Approved: 3/3/97
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Tim Carmody at 3:30 p.m. on March 19, 1997 in Room 313--S of the Capitol.

All members were present except: Representative Phill Kline (excused)
Representative Mayans (excused)
Representative Powell, (excused)
Representative Wilk (excused)
Representative Sawyer (excused)

Committee staff present: Jerry Ann Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Jill Wolters, Revisor of Statutes
Jan Brasher, Committee Secretary

Conferees appearing before the committee: Kelly Feyh, Assistant Attoreny General, Criminal Division
Tuck Duncan, Kansas Wine and Spirits Wholesale Association
Judge John White, Alternative Sanctions Committee
Brian Farley, District Court Trustee, Douglas County
Dan Vopat, District Court Trustee, Third Judicial District
Ron Smith, Kansas Bar Association
Debra Perelman, National Conference of Commissioners on Uniform State Laws, written testimony only

Others attending: See attached list

The Chair called the meeting to order at 3:45.

The Chair opened the hearing on **SB 257.**

SB 257: Penalties for certain violations involving minors and alcoholic liquor and cereal malt beverages.

Kelly Feyh, Assistant Attorney General, Criminal Division, testified in support of **SB 257**. The conferee stated that this bill is a result of Attorney General Stovall's C.A.M.P.U.S. Task Force. The conferee stated that this bill will increase the penalties for the sale of alcoholic liquor and cereal malt beverages to minors. The conferee stated that this bill will also increase the penalty for licensees or permit holders who permit the consumption of alcoholic liquor or cereal malt beverages by a minor on premises where ever alcoholic beverages are sold. The conferee stated that the Task Force recommended the graduated penalties because there seems to be a correlation between the consumption of such beverages and problems on college campuses. The conferee stated that there is a technical error in the bill in that Section 1, line 22 should read "upon a second or subsequent conviction" rather than "upon a second conviction." (Attachment 1)

The conferee discussed in addition to the penalties for a class B person misdemeanor there should be a minimum fine referring to page 1, line 27. The conferee stated that the purpose of this bill is to act as a deterrent.

Tuck Duncan, Kansas Wine and Spirits Wholesale Association testified in support of **SB 257** with the addition of an amendment. The conferee stated that there should be some element of "scienter," knowledge or intent relevant to the crime. The conferee referred to K.S.A. 41-2615(a) and requested that the words "or unknowingly" be deleted. The conferee stated that in reviewing this bill there seems to be mixed definitions in this bill. The conferee stated that in some places in the bill the word "minor" is used and in other places the words "persons not of lawful age." The conferee stated that he thought the language should consistently refer to persons who have not obtained the legal drinking age. (Attachment 2)

The Chair referred to written testimony in support of **SB 257** from MADD. (Attachment 3)

SB 73: Income withholding for criminal costs as a condition of probation or upon violation of a condition of probation.

Judge John White, District Judge from Iola, Kansas testified in support of **SB 73** on behalf of the Alternative Sanctions Committee of the Supreme Court. The conferee stated that this bill will provide for wage withholding for enforcement purposes in criminal cases. The conferee stated that this bill was proposed due to a Senate Resolution to determine alternative sanctions. The conferee stated that the Sanctions Committee looked at alternative sanctions to address prison overcrowding, particularly in regard to probation revocations. The Committee found that all alternative sanctions options currently used by other states were already being used in Kansas. The conferee stated that failure to make court-ordered payments ranks second in frequency of violations. (Attachment 4) The conferee referred to a chart showing restitution/court debt owed, as of July 1996. (Attachment 5)

In response to the Chair's inquiry, Judge White stated that there is a limitation provided in the bill as determined by the Child Support Act. The Committee members discussed with the conferee whether this bill could remove the incentive to work. The conferee commented that a condition of probation is to get a job.

Brian Farley, District Court Trustee in Douglas County, testified in support of **SB 73** and **HB 2486**. The conferee requested that **HB 2486** be amended into **SB 73**. The conferee stated that the inclusion of **HB 2486** allow District Court Trustees to participate in the bidding process for the collection of restitution and court costs. The conferee stated that the Attorney General advised all interested parties that district court trustees could not bid on contracts under K.S.A. 75-719 because there was no enabling legislation for those types of collections. (Attachment 6)

In answer to the Chair's question, Mr. Farley stated that there would not be a conflict of interest because there are laws on how money is to be allocated and child support is first priority.

Dan Vopat, District Court Trustee, Third Judicial District, testified in support of **SB 73**. The conferee requested amending **HB 2473** and **HB 2486** into **SB 73**. The conferee stated that those bills would give the DCT program the additional statutory authority needed to enforce criminal cost recovery for the State of Kansas. (Attachment 7)

The Committee members discussed with the conferee the applicability of federal regulations.

The Chair closed the hearing on **SB 73**

The Chair opened the hearing on **SB 8**.

SB 8: Enacting the uniform fraudulent transfers act

Ron Smith, Kansas Bar Association testified in support of **SB 8**. The conferee stated that **SB 8**(UFTA) affects primarily debtor-creditor transfers. The conferee stated that this bill will help to prevent the defrauding of creditors. The conferee stated that changing to the Uniform Act creates two principal benefits in Kansas: (1) lawyers can use the case law of other states with the UFTA to help construe the act her; and (2) it changes our debtor-creditor law to more closely mirror changes already found in the federal bankruptcy code. (Attachment 8)

Debra Perelman, National Conference of Commissioners on Uniform State Laws provided written testimony in support of **SB 8**. The testimony discusses the purpose of the bill as providing a creditor with the capacity to procure assets a debtor has transferred to another person in an attempt to keep them from being used to satisfy the debt. (Attachment 9)

An excerpt from the Report of the Special Committee on Judiciary referring to UFTA was provided to the Committee members. (Attachment 10)

The Chair closed the hearing on **SB 8**.

The Chair adjourned the meeting at 4:45 p.m.

The next meeting is scheduled for March 20, 1997.

HOUSE JUDICIARY COMMITTEE COMMITTEE GUEST LIST

DATE: 3-19-97

NAME	REPRESENTING
DAVID TALLMAN	KS BAR ASSN
Brian Farley	Douglas County District Court
Mark Gleeson	OJA
John W. White	Kansas Judges - OJA
Jerry Sloan	OJA
Kelly Feyh	AG office
Julene Masku	AG office
Dene Johnson	KS ASAP Assn
Gary Carter	KDOR
Heather Randall	Whitney Damron, PA
Danny J. Lopez	Shawnee County Dist. Ct. Trustee
Natalie Haas	BIDS
Rip Vaughan D. Vera	Rep

F1

State of Kansas

Office of the Attorney General

301 S.W. 10TH AVENUE, TOPEKA 66612-1597

CARLA J. STOVALL
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
FAX: 296-6296
TTY: 291-3767

HOUSE COMMITTEE ON JUDICIARY
ASSISTANT ATTORNEY GENERAL KELLY FEYH'S
TESTIMONY IN SUPPORT OF
SENATE BILL NO. 257

Mr. Chairman, members of the committee, thank you for the opportunity to testify in support of this bill.

Senate Bill No. 257 is a product of Attorney General Stovall's C.A.M.P.U.S. Task Force. As you may know, Attorney General Stovall created the C.A.M.P.U.S. Task Force, composed of public and private university and community college administrators; university and municipal police officers; students; parents; and various individuals involved in student assistance services and the criminal justice system, in order to bring awareness of campus safety issues to the forefront. The Task Force accomplished this with a series of meetings to share ideas and concerns. Those meetings resulted in specific recommendations, one of which is the amendment before you.

