Approved: 3-23-93
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 10:05 a.m. on February 24, 1993 in Room 514-S of the Capitol.

All members were present except: Senator Rock (excused)

Committee staff present: Michael Heim, Legislative Research Department
Gordon Self, Revisor of Statutes
Sue Krische, Committee Secretary

Conferees appearing before the committee:

Bud Grant, Kansas Retail Council
Ed Schaub, Western Resources, Inc.
George Barbee, Kansas Association of Financial Services
Jim Maag, Kansas Bankers Association
Kevin Case, American Association of Creditor Attorneys
Jeff Sonnich, Kansas-Nebraska League of Savings Institutions
Elwaine Pomeroy, Kansas Collectors Association
Ron Smith, Kansas Bar Association
Kyle Smith, KBI
Michael Santos, Assistant City Attorney, Overland Park, Kansas

Others attending: See attached list

SB 244 - Attorney fees in actions on a contract or installment.

Bud Grant, Kansas Retail Council, appeared in support of SB 244 stating the bill would allow the business deciding to file an action in court in an effort to collect to be awarded attorney fees and costs in the event the business prevails in that action (Attachment 1). Mr. Grant asked that the repeal of K.S.A. 16a-2-507 of the Uniform Consumer Credit Code be amended into SB 244, as this provision would be in conflict with the new bill. Senator Bond suggested exempting from SB 244 contracts of insurance due to the question of how to deal with assessments of comparative negligence wherein one party would not be responsible for the entire attorney fees.

Ed Schaub, Western Resources, Inc., testified in support of SB 244 and requested an amendment that would permit a defendant who obtains a completely favorable verdict to also be considered a prevailing party and an amendment to eliminate some language which is redundant (Attachment 2).

SB 364 - Attorney fees in civil actions to recover amounts on certain accounts, instruments and contracts.

George Barbee, Executive Director, Kansas Association of Financial Services, testified that SB 364 would allow lenders to collect attorney fees and court costs in those cases where it becomes necessary to use attorneys to collect on delinquent loans (Attachment 3).

Jim Maag, Kansas Bankers Association, appeared in support of SB 364 noting the bill as drafted would allow the prevailing party in any action for the collection of a variety of accounts, notes, bills, negotiable instruments, or contracts for a line of credit or contract relating to the purchase of goods or merchandise or for labor or services, to make an agreement to recover attorney fees (Attachment 4). He cited the need for uniformity in Kansas law relating to the recovery of attorney fees and asked the Committee to repeal the 1876 Kansas law prohibiting a bank from contracting for the payment of attorney fees in any note, bill of exchange, bond or mortgage.

Kevin Case, American Association of Creditor Attorneys, testified in support of SB 364 emphasizing the need for a viable means of ensuring that creditors are able to recoup a significant cost of doing business (Attachment 5).

Jeff Sonnich, Kansas-Nebraska League of Savings Institutions, appeared in support of SB 364 and requested an amendment to add on line 14 after "bill," the language: "notes secured by real estate mortgages" (Attachment 6).

Bill Caton, Commissioner, Office of Consumer Credit, submitted written testimony requesting SB 364 be amended to include the outcome of the bill in the Consumer Credit Code and be amended to add wording to include prejudgment settlements if both parties agree to include attorneys' fees in the settlement (Attachment 7).

Elwaine Pomeroy, Kansas Collectors Association, appeared in opposition to SB 244 and SB 364 stating this legislation would encourage the filing of lawsuits in order to obtain the benefit of collecting from the debtor the attorney fees involved in the collection process (Attachment 8). Mr. Pomeroy noted these fees would add to the burden of debtors trying to pay their obligations.

Ron Smith, Kansas Bar Association, expressed the concern of the Bar Association with SB 364 that the bill would allow that the business community could collect an attorney fee as part of damages and costs if the business is the plaintiff, but if the general public is the plaintiff against many of these businesses for a variety of causes of action, there is no attorney fee shift (Attachment 9).

SB 289 - Admissibility of forensic examinations and certificates.

Kyle Smith, KBI, testified in support of SB 289 stating the bill addresses the problem of the backlog and delays caused by the growing demand on forensic examiners by the court system given the limited number of examiners available (Attachment 10). SB 289 would allow certificates of forensic examinations to be admitted in lieu of actual testimony in court proceedings. In response to a question, Mr. Smith stated he would have no objection to amending SB 340 into SB 289.

Sergeant Terry Maple submitted written testimony in support of SB 289 on behalf of the Kansas Highway Patrol (Attachment 11).

SB 340 - Evidentiary foundation necessary for admissibility of breath tests in certain drug and alcohol offenses.

Michael R. Santos, Senior Assistant City Attorney, Overland Park, KS, testified that he would not object to the amendment of the provisions of SB 340 into SB 289 and asked that a fourth foundation requirement for introducing breath tests in court be included in the bill as specified in his written testimony (Attachment 12). Chairman Moran asked Senator Bond to work with the parties concerned and staff to develop a balloon merging these bills for consideration by the full Committee.

Ron Smith, Kansas Bar Association, suggested in lieu of adoption of the provisions in SB 289 and SB 340 that the issue of court testimony by forensic experts be dealt with in pretrial conferences for felonies and by establishing a pretrial conference procedure in serious misdemeanors wherein the judge could rule on whether testimony on laboratory tests is required (Attachments 13 and 14).

The meeting was adjourned at 11:00 a.m. The next meeting is scheduled for February 25, 1993.

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 2-24-13

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
KEVIN CASE	4601 COLLEGE BLVD SUITE 200 LEAWOOD	BUCK, BOHM & STEIN (AACA)
Elwaine F Pomeroy	Topeka	Kansas Collectors Association Inc
David Hanson	Topeka	Ks Assoc P+C Insur
Lori Callahan	Topeka	kammco
Kyle Smith	Topeka	KBI
Steve Starr	Topeka	KBI
Dan Randle	Topeka	KCI
Ron Jones	Topeka	KBI
Lee Wright	Overland Park	Farmers Ins. Group
Bill Sneed	Topeka	State Farm
JEFF SOMMERS	TOPEKA	HNLSI
George Barbee	Topeka	KAFS
Rosalie Thornburgh	Topeka	KDOT
Greg Winkler	Topeka	KS Credit Union Assn.
Ron Smith	"	Ks Bar
Rogers Brazier	Topeka	DOA - Legal
Dave Frankel	Lawrence	KTLA - intern
Captain Stephen E. Ford	Overland Park	Overland Park P.D.
Sue A. Dickey	Overland Park	Overland Park Law Dept.
Anita Larson	Topeka	Security Benefit
Jim Mazza	"	KBA
Chuck Stones	"	"
ED SCHAUB	"	WESTERN RESOURCES
BOYD GRANT	"	KCCI

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

500 Bank IV Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321

A consolidation of the Kansas State Chamber of Commerce, Associated Industries of Kansas, Kansas Retail Council

SB 244

February 24, 1993

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

Senate Judiciary Committee

by

Bud Grant
Executive Director
Kansas Retail Council

Mr. Chairman and members of the Committee:

My name is Bud Grant and I am appearing here today on behalf of the Kansas Retail Council in support of SB 244. Thank you for this opportunity.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

Anyone who is in business will tell you that one of the most expensive problems for business is the collection of bad debts. Not only is the problem itself expensive, but in many cases so is the solution.

SJ
2-24-93
Attachment 1

If the solution is through the courts, other than the Small Claims Court, then business man or woman must judge whether hiring an attorney and paying the associated fees and costs are offset by the size of the debt. All too often they are not, much to the detriment of the small business owner. In most cases the debt is written off, making the business and the consumer the loser. The winner? Unfortunately, the person refusing to pay.

SB 244 would allow the business deciding to file an action in court in an effort to collect to be awarded attorney fees and costs in the event the business prevails in that action. The threat of this provision alone will assist in collection of some bad debts. The bill further provides that, as a defense for the defendant, if the debt has been paid and that fact can be proven, then the defendant is the prevailing party and is awarded the attorney fees and costs.

Mr. Chairman, because we are dealing with consumer debt and issues covered within the provisions of the Uniform Consumer Credit Code (UCCC), I would request that the repeal of K.S.A. 16a-2-507 be amended into the bill. That section states as follows: "With respect to a consumer credit transaction, the agreement may not provide for payment by the consumer of attorney fees. A provision in violation of this section is unenforceable."

Obviously Mr. Chairman, this provision is incompatible with the purpose of SB 244 and should be repealed.

I would appreciate the Committee's favorable consideration of this proposal and would attempt to answer any questions.

Western Resources

818 Kansas Avenue
P.O. Box 889
Topeka, Kansas 66601
Phone (913) 575-6300

TESTIMONY

TO

SENATE JUDICIARY COMMITTEE

SENATE BILL 244

FEBRUARY 23, 1993

BY ED SCHAUB, WESTERN RESOURCES, INC.

Mr. Chairman, Members of the Committee:

Western Resources appears today in support of Senate Bill Number 244. We believe that it will have a positive effect in discouraging needless litigation. If a defendant knows at the outset that it will have to pay more than what it already owes in the event it loses a lawsuit, there will be a powerful incentive to avoid litigation that does not exist now.

Western Resources would propose two amendments to the bill. The first, as is set forth in the balloon on the attached copy, would permit a defendant who obtains a completely favorable verdict to also be considered a prevailing party. This is done through the addition of language which includes as a "prevailing party" a defendant who alleges that the plaintiff is entitled to nothing and who subsequently prevails.

Our second amendment is designed to eliminate some language which is redundant from the bill, and has no substantive effect.

I would be happy to entertain any questions the committee may have.

