Approved:2-16-04
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 p.m. on February 4, 2004 in Room 313-S of the Capitol.

All members were present except:
Representative Dan Williams- excused

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

Conferees appearing before the committee:
Loren Snell, Office of Attorney General, Medicaid Fraud Division
Kevin Steck, Federal Bureau of Investigation, Chief Legal Council, Kansas City
Marlee Carpenter, Kansas Chamber of Commerce and Industry
Rick Fleming, Office of Securities Commissioner
Whitney Damron, Kansas Bar Association

The Chairman entertained request for bill introductions.

Loren Snell, Office of Attorney General, Medicaid Fraud Division, requested three bills (Attachment 1):

- Amend K.S.A. 21-3437, Mistreatment of Dependent Adult Statute, to make a violation os subsection (a)(2) consistent with the theft statute and make a violation of subsection (a)(3) a felony
- Enact a civil medicaid false claims act, and amend te state asset seizure and forfeiture act to include medicaid offenses
- Amend K.S.A. 60-460 to provide a hearsay exception allowing for admission of videotaped statements of victims who are elderly and/or dependent adults who become unavailable at trial due to death or disability

Representative Patterson made the motion to have the requests number two & three introduced as committee bills. Representative Owens seconded the motion. The motion carried.

Chairman O'Neal explained that **HB 2693** deals with the same subject matter as bill request number one and was scheduled for a hearing in House Criminal & Juvenile Justice the following week and suggested that Mr. Snell look at the bill and see if it was substantially different. Representative Patterson made the motion to have a bill be drafted if it was substantially different that **HB 2693**. Representative Jack seconded the motion. The motion carried. (After the committee meeting Mr. Snell compared **HB 2693** and the Attorney General's proposed language and believes the language is substantially similar and withdrew his request via e-mail).

Kevin Steck, Federal Bureau of Investigation, Chief Legal Council, Kansas City, requested a bill which would provide civil liability protection for agents of the FBI.. (Attachment 2) Representative Patterson made the motion to have the request introduced as a committee bill. Representative Loyd seconded the motion. The motion carried.

Marlee Carpenter, Kansas Chamber of Commerce and Industry, requested a bill be drafted after model legislation which has been endorsed by the Council of State Governments, called the Jury Patriotism Act. (Attachment 3) Representative Patterson made the motion to have the request introduced as a committee bill. Representative Owens seconded the motion. The motion carried.

Representative Swenson requested a bill which would subject business to the same penalty as workers when they file a false claim. Representative Patterson made the motion to have the request introduced as a committee bill. Representative Ward seconded the motion. The motion carried.

MINUTES OF THE HOUSE JUDICIARY COMMITTEE at 3:30 p.m. on February 4, 2004 in Room 313-S of the Capitol.

Representative Jack appeared before the committee with three bill requests:

- punitive damage amendments
- contracts sampling of crops
- amount of time a juvenile offenders can stay in a level 6 facility without being transferred to a level 5

He made the motion to have the requests introduce as committee bills. Representative Patterson seconded the motion. The motion carried.

Representative Newton requested amendments to chapter 23, civil rules of procedure. He made the motion to have it introduced as a committee bill. Representative Long-Mast seconded the motion. The motion carried.

Representative Patterson requested two bills:

- expand Star Bond redevelopment
- allow cities to reduce code standards for redevelopment

He made the motion to have his requests introduced as committee bills. Representative Loyd seconded the motion. The motion carried. Representative Patterson later withdrew his request for a bill introduction on allowing cities to reduce code standards for redevelopment.

Representative O'Neal requested four bills for introductions:

- Draft the Uniform Law Commission bill for Interstate Family Support Act
- Consent in health care decisions
- regular update of Judicial Branch information
- prohibition against using provisos to take money from fee funds

Representative Loyd made the motion to have the requests introduced as committee bills. Representative Long-Mast seconded the motion. The motion carried.

Hearings on **HB 2564 - establishing a time frame for tenants to recover property following a forcible detainer action**, were opened.

Representative Jim Ward appeared as a proponent of the bill, which address the question of whether a landlord who has lawfully obtained possession of a tenant's personal property is guilty of conversion by refusing to deliver possessions to the tenant without the tenant first paying the landlords expenses and past-due rent.

The proposed bill would give the tenant 120 hours to 14 days to remove personal property if a forcible detainer action is brought.(Attachment 4)

Hearings on **HB 2564** were closed.

Hearings on **HB 2565 - clarifying amendments to the civil liability worthless check statute**, were opened.

There were no conferees which appeared in support of the proposed bill, however, Jon Craig, Attorney, Garden City and Doug Smith, Kansas Credit Attorneys Association and Kansas Collectors Association, did provide written testimony. (Attachments 5 & 6)

Staff agreed that clarifying changes were needed in the bill. The 2000 Legislature changed the language to allow for a written demand be sent by 1st class mail, but missed changing the language on page 2 & 3.

Hearings on **HB 2564** were closed.

HB 2347 - Uniform Securities Act

Representative Long-Mast made the motion to adopt the balloon amendments from the Special Committee on Judiciary Interim (Attachment 7). Representative Patterson seconded the motion. The motion carried.

MINUTES OF THE HOUSE JUDICIARY COMMITTEE at 3:30 p.m. on February 4, 2004 in Room 313-S of the Capitol.

Representative Long-Mast made the motion to adopt the Kansas Bankers proposed amendment to add the words "or trust company" on page 2, line 10. Representative Loyd seconded the motion. The motion carried.

The Kansas Cooperative Council was concerned that some of the exemptions they have under current Act they would not have under the new Act. While neither the Kansas Cooperative Council or the Office of the Kansas Securities Commissioner knew what the fix would be they agreed to work on it and try to address the concerns in the Senate.

The committee considered the proposed amendments from the Kansas Bar Association. No interest was shown for including 1, 2, 3, 5 & 6 in the proposed bill (Attachment 8). Whitney Damron & Rick Fleming both agreed that the proposed amendments remain unresolved between the two groups but they would work together to see if agreements could be reached on any of the issues.

Representative Crow made the motion to adopt proposal #5 to change the civil statute of limitations from one year to two. Representative Rehorn seconded the motion. The motion carried.

Rick Fleming, Office of Securities Commissioner, asked the committee to change apply tolling provisions to the criminal statute of limitations. Representative Long-Mast made the motion. Representative Ward seconded the motion. The motion carried.

Representative Long-Mast made the motion to report **HB 2347** favorably for passage, as amended. Representative Jack seconded the motion. The motion carried.

The committee meeting adjourned at 5:30 p.m. The next meeting is scheduled for February 9, 2004.

2004 Legislative Proposals
Attorney General's Office
Medicaid Fraud and Abuse Division

Proposal #1

Amend to K.S.A. 21-3437, Mistreatment of Dependent Adult, to make a violation of subsection (a)(2) consistent with the theft statute, and making a violation of subsection (a)(3) a felony.

- Crimes against resources of dependent adults must be charged under 21-3437, rather than charged as theft under K.S.A. 21-3701, according to recent Court of Appeals decision in *State v. Maxon*, a November 21, 2003, decision.
- Currently 21-3437 makes no provision regarding the amount or value of the resources that are taken from the dependent adult, but rather makes any violation a misdemeanor.
- *State v. Maxon*- Defendants took advantage of the vulnerability of an elderly, recently widowed woman in an amount in excess of $600,000.00. The state charged with felony theft; however, the court held that the victim was a dependent adult and the state cannot elect to prosecute the defendant for the general crime of theft when the acts constitute the specific crime of mistreatment of a dependent adult. The case can be found at http://www.kscourts.org/kscases/ctapp/2003/20031121/87696.htm
- *State v. McKenzie*- Mckenzie "sweet-talked" her way into victims' household and was an in-home care giver. McKenzie, in a one year period, bilked the victims of about $300,000.00. McKenzie was convicted of four counts of mistreatment of a dependent adult, all misdemeanors under the law.
- Subsection (a)(3) would make it a felony to omit or deprive a dependent adult of necessary goods or services. *State v. Allen*- Allen ran a residential care facility in which she "cared for" 5 dependent adults. They were found on a cold November day to be in the home with no guardian, no heat, no running water, no sewer service and no food. Allen received the victims social security checks, and routinely spent the money on things other than the victims. One victim died of syphilis that she had contracted while at the home, but had gone untreated due to Allen's failure to take the victim to the doctor.

Proposal #2

Enact a civil medicaid false claims act, and amend the state asset seizure and forfeiture act, K.S.A. 60-4101 *et seq.*, to include medicaid offenses.

- A false claims act would provide an alternative to criminal prosecution in those cases where the fraud is evident but the necessary element of intent is difficult to prove. It would also provide a civil mechanism for obtaining a judgment against offenders for purpose of reimbursing the government for fraudulent monies obtained.
- Includes a whistle blower provision that encourages private parties with knowledge and/or evidence of medicaid fraud to come forward and pursue an action in civil court. Also would serve to encourage reluctant victims to come forward if they suspect they are the victim of fraudulent activity.

- Provides protection to employers that may be adversely impacted if they speak out about fraud that they have witnessed in their workplace.
- Recent study by group called "Taxpayers against Fraud" found that false claims act resulted in several settlements by medicaid fraud defendants, and recommends that all states should enact false claims acts.
- Allowing for forfeiture in medicaid fraud cases would provide a method by which we could seize any asset whose purchase is traceable in whole or in part to any medicaid payments that were fraudulently received. This would assist in those cases in which we are likely to receive minimal payments from the defendant as payment towards the restitution.
- Would also decrease our reliance on the federal government for prosecution of some medicaid fraud cases where forfeiture becomes an evident possibility.
- Currently 25 states have false claims acts and 23 states have forfeiture or injunctive power statutes that they can utilize in medicaid fraud matters.

Proposal #3

Amend K.S.A. 60-460 to provide a hearsay exception allowing for admission of videotaped statements of victims who are elderly and/or dependent adults and who become unavailable at trial due to death or disability.

- Modeled after a California statute that has withstood legal challenges.
- Similar to a current exception under Kansas law in which child testimony is permitted to be provided by videotaped statement in the case involving a child victim.
- Gives total discretion to the court to allow or disallow the statements, discretion that is only exercisable if certain criteria have been satisfied.
- Since the cases our division prosecutes typically involve elderly victims, and since white collar crime involves a very intensive and extended investigative process, there is a strong likelihood that the victim may be unavailable to testify by the time the matter actually proceeds to trial. Some cases have been declined for investigation and/or prosecution due to the deteriorating health of the victim at the time the fraud or abuse occurred, and the death or disability of the victim during the investigation process. It is estimated that in the last 5 or 6 years 25-30 cases have been terminated due to death or disability of the victim.
- Furthermore, the Insurance Department had a case in which the victim was an elderly individual, and was scammed by an insurance salesperson. The victim died and as a result the case had to be dismissed.

U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.

1300 Summit
Kansas City, Missouri 64105

February 4, 2004

Honorable Michael O'Neal
Kansas House of Representatives
Room 170-W
300 Southwest 10th Avenue
Topeka, Kansas 66612

Re: Civil Liability Protection for Agents
of the Federal Bureau of Investigation

Dear Representative O'Neal:

The purpose of this letter is to request consideration by the House Judiciary Committee concerning the implementation of legislation to provide civil liability protection to our Special Agents when addressing criminal activity arising in the State of Kansas.

In today's heightened security climate, our Agents are being contacted on an increasing basis by Kansas citizens and law enforcement officers to respond to a myriad of suspicious activities in the event such may be related to terrorist activities. Often, no federal violation has been committed. However, state criminal violations are likely present and in some situations our employees have been placed in situations whereby limited action was or could have been required to assist state officers or control the scene until they arrive.

Additionally, in the war on terror, our Agents are involved in numerous Joint Terrorism Task Forces in order to combine limited resources and promote mutual cooperation among all law enforcement. Recognizing that participating Kansas law enforcement officers may be called upon to act solely on a federal criminal matter or be requested to provide assistance outside their respective jurisdiction, we provide federal deputizations for these officers through the United States Marshal Service to ensure that they have the requisite authority to act as a law enforcement officer and to provide related civil liability protection when performing in this capacity.

Under current Kansas law, situations may arise whereby our Agents are required to take law enforcement actions, yet would be considered to be acting as a private citizen where no federal violation is present. In these instances our Agents, with extensive law enforcement training and experience, may not be afforded various qualified immunity and good faith defenses normally provided to recognized law enforcement officers.

Many states have already implemented legislation to provide limited authority and civil liability protection to federal officers who find themselves in those situations whereby they are required to take action to protect the public or prevent a crime and a federal criminal violation is not readily apparent. For example, Missouri has passed such a law which we believe provides limited police authority while providing the requisite civil liability protection.

Missouri Revised Statute 70.820 provides in part:

> A federal law enforcement officer may arrest on view, and without a warrant, at any place within the state, any person the officer sees asserting physical force or using forcible compulsion for the purpose of causing or creating a substantial risk of death or serious physical injury to any person or any person the officer sees committing a dangerous felony. Any such action shall be deemed to be within the scope of the federal officer's employment.
>
> To provide assistance to law enforcement officers, a federal law enforcement officer shall have the same authority as a law enforcement officer where:
>
> (1) the federal law enforcement officer is rendering assistance at the request of any law enforcement officer of this state; or
>
> (2) the federal law enforcement officer is effecting an arrest or providing assistance as part of a bona fide task force or joint investigation in which law enforcement officers of this state are participating.

The statute also permits federal law enforcement officers to respond to emergency situations in which the officer has a reasonable belief that a crime is about to be committed, is being committed, or has been committed involving injury or threat of injury to any person, property, or governmental interest and the officer's response is reasonably necessary to prevent or end the emergency situation or mitigate the likelihood of injury.

The definition of a federal law enforcement officer for purposes of the above could be limited to any person employed by the United States government and assigned to the Federal Bureau of Investigation, who is empowered to effect an arrest with or without a warrant for violation of the United States Code and who is authorized to carry a firearm in the performance of the person's official duties.

Based upon the changing role and demands placed on law enforcement to protect the nation's security and the close mutual working relationship between local, state and federal agencies, the above requested civil liability protection would well serve our Agents who are called upon to address emergency situations or provide law enforcement assistance in the State of Kansas.

We recognize that the enclosed language is in a draft format and would appreciate any assistance your staff may provide in formalizing this request. I appreciate your consideration of this matter and remain available to provide any additional information or assistance your committee may require. In this regard, please feel to contact me at (816) 512-8604.