The Task Force discussed at length the issue of students using false identification to obtain cereal malt beverages and liquor. One of the Task Force recommendations was to provide for graduated penalties in K.S.A. 1996 Supp. 8-260 for a second or subsequent conviction of possession of a fictitious or falsified identification card. Consistent with that recommendation, and believing that the penalties for businesses that furnish cereal malt beverages and liquor to minors are not currently severe enough, the Task Force recommended the changes set forth in Senate Bill No. 257.

Senate Bill No. 257 would amend K.S.A. 21-3610 and K.S.A. 21-3610a to increase the penalties for the sale of alcoholic liquor and cereal malt beverages to minors. Currently, it is a class B

H Judiciary Attach #1
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person misdemeanor, punishable by a fine of $100 to $250 and a possible term of imprisonment in the county jail not to exceed six months, to furnish liquor or cereal malt beverages to a minor, regardless of how many prior offenses have occurred. Senate Bill No. 257 would provide for increased and graduated penalties, making it a class B person misdemeanor, punishable by a minimum fine of $500 and possible term of imprisonment in the county jail not to exceed six months for the first offense, and a class A person misdemeanor, punishable by a minimum fine of $1000 and possible imprisonment in the county jail not to exceed one year, for a second or subsequent offense. There is a technical error in the bill in that Section 1, line 22 should read "upon a second or subsequent conviction" rather than "upon a second conviction."

Senate Bill No. 257 would also amend K.S.A. 1996 Supp. 41-2615 to increase the penalty for licensees or permit holders (or owners, officers and employees thereof) who permit the consumption of alcoholic liquor or cereal malt beverages by a minor on premises where alcoholic beverages are sold. Upon a first offense, it would be a class B person misdemeanor, punishable by a minimum fine of $500 and/or a possible term of imprisonment not to exceed thirty days in the county jail. Upon a second or subsequent offense, the penalty would increase to a class A person misdemeanor, punishable by a minimum fine of $1000 and/or a possible term of imprisonment in the county jail not to exceed sixty days.

I appreciate your support of this bill. Thank you.

#2

K • A • N • S • A • S
WINE & SPIRITS
WHOLESALERS ASSOCIATION, INC.

March 19, 1997

To: House Judiciary Committee
From: R.E. "Tuck" Duncan
RE: SB ~~174~~ 257

I appear today in support of SB 257, which increases the penalties for selling alcoholic beverages to minors. However, we believe an amendment is necessary by striking two words, as follows:

"K.S.A. 41-2615. (a) no licensee or permit holder, or any owner, officer or employee thereof shall knowingly ~~or unknowingly~~ permit the possession or consumption of alcoholic liquor or cereal malt beverage by a minor on premises where alcoholic beverages are sold..."

The justification in eliminating the "or unknowingly" language is that the first conviction has a possible penalty of 30 days imprisonment and that a second or subsequent conviction has a possible penalty of 60 days imprisonment. Generally in the criminal law for a defendant to be found guilty of a particular crime there must be an element of "scienter". This is a knowledge of a state of facts which it was the defendants duty to guard against and defendant's omission to do so has lead to the injury complained of. When one's liberty is at risk, it should be so with knowledge of and intent to commit the prohibited act.

The Kansas Wine and Spirits Wholesalers Association is actively engaged in efforts to deter underage purchasing of beverage alcohol. Provided herewith are examples of materials that have been distributed this past year.

Thank you for your attention to and consideration to this matter.

House Judiciary Comm
Attach #2
3/19/97

214 S. W. 7TH STREET • TOPEKA, KANSAS 66603 • (913) 233-9370 • Fax 233-5659

H 3

MADD™

Mothers Against Drunk Driving

3601 SW 29th Street • Topeka, KS 66614 • (913) 271-7525 • 1 (800) 228-6233
KANSAS STATE OFFICE

WRITTEN TESTIMONY SUBMITTED TO THE HOUSE JUDICIARY COMMITTEE IN SUPPORT OF SENATE BILL 257

DURING 1994, KANSAS RECORDED 1,946 DUI ARRESTS AND 3,627 LIQUOR LAW VIOLATION ARRESTS OF INDIVIDUALS UNDER THE AGE OF 21. MORE THAN 549 DRINKING DRIVERS UNDER THE AGE OF 21 WERE INVOLVED IN ALCOHOL-RELATED CRASHES DURING 1994. THIRTEEN OF THE 549 DRIVERS WERE KILLED AND 223 WERE INJURED.

APPROXIMATELY 435 PASSENGERS AGES 15 - 19 WERE INVOLVED IN ALCOHOL-RELATED CRASHES WHILE RIDING WITH A DRINKING DRIVER DURING 1994. SIX OF THESE PASSENGERS WERE KILLED AND 189 WERE INJURED.

THE AVAILABILITY OF ALCOHOL TO MINORS DURING 1994 RESULTED IN A TOTAL OF 19 DEATHS AND MORE THAN 412 INJURIES TO DRINKING DRIVERS UNDER THE AGE OF 21 AND PASSENGERS AGES 15 - 19 RIDING WITH A DRINKING DRIVER. THESE STATISTICS DO NOT INCLUDE NONDRINKING DRIVERS AND THEIR PASSENGERS INVOLVED IN ALCOHOL-RELATED CRASHES, AS A RESULT OF DRINKING DRIVERS UNDER THE AGE OF 21.

THE ECONOMIC IMPACT IN TERMS OF 'SOCIETAL COSTS' FOR THESE DRINKING DRIVERS AND THEIR PASSENGERS, KILLED AND INJURED, EXCEEDED $24 MILLION DOLLARS DURING 1994. OVER 25% OF FIRST YEAR MEDICAL COSTS FOR PERSONS HOSPITALIZED AS A RESULT OF A CRASH ARE PAID BY TAX DOLLARS, ABOUT TWO-THIRDS THROUGH MEDICAID AND ONE-THIRD THROUGH MEDICARE.

KANSAS MADD ASKS YOUR SUPPORT FOR SENATE BILL 257.

SOURCE: - DUI arrests and Liquor Law Violation arrests - Kansas Bureau of Investigation (1995 & 1996 statistics are unavailable).
- Crash data - Kansas Bureau of Traffic Safety.
- Societal Cost data - National Highway Traffic Safety Administration
- Kansas MADD

House Judiciary Comm
Attach 3
2/19/97

#4

Senate Bill No. 73

Wage Withholding Orders In Criminal Cases

Summary of Testimony

John W. White
District Judge
Iola, KS.

Chair, Kansas Supreme Court
Alternative Sanctions Committee

House Judiciary Comm.
Attach #4
3/19/97

Senate Bill No. 73

Concerning wage withholding orders in criminal cases

To: House Judiciary Committee, Rep. Carmody, Chair;

I am appearing before the Committee in support of Senate Bill 73 - a bill that provides for wage withholding orders in criminal cases. The bill includes one of several legislative proposals introduced by the Special Committee on the Judiciary on recommendation of the Kansas Supreme Court's Alternative Sanctions Committee. S.B. 73 grants statutory authority for district courts to order employers to withhold specific sums of money from wages owed to criminal defendants. The amount withheld by employers is to be paid to the courts to be applied on court-ordered payments.

The purposes of the proposed legislation are twofold: (1) to assist the district courts in enforcement of conditions of probation, and (2) to assist in collection of money owed to the state's courts including court costs, fines, restitution to the victim, reimbursement for indigent counsel fees, and other costs.

The provisions of S.B. 73 are similar to the provisions of Kansas statutes relating to wage withholding orders in child support enforcement cases. Wage withholding orders have proved to be effective in enforcement of child-support orders. Enactment of S.B. 73 will provide the courts with an enforcement tool for collection of court-ordered payments and will reduce the time required for monitoring and enforcement of the payment order.

