Approved: April 1, 2005
Date

MINUTES OF THE HOUSE FINANCIAL INSTITUTIONS COMMITTEE

The meeting was called to order by Chairman Ray Cox at 3:30 P.M. on March 2, 2005 in Room 527-S of the Capitol.

All members were present except:
Rob Olson- excused

Committee staff present:
Melissa Calderwood, Kansas Legislative Research Department
Michele Alishahi, Kansas Legislative Research Department
Bruce Kinzie, Revisor of Statutes Office
Patti Magathan, Committee Secretary

Conferees appearing before the committee:
Doug Wareham - Kansas Bankers Association
Bruce Morgan - Valley State Bank, Roeland Park
Matt Goddard - Heartland Community Bankers Association
Bill Henry - Kansas Credit Union Association
Ron Gaches - Kansas Association of Financial Services
Sonya Allen - Office of the State Banking Commissioner

Others attending:
See attached list.

Melissa Calderwood, Legislative Research, gave the committee an overview of **SB 57** - Consumer protection; exemption for occasional sale of certain repossessed collateral as it relates to The Kansas Consumer Protection Act. **(Attachment 1)**

Representative Grant moved that the minutes of the February 9 meeting be approved as written. Minutes were approved by consensus.

Chairman Cox opened hearings on **SB 57** - Consumer protection; exemption for occasional sale of certain repossessed collateral.

Doug Wareham testified on behalf of the Kansas Bankers Association. **(Attachment 2)** Mr. Wareham supports **SB 57** and said that banks should not be considered "suppliers" when they are merely selling collateral on an as-is, occasional basis.

Bruce Morgan, Valley State Bank, Roeland Park, also testified as a proponent. Mr. Morgan stated that **SB 57** is important to banks within this state and he asked this committee to approve and recommend it for consideration by the full House. He stated that this bill is necessary because it clarifies language in the existing statute defining a "supplier." **(Attachment 3)**

Matt Goddard, Heartland Community Bankers Association, testified as a proponent. They support **SB 57** also, saying that this bill removes the ambiguity in the existing statute and allows lenders to proceed with a clear understanding of their legal status. **(Attachment 4)**

Bill Henry, Kansas Credit Union Association, testified as a proponent, saying that they support this bill. **(Attachment 5)**

Ron Gaches, representing the Kansas Association of Financial Services, testified as a proponent, saying that they like the bill. **(Attachment 6)**

Written testimony was provided by **Renee Murray** of Community Bankers Association. **(Attachment 7)**

Representative Dillmore questioned whether lenders are also licensed dealers. Mr. Morgan replied that most lenders have a limited-purpose license which allows them to transport vehicles and gives them access to dealer auctions. Representative Dillmore then outlined a potential scenario of a failed housing development with

multiple units in various stages of construction. If the bank were to complete construction and sell the units, he would consider that more than an "incidental sale." Mr. Morgan replied that there is law in place to govern that scenario. State Banking laws, the National Bank Act, and the Bank Holding Company Act all prohibit banks from participating in real estate development.

Chairman Cox closed the hearings on **SB 57** - Consumer protection; exemption for occasional sale of certain repossessed collateral and opened hearings on **SB 104** - Banks and Banking - Examination of certain business entities affiliated with banks or trust companies.

Testifying as a proponent was **Sonya Allen** of the Office of the State Banking Commissioner. **(Attachment 8)** This bill amends statute K.S.A. 9-1702 in the state banking code and modernizes the existing law. This bill would give the Kansas Banking Commissioner parity with other state's Banking Commissioners and with Federal Regulators.

Doug Wareham testified as a proponent on behalf of the Kansas Bankers Association, saying that the bill makes two changes to the existing statute. First, it removes the State Banking Board's role of approving the examination of a bank's affiliated business entities and places that authority with the State Bank Commissioner or the commissioner's designee. Secondly, it defines the term "affiliate" to ensure that business affiliate information examined by state bank examiners mirror the same type of information examined by federal bank regulators. This bill was amended in the senate with language that specifically defines what an "affiliate" is and the K.B.A. believes that, as amended, this proposal brings the Kansas banking code in line with federal banking laws. **(Attachment 9)**

Written testimony was provided by proponent **Richard Rucker**, Home Bank and Trust, Eureka. **(Attachment 10)**. Written material was also provided by proponents from the **Conference of State Banking Supervisors**. **(Attachment 11)**.

Chairman Cox closed hearing on **SB 104** - Banks and Banking - Examination of certain business entities affiliated with banks or trust companies.

Meeting adjourned at 4:11 P.M.

Next meeting is scheduled for March 7, 2005.

FINANCIAL INSTITUTIONS COMMITTEE
GUEST LIST

DATE: 3-02-05

NAME	REPRESENTING
Bill Henry	Ks Credit Union Assn
Ken Wendt	Hein Law Firm
Doug Wareham	Kansas Bankers Assn.
Alex A. Kotsiantz	P.I.A.
Ron Gaches	KAFS
Sonya Allen	OSBC
Dana Hampton	OSBC
BRUCE B MORGAN	VALLEY STATE BANK
Jamie Rutherford	Little Gov't Relations
Renee Murray	CBA
Matt Goddard	HCBA
Brad Smoot	KS Govt'l Consulting

Kansas Consumer Protection Act

Background

The Kansas Consumer Protection Act was constructed with the following policies, as defined in statute (KSA 50-623),

- simplify, clarify and modernize the law governing consumer transactions;
- protect consumers from suppliers who commit deceptive and unconscionable practices;
- protect consumers from unbargained for warranty disclaimers; and
- provide consumers with a three-day cancellation period for door-to-door sales.

The Kansas Consumer Protection Act (KCPA) replaced the 1968 Buyer Protection Act. The Buyer Protection Act did not provide for private remedies and covered only merchandise. The KCPA covers the sale of services and real estate, in addition to merchandise. The act also includes additional provisions relating to disclaimers of warranty and cancellations of home solicitation sales.

Definitions

"Consumer" as defined in KSA 50-624 is defined broadly as "an individual or sole proprietor who seeks or acquires property or services for personal, family, household, business or agricultural purposes."

"Consumer transaction" means a sale, lease, assignment or other disposition for value of property or services within the state to a consumer or solicitation by a supplier regarding the disposition. Consumer transactions not addressed by this act are insurance contracts and securities.

"Services" include:

- work, labor and other personal services;
- privileges with respect to transportation, hotel and restaurant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals and cemetery accommodations; and
- any other act performed for a consumer by a supplier.

Regulation

KCPA addresses a number of actions subject to regulation. The act addresses deceptive practices, unconscionable acts, door-to-door sales, motor vehicle warranties, odometer fraud, printing of account numbers on credit card receipts, telephone solicitations including the no-call list and slamming, and abuse of the elderly. The Attorney General has the authority under this act to conduct research, hold public hearing, make inquiries and publish studies relating to consumer sales and practices, and also has rule-making authority. County or district attorneys may also take action to address violations and the Attorney General may enjoin with similar regulators in other states to address such violations. In addition, other remedies in the act include civil penalties and class action suits. A copy of the 2003 Annual Report from the Office of the Attorney General (Consumer Protection & Antitrust Division) is attached. The report addresses the types of complaints filed with the Office.

2003 ANNUAL REPORT

Consumer Protection & Antitrust Division

Office of Attorney General
Phill Kline

(Submitted pursuant to K.S.A. 50-628 and K.S.A. 50-109)

May , 2004

TO: The Honorable Kathleen Sebelius, Governor
and Members of the Kansas Legislature

Sincerely,

Phill Kline
Attorney General

OFFICE OF THE ATTORNEY GENERAL
STATE OF KANSAS
PHILL KLINE
ATTORNEY GENERAL

2003 CONSUMER PROTECTION/ANTITRUST STAFF

	Bryan J. Brown	Deputy Attorney General
	Kristy L. Hiebert	Assistant Attorney General
	Joseph N. Molina	Assistant Attorney General
*	Rex G. Beasley	Assistant Attorney General
	Stacy A. Jeffress	Assistant Attorney General
*	Shelley H. King	Assistant Attorney General
	James R. McCabria	Assistant Attorney General
	Karl R. Hansen	Assistant Attorney General
	Kevin Schumaker	Assistant Attorney General
*	Teresa A. Salts	Special Agent Supervisor
	Erica D. Strome	Special Agent
	Jared M. Reed	Special Agent
	Angela N. Nordhus	Special Agent
	Judy Jenkins	Special Agent
	Jerry Howland	Special Agent
	Mary Kennedy	Special Agent
	Natalie A. Hogan	Special Agent
*	Deborah L. Johnson	Special Agent
	Sheila Meneses	Special Agent
	Larry Larsen	Consumer Specialist
	Sarah Elsen	Consumer Specialist
	Sarah R. Weeks	Legal Assistant
	Connie Ullman	Secretary
	Amber Meseke	Secretary
	Joanne Kensinger	Office Clerk
	Marti Nelson	Office Clerk
	Emilie Burkhardt	Law Clerk
*	Leslie Hendrix	Law Clerk
	Rebekah Gaston	Law Clerk

* Served a portion of 2003. No longer with the Consumer Protection Division.

CATEGORIES OF NEW COMPLAINTS

Complaints Filed:	5,244
Complaints Closed:	7,189
Written Inquiries:	7,178
Total Annual Consumer Restitution:	$1,689,100

Category	Complaints Assigned to Special Agents	Complaints Processed by Intake Review Committee	Percent of Total
Advertising (general)	20	10	0.57%
Antitrust	5	0	0.10%
Appliances	10	17	0.51%
Assistive Device Lemon Law	3	1	0.08%
Auto	383	225	11.60%
Boats, Boating Equipment, Repairs, etc.	1	2	0.06%
Book, Record & Tape Clubs	4	6	0.19%
Business Opportunity Services	32	13	0.86%
Cable Television	9	10	0.36%
Cemeteries	9	6	0.29%
Charitable Organizations	378	4	7.28%
Clothing	4	4	0.15%
Collectibles/Antiques	4	0	0.08%
Computer - Unsolicited e-mail (spamming)	0	6	0.11%
Collection	156	127	5.40%
Computer - Internet Gambling	0	0	0.00%
Contests/Promotional	118	12	2.48%
Computer - Internet Sales	95	64	3.03%
Computer Online Services	148	32	3.43%
Computers	36	18	1.03%
Contests/Sweepstakes	3	8	0.21%
Credit	204	88	5.57%
Credit Reporting Agencies	29	14	0.82%
Discount Buying Clubs	25	5	0.57%
Door-To-Door Sales	56	11	1.28%
Education	2	5	0.13%
Employment Services	5	3	0.15%
Energy Savings Devices	0	0	0.00%
Failure to Furnish Merchandise (other than mail order)	0	3	0.06%
Farm Implements/Equipment	7	3	0.19%
Faxes Unsolicited	34	4	0.72%
Fire, Heat & Smoke Alarms	0	0	0.00%
Floor Coverings (carpet, etc.)	7	7	0.27%

Food Products	1	5	0.11%
Funeral Homes and Plans	8	3	0.21%
Furniture	15	10	0.48%
Gasohol & Stills	0	0	0.00%
Gasoline Pricing and Contents	5	0	0.10%
Health Services (doctors, dentists, hospitals, etc.)	27	40	1.28%
Health Spas & Weight Salons	32	10	0.80%
Hearing Aids	14	0	0.27%
Heating & Air Conditioning	8	6	0.27%
Home Construction	0	7	0.13%
Home Improvement	89	122	4.02%
Identity Theft	38	8	0.88%
Invoice & Billing Schemes (noncredit code)	2	0	0.04%
Jewelry	5	5	0.19%
Land Sales/Subdivided KS	0	0	0.00%
Land Resale Companies	1	0	0.02%
Loan Finders	37	7	0.84%
Magazine Subscriptions	36	19	1.05%
Mail Order	181	71	4.81%
Medical Equipment/Devices	49	1	0.95%
Medical Discount Cards	38	7	0.86%
Miscellaneous	4	0	0.08%
Mobile Home Parks	0	0	0.00%
Mobile Homes & Manufactured Homes	20	8	0.53%
Mortgage Escrow Problems	1	1	0.04%
Mortgages	25	31	1.07%
Motor Homes/RV's/Campers (anything on wheels)	0	0	0.00%
Motorcycles & Bicycles	1	4	0.10%
Moving & Storage	8	10	0.34%
Multi-level & Pyramid Distributorship Co.	47	6	1.01%
Musical Instruments, Lessons, etc.	0	0	0.00%
Negative Selection	7	0	0.13%
No-Call (enforcement actions)	45	2	0.90%
Nurseries, Lawn, Gardening and Landscape Service & Supplies	6	5	0.21%
Nursing Homes	7	0	0.13%
Office Equipment & Supplies	2	2	0.08%
Pest Control	4	4	0.15%
Pets/Animals	11	10	0.40%

Photo Studios, Equipment & Services	7	1	0.15%
Privacy Issues	1	0	0.02%
Real Estate (houses)	5	12	0.32%
Real Estate (other than houses)	2	2	0.08%
Rebates	17	11	0.53%
Recovery Companies	0	0	0.00%
Referral Selling	1	0	0.02%
Satellite Systems	26	5	0.60%
Scanning Equipment	0	0	0.00%
Securities & Investments (other than stocks & bonds)	2	2	0.08%
Security Systems and Services	22	10	0.61%
Services (general)	238	102	6.48%
Services (professional)	9	15	0.46%
Sewing Machines	0	0	0.00%
Sporting Goods	74	2	1.45%
Steel Buildings	2	0	0.04%
Stereo Equipment	3	2	0.10%
Telephone - 800#s, 900#s and International Calls	18	1	0.36%
Telephone - Cramming	34	1	0.67%
Telephone - Service, Cell Phones & Slamming	588	47	12.11%
Telephone - Prepaid Phone Cards	5	1	0.11%
Telephone Solicitations	26	3	0.55%
Telephone Solicitations/General	51	10	1.16%
Televisions and VCR's	7	9	0.31%
Timeshare Sales	13	3	0.31%
Tobacco Sales	1	0	0.02%
Toys	1	3	0.08%
Trade & Correspondence Schools	31	3	0.65%
Travel	36	26	1.18%
Unauthorized Practice of Law	11	3	0.27%
Vending Machines	3	1	0.08%
Warranty Problems (other than automobiles)	17	8	0.48%
Water Softeners, Conditioners, Purifiers, etc.	7	0	0.13%
Work-at-Home Schemes	13	17	0.57%
TOTAL CASES OPENED	3832	1412	100.00%

2003 DISPOSITION OF CLOSED COMPLAINTS

	Complaints Closed	Percent of Total
Inquiry or Information Only	375	5.22%
Referred to Private Attorney	437	6.08%
Referred to County/District Attorney	108	1.50%
Referred to Other State Attorney General	145	2.02%
Referred to Other Kansas Agency	160	2.23%
Referred to Small Claims Court	382	5.32%
Referred to Federal Agency (FTC, Post Office, etc.)	160	2.23%
Money Refunded/Contract Cancelled	1736	24.17%
Merchandise Delivered to Consumer	78	1.09%
Repaired/Replaced Product	85	1.18%
Mediation Only - No Savings	349	4.86%
No Reply from Complainant	375	5.22%
Unable to Locate Respondent	209	2.91%
Practice Complained of Discontinued	61	.85%
Respondent Out of Business	78	1.09%
Refer to other Country	16	0.22%
No Violation	1073	14.94%
Insufficient Evidence to Prove Violation	264	3.68%
Complaint Withdrawn	109	1.52%
Unable to Satisfy Complainant - No Further Action	33	.46%
Other	196	2.73%
No Jurisdiction under KCPA	95	1.32%
No Jurisdiction - Supplier Declined Mediation	0	0.00%
Lawsuit Complaint Files		
Respondent Enjoined	2	0.03%
Respondent Enjoined/Violations Found	12	0.17%
Consent Judgment	540	7.52%
Voluntary Compliance Agreement	57	0.79%
Default Judgment	13	0.18%
Other Lawsuit	1	0.01%
Defendant Filed Bankruptcy	33	0.46%
Dismissed	1	0.01%
TOTAL CASES CLOSED	7183	100.00%

SUMMARY OF 2003
CONSUMER PROTECTION ENFORCEMENT ACTIONS

State v. Mike Aherns, individually, Mark A. White, individually, and Mike Aherns and Mark A. White d/b/a K.C. Auto Outlets

On April 16, 2003, the Attorney General filed a Petition for deceptive acts and practices related to misrepresentations in lien pay-off and trade-ins. The defendants were named by Wyandotte County DA in a criminal action involving similar transactions and the office determined it was appropriate to dismiss the action without prejudice.