SJ
2-24-93
Attachment 2

Session of 1993

SENATE BILL No. 244

By Committee on Judiciary

2-9

AN ACT concerning attorney fees; relating to actions on contract and installment account.

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

Section 1. Reasonable attorney fees and costs shall be awarded to the prevailing party in any action on a contract or installment account, regardless of whether such action is instituted by the seller, holder or buyer. If the defendant alleges in the defendant's answer that the full amount to which the plaintiff is entitled has been tendered, and deposits such ~~full~~ amount ~~so tendered~~ with the court, ~~for the plaintiff~~, and the allegation is found to be true, then the defendant is deemed to be the prevailing party, within the meaning of this section.

or alleges that the plaintiff is entitled to nothing,

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

The Kansc Association of Finc cial Services
George Barbee, Executive Director
Jayhawk Tower, 700 SW Jackson, Suite 702
Topeka, KS 66603-3740
913/233-0555 Fax: 913/357-6629

STATEMENT

To: Senate Judiciary Committee

Re: SB-364

Mr. Chairman and members of the committee, my name is George Barbee, Executive Director of the Kansas Association of Financial Services. This association is comprised of all the major consumer finance companies operating in Kansas. I am appearing today in support of Senate Bill 364.

This bill would allow lenders to collect attorney fees and court costs in those cases where it becomes necessary to use attorneys to collect on delinquent loans.

The Uniform Consumer Credit Code presently prohibits including agreements in contracts because of an ancient Kansas statute, KSA 58-2312 which prohibits inclusion of collecting attorney fees when writing lending contracts. The statute was adopted in 1923 for reasons unknown to me.

The information I have on the other state policies is dated 1991, but I have no reason to believe that that has changed. It shows that:

a)	Attorney fees permitted	40 states
b)	Not permitted	9 states
c)	No policy	1 state

It has come to my attention that three years ago, late in the session, a provision was amended into a House bill on the floor that would have allowed attorney fees to be collected. The bill passed the House on a vote of 95 to 24. The senate committee considering this bill deleted the House amendment on the basis that the bill contained two subjects and therefore would be unconstitutional.

Passage of this bill will not cause a great rush on the courthouses of Kansas. When a delinquent account has reached the point where there is litigation involved there has been a great effort made at restructuring the loan and other arrangements to collect the account. This will only apply to those accounts where this is the last step in order to collect on a delinquent loan. I asked one of my larger chain consumer finance companies how many cases a year they would actually collect attorney fees and the response was about 15.

I believe this bill might even ease the ability for someone who has a marginal credit history to gain a loan from a consumer finance company because the company would know that they would have the ability to collect attorney fees if necessary.

Mr. Chairman, in conclusion I appreciate the opportunity to present this bill under the time restraints you have this week and would be glad to stand for questions.

The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

February 24, 1993

TO: Senate Committee on Judiciary

FROM: James S. Maag, Senior Vice President
Kansas Bankers Association

RE: **SB 364: Contracting for Attorney Fees**

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before the Committee on the provisions of **SB 364**. As drafted, the bill would allow the prevailing party in any action for the collection of a variety of accounts, notes, bills, negotiable instruments, or contracts for a line of credit or contract relating to the purchase of goods of merchandise or for labor or services, to make an agreement to recover attorney fees.

When a bank attempts to collect on delinquent promissory notes, the issue of who pays the attorney fees does arise. Many states allow promissory notes to contain a particular clause providing for the recovery of attorney fees by the bank. In fact, the Uniform Commercial Code does provide that the first item to be paid out of the proceeds from a sale of collateral is "reasonable attorneys' fees and legal expenses incurred by the secured party" unless such action is prohibited by other state law. Accordingly it would be legal to contract for attorney fees in connection with the collection of a loan that is secured by personal property.

However, this 20th century law is pre-empted in Kansas by a 19th century law first adopted in 1876 (K.S.A. 58-2312), which prohibits a bank from contracting for the payment of attorney fees in any note, bill of exchange, bond or mortgage. In addition, there is a provision in the Uniform Consumer Credit Code which prohibits an agreement involving a consumer credit transaction from providing for the payment by the consumer of attorney fees. (However, the UCCC does allow a debtor to recover attorney fees from a **creditor** found to be in violation of the provisions of the Code.)

On the other hand, there are currently some 75 Kansas statutes which allow for attorney fees. I have attached an article from the Kansas Bar Journal (Fall, 1984), by Ron Leslie, in which he gives a Kansas historical perspective on the recovery of attorney fees. The article lists the numerous sections of the state statutes which have allowed for recovery of attorneys fees in certain circumstances.

The law as it exists in Kansas is grossly unfair to the creditor and is just one more factor which all creditors must consider when determining the costs of credit to borrowers.

We truly believe that it is time for the Legislature to review this antiquated law, and in light of the legislative actions over the past years concerning the awarding of attorney fees, adopt the provisions contained in SB 364.

SJ
2-24-93

Office of Executive Vice President • 1500 Merchants National Building
Eighth and Jackson • Topeka, Kansas 66612 • (913) 232-3444
FAX (913) 232-3484

Attachment 4

Recovery of Attorney Fees—An Historical Perspective

By Ron Leslie

Trial lawyers and general practitioners are frequently asked by clients whether attorney fees can be recovered in litigation. The answer to that question is affirmative in a surprising, and increasing, number of cases.

The passage of K.S.A. 60-2007 by the 1982 Kansas Legislature called the attention of the trial bar to the subject of recovery of attorney fees in contested litigation. That statute, of course, provides for the possible assessment of attorney fees by the trial court against a party when the party's attorney asserts a claim or defense "without a reasonable basis in fact and not in good faith." An attorney may also be held personally liable if the court finds that the attorney knowingly and not in good faith asserted a claim or defense. While the content of that rule is similar to Disciplinary Rule 7-102 of the Code of Professional Responsibility, K.S.A. 60-2007 has added new and more immediate sanctions against lawyers and parties who file cases without substantial merit. However, that statute is merely the latest in a long line of legislative enactments providing for recovery of attorney fees in contested litigation under certain circumstances.

The purpose of this article is to examine the history of the recovery of attorney fees in litigated cases in Kansas, and to give trial lawyers and general practitioners an overview of the current status of the law in the field.

The following topic areas are excluded:

a) Where the litigant attempting to recover fees is a governmental agency. For example, K.S.A. 22-3901 *et seq* sets out certain categories of common nuisances which may be abated upon a complaint by the Attorney General or a county attorney. K.S.A. 22-3904 (3) mandates that the court award a reasonable fee to the prosecuting attorney in the event of a judgment for the state.

b) Where attorney fees are sought under Federal law.

c) Where the amount an attorney can charge his own client is subject to the approval of the court. The most common example is K.S.A. 59-1717, providing that an attorney who has represented the administrator or executor of a decedent's estate must have his or her fees approved by the court.

COMMON LAW RULE

Much of our common law traces its antecedents to the English common law. Under English common law, the prevailing party normally must pay the attorney fees of both parties. However, American courts have generally held that attorney fees are not recoverable absent statutory authorization. Furney, *Recovery of Attor-*

neys Fees in Kansas, 18 W.L.J. 534 (1979).

Kansas departed from the English rule very early in its history. In *Swartzell v. Rogers*, 3 Kan. 374 (1866), the primary issue was whether attorney fees should be assessed as part of the costs of the case. The court denied plaintiff's request for fees and stated: "That matter is conclusively settled by statutory enactment." The court also raised an interesting argument—the policy of the law should not be that the more doubtful plaintiff's claim is, the more exposure the defendant should have for plaintiff's attorneys fees. As we shall soon see, this policy argument has been given little weight by the Kansas Legislature in the intervening years.

In 1872, *Stover v. Johnnycake*, 9 Kan. 367 (1872) gave additional emphasis to the developing rule of Kansas. In that case the Kansas Supreme Court held that a judgment for attorney fees would not be allowed in litigation unless stipulated for or unless expressly allowed by statute.

While some jurisdictions have, on occasion, created an exception to the American rule in cases of bad faith or fraud, Kansas has not recognized this exception. The general rule has been routinely followed, with only the following exceptions:

In *Columbia Knickerbocker Trust Co. v. City of Atchison*, 93 Kan. 302, 144 Pac. 222 (1914) the court allowed recovery of fees in a mandamus action wherein citizens of the City of Atchison filed suit to compel officers of the City to levy a tax for the payment of defaulted bonds issued by the City. Even this allowance was based on a statutory authorization that stated that plaintiff in a mandamus action could recover damages and costs. The court evidently reasoned that attorney fees were an element of costs.

In *Barten v. Turkey Creek Watershed Joint District No. 32*, 200 Kan. 489, 438 P.2d 732 (1968), plaintiff sought mandamus against a watershed district to force the holding of an election on a method of financing a plan of improvement. The court reaffirmed its earlier ruling, held that the action on the part of the board in refusing to hold an election was unreasonable, and allowed damages and attorney fees to plaintiff.

Kansas has also allowed recovery absent statutory authorization where an attorney has, through services to the attorney's client, created a fund in which others besides the attorney's client will share.

Kansas has also allowed recovery

About the Author

RONALD L. LESLIE *earned his J.D. in 1965 from the University of Kansas where he was on the editorial staff of the Kansas Law Review. He is a partner in Hess, Leslie, and Brown of Hutchinson, a firm engaged in general practice. He is a member of the Reno County, Kansas, and American Bar Associations, and is a past president of the Reno County Bar Association.*

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absent statutory authorization where an attorney has, through services to the attorney's client, created a fund in which others besides the attorney's client will share. In *Quesenbury v. Wichita Coca Cola Bottling Company*, 229 Kan. 501, 625 P.2d 1129 (1981), the court ruled that plaintiff's attorney is entitled to a fee on the insurer's subrogated portion of settlement proceeds recovered for property damage.

