

Approved: 3/31/09
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on March 11, 2009, in Room 143-N of the Capitol.

All members were present except:

Representative Joe Patton- excused
Representative Kevin Yoder- excused

Committee staff present:

Melissa Doebelin, Office of the Revisor of Statutes
Matt Sterling, Office of the Revisor of Statutes
Jill Wolters, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Sue VonFeldt, Committee Assistant

Conferees appearing before the Committee:

Jim Pottorff, Chief Counsel-University of Kansas
Don Gronniger, Legal Counsel for KVC Behavioral Health Care
Melissa Ness, St Francis Community Services
Keith Rickard, Executive Director of the Guidance Center Leavenworth, Kansas
Callie Hartle, Kansas Association for Justice
Phil Perry, Homebuilders Association of Greater Kansas City
Ed Klumpp, Kansas Association of Chiefs of Police and Kansas Peace Officers Association
John Federico, Kansas Cable Telecommunications
Sandie Bayless, Westar
Patrick Broxterman, Assistant Attorney General

Others attending:

See attached list.

The hearing on **SB 8 - Kansas tort claims act; medical students enrolled at University of Kansas Medical Center** was opened.

Proponents:

Jim Pottorff, Chief Counsel-University of Kansas, appeared before the committee as a proponent and asked them to support this bill which would amend KSA 75-6102 to include medical students enrolled at the University of Kansas Medical Center who are in clinical training at the University of Kansas Medical Center or other health care institutions in the definition of employee under the Kansas Tort Claims Act.

(Attachment 1)

Don Gronniger, Legal Counsel for KVC Behavioral Health Care, spoke in favor of the bill but also asked for an amendment to include foster homes and many organizations that provide various services for populations previously served by the State. (Attachment 2)

Melissa Ness, St Francis Community Services, stated they provide services for troubled youth and their families, with a range of services from family preservation, reintegration / foster care and foster care homes. While in support of the bill, they also would like it amended to extend tort claims coverage to child welfare providers who are under contract with the state to provide services the state would otherwise provide. (Attachment 3)

Keith Rickard, Executive Director of the Guidance Center at Leavenworth, Kansas, spoke in support of the bill but also requested the bill be modified to add community mental health centers. He stated it would relieve them from a significant financial burden and at the same time make them more competitive for the professionals they must hire to provide psychotherapy and other mental health service. (Attachment 4)

CONTINUATION SHEET

Minutes of the House Judiciary Committee at 3:30 p.m. on March 11, 2009, in Room 143-N of the Capitol.

Callie Hartle, Kansas Association for Justice, appeared to urge the Committee to reject the proposed amendments to add immunity under the tort claims act to contractors providing child welfare and foster care services. She pointed out several statements for the Committee to consider:

- 1) Kansas privatized foster care services in 1997 for many reasons, not the least of which was litigation.
- 2) Kansas pays litigation costs of defending liability claims against entities that are protected by the tort claims act.
- 3) the proposed amendments set a dangerous precedent and asks the question if other contractors also will want tort claims immunity.
- 4) The tort claims act is intended to protect the state-not the private sector.

Eliminating liability does not improve the performance of private contractors, it instead insulates private contractors from accountability. ([Attachment 5](#))

There were no opponents.

The hearing on **SB 8** was closed.

The hearing on **SB 237** - Scrap metal, regulations concerning selling and buying was opened.

Phil Perry, Staff VP of Governmental Affairs for Homebuilders Association of Greater Kansas City, spoke as a proponent and said this bill accomplishes three things, 1) expands the scope of materials covered under the law, 2) requires additional record keeping by the buyer, and, 3) increases penalties for violation of the law. He also stated this would help bring Kansas law in line with surrounding states, specifically Missouri. This bill is modeled after an ordinance the Unified Government of Wyandotte County and Kansas City, Kansas recently adopted. Legitimate scrap dealers participated and want to help keep the unscrupulous dealers out of the business to protect their reputation. ([Attachment 6](#))

Ed Klumpp, on behalf of the Kansas Association of Chiefs of Police and Kansas Peace Officers Association spoke in favor of the bill. Utility companies, businesses, homebuilders, property owners, school districts and governmental entities of our state lose hundreds of thousands of dollars to these thefts each year. He showed the Committee pictures of missing manhole covers and the danger this creates. He also said thieves are finding new ways to circumvent the law and are stealing utility poles, roadway signs/posts, guard rails and even the seats from stadium bleachers. ([Attachment 7](#))

Mr. Klumpp also offered a balloon to clearly identify a "junk vehicle" as a vehicle "not requiring a title as provided in chapter 8 of the Kansas Statutes Annotated, and amendments thereto". He further explained there is a separate bill, **HB 2258**, that deals strictly with automobiles that have to be titled. ([Attachment 8](#))

John Federico, President and Legislative Counsel for the Kansas Cable Telecommunications appeared before the Committee in strong support of the bill. He stated the theft of copper and other materials creates disruption of service and costly repair and replacement parts and materials. What was once a nuisance is now a severe economic service and safety issue. ([Attachment 9](#))

Written Only Proponents:

Eric Stafford, Director of Governmental Affairs for the Associated General Contractors of Kansas provided written testimony in support of the bill. ([Attachment 10](#))

Sandie Bayless, representing Westar Energy, provided written testimony in support of the bill because it provides additional deterrent to the theft of metals. ([Attachment 11](#))

There were no opponents.

The hearing on **SB 237** was closed.

The hearing on **SB 159 - Enforcement of tobacco settlement** was opened.

CONTINUATION SHEET

Minutes of the House Judiciary Committee at 3:30 p.m. on March 11, 2009, in Room 143-N of the Capitol.

Patrick Broxterman, Senior Assistant Attorney General in the Tobacco Enforcement Unit, appeared in strong support of the bill. He stated this bill is complementary to the tobacco Master Settlement Agreement (MSA) escrow statutes. The MSA is an agreement between fifty-two states and territories and multiple Participating Tobacco Manufactures. To receive this money, all Settling States, including Kansas, must “diligently enforce” certain laws and that currently the PM’s are challenging every Settling State on the diligent enforcement of its MSA escrow laws. This bill amends K.S.A. 50-6a04 and proposes eighteen new sections. It provides enhanced enforcement of the MSA Escrow Statutes and thus helps ensure continued receipt of MSA payouts. The majority of other MSA Settling States have already adopted most of this legislation. (Attachment 12)

Mr. Broxterman also requested some clarification corrections (identified as Balloon 1). (Attachment 13)

There were no opponents.

The hearing on **SB 159** was closed.

SB 70 - Trusts; unitrust conversion; uniform principal and income act.

Representative Whitham made the motion to report SB 70 favorably for passage. Representative Pauls seconded the motion.

Representative King made the substitute motion to amend the bill, (identified as Balloon 2), on page 4, after line 23, by inserting the following: “New Sec. 2, (a) the income standard established in section 1, and amendments thereto does not create a presumption or implication that a trustee who distributes less than 3% or more than 5% is breaching a trustee’s fiduciary duty to a beneficiary. (B) This section shall be part of and supplemental to the uniform principal and income act (1997), and by renumbering the remaining section accordingly. (Attachment 14)

The motion was seconded by Representative Jack. Motion carried.

Representative Whitham made the motion to report SB 70 favorably for passage as amended. Representative Jack seconded the motion. Motion carried.

The next meeting is scheduled for March 12, 2009.

The meeting was adjourned at 5:10 p.m.

JUDICIARY COMMITTEE GUEST LIST

DATE: 3-11-09

NAME	REPRESENTING
Ed Klumpp	KACP & KPOA
Kent Coraish	KAB
Rich Gannon	KPA
Dan Gibb	KSAG
Patrick Broxteman	KSAG
DAVE HEINEMANN	ACS
Melanie Owens	Saint Francis Community Services
Dan Bronniger	KVC Behavioral Health Care, Inc.
Melissa Ness	Connection Unlimited / Saint Frances Community Services
Kelley McMahon	KVC Behavioral Health Care Inc.
James P. Potter Jr	KU
John @ [unclear]	Wistar
Jandee Bayless	Wistar
Patricia Vogelberg	Korner
Landau Ayers	KDHE
Joseph Molina	KS Bar Assn.
Chip Wheelen	ACSF Board of Governors
Steven Hilbert	KDOR / ABC

JUDICIARY COMMITTEE GUEST LIST

DATE: 3/11/09 cont

NAME	REPRESENTING
Kevin Bane	Cap Lobby Group LLC
Benjamin Miller-Coleman	Rep. Goyler
Sean Miller	CAPITOL STRATEGIES
Alicia Jones	Intern for Rep. Crow

Historically, KU medical students have obtained their clinical training at the KU Hospital and at many other sites in order to obtain adequate exposure to a variety of patient populations. This occurs at the Via Christi hospitals and at HCA Wesley hospital in Wichita. In Kansas City, an example is the opportunity to see pediatric patients at Children's Mercy Hospital.

Unfortunately, from time to time medical students are named as defendants in medical malpractice claims and lawsuits. Since the 1980s, seven medical students have been named along with physicians and/or hospital or outpatient facilities in medical malpractice lawsuits. All medical student defendants have been dismissed without a settlement payment or judgment against the students, except in one case that is currently pending. This case was filed in February 2008, so it is covered by virtue of the proviso for that year. We anticipate this pending case also will be dismissed without a payment or judgment against the medical student.

Since May 1, 1986, Kansas Tort Claims Act coverage has been provided to medical students on an annual basis through appropriations bills that stated medical students "shall be considered employees for purposes of the Kansas tort claims act"..." while in clinical training." The Kansas Tort Claims Act caps liability at \$500,000 per occurrence.

Beginning in March 2006, secondary coverage in the amount of \$500,000/\$2,500,000 was purchased from private insurance carriers because the majority of hospitals and other training locations for medical students require a total of \$1,000,000 per occurrence and up to \$3,000,000 annual aggregate. Consequently, the tort claims act provides the "first dollar" or layer of coverage.

Medical students are not allowed to make unilateral decisions regarding the care and treatment of patients, but they do learn how to properly examine patients under the direct supervision and control of an attending medical faculty physician. The students learn to write appropriate medical records entries documenting their physical findings and treatment plan. Their documentation in the medical records must be approved and countersigned by the attending faculty physician. Since the names of medical students appear in patients' medical records, students are occasionally named in claims and lawsuits. When a plaintiff's counsel is

informed of the nature of the role of a medical student in treatment of a patient, the student is routinely dismissed from the case or claim.

Despite the successful track record in securing dismissals of claims against medical students, potential liability exposure remains. The provision of Tort Claims coverage is important for two reasons. It provides "first line" coverage from state resources and enables our students to train at a variety of locations and obtain the necessary exposure to a variety of patients. Second, this "first line" coverage facilitates the procurement of a secondary commercial insurance policy at more reasonable rates.

We are very comfortable with the bill and ask the committee to act favorably on the bill without amendments.

Medical Students → 175 - per class
× 4
675 - 700 total
approx 300 to 325 sum w
• Faculty 407
• Residents 703



**House Committee on Judiciary
Testimony in Support of SB 8
March 11, 2009**

Chairman Kinzer and honorable members of the Committee, I am Dan Gronniger, Legal Counsel for KVC Behavioral HealthCare. We appreciate the opportunity to provide testimony in support of SB 8 and respectfully request the amendment of the underlying bill at the appropriate time when the bill is worked by the Committee. The amendment would include foster homes and many organizations that provide various services for populations previously served by the State. The amendment would provide coverage under the Kansas Tort Claims Act for services provided to very vulnerable populations through agreements with the State of Kansas.

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KVC Behavioral HealthCare, Inc. (KVC) is a private, not-for-profit organization providing medical and behavioral healthcare, social services and education to children and families. KVC provides a wide array of behavioral healthcare services that include inpatient and outpatient mental health services as well as foster care case management. KVC is proud to have served Kansas families for over 40 years and is fully accredited by The Joint Commission, one of the oldest and most widely respected national accrediting bodies.

When the Kansas Department of Social and Rehabilitation Services (SRS) made the decision to privatize its child welfare case management services in 1996, KVC answered the call to serve as one of the initial providers of these services and continues in that role today. The State and its employees obviously had been covered by the Kansas Tort Claims Act prior to privatization, but unfortunately this coverage was not transferred to the new providers of these services. Similarly in 2007, SRS decided to privatize the children's psychiatric hospital beds in Eastern Kansas which previously had been located at Rainbow Mental Health Facility, a state operated mental health hospital. KVC is proud to have been awarded a grant to provide these services as well, but again without the coverage of the tort claims act.

KVC now plays many roles which have legitimately and traditionally been played by the state. In this age of regular litigation, one substantial lawsuit could bring substantial damage to our organization and the services it provides. This would be to the detriment of not only KVC but the hundreds of families that are served each day as well as the state itself. No such award has ever been made against KVC, nor do we anticipate it. However, coverage under the tort claims act would help ensure the operations which have been so vital in helping children and families continue to receive services for generations to come.

In conclusion, KVC requests the adoption of the balloon amendment and the passage of SB 8 by the Committee. I would be happy to stand for questions.