State v. American Auto Consultants, Inc.

On July 9, 2002, the Attorney General filed a Petition for two counts of deceptive contract practices, one count of unconscionable practices, and one count of a deceptive contract term regarding the Defendant's home-based business website services. The Defendant agreed to refund money to the consumer and the case was dismissed without prejudice.

In the Matter of American Lawyer Media, Inc. d/b/a The American Lawyer - Solicitations

On April 18, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with the above company for alleged violations of the KCPA relating to deceptive and/or unconscionable business practices. The Respondent agreed to pay $3,500.00 in civil penalties and investigative fees.

State v. American Paving Company, Joshua J. Werner d/b/a American Paving Company

On May 15, 2003, the Attorney General filed a Petition for violations of the Kansas Consumer Protection Act regarding compliance with door-to-door sales. A Consent Judgment was filed on September 29, 2003, and the Defendant agreed to pay $1,500.00 in civil penalties and investigative fees. A companion criminal case was filed for operating without a transient license, a Class A misdemeanor to which the Defendant pled guilty.

State v. Wade Ryan Brown

On September 22, 2003, the Attorney General filed a lawsuit against this individual for unconscionable business practices. The Attorney General alleges that Defendant Brown enters into contracts and accepts payment for services that he knows or has reason to know he will not perform. The case is pending.

State v. Business Options, Inc., a/k/a US Bell, Kurtis Kintzel, individually, and Keanan Kintzel, individually

On November 14, 2003, the Attorney General entered into a Consent Judgment with this company for alleged violations of the KCPA related to slamming long distance services. The Defendants agreed to pay $25,000.00 in civil penalties and investigative fees.

State v. Michael Cooper, Renaissance TTP, Inc., d/b/a The Tax People.net, d/b/a Advantage International Marketing (AIM)

On May 15, 2001, the Court found that Renaissance TTP Inc. and Michael C. Cooper were operating an illegal pyramid and entered a Temporary Injunction against them. The Court also froze the assets and appointed a Receiver for Renaissance. A copy of the Temporary Injunction can be found on the Court's web site at http://www.shawneecourt. In March 2003, Mr. Cooper was found in contempt for failing to cooperate with the receiver and for failing to account for, and deliver to the Court over $1.7 million dollars from the sale of the company's beach house in Puerto Vallarta, Mexico. Mr. Cooper was then jailed, but was given a temporary release to travel to Mexico with the purpose of returning with the money. Mr. Cooper did not return as ordered, but remained in Mexico. On June 5, 2003, the Court entered judgment against Renaissance and also against Michael Cooper personally for civil penalties under the KCPA in the amount of $13,220,000.00. The Court also made the Injunction entered on May 15, 2003, final and permanent. On July 14, 2003, the Court entered an additional judgment against Renaissance and also against Michael Cooper personally for consumer damages under the KCPA in the amount of $13,621,500.00 and for attorneys fees and expenses incurred in the case. Ownership of the Coopers' home was also transferred to the receiver. Thereafter, Mr. Cooper's family joined him in Puerto Vallarta, Mexico where they are now believed to be residing in the condominium complex that the corporation owned. Although Mr. Cooper remains in Mexico he has filed an appeal with the Kansas Court of Appeals. Renaissance TTP Inc., did not appeal the judgment. The next step for this office is to defend the judgment against Mr. Cooper in the appellate court and to look for any assets which could be used to satisfy the judgments.

State v. Gary Gucciano d/b/a Solstice Arms, Inc., SAI, Solstice Arms Int and Solstice Arms

On May 21, 2003, the Attorney General filed a Petition against this sole proprietorship that does custom gunsmithing of firearms and firearms parts kits supplied by consumers for violations of the KCPA relating to unconscionable and deceptive business practices. The Attorney General alleged that consumers were solicited to send money and guns on the promise that services would be rendered in a timely manner and guns returned. Many consumers had been waiting over two years to receive any benefit from their contract. Over 250 guns were seized involving more than 200 consumers. The Defendant entered into a Consent Judgment, the relief including the return of property and restitution to consumers, civil penalties and an injunction to prohibit him from accepting payment prior to rendering services and returning property to consumers who request his service. As of today, the office has been unable to locate approximately ten of the consumers whose property we are holding.

State v. Genuine Parts Company, Inc., d/b/a NAPA, and JETA, Inc., d/b/a Jayhawk Auto Supply

On May 18, 2001, the Attorney General filed a lawsuit against the above named auto parts dealers for inaccurate price scanning equipment and practices. A pretrial conference

occurred in October, 2002. This case was settled by a Consent Judgment reached between the parties. Kansas received $1,750.00.

In the Matter of H&R Block Services, Inc.

On April 17, 2003, along with 42 other states, the Attorney General entered into an Assurance of Voluntary Compliance with this company for automatically adding a fee of $22 for one of the for-fee optional service Peace of Mind guarantee,(POM) to all consumer tax return preparation invoices without first obtaining the consumer's affirmative acceptance of POM. This multistate investigation resulted in an offer from H&R Block to provide $2,300,00.00 to the states, of which $50,000.00 was paid to Kansas.

State v. Thomas W. Hart, d/b/a Hart's Hearing Aid Center

On September 19, 2003, the Attorney General filed a lawsuit against this individual and company for violations of the KCPA regarding deceptive business practices and failure to obey subpoena. Defendant Hart represented that his products and services were covered with a "full money back guarantee" and did not follow through. Hart is now living in San Diego, California. The Attorney General obtained a default judgment against Hart on November 24, 2003. The Court ordered $60,000.00 in civil penalties, $12,350.00 in consumer restitution, $400.00 for investigative fees, as well as additional penalties of $100.00 per day until Defendant complies with the subpoena.

In the Matter of Holm Automotive, Inc.

On October 17, 2003, the Attorney General entered into a Consent Judgment with Holm Automotive for alleged violations of the KCPA related to deceptive advertising. The Respondent agreed to pay $2,500.00 in civil penalties and investigative fees.

State v. Leasecomm Corporation, and Microfinancial Incorporated

On May 29, 2003, the Attorney General filed a Consent Judgment with this company for violations of the KCPA. The Defendant agreed to pay $45,000.00 in civil penalties and $45,000.00 in investigative fees and expenses.

In the Matter of Lewis Motors, Inc., a Kansas Corporation and Aleta Blu, individually

On November 25, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with Lewis Motors, Inc., a Kansas Corporation and Aleta Blu, individually, for alleged violations of the KCPA. The Attorney General alleged that Respondent had misrepresented to the consumer the availability of a rebate to get the consumer to enter into a transaction. The Respondent agreed to pay $2,000.00 in consumer restitution and $1,750.00 in civil penalties and investigative fees.

State v. Mark Mason d/b/a RR Custom Paint

On November 6, 2002, the Attorney General filed a lawsuit with this company who does custom painting and modification of model railroad trains for several violations of the KCPA relating to unconscionable and deceptive business practices. The Defendant entered into a Consent Judgment which required restitution and return of the property to consumers. The allegations are similar to those alleged in State v. Gucciano. The office

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seized over 600 model trains, involving over 200 consumers. We have been unable to locate approximately 5 consumers.

State v. New Horizons TKD, Inc. d/b/a Sixth Street Fitness, Donald Booth, individually, The Club, L.L.C. d/b/a Total Fitness Athletic Center, and Martin Tuley, individually

On October 2, 2002, the Attorney General filed a Petition for deceptive and unconscionable business practices. Sixth Street Fitness represented to prepaid consumers that it had merged with Total Fitness and consumers were required to complete their contracts at that business when in fact no merger had taken place. Sixth Street Fitness continued to accept new memberships after it had reason to believe it would be closing its operations without disclosing that fact to consumers. The Attorney General's Office contacted the third- party vendor that managed automatic withdrawals of payments for the businesses and, most consumers received restitution. Both businesses ceased operations. As a result, the Attorney General agreed to dismiss the case without prejudice.

In the Matter of Noller Automotive Group, Inc.

On November 13, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with Noller Automotive Group, Inc. for alleged violations of the KCPA, related to deceptive advertising. The Respondent agreed to pay $2,000.00 in civil penalties and investigative fees.

In the Matter of Pfizer Inc.

On December 31, 2002, along with 19 other states the Attorney General entered into an Assurance of Voluntary Compliance with Pfizer, Inc. for their promotional practices for Zithromax. The Respondent agreed to pay $4,000,000.00 to the states, of which $127,273.00 was paid to Kansas.

State v. Jack Pittaway Jr., d/b/a Pittaway Construction

On February 11, 2003, the Attorney General filed a lawsuit against Jack Pittaway, Jr., d/b/a Pittaway Construction, for violations of the KCPA regarding unconscionable business practices. Defendant Pittaway entered into a contract and accepted payment to perform services that have not been completed to date. An Order for Default Judgment was filed on August 25, 2003, ordering the Defendant to pay $2,120.31 in consumer restitution and $10,000.00 in civil penalties.

State v. Pro-Life Campaign Committee, and Pablo Gersten, individually

On May 21, 2003, the Attorney General filed a lawsuit against this individual and company for violations of the KCPA related to registration of a Charitable organization. On September 17, 2003 the office determined it was appropriate to dismiss the action without prejudice due to facts which came to light after filing.

State v. Rural Cellular Corporation, and RCC Holdings, Inc., a subsidiary of Rural Cellular Corporation, f/k/a Triton Cellular, a/k/a Cellular One, a/k/a Unicel

On March 20, 2003, the Attorney General entered into a Consent Judgment with the Defendants for alleged violations of the KCPA and the Kansas No-Call Act, related to provision of cellular phone service. In addition to complaints of being contacted despite

being registered on the Kansas No-Call List, consumers complained that Defendants unilaterally changed material terms in their service agreements. The Defendants agreed to pay $30,000.00 in civil penalties and investigative fees.

State v. Gregory L. Sams, individually, and d/b/a Benefit Reduction Services

On September 17, 2003, the Attorney General filed a lawsuit against this individual and company for violations of the KCPA regarding deceptive and unconscionable business practices. Defendant Sams was a convicted felon whose parole conditions prohibited his handling of other people's money or making contact with elderly people. After leaving prison in 2002, Sams went to work for an insurance company from which he allegedly stole a customer list. He then used confidential information about those consumers to telemarket them and access their bank accounts. He offered discount services to elders for long-term healthcare and savings on prescription drugs. The Attorney General obtained a default judgment on December 30, 2003, which includes $380,000.00 in civil penalties, $2,056.25 in consumer restitution, $1,290.00 in investigative fees. The Missouri Parole Board has revoked Sams' parole, and he has been reincarcerated.

In the Matter of Paul A. Schmitt Music Company, d/b/a Schmitt Music Centers

On March 5, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with above named company for using unconscionable practices when conducting sales to elderly clients. The Respondent agreed to pay $15,000.00 to the Attorney General's Office, for civil penalties and investigative fees and to pay $51,695.00 in consumer restitution.

State v. Thomas W. Shavenore

On June 23, 2003, the Attorney General filed a lawsuit against this individual for unconscionable business practices. Defendant Shavenore entered into a contract and accepted payment for siding services that have not been completed to date. The case was dismissed without prejudice.

State v. David Scott d/b/a Slanted Fedora Entertainment

On September 19, 2003, the Attorney General filed a Petition alleging 27 violations of the KCPA. This Kansas company organizes and promotes Star Trek and science fiction related conventions across the country. Allegations include misrepresentations as to which stars will appear at the conventions, failure to comply with refund policies and charging consumers' credit or debit cards without authorization. Defendants filed a motion seeking to dismiss several of the counts as they were not pled with specificity. Pursuant to the Court's ruling, the petition was amended on January 9, 2004. The amended petition contains 120 pages, over 1000 paragraphs, and 67 allegations of KCPA violations. A second amended petition was filed April 8, 2004, containing 80 allegations of KCPA violations. The case is still pending.

State v. Steakhouse Quality Meats Inc., d/b/a Steakhouse Meats, Reem Khashou, Rodney Creighton, and Clayton Simpson

On May 8, 2003, the Attorney General filed a lawsuit against this company for violations of the KCPA relating to "price per pound" and "door-to-door" solicitation violations

and violations of the Judgment entered into on October 22, 1998, against its predecessor America's Choice Steak, Inc. and Rodney Creighton. The case is pending.

In the Matter of Superior Toyota, Inc.

