Approved: 3-10-2003
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE.

The meeting was called to order by Chairman Michael R. O'Neal at 3:30 p.m. on February 4, 2003 in Room 313-S of the Capitol.

All members were present except:
Representative Dale Swenson - Excused

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:
Representative Doug Patterson
BillYanek, Kansas Association of Realtors
Barbara Conant, Kansas Trial Lawyers Association
Tom Lauhon, American Residential Inspections
Kerry Parham, Home Inspector, Wichita

Representative Patterson requested a committee bill that would clarify the provisions of the ignition interlock statutes. He made the motion to have the request introduced as a committee bill. Representative Long seconded the motion. The motion carried.

Hearings on **HB 2100 - Home inspections; contractual language limiting liability void**, were opened.

Representative Doug Patterson appeared as the sponsor of the proposed bill. He testified that those people who are considering purchasing a home sometimes hire a home inspection service at a costs of $200 - $400, to find any defects in the house. The problem has arisen when the inspector determines that there are no defects in the house and the buyer purchases the house only to find out a short time after they move in that there are defects that cost a substantial amount of money to repair. The only recourse is to fix the home and notify the person who did the home inspection and get back the inspection fee, because the contract they signed holds the inspector not liable for any defects that they might have missed and if any show up then their only obligation is to return the inspection fee.

He provided the court with two current Court of Appeals opinions (Attachment 1):

- In *Moler v. Melzer,* Moler brought suit against Apex Building inspectors, alleging he had purchased a home based on a favorable inspection report prepared by Apex. Moler brought suit to recover the cost of damages for repairing structural problems that Apex had failed to discover. The court ruled that the contract between the parties limiting Apex's liability to the cost of the inspection was valid and enforceable.
- In *Corral v. Rollins Protective Services Company*, Corral hired Rollins Protection Company to install and service a fire & burglary alarm system. A fire occurred and the alarm system failed to function. There was substantial damage and a suit was filed against Rollins for the amount of loss asserting five separate causes of action based upon (1) negligence, (2) strict liability, (3) breach of implied warranty, (4) breach of express warranty and (5) violation of Kansas Consumer Protection Act. The petition was later amended to include an alleged violation of the Magnuson-Moss Warranty Act. The trial court granted summary judgement upon Corral's claims of breach of implied warranty and violation of the Kansas Consumer Protection Act, but the Appeals Court reversed that judgement. The judgement granting summary judgement and partial summary judgement on the other claims was sustained.

Bill Yanek, Kansas Association of Realtors, appeared as a proponent of the bill. He informed the committee that realtors and their clients rely on the expertise of qualified third party inspections to identify defects and believe that consumers should be protected from home inspectors who disclaim or limit their liability. (Attachment 2).

MINUTES OF THE HOUSE JUDICIARY COMMITTEE at 3:30 p.m. on February 4, 2003 in Room 313-S of the Capitol.

Barbara Conant, Kansas Trial Lawyers Association, requested an amendment which would expand the bill to include termite, septic system, swimming pools, spas, tennis courts and playground equipment inspections (Attachment 3).

Written testimony in support of the proposed bill was provided by Kansas Building Industry Association (Attachment 4).

Tom Lauhon, American Residential Inspections, appeared before the committee as a proponent of the bill. He believes that unlimiting liability would be detrimental to inspectors and would cause the cost of inspections to rise and their insurance rates to increase. He suggested that the insurance companies require inspection companies to put the limited liability clause in their contracts.

Kerry Parham, Home Inspector, Wichita, also agreed that the bill would increase cost of inspections and insurance. He commented that the public needs to research home inspection companies before they hire one.

The hearings on **HB 2100** were closed.

The committee meeting adjourned at 5:00 p.m. The next committee meeting was scheduled for Wednesday, February 5, 2003 at 3:30 p.m. in room 313-S.

STATE OF KANSAS

HOUSE OF
REPRESENTATIVES

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HEALTH AND HUMAN SERVICES
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INDIAN AFFAIRS
HOUSE RULES COMMITTEE

DOUG PATTERSON
MAJORITY WHIP

February 4, 2003

Re: HB 2100

Dear Chairman O'Neal and members of the Judiciary Committee.

I offer testimony in support of HB 2100. Today, one of the most important component of a residential sale closing is the Home Inspector. Home Inspectors are perceived by the home buyer to be an expert in home construction and condition.

As in the case in all occupations, a majority of Home Inspectors are competent professionals. Some however, do not discharge their responsibilities capability.

An error made by a Home Inspector can have catastrophic and expensive consequences. Today however, more and more Home Inspectors are disclaiming any responsibility for errors, negilence and omission made by them. The standard form contract used by many Home Inspectors today provides that the sole remedy for bad inspectors is the return of the fee paid by the consumer, generally $250.00 to 400.00 although the cost to cure the error is much more expensive.

HB 2100 simply provides that such disclaimers of responsibility are against public policy. It requires Home Inspectors to be careful in discharging their obligations and to stand responsible for their mistakes–just as the rest of us in dealing with the consuming public.

Respectfully,

Doug Patterson

H. JUDICIARY
2-04-03
Attachment: 1

MOLER v. MELZER, 24 Kan. App. 2d 76 (1997)
942 P.2d 643

ALAN DOUGLAS MOLER, *Appellant*, v. MARK EDWARD MELZER, d/b/a APEX BUILDING INSPECTORS, and MARCHELLE CO., INC., d/b/a APEX BUILDING INSPECTORS TRS, *Appellees*.

No. 76,282[fn1]
Court of Appeals of Kansas.
Opinion filed July 3, 1997.

[fn1] **REPORTER'S NOTE:** Previously filed as an unpublished opinion, the Supreme Court granted a motion to publish by an order dated July 10, 1997, pursuant to Rule 7.04 (1996 Kan. Ct. R. Annot. 40).

SYLLABUS BY THE COURT

1. CONTRACTS - *Construction.* Rules for construing contracts are stated and applied.

2. SAME - *Clause Limiting Liability - No Special Consideration Required.* Kansas has never imposed a requirement that a contract clause limiting liability be supported by separate consideration.

3. CONSUMER PROTECTION ACT - *Application.* Portions of the Kansas Consumer Protection Act are construed and applied.

4. SAME - *Clause Limiting Liability - Consumer Protection Act Not Applicable under Facts Because Clause Relates to Services, Not Property* The contract clause here involved, which limits a party's liability, does not violate K.S.A. 50-639(a)(2).

5. SAME - *Clause Limiting Liability - Clause Not Unconscionable.* The contract clause here involved is not unconscionable, applying the factors listed in *Wille v. Southwestern Bell Tel. Co.*, 219 Kan. 755, 549 P.2d 903 (1996).