Present Kansas law encourages courts to order criminal defendants to pay restitution to the victims of their crimes. Courts also routinely order defendants to pay court costs, counsel fees, restitution, and other court-ordered payments. Few defendants are financially able to pay the full amount ordered for costs and fees at the time of

sentencing. As a result, most defendants placed on probation are ordered to pay costs in monthly payments.

During its study of the use of alternative sanctions in probation violation cases, the Alternative Sanctions Committee surveyed Kansas district courts concerning the conditions of probation most frequently violated. Failure to make court-ordered payments ranks second in frequency of violations, the most frequent being failure to report to court services or community corrections officers as directed.

As you might expect, few criminal defendants are good money managers. Although the probationer's failure to pay is a violation of his or her conditions of probation, due to the present overcrowded conditions in our state's prisons and county jails, defendants failing to make court-ordered payments are not frequently revoked from probation. Monitoring and enforcement of the payments is time-consuming to court services officers and judges, and frequently are not given a high priority insofar as enforcement is concerned. As a result, court-ordered payments are often not made.

A survey performed by the Office of Judicial Administration reflects that millions of dollars in court costs go uncollected each year. These costs include the costs unpaid in criminal cases. The state has a significant interest, both financially and as a matter of policy, in enforcing probation orders relating to payment of restitution to victims, and in collection of sums ordered for court costs, reimbursement to the state for indigent defendant attorney fees, fines and other court-ordered payments.

I ask your support for passage of Senate Bill 73.

#95

Appendix E

Restitution/Court Debt Owed, July 1996

County	District	No. of Accounts	Judgment/ Restitution	Fines	Docket Fee	Other	Bond	Total
Allen	31	445	$275,850.57	$37,663.96	$21,381.10	$92,608.74	$0.00	$427,504.37
Anderson	4	206	$185,723.90	$10,105.50	$9,662.03	$39,192.58	$0.00	$244,684.01
Atchison	1	394	$142,462.96	$22,158.57	$14,384.30	$53,398.19	$0.00	$232,404.02
Barber	30	96	$202,609.27	$7,563.00	$3,447.00	$19,021.18	$0.00	$232,640.45
Barton	20	534	$223,629.53	$32,602.50	$23,864.94	$71,836.75	$0.00	$351,933.72
Bourbon	6	464	$120,911.51	$26,926.01	$29,041.95	$88,205.01	$0.00	$265,084.48
Brown	22		$162,179.98	$25,571.50	$14,407.43	$113,478.12	$0.00	$315,637.03
Butler	13	1102	$1,051,975.07	$165,862.46	$44,468.35	$248,697.86	$0.00	$1,511,003.74
Chase	5	236	$34,294.75	$35,957.88	$7,337.98	$19,364.23	$0.00	$96,954.84
Chautauqua	14	123	$36,392.48	$13,681.67	$4,459.58	$15,981.21	$0.00	$70,514.94
Cherokee	11		$135,775.59	$44,056.51	$25,791.20	$64,044.20	$0.00	$269,667.50
Cheyenne	15	33	$23,627.35	$3,046.00	$1,024.00	$20,694.51	$0.00	$48,391.86
Clark	16	30	$3,596.91	$4,085.00	$505.50	$5,710.23	$0.00	$13,897.64
Clay	21		$77,627.52	$6,095.25	$5,975.75	$9,993.42	$0.00	$99,691.94
Cloud	12		$77,153.80	$21,631.50	$17,108.14	$44,781.57	$0.00	$160,675.01
Coffey	4		$84,048.01	$39,616.46	$12,710.00	$86,807.93	$0.00	$223,182.40
Comanche	16	50	$9,455.70	$5,849.98	$2,019.88	$5,145.33	$0.00	$22,470.89
Cowley-A	19	314	$88,016.59	$29,164.52	$14,298.50	$28,077.99	$0.00	$159,557.60
Cowley-W	19	710	$545,610.22	$58,292.05	$29,447.50	$120,605.41	$0.00	$753,955.18
Crawford	11	857	$560,797.88	$66,021.00	$45,853.16	$104,888.76	$0.00	$777,560.80
Decatur	17	69	$32,310.91	$4,206.00	$3,245.71	$20,944.36	$0.00	$60,706.98
Dickinson	8	922	$397,822.34	$58,489.67	$38,996.51	$40,718.57	$0.00	$536,027.09
Doniphan	22	186	$164,537.57	$17,333.00	$5,697.85	$48,102.04	$0.00	$235,670.46
Douglas	7		$1,233,735.80	$179,808.76	$258,824.86	$618,527.00	$0.00	$2,290,896.42
Edwards	24	68	$35,866.56	$2,816.00	$5,384.47	$14,911.74	$0.00	$58,978.77
Elk	13		$58,915.34	$11,413.00	$6,365.31	$18,404.29	$0.00	$95,097.94
Ellis	23		$863,655.52	$68,259.31	$36,967.12	$145,050.27	$0.00	$1,113,932.22
Ellsworth	20	219	$25,926.72	$19,296.74	$9,423.95	$51,933.70	$0.00	$106,581.11
Finney	25	1662	$569,704.48	$227,273.58	$79,003.77	$165,218.02	$0.00	$1,041,199.85
Ford	16	961	$574,938.53	$90,536.14	$40,338.12	$207,998.19	$0.00	$913,810.98
Franklin	4	1201	$990,976.97	$54,048.51	$67,213.85	$77,938.44	$0.00	$1,190,177.77
Geary	8	2246	$1,494,781.99	$119,024.10	$99,508.84	$241,356.58	$0.00	$1,954,671.51
Gove	23		$4,330.32	$4,147.00	$32.50	$3,802.24	$0.00	$12,312.06
Graham	17	83	$24,266.81	$4,823.77	$2,724.93	$15,005.07	$0.00	$46,820.58
Grant	26	98	$33,714.41	$8,099.66	$1,983.35	$13,696.30	$0.00	$57,493.72
Gray	16	263	$97,465.95	$37,253.20	$8,686.05	$41,287.87	$0.00	$184,693.07
Greeley	25	23	$33,513.28	$2,692.00	$649.25	$6,232.60	$0.00	$43,087.13
Greenwood	13	330	$137,560.67	$34,731.11	$11,525.39	$40,629.00	$0.00	$224,446.17
Hamilton	25		$19,481.04	$10,640.00	$2,699.32	$8,925.90	$0.00	$41,746.26
Harper	30	194	$112,367.03	$16,335.50	$5,747.97	$37,724.26	$0.00	$172,174.76
Harvey	9	550	$188,774.69	$46,603.19	$18,252.54	$153,993.62	$0.00	$407,624.04
Haskell	26	143	$36,007.74	$25,961.41	$6,042.50	$19,532.21	$0.00	$87,543.86
Hodgeman	24	27	$7,561.11	$3,640.28	$923.50	$6,759.50	$0.00	$18,884.39
Jackson	2	451	$258,636.81	$35,642.54	$16,491.46	$39,506.90	$0.00	$350,277.71
Jefferson	2	366	$73,848.59	$36,322.79	$12,281.40	$45,264.90	$0.00	$167,717.68
Jewell	12	31	$209,516.68	$1,859.00	$993.50	$9,511.33	$0.00	$221,880.51
Johnson*	10							$12,000,000.00
Kearny	25	169	$10,649.39	$31,648.50	$10,068.57	$14,019.90	$0.00	$66,386.36
Kingman	30	332	$815,197.30	$33,306.65	$10,712.69	$65,978.38	$0.00	$925,195.02
Kiowa	16	108	$10,492.98	$6,244.00	$4,267.39	$12,364.14	$0.00	$33,368.51
Labette	11		$1,479,361.89	$39,996.79	$54,549.96	$294,379.08	$0.00	$1,868,287.72
Lane	24	28	$18,505.33	$5,297.00	$1,070.01	$4,151.76	$0.00	$29,024.10
Leavenworth	1	703	$676,269.68	$46,853.00	$32,398.80	$93,877.94	$0.00	$849,399.42
Lincoln	12		$5,417.09	$8,060.54	$4,038.76	$33,691.23	$0.00	$51,207.62
Linn	6		$129,342.44	$30,126.24	$15,858.11	$35,577.74	$50.00	$210,954.53
Logan	15	32	$633.97	$440.00	$990.00	$12,916.56	$0.00	$14,980.53
Lyon	5	1622	$1,056,798.00	$242,200.17	$101,132.75	$573,697.76	$0.00	$1,973,828.68