House Judiciary

Date 3-11-09

Attachment # 2





Testimony before the House Judiciary Committee In Support of SB 8 - March 11, 2009

Saint Francis Community Services has a rich history of serving troubled youths and their families over 60 years. We provide a range of services from family preservation, reintegration/ foster care foster care homes, which we do so under contract with the state, as well as, drug and alcohol services, and residential services and community supports. Through those programs last year we served over 2000 children and families, in 54 rural and frontier counties, with 12 offices and over 600 full and part time employees. In July of this year our Family Preservation Services will extend into Region 3 based on the SRS designation.

2009 POLICY AGENDA~

SERVING A RURAL POPULATION

The needs, perspectives and culture of our rural and frontier population shall be reflected in decisions and policies that shape services to children and families at all levels.

MENTAL HEALTH AND BEHAVIORAL SERVICES

All children in the child welfare system will have access to quality, and timely mental health and behavioral health services designed to sustain and reunite families.

MANAGING POSITIVE SYSTEMS CHANGE

System changes that impact children and families must be adequately funded, accompanied by plans to build system capacity, and have a process for monitoring and evaluating performance against outcomes.

For more information contact
mlness@connections-unlimited.net

The system serving children and families will reflect regional differences, ensure access to critical services and effectively manage change

Today we ask that you consider an amendment to the legislation before you. The intent of the amendment would extend tort claims coverage to child welfare providers who are under contract with the state to provide services the state would otherwise provide.

In 1996 the first privatized child welfare contracts were let. Prior to that time those child welfare services were provided by state employees who were in covered by the Tort Claims Act. That privilege did not transfer to the private agencies although the responsibilities with increased accountability for positive outcomes for a vulnerable population of children and families did.

Scope of the amendment~

The amendment sets a well defined parameter for services covered and while narrowing the privilege by requiring that an agency must demonstrate they are accredited by a national accrediting body such as the Joint Commission. (Formerly the Joint Commission on the Accreditation of Health Care Organizations) The accreditation process provides does not supplant state oversight but adds an additional dimension in ensuring quality programming. It requires that agencies meet rigorous performance standards with documented, ongoing quality improvement activities during the period of accreditation.

Rationale~

We believe extension of this coverage is consistent with the past practice of coverage for state employees who provided services to these populations. In addition, extending this public policy to organizations and individuals contracting with the state is not without precedence. As referenced earlier in the bill, providers of juvenile justice services who are under contract with the state are provided coverage.

Protection and support

House Judiciary

Date 3-11-09

Attachment # 3

With the significant reduction in the resources for these new contracts, (\$14 M overall) we continue to look at ways to reduce expenditures *without* jeopardizing quality service or our ability to provide needed services for the state. Social service agencies like ours are often charged higher premiums due to working with high risk children and families.

Extending tort claims coverage to these providers would afford protection and *potentially* reduce insurance rates while encouraging additional carriers to the market. In turn, decreased insurance rates allow us to focus resources on sustaining critical services provide new programming and ensure quality in our service delivery system

Conclusion

We understand that with every new piece of legislation or amendment questions will arise that represent a variety of perspectives on the value and impact of the legislation. We believe the time is ripe to revisit, acknowledge and then affirm the need for this coverage for the services listed in the amendment. *We ask the committee to take a serious look at this issue as a matter of public policy and accept the amendment as proposed.*

Respectfully submitted,
Melissa L. Ness JD, MSW
Advocacy Coordinator, St. Francis Community Services

SB 8 – Amendment expanding tort immunity to providers of child welfare services under contract with the state.

Proposal

Insert on page 2 at Line 26 of Section 1(d) of Senate Bill No. 8:

(K) officers, directors, employees, agents of domestic not-for-profit corporations accredited by the joint commission, inc. and licensed by the Kansas department of health and environment to provide child placing, case management, psychiatric residential treatment, and psychiatric hospital services reimbursed through contracts with the state of Kansas; and

(L) persons and members of families licensed by the Kansas department of health and environment to provide foster home services for children in need of care.

This additional revision would require the following revisions to the 1-6-09 version of S.B. No. 8:

(1) Delete “and” from the end of new subsection 1(d)(I), and

(2) Delete the period (end punctuation) following the last word in new subsection 1(d)(J) and replace it with a semi-colon.

Issue - Prior to contracting with private providers in 1996 for child welfare services e.g. foster care, adoption, and family preservation, the state and its employees provided those services. As such they were afforded the protection of tort immunity. This privilege was not extended to child welfare providers once services responsibilities were transferred. We believe this privilege, as a matter of public policy should be extended to providers who under contract and state oversight provide the same services once provided by the state. (It is important to note that this privilege is extended currently to organizations providing juvenile justice services under state contract)

Scope - The extension of this privilege is to those organizations who provide the service under contract with and licensed by the state **and** who must demonstrate they are accredited by the **Joint Commission** a nationally recognized accrediting body. (Formerly known as the Joint Commission on Accreditation of Health Care Organizations.)



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Testimony to the House Judiciary Committee

**Testimony on
Senate Bill 8**

March 11, 2009

Presented by:

Keith Rickard, Executive Director
The Guidance Center, Leavenworth

House Judiciary

Date 3-11-09

Attachment # 4

Mister Chairman and members of the Committee, my name is Keith Rickard, I am the Executive Director of The Guidance Center in Leavenworth. The Guidance Center serves Atchison, Jefferson, and Leavenworth Counties.

The Association represents the 27 licensed Community Mental Health Centers (CMHCs) in Kansas who provide home and community-based, as well as outpatient mental health services in all 105 counties in Kansas, 24-hours a day, seven days a week. In Kansas, CMHCs are the local Mental Health Authorities coordinating the delivery of publicly funded community-based mental health services. The CMHC system is state and county funded and locally administered. Consequently, service delivery decisions are made at the community level, closest to the residents that require mental health treatment. Each CMHC has a defined and discrete geographical service area. With a collective staff of over 4,500 professionals, the CMHCs provide services to Kansans of all ages with a diverse range of presenting problems.

Together, this system of 27 licensed CMHCs form an integral part of the total mental health system in Kansas. As part of licensing regulations, CMHCs are required to provide services to all Kansans needing them, regardless of their ability to pay. This makes the community mental health system the "safety net" for Kansans with mental health needs, collectively serving over 123,000 Kansans with mental illness.

I stand before you today to discuss Senate Bill 8. A Community Mental Health Center is defined in and recognized by K.S.A. 19-4001, et. seq. Community Mental Health Centers (CMHCs) are more than just another group of providers. They are the county's legally delegated authorities to manage mental health care in Kansas. The CMHCs function as the local mental health authorities. As such, the Kansas mental health system is a relationship of shared governance between two governmental entities – the state and the counties.

The primary goal of CMHCs is to provide quality care, treatment and rehabilitation to individuals with mental health problems in the least restrictive environment. The members of the Association provide services to all those needing care, regardless of economic level, age or type of illness. The CMHCs strongly endorse treatment at the community level, in order to allow individuals to keep functioning in their own homes and communities, at a considerably reduced cost to them, third-party payers and/or the taxpayer.

Kansas CMHCs provide care to over 123,000 citizens per year. Patient loads have doubled over the past ten years largely as a result of deinstitutionalization of those with mental illness. During the period from 1970 to 1997, the State Psychiatric Hospital average daily census declined by more than 80%. Many of these former hospital patients now rely on CMHCs to mental health services to maintain their ability to live in their own community. A recent study has shown that Kansas, through the efforts of the association's membership, has seen more individuals in its public mental health system, has greater penetration rates, have residents that report doing better for receiving mental health services and for those receiving mental health services they are living more independently than in neighboring states.¹

A CMHC is designed to serve as a safety net for those citizens who are in need of mental health services and who have either no ability to pay for such services or limited ability to pay. All of the Kansas CMHCs are specifically obligated by K.S.A. 19-4005 to provide care regardless of a patient's ability to pay. And all of our members, when patients present with some ability to pay, use a sliding scale based on resources to determined amount of payment.

In order to provide these services to Kansas residents, our members employ psychiatrists, PHD level psychologists, masters' level psychologists and social workers and a support staff for these professionals in order to carry out our mission. You, of course, can see that we have to compete for the services of these individuals with the private sector and we experience budget strains like any other organization. We also are currently subject to being sued by current and former patients like any other hospital, mental health center, or psychiatric group practice.

Notwithstanding the mission we have, we find it necessary to pay premiums for professional liability coverage for not only ourselves but our employees as well. Since we so closely resemble a local health department or indigent healthcare clinic, our association believes that affording us the same protection provided by the Kansas Tort Claims Act would relieve us from a significant financial burden and at the same time make us competitive for the professionals we must hire to provide psychotherapy and other mental health services.

Initially, this law was established for protection of state agencies in Kansas, and has been amended several times since to include other health care providers. The neighboring state of Colorado covers licensed Community Mental Health Centers under the "Colorado Governmental Immunity Act", as it also covers health care providers who do not fall under the Federal Tort Claims Act, to ensure continued services for the citizens of Colorado at those facilities.²

In the long run, adding CMHCs under the Kansas Tort Claims Act protection will reduce premiums, increase competition among insurance providers, and allow CMHCs to reallocate premium savings directly into enhanced patient care. One broker in Kansas indicated that an initial premium savings of 10% could be achieved. However, moving forward this action could result in increased competition by insurance carriers thus lowering the premiums even further. CMHC directors and boards are constantly looking for ways to reduce costs and ensure levels of care are not cut or reduced. This cost savings and liability protection could be a significant tool in helping to achieve this, and also guarantee continued access to care and treatment for Kansans with mental illness.

Senate Bill 8 can accomplish a number of goals for our members and for the Kansans who seek care and treatment at their Community Mental Health Center. We are requesting that K.S.A. 75-102(e)(3) be modified to add community mental health centers. This modification is necessary because, just like local health departments, the CMHCs are treating medically indigent Kansans--many times the exact same consumers. The only difference is that our members are providing mental health care services to the medically indigent.

Please consider inclusion of Community Mental Health Centers under the Kansas Tort Claims Act. Thank you and I am happy to stand for questions.

¹ *How Kansas Stacks Up: A Regional and National Comparison of Mental Health Care Services* ; The Association of Community Mental Health Centers of Kansas, Inc.; 2007. See at <http://www.acmhck.org/common/modules/documentcenter2/documentview.aspx?DID=244&DL=1>

² Colorado Revised Statutes 24-10-101, et. seq.; *The Colorado Governmental Immunity Act*.



Your rights. Our mission.

To: Representative Lance Kinzer, Chairman
Members of the House Judiciary Committee

From: Terry Humphrey and Callie Hartle

Date: March 11, 2009

Re: SB 8 Tort Claims Act Proposed Amendments

I appear today regarding proposed amendments to SB 8 extending immunity under the tort claims act to contractors providing child welfare and foster care services. We urge the Committee to reject the proposed amendments.

My comments are offered today with the caveat that we have reviewed only an early draft of the amendments, which may have changed from the draft proposed before the Committee. We will provide the Committee with additional written comments as appropriate.

KsAJ has previously opposed expansions of the tort claims act and all other limitations on accountability or extensions of immunity to public and private entities. Justice requires that we all be accountable for our actions. If we cause harm, justice requires we make things right for those that are hurt. Immunity limits or eliminates accountability.

As currently drafted, SB 8 is an attempt to enact what has been the law through budget proviso for a number of years. Although we are disturbed at the trend toward expansion of the tort claims act, we believe SB 8 is an attempt to clarify what is already law. I therefore distinguish KsAJ's observations on the current bill with our serious concerns with the proposed amendments.

The following are general observations for the Committee's consideration in relation to any amendment extending tort claims immunity to private child welfare providers:

- 1. Kansas privatized foster care services in 1997 for many reasons, not the least of which was litigation.**

Kansas privatized the child welfare system after documented failings in the foster care system, multiple compliance audit failures, and a lawsuit against the Department of SRS

House Judiciary

Date 3-11-09

Attachment # 5

by the American Civil Liberties Union that cost the state over \$800,000 in legal fees to defend SRS. Presumably, part of the State's decision to privatize was not only to outsource the actual administration of foster care, but to outsource liability for the performance of contractors as well.

It is a policy question for the Committee whether to allow contractors to be immune or whether assumption of liability is part of the contracted duties of private child welfare providers, and whether extending immunity improves the performance of child welfare contractors or not.

We argue that eliminating liability does not improve the performance of private contractors. Instead, immunity insulates private contractors from accountability. Immunity also eliminates remedies for children and families in the foster care system if they are hurt by the actions of a contractor, whether such actions are negligent or intentional.

2. Kansas pays litigation costs of defending liability claims against entities that are protected by the tort claims act.

We question the long-term fiscal cost to the State of assuming the liability for acts of private entities under the tort claims act, since the State will be asked to defend claims of negligence arising against entities protected under the tort claims act. We do not believe it is in the State's financial best interest to assume the liability and litigation costs of private entities, especially since the State of Kansas is not in direct control of private contractors, their employees, agents, and directors.

