KANSAS ASSOCIATION FOR JUSTICE

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To: The Honorable Thomas C. Owens, Chairperson
Members of the Senate Committee on Judiciary

From: N. Russell Hazlewood

Date: February 16, 2011

RE: SB 106 Consumer Protection Act

The Kansas Association for Justice (KsAJ) is a statewide, nonprofit organization of trial lawyers. KsAJ members support protection of the right to trial by jury and laws that are fair to all parties to a dispute. KsAJ supports consumer protection laws and the Kansas Consumer Protection Act. We are opposed to SB 106.

My name is Russ Hazlewood. I am a lawyer with the firm of Graybill & Hazlewood, L.L.C., in Wichita, Kansas. I graduated from the University of Kansas Law School in 1997. Since 2000, much of my practice has focused on advocating for and protecting the rights of Kansas consumers. I am very familiar with the Kansas Consumer Protection Act, and I am frequently called upon by the bar to lecture about the Act in continuing legal education programs. I am here to speak in opposition to SB 106 which, if enacted, would eviscerate the KCPA and abdicate the responsibility for safeguarding Kansas consumers to a bureaucracy in Washington, D.C.

The Kansas Consumer Protection Act, K.S.A. § 50-623, *et seq.*, was enacted in 1973 with the express purpose of broadening the law as necessary to protect consumers from suppliers who commit deceptive and unconscionable practices. Shortly after the KCPA became law, its legislative history was recorded in a Kansas law journal article authored by Barkley Clark, associate Dean and Professor of law at the University of Kansas School of Law. He acted as Special Counsel to the Legislature in connection with the KCPA. He explained that the KCPA was designed to afford broad protection and encompass all types of consumer transactions in lieu of a "scattershot" approach. He wrote:

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> The new consumer legislation is in great part a product of nearly four years' debate and refinement in the Legislature. It reflects the thinking, and in some cases the amendments, of many interest groups, including the Consumer Protection Division of the Attorney General's office, the Kansas Bankers Association, the Kansas Association of Finance Companies, the Kansas Retail Council, the credit unions, the Kansas Motor Vehicle Dealers Association, and the legal aid societies. The convergence of such wide-ranging interest groups has yielded a product which is essentially a compromise; it eliminates some of the most flagrant abuses in the consumer arena while at the same time protecting the legitimate lender and seller.
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> . . . .
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> The new Kansas Consumer Protection Act . . . increases the power of both the Attorney General and the private consumer to fight deceptive sales practices.

Clark, The New Kansas Consumer Legislation, 42 J.K.B.A.147-148, 189 (Fall 1973).

The KCPA reflects the Legislature's recognition of the "merit of encouraging consumers to pursue their rights" to enforce the act. *Alexander v. Certified Master Builders Corp.*, 268 Kan. 812, 822 (2000); Kansas Comment to K.S.A. § 50-636 ("The purpose of this provision is to encourage enforcement of the act by a consumer acting as his own 'private attorney general.'"). Professor Clark explained:

> [The KCPA] breaks new ground in granting substantial civil penalties to aggrieved consumers, in the hope they will enforce the Act as "private attorneys general." For example, a consumer may obtain appropriate declaratory and injunctive relief irrespective of his ability to recover damages. In addition, an aggrieved consumer may recover the greater of his actual damages or civil penalties of up to $2,000 as awarded in the discretion of the court . . . .

42 J.K.B.A. at 189.

Private enforcement is important because governmental agencies often lack the resources and/or the political willpower to prosecute every violation of the

KCPA. There are simply too many transactions, of too many types, and in too many geographic areas for any government agency to effectively police all of them. On the other hand, private enforcement, under the watchful eye of the Attorney General's office, has proven to be both an effective and efficient solution. In *Alexander*, the Kansas Supreme Court explained that private lawsuits serve not only to redress an individual consumer's damages, but also to stop deceptive acts and practices by suppliers. *Id.* at 823.

> It is the consumer who suffers from deceptive and unconscionable acts and practices by suppliers. In most cases involving deceptive and unconscionable acts, the consumer suffers monetary damage. The purpose of the KCPA is not only to stop such practices in the market place but also to provide consumers with an avenue to recover damages suffered. By allowing the consumer personal recovery together with attorney fees the overall purpose of the KCPA is advanced.

