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ON BEHALF OF THE
AMERICAN TORT REFORM ASSOCIATION

SUPPORTING S.B. 106, AN ACT TO
AMEND THE CONSUMER PROTECTION ACT

BEFORE THE KANSAS
SENATE JUDICIARY COMMITTEE

FEBRUARY 16, 2011

Senate Judiciary
2-16-11
Attachment 6

Mr. Chairman and Members of the Committee, I am appearing on behalf of the American Tort Reform Association ("ATRA") to express ATRA's support for S.B. 106.

Background

I am an associate in Shook, Hardy & Bacon L.L.P.'s Washington, D.C.-based Public Policy Group. My work focuses primarily on tort law and civil justice system reform; it is generally divided among legislative efforts, appellate litigation, and academic writing. I received my J.D. from Wake Forest University School of Law and my B.S. from the University of Virginia's McIntire School of Commerce. I have written on the issue addressed by S.B. 106, coauthoring *"That's Unfair!" Says Who – The Government or Litigant?: Consumer Protection Claims Involving Regulated Conduct*, 47 Washburn L.J. 93 (2007) [hereinafter *Consumer Protection Claims Involving Regulated Conduct*], with my colleagues Victor E. Schwartz and Cary Silverman.

ATRA's Interest

Founded in 1986, ATRA is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. ATRA believes S.B. 106 is sound legislation which will provide greater clarify and definition regarding important consumer protection provisions, promote consistency and fairness in consumer protection lawsuits, and help curb avenues for abuse.

S.B. 106 Would Provide Commonsense Reforms to Kansas' Consumer Protection Law

Hardly a day goes by today that we do not learn of a consumer protection lawsuit that takes our litigious culture to a new level. Examples of abuse extend from coast-to-coast. In the District of Columbia, an administrative law judge sued a neighborhood dry cleaner for $54 million after they allegedly lost a pair of his pants. They had displayed signs: "satisfaction guaranteed" and "next day service." He was not satisfied. A resident brought an action against AOL claiming that they offer new subscribers a cheaper rate than current subscribers. But he was not even a subscriber. A now ex-Florida Congressman sued phone companies claiming they should have refunded leftover balances on calling cards to the District of Columbia government as "unclaimed property." In California, we hear of a lawsuit against McDonald's claiming that by "tempting kids with toys to get them to nag their parents to buy Happy Meals," McDonald's commits a consumer protection violation through "pester power" and should no longer be permitted to sell Happy Meals. Another lawsuit contended that locks labeled "Made in the U.S.A." contain a few screws from abroad. Elsewhere, law firms sue cell phone companies claiming that the radiation may lead to brain cancer, despite the fact that there are no reported injuries or reputable scientific evidence to support such a claim and the Federal Communications Commission, which regulates the emissions, has found them to be safe.

S.B. 106 would amend the Kansas Consumer Protection Act ("KCPA") in a manner that helps avoid this unwarranted and expensive litigation. The bill would enshrine four commonsense principles into Kansas law. These include the following:

1. ***Consistency between state and federal law.*** Courts interpreting Kansas law as to what is an unfair or deceptive trade practices should not be at odds with the Federal Trade Commission (FTC). After all, state consumer protection laws were modeled off the Federal

Trade Act, which established the FTC in 1914. State adoption of "little-FTC Acts" was intended to complement the FTC Act by combining the resources to target unfair and deceptive trade practices at both the local and national levels. *See* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 Kansas L. Rev. 1, 5-16 (2006) (discussing the history of consumer protection statutes). Over time, many of the state laws also were amended to authorize private lawsuits, an element not included in the federal law.

State CPAs were not intended to lead to deviations or conflicts in interpretation with federal law. States, such as Kansas, can benefit from the standards, opinions, and adjudications developed by the FTC over several decades. That is why the consumer protection laws of at least 23 states include a provision directing state regulators to look to the FTC for guidance in terms of substantive law. *See Consumer Protection Claims Involving Regulated Conduct*, 47 Washburn L.J. at 103 n.40 (providing citations).