HISTORICAL TRENDS

The Kansas Legislature has steadily eroded the Kansas common law rule. Seventy-five statutes were found allowing recovery of attorney fees in litigation, usually at the discretion of the trial judge. An analysis of these statutes shows three trends.

First, the Kansas Legislature has sought to add emphasis to rights that it has deemed of particular importance by means of attorney fee provisions. Early in the state's history, before transportation and communication facilities were highly developed, the Legislature responded to factors arising within Kansas. In the twentieth century, however, as Kansas became an integral part of the national economy and political system, many of the enactments have been responses by the Kansas Legislature to national conditions.

Prior to 1910, nearly all legislative enactments addressed to recovery of attorney fees were concerned with some aspect of agriculture, reflecting the agrarian nature of the Kansas economy. For example, the Legislature's first venture into this area, in 1868, concerned the subject of partition fences. The duty to erect or maintain a partition fence between adjoining landowners was enforced by recovery of attorney fees provisions, as was the assessment of damages by appointed fence viewers. (K.S.A. 29-303, 29-305, 29-310 and 29-404). The general practicing attorney will rarely, if ever, see a case involving partition fences today.

Other early attorney fee provisions were concerned with such matters as the liability of railroads for failure to pay full value for death of livestock (K.S.A. 66-296), liability of one controlling a canal or reservoir who charged more for use of the water than the county commissioners allowed (K.S.A. 42-389), and against a purchaser of grain who defrauded the seller concerning the actual weight of the grain (K.S.A. 83-140).

As Kansas began the process of shifting to a mixed agricultural and industrial economy, the first attorney fee enactment governing employer-employee relations came into law in 1897. K.S.A. 44-117 prohibited blacklisting by any employer who would seek to prevent a former employee from regaining work, and K.S.A. 44-119 provided that an employer found liable under 44-117 would also be liable for the employee's attorney fee.

In the early 1930's, as the Great Depression deepened its hold on the nation, financial institutions began to encounter difficulties. The Legislature responded by making it unlawful for an insurance company to unjustly refuse to pay the full amount of a just claim. If the insured recovered judgment against the insurance company, the court was authorized to award attorney fees to the insured. (K.S.A. 40-256).

In the 1930's and early 1940's, the nation began enacting various components of the modern welfare state. In 1943, Kansas joined that trend by adopting its worker's compensation law. As part of its package of laws, the Legislature adopted K.S.A. 44-512(a), providing that an employer failing to pay compensation to an in-

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jured worker when due could be assessed attorney fees by the court.

In the early 1970's a wave of consumerism swept the country. This was motivated, in part, by President Johnson's Great Society. Kansas, again responding to national trends, adopted a number of consumer rights provisions with attorney fees components. For example, K.S.A. 16A-5-201 provides that if the Uniform Consumer Code is violated by the creditor, the consumer shall be awarded damages and reasonable attorney fees.

The second trend clearly discernible is that the Legislature has adopted attorney fees provisions with increasing frequency in recent years.

The second trend clearly discernible is that the Legislature has adopted attorney fees provisions with increasing frequency in recent years.

In fact, 47 of the 75 statutes analyzed were passed after 1960. Thirty of them were passed in the 1970's and early 1980's, more than all the attorney fee statutes enacted from the founding of the state through 1950.

The third historical trend is apparently, in part, a response to the second trend. The Legislature, over the years, has done much by way of enactment of attorney fee provisions to encourage individuals to enforce rights favored by the Legislature. Kansans have accepted the invitation to seek judicial determination of their claims all too frequently.

The Legislature has responded to the increasingly litigious nature of Kansas citizens by passing a number of statutes imposing sanctions, including attorney fees, for actions which courts consider frivolous or which serve to cause delays. For example, in 1963, K.S.A. 60-256(g) was enacted, providing that if affidavits were presented in bad faith or for the purpose of delay in a summary judgment proceeding, the court might award reasonable attorney fees to the other party. Many other sections of the code of civil procedure adopted in 1963 contained similar provisions with respect to various aspects of discovery. The logical culmination of this trend was the passage of K.S.A. 60-2007, which encompasses all civil cases and applies to all components of such cases.

PRESENT STATUTORY LAW

An analysis is now presented of the current status of the statutory law with respect to recovery of attorney fees in Kansas. This section is intended to be a helpful reference guide for the general practitioner. The analysis is, of course, no substitute for a detailed examination of an applicable statute by counsel.

The statutory enactments can be categorized as follows: civil procedure, consumer rights, domestic relations, insurance companies, labor relations, motor vehicles, public utilities and common carriers, railroads, real estate, and unfair commercial practices. In addition, eight statutes appear to be isolated enactments, and therefore have been placed in a miscellaneous category by the writer.

For ease of reference the ten major categories are presented in alphabetical order, followed by the miscellaneous category. The statutes within each section are presented in the sequence in which they are found in Kansas Statutes Annotated.

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Statute	Date	Description
1. Civil Procedure.		
60-211	1982	Attorney willfully signs pleading without good grounds.
60-230	1963	Failure of a party to attend a deposition.
60-237	1963	Failure to allow discovery.
60-256(g)	1963	Use of affidavits in bad faith in summary judgment proceeding.
60-721	1978	Answer to a garnishment contraverted without good cause.
60-905(b)	1963	Posting of a bond to cover damages and attorney fees for a temporary injunction.
60-910(b)	1963	Motion to vacate permanent injunction not in good faith.
60-2007	1982	Court determines that an action, pleading, or component of a case was frivolous in nature.
61-1713	1969	Refusal to admit truth of facts or genuineness of documents under limited actions procedures.
61-2709	1979	To an appellee successful on an appeal from a small claims decision.
2. Consumer Rights.		
16a-5-201	1973	Consumer Credit Code violated by creditor.
16a-5-203	1973	Disclosure provisions of the Consumer Credit Code violated by the creditor.
50-634	1973	Supplier found guilty under the Consumer Protection Act, or where the consumer has brought a groundless action.
50-639	1973	Supplier disclaims implied warranties under Consumer Protection Act.
50-715	1973	Reporting agency willfully fails to comply with the provisions of the Fair Credit Reporting Act.
50-716	1973	Reporting agency negligently fails to comply with the provisions of the Fair Credit Reporting Act.
3. Domestic Relations.		
38-131	1971	Visitation rights by grandparents are denied.
38-1103	1970	Complaining witness in a paternity case prevails and has been represented by private counsel.
38-1307	1978	Moving party has selected a clearly inconvenient forum under the Uniform Child Custody Jurisdiction Act.

38-1308	1978.....	Jurisdiction under the uniform act declined by reason of conduct of the petitioner.
38-1315	1978.....	A party violates a custody decree of another state, making it necessary to enforce the decree in this state under the uniform act.
60-1610	1963.....	Fees to either party in a divorce action.
4. Insurance.		
40-256	1931.....	Insurance company refuses without just cause to pay a claim.
40-908	1927.....	Insurance company insuring against fire, tornado, lightning, or hail fails to pay insured.
40-1517	1927.....	Mutual hail insurance company fails to pay insured.
40-2004	1949.....	Unauthorized or foreign insurer fails to pay claim.
5. Labor Relations		
44-119	1897.....	Employer blacklisting.
44-831	1975.....	Right to work provisions violated.
6. Motor Vehicles.		
40-3111(b)	1974.....	Insurance company fails to make timely payments on P.I.P. benefits.
60-2006	1969.....	Automobile negligence case involving damages of less than $750.00
7. Public Utilities and Common Carriers.		
17-1917	1974.....	Failure of a public utility to move lines when requested.
66-176	1923.....	Utility or common carrier violating regulatory laws.
8. Railroads.		
66-165	1901.....	Unauthorized charges.
66-203	1905.....	Failure to supply railroad cars.
66-233	1885.....	Damages caused by fire.
66-259	1893.....	Failure to give bill of lading.
66-266	1898.....	Causing death to cattle in transit.
66-269	1905.....	Failure to allow owners or agents to accompany shipments of livestock.
66-296	1874.....	Death of livestock.
66-305	1911.....	Failure to pay damages upon demand.
66-310	1885.....	Refusal to build fence.
66-318	1909.....	Shipment delays.
66-522	1907.....	Confiscation or diversion of coal.
9. Real Estate.		
26-509	1972.....	Jury award exceeds appraisers' award in condemnation.

29-303	1868.....	Party failing to rebuild partition fence.
29-305	1868.....	Failure to erect or maintain assigned part of partition fence.
29-310	1868.....	Failure to divide land where a partition fence should be built.
29-404	1868.....	Failure to repair a partition fence.
55-202	1909.....	Failure to release an oil and gas lease within 60 days of forfeiture.
58-2257	1941.....	Failing to return real estate document in possession to rightful possessor.
58-2309a	1971.....	Failure to release mortgage when required.
58-3410	1973.....	Under Marketable Record Title Act against one slandering title to real estate.
60-1003(c)	1963.....	Against owners of land in a partition action.

10. Unfair Commercial Practices.

17-1268	1967.....	Selling securities in violation of law.
16-720(b)	1972.....	Pawn brokers refusing to redeliver stolen property on presentation of proper evidence of ownership.
34-229	1931.....	Surety on a warehouseman's bond fails to pay on demand.
41-701(4)	1974.....	Suppliers of alcoholic liquor, beer, or cereal malt beverage who fix the resale price.
50-108	1897.....	Against those involved in unlawful trusts, agreements, or other combinations in restraint of trade.
50-130	1899.....	Injunction violated relating to illegal futures dealings.
50-137	1887.....	Grain dealers and buyers who unlawfully agree to pool prices.
50-505	1957.....	Unfair practices involving dairy products.
50-801	1973.....	Violations of any section of Chapter 50 of Kansas Statutes Annotated.
58-3316(a)	1967.....	Selling subdivided lands in violation of the Uniform Land Sale Practices Act.
65-741	1961.....	Violation of dairy regulatory laws.
83-121e	1963.....	Using inaccurate or false weighing devices.
83-140	1905.....	Grain dealer underweighing grain.
84-7-601	1965.....	Bailee losing a warehouse receipt or bill of lading.

