does make uniform perpetuity reform possible. The Uniform Statutory Rule Against Perpetuities has quickly become far and away the most widely adopted perpetuity–reform measure in the country and the only realistic hope for uniform perpetuity reform.

Uniformity in this area is especially desirable. The desirability of uniformity stems mainly from the high degree of mobility in American society. Many clients, for example, retire to states other than the one in which they were domiciled during their employment years. Many other clients own land in states other than the state of their domicile. Many trusts confer a power of appointment upon the settlor's children or grandchildren who might be domiciled in different states when they exercise their powers. These and other sometimes unplanned for post–execution events can give rise to increased conflict–of–laws litigation and the potential applicability of the perpetuity law of any state in the union.

As discussed more fully in the *Questions and Answers* component of this packet, the merits of the USRAP are that it:

- fine tunes the rule against perpetuities so that it reaches only its real target, that of placing an outer time limit on long–term or perpetual trusts while validating reasonable trusts;
- extends the benefits of a perpetuity savings clause to trust clients whose lawyers neglected to put one in;
- is simple to administer;
- requires no new learning of the bar; and
- nearly eliminates perpetuity litigation.

Because of the desirability of uniformity in this area and because the USRAP method of reform is superior to other methods so far devised, enactment of the USRAP should not be restricted to states that have not yet enacted a perpetuity–reform measure. Several of the enacting states had previously adopted one of the earlier perpetuity–reform measures, which they repealed incident to enactment of the USRAP.

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THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES: QUESTIONS AND ANSWERS

1. ***What is the "rule against perpetuities" and what is its purpose?***

Anglo-American law has traditionally and wisely prohibited people from tying up family property in trusts or other property arrangements for the duration not only of an existing generation but for numbers of future generations. The legal rule that prohibits these perpetual or unreasonably long-lasting trusts is called the "rule against perpetuities."

The common law rule against perpetuities is a complicated rule, but shorn of its complexities, it functions to impose a time limit on trusts. What is the time limit? The time limit thought appropriate is one basically geared to the duration of an existing generation (which can be an existing generation more remote than the one immediately below the person creating the trust), with an extra tack-on period of 21 years for good measure. Specifically, the rule against perpetuities measures the time limit by the period of "lives in being plus 21 years." The term "lives in being" is the law's arcane way of referring to the lifetimes of persons who were living when the trust was created.

2. ***If the rule against perpetuities wisely invalidates perpetual or unreasonably long-lasting trusts, why is there a need for a Uniform Statutory Rule Against Perpetuities?***

Under the common law rule, a trust is invalid if it might exceed the lives-in-being-plus-21-years time limit. To be valid, in other words, there cannot be any possibility that the trust will exceed the time limit, even if that possibility is so remote that reasonable people would dismiss it as absurd. This is sometimes referred to as the "what-might-happen" approach.

The what-might-happen approach causes the common law rule against perpetuities to have bad as well as good effects. The good effect is that it invalidates perpetual or unreasonably long-lasting trusts. The bad effect is that it sometimes overreaches and invalidates perfectly reasonable trusts such as one that requires the donor's grandchildren to reach age 25 in order to be entitled to receive a sum of money. The common law rule, in other words, is harshly over-inclusive.

3. ***What are the main purposes of the USRAP?***

The Uniform Statutory Rule Against Perpetuities (USRAP) is a remedial statute that adopts a what-*does*-happen approach (also called the "wait-and-see" approach). By the simple expedient of switching from a what-might-happen to a what-does-happen standard, the USRAP returns the rule against perpetuities to its original purpose of preventing perpetual or unreasonably long-lasting trusts without defeating reasonable trusts.

Expert estate planning attorneys have already found a way of establishing a what-does-happen (wait-and-see) rule for trusts they draft. They routinely make trusts such as the one described in Question 2 valid. The way they do this is by inserting a so-called perpetuity savings clause into the document. A perpetuity savings clause acts as an outer time limit on the trust. The time limit is often geared to the 21-year period following the death of the survivor of a group of people (such as the client's descendants) living when the trust was created.

The USRAP is a perpetuity reform statute that, in effect, extends the benefits of a

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perpetuity savings clause to citizens whose lawyers, through mistake or ignorance, neglected to put one in. The USRAP does this by adopting the wait-and-see plus deferred reformation method of perpetuity reform. This is the same approach adopted by the American Law Institute in the Restatement (Second) of Property (1983). In fact, the USRAP essentially codifies the Restatement (Second) of Property.

4. ***How does the USRAP accomplish its purposes?***

The USRAP uses four principal features to accomplish its purposes:

Feature 1: Common Law Validity Preserved. The USRAP provides that a will or trust that is valid under the common law rule against perpetuities remains valid.

Feature 2: Wait and See. The USRAP's wait-and-see feature provides that a will or trust that would have been invalid under the common law rule against perpetuities is given up to 90 years to run its course.

Feature 3: Deferred Reformation. The deferred reformation feature only applies to trusts that are subject to the wait-and-see feature. For those few cases in which such a trust extends beyond 90 years, the USRAP provides for court reformation to make it valid; within the 90-year constraint, the reformation is to come as close as possible to the transferor's plan of distribution as manifested in the trust document itself. Because court reformation will so seldom become necessary, the USRAP method can be described as a *"judicial hands-off" approach* to perpetuity questions.

Feature 4: Non-family Oriented Transactions Exempted from Perpetuity Law. Commercial transactions are exempted from the rule against perpetuities.

5. ***Why does the USRAP preserve validity under the common law rule against perpetuities rather than subject all trusts to a 90-year period?***

Preserving common law validity is a "must" feature. The mobility of society makes it necessary. Preserving validity under the common law rule against perpetuities allows a testamentary trust, drawn by a lawyer in a USRAP state in compliance with accepted common law practice, not only to be valid in the USRAP state, but also to be valid if the client dies domiciled in (or owns land covered by the trust in) a common law jurisdiction. Conversely, this feature allows a testamentary trust, drawn in compliance with accepted common law practice by a lawyer in a common law jurisdiction, to still be valid if the client dies domiciled in (or owns land covered by the trust in) a USRAP state.

Compliance with the common law rule against perpetuities confers another very attractive benefit. It insulates the trust or other property arrangement from any possible future reformation suit under the deferred reformation feature. Only interests whose validity is governed by the wait and see element are vulnerable to reformation. Reformation is never necessary—or permitted—for dispositions that are initially valid under the common law rule against perpetuities.

In estate planning practice, then, the USRAP creates every incentive to comply with the common law rule against perpetuities, through the use of a traditional perpetuity savings clause, if appropriate, or one tailored to the particular trust. Practitioners who now successfully draft for initial validity, as most do, by far, should continue with business as usual. They need not learn a new and complicated scheme of perpetuity law and they need not make any adjustment in their forms or practice.

10-2/5

6. ***What are the advantages of using a flat period of 90 years for the wait-and-see element?***

The use of a flat period of 90 years simplifies the process of measuring the permissible vesting period for the wait-and-see element. The alternative would be to measure the period on a case-by-case basis by the controversial measuring-lives approach. The 90-year period is designed to approximate the average margin-of-safety period provided under the wait-and-see method using actual measuring lives (or by traditional perpetuity saving clauses). This margin-of-safety period is ample enough so that almost all trusts will run their course long before the 90 years expires, and that will be the end of the matter.

7. ***Does the USRAP require new learning of the bar? Is the USRAP a complicated statute?***

No to both questions. Among the USRAP's great strengths are that it is not a complicated statute and that it does not require new learning on the part of the bar. Although it is true that the Official Commentary to the USRAP is quite lengthy, that fact belies the simplicity of the statute. The lengthy Commentary is not "needed" to explain the statute. The Commentary is supplied so that even lawyers and judges not familiar with the common law rule against perpetuities can understand both the common law rule and how the USRAP alters it.

A full appreciation of the point requires noticing the distinction between what lawyers must know in planning and drafting legal documents and what they must know if they actually have a perpetuity-violation case.

With respect to the planning and drafting end of the practice, lawyers need to know only one thing: *Continue to use the same traditional perpetuity-saving/termination clause, using specified lives in being plus 21 years, you used before enactment.*

The picture is entirely different for the rare lawyer or judge who has an actual or potential perpetuity-violation case. These lawyers and judges will very much appreciate the extensive Official Comments because those Comments will provide great assistance in analyzing the case. Remember that an actual or potential perpetuity-violation case will arise very infrequently under the USRAP. When such a case does arise, however, lawyers (or judges) involved in the case will find considerable guidance for its resolution in the detailed analysis contained in the Commentary accompanying the USRAP itself. In short, the detailed analysis in the Commentary accompanying the USRAP need not be part of the general learning required of lawyers in the drafting and planning of dispositive documents for their clients. The detailed analysis is supplied for the assistance in the resolution of an actual violation. Only then need that detailed analysis be consulted and, in such a case, it will prove extremely helpful.