3. The proposed amendments set a dangerous precedent. Will other contractors also want tort claims immunity?

SB 8 as currently draft contains new language specifically stating that independent contractors, except for limited exceptions already in law, are not considered "employees" and therefore do not have immunity under the tort claims act (see page 2, lines 28-30.) We believe the new language is the correct policy. However, proposed amendments extending tort claims immunity to private child welfare contractors is in conflict with these provisions.

Extending immunity to private contractors in the child welfare and foster care arena will invite other contractors with the state to seek similar immunity. For example, nursing homes contract with the State to provide Medicaid services. Would they seek similar protection under the tort claims act?

4. The tort claims act is intended to protect the state—not the private sector.

In the early draft amendment KsAJ reviewed, tort claims immunity is extended to domestic not-for-profit corporations accredited by the Joint Commission (formerly

known as the Joint Commission on Accreditation of Health Care Organizations or JCAHO.)

The Joint Commission is a private organization which means it is not transparent in the same way that the state is. The Joint Commission is not subject to “sunshine” laws such as the Kansas Open Records Act and therefore, the public has no access to the underlying surveys that supports findings. There is no ability for an aggrieved consumer to appeal any of the Joint Commission’s findings. Coupling the proposed tort claims immunity with the JCAHCO accreditation just further buries accountability in an area, foster child welfare, where greater accountability and not less is highly desirable.

Thank you for the opportunity to provide the Committee with the Kansas Association for Justice’s testimony. We urge you to reject proposed amendments that extend immunity under the tort claims act to child welfare and foster care contractors.



**HOME BUILDERS ASSOCIATION
OF GREATER KANSAS CITY**



600 EAST 103RD STREET • KANSAS CITY, MISSOURI 64131-4300 • (816) 942-8800 • FAX (816) 942-8367 • www.kchba.org

**Testimony on SB 237
Phil Perry, Staff VP, Governmental Affairs
House Committee on Judiciary
March 11, 2009**

Mr. Chairman and members of the committee, thank you for the opportunity to appear before you today. My name is Phil Perry and I am the Staff VP of Governmental Affairs for the Home Builders Association of Greater Kansas City and I am appearing before you today to speak in favor of SB 237, an act relating to the regulation of scrap metal.

The Home Builders Association of Greater Kansas City and a diverse group business entities that includes law enforcement, utilities, contractors, telecommunication companies, municipalities and others, believe that the changes proposed in SB 237 will help bring Kansas law in line with surrounding states, specifically our neighbors to the east –Missouri–.

The proposed changes in SB 237 accomplishes several things including; 1) expanding the scope of materials covered under the law, 2) requiring additional record keeping for the buyer (scrap metal dealer), and most importantly,...increasing penalties for violation of the law. Scrap metal thefts from constructions sites, vacant buildings, residences, utilities, vehicles, and other areas are likely to increase, considering the current economic situation in our country, unless we step in and increase the penalties for committing these crimes. We feel strongly that passage of SB 237 goes a long way in dis-incenting the extremely disruptive and costly behavior of certain criminals.

Do Business With A Member

House Judiciary
Date 3-11-09
Attachment # 4

SB 237 is modeled after an ordinance the Unified Government of Wyandotte County and Kansas City, KS recently adopted. As we understand, the Unified Government vetted their ordinance quite thoroughly and spent a significant amount of time tweaking it after receiving feedback from all interested parties. The impetus for the enhancements to the UG's ordinance came after hearing from neighborhood groups who were experiencing an increase in "backyard" scrap metal dealers. These unlicensed and unregulated "dealers" were buying scrap metal from individuals for cash and then proceeding to sell it to legitimate dealers in the area. Legitimate dealers participated in the process in Wyandotte County to help keep the unscrupulous dealers out of the business and to protect their reputation.

With the changes made by the Unified Government, coupled with those in Kansas City, MO and the State of Missouri, we feel that it is important that there be some uniformity throughout the State of Kansas to prevent thefts in other areas and the materials brought in to our State to be sold. At the end of the day, in a very "challenging" economic environment, we do not need to make it easy for those that resort to stealing copper and other materials, to add cost to existing businesses, to those investing in new developments and infrastructure, or the consumer.

Thank you very much for your time and I would be glad to answer any questions.



Kansas Association of Chiefs of Police
PO Box 780603, Wichita, KS 67278 (316)733-7301

Kansas Peace Officers Association
PO Box 2592, Wichita, KS 67201 (316)722-8433



March 11, 2009

Testimony to the House Judiciary Committee In Support of SB 237 Scrap Metal Sales

Chairman Kinzer and committee members,

The Kansas Association of Chiefs of Police and the Kansas Peace Officers Association strongly believes there is a need to strengthen the existing scrap metal laws. To that end, we support SB 137.

THE PROBLEM:

The theft of metal and the selling of that stolen metal to scrap yards continue to plague the state. Utility companies, businesses, homebuilders, property owners, school districts, and government entities of our state lose hundreds of thousands of dollars to these thefts each year. These thieves are finding new ways to circumvent the laws passed a few years ago. Manhole covers, utility poles, roadway signs/posts, guard rails, and even the seats from stadium bleachers have been targets of these thieves. These items are not in the current definition of "regulated scrap metal." The problem is not isolated and is impacting virtually every geographical area of our state. It should be obvious to anyone buying these items that they do not belong to the seller. The current definition of "regulated scrap metal" is too narrow and allows for circumvention by criminal ingenuity.

THE SOLUTION:

1. Redefine "regulated scrap metal" as proposed in section 1, line 36, page 1 through line 17, page 2.
2. Add to the law a provision to cover the sale and purchase of items that a reasonable person would recognize as not belonging to the seller as proposed in section 3, line 21, page 4 through line 8, page 5.
3. Clarify the dealer cannot dispose of or destroy items law enforcement has reason to believe is stolen for a period of time sufficient to allow for further investigation. See section 3, lines 9-15 on page 5.
4. Expand the identifying information collected by scrap metal dealers that will aid the law enforcement investigation of stolen items. See line 39, page 2 through line 21, page 3.
5. Enhance the penalties with progressive increases for subsequent offenses as proposed in section 4 lines 16-34, page 5.

REQUESTED POLICY DECISIONS:

1. Recognize that these thefts and their associated costs are sufficient to require additional legislative solutions.
2. Identify and apply the appropriate balance between the cost to victims, the law enforcement needs to address this crime, and the business needs of legitimate scrap metal buyers and sellers.
3. Improve requirements for scrap metal purchasers to retain adequate information for law enforcement to return stolen property to the owner and to identify and arrest the criminals responsible.
4. Establish appropriate cost effective punishment to deter persons from engaging in the theft of these materials; and to deter businesses who make those thefts profitable when a reasonable person would know the items are stolen or who fail to comply with legislation to collect the data identified in policy decision 3.

We strongly encourage the committee to adopt the requested policy decisions and to recommend SB 137 favorably to the full House for passage.

Ed Klumpp
Legislative Committee Chair-KACP
Legislative Committee Chair-KPOA
eklumpp@cox.net
(785)640-1102

House Judiciary

Date 3-11-09

Attachment # 7

SENATE BILL No. 237

By Committee on Judiciary

2-6

10 AN ACT concerning scrap metal; relating to regulation thereof; amend-
11 ing K.S.A. 2008 Supp. 50-6,109, 50-6,110, 50-6,111 and 50-6,112 and
12 repealing the existing sections.

13
14 *Be it enacted by the Legislature of the State of Kansas:*

15 Section 1. K.S.A. 2008 Supp. 50-6,109 is hereby amended to read as
16 follows: 50-6,109. As used in K.S.A. 2008 Supp. 50-6,109 through 50-
17 6,112, and amendments thereto:

18 (a) "Scrap metal dealer" means any person that operates a business
19 out of a fixed location, and that is also either:

20 (1) Engaged in the business of buying and dealing in regulated scrap
21 metal;

22 (2) purchasing, gathering, collecting, soliciting or procuring regulated
23 scrap metal; or

24 (3) operating, carrying on, conducting or maintaining a regulated
25 scrap metal yard or place where regulated scrap metal is gathered to-
26 gether and stored or kept for shipment, sale or transfer.

27 (b) "Regulated scrap metal yard" means any yard, plot, space, enclo-
28 sure, building or any other place where regulated scrap metal is collected,
29 gathered together and stored or kept for shipment, sale or transfer.

30 (c) "Regulated scrap metal" shall mean wire, cable, bars, ingots, wire
31 scraps, pieces, pellets, clamps, aircraft parts, *junk vehicles, vehicle parts,*
32 pipes or connectors made from aluminum; catalytic converters containing
33 platinum, palladium or rhodium; and copper, titanium, tungsten, stainless
34 steel and nickel in any form; for which the purchase price described in
35 K.S.A. 2008 Supp. 50-6,110 and 50-6,111, and amendments thereto, was
36 primarily based on the content therein of aluminum, copper, titanium,
37 tungsten, nickel, platinum, palladium, stainless steel or rhodium; *any item*
38 *composed in whole or in part of any nonferrous metal other than an item*
39 *composed of tin, that is purchased or otherwise acquired for the purpose*
40 *of recycling or storage for later recycling.* Aluminum shall not include
41 food or beverage containers.

42 (d) "Bales of regulated metal" means regulated scrap metal property
43 processed with professional recycling equipment by compression, shear-

House Judiciary
Date 3-11-09
Attachment # 8

8-2

1 ing or shredding, to a form in which it may be sold by a scrap metal dealer
2 consistent with industry standards.

3 (e) "Ferrous metal" means a metal that contains iron or steel.

4 (f) "Junk vehicle" means a ~~motor~~ vehicle, aircraft, boat, farming im-
5 plement, industrial equipment, ~~trailer~~ or any other convenience used on
6 the highways and roadways, which has no use or resale value except as
7 scrap.

8 (g) "Nonferrous metal" means a metal that does not contain iron or
9 steel, including but not limited to, copper, brass, aluminum, bronze, lead,
10 zinc, nickel and their alloys.

11 (h) "Tin" means a metal consisting predominantly of light sheet metal
12 ferrous scrap, including large and small household appliances, construc-
13 tion siding and construction roofing.

14 (i) "Vehicle part" means either the front clip consisting of the two
15 front fenders, hood, grill and front bumper of an automobile assembled
16 as one unit; or the rear clip consisting of those body parts behind the rear
17 edge of the back doors, including both rear quarter panels, the rear win-
18 dow, trunk lid, trunk floor panel and rear bumper, assembled as one unit.

19 Sec. 2. K.S.A. 2008 Supp. 50-6,110 is hereby amended to read as
20 follows: 50-6,110. (a) Except as provided in subsection (e), it shall be
21 unlawful for any person to sell any item or items of regulated scrap metal
22 to a scrap metal dealer, **or employee or agent of a dealer**, in this state
23 unless such person presents to such scrap metal dealer, **or employee or**
24 **agent of such dealer**, at or before the time of sale, the following infor-
25 mation described below regarding such item or items of regulated scrap
26 metal:

27 —Such information shall include: The seller's name, address and place
28 of business, if any, sex, date of birth and the identifying number from the
29 seller's driver's license, military identification card, passport or personal
30 identification license. The identifying number from an official govern-
31 mental document for a country other than the United States may be used
32 to meet this requirement provided that a legible fingerprint is also ob-
33 tained from the seller.

34 (b) Every scrap metal dealer shall keep a register in which the dealer,
35 **or employee or agent of the dealer**, shall at the time of purchase or
36 receipt of any item for which such information is required to be pre-
37 sented, cross-reference to previously received information, or enter the
38 name, residence or place of business, if any, of the person from whom
39 the scrap metal dealer purchased or received the item, a description made
40 in accordance with the commodity code standards of the trade of items
41 purchased, the price paid for such item or items, and a copy of the seller's
42 photo driver's license card or another government-issued photo identifi-
43 cation card, accurately and legibly record at the time of sale the following

not requiring a title as provided in chapter 8 of the Kansas
Statutes Annotated, and amendments thereto

1 information:

2 (1) The time, date and place of transaction;

3 (2) the seller's name, address, sex, date of birth, and the identifying
4 number from the seller's driver's license, military identification card, pass-
5 port, or personal identification license; the identifying number from an
6 official governmental document for a country other than the United States
7 may be used to meet this requirement provided that a legible fingerprint
8 is also obtained from the seller;

9 (3) a copy of the identification card or document containing such
10 identifying number;

11 (4) the license number, color and style or make of any motor vehicle
12 in which the junk vehicle or other regulated scrap metal property is de-
13 livered in a purchase transaction;

14 (5) a general description, made in accordance with the custom of the
15 trade, of the predominant types of junk vehicle or other regulated scrap
16 metal property purchased in the transaction;

17 (6) the weight, quantity or volume, made in accordance with the cus-
18 tom of the trade, of the regulated scrap metal property purchased;

19 (7) if a junk vehicle or vehicle part is being bought or sold, a descrip-
20 tion of the junk vehicle or vehicle part, including the make, model, color,
21 vehicle identification number and serial number if applicable;

22 (8) the amount of consideration given in a purchase transaction for
23 the junk vehicle or other regulated scrap metal property;

24 (9) the name of the individual acting on behalf of the regulated scrap
25 metal dealer in making the purchase; and

26 (c) The scrap metal dealer's register, including copies of identification
27 cards, may be kept in electronic format.