Sincerely,

Kevin L. Stafford
Special Agent in Charge

cc:

Honorable John Vratil
Kansas Senate
Room 522-S
300 Southwest 10th Avenue
Topeka, Kansas 66612

Jury Service Reform is Needed in Kansas

The Public Policy Purpose

- In both civil and criminal cases, defendants should be judged by a jury of their peers. Jury service is one of the most important duties of good citizenship. All citizens have both a right and a civic obligation to serve on a jury.
- Americans believe in the jury system. According to a 1998 American Bar Association public opinion poll, 78% of the public rates our jury system as the fairest way to determine guilt or innocence, and 69% consider juries to be the most important part of the justice system. Despite the public's strong support of the jury system, interest in serving on juries has dropped off substantially in recent years. Jury reform is necessary to reduce the burden placed on citizens who are called for jury service.

The Problem

- Jury service in Kansas can be inconvenient and unduly burdensome. For example, if a citizen receives a juror summons for an inconvenient time, he or she may need to appear in court and request to be excused or for a deferral of service to another date. Kansas law does not provide for a uniform term and, in some counties, the term of service can be rather lengthy. Kansans can be called repeatedly for jury service, so long as they have not served within the past year. In addition, most jurors receive just $10 per day from the court for each day of jury service, which can be especially difficult on citizens selected to serve on a lengthy trial.
- Kansas law provides a court may fine an individual who fails to appear for jury service no more than $100. The fine for evading jury service is comparable to a parking ticket and is rarely imposed.
- Those who do show up to jury duty are often armed with excuses not to serve. Kansas's current law allows the court to excuse any person summoned for jury service for "reasons of compelling personal hardship or because requiring service would be contrary to public welfare, health or safety." This language is so broad and ambiguous that it may exempt whole categories of people. Those called for jury service, particularly professionals, may abuse this broad provision to avoid their civic responsibility. The standard also provides little guidance to those who must decide whether to grant requests to be excused.
- Kansas law prohibits an employer from discharging or threatening to discharge an employee because the employee responds to a juror summons. Yet, it does not explicitly prohibit an employer from penalizing an employee in other ways due to their service, nor does it protect an employee from being required to use leave time to serve.
- The result may be a jury that is not representative of the community. The right to a fair trial of one's peers and the right of all citizens to serve on a jury is at risk.

The Solution: The Jury Patriotism Act

This model legislation has been endorsed by the Council of State Governments as well as organizations across the political spectrum, including the National Federation of Independent Business, AFL-CIO, National Black Chamber of Commerce, National Association of Manufacturers, and National Association of Wholesalers-Distributors.

The Burdens of Jury Service Would Be Reduced or Eliminated

- Jurors would have the right to one automatic postponement of jury service with a simple and convenient method of rescheduling service to a more convenient time. In addition, courts would differ jury duty for an employee of a small business if another employee of the same business is summoned for service during the same period. These provisions would significantly reduce the need for excuses from jury service.

- Citizens would not spend more than one day at the courthouse unless selected to serve on a jury panel. This "one-day/one-trial" system guarantees that a juror, if not selected for a trial, is dismissed from jury duty at the end of the day. It has proven to significantly reduce the length of jury service and the time an employee is absent from work. Jurors would greatly prefer the one-day/one-trial system over a longer term of service. The one-day/one-trial system is hailed by the National Center for State Courts as a "best practice" and half of state courts nationwide have adopted this shorter term of service. All courts in Kansas should adopt this shorter term of service.

- Citizens would be guaranteed that they would not be called for jury service more often than once every two years.

- Those summoned to jury service would have greater employment protection. They would be protected from any adverse action on account of their response to a juror summons and could not be required to use leave time in order to serve.

- An innovative "Lengthy Trial Fund" would help relieve the burden on jurors serving on lengthy civil trials. Employees of small businesses who not fully compensated by their employers who serve on such trials would be eligible for additional supplemental compensation from the fund (up to $300 per day) after the tenth day of service. This fund would be financed through a minimal fee paid by attorneys filing civil cases in state trial courts, and would not require an allocation of state resources.

All People Would Have the Opportunity and Obligation to Serve

- All citizens should serve on a jury unless it would create a true hardship. Excuses would be granted only to those who cannot obtain a substitute care giver, would incur costs that would have a substantial adverse impact on the individual's ability to live or support his or her family, or would be unable to serve due to illness or disease. The court would grant excuses based on documentation supporting the need to be excused.

- Providing one automatic postponement, adopting a one-day/one-trial system, limiting the frequency of jury service, strengthening employment protection, and making additional compensation available to those who serve on lengthy trials should significantly reduce the burden of jury service. In consideration of the additional flexibility of service, citizens should be deterred from ignoring a jury summonses by an appropriate penalty. The Jury Patriotism Act would increase the maximum fine for a person who fails to show reasonable cause for not responding to a juror summons from $100 to $200 for each unexcused absence and provide judges with discretion to require no-shows to complete community service in lieu of, or in addition to, paying the fine.

AN ACT concerning petit jury service and creating a Lengthy Trial Fund.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. K.S.A. 43-155 is hereby amended to read as follows:

"43-155. Jury service; declaration of public policy.

The public policy of this state is declared to be that jury service is the solemn obligation of all qualified citizens, and that excuses from the discharge of this responsibility should be granted by the judges of the courts of this state only for reasons of ~~compelling personal hardship or because requiring service would be contrary to the public welfare, health or safety~~ undue or extreme hardship or because the juror suffers from a mental or physical condition that causes him or her to be incapable of performing jury service; that all litigants entitled to trial by jury shall have the right to juries selected at random from a fair cross section of the community in the district wherein the court convenes; and that all citizens shall have the opportunity to be considered for service on juries in the district courts of Kansas."

SECTION 2. K.S.A. 43-158 is hereby amended to read as follows:

"43-158. Same; persons excluded from jury service.

The following persons shall be excused from jury service:

(a) Persons unable to understand the English language with a degree of proficiency sufficient to respond to a jury questionnaire form prepared by the commissioner;

(b) persons under adjudication of incompetency;

(c) persons who within 10 years immediately preceding have been convicted of or pleaded guilty, or nolo contendere, to an indictment or information charging a felony; and

(d) persons who have served as jurors in the county within ~~one~~ two years immediately preceding."

SECTION 3. New section. K.S.A. 43-158a is hereby created to read as follows:

"43-158a. Same; length of service.

Service of prospective jurors shall be for no more than one (1) court day in actual attendance, unless a prospective juror is selected to serve in a trial or is under consideration to serve on a

trial and such consideration covers a period of two (2) or more days. Once selected, a juror shall serve on the jury for the duration of the trial unless excused by the presiding judge."

SECTION 4. K.S.A. 43-159 is hereby repealed in its entirety and reenacted to read as follows:

"43-159. Same; exclusions from jury service by court.

(a) An individual may apply to be excused from jury service for a period of up to twenty-four (24) months, instead of seeking a postponement when either:

(1) The prospective juror has a mental or physical condition that causes him or her to be incapable of performing jury service. The juror, or the juror's personal representative, must provide the court with documentation from a physician licensed to practice medicine verifying that a mental or physical condition renders the person unfit for jury service for a period of up to twenty-four (24) months.

(2) Jury service would cause undue or extreme hardship to the prospective juror or a person under his or her care or supervision.

(b) A judge of the court for which the individual was called to jury service shall make undue or extreme hardship determinations. The authority to make these determinations is delegable only to court officials or personnel who are authorized by the laws of this State to function as members of the judiciary.

(c) A person asking to be excused based on a finding of undue or extreme hardship must take all actions necessary to have obtained a ruling on that request by no later than the date on which the individual is scheduled to appear for jury duty.

(d) For purposes of this Act, "undue or extreme hardship" is limited to circumstances in which an individual would:

(1) Be required to abandon a person under his or her personal care or supervision due to the impossibility of obtaining an appropriate substitute caregiver during the period of participation in the jury pool or on the jury; or

(2) Incur costs that would have a substantial adverse impact on the payment of the individual's necessary daily living expenses or on those for whom he or she provides the principle means of support; or

(3) Suffer physical hardship that would result in illness or disease.

(e) "Undue or extreme hardship" does not exist solely based on the fact that a prospective juror will be required to be absent from his or her place of employment.

(f) A person asking a judge to grant an excuse based on "undue or extreme hardship" shall be required to provide the judge with documentation, such as, but not limited to, federal and state income tax returns, medical statements from licensed physicians, proof of dependency or guardianship, and similar documents, which the judge finds to clearly support the request to be excused. Failure to provide satisfactory documentation shall result in a denial of the request to be excused.

(g) After twenty-four (24) months, a person excused from jury service shall become eligible once again for qualification as a juror unless the person was excused from service permanently. A person is excused from jury service permanently only when the deciding judge determines that the underlying grounds for being excused are of a permanent nature."

SECTION 5. New section. K.S.A. 43-159a is hereby created to read as follows:

"43-159a. Same; postponements from jury service.

(a) Individuals scheduled to appear for jury service have the right to postpone the date of their initial appearance for jury service one (1) time only. When requested, postponements shall be granted, provided that:

(1) The juror has not previously been granted a postponement;

(2) The prospective juror appears in person or contacts the clerk by telephone, electronic mail, or in writing to request a postponement; and

(3) Prior to the grant of a postponement with the concurrence of the clerk, the prospective juror fixes a date certain on which he or she will appear for jury service that is not more than six (6) months after the date on which the prospective juror originally was called to serve and on which date the court will be in session.

(b) A subsequent request to postpone jury service may be approved by a judicial officer only in the event of an extreme emergency, such as a death in the family, sudden grave illness, or a natural disaster or a national emergency in which the prospective juror is personally involved, that could not have been anticipated at the time the initial postponement was granted. Prior to the grant of a second postponement, the prospective juror must fix a date certain on which the individual will appear for jury service within six (6) months of the postponement on a date when the court will be in session.

(c) An individual who fails to appear in person on the date scheduled for jury service and who has failed to obtain a postponement in compliance with the provisions for requesting a postponement, or who fails to appear on the date set pursuant to subsections (a)(3) or (b) of this Section, shall be punished by the imposition of a fine not exceeding two hundred dollars ($200) for each day of unexcused absence."

SECTION 6. K.S.A. 43-165 is hereby amended to read as follows:

"43-165. Same; rules governing jury service, enforcement; unexcused nonattendance of juror, penalty.

(a) Each judicial district of the district court may direct from time to time, the number of jurors to be summoned for said court, ~~and how long they shall be summoned before their attendance shall be required,~~ and may make such rules and orders as it may deem proper, touching the jury service of the court, not inconsistent with the provisions hereof, and may enforce the same by attachment and fine not exceeding one hundred dollars ($100). Unexcused, nonattendance of a person summoned unless reasonable cause for such nonattendance be shown to the satisfaction of the court shall be punished by the imposition of a fine not exceeding ~~one~~ two hundred dollars ~~($100)~~ $200 for each day of unexcused absence.

(b) In addition to, or in lieu of, the fine provided by subsection (a), the court may order that the prospective juror complete a period of community service for a period no less than if the prospective juror would have completed jury service, and provide proof of completion of this community service to the court."

3-6

SECTION 7. New section. K.S.A. 43-171a is hereby created to read as follows:

"43-171a. Lengthy Trial Fund.

The Kansas Judicial Council shall promulgate rules to establish a Lengthy Trial Fund that shall be used to provide full or partial wage replacement or wage supplementation to jurors who serve as petit jurors in civil trials for more than five (5) days.

(a) The court rules shall provide for the following:

(1) The selection and appointment of an Administrator for the Fund.

(2) Procedures for the administration of the Fund, including payments of salaries of the Administrator and other necessary personnel.

(3) Procedures for the accounting, auditing and investment of money in the Lengthy Trial Fund.

(4) A report by the Supreme Court on the administration of the Lengthy Trial Fund in its annual report on the judicial branch, setting forth the money collected for and disbursed from the Fund.

(b) Notwithstanding any other fees required under State law, each trial court in the State shall collect from each attorney who files a civil case, unless otherwise exempted under the provisions of this Section, a fee of five dollars ($5) per case to be paid into the Lengthy Trial Fund. A lawyer will be deemed to have "filed a case" at the time the first pleading or other filing on which an individual lawyer's name appears is submitted to the court for filing and opens a new case. All such fees shall be forwarded to the Administrator of the Lengthy Trial Fund for deposit.

(c) The Administrator shall use the fees deposited in the Lengthy Trial Fund to pay full or partial wage replacement or supplementation to jurors whose employers pay less than full regular wages when the period of jury service lasts more than five (5) days.

(d) The court may pay replacement or supplemental wages:

(1) beginning on the sixth day of jury service to any juror otherwise eligible to be excused from service pursuant to K.S.A. 43-159(d)(2). The amount paid from the Fund shall be no

more than is needed to relieve such financial hardship and, in no event, may exceed one hundred dollars ($100) per day per juror.

(2) beginning on the eleventh day of jury service, not to exceed three hundred dollars ($300) per day per juror, to any juror.

(e) The court may, in its discretion, limit the amount of disbursements under paragraph (d) based on the availability of financial resources.

(f) Any juror who is serving or has served on a jury that qualifies for payment from the Lengthy Trial Fund, provided the service commenced on or after the effective date of this Act, may submit a request for payment from the Lengthy Trial Fund on a form that the Administrator provides. Payment shall be limited to the difference between the state paid jury fee and the actual amount of wages a juror earns, up to the maximum level payable, minus any amount the juror actually receives from the employer during the same time period.

(1) The form shall disclose the juror's regular wages, the amount the employer will pay during the term of jury service starting on the sixth day and thereafter, the amount of replacement or supplemental wages requested, and any other information the Administrator deems necessary for proper payment.

(2) The juror also shall be required to submit verification from the employer as to the wage information provided to the Administrator, for example, the employee's most recent earnings statement or similar document, prior to initiation of payment from the Fund.

(3) If an individual is self-employed or receives compensation other than wages, the individual may provide a sworn affidavit attesting to his or her approximate gross weekly income, together with such other information as the Administrator may require, in order to verify weekly income.

(g) The following attorneys and causes of action are exempt from payment of the Lengthy Trial Fund fee:

(1) Government attorneys entering appearances in the course of their official duties;

(2) *Pro se* litigants;

(3) Cases in small claims court or the state equivalent thereof; or

(4) Claims seeking social security disability determinations; individual veterans' compensation or disability determinations; recoupment actions for government backed educational loans or mortgages; child custody and support cases; actions brought *in forma pauperis*; and any other filings designated by rule that involve minimal use of court resources and that customarily are not afforded the opportunity for a trial by jury."

SECTION 8. K.S.A. 43-173 is hereby amended to read as follows:

"43-173. Jury service; right to serve; liability; costs.

(a) No employer shall discharge, ~~or~~ threaten to discharge, or otherwise subject any ~~permanent~~ employee to any adverse employment action by reason of such employee's jury service, or the attendance or scheduled attendance in connection with such service, in any court of Kansas.