Appeal from Sedgwick District Court; PAUL BUCHANAN, judge.

Affirmed.

Edgar Wm. Dwire and *Warren Jones*, of Malone, Dwire and Jones, of Wichita, for appellant.

Charles E. Millsap and *Lyndon W. Vix*, of Fleeson, Gooing, Coulson & Kitch, L.L.C., of Wichita, for appellees.

Before ROYSE, P.J., ELLIOTT, J., and J. BYRON MEEKS, District Judge, assigned.

ELLIOTT, J.:

Alan Douglas Moler sued Apex Building Inspectors, alleging he had purchased a house based on a favorable inspection report prepared by Apex. Moler sought damages for the costs of repairing structural problems Apex had failed to discover. The trial

court granted summary judgment in favor of Apex, ruling that the contract between the parties limiting Apex's liability to the cost of the inspection was valid and enforceable.

Moler appeals and we affirm.

Moler first contends the contract clause limiting Apex's liability is neither valid nor enforceable. The clause read: "In the case that the client should become dissatisfied with the inspection, it's [*sic*] findings, or future occurrences, the client will hold the inspector or the company represented liable for the cost of the inspection only."

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ler argues the contract clause is enforceable only if it is expressed in clear and unequivocal language. See *Johnson v. Board of Pratt County Comm'rs*, 259 Kan. 305, Syl. ¶ 16, 913 P.2d 119 (1996); *Zenda Grain & Supply Co. v. Farmland Industries, Inc.*, 20 Kan. App. 2d 728, Syl. ¶ 1, 894 P.2d 881 (1995). Kansas law also provides that competent parties are free to make their own contracts where not illegal, against public policy, or induced by fraud. And a party who freely enters a contract is bound by it even though it was unwise or disadvantageous to the party, so long as the contract is not unconscionable. *Corral v. Rollins Protective Services Co.*, 240 Kan. 678, Syl. ¶ 2, 732 P.2d 1260 (1987).

Corral held the limitation of liability clause there involved to be valid. 240 Kan. at 683-84. In *Zenda*, we found the clause to be not sufficiently clear and unequivocal. 20 Kan. App. 2d at 735. Thus, the question for our resolution is whether the clause in the Apex contract was clear enough to advise Moler of its purpose and potential effect. In this regard, *Zenda* did not void all similar clauses which do not use the exact language validated in *Corral*.

The language in the present case could not possibly refer to anything other than the possibility Apex might miss something in its inspection. Unlike in *Zenda*, the present clause could not have been intended for any other purpose. Further, Moler does not allege he misunderstood what the clause meant. He noticed the clause and was concerned by it, but never questioned Apex about his concerns. The clause was enforceable as a clear expression of Apex's intent to limit liability.
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Moler next argues the clause effects a release of liability and, therefore, must be supported by separate consideration. We disagree.

The clause limiting Apex's liability was not a release in any traditional sense. See 57A Am. Jur. 2d, Negligence ¶ 49, pp. 106-07. Kansas has never imposed a requirement that a contract clause *limiting* liability be supported by separate consideration.

Moler urges that we follow *Schaffer v. Property Evaluations, Inc.*, 854 S.W.2d 493 (Mo. App. 1993). So far as we can determine, *Schaffer* is leading a parade of one; in any event, we decline to adopt its reasoning.

Moler next argues the clause violates K.S.A. 50-639(a)(2) of the Kansas Consumer Protection Act (KCPA). While the contract involved in the present case probably is a consumer transaction as defined in K.S.A. 50-624(c), the problem is that K.S.A. 50-639 applies *only* where the subject of the consumer transaction is property and not services. "Property" and "services" are separately defined. K.S.A. 50-624(g), (h).

The subject of the transaction here involved was not property, but the *inspection* of a building - a service.

The clause limiting Apex's liability does not violate K.S.A. 50-639(a)(2), and Moler does not argue on appeal that Apex engaged in any deceptive act or practice under 50-626 of the KCPA.

Finally, Moler argues the clause is unconscionable, claiming the contract was on a preprinted form and claiming he was not in a position to negotiate for different contract provisions.

Our Supreme Court listed various factors as relevant in

c mining whether a contract is unconscionable in *Wille v. Southwestern Bell Tel. Co.*, 219 Kan. 755, 758-59, 549 P.2d 903 (1976).

Here, the clause limiting Apex's liability was not hidden; it appears as the last of six short provisions, each of which is accompanied by a box to be checked by the client after he or she has read the provision. And just before the signature line, the client must check a box indicating he or she has read the foregoing provisions: "The client agrees to permit the inspector to perform the inspection of the property according to the terms listed above without change as read and understood."
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The record in this case gives no indication of an inequality of bargaining or economic power, nor any indication that Moler could not have sought a different inspection company had he been unsatisfied with the contract provisions. On these facts, the contract clause limiting Apex's liability was not unconscionable.

Affirmed.
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CORRAL v. ROLLINS PROTECTIVE SERVICES CO., 240 Kan. 678 (1987)
732 P.2d 1260

JAMES A. CORRAL, *Appellant,* v. ROLLINS PROTECTIVE SERVICES COMPANY, d/b/a Rollins Protective Services, Inc., a subsidiary of Corporation of Rollins, Inc., *Appellee.*

No. 59,325
Supreme Court of Kansas
Opinion filed February 20, 1987.

SYLLABUS BY THE COURT

1. JUDGMENTS - *Summary Judgment - Application.* A motion for summary judgment is to be sustained only where the record conclusively shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. However, only disputed "material" facts will preclude summary judgment. If a disputed fact, however resolved, could not affect the judgment, it does not present a genuine issue of a material fact.

2. CONTRACTS - *Freedom of Parties to Make Contracts on Their Own Terms - Exception Recognized for Unconscionable Contracts.* Mentally competent parties may make contracts on their own terms and fashion their own remedies where they are not illegal, contrary to public policy, or obtained by fraud, mistake, overreaching, or duress. A party who has fairly and voluntarily entered into such a contract is bound thereby, notwithstanding it was unwise or disadvantageous to him. However, an exception to this principle of freedom of contract has been recognized when a contract is so one-sided that it is found to be unconscionable.

3. SAME - *Warranty - Express or Implied Warranties.* Warranties, express or implied, may be present in any type of contract including sales, leases, bailments, service agreements, and others.

4. SAME - *Express Warranty.* In order to constitute an express warranty, no particular language is necessary. It need not be in writing or be made in specific terms, and the word "warrant" or "warranty" need not be used.

5. SAME - *Warranty - Reliance by One Party on Affirmative Statements Made by Other Party to Contract.* Any direct and positive affirmation of a matter of fact, as distinguished from a mere matter of opinion or judgment, made by one party during contract negotiations and as part of the contract, designed or intended by the first party to induce the other party to enter into the contract, and actually relied upon by the other party in doing so, is a "warranty."