#5 Hearing Testimony Comm. 3/14/95

Appendix E

Restitution/Court Debt Owed, July 1996

County	District	No. of Accounts	Judgment/ Restitution	Fines	Docket Fee	Other	Bond	Total
Marion	8	541	$57,547.40	$24,059.00	$21,169.25	$46,833.48	$0.00	$149,609.13
Marshall	22	251	$119,771.13	$14,061.50	$6,787.29	$69,362.87	$0.00	$209,982.79
McPherson	9	481	$857,500.79	$27,275.60	$13,514.16	$197,558.59	$0.00	$1,095,849.14
Meade	16	203	$7,423.07	$35,198.93	$7,797.81	$49,079.93	$0.00	$99,499.74
Miami	6	726	$231,705.10	$36,731.09	$34,024.01	$123,793.83	$0.00	$426,254.03
Mitchell	12	150	$155,594.78	$10,592.00	$5,673.18	$24,854.88	$0.00	$196,714.84
Montgomery-C	14	175	$38,456.23	$14,998.50	$4,727.50	$21,395.41	$0.00	$79,577.64
Montgomery-I	14	647	$398,166.45	$83,435.60	$22,604.73	$127,799.26	$0.00	$632,006.04
Morris	8	131	$137,524.92	$7,676.00	$3,987.50	$13,291.11	$100.00	$162,579.53
Morton	26	59	$33,583.93	$1,211.50	$1,467.99	$17,524.66	$0.00	$53,788.08
Nemaha	22	184	$176,120.40	$5,534.17	$4,533.50	$48,614.40	$0.00	$234,802.47
Neosho-C	31	775	$404,649.45	$29,677.85	$43,518.22	$208,608.96	$0.00	$686,454.48
Neosho-E	31	91	$807.90	$17,451.00	$1,384.00	$8,609.50	$0.00	$28,252.40
Ness	24	54	$10,351.09	$4,109.00	$2,364.50	$17,914.10	$0.00	$34,738.69
Norton	17	228	$55,472.50	$25,479.50	$6,750.54	$65,614.95	$0.00	$153,317.49
Osage	4		$41,490.37	$35,925.05	$15,474.25	$105,872.06	$0.00	$198,761.73
Osborne	17	93	$11,956.25	$4,679.00	$4,356.50	$17,211.67	$0.00	$38,203.42
Ottawa	28	154	$198,469.57	$30,374.00	$6,431.25	$8,469.92	$0.00	$243,744.74
Pawnee	24	284	$63,118.62	$22,469.23	$17,604.78	$40,036.92	$0.00	$143,229.55
Phillips	17	330	$33,307.53	$30,578.25	$11,775.77	$34,553.78	$0.00	$110,215.33
Pottawatomie	2	371	$275,820.72	$44,751.76	$16,797.16	$74,285.69	$0.00	$411,655.33
Pratt	30	235	$114,341.71	$26,933.27	$6,318.99	$46,996.16	$0.00	$194,590.13
Rawlins	15	46	$27,710.72	$2,975.00	$1,809.50	$31,460.59	$0.00	$63,955.81
Reno	27	1731	$1,225,281.85	$437,377.56	$91,406.22	$173,763.77	$0.00	$1,927,829.40
Republic	12	192	$37,081.07	$17,455.75	$5,194.50	$33,933.23	$0.00	$93,664.55
Rice	20	115	$45,792.76	$5,843.50	$2,196.62	$8,699.37	$0.00	$62,532.25
Riley	21		$1,112,534.49	$36,019.48	$55,302.49	$53,588.47	$0.00	$1,257,444.93
Rooks	23	108	$197,060.41	$9,123.50	$4,676.83	$26,229.13	$0.00	$237,089.87
Rush	24	48	$28,154.57	$5,431.00	$3,446.47	$9,863.96	$0.00	$46,896.00
Russell	20	177	$89,609.27	$13,810.00	$7,864.05	$35,995.48	$0.00	$147,278.80
Saline	28	2743	$2,725,386.88	$232,968.31	$163,187.71	$177,451.46	$50.00	$3,299,044.36
Scott	25		$32,876.24	$12,892.00	$6,026.00	$17,526.12	$0.00	$69,320.36
Sedgwick	18		$16,763,209.38	$3,249,050.49	$2,725,274.74	$4,088,397.75	$0.00	$26,825,932.36
Seward	26	324	$342,781.26	$45,398.23	$2,963.47	$66,625.80	$100.00	$457,868.76
Shawnee	3		$6,864,928.30	$817,039.69	$718,728.67	$1,469,478.28	$0.00	$9,870,174.94
Sheridan	15	20	$40,977.27	$1,492.00	$1,056.00	$1,678.11	$0.00	$45,203.38
Sherman	15	189	$185,324.88	$18,546.00	$4,833.50	$56,593.65	$0.00	$265,298.03
Smith	17	118	$9,994.45	$15,238.42	$5,275.77	$12,811.08	$0.00	$43,319.72
Stafford	20	91	$115,694.96	$14,288.50	$4,168.00	$27,892.49	$0.00	$162,043.95
Stanton	26	81	$44,728.94	$7,704.00	$2,765.36	$22,060.00	$0.00	$77,258.30
Stevens	26	66	$16,928.27	$8,474.66	$2,974.43	$16,507.13	$0.00	$44,884.49
Sumner	30	757	$276,354.50	$51,786.29	$19,512.25	$153,270.84	$0.00	$500,923.88
Thomas	15	341	$68,326.57	$16,867.00	$12,797.15	$76,463.86	$250.00	$174,704.58
Trego	23	71	$26,570.34	$3,993.00	$3,239.94	$13,047.92	$0.00	$46,851.20
Wabaunsee	2		$74,091.49	$47,500.48	$26,047.30	$43,758.12	$0.00	$191,397.39
Wallace	15	32	$980.30	$2,933.00	$1,068.97	$15,952.95	$0.00	$20,935.22
Washington	12	103	$188,708.44	$8,221.00	$4,339.00	$12,145.06	$0.00	$213,413.50
Wichita	25	28	$11,702.47	$3,364.00	$837.00	$3,992.50	$0.00	$19,895.97
Wilson	31	388	$276,588.25	$32,668.77	$16,974.95	$70,350.75	$0.00	$396,582.72
Woodson	31	143	$16,796.79	$15,387.50	$7,251.35	$18,770.43	$0.00	$58,206.07
Wyandotte	29		$8,244,043.91	$382,236.84	$1,503,658.94	$645,495.34	$0.00	$10,775,435.03
TOTAL**		32,756	$58,438,024.46	$8,270,668.24	$6,966,219.41	$13,238,248.38	$550.00	$98,913,710.49

*Because it is in the process of installation of a new computer system, detailed data was not available for the 10th Judicial District in Johnson County.