(b) Any employer who violates the provisions of this section:

(1) Shall be liable for damages for any loss of wages, actual damages and other benefits suffered by an employee by reason of such violation;

(2) shall be ordered to reinstate any employee discharged by reason of such employee's jury service; and

(3) may be enjoined from further violations of this section and ordered to provide other appropriate relief.

(c) An employee may not be required or requested to use annual, vacation, or sick leave for time spent responding to a summons for jury duty, time spent participating in the jury selection process, for time spent actually serving on a jury. Nothing in this provision shall be construed to require an employer to provide annual, vacation, or sick leave to employees under the provisions of this statute who otherwise are not entitled to such benefits under company policies.

~~(c)~~ (d) Any individual who is reinstated to a position of employment in accordance with the provisions of this section shall be considered as having been on furlough or leave of absence during such period of jury service, shall be reinstated to employee's position of employment without loss of seniority, and shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on

furlough or leave of absence in effect with the employer at the time such individual entered upon jury service.

~~(d)~~ (e) In any action or proceeding under this section, the court may award a prevailing employee who brings such action by retained counsel reasonable attorney fees as part of the costs. The court may award a prevailing employer reasonable attorney fees as part of the costs only if the court finds that the action is frivolous or brought in bad faith.

(f) A court shall automatically postpone and reschedule the service of a summoned juror of an employer with five (5) or fewer full-time employees, or their equivalent, if another employee of that employer has previously been summoned to appear during the same period. Such postponement will not effect an individual's right to one (1) automatic postponement under K.S.A. 43-159a."

SECTION 9. The provisions of this Act are severable. If any portion of this Act is declared unconstitutional or the application of any part of this Act to any person or circumstance is held invalid, the remaining portions of the Act and their applicability to any person or circumstance shall remain valid and enforceable.

SECTION 10. This Act shall take effect on July 1, 2004.

3-10

No. 87,987

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATEWIDE AGENCIES, INC.,

Appellant,

v.

DEBRA DIGGS,

Appellee.

SYLLABUS BY THE COURT

In this landlord appeal from the trial court's finding that landlord converted tenant's personal property during eviction proceedings (1) rules of statutory construction are restated and applied, (2) the provisions of K.S.A. 2001 Supp. 58-2565(d) allowing landlord's rights to and possession of tenant's personal property are held to apply (a) where tenant abandons or surrenders possession of the dwelling unit and leaves personal property therein, or (b) where tenant is removed from the dwelling unit as the result of a forcible detainer action and fails to remove tenant's personal property in the dwelling unit after possession of the dwelling unit is returned to the landlord, and (3) based on the trial court's specific finding that landlord fully complied with all the requirements of K.S.A. 2001 Supp. 58-2565(d), it is held that conversion of tenant's property did not occur and the trial court's finding of conversion and award of damages to tenant is reversed.

Appeal from Reno District Court; RONALD D. INNES, judge. Opinion filed February 7, 2003. Reversed and remanded with directions.

Thomas D. Arnhold, of Thomas D. Arnhold, P.A., of Hutchinson, for appellant.

Kerry J. Granger, of Hutchinson, for appellee.

Before GERNON, P.J., KNUDSON, J., and LARSON, S.J.

LARSON, S.J.: This landlord/tenant appeal raises the question of whether a landlord who has lawfully obtained possession of a tenant's personal property is guilty of conversion by refusing to deliver possession to the tenant without the tenant first paying landlord's expenses and past-due rent.

Statewide Agencies, Inc. (Statewide or landlord) leased residential real estate to Debra Diggs (Diggs or tenant). Diggs failed to pay November 2000 rent when it was due. The required 3 days' notice to pay rent or quit was given.

On December 5, 2000, landlord filed a petition against tenant seeking unpaid rent, expenses, and immediate possession of the premises. The hearing set for December 13 was not held because tenant had not been served by that time. Landlord filed an amended petition on December 28, 2000, with a hearing date of January 4, 2001. Service was made by tacking on the door of the leased premises and

mailing.

Diggs failed to appear at the January 4, 2001, hearing and the court entered an order of immediate possession and writ of restitution dated January 4, 2001, and filed January 8, 2001. The order and writ found landlord should be restored to immediate possession of the leased premises. It also provided that if tenant failed to remove her property from the premises the sheriff should execute the writ and the landlord could change the locks on the premises and store the remaining possessions of the tenant in the leased premises rather than incur the cost of moving and storing items in another facility.

The sheriff served the order and writ by tacking it on the door of the leased premises on January 9, 2001, and required the tenant to move by January 10, 2001, at 12 p.m. On January 11, 2001, the sheriff evicted the tenant, and the landlord changed the locks to the premises. Tenant requested removal of her personal property and took her purse, medications, and a few other personal items.

At trial Mark McKibben and Kathy Carey, employees of landlord, testified that 15 days after tenant had been evicted, or January 26, 2001, a notice was placed in a newspaper stating tenant's property would be sold after February 12, 2001, unless unpaid rent and expenses were paid to landlord. A copy of the notice was sent to Diggs' last known address within 7 days of publication. McKibben returned several items of tenant's personal property. The remainder of tenant's property was taken to a storage facility.

Landlord sold some of tenant's personal property at rummage sales for $757.19. Landlord's employees purchased tenant's appliances for $275. Unsold items were stored.

On March 20, 2001, landlord filed an amended petition seeking judgment of $1,773.54 for past due rent, damages, late charges, and costs. On April 26, 2001, Diggs filed a pro se answer and counterclaim which was never served on Statewide's counsel. One counterclaim contended landlord had unlawfully converted her personal property; she requested return of her property or the replacement value and punitive damages of $4,000.

A pretrial hearing was set and at this time an attorney entered his appearance for Diggs. The notice of the trial setting for June 13, 2001, stated: "The parties SHALL exchange a list of all witnesses and copies of all exhibits at least ten days prior to trial." Landlord complied with this notice.

Counsel for both parties first discovered at the June 13, 2001, trial that the tenant had filed counterclaims. Landlord agreed tenant's counterclaims could be heard, but only if her evidence was limited to her testimony because she had not complied with the trial notice. The trial court agreed, and the court trial resulted in the following testimony.

McKibben testified as to the lease, the default, the notice concerning Diggs' property previously referred to, and the sale of part of the property. Landlord claimed past-due rent from November 2000 through January 2001, damage to the premises, and moving and storage expenses for tenant's property. McKibben and Carey stated tenant never asked for the return of her belongings between the date of the eviction and "the date they had statutory authority to sell or dispose of the personal property." They also stated tenant did not offer to pay any rent or damages or ask for the return of her property prior to the sale of her property.

McKibben and Carey were asked at trial if tenant had requested the return of her personal belongings, would they have returned them if the rent was not paid. Landlord claimed both responded that tenant never asked for her belongings, but they would not have returned the items if she had. Tenant contended, and the district court held, that McKibben, Carey, and tenant had testified tenant asked

landlord for the return of her property prior to the published notice and was told she could have her property when she paid the rent. Tenant also testified her daughter asked for tenant's belongings, but tenant did not know when she did so. Tenant testified as to the value of her property. There was never any testimony that tenant offered to pay landlord's expenses and past-due rent.

At the conclusion of the hearing, the trial court awarded landlord a judgment against tenant for $1,116.24 for past rent and damages. As to tenant's conversion claim, it found tenant requested removal of her personal property the day of the eviction and within days after the eviction but landlord refused unless she paid past-due rent. The trial court held the landlord had fully complied with K.S.A. 2001 Supp. 58-2565(d) as to all of the procedures for the sale of tenant's property. Notwithstanding this finding, it held landlord wrongfully converted tenant's property. Tenant's other counterclaims and request for punitive damages were denied.

The trial court scheduled a later hearing for July 2001 concerning the value of tenant's converted property. Landlord objected, contending tenant was bound by the notice of trial and no further evidence by the tenant should be considered. The trial court ruled that further proceedings would be held on tenant's damage claim once she had complied with the notice requirements.

Eleven days before the July hearing, tenant provided a list of witnesses and exhibits that she intended to use at the hearing. Landlord again objected, but the trial court found its notice requirements had now been met and allowed tenant to introduce additional evidence beyond that presented at the June hearing.

Tenant, her ex-husband, and her daughter testified at the July hearing as to the value of her property. Tenant provided a list of her personal property at the leased premises showing a total value of $20,089.97. This included a claim for a diamond ring that had been worth $3,000 sewn into a dress hem. Tenant's ex-husband testified he did not know that she had a diamond ring.

An auctioneer with 20 years' experience testified for landlord as an expert witness as to the value of tenant's property. Based on tenant's list and her unsold property, he valued each item with his valuation totaling $1,512. The trial court ordered landlord to return to tenant all property still in its possession, which it did. It further ordered both parties to provide an agreed list of property not in landlord's possession.

On November 2, 2001, the trial court issued its final order, stating that as it had not received any agreed lists it was left to speculate as to the items claimed to have been converted by the landlord and the extent of the damages incurred by the tenant. Nevertheless, the trial court granted judgment against landlord for the amount of the sale proceeds of tenant's personal property of $757.19, an additional amount of $5,000 as further damages incurred due to the conversion of her property by landlord, and the return of all items of tenant's personal property in landlord's possession. The money damages were ordered set off by the previous $1,116.24 judgment awarded Statewide against Diggs, resulting in a monetary judgment against Statewide and in favor of Diggs of $4,640.95.

It is from this judgment that Statewide has appealed.

Landlord raises procedural issues on appeal, but we reach and center our decision on whether a conversion existed under the specific facts of this case. This question is one of statutory construction. Landlord contends the trial court erroneously interpreted K.S.A. 2001 Supp. 58-2565(d) and "surrender" as used therein too narrowly. Landlord also argues that it did not convert tenant's property because it relied upon and complied precisely with the terms and provisions of K.S.A. 2001 Supp.

58-2565(d).

We have here clear issues of statutory construction, and we must follow the rules set out in *GT, Kansas, L.L.C. v. Riley County Register of Deeds*, 271 Kan. 311, 316, 22 P.3d 600 (2001):

"This case involves the interpretation of statute, which is a question of law over which our review is unlimited. *Hamilton v. State Farm Fire & Cas. Co.*, 263 Kan. 875, 879, 953 P.2d 1027 (1998). Our rules of statutory construction are well known and require us to interpret a statute to give the effect intended by the legislature, *State ex rel. Stephan v. Kansas Racing Comm'n*, 246 Kan. 708, 719, 792 P.2d 981 (1990), construe the statute to avoid unreasonable results, *Wells v. Anderson*, 8 Kan. App. 2d 431, 433, 659 P.2d 833, *rev. denied* 233 Kan. 1093 (1983), and read the statute to give effect, if possible, to the entire act and every part thereof. *KPERS v. Reimer & Koger Assocs., Inc.*, 262 Kan. 635, 643-44, 941 P.2d 1321 (1997). Ordinary words are to be given their ordinary meaning, and a statute should not be so read as to add that which is not readily found therein or to read out what as a matter of ordinary English language is in it. *Director of Taxation v. Kansas Krude Oil Reclaiming Co.*, 236 Kan. 450, 455, 691 P.2d 1303 (1984)."

In addition, because in this case the Kansas Legislature added specific language to the statute in issue subsequent to a previous decision of the Kansas Supreme Court, we are also cognizant of our standard that "[w]hen the legislature revises an existing law, it is presumed that the legislature intended to change the law as it existed prior to the amendment. [Citations omitted.]" *Hughes v. Inland Container Corp.*, 247 Kan. 407, 414, 799 P.2d 1011 (1990).

When the Kansas Residential Landlord and Tenant Act (KRLTA), K.S.A. 58-2540 *et seq.*, was enacted in 1975, the legislature eliminated landlord's liens on tenant's personal property as well as distraint for rent except as permitted by K.S.A. 58-2565. K.S.A. 58-2567. See generally Brand, *The New Residential Landlord and Tenant Act*, 44 J.B.A.K. 227, 234-35 (1975). These statutory provisions, primarily K.S.A. 58-2565(d), were central to the Supreme Court's decision of *Davis v. Odell*, 240 Kan. 261, 729 P.2d 1117 (1986). *Davis* discusses in detail the precise questions we face here but under the statutory language of K.S.A. 58-2565(d) as then existed. That language, as we will later see, has been amended in a manner that appears to limit the precedential authority of *Davis* to situations involving abandonment or surrender. It nevertheless remains an important decision in the landlord/tenant area in Kansas, and we will discuss it in some detail.

In *Davis*, the landlord obtained a default judgment for possession of the premises and unpaid rent. A writ of restitution was issued to the sheriff, directing the sheriff to remove the tenants from the premises, restore the possession of the premises to the landlord, and execute upon the tenant's nonexempt personal property to satisfy the judgment. The landlord, under the supervision of the sheriff, took possession of the premises and removed the tenant's personal property. The tenants demanded the return of their property upon their return from work that day, which the landlord refused unless the judgment and moving expenses were paid.

The language of K.S.A. 58-2565(d) at the time of the *Davis* opinion allowed landlord possession of tenant personal property only "[i]f the tenant abandons or surrenders possession of the dwelling unit and leaves household goods, furnishings, fixtures, or other property in the dwelling unit." The *Davis* opinion held that the tenant had not abandoned or surrendered the premises but rather possession in the landlord had been obtained through a forcible detainer action. The landlord had no right to either sell or dispose of the property other than by execution as provided by statute. Therefore, the landlord had converted the tenant's property by removing it from the premises upon the eviction and was liable for the damages awarded to tenant in a jury trial. 240 Kan. at 270-71.

Subsequent to the *Davis* decision, the Kansas Legislature in 1996 amended K.S.A. 58-2565(d) by inserting the following italicized language:

"(d) If the tenant abandons or surrenders possession of the dwelling unit and leaves household goods, furnishings, fixtures or any other personal property in or at the dwelling unit *or if the tenant is removed from the dwelling unit as a result of a forcible detainer action, pursuant to K.S.A. 61-2301, et seq., and amendment thereto, and fails to remove any household goods, furnishings, fixtures or any other personal property in or at the dwelling unit after possession of the dwelling unit is returned to the landlord*, the landlord ~~takes~~ *may take* possession of the property, store it at tenant's expense and sell or otherwise dispose of the same upon the expiration of ~~thirty (30)~~ *30* days after the landlord takes possession of the property, if at least ~~fifteen (15)~~ *15* days prior to the sale or other disposition of such property the landlord shall publish once in a newspaper of general circulation in the county in which such dwelling unit is located a notice of the landlord's intention to sell or dispose of such property. Within seven ~~(7)~~ days after publication, a copy of the published notice shall be mailed by the landlord to the tenant at the tenant's last known address. ~~Said~~ *Such* notice shall state the name of the tenant, a brief description of the property and the approximate date on which the landlord intends to sell or otherwise dispose of such property. If the foregoing requirements are met, the landlord may sell or otherwise dispose of the property without liability to the tenant or to any other person who has or claims to have an interest in ~~said~~ *such* property, except as to any secured creditor who gives notice of ~~his or her~~ *creditor's* interest in such property to the landlord prior to the sale or disposition thereof, if the landlord has no knowledge or notice that any person, other than the tenant, has or claims to have an interest in ~~said~~ *such* property. During such ~~thirty day~~ *30* period after the landlord takes possession of the property, and at any time prior to sale or other disposition thereof, the tenant may redeem the property upon payment to the landlord of the reasonable expenses incurred by the landlord of taking, holding and preparing the property for sale and of any amount due from the tenant to the landlord for rent or otherwise." 1996 Sess. Law ch. 113, § 1.