8. ***Why does the USRAP use a flat period of years to measure the permissible vesting period for the wait-and-see element?***

The traditional method of measuring the permissible vesting period under the wait-and-see method of perpetuity reform has been by reference to lives in being at the creation of the interest (the measuring lives) plus 21 years. There are, however, various difficulties and costs associated with identifying and tracing a set of actual measuring lives to see which one is the survivor and when he or she dies. In addition, it has been documented that the use of actual measuring lives plus 21 years does not produce a period of time that self-adjusts to each disposition, extending dead-hand control no further than necessary in each case; rather, the use of actual measuring lives (plus 21 years) generates a permissible vesting period whose length

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almost always exceeds by some arbitrary margin the point of actual vesting in cases traditiona validated by the wait-and-see strategy. The actual-measuring-lives approach, therefore, performs a margin-of-safety function. Given this fact, and given the costs and difficulties associated with the actual-measuring-lives approach, the USRAP forgoes the use of actual measuring lives and uses instead a permissible vesting period of a flat 90 years. The expiration of a permissible vesting period measured by a flat period of years is litigation free, easy to determine, and unmistakable.

9. *How was the 90 years derived?*

The 90-year period was derived using average life expectancy tables to approximate the average period of time that would be produced by the traditional perpetuity period of a life in being plus 21 years.

10. *Does the 90-year period mesh with the federal generation-skipping transfer tax?*

Yes. Although the U.S. Treasury Department originally issued temporary regulations under the "grandfathering" provisions of the federal generation-skipping transfer tax that did not allow for the USRAP's use of a 90-year period, these regulations were issued in ignorance of the existence of the USRAP. When the USRAP's approach was called to the attention of the Treasury Department, the Department issued a letter of intent to revise the regulations to accommodate the USRAP's 90-year approach.

11. *Does the USRAP require "waiting" for 90 years in all cases?*

No. First of all, the only trusts that are subject to the 90-year period are those that fail to qualify for validity under the common law rule against perpetuities. Those trusts make up a small fraction of all trusts. With respect to that small fraction of trusts that are subject to the 90-year period, most of them by a large margin will run their course well within the allowed 90 years. Very few such trusts will still be in operation at the end of the 90-year period.

12. *Does the USRAP allow trusts to last longer than they now can under the common law rule against perpetuities? Does the USRAP extend dead hand control?*

No to both questions. The flat-period-of-years method was not used as a means of increasing permissible dead-hand control by lengthening the permissible vesting period beyond its traditional boundaries. In fact, the 90-year period falls substantially short of the absolute maximum period of time that could theoretically be achieved under the common-law rule itself, by the so-called "twelve-healthy-babies" ploy—a ploy that would average out to a period of about 115 years, which is 25 years or 27.8% longer than the 90 years allowed by the USRAP.

13. *Does the USRAP cause harm because it puts the validity of property interests in abeyance for 90 years?*

No. At one time, those who opposed the wait-and-see method of perpetuity reform argued that wait-and-see could cause harm because it puts the validity of property interests in abeyance during the permissible vesting period. During the permissible vesting period, it was argued, no one could determine whether an interest was valid or not. This argument has been shown to be

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false. Keep in mind that the wait-and-see element is applied only to interests that would be inva... were it not for wait-and-see. Such interests are always *nonvested* future interests. Wait-and-see does nothing more than add an *additional* contingency, which is that the other contingencies must be resolved one way or the other *within a certain period of time. If* that period of time is easily determined, as it is under the USRAP, then the additional contingency causes no more uncertainty in the state of the title that would have been the case had the additional contingency been originally expressed in the governing instrument, *as it is would have been had the drafting attorney inserted a perpetuity savings clause.* It should also be noted that only the status of the affected *future* interest in the trust is deferred. In the interim, the other interests, such as the interests of current income beneficiaries, are carried out in the normal course without obstruction. In short, the USRAP causes no more "uncertainty" in the state of the title than routinely occurs in the vest majority of trusts that contain a perpetuity savings clause.

14. ***Why is uniformity among the states important?***

Because of the high degree of mobility of American society. In the few short years since promulgation, the USRAP has become far and away the most widely adopted perpetuity reform measure in the country. If more and more states move to enactment, uniformity will ultimately become realizable, to the benefit of citizens with multi-state connections.

UNIFORM STATUTORY RULE AGAINST PERPETUITIES

In American property law, rights to possession, use and/or consumption of property exist in, or run with, time. The limitations or extent of rights depend upon time. All the rights that one may have – full ownership or fee simple ownership (of real property) – mean all the rights that a person may have for infinite time. But it follows that rights may be owned or held for less than an infinite amount of time. And so we have such interests in property as "estate for years" and "life estates." With such property interests, there is a remainder interest which occupies the time after the "estate for years" or the "life estates" terminate. These interests are called "remainder interests," and they are interests in property that can arise only at a time in the future. Hence, they are called "future interests."

Future interests become even more complicated because they may be "vested" or "nonvested" interests. A "vested" future interest belongs to someone now – immediately – even though the person to whom it belongs may not come into actual possession of the property for years. A "nonvested" interest belongs to no one until some event in the future determines who actually takes it. For example, James may, by deed, give Smith an estate for life in specific real estate, while giving the remainder to all of Smith's children alive at the time Smith dies. This remainder cannot vest until Smith dies, because it cannot be determined how many children might be born to Smith (or adopted by Smith) and how many might be alive when he dies, until his actual death. The remainder will vest only when he dies and the life estate terminates.

Nonvested future interests have been a part of American property law, as an inheritance from English common law, since the time of the original thirteen colonies. But the common law has also established limitations upon nonvested future interests. The principal limitation is expressed in terms of time, and the policy to be served is simple – the law does not favor nonvested future interests that cannot vest, or will not vest, within a cognizable time period. The classic expression of this limitation is called the "Rule Against Perpetuities." The accepted common–law formulation of the Rule is as follows:

> "No [nonvested property] interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest."

The common–law Rule appears simple, but it has evolved into a kind of conundrum in its application. Improperly drafted deeds, trusts, instruments, and wills can result in invalid future interests. These are frequently interests that should not be extinguished, and people are injured as a result.

There are two fundamental problems with the common–law Rule that lead to such harsh results. The Rule depends upon possible, not actual, events. Any hypothetical violation of the Rule, no matter how improbable, extinguishes otherwise legitimate interests. It is also an all–or–nothing kind of Rule. If one member of a class of possible takers of a future interest potentially takes a vested interest beyond the prescribed time, the interests of all members of the class fail. The Rule Against Perpetuities challenges those who draft property documents. A slight inadvertence can have a very drastic and harsh effect.

Nobody questions the fundamental policy. Perpetual nonvested interests should not be permitted. The problem is to serve this fundamental policy while eliminating the harsh effects of the common–law Rule. This is the role the Uniform Statutory Rule Against Perpetuities is designed to play.

The common–law Rule has a validating and invalidating function. Those interests that meet the prescribed time period are absolutely valid and unassailable. Those that violate the Rule are absolutely invalid. The Uniform Statutory Rule principally affects

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the invalidating side of the common–law Rule. If a future interest must vest within the prescribed period of a life in being plus 21 years (the common–law formula), it is a valid interest under the Uniform Statutory Rule. But, if it violates the Rule in some hypothetical sense, the Uniform Statutory Rule does not, absolutely, extinguish an interest.

The Uniform Statutory Rule adopts what has become known as the "wait–and–see" approach. This is the principal reform of the common–law Rule. Rather than invalidating future interests based on hypothetical possibilities, the Uniform Statutory Rule provides a period of time within which an interest can actually vest. If it does, it is saved. If it does not, then it is invalid. We wait and see, in other words, if an interest will, in fact, vest.

The basic statement of the Rule in the Uniform Statutory Rule is as follows:

> "A nonvested property interest is invalid unless:
>
> (1) when the interest is created, it is certain to vest or to terminate within the lifetime of an individual then alive or within 21 years after the death of that individual; or
>
> (2) the interest either vests or terminates within 90 years after its creation."

The initial part of the Rule restates the common law and validates interests that meet the basic test. The second part of the Uniform Statutory Rule deals with invalidation. It sets a period of time, 90 years, within which actual vesting validates an interest. Invalidation can occur only if the future interest has not vested 90 years after its creation. We "wait and see" 90 years.

Why a fixed number of years? It is the simplest and least capricious way to measure time. Why 90 years? To give ample time, within the lifetimes involved in measuring these interests, for a nonvested future interest to vest. Ninety years represents an estimate of the actual time most extended future interests will take, at the outside, to vest. If they do not vest, 90 years is a sufficient time to justify invalidating such interests.

Powers of appointment are given separate treatment in the statement of the basic Rule in Section 1. A "power of appointment" leaves to another person the opportunity to designate who takes nonvested future interests. They are traditionally subject to the "Rule Against Perpetuities." The Uniform Statutory Rule deals with them separately from other property interests because of particular distinctions made between general and non–general powers, testamentary and non–testamentary powers. But the Rule is fundamentally the same. If a delegation of a power vests within the common–law time for vesting, it is absolutely valid. Otherwise, "wait and see," the 90 year period, applies to the question of invalidity.