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11. Miscellaneous.

16-207 (d)	1975	Lenders exceeding the maximum interest rate.
22-2518	1974	Unlawful interception of wire and oral communications.
40-3114	1977	Against employers, doctors, and hospitals, for failure to furnish required information to insurers.
42-389	1891	Requiring that illegal consideration be paid as a condition to a right to obtain water.
44-512a	1943	Against an employer failing to pay compensation to an injured workman when due under the worker's compensation law.

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59-1504	1975.....	In favor of any person named in a Will or Codicil who defends it, or prosecutes any proceedings in good faith and with just cause, for the purpose of having it admitted to probate, whether successful or not, or any person who successfully opposes the probate of any Will or Codicil. Also in favor of any heir-at-law or beneficiary under a Will who, in good faith and for good cause, successfully prosecutes or defends any other action for the benefit of the ultimate recipients of the Estate.
60-2604	1963.....	Amercement against a sheriff or court clerk failing to perform an official duty.
74-7311	1978.....	In favor of a claimant under the Crime Victims Reparations Act.

CONCLUSIONS

What can we expect from the Kansas Legislature in the future in the area of recovery of attorney fees? History tells us that two of the trends previously discussed may safely be projected into the future.

It is likely that national political and economic trends will continue to be reflected in enactments of the Kansas Legislature. History shows us that the Legislature, often responding to national trends, will continue providing for recovery of attorney fees in selected areas of particular concern.

It is also likely that the trend for an increasing number of such legislative enactments will continue. Nearly every session of the Kansas Legislature produces further attorney fee enactments.

The third trend, however—sanctions against harassing and delaying tactics—seems to have been laid to rest. The revisions of K.S.A. 60-211 and the passage of K.S.A. 60-2007 now encompass all issues in civil cases where there was no substantial basis for filing suit, raising a particular defense, or where delaying tactics were used in the conduct of litigation.

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KANSAS COMMENT 1983

Just as the previous section sets forth the rules governing collection of third-party obligations, so does this section authorize physical repossession of tangible collateral. The Kansas version of this section does not vary from the 1972 Official Text. The creditor can achieve repossession in three ways: (1) the debtor can turn over the collateral voluntarily; (2) the creditor can use self-help to recover the collateral so long as there is no "breach of the peace;" and (3) the creditor can obtain the collateral "by action," i.e., a writ of replevin under K.S.A. 60-1005 or 60-1006.

There is no constitutional prohibition against self-help repossession because seizure of the goods by the creditor alone (or through an agent) does not involve sufficient "state action" to trigger the Fourteenth Amendment. Benschoter v. First Nat'l Bank of Lawrence, 218 K. 144, 542 P.2d 1042 (1975). However, this does not mean that notice prior to repossession will not be required in some cases. For example, in Klingbiel v. Commercial Credit Corp., 439 F.2d 1303 (10th Cir. 1971) the secured party was held guilty of conversion because the security agreement appeared to require notice prior to repossession, and none was given. Similarly, a line of judicial decisions holds that the secured party may be liable for repossessing without prior notice after establishing a pattern of accepting late payments. See, e.g., Lee v. Wood Products Credit Union, 551 P.2d 446 (Ore. 1976). Finally, the Kansas Uniform Consumer Credit Code imposes a duty on the secured creditor to give notice of the consumer's right to cure a default caused by a missed installment; failure to give the statutory notice of right to cure triggers liability for attorney's fees. K.S.A. 16a-5-110, 16a-5-111 and 16a-5-201(8). Moreover, failure to give the UCCC notice of right to cure might well trigger liability in conversion, as well as the minimum civil penalty found in 84-9-507(1). See D.E.B. Adjustment Co. v. Cawthorne, 623 P.2d 82 (Colo. App. 1981).

Nothing in this section or elsewhere in Article 9 defines the term "breach of the peace." The courts are left with that job. The leading Kansas case is Benschoter v. First Nat'l Bank of Lawrence, supra, where the court held that "stealth" does not constitute a breach of the peace. On the other hand, there are cases holding that a secured creditor accompanied by the sheriff, leaving the impression that a court order has been issued when in fact it hasn't, is a breach of the peace because of the misrepresentation which is created. Stone Mach. Co. v. Kessler, 463 P.2d 651 (Wash. App. 1970). Forced entry into the debtor's premises would almost certainly be considered a breach of the peace, and the UCCC expressly so provides for consumer repossessions. K.S.A. 16a-5-112. A wise creditor will back off and get a writ of replevin rather than trying to repossess over active debtor or third-party protest. There are also numerous cases involving the "golden glove compartment," where the creditor repossesses a motor vehicle but fails to make sure that all the other personal property of the debtor has been removed.

The provisions in this section concerning assembly of collateral and rendering equipment unusable were not found in pre-UCC Kansas law. This can be a handy tool for the foreclosing creditor. The leading judicial decision illustrating the utility of the tool is Clark Equip. Co. v. Armstrong Equip. Co., 431 F.2d 54 (5th Cir. 1970), cert. denied 402 U.S. 909 (1971).

Once repossession has occurred (through replevin or self-help), the duty of the secured party to take reasonable care of the collateral under 84-9-207 arises, just as it does from the moment a pledgee takes possession of the collateral prior to default.

Statutory Reference:

Former K.S.A. 58-307.

Research and Practice Aids:

Chattel Mortgages⇐162.
Pledges⇐53 et seq.
Sales⇐179.
C.J.S. Chattel Mortgages § 183 et seq.
C.J.S. Pledges § 52 et seq.
C.J.S. Sales § 597 et seq.
Vernon's Kansas U.C.C.—Howe & Navin, 84-9-503.
Retaking possession of property sold under conditional sales contract. Am. Jur. 1st ed., Sales § 938 et seq.
Effect of taking of possession of goods subject to trust receipt. Am. Jur. 1st ed., Trust Receipts § 10.

Law Review and Bar Journal References:

U.C.C. remedies upon default of security agreement discussed in "Survey of Kansas Law: Secured Transactions," Gerald D. Haag, 21 K.L.R. 107, 114 (1972).
Constitutionality of self-help repossession discussed in "The New Kansas Consumer Legislation," Barkley Clark, 42 J.B.A.K. 147, 151 (1973).
Changes in repossession law under the UCCC discussed in "The New Kansas Consumer Legislation," Barkley Clark, 42 J.B.A.K. 147, 197 (1973).
"Summary Repossession, Replevin, and Foreclosure of Security Interests," Thomas V. Murray, 46 J.B.A.K. 93, 98, 100 (1977).
Applicability of implied waiver doctrine to article 9 transactions, "Uniform Commercial Code: Farm Creditor Protection," Brian McMahill, 18 W.L.J. 199 (1978).
"Survey of Kansas Law: Secured Transactions," J. Eugene Balloun, 27 K.L.R. 301, 303 (1979).

CASE ANNOTATIONS

1. Self-help repossession provisions not violative of due process; no state action present; subrogation entitlement. Benschoter v. First National Bank of Lawrence, 218 K. 144, 145, 147, 148, 149, 150, 151, 152, 154, 155, 542 P.2d 1042.
2. Cited in holding enforceable lien existed between original parties; no action for damages for breach of contract when damage not a result of such breach. Kansas State Bank v. Overseas Motosport, Inc., 222 K. 26, 28, 29, 563 P.2d 414.
3. Voluntarily surrendered secured property not obtained through "legal process"; tax lien does not attach to buyer of same. Robbins-Leavenworth Floor Covering, Inc. v. Leavenworth Nat'l Bank & Trust Co., 229 K. 511, 514, 515, 516, 625 P.2d 494.
4. Secured creditor sale of collateral not in "commercially reasonable manner"; test; deficiency not barred. Westgate State Bank v. Clark, 231 K. 81, 86, 642 P.2d 961 (1982).

84-9-504. Secured party's right to dispose of collateral after default; effect of disposition. (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the article on sales (article 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article.

History: L. 1965, ch. 564, § 396; L. 1975, ch. 514, § 34; Jan. 1, 1976.

OFFICIAL UCC COMMENT

Prior Uniform Statutory Provision:

Section 6, Uniform Trust Receipts Act; Sections 19, 20, 21, and 22, Uniform Conditional Sales Act.

Purposes:

1. The Uniform Trust Receipts Act provides that an entruster in possession after default holds the collateral with the rights and duties of a pledgee, and, in particular, that he may sell such collateral at public or private sale with a right to claim deficiency and a duty to account for any surplus. The Uniform Conditional Sales Act insisted on a sale at public auction with elaborate provisions for the giving of notice of sale. This section follows the more liberal provisions of the Trust Receipts Act. Although public sale is recognized, it is hoped that private sale will be encouraged where, as is frequently the case, private sale through commercial channels will result in higher realization on collateral for the benefit of all parties. The only restriction placed on the secured party's method of disposition is that it must be commercially reasonable. In this respect this section follows the provisions of the section on resale by a seller following a buyer's rejection of goods (Section 2-706). Subsection (1) does not restrict disposition to sale: the collateral may be sold, leased, or otherwise disposed of—subject of course to the general requirement of subsection (2) that all aspects of the

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dollars ($500), together with a reasonable attorney's fee for preparing and prosecuting the action. The plaintiff in such action may recover any additional damages that the evidence in the case warrants. Civil actions may be brought under this act before any court of competent jurisdiction, and attachments may be had as in other cases.