6. SAME - *Warranty - Express and Implied Warranties - Terms Construed.* Express warranties are those for which a party bargained; they go to the essence of the bargain, being a part of its basis, and are contractual, having been created during the bargaining process. Implied warranties arise by operation of law and not by agreement of the parties, their purpose being to protect a party from loss where the subject matter of the contract, though not violating an express promise, fails to conform to the normal commercial standard or meet the party's known particular purpose.

7. SAME - *Magnuson-Moss Warranty Act - Act Applies to Sales of Consumer Products to Consumers.* The federal Magnuson-Moss Warranty Act,

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15 U.S.C. § 2301 *et seq.* (1982), by its own terms is limited to sales of consumer products to a consumer as those terms are

defined in the Act. The Act does not apply to contracts for services or leases of personal property.

8. SAME - *Service Contract - Implied Warranty Exists When Express Warranty Not Stated.* A person who contracts to perform work or to render service, without an express warranty, impliedly warrants to perform the task in a workmanlike manner and to exercise reasonable care in doing the work.

9. SAME - *Implied Warranties on Non-sale Contracts Not Precluded by Uniform Commercial Code.* The Kansas Uniform Commercial Code, K.S.A. 84-2-101 *et seq.*, applies only to sales but does not preclude the application of common-law or statutory implied warranties to transactions which are not sales and which are not controlled by the UCC.

10. CONSUMER PROTECTION ACT - *Application.* The Kansas Consumer Protection Act, K.S.A. 50-623 *et seq.*, is discussed under the facts of this case and applied.

Appeal from Johnson district court, MARION W. CHIPMAN, judge. Opinion filed February 20, 1987. Affirmed in part, reversed in part, and remanded for further proceedings.

Paul Hasty, Jr., of Wallace, Saunders, Austin, Brown & Enochs, Chtd., of Overland Park, argued the cause and *Jeffrey L. Lauersdorf,* of the same firm, was with him on the briefs for appellant.

Jeffrey S. Nelson, of Shook, Hardy & Bacon, of Overland Park, argued the cause and was on the brief for appellee.

The opinion of the court was delivered by

HOLMES, J.:

James A. Corral, plaintiff below in an action to recover damages for a fire loss suffered at his residence, appeals from orders of summary judgment and partial summary judgment rendered in favor of the defendant, Rollins Protective Services Co. (Rollins). The trial court determined that its orders constituted a final judgment under K.S.A. 60-254(b) and Corral appeals.

Rollins had installed and agreed to service a fire and burglary alarm system in the Corral home. A fire occurred, the alarm system failed to function, and Corral sustained substantial damage. Suit was filed against Rollins for the amount of the fire loss asserting five separate causes of action based upon (1) negligence, (2) strict liability, (3) breach of implied warranty, (4) breach of express warranty, and (5) violation of the Kansas Consumer Protection Act (KCPA). In an amended petition, an additional cause of action was alleged for violation of the federal

Magnuson-Moss Warranty Act. Upon motions filed by Rollins, the trial court granted partial summary judgment on the negligence and strict liability claims limiting any recovery thereunder to $250.00 and granted summary judgment in full as to the remaining claims.

A motion for summary judgment is to be sustained only where the record conclusively shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Williams v. Community Drive-in Theater, Inc.*, 214 Kan. 359, 520 P.2d 1296 (1974). However, only disputed "material" facts will preclude summary judgment. If a disputed fact, however resolved, could not affect the judgment, it does

resent a genuine issue of a material fact. *Secrist v. Tr ey,* 196 Kan. 572, 575, 412 P.2d 976 (1966). In the case at bar, it does not appear that Corral contests the facts as contained in the trial court's decision, but instead takes issue only with the trial judge's application of the law.

On August 28, 1978, Corral entered into a one-page contract with Rollins entitled "Installation-Service Agreement." Under the terms of the agreement Rollins was to install and service a burglary/fire alarm system at plaintiff's residence in Stanley, Kansas. Corral agreed to pay $1,760 for installation and then $35.20 per month for servicing. The contract was for an initial three-year period and thereafter converted to a yearly term until cancellation by one of the parties. Three provisions of the agreement are relevant to this action.

> "The Rollins Protective System shall remain personal property and title thereto shall continue in Rollins. Customer covenants and agrees not to mortgage, sell, pledge or permit the damage or destruction of the System; to use the System in a proper manner; and upon termination of this Agreement to immediately return the System to Rollins in the same condition as when received, reasonable wear, tear and depreciation resulting from proper use thereof alone excepted. Rollins hereby waives all lien rights on the Customer's property described in Exhibit `A'.
>
> . . . .
>
> "It is further agreed that Rollins is not an insurer of the Customer's property and that all charges and fees herein provided for are based solely on the cost of installation, service of the System and scope of liability hereinafter set forth and are unrelated to the value of the Customer's property or the property of others located on the Customer's premises.
>
> "The parties agree that if loss or damage should result from the failure of
>
> Page 681
>
> performance or operation or from defective performance or operation or from improper installation or servicing of the System, that Rollins' liability, if any, for the loss or damage thus sustained shall be limited to a sum equal to ten (10%) per cent of one year's service charge or $250.00, whichever sum is the greater, and that the provisions of this paragraph shall apply if loss or damage, irrespective of cause or origin, results, directly or indirectly to persons or property from performance or nonperformance of obligations imposed by this Agreement or from negligence, active or otherwise, of Rollins, its agents or employees."

On November 30, 1981, a fire occurred at Corral's residence causing an estimated $185,631.30 damage. Appellant claimed that the fire alarm system failed to relay an alarm to the defendant's central receiving station, which resulted in a delay in the summoning of firefighters. Corral claimed that the damage to his residence and personal belongings was much worse than would have occurred if the fire alarm system had functioned properly.

NEGLIGENCE AND STRICT LIABILITY

Corral alleged that Rollins' negligence in failing to exercise

nable care in the installation and maintenance of the alarm em resulted in the destruction of his home. He also sought to recover from Rollins based upon the theory of strict liability. The trial court held that the provisions of the agreement limited Corral's recovery under these theories to the sum of $250. It is plaintiff's position that the trial court erred by enforcing the limitation of damages clause, and in not finding the clause violated public policy.

