

March 6, 2012

**Testimony before the Senate Committee on Judiciary
in Support of HB 2629
re: Product Liability of Resellers of Used Products
on Behalf of the Kansas Chamber**

Dear Mr. Chairman and Members of the Committee:

Thank you for affording me the opportunity to testify on behalf of the Kansas Chamber in support of HB 2629.

SUMMARY

The Kansas Product Liability Act (“KPLA”) governs product liability suits and was enacted by the Legislature in 1981. Although it was – like many of our acts – based on model legislature, the Legislature did not adopt it verbatim. Recently, in *Gaumer v. Rossville Truck and Tractor Co.*,¹ our Kansas Supreme Court for the first time found there to be product liability not only for the sale of *new* products, but also for the sale of *used* products, and based its reasoning primarily on the absence of some specific language in the KPLA compared to the model act. HB 2629 simply reinserts that language from the model act back into the KPLA, thereby eliminating product liability for resellers of used products under most circumstances.

¹ 257 P.3d 292 (2011).

BACKGROUND

Products Liability Pre-KPLA

In *Brooks v. Dietz*,² our Kansas Supreme Court adopted the doctrine of strict liability in tort, as set out in the Restatement (Second) of Torts § 402A (1964), for the sale of a dangerously defective product. Section 402A states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Subsequently, in *Kennedy v. City of Sanyer*, the Court borrowed the reasoning of other states' courts and endorsed what is known as a "chain of distribution" liability theory:

*Under the doctrine of strict liability the liability of a manufacturer and those in the chain of distribution extends to those individuals to whom injury from a defective product may reasonably be foreseen, and then only in those situations where the product is being used for the purpose for which it was intended or for which it is reasonably foreseeable it may be used.*³

² 218 Kan. 698, Syl. ¶ 1, 545 P.2d 1104 (1976).

³ 228 Kan. 439, 445–46, 618 P.2d 788 (1980)

Legislative History of KPLA

Five years after the *Brooks* decision, the Kansas Legislature passed the KPLA in 1981, basing it loosely on the Model Uniform Product Liability Act (“MUPLA”) published by the Department of Commerce in 1979.⁴ As originally drafted, it was almost identical to the MUPLA, but the final version of the KPLA shows that the Legislature made a great number of revisions to it. Specifically, the MUPLA contained a provision reading as follows:

*The term ‘product seller’ does not include: ... (3) A commercial seller of used products who resells a product after use by a consumer or other product user, provided the used product is in essentially the same condition as when it was acquired for resale....*⁵

While the original Kansas bill contained similar language, upon final amendment the Legislature removed that language.⁶

Post-KPLA Court Rulings

Three years after the passage of the KPLA, a Kansas federal district court judge was faced with the previously-unanswered question of whether Kansas law provided for liability for the resale of used products. In the absence of any Kansas state court holdings, the federal district court judge reviewed the issue thoroughly and concluded it did *not*, stating:

The purpose of discouraging the marketing of defective products would not be furthered by extending strict liability to the seller of used goods who has not repaired or remanufactured the goods. In the case at bar, the used product seller was dealing with a 40-year-old product made by a manufacturer with whom the seller had no sort of business relationship. This used product seller was so far removed from the initial chain of distribution that it could not have discouraged the production and manufacturing of a defective product.

...

⁴ See 44 Fed. Reg. 62,414–62, 750 (October 31, 1979).

⁵ § 102, MUPLA, 44 Fed. Reg. 62,717 (1979).

⁶ S.B. 165, 1981 Session (Kan. 1981) (as amended by House Committee of the Whole); House J. 1981, p. 753.

The Kansas Legislature, subsequent to the occurrence which is the subject of this lawsuit, passed the Kansas Product Liability Act of 1981, K.S.A. 60–3301 et seq., which limits the scope of product liability actions by creating a “useful safe life” presumption for products and a statute of repose. Although this statute is not applicable to the case at bar, the intent of the legislature to limit the scope of products liability actions is a factor which can be considered by the court.