28 ~~(b)~~ (d) Notwithstanding the foregoing, this section shall not apply to:

29 (1) Transactions involving regulated scrap metal, except for catalytic
30 converters, for which the total sale price for all regulated scrap metal is
31 \$50.00 or less;

32 (2) transactions involving only catalytic converters for which the total
33 sale price is \$30.00 or less;

34 (3) transactions in which the seller is also a scrap metal dealer; or

35 (4) transactions for which the seller is known to the purchasing scrap
36 metal dealer to be an established business that operates out of a fixed
37 business location and that can reasonably be expected to generate regu-
38 lated scrap metal.

39 Sec. 3. K.S.A. 2008 Supp. 50-6,111 is hereby amended to read as
40 follows: 50-6,111. (a) It shall be unlawful for any such scrap metal dealer,
41 **or employee or agent of the dealer**, to purchase any item or items of
42 regulated scrap metal in a transaction for which K.S.A. 2008 Supp. 50-
43 6,110, and amendments thereto, requires information to be presented by

1 the seller, without demanding and receiving from the seller that infor-
 2 mation. Every scrap metal dealer shall file and maintain a record of in-
 3 formation obtained in compliance with the requirements in K.S.A. 2008
 4 Supp. 50-6,110, and amendments thereto. All records kept in accordance
 5 with the provisions of this act shall be open at all times to peace or law
 6 enforcement officers and shall be kept for two years. If the required
 7 information is maintained in electronic format, the scrap metal dealer
 8 shall provide a printout of the information to peace or law enforcement
 9 officers upon request.

10 (b) *It shall be unlawful for any scrap metal dealer, or employee or*
 11 *agent of the dealer, to purchase any item or items of regulated scrap*
 12 *metal in a transaction for which K.S.A. 2008 Supp. 50-6,110, and amend-*
 13 *ments thereto, requires information to be presented by the seller, without*
 14 *obtaining from the seller a signed statement that: (1) each item is the*
 15 *seller's own personal property, is free of encumbrances and is not stolen;*
 16 *or (2) that the seller is acting for the owner and has permission to sell*
 17 *each item.*

18 (c) *It shall be unlawful for any scrap metal dealer, or employee or*
 19 *agent of the dealer, to purchase any junk vehicle in a transaction for*
 20 *which K.S.A. 2008 Supp. 50-6,110, and amendments thereto, requires*
 21 *information to be presented by the seller, without: (1) inspecting the ve-*
 22 *hicle offered for sale and recording the vehicle identification number; and*
 23 *(2) obtaining an appropriate vehicle title or bill of sale issued by a gov-*
 24 *ernmentally operated vehicle impound facility if the vehicle purchased*
 25 *has been impounded by such facility or agency.*

26 (d) *It shall be unlawful for any scrap metal dealer, or employee or*
 27 *agent of the dealer, to, ~~directly or indirectly,~~ purchase or receive any*
 28 *regulated scrap metal from a minor ~~or receive any stolen property or any~~*
 29 *property which such dealer has reason to believe or suspect cannot be*
 30 *rightfully or lawfully sold by the person offering it.*

31 (e) *It shall be unlawful for any scrap metal dealer, or employee or*
 32 *agent of the dealer, to purchase any of the following items of regulated*
 33 *scrap metal property without obtaining proof that the seller is an em-*
 34 *ployee, agent or person who is authorized to sell the item of regulated*
 35 *scrap metal property on behalf of the governmental entity, utility pro-*
 36 *vider, railroad, cemetery, civic organization or scrap metal dealer:*

- 37 (1) Utility access cover;
- 38 (2) street light poles ~~and~~ or fixtures;
- 39 (3) road ~~and~~ or bridge guard rails;
- 40 (4) highway or street sign;
- 41 (5) water meter cover;
- 42 (6) traffic directional ~~and~~ or traffic control signs;
- 43 (7) traffic light signals;

- 1 (8) any metal marked with any form of the name or initials of a gov-
2 ernmental entity;
- 3 (9) property owned and marked by a telephone, cable, electric, water
4 or other utility provider;
- 5 (10) property owned and marked by a railroad;
- 6 (11) funeral markers ~~and~~ or vases;
- 7 (12) historical markers;
- 8 (13) bales of regulated scrap metal property;
- 9 (14) beer kegs;
- 10 (15) manhole covers;
- 11 (16) fire hydrants or fire hydrant caps;
- 12 (17) junk vehicles with missing or altered vehicle identification
13 numbers;
- 14 (18) real estate signs; and
- 15 (19) bleachers or risers, **in whole or in part.**

16 (f) It shall be unlawful for any scrap metal dealer, **or employee or**
17 **agent of the dealer**, to sell, trade, melt or crush, or in any way dispose
18 of, alter or destroy any regulated scrap metal, junk vehicle or vehicle part
19 upon notice from any law enforcement agency, or any of their agents or
20 employees, that they have cause to believe an item has been stolen. A
21 scrap metal dealer shall hold any of the items that are designated by or
22 on behalf of the law enforcement agency for 30 days, exclusive of weekends
23 and holidays.

24 Sec. 4. K.S.A. 2008 Supp. 50-6,112 is hereby amended to read as
25 follows: 50-6,112. (a) Except as provided in subsections (b) and (c), any
26 person intentionally violating the provisions of K.S.A. 2008 Supp. 50-
27 6,109 through 50-6,111, and amendments thereto, shall be guilty of a
28 class C misdemeanor; and shall be subject to a fine of not less than \$200
29 nor more than \$500 or confinement in the county jail for a term of not
30 more than one month, or both such fine and confinement.

31 (b) Any person convicted of violating the provisions of K.S.A. 2008
32 Supp. 50-6,109 through 50-6,111, and amendments thereto, for the second
33 time within a two-year period shall be guilty of a class B misdemeanor
34 and shall be subject to a fine of not less than \$500 nor more than \$1000
35 or confinement in the county jail for a term of not more than six months,
36 or both such fine and confinement.

37 (c) Any person convicted of violating the provisions of K.S.A. 2008
38 Supp. 50-6,109 through 50-6,111, and amendments thereto, for the third
39 and subsequent times within a two-year period shall be guilty of a class
40 A misdemeanor and shall be subject to a fine of not less than \$1000 nor
41 more than \$2500 or confinement in the county jail for a term of not more
42 than one year, or both such fine and confinement.

43 Sec. 5. K.S.A. 2008 Supp. 50-6,109, 50-6,110, 50-6,111 and 50-6,112

- 1 are hereby repealed.
- 2 Sec. 6. This act shall take effect and be in force from and after its
- 3 publication in the statute book.

8-6



Kansas **Cable Telecommunications** Association

Testimony In Support of SB 237

Offered By

John J. Federico, J.D.

On Behalf of the KCTA

House Judiciary Committee

March 11, 2009

Chairman Kinzer, I appreciate the opportunity to appear before your committee in strong support of SB 237. I am John Federico, President and Legislative Counsel for the Kansas Cable Telecommunications Association.

In short, the cable industry stands alongside the many industries represented by the proponents of this bill, and support any efforts by the Kansas Legislature to deter the theft of copper and other necessary to serve our customers.

The increased frequency and severity of these crimes has made the bolstering of the current penalty provisions in our Kansas statutes one our industries highest priorities.

As you can imagine, the theft of copper and other materials creates disruption of service and costly repair and replacement of parts and materials. Most times, the theft of these materials is indiscriminate, and destructive. What was once a nuisance is now a severe *economic, customer service* and *safety issue*.

We strongly urge your support of SB 237 and we stand ready at assist in any way possible to pass this important legislation.

I am happy to stand for questions.

House Judiciary

Date 3-11-09

Attachment # 9



Building a Better Kansas Since 1934
200 SW 33rd St. Topeka, KS 66611 785-266-4015

**TESTIMONY OF
ASSOCIATED GENERAL CONTRACTORS OF KANSAS
BEFORE HOUSE COMMITTEE ON JUDICIARY
SB 237**

March 11, 2009

By Eric Stafford, Associated General Contractors of Kansas, Inc.

Mister Chairman and members of the committee, my name is Eric Stafford. I am the Director of Government Affairs for the Associated General Contractors of Kansas, Inc. The AGC of Kansas is a trade association representing the commercial building construction industry, including general contractors, subcontractors and suppliers throughout Kansas (with the exception of Johnson and Wyandotte counties).

The AGC of Kansas supports Senate Bill 237 and asks that you recommend it favorably for passage.

Scrap metal theft remains a major problem for the commercial construction industry. The passage of HB 2035 in 2007 took positive steps in requiring scrap metal dealers in maintaining records of individuals looking to sell regulated scrap metals.

With this legislation in place however, theft remains an issue to AGC members with material costs at all-time highs. For example, a new 500 foot role of 500MCM wire would cost about \$3,000. Members are cautious of installing copper piping at jobsites for fear of individuals stealing the metal for resale.

SB 237 would require additional information to be collected by the scrap metal dealer for the individual selling the metal while also strengthening the penalties and fines for offenders. Legislation that would deter property theft crime of scrap metals is supported by AGC.

Again, the AGC of Kansas respectfully requests that you recommend SB 237 favorably for passage. Thank you for your consideration.

House Judiciary
Date 3-11-09
Attachment # 10



**Written Testimony of Sandie Bayless
Before the House Judiciary Committee
On SB 237
March 11, 2009**

Chairman Kinzer and members of the committee, thank you for the opportunity to provide written testimony in support of SB 237.

For many years, electric utilities, such as Westar Energy, have been victims of metal theft. Copper is the most common target for theft. With recent high commodity prices, we saw record numbers of thefts. Last year, we incurred an estimated \$130,000 of known losses from metal thefts. Commodity prices have declined, but thefts still occur on a regular basis.

We have two reasons to support this legislation, our employees and our customers. Many times, the targets of metal theft are devices or equipment that provide safety from electric shock. Eighty percent of the thefts that occur on our property happen at our substations. These thefts directly impact safety and reliability. There is a reason substations have physical barriers to entry. The equipment in those facilities can be dangerous if not handled by experienced professionals.

In Wichita, you could drive in most neighborhoods and find our poles have lost their grounding wires. Thieves have literally chopped out these wires with a hatchet and put the strand of wire in their car and driven to the next pole to repeat the process. During the ice storm recovery in late 2007, our linemen arrived at a site near Manhattan to put the conductor back on a pole and found someone had already chopped out the span of conductor and carried it off. There is a financial impact to these thefts, but our greater concern is for the safety of our employees and customers.

We support SB 237 because it provides additional deterrent to the theft of metals. Thank you for your consideration of my comments.



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

STEVE SIX
ATTORNEY GENERAL

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House Judiciary Committee
Senate Bill 159
Assistant Attorney General Patrick Broxterman
March 11, 2009

Mr. Chairman and members of the committee, thank you for allowing me to provide testimony in support of Senate Bill 159, legislation that is complementary to our tobacco Master Settlement Agreement (“MSA”) escrow statutes. I am the senior Assistant Attorney General in the Tobacco Enforcement Unit of the Office of Attorney General Steve Six. Attorney General Six is a strong proponent of this legislation and believes it will help ensure continued receipt of monies from the MSA.

The MSA is an agreement between 52 states and territories (“Settling States”), and multiple Participating Tobacco Manufacturers (“PMs”). Pursuant to this agreement, Kansas receives a payout of approximately \$55 million per year, plus an approximate additional \$15 million per year from 2008 through 2017.¹ To receive this money, all Settling States, including Kansas, must “diligently enforce” certain laws ensuring that Non-Participating Tobacco Manufacturers (“NPMs”) to the MSA deposit the required funds into individual escrow accounts.

According to our current law, these escrow funds ensure “that the state will have an eventual source of recovery from [NPMs] if they are proven to have acted culpably [regarding certain tobacco health related claims]. It is thus in the interest of the state to require that NPMs establish a reserve fund to guarantee a source of compensation for future claims, and to prevent NPMs from deriving large, short-term profits and then becoming judgment-proof before liability may arise.” (K.S.A. 50-6a01). The proposed legislation assists with these efforts.

Currently, the PMs are challenging every Settling State on the diligent enforcement of its MSA escrow laws. Pursuant to the MSA’s dispute resolution procedures, the PMs have initiated nationwide arbitration for enforcement actions in 2003 – 2005. For the 2003 dispute, the arbitration is set to begin November, 2009. The arbitrations for 2004 and 2005 likely will began shortly thereafter. Additionally, the PMs are preparing to challenge enforcement for 2006 and will likely challenge enforcement for each year thereafter.

¹ These numbers differ each year depending on, among other things, nationwide cigarette and roll-your-own tobacco sales.

House Judiciary

Date 3-11-09

Attachment # 12

Regardless of the diligent enforcement determination for any past year, we must ensure that Kansas diligently enforces its escrow statute or risk losing annual MSA payouts.

Senate Bill 159 proposes changes to the laws supporting the Requirements for Sale of Cigarettes Act (“MSA Escrow Statutes”) (K.S.A. 50-6a01 – 50-6a03). The bill amends K.S.A. 50-6a04, and proposes eighteen new sections. It provides enhanced enforcement of the MSA Escrow Statutes and thus helps ensure continued receipt of MSA payouts. The majority of other MSA Settling States have already adopted most of this legislation.