Beyond the "wait–and–see" approach to invalidity, the Uniform Statutory Rule gives invalid future interests a second chance. Section 3 permits a court to reform an invalid interest or power of appointment "in the manner that most closely approximates the transferor's manifested plan of distribution..." The court can reform interests by vesting them within 90 years of their creation. So, even if 90 years pass and there is no vesting of an interest, the appropriate court can save it from extinction.

The remainder of the Uniform Statutory Rule copes with issues inherent in the basic application of the "Rule Against Perpetuities." Section 2 settles questions of the creation of nonvested property interests because the Rule begins to run at the time an interest is created. And there are some kinds of interests to which the Rule should not apply. These are the subject of Section 4. An example is a fiduciary's power relating to the administration or management of assets. Fiduciary powers are technically nonvested in character, but are no threat to the ultimate determination of property ownership. It would, therefore, be inappropriate to apply the Rule against fiduciary powers.

The Uniform Statutory Rule Against Perpetuities eliminates the onerous burdens of the common–law Rule without disturbing the basic policy which the common–law Rule evolved to serve.

UNIFORM SIMULTANEOUS DEATH ACT (1991) (USDA 1991)

The original Uniform Simultaneous Death Act was promulgated in 1940 by the Uniform Law Commissioners. The 1991 version comes from work completed on Uniform Probate Code, Article II in 1990 and the Uniform Act on Intestacy, Wills and Donative Transfers in 1991. The Uniform Simultaneous Death Act is incorporated into both these acts. It can adopted as a separate, free-standing act, however, as the USDA 1991.

If persons who are each other's heirs in intestacy, devisees in mutual wills, or or other non-probate transfer arrangement that involves reciprocal interests, die or are killed close together in time, the question is inevitably raised, for the purposes of determining where property goes, as to who died first? The classic case involves the husband and wife who are killed in the same automobile accident. The question is raised because the law generally puts property from the first to die into the estate of the person who dies second. The unpalatable result of that determination is the fact that the property of the first to die passes through two estates (and possibly two probates), one for the first to die and one for the second to die. Two probates is inevitably worse than one, considering the costs and delays inherent in that process. Better to transfer property directly to those who truly survive a deceased individual.

Since 1940 the USDA has been available to the states to provide a rule of law that reaches the desired result. USDA 1991 is the up-to-date version.

The fundamental rule is simple. If it cannot be proved that one individual survived another by a time period of 120 hours, by law that individual predeceases the other. The effect of the rule is to make each individual predecease the other. If a husband and wife are killed together, for example, in that automobile accident, each predeceases the other by law. No property passes between them at death. Their other heirs, devisees, and/or beneficiaries will take their property, however that transfer is arranged.

USDA 1991 provides rules for passage of joint property, for when death legally occurs, and for exceptions to the 120 hour rule. It is possible in wills and other instruments to waive or vary the rule. USDA 1991, also, provides for a presumption of death after five years if a person is missing or a body cannot be found, as well.

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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

Gary Stotts
Secretary

To: Senate Judiciary Committee

From: Gary Stotts
Secretary of Corrections

Date: February 26, 1992

Subject: Senate Bill 615

This bill would amend K.S.A. 1991 Supp. 75-6102(e), which is part of the Kansas Tort Claims Act, to include within the definition of "Community service work" the following provision: "(6) or as a condition of parole or conditional release as ordered by the Kansas parole board." Pursuant to K.S.A. 1991 Supp. 75-6104(s) there is an exemption from liability for a governmental entity for damages resulting from performance of community service work.

The current exemption from liability for community services extends to work performed by a person (1) under contract of diversion; (2) community corrections assignment; (3) suspension of sentence or probation; (4) in lieu of fine; (5) condition of placement pursuant to K.S.A. 38-1663. The definition does not include community service work performed as a condition of parole. The Kansas Parole Board has placed on some parolees the condition of performing community service work. To include parolees within the definition of community service work is consistent with the other placements as set forth in the definition. The rationale for inclusion of parolees within the definition is the same as for the other groups now included.

In the event SB 479 regarding sentencing guidelines is enacted, the terms "post-release supervision" and "non-prison sanction" should be considered for inclusion within the definition of "community service work". Post-release supervision is the equivalent of parole while non-prison sanctions includes placement on probation, community corrections, conservation camp, house arrest, and other community-based sanctions.

GS:CES/pa

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Testimony on SB 627
Before the Senate Judiciary Subcommittee on Civil Procedure
February 26, 1992
By: Larry W. Magill, Jr. for the
Independent Insurance Agents of Kansas
and the
Professional Insurance Agents of Kansas

Thank you Mr. Chairman and members of the committee for the opportunity to appear today in support of SB 627, a measure that we requested the Senate Judiciary Committee introduce.

Our two associations have entered into serious consolidation discussions that should be concluded by this summer with a possible merger on September 1st or October 1st.

We have discussed a merger off and on since the early 1980's. All of the surveys conducted in Kansas as well as countrywide indicate that anywhere from 80-95% of our members in each association support merging the two. We address identical memberships with very similar programs, benefits and services. In this age of reducing commissions and difficult insurance markets, our members cannot afford to support two associations.

In doing the preliminary research for a merger, we asked our attorney to let us know what would be required. Attached to my testimony is his response along with highlighted copies of the statutes in question. As he points out in his letter, there is some ambiguity between K.S.A. 17-6705(c) and K.S.A. 17-6505 as to whether a vote of the entire membership of both associations is required with two-thirds voting in favor.

However, since both of our associations elect our officers by a general membership vote and one of them elects board members by a

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general membership vote, we felt that the only safe way to proceed was to obtain a vote of the entire membership. This will be very time consuming and costly since the entire membership never responds to anything! It will probably involve several proxy mailings followed by individual phone calls to each member.

A mail vote like this will not give the members an opportunity to appear at a meeting, ask questions and voice concerns in a give and take discussion. Unfortunately, a mail vote requires them to act only on the basis of information we provide to them through the mail.

We believe most nonprofit boards make every effort to accurately represent the interests of their members. If they do not, the members will not remain a part of the organization. If a merger were affected that did not meet with member approval, they would simply cease paying dues to the organization.

We have not had time to analyze the other 49 states' requirements for merger of two nonprofit corporations. We do know that five other state Independent Insurance Agent and Professional Insurance Agent associations have already merged and that none of them had to have a vote of the entire membership of each association. Whether they simply formed a new corporation without dissolving the old to circumvent the statute, ignored it or had a different law, we are not certain. We also suspect that the Kansas law was simply patterned after a similar Delaware statute with very little discussion or debate. Mergers of nonprofit associations are relatively uncommon and ours is probably the largest to come along in quite awhile.

We are committed to moving ahead with the merger regardless of whether this legislation passes. We are also convinced we will obtain

the necessary number of positive votes, but would like to avoid the time and expense that will require. For that reason, we urge the committee to act favorably on SB 627. We would be happy to answer questions or provide any additional information the committee would like.

GEHRT & ROBERTS, CHARTERED

ATTORNEYS AT LAW
5601 SW BARRINGTON COURT SOUTH
P.O. BOX 4306
TOPEKA, KANSAS 66604
(913) 273-7722
FAX # (913) 273-8560
ID # 48-0992424

FLOYD E. GEHRT
ROBERT L. ROBERTS
WILLIAM A. LARSON
WILLIAM W. SNEED
GREGORY A. LEE
CRAIG C. BLUMREICH
RON D. MARTINEK
BRIAN G. BOOS
MATTHEW S. CROWLEY

ASSOCIATED COUNSEL
HARLAND K. RIEGER

January 2, 1992

Larry Magill
Independent Insurance Agents of Kansas
815 Topeka Avenue
Topeka, Kansas 66612

Re: IIAK - PIA Merger

Dear Larry:

I have had a chance to do some preliminary research on the potential consolidation or merger of PIA and IIAK. I'm enclosing a copy of K.S.A. 17-6705, K.S.A. 17-6712 and K.S.A. 17-6505. Generally, K.S.A. 17-6705 governs the merger or consolidation of nonstock, nonprofit corporations. I am assuming that IIAK and PIA are indeed nonstock, nonprofit corporations.

The basic procedure for a merger or consolidation is outlined under K.S.A. 17-6705. The governing board of the corporations that desire to either merge or consolidate must enter into an agreement of merger or consolidation. The difference between merger and consolidation is that under a merger one corporation is merged into the other, whereas in a consolidation the corporations are consolidated and new articles of incorporation are promulgated. In my view, a merger would be somewhat less expensive than a consolidation. For one thing, if the corporations merged it would be possible to use the articles of incorporation of the surviving corporation with whatever changes are necessary rather than having to prepare new articles of incorporation for a consolidated corporation. There are also various other formalities that would have to be accomplished for a new consolidated corporation. Furthermore, it might simpler tax-wise. It is possible that with a consolidation the new corporation would have to reapply for tax exempt status under 501(c)(6) of the Internal Revenue Code. I understand that you will talk with your accountants concerning this issue. If you decided to do a merger rather than a consolidation, it is of course always possible to change the name of the corporation into which the other corporation is merged. This is a very simple procedure.