It is the traditional rule, followed in Kansas, that mentally competent parties may make contracts on their own terms and fashion their own remedies where they are not illegal, contrary to public policy, or obtained by fraud, mistake, overreaching, or duress. *Belger Cartage Serv., Inc. v. Holland Constr. Co.,* 224 Kan. 320, 327, 582 P.2d 1111 (1978); *Kansas City Structural Steel Co. v. L.G. Barcus & Sons, Inc.,* 217 Kan. 88, 535 P.2d 419 (1975); *Kansas Power & Light Co. v. Mobil Oil Co.,* 198 Kan. 556, 426 P.2d 60 (1967). A party who has fairly and voluntarily entered into such a contract is bound thereby, notwithstanding it was unwise or disadvantageous to him. *Wille v. Southwestern Bell Tel. Co.,* 219 Kan. 755, 757, 549 P.2d 903 (1976). However, an exception to this principle of freedom of contract has been recognized when a contract is so one-sided that it is found to be
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unconscionable. *Wille v. Southwestern Bell Tel. Co.,* 219 Kan. 757.

Although this court has not previously dealt with the validity and enforceability of provisions limiting damages in contracts involving fire and/or burglar alarm systems, the vast majority of cases from our sister states dealing with the issue upholds such provisions. See generally Annot., Burglary-Fire Alarm Malfunction Liability, 37 A.L.R.4th 47; and Annot., Validity, Construction, and Effect of Limited Liability or Stipulated Damages Clause in Fire or Burglar Alarm Service Contracts, 42 A.L.R.2d 591, and cases cited therein.

In *Atkinson v. Pacific Fire Extinguisher Co.,* 40 Cal.2d 192, 253 P.2d 18 (1953), the defendant had agreed to install and maintain a fire detection system in plaintiff's business. Subsequently, a fire erupted on the premises, no alarm was sounded, and plaintiff's building was destroyed. A provision in the parties' contract limited the defendant's liability to the sum of $25. In the litigation that followed the fire, plaintiff received judgment in the amount of $97,000. On appeal the court upheld the liability limiting provisions and plaintiff's award was reduced to the liquidated sum of $25. The court reasoned that damage was likely to take place if a fire occurred even if the alarm functioned properly and that arriving at the damage caused by the failure of the alarm to function was bound to be very speculative. In addition, the court noted that for the small fee the defendant received it should not be placed in the position of being a fire insurer of plaintiff's property. See *American District Telegraph Co. v. Roberts & Son,* 219 Ala. 595, 122 So. 837 (1929); *Scott & Fetzer v. Montgomery Ward,* 112 Ill.2d 378, 493 N.E.2d 1022 (1986); *Abel Holding Co. v. American Dist. Telegraph Co.,* 138 N.J. Super. 137, 350 A.2d 292 (1975), *aff'd* 147 N.J. Super. 263, 371 A.2d 111 (1977); *Appliance Associates v. Dyce-Lymen Sprinkler,* 123 A.D.2d 512, 507 N.Y.S.2d 104 (1986). In *Fireman's Fund Ins. Co. v. Morse Signal Devices,* 151 Cal.App.3d 681, 198 Cal.Rptr. 756 (1984), the court appeared to accept the rule from *Atkinson,* except it indicated that clauses limiting damages would not be upheld where gross negligence by the alarm company was found.

In at least one case, *Antical Chemicals, Inc. v. Westinghouse,*
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86 A.D.2d 768, 448 N.Y.S.2d 279 (1982), a contract clause was enforced to prevent any recovery against the alarm company. The facts in *Antical Chemicals* are very similar to those at bar. The plaintiff claimed that the defendant's alarm system failed to transmit a fire alarm to the defendant's central communication center and consequently the communication center did not contact the fire department and damages were sustained to plaintiff's warehouse. The defendant's agreement with plaintiff contained a disclaimer of responsibility for communications failures. The court granted defendant Westinghouse's motion for partial summary judgment on the grounds any recovery was barred by the disclaimer contained in the contract.

The precise clause at issue in the present case was found to be valid in *Gill v. Rollins Protective Services Co.*, 722 F.2d 55 (4th Cir. 1983). In *Gill* a residential fire occurred, no alarm was reported by defendant's system, and the customer's home was totally destroyed. One of the issues presented in the case was whether the installer and maintainer of a fire-burglary protection system could contractually exempt itself from liability for negligence. The court reviewed existing Virginia law and determined that parties on equal footing may contractually limit their liability for ordinary negligence. However, the case was remanded for a new trial based upon the Virginia Consumer Protection Act, as will be more fully discussed later in this opinion.

In *Kansas City Structural Steel Co. v. L.G. Barcus & Sons, Inc.*, 217 Kan. at 95, the court stated:

> "The policy of the law in general is to permit mentally competent parties to arrange their own contracts and fashion their own remedies where no fraud or overreaching is practiced. Contracts freely arrived at and fairly made are favorites of the law. (*Kansas Power & Light Co. v. Mobil Oil Co.*, 198 Kan. 556, 426 P.2d 60.) None of the parties here involved were neophytes or babes in the brambles of the business world. Both companies, it would appear, dealt in projects involving considerable sums of money; both operated substantial business enterprises; and there is no suggestion that their businesses were not capably managed and profitably operated. The trial court did not find the limitation on damages imposed by the exculpatory clause was unconscionable, and we cannot view it as such. The limitation imposed was not total and was agreed upon by parties standing on equal footing."

There is no contention here that Corral was at any business disadvantage or that he did not or could not understand the clear
Page 684
terms of the contract. Also, there does not appear to be any contention that the agreement was obtained by Rollins through fraud, mistake, or duress. Neither is there any contention that Rollins was guilty of any gross or wanton negligence or intentional misconduct which resulted in the failure of the alarm system. The limitation of liability clause is not contrary to public policy and the district court did not err in finding it valid as to the claims based upon negligence and strict liability and limiting Rollins' liability thereunder.

EXPRESS WARRANTY

Appellant contends that the trial court erred in sustaining Rollins' motion for summary judgment on his theory of breach of an express warranty. It is the position of Corral that certain statements and directions in the operating instructions furnished

ollins constituted an express warranty that "in the event of re when the alarm is in the delayed position, a telephone communicator will notify the Rollins Central Emergency Center which, in turn, will notify the fire department."

Rollins, on the other hand, contended that as there was no sale of goods there could be no warranty, express or implied, because the Uniform Commercial Code, K.S.A. 84-2-101 *et seq.*, (UCC) applies only to sales. The trial court concluded that the UCC applied, that there could be no warranties outside the terms of the UCC, and, therefore, there were no warranties in this transaction. We agree that the agreement here did not involve a sale and that the UCC is limited to sales. However, the trial court was in error, as will be shown in more detail later, when it concluded there could be no warranties unless the transaction constituted a sale subject to the UCC. Warranties, express or implied, may be present in any type of contract including sales, leases, bailments, service agreements, and others. The question here is not whether there was a warranty under the UCC, but whether Rollins made any express warranties to Corral which induced him to enter into the contract. While it is true that most of the reported cases involving warranties are sales cases, warranties are by no means limited to sales.