SUMMARY OF BILL SECTIONS

Section 1: Updates and adds to the definitions currently in K.S.A. 50-6a04(j). Particularly important is the addition of “brand family,” which describes how stamping agents must classify cigarette sales on their monthly reports to the Kansas Department of Revenue (“KDOR”).

Section 2: Changes the resident agent requirements for NPMs and requires the NPMs to consent to the jurisdiction of the 3rd Judicial District Court of Kansas in Shawnee County. The section is modeled after the Kansas Registered Office and Resident Agent statutes (K.S.A. 17-6203 – 17-6205).

Section 3: Details general reporting requirements for licensed Kansas distributors and wholesale dealers (“stamping agents”) in relation to the MSA.

Section 4: Allows the Attorney General (“AG”) and KDOR to share information. Also, allows information sharing with federal agencies and agencies of other states for enforcement of similarly situated laws. Information shared under this section by the AG or KDOR remains confidential, however any person lawfully releasing information pursuant to this section shall not be subject to Kansas’s confidential taxpayer liability laws (K.S.A. 75-5133.) Also allows Tobacco Product Manufacturers (“TPMs”) to inquire to stamping agents regarding products sold.

Section 5: Requires a new NPM or “high risk” for non-compliance NPM to post a bond of at least \$50,000. If an NPM fails to meet its escrow obligation, the state may use this bond for a judgment.

Section 6: Requires a stamping agent to provide assurance of compliance with this act.

Section 7: Allows KDOR to suspend or revoke the license of and impose a civil penalty on any stamping agent violating this act. Also, allows KDOR to request help from the AG's office for administrative hearings.

Section 8: Identifies contraband items and provides exceptions. Generally, the exceptions allow stamping agents to bring certain contraband (or "delisted") product into the state to store for sale in another state.

Section 9: Allows the AG to seek an injunction against a stamping agent violating this act.

Section 10: In addition to the Class A misdemeanor for NPMs submitting false information under current law, establishes a Class B misdemeanor for anyone who sells or possesses product in violation of this act. Also, gives the Attorney General concurrent authority along with a county or district attorney to prosecute violations of this act.

Section 11: Makes violations of this act a deceptive trade practice under the Kansas Consumer Protection Act.

Section 12: Allows for reclaiming attorneys fees and costs of an action.

Section 13: Presumes numbers of cigarettes and roll-your-own product submitted by KDOR to the AG accurate for any action brought under this act.

Section 14: Allows the AG to promulgate rules regarding TPMs. Allows KDOR to do the same for stamping agents.

Section 15: Establishes that K.S.A. 50-6a01 – 50-6a03 controls if there are any conflicts.

Section 16 (Changes to K.S.A. 50-6a04):

Subsection (a): Makes it illegal to affix or caused to be affixed tax stamps to tobacco products of TPMs not listed on the directory. Second, makes it illegal to sell, offer, possess for sale, or import cigarettes of a TMP not included in the directory.

Subsection (b): Updates AG's directory language.

Subsection (c): Requires TPMs to annually certify that they are either a PM to the MSA, or an NPM that is in compliance with the Kansas escrow laws, and all relevant rules and regulations. Requires PMs to provide a list of brand families for purposes of calculating payments under the MSA, and certify that it is a party to the MSA. Requires NPMs to provide a list of brand families, the number of cigarettes sold by brand family, a copy of the escrow agreement, details of any withdrawals or transfers from the escrow fund, and to certify they have made the required escrow deposits. It also requires joint and several liability of NPM importers for escrow payments and lists document retention requirements.

Section 17: Repeals former K.S.A. 50-6a04.

Thank you for allowing me to testify today in support of Senate Bill 159. I am happy to answer any questions.

SENATE BILL No. 159

By Committee on Judiciary

2-2

Balloon 1

House Judiciary
Date 3-11-09
Attachment # 13

9 AN ACT concerning tobacco; relating to the enforcement of the laws
10 regarding the sale of cigarettes; amending K.S.A. 50-6a04 and repeal-
11 ing the existing section.
12

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

14 New Section 1. As used in this act:

15 (a) "Act" means the provisions of K.S.A. 50-6a01 through 50-6a06,
16 and amendments thereto, and the provisions of sections 1 through 15,
17 and amendments thereto.

18 (b) "Brand family" means all styles of cigarettes sold under the same
19 trademark and differentiated from one another by means of additional
20 modifiers or descriptors, including, but not limited to, "menthol,"
21 "lights," "kings," and "100s," and includes any brand name (alone or in
22 conjunction with any other word), trademark, logo, symbol, motto, selling
23 message, recognizable pattern of colors or any other indicia of product
24 identification identical, similar to or identifiable with a previously known
25 brand of cigarettes.

26 (c) "Cigarette" has the same meaning given that term in subsection
27 (d) of K.S.A. 50-6a02, and amendments thereto.

28 (d) "Director" means the director of taxation.

29 (e) "Master settlement agreement" has the same meaning given that
30 term in subsection (e) of K.S.A. 50-6a02, and amendments thereto.

31 (f) "Non-participating manufacturer" means any tobacco product
32 manufacturer that is not a participating manufacturer.

33 (g) "Participating manufacturer" has the meaning given that term in
34 subsection (i)(1) of K.S.A. 50-6a02, and amendments thereto.

35 (h) "Qualified escrow fund" has the same meaning given that term
36 in subsection (f) of K.S.A. 50-6a02, and amendments thereto.

37 (i) "Retail dealer" has the same meaning given that term in subsec-
38 tion (q) of K.S.A. 79-3301, and amendments thereto.

39 (j) "Stamping agent" means a person who is authorized to affix tax
40 indicia to packages of cigarettes pursuant to K.S.A. 79-3311, and amend-
41 ments thereto, or any person who is required to pay the tax on the priv-
42 ilege of selling or dealing in roll-your-own tobacco products pursuant to
43 K.S.A. 79-3371, and amendments thereto.

"Resident agent" means a domestic corporation, a domestic limited partnership, a domestic limited liability company or a domestic business trust or a foreign corporation, a foreign limited partnership, a foreign limited liability company or a foreign business trust authorized to transact business in this state, and which is generally open during regular business hours to accept service of process on behalf of a non-participating manufacturer.

[Reletter remaining subsections.]

1 (k) "Tax indicia" has the same meaning given that term in subsection
2 (u) of K.S.A. 79-3301, and amendments thereto.

3 (l) "Tobacco product manufacturer" has the same meaning given that
4 term in subsection (i) of K.S.A. 50-6a02, and amendments thereto.

5 (m) "Units sold" has the same meaning given that term in subsection
6 (j) of K.S.A. 50-6a02, and amendments thereto.

7 (n) "Vending machine operator" has the same meaning given that
8 term in subsection (y) of K.S.A. 79-3301, and amendments thereto.

9 New Sec. 2. (a) Any non-participating manufacturer that has not reg-
10 istered with the secretary of state to do business in the state as a foreign
11 corporation or business entity shall, as a condition precedent to having
12 its brand families included or retained in the directory, appoint and con-
13 tinually engage without interruption the services of an agent in this state
14 to act as agent for the service of process on whom all process, and any
15 action or proceeding against it concerning or arising out of the enforce-
16 ment of this act may be served in any manner authorized by law. Such
17 service shall constitute legal and valid service of process on the non-
18 participating manufacturer. The non-participating manufacturer shall
19 provide to the attorney general the name, address, phone number, proof
20 of the appointment and availability of such resident agent, and such in-
21 formation shall be provided to the satisfaction of the attorney general.

22 (b) (1) A non-participating manufacturer may substitute its ~~regis-~~
23 ~~tered~~ agent for another by notifying, in writing sent via certified or reg- resident
24 istered mail, the attorney general of such termination of the authority of
25 the current agent and providing proof to the satisfaction of the attorney
26 general of the appointment of a new agent. Such substitution shall not
27 become effective until 30 days after receipt of such notification by the
28 attorney general.

29 (2) A resident agent of a non-participating manufacturer that wishes
30 to resign shall notify the attorney general, in writing via certified or reg-
31 istered mail, and provide to the attorney general the name and address
32 of the successor agent. There shall be attached to the notification a state-
33 ment of each affected non-participating manufacturer ratifying such
34 change of resident agent. Upon receipt of such notification by the attor-
35 ney general, the successor resident agent shall become the resident agent
36 of such non-participating manufacturers that have ratified and approved
37 the substitution.

38 (3) (A) A resident agent of a non-participating manufacturer may re-
39 sign without appointing a successor by notifying, in writing sent via cer-
40 tified or registered mail, the attorney general. Such resignation shall not
41 become effective until 60 days after receipt of such notification by the
42 attorney general. There shall be attached to the notification an affidavit
43 by the resident agent, if an individual, or by the authorized officer, if a

1 corporation or other business entity, attesting that at least 30 days prior
2 to the expiration of the 60 day period, notice was sent via certified or
3 registered mail to the designated contact of the non-participating man-
4 ufacturer for which such resident agent was acting that such agent was
5 resigning its position.

6 (B) After receipt of the notice of resignation of its resident agent, the
7 non-participating manufacturer for which such resident agent was acting
8 shall obtain and designate a new resident agent to take the place of the
9 resigning resident agent. If such non-participating manufacturer fails to
10 obtain and designate a new resident agent and provide notice thereof, in
11 writing via certified or registered mail, to the attorney general prior to
12 the expiration of the 60-day period provided in subparagraph (A), such
13 non-participating manufacturer shall be removed from the directory.

14 (4) If a ~~registered~~ agent of a non-participating manufacturer dies, the
15 non-participating manufacturer shall have 30 days after the death of such
16 ~~registered~~ agent to appoint and notify, in writing via certified or registered
17 mail, the attorney general of the non-participating manufacturer's new
18 ~~registered~~ agent. Service upon the non-participating manufacturer after
19 the death of such agent but prior to the appointment of a new agent shall
20 be had upon the secretary of state. Failure by the non-participating man-
21 ufacturer to appoint a new resident agent, and provide proof of such
22 appointment to the satisfaction of the attorney general prior to the ex-
23 piration of the 30-day period shall result in removal from the directory.

24 (5) After the resignation of the resident agent becomes effective as
25 provided in subparagraph (3)(A), or after the death of such resident agent
26 as provided in paragraph (4), and if no new resident agent is obtained
27 and notification is provided in the time and manner required in this sec-
28 tion, then service of process against the non-participating manufacturer
29 for which the previous resident agent had been acting shall thereafter be
30 made upon the secretary of state in the manner prescribed by K.S.A. 60-
31 304, and amendments thereto.

32 (c) A non-participating manufacturer shall provide irrevocable writ-
33 ten consent that actions brought under this act may be commenced
34 against it in the district court of the third judicial district, Shawnee county,
35 Kansas, by service of process on the appointed service of process agent
36 designated pursuant to this section.

37 New Sec. 3. (a) (1) ~~No later than 10 calendar days after the end of~~
38 ~~each calendar month, and more frequently if so directed by the attorney~~
39 ~~general or director, each stamping agent shall submit such information~~
40 ~~as the attorney general or the director requires to facilitate compliance~~
41 ~~with this act including, but not limited to, a list by brand family of the~~
42 ~~total number of cigarettes or the equivalent stick count to which the~~
43 ~~stamping agent affixed tax indicia, caused tax indicia to be affixed or oth-~~

resident

(d) A resident agent may change the resident agent's address when appointed to accept service of process on behalf of a non-participating manufacturer for which such agent is a resident agent, to another address in this state by mailing a letter, via certified or registered mail, to the attorney general. The letter shall be on company letterhead and executed by the resident agent. The letter shall contain the following:
(1) The names of all non-participating manufacturers represented by the resident agent;
(2) the address at which the resident agent has maintained the resident agent's office for each manufacturer;
(3) a certification of the new address to which the resident agent's address will be changed to on a given day; and
(4) a certification at which the resident agent will thereafter maintain the resident agent's address for each of the non-participating manufactures recited in the letter.

Upon the filing of the letter with the attorney general and thereafter or until further change of address, as authorized by law, the office address of the resident agent recited in the letter shall be located at the new address of the resident agent as provided in the letter.

1 erwise paid the tax due for such cigarettes during the previous calendar
2 month.

3 (2) Invoices and documentation of sales of all non-participating man-
4 ufacturer cigarettes, and any other information relied upon in reporting
5 to the attorney general or the director shall, upon request, be made avail-
6 able to the attorney general or the director. Such invoices and documents
7 shall be maintained.

- 8 (A) On or after January 1, 2010, for a period of at least three years,
- 9 (B) on or after January 1, 2011, for a period of at least four years, and
- 10 (C) on or after January 1, 2012, for a period of at least five years.

11 (b) At any time, the attorney general may request from the non-par-
12 ticipating manufacturer or the financial institution at which such manu-
13 facturer has established a qualified escrow fund for the purpose of com-
14 pliance with subsection (b) of K.S.A. 50-6a03, and amendments thereto,
15 proof of the amount of money in such fund, exclusive of interest, the
16 amount and date of each deposit to such fund and the amount and date
17 of each withdrawal from such fund.