The agreement to merge or consolidate has to include the five specific items set forth in K.S.A. 17-6705(b). In order to prepare an agreement for merger or consolidation I would have to get together with the boards or their respective representatives to hammer out the details of the agreement. Probably item four which refers to the manner of converting the memberships of each constituent corporation to the membership of the surviving or consolidated corporation will be the most critical of the requirements to be determined. After briefly reviewing the by-laws of both corporations, it seems to me to be obvious that new by-laws would also have to be prepared.

Once the agreement is reached, it must be approved at either an annual meeting or a special meeting of each constituent corporation.

K.S.A. 17-6705 provides that to approve the merger or consolidation a two thirds vote of the members who have a right to vote for the governing bodies of the associations is required. There are a couple of points concerning this requirement that are not absolutely clear in reading the applicable statute and in reviewing the by-laws of the associations.

The PIA by-laws provide that the members have the right to vote for the board of directors, so it seems to be fairly clear to me that with respect to the PIA, the two thirds requirement would apply to the membership at large.

The IIAK by-laws are far more complicated. The association is governed by a board of governors consisting of 17 members which include the president, president elect, vice president, secretary, treasurer, state national director, immediate past president, six zone directors, three members representing the membership at large and the president of the Kansas Young Agents committee. The majority of the officers are elected by the membership at large while the remainder of the officers and directors are appointed by either the president or the president elect. Consequently, a portion of the governing body is elected by the membership and a portion is appointed by officers elected by the membership.

K.S.A. 17-6705 does not contemplate this sort of situation. The statute provides that where the membership has the right to vote for the governing body of the association, a two thirds vote of the membership is required to approve the merger. It also states that where no members of the association have the right to vote for the governing body, and where the governing body is elected by the governing body itself, a two thirds vote of the governing body is sufficient to approve a merger or consolidation. After considering the issue at some length, we've come to the conclusion that the only safe way to approve the merger and consolidation for the IIAK is to obtain a two thirds vote from the membership because clearly some of the members do elect some of the governing body of the association, and those who are appointed are appointed by elected members of the governing body.

The other issue with respect to the two thirds requirement is whether the two thirds requirement applies to the entire membership or simply a quorum of the membership. K.S.A. 17-6705(c) seems to state that two thirds of the entire membership is required. The point is not entirely clear, however. The comments to K.S.A. 17-6705 refer to K.S.A. 17-6505, which I have also enclosed. Under K.S.A. 17-6505, one third of the voting membership of a nonstock corporation constitutes a quorum for the transaction of business. The by-laws can, and in this case do, provide for a quorum of less than one third of the membership. The approval of various actions by the membership requires a majority vote of a quorum unless the action for which approval is sought is governed by a statute which requires a larger number. In this case it could be argued that the two thirds requirement in K.S.A. 17-6705 simply refers to a two thirds quorum as allowed under K.S.A. 17-6505 as opposed to a two thirds vote of the entire membership of both associations.

There are no cases in Kansas addressing whether you need a two thirds vote of the membership or a two thirds vote of a quorum in order to comply with the requirement of K.S.A. 17-6705(c). However, K.S.A. 17-6705 appears to have been modeled from a Delaware statute, and it is possible that we could find some case law in Delaware or other states that have modeled their statutes after Delaware that might give us some guidance on this point. It strikes me that it would be a lot easier to obtain approval of the merger or consolidation if we only needed a two thirds vote of a quorum. We will look into this issue and see what we can find. As it stands now, however, my reading of the statute is that we need a two thirds vote of the entire membership.

To go on with the procedure, after the agreement is reached and the date of the annual or special meeting is set, you must provide notice to each member at least 20 days prior to the date of the meeting. Assuming a two thirds vote is obtained, the agreement, or alternatively, a certificate of merger or consolidation, as authorized by K.S.A. 17-6701(c), must be filed with the Secretary of State and the proper filing fees paid. The certificate or agreement must also be filed with the Register of Deeds in the counties in which the registered agents for service of process of the corporations are located.

I'm enclosing a copy of K.S.A. 17-6712 because that statute applies to nonstock as well as stock corporations. In order to comply with K.S.A. 17-6712, after the certificate of merger is approved and filed, you must within ten days notify any member of either association who has objected in writing and has voted against the merger or consolidation, that the merger or consolidation has become effective. If any member, within 20 days after the date of mailing the notice, makes demand in writing, the merged or new corporation must pay to the member the value of the member's membership. There is a procedure for judicially determining the value of the dissenting member's membership in the event an agreement cannot be reached.

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This is a rather difficult statute to comply with or to interpret for nonstock corporations since it is basically enacted to apply to stock corporations, but by definition has been expanded to nonstock corporations. In my view the only monetary value to a membership in IIAK or PIA would be a prorated portion of the dues, assuming the dues are collected on an annual basis. For example, if a member pays all of his dues in 1992 in January, and the merger or consolidation becomes effective in April, any member who has objected in writing and voted against the consolidation or merger may make a demand within 20 days after the merger became effective and presumably would be entitled to a proportionate refund of his dues. Under this statute a member would obviously forfeit his membership if he made such a demand. I have no idea whether any members of either IIAK or PIA would be so upset with a merger or consolidation that they would file a demand pursuant to this statute, but the notification as to the effective date of the merger or consolidation must be sent out to dissenting members who have objected in writing in order to comply with the law.

You also brought up the issue of what to do with the for profit subsidiaries of both associations. It would of course be possible to go through a merger or consolidation procedure with the for profit subsidiaries as well. I believe, however, it would be much simpler to have one of the for profit subsidiaries purchase the stock of the other and then change the name of the for profit subsidiary, if necessary. If you do a merger rather than a consolidation, the for profit subsidiary of the association within which the other is merged should be the one that purchases the stock. If you do a consolidation, the situation would be somewhat more complicated, but could probably still be accomplished with a stock purchase agreement of some sort. I might add that this might be another reason that a merger might be a little less complicated and expensive.

Please let me know if you have any questions about the basic procedures for merger and consolidation as I have outlined. In the meantime I will try to see if we can find any case law on this two thirds requirement that might simplify it for the corporations. I will look forward to hearing from you. Thank you.

Very truly yours,

GEHRT & ROBERTS, CHARTERED

William A. Larson

WAL/js
encl.

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Civil Rights v. Service Envelope Co., 233 K. 20, 25, 660 P.2d 549 (1983).

17-6710. Issuance of stock, bonds, securities and other obligations by corporation surviving or resulting from merger or consolidation. When two or more corporations are merged or consolidated, the corporation surviving or resulting from the merger or consolidation may issue bonds or other obligations, negotiable or otherwise, and with or without coupons or interest certificates thereto attached, to an amount sufficient with its capital stock to provide for all the payments it will be required to make, or obligations it will be required to assume, in order to effect the merger or consolidation. For the purpose of securing the payment of any such bonds and obligations, it shall be lawful for the surviving or resulting corporation to mortgage its corporate franchise, rights, privileges and property, real, personal or mixed. The surviving or resulting corporation may issue certificated or uncertificated shares of its capital stock and other securities to the stockholders of the constituent corporations in exchange or payment for the original shares, in such amount as shall be necessary in accordance with the terms of the agreement of merger or consolidation in order to effect such merger or consolidation in the manner and on the terms specified in the agreement.

History: L. 1972, ch. 52, § 88; L. 1973, ch. 100, § 8; L. 1986, ch. 399, § 13; July 1.

Source or prior law:

17-3709.

KANSAS COMMENT

This section, Delaware § 260 and former K.S.A. 17-3709 are nearly identical in enumerating certain general powers of a corporation surviving a merger or resulting from a consolidation of corporations.

Cross References to Related Sections:

Power of corporation to deal in securities of other corporations, see 17-6103.

Stock and dividends, see ch. 17, art. 64.

Conferral of voting rights on holders of corporation's bonds, debentures or other obligations, see 17-6511.

Sale, lease or exchange of corporation's property and assets, see 17-6801.

Mortgage or pledge of corporation's property and assets, see 17-6802.

Defense of usury not available to corporation in enforcing payment of any bond, note or other evidence of indebtedness, see 17-7105.

Research and Practice Aids:

Corporations ⇐ 587, 588.

C.J.S. Corporations §§ 1610, 1627, 1628.

17-6711. Effect of merger or consolidation on pending actions. Any action or proceeding, whether civil, criminal or administrative, pending by or against any corporation which is a party to a merger or consolidation shall be prosecuted as if such merger or consolidation had not taken place, or the corporation surviving or resulting from such merger or consolidation may be substituted in such action or proceeding.

