

Approved: March 19, 1999
Date

MINUTES OF THE SENATE COMMERCE COMMITTEE.

The meeting was called to order by Chairperson Alicia Salisbury at 8:00 a.m. on March 18, 1999 in Room 123-S of the Capitol.

All members were present except:

Committee staff present: Jerry Donaldson, Legislative Research Department
Bob Nugent, Revisor of Statutes
Betty Bomar, Committee Secretary

Conferees appearing before the committee:

Representative Gerry Ray
C. Steven Rarrick, Deputy Attorney General
Cal Dickinson, AARP
John Pinegar, Direct Marketing Association

Others attending: See attached list

Upon motion by Senator Jordan, seconded by Senator Ranson, the Minutes of the March 17, 1999 Meeting were unanimously approved.

HB 2197 - Consumer protection, negative option invitation or announcement

Representative Gerry Ray testified in support of **HB 2197**, stating the bill offers protection to citizens in the state from "negative option" practices. Negative option is a term used to describe the practice of sending unsolicited goods or services for which the receiver must take action to decline. If the receiver does not decline the service, the receiver's credit card account is charged. **HB 2197** is an attempt to outlaw this type of a practice in the State of Kansas. (Attachment 1)

C. Steven Rarrick, Deputy Attorney General, Consumer Protection Division, Office of the Attorney General, testified in support of **HB 2197**, stating the bill modifies the statute which deals with the receipt of unsolicited goods. Currently, unordered goods or services received are considered an unconditional gift, and a person may dispose of them as they see fit. Collecting on a bill for unordered goods or services is a deceptive act or practice under the Consumer Protection Act. **HB 2197** clarifies that the failure to respond to a negative option solicitation does not mean the property or services were ordered or requested, and defines the term "negative option invitation or announcement". (Attachment 2)

The language on Page 2, Line 5 exempts book clubs, music clubs, etc., in which a person has agreed in advance to receive property on a periodic basis. Mr. Rarrick submitted a proposed amendment, requested by the AARP, which prohibits a supplier from accessing a consumer's bank account without the express written authorization of the consumer. This proposal is a result of the increase of incidents in which a supplier uses a consumer's checking account number, and the bank account is debited through a "sight-draft", without anything in writing from the consumer. The proposed amendment prohibits sight drafts in all consumer transactions, and requires written authorization.

Cal Dickinson, AARP, testified in support of **HB 2197**, stating AARP believes the bill will strengthen consumer protection laws. AARP strongly supports the proposed amendment that prevents unauthorized access to bank accounts and requires express written authorization. (Attachment 3)

John Pinegar, Direct Telemarketing Association (DMA), testified in support of **HB 2197**, however, opposes the present language in the proposed amendment submitted as "New Section 2". DMA believes the language of the Federal law should be duplicated and the word "verifiable" be inserted and the words "written authorization" stricken.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMERCE COMMITTEE, Room 123-S of the Statehouse, at 8:00 a.m. on March 18, 1999.

In response to questions from the Committee, Mr. Rarrick advised that the penalty for consumer fraud was up to \$5,000 or if disabled or elderly, up to an additional \$10,000; he agrees the words "savings or bankcard account" should be stricken; and disagrees with inserting the word "verifiable" rather than "written authorization"; stating on balance, between convenience and protection, that the consumer should be protected.

The Chair, after additional Committee discussion on the amendment, informed the Committee action on **HB 2197** will be postponed to allow the parties involved an opportunity to resolve differences on the amendment.

The meeting adjourned at 9:00 a.m.

The next meeting is scheduled for March 19, 1999.

GERRY RAY
REPRESENTATIVE, 20TH DISTRICT
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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE-CHAIR: ENVIRONMENT
MEMBER: TAXATION
TRANSPORTATION

March 18, 1999

SENATE COMMITTEE ON COMMERCE

TESTIMONY OF REPRESENTATIVE GERRY RAY

HOUSE BILL 2197

Madam Chairman, members of the Committee. Thank you for hearing HB 2197. This is a bill I believe offers protection to the citizens of Kansas from a practice called "negative option". You may not be acquainted with the term or practice, I certainly was not until I became a target for it.

Let me explain. Last summer my husband and I received my MasterCard statement which had two charges we could not identify. One for \$53.00 and the other for \$55.00 for discount services. After some investigative work on our part we were able to obtain "800" numbers for both companies from the credit card company.

The first company was contacted and they explained we had been sent material on their discount service. Because we did not take action to decline the service, the charge was added to our MasterCard account. We believe the material appeared to be "junk mail" and we most likely threw it away unopened. They agreed to credit our account, however it took about two months for it to be done. I might mention we had already denied the charge with the credit card company but still wished to have the matter expressly settled.

The story on the other company was the same with the exception that the "800" number was useless. We called at all times during the day and night and always got an answering machine with a message saying "We cannot take your call now - try again later." Finally by working with the credit card company we discovered this company was an affiliate of another company and we were able to reach them through the parent firm.