18 (c) In addition to the information required to be submitted pursuant
19 to subsections (a) and (b) and subsection (c) of K.S.A. 50-6a04, and
20 amendments thereto, the attorney general or the director may require a
21 stamping agent or tobacco product manufacturer to submit any additional
22 information including, but not limited to, samples of the packaging or
23 labeling of each brand family as is necessary to enable the attorney general
24 to determine whether a tobacco product manufacturer is in compliance
25 with this act.

26 (d) A stamping agent or non-participating manufacturer receiving a
27 request pursuant to subsection (c) shall provide the requested informa-
28 tion within 30 calendar days from receipt of the request.

29 New Sec. 4. (a) The director is authorized to disclose to the attorney
30 general any information received under this act, as requested by the at-
31 torney general for purposes of determining compliance with or enforcing
32 the provisions of this act. The director and attorney general shall share
33 with each other information received under this act and the director and
34 the attorney general may share such information with federal agencies,
35 attorneys general of other states or directors of taxation or their equiva-
36 lents of other states, for purposes of enforcement of this act, the corre-
37 sponding federal laws or the corresponding laws of other states.

38 (b) Except as otherwise provided, any information provided to the
39 attorney general or director for purposes of enforcement of this act may
40 be shared between the attorney general and the director and shall not be
41 disclosed publicly by the attorney general or the director except when
42 necessary to facilitate compliance with and enforcement of this act.

43 (c) On a quarterly basis, and upon request made in writing by a to-

No later than 10 calendar days after the end of each calendar month, and more frequently if so directed by the attorney general or director, each stamping agent authorized to affix tax indicia to packages of cigarettes pursuant to K.S.A. 79-3311, and amendments thereto, shall submit such information as the attorney general or director requires.

No later than 20 calendar days after the end of each calendar month, and more frequently if so directed by the attorney general or director, each stamping agent who is required to pay the tax on the privilege of selling or dealing in roll-your-own tobacco products pursuant to K.S.A. 79-3371, and amendments thereto, shall submit such information as the attorney general or director requires.

for a period of at least three years

13-5

1 bacco product manufacturer, the attorney general or the director may
2 provide the name of any stamping agent who reports selling the tobacco
3 product manufacturer's products.

4 (d) On a quarterly basis, and upon request made in writing by a to-
5 bacco product manufacturer, a stamping agent shall provide to the re-
6 questing tobacco product manufacturer the total number of cigarettes,
7 by brand family, which the stamping agent reported to the attorney gen-
8 eral, pursuant to section 3, and amendments thereto, provided that such
9 information provided by the stamping agent to a tobacco manufacturer
10 shall be limited to the brand families of that manufacturer as listed in the
11 directory established in subsection (b) of K.S.A. 50-6a04, and amend-
12 ments thereto.

or director

product

13 (e) Unless disclosure is authorized under this section, all information
14 obtained by the director and disclosed to the attorney general or shared
15 with federal agencies, attorneys general of other states or directors of
16 taxation or their equivalents of other states for purposes of enforcement
17 of this act, the corresponding federal laws or the corresponding laws of
18 other states, shall be confidential. The penalties provided under K.S.A.
19 75-5133, and amendments thereto, shall not apply when information is
20 lawfully disclosed pursuant to this section.

21 New Sec. 5. (a) Notwithstanding any other provision of law, if a
22 newly qualified non-participating manufacturer is to be listed in the di-
23 rectory, or if the attorney general reasonably determines that any non-
24 participating manufacturer who has filed a certification pursuant to sub-
25 section (c) of K.S.A. 50-6a04, and amendments thereto, poses an elevated
26 risk for noncompliance with this act neither such non-participating man-
27 ufacturer nor any of its brand families shall be included or retained in the
28 directory unless and until such non-participating manufacturer, or its
29 United States importer that undertakes joint and several liability for the
30 manufacturer's performance in accordance with subsection (c)(3)(I) of
31 K.S.A. 50-6a04, and amendments thereto, has posted a bond in accord-
32 ance with this section.

33 (b) The bond required by this section shall be posted by corporate
34 surety located within the United States in an amount equal to the greater
35 of \$50,000 or the amount of escrow the non-participating manufacturer
36 in either its current or predecessor form was required to deposit for sales
37 of cigarettes in this state during the previous calendar year. The bond
38 shall be written in favor of the state of Kansas and shall be conditioned
39 on the performance by the non-participating manufacturer, or its United
40 States importer that undertakes joint and several liability for the manu-
41 facturer's performance in accordance with subsection (c)(3)(I) of K.S.A.
42 50-6a04, and amendments thereto, of all of its duties and obligations
43 under this act during the year in which the certification is filed and the

1 next succeeding calendar year.

2 (c) A non-participating manufacturer may be deemed to pose an el-
3 evated risk for noncompliance with this act if:

4 (1) The non-participating manufacturer, or any affiliate thereof, has
5 underpaid an escrow obligation with respect to any other state or juris-
6 diction that is a party to the master settlement agreement at any time
7 within the three calendar years prior to the date of submission or approval
8 of the most recent certification, unless:

9 (A) The non-participating manufacturer did not make the underpay-
10 ment knowingly or recklessly and the non-participating manufacturer
11 promptly cured the underpayment within 180 calendar days of notice of
12 the underpayment; or

13 (B) the underpayment or lack of payment is the subject of a good
14 faith dispute as documented to the satisfaction of the attorney general
15 and the underpayment is cured within 90 calendar days of entry of a final
16 order establishing the amount of the required escrow payment;

17 (2) any state or jurisdiction that is party to the master settlement
18 agreement has removed the non-participating manufacturer, or its brands
19 or brand families, or an affiliate, or such affiliate's brands or brand fam-
20 ilies, from the state's directory for noncompliance with the corresponding
21 laws of such other state or jurisdiction at any time within three calendar
22 years prior to the date of submission or approval of the most recent cer-
23 tification; or

24 (3) any state or jurisdiction that is party to the master settlement
25 agreement has pending litigation, or an unsatisfied judgment against the
26 non-participating manufacturer, or any affiliate thereof, for unpaid escrow
27 obligations, or associated penalties, costs or attorney fees.

28 (d) As used in this section, "newly qualified non-participating man-
29 ufacturer" means a non-participating manufacturer that has not previ-
30 ously been listed in the directory. Such non-participating manufacturer
31 may be required to post a bond in accordance with this section for the
32 first five years of its listing, or longer, if they have been deemed to pose
33 an elevated risk for noncompliance.

wholesale dealer, as defined in K.S.A. 79-3301, and
amendments thereto, or distributor, as defined in K.S.A.
79-3301, and amendments thereto, of cigarettes, as defined
in K.S.A. 50-6a02, and amendments thereto,

34 New Sec. 6. No ~~person~~ shall be issued a license or granted a renewal
35 of a license by the Kansas department of revenue ~~as a stamping agent~~
36 unless such ~~person~~ has provided to the ~~attorney general~~ reasonable as-
37 surances, in writing and under penalty of perjury, that such person will
38 comply fully with the stamping agent requirements in this act.

director

39 New Sec. 7. (a) In addition to or in lieu of any other civil or criminal
40 remedy provided by law, the director or the director's designee, upon a
41 finding that a stamping agent has violated subsection (a) of K.S.A. 50-
42 6a04, and amendments thereto, or any rules or regulations adopted pur-
43 suant to this act, may revoke or suspend the license of any licensee in the

wholesale dealer or distributor

1 manner provided by K.S.A.79-3309, and amendments thereto. Each
2 package of cigarettes to which tax indicia is affixed, is caused to be affixed
3 or tax is paid thereupon, and each sale or offer to sell cigarettes in violation
4 of subsection (a) of K.S.A. 50-6a04, and amendments thereto, shall con-
5 stitute a separate violation. The director may also impose a civil penalty
6 in an amount not to exceed the greater of 500% of the retail value of the
7 cigarettes involved or \$5,000 upon a finding of violation of subsection (a)
8 of K.S.A. 50-6a04, and amendments thereto, or a violation of any rules
9 or regulations adopted pursuant to this act. Such fine shall be imposed
10 in the manner provided by K.S.A. 79-3391, and amendments thereto. Any
11 fine collected pursuant to this subsection shall be remitted to the state
12 treasurer in accordance with the provisions of K.S.A. 75-4215, and
13 amendments thereto. Upon receipt of each such remittance, the state
14 treasurer shall deposit the entire amount in the state treasury to the credit
15 of the cigarette and tobacco products regulation fund created pursuant
16 to subsection (e) of K.S.A. 79-3391, and amendments thereto. The mon-
17 eys credited to this fund shall be used for the purposes of enforcement
18 of this act, or K.S.A. 79-3301 et seq., and amendments thereto.

19 (b) The attorney general or the attorney general's duly authorized
20 designee shall, when requested by the director, assist the director in a
21 hearing to suspend or revoke a stamping agent's license for a violation of
22 this act.

23 New Sec. 8. (a) The following shall be deemed contraband under
24 K.S.A. 79-3323, and amendments thereto:

25 (1) Any cigarettes that have been sold, offered for sale or possessed
26 for sale in this state in violation of subsection (a) of K.S.A. 50-6a04, and
27 amendments thereto; and

28 (2) any cigarettes to which tax indicia has been affixed, was caused to
29 be affixed or the tax paid thereupon as required by K.S.A. 79-3311 or 79-
30 3371, and amendments thereto, in violation of subsection (a) of K.S.A.
31 50-6a04, and amendments thereto.

32 (b) Any cigarettes constituting contraband may be seized by the at-
33 torney general or attorney general's authorized agent, the director or di-
34 rector's authorized agent or any law enforcement officer. All such ciga-
35 rettes shall be subject to seizure, with or without process or warrant, and
36 forfeiture, as provided herein and in K.S.A. 79-3324a, and amendments
37 thereto, and shall be destroyed and not resold. Such cigarettes shall be
38 deemed contraband whether the violation of subsection (a) of K.S.A. 50-
39 6a04, and amendments thereto, is knowing or otherwise.

40 (c) (1) Any stamping agent that distributes cigarettes in a state other
41 than Kansas may store in its Kansas warehouse cigarettes made contra-
42 band pursuant to this section if such stamping agent has affixed the tax
43 indicia of such other state to each package of cigarettes or can provide

1 evidence that it has paid the required tax thereupon.

2 (2) Cigarettes made contraband pursuant to this section, without be-
3 ing subject to seizure or forfeiture, may be transported in, into or through
4 the state either:

5 (A) On a commercial carrier with a proper bill of lading with an out-
6 of-state destination;

7 (B) when the tax indicia of another state is affixed to each package of
8 cigarettes; or

9 (C) on a commercial carrier with a proper bill of lading to a licensed
10 Kansas stamping agent who affixes tax indicia to cigarettes for sale in a
11 state other than Kansas if the packing slip accompanying the shipment
12 indicates the shipment is for sale in a state other than Kansas and iden-
13 tifies the state in which the shipment is to be sold. The time of delivery
14 of the shipments shall be indicated on the bill of lading of the common
15 carrier when delivery is completed. The receiving Kansas stamping agent
16 must, within 24 hours of receiving the delivery, affix or caused to be
17 affixed to each package of cigarettes the stamp of the state in which they
18 are to be sold.

19 New Sec. 9. The attorney general, on behalf of the director, may seek
20 an injunction to restrain a threatened or actual violation of this act by a
21 stamping agent and to compel the stamping agent to comply with this act.

22 New Sec. 10. (a) It shall be unlawful for a person to sell or distribute
23 cigarettes, or acquire, hold, own, possess, transport, import or cause to
24 be imported cigarettes that the person knows or should know are in-
25 tended for distribution or sale in this state in violation of subsection (a)
26 of K.S.A. 50-6a04, and amendments thereto. A violation of this subsection
27 shall be a class B misdemeanor.

28 (b) It shall be unlawful for a non-participating manufacturer, directly
29 or indirectly, to falsely represent to any person in Kansas:

- 30 (1) Any information about a brand family listed on the directory;
- 31 (2) that it is a participating manufacturer;
- 32 (3) that it has made all required escrow payments; or
- 33 (4) that it has satisfied any other requirements imposed pursuant to
34 this act.

35 A violation of this subsection is a class A nonperson misdemeanor.

36 (c) The attorney general shall have concurrent authority with any
37 county or district attorney to prosecute any violation of this section.

38 New Sec. 11. (a) Any violation of this act involving the sale or at-
39 tempted sale of cigarettes by a stamping agent to a retail dealer, or con-
40 sumer, or by a retail dealer, to a consumer, shall constitute an unlawful
41 and deceptive trade practice as provided in K.S.A. 50-626, and amend-
42 ments thereto, and shall be subject to the penalties provided for in K.S.A.
43 50-623 et seq., and amendments thereto, in lieu of or in addition to any

, vending machine operator

or vending machine operator

1 penalties provided in this act.