Adrian v. Elmer, 178 Kan. 242, 284 P.2d 599 (1955), was an action based upon the sale of a bull purchased for breeding

purposes. It was alleged that the bull turned out to be "almost entirely barren, impotent and unfit for the purposes for which he was purchased." The court, in defining an express warranty, held:

> "In order to constitute an express warranty, no particular language is necessary. It need not be in writing or be made in specific terms, and the word `warrant' or `warranty' need not be used." Syl. ¶ 1.
>
> "Any direct and positive affirmation of a matter of fact, as distinguished from a mere matter of opinion or judgment, made by seller during sale negotiations and as part of the contract, designed or intended by seller to induce buyer to buy, and actually relied upon by buyer in buying, is a `warranty.'" Syl. ¶ 2.

In *Naaf v. Griffitts,* 201 Kan. 64, 439 P.2d 83 (1968), an action for breach of an express warranty in a sales transaction, the court held:

> "An express warranty is created by any direct and positive affirmation of fact made by the seller concerning the article to be sold during sale negotiations and as part of the contract upon which the seller intends the buyer to rely in making the purchase." Syl. ¶ 1.

In 67A Am.Jur.2d, Sales § 690, the distinction between "express" and "implied" warranties is stated as:

> "Express warranties are those for which the buyer bargained; they go to the essence of the bargain, being a part of its basis, and are contractual, having been created during the bargaining process. Implied warranties arise by operation of law and not by agreement of the parties, their purpose being to protect the buyer from loss where merchandise, though not violating an express promise, fails to conform to the normal commercial standard or meet the buyer's known particular purpose." pp. 46-47.

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is clear that for there to be an express warranty there must be an explicit statement, written or oral, by the party to be bound prior to or contemporaneous with the execution of the contract. The operating manual here does not rise to the status of an express warranty. The manual is clearly instructional and advises the homeowner how to properly activate the protective system upon leaving the premises and how to deactivate it upon reentry. Statements in the operating instructions relied upon by appellant merely state what is expected to happen when the operating controls are set in a particular manner, that is, when the alarm system is activated. Those statements do not constitute warranties as to the system's performance and there is no assertion that
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such statements were part of the inducement for the agreement. There is nothing in the agreement itself which even approaches an express warranty.

We conclude the trial judge did not commit error in granting summary judgment to Rollins on the claim of a breach of express warranty, albeit he did so for the wrong reason.

MAGNUSON-MOSS WARRANTY ACT

On September 26, 1985, Corral filed a second amended petition in which he alleged an additional cause of action asserting a violation of the federal Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.* (1982). Following a motion for summary judgment by Rollins, the trial court granted summary judgment on the basis that in the absence of a sale there were no warranties that were protected by the Act. We agree.

The Magnuson-Moss Warranty Act was passed by Congress in 1975 and applies to the *sale* of consumer products manufactured after July 4, 1975. The Act sets forth three purposes for its enactment: (1) improving the adequacy of information available to consumers; (2) preventing deception of consumers, and (3) stimulating competition in the marketing of consumer products. 15 U.S.C. § 2302(a). The reasoning that underlies these purposes is: (1) Better informed consumers will make better judgments about how to spend their dollars; (2) consumers who have greater advance knowledge about the warranties that accompany goods will select those products that have stronger warranties; (3) as consumers begin to select goods based upon warranties, manufacturers and sellers will be induced to compete on warranty terms; (4) this will provide better warranty protection to consumers and conceivably better product quality since strong warranties will not accompany weak goods. Reitz, *Consumer Protection Under the Magnuson-Moss Warranty Act,* 1978 ALI-ABA Comm. on Cont. Prof. Educ. 23.

Rollins maintains that the Act is inapplicable, and relies upon language found in the definitional section of the law which refers only to sales transactions. A "consumer" is described as a *buyer* of any consumer product, *i.e.,* personal property used for personal, family, or household purposes. 15 U.S.C. § 2301(1) and (3). The critical aspects of the law, "written warranty" and
Page 687
"implied warranty," are defined in 15 U.S.C. § 2301(6) and (7) respectively.

"The term `written warranty' means:

(A) any written affirmation of fact or written promise made *in connection with the sale of a consumer product by a supplier to a buyer* which relates to the nature of the material or workmanship and affirms or promises that such material or

1-11

> kmanship is defect free or will meet a specified
> vel of performance over a specified period of time,
> or
>
> (B) any undertaking in writing *in connection with the sale by a supplier of a consumer product* to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking."
>
> "The term `implied warranty' means an implied warranty arising under State law . . . in connection with the *sale* by a supplier of a consumer product." (Emphasis added.)

Warranties on services are not covered under the Act. 16 C.F.R. § 700.1(h) (1986). Also, the Act does not apply to leases of consumer products since a "written warranty" under the Act only arises in connection with the "sale" of a consumer product. 15 U.S.C. § 2301(6). Thus, the Act literally covers only warranties on a consumer product "sold" to a consumer. Clark and Smith, The Law of Product Warranties, ¶ 15.08 (1986 Supp.).

Corral seeks to rely on a few cases from other jurisdictions which have applied the Act to transactions which were not clearly sales. In *Henderson v. Benson-Hartman Motors, Inc.*, 41 U.C.C. Rep. Serv. 782 (Callaghan, 1985), the court extended the Act to an automobile lease which "had most of the characteristics of a sale." The court found that the lease in question closely resembled an installment sales agreement in that:

> "This lease agreement extends for most of the useful life of the automobile. The payments due under the lease agreement may be almost equal to the full purchase price, with interest, of the automobile under a four year installment sales agreement. Also, unlike typical lease agreements, the responsibility for maintaining the automobile rests with the lessee, taxes are to be paid by the lessee, the lessee must obtain insurance, and in the event of default, the lessee pays the remaining installments and receives a credit for the proceeds from the sale of the automobile." 41 U.C.C. Rep. Serv. at 783-84.

Based upon its finding that the lease should be treated as a sale, the court held it was subject to the Act.

In *Freeman v. Hubco Leasing, Inc.*, 253 Ga. 698, 324 S.E.2d 462 (1985), the plaintiff leased a DeLorean sports car from the

defendant. The lease called for forty-eight monthly payments and then a final lump sum payment at the end of the lease, after which the plaintiff would own the car. Under Georgia law, such a transaction was viewed as a sale and the court, having found an installment sale contract rather than a lease, held the Act applied.

Another case applying the Act to a lease transaction is *Business Modeling v. GMC,* 123 Misc.2d 605, 474 N.Y.S.2d 258 (1984), where the lessee of an automobile was allowed to proceed against the lessor under the terms of the Act. The court determined the lessee was a consumer and ignored all other provisions of the Act which clearly limit it to sales.