The statute in effect at the time of the *Davis* case stated that the person executing the writ in a forcible detainer action shall restore possession of the premises to the plaintiff "and shall levy and collect the money judgment, if any, the costs and make return, as upon other executions." K.S.A. 61-2311. This statute, and the other forcible detainer statutes, were repealed in 2000. L. 2000, ch. 161, § 117. They were replaced with the current Forcible Detainer Act, K.S.A. 2001 Supp. 61-3801 *et seq*. See L. 2000, ch. 161, §§ 78-85. The current statute for a writ of execution does not have language for levying and collecting the money judgment. See K.S.A. 2001 Supp. 61-3808. It appears that since 2000, K.S.A. 2001 Supp. 58-2565(d) sets forth the method to take possession of the tenant's personal property after the tenant has been evicted under the Forcible Detainer Act. K.S.A. 58-2565(d) was amended in 2000 by deleting the reference to K.S.A. 61-2301 *et seq*. and inserting in its place "sections 78 through 85 and amendments thereto" which are the currently applicable provisions of the Forcible Detainer Act.

With this background, we turn to the facts of the case we face and the contention of the parties. Diggs cites no cases and simply argues landlord's agent was wrong in telling her she could not get her property back without paying the rent and, therefore, must pay the damages assessed for conversion of her property. She further argues the evidence supports this finding.

Statewide makes what sounds like an abandonment and surrender argument that Diggs never asked for her property back within the 30 days after her eviction. This is simply contrary to the facts as found by the trial court. This argument has no merit.

The argument that Statewide makes which does have merit is that it fully and precisely complied with the provisions of K.S.A. 2001 Supp. 58-2565(d). The trial court in its journal entry of June 13, 2001,

specifically so found. What the trial court did was to focus on the phrase "fails to remove" in 58-2565(d) and construed that to mean the 1996 amendment allowed a tenant a reasonable time to remove its personal property after being evicted. The trial court's interpretation was consistent with the *Davis* decision. But, it did not recognize that the *Davis* court noted that K.S.A. 58-2565(d) was not a part of the Uniform Residential Landlord Tenant Act and was added at the request of the organization representing landlords. 240 Kan. at 266. Thus, it is clearly shown that K.S.A. 58-2565(d) was from the beginning intended to be an exception to the restrictions of K.S.A. 58-2567.

Under the trial court's interpretation, a tenant would be able to keep his or her personal property on the premises for "a reasonable time" after being evicted, and the landlord could not change the locks during this time. This would prevent an immediate commencement of the levy against tenant's property to collect unpaid rent and damages after the tenant's eviction. It would give some unknown time for the tenant to remove personal property, require an additional court order, and increase the landlord's damages. It could also possibly raise a question of landlord liability for damage to stored tenant property.

Legislative research does not support the trial court's interpretation and clearly shows the 1996 amendments to K.S.A. 58-2565(d) were in response to the *Davis* case. The 1996 amendment to K.S.A. 58-2565(d) was introduced by the House Judiciary Committee as H.B. 2751. House J. 1996, p. 1468. The bill was summarized as the "landlord may retain possession of tenant['s] personal property in forcible detainer action if tenant does not remove such personal property within 120 hours or possession by landlord. Minutes of the House Judiciary Committee, February 23, 1996, p. 3.

House Representative Vaughn L. Flora stated that H.B. 2751

"would clarify for both landlords and tenants how tenant's abandoned property is to be treated. There was a Kansas Supreme Court decision Davis vs Odell which said that in cases of forcible detainer (an eviction) the tenant[']s property might not be considered abandon[ed].

"This bill simply states that 5 days after the landlord has been awarded possession of the real estate by the court through the action of the Sheriff, the landlord could then go through the process outlined in the Landlord Tenant Act of storage, notification to the tenant and so on. There would be a finite time and process created so both the tenant and the landlord would be aware of how abandon[ed] property is to be treated in cases of forcible detainer." Minutes of House Judiciary Committee, February 23, 1996, Attachment 47.

Patrick DeLapp of the Shawnee County Landlord Association testified:

"Presently, it is in limbo about what to do with the former tenant's belongings. Davis vs Odell, a case heard by the Kansas Supreme Court, ruled that a forcible detainer action 'eviction' may not consider abandonment. What the court did not tell us is what we can do with the property. If it was abandoned we would know what to do with the property . . . .

"The bill will clarify what to do with the property in forcible detainer [actions]." Minutes of the House Judiciary Committee, February 23, 1996, Attachment 48.

DeLapp also indicated landlords had held tenant's property for months after eviction because they did not know what to do with it and feared legal challenges. Minutes of the House Judiciary Committee, February 23, 1996, Attachment 48.

Marie Landry, a manager with the Housing and Credit Counseling, Inc., stated:

"In our experience, landlords have not had a viable option for removing tenant's property when a tenant has been removed from the dwelling unit as a result of a forcible detainer action. We have suggested they use abandonment procedures to protect themselves from personal liability.

"We do foresee the possibility that a question may arise regarding the landlord's right to charge storage fees during the 120 hour period after possession has been returned to the landlord." Minutes of the House Judiciary Committee, February 23, 1996, Attachment 49.

Landry suggested language be included that the landlord cannot recover expenses for the 120-hour period after eviction. Minutes of the House Judiciary Committee, February 23, 1996, Attachment 49.

The subcommittee recommended that H.B. 2751 "be amended so that 'no recoverable expenses may be accrued by the landlord after the tenant is removed from the dwelling unit as a result of a forcible detainer action' and to remove the 120 hour time frame." Minutes of the House Judiciary Committee, February 23, 1996, p. 4. The House Judiciary Committee amended H.B. 2751 by striking "'within 120 hours,'" and passed the bill as amended. House J. 1996, pp. 1677, 1711. The House of Representatives and the Senate passed H.B. 2751 as amended. House J. 1996, p. 1714; Senate J. 1996, 1590.

Our legislative research did not find an explanation for the deletion of a tenant's right to remove his or her property within 120 hours after eviction. Nevertheless, the legislature did consider giving tenants a specific time to remove their property after eviction and specifically rejected that provision. This clearly shows the trial court's attempt to construe the statute by the inclusion of "a reasonable time" was considered and rejected by the legislature.

The legislature may have realized the problems that could occur by giving the tenant unlimited access to the premises and making the landlord's premises a storage facility. Regardless of the reason and the possible harshness of the statutory provision as written, the conclusion remains the same. The legislature intended to treat nonpaying tenants the same regardless of whether the property was left behind when they abandoned or surrendered the premises to the landlord or when they were lawfully evicted by court order. The italicized language earlier set forth which was added to K.S.A. 58-2565(d) by the 1996 Kansas Legislature may in instances like ours here be to the tenant's detriment, but the plain language of the last sentence of K.S.A. 58-2565(d) controls in both instances:

"During such thirty-day period after the landlord takes possession of the property, and at any time prior to sale or other disposition thereof, the tenant may redeem the property upon payment to the landlord of the reasonable expenses incurred by the landlord of taking, holding and preparing the property for sale and of any amount due from the tenant to the landlord for rent or otherwise."

This language has been in the statute since its enactment. It now clearly applies where tenant removal is required by a forcible detainer action. The 1996 amendment to K.S.A. 58-2565(d) and the 2000 amendments to the Forcible Detainer Act have in effect authorized landlords to take the precise action that Statewide took in this case.

We hold the trial court erred in its interpretation of K.S.A. 2001 Supp. 58-2565(d) and is reversed as to its judgment awarding Diggs damages on her conversion claim. This will require reinstatement of landlord's judgment against tenant, which was not appealed.

Reversed and remanded to the trial court with instructions to reinstate the judgment in favor of Statewide Agencies, Inc., and against Debra Diggs for $1,116.24 and costs.

END

LAW OFFICES OF

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TELEPHONE (620) 275-4146
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February 3, 2004

Representative Mike O'Neal
Kansas House of Representatives
Kansas State Capitol
Topeka, KS 66612

Re: House Bill 2565

Dear Mr. O'Neal:

I understand there will be a hearing on House Bill 2565 on February 4, 2004. I apologize for not being able to appear but my notice was too short and the distance to great. I would like to thank you for introducing this legislation so quickly after my letter to Representative Ward Loyd. I would also like to make a few comments on your proposed bill which you may choose to share with the rest of your committee. I presume you already have my original letter to Ward Loyd stating the need for this legislation so I won't repeat any of that and will confine myself to comments on your draft bill.

My request addressed preceived inconsistencies in KSA 60-2610 and 60-2611, the Kansas Worthless Check Statutes. The first inconsistency was that the type of notice required by the two different statutes differed. Your draft House Bill absolutely reconciles this with your proposed change to KSA 60-2611.

I have also reviewed your proposed correction of the inconsistency in KSA 60-2610, subsection c. I don't think that the fix for that subsection will be quite as simple. Subsection c of KSA 60-2610 refers to tendering a itemized amount of money prior to commencement of a dispositional hearing as payment in full of the plaintiff's claim. The last two sentences of that subsection parallel language contained in subsection a immediately after paragraph (2). I must say that I don't really understand why these last two sentences have been stated again in subsection c. Subsection c addresses a tender of money prior to any dispositional hearing and prior to any award made by the Court. It allows a Court to waive all or part of the attorney fees if the Court determines the other amounts awarded or, as you have restated it, the amount tendered is sufficient to adequately compensate the holder of the check. As I stated in my original letter there is no amount awarded for the Court to look at to determine that a reduction of attorney fees should occur. Likewise, there is no opportunity for the Court to look at the amount

tendered if the statute is amended as this is an amount tendered prior to the first dispositional hearing and prior to any determinations by the Court. In my opinion these last two sentences should simply be stricken from the statute. All of the amounts that are required to be tendered prior to the first dispositional hearing are set forth in the statute and none of those amounts are discretionary or changeable except the amount of attorney fees that are specified as reasonable. The Court has an inherit power to determine whether attorney fees are reasonable and could always use that power to determine the amount of the attorney fees asked for by a plaintiff or a plaintiff's attorney is unreasonable and therefore limit the amount. It is therefore my suggestion that the last two sentences beginning with the language "The Court may waive . . . ", simply be stricken.

I am also concerned that the "tendered" language may be used by some Judges as a means for striking attorney fees in prejudgment cases regularly. Many Judges still do not approve of the worthless check statute and might use the ability to waive attorney fees in the prejudgment tender to gut the prejudgment tender and make it financially impossible for attorneys to handle worthless check cases. If attorney fees are routinely waived attorneys could not afford to represent most clients.

I hope you won't think that I'm ungrateful by suggesting more change than you proposed in your original draft of the House Bill. I remain very happy that you and your committee have taken such quick action on this.

I am available by telephone for further comments if you would like to discuss this. Thank you for your assistance.

Sincerely,

Jon R. Craig

lc
cc: Ward Loyd
Doug Smith

KANSAS CREDIT ATTORNEYS ASSOCIATION AND KANSAS COLLECTORS ASSOCIATION, INC.

REMARKS CONCERNING HOUSE BILL NO. 2565

HOUSE JUDICIARY COMMITTEE

FEBRUARY 4, 2004

Chairman O'Neal and Members of the House Judiciary Committee:

Thank you for the opportunity to present remarks regarding House Bill No. 2565 on behalf of the Kansas Credit Attorneys Association and Kansas Collectors Association, Inc. The Kansas Credit Attorneys Association is a statewide organization of attorneys, representing approximately 60 law firms, whose practice includes considerable collection work, and Kansas Collectors Association, Inc., which is an association of collection agencies in Kansas. Our members represent the interests of retail merchants of all sizes and other small businesses in collection and legal matters resulting from the unpaid or past due payment for goods or services.

We join Mr. Craig, the requestor of this legislation, in his concerns about the confusion created by KSA 60-2611. KSA 60-2610(b) clearly states that recovery of attorney fees in a civil action to collect on a worthless check may be awarded if a written demand is sent to the drawer by first class mail. The requirement that a written demand be sent by restricted mail was deleted from KSA 60-2610 during the review and amendments to Chapter 60 that occurred in 2000. Unfortunately, KSA 60-2611 was apparently overlooked in the 2000 amendments and now contradicts KSA 60-2610 by requiring the written demand to be sent by restricted mail.

This contradiction unnecessarily complicates procedure for parties involved in collection on worthless checks and for the courts who must attempt to reconcile the irreconcilable at trial. The confusion could easily be resolved either by accepting the changes to KSA 60-2611 as proposed in House Bill No. 2565 and affirming the legislature's decision in 2000 to drop the requirement that written demands be sent by restricted mail. In fact, we believe that KSA 60-2611 is simply superflous and merely restates procedures that are dealt with completely and comprehensively in KSA 60-2610. We feel that striking KSA 60-2611 altogether would both resolve any current confusion and eliminate future opportunity for such problems to arise again.

We also agree with Mr. Craig's issue with KSA 60-2610(c). Subsection (c) sets forth the procedures by which the drawer of a worthless check may resolve a matter prior to hearing or trial. The language allowing the court to waive attorney fees presumes the matter has progressed to a dispositional hearing - past the point at which the settlement procedure in subsection (c) can be used. A better solution than making small changes in wording would be to simply strike the last two sentences of subsection (c).

The same language in subsection (c) is present in subsection (a), where it appropriately belongs in a discussion of trial procedure and fee recovery.

We respectfully request that you consider our remarks along with Mr. Craig's as you work your way through this issue.

Thank you again for your time and consideration.

Douglas E. Smith
For the Kansas Credit Attorneys Association
and the Kansas Collectors Association, Inc.

