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To: Senator Tim Owens, Chairman
Members of the Senate Judiciary Committee

From: Callie Jill Denton
Director of Public Policy

Date: March 6, 2012

RE: HB 2629 As Amended Concerning the Kansas product liability act (OPPOSED)

The Kansas Association for Justice (KsAJ) is a professional association of attorneys. **KsAJ opposes HB 2629 as introduced, and as amended.**

The Kansas Product Liability Act (KPLA) currently contains statutory defenses that protect sellers of both new and used products. HB 2629 as introduced goes too far. And amendments made by the House Judiciary Committee eliminate virtually all accountability for retail sellers of used products to purchasers. There is no justification for allowing sellers of used goods to escape liability for their negligent acts, or to be less accountable than other retailers.

Gaumer v. Rossville Truck and Tractor Company, Inc.

HB 2629 as introduced targeted the Kansas Supreme Court's decision in *Gaumer v. Rossville Truck and Tractor Company, Inc.*, ___ P.3d ___, 2011 WL 3524197 (Kan. Aug. 12, 2011). Mr. Gaumer's father purchased a used hay baler "as is". The hay baler was missing a safety shield which was part of its original equipment. A week after it was purchased, the baler malfunctioned. While Mr. Gaumer was inspecting the baler, he slipped, and his left hand entered the baler through an entry in the machine that the missing safety shield would have covered. Mr. Gaumer suffered an amputation of his left arm just below his elbow. The Supreme Court ruled that the Kansas Products Liability Act does not distinguish between sellers of new and used products and that sellers of used products are subject to strict liability.

The Court's decision in *Gaumer* did not reverse previous Kansas case law interpreting the Kansas Product Liability Act. Instead, the Court reviewed legislative history of the KPLA, the Restatement 2nd, and common law to find that the defendant could be subject to strict liability in *Gaumer*. The Court also considered the public policy of deterring negligent conduct and protecting consumers, as well as the impact on sellers by affirming that sellers of used products are strictly liable under the KPLA.

Kansas is not an outlier in holding that sellers of used goods are subject to strict liability. Six states, including Texas, have applied strict liability to nearly all sellers of used products. Other states have applied strict liability when the product has been remanufactured or repaired, or have applied strict liability under certain circumstances, such as when the seller had knowledge of the defect. Only five states have decisions generally rejecting strict liability against sellers of used products.

Current Law Already Protects Sellers of Used Products

Sellers of used products are shielded from liability under current law. The KPLA already limits the liability of sellers of new and used products in many ways. The "seller's defense" at K.S.A. 60-3306 protects sellers of new and used products from strict liability unless certain conditions are met. Sellers will not be held strictly liable if they meet the following five-part test:

- (1) The seller had no knowledge of the defect at the time of sale. But, the law does not permit a seller to turn a blind eye to a defective product.
- (2) The seller could not have discovered the defect exercising reasonable care. The seller currently has to exercise reasonable care in assuring used products are not defective before reselling them. Courts look at the facts of a case to determine if the seller was reasonably careful.
- (3) The seller was not a manufacturer.
- (4) The manufacturer was subject to service of process in Kansas.
- (5) A judgment against the manufacturer is reasonably certain to be satisfied.

The "seller's defense" in K.S.A. 60-3306 is not the only protection for sellers of used and new products in the KPLA. In addition, there is a presumed 10 year "useful safe life" of a product to protect against old and dilapidated products, K.S.A. 60-3303. Sellers are not liable for harm caused after the product's "useful safe life" has expired.

The provisions of K.S.A. 60-3305 give further protection for sellers. Even if a product causes injury, it may be deemed not defective under K.S.A. 60-3305 if the product, at the time of manufacture, was in compliance with legislative regulatory standards or administrative regulatory safety standards.

The current law in the KPLA is a good balance. It protects both sellers of used products and the purchaser, who has an expectation that the used product they buy is not unreasonably dangerous.

House Amendments Take Giant Leaps Backward

Despite significant protections for sellers within current law, amendments added by the House eliminate virtually all accountability for retail sellers of used products to purchasers.

HB 2629 as amended by the House creates a new defense for retail sellers of used products. Under HB 2629, a retail seller of used products is not subject to liability in a product liability claim from an alleged product defect if the product seller establishes that the seller resold the product after it was used by a consumer or other product user and it was sold in substantially the same condition as it was when it was acquired for resale.

The only exceptions are claims arising out of the following:

- intentional misrepresentation
- alleged breach of express warranty as defined by K.S.A. 84-2-313
- alleged breach of implied warranty, as defined by K.S.A. 84-2-314, or

- intentional concealment or intentional nondisclosure or a condition known to seller.

Under the House amendments, a retail seller of used products would no longer be accountable for knowing that used products are defective at the time of sale, or exercising reasonable care in discovering defects in a used product. Under HB 2629, sellers must only demonstrate that the product was used and that it was sold in substantially the same condition as it was acquired for resale, even if a defect causes permanent injury or death.

Further, under the House amendments, a significant burden is on an injured plaintiff to prove that misrepresentations, concealment, and nondisclosure by the seller are intentional.

There are strong public policy rationales for a vital product liability act: achieving maximum protection for Kansas citizens that are injured by dangerous and defective products; discouraging the selling of defective and dangerous products that would be harmful to the public; and protection of consumer expectations which are critical to a robust economy. HB 2629 conflicts with these rationales.

KsAJ respectfully requests that the House Judiciary Committee take no action on HB 2629.