**Column totals do not add to final column because no breakdown of Johnson County data is available.

#6

DISTRICT COURT TRUSTEE
SEVENTH JUDICIAL DISTRICT
JUDICIAL CENTER, 111 E. 11TH
LAWRENCE, KANSAS 66044-2966

913-841-7700, ext. 315
Fax: 913-832-5174

BRIAN M. FARLEY
District Court Trustee

KATY S. NITCHER
Deputy Court Trustee

March 19, 1997

Rep. Tim Carmody
Kansas House of Representatives
Judiciary Committee

Re: Senate Bill 73 and House Bill 2486

Dear Representative Carmody:

Thank you and the other members of this committee for granting me this opportunity to address Senate Bill 73 and House Bill 2486. My name is Brian Farley, and I am the district court trustee in Douglas County. I am testifying as a proponent of Senate Bill 73 and as a proponent of amending into this bill the language contained in House Bill 2486.

Senate Bill 73 creates a process for victims of crime to collect restitution through court orders for the withholding of income. The withholding would be made from the employment earnings of the perpetrators of the underlying crimes. This is a valuable tool that has proven to be effective for the collection of child support. The Attorney General of Kansas, under the authority of K.S.A. 75-719, is currently reviewing bids for the provision of collection services to victims of crime and to Kansas courts for the collection of court costs and fines. The successful bidders will make use of Senate Bill 73.

During the bidding process, the Attorney General advised all interested parties that district court trustees could not bid on contracts under K.S.A. 75-719 because there is no enabling legislation to allow district court trustees to collect anything other than court-ordered child support and spousal maintenance. House Bill 2486 was drafted to allow district court trustees to participate in the bidding process.

House Bill 2486 will give not give a competitive advantage to any district court trustee. The only effect will be to allow these government offices to compete for contracts in the privatized arena. I believe that district court trustees can provide better service for a better price and that these government offices should have the opportunity to compete for these contracts. Collection of court-ordered restitution, costs and fines is particularly important to the district court and is very similar to the type of activity district court trustees currently are engaged in.

Thank you for the opportunity to address you regarding this important subject. Please contact me for answers to any questions you might have regarding how this legislation will function or why district court trustees should be allowed to bid on contracts of this nature.

Respectfully,

Brian M. Farley
District Court Trustee

House Judiciary Comm
Attach 6
3/19/97

TO: HOUSE JUDICIARY COMMITTEE

FROM: DANNY J. VOPAT, DISTRICT COURT TRUSTEE, THIRD JUDICIAL DISTRICT, SHAWNEE COUNTY

DATE: MARCH 19, 1997

SUBJECT: WRITTEN TESTIMONY FOR SENATE BILL 73.

I want to thank Committee Chairperson Representative Tim Carmody and the other members of the House Judiciary Committee for this opportunity to express my views on Senate Bill (S.B.) 73.

I am here to encourage the passage of S.B. 73. This bill would promote criminal cost collection by allowing income withholding against convicted criminals. This income withholding would be similar to the income withholding support enforcement performed under K.S.A. 23-4,100 et seq.

The District Court Trustee (DCT) program is very familiar with the implementation and use of income withholding orders to enforce support orders. I would request that S.B. 73's language be amended to include the District Court Trustees as a "Public office" to perform criminal cost collection by income withholding.

I would also request that S.B. 73 be further amended to include the language of House Bills (H.B.) 2473 and 2486. These amendments would give the DCT program the additional statutory authority needed to enforce criminal cost recovery for the State of Kansas.

These proposed amendments to S.B. 73 will also improve and amend the DCT enabling statutes (K.S.A. 23-492, 23-493, 23-495, 23-496, 23-497, 23-498, 23-4,100), the collection of debts owed statutes of K.S.A. 1996 Supp. 75-719, the restriction on wage garnishment statute K.S.A. 1996 Supp. 60-2310(d)(1), and the state debt set-off statute K.S.A. 1996 Supp. 75-6202. These amendments, if adopted, will improve the support and debt collection tools of the DCT programs in Kansas, make the DCT program a more efficient support and debt collector by utilizing this collection machine for a wider range of debts, and allow the DCT program to compete on an equal level with the Kansas Department of Social and Rehabilitation Services' (SRS) Title IV-D support enforcement program.

The proposed amendments to K.S.A. 23-492, 23-493, 23-495, 23-496, 23-497, 23-498, 23-4,100, and K.S.A. 1996 Supp. 75-719 would mainly authorize the DCT program to collect additional debts owed

House Judiciary Comm
Attach 7
3/19/97

TO: HOUSE JUDICIARY COMMITTEE

FROM: DANNY J. VOPAT, DISTRICT COURT TRUSTEE, THIRD JUDICIAL DISTRICT, SHAWNEE COUNTY

DATE: MARCH 19, 1997

SUBJECT: WRITTEN TESTIMONY FOR SENATE BILL 73.

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The proposed amendments to K.S.A. 23-492, 23-493, 23-495, 23-496, 23-497, 23-498, 23-4,100, and K.S.A. 1996 Supp. 75-719 would mainly authorize the DCT program to collect additional debts owed

besides support obligations. These debts would include court costs, fines, and restitution judgments in criminal cases. This increased enforcement ability would allow the DCT programs to be contract agents with the Attorney General under K.S.A. 1996 Supp. 75-719.

The proposed amendments to K.S.A. 23-497 would also allow the DCT programs to be funded by optional methods instead of the limited flat fee rate. These options would allow the DCT to charge collection fees that match the costs of collection, and thus be more acceptable by the users of the service.

The proposed amendments to K.S.A. 60-2310(d)(1) wage garnishment statute and K.S.A. 75-6202 state debt set-off statute would allow these enforcement tools to be used by the DCT program. These amendments would give the DCT program the same tools that the SRS now enjoys, being:

1. Assignment of support debt by the support obligee to the DCT would not prevent garnishment of the support obligor's wages under this amendment to K.S.A. 60-2310(d)(1). If the DCT is not a Title IV-D contractor with the SRS such an assignment would currently prohibit wage garnishment by the DCT; and

2. State debt set-off by a DCT of a support obligor's state refunds would be permitted. If the DCT is not a Title IV-D contractor with the SRS such enforcement tool is not available to the DCT. <u>The current law gives the SRS and its contractors an unequal advantage in support enforcement</u>.

I request the committee consider and pass the above amendments to S.B. 73 to provide fair and equal enforcement tools for the two support enforcement programs to **benefit Kansas' children** and improve criminal cost collection. Thank you for your time.

#8

KANSAS BAR ASSOCIATION

1200 SW Harrison St.
P.O. Box 1037
Topeka, Kansas 66601-1037
Telephone (913) 234-5696
FAX (913) 234-3813
Email: ksbar@ink.org

Legislative Testimony

TO: Members, House Judiciary Committee

FROM: Ron Smith, General Counsel

SUBJ: SB 8,
Uniform Fraudulent Transfers Act

DATE: March 19, 1997

The Kansas Bar Association supports this bill.

The UFTA affects primarily debtor-creditor transfers. Sometimes debtors who have judgments against them try to "transfer" their property rights – the ownership of real or personal property – to other persons for less than reasonable cost in order to avoid the creditor rights to recoup property. Kansas currently uses the "badges of fraud" concept to indicate when a "suspicious" transfer has taken place. The badges of fraud is a concept left over from the 16th Century Statute of Elizabeth (13 Eliz. ch. 5, 1570). As was stated in a recent case,

> "[B]adges of fraud are suspicious circumstances . . . [and] are circumstances frequently attending conveyances and transfers of property intending to hinder, delay, or defraud creditors. They are red flags, and when they are unexplained in the evidence, they may warrant an inference of fraud. Some are weak; others are strong. One weak badge of fraud, standing alone, would have little evidentiary value in establishing a fraudulent conveyance. For example, the mere fact that grantor and grantee are related, standing alone, would not support a finding that the conveyance was fraudulent. On the other hand, the concurrence of several badges of fraud are said to make out a strong case. * * * If a transfer is made by a debtor in anticipation of a suit against him, or after a suit has begun, and while it is pending against him, this is a badge of fraud, and especially if it leaves the debtor without any estate, or greatly reduces his property.' * * * The possible [types of] indicia of fraud are so numerous that no court could pretend to anticipate and catalog them. A single one may stamp the transaction as fraudulent, and, when several are found in combination, strong and clear evidence on the part of the upholder of the transaction will be required to repel the conclusion of fraud.' *Koch Engineering Co. v. Faulconer,* 239 Kan. 101, 716 P.2d 180, 185-186 (1986).