Session of 2003

HOUSE BILL No. 2347

By Representative O'Neal

2-12

AN ACT enacting the Kansas uniform securities act; amending K.S.A. 12-1675, 12-1677b, 12-4516, 16-214, 17-4632, 50-1009, 50-1016, 66-1508, 74-8229 and 75-6302 and K.S.A. ~~2002~~ Supp. 17-49a01, 21-4619, ~~21-4704~~ and 75-3170a and repealing the existing sections; also repealing K.S.A. 17-1260, ~~17-1264, 17-1265,~~ 17-1266, 17-1267, 17-1269, 17-1273, 17-1274 and 17-1275 and K.S.A. ~~2002~~ Supp. 17-1252, 17-1253, 17-1254, 17-1255, 17-1257, 17-1258, 17-1259, 17-1261, 17-1262, 17-1262a, 17-1263, 17-1266a, 17-1268, 17-1270, 17-1270a, 17-1270b, 17-1271 and 17-1272.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. Sections 1 through 52, and amendments thereto, may be cited as the Kansas uniform securities act.

New Sec. 2. In this act, unless the context otherwise requires:

(1) "Administrator" means the securities commissioner of Kansas, appointed as provided in K.S.A. 75-6301, and amendments thereto.

(2) "Agent" means an individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities or represents an issuer in effecting or attempting to effect purchases or sales of the issuer's securities, but a partner, officer, or director of a broker-dealer or issuer, or an individual having a similar status or performing similar functions is an agent only if the individual otherwise comes within the term. The term does not include an individual excluded by rule adopted or order issued under this act.

(3) "Bank" means:

(A) A banking institution organized under the laws of the United States;

(B) a member bank of the federal reserve system;

(C) any other banking institution, whether incorporated or not, doing business under the laws of a state or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to be exercised by national banks under the authority of the comptroller of the currency pursuant to section 1 of Public Law 87-722 (12 U.S.C. section 92a), and which is supervised and examined by a state or federal agency having supervision

Amendments adopted by the Special Committee on Judiciary, 2003 Int
Drafted January 16, 2004

[NCCUSL means National Conference of Commissioners on Uniform Laws]

[If a page is not included, there are no amendments on that page]

2003

17-1264, 17-1264a, 17-1265, 17-1265a,

[NOTE: 2002 references amended to 2003 on the following: page 71, line 29; page 72, line 18; page 74, line 6; page 75, line 12; page 85, line 31]

over banks, and which is not operated for the purpose of evading this act; and

(D) a receiver, conservator, or other liquidating agent of any institution or firm included in subparagraph (A), (B), or (C).

(4) "Broker-dealer" means a person engaged in the business of effecting transactions in securities for the account of others or for the person's own account. The term does not include:

(A) An agent;

(B) an issuer;

(C) a bank [or] savings institution, if :

(i) Its activities as a broker-dealer are limited to those specified in subsections 3(a)(4)(B)(i) through (vi) and (viii) through (x); 3(a)(4)(B)(xi) if limited to unsolicited transactions; 3(a)(5)(B); and 3(a)(5)(C) of the securities exchange act of 1934 (15 U.S.C. sections 78c(a)(4) and (5)); or

(ii) it is a bank that satisfies the conditions described in subsection 3(a)(4)(E) of the securities exchange act of 1934 (15 U.S.C. section 78c(a)(4));

(D) an international banking institution; or

(E) a person excluded by rule adopted or order issued under this act.

(5) "Depository institution" means:

(A) A bank; or

(B) a savings institution, trust company, credit union, or similar institution that is organized or chartered under the laws of a state or of the United States, authorized to receive deposits, and supervised and examined by an official or agency of a state or the United States if its deposits or share accounts are insured to the maximum amount authorized by statute by the federal deposit insurance corporation, the national credit union share insurance fund, or a successor authorized by federal law. The term does not include:

(i) An insurance company or other organization primarily engaged in the business of insurance;

(ii) a morris plan bank; or

(iii) an industrial loan company.

(6) "Federal covered investment adviser" means a person registered under the investment advisers act of 1940.

(7) "Federal covered security" means a security that is, or upon completion of a transaction will be, a covered security under section 18(b) of the securities act of 1933 (15 U.S.C. section 77r(b)) or rules or regulations adopted pursuant to that provision.

(8) "Filing" means the receipt under this act of a record by the administrator or a designee of the administrator.

(9) "Fraud," "deceit," and "defraud" are not limited to common law deceit.

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, or trust company

[requested by the Kansas Bankers Association, supported by the Office of the Securities Commissioner]

7-2

(K) a private business development company as defined in section 202(a)(22) of the investment advisers act of 1940 (15 U.S.C. section 80b-2(a)(22)) with total assets in excess of $10,000,000;

(L) a federal covered investment adviser acting for its own account;

(M) a "qualified institutional buyer" as defined in rule 144A(a)(1), other than rule 144A(a)(1)(i)(H), adopted under the securities act of 1933 (17 C.F.R. 230.144A);

(N) a "major U.S. institutional investor" as defined in rule 15a-6(b)(4)(i) adopted under the securities exchange act of 1934 (17 C.F.R. 240.15a-6);

(O) any other person specified by rule adopted or order issued under this act.

(12) "Insurance company" means a company organized as an insurance company whose primary business is writing insurance or reinsuring risks underwritten by insurance companies and which is subject to supervision by the insurance commissioner or a similar official or agency of a state.

(13) "Insured" means insured as to payment of all principal and all interest.

(14) "International banking institution" means an international financial institution of which the United States is a member and whose securities are exempt from registration under the securities act of 1933.

(15) "Investment adviser" means a person that, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. The term includes a financial planner or other person that, as an integral component of other financially related services, provides investment advice to others for compensation as part of a business or that holds itself out as providing investment advice to others for compensation. The term does not include:

(A) An investment adviser representative;

(B) a lawyer, accountant, engineer, or teacher whose performance of investment advice is solely incidental to the practice of the person's profession;

(C) a broker-dealer or its agents whose performance of investment advice is solely incidental to the conduct of business as a broker-dealer and that does not receive special compensation for the investment advice;

(D) a publisher of a bona fide newspaper, news magazine, or business or financial publication of general and regular circulation;

(E) a federal covered investment adviser;

(F) a bank, savings institution,

any other person, other than an individual, of institutional character with total assets in excess of $10,000,000 not organized for the specific purpose of evading this act; or

(P)

[Compromise amendment between the Office of the Securities Commissioner, the Securities Industry Association and NCCUSL]

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[requested by the Kansas Bankers Association, supported by the Office of the Securities Commissioner]

(C) any other person that is excluded by the investment advisers act of 1940 from the definition of investment adviser; or

(H) any other person excluded by rule adopted or order issued under this act.

(16) "Investment adviser representative" means an individual employed by or associated with an investment adviser or federal covered investment adviser and who makes any recommendations or otherwise gives investment advice regarding securities, manages accounts or portfolios of clients, determines which recommendation or advice regarding securities should be given, provides investment advice or holds herself or himself out as providing investment advice, receives compensation to solicit, offer, or negotiate for the sale of or for selling investment advice, or supervises employees who perform any of the foregoing. The term does not include an individual who:

(A) Performs only clerical or ministerial acts;

(B) is an agent whose performance of investment advice is solely incidental to the individual acting as an agent and who does not receive special compensation for investment advisory services;

(C) is employed by or associated with a federal covered investment adviser, unless the individual has a "place of business" in this state and is:

(i) An "investment adviser representative" as that term is defined by rule adopted under section 203A of the investment advisers act of 1940 (15 U.S.C. section 80b-3a); or

(ii) not a "supervised person" as that term is defined in Section 202(a)(25) of the Investment Advisers Act of 1940 (15 U.S.C. Section 80b-2(a)(25)); or

(D) is excluded by rule adopted or order issued under this act.

(17) "Issuer" means a person that issues or proposes to issue a security, subject to the following:

(A) The issuer of a voting trust certificate, collateral trust certificate, certificate of deposit for a security, or share in an investment company without a board of directors or individuals performing similar functions is the person performing the acts and assuming the duties of depositor or manager pursuant to the trust or other agreement or instrument under which the security is issued.

(B) The issuer of an equipment trust certificate or similar security serving the same purpose is the person by which the property is or will be used or to which the property or equipment is or will be leased or conditionally sold or that is otherwise contractually responsible for assuring payment of the certificate.

(C) The issuer of a fractional undivided interest in an oil, gas, or other mineral lease or in payments out of production under a lease, right, or

, as that term is defined by rule adopted under section 203A of the investment advisers act of 1940 (15 U.S.C. section 80b-3a),

[Compromise amendment between the Office of the Securities Commissioner, the Securities Industry Association and NCCUSL]

h-4

position of, a security or interest in a security for value, and "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to purchase, a security or interest in a security for value.

(A) A security given or delivered with, or as a bonus on account of, a purchase of securities or any other thing is considered to constitute part of the subject of the purchase and to have been offered and sold for value.

(B) A gift of assessable stock is considered to involve an offer and sale.

(C) A sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, and a sale or offer of a security that gives the holder a present or future right or privilege to convert the security into another security of the same or another issuer, is considered to include an offer of the other security.

(27) "Securities and exchange commission" means the United States securities and exchange commission.

(28) "Security" means a note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; put, call, straddle, option, or privilege on a security, certificate of deposit, or group or index of securities, including an interest therein or based on the value thereof; put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or, in general, an interest or instrument commonly known as a "security"; or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. The term:

(A) Includes both a certificated and an uncertificated security;

(B) does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed sum of money either in a lump sum or periodically for life or other specified period;

(C) does not include an interest in a contributory or noncontributory pension or welfare plan subject to the employee retirement income security act of 1974;

(D) includes as an "investment contract" an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor. A "common enterprise" means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors; and

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[Specifically recommended by the Special Committee on Judicairy]

5

act or an agent registered under this act for soliciting a prospective purchaser in this state; and

(D) the issuer reasonably believes that all the purchasers in this state, other than those designated in paragraph (13), are purchasing for investment;

(15) a transaction under an offer to existing security holders of the issuer, including persons that at the date of the transaction are holders of convertible securities, options, or warrants, if a commission or other remuneration, other than a standby commission, is not paid or given, directly or indirectly, for soliciting a security holder in this state;

(16) an offer to sell, but not a sale, of a security not exempt from registration under the securities act of 1933 if:

(A) A registration or offering statement or similar record as required under the securities act of 1933 has been filed, but is not effective, or the offer is made in compliance with rule 165 adopted under the securities act of 1933 (17 C.F.R. 230.165); and

(B) a stop order of which the offeror is aware has not been issued against the offeror by the administrator or the securities and exchange commission, and an audit, inspection, or proceeding that is public and that may culminate in a stop order is not known by the offeror to be pending;

(17) an offer to sell, but not a sale, of a security exempt from registration under the securities act of 1933 if:

(A) A registration statement has been filed under this act, but is not effective;

(B) a solicitation of interest is provided in a record to offerees in compliance with a rule adopted by the administrator under this act; and

(C) a stop order of which the offeror is aware has not been issued by the administrator under this act and an audit, inspection, or proceeding that may culminate in a stop order is not known by the offeror to be pending;

(18) a transaction involving the distribution of the securities of an issuer to the security holders of another person in connection with a merger, consolidation, exchange of securities, sale of assets, or other reorganization to which the issuer, or its parent or subsidiary and the other person, or its parent or subsidiary, are parties;

(19) a rescission offer, sale, or purchase under section 39, and amendments thereto;

(20) employees' stock purchase, savings, option, profit- sharing, pension, or similar employees' benefit plan, including any securities, plan interests, and guarantees issued under a compensatory benefit plan or compensation contract, contained in a record, established by the issuer, its parents, its majority-owned subsidiaries, or the majority-owned sub-

an offer or sale of a security through a broker-dealer registered under this act to a person not a resident of this state and not present in this state if the offer or sale does not constitute a violation of the laws of the state or foreign jurisdiction in which the offeree or purchaser is present and is not part of an unlawful plan or scheme to evade this act;

(21)

[Compromise amendment between the Office of the Securities Commissioner, the Securities Industry Association and NCCUSL]

7-9

sidiaries of the issuer's parent for the participation of their employees including offers or sales of such securities to:

(A) Directors; general partners; trustees, if the issuer is a business trust; officers; consultants; and advisors;

(B) family members who acquire such securities from those persons through gifts or domestic relations orders;

(C) former employees, directors, general partners, trustees, officers, consultants, and advisors if those individuals were employed by or providing services to the issuer when the securities were offered; and

(D) insurance agents who are exclusive insurance agents of the issuer, or the issuer's subsidiaries or parents, or who derive more than 50% of their annual income from those organizations; (22)

~~(21)~~ a transaction involving:

(A) A stock dividend or equivalent equity distribution, whether the corporation or other business organization distributing the dividend or equivalent equity distribution is the issuer or not, if nothing of value is given by stockholders or other equity holders for the dividend or equivalent equity distribution other than the surrender of a right to a cash or property dividend if each stockholder or other equity holder may elect to take the dividend or equivalent equity distribution in cash, property, or stock;

(B) an act incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims, or property interests, or partly in such exchange and partly for cash; or

(C) the solicitation of tenders of securities by an offeror in a tender offer in compliance with rule 162 adopted under the securities act of 1933 (17 C.F.R. 230.162); or (23)

~~(22)~~ a nonissuer transaction in an outstanding security by or through a broker-dealer registered or exempt from registration under this act, if the issuer is a reporting issuer in a foreign jurisdiction designated by this paragraph or by rule adopted or order issued under this act, has been subject to continuous reporting requirements in the foreign jurisdiction for not less than 180 days before the transaction, and the security is listed on the foreign jurisdiction's securities exchange that has been designated by this paragraph or by rule adopted or order issued under this act, or is a security of the same issuer that is of senior or substantially equal rank to the listed security or is a warrant or right to purchase or subscribe to any of the foregoing. For purposes of this paragraph, Canada, together with its provinces and territories, is a designated foreign jurisdiction and the Toronto stock exchange, inc., is a designated securities exchange. After an administrative hearing in compliance with the Kansas administrative procedure act, the administrator, by rule adopted or order issued

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under this act, may revoke the designation of a securities exchange under this paragraph, if the administrator finds that revocation is necessary or appropriate in the public interest and for the protection of investors.

New Sec. 8. A rule adopted or order issued under this act may exempt a security, transaction, or offer; a rule under this act may exempt a class of securities, transactions, or offers from any or all of the requirements of sections 11 through 16 and section 33, and amendments thereto; and an order under this act may waive, in whole or in part, any or all of the conditions for an exemption or offer under sections 6 and 7, and amendments thereto.

New Sec. 9. (a) Except with respect to a federal covered security or a transaction involving a federal covered security, an order under this act may deny, suspend application of, condition, limit, or revoke an exemption created under section 6 (3)(C), (7) or (8) or section 7, and amendments thereto, or an exemption or waiver created under section 8, and amendments thereto, with respect to a specific security, transaction, or offer. An order under this section may be issued only pursuant to the procedures in section 16(d) or section 43, and amendments thereto, and only prospectively.