268 Kan. at 822.

The Court further explained the importance of civil penalties as a tool for restitution and deterrence. Sometimes, the consumer suffers damages which may be difficult to quantify monetarily, as when an elderly consumer is harassed by incessant, deceptive and/or threatening calls from an aggressive debt collector. In other circumstances, the amount of actual damages that might be proven would be insufficient to completely compensate the consumer for the burdens suffered or the inconvenience of prosecuting a lawsuit to enforce the Act. To remedy these situations, the KCPA provides for a civil penalty as an alternative to actual damages. In that regard, the Legislature allowed a consumer aggrieved under the KCPA to recover either damages or a civil penalty, whichever is greater.

Since its inception, the KCPA has included some protection for small business owners and farmers. K.S.A. § 50-624(b) defines "consumer" to include an individual, husband and wife, sole proprietor, or family partnership who seeks or acquires property or services for personal, family, household, business or agricultural purposes.

Over the past 37 years, the Legislature has repeatedly and consistently found it necessary to broaden the reach of the KCPA and to enhance the protections it affords to Kansas consumers. For example, when the KCPA was first enacted, a district court could award a consumer up to $2,000 as a civil penalty

where a violation was established. To deter misconduct, the Legislature strengthened the Act by increasing the maximum penalty to $5,000 in 1991, and to $10,000 in 2001. In addition, in 1996, the Legislature enacted provisions that permit a court to award additional civil penalties of up to $10,000 to elderly and disabled consumers victimized by deceptive or unconscionable practices. Just last year, those enhanced protections were also expanded to veterans and their surviving spouses and the immediate family members of our soldiers. K.S.A. § 50-676, *et seq.* (amended by 2010 Kansas Laws Ch. 129 (S.B. 269)).

The Legislature has also amended the Act on several occasions to make it possible for consumers to enforce it regardless that they have not suffered a distinct monetary loss. For example, in 1974, K.S.A. 50-634(b) was amended to confirm that a consumer aggrieved by a violation of the Act may sue to enforce it whether or not he or she has suffered a monetary loss; and in 1991, it amended K.S.A. § 50-626(b)(1)(B) to clarify that a consumer can seek to redress a deceptive act whether or not he or she was actually mislead. These amendments strengthened the Act by empowering better informed or more vigilant consumers to protect those who are more vulnerable.

In its present form, the KCPA is an effective tool for protecting consumers from suppliers who commit deceptive and unconscionable practices. The Act deters consumer fraud without widespread litigation; without imposing reporting or regulatory burdens on suppliers; and without imposing an undue burden on our limited State budgetary resources. The Act also protects honest and ethical suppliers from the unfair advantage their competitors might otherwise gain by engaging in false advertising or other misconduct. In short, the Act it is working as intended.

For reasons I do not comprehend, Senate Bill 106 proposes to eviscerate the KCPA and undo almost 40 years of progress in consumer protection law this State. The bill effectively abandons consumer protection to the Obama administration. If SB 106 is passed, the KCPA will be rendered impotent; dishonest suppliers will be emboldened; and victimized Kansas consumers will be left twisting in the wind.

SB 106 would abandon consumer protection to the federal government by rendering the KCPA inapplicable to almost every conceivable transaction.

SB 106 would make the KCPA inapplicable to any transaction "otherwise permitted or regulated by the [FTC] or any other regulatory body or officer acting

under [state or federal law]." The FTC is a federal enforcement agency with jurisdiction over transactions "in interstate commerce." The FTC and other federal and state regulatory bodies and officers have jurisdiction over virtually every aspect of modern commerce, *e.g.*, banking, real estate, food products, securities, healthcare services, pharmaceuticals, debt collection, legal services, accounting services, motor vehicle sales and even haircuts. It could and will be asserted that under SB 106, the KCPA is inapplicable to almost every transaction imaginable. Under the present law, victimized Kansas consumers can look to the Kansas Attorney General, or their local district or county attorney, or a private lawyer for assistance. If SB 106 is passed, these same consumers will be left with no remedy other than to call a distant bureaucrat who, in most instances, will be unwilling or unable to resolve the issue. Furthermore, even in those instances where a government agency does get involved, the consumer will not be made whole, as there is no private cause of action under the FTC Act or most other regulatory plans.