(e) The mortgagee or assignee of a mortgagee entering satisfaction or causing to be entered satisfaction of a mortgage under the provisions of subsection (a) shall furnish to the office of the register of deeds the full name and last known post office address of the mortgagor or the mortgagor's assignee. The register of deeds shall forward such information to the county clerk who shall make any necessary changes in address records for mailing tax statements.

History: L. 1971, ch. 189, § 1; L. 1980, ch. 163, § 1; July 1.

Law Review and Bar Journal References:

"Recovery of Attorney Fees in Kansas," Mark A. Furney, 18 W.L.J. 535, 544, 546, 547 (1979).

CASE ANNOTATIONS

1. Applied; title insurance companies held liable for punitive damages for failure to exercise care in disbursing purchaser's funds. Ford v. Guarantee Abstract & Title Co., 222 K. 244, 264, 553 P.2d 254.

58-2310. Same; application to mortgages heretofore paid. K.S.A. 58-2309 shall be construed so as to apply to mortgages heretofore paid, but not discharged of record: *Provided*, That if the residence of the holder of such mortgage can be ascertained, no action shall be brought until demand is made in accordance with said section; but such demand need not be in writing, and will be excused if the residence of the holder of such mortgage cannot, with due diligence, be ascertained.

History: L. 1889, ch. 175, § 2; March 6; R.S. 1923, 67-310.

58-2311. Same; joinder of actions. In any action commenced in the district court to recover damages under the provisions of this act, the plaintiff may unite with such claim a cause of action to cancel the mortgage and remove the cloud from the title; and if plaintiff recovers damages in such action, he or she shall be entitled to a further judgment canceling such mortgage and quieting the title to the mortgaged premises; and where personal service of summons cannot be had on the defendant or defendants within this state, judgment canceling such mortgage may be rendered in the action upon proof of due service by publication, or upon due personal service obtained out of this state.

History: L. 1889, ch. 175, § 3; March 6; R.S. 1923, 67-311.

58-2312. Stipulation for attorney's fees void. Hereafter it shall be unlawful for any person or persons, company, corporation or bank, to contract for the payment of attorney's fees in any note, bill of exchange, bond or mortgage; and any such contract or stipulation for the payment of attorney's fees shall be null and void; and that hereafter no court in this state shall render any judgment, order or decree by which any attorney's fees shall be allowed or charged to the maker of any promissory note, bill of exchange, bond, mortgage, or other evidence of indebtedness by way of fees, expenses, costs or otherwise: *Provided*, That in all existing mortgages wherein no amount is stipulated as attorney's fees, not more than eight percent on sums of two hundred and fifty dollars or under, and not more than five percent on all sums over two hundred and fifty dollars, shall be allowed by any court as attorney's fees: *And provided further*, That this act shall not apply to existing mortgages wherein any sum has been stipulated as attorney's fees.

History: L. 1876, ch. 77, § 1; March 1; R.S. 1923, 67-312.

Cross References to Related Sections:

Contracts and promises, see ch. 16.

Research and Practice Aids:

Hatcher's Digest, Mortgages § 161.

Attorney's fees, Kansas Practice Methods § 1247.

Execution of mortgage note, attorney fees, Kansas Practice Methods § 297.

Law Review and Bar Journal References:

Secured transactions under UCC, J. Eugene Balloun, 5 W.L.J. 192, 215 (1966).

Impact of the Uniform Consumer Credit Code upon Kansas, Barkley Clark, 18 K.L.R. 277, 291 (1970).

Prohibition against provision allowing creditor to collect attorney fees on promissory note, does not change law hereunder, Barkley Clark, 42 J.B.A.K. 147, 199 (1973).

"Recovery of Attorney Fees in Kansas," Mark A. Furney, 18 W.L.J. 535, 538, 543, 544, 545 (1979).

"The U.C.C.C. and Real Estate Financing: A Square Peg in a Round Hole," Thomas L. Griswold, 28 K.L.R. 601, 614 (1980).

CASE ANNOTATIONS

1. Provisions in bond which violate this section

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S.B. 364

TESTIMONY OF KEVIN D. CASE
BEFORE THE SENATE JUDICIARY COMMITTEE
THE KANSAS STATE SENATE
February 24, 1993

The American Association of Creditor Attorneys (AACA) is a nationwide network of law firms engaged in collection and litigation. With member law firms throughout the United States, AACA is the largest association of attorneys engaged principally in the collection of debt and commercial litigation in the U.S.

In the State of Kansas, AACA-member firms are located in Johnson County, Shawnee County and Sedgwick County, Kansas. These law firms represent hundreds of Kansas businesses. The firm Buck, Bohm & Stein, P.C., with whom I am affiliated as an attorney, is located in Leawood, Kansas, and employs over 40 full-time employees.

I am a proponent of Senate Bill 364. The Bill represents a viable means of ensuring that my clients are able to recoup a significant cost of doing business. Furthermore, S.B. 364 would more fairly treat all businesses equally as opposed to the current procedure of favoring some businesses over others in recouping collection costs.

For example, Federal Law has recently abrogated Kansas's prohibition against collecting attorneys fees in certain student loan collection cases for organizations who write student loans. See, 20 USC 1091(a). Kansas Courts are now allowing certain organizations who write student loans to collect their reasonable collection costs, including attorneys fees.

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We believe the trend of the law in other states and as evidenced by Federal Law, acknowledges that the expenses incurred in collecting just debts are legitimate expenses. To effectively recognize this real cost of extending credit, and providing goods and services to consumers in Kansas, S.B. 364 would allow businesses who incur such collection costs, to recover them in an action for collection of the debt.

I urge this Committee to report S.B. 364 favorably to the full Senate.

Kansas-Nebraska League of Savings Institutions

Jeffrey D. Sonnich, Vice-President

Suite 512
700 Kansas Avenue
Topeka, Kansas 66603
(913) 232-8215

February 24, 1993

TO: Senate Committee on Judiciary

FROM: Jeffrey Sonnich, Kansas-Nebraska League of Savings Institutions

RE: S.B. No. 364

Mr. Chairman. Members of the Committee. The Kansas-Nebraska League of Savings Institutions appreciates the opportunity to appear before the Senate Committee on Judiciary in support of S.B. 364.

S.B. 364 would repeal two sections of existing law that prohibit the contracting for attorney fees in notes, bonds, mortgages or consumer transactions. Further, it would allow lenders to recover attorney fees in civil actions brought against debtors who are subject to loans under default. Should the lender prevail in such actions this bill would allow reasonable attorney fees to be set by the court.

While the bill would allow attorney fees in civil actions to recover on a "...,note, bill, negotiable instrument..." the committee may want to consider amending the bill by adding on line 14 after "bill," the following language: "notes secured by real estate mortgages,". In our opinion this language would clarify the intent of the bill as it relates to real estate transactions.

The Kansas-Nebraska League of Savings appreciates the opportunity to express our views on S.B. 364 and would respectfully request the Senate Committee on Judiciary pass this bill favorably.

Jeffrey Sonnich
Vice President

JDS\bw

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KANSAS

Office of CONSUMER CREDIT COMMISSIONER

Joan Finney
Governor

Wm. F. Caton
Commissioner

MEMORANDUM

DATE: February 22, 1993

TO: Senator Jerry Moran

FROM: Wm. F. Caton, Commissioner Bill Caton

SUBJECT: Testimony on Senate Bill 364

Please accept this written testimony in lieu of my personal appearance before the Judicial Committee. Kansas Development Finance Authority is scheduled to close a refinancing on the Kansas Housing Development Corporation bonds and I will be in Kansas City on the hearing date.

I have two concerns with SB 364 that I would like to address. I feel the concept of this bill is equitable to both the consumer and the creditor and I would support such a bill if my concerns are satisfied.

My primary concern is that this legislation repeals K.S.A. 16a-2-507 which is part of the Kansas Consumer Credit Code. The repeal of this section would completely silence the code as to the handling of attorney's fees. I strongly feel that the outcome of this legislation should be included in the code so that both consumers and creditors will be able to reference the code in regard to this matter.

Secondly, this bill is worded in such that attorney's fees will only be awarded in a case where there is a judgement rendered by the court. I believe this will discourage prejudgment settlements between the creditor and the borrower. I suggest that wording be added to include prejudgment settlements if both parties agree to include attorney's fees in the settlement. In the case of a prejudgment settlement, where the court is not charged with determining the reasonable attorney fee, there should be a maximum amount allowable. (Missouri has a maximum of 15% of the outstanding balance which I feel is reasonable.) The Committee may wish to address lower or higher limits.

I have discussed this with industry representatives and they do not feel my concerns are unreasonable. If passage of this bill changes the present handling of attorney's fees, I believe it is very important that the changes be included in the code. Bruce Kinzie, Revisor of Statutes Office, worked on a bill that was not introduced in 1992 legislative session which included satisfactory wording that could be used for the changes to the code.

If you have any questions please do not hesitate to contact me.

JAYHAWK TOWER, 700 S.W. JACKSON, SUITE 1001 / TOPEKA, KANSAS 66603 / (913) 296-3151

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Elwaine Pomeroy For Kansas Collectors sociation, Inc.

February 24, 1993

REMARKS CONCERNING SENATE BILL 244 AND SENATE BILL 364

Kansas Collectors Association, Inc. opposes both Senate Bill 244 and Senate Bill 364, each of which would permit the recovery of attorney fees in certain instances. The Collectors are concerned that this type of legislation would encourage unfair competition, because it would permit the assessment of attorney fees in those instances where civil actions were instituted to collect debts. Collection agencies try to work with debtors to work out arrangements to repay debts without filing lawsuits. Legislation that permits the assessments to attorney fees but not collection fees makes the services rendered by collection agencies at a competitive disadvantage.