(b) Knowledge of order required. A person does not violate section 11, 13 through 16, 33, or 39, and amendments thereto, by an offer to sell, offer to purchase, sale, or purchase effected after the entry of an order issued under this section if the person did not know, and in the exercise of reasonable care could not have known, of the order.

[Compromise amendment between the Office of the Securities Commissioner, the Securities Industry Association and NCCUSL]

New Sec. 10. The administrator may by rules and regulations set a fee not to exceed $2,500 for an application or filing made in connection with any exemption from securities registration.

New Sec. 11. It is unlawful for a person to offer or sell a security in this state unless:

(1) The security is a federal covered security [and, if required by section 12, and amendments thereto, notice or documents have been filed and the fee has been paid];

(2) the security, transaction, or offer is exempted from registration under sections 6 through 8, and amendments thereto; or

(3) the security is registered under this act.

New Sec. 12. (a) *Required filing of records.* With respect to a federal covered security, as defined in section 18(b)(2) of the securities act of 1933 (15 U.S.C. section 77r(b)(2)), that is not otherwise exempt under sections 6 through 8, and amendments thereto, a rule adopted or order issued under this act may require the filing of any or all of the following records:

(1) Before the initial offer of a federal covered security in this state, all records that are part of a federal registration statement filed with the securities and exchange commission under the securities act of 1933 and a consent to service of process complying with section 50, and amendments thereto, signed by the issuer and the payment of a fee not to exceed $2,500;

(2) after the initial offer of the federal covered security in this state,

cords under this section must contain or be accompanied by the following records in addition to the information specified in section 15, and amendments thereto, and a consent to service of process complying with section 50, and amendments thereto:

(1) A copy of the latest form of prospectus filed under the securities act of 1933;

(2) a copy of the articles of incorporation and bylaws or their substantial equivalents currently in effect; a copy of any agreement with or among underwriters; a copy of any indenture or other instrument governing the issuance of the security to be registered; and a specimen, copy, or description of the security that is required by rule adopted or order issued under this act

(3) copies of any other information or any other records filed by the issuer under the securities act of 1933; and requested by the administrator

(4) an undertaking to forward each amendment to the federal prospectus, other than an amendment that delays the effective date of the registration statement, promptly after it is filed with the securities and exchange commission.

(c) *Conditions for effectiveness of registration statement.* A registration statement under this section becomes effective simultaneously with or subsequent to the federal registration statement when all the following conditions are satisfied:

(1) A stop order under subsection (d) or section 16, and amendments thereto, or issued by the securities and exchange commission is not in effect, and a proceeding is not pending against the issuer under section 16, and amendments thereto, and the administrator has not given written notice of deficiencies that are unresolved and that would constitute grounds for a stop order under section 16, and amendments thereto; and

(2) the registration statement has been on file for at least 20 days or a shorter period provided by rule adopted or order issued under this act.

(d) *Notice of federal registration statement effectiveness.* The registrant shall promptly notify the administrator in a record of the date when the federal registration statement becomes effective and the content of any price amendment and shall promptly file a record containing the price amendment. If the notice is not timely received, the administrator may issue a stop order, without prior notice or hearing, retroactively denying effectiveness to the registration statement or suspending its effectiveness until compliance with this section. The administrator shall promptly notify the registrant of an order by telephone or electronic means and promptly confirm this notice by a record. If the registrant subsequently complies with the notice requirements of this section, the stop order is void as of the date of its issuance.

(e) *Effectiveness of registration statement.* If the federal registration statement becomes effective before each of the conditions in this section

[Compromise amendment between the Office of the Securities Commissioner, the Securities Industry Association and NCCUSL]

being offered or distributed in a nonexempted transaction by or for the account of the issuer or other person on whose behalf the offering is being made or by an underwriter or broker-dealer that is still offering part of an unsold allotment or subscription taken as a participant in the distribution. For the purposes of a nonissuer transaction, all outstanding securities of the same class identified in the registration statement as a security registered under this act are considered to be registered while the registration statement is effective. If any securities of the same class are outstanding, a registration statement may not be withdrawn until one year after its effective date. A registration statement may be withdrawn only with the approval of the administrator.

(i) *Periodic reports.* While a registration statement is effective, a rule adopted or order issued under this act may require the person that filed the registration statement to file reports, not more often than quarterly, to keep the information or other record in the registration statement reasonably current and to disclose the progress of the offering.

(j) *Posteffective amendments.* A registration statement shall be amended after its effective date if there are material changes in information or documents in the registration statement or if there is an increase in the aggregate amount of securities offered or sold in this state. The posteffective amendment becomes effective when the administrator provides written notice that the amendment has been accepted. If a posteffective amendment is made to increase the number of securities specified to be offered or sold, the person filing the amendment shall pay a registration fee based upon the increase in such price calculated in accordance with the rate and fee specified in subsection (b). ~~A posteffective amendment relates back to the date of the offering of the additional securities being registered if, within one year after the date of the sale, the amendment is filed and the additional registration fee is paid.~~ If a posteffective amendment for registration of additional securities and payment of additional fees is not filed in a timely manner, there shall be no penalty assessed if the amendment is filed and the additional registration fee is paid within one year after the date the additional securities are sold in this state.

New Sec. 16. (a) *Stop orders.* The administrator may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, a registration statement if the administrator finds that the order is in the public interest and that:

(1) The registration statement as of its effective date or before the effective date in the case of an order denying effectiveness, an amendment under section 15 (j), and amendments thereto, as of its effective date, or a report under section 15 (i), and amendments thereto, is incomplete in a material respect or contains a statement that, in the light of the

[Technical amendment, requested by the Office of the Securities Commissioner]

stop order proceeding against an effective registration statement on the basis of conduct or a transaction known to the administrator when the registration statement became effective unless the proceeding is instituted within 30 days after the registration statement became effective.

(d) *Summary process.* The administrator may summarily revoke, deny, postpone, or suspend the effectiveness of a registration statement pending final determination of an administrative proceeding. Upon the issuance of the order, the administrator shall promptly notify each person specified in subsection (e) that the order has been issued, the reasons for the revocation, denial, postponement, or suspension, and that within 15 days after the receipt of a request in a record from the person the matter will be scheduled for a hearing. If a hearing is not requested and none is ordered by the administrator, within 30 days after the date of service of the order, the order becomes final. If a hearing is requested or ordered, the administrator, after notice of and opportunity for hearing for each person subject to the order, may modify or vacate the order or extend the order until final determination.

(e) *Procedural requirements for stop order.* (1) A stop order may not be issued under this section without:

(A) Appropriate notice to the applicant or registrant, the issuer, and the person on whose behalf the securities are to be or have been offered;

(B) an opportunity for hearing; and

(C) findings of fact and conclusions of law in a record.

(2) Any proceeding under this section shall be done in accordance with the Kansas administrative procedure act.

(f) *Modification or vacation of stop order.* The administrator may modify or vacate a stop order issued under this section if the administrator finds that the conditions that caused its issuance have changed or that it is necessary or appropriate in the public interest or for the protection of investors.

New Sec. 17. The administrator may waive or modify, in whole or in part, any or all of the requirements of sections 12, 13, and 14(b), and amendments thereto, or the requirement of any information or record in a registration statement or in a periodic report filed pursuant to section 15[(]i[)] and amendments thereto.

(i)

[Technical amendment, requested by the Office of the Securities Commissioner]

New Sec. 18. (a) *Registration requirement.* It is unlawful for a person to transact business in this state as a broker-dealer unless the person is registered under this act as a broker-dealer or is exempt from registration as a broker-dealer under subsection (b) or (d).

(b) *Exemptions from registration.* The following persons are exempt from the registration requirement of subsection (a):

(1) A broker-dealer without a place of business in this state if its only transactions effected in this state are with:

11-7

register as a broker-dealer, agent, investment adviser, or investment adviser representative by filing an application and a consent to service of process complying with section 30, and amendments thereto, and paying the fee specified in section 27, and amendments thereto, and any reasonable fees charged by the designee of the administrator for processing the filing. The application must contain:

(1) The information or record required for the filing of a uniform application; and

(2) upon request by the administrator, any other financial or other information or record that the administrator determines is appropriate.

(b) *Amendment.* If the information or record contained in an application filed under subsection (a) is or becomes inaccurate or incomplete in a material respect, the registrant shall promptly file a correcting amendment.

(c) *Effectiveness of registration.* If an order is not in effect and a proceeding is not pending under section 29, and amendments thereto, registration becomes effective at noon on the 45th day after a completed application is filed, unless the registration is denied. A rule adopted or order issued under this act may set an earlier effective date or may defer the effective date until noon on the 45th day after the filing of any amendment completing the application.

(d) *Registration renewal.* A registration is effective until midnight on December 31 of the year for which the application for registration is filed. Unless an order is in effect under section 29, and amendments thereto, a registration may be automatically renewed each year by filing such records as are required by rule adopted or order issued under this act, by paying the fee specified in section 27, and amendments thereto, and by paying costs charged by the designee of the administrator for processing the filings.

(e) *Additional conditions or waivers.* A rule adopted or order issued under this act may impose other conditions not inconsistent with the national securities markets improvement act of 1996. An order issued under this act may waive, in whole or in part, specific requirements in connection with registration as are in the public interest and for the protection of investors.

New Sec. 24. (a) *Succession.* A broker-dealer or investment adviser may succeed to the current registration of another broker-dealer or investment adviser or a notice filing of a federal covered investment adviser, and a federal covered investment adviser may succeed to the current registration of an investment adviser or notice filing of another federal covered investment adviser, by filing as a successor an application for registration pursuant to section 18 or 20, and amendments thereto, or a notice pursuant to section 22, and amendments thereto, for the unexpired

or the administrator has given written notice of deficiencies that are unresolved and that would constitute grounds for denial under section 29, and amendments thereto

[Requested by the Office of the Securities Commissioner]

2-12

(b) *Disciplinary conditions — registrants.* An order issued under this act may revoke, suspend, condition, or limit the registration of a registrant if the administrator finds that the order is in the public interest and that there is a ground for discipline under subsection (d) against the registrant or, if the registrant is a broker-dealer or investment adviser, against any partner, officer, or director, any person having a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser. However, the administrator:

(1) May not institute a revocation or suspension proceeding under this subsection based on an order issued by another state that is reported to the administrator or designee later than one year after the date of the order on which it is based; and

(2) under subsection (d)(5)(A) and (B), may not issue an order on the basis of an order under the state securities act of another state unless the other order was based on conduct for which subsection (d) would authorize the action had the conduct occurred in this state.

(c) *Disciplinary penalties — registrants.* If the administrator finds that the order is in the public interest and that there is a ground for discipline under subsection (d)(1) through (6), (8), (9), (10), (12) or (13) against a registrant or, if the registrant is a broker-dealer or investment adviser, against any partner, officer, or director, any person having similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser, then the administrator may enter an order against the registrant containing one or more of the following sanctions or remedies:

(1) A censure;

(2) a bar or suspension from association with a broker-dealer or investment adviser registered in this state;

(3) a civil penalty up to ~~[a maximum of $10,000]~~ for each violation;

(4) an order requiring the registrant to pay restitution for any loss or disgorge any profits arising from a violation, including, in the administrator's discretion, the assessment of interest ~~[not to exceed 15% per annum]~~ from the date of the violation;

(5) an order charging the registrant with the actual cost of an investigation or proceeding; or

(6) an order requiring the registrant to cease and desist from any action that constitutes a ground for discipline, or to take other action necessary or appropriate to comply with this Act.

(d) *Grounds for discipline.* A person may be disciplined under subsections (a) through (c) if the person:

(1) has filed an application for registration in this state under this act or the predecessor act within the previous 10 years, which, as of the effective date of registration or as of any date after filing in the case of

$25,000

. If any person is found to have violated any provision of this act, and such violation is committed against elder or disabled persons, as defined in K.S.A. 50-676, and amendments thereto, in addition to any civil penalty otherwise provided by law, the administrator may impose an additional penalty not to exceed $15,000 for each such violation. The total penalty against a person shall not exceed $1,000,000

at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto

[Compromise amendment between the Office of the Securities Commissioner, the Securities Industry Association and NCCUSL]

7-13

in subsection (b), a rule adopted or order issued under this act may require the filing of a prospectus, pamphlet, circular, form letter, advertisement, sales literature, or other advertising record relating to a security or investment advice, addressed or intended for distribution to prospective investors, including clients or prospective clients of a person registered or required to be registered as an investment adviser under this act.

(b) *Excluded communications.* This section does not apply to sales and advertising literature specified in subsection (a) which relates to a federal covered security, a federal covered investment adviser, or a security or transaction exempted by section 6, 7, or 8, and amendments thereto, except as required for a notice filing under section 6, 7, or 8, and amendments thereto.

New Sec. 34. (a) It is unlawful for a person to make or cause to be made, in a record that is used in an action or proceeding or filed under this act, a statement that, at the time and in the light of the circumstances under which it is made, is false or misleading in a material respect, or, in connection with the statement, to omit to state a material fact necessary to make the statement made, in the light of the circumstances under which it was made, not false or misleading.

(b) It is unlawful for any person to influence, coerce, manipulate or mislead any person in connection with financial statements or appraisals to be used in the offer, sale or purchase of securities for the purpose of rendering such financial statements or appraisals materially misleading.

(c) It is unlawful for any person to:

(1) Alter, destroy, shred, mutilate, conceal, cover up or falsify any record with the intent to impede, obstruct or influence any investigation by the administrator or the administrator's designee;

(2) alter, destroy, shred, mutilate or conceal a record with the intent to impair the object's integrity or availability for use in a proceeding before the administrator or a proceeding brought by the administrator; or

(3) take action harmful to a person with the intent to retaliate, including, but not limited to, interference with lawful employment of such person, for providing truthful information relating to a violation of this act.

New Sec. 35. The filing of an application for registration, a registration statement, a notice filing under this act, the registration of a person, the notice filing by a person, or the registration of a security under this act does not constitute a finding by the administrator that a record filed under this act is true, complete, and not misleading. The filing or registration or the availability of an exemption, exception, preemption, or exclusion for a security or a transaction does not mean that the administrator has passed upon the merits or qualifications of, or recommended or given approval to, a person, security, or transaction. It is unlawful to make, or

intentionally

[Conforming amendment with '03 SB 110, requested by the Office of the Securities Commissioner. **FYI** Sec. 34 (b) is K.S.A. 2003 Supp. 17-1264a; Sec. 34 (c) is K.S.A. 2003 Supp. 17-1265a, both sections being repealed upon the effective date of this act]

4-14

cause to be made, to a purchaser, customer, client, or prospective customer or client a representation inconsistent with this section.