It is difficult to imagine how or why anyone who cares about protecting Kansas consumers would think it prudent to abandon the protections of the KCPA to a federal bureaucracy. Moreover, SB 106's treatment of the FTC Act just doesn't make sense. On the one hand, the bill provides that the KCPA must be construed in accordance with the FTC's policies and interpretations. On the other hand, the bill provides that the KCPA has no application whatsoever to transactions regulated by the FTC. In addition, unlike some other states' consumer protection laws, the KCPA was not based upon the FTC Act, and the definitions and prohibitions in the two acts differ significantly. While the bill requires Kansas courts to construe the KCPA according to federal decisions interpreting the FTC Act, there is no guidance about how to address differences in the statutory language or what must be done where there is disagreement among the federal circuits. In that regard SB 106 would inject unnecessary confusion into Kansas consumer protection law that will require decades of litigation to resolve.

SB 106 would repeal existing KCPA protections for small businesses and farmers.

SB 106 removes all protections currently afforded to small businesses and farmers under the KCPA. These protections have been in place for almost 40 years. While they have served as an important deterrent to victimizing these individuals and organizations, they have not generated substantial litigation. Consequently, we are left wondering why they should be repealed.

SB 106 would make it impossible for many victimized consumers to enforce the KCPA.

As stated above, the Legislature has made clear that a deceptive or unconscionable practice violates the KCPA even where it is unsuccessful. For example, if a supplier offers to sell a vitamin to a consumer under the guise that it will cure his cancer, the consumer can invoke the Act to protect other consumers, regardless that he was not deceived and did not purchase the product. Under that framework, the Act permits the stronger of us to protect the least of us. SB 106 would make that impossible by re-writing the law to condone dishonest practices to the extent they are unsuccessful.

By reversing the 1974 amendment to K.S.A. 50-634(b), SB 106 would also make the KCPA inapplicable to circumstances where a consumer is aggrieved by deceptive or unconscionable conduct that does not result in actual damages. For example, the Act will no longer protect consumers from dishonest or overreaching debt collection activities - regardless how dishonest or outrageous - unless the consumer accedes to the collector's demands and makes a payment. This would be a huge step backwards and could be construed as a legislative sanction for that type of wrongful conduct.

Finally, by foreclosing consumers from recovering any civil penalties, SB 106 effectively makes private enforcement of the KCPA impracticable. As stated above, many deceptive or unconscionable schemes do not result in easily identifiable monetary damages. Furthermore, the burdens of prosecuting a private enforcement action are considerable. This body has long recognized the importance of civil penalties in encouraging private enforcement and deterring wrongful conduct. With that in mind, the Legislature has repeatedly, consistently passed legislation to enhance the civil penalties available to aggrieved consumers under the KCPA. It would make no sense to reverse course by eliminating civil penalties in their entirety.

SB 106 appears to make the Act applicable only to pre-transaction misconduct.

Under the current law, a supplier can violate the KCPA before, during, or after a consumer transaction. For example, a collector may engage in unfair debt collection practices long after the underlying transaction has been concluded, and such conduct would be actionable. However, the new subsection 4(h) set out in SB 106 defines "loss" narrowly to include only those circumstances where the

wrongful conduct was an inducement to enter the transaction; and it provides that the Act can only be enforced by a consumer who suffers "loss." As such, it could be argued that, under SB 106, as long as the supplier is honest before the transaction, it is free to engage in deceptive or unconscionable practices at any time thereafter. Without limitation, this change would appear to eliminate all regulation of debt collection activities under the KCPA.

SB 106 would facilitate dishonest marketing of goods and services.

The new subsection 4(h) set out in SB 106 also limits damages to the difference between the price the consumer paid for a good or service and its actual market value. That change would facilitate dishonest marketing of goods and services, so long as they are sold for market value. So, for example, a car dealer could falsely represent that a vehicle had never been wrecked – or that it would get 50 mpg - so long as the sales price approximated a market price. Similarly, a jeweler could misrepresent the quality of a diamond and a multi-level marketer could unload a bottle of vitamins with the unequivocal promise they will cure any disease or reverse the aging process. Under that scenario, honest suppliers would be disadvantaged, as market forces would actually encourage bait-and-switch schemes.

Section 1 indicates SB 106 would apply retroactively, if passed, which is of significant concern to any pending KCPA cases or claims not yet filed. We also question the necessity of applying the bill retroactively.

The KCPA is important, and it works. Kansas consumers need and deserve its protections. On behalf of the Kansas Association for Justice, I respectfully request that the Committee oppose SB 106.