All of the cases which we have found which apply the Act to transactions which are not clearly sales are readily distinguishable from the facts now before the court. The

ment here, whether it be denominated a lease, a service agreement, or a lease/service agreement, has none of the characteristics of a sale and is clearly not subject to the terms of the act. The trial court was correct in granting summary judgment to Rollins on the claim of a violation of the Magnuson-Moss Warranty Act.

IMPLIED WARRANTY

Corral asserted a cause of action based upon a breach of the implied warranties of merchantability and fitness for a particular purpose. The trial court held that as there was no sale there could be no implied warranty under the UCC.

A "warranty" may be generally defined as an assurance by one party to a contract of the existence of a fact upon which the other contracting party may rely, but which is collateral to the main purpose of the contract. 17A C.J.S., Contracts § 342. A warranty may be either express, as set forth in the contract, or implied under the circumstances of the case. While it is true that warranty actions involving the sale of goods are dealt with pursuant to the terms of the UCC, the creation of warranties is not confined to cases arising out of sale transactions. In Kansas it is recognized that a person who contracts to perform work or to render service, without an express warranty, impliedly warrants to perform the task in a workmanlike manner and to exercise reasonable care in doing the work. *Tamarac Dev. Co. v. Delamater,*
Page 689
Freund & Assocs., 234 Kan. 618, 622, 675 P.2d 361 (1984); *Gilley v. Farmer,* 207 Kan. 536, 485 P.2d 1284 (1971); *Scott v. Strickland,* 10 Kan. App. 2d 14, 691 P.2d 45 (1984); *Crabb v. Swindler, Administratrix,* 184 Kan. 501, 337 P.2d 986 (1959). In *Crabb* we held:

> "When a party binds himself by contract to do a work or perform a service, in the absence of an express agreement, there is an implied agreement or warranty, which the law annexes to the contract, that he will do a workmanlike job and will use reasonable and appropriate care and skill." Syl. ¶ 2.

Gilley v. Farmer, 207 Kan. 536, was an action against an insurance carrier for failure to properly handle a claim. The court stated:

> "[T]his court has been consistent in holding that where a person contracts to perform work or to render a service, without express warranty, the law will imply an undertaking or contract on his part to do the job in a workmanlike manner and to exercise reasonable care in doing the work. (*Crabb v. Swindler, Administratrix,* 184 Kan. 501, 337 P.2d 986.)
>
> "Where negligence on the part of the contractor results in a breach of the implied warranty, the breach may be tortious in origin, but it also gives rise to a cause of action *ex contractu.* An action in tort may likewise be available to the contractee and he may proceed against the contractor either in tort or in contract; or he may proceed on both theories." p. 542.

Another illustration of an implied warranty outside a sales transaction exists in the law of bailments. Under the common law, an implied warranty of fitness exists in connection with bailments made for the mutual benefit of the parties. 63

ur.2d, Products Liability § 199. This implied warranty of ess for intended purpose was discussed in *Global Tank Trailer Sales v. Textilana-Nease, Inc.*, 209 Kan. 314, 496 P.2d 1292 (1972):

> "An implied warranty of fitness has been recognized in connection with bailments made for the mutual benefit of the parties. The rule is that if a bailment is for the mutual benefit of both the bailor and the bailee, such as a let-for-hire agreement, then a higher duty arises on the part of the bailor, the general rule being that, while the bailor is not an absolute insurer against injuries from a defective chattel, he is charged with the duty of inspection to determine whether or not the chattel is fit for the purpose intended. Thus, if the defect were discoverable, he became liable for injuries to the bailee, arising from this unsafe condition, under the theory of an implied warranty of fitness." p. 320.

The court has also recognized that implied warranties may exist in lease transactions. See *Stephens v. McGuire*, 184 Kan. 46, 334 P.2d 363 (1959), and *Hohmann v. Jones*, 146 Kan. 578, 72 P.2d 971 (1937).
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The trial court was in error when it concluded that there could be no implied warranties outside the ambit of the UCC. We agree that the UCC only applies to sales but that does not preclude the application of common-law or statutory implied warranties to transactions which are not sales and clearly are not controlled by the UCC. Here, the trial court found that the parties had entered into an "installation and service agreement." Additionally, there is no contention by Rollins that the $250.00 limitation of liability clause applies. Rollins states in its brief:

> "The Service Agreement itself never mentions the word warranty. The limitation of liability clause merely limits the damages available in actions based on theories such as negligence and strict liability. . . . Clearly, the Service Agreement itself does not attempt to limit remedies for a breach of implied warranty."

Summary judgment on the claim of breach of implied warranty must be reversed.

KANSAS CONSUMER PROTECTION ACT

The next issue raised by Corral is that the trial court improperly entered judgment on his claim for violation of the Kansas Consumer Protection Act, K.S.A. 50-623 *et seq.* (KCPA).

In his Memorandum Decision in this case, the trial judge rejected Corral's claimed violation of the KCPA, stating:

> "5. Plaintiff's claim for relief based upon a violation of the Kansas Consumer [Protection] Act is based upon an alleged violation of K.S.A. 50-639[a](2) and (e) improperly limiting the warranties and remedies available for breaches thereof. In order for the plaintiff to prevail on this argument he must first prove that such warranties would be imposed by law. Those warranties would be imposed only by the Uniform Commercial Code. It imposes no such warranties upon the type of contract entered into by the parties. K.S.A. 50-369

rovides that nothing in the section shall be nstrued to expand the implied warranty of erchantability as defined in K.S.A. 84-2-314 to involve obligations in excess of those which are appropriate to the property. Since there [were] no implied warranties imposed by law there can be no violation of the Kansas Consumer Protection Act. However, it should be noted that the Service Agreement does not attempt to limit the existence of an implied warranty of merchantability of fitness for a particular service. It does not attempt to limit the remedy of such warranty. The limitation of liability clause, contained in the Agreement between the parties simply limits the damages available in actions based on theories such as negligence and strict liability. Clearly, the Agreement between the parties does not attempt to limit remedies for a breach of implied warranty. Accordingly, the Court holds that plaintiff's claim for relief based upon a violation of the Kansas Consumer Protection Act does not state facts sufficient to constitute a claim for relief."

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Having already determined that the agreement in this case is not subject to or controlled by the UCC, the trial court's holding to the contrary is clearly erroneous.

Rollins seizes upon isolated language by Professor Barkley Clark in *The New Kansas Consumer Legislation,* 42 J.B.A.K. 147 (1973). Quotations are taken out of context and run together in appellee's brief as if one continuous statement. A careful reading of the article makes it clear that Professor Clark did not contend that passage of the UCC eliminated all warranties except in the law of sales.