Changing to the Uniform Act creates two principle benefits in Kansas: (1) lawyers can use the case law of other states with the UFTA to help construe the act here; and (2) it changes our debtor-creditor laws to more closely mirror changes already found in the federal bankruptcy act.

Thank you.

House Judiciary Comm.
Attach #8
3/19/97

#9

SUPPLEMENTAL NOTE
ON
SENATE BILL NO. 8
As Amended by Senate Committee on Judiciary
Brief

S.B. 8 enacts the Uniform Fraudulent Transfers Act aimed at protecting unsecured creditors in situations where the debtor manipulates property to defeat the creditors interests. The fundamental remedy is the recovery of the property for the creditor.

The definition of asset in Section 2, together with the definitions of insolvent (Section 2) and value (Section 3), in a general sense formulate the core concept of the Act: the transfer of an asset (or incurring an obligation) for inadequate value by an insolvent debtor or one rendered insolvent by the transaction is a fraudulent transfer.

The basic rule of the Act is stated in Section 4: a transfer made or an obligation incurred with actual intent to hinder, delay, or defraud creditors is actionable by creditors. Subsection b sets out 11 badges of fraud ; if several of these appear it is strong evidence of fraud, e.g., the transfer was to an insider, was concealed, or the debtor absconded. Subsection a(2), on the other hand, sets out two cases where the law decrees the fraudulent intent exists if the debtor:

1. was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

2. intended to incur, or believed or reasonably should have believed that such debtor would incur, debts beyond such debtor s ability to pay as they became due.

The bill in Section 5 sets out two further cases where the transaction is fraudulent:

1. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

2. A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

Remedies that a creditor has to attack and to avoid a fraudulent transfer or to enforce an obligation under this act (Section 7) include:

1. avoidance of the transfer or obligation to the extent necessary to satisfy the creditor s claim;

2. an attachment or other provisional remedy against the asset transferred or other property of the transferee;

3. an injunction against further disposition by the debtor or a transferee, or both;

4. appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

5. any other relief the circumstances may require.

A good faith purchaser for reasonably equivalent value is protected who did not share in the debtor s fraudulent purpose and subsequent good faith transferees for value who are sufficiently remote in Section 8. The bill also gives a good faith transferee or obligee against whom the transaction can be avoided protection for any value given.

Section 9 prescribes statutes of limitation specifically for the act, basically four years, except one year for transactions involving an insider for an antecedent debt.

The Senate Committee amended the bill to have it effective January 1, 1998.

Background

The bill was recommended by the 1996 interim Special Committee on Judiciary. The bill was supported by the Kansas Bar Association and the National Conference of Commissioners on Uniform State Laws. The fiscal note states the bill has no fiscal impact.

The National Conference of Commissioners on Uniform State Laws proposed the Uniform Fraudulent Conveyance Act (UFCA) in 1918 to try and protect unsecured creditors. It was created to supersede the Statute of 13 Elizabeth which was enacted in some form by many states, including Kansas (see K.S.A. 33-102). The UFCA was adopted in 26 states and its provisions were incorporated into the Federal Bankruptcy Act.

In 1984, this 1918 act was revised and renamed the Uniform Fraudulent Transfers 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 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. Also, creditor-debtor relationships have changed and become more complicated, so that the whole issue of fraudulent transfers needed rethinking.

The Uniform Act has been endorsed by the American Bar Association and has been adopted in 35 states. Kansas was one of three states which had the Act before its Legislature in 1996.

House Judiciary Comm
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A Few Facts About
THE UNIFORM FRAUDULENT TRANSFER ACT

PURPOSE: Providing a creditor with the capacity to procure assets a debtor has transferred to another person to keep them from being used to satisfy the debt.

ORIGIN: The Uniform Fraudulent Transfer Act, completed by the Uniform Law Commissioners in 1984, revises the Uniform Fraudulent Conveyance Act of 1918.

ENDORSED BY: American Bar Association

STATE ADOPTIONS:

Alabama
Arizona
Arkansas
California
Colorado
Connecticut
Delaware
District of Columbia
Florida
Hawaii
Idaho
Illinois
Indiana
Iowa
Maine
Massachusetts
Minnesota
Missouri
Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
North Dakota
Ohio
Oklahoma
Oregon
Pennsylvania
Rhode Island
South Dakota
Texas
Utah
Vermont
Washington
West Virginia
Wisconsin

1997 INTRODUCTIONS:

For any further information regarding the Uniform Fraudulent Transfer Act, please contact John McCabe or Katie Robinson at 312-915-0195.

(1/1/97)

House Judiciary Comm.
Attach 9
9-2

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.

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.

A SHORT COMPARISON OF THE UNIFORM FRAUDULENT TRANSFER ACT WITH THE UNIFORM FRAUDULENT CONVEYANCE ACT

The Uniform Fraudulent Transfer Act (UFTA) is a modernization of the Uniform Fraudulent Conveyance Act (UFCA) that was originally promulgated by the Uniform Law Commissioners in 1918. Since the rights and remedies between the earlier and later Acts are much the same, what are the differences, and what advantages accrue from adopting the UFTA over the UFCA? A short summary of the substantive differences follows[1]:

1. There are a number of more precisely defined terms in UFTA in Section 1 than are found in Section 1 of the UFCA. These new definitions include the words "affiliate," "claims," "debtor," "insider," "lien," "person," "property," "relative," "transfer," and "valid lien." The newly defined terms result in greater clarity throughout the UFTA and facilitate new provisions that will be discussed a little further on. Of the definitions, the one giving the UFTA its new title is "transfer." "Transfer" replaces the word "conveyance" as found in Section 1 of the UFCA. Both are comprehensive terms, but "transfer" comes from Section 101(48) of the Bankruptcy Code and is the more accepted modern term.

2. Both UFTA and UFCA define "insolvency" in Section 2, but UFTA establishes a rebuttable presumption of insolvency in Section 2(b) when a debtor is not generally paying his or her debts as they become due. Section 2(d) of UFTA prevents any fraudulently transferred property from being included in the debtor's assets when determining whether the debtor is insolvent or not. Section 2(e) of the UFTA prevents any obligation secured by a valid lien on the debtor's property, that is not an asset under Section 4, from being included as a debt for the purposes of determining insolvency. UFCA has no provisions similar to UFTA Sections 2(b), (d) or (e).

3. UFTA Section 3 replaces the term "reasonably equivalent value" for the term "fair consideration" as found in UFCA Section 3. "Reasonably equivalent value" is somewhat different from "fair consideration." "Good faith," which is an element in "fair consideration," is not an element in "value." "Good faith" becomes an element of defenses raisable under UFTA

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[1] A complete overview of the UFTA is contained in the summary that accompanied this comparison.

Section 8. Also, "reasonably equivalent value" does not "include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person." "Fair consideration" under UFCA does not explicitly exclude such an unperformed promise, and there is a split in authorities as to whether such promises are or are not "fair consideration." Generally, under UFTA, "reasonably equivalent value" is to be considered from the point of view of the creditor. Would the value received in the transfer be available to satisfy the debt?