History: L. 1972, ch. 52, § 89; July 1.

Source or prior law:

17-3708.

KANSAS COMMENT

This section is identical to Delaware § 261, which is substantially the same as former K.S.A. 17-3708. These sections have the effect of saving pending actions by or against a corporation which is a party to a merger or consolidation.

Cross References to Related Sections:

Effect of dissolution on pending actions, see 17-6811.

Substitution of trustee or receiver as plaintiff in pending actions, see 17-6909.

Actions against corporations, directors, officers or stockholders, see ch. 17, art. 71.

Effect of code on pending actions, see 17-7403.

Research and Practice Aids:

Corporations ⇐ 591.

C.J.S. Corporations § 1631 et seq.

17-6712. Payment for "stock" of "stockholder" objecting to merger or consolidation; "stockholder," "stock" and "share" defined; notice to objecting stockholders; demand for payment; appraisal and determination of value by district court, when; taxation of costs; rights of objecting stockholders; status of stock; section inapplicable to certain shares of stock. (a) When used in this section, the word "stockholder" means a holder of record of stock in a stock corporation and also a member of record of a nonstock corporation; the words "stock" and "share" mean and include what is ordinarily meant by those words and also membership or membership interest of a member of a nonstock corporation.

(b) The corporation surviving or resulting from any merger or consolidation, within 10 days after the effective date of the merger or consolidation, shall notify each stockholder of any corporation of this state so merging or consolidating who objected thereto in writing and whose shares either were not entitled to vote or were not voted in favor of the merger or consolidation, and who filed such written objection with the corporation before the taking of the vote on the merger or consolidation,

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that the merger or consolidation has become effective. If any such stockholder, within 20 days after the date of mailing of the notice, shall demand in writing, from the corporation surviving or resulting from the merger or consolidation, payment of the value of the stockholder's stock, the surviving or resulting corporation shall pay to the stockholder, within 30 days after the expiration of the period of 20 days, the value of the stockholder's stock on the effective date of the merger or consolidation, exclusive of any element of value arising from the expectation or accomplishment of the merger or consolidation.

(c) If during a period of 30 days following the period of 20 days provided for in subsection b), the corporation and any such stockholder ail to agree upon the value of such stock, any uch stockholder, or the corporation surviving r resulting from the merger or consolidation, nay demand a determination of the value of ne stock of all such stockholders by an appraiser or appraisers to be appointed by the istrict court, by filing a petition with the court vithin four months after the expiration of the hirty-day period.

(d) Upon the filing of any such petition by stockholder, service of a copy thereof shall e made upon the corporation, which shall file ith the clerk of such court, within 10 days fter such service, a duly verified list containg the names and addresses of all stockholders ho have demanded payment for their shares d with whom agreements as to the value of eir shares have not been reached by the corporation. If the petition shall be filed by the rporation, the petition shall be accompanied such duly verified list. The clerk of the urt shall give notice of the time and place ed for the hearing of such petition by regered or certified mail to the corporation and the stockholders shown upon the list at the dresses therein stated and notice shall also given by publishing a notice at least once, least one week before the day of the hearing, a newspaper of general circulation in the unty in which the court is located. The court y direct such additional publication of notice it deems advisable. The forms of the notices mail and by publication shall be approved the court..

(e) After the hearing on such petition the urt shall determine the stockholders who ve complied with the provisions of this secn and become entitled to the valuation of d payment for their shares, and shall appoint an appraiser or appraisers to determine such value. Any such appraiser may examine any of the books and records of the corporation or corporations the stock of which such appraiser is charged with the duty of valuing, and such appraiser shall make a determination of the value of the shares upon such investigation as seems proper to the appraiser. The appraiser or appraisers shall also afford a reasonable opportunity to the parties interested to submit to the appraiser or appraisers pertinent evidence on the value of the shares. The appraiser or appraisers, also, shall have the powers and authority conferred upon masters by K.S.A. 60-253 and amendments thereto.

(f) The appraiser or appraisers shall determine the value of the stock of the stockholders adjudged by the court to be entitled to payment therefor and shall file a report respecting such value in the office of the clerk of the court, and notice of the filing of such report shall be given by the clerk of the court to the parties in interest. Such report shall be subject to exceptions to be heard before the court both upon the law and facts. The court by its decree shall determine the value of the stock of the stockholders entitled to payment therefor and shall direct the payment of such value, together with interest, if any, as hereinafter provided, to the stockholders entitled thereto by the surviving or resulting corporation. Upon payment of the judgment by the surviving or resulting corporation, the clerk of the district court shall surrender to the corporation the certificates of shares of stock held by the clerk pursuant to subsection (g). The decree may be enforced as other judgments of the district court may be enforced, whether such surviving or resulting corporation be a corporation of this state or of any other state.

(g) At the time of appointing the appraiser or appraisers, the court shall require the stockholders who hold certificated shares and who demanded payment for their shares to submit their certificates of stock to the clerk of the court, to be held by the clerk pending the appraisal proceedings. If any stockholder fails to comply with such direction, the court shall dismiss the proceedings as to such stockholder.

(h) The cost of any such appraisal, including a reasonable fee to and the reasonable expenses of the appraiser, but exclusive of fees of counsel or of experts retained by any party, shall be determined by the court and taxed upon the parties to such appraisal or any of them as appears to be equitable, except that

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the cost of giving the notice by publication and by registered or certified mail hereinabove provided for shall be paid by the corporation. The court, on application of any party in interest, shall determine the amount of interest, if any, to be paid upon the value of the stock of the stockholders entitled thereto.

(i) Any stockholder who has demanded payment of the stockholder's stock as herein provided shall not thereafter be entitled to vote such stock for any purpose or be entitled to the payment of dividends or other distribution on the stock, except dividends or other distributions payable to stockholders of record at a date which is prior to the effective date of the merger or consolidation, unless the appointment of an appraiser or appraisers shall not be applied for within the time herein provided, or the proceeding be dismissed as to such stockholder, or unless such stockholder with the written approval of the corporation shall deliver to the corporation a written withdrawal of the stockholder's objections to and an acceptance of the merger or consolidation, in any of which cases the right of such stockholder to payment for the stockholder's stock shall cease.

(j) The shares of the surviving or resulting corporation into which the shares of such objecting stockholders would have been converted had they assented to the merger or consolidation shall have the status of authorized and unissued shares of the surviving or resulting corporation.

(k) This section shall not apply to the shares of any class or series of a class of stock, which, at the record date fixed to determine the stockholders entitled to receive notice of and to vote at the meeting of stockholders at which the agreement of merger or consolidation is to be acted on, were either (1) registered on a national securities exchange, or (2) held of record by not less than 2,000 stockholders, unless the articles of incorporation of the corporation issuing such stock shall otherwise provide; nor shall this section apply to any of the shares of stock of the constituent corporation surviving a merger, if the merger did not require for its approval the vote of the stockholders of the surviving corporation, as provided in subsection (f) of K.S.A. 17-6701 and amendments thereto. This subsection shall not be applicable to the holders of a class or series of a class of stock of a constituent corporation if under the terms of a merger of consolidation pursuant to K.S.A. 17-6701 or 17-6702, and amendments thereto, such holders are required to accept for such stock anything except (i) stock or stock and cash in lieu of fractional shares of the corporation surviving or resulting from such merger or consolidation, or (ii) stock or stock and cash in lieu of fractional shares of any other corporation, which at the record date fixed to determine the stockholders entitled to receive notice of and to vote at the meeting of stockholders at which the agreement of merger or consolidation is to be acted on, were either registered on a national securities exchange or held of record by not less than 2,000 stockholders, or (iii) a combination of stock or stock and cash in lieu of fractional shares as set forth in (i) and (ii) of this subsection.

History: L. 1972, ch. 52, § 90; L. 1973, ch. 100, § 9; L. 1986, ch. 399, § 14; July 1.

Source or prior law:
17-3707a.

KANSAS COMMENT

Section 17-6712 is a combination of the provisions of § 262 of the Delaware code and former K.S.A. 17-3707a, which set forth the rights of dissenting stockholders in corporations merging or consolidating. The provisions of this section can be summarized as follows:

(1) Subsection (a) is identical to the Delaware provision; former 17-3707a did not contain any provisions which defined "stockholder," "stock" and "share" so as to make these terms applicable throughout the section to non-stock as well as stock corporations.

(2) Subsection (b) is nearly identical to the corresponding subsection of Del. § 262. It reverses, to some extent, the requirements of the first paragraph of 17-3707a with respect to the burden of initiating the procedure for paying a dissenting stockholder for the value of his stock. The prior Kansas statute placed the burden upon the dissenting stockholder to initially make the requisite written demand upon the corporation surviving or resulting from any merger or consolidation, while subsection (b) requires that prior to any such stockholder being obligated to make demand for payment, such surviving or resulting corporation must give notice to dissenting stockholders that the merger or consolidation has become effective. There is no change from prior law, however, with respect to the procedure for making such demand and the time frames with respect thereto, but it should be noted that a dissenting stockholder under subsection (b) includes a stockholder who did not have the right to vote for the merger or consolidation, as well as a stockholder who did not vote for the proposition. A dissenting stockholder under 17-3707a was one who had the right to vote for the merger or consolidation but who did not vote in favor thereof.