On September 15, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with this company for alleged violations of the KCPA relating to an advertisement that contained misleading representations. The Respondent agreed to pay $2,500.00 in civil penalties and investigative fees.

State v. Joe Taylor, d/b/a Taylor Roofing

On June 19, 2003, the Attorney General filed a lawsuit against this individual and company for unconscionable business practices. The Attorney General alleges that Defendant Taylor entered into a contract and accepted payment for services that have not been completed to date and for which Defendant never intended to perform. Defendant entered an Assurance of Voluntary Compliance wherein he agreed to pay $44,000.00 in consumer restitution and $500.00 in civil penalties and investigation fees.

State v. Mark Tilford, individually, and d/b/a Mr. Stitch Upholstery & Tops, Inc., d/b/a MS Interiors, d/b/a Mr. Stitch, Inc.

On March 11, 2003, the Attorney General filed a lawsuit against this company for unconscionable business practices. The Defendant entered into a contract representing that custom remodeling services had been performed and required payment for the same, when in truth the payments were not applied for that purpose and consumers received no benefit for the services or payment. The case is scheduled for trial August 23, 2004.

In the Matter of Wal-Mart Stores, Inc.

On August 20, 2003, the Attorney General along with 42 other state Attorneys General entered into an Assurance of Voluntary Compliance with this company setting tobacco retailing practices with regard to sales to minors. The Respondent agreed to pay $437,500.00 to the states, of which $9,486.19 will be paid to Kansas.

State v. Jerry Washburn, individually, and Jerry Washburn, d/b/a Affordable Asphalt Maintenance

On March 19, 2003, the Attorney General filed a lawsuit against this individual and company for alleged unconscionable business practices in violation of the "door-to-door" solicitation laws. Defendant Washburn entered into a contract and accepted payment for services without providing the notice of right-to-cancel. The case is scheduled for trial August 30, 2004.

State v. Joshua Werner

On May 15, 2003, the Attorney General filed a Petition for violations of the Kansas Consumer Protection Act regarding compliance with door-to-door sales. A Consent Judgment was filed on September 29, 2003, and the Defendant agreed to pay $1,500.00 in civil penalties and investigative fees. A companion criminal case was filed for operating without a transient license, a Class A misdemeanor to which the Defendant pled guilty.

In the Matter of Wolfe's Camera Shops, Inc.

On September 27, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with this company for alleged violations of the KCPA regarding a number of advertisements that contained misleading representations as to benefits of offered incentives and price. The respondent agreed to pay $2,500.00 in civil penalties and investigative fees.

CONCLUSION

The above enforcement actions taken by the Consumer Protection Division reflect the priority that the Office of Attorney General Phill Kline has in protecting Kansas consumers from deceptive and unconscionable business practices. Strong, yet fair enforcement of consumer laws, combined with effective consumer education efforts, provide the level of protection to Kansas consumers mandated by the Kansas Legislature under the KCPA.

SUMMARY OF 2003 ANTITRUST ENFORCEMENT ACTIONS

State of Kansas ex rel. vs Abbott Laboratories Inc., Geneva Pharmaceuticals, Inc., and IVAX Pharmaceuticals, Inc., formerly known as Zenith Goldline Pharmaceuticals, Inc.

On September 27, 2001, Kansas joined Florida and Colorado in filing a complaint against Abbott Laboratories, Geneva Pharmaceuticals, Inc and IVAX Pharmaceuticals. The case involves the drug Hytrin, a brand-name drug manufactured by Abbott that is prescribed for the treatment of hypertension and benign prostatic hyperplasia ("BPH"). The complaint alleges that certain conduct by these companies prevented generic versions of Hytrin from coming to the market and that this conduct violates the antitrust laws of the United States and Kansas. A settlement has been reached with IVAX Pharmaceuticals. The case involving Abbot Laboratories, Inc. and Geneva Pharmaceuticals, Inc. is still pending.

1-14

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1-14

State of Kansas ex rel. vs BMG Music, Bertelsmann Music Group Inc., Capitol Records Inc., d/b/a EMI Music Distribution, Virgin Records America Inc., Priority Records, L.L.C., MTS Inc., d/b/a Tower Records, Musicland Stores Corporation, Sony Music Entertainment, Inc., Trans World Entertainment Corporation, Universal Music Group, Inc., Universal Music & Video Distribution Corp., UMG Recordings Inc., Warner-Elektra-Atlantic Corp., Warner Music Group Inc., Warner Bros. Records Inc., Atlantic Recording Corp., Elektra Entertainment Group Inc., and Rhino Entertainment Co.

On August 8, 2000, the Attorney General, along with 41 other states and three territories, filed suit in the United States District Court for the Southern District of New York, against the nation's largest distributors of recorded music, affiliated labels and various retailers for price fixing. Also named were retail giants Musicland, which operates more than 1,300 retail outlets under the Musicland and Sam Goody trade names, Trans World, which operates more than 900 stores under the names Camelot, FYE, Music & Movies, Planet Music, Record Town, Saturday Matinee, Spec's Music, Strawberries and the Wall, and MTS Inc. (doing business as Tower Records.) The complaint further targets unnamed co-conspirators "both known and unknown" and calls for the awarding of triple damages to consumers and the assessment of civil penalties against the companies. The complaint alleges that in the early 1990's, recorded music outlets such as Best Buy, Circuit City and Target began to offer stiff competition to mall-based music stores. The Defendants are accused of engaging in an unlawful scheme designed primarily to stop retail outlets from offering music at deep discounts. The parties have agreed to a settlement which included a cash payment of $13.86 to consumers who made a timely claim, and a contribution of music CD"s to the States. Kansas share of the CD's will be distributed to the public libraries. Distribution is expected to be completed by the end of summer 2004.

State of Kansas ex rel. vs Bristol-Myers Squibb Co., Danbury Pharmacal, Inc., and Watson Pharma, Inc. (In Re Buspirone Antitrust Litigation)

This case was first filed by thirty-two states in December, 2001, in the federal district court for the Southern District of New York. Kansas joined the multistate suit in April, 2002. The case involves the anti-anxiety drug BuSpar, which is Bristol Myers Squibb Co.'s name for buspirone. The states' complaint alleged that Bristol-Myers Squibb Co. fraudulently listed its patent for BuSpar in the FDA's Orange Book and that Bristol-Myers Squibb Co. entered into anticompetitive agreements with two companies to prevent distribution of generic buspirone. A settlement has been reached resulting in payments to consumers based upon claims submitted. Calculation and distribution of settlement proceeds for state agencies is pending. The consumer claims have been paid.

State of Kansas ex rel. vs Cardizem

On July 2, 2001, this action was brought by the Attorney General, along with Attorneys General of 26 other states, seeking relief for a series of anti-competitive and illegal acts by which Defendants sought to delay or prevent the marketing of less expensive, generic alternatives to Cardizem CD, a highly profitable, brand-name drug for treatment of chronic chest pains, high blood pressure, and prevention of heart attacks. The parties have agreed to a settlement which must be approved by the court.

State of Kansas ex rel. v. Microsoft

On May 18, 1998, the Attorney General, along with 18 other states and the Department of Justice, filed an antitrust action against Microsoft Corporation in the United States District Court for the District of Columbia. The suit alleged that Microsoft's conduct violated state and federal antitrust laws. In November 1999, the court found that Microsoft had violated the state and federal antitrust laws and caused consumer harm by, *inter alia,* engaging in a series of actions designed to protect its monopoly power. The Court also found that Microsoft demonstrated that it would use its prodigious market power and immense profits to harm any firm that insisted on pursuing initiatives that could intensify competition against one of Microsoft's core products, and that Microsoft's past success in hurting such companies and stifling innovation deters investment in technologies and businesses that exhibit the potential to threaten Microsoft. The Court issued an order in June 2000 which included remedies involving the reorganization of the structure of Microsoft. Microsoft appealed to the United States Court of Appeals for the District of Columbia which affirmed the Findings of Fact that Microsoft's conduct violated the law, but reversed and remanded the case for further proceedings and consideration of the remedy to be imposed for the illegal conduct. In November 2000, nine states and the Department of Justice entered into a settlement of the case which must be approved by the Court. The State of Kansas and the other non-settling states continued to litigate and submitted a separate remedy proposal. The litigating states presented their case last spring. Although there was significant industry opposition to the DOJ settlement the court approved the settlement while at the same time granting judgement to the litigating states for some, but not all, of the additional relief suggested by the litigating states. Kansas and the other states are working with Microsoft to insure compliance with the settlement and judgement.

State of Kansas ex rel. vs Salton

Kansas and the Attorneys General of all States (except Minnesota, Missouri and New Mexico), Puerto Rico, and the District of Columbia brought a resale price maintenance, exclusive dealing and monopolization lawsuit against Salton, Inc., claiming that Salton's alleged practices affected the price at which some Salton products (primarily the George Forman Grill) were sold at some retail stores during the period from Jan. 1, 1998 -Sept. 6, 2002. The case has been settled subject to court approval.

Under the proposed settlement, Salton has agreed to pay the States $7.654 million for claimed damages. This payment will be made in three installments, the last of which is on or before March 1, 2004. Salton will also pay the States $200,000 for costs and attorneys' fees. Salton has agreed to a court order prohibiting certain conduct in the sale of its indoor contact grills, including agreements to set retail prices.

In view of the difficulty in identifying the millions of purchasers of the George Forman Grills covered by the settlement and the relatively small alleged overcharge per grill, the settlement funds will be distributed in each state on a *cy pres* basis to not-for-profit corporations, charitable organizations, or governmental entities to advance health or nutrition-related causes. Kansas received $75,000.00 in settlement proceeds. Proceeds were distributed via a court approved cypress distribution to four pregnancy maintenance organizations for the advancement of health and nutritional programs.

***State of Kansas ex rel. vs. Bristol-Myers Squibb Co. ("BMS")*, (Taxol)**

Kansas, along with a group of 28 other states, the District of Columbia, Puerto Rico, and the Virgin Islands joined together in the multi-state action that accuses Bristol of acting illegally to keep the cheaper, generic version of Taxol off the market. Suit was filed in the United States District Court for the District of Columbia.

The lawsuit alleges that Bristol knowingly manipulated the US Patent and Trademark Office process by fraudulently securing patents that had no legal validity, which prevented generic drug manufacturers from entering the marketplace until 2000. Bristol's sales of Taxol have totaled at least $5.4 billion since 1998. A standard course of treatment using the name brand drug can cost between $6,000 and $10,000 per patient. A settlement has been reached. Consumers will be paid based upon claims submitted, averaging $500.00 each. Proceeds of $260,000.00 recovered for state agencies and Medicaid.

State of Missouri, State of Arkansas, State of Kansas, State of Illinois, State of Iowa and State of Texas, Plaintiffs v. Arch Coal, Inc., New Vulcan Coal Holdings, LLC, and Triton Coal Company, LLC., Defendants.

The State of Kansas, along with five other affected states, sued in Federal District Court seeking an injunction to stop the acquisition of Triton Coal Co. by Arch Coal, Inc. The six plaintiff states represent the largest purchasers of coal from the region in question. The coal industry is highly consolidated, and within the Wyoming Southern Powder River Basin, even more so. The removal of Triton from the Southern Powder River Basin would concentrate 100% of 8800 Btu coal in the hands of only three producers, and concentrate 86% of the 8400 Btu coal in that region. Kansas utilities purchase more than 96% of the state's coal needs from this region. Price increases for coal resulting from a shrinking competitive market would be passed along in the form of higher utility costs to Kansas residents, businesses, and industrial electric ratepayers. The matter was heard in June and early July, 2004. The court is expected to render a decision by mid-August.

In Re: Kansas Microsoft Litigation

This Microsoft matter is a private class action alleging overcharges by Microsoft on certain software products. Similar matters are pending in state courts throughout the country. Plaintiffs' attorneys have met with varying degrees of success both with regard to the merits of the case, and approval of proposed settlements. The proposed settlement in Kansas did not appear fair to consumers, and the proposed attorneys fees appear disproportionate to the benefit provided by the settlement. The Kansas Attorney General filed an objection to the settlement on behalf of Kansas consumers. Several additional parties filed objections on similar grounds. The court heard the matter in May, 2004, and approved the settlement despite the objections. However, the court has taken the attorneys fees matter under advisement and has not yet rendered a decision as to the amount of fees to be awarded. A supplemental objection was filed by the State for the court's consideration as it reviews the fee matter.

Fatema Azizian, et al. v. Federated Department Stores, Inc., et al.

This matter is a private class action alleging collusion and price fixing in the cosmetics industry. The settlement in this case is questionable and as presented, the true value of the settlement to consumers cannot be determined. There are also concerns with regard to proper notice to consumers. The State of Kansas along with ten other states have filed an objection to the settlement on behalf of consumers in their respective states. Disposition of the matter is pending.

ANTITRUST INVESTIGATIONS

Smithfield acquisition of Farmland Foods

The Kansas Attorney General investigated the competitive effects of the merger of these two entities. While the reduction of competition in any given market is cause for concern, no legal grounds were found to exist upon which this transaction could be successfully challenged. Joint public hearings by the Kansas, Nebraska, and South Dakota Attorneys General were held as part of this investigation.

Caremark acquisition of AdvancePCS

The State of Kansas investigated the competitive effects of the merger of these two entities. While the reduction of competition in any given market is cause for concern, no legal grounds were found to exist upon which this transaction could be successfully challenged.

Prescription Drugs v. Generic Equivalents

The Kansas Attorney General currently is performing three separate confidential investigations regarding anti-competitive behavior by manufacturers of branded drugs intending to keep generic versions of their respective drugs from coming to market, or inflating the cost of the generic versions of branded drugs.

NO-CALL
ENFORCEMENT ACTIONS

In the Matter of ADT Security Services, Inc.

On November 13, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with ADT Security Services, Inc. for alleged violations of the Kansas No-Call Act. The Respondent agreed to pay $5,000.00 in civil penalties and investigative fees.

State v. Allen Equity Mortgage, Inc.

On August 12, 2003, the Attorney General entered into a Consent Judgment with Allen Equity Group Mortgage, Inc. for violations of the Kansas No-Call Act. The Defendant agreed to pay $1,500.00 in civil penalties and investigative fees.

In the Matter of American Residential Funding, Inc.

On October 21, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with American Residential Funding, Inc. for alleged violations of the Kansas No-Call Act. The Respondent agreed to pay $4,000.00 in civil penalties and investigative fees.

State v. The Ameridebt Group, Inc.

On November 18, 2003, the Attorney General entered into a Consent Judgment with The Ameridebt Group, Inc. for violations of the Kansas No-Call Act. The Defendant agreed to pay $6,500.00 in civil penalties and investigative fees.