2 (b) For purposes of this section, a stamping agent shall be deemed a
3 "supplier" for purposes of a consumer transaction, as defined in subsec-
4 tion (c) of K.S.A. 50-624, and amendments thereto, regardless of whether
5 the stamping agent sells to a retail dealer or consumer.

6 New Sec. 12. In any action brought by the state to enforce the pro-
7 visions of this act the state shall be entitled to recover the costs of inves-
8 tigation, expert witness fees, costs of the action and reasonable attorney
9 fees. Recovery of such costs and fees shall be remitted to the state agency
10 or agencies who initiated and brought such action.

11 New Sec. 13. In any action under K.S.A. 50-6a03, and amendments
12 thereto, reports of the numbers of ~~cigarettes stamped~~ submitted to the
13 attorney general pursuant to subsection (a) of section 3, and amendments
14 thereto, shall be admissible in evidence and shall be presumed to accu-
15 rately account for the number of ~~cigarettes stamped~~ during the time pe-
16 riod by the stamping agent that submitted the report absent a contrary
17 showing by the non-participating manufacturer or importer. Nothing in
18 this section shall be construed as limiting or otherwise affecting the state's
19 right to maintain that such reports are incorrect or do not accurately
20 reflect a non-participating manufacturer's sales in the state during the
21 time period in question, and the presumption shall not apply in the event
22 the state does so maintain.

23 New Sec. 14. Notwithstanding subsection (j) of K.S.A. 50-6a02, and
24 amendments thereto, the attorney general may promulgate rules and reg-
25 ulations necessary to effect the purposes of this act for the regulation of
26 tobacco product manufacturers. The director may promulgate rules and
27 regulations necessary to effect the purposes of this act for the regulation
28 of stamping agents, retail dealers and vending machine operators.

29 New Sec. 15. If a court of competent jurisdiction finds that the pro-
30 visions of K.S.A. 50-6a01 through 50-6a03, and amendments thereto, con-
31 flict with and cannot be reconciled with any other provisions of this act,
32 then such provisions of K.S.A. 50-6a01 thru 50-6a03, and amendments
33 thereto, shall control. If any provision of this act causes K.S.A. 50-6a01
34 through 50-6a03, and amendments thereto, to no longer constitute a qual-
35 ifying or model statute as those terms are defined in the master settlement
36 agreement, then that portion of this act shall not be valid. If any provision
37 of this act is for any reason held to be invalid, unlawful or unconstitutional,
38 such decision shall not affect the validity of the remaining portions of this
39 act or any part thereof.

40 Sec. 16. K.S.A. 50-6a04 is hereby amended to read as follows: 50-
41 6a04. (a) No person may affix, or cause to be affixed, tax stamps or meter
42 impressions to individual packages of cigarettes or pay the required tax
43 on roll-your-own tobacco in accordance with K.S.A. 79-3371, and amend-

(c) If a court determines that a person has violated this act, the court shall order any profits, gains, gross receipts or other benefit from the violation be surrendered. Any profits, gains, gross receipts or other benefit surrendered from the violation shall be collected pursuant to this subsection and shall be remitted to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the cigarette and tobacco products regulation fund created pursuant to subsection (e) of K.S.A. 79-3391, and amendments thereto. (d) Unless otherwise expressly provided, the remedies or penalties provided by this act are cumulative to each other and to the remedies or penalties under all other laws of this state.

non-participating manufacturers'

or director

. These reports

on which state taxes were paid

1 ~~ments thereto, unless the tobacco product manufacturer that makes or~~
2 ~~sells such cigarettes or roll-your-own tobacco has:~~

3 ~~—(1) Become a participating manufacturer, or~~

4 ~~—(2) made all required escrow payments.~~

5 *No person may:*

6 (1) *Affix, or cause to be affixed, tax indicia to a package of cigarettes,*
7 *or otherwise pay the tax due upon such cigarettes, of a tobacco product*
8 *manufacturer brand family not included in the directory; or*

9 (2) *sell, offer, possess for sale or import for personal consumption in*
10 *this state, cigarettes of a tobacco product manufacturer brand family not*
11 *included in the directory.*

12 (b) (1) *Not later than July 1, 2002 2009, the attorney general shall*
13 *develop a list directory, to be posted on the attorney general's website;*
14 *of all tobacco product manufacturers that have become participating man-*
15 *ufacturers or made all required escrow payments. This list shall include*
16 *the brand families identified by each such tobacco product manufacturer*
17 *under subsection (c). The list shall be updated as necessary. A person*
18 *may rely upon the attorney general's list in affixing or causing to be affixed*
19 *stamps or meter impressions to individual packages of cigarettes or paying*
20 *the tax on roll-your-own tobacco as required by K.S.A. 79-3371, and*
21 *amendments thereto, of any brand family included on the list. Except as*
22 *otherwise provided, the directory shall list all tobacco product manufac-*
23 *turers and brand families of such tobacco product manufacturers that*
24 *have provided current and accurate certifications conforming to the*
25 *requirements of subsection (c).*

26 (2) *The attorney general shall not include or retain in the directory*
27 *any non-participating manufacturer, or non-participating manufacturer's*
28 *brand family, that has failed to provide the required certification, or*
29 *whose certification the attorney general determines is not in compliance*
30 *with subsection (c), unless such failure or noncompliance has been cured*
31 *to the satisfaction of the attorney general.*

32 (3) *In the case of a non-participating manufacturer, neither the to-*
33 *bacco product manufacturer nor a brand family shall be included or re-*
34 *tained in the directory if the attorney general concludes:*

35 (A) *That an escrow payment required pursuant to K.S.A. 50-6a03,*
36 *and amendments thereto, for any period for any brand family, whether*
37 *or not listed by such non-participating manufacturer, has not been fully*
38 *paid into a qualified escrow fund governed by an escrow agreement that*
39 *has been approved by the attorney general;*

40 (B) *that an outstanding final judgment, including interest thereon, for*
41 *a violation of K.S.A. 50-6a03, and amendments thereto, has not been fully*
42 *satisfied for such tobacco product manufacturer; or*

43 (C) *that, within three calendar years prior to the date of submission*

1 or approval of the most recent certification, such tobacco product man-
2 ufacturer has defaulted on escrow payments in any other state or juris-
3 diction that is a party to the master settlement agreement and the default
4 has not been cured within 90 calendar days of such default.

5 (4) The attorney general shall update the directory as necessary in
6 order to correct mistakes and to add or remove a tobacco product man-
7 ufacturer or brand family so as to keep the directory in conformity with
8 the requirements of this act.

9 (5) The attorney general shall promptly post in the directory and
10 transmit by electronic mail to each stamping agent that has provided an
11 electronic mail address, notice of removal from the directory of a tobacco
12 product manufacturer or brand family.

13 (6) Unless otherwise provided by agreement between a stamping
14 agent and a tobacco product manufacturer, the stamping agent shall be
15 entitled to a refund from a tobacco product manufacturer for any money
16 paid by the stamping agent to the tobacco product manufacturer for any
17 cigarettes of the tobacco product manufacturer in the possession of the
18 stamping agent on the effective date of removal from the directory of that
19 tobacco product manufacturer or brand family.

20 (7) Unless otherwise provided by agreement between a retail dealer
21 or a vending machine operator and a tobacco product manufacturer, a
22 retail dealer or a vending machine operator shall be entitled to a refund
23 from a tobacco product manufacturer for any money paid by the retail
24 dealer or vending machine operator to a stamping agent for any cigarettes
25 of the tobacco product manufacturer still in the possession of the retail
26 dealer or vending machine operator on the effective date of removal from
27 the directory of that tobacco product manufacturer or brand family.

28 (c) In order to be included on the list developed by the attorney
29 general under subsection (b), a tobacco product manufacturer shall (1)
30 submit to the attorney general a list of brand families whose cigarettes
31 are to be counted in calculating the participating manufacturer's annual
32 payments under the master settlement agreement or required escrow
33 payments whichever is applicable, (2) appoint a registered agent for serv-
34 ice of process in the state and identify such registered agent to the attor-
35 ney general, and (3) certify, under penalty of perjury, that all escrow
36 payments have been made by all other tobacco product manufacturers
37 that previously made or sold brand families identified under this subsec-
38 tion or brand style included within such brand families, except that, if the
39 brand family or brand style was made or sold by the manufacturer before
40 the effective date of this act, such manufacturer shall be required only to
41 identify such predecessor manufacturer or manufacturers. A tobacco
42 product manufacturer may update the list to reflect changes: (1) On or
43 before April 30 of each year, every tobacco product manufacturer whose

1 cigarettes are sold in this state, whether directly or through a stamping
2 agent or similar intermediary or intermediaries, shall execute and deliver
3 in the manner prescribed by the attorney general a certification to the
4 attorney general certifying under penalty of perjury that, as of the date
5 of such certification, such tobacco product manufacturer either is:

6 (A) A participating manufacturer; or

7 (B) in full compliance with K.S.A. 50-6a03, and amendments thereto,
8 including payment of all quarterly installment payments as may be re-
9 quired by subsection (d).

10 (2) A participating manufacturer shall include in its certification a
11 list of its brand families. The participating manufacturer shall update such
12 list 30 calendar days prior to any addition to, or modification of its brand
13 families by executing and delivering a supplemental certification to the
14 attorney general.

15 (3) A non-participating manufacturer shall include in its certification:

16 (A) The number of units sold for each brand family sold in the state
17 during the preceding calendar year;

18 (B) a list of all of its brand families sold in the state at any time during
19 the current calendar year, including any brand family sold in the state
20 during the preceding calendar year that is no longer being sold in the
21 state as of the date of such certification;

22 (C) the identity, by name and address, of any other tobacco product
23 manufacturer who manufactured such brand families in the preceding or
24 current calendar year;

25 (D) a declaration that such non-participating manufacturer is regis-
26 tered to do business in the state, or has appointed a resident agent for
27 service of process, and provided notice thereof as required by section 2,
28 and amendments thereto;

29 (E) a declaration that such non-participating manufacturer:

30 (i) Has established and continues to maintain a qualified escrow fund;
31 and

32 (ii) has executed an escrow agreement that governs the qualified es-
33 crow fund and that such escrow agreement has been reviewed and ap-
34 proved by the attorney general;

35 (F) a declaration that such non-participating manufacturer consents
36 to the jurisdiction of the district court of the third judicial district, Shaw-
37 nee county, Kansas, for purposes of enforcing this act, or rules or regu-
38 lations promulgated pursuant thereto, as required by subsection (c) of
39 section 2, and amendments thereto;

40 (G) a declaration that such non-participating manufacturer is in full
41 compliance with subsection (b) of K.S.A. 50-6a03, and amendments
42 thereto, and any rules or regulations promulgated pursuant to this act;

43 (H) (i) the name, address and telephone number of the financial in-

1 *stitution where the non-participating manufacturer has established such*
2 *qualified escrow fund required pursuant to subsection (b) of K.S.A. 50-*
3 *6a03, and amendments thereto;*

4 *(ii) the account number of such qualified escrow fund and any sub-*
5 *account number for the state of Kansas;*

6 *(iii) the amount such non-participating manufacturer placed in such*
7 *qualified escrow fund for cigarettes sold in this state during the preceding*
8 *calendar year, the date and amount of each such deposit and such evi-*
9 *dence or verification as may be deemed necessary by the attorney general*
10 *to confirm the foregoing; and*

11 *(iv) the amount and date of any withdrawal or transfer of funds the*
12 *non-participating manufacturer made at any time from such qualified*
13 *escrow fund or from any other qualified escrow fund into which it ever*
14 *made escrow payments pursuant to subsection (b) of K.S.A. 50-6a03, and*
15 *amendments thereto; and*

16 *(I) in the case of a non-participating manufacturer located outside of*
17 *the United States, a declaration from each of its importers to the United*
18 *States of any of its brand families to be sold in Kansas that such importer*
19 *accepts joint and several liability with the non-participating manufacturer*
20 *for:*

21 *(i) All escrow deposits due under subsection (b) of K.S.A. 50-6a03,*
22 *and amendments thereto;*

23 *(ii) all penalties assessed under subsection (b) of K.S.A. 50-6a03, and*
24 *amendments thereto; and*

25 *(iii) payment of all costs and attorney fees pursuant to any successful*
26 *action under this act against said manufacturer.*

27 *Such declarations by importers of a non-participating manufacturer*
28 *shall appoint for the declarant a resident agent for service of process in*
29 *Kansas in accordance with section 2, and amendments thereto, and con-*
30 *sent to jurisdiction in accordance with section 2, and amendments thereto.*

31 *(4) A tobacco product manufacturer may not include a brand family*
32 *in its certification unless:*

33 *(A) In the case of a participating manufacturer, said participating*
34 *manufacturer affirms that the brand family shall be deemed to be its*
35 *cigarettes for purposes of calculating its payments under the master set-*
36 *tlement agreement for the relevant year in the volume and shares deter-*
37 *mined pursuant to the master settlement agreement; or*

38 *(B) in the case of a non-participating manufacturer, said non-partic-*
39 *ipating manufacturer affirms that the brand family shall be deemed to be*
40 *its cigarettes for purposes of subsection (b) of K.S.A. 50-6a03, and amend-*
41 *ments thereto.*