(3) Under Del. § 262 (c), where there is disagreement as to the value of stock, the dissenting stockholder or the corporation may petition the court within four months after the expiration of the time for payment stated in subsection (b) and demand the determination of the value of the stock of all such stockholders by an appraiser. The corresponding provision in the 1939 code was quite similar, but the time

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C.J.S. Business Trusts § 11; Corporations § 1605 et seq.; Joint Stock Companies § 48.

17-6705. Merger or consolidation of domestic nonstock, nonprofit corporations. (a) Any two or more nonstock, nonprofit corporations of this state may merge into a single corporation, which may be any one of the constituent corporations, or they may consolidate into a new nonstock, nonprofit corporation formed by the consolidation, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section.

(b) The governing body of each corporation which desires to merge or consolidate shall adopt a resolution approving an agreement of merger or consolidation. The agreement shall state: (1) The terms and conditions of the merger or consolidation; (2) the mode of carrying the same into effect; (3) such other provisions or facts required or permitted by this act to be stated in articles of incorporation for nonstock, nonprofit corporations as can be stated in the case of a merger or consolidation, stated in such altered form as the circumstances of the case require; (4) the manner of converting the memberships of each of the constituent corporations into memberships of the corporation surviving or resulting from the merger or consolidation; and (5) such other details or provisions as are deemed desirable. Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation.

(c) The agreement shall be submitted to the members of each constituent corporation who have the right to vote for the election of the members of the governing body of their corporation, at an annual or special meeting thereof for the purpose of acting on the agreement. Due notice of the time, place and purpose of the meeting shall be mailed to each member of each such corporation who has the right to vote for the election of the members of the governing body of such corporation, at the member's address as it appears on the records of the corporation, at least 20 days prior to the date of the meeting. The notice shall contain a copy of the agreement or a brief summary thereof, as the governing body shall deem advisable. At the meeting the agreement shall be considered and a vote by ballot, in person or by proxy, taken for the adoption or rejection of the agreement, each member who has the right to vote for the election of the members of the governing body of his corporation being entitled to one vote. If the votes of 2/3 of the total number of members of each such corporation who have the voting power above mentioned shall be for the adoption of the agreement, then that fact shall be certified on the agreement by the officer of each such corporation performing the duties ordinarily performed by the secretary or assistant secretary of a corporation, under the seal of each such corporation. The agreement so adopted and certified shall be executed, acknowledged and filed, and shall become effective, in accordance with K.S.A. 17-6003, and amendments thereto. It shall be recorded in the office of the register of deeds of the county in this state in which the registered office of each such constituent corporation is located; or if any of the constituent corporations shall have been specially created by act of the legislature, then the agreement shall be recorded in the county where such corporation had its principal place of business in this state. The provisions set forth in the last sentence of subsection (c) of K.S.A. 17-6701, and amendments thereto, shall apply to a merger under this section, and the reference therein to "stockholder" shall be deemed to include "member" hereunder.

(d) If, under the provisions of the articles of incorporation of any one or more of the constituent corporations, there shall be no members who have the right to vote for the election of the members of the governing body of the corporation other than the members of that body themselves, the agreement duly entered into as provided in subsection (b) shall be submitted to the members of the governing body of such corporation or corporations, at a meeting thereof. Notice of the meeting shall be mailed to the members of the governing body in the same manner as is provided in the case of a meeting of the members of a corporation. If at the meeting ⅔ of the total number of members of the governing body shall vote by ballot, in person, for the adoption of the agreement, that fact shall be certified on the agreement in the same manner as is provided in the case of the adoption of the agreement by the vote of the members of a corporation; thereafter, the same procedure shall be followed to consummate the merger or consolidation.

(e) The provisions of subsection (e) of

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S.A. 17-6701, and amendments thereto, all apply to a merger under this section.

(f) Nothing in this section shall be deemed authorize the merger of a charitable non-ock corporation into a nonstock corporation such charitable nonstock corporation would ereby have its charitable status lost or im-ired, but a nonstock corporation may be erged into a charitable nonstock corporation nich shall continue as the surviving rporation.

History: L. 1972, ch. 52, § 83; L. 1988, . 99, § 43; Revived and amend., L. 1988, . 100, § 43; May 5.

KANSAS COMMENT

3y virtue of K.S.A. 17-2904, private Kansas corporations organized for profit (stock or non-stock) were subject the applicable provisions of the 1939 corporation code ulating corporations organized for profit. Thus 17-3701 seq. governed the merger or consolidation of non-stock, profit corporations, as well as stock corporation orga-ed for profit. Delaware, however, makes special pro-ion (U255) for the merger or consolidation of domestic -stock, nonprofit corporations, and 17-6705 is nearly ntical to that provision.

The procedure prescribed by this section is quite similar the procedure for merging or consolidating other do-stic corporations. One notable exception is that this tion requires a two-thirds vote in favor of the agreement merger or consolidation by the members of the non-ck, nonprofit corporation (or by the governing body reof, if no members are entitled to vote) for adoption the agreement. Also, there are no provisions in this tion corresponding to subsection (d) or (f) of section 17-1 but it should be noted that subsection (e) of 17-6701 applicable to a merger under this section.

oss References to Related Sections:

Effect of merger or consolidation of charitable corpo-ons or associations on gift, devise or bequest to one of ginal corporations or associations, see 17-1738.

Voting rights of members of non-stock corporations, see 6505.

Amendment of articles of incorporation, see 17-6602.

Fee for filing agreement of merger or consolidation, see 7506.

search and Practice Aids:

Corporations ⇐ 581 et seq.

C.J.S. Corporations § 1605 et seq.

17-6706. Merger or consolidation of do-estic and foreign nonstock, nonprofit cor-rations; service of process upon surviving resulting corporation. (a) Any one or more nstock, nonprofit corporations of this state y merge or consolidate with one or more her nonstock, nonprofit corporations of any her state or states of the United States or of District of Columbia, if the laws of such her jurisdiction permit a corporation of such jurisdiction to merge with a corporation of another jurisdiction. The constituent corporations may merge into a single corporation, which may be any one of the constituent corporations, or they may consolidate into a new nonstock, nonprofit corporation formed by the consolidation, which may be a corporation of the state of incorporation of any one of the constituent corporations, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section. In addition, any one or more nonstock, nonprofit corporations organized under the laws of any jurisdiction other than one of the United States may merge or consolidate with one or more nonstock, nonprofit corporations of this state if the surviving or resulting corporation will be a corporation of this state, and if the laws under which the other corporation or corporations are formed permit a corporation of such jurisdiction to merge with a corporation of another jurisdiction.

(b) All the constituent corporations shall enter into an agreement of merger or consolidation. The agreement shall state: (1) The terms and conditions of the merger or consolidation; (2) the mode of carrying the same into effect; (3) the manner of converting the memberships of each of the constituent corporations into memberships of the corporation surviving or resulting from such merger or consolidation; (4) such other details and provisions as shall be deemed desirable; and (5) such other provisions or facts as shall then be required to be stated in articles of incorporation by the laws of the state which are stated in the agreement to be the laws that shall govern the surviving or resulting corporation and that can be stated in the case of a merger or consolidation. Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation.

(c) The agreement shall be adopted, approved, executed and acknowledged by each of the constituent corporations in accordance with the laws under which it is formed and, in the case of a Kansas corporation, in the same manner as is provided in K.S.A. 17-6705, and amendments thereto. The agreement shall be filed and recorded and shall become effective for all purposes of the laws of this state when and as provided in K.S.A. 17-6705, and amend-

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Source or prior law:

17-3303.

KANSAS COMMENT

Section 17-6504 is a recodification of 17-3303, which made it mandatory that cumulative voting be afforded each stockholder at all elections of directors. Section 214 of the Delaware code, making cumulative voting permissive only, was rejected because it does not afford adequate protection to minority stockholders.

Revisor's Note:

Section inapplicable to corporations not authorized to issue stock, see 17-6505.

Cross References to Related Sections:

Voting provisions authorized for inclusion in articles of incorporation, see 17-6002 (b) (4).

Election of directors at organizational meeting, see 17-6008.

Board of directors, see 17-6301.

Voting rights of holders of fractional shares, see 17-6405.

Conferral of voting rights on holders of corporation's bonds, debentures or other obligations, see 17-6511.

Research and Practice Aids:

Corporations ⇐ 200.

C.J.S. Corporations § 549.

Law Review and Bar Journal References:

Mandatory cumulative voting retained to afford more protection to minority stockholders in "The Kansas Corporation Code of 1972," William E. Treadway, 40 J.B.A.K. 301, 343 (1971).