The Kansas Collectors Association is also concerned that this type of legislation would encourage the filing of lawsuits in order to obtain the benefit of collecting from the debtor the attorney fees involved in the collection process. Would not attorneys always feel obligated to their clients to file a lawsuit in order to have their fees be assessed against the debtor, rather than having the clients of the attorney pay the attorney fees?

The issue of unfair competition could be addressed by broadening the legislation to refer to "collection fees" instead of "attorney fees", but this type of legislation would still encourage the filing of litigation in order to assess those costs against the debtors. Keep in mind also that the debtors against whom these fees would be assessed are persons who are already having difficulties paying their bills.

We also urge the committee to keep in mind the cumulative effect of legislation being considered. I addressed this committee last week concerning proposals to increase docket fees. Increased docket fees, like attorney fees assessed against debtors, would be additional burdens that debtors would have to try to pay. With

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thousands of Kansans being laid-off, as we know is occurring, we should be especially concerned about persons already burdened with trying to pay their bills.

Senate Bill 244 does not contain any repealers, so in that respect Senate Bill 364 is more technically correct. K.S.A. 16a-2-507 has been on the books since it was passed in 1973. K.S.A. 58-2312 has been the law in Kansas for 117 years, having been enacted in 1876. I would urge the committee to carefully consider the public policy issues involved before changing the established law of Kansas that has served us for so many years.

From a technical standpoint, there is a typographical error in the repealer section on line 22 of Senate Bill 364.

Elwaine F. Pomeroy
For Kansas Collectors Association, Inc.

KANSAS BAR ASSOCIATION

Legislative Information for the Kansas Legislature

TO: **Members, Senate Judiciary Com.**

FROM: **Ron Smith, KBA General Counsel**

SUBJ: **SB 244, SB 364, Attorney Fees**

SUMMARY:

The Board of Governors of the Kansas Bar Association opposes these types of piecemeal changes to attorney fee laws. The Board does not oppose a universal "English Rule" on fees if that is the public policy you want. However, an English rule — that the loser pays the winner's fees — is a fundamental change in American jurisprudence.

BACKGROUND:

SB 244 is slightly different than SB 364 but the effect is generally the same, to allow a reasonable attorneys fee as part of collection efforts.

The Board understands the frustration of the business community when it tries to collect on a debt owed, and must pay its own attorney fees from the collection itself.

Federal and State courts see many instances of "fee shifts." Kansas has more than 130 statutes allowing a prevailing party fee shift. Each is designed to promote separate public policy encouraging that particular litigation and the "private attorneys general concept" found in laws which allow a prevailing party to recover damages and costs plus a reasonable fee.

We also understand the American rule on attorney fees is specific: each party generally pays its own attorney unless specifically authorized by statute or contract.

The Board is concerned about the perceived fairness issue. By enacting SB 364 we create a situation where a large segment of the business community can collect an attorney fee as part of damages and costs if the business is the plaintiff but if the general public is the plaintiff against many of these businesses for a variety of causes of action, there is no attorney fee "shift."

As an example the bills would

This legislative analysis is provided in a format easily inserted into bill books. We hope you find this convenient.

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allow a hospital to sue an individual on an overdue bill due to an automobile accident and seek a reasonable attorney fee. The individual, however, may sue for damages from the same automobile accident, but cannot recover an attorney fee from the defendant since the cause of action sounds in tort.

Subrogation. Since an insurance company has a right to a subrogation based on contract, can the insurer recover with a fee shift owed from the insured, however, if the insured has a grievance against the company such as a bad faith claim, it cannot recover attorney fees? If you are making public policy in this area, then you should speak to these questions.

Malpractice. Medical, accountant, and legal malpractice are issues which are "contract" related. SB 244 discusses *"any action on a contract* or installment accounts," while SB 364 discusses "contracts ... for services." While customarily malpractice actions are "tort," they also are based on breaching the contract to provide reasonable and competent medical, accounting or legal services. What starts out as an action for recovery of medical care or legal services can, with a counterclaim for malpractice, turn into a malpractice case. Obviously it isn't the intent of these bills that malpractice actions be subject to an attorney fee shift to the prevailing party, but if that is the intent then the language needs to be a bit more precise.

SB 364 allows a lawyer, for example to sue a client for fees, then get additional attorney fees top of the dispute over attorney fees that precipitated the action in the first place.

SB 364 appears to allow the defendant to be the prevailing party and get fees even if the contract between plaintiff and defendant only allows the "plaintiff" to get the fees. This type of contract is common in lending situations. In line 17 through 19, the bill states "...if the contract which is the subject of the action provides for attorneys fees to be awarded in addition to the amount of the judgment" then the "prevailing party shall be allowed reasonable fees..." Those clauses can describe a contract that provides for plaintiff recovery, but allow the defendant recovery of fees if defendant "prevails."

Further, we think the last clause in line 20-21 is unnecessary. In line 20 we would suggest a period after the word "court."

Obviously, these bills will prompt the filing of more lawsuits. In an environment where many Americans think we are too litigious, these bills run counter to that feeling. We also note it often is the business community that complains of our national litigiousness.

Finally, the courts must determine reasonableness of fees. This is going to require major new amounts of time for our judges, especially Small Claims and Chapter 61 judges.

CONCLUSION

Having said all this I do want to

that the Board of Governors has instructed me to make these points and then let you, as policy makers, decide how best you want to proceed. Obviously, KBA attorneys will be representing both the business community in these lawsuits, and the few instances where defendants hire attorneys to defend them. We shall abide by your decision.

ROBERT B. DAVENPORT
DIRECTOR

KANSAS BUREAU OF INVESTIGATION

DIVISION OF THE OFFICE OF ATTORNEY GENERAL
STATE OF KANSAS
1620 TYLER
TOPEKA, KANSAS 66612-1837
(913) 232-6000

ROBERT T. STEPHAN
ATTORNEY GENERAL

TESTIMONY
KYLE G. SMITH, ASSISTANT ATTORNEY GENERAL
KANSAS BUREAU OF INVESTIGATION
BEFORE THE SENATE JUDICIARY COMMITTEE
IN SUPPORT OF SENATE BILL 289
FEBRUARY 19, 1993

Mr. Chairman and Members of the Committee:

I am pleased to be here in support of Senate Bill 289. This bill seeks to alleviate a chronic problem of the Kansas court systems and the KBI. The problem is the backlog and delays caused by the growing demand on forensic examiners given the limited number of examiners available. This problem is most acute in cases involving controlled substances and blood alcohol contents. Currently, prosecutors and courts are having to coordinate the scheduling of trials two and three months in advance due to prior subpoenas served on our examiners. As shown by the graphs and information attached to this testimony, all too often these subpoenas requiring the examiner travel across Kansas to court is a complete waste of time as no testimony is taken. The bottom line is that seldom is a scientific, repeatable fact a real issue at trial.

Defense attorneys are aware of this log jam and will frequently wait to see if the examiner actually arrives and then enter a plea of guilty. The toxicology division in fiscal year 1992 actually only testified in 34% of the cases that they were compelled to appear.

Having these examiners on the road on these wasted trips only aggravates the situation as they are obviously not available for cases where the scientific conclusions are actually being challenged nor are

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they back at the laboratory conducting examinations on other evidence that has been submitted. The backlog created not only causes delays throughout the entire criminal justice system, but could seriously impact the investigation of a recent crime where needed lab test results are delayed.