Our next question was "how did the companies assess our charge account number?" It seems we had ordered from a couple of catalogs we had received in the mail and these companies were affiliates of those catalog companies.

Ironically this all took place at a time when I was serving on the Information Management Interim Committee, which was dealing primarily with privacy issues. So I was primed to recognize that my privacy had been seriously infringed upon.

Senate Commerce Committee

Date 3-18-99

Attachment # 1 - Other 1-2

The Interim Committee did not introduce a bill because we could not complete the research on the issue in time to make the deadline. Therefore, I requested HB 2197. Representative Phill Kline, who is a co-sponsor of the bill, was Chair of the Information Management Committee.

Steve Rarrick and Kelli Benintendi of the Consumer Protection Division of the Attorney General's Office, drafted the bill before you. There are several changes proposed to address some problems and I will ask Mr. Rarrick to go over those in a minute.

Again, thank you for considering this bill. When I first learned about the negative option practice, I was astounded that such things were occurring. It took about eight weeks of work on the part of both my husband and me, including chargeable long distance calls, to get it straightened out. I could not believe we are required to carefully read our "junk mail" in order to protect ourselves. I hope you agree that HB 2197 is needed to eliminate this problem and will recommended it favorable for passage.

I would be pleased to stand for questions.



CARLA J. STOVALL
ATTORNEY GENERAL

State of Kansas

Office of the Attorney General

CONSUMER PROTECTION/ANTITRUST DIVISION

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Testimony of
C. Steven Rarrick, Deputy Attorney General
Consumer Protection Division
Office of Attorney General Carla J. Stovall
Before the Senate Commerce Committee
RE: HB 2197
March 18, 1999

Chairperson Salisbury and Members of the Committee:

Thank you for the opportunity to appear before you today on behalf of Attorney General Carla J. Stovall to testify in support of HB 2197. My name is Steve Rarrick and I am the Deputy Attorney General for Consumer Protection.

HB 2197 modifies K.S.A. 50-617, which deals with the receipt of unsolicited goods. Under the current statute, a person may consider unordered goods or services received to be an unconditional gift, and may dispose of them as they see fit. Collecting on a bill for unordered goods or services is a deceptive act or practice under the Kansas Consumer Protection Act (KCPA). The amendments contained in HB 2197 clarify that the failure to respond to a negative option solicitation does not mean the property or services were affirmatively ordered or requested, and define the term "negative option invitation or announcement."

An example of a negative option announcement would be if your credit card company sent a 30-day trial offer of their credit card protection program for which you would be billed unless canceled before the expiration of the trial offer time. In this negative option scenario, even though the program was never requested or ordered, you would have to make sure the company's cancellation procedure was followed in order to avoid being charged. Cancellation may involve calling a company representative and listening to a high pressure sales pitch for the program before being allowed to cancel something that you didn't even order.

The Consumer Protection Division receives inquiries about negative option solicitations, and recently we have received complaints against two different companies using negative options to sell discount buying club memberships. The negative option announcement is sent to the consumer by bulk mail that many consumers discard as junk mail. The envelope does not indicate that a consumer will be charged if the membership is not canceled. Both of these companies appear to have acquired credit card numbers when other merchandise was purchased by phone from a catalog or television advertisement.

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Attachment # 2-1 thru 2-4

The amendments to K.S.A. 50-617 in this bill specifically provide that property or services received when a person fails to respond to a negative option solicitation are unordered. Any attempt to collect or bill for the unordered property or services would be a violation of the KCPA.

Amendments made to the bill while in the House Business, Commerce and Labor Committee, and passed in the House with no opposition, include:

On page 1, lines 24 and 25, changing the word "unsolicited" to "unordered" to be consistent with the other language in the statute.

On page 1, line 38, adding "or sends" following "proposes to send," to include circumstances in which the property or services are sent as part of the negative option invitation or announcement.

On page 2, lines 1 and 2, following "Any attempt to collect," deleting "on billing for" and adding "or bill for unordered" in order to include both collection efforts and simply billing for unordered property or services as deceptive acts or practices.

On page 2, line 2, deleting "received as an unconditional gift."

Both our office and Representative Gerry Ray were contacted by members of the direct marketing industry with suggested language related to book-of-the-month type arrangements. The amendment at page 2, line 5, was mutually agreed to and applies to book clubs, music clubs, etc., in which a person has agreed in advance to receive property on a periodic basis.

Additionally, at the request of AARP, we have also included a balloon amendment at page 2, which would prohibit a supplier from accessing a consumer's bank account without the express written authorization of the consumer. Many consumers are unaware that once a supplier has their checking account number, their bank account may be debited through a "sight-draft," without anything in writing from the consumer. The language contained in this proposed amendment is nearly identical to language contained in the federal Telemarketing Sales Rule. However, this proposal differs from the Telemarketing Sales Rule in two important ways.