17-6505. Voting rights of members of nonstock corporations; proxies; quorum; election of governing body; failure to hold election. (a) The provisions of K.S.A. 17-6501 to 17-6504 and K.S.A. 17-6506, and amendments thereto, shall not apply to corporations not authorized to issue stock.

(b) Unless otherwise provided in the articles of incorporation of a nonstock corporation, each member shall be entitled at every meeting of members to one vote in person or by proxy, but no proxy shall be voted after three (3) years from its date, unless the proxy provides for a longer period.

(c) Unless otherwise provided in this act, the articles of incorporation or bylaws of a nonstock corporation may specify the number of members having voting power who shall be present or represented by proxy at any meeting in order to constitute a quorum for, and the votes that shall be necessary for, the transaction of any business. In the absence of such specification in the articles of incorporation or bylaws of a nonstock corporation, 1/3 of the members of such corporation shall constitute a quorum at a meeting of such members, and the affirmative vote of a majority of such members present in person or represented by proxy at the meeting and entitled to vote on the subject matter shall be the act of the members, unless the vote of a greater number is required by this chapter, the articles of incorporation or bylaws.

(d) If the election of the governing body of any nonstock corporation shall not be held on the day designated by the bylaws, the governing body shall cause the election to be held as soon thereafter as convenient. The failure to hold such an election at the designated time shall not work any forfeiture or dissolution of the corporation, but the district court may summarily order such an election to be held upon the application of any member of the corporation. At any election pursuant to such order, the persons entitled to vote in such election who shall be present at such meeting, either in person or by proxy, shall constitute a quorum for such meeting, notwithstanding any provision of the articles of incorporation or the bylaws of the corporation to the contrary.

History: L. 1972, ch. 52, § 58; L. 1988, ch. 99, § 24; Revived and amend., L. 1988, ch. 100, § 24; May 5.

Source or prior law:

17-2904, 17-3304 and 17-3305.

KANSAS COMMENT

Subsections (a) and (b) of this section are similar to the provisions of former K.S.A. 17-3304 in providing for the voting rights of members of corporations not authorized to issue capital stock. Subsection (a) makes inapplicable to all non-stock corporations the provisions of sections 17-6501 to 17-6504, all relating to the voting rights of stockholders. The first sentence of 17-3304 was not as broad in scope, since it excluded from application to "nonprofit" corporations having no capital stock only the provisions of 17-3303 requiring cumulative voting.

Subsection (b) and the balance of 17-3304 are essentially the same in providing that without any provisions in the articles of incorporation to the contrary, members of non-stock corporations are entitled to one vote, either in person or by proxy, but proxies are limited to a duration of three years, unless otherwise stated therein.

Subsection (c) authorizes quorum requirements for meetings of the members of non-stock corporations to be set forth in the articles of incorporation or in the bylaws of the corporation. The quorum requirements, for both stock and non-stock corporations, were formerly contained in 17-3305, and are essentially the same as those contained in subsection (c). It should be noted that nearly identical quorum requirements for corporations authorized to issue capital stock are made in section 17-6505 of the new code. Also applicable to this discussion is former K.S.A. 17-2904, which permitted non-profit corporations to prescribe in the bylaws or articles of incorporation rules for ascertaining its membership, but if they were not so prescribed, only persons who were current on their dues could vote at meetings, either in person or by proxy.

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STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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

ROBERT T. STEPHAN
ATTORNEY GENERAL

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

TESTIMONY OF
MARK W. STAFFORD, ASSISTANT ATTORNEY GENERAL
SENATE SUB-COMMITTEE
ON CIVIL PROCEDURE

Re: 1992 Senate Bill No. 685
February 26, 1992

On behalf of Attorney General Robert T. Stephan, I would like to thank this committee for the opportunity to support Senate Bill No. 685. This clean-up bill was requested by our office to strengthen the telemarketing fraud statute enacted last session.

A telemarketer is a supplier who solicits by telephone, by postcard, or by other similar written notice sent through the mail. A verbal agreement made pursuant to a telemarketer's solicitation is not binding unless the consumer signs and returns a written contract. The telemarketer may not make or submit a charge to the consumer's credit card account until the telemarketer has received the contract.

The first clean-up measure requested is to delete references to "contracts" between telemarketers and consumers. We believe that the word "confirmation" more accurately describes the signed document which the consumer must return to the telemarketer. By referring to the document as a contract, issues arise as to whether the writing expresses the final and complete agreement between the parties. By referring to the document as a confirmation, disputes are avoided as to whether prior verbal representations or promises by the telemarketer are incorporated into or excluded from the document.

Additionally, we request that the contents of the confirmation be enlarged as indicated on line 23. There is an abundance of telephone boiler-room operations and mail service drops available which insulate suppliers from consumer contact. The amendment would require the telemarketer to give more accurate information to the consumer.

Exclusions from the telemarketing fraud statute appear at K.S.A. 1991 Supp. 50-673. Subsection (d) provides an exclusion for telemarketers who have a refund policy. This subsection virtually nullifies the act. A telephone solicitor who, in passing, states

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that there is a full 30 day refund guarantee is not subject to the act. The consumer likely will not see any of the essential terms in print, and the telephone caller may charge the consumer's credit card account. We request that this exclusion apply only to those who solicit in writing, and who describe the refund policy in the solicitation.

Finally, we request additional language to K.S.A. 1991 Supp. 50-675 so that the telemarketing fraud statute can be more effectively enforced by our office. The language in Senate Bill 685 would clarify that telemarketers who violate the statute have committed a prohibited act, and may face civil penalties and other enforcement measures. On page 3, line 17, the phrase "in violation of this act" should be added after the word "transaction" so that legitimate transactions are not made unlawful.

We ask for your support of Senate Bill 685, with the suggested amendment, as a means to protect consumers.

BEFORE THE SUBCOMMITTEE ON CIVIL PROCEDURE
OF THE SENATE JUDICIARY COMMITTEE

TESTIMONY IN OPPOSITION TO SENATE BILL NO. 685
February 26, 1992

Senate Bill No. 685, if adopted, would impose certain requirements on telemarketers which MCI considers unnecessary. Subsections (a), (b) and (c) of Sec. 2 generally do not apply to telemarketing of long distance services. MCI is specifically concerned with the language in Section 2(d) which would amend K.S.A. 1991 Supp. 50-673 so as to require that consumers receive written notice that they may receive a refund for return of goods or cancellation of service in order for the telemarketer to be exempt from the telemarketing fraud statutes. Absent such notice the consumer would not be obligated to pay for calls made, which invites fraud.

Consumers expect to be able to buy telephone service, both local but especially long distance service, by telephone. Requiring a written notice, as proposed in this bill, would only increase the cost to the consumer.

MCI has a telemarketing center in Wichita which employs several hundred people; about one-half of them part-time. The center markets MCI services nationwide. All sales are verified by an independent group, not located in Wichita, so as to remove any possibility of miscommunication or misunderstanding. Thus, consumers have every opportunity to change their minds.

Further, with respect to long distance service, consumers only pay for that which they use. They may have service from a particular carrier but not use it, in which case they are not billed. Thus the issue of a refund does not arise. The consumer may cancel long distance service any time, with no penalty and only be billed for calls made.

MCI strongly supports responsible telemarketing. MCI's Position Statement on Telemarketing and Consumer Safeguards are attached to my remarks.

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MCI Telecommunications
Corporation

MCI TELECOMMUNICATIONS CORPORATION POSITION STATEMENT ON RESPONSIBLE TELEMARKETING

Telemarketing is the use of the telephone to buy or sell goods and services; to raise support for a political or charitable cause; or to conduct an opinion or information survey.

Telemarketing is a valuable buying and marketing tool for both consumers and businesses. American consumers increasingly rely on telemarketing to learn about products and services and to purchase them. The growing importance of telemarketing reflects the critical importance of the telephone in contemporary family and business life.

Consumers and telemarketers have a strong and mutual interest in honest, accurate telemarketing. Fraud, abuse and annoyance are in no one's interest. MCI supports industry standards for telemarketers that will ensure that both consumers and businesses enjoy the benefits of responsible telemarketing.

HOW DO CONSUMERS BENEFIT FROM TELEMARKETING?

* **Telemarketing Is Convenient** -- Consumers save travel and time by doing business over the telephone.

* **Telemarketing Provides Information** -- Telemarketers provide valuable information about products and services. Personal contact with sales representatives permits customers to ask questions and get details of particular interest to them.

* **Telemarketing Promotes Competition** -- Telemarketing provides consumers more choice of products. Competition results in lower prices for customers.

* **Telemarketing Is Building The Economy** -- Telemarketing provides jobs for four million workers and provides opportunities for small and large businesses to provide goods and services.

THE BENEFITS OF TELEMARKETING TO BUSINESSES:

American businesses and organizations use telemarketing extensively. More than 500,000 American business, social and political organizations have found telemarketing to be a key tool to reach customers for the following reasons:

* Telemarketing provides a low-cost, efficient method to advertise and educate consumers, particularly for small companies or new businesses.