New Sec. 36. A broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative is not liable to another broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative for defamation relating to a statement that is contained in a record required by the administrator, or designee of the administrator, the securities and exchange commission, or a self-regulatory organization, unless the person knew, or should have known at the time that the statement was made, that it was false in a material respect or the person acted in reckless disregard of the statement's truth or falsity.

New Sec. 37. (a) *Criminal penalties.* (1) Except as provided in subsections (a)(2) through (a)(4), a conviction for an intentional violation of this act, or a rule adopted or order issued under this act, except section 33, and amendments thereto, or the notice filing requirements of section 12 or 22, and amendments thereto, is a severity level 7, nonperson felony. An individual convicted of violating a rule or order under this act may be fined, but may not be imprisoned, if the individual did not have knowledge of the rule or order.

(2) A conviction for an intentional violation of section 30 or 31, and amendments thereto, is:

(A) ~~a severity level 6, nonperson felony if the violation resulted in a loss of $1,000,000 or more;~~ 4 $100,000

(B) ~~a severity level 4, nonperson felony if the violation resulted in a loss of at least $100,000 but less than $1,000,000;~~

~~(C)~~ a severity level 5, nonperson felony if the violation resulted in a loss of at least $25,000 but less than $100,000; or (C)

~~(D)~~ a severity level 6, nonperson felony if the violation resulted in a loss of less than $25,000. 7

(3) A conviction for an intentional violation of section 11, 18 (a), 18 (c), 19 (a), 19 (d), 20 (a), 20 (c), 20 (d), 21 (a), or 21 (e), and amendments thereto, is: 5 $100,000 (C)

(A) a severity level ~~4~~ nonperson felony if the violation resulted in a loss of ~~$1,000,000~~ or more;

(B) ~~a severity level 5, nonperson felony if the violation resulted in a loss of at least $100,000 but less than $1,000,000;~~

~~(C)~~ a severity level 6, nonperson felony if the violation resulted in a loss of at least $25,000 but less than $100,000; or

~~(D)~~ a severity level 7, nonperson felony if the violation resulted in a loss of less than $25,000.

(4) A conviction for an intentional violation of section 34 or 35, and amendments thereto, is a severity level 8, nonperson felony.

(5) Any violation of section 11, 18 (a), 18 (c), 19 (a), 19 (d), 20 (a), 20 (c), 20 (d), 21 (a), 21 (e), 30 or 31, and amendments thereto, resulting in a loss of $25,000 or more shall have a presumptive sentence of imprisonment regardless of its location on the sentencing grid block.

[Conforming amendments with '03 SB 110, requested by the Office of the Securities Commissioner]

(b) *Statute of Limitations.* No prosecution for any crime under this act may be commenced more than five years after the alleged violation, except that no prosecution for any crime under this act may be commenced more than 10 years after the alleged violation if the victim is the Kansas public employees retirement system. A prosecution is commenced when a complaint or information is filed, or an indictment returned, and a warrant thereon is delivered to the sheriff or other officer for execution, except that no prosecution shall be deemed to have been commenced if the warrant so issued is not executed without unreasonable delay.

(c) *Criminal reference.* The administrator may refer such evidence as may be available concerning violations of this act or of any rules and regulations or order hereunder to the attorney general or the proper county or district attorney, who may in the prosecutor's discretion, with or without such a reference, institute the appropriate criminal proceedings under this act. Upon receipt of such reference, the attorney general or the county attorney or district attorney may request that a duly employed attorney of the administrator prosecute or assist in the prosecution of such violation or violations on behalf of the state. Upon approval of the administrator, such employee shall be appointed a special prosecutor for the attorney general or the county attorney or district attorney to serve without compensation from the attorney general or the county attorney or district attorney. Such special prosecutor shall have all the powers and duties prescribed by law for assistant attorneys general or assistant county or district attorneys and such other powers and duties as are lawfully delegated to such special prosecutor by the attorney general or the county attorney or district attorney.

(d) *No limitation on other criminal enforcement.* This act does not limit the power of this state to punish a person for conduct that constitutes a crime under other laws of this state.

New Sec. 38. (a) *Securities litigation uniform standards act.* Enforcement of civil liability under this section is subject to the securities litigation uniform standards act of 1998.

(b) *Liability of seller to purchaser.* A person is liable to the purchaser if the person sells a security in violation of section 11, and amendments thereto, or by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make a statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. An action under this subsection is governed by the following:

(1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the

If an attorney employed by the administrator acts as a special prosecutor, the administrator may pay extradition and witness expenses associated with the case.
[Requested by the Office of the Securities Commissioner]

7-16

security, and interest ~~at 15% per annum~~ from the date of the purchase, costs, and reasonable attorneys' fees determined by the court, upon the tender of the security, or for actual damages as provided in paragraph (3).

(2) The tender referred to in paragraph (1) may be made any time before entry of judgment. Tender requires only notice in a record of ownership of the security and willingness to exchange the security for the amount specified. A purchaser that no longer owns the security may recover actual damages as provided in paragraph (3).

(3) Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, and interest ~~at 15% per annum~~ from the date of the purchase, costs, and reasonable attorneys' fees determined by the court.

(c) *Liability of purchaser to seller.* A person is liable to the seller if the person buys a security by means of an untrue statement of a material fact or omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the seller not knowing of the untruth or omission, and the purchaser not sustaining the burden of proof that the purchaser did not know, and in the exercise of reasonable care, could not have known of the untruth or omission. An action under this subsection is governed by the following:

(1) The seller may maintain an action to recover the security, and any income received on the security, costs, and reasonable attorneys' fees determined by the court, upon the tender of the purchase price, or for actual damages as provided in paragraph (3).

(2) The tender referred to in paragraph (1) may be made any time before entry of judgment. Tender requires only notice in a record of the present ability to pay the amount tendered and willingness to take delivery of the security for the amount specified. If the purchaser no longer owns the security, the seller may recover actual damages as provided in paragraph (3).

(3) Actual damages in an action arising under this subsection are the difference between the price at which the security was sold and the value the security would have had at the time of the sale in the absence of the purchaser's conduct causing liability, and interest ~~at 15% per annum~~ from the date of the sale of the security, costs, and reasonable attorneys' fees determined by the court.

(d) *Liability of unregistered broker-dealer and agent.* A person acting as a broker-dealer or agent that sells or buys a security in violation of section 18 (a), 19 (a), or 35, and amendments thereto, is liable to the customer. The customer, if a purchaser, may maintain an action for recovery of actual damages as specified in subsections (b)(1) through (3),

at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto

[Compromise amendment between the Office of the Securities Commissioner, the Securities Industry Association and NCCUSL]

2-1-L

or, if a seller, for a remedy as specified in subsections (c)(1) through (3).

(e) *Liability of unregistered investment adviser and investment adviser representative.* A person acting as an investment adviser or investment adviser representative that provides investment advice for compensation in violation of section 20 (a), 21 (a), or 35, and amendments thereto, is liable to the client. The client may maintain an action to recover the consideration paid for the advice, interest ~~at 15% per annum~~ at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto from the date of payment, costs, and reasonable attorneys' fees determined by the court.

(f) *Liability for investment advice.* A person that receives directly or indirectly any consideration for providing investment advice to another person and that employs a device, scheme, or artifice to defraud the other person or engages in an act, practice, or course of business that operates or would operate as a fraud or deceit on the other person, is liable to the other person. An action under this subsection is governed by the following:

(1) The person defrauded may maintain an action to recover the consideration paid for the advice and the amount of any actual damages caused by the fraudulent conduct, interest ~~at 15% per annum~~ from the date of the fraudulent conduct, costs, and reasonable attorneys' fees determined by the court, less the amount of any income received as a result of the fraudulent conduct.

(2) This subsection does not apply to a broker-dealer or its agents if the investment advice provided is solely incidental to transacting business as a broker-dealer and no special compensation is received for the investment advice.

(g) *Joint and several liability.* The following persons are liable jointly and severally with and to the same extent as persons liable under subsections (b) through (f):

(1) A person that directly or indirectly controls a person liable under subsections (b) through (f), unless the controlling person sustains the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist;

(2) an individual who is a managing partner, executive officer, or director of a person liable under subsections (b) through (f), including an individual having a similar status or performing similar functions, unless the individual sustains the burden of proof that the individual did not know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist;

(3) an individual who is an employee of or associated with a person liable under subsections (b) through (f) and who materially aids the conduct giving rise to the liability, unless the individual sustains the burden

[Compromise amendment between the Office of the Securities Commissioner, the Securities Industry Association and NCCUSL]

7-18

and amendments thereto, may have arisen and fairly advising the purchaser, seller, or recipient of investment advice of that person's rights in connection with the offer, and any financial or other information necessary to correct all material misrepresentations or omissions in the information that was required by this act to be furnished to that person at the time of the purchase, sale, or investment advice;

(B) if the basis for relief under this section may have been a violation of section 38 (b), and amendments thereto, an offer to repurchase the security for cash, payable on delivery of the security, equal to the consideration paid, and interest ~~[at 15% per annum]~~ from the date of the purchase, less the amount of any income received on the security, or, if the purchaser no longer owns the security, an offer to pay the purchaser upon acceptance of the offer damages in an amount that would be recoverable upon a tender, less the value of the security when the purchaser disposed of it, and interest ~~[at 15% per annum]~~ from the date of the purchase in cash equal to the damages computed in the manner provided in this subsection;

(C) if the basis for relief under this section may have been a violation of section 38 (c), and amendments thereto, an offer to tender the security, on payment by the seller of an amount equal to the purchase price paid, less income received on the security by the purchaser and interest ~~[at 15% per annum]~~ from the date of the sale, or if the purchaser no longer owns the security, an offer to pay the seller upon acceptance of the offer, in cash, damages in the amount of the difference between the price at which the security was purchased and the value the security would have had at the time of the purchase in the absence of the purchaser's conduct that may have caused liability and interest ~~[at 15% per annum]~~ from the date of the sale;

(D) if the basis for relief under this section may have been a violation of section 38 (d), and amendments thereto; and if the customer is a purchaser, an offer to pay as specified in subparagraph (B); or, if the customer is a seller, an offer to tender or to pay as specified in subparagraph (C);

(E) if the basis for relief under this section may have been a violation of section 38 (e), and amendments thereto, an offer to reimburse in cash the consideration paid for the advice and interest ~~[at 15% per annum]~~ from the date of payment; or

(F) if the basis for relief under this section may have been a violation of section 38 (f), and amendments thereto, an offer to reimburse in cash the consideration paid for the advice, the amount of any actual damages that may have been caused by the conduct, and interest ~~[at 15% per annum]~~ from the date of the violation causing the loss;

(2) the offer under paragraph (1) states that it must be accepted by the purchaser, seller, or recipient of investment advice within 30 days

at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto
[Compromise amendment between the Office of the Securities Commissioner, the Securities Industry Association and NCCUSL]

61-7

(b) *Prohibited conduct.* (1) It is unlawful for the administrator or an officer, employee, or designee of the administrator to use for personal benefit or the benefit of others records or other information obtained by or filed with the administrator that are not public under section 46 (b), and amendments thereto. This act does not authorize the administrator or an officer, employee, or designee of the administrator to disclose the record or information, except in accordance with section 41, 46 (c), or 47, and amendments thereto.

(2) Neither the administrator nor any employee of the administrator shall be interested as an officer, director, or stockholder in securing any authorization to sell securities under the provisions of this act.

(c) *No privilege or exemption created or diminished.* This act does not create or diminish a privilege or exemption that exists at common law, by statute or rule, or otherwise.

(d) *Investor education.* (1) The administrator may develop and implement investor education initiatives to inform the public about investing in securities, with particular emphasis on the prevention and detection of securities fraud. In developing and implementing these initiatives, the administrator may collaborate with public and nonprofit organizations with an interest in investor education. The administrator may accept a grant or donation from a person that is not affiliated with the securities industry or from a nonprofit organization, regardless of whether the organization is affiliated with the securities industry, to develop and implement investor education initiatives. This subsection does not authorize the administrator to require participation or monetary contributions of a registrant in an investor education program.

(2) There is hereby established in the state treasury the investor education fund. Such fund shall be administered by the administrator for the purposes described in subsection (d)(1) and for the education of registrants, including official hospitality. Moneys collected as civil penalties under this act shall be credited to the investor education fund. The administrator may also receive payments designated to be credited to the investor education fund as a condition in settlements of cases arising out of investigations or examinations. All expenditures from the investor education fund shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the administrator or by a person or persons designated by the administrator. ~~Five~~ Two years after the effective date of this act, the administrator shall conduct a review and submit a report to the governor and the legislature concerning the expenditures from the investor education fund and the results achieved from the investor education program.

[Requested by the Office of the Securities Commissioner]

New Sec. 41. (a) *Authority to investigate.* The administrator may:

(1) Conduct public or private investigations within or outside of this

7-20

(6) impose a civil penalty of not greater than ~~[$10,000]~~ $25,000 for each violation; and

(7) grant any other necessary or appropriate relief.

(d) *Application for relief.* This section does not preclude a person from applying to any court of competent jurisdiction or a court of another state for relief from a request to appear, testify, file a statement, produce records, or obey a subpoena.

(e) *Use immunity procedure.* An individual is not excused from attending, testifying, filing a statement, producing a record or other evidence, or obeying a subpoena of the administrator under this act or in an action or proceeding instituted by the administrator under this act on the ground that the required testimony, statement, record, or other evidence, directly or indirectly, may tend to incriminate the individual or subject the individual to a criminal fine, penalty, or forfeiture. If the individual refuses to testify, file a statement, or produce a record or other evidence on the basis of the individual's privilege against self-incrimination, the administrator may compel the testimony, the filing of the statement, the production of the record, or the giving of other evidence. The testimony, record, or other evidence compelled under such an order may not be used, directly or indirectly, against the individual in a criminal case, except in a prosecution for perjury or contempt or otherwise failing to comply with the order.

(f) *Assistance to securities regulator of another jurisdiction.* At the request of the securities regulator of another state or a foreign jurisdiction, the administrator may provide assistance if the requesting regulator states that it is conducting an investigation to determine whether a person has violated, is violating, or is about to violate a law or rule of the other state or foreign jurisdiction relating to securities matters that the requesting regulator administers or enforces. The administrator may provide the assistance by using the authority to investigate and the powers conferred by this section as the administrator determines is necessary or appropriate. The assistance may be provided without regard to whether the conduct described in the request would also constitute a violation of this act or other law of this state if occurring in this state. In deciding whether to provide the assistance, the administrator may consider whether the requesting regulator is permitted and has agreed to provide assistance reciprocally within its state or foreign jurisdiction to the administrator on securities matters when requested; whether compliance with the request would violate or prejudice the public policy of this state; and the availability of resources and employees of the administrator to carry out the request for assistance.