State v. Ameripure Water Company

On May 14, 2003, the Attorney General entered into a Consent Judgment with Ameripure Water Company for violations of the Kansas No-Call Act. The Defendant agreed to pay $10,000.00 in costs and investigative fees.

State v. Banker's Life & Casualty Company

On January 28, 2003, the Attorney General entered into a Consent Judgment with Banker's Life & Casualty Company for violations of the Kansas No-Call Act. The Defendant agreed to pay $15,000.00 in costs and fees.

State v. Beyond Marketing Corp.

On October 17, 2003, the Attorney General entered into a Consent Judgment with Beyond Marketing Corp. for violations of the Kansas No-Call Act. The Defendant agreed to pay $4,000.00 in civil penalties and investigative fees.

In the Matter of Big River Marketing, Ltd.

On May 8, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with Big River Marketing, Ltd. for alleged violations of the Kansas No-Call Act. The Respondent agreed to pay $3,500.00 in civil penalties and investigative fees.

In the Matter of BrainstormUSA, L.L.C.

On August 14, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with BrainstormUSA, L.L.C. for alleged violations of the Kansas No-Call Act. The Respondent agreed to pay $2,500.00 in civil penalties and investigative fees.

In the Matter of Chalonne Foerster, d/b/a Five Star Cellular

On August 6, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with Five Star Cellular for alleged violations of the Kansas No-Call Act. The Respondent agreed to pay $10,000.00 in civil penalties and investigative fees.

State v. Debt Management Center, Inc.

On April 14, 2003, the Attorney General entered into a Consent Judgment with Debt Management Center, Inc. for alleged violations of the Kansas No-Call Act. The Defendant agreed to pay $15,000.00 in costs and fees.

In the Matter of Direct Security Services, Inc.

On April 18, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with Direct Security Services, Inc. for alleged violations of the Kansas No-Call Act. The Respondent agreed to pay $4,000.00 in civil penalties and investigative fees.

In the Matter of Escapes!, Inc., an Arkansas corporation

On August 20, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with Escapes!, Inc. for alleged violations of the Kansas No-Call Act. The Respondent agreed to pay $1,500.00 in costs and investigative fees.

In the Matter of GGIS L.L.P.. d/b/a Gentry Group

On June 13, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with GGIS L.L.P. d/b/a Gentry Group for alleged violations of the Kansas No-Call Act. The Respondent agreed to pay $5,000.00 in civil penalties and investigative fees.

State v. Grand Vacations International, Inc.

On March 17, 2003, the Attorney General filed a lawsuit with Grand Vacations International, Inc. for alleged violations of the Kansas No-Call Act. The case is pending.

State v. Grandvista Vacations, L.L.C., a Missouri limited liability company

On January 28, 2003, the Attorney General entered into a Consent Judgment with Grandvista Vacations of the Kansas No-Call Act. The Defendant agreed to pay $10,000.00 in civil penalties and investigative fees.

State v. Guardian Marketing Services, Corp.

On August 28, 2003, the Attorney General entered into a Consent Judgment with Guardian Marketing Services, Corp. for violations of the Kansas No-Call Act. The Defendant agreed to pay $4,500.00 in civil penalties and investigative fees.

In the Matter of Hearthside Lending Corporation

On June 25, 2003, the Attorney General entered into an Assurance of Voluntary Compliance for alleged violations of the Kansas No-Call Act. The Respondent agreed to pay $4,000.00 in costs and investigative fees.

State v. Heartland Home Finance Inc.

On March 12, 2003, the Attorney General entered into a Consent Judgment with Heartland Home Finance Inc. for violations of the Kansas No-Call Act. The Defendant agreed to pay $4,000.00 in civil penalties and investigative fees.

State v. Higher Response Marketing, Inc.

On June 6, 2003, the Attorney General entered into a Consent Judgment with Higher Response Marketing, Inc. for violations of the Kansas No-Call Act. The Defendant agreed to pay $6,000.00 in civil penalties and investigative fees.

State v. Humboldt Corporation Inc.

On October 17, 2003, the Attorney General entered into a Consent Judgment with Humboldt Corporation Inc. for violations of the Kansas No-Call Act. The Defendant agreed to pay $2,500.00 in civil penalties and investigative fees.

In the Matter of Judson Enterprises, Inc. , and d/b/a K Designers Inc.

On August 20, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with Judson Enterprises, Inc. d/b/a K Designers Inc. for alleged violations of the Kansas No-Call Act. The Respondent agreed to pay $5,000.00 in civil penalties and investigative fees.

State v. Kathryn Blank, individually and d/b/a KB & Associates

On June 26, 2003, the Attorney General entered into a Consent Judgment with KB & Associates for violations of the Kansas No-Call Act. The Defendant agreed to pay $5,000.00 in civil penalties and investigative fees.

State v. Krane Products, Inc.

On June 3, 2003, the Attorney General entered into a Consent Judgment with Krane Products, Inc. for violations of the Kansas No-Call Act. The Defendant agreed to pay $2,500.00 in costs and investigative fees.

State v. Lifeline Industries, Inc.

On June 5, 2003, the Attorney General entered into a Consent Judgment with Lifeline Industries, Inc. for violations of the Kansas No-Call Act. The Defendant agreed to pay $3,000.00 in civil penalties and investigative fees.

State v. Lighthouse Financial Corporation

On October 17, 2003, the Attorney General entered into a Consent Judgment with Lighthouse Financial Corporation for violations of the Kansas No-Call Act. The Defendant agreed to pay $2,500.00 in civil penalties and investigative fees.

In the Matter of Mortgage Pros, Inc.

On August 20, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with Mortgage Pros, Inc. for alleged violations of the Kansas No-Call Act. The Respondent agreed to pay $4,000.00 in civil penalties and investigative fees.

In the Matter of New Colorado Prime Holdings, Inc.

On August 20, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with New Colorado Prime Holdings, Inc. for alleged violations of the Kansas No-Call Act. The Respondent agreed to pay $3,000.00 in civil penalties and investigative fees.

State v. Pacesetter Corporation, a Nebraska Corporation

On April 28, 2003, the Attorney General entered into a Consent Judgment with Pacesetter Corporation for violations of the Kansas No-Call Act. The Defendant agreed to pay $5,000.00 in civil penalties and investigative fees.

State v. Rural Cellular Corporation, and RCC Holdings, Inc., a subsidiary of Rural Cellular Corporation, f/k/a Triton Cellular, a/k/a Cellular One, a/k/a Unicel

On March 20, 2003, the Attorney General entered into a Consent Judgment with the Defendants for alleged violations of the KCPA and the Kansas No-Call Act, related to provision of cellular phone service. In addition to complaints of being contacted despite being registered on the Kansas No-Call List, consumers complained that Defendants unilaterally changed material terms in their service agreements. The Defendants agreed to pay $30,000.00 in civil penalties and investigative fees.

In the Matter of Satellite Network, Inc.

On September 9, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with Satellite Network, Inc. for alleged violations of the Kansas No-Call Act. The Respondent agreed to pay $3,000.00 in civil penalties and investigative fees.

In the Matter of Scharig Alarms Systems, Inc.

On October 18, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with Scharig Alarms Systems, Inc. for alleged violations of the Kansas No-Call Act. The Respondent agreed to pay $5,000.00 in civil penalties and investigative fees.

In the Matter of Sears Home Improvement Products, Inc.

On April 1, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with Sears Home Improvement Products, Inc. for alleged violations of the Kansas No-Call Act. The Respondent agreed to pay $50,000.00 in civil penalties and investigative fees.

State v. Seniorsfirst, L.L.C.

On January 28, 2003, the Attorney General entered a Journal Entry of Consent Judgment against Seniorsfirst, L.L.C. for violations of the Kansas No-Call Act. The Defendant agreed to pay $3,000.00 in civil penalties and investigative fees.

State v. Shepherd of the Hills Entertainment Group Inc., d/b/a Branson Hotline

On May 16, 2003, the Attorney General entered into a Consent Judgment with Shepherd of the Hills Entertainment Group Inc., d/b/a Branson Hotline for violations of the Kansas No-Call Act. The Defendant agreed to pay $4,500.00 in civil penalties and investigative fees.

State v. Star Equity Funding, L.L.C.

On June 26, 2003, the Attorney General entered into a Consent Judgment with Star Equity Funding, L.L.C., for violations of the Kansas No-Call Act. The Defendant agreed to pay $2,000.00 in civil penalties and investigative fees.

State v. Sterling Coast to Coast Financial Group, Inc.

On March 10, 2003, the Attorney General entered into a Consent Judgment with Sterling Coast to Coast Financial Group, Inc. for violations of the Kansas No-Call Act. The Defendant agreed to pay $5,000.00 in civil penalties and investigative fees.

In the Matter of Sunterra Corporation

On April 11, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with Sunterra Corporation for alleged violations of the Kansas No-Call Act. The Respondent agreed to pay $10,000.00 in civil penalties and investigative fees.

State v. T & T Cleaning Systems, Inc.

On April 11, 2003, the Attorney General entered into a Consent Judgment with T & T Cleaning Systems, Inc. for violations of the Kansas No-Call Act. The Defendant agreed to pay $5,000.00 in civil penalties and investigative fees.

State v. Take Time for Branson Inc., d/b/a Branson Bound

On September 18, 2003, the Attorney General filed a lawsuit with Take Time for Branson, d/b/a Branson Bound for alleged violations of the Kansas No-Call Act. The case is pending.

In the Matter of TruGreen Limited Partnership, d/b/a TruGreen Chemlawn

On November 13, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with TruGreen Limited Partnership, d/b/a TruGreen Chemlawn for alleged violations of the Kansas No-Call Act. The Respondent agreed to pay $3,000.00 in civil penalties and investigative fees.

In the Matter of Union Companies, Inc., d/b/a Telesource

On December 3, 2003, the Attorney General entered into an Assurance of Voluntary Compliance with Union Companies, Inc. d/b/a Telesource for alleged violations of the Kansas No-Call Act. The Respondent agreed to pay $5,000.00 in civil penalties and investigative fees.

State v. US Security, Inc.

On January 28, 2003, the Attorney General entered into a Consent Judgment with US Security, Inc. for violations of the Kansas No-Call Act. The Defendant agreed to pay $2,000.00 in civil penalties and investigative fees.

State v. Valdoro Marketing, LLC

On April 4, 2003, the Attorney General entered into a Consent Judgment with Valdoro Marketing, LLC for violations of the Kansas No-Call Act. The Defendant agreed to pay $10,000.00 in civil penalties and investigative fees.

State v. Vacation Depot Inc.

On August 27, 2003, the Attorney General entered into a Consent Judgment with Vacation Depot Inc. for violations of the Kansas No-Call Act. The Defendant agreed to pay $10,000.00 in civil penalties and investigative fees.

2003 NO-CALL COMPLAINTS

Complaints Filed:	**1,814**
Complaints Closed:	**1,906**

Category	
No-Call	1,814

2003 DISPOSITION OF NO-CALL CLOSED COMPLAINTS

	Complaints Received	Percent of Total
No Reply From Complainant	11	0.58%
Unable to Locate Respondent	283	14.85%
Respondent Out of Business	16	0.84%
No Violation	312	16.37%
Insufficient Evidence	20	1.05%
Withdrawn	1	0.05%
Other	5	0.26%
Defendant Enjoined & Violations Found	2	0.10%
Consent Judgment	375	19.67%
Assurance of Voluntary Compliance	174	9.13%
Default Judgment	18	0.94%
No-Call Charity	95	4.98%
No-Call Political	2	0.10%
No-Call Polling	103	5.40%

No-Call Established Business Relationship Exemption	203	10.65%
No-Call Express Authorization Exemption	17	0.89%
No-Call Collection Exemption	158	8.29%
No-Call Affirmative Defense - Mistake	31	1.63%
No-Call Affirmative Defense - Business Phone	65	3.41%
Misfiled - Transferred	15	0.79%
TOTAL CASES	1906	100.00%

The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

Date: March 2, 2005

To: House Financial Institutions Committee

From: Doug Wareham, Vice President-Government Affairs

Re: Senate Bill 57

Mr. Chairman and members of the Committee, I am Doug Wareham appearing on behalf of the Kansas Bankers Association (KBA). KBA's membership includes 360 Kansas banks, which operate more than 1,300 banking facilities in 440 towns and cities across the state.

KBA appreciates the opportunity to appear in support of Senate Bill 57. This bill will ensure lenders faced with the incidental sale of repossessed collateral will not be subjected to provisions of the Kansas Consumer Protection (KCPA), a scenario that has proven it can lead to costly litigation for Kansas banks that were simply attempting to sell repossessed property on an "as is" basis. Following my comments this morning, you will hear a specific example from Mr. Bruce Morgan, Chairman/CEO of Valley State Bank of how the lack of a "bright line" differentiating regular sales by suppliers and the incidental sale of repossessed property by lenders can lead to costly litigation. I'm confident you will find Mr. Morgan's experience both enlightening and compelling.

Before we listen to a real world experience, I would like to first stress the point that KBA's support for S.B. 57 is founded on our belief that banks should not be considered as suppliers as defined by the Kansas Consumer Protection Act. Simply put, the primary business of banks is lending money. Any sale of repossessed property by banks should be considered incidental. In fact, current state law requires as much.

Kansas Banking Code Prohibits Banks From Selling Property as a Business (Light Blue Attachment)

I would like to begin by drawing your attention to Chapter 9, Article 11 of our state banking code. K.S.A. 9-1112 clearly states that no bank shall buy, sell or trade tangible personal property as a business. K.S.A. 9-1112(d) further clarifies that banks may hold or sell any property coming into its ownership in the collection of debts, but it requires that the property be sold within one year of acquisition. Banks are clearly prohibited from selling property in the same way a supplier as defined by the Kansas Consumer Protection Act could. If found to be in violation of the unlawful transactions language found at K.S.A. 9-1112, a bank would be subjected to disciplinary action by the State Bank Commissioner and State Banking Board, which could include a cease and desist order, potentially civil money penalties and even the loss of the banks charter. In simple terms, the stick, which ensures that banks do not make the sale of property a part of their ordinary course of business, could not be any bigger.

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email kbaoffice@ink.org

Courts –Warrants of Merchantability Do Not Apply to the Sale of Repossessed Vehicles (Yellow Attachment)

Next, I would like to draw your attention to the Uniform Commercial Code, which we believe further substantiates the fact that the incidental sale of repossessed property by banks is not the same as a merchant selling goods to a consumer. Article 2 of the UCC provides that there is an implied warranty of merchantability when a "merchant" sells goods to a consumer. "Merchant" is defined at K.S.A. 84-2-104(1) as:

> "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill".