Corral clearly asserted a cause of action for violation of K.S.A. 50-639(a)(2) and (e). K.S.A. 50-624 defines certain words and terms used in the KCPA as follows:

"(b) `Consumer' means an individual who seeks or acquires property or services for personal, family, household, business or agricultural purposes.

"(c) `Consumer transaction' means a sale, lease, assignment or other disposition for value of property or services within this state (except insurance contracts regulated under state law) to a consumer or a solicitation by a supplier with respect to any of these dispositions.

. . . .

"(h) `Services' includes:

(1) Work, labor and other personal services;

. . . .

(3) any other act performed for a consumer by a supplier.

"(i) `Supplier' means a manufacturer, distributor, dealer, seller, lessor, assignor, or other person who, in the original course of business, solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer."

K.S.A. 50-639 provides in part:

"(a) Notwithstanding any other provisions of law, with respect to property which is the subject of or is intended to become the subject of a consumer transaction in this state, no supplier shall:

(1) Exclude, modify or otherwise attempt to limit the implied warranties of merchantability and fitness for particular purpose; or

(2) exclude, modify or attempt to limit any remedy provided by law, including the measure of damages available, for a breach of implied warranty of merchantability and fitness for a particular purpose.

. . . .

"(c) A supplier may limit the supplier's implied warranty of merchantability and fitness for a particular purpose with respect to a defect or defects in the property only if the supplier establishes that the consumer had knowledge

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of the defect or defects, which became the basis of the bargain between the parties. In neither case shall such limitation apply to liability for personal injury nor property damage.

. . . .

"(e) A disclaimer or limitation in violation of this section is void."

In addition to his claims under K.S.A. 50-639, Corral also asserts he is claiming under K.S.A. 50-627 in that the agreement constituted an unconscionable act or practice under the statute. K.S.A. 50-627(b) sets forth several specific actions which the court must consider in determining whether an act is unconscionable. Rollins, on the other hand, argues that the allegation of unconscionability was never properly before, nor presented to, the trial court. The record is confusing.

The original petition in this case, filed September 28, 1983, made no claims of any unconscionable acts by Rollins and made no reference to K.S.A. 50-627. On October 5, 1983, a "First Amended Petition" was filed, however, nothing in it referred to unconscionability. As this amended petition was filed prior to any responsive pleading of Rollins, it was timely and properly filed. K.S.A. 60-215(a). On May 1, 1985, another petition entitled "Plaintiff's First Amended Petition" was filed which contained the allegation:

"28. That the installation service agreement entered into by the parties contains a limitation of liability clause which constitutes an unconscionable act and practice pursuant to K.S.A. 50-627."

No order approving the filing of this amended petition appears in the record before this court and Rollins' counsel did not consent to its filing. See K.S.A. 60-215(a). Thereafter, on September 26, 1985, a "Second Amended Petition" was filed in which "the plaintiff adopts and incorporates all allegations set forth in his First Amended Petition." The petition then proceeded to state, for the first time, a claim under the Magnuson-Moss Warranty Act. The filing of this petition was approved by an order of the court filed October 14, 1985. That order referred to

intiff's Motion for an order allowing plaintiff to file a ond Amended Petition incorporating the original Petition and the First Amended Petition." We have no way of determining which "First Amended Petition" the trial court intended to be included in the "Second Amended Petition" and therefore we leave it to
Page 693
the trial court to determine, on remand, whether plaintiff may proceed under K.S.A. 50-627 for an alleged unconscionable act or practice.

As indicated earlier in this opinion, the general rule is that contractual agreements limiting liability are valid if fairly and knowingly entered into and if not in violation of other provisions of law. However, none of the cases cited by either party involve the application of state consumer protection laws. Our research has disclosed only one similar case which does involve such a statute and, as fate would have it, that case was against Rollins Protective Services Co., our appellee, and involved what appears to have been an identical agreement. In *Gill v. Rollins Protective Services Co.*, 722 F.2d 55 (4th Cir. 1983), the plaintiff entered into a contract for a fire and burglary alarm system, evidently similar to the one in this case. A fire occurred at Gill's home, the alarm failed and Gill suffered extensive damage to real and personal property. An action was filed against Rollins on theories of common-law negligence and violation of the Virginia Consumer Protection Act. Va. Code § 59.1-196 *et seq.* (1982).

Following a trial to a jury, the case was submitted on both theories propounded by the plaintiff without any special questions or special verdict. The jury returned a general verdict for plaintiff for $238,032.78 and Rollins appealed. As pointed out earlier, the court first recognized the validity of the limited liability provision of the contract and that damages for negligence were limited thereunder to $250.00. However, as to the alleged violations of the Virginia Consumer Protection Act, the court stated:

> "The limiting provision in the Rollins contract does not in terms attempt to limit Rollins' liability for violations of the Virginia Consumer Protection Act. Because of that, and especially in view of the rule that such limitations of liability are not favored and are strictly construed, see *Fairfax Gas & Supply Co. v. Hadary,* 151 F.2d 939, 940 (4th Cir. 1945) (diversity case arising under Virginia law), we do not read such a limitation into the contract, even if it be valid and enforceable. *Cf.* Restatement (Second) of Contracts §§ 179, 195. The contractual agreement between the parties, therefore, is not a defense to, and does not limit any liability for, damages under the Virginia Consumer Protection Act.
>
> . . . .
>
> "As before discussed, under the statutory theory of recovery, Mrs. Gill may recover her damages regardless of the limitation clause in the contract, while
> Page 694
> upon the negligence theory her damages may be limited to $250. Because we cannot say which theory was the basis of the jury's verdict, the judgment must be vacated and the case remanded for a new trial. [Citations omitted.] Upon a new trial, we suggest that separate verdicts, as to negligence on the one hand and the statutory cause of action on the other, are appropriate." pp. 58-59.

, conclude the trial court erred in granting summary judgment upon the claim of an alleged violation of the KCPA.

We are not unmindful of the impact this decision may have upon firms such as Rollins, which are attempting to provide a useful, and in many cases, essential service to the public at a reasonable cost. Alarm companies should not be held to be insurers of the property of their customers for the nominal fees they charge for their services. However, it is not for this court to create exceptions to our consumer protection act which are not clearly contained therein. K.S.A. 50-623 requires that the act be liberally construed to, among other things, "protect consumers from unbargained for warranty disclaimers" and "to protect consumers from suppliers who commit deceptive and unconscionable practices." If alarm companies are to be excepted from the provisions of the Act, such must be done by the legislature and not by the courts.