New Sec. 42. (a) *Civil action instituted by administrator.* If the administrator believes that a person has engaged, is engaging, or is about

[Compromise amendment between the Office of the Securities Commissioner, the Securities Industry Association and NCCUSL]

7-21

to engage in an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act or that a person has, is, or is about to engage in an act, practice, or course of business that materially aids a violation of this act or a rule adopted or order issued under this act, the administrator may maintain an action in any court of competent jurisdiction to enjoin the act, practice, or course of business and to enforce compliance with this act or a rule adopted or order issued under this act.

(b) *Relief available.* In an action under this section and on a proper showing, the court may:

(1) Issue a permanent or temporary injunction, restraining order, or declaratory judgment;

(2) order other appropriate or ancillary relief, which may include:

(A) An asset freeze, accounting, writ of attachment, writ of general or specific execution, and appointment of a receiver or conservator, that may be the administrator, for the defendant or the defendant's assets;

(B) ordering the administrator to take charge and control of a defendant's property, including investment accounts and accounts in a depository institution, rents, and profits; to collect debts; and to acquire and dispose of property;

(C) imposing a civil penalty up to ~~[$10,000 per]~~ $25,000 for each violation;

(D) an order of rescission, restitution, or disgorgement directed to a person that has engaged in an act, practice, or course of business constituting a violation of this act or the predecessor act or a rule adopted or order issued under this act or the predecessor act; and

(E) ordering the payment of prejudgment and postjudgment interest; or

(3) order such other relief as the court considers appropriate.

(c) *No bond required.* The administrator may not be required to post a bond in an action or proceeding under this act.

New Sec. 43. (a) *Cease and desist order.* If the administrator finds that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act or that a person has materially aided, is materially aiding, or is about to materially aid an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act, the administrator may:

(1) Issue an order directing the person to cease and desist from engaging in the act, practice, or course of business or to take other action necessary or appropriate to comply with this act;

(2) issue an order denying, suspending, revoking, or conditioning the exemptions for a broker-dealer under section 18 (b)(1)(D) or (F), and amendments thereto, or an investment adviser under section 20 (b)(1)(C),

. If any person is found to have violated any provision of this act, and such violation is committed against elder or disabled persons, as defined in K.S.A. 50-676, and amendments thereto, in addition to any civil penalty otherwise provided by law, the court may impose an additional penalty not to exceed $15,000 for each such violation. The total penalty against a person shall not exceed $1,000,000

[Compromise amendment between the Office of the Securities Commissioner, the Securities Industry Association and NCCUSL]

7-22

and amendments thereto; or

(3) issue an order under section 9, and amendments thereto.

(b) *Additional administrative sanctions and remedies.* If the administrator finds, by written findings of fact and conclusions of law, that a person has violated this act or a rule adopted or order issued under this act, the administrator, in addition to any other power granted under this act, may enter an order against the ~~registrant~~ containing one or more of the following sanctions or remedies:

(1) A civil penalty up to ~~a maximum of $10,000~~ for each violation;

(2) a bar or suspension from association with a broker-dealer or investment adviser registered in this state;

(3) an order requiring the person to pay restitution for any loss or disgorge any profits arising from the violation, including, in the administrator's discretion, the assessment of interest ~~not to exceed 15% per annum~~ from the date of the violation; or

(4) an order charging the person with the actual cost of the investigation or proceeding.

(c) *Procedures for orders.* (1) An order under subsection (b) shall not be entered unless the administrator first provides notice and opportunity for hearing in accordance with the provisions of the Kansas administrative procedures act.

(2) An order under subsection (a) is effective on the date of issuance. Upon issuance of the order, the administrator shall promptly serve each person subject to the order with a copy of the order. The order must include a statement of the reasons for the order and notice that upon receipt of a written request the matter will be set for a hearing which shall be conducted in accordance with the provisions of the Kansas administrative procedures act. If a person subject to the order does not request a hearing and none is ordered by the administrator within 30 days after the date of service of the order, the order becomes final as to that person by operation of law. If a hearing is requested or ordered, the administrator, after notice of and opportunity for hearing to each person subject to the order, may modify or vacate the order or extend it until final determination.

(3) An order under subsection (a) may contain a notice of the administrator's intent to seek administrative sanctions or remedies under subsection (b). If the person subject to the order does not request a hearing and none is ordered by the administrator within 30 days after service of the order, the administrator may modify the order to include sanctions or remedies under subsection (b). If a hearing is requested or ordered, the administrator, after notice and opportunity for hearing, shall by written findings of fact and conclusions of law vacate, modify, or make permanent the order, and the administrator may modify the order to include

person
[Technical amendment, requested by the Office of the Securities Commissioner]

$25,000

. If any person is found to have violated any provision of this act, and such violation is committed against elder or disabled persons, as defined in K.S.A. 50-676, and amendments thereto, in addition to any civil penalty otherwise provided by law, the administrator may impose an additional penalty not to exceed $15,000 for each such violation. The total penalty against a person shall not exceed $1,000,000
[Compromise amendment between the Office of the Securities Commissioner, the Securities Industry Association and NCCUSL]

at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto
[Compromise amendment between the Office of the Securities Commissioner, the Securities Industry Association and NCCUSL]

7-23

New Sec. 48. A final order issued by the administrator under this act is subject to judicial review in accordance with the provisions of the act for judicial review and civil enforcement of agency actions.

New Sec. 49. (a) *Sales and offers to sell.* Sections 11, 12, 18 (a), 19 (a), 20 (a), 21 (a), 30, 35, 38, and 39, and amendments thereto, do not apply to a person that sells or offers to sell a security unless the offer to sell or the sale is made in this state or the offer to purchase or the purchase is made and accepted in this state.

(b) *Purchases and offers to purchase.* Sections 18 (a), 19 (a), 20 (a), 21 (a), 30, 35, 38, and 39, and amendments thereto, do not apply to a person that purchases or offers to purchase a security unless the offer to purchase or the purchase is made in this state or the offer to sell or the sale is made and accepted in this state.

(c) *Offers in this State.* For the purpose of this section, an offer to sell or to purchase a security is made in this state, whether or not either party is then present in this state, if the offer:

(1) Originates from within this state; or

(2) is directed by the offeror to a place in this state and received at the place to which it is directed.

(d) *Acceptances in this State.* For the purpose of this section, an offer to purchase or to sell is accepted in this state, whether or not either party is then present in this state, if the acceptance:

(1) Is communicated to the offeror in this state and the offeree reasonably believes the offeror to be present in this state and the acceptance is received at the place in this state to which it is directed; and

(2) has not previously been communicated to the offeror, orally or in a record, outside this state.

(e) *Investment advice and misrepresentations.* Sections 20 (a), 21 (a), 22 (a), 31, 34, and 35, and amendments thereto, apply to a person if the person engages in an act, practice, or course of business instrumental in effecting prohibited or actionable conduct in this state, whether or not either party is then present in this state.

New Sec. 50. (a) *Signed consent to service of process.* A consent to service of process required by this act must be signed and filed in the form required by a rule or order under this act. A consent appointing the administrator the person's agent for service of process in a noncriminal action or proceeding against the person, or the person's successor or personal representative under this act or a rule adopted or order issued under this act after the consent is filed, has the same force and validity as if the service were made personally on the person filing the consent. A person that has filed a consent complying with this subsection in connection with a previous application for registration or notice filing need not file an additional consent.

Publications, radio, television, or electronic communications. An offer to sell or to purchase is not made in this state when a publisher circulates or there is circulated on the publisher's behalf in this state a bona fide newspaper or other publication of general, regular, and paid circulation that is not published in this state, or that is published in this state but has had more than two thirds of its circulation outside this state during the previous 12 months or when a radio or television program or other electronic communication originating outside this state is received in this state. A radio or television program, or other electronic communication is considered as having originated in this state if either the broadcast studio or the originating source of transmission is located in this state, unless:

(1) the program or communication is syndicated and distributed from outside this state for redistribution to the general public in this state;

(2) the program or communication is supplied by a radio, television, or other electronic network with the electronic signal originating from outside this state for redistribution to the general public in this state;

(3) the program or communication is an electronic communication that originates outside this state and is captured for redistribution to the general public in this state by a community antenna or cable, radio, cable television, or other electronic system; or

(4) the program or communication consists of an electronic communication that originates in this state, but which is not intended for distribution to the general public in this state.

(f)

[Compromise amendment between the Office of the Securities Commissioner, the Securities Industry Association and NCCUSL]

42-4

statement that the request is being made in conjunction with a prosecution of an offense that requires a prior conviction as one of the elements of such offense;

(7) the supreme court, the clerk or disciplinary administrator thereof, the state board for admission of attorneys or the state board for discipline of attorneys, and the request is accompanied by a statement that the request is being made in conjunction with an application for admission, or for an order of reinstatement, to the practice of law in this state by the person whose record has been expunged;

(8) the Kansas lottery, and the request is accompanied by a statement that the request is being made to aid in determining qualifications for employment with the Kansas lottery or for work in sensitive areas within the Kansas lottery as deemed appropriate by the executive director of the Kansas lottery;

(9) the governor or the Kansas racing commission, or a designee of the commission, and the request is accompanied by a statement that the request is being made to aid in determining qualifications for executive director of the commission, for employment with the commission, for work in sensitive areas in parimutuel racing as deemed appropriate by the executive director of the commission or for licensure, renewal of licensure or continued licensure by the commission;

(10) the Kansas sentencing commission;

(11) the state gaming agency, and the request is accompanied by a statement that the request is being made to aid in determining qualifications: (A) To be an employee of the state gaming agency; or (B) to be an employee of a tribal gaming commission or to hold a license issued pursuant to a tribal-gaming compact;

(12) the Kansas securities commissioner or a designee of the commissioner, and the request is accompanied by a statement that the request is being made in conjunction with an application for registration as a broker-dealer, agent, investment adviser or investment adviser representative by such agency and the application was submitted by the person whose record has been expunged; or

(13) the department of wildlife and parks and the request is accompanied by a statement that the request is being made to aid in determining qualifications for a permit as a commercial guide or associate guide under K.S.A. 32-964, and amendments thereto.

~~[Sec. 60. K.S.A. 2002 Supp. 21-4704 is hereby amended to read as follows: 21-4704. (a) For purposes of sentencing, the following sentencing guidelines grid for nondrug crimes shall be applied in felony cases for crimes committed on or after July 1, 1993:~~]

7-25

Also, strike all on pages 78 through 81, renumber remaining sections accordingly.

[Conforming amendments with '03 SB 110, requested by the Office of the Securities Commissioner]

cies which receive appropriations from the state general fund to provide such services.

(b) Nothing in this act or in the sections amended by this act or referred to in subsection (a), shall be deemed to authorize remittances to be made less frequently than is authorized under K.S.A. 75-4215 and amendments thereto.

(c) Notwithstanding any provision of any statute referred to in or amended by this act or referred to in subsection (a), whenever in any fiscal year such 20% credit to the state general fund in relation to any particular fee fund is $200,000, in that fiscal year the 20% credit no longer shall apply to moneys received from sources applicable to such fee fund and for the remainder of such year the full 100% so received shall be credited to such fee fund, except as otherwise provided in subsection (d) and except that during the fiscal year ending June 30, 1993, with respect to the fire marshal fee fund, when the 20% credit to the state general fund prescribed by K.S.A. 31-133a, 31-134 and 75-1514 and amendments thereto, in the aggregate, is $400,000, then in that fiscal year such 20% credit no longer shall apply to moneys received from sources applicable to the fire marshal fee fund and for the remainder of such fiscal year the full 100% so received shall be credited to the fire marshal fee fund.

Sec. 66. K.S.A. 75-6302 is hereby amended to read as follows: 75-6302. (a) On July 1, 1982, the office of the securities commissioner of Kansas provided for by K.S.A. 17-1270, prior to its amendment ~~by this act~~ *in 1982, and prior to its repeal by this act*, shall be and is hereby abolished and all of the powers, duties and functions of such securities commissioner shall be and are hereby transferred to and conferred and imposed upon the securities commissioner of Kansas provided for by this act.

(b) Except as otherwise provided in this act, the securities commissioner provided for by this act shall be the successor in every way to the powers, duties and functions of the securities commissioner, in which the same were vested prior to the effective date of this act.

(c) Whenever the securities commissioner of Kansas, or words of like effect, is referred to or designated by a statute, contract or other document, such reference or designation shall be deemed to apply to the securities commissioner provided for by this act.

(d) All rules and regulations and all orders and directives of the securities commissioner of Kansas in existence immediately prior to the effective date of this act shall continue to be effective and shall be deemed to be the rules and regulations and orders or directives of the securities commissioner of Kansas provided for by this act, until revised, amended, repealed or nullified pursuant to law.

Sec. 67. K.S.A. 12-1675, 12-1677b, 12-4516, 16-214, 17-1260, 17-

7-26

1264, 17-1265, 17-1266, 17-1267, 17-1269, 17-1273, 17-1274, 17-1275, 17-4632, 50-1009, 50-1016, 66-1508, 74-8229 and 75-6302 and K.S.A. [2002] Supp. 17-1252, 17-1253, 17-1254, 17-1255, 17-1257, 17-1258, 17-1259, 17-1261, 17-1262, 17-1262a, 17-1263, 17-1266a, 17-1268, 17-1270, 17-1270a, 17-1270b, 17-1271, 17-1272, 17-49a01, 21-4619 [, 21-4704] and 75-3170a are hereby repealed.

Sec. 68. This act shall take effect and be in force from and after July 1, [2004] and its publication in the statute book.

2003

17-1264, 17-1264a, 17-1265, 17-1265a,

2005

[Requested by the Office of the Securities Commissioner]

7-27

KANSAS BAR ASSOCIATION

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January 21, 200

TO: Members of the House Judiciary Committee

FROM: Kansas Bar Association

RE: **HB 2347**

The Kansas Bar Association appears in support of HB 2347, but would recommend the following changes:

#1 Page 14, line 39, insert "(20) an offer or sale of a security to a person not a resident of this state and not present in this state if the offer or sale does not constitute a violation of the laws of the state or foreign jurisdiction in which the offeree or purchaser is presnet and is not part of an unlawful plan or scheme to evade this act; and renumber subsequent sections.

#2 Page 18, lines 25 – 27, strike language after "thereto" on line 25 through "thereto" on line 27.

#3 Page 37, lines 23 and 24, strike after "records" on line 23 through "and" in line 24.

#4 Page 49, line 19, strike "one year" and insert "two years".

#5 Page 51, lines 4 and 5, strike all of section 3 and renumber subsequent sections.

#6 Page 87, line 8, strike "2004" and insert "2005".

House Judiciary Committee
2-4-04
Attachment 8