First, this proposal prohibits sight drafts in all consumer transactions, not just telemarketing transactions. Second, this proposal requires written authorization, which will allow banks to decline to pay sight drafts not supported by a written authorization. This will prevent consumers from being defrauded by unscrupulous companies that utilize sight drafts and other quick payment methods and then disappear, leaving the consumer with no recourse for the unauthorized withdrawal of funds from their bank accounts. We have contacted the Kansas Bankers Association, and they do not oppose this bill. The Attorney General supports this proposal.

On behalf of Attorney General Stovall, I would urge your favorable consideration of HB 2197 as amended and with the proposed balloon amendment. Thank you.

HOUSE BILL No. 2197

By Representatives Ray, Adkins, Beggs, Campbell, Carmody, Cox, Faber, Freeborn, Glasscock, Huff, Jennison, Phil Kline, Phill Kline, Lane, Lightner, Loyd, McCreary, Myers, Powell, Shultz, Stone and Wilk

2-1

12 AN ACT relating to consumer protection; concerning negative option
13 invitation or announcement; amending K.S.A. 50-617 and repealing
14 the existing section.

15
16 *Be it enacted by the Legislature of the State of Kansas:*

17 Section 1. K.S.A. 50-617 is hereby amended to read as follows: 50-
18 617. (a) Whenever any supplier shall, in any manner, or by any means,
19 deliver ~~goods property~~ or services not ~~actually~~ affirmatively ordered or
20 requested by the recipient, the receipt of any such unordered ~~goods prop-~~
21 ~~erty~~ or services shall for all purposes be deemed an unconditional gift to
22 the recipient who may use or dispose of the same in any manner the
23 recipient sees fit without any obligation on the recipient's part to the
24 ~~sender~~ supplier. *Property or services are considered to be unsolicited*
25 **unordered unless the recipient specifically requested, in an affirmative**
26 **manner, the receipt of the property or services according to the terms**
27 **under which they are being offered. Property or services are not consid-**
28 **ered to have been affirmatively ordered or requested if a person fails to**
29 **respond to a negative option invitation or announcement to purchase the**
30 **property or services, and the property or services are provided notwith-**
31 **standing.** In any action for the return of such ~~goods property~~ or for pay-
32 ment of the purchase price of such ~~goods property~~ or services or any
33 other consideration, it shall be a complete defense that the ~~goods property~~
34 or services were delivered to the recipient ~~unordered~~ voluntarily and that
35 the recipient did not ~~actually~~ affirmatively order or request the same.

36 (b) *As used in this section, "negative option invitation or announce-*
37 *ment" means any material sent by a supplier which identifies property or*
38 *services which such supplier proposes to send or sends to recipients, and*
39 *the recipients are thereafter billed for the property or services identified*
40 *in the material, unless by a date or within a time specified by the supplier,*
41 *the recipients, in conformity with the supplier's terms set forth in the*
42 *material, instruct the supplier not to send the identified property or serv-*
43 *ices.*

2-3

1 ~~(b)~~ (c) Any attempt to collect on billing for goods or bill for un-
2 **dered property** or services received as an unconditional gift under this
3 section is a deceptive act or practice under the Kansas consumer protec-
4 tion act.

5 (d) **The provisions of this act do not apply to plans and arrange-**
6 **ments regulated by and in compliance with 16 C.F.R. 425 or to**
7 **contractual plans or arrangements such as continuity plans, sub-**
8 **scription arrangements, standing order arrangements and series**
9 **arrangements under which the supplier periodically ships prop-**
10 **erty to a consumer who has affirmatively ordered or requested in**
11 **advance to receive such property on a periodic basis.**

12 ~~(e)~~ (e) This section shall be part of and supplemental to the Kansas
13 consumer protection act.

14 Sec. ~~2~~ K.S.A. 50-617 is hereby repealed.

15 Sec. ~~3~~ This act shall take effect and be in force from and after its
16 publication in the statute book.

New Sec. 2. (a) *No supplier shall obtain or submit for payment a check, draft or other form of negotiable paper drawn on a person's checking, savings or bankcard account without the consumer's express written authorization.*

(b) *A violation of subsection (a) is an unconscionable act within the meaning of K.S.A.50-627 and amendments thereto.*

(c) *This section shall be part of and supplemental to the Kansas consumer protection act.*

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VACANT

My name is Cal Dickinson. I am an AARP volunteer serving as a member on the Capitol City Task Force of the Kansas State Legislative Committee of AARP.

As a representative of AARP I speak in support of House Bill No. 2197. AARP has a long history of advocating for legislation related to consumer protection.

We believe HB2197 will strengthen consumer protection laws as an additional tool to assist our citizens. In addition, The proposed amendment to HB2197, that of preventing unauthorized access to bank accounts and requiring express written authorization from the consumer before a bank account can be debited, affords needed and helpful protection for consumers young and old.

Thus, HB2197 offers "consumer friendly" relief for those persons who may not fully understand the consequences of their transactions with suppliers. A number of our AARP members report unauthorized withdrawals from their bank accounts.

AARP wholeheartedly endorses HB2197 as well as the proposed amendment offered today.

Thank you for the opportunity to speak for this important consumer protection bill.