While we believe the sale of a used vehicle, for example, by a merchant as defined above would fall under the rules of Article 2 of the UCC, it does not appear that the occasional sale of a repossessed vehicle by a bank would make a bank a "merchant". K.S.A. 84-2-314, which establishes the warranty of merchantability, indicates that such warranty is implied only if the seller is a merchant with respect to goods of that kind. Obviously this qualification restricts the implied warranty to a much smaller group than everyone who is engaged in business and requires a professional status as to particular kinds of goods being sold.

Additionally, a review of related case law (Gold Attachments) finds that the several Courts across the country have actually opined on the very issue of whether a bank that sells repossessed vehicles is considered to be a "merchant" under Article 2 of the UCC. Both the Fifth District Court of Appeals of Florida, and the Supreme Court of Alabama have held that in the sale of a repossessed vehicle, a bank is not a "merchant" and the sale did not carry with it the implied warranty of merchantability. Those cases are attached for your review. We hope you will conclude that after an examination of UCC law it does not appear that a bank would have any duty of implied warranties in the sale of goods, which are in fact repossessed collateral.

Other Relevant Laws Where Banks Are Excluded (Purple Attachment)

Licensed Vehicle Dealers - One might assume that if the sale of a repossessed vehicle falls under the definition of "supplier" under the general provisions of the KCPA, then perhaps banks would be required to be licensed as a vehicle dealer under the Kansas Motor Vehicle Code. In reviewing the definition of "vehicle dealer" found at K.S.A. 8-2401(a) you will find that is not the case. Kansas law specifically excludes "any bank...with regard to its disposition of repossessed vehicles" from the definition of a dealer.

KCPA Odometer Fraud - The final statute I would like to reference is within the Kansas Consumer Protection Act itself and deals with Odometer Fraud. K.S.A. 50-647(a), defines "supplier" for this section. You will note the statute specifically excludes "any bank...with regard to its disposition of repossessed vehicles". Once again, we believe this should serve as evidence that when state policy regarding the sale of repossessed collateral was previously considered, exclusions were established for lenders faced with the incidental sale of the repossessed property.

Attorney General's Opinion 2005-2 (Gray Attachment)

The final item I wish to comment on is the Attorney General's opinion attached to my testimony. I should point out that this opinion was offered following a request from State Representative Tom Thull and is very current, having been issued on January 27, 2005. While this opinion focused on the occasional sale of repossessed vehicles, it exposes the troubling scenario that will continue to play-out with all repossessed collateral transactions if the difference between lenders and suppliers is not clarified. Without the adoption of statutory language, what assurances will lenders that sell repossessed collateral on an "as is" basis have that they will not later find themselves subjected to provisions of the KCPA that were designed to address suppliers.

The Synopsis found on the front page of Attorney General Opinion No. 2005-2 states the following:

> "A financial institution that only occasionally sells vehicles, when necessary to dispose of repossessed collateral on a loan it has made, is not a "supplier" under the Kansas Consumer Protection Act and therefore it may disclaim or limit warranties on such vehicles without violating K.S.A. 50-627. However, a financial institution that regularly or frequently sells repossessed vehicles may be considered a "supplier" if such sales are frequent or numerous enough to be considered within the institution's ordinary course of business."

Needless to say, we were hopeful, right up until the word "however" surfaced. Looking deeper into the Attorney General's opinion on Page 3 you will find this statement:

> "we do not believe any "bright line" rule exists to distinguish when a financial institution is or is not a supplier under the KCPA. Rather, we believe this determination is fact-sensitive and must be made on a case-by-case basis."

While KBA respects the opinion expressed by the Attorney General, we do not believe it is in the best interest of anyone, except maybe the trial lawyer seeking to capitalize on the frustrations of an individual found later to have regrets for the "as is" purchase he or she made, to have this problem litigated on a case-by-case basis.

Simply put, we believe the absence of a clearly defined exception for all sales of repossessed collateral opens the door for countless legal battles fought over the lack of a "bright-line" in Kansas law. We believe S.B. 57 provides the much-needed "bright line" referenced in the attorney general's opinion.

Once again, thank you for the opportunity to appear in support of S.B. 57 and I would be happy to stand for questions.

9-1112

Chapter 9.--BANKS AND BANKING; TRUST COMPANIES
Article 11.--BANKING CODE; POWERS

9-1112. Unlawful transactions. (a) **No bank shall buy, sell or trade tangible property as a business** or invest in the stock of another bank or corporation, except as specifically authorized.

(b) No bank shall sell, give or purchase any instrument, contract, security or other asset to or from any employee or to or from the bank's parent company or a subsidiary of the bank's parent company without prior approval of the commissioner. Approval of the commissioner need not be obtained for an assignment of third party loans and security for the payment thereof to or from a subsidiary of the bank's parent company.

(c) No bank shall acquire or make a loan on its own shares of stock, or the stock of the bank's parent company or a subsidiary of the bank's parent company except as provided in subsection (d) or except as provided in subsection (26) of K.S.A. 9-1101, and amendments thereto.

(d) **A bank may hold or sell any property coming into its ownership in the collection of debts. All such property except legal investments, shall be sold within one year of acquisition, provided a commercially reasonable sale can occur.**

(e) If a commercially reasonable sale cannot occur within one year, the bank shall not carry such property as a book asset, except that the commissioner may authorize a bank to carry such property as a book asset for a longer period.

History: L. 1947, ch. 102, § 41; L. 1975, ch. 44, § 18; L. 1981, ch. 52, § 1; L. 1985, ch. 56, § 3; L. 1988, ch. 61, § 3; L. 1990, ch. 59, § 1; L. 1993, ch. 31, § 3; L. 2001, ch. 36, § 1; July 1.

84-2-104

Chapter 84.--UNIFORM COMMERCIAL CODE
PART 1.--SHORT TITLE, GENERALCONSTRUCTION AND SUBJECTMATTER
Part 1.--SHORT TITLE, GENERALCONSTRUCTION AND SUBJECT MATTER
Article 2.--SALES

84-2-104. Definitions: "Merchant"; "between merchants"; "financing agency". (1) **"Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction** or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) "Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (section 84-2-707).

(3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

History: L. 1965, ch. 564, § 21; Jan. 1, 1966.

84-2-314

Chapter 84.--UNIFORM COMMERCIAL CODE
PART 3.--GENERAL OBLIGATION ANDCONSTRUCTION OF CONTRACT
Part 3.--GENERAL OBLIGATION ANDCONSTRUCTION OF CONTRACT
Article 2.--SALES

84-2-314. Implied warranty: Merchantability; usage of trade. (1) Unless excluded or modified (section 84-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (section 84-2-316) other implied warranties may arise from course of dealing or usage of trade.

History: L. 1965, ch. 564, § 48; Jan. 1, 1966.

8-2401

Chapter 8.--AUTOMOBILES AND OTHER VEHICLES
Article 24.--LICENSURE OF VEHICLESALES AND MANUFACTURE

8-2401. Definitions. As used in this act, the following words and phrases shall have the meanings:

(a) "Vehicle dealer" means any person who: (1) For commission, money or other thing of value is engaged in the business of buying, selling or offering or attempting to negotiate a sale of an interest in vehicles; or (2) for commission, money or other thing of value is engaged in the business of buying, selling or offering or attempting to negotiate a sale of an interest in motor vehicles as an auction motor vehicle dealer as defined in (bb); **but does not include: (A) Receivers, trustees, administrators, executors, guardians, or other persons appointed by or acting under the judgment or order of any court, or any bank, trustee or lending company or institution which is subject to state or federal regulations as such, with regard to its disposition of repossessed vehicles;** (B) public officers while performing their official duties; (C) employees of persons enumerated in provisions (A) and (B), when engaged in the specific performance of their duties as such employees; (D) auctioneers conducting auctions for persons enumerated in provisions (A), (B) or (C); or (E) auctioneers who, while engaged in conducting an auction of tangible personal property for others, offer for sale: (i) Vehicles which have been used primarily in a farm or business operation by the owner offering the vehicle for sale, including all vehicles which qualified for a farm vehicle tag at the time of sale except vehicles owned by a business engaged primarily in the business of leasing or renting passenger cars; (ii) vehicles which meet the statutory definition of antique vehicles; or **(iii) vehicles for no more than four principals or households per auction.** All sales of vehicles exempted pursuant to provision (E), except truck, truck tractors, pole trailers, trailers and semitrailers as defined by K.S.A. 8-126, and amendments thereto, shall be registered in Kansas prior to the sale.

50-647

Chapter 50.--UNFAIR TRADE AND CONSUMER PROTECTION
Article 6.--CONSUMER PROTECTION

50-647. Odometer fraud; civil remedies; definitions. As used in K.S.A. 50-647 through 50-653:

(a) "Supplier" means: (1) A licensed motor vehicle dealer; (2) any person or business which purchases, sells or exchanges five or more motor vehicles in any one calendar year; or (3) any person or business which in the ordinary course of business purchases, sells or exchanges motor vehicles, but **supplier does not include any bank, trust company, trustee or lending company or institution which is subject to state or federal regulation as such, with regard to its disposition of repossessed vehicles.**

(b) "Consumer" means an individual or sole proprietor.

(c) "Set off" means a reasonable allowance for the consumer's use of the motor vehicle as calculated from the most recent edition of the United States department of transportation's cost of owning and operating automobiles and vans.

History: L. 1988, ch. 211, § 2; July 1.

January 27, 2005

ATTORNEY GENERAL OPINION NO. **2005-2**

The Honorable John T. "Tom" Thull
State Representative, 72nd District
State Capitol, Room 302-S
Topeka, Kansas 66612

Re:

Unfair Trade and Consumer Protection--Supplier--Disclaimer or Limitation of Warranties

Synopsis:

A financial institution that only occasionally sells vehicles, when necessary to dispose of repossessed collateral on a loan it has made, is not a "supplier" under the Kansas Consumer Protection Act and therefore it may disclaim or limit warranties on such vehicles without violating K.S.A. 50-627. However, a financial institution that regularly or frequently sells repossessed vehicles may be considered a "supplier" if such sales are frequent or numerous enough to be considered within the institutions's ordinary course of business. Cited herein: K.S.A. 8-2401; 50-623; K.S.A. 2004 Supp. 50-624; K.S.A. 50-647; 79-3601; K.S.A. 2004 Supp. 79-3602.

* * *

Dear Representative Thull:

As State Representative for the 72nd District, you ask whether the Kansas Consumer Protection Act (KCPA)[(1)] applies to financial institutions' incidental sales of repossessed vehicles. In seeking this opinion, you provide us information on a Kansas Supreme Court case, *York v. InTrust Bank*,[(2)] and numerous laws related to sales of repossessed vehicles and financial institutions. Specifically, you state as follows:

> "There are compelling reasons to distinguish *York* from the occasional sale of a repossessed vehicle by a financial institution. In addition, a survey of related laws proves that the occasional sale of a repossessed vehicle by a bank

was never intended to put a bank in the same category and under the same rules of trade as an entity regularly engaged in the sale of used vehicles."

Whether a financial institution is subject to the KCPA when selling repossessed vehicles hinges on whether the institution is a supplier under the act. The KCPA defines "supplier" as "a manufacturer, distributor, dealer, seller, lessor, assignor, or other person who, *in the ordinary course of business*, solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer."[(3)]

The *York* case addressed whether a bank was a supplier under the KCPA when it sold residential real estate obtained through a deed in lieu of foreclosure. Notably, rather than selling the property as a whole to another developer, the bank attempted to subdivide and develop it with the intention of selling 57 individual lots or homes over a period of numerous years. The bank relied on an Ohio case[(4)] in arguing that it was "not a supplier under the KCPA because its ordinary business [was] banking, not selling real estate."[(5)]

The court rejected the bank's argument in keeping with the basic tenet that "the guiding principle to be applied in interpreting the KCPA is that the act is to be liberally construed in favor of the consumer."[(6)] However, in finding that the bank's sales of the property were in the ordinary course of business and that the bank therefore was a supplier under the KCPA, the Court stated that "[t]he significant fact in the present case is that InTrust sold or intended to sell numerous lots over an extended period of time."[(7)]

Whether the courts also would consider a financial institution that only occasionally sells repossessed vehicles a supplier under the KCPA requires a review of related laws. "[I]n construing statutes and determining legislative intent, several provisions of an act or acts, *in pari materia*, must be construed together with a view of reconciling and bringing them into workable harmony if possible."[(8)] With that in mind, we look to the various statutory provisions dealing with financial institutions, consumer protection, and used car sales.

For instance, in another section of the KCPA - relating to odometer fraud - "supplier" is defined as follows:

> "(1) A licensed motor vehicle dealer; (2) any person or business which purchases, sells or exchanges five or more motor vehicles in any one calendar year; or (3) any person or business which in the ordinary course of business purchases, sells or exchanges motor vehicles,

but supplier does not include any bank, trust company, trustee or lending company or institution which is subject to state or federal regulation as such, with regard to its disposition of repossessed vehicles."[(9)]

Similarly, under the provisions applicable to licensure of vehicle sales and manufacture, a "vehicle dealer" is defined as:

> "[A]ny person who: (1) For commission, money or other thing of value is engaged in the business of buying, selling or offering or attempting to negotiate a sale of an interest in vehicles . . . *but does not include . . . any bank, trustee or lending company or institution which is subject to state or federal regulations as such, with regard to its disposition of repossessed vehicles. . . .*"[(10)]

Finally, the Kansas retailers' sales tax act[(11)] defines an "[i]solated or occasional sale" as:

> "[T]he nonrecurring sale of tangible personal property . . . by a person not engaged at the time of such sale in the business of selling such property. . . . *Such term shall include: (1) Any sale by a bank, savings and loan institution, credit union or any finance company . . . of tangible personal property which has been repossessed by any such entity.*"[(12)]

We believe there is a significant difference between a financial institution developing and selling numerous lots over several years in order to dispose of property obtained as a result of a deed in lieu of foreclosure, and a financial institution occasionally selling a vehicle it has repossessed. Nonetheless, a financial institution that regularly or frequently sells repossessed vehicles - or one that accumulates repossessed vehicles and then advertises or sells numerous vehicles at once - still might be considered a supplier under the KCPA. In other words, we do not believe any "bright line" rule exists to distinguish when a financial institution is or is not a supplier under the KCPA. Rather, we believe this determination is fact-sensitive and must be made on a case-by-case basis.