Section 3(b) of the UFTA deals specifically with the problem raised by Durrett v. Washington National Insurance Company, 621 F.2d 201 (5th Cir. 1980), in which a foreclosure sale of a debtor's property under a mortgage was held a fraudulent transfer when the sale resulted in a recovery of less than 70% of the property's value. Section 3(b) of UFTA provides that "reasonably equivalent value" results when a properly conducted foreclosure sale takes place, no matter the amount recovered. UFCA includes no comparable rule.

UFTA Section 3(c) defines "present value." No similar rule is included in the UFCA.

4. UFTA Section 4(a) combines Sections 5, 6 and 7 of UFCA with clarifications. Section 4(b) of UFTA is new. Section 4 of UFTA generally provides for those actions that are fraudulent to present and future creditors. A future creditor under this Section is, simply, one whose claim "arose . . . after the transfer was made or the obligation incurred."

Section 4(b) lists a series of factors that may be considered to determine the issue of intent under Section 4(a)(1). The list of factors includes most of the badges of fraud construed by courts over the history of the UFCA and predecessor legislation. The list is non-exclusive.

5. UFTA Section 5 provides for transfers fraudulent to creditors only. Section 5(a) is derived from Section 4 of the UFCA. Section 5(b) is new, and identifies a kind of transfer, the "insider" transfer, that is not specifically a fraudulent transfer in the UFCA. The "insider" transaction in Section 5(b) of the UFTA is derived from prior case law. An "insider" is defined in Section 1(7) of the UFTA and includes relatives or family members, partners, a corporate director, and the like.

In part, Section 8 of the UFCA is subsumed in

Section 5(b) of the UFTA. Section 8 of the UFCA deals with transactions between partners and with a person not a partner that results in the insolvency of the partnership. Although partners are "insiders" under the UFTA, liability occurs when an insider "had reasonable cause to believe that the debtor was insolvent." Under Section 8(a) of the UFCA, a partner was, per se, liable, a rule deemed unduly favorable to partnership creditors and unduly burdensome to a partner's creditors. UFTA has no specific sections dealing with partnership transfers such as Section 8 of the UFCA.

6. Section 6 of the UFTA is entirely new. It was created to eliminate questions about the time a transfer is made or an obligation is incurred.

7. Section 7 of the UFTA incorporates Sections 9 and 10 of the UFCA. The UFTA makes no distinction between claims of creditors that have matured as opposed to those that are unmatured, as the UFCA does. Remedies under Section 7 are available to all creditors. Section 7(a)(2) provides for attachment, subject to constitutional constraints. But attachment is offered as an alternative remedy in the UFTA because of the uncertainty over the constitutional problems. A jurisdiction may reject Section 7(a)(2) without impairing uniformity, therefore.

8. Section 8 of the UFTA is entirely new. The UFCA does not provide for transferee defenses and protection of transferee interests. Note that good faith is an element of the defense established in Section 8(a).

9. UFTA Section 9 is new. It establishes statutes of limitations, a subject not addressed at all in the UFCA.

THE UNIFORM FRAUDULENT TRANSFER ACT

by

FRED H. MILLER
Professor of Law at the University of Oklahoma

Section by Section Analysis of the Act

Section 1 contains definitions. Section 2 also contains the definition of "insolvent," and Section 3 the definition of "value." The definition of "asset" in Section 2(2), together with the latter definitions of "insolvent" and "value," in a general sense formulate the core concept of the act: the transfer of an asset (or incurring an obligation) for inadequate value by an insolvent debtor or one rendered insolvent by the transaction is a fraudulent transfer. Subsection 3(B) is worth particular note in this respect because it overrules for state law the controversial holding in Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980), that a regularly conducted mortgage foreclosure that produces a price "too low" may be avoided as a fraudulent conveyance. By clouding property titles the Durrett rule virtually is a self-fulfilling prophecy.

Section 4 Subsection a(1) states the basic rule of the act: a transfer made or an obligation incurred with actual intent to hinder, delay or defraud creditors is actionable by creditors. How does a creditor prove the debtor's actual intent? Subsection b sets out "badges of fraud" if several of these appear it is strong evidence. Subsection a(2), on the other hand, sets out two cases where the law decrees the intent exists if the facts are as stated.

Section 5 states two further cases where the law decrees the transaction is fraudulent, but only as to present creditors and not also as to creditors arising later as is the case for transfers covered by Section 5.

Section 6 defines when a transaction occurs. It occurs when it can prejudice the rights of third parties, and not when it actually occurs between the parties to it. For example, a creditor does not need this act to set aside a fraudulent security interest that is never filed; the creditor can defeat that interest under the Uniform Commercial Code. Subsection 5 of this Section also states the time when an obligation is incurred.

Section 7 describes the remedies a creditor has to attack and avoid a fraudulent transfer or obligation.

Section 8, however, protects a good faith purchaser for reasonably equivalent value who did not share in the debtor's fraudulent purpose and subsequent good faith transferees for value who are sufficiently remote. Subsection (d) also gives a good faith transferee or obligee against whom the transaction can be avoided protection for any value given.

Subsection (e) is important as protecting lease terminations and security interest enforcement against "Durrett type" attacks, and Subsection (f) allows "workouts" and the like to occur.

Section 9 prescribes statutes of limitation specifically for the act.

Section 10 states the act is supplemented by other law and Section 11 specifies that in interpreting the act, precedent from other states that have enacted it should be used to maintain uniformity.

Section 12 provides the title.

Section 13 repeals the current statutes on the subject, including any old predecessor versions of this act.

DURRETT, THE UNIFORM FRAUDULENT TRANSFER ACT, AND FEDERAL BANKRUPTCY LAW - SORTING OUT CONFUSION

There has been much confusion over the relationship of mortgage foreclosures, however done, and fraudulent conveyance statutes, including the 1984 Uniform Fraudulent Transfer Act (UFTA). The confusion results from a single, now notorious case, Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980). The Court, in Durrett, held a noncollusive mortgage foreclosure conducted pursuant to Texas law a constructively fraudulent transfer under Section 67d of the Bankruptcy Act. The Bankruptcy Act has fraudulent transfer provisions directly analogous to the UFTA.

Durrett has not been followed in all circuits of the federal courts. It has been directly rejected in the Sixth and Ninth Circuits, for example. Its influence on state law in the interpretation of the 1918 Uniform Fraudulent Conveyance Act (UFCA) and those states still following the common law is not yet clear. Much speculation attends the possibilities in that regard, however.

Why is Durrett so important? Its holding calls the validity of the bulk of mortgage foreclosure sales into question. Almost never do such sales realize the current market price for real estate bought and sold in the ordinary course. A key element in fraudulent conveyance analysis is the concept of "fair consideration" or "reasonably equivalent value." In Durrett, the foreclosure sale realized less than 70% of the alleged market value, and was a fraudulent transfer for that fact.

As a result of Durrett, buyers in foreclosure sales lose assurance of title. Lenders cannot be sure of lending practices. The uncertainty that Durrett forecasts has large economic impact in real estate markets.

UFTA attempts to alleviate the difficulties that Durrett suggests. In Section 3(b), value is "reasonably equivalent value" if given in "a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement." Adoption of this provision would preclude a Durrett type of holding in any state adopting UFTA. Only private, non-public types of transfers, such as some kinds of deed in lieu of foreclosure, would be vulnerable. But these are exactly the kinds of transfers UFTA is designed to remedy anyway. UFTA Section 3(b) removes the uncertainty that Durrett has created, insofar as state law is concerned.

We must be clear, however, on the distinction between federal and state law, the Bankruptcy Act and state fraudulent conveyance law. Durrett still applies in federal bankruptcy law,

even when the UFTA applies in state actions. Indeed, in the 1984 amendments to the Bankruptcy Act, the holding in Durrett was reinforced. Durrett continues to be a problem in bankruptcy proceedings.