The judgment of the trial court granting summary judgment upon Corral's claims of breach of implied warranty and violation of the Kansas Consumer Protection Act is reversed; the judgment granting summary judgment and partial summary judgment on the other claims is sustained and the case is remanded for further proceedings.
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KANSAS
Association of REALTORS®
SOLD on Service

TO: HOUSE JUDICAIRY COMMITTEE

FROM: BILL YANEK, KAR DIRECTOR OF GOVERNMENTAL RELATIONS

DATE: February 4, 2003

SUBJECT: House Bill 2100

HB 2100 would make any agreement or contract issued by a home inspector for a home inspection report that contained "language limiting or disclaiming the home inspector's liability" against public policy and void.

The Kansas Association of REALTORS® supports passage of HB 2100.

Under 58-30-106 of the Kansas Brokerage Relationships in Real Estate Transactions Act, our licensees are required to disclose "material facts actually known". REALTORS® are not property inspection experts, therefore they routinely recommend that clients seek an inspection by a "qualified third party".

REALTORS® and their clients rely on the expertise of qualified third party inspectors to identify material defects in systems and components prior to the sale of real estate.

Consumers should be protected from home inspectors who issue reports, yet disclaim or limit their liability.

We urge you to pass favorably House Bill 2100.

785.267.3610 VOICE
800.366.0069 TOLL FREE
785.267.1867 FAX

H. JUDICIARY
2-04-03
Attachment: 2

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Members of the House Judiciary Committee

FROM: Barbara A. Conant
Kansas Trial Lawyers Association

RE: 2003 2100

DATE: Feb. 3, 2003

Chairman O'Neal and members of the House Judiciary Committee, I am Barb Conant, director of public affairs for the Kansas Trial Lawyers Association (KTLA). KTLA is a statewide, nonprofit organization of lawyers who represent consumers and advocate for the safety of families and the preservation of the civil justice system. We appreciate the opportunity to offer comments regarding HB 2100.

Kansas and the nation are currently experiencing the lowest interest rates for home mortgages in this century. These historically low rates are making the dream of home ownership a reality to many Kansans who previously were not financially able to purchase a home. However, many of these first-time buyers are not sophisticated consumers. They are particularly vulnerable to scams that can occur during the purchase of a home that can turn the dream of homeownership into a nightmare.

KTLA agrees that home buyers and sellers deserve consumer protection in residential real estate transactions. As such, KTLA supports the intent of HB 2100 which is to provide consumer protection to both home buyers and sellers in the residential real estate market. However, much of the protection that the bill would otherwise provide is partially, if not completely, undermined by the fact the bill does not apply to all inspections done as part of the sale of a residential property.

There is much to like about HB 2100. Foremost is that HB 2100 unequivocally states that it is against Kansas public policy to charge a Kansas homeowner for a "whole house inspection" in a residential real estate transaction, and then include in the contract exculpatory language that would eliminate the liability of the inspector to identify defects in the home. While KTLA supports the basic tenet of HB 2100, we believe the bill needs to be expanded beyond "whole house inspections" to include any inspection conducted as part of a residential real estate transaction, specifically including inspections done for wood destroying insects (i.e. termite inspections), septic systems, swimming pools, spas, tennis courts and playground equipment. The bill should likewise cover any single component inspection conducted for the premises, specifically including electrical, plumbing or roof inspections, among others.

H. JUDICIARY
02.04.03
Attachment: 3

Terry Humphrey, Executive Director

Fire Station No. 2 • 719 SW Van Buren Street, Suite 100 • Topeka, Ks 66603-3715 •

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HB 2100 addresses, and is in fact limited to, "whole house inspections" conducted in real estate transactions. The purpose of a "whole house inspection" is to identify defects before the buyer makes the decision to purchase the home. These inspections are conducted as part of most residential real estate sales. It is grossly unfair to allow an inspector to charge for a "whole house inspection" designed to help consummate a sale, but then allow the inspector to disclaim any and all liability for what they failed to find during the inspection. HB 2100 eliminates this problem by prohibiting the "whole house inspector" from using such exculpatory language in their inspector's contract.

But as drafted, HB 2100 does not apply to termite inspections, even though a termite inspection may be one of the most important pre-sales inspection performed on the home. HB 2100 also eliminates from coverage, inspections done for septic systems, swimming pools, spas, and tennis courts and playground equipment. A faulty or derelict inspection in one or more of these areas can be just as financially devastating to an unsuspecting homeowner as a poorly performed whole house inspection. We believe that these inspections should be included if the bill is to provide meaningful consumer protection.

We are also concerned that HB 2100 exempts from coverage under the bill, any single component inspection conducted for the premises, specifically including electrical, plumbing or roof inspections. Obviously to the extent that prospective purchasers are relying on these inspections to make their decisions regarding the sales transaction, the inspectors should not be able to contractually eliminate their liability.

KTLA appreciates the opportunity to offer our concerns HB 2100. KTLA supports the intent of HB 2100 and recommends the scope of the bill be broadened to include all inspections conducted as part of a residential real estate sale. We encourage the committee to expand the scope of the consumer protection offered in HB 2100 to give members of the home-buying public the protections they deserve.

KANSAS
BUILDING INDUSTRY
ASSOCIATION, INC.

STATEMENT OF THE KANSAS BUIDLING INDUSTRY ASSOCIATION

TO THE HOUSE JUDICIARY COMMITTEE

REPRESENTATIVE MIKE O'NEAL, CHAIR

REGARDING H.B. 2100

FEBRUARY 4, 2003

Mr. Chairman and Members of the Committee, I am Chris Wilson, Director of Governmental Affairs of the Kansas Building Industry Association (KBIA). KBIA appreciates the opportunity to come before you today to support H.B. 2100. KBIA is the trade and professional organization of the home building industry in Kansas, with approximately 1800 members.

H.B. 2100 declares provisions limiting or disclaiming the liability of home inspectors to be against public policy and void. We believe it is good public policy for those providing professional services to be held accountable for the services that they perform. Where there are contractual provisions in a home inspector's agreement, those they perform the service for need to know that the home inspector is legally responsible for the services performed and the information provided. Home inspectors should be accountable for their work product.

A concern that the building industry has is that home inspectors are sometimes inspecting for only cosmetic defects. Yet, the perception of those paying for the inspection may be that the inspection is more thorough. A satisfactory home inspection report provides the buyer with confidence in the condition of the home. If later, a serious defect is found, correcting it may pose a major cost to the homeowner or contractor, yet the home inspector's liability is minimized through agreements limiting liability. By not allowing minimizing of liability, H.B. 2100 will provide for more thorough and accurate home inspections.

KBIA respectfully requests your favorable consideration of H.B. 2100.

H. JUDICIARY
2.04.03
Attachment: 4