In summary, we do not believe a financial institution that only occasionally sells repossessed vehicles is a supplier subject to the provisions of the KCPA. When reading K.S.A. 2004 Supp. 50-624(j) in *pari materia* with K.S.A. 50-647(a), 8-2401(a) and K.S.A. 2004 Supp. 79-3602(q), it is our opinion that when a financial institution occasionally

sells repossessed vehicles one at a time, it is not a supplier under the KCPA and therefore may disclaim or limit warranties on such vehicles.

Sincerely,
Phill Kline
Attorney General of Kansas
Laura M. Graham
Assistant Attorney General

PK:JLM:LMG:jm

FOOTNOTES

Click footnote number to return to corresponding location in the text.

1. K.S.A. 2004 Supp. 50-623 *et seq.*

2. 265 Kan. 271 (1998).

3. K.S.A. 2004 Supp. 50-624(j) (emphasis added).

4. *Moore v. Florida Bank of Commerce*, 654 F.Supp. 38 (S.D. Ohio 1986), *aff'd* 833 F.2d 1013 (6th Cir. 1987).

5. 265 Kan. at 288.

6. *State ex rel. Stephan v. Brotherhood Bank and Trust Co.*, 8 Kan.App.2d 57, 60 (1982).

7. 265 Kan. at 289.

8. *State ex rel. Morrison v. Oshman Sporting Goods Co.*, 275 Kan. 763, 768 (2003).

9. K.S.A. 50-647(a) (emphasis added).

10. K.S.A. 8-2401(a) (emphasis added).

11. K.S.A. 79-3601 *et seq.*

12. K.S.A. 2004 Supp. 79-3602(q) (emphasis added).

1959). Although there was no objection made to these questions, the asking of such questions without any factual foundation is so egregious as to constitute fundamental error.

The judgment and sentence below should be reversed and this case remanded for discharge of the defendant, or, at the very least, a new trial should be ordered because of the prejudicial misconduct of the prosecutor.

Francis JOYCE and Columbia Joyce, Appellants,

v.

COMBANK/LONGWOOD, a Florida banking corporation, n/k/a Combank/Seminole County, Florida, Appellee.

No. 80–1207.

District Court of Appeal of Florida, Fifth District.

Nov. 18, 1981.

Buyers of repossessed automobile from bank sued the bank alleging a breach of the implied warranty of merchantability. The Circuit Court, Seminole County, Kenneth M. Leffler, J., rendered summary judgment in favor of the bank and buyers appealed. The District Court of Appeal, Orfinger, J., held that the sale by the bank of the repossessed automobile did not carry with it the implied warranty of merchantability.

Affirmed.

Sales ⇐272

In sale of repossessed automobile, bank was not "merchant" and sale did not carry with it implied warranty of merchantability, notwithstanding bank's sale of four other repossessed vehicles in the same year. West's F.S.A. § 672–314(1).

Leon B. Cheek, III, Altamonte Springs, for appellants.

Marvin E. Rooks, Casselberry, for appellee.

ORFINGER, Judge.

We are asked to determine on this appeal if the sale by the bank of a repossessed automobile carries with it the implied warranty of merchantability contained in section 672.2–314(1), Florida Statutes (1979).[1] The trial court held that it did not and granted a summary final judgment in favor of the bank. The purchaser appeals and we affirm.

The facts appear in the record without dispute. Appellants filed suit against the bank alleging that they had purchased a vehicle from the bank which they subsequently discovered to have a defectively repaired front axle. The front axle broke and appellants wanted a refund of the purchase price. The vehicle in question had been repossessed by the bank. Both parties agree that the bank made full disclosure of a minor accident involving the car, but not a broken axle of which the bank was unaware. Plaintiffs did not assume the bank knew any more about the car than they did, and the bank did not hold itself out as having any special knowledge about the car. Pursuant to normal banking practice, Combank sold four other repossessed automobiles during the preceding year. The bank does not hold itself out as having any special knowledge or skill with respect to automobiles when making such sales.

1. § 672.2–314(1), Fla.Stat. (1979):
Unless excluded or modified (§ 672.2–316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

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The record is clear t specialized knowledge a did the bank employee fact, appellant Francis he was better qualifie condition of the car th employee who negotiat pears without dispute t "professional status as [kind] of goods."

2. Section 672.2–104(1), F
"Merchant" means a goods of the kind or ot tion holds himself out or skill peculiar to th involved in the transac

2-12

Unless excluded or modified, a warranty of merchantability is implied in a contract for sale of goods "if the seller is a merchant with respect to goods of that kind." § 672.2–314, Fla.Stat. (1979). The trial court determined, however, that "Defendant, Combank/Seminole County, is not a merchant as that term is defined in the Uniform Commercial Code with respect to the sale of used cars."

Appellant contends that the trial court could not make this determination as a matter of law because the record shows that the bank had repossessed and sold four other automobiles within the one-year period immediately preceding the transaction in question, so there was a factual issue on whether the bank was or was not a "merchant" under section 672.2–104. We disagree. While the general definition of "merchant" under section 672.2–104(1) is relatively broad,[2] the term becomes more sharply defined when the implied warranty provision of section 672.2–314 is called into play. The official comments to section 672.-2–104 say:

> On the other hand, in section 2–314 on the warranty of merchantability, such warranty is implied only "if the seller is a merchant with respect to goods of that kind." Obviously this qualification restricts the implied warranty to a much smaller group than everyone who is engaged in business *and requires a professional status as to particular kinds of goods.* [emphasis added].

The record is clear that the bank had no specialized knowledge as to automobiles nor did the bank employee who sold the car. In fact, appellant Francis Joyce testified that he was better qualified to determine the condition of the car than was defendant's employee who negotiated the sale. It appears without dispute that the bank had no "professional status as to the particular [kind] of goods."

Under similar code provisions other states have reached the same result. In *Donald v. City National Bank of Dothan*, 329 So.2d 92 (Ala.1976), the bank was sued because of an alleged breach of warranty in the sale of a repossessed boat. In sustaining a summary judgment for the bank, the court said

> "No evidence was offered that the [Bank] deals in the kind of goods involved in this transaction—boats—or that it holds itself out as having knowledge or skill peculiar to such goods.
>
> The record before the trial court and here indicates that the sale of the boat was no more than an isolated transaction by the bank."

Id. at 95.

Appellant says that here, the fact that five repossessed vehicles were sold in the one-year period involves more than "an isolated transaction," but we do not agree that the number of transactions alone is material. In *All State Leasing Co. v. Bass*, 96 Idaho 873, 538 P.2d 1177 (1977), a leasing company had leased a car wash unit to a lessee. Defending a suit for breach of lease payments, the lessee alleged a breach of implied warranty of merchantability under that State's counterpart of section 2–314. The court held that even forty to fifty such lease transactions within the prior six to eight months did not, in and of itself, make the leasing company a "merchant" under the code.

There is no showing here that the bank deals in the kind of goods involved here or that the sales of the repossessed automobiles were anything other than isolated, sporadic occurrences. On the record before us, the trial court was correct in its holding that the bank was not a "merchant" and that there was thus no implied warranty of merchantability in the sale of the repos-

2. Section 672.2–104(1), Florida Statutes (1979): "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

2-13

sessed automobile. The summary final judgment is

AFFIRMED.

COBB and FRANK D. UPCHURCH, JJ., concur.

In re The ESTATE OF Eugene N. SUGGS, Jr., Deceased.

Frances M. SUGGS, Appellant,

v.

ESTATE OF Eugene N. SUGGS, Jr., and Evelyn L. Davis, as Personal Representative of the Estate of Eugene N. Suggs, Jr., Appellee.

No. 81-103.

District Court of Appeal of Florida, Fifth District.

Nov. 18, 1981.

Action was filed against personal representative of decedent's estate requesting declaration that plaintiff was common-law wife of the decedent, determination of her interest in certain property owned jointly by her and decedent, and other relief. The Circuit Court, Orange County, Richard H. Cooper, J., entered judgment in favor of personal representative, and appeal was taken. The District Court of Appeal, Orfinger, J., held that: (1) because she was married to another on date when common-law marriages were no longer valid in Florida, plaintiff lacked capacity to enter into common-law marriage with decedent while such marriages were still recognized, and (2) there being no valid marriage between plaintiff and decedent and no language in deed showing intent to create an estate of survivorship, finding that plaintiff and decedent were tenants in common without right of survivorship was correct.

Affirmed.

1. Marriage ⇐11

Because appellant was married to another on date when common-law marriages were no longer valid in Florida, she lacked capacity to enter into a common-law marriage with decedent while such marriages were still recognized. West's F.S.A. § 741.211.

2. Husband and Wife ⇐14.2(2)

A conveyance to spouses as husband and wife creates estate by the entirety in absence of express language showing a contrary intent.

3. Tenancy in Common ⇐3

There being no valid marriage between appellant and decedent and no language in deed showing intent to create an estate of survivorship, finding that appellant and decedent were tenants in common without right of survivorship was correct.

Robert L. Thomas, Apopka, for appellant.

Stephen M. Stone, Orlando, for appellee.

ORFINGER, Judge.

Appellant filed an action against the personal representative of decedent's estate requesting a declaration that she was the common law wife of the decedent, a determination of her interest in certain property owned jointly by her and the decedent, and other relief. The personal representative denied the allegations of the marriage, and asserted affirmatively that appellant was not the common law wife of decedent because she was married to another man until April 26, 1968; therefore, she was not competent to become the common law wife of decedent until a time after January 1, 1968, when common law marriages were abolished in Florida.[1] Following a non-jury trial, the trial court, having determined that

1. § 741.211, Fla.Stat. (1967).

appellant was not the
decedent and was the
ing widow, denied he
the surviving tenant
real property owned
self. We affirm.

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Robert G. DONALD

v.

CITY NATIONAL BANK OF DOTHAN, Alabama, a National Banking Association.

SC 1623.

Supreme Court of Alabama.

Feb. 27, 1976.

Buyer who bought repossessed boat from bank brought action against bank, alleging breach of warranty. The Circuit Court, Houston County, Jerry M. White, J., rendered summary judgment for bank, and buyer appealed. The Supreme Court, Shores, J., held that evidence supported finding that bank had not breached implied warranty of merchantability; that evidence supported finding that bank had not breached implied warranty of fitness of boat for particular purpose; and that material issue of fact existed which precluded rendition of summary judgment on issue of whether bank had informed buyer that boat contained generator.

Affirmed in part, reversed in part, and remanded.

1. Judgment ⇐185(2)

Party moving for summary judgment has burden of showing absence of any genuine issue of material fact, and all reasonable doubts touching existence of genuine issue of material fact must be resolved against moving party. Rules of Civil Procedure, rule 56.

2. Judgment ⇐178, 185.2(9)

Purpose of motion for summary judgment is to test evidence to determine if any real issue exists, and thus failure of party opposing motion to offer any affidavits or other testimony to contradict evidence presented by movant party leaves court no alternative but to consider such evidence uncontroverted. Rules of Civil Procedure, rule 56(e).

3. Judgment ⇐185.2(9)

If there is testimony in plaintiff's deposition which would contradict facts as set out in defendant's affidavits in support of motion for summary judgment, failure of plaintiff to offer counteraffidavits or testimony is of no consequence, since repetition of same facts in counteraffidavit would be useless act. Rules of Civil Procedure, rule 56.

4. Sales ⇐272

Where bank's sale of repossessed boat to buyer was isolated transaction by bank and bank did not otherwise deal in boats, bank was not "merchant" within Uniform Commercial Code, and thus transaction did not give rise to implied warranty of merchantability. Code of Ala., Tit. 7A, §§ 2–104(1), 2–314.

See publication Words and Phrases for other judicial constructions and definitions.

5. Sales ⇐273(3, 5)

Implied warranty of fitness for particular purpose will be implied if seller has reason to know buyer's particular purpose, if seller has reason to know that buyer is relying on seller's skill to furnish appropriate goods, and if buyer does in fact rely upon seller's skill. Code of Ala., Tit. 7A, § 2–315.

6. Sales ⇐441(2)

Evidence that buyer stated to bank officer his interest in buying repossessed boat to put into charter service, that bank possessed no skill or judgment concerning boats, and that buyer had independent inspections and surveys made of boat and relied upon such reports in making purchase of boat, was sufficient to establish that transaction did not give rise to implied warranty of fitness of boat for particular purpose. Code of Ala., Tit. 7A, § 2–315.

7. Judgment ⇐

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7. Judgment ⇐185.3(18)

Where buyer's deposition charged that bank from whom he purchased repossessed boat, had indicated that boat contained generator, and bank's affidavit in support of its motion for summary judgment stated that no employee of bank had made such representation to buyer, material issue of fact existed which precluded summary judgment on issue of whether generator was included in transaction. Rules of Civil Procedure, rule 56.

8. Judgment ⇐181(14)

Partial summary judgment is appropriate where separate claims are involved and there is no genuine issue of fact as to less than all of such claims. Rules of Civil Procedure, rule 56(e).

J. Ronald Storey, Dothan, for appellant.

Alto V. Lee, III, and Alan C. Livingston, Dothan, for appellee.

SHORES, Justice.

The plaintiff filed suit against City National Bank of Dothan claiming damages for alleged breach of warranty on the sale of a boat. The bank denied the allegations of the complaint and filed a motion for summary judgment supported by testimony of Robert G. Donald, the plaintiff, Jesse S. Doyle and James H. Eason, officers of the bank. The plaintiff filed a brief in opposition to the motion but filed no affidavits or other testimony in opposition thereto. The court granted summary judgment and the plaintiff appealed. The only question presented is whether any genuine issue of material fact exists according to the depositions.

An officer of the bank told the plaintiff that the bank had repossessed a boat and was interested in selling it. The plaintiff says in deposition:

". . . I told him that I was possibly interested in one, because I was thinking about buying a boat to put into charter service out out of Destin, Florida."

The boat was located at Tibbetts Marina at Panama City. The plaintiff went to Panama City to "look at the boat" and says Tibbetts was in the process of making repairs on it. Prior to purchasing the boat the plaintiff hired Willings Detroit Diesel of Birmingham to inspect it. He said Willings was unable to make a "running test" because the engines would not start, but reported to him that it needed repiping, new tubes and lines, but otherwise "everything appeared okay." In addition, and again prior to the purchase of the boat, the plaintiff hired Tibbetts Boat Works to do a vessel survey and install new batteries. This report described the specifications of the boat and stated that the topsides, decking bilges and water tanks were in "good" condition.