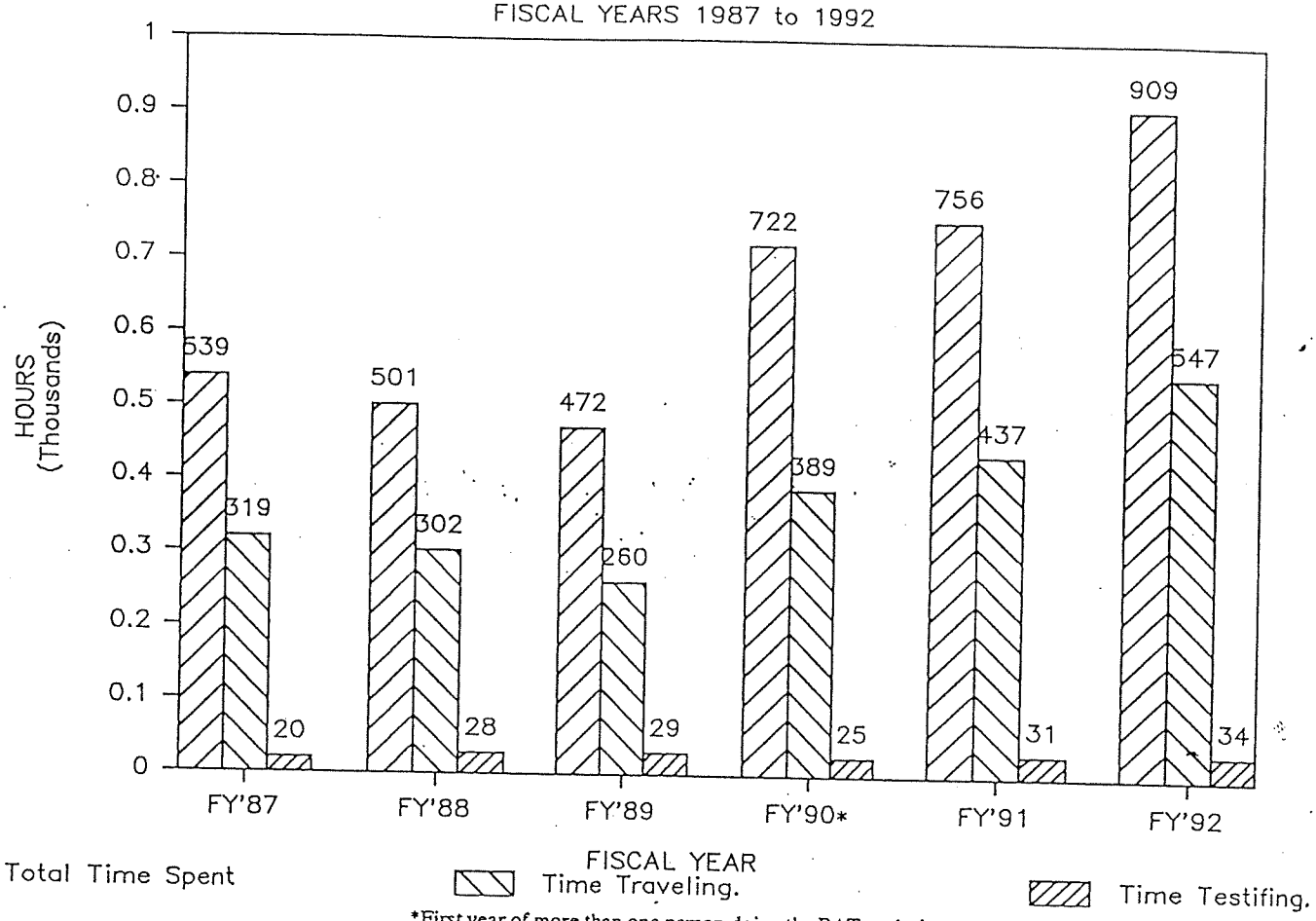
Approximately 19 other states have addressed this problem in varying degrees by allowing certificates of forensic examinations to be admitted in lieu of actual testimony. SB 289 adapts the New Jersey and Minnesota statutes to offer such a solution for Kansas. A defendant's rights to cross-examination and confrontation are preserved as a defendant is entitled to receive a copy of the certificate within 20 days of arraignment and could then move to have the actual examiner be present. However, if, as is the case in the vast majority of trials, scientific evidence is not being challenged as part of the defense, the certificate would allow the case to proceed and the examiner to spend his or her time on cases where the results are an issue. It should also be noted that a prosecutor is not required to utilize this option and so has complete discretion as in to what form the evidence will be presented.

Given the lack of appropriations to provide sufficient examiners and travel funding to deal with this backlog problem, we feel this is a realistic and fair procedure to reduce congested court dockets and wisely utilize what resources we have. I would be happy to answer any questions.

#098

KBI TOXICOLOGY COURT DATA

FISCAL YEARS 1987 to 1992



*First year of more than one person doing the BAT analysis.

SUBPOENA STATISTICS

	FY'87	FY'88	FY'89	FY'90	FY'91	FY'92
Number Received:	323	493	491	575	567	681
Times Testified:	37	38	40	45	50	52

TOXICOLOGY
FY'92 in REVIEW

From Fiscal Year 1991 to Fiscal Year 1992:

CASES

DUI-Drug case submissions up 14%.

BAT case submissions down 5%.

Total Toxicology case submissions down 2%.

COURT

Subpoenas received up 20%.

Total time spent on court up 20%.

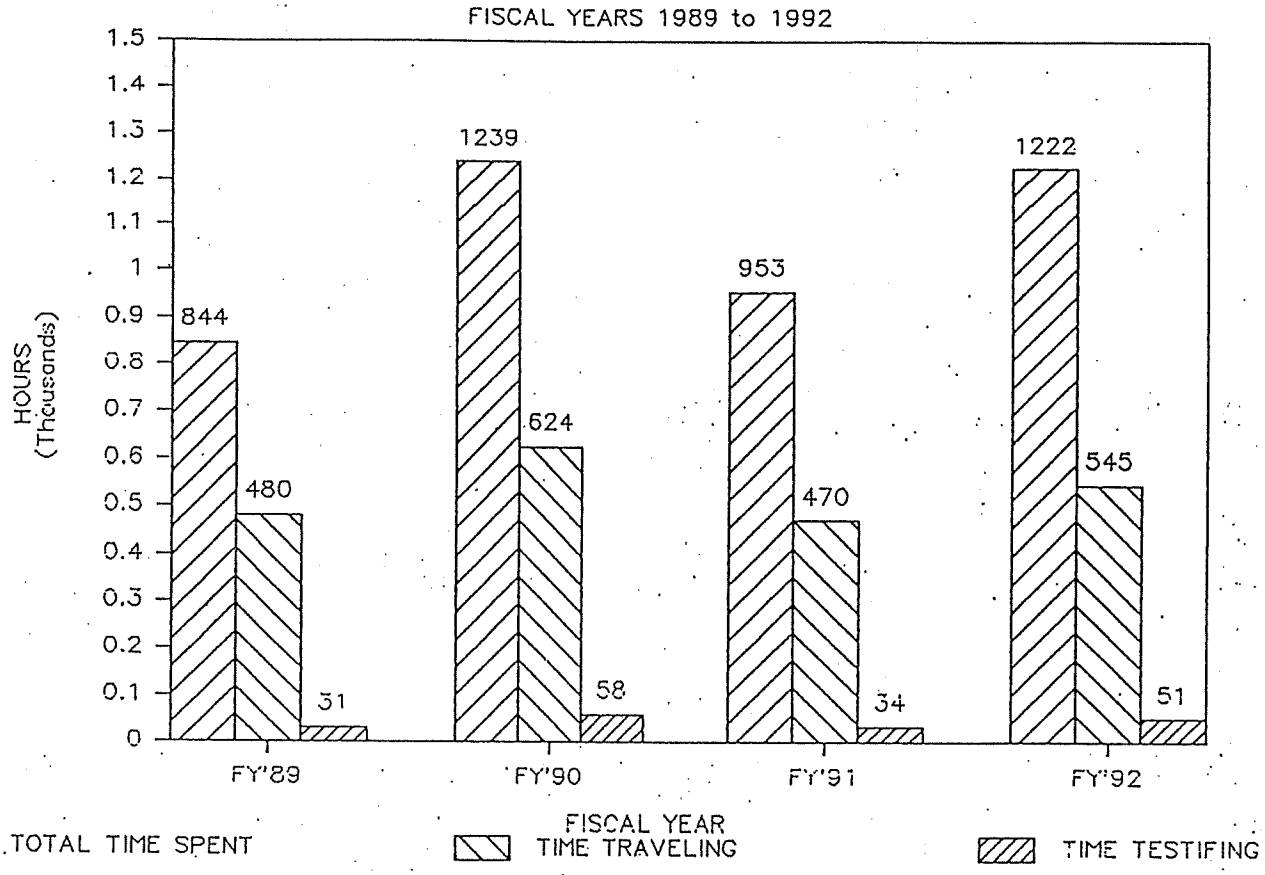
Time spent traveling due to court up 25%.

Times testified up 0.4%.

The percentage of times testified verses times appeared dropped from 47% in FY'91 to only 34% in FY'92.

KBI CHEMISTRY COURT DATA

FISCAL YEARS 1989 to 1992



SUBPOENA STATISICS

	FY'89	FY'90	FY'91	FY'92
Number Received:	1257	1656	1437	1395
Times Testified:	87	137	87	100

States with statutes allowing forensic reports in lieu of testimony:

Alaska	A.S. 12, 45.155
Delaware	11 3505
Illinois	38-115.5.1
Iowa	691.1
Louisiana	15:499
Maryland	Ch. 794, 10.1001, 10.1003
Michigan	27A.2167
Minnesota	634.15
Nevada	NRS.315
New Jersey	2 C:35-19
New York	190.30 2-a
North Dakota	19, 19.01
Ohio	2925.51
Oklahoma	Title 22, O.S. Section 751
South Carolina	98-7, Rules of Crim. Proc. #6
South Dakota	Title 23, 23.3-19.3
Virginia	607, Section 19.2-187
Wisconsin	Ch. 165, Sub Ch. III 165.71

#098A

SUMMARY OF TESTIMONY

Before the Senate Judiciary Committee

February 19, 1993

Senate Bill 289

Presented by the Kansas Highway Patrol
(Sergeant Terry Maple)

Appeared in Support

Mr. Chairman, members of the Committee, on behalf of Colonel Lonnie McCollum I appear before you today in support of Senate Bill 289.

This legislation precludes our breath alcohol technicians from having to personally appear before the court of jurisdiction. The positive impact of submitting a "certificate of forensic examination" in lieu of requiring personal testimony by the technician is substantial.

In 1992, our breath alcohol technicians drove 8,898 miles (27% increase over 1991) for court appearances and spent 114 hours (31% increase over 1991) at court. Only a fraction of the court time was actually spent on the witness stand testifying, the majority of our technicians time was spent waiting. As a matter of practice, defense attorneys subpoena our technicians only to stipulate to the test results after the subpoena has been honored.

Passage of this bill will enhance the efficiency of our Breath Alcohol Program by significantly reducing the time spent travelling to and waiting in court.

I respectfully urge the Committee's favorable consideration of this bill.