It is the conclusion of this court that the Kansas Supreme Court would declare that the seller of a used product who has not repaired or remanufactured the product is not subject to strict liability if that product is defective.⁷

The Gaumer Case

In the recent Kansas case of *Gaumer*, our Kansas Supreme Court for the first time applied products liability to resellers of used products. In *Gaumer*, the plaintiff’s father purchased a used hay baler “as is” on June 3, 2003. When he bought it, the baler was missing a safety shield on its side that would have been part of the baler as originally manufactured and sold. A week later, the baler malfunctioned and Gaumer parked the baler and let its engine idle while he squatted near its side to investigate the problem. Gaumer placed his right hand on the outside of the baler for support and observed its internal operation through the hole left by the missing safety shield, but he slipped and his left arm entered the same hole in the baler and was amputated just below the elbow.

Gaumer claimed Rossville was negligent by failing to warn about the potentially dangerous condition of the baler without the safety shield, negligent by failing to inspect the baler before the sale to Gaumer's father, and strictly liable for selling a product in an unreasonably dangerous condition.⁸

The Supreme Court considered the fact that the Legislature did not include in the KPLA the same language regarding used products found in the MUPLA and concluded: “This removal may speak volumes”. The Court noted its prior holdings that “[C]hanges made in the statute during the course of enactment may be considered by this court in determining legislative intent⁹” and ultimately held that the Legislature appears to have intended to provide for product liability of resellers of used products. HB 2629 is the Legislature’s response to that ruling.

⁷ *Sell v. Bertsch and Co., Inc.*, 577 F. Supp. 1393, 1398-99 (D. Kan. 1984).

⁸ *Gaumer*, 292 Kan. at 750-51, 257 P.3d at 294 (emphasis added).

⁹ *Gaumer*, 292 Kan. at 755-56, 257 P.3d at 297 (citing *Urban Renewal Agency v. Decker*, 197 Kan. 157, 160, 415 P.2d 373 (1966)).

OVERVIEW OF HB 2629

Currently, K.S.A. 60-3306 of the KPLA provides criteria for which a product seller is *not* liable for alleged defects. As originally drafted, HB 2629 took the existing language of 60-3306 and made it “§ 1(a)” and added a new § 1(b) regarding *used* products.

The House Committee re-worked the structure of the bill to have a revised new § 1(b)(1) & (2) pertaining to used products. The revised new § 1(b)(1) is very similar to the original language of the bill, consolidating language found in lines 7-8 and 23-27. Regardless of format, this is essentially the language our Supreme Court found was in the model act but was “missing” from the KPLA, the *absence* of which led the Court to conclude the Legislature *intended* there to be the potential for liability for the resale of used products. HB 2629, even as amended by the House, reinserts the language from the model act back into the KPLA.

Additionally, the House Committee added a new § 1(b)(2) that would carve out claims for intentional misrepresentation and intentional concealment. ***While the Proponents have no objection to that language, the references to alleges breaches of express warranties and implied warranties is problematic.***

A different statute, K.S.A. 60-3302, contains the KPLA’s definitions and, in sub-section (c), defines a “product liability claim” to include claims for breaches of “express or implied warranty”. **The effect of the House Committee’s excepting-out express and implied warranties, then, is to effectively gut the bill. Every products liability claim against a reseller of used products would simply be plead as a breach of express or implied warranty claim, which is exactly what the model act was designed to avoid.**

The Chamber respectfully requests this Committee strike references in new Section (1)(b)(2) to express and implied warranties and, with that change, would continue to support HB 2629.

CONCLUSION

In the absence of HB 2629, sellers of used products (often small family businesses or sole proprietorships) will be forced to forego selling “as-is” altogether for fear of future liability and high insurance costs. If not forced completely out of the used-products business, they will have to raise their prices to account for the increased risk attached to such selling.

Either way, buyers are likely to seek out “as-is” products or lower priced products outside the State of Kansas. For instance, rather than buying a higher-priced used piece of agricultural equipment from a Kansas dealer, a Kansas farmer will instead buy directly from another farmer or, alternatively, choose to buy from a dealer in a neighboring state that has not extended strict liability to sellers of used products. Either way, at least the same number of products likely to cause injury would remain in use in Kansas, but they will be purchased from non-Kansans. This has the dual-harm of not only reducing Kansas commerce, but also imposing additional burdens on purchasers of used products to not only purchase from out-of-state dealers. If Kansans must purchase from out-of-state dealers, they will likely have to return to that foreign jurisdiction for both on-going service and dispute resolution. That is a poor outcome.

Thank you.

CARTER LLP – ATTORNEYS

By:



Eric C. Carter