The plaintiff contended that Tibbetts advised him that the generator was being repaired but would be shipped later.

The bank claims that no evidence was offered establishing any warranties; and, in addition, that summary judgment was proper since the plaintiff failed to file any affidavits or other testimony in opposition to its motion.

The plaintiff contends that there were issues of material fact requiring the court to overrule the bank's motion. He summarizes these issues as follows:

1. Whether the bank is a merchant with regard to the goods sold, giving rise to an implied warranty of merchantability under Title 7A, § 2-314, Code;

2. whether the bank had reason to know of any particular purpose to which the boat would be put, thereby creating an implied warranty for a particular purpose under Title 7A, § 2-315; and

3. whether the bank breached its express agreement to include a generator with the boat.

2-16

[1] Summary judgment in this state is never proper if there is any evidence in support of the party opposing the motion. Further, Rule 56, ARCP, must be read in context with our scintilla rule. ". . . Thus, if there is a scintilla of evidence supporting the position of the party against whom the motion is made, so that at a trial he would be entitled to go to the jury, summary judgment cannot be granted." Rule 56, ARCP, Comments; *Langan Construction Co. v. Dauphin Island Marina, Inc.*, 294 Ala. 325, 316 So.2d 681 (1975). Moreover, the movant has the burden of showing the absence of any genuine issue of material fact and all reasonable doubts touching the existence of a genuine issue of material fact must be resolved against the movant party. *Bennett v. United Auto Parts, Inc.*, 294 Ala. 300, 315 So.2d 579 (1975).

Nevertheless, summary judgment does serve a useful purpose. The procedure is designed to pierce the pleadings and determine if causes or defenses lack real merit. It is said ". . . the rule is intended to prevent vexation and delay, improve the machinery of justice, promote the expeditious disposition of cases, and avoid unnecessary trials when no genuine issues of fact have been raised." 10 C. Wright & R. Miller, Federal Practice and Procedure: Civil § 2712 (1973).

Rule 56(e), ARCP, provides in part:

". . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The plaintiff did not file any affidavits or other testimony in opposition to the motion. However, as noted in the last sentence of Rule 56(e), supra, summary judgment can still only be entered against him if "appropriate." That is, the movant party must initially show the absence of a genuine issue of material fact. *Dawkins v. Green*, 412 F.2d 644 (5th Cir. 1969).

[2] But, since the purpose of a motion for summary judgment is to test the evidence to determine if any real issue exists, the failure of the party opposing the motion to offer any affidavits or other testimony to contradict the evidence presented by the movant party leaves the court no alternative but to consider that evidence uncontraverted. *Epps v. Remmel*, 237 Ark. 391, 373 S.W.2d 141 (1963).

[3] Part of the evidence offered by the bank in this case was the deposition of the plaintiff. If there is testimony in his deposition which would contradict the facts as set out in the other testimony, then the failure of the plaintiff to offer counteraffidavits or testimony would be of no consequence since repetition of the same facts in a counteraffidavit would be a useless act. *Powell v. United States Steel Corp.*, 305 F.Supp. 645 (S.D.W.Va.1969).

We turn now to the evidence.

Two officers of the bank testified that the bank made absolutely no representations whatever concerning the boat; that the plaintiff was told that all the bank wanted was to get rid of the boat and was not willing to finance the purchase; and that it wanted "'. . . to sell the boat as it sits at Mr. Tibbetts['] dock. . . .'"

The depositions of the bank's officers state unequivocally that no officer or employee of the bank ever made any representation of any kind about the boat, other than there were no liens or encumbrances against it. The plaintiff offered no evidence of any express warranty or representation other than as to the inclusion of a generator with the boat. He does contend on appeal that an implied warranty of

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merchantability was made under the provisions of Title 7A, § 2–314, which provides, in part:

". . . a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . ."

§ 2–314(c) provides that goods to be merchantable must be at least such as "are fit for the ordinary purposes for which such goods are used; . . ."

A merchant is defined by Title 7A, § 2–104(1), as:

". . . a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction . . ."

A merchant is defined in Anderson, Uniform Commercial Code, Vol. 1, § 2–104:4 (2d ed. 1970), as follows:

"(a) Dealer. He may be a person who deals in goods of the kind involved. Whether he deals in other goods is immaterial. He must deal in goods of the kind involved in the transaction in order to come within the first category.

"(b) Representation. He may be a person who by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction. Whether he actually has such knowledge or skill is immaterial if he so holds himself out."

Obviously, a bank may be a merchant under the U.C.C. definitions (see Official Comments to § 2–104); but absolutely no evidence was offered in this case to bring the bank within either of the definitions. No evidence was offered that the City National Bank of Dothan deals in the kind of goods involved in this transaction—boats—or that it holds itself out as having knowledge or skill peculiar to such goods.

[4] The record before the trial court and here indicates that the sale of the boat was no more than an isolated transaction by the bank.

Prince v. LeVan, Alaska 1971, 486 P.2d 959 (9 U.C.C. Reporting Service 367), also involved a sale of a boat. In treating the same issue the court said:

"In the present case we deal with a single isolated transaction. Defendants were not shown to deal in vessels or to possess peculiar knowledge or skill in relation to vessels. Defendants were therefore not merchants [under U.C.C., § 2–104(1)] and a warranty of merchantability may not be implied [under U.C.C., § 2–314]." At 964 (9 U.C.C. Reporting Service at 375)

The plaintiff next argues that an implied warranty of fitness was made within Title 7A, § 2–315, which provides:

"Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

[5] This provision of the U.C.C. deals with an implied warranty of fitness for a *particular* purpose as opposed to ordinary purpose under the warranty of merchantability. This warranty is implied if:

1. The seller has reason to know the buyer's particular purpose; *and*

2. the seller has reason to know that the buyer is relying on the seller's skill or judgment to furnish appropriate goods; *and*

3. the buyer, in fact, relied upon the seller's skill or judgment. J. White & R. Summers, Handbook of the Law under the Uniform Commercial Code, § 9–9 (1972).

2-18

[6] Although the plaintiff's deposition indicates that he told the bank officer that he "was thinking about buying a boat to put into charter service out of Destin, Florida," the record is devoid of any evidence that the plaintiff in anywise relied upon the bank's skill or judgment (or indeed that it possessed such skill or judgment) that the boat was fit for a particular purpose, here, charter service. To the contrary, the only evidence adduced on the implied warranty of fitness for a particular purpose indicates that plaintiff did not rely on the bank's skill or judgment. He offered no evidence to show that the bank possessed any skill or knowledge upon which he could have relied. In fact, the deposition of the plaintiff reveals the contrary. He, himself, had independent inspections and surveys made of the boat at his own expense and relied upon these reports in making the purchase rather than upon any skill or knowledge of the seller. *Sylvia Coal Co. v. Mercury Coal & Coke Co.*, 151 W.Va. 818, 156 S.E.2d 1 (1967); *Vacuum Concrete Corp. v. Berianti Construction Co.*, 206 Pa.Super. 548, 214 A.2d 729 (1965).

No evidence was presented to establish an implied warranty of fitness for a particular purpose under Title 7A, § 2–315.

This case is here on the plaintiff's appeal from a summary judgment granted in favor of the bank.

[7] The only question remaining concerns the generator, which the plaintiff says was not on the boat and which he says he has yet to receive. In his deposition, the plaintiff says " . . . when I first asked the bank about the boat, they said, yes, it had a generator on it." We think this testimony establishes a scintilla of controversy as to whether the defendant made a warranty with respect to the generator. Since, on this issue, a genuine issue of material fact was established, summary judgment was improper as to this issue.

[8] The bank, therefore, was entitled to partial summary judgment; but, as such motion related to the generator, it should have been denied. ARCP 56(b). A partial summary judgment is appropriate when separate claims are involved and there is no genuine issue of fact as to less than all of such claims. *Raible v. Newsweek, Inc.*, 341 F.Supp. 804 (W.D.Pa.1972); *Triangle Ink & Color Co., Inc. v. Sherwin-Williams Co.*, 64 F.R.D. 536 (N.D.Ill.1974). " . . . A separate claim has been defined as that which is entirely distinct from other claims involved in an action which arises from a different occurrence or transaction which form the basis of separate units of judicial action. [Citations omitted]." (64 F.R.D. at 538)

Since there is a scintilla of evidence in support of the claim involving the generator and since that claim is separate from the claims involving the alleged warranty of merchantability, and warranty of fitness for a particular purpose, partial summary judgment under ARCP 56(b) was appropriate; but the plaintiff is entitled to a trial insofar as his claim that the bank told him the boat included a generator.

Affirmed in part, reversed in part and remanded.

MERRILL, MADDOX, JONES and EMBRY, JJ., concur.

WEST KEY NUMBER SYSTEM

Morris Wayne McCLENDON

v.

Judy Ann McCLENDON.

Civ. 656.

Court of Civil Appeals of Alabama.

Feb. 4, 1976.

Rehearing Denied March 3, 1976.

Mother filed petition against father seeking modification of child support payments pursuant to divorce decree. The Circuit Court, Etowah County, A. B. Cun-

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Testimony Regarding Senate Bill No. 57
House Committee on Financial Institutions
Bruce B. Morgan, Ph.D.
March 2, 2005

Chairman Cox and Members of the Committee, thank you for allowing me to offer some testimony on Senate Bill No. 57, an Act concerning the Kansas Consumer Protection Act relating to the occasional sale of certain repossessed collateral amending K.S.A. 2004 Supp. 50-634.

As an introduction, I am Chairman, President and CEO, of Valley State Bank, Roeland Park, Kansas, and am the majority owner of its parent, Valley Bancshares, Inc. I served two terms on the Kansas State Banking Board and am a Past Chairman. Presently, I serve on the State Affairs Committee, Kansas Bankers Association; Chair, Regulatory Affairs, Community Bankers Association of Kansas; and am a member of the Federal Reserve Board's Consumer Advisory Council that meets with the Board of Governors to advise them on various consumer regulations promulgated by the Federal Reserve.

The proposed change in the Kansas Consumer Protection Act outlined in Senate Bill No. 57 is important to banks within this state and I ask this Committee to approve and recommend it for consideration by the full House.

The Kansas Legislature has defined "Bank" and "Banking" in K.S.A. 2004 Supp. 9-701 and 9-702. In addition, the Legislature has provided for the holding and sale of repossessed collateral in K.S.A. 2004 Supp. 9-1102. In K.S.A. 2004 Supp. 9-1112(d), "a Bank may hold or sell any property coming into its ownership through the collection of debts." The Statute provides that the repossessed collateral "shall be sold within one year" and in a commercially reasonable manner.

A Kansas state bank is not a "Supplier" as defined by the Kansas Consumer Protection Act because a bank, by definition, is not in the "ordinary course of business" of soliciting, engaging in, or enforcing consumer transactions, involving "Property" or "Services" as defined in the Kansas Consumer Protection Act (See K.S.A. 2004 Supp. 50-624(i)(1) and (i)(2)).

In Kansas, banks take deposits and loan money to Kansas consumers and businesses. In my opinion, the primary business of banking is lending; lending to Kansas consumers and businesses to foster growth and development of our state economy and meet the credit needs of our consumers and businesses.

So why is Senate Bill No. 57 necessary? To remove any ambiguity in the definition of "Supplier" and provide an exemption for banks for the purpose of the disposition of repossessed collateral.

A number of Banks have been involved in litigation in Kansas where "creative" trial lawyers have sued banks under the Kansas Consumer Protection Act under the theory that the occasional sale of repossessed collateral is covered by the Act. The Act provides that a Plaintiff can be awarded compensatory damages, civil money penalties of $10,000.00 per violation per day, and payment of attorney's fees if they prevail in this type of action.

When a bank obtains ownership of repossessed collateral in the collection of a debt, the bank must sell it in a reasonable commercial manner within a specific period of time. The repossessed collateral is sold "as is, with no warranty express or implied" and the buyer accepts the repossessed collateral on these terms and conditions.

To apply the Kansas Consumer Protection Act to these occasional sales of repossessed collateral is unduly burdensome, results in costly frivolous litigation, and if the buyer prevails, the buyer can be awarded compensatory damages, and the seller assessed civil money penalties per day for each violation. This type of action could threaten the safety and soundness of the bank selling the repossessed collateral.

Valley State Bank, and three other banks, sold a piece of repossessed collateral (a piece of real estate located in Platte County, Missouri) in July, 2002, to a Missouri limited liability company. The individuals involved in the limited liability company sued Valley State Bank, me personally, and the Bank's independent appraiser in 2004 in Johnson County citing a number of allegations and claims under the Kansas Consumer Protection Act, including the payment of compensatory damages, civil money penalties for each violation, and payment of Plaintiff's attorney fees.

After initial discovery, we filed a Motion for Summary Judgment. The District Court granted our Motion for Summary Judgment after consideration of written briefs, arguments of counsel, and for good cause. Unfortunately, as Defendants, we had to pay legal fees in excess of $50,000.00 to defend this action.

In my opinion, the Kansas Legislature did not intend that the Kansas Consumer Protection Act be applied to the occasional sale of repossessed collateral by banks. Prior Legislatures have defined "bank", "banking", and have provided provisions related to the holding of and sale of repossessed collateral owned through the collection of debts, and these provisions work.

Senate Bill No. 57 before this Committee will exempt banks selling repossessed collateral from the definition of "Supplier" in the Kansas Consumer Protection Act, and be consistent with the present banking laws and regulations that Kansas banks must follow, and hopefully, reduce burdensome litigation for banks.

I support Senate Bill No. 57, and am asking that this Committee approve and recommend its passage to the full House.

Thank you for the opportunity to share these remarks and for your consideration of this important legislation.

HEARTLAND COMMUNITY BANKERS ASSOCIATION

Matthew S. Goddard, Vice President

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Topeka, Kansas 66603
Office (785) 232-8215 • Fax (785) 232-9320
mgoddard@hcbankers.com

To: House Financial Institutions Committee

From: Matthew Goddard
Heartland Community Bankers Association

Date: March 2, 2005

Re: Senate Bill No. 57

The Heartland Community Bankers Association appreciates the opportunity to express our support for Senate Bill 57 with the House Committee on Financial Institutions.

The bill excludes lenders who are selling repossessed collateral from the definition of "supplier" under the Kansas Consumer Protection Act. In January an opinion issued by the Attorney General stated that a financial institution that "occasionally sells repossessed vehicles one at a time" is not considered a supplier under the Consumer Protection Act. However, the opinion also said that this determination would have to be made on a case-by-case basis. Senate Bill 57 would remove this ambiguity and allow lenders to proceed in the future with a clear understanding of their legal status.