Section 2 amends K.S.A. 60-623 to provide such a measure. This reasonable rule of construction promotes consistency and helps assure that federal and state regulators do not work at cross purposes. In addition, it provides guidance upon which businesses can reasonably rely as to what practices are acceptable.

2. ***The Government, Not Private Lawyers, Should Decide What's Deceptive.*** The state and federal governments have established and charged various government agencies with regulating practices to protect the public health and safety. These responsibilities often include approving or providing standards for marketing practices, labeling of products, and terms of service. Millions of taxpayer dollars are spent each year to fund regulatory agencies. These public funds allow agencies to hire experts to formulate policy, inspectors to monitor conduct and respond to consumer complaints, and lawyers to further enforcement of the law.

More than two thirds of state legislatures have codified a policy that conduct authorized or permitted by a government agency is outside the scope of the consumer protection law. *See Consumer Protection Claims Involving Regulated Conduct*, 47 Washburn L.J. at 104 n.52 (providing citations). Section 2 would incorporate such a provision into K.S.A. § 50-623(c). These provisions are based on the concept that the legislature has determined certain matters are appropriate for resolution by administrative agencies with particular expertise. In addition, the public policy behind these provisions is that consumer protection laws were meant to fill a gap by protecting consumers where product safety was not already closely monitored and regulated by the government.

It would be odd to have one agency, for example, a state utility commission, find a practice acceptable, but have the state's attorney general bring an action claiming the same practice is deceptive. This principle should also hold true with respect to private lawsuits. In such cases, the government regulation should set the standard for acceptable business practices.

3. ***Those who relied on a misrepresentation should recover; those who did not view or rely upon the statement or practice should not.*** Section 3 of the bill codifies a commonsense ruling by the Kansas Supreme Court, in which the Court found that in order for an individual to recover damages for a violation of the KCPA, he or she must prove that the violation *caused* her to enter into the transaction that resulted in her loss. *See Finstad v. Washburn Univ. of Topeka*, 845 P.2d 685 (Kan. 1993). In that case, a group of college students sought civil penalties under the KCPA alleging that the university falsely stated in its catalogue that it was accredited by the National Shorthand Reporters Association. The only problem – the students admitted they did not rely on this statement when enrolling and most were not even aware of it. Nevertheless, the students claimed they were "aggrieved," in the words of the

KCPA, because they paid tuition for a program that was not accredited. The Kansas Supreme Court affirmed dismissal of the suit, finding that it would "not interpret an aggrieved consumer to be one who is neither aware of nor damaged by a violation of the Act." *Id.* at 473.

Section 3 of the bill places this sound decision in the text of Kansas law. It replaces the amorphous term "aggrieved" consumer by providing that a person who suffers a loss as a result of a KCPA violation may bring a lawsuit. It requires causation – providing that it is not enough that a person merely purchased a product or service – he or she must have done because he or she relied upon the alleged misrepresentation.

4. Only Consumers who bring a lawsuit for monetary damages should recover their actual loss. Section 3 of the bill also clarifies that the measure of damages for a private plaintiff who brings a KCPA claim is his or her "out-of-pocket" loss. This is defined as the difference between the amount paid by the consumer for the good or service and the actual market value of the good or service that the consumer received. The KCPA currently provides no guidance regarding the measure of damages in a private action. In other states, we have seen lawyers attempt to take advantage of loosely worded statutes to obtain substantial monetary judgments on behalf of clients who merely purchased a product or saw an advertisement, but otherwise received that for which they paid. A more certain, predictable definition of damages will reduce the possibility of "runaway" damage awards.

Conclusion

S.B. 106 clarifies the requirements to prove and recover damages in a consumer protection claim. This creates a fairer environment for all litigants. Kansas should adopt it.