Why eliminate Durrett-type holdings? Durrett reflects dissatisfactions with the state of foreclosure procedures and perceived inequities that result from them. And that may be a legitimate concern. Using notions of fraudulent transfer to redress those inequities, however, is an oblique approach at best and a meat axe at the worst.

UFTA, its predecessor UFCA, and all fraudulent conveyance law preceding them primarily protect unsecured creditors (those for which no property acts as collateral) from certain actions of debtors that most everybody can agree are actually or constructively fraudulent. Durrett tends to turn that notion on its head. It would turn the remedy against secured creditors who are using accepted, legal procedures to recover loss after a default. This is not a role that fraudulent transfer law was ever designed to fill.

Not only does Durrett turn the remedy against an inappropriate defendant, it clouds every subsequent sale until the statute of limitations runs on any possible fraudulent transfer action. Every title examination after a foreclosure must inevitably result in exceptions for fraudulent transfer actions, leaving subsequent purchasers exposed. These are costs that are borne by sellers and buyers who are not involved in the foreclosure. If there are inequities in foreclosure actions, attacking them with fraudulent transfer theories merely spreads their burden to others. Nothing is really done to remedy them. UFTA Section 3(b) is an appropriate, timely response to the problem.

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.

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.

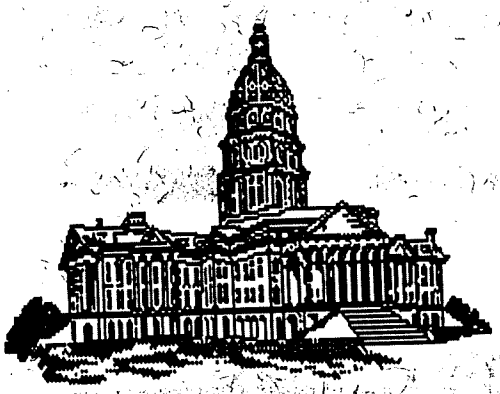
The fundamental relief for a creditor when there is a fraudulent transfer is recovery of the property from the person to whom it has been transferred. UFTA allows "avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim...." Whatever is necessary to obtain the 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.

Committee Reports to the 1997 Kansas Legislature



Part I—Special Committees

Part II—Selected Joint Committees

Kansas Legislative Research Department
December, 1996

damages provision added by the House. The law professor pointed out a potential problem with K.S.A. 60-214(c) dealing with indemnification of defendants by third parties. He suggested that this subsection be repealed since it may preclude a plaintiff from collecting from a third party found to be liable to an insolvent defendant.

CONCLUSIONS AND RECOMMENDATIONS

The Committee recognizes the hard work of the Civil Justice Advisory Committee of the Kansas Judicial Council in their efforts to update the Kansas rules of civil procedure in line with the recent changes in the federal rules of civil procedure. The Committee believes that the best starting point for discussion of the proposed changes in civil procedure is the version of S.B. 140 as amended by the Senate with the addition of several minor changes made by the House Committee. Legislation is recommended to accomplish this. Not included are several controversial amendments dealing with punitive damages and expert witnesses that were made in the House. ■

STUDY TOPIC: Fraudulent Transfers*

SUMMARY: Topic 3 calls for a study of the Uniform Fraudulent Transfers Act proposed by the National Conference of Commissioners on Uniform State Laws. The study was requested by Representative Mike O'Neal, Chairman of the House Judiciary Committee and interim Committee Chairman. The act was introduced in the Kansas Legislature as H.B. 2503 in 1995.

BACKGROUND

EXPLANATION OF THE ACT. The Uniform Fraudulent Transfers Act is aimed at protecting unsecured creditors in situations where the debtor manipulates property to defeat the creditors' interests. The National Conference of Commissioners on Uniform State Laws proposed the Uniform Fraudulent Conveyance Act (UFCA) in 1918 to try and protect unsecured creditors. It was created to supersede the Statute of 13 Elizabeth which was enacted in some form by many states. The UFCA was adopted in 26 states and its provisions were incorporated into the Federal Bankruptcy Act.

In 1984, this 1918 act was revised and renamed the Uniform Fraudulent Transfers 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. 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. Also, creditor-debtor relationships have changed and become more complicated, so that the whole issue of fraudulent transfers needed rethinking.

The Uniform Act has been endorsed by the American Bar Association and has been adopted in 35 states. Kansas was one of three states which had the act before its legislature in 1996.

SUMMARY OF THE BILL. Section 1 contains definitions of "affiliate," "asset," "claim," "creditor," "debt," "debtor," "insider," "lieu," "transfers," and various other terms. **Section 2** also contains the definition of "insolvent," *i.e.*, one whose sum of debts is greater than the fair value of their assets. **Section 3** contains the definition of "value."

The definition of "asset" in Section 2(2), together with the latter definitions of "insolvent" and "value," in a general sense formulate the core concept of the act: the transfer of an asset (or incurring an obligation) for inadequate value by an insolvent debtor or one rendered insolvent by the transaction is a fraudulent transfer. Subsection 3(B) overrules for state law the controversial holding in *Durrett v. Washington Nat. Ins. Co.*, 621 F.2d 201 (5th Cir. 1980), which held that a regularly conducted mortgage foreclosure that produces a price "too low" may be avoided as a fraudulent conveyance.

Section 4, Subsection a(1), states the basic rule of the act: a transfer made or an obligation incurred with actual intent to hinder, delay, or defraud creditors is actionable by creditors. Subsection b sets out 11 "badges of fraud"; if several of these appear it is strong evidence of fraud, e.g., the transfer was to an insider, was

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* S.B. 8 accompanies the Committee's reports.

concealed, or the debtor absconded. Subsection a(2), on the other hand, sets out two cases where the law decrees the intent exists if the debtor:

1. was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
2. intended to incur, or believed or reasonably should have believed that such debtor would incur, debts beyond such debtor's ability to pay as they became due.

Section 5 states two further cases where the law decrees the transaction is fraudulent:

1. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.
2. A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

Section 6 defines when a transaction occurs. It occurs when it can prejudice the rights of third parties, and not when it actually occurs between the parties to it. For example, a creditor does not need this act to set aside a fraudulent security interest that is never filed; the creditor can defeat that interest under the Uniform Commercial Code. Subsection (e) of this section also states the time when an obligation is incurred.

Section 7 describes the remedies a creditor has to attack and avoid a fraudulent transfer or obligation, which include:

1. avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
2. an attachment or other provisional remedy against the asset transferred or other property of the transferee;
3. an injunction against further disposition by the debtor or a transferee, or both;
4. appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or
5. any other relief the circumstances may require.

Section 8 protects a good faith purchaser for reasonably equivalent value who did not share in the debtor's fraudulent purpose and subsequent good faith transferees for value who are sufficiently remote. Subsection (d) also gives a good faith transferee or obligee against whom the transaction can be avoided protection for any value given.

Section 9 prescribes statutes of limitation specifically for the act, basically four years except one year for transactions covered under Section 5(b) to an insider for an antecedent debt.

Testimony of Conferees

Conferees included a representative of the National Conference of Commissioners on Uniform State Laws and received correspondence from a Kansas City attorney. The representative of the National Conference gave a detailed explanation of the proposed uniform law. The proposed law was endorsed by the Kansas City attorney as a needed addition in the fraudulent transfers area to achieve uniformity and consistency.

Conclusions and Recommendations

The Committee believes that predictability and consistency in the fraudulent transfers area of the law dealing with unsecured creditors would be enhanced by the passage of the Uniform Fraudulent Transfers Act. The Committee therefore recommends that legislation be introduced into the 1997 Legislature for favorable passage. ■