HCBA is unaware of a problem involving lenders selling repossessed collateral that would necessitate a change in the Consumer Protection Act. Even if isolated problems did exist, we believe those instances could be handled through already available legal avenues. Creating a new regulatory burden for lenders selling repossessed collateral could actually have a detrimental impact on Kansas consumers. Financial institutions only have automobiles for sale when they must take action to secure collateral because a loan is in default. Selling that repossessed collateral is the only way a lender has to recoup at least some of the money it loaned out. If Kansas law makes it more difficult to sell that collateral, or at least increases the expense of selling it, then lenders may react by tightening their underwriting standards. This means that it would be tougher to be approved for a loan and the amount of credit available to Kansas consumers would be diminished.

Our membership consists of savings associations that specialize in mortgage lending. Auto lending is a small part of their business and is often just a customer service. For most HCBA members, a year with just a few repos is normal and a year without any would not be uncommon. Our largest Kansas auto lender is only forced into repossession five or six times a year. We do not believe any of our members sell automobiles "in the ordinary course of business," a phrase used in defining "supplier" in the Consumer Protection Act. Senate Bill 57 will make sure the Consumer Protection Act is not broadly interpreted to bring regulated financial institutions making limited sales under its purview.

We respectfully request that the House Committee on Financial Institutions recommend SB 57 favorable for passage.

Thank you.

KANSAS CREDIT UNION ASSOCIATION

Testimony for the
House Financial Institutions Committee

March 2, 2005

Chairman Cox, members of the committee, I am Bill Henry, Director of Governmental Relations & Regulatory Affairs for the Kansas Credit Union Association and I appear before you today as a proponent of SB 57.

SB 57 amends the Kansas Consumer Protection Act and removes credit unions and other financial institutions which occasionally sell repossessed motor vehicles from the definition of "supplier" in the act.

For sometime credit unions have believed they—like other financial institutions—are not in the ordinary course of business of selling used and repossessed vehicles and are not subject to the provisions of K.S.A. 2004 Supp. 50-624.

However we have found an absence of case law in tenth circuit federal cases that indicates financial institutions are **or** are not suppliers in the ordinary case of doing business as financial institutions when they sell repossessed collateral. Other cases from other jurisdictions indicate a financial institution is not doing business in the ordinary course of business when they engage in the occasional sale of repossessed collateral.

We had hoped a recent attorney's general opinion on this topic would have clarified this issue but it did not provide a clear answer to this situation.

As a result the association believes the passage of SB 57 will clarify that financial institutions are not engaging as a supplier with the occasional sale of a repossessed motor vehicle.

Bill Henry

Director of Governmental Affairs
Kansas Credit Union Association

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Fax 785-232-2730

House Financial Institutions
March 2, 2005
Attachment 5

GACHES, BRADEN, BARBEE & ASSOCIATES
PUBLIC AFFAIRS & ASSOCIATION MANAGEMENT
825 S. Kansas Avenue, Suite 500 • Topeka, Kansas 66612 • Phone: (785) 233-4512 • Fax: (785) 233-2206

House Financial Institutions Committee
SB 57 – Incidental Sale of Repossessed Collateral
Testimony of the Kansas Association of Financial Services
Presented by Ron Gaches, Executive Director
Wednesday, March 2, 2005

Thank you Chairman Cox for this opportunity to appear in support of passage of Senate Bill 57 on behalf of the Kansas Association of Financial Services.

Current law regarding the incidental sale of repossessed collateral (primarily cars and trucks) is unclear as to the obligations of the financial institution. Senate Bill 57 makes clear that such sales by lenders are not subject to the warranty, disclosure and inspection requirements of the Kansas Consumer Protection Act.

Obviously, lenders do not intend to take possession of repossessed cars and trucks and they are not equipped or qualified to offer purchasers the same kind of protections as new and used car and truck dealers. SB 57 makes clear the reach of the Consumer Protection Act and allows lenders to conduct business as they have in the past without worry of litigation for noncompliance of the Act for incidental sales.

We urge your support for passage of SB 57.

CBA
Community Bankers
Association of Kansas

Directed By The Members We Serve

Date: March 2, 2005

To: House Financial Institutions Committee

From: Renee Murray, Community Bankers Association (CBA)

Re: SB57

Mr. Chairman, and Members of the Committee, thank you for accepting written testimony on behalf of the Community Bankers Association (CBA) on Senate Bill No. 57. The CBA has reviewed the language and strongly feel the changes are a positive to the law for Kansas bankers. The clarification of "supplier" under the Kansas Consumer Protection Act will rightfully not include banks when selling repossessed collateral. Not including banks, trust companies or lending institutions in the language will assure that burdensome lawsuits do not arise and cause undue damages. The CBA supports SB57 and asks the Committee to support it as well. Thank you.

House Financial Institutions
March 2, 2005
Attachment 7

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KANSAS

KATHLEEN SEBELIUS, GOVERNOR

OFFICE OF THE STATE BANK COMMISSIONER
CLARENCE W. NORRIS, Bank Commissioner

March 2, 2005

HOUSE FINANCIAL INSTITUTIONS COMMITTEE

Chairman Cox and Members of the Committee:

I am Sonya Allen, the General Counsel for the Office of the State Bank Commissioner. I am here today to testify in support of **Senate Bill 104**. This bill amends K.S.A. 9-1702, the statute in the state banking code that grants the commissioner authority to conduct examinations of fiduciary activities of officers and directors of banks or trust companies, if those officers or directors are acting in some individual fiduciary capacity that could have an effect on the safety and soundness of the bank or trust company at which they are employed. The statute also allows the commissioner to examine the affairs of affiliates (holding companies, investment companies, etc.) of banks or trust companies to determine the impact those affiliates may have on the safety and soundness of the bank or trust company itself. The current law requires that the commissioner seek the approval of the state banking board before conducting such investigations. As the number of affiliates has grown over the years, and more and more banks have holding companies, we believe, and the state banking board agrees, that the ability to examine these affiliates should be more routine, and within the full control of the commissioner. The commissioner needs the ability to see the whole picture; to see how the holding company and the affiliates affect the bank. Without that routine ability at each examination to obtain basic holding company and/or affiliate information, it makes it difficult for us to thoroughly assess how those affiliates affect a bank's condition. We view this as a modernization of the law, recognizing that affiliate activities can have an effect on the bank. Removing the requirement that prior approval of the banking board be sought, and giving such authority directly to the commissioner, will give the agency parity with many other state banking departments, 36 in fact, who have such authority, as well as federal regulators, who have full authority to examine affiliates of banks to determine their effect on the safety and soundness of the institution. The state banking board, which is comprised of six bankers and three public members, has reviewed the amendments and they are supportive of the changes. The language we used to describe the scope and purpose of our affiliate review authority, found on lines 29 to 31, was taken from the Federal Deposit Insurance Act. In addition, we were supportive of and assisted in the creation of, the Senate floor amendment, which added a definition of "affiliate". The amendment's reference to the Bank Holding Company Act definition is one that bankers understand, as there are already rules at the Federal level that all banks must follow regarding transactions with their affiliates. It is our belief and understanding that referencing that same affiliate definition in state law will provide bankers some measure of comfort, because it more clearly defines the scope of the commissioner's review authority.

I would stand for questions concerning the bill.

The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

Date: **March 2, 2005**

To: **House Financial Institutions Committee**

From: **Doug Wareham, Vice President-Government Affairs**

Re: **Statement Supporting Senate Bill 104**

Mr. Chairman and members of the committee, I am Doug Wareham appearing on behalf of the Kansas Bankers Association (KBA) in support of S.B. 104. KBA's membership includes 360 Kansas banks, which operate more than 1,300 banking facilities in 440 towns and cities across the state.

S.B. 104 enacts two changes to the Kansas Banking Code. First, it removes the State Banking Board's role of approving the examination of a banks affiliated business entities and places that authority with the State Bank Commissioner or the commissioner's designee. Secondly, it defines the term "affiliate" to ensure that business affiliate information examined by state bank examiners mirrors the same type of information examined by federal bank regulators.

While KBA has a long-standing policy supporting the various oversight roles played by the State Banking Board, we realize that in most instances banks willingly provide the "affiliate" information in question, when access to such information is requested by bank examiners. KBA also appreciates the fact that the existence of a requirement to first seek approval from the State Banking Board may cause delays in gaining access to information that is needed by bank examiners to ensure the safety and soundness of the bank and in turn protect the banks customers.

KBA was pleased that S.B. 104 was amended by the Senate Committee of the Whole with language that specifically defines what an "affiliate" is and believes that, as amended, this proposal simply brings the Kansas banking code in line with federal banking laws that currently provide the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency with the authority to examine affiliated business information.

Thank you for the opportunity to appear in support of S.B. 104. I would be happy to respond to questions.

House Financial Institutions
March 2, 2005
Attachment 9

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741 N. 4th
Clearwater, KS
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HOUSE COMMITTEE ON FINANCIAL INSTITUTIONS

March 2, 2005

Chairperson Cox and Members of the Committee:

My name is Richard D. Rucker. I'm currently the President/Chairman of Home Bank & Trust Co. of Eureka, and have been in banking for thirty five (35) years. I have served on the State Banking Board for five years and was the Chairman of the Banking Board in 2004. I would like to express my support for Senate Bill 104.

Staff has discussed this proposed legislation with the State Banking Board and all Board Members listened to Staff and provided input on this issue. It is my opinion this legislation would enhance Staff's ability in being able to discuss with the State Bank Board Members the Soundness and Safety of a Bank and its Parent Holding Company, under it's supervision. .

Pertaining to certain issues, which relate to Soundness and Safety of a Bank, on several occasions Holding Company questions are brought up by the Board Members, which cannot, under the current State Regulation be answered immediately by Staff. Yes, the Federal Reserve, which regulates Holding Companies, and the FDIC share information with Staff, or can, pertaining to the Holding Company entity if Bank Commission Staff have concerns about a State Bank. At the same time Staff must go to those Regulators to seek answers to those questions or review data supplied by those Regulators. When received, this data could be out of date or after a Bank Board Meeting thus reducing the efficiency of the Board and Staff coming to a decision in a timely manner.

Most One Bank Holding Companies don't have numerous subsidiaries and thus only one set of books. It should be fairly easy to review and get on with finishing their examination of the Bank. Also, as we know our State Bank Commission Staff is highly qualified to do this and in my opinion it would take minimal time on the examining Bank's Management involvement, in each of the above two entities, to accommodate this process.

It's important to realize that on occasions a Bank Holding Company might borrow funds to pass down to the bank to enable it to grow more rapidly or to increase capital due to losses, involving the banks loan portfolio. Also, in most cases the dividends from the Bank to the Holding Company enable the Holding Company to service debt. At times you will have a Holding Company invest in fixed assets by means of building a banking facility and having a lease arrangement with the Bank to enable the Bank to increase it's locations. This type of transaction can circumvent being accountable to the Bank Commission, in regards to Bank Fixed Asset Limitations, per Banking Regulation. These are just a few reasons why I feel the Bank Commission should be able to review the Bank Holding Company financial records.

We need to remember in many Community Banks management is also involved in ownership and has the ability to receive compensation and to manage expense in both entities. I don't believe I'm aware of any abuse in these areas, while I have served on the Banking Board, but at the same time it could happen. An ounce of prevention is worth a pound of cure and I believe Senate Bill 104 provides that prevention.

Who knows, maybe in the future the Federal Reserve will accept the State Banking Department's Examination of the Holding Company, thus reducing that additional needed examine for State Banks. We do know all Regulators are looking for more efficient and cost effective ways of examining Banks and their related Parent Companies. This might help move us closer towards that common goal.

Respectfully,

Richard D. Rucker
President/Chairman
Home Bank & Trust Co.
PO Box 620
Eureka, Kansas 67045

Testimony of Neil Milner

Chairman and CEO
Conference of State Bank Supervisors

On State Examination Authority

House Financial Institutions
March 2, 2005
Attachment 11

The Conference of State Bank Supervisors (CSBS) is the professional association of state officials who charter, regulate and supervise the nation's approximately 6,000 state-chartered commercial and savings banks, and more than 400 state-licensed foreign banking offices nationwide.

We appreciate the opportunity to submit testimony on the importance of a viable state banking system with appropriate supervisory and enforcement authority. The legislation being considered by the Committee on Financial Institutions and Insurance will give the Kansas Office of the State Bank Commissioner the additional tools they need to supervise a dynamic industry, serve the public needs and convenience, protect consumers from unscrupulous practices, and foster economic development and prevent economic instability. It is important to empower your state regulator in order to put them in a better position to defend against federal intervention. The Kansas Office of the State Bank Commissioner should have available to it powers similar to those of the federal agencies; otherwise it could be considered an abdication of appropriate state rights to the federal government.

Individual markets vary widely from state to state, or even from community to community. State banking laws and state enforcement allow state policymakers to determine how best to serve and protect their citizens. Chartering of financial institutions at the state level promotes the availability of capital in all communities, and local enforcement allows the state regulators to take into consideration conditions in the local markets before taking action. Without the appropriate tools at the state level, critical decisions are left to the federal bank regulators in Washington.

CSBS, through its accreditation program, has created a list of best practices for state banking departments, including the types of enforcement authority that should be available to the department. Included in the list of supervisory practices are:

- The department must have the authority and a sufficient number of qualified examiners to examine all specialty areas including bank holding companies.
- The department should also have the authority to remove officers, directors and employees; and to prohibit such individuals from serving in any capacity in any other financial institution that the department regulates.
- The department must also have the ability to assess civil money penalties sufficient to deter violations of laws and regulations and/or violations of orders or agreements. Civil money penalties should be per violation per day.

CSBS strongly endorses the legislation you have before you that improves the enforcement authority of your Office of the State Bank Commissioner. As the primary regulator of state institutions, the Office of the State Bank Commissioner should have the same remedies that the federal agencies have in order to have the flexibility, credibility and the power to adequately supervise the industry. Civil money penalties can effectively encourage correction of violations and serve as a deterrent to future violations, reckless or unsound practices and breaches of fiduciary duty. Being able to remove or suspend a person participating in the affairs of a financial institution gives the Office of the State Bank Commissioner the power to remove a problem without penalizing the entire institution. The authority to review holding company and bank affiliate activities helps to insure compliance with both state and federal laws and gives the Office of the State Bank Commissioner a better picture of the overall health of the bank itself.

Thank you again for this opportunity to submit testimony on what is a very important matter.