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* Telemarketing provides an outlet for businesses whose products are not sold in stores.

* Telemarketing can be absolutely crucial to small and emerging businesses. Without telemarketing, for example, MCI would not have been able to compete with AT&T's near-monopoly for residential long distance subscribers.

* Telemarketing provides political candidates and parties a low-cost way to reach citizens.

* Telemarketing helps community and charitable organizations raise public awareness about their issues, and generate essential funding.

MCI CONSUMER SAFEGUARDS

Consumers want and need protection from fraudulent and abusive telephone solicitation practices. Effective consumer safeguards also benefit legitimate businesses by weeding out irresponsible telemarketers. MCI has adopted the following safeguards to protect consumers:

DISCLOSURE/IDENTIFICATION:

All telemarketers should promptly disclose their company name (or a like form of identification) as well as the name of the person calling, and the primary purpose of the call.

HOURS OF CALLING:

Telemarketers should limit their calling hours to 9:00am to 9:00pm, Monday through Saturday, and 12:00 noon through 5:00pm on Sunday.

SEIZED LINES:

Some telemarketing calling equipment "seizes" the telephone line; that is, a recorded or computer generated message continues playing until it is finished, whether or not the called party has hung up. Telemarketers should not use such equipment, and should only use equipment which rapidly releases the line after the called party hangs up.

LIVE-OPERATOR VOICE:

Consumers resent being called by a computer generated voice or recorded message. Telemarketers should make initial contact with consumers by live operators only.

"NO CALL" LISTS:

Telemarketers should maintain "no-call" lists to insure that customers who do not want to be telemarketed are not called. To get on the "no call" list a customer should provide name, address and telephone number. The "no-call" listing should last one year and may be renewed at the request of the consumer.

UNLISTED NUMBERS:

A consumer who has an unlisted telephone number may not want to receive calls from a telemarketer. These consumers should ask the telemarketer to place their names on the "no-call" list as specified above.

SEQUENTIAL AND RANDOM DIALING:

Some telemarketers have used equipment which dials telephone numbers randomly or sequentially. As a result, some large offices with many sequential numbers complain because their business can be disrupted. In addition, hospitals, police stations, and emergency rooms can be interrupted by the sequential or random dialing of telemarketers. Therefore, telemarketers should be prohibited from using sequential or random dialing equipment.

VERIFICATION:

Telemarketers should establish and maintain verification processes to assure the legitimacy of all telemarketing sales. At a minimum, these standards should serve to verify the identity of the buyer and his or her agreement to purchase. Telemarketers should also implement procedures for internal monitoring to identify and correct human and mechanical errors.

REGISTRATION:

MCI supports reasonable registration requirements for telemarketers to assist action against illegal activities. Exemptions are appropriate when a business is already registered and/or regulated in the state.

ENFORCEMENT:

Appropriate penalties should be assessed against persons or businesses that employ fraudulent or deceptive telemarketing practices. State law enforcement agencies, or state agencies responsible for regulation of the goods or services sold by telemarketers, should be given the responsibility to bring enforcement actions against those committing illegal activities.

OCTOBER 1991

KANSAS
LEGISLATION OF POTENTIAL INTEREST TO MCI
as of February 21, 1992

S.B. 678	Provides for establishment of a Notification Center (voluntary membership). Excavators would be required to serve notice of intent on Center. Referred: Energy and Natural Resources
S.B. 685	Written notification of refund provisions required before telemarketing fraud provision of consumer protection act becomes inapplicable. Referred: Judiciary 2/26/92: Hearing in Subcommittee on Civil Procedure.
SCR 1635	Amends Constitution. Increases the tax rate on public utility real and personal property from 30% to 33%. Includes inventories as personal property. Referred: Assessment and Taxation
SCR 1636	Amends Constitution. Includes public utility inventories as personal property. Would only apply in counties with a population of more than 100,000 which adopt a resolution to that effect. Referred: Assessment and Taxation.
H.B. 2943	Imposes an excise tax on personal property inventories of merchants. Referred: Taxation
H.B. 2945	Imposes restrictions on pay-per-call services. Referred: Computers, Communication and Technology ~~2/26/92: Hearing~~ 3/2/92: Hearing, ~~Final Action~~
H.B. 3005	Establishes the public utility private enterprise review board which would determine whether a compelling public interest exists to allow the public utility to compete with private enterprise. Referred: Energy and Natural Resources
H.B. 3022	Expands extended area service concept; limits surcharge for optional EAS. Referred: Energy and Natural Resources
H.B. 3028	Requires providers of caller identification services to withhold display of caller's telephone number at caller's request. Referred: Computers, Communications, Technology 2/26/92: Hearing 3/2/92: Hearing. Final Action

Mike Reecht
State Director
Government Affairs
Kansas

Capitol Tower
400 SW 8th Street, Suite 301
Topeka, KS 66603
Phone (913) 232-2128

TESTIMONY OF MIKE REECHT ON BEHALF OF AT&T ON SENATE BILL 685 BEFORE THE SENATE JUDICIARY SUBCOMMITTEE

Mr. Chairman and Members of the Committee:

My name is Mike Reecht and I appear before you today on behalf of AT&T with regard to Senate Bill 685. AT&T opposes Senate Bill 685 in its current form.

AT&T sells its services and products through its national telemarketing operation. AT&T long distance can be provided to customers within one day of ordering the service. AT&T's discount plans such as ReachOut, Pro WATS or other long distance savings plans can likewise be available to customers on one day's notice.

I appeared before a Senate subcommittee last session on Senate Bill 133. SB 133 was passed into law after an amendment was adopted that is essentially the language contained in Senate Bill 685 on lines 4-12 excluding the italicized print.

Senate Bill 685 would require telemarketing firms like AT&T to initially contact potential customers via a postcard that specifies refund policies before a sale can be consummated.

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AT&T and other reputable telemarketers pride themselves on service to their customers. As part of that dedication to service, we make every effort to satisfy an unhappy customers's refund request. Unfortunately Senate Bill 685 seems to be a result of an unscrupulous telemarketer taking advantage of a consumer. I do not believe, that forcing legitimate telemarketing firms to alter their practices which would make it slower and more difficult for their customers to receive a service or product, is the answer.

The unscrupulous telemarketer will continue to operate as they wish while legitimate concerns will attempt to comply with the law. And the consumer will suffer.

AT&T does not approve of the practices Senate Bill 685 is trying to curb, however the language contained in lines 4-6 on page 3 of the bill is not the answer.

I urge you to reject this legislation, while directing the Attorney General and the legitimate telemarketing industry representatives to find acceptable solutions that provide safeguards to customers from disreputable companies, while at the same time not diminishing what consumers are able to obtain today.

TESTIMONY OF BOB W. STOREY
SENATE BILL NO. 685
SENATE JUDICIARY SUBCOMMITTEE

Mr. Chairman and Members of the Committee:

I represent Dehart & Darr Associates, Inc., a public relations firm in Washington, D.C., who in turn represents the Direct Marketing Association ("DMA").

My purpose in submitting this testimony to your committee is to oppose Senate Bill No. 685 in its present form.

During the last legislative session, DMA worked with the Attorney General's office and the legislature in attempting to regulate the unethical practices of some telemarketers whereby consumers are induced into entering into contracts for purchases of goods or services. In doing so, DMA helped with the drafting of the language now contained on page 3, subparagraph (d) lines 4-12, (excluding the italicized language) of Senate Bill No. 685.

DMA is one of the largest and oldest national trade associations serving the direct marketing industry. Members include the "Book of the Month Club" and "Record of the Month Club." As I am sure both you and the Attorney General's office are aware, the members of DMA do not use unethical or illegal means to induce consumers to purchase goods or services.

All members of DMA have full refund policies and have never refused a customer's request for a refund within or beyond the 30-day period.

The italicized language in lines 4-6 of Senate Bill 685 appears to be an attempt to catch those few unscrupulous and unethical firms who use telemarketing as a means of fraud.

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In our opinion, passage of Senate Bill No. 685 in its present form would <u>not</u> protect the consumer from these types of unethical telemarketing schemes but would certainly harm the majority of the industry who operate within the confines of the law.

Even a requirement that all telemarketers send written notice or confirmation stating that the consumer may obtain a full refund would not guarantee that the unscrupulous businesses would make such a refund--more than likely they would not.

On behalf of my client, I have visited with Mark Stafford in the Consumer Protection Division of the Attorney General's office and assured him that we will work with him in any way possible to help control the unethical practices described herein. Further, I have advised him that I will contact him within the next week to propose some language which might control the unethical practices.

My clients do not approve of the practices which Senate Bill No. 685 is attempting to correct. However, we honestly do not believe that the italicized language contained in lines 4-6 on page 3 of the bill is the answer.

We respectfully request that the bill in its present form be rejected and that we be given an opportunity to work with the Attorney General's office and the legislature in attempting to solve this problem.

Thank you for your consideration.