42 *Nothing in this paragraph shall be construed as limiting or otherwise*
43 *affecting the state's right to maintain that a brand family constitutes cig-*

1 *arettes of a different tobacco product manufacturer for purposes of cal-*
2 *culating payments under the master settlement agreement or subsection*
3 *(b) of K.S.A. 50-6a03, and amendments thereto.*

4 (5) *Invoices and documentation of sales and other such information*
5 *relied upon for such certification shall be maintained by tobacco product*
6 *manufacturers.*

7 ~~(A) *On or after January 1, 2010, for a period of at least three years;*~~

8 ~~(B) *on or after January 1, 2011, for a period of at least four years;*~~

9 ~~*and*~~

10 ~~(C) *on or after January 1, 2012, for a period of at least five years.*~~

11 (d) *In addition to or in lieu of any other civil or criminal penalty*
12 *provided by law, upon a finding that a licensee has violated subsection*
13 *(a) or any rules and regulations adopted pursuant thereto, the director*
14 *may revoke or suspend the license of any licensee in the manner provided*
15 *by K.S.A. 79-3309, and amendments thereto. The director may also im-*
16 *pose a civil fine in an amount not to exceed the greater of 500% of the*
17 *retail value of the cigarettes or roll-your-own tobacco involved or \$5,000*
18 *upon a finding of a violation of subsection (a) or any rules and regulations*
19 *adopted pursuant thereto. Such fine shall be imposed in the manner*
20 *provided by K.S.A. 79-3391, and amendments thereto. The attorney gen-*
21 *eral may require a tobacco product manufacturer subject to the require-*
22 *ments of subsection (c) to make the escrow deposits required by subsection*
23 *(b) of K.S.A. 50-6a03, and amendments thereto, in quarterly installments*
24 *during the calendar year in which the sales covered by such deposits are*
25 *made. The attorney general may require production of information suf-*
26 *ficient to enable the attorney general to determine the adequacy of the*
27 *amount of the installment deposit.*

28 (e) ~~*Any cigarettes or roll-your-own tobacco that are stamped, to*~~
29 ~~*which a meter impression is affixed or for which tax is paid as required*~~
30 ~~*by K.S.A. 79-3371, and amendments thereto, in violation of subsection*~~
31 ~~*(a) shall be deemed contraband under K.S.A. 79-3323, and amendments*~~
32 ~~*thereto, and shall be subject to seizure and forfeiture as provided therein*~~
33 ~~*and in K.S.A. 79-3324a, and amendments thereto. All such cigarettes and*~~
34 ~~*roll-your-own tobacco seized and forfeited shall be destroyed. Such cig-*~~
35 ~~*arettes and roll-your-own tobacco shall be deemed contraband whether*~~
36 ~~*the violation of subsection (a) is knowing or otherwise.*~~

37 ~~*—(f) (1) The director may require wholesale dealers and distributors*~~
38 ~~*to submit such information as is necessary to enable the attorney general*~~
39 ~~*to determine whether a nonparticipating manufacturer has made the re-*~~
40 ~~*quired escrow payments.*~~

41 ~~*—(2) The attorney general may require nonparticipating manufacturers*~~
42 ~~*to submit such information as the attorney general may determine is*~~
43 ~~*necessary to enable the attorney general to determine whether a non-*~~

1 participating manufacturer has made the required escrow payments.
2 ~~—(g) The attorney general may require a nonparticipating manufac-~~
3 ~~turer to make the required escrow payments in quarterly installments~~
4 ~~during the year in which the sales covered by such payments are made~~
5 ~~in order to be placed on the list developed by the attorney general under~~
6 ~~subsection (b):~~
7 ~~—(h) (1) It shall be unlawful for a nonparticipating manufacturer, di-~~
8 ~~rectly or indirectly, to falsely represent to any person in Kansas:~~
9 ~~—(A) Any information about a brand family pursuant to the list sub-~~
10 ~~mitted pursuant to subsection (b);~~
11 ~~—(B) that it is a participating manufacturer;~~
12 ~~—(C) that it has made all required escrow payments; or~~
13 ~~—(D) that it has satisfied any other requirements imposed pursuant to~~
14 ~~this statute.~~
15 ~~—(2) Violation of this section is a class A, nonperson misdemeanor.~~
16 ~~—(i) The director and the attorney general may enter into a written~~
17 ~~agreement authorizing the exchange of information reasonably necessary~~
18 ~~to the enforcement and administration of this section.~~
19 ~~—(j) As used in this section:~~
20 ~~—(1) “Participating manufacturer” has the meaning ascribed thereto in~~
21 ~~subsection (a) of K.S.A. 50-6a03, and amendments thereto.~~
22 ~~—(2) “Required escrow payments” means the amounts described in~~
23 ~~subsection (b)(1) of K.S.A. 50-6a03, and amendments thereto.~~
24 ~~—(3) “Director” means the director of taxation.~~
25 Sec. 17. K.S.A. 50-6a04 is hereby repealed.
26 Sec. 18. This act shall take effect and be in force from and after its
27 publication in the statute book.

SENATE BILL No. 70

By Committee on Judiciary

1-22

Balloon 2

9 AN ACT concerning trusts; relating to the uniform principal and income
10 act.

11
12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. (a) Unless expressly prohibited by the governing instru-
14 ment, a trustee may release the power under K.S.A. 58-9-104, and
15 amendments thereto, and convert a trust into a unitrust as described in
16 this section if all of the following apply:

17 (1) The trustee determines that the conversion will enable the trustee
18 to better carry out the intent of the settlor or testator and the purposes
19 of the trust;

20 (2) the trustee gives to each qualified beneficiary of the trust, as de-
21 fined by K.S.A. 58a-103, and amendments thereto, written notice of (A)
22 the trustee's intention to release the power to adjust and to convert the
23 trust into a unitrust and (B) how the unitrust will operate, including what
24 initial decisions the trustee will make under this section; and

25 (3) no qualified beneficiary objects to the conversion to a unitrust in
26 a writing delivered to the trustee within 60 days of the mailing of the
27 notice under subsection (a)(2).

28 (b) (1) If a qualified beneficiary timely objects to the conversion to
29 a unitrust, the trustee may petition the appropriate district court to ap-
30 prove the conversion to a unitrust.

31 (2) A qualified beneficiary may request a trustee to convert to a un-
32 itrust. If the trustee does not convert, the qualified beneficiary may pe-
33 tition the appropriate district court to order the conversion.

34 (3) The district court shall approve the conversion or direct the re-
35 quested conversion if the court concludes that the conversion will enable
36 the trustee to better carry out the intent of the settlor or testator and the
37 purposes of the trust, after considering the factors enumerated under
38 subsection (c) deemed by the court to be relevant.

39 (c) In deciding whether to exercise the power conferred by subsec-
40 tion (a), the trustee shall consider all factors relevant to the trust and its
41 beneficiaries, including the following to the extent they are relevant:

42 (1) The nature, purpose, and expected duration of the trust;

3 (2) the intent of the settlor;

House Judiciary
Date 3-11-09
Attachment # 14

- 1 (3) the identity and circumstances of the beneficiaries;
- 2 (4) the needs for liquidity, regularity of income and preservation and
3 appreciation of capital;
- 4 (5) the assets held in the trust; the extent to which they consist of
5 financial assets, interests in closely held enterprises, tangible and intan-
6 gible personal property, or real property; the extent to which an asset is
7 used by a qualified beneficiary; and whether an asset was purchased by
8 the trustee or received from the settlor;
- 9 (6) the net amount allocated to income under the other sections of
10 this act and the increase or decrease in the value of the principal assets,
11 which the trustee may estimate as to assets for which market values are
12 not readily available;
- 13 (7) the actual and anticipated effect of economic conditions on prin-
14 cipal and income and effects of inflation and deflation; and
- 15 (8) the anticipated tax consequences of conversion.
- 16 (d) After a trust is converted to a unitrust, all of the following apply:
- 17 (1) The trustee shall follow an investment policy seeking a total return
18 for the investments held by the trust, whether the return is to be derived:
- 19 (A) from appreciation of capital;
- 20 (B) from earnings and distributions from capital; or
- 21 (C) from both.
- 22 (2) The trustee shall make regular distributions in accordance with
23 the governing instrument construed in accordance with the provisions of
24 this section.
- 25 (3) The term "income" in the governing instrument shall mean an
26 annual distribution — the unitrust distribution — equal to between 3%
27 and 5% — the payout percentage — of the net fair market value of the
28 trust's assets, whether such assets would be considered income or prin-
29 cipal under other provisions of this act, averaged over a period of up to
30 the three preceding years.
- 31 (e) The trustee may, in the trustee's discretion from time to time,
32 determine all of the following:
- 33 (1) The effective date of a conversion to a unitrust;
- 34 (2) the provisions for prorating a unitrust distribution for a short year
35 in which a qualified beneficiary's right to payments commences or ceases;
- 36 (3) the frequency of unitrust distributions during the year;
- 37 (4) the effect of other payments from or contributions to the trust on
38 the trust's valuation;
- 39 (5) whether to value the trust's assets annually or more frequently;
- 40 (6) what valuation dates to use;
- 41 (7) how frequently to value nonliquid assets and whether to estimate
42 their value;
- 3 (8) whether to omit from the calculations trust property occupied or

1 possessed by a qualified beneficiary; and
2 (9) any other matters necessary for the proper functioning of the
3 unitrust.

4 (f) (1) Expenses which would be deducted from income if the trust
5 were not a unitrust may not be deducted from the unitrust distribution.

6 (2) Unless otherwise provided by the governing instrument, the
7 unitrust distribution shall be paid from the following sources in the following
8 order: Net income, net realized short- term capital gains, net realized
9 long-term capital gains and the principal of the trust.

10 (g) The trustee or, if the trustee declines to do so, a qualified bene-
11 ficiary may petition the appropriate district court to:

12 (1) Authorize a payout percentage of less than 3% or more than 5%;

13 (2) provide for a distribution of net income, as would be determined
14 if the trust were not a unitrust, in excess of the unitrust distribution if
15 such distribution is necessary to preserve a tax benefit;

16 (3) average the valuation of the trust's net assets over a period other
17 than three years; and

18 (4) reconvert from a unitrust. Upon a reconversion, the power to
19 adjust under K.S.A. 58-9-104, and amendments thereto, shall be revived.

20 (h) A conversion to a unitrust does not affect a provision in the gov-
21 erning instrument directing or authorizing the trustee to distribute prin-
22 cipal or authorizing a qualified beneficiary to withdraw a portion or all of
23 the principal.

24 (i) Except as provided in subsection (j), a trust may not be converted
25 into a unitrust in any of the following circumstances:

26 (1) If payment of the unitrust distribution would change the amount
27 payable to a qualified beneficiary as a fixed annuity or a fixed fraction of
28 the value of the trust assets.

29 (2) If the unitrust distribution would be made from any amount which
30 is permanently set aside for charitable purposes under the governing in-
31 strument and for which a federal estate or gift tax deduction has been
32 taken, unless both income and principal are so set aside.

33 (3) If:

34 (A) Possessing or exercising the power to convert would cause an
35 individual to be treated as the owner of all or part of the trust for federal
36 income tax purposes; and

37 (B) the individual would not be treated as the owner if the trustee
38 did not possess the power to convert.

39 (4) If:

40 (A) Possessing or exercising the power to convert would cause all or
41 part of the trust assets to be subject to federal estate or gift tax with
42 respect to an individual; and

3 (B) the assets would not be subject to federal estate or gift tax with

1 respect to the individual if the trustee did not possess the power to
2 convert.

3 (5) If the conversion would result in the disallowance of a federal
4 estate tax or gift tax marital deduction which would be allowed if the
5 trustee did not have the power to convert.

6 (6) If the trustee is a qualified beneficiary of the trust.

7 (j) (1) If subsection (i)(3), (4) or (6) applies to a trustee and there is
8 more than one trustee, a co-trustee to whom the provision does not apply
9 may convert the trust, unless the exercise of the power by the remaining
10 trustee or trustees is prohibited by the governing instrument.

11 (2) If subsection (i)(3), (4) or (6) applies to all the trustees, the trust-
12 tees may petition the appropriate district court to direct a conversion.

13 (k) (1) A trustee may release the power conferred by subsection (a)
14 to convert to a unitrust if any of the following apply:

15 (A) The trustee is uncertain about whether possessing or exercising
16 the power will cause a result described in subsection (i)(3), (4) or (5).

17 (B) The trustee determines that possessing or exercising the power
18 will or may deprive the trust of a tax benefit or impose a tax burden not
19 described in subsection (i).

20 (2) The release may be permanent or for a specified period, including
21 a period measured by the life of an individual.

22 (l) This section shall be part of and supplemental to the uniform prin-
23 cipal and income act (1997).

24 Sec. 2. This act shall take effect and be in force from and after its
25 publication in the statute book.

New Section 2. (a) The income standard established in section 1, and amendments thereto, does not create a presumption or implication that a trustee who distributes less than 3% or more than 5% is breaching a trustee's fiduciary duty to a beneficiary.
(b) This section shall be part of and supplemental to the uniform principal and income act (1997).

[Renumber remaining section.]