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Attachment 11

TO: Chairman Jerry Moran and Members of the Senate Judiciary Committee

FROM: Myron E. Scafe, Chief of Police, Overland Park, Kansas
Michael R. Santos, Senior Assistant City Attorney, Overland Park, Kansas

SUBJECT: SB 340 Concerning Admissibility of DUI Breath Tests

DATE: February 24, 1993

I. The Historical Perspective

The Kansas legislature has been a leader in the development of effective legislation to combat the problem of drunken driving on our highways. In 1982 it passed a comprehensive DUI law that required mandatory minimum sentencing. In 1985 it created one of the first per se .10 laws in the country. In 1989 it passed a comprehensive commercial drivers DUI statute. The adoption of these laws has resulted in the reduction of fatality and injury accidents caused by DUI. Because of the importance of the breath test to DUI prosecution, most defense attorneys focus on keeping the breath results out of evidence. In our opinion, without denigrating the legitimate efforts of defense attorneys to effectively represent their clients, many of the challenges to the breath tests are not legitimate challenges to the introduction of the breath test results; but rather, challenges to the probative value or weight to be given the test results. Senate Bill 340 provides the legislative guidance to the court to insure that once a proper evidentiary foundation has been laid, the results of the test will be admitted into evidence.

II. Recommended Amendments to SB 340

Based on changes in the existing case law, we recommend the following amendment to the proposed language of Senate Bill 340:

> Section 1. (a) The following evidence shall constitute sufficient evidentiary foundation to admit the test results of a breath test administered pursuant to K.S.A. 8-1001 et seq and amendments thereto:
>
> (1) proof that at the time the test was administered the officer was trained and certified by the department of health and environment to conduct human breath testing;
>
> (2) proof that at the time the test was administered the device used to test the person's breath was certified by the department of health and environment to test human breath;

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Attachment 12

(3) proof that at the time the test was administered the device used to test the person's breath was functioning properly and the test was administered in accordance with the manufactuers instructions as adopted into the operating protocol established by the department of health and environment for that breath testing device; and

(4) proof that the officer, prior to administering the test first gave oral and written notice to the person who's breath was tested, of the information contained in the Kansas implied consent advisory form issued by the Department of Revenue.

(b) Upon admission of the foundation proof set forth in subsection (a), no further evidentiary foundation shall be necessary for admission of the breath test result into evidence. Once the admissibility of the breath test result has been established, evidence challenging the test or the test result shall be considered only as to the probative weight to be given the test results and not as to the admissibility of the results.

We believe Barnhart vs. Department of Revenue, 243 Kan. 209 (1988), State vs. McNaught, 238 Kan. 567 (1986), City of Shawnee vs. Gruss, 2 Kan App 2d 131 (1978) and State vs. Lieurance, 14 Kan App 2d 87 (1989) support the use of the proposed language.

II. **Why is SB 340 needed?**

Pursuant to state law the Director of the Department of Health and Environment is charged with the responsibility of insuring that human breath testing for law enforcement is conducted in accordance with scientific standards that will insure its reliability in court. Because many courts are not familiar with the extensive state regulation of breath testing, challenges to the admissibility of test results are permitted that are in fact challenges to the probative weight to be given the results.

III. **What is the existing state regulation concerning the testing of human breath for law enforcement purposes?**

The following law exists in Kansas today to insure the scientific reliability of breath testing by law enforcement officers.

A. **K.S.A. 65-1,107** provides that the Secretary of Health and Environment is hereby authorized and empowered to promulgate rules and regulations establishing...the procedures, qualifications of personnel and standards of performance in the testing of human breath for law enforcement purposes, including procedures for the periodic inspection of apparatus, equipment and devices... and the requirements for the training, certification and periodic testing of persons who

operate apparatus, equipment or devices for the testing of human breath for law enforcement purposes.

B. **K.S.A. 65-1,109** provides that it shall be unlawful for any person to make any test of the human breath for law enforcement purposes unless they have complied with the rules and regulations of the Secretary of Health and Environment adopted ... to govern the procedures, standards of performance and qualifications, training certification and annual testing of personnel for the testing of human breath for law enforcement purposes ... and the apparatus, equipment or device used by such person in the testing of human breath is of a type approved by the Secretary of Health and Environment and otherwise complies with the regulations and rules of the Secretary of Health and Environment ... for the periodic inspection of such apparatus, equipment and devices.

In addition to the above statutory provisions, the Secretary of Health and Environment has adopted the following rules and regulations that insure the scientific reliability of human breath testing by law enforcement officers within the state.

C. **K.A.R. 28-32-1** provides that each law enforcement agency performing breath evidential testing for alcohol shall apply to the Kansas Department of Health and Environment for certification of test equipment and approval of procedures, performance standards and training and test equipment and devices. In addition,

1. evidential breath test devices certified in Kansas shallmeet the specifications determined by the Department of Health and Environment...

2. testing shall be conducted in accordance with approved procedures, and using the equipment and devices certified by the department...

3. equipment shall be operated strictly according to description provided by the manufacturer and approved by the Department of Health and Environment...

4. reliability of instrument performance shall be assured by weekly testing with alcohol standards furnished by the Department of Health and Environment. These results shall be reported monthly to the Department of Health and Environment.

D. **K.A.R. 28-32-2** provides that each law enforcement agency performing evidential breath alcohol tests shall participate in a performance evaluation program conducted or approved by

the Department of Health and Environment, that shall include requiring each certified operator shall test and report the number of proficiency test specimens specified by the Secretary. Failure to test and report proficiency specimens or unsatisfactory results from such testing shall constitute reason for revoking the certification of the operator.

E. **K.A.R. 28-32-5** provides that in order to perform evidential breath alcohol tests for law enforcement purposes a person shall:

1. be duly appointed a Kansas law enforcement officer ...;

2. shall receive adequate training in breath alcohol testing;

3. shall successfully test four proficiency test specimens ... ;

4. ... shall successfully complete a written examination prescribed by the Department of Health and Environment.

IV. **SB 340 does not prohibit the defendant from rebutting the results of the test.**

Statutory presumptions are rebuttable. The term prima facia evidence carries the inference that such evidence may be rebutted and overcome, and notwithstanding the rule, an accused has the opportunity to submit his evidence and make a full defense. State v Nossaman, 107 Kan. 715 (1920). Once the prosecutor has laid the evidentiary foundation requirements of SB 340 the test results are simply before the fact finder. The defendant remains free to challenge the validity and probative value of the result. SB 340 simply establishes a known, simple and reliable evidentiary standard for admitting breath test results.

KANSAS BAR ASSOCIATION

Legislative Information for the Kansas Legislature

TO: **Members, Senate Judiciary Committee**
FROM: **Ron Smith, KBA General Counsel**
SUBJ: **SB 289**

SUMMARY:

SB 289 is one means of addressing the problem of unnecessary testimony of forensic employees of law enforcement. There is another.

KBA POSITION

The Kansas Bar Association opposes legislation immunizing persons from testifying, or grant privileges against testifying, in court, except under certain circumstances.

BACKGROUND

Courtrooms are intended to determine the best possible version of the truth, consistent with civil liberties.

To further that goal, the judiciary and juries must hear all relevant evidence. Often the critical piece of defense testimony is cross examination of the means by which forensic evidence is produced and the reliability of testing means used.

Some interest groups seek to avoid testifying by expanding privileges against testifying in court, immunizing themselves from disclosing documents under subpoena, or creating statutory ``minimums" of what constitutes prima facie evidence.

The Criminal and Civil Procedure codes abolished all common law privileges against testifying. K.S.A. 60-407 states that ``except as otherwise provided by statute," no person has a privilege to refuse to be a witness. That code regulates many statutory privileges.

While we do not challenge the authority of the legislature to define the parameters of when a person can testify, there should be some structure to such change.

Since the Code of Civil and Criminal Procedure was adopted after extensive involvement of the Judicial Council and examination of case law the Kansas Bar Associa-

This legislative analysis is provided in a format easily inserted into bill books. We hope you find this convenient. SJ

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tion opposes legislation that extends, limits or interprets rules of evidence regarding admissibility of evidence or testimony from otherwise bona fide witnesses, *unless* (1) there is significant Judicial Council study of such extension, limitation or interpretation, (2) a lesser restrictive method of meeting the identified problem does not exist, (3) case law is unable to speak to the issue in a manner consistent with good public policy, (4) the public interest in the change is compelling, and (5) the public interest is best served by the proposed change.

Problems

I sent this bill out to members who do criminal defense work and these were among their comments:

1. Subsection 2 essentially forbids any type of cross-examination on both the individual who performed the analysis and the type of analysis performed. Some believe this may present due process considerations and perhaps make the bill unconstitutional. For example, at trial involving first degree murder, SB 289 would allow a certificate to be introduced into evidence which could indicate that the blood found on the defendant's clothing matched that of the victim. It precludes cross examination of the conclusions reached in a report.

2. Subsection 3 indicates that when the prosecution intends to offer such a certificate, notice must be given within twenty days of arraignment. Arraignment on a misdemeanor charge occurs at first appearance. Therefore, under this statute the prosecution would have to give twenty days notice to opposing counsel or defendant twenty days prior to the defendant's first appearance. In many felony cases the defendant is arraigned immediately after the completion of the preliminary hearing. That requires the prosecution to provide notice twenty days prior to the preliminary hearing. If the preliminary hearing is held less than twenty days after the first appearance, there essentially cannot be adequate notice.

3. Suggest restricting the bill to bond, probation or diversion revocation hearings, not trials.

Recommendations

In SB 289, if you feel you want to include this bill as affecting trials, we believe a lesser restrictive alternative is available.

Current pretrial conferences allowed in felony matters can handle this problem. The prosecutor simply raises the issue with defense counsel: is a defense argument built around the credibility of forensic reports which the prosecution will offer into evidence?

If the answer is no, the judge can arrange for the evidence to be received in some other way than through the direct testimony of the witness who conducted the test.

If the answer is yes, the judge can still inquire as to the basis of the

defense counsel's reason for ating the witness present, and make a decision on having that witness testify in that manner.

This pretrial conferencing is available only in felonies. To the extent it is the KBI's intent that it be available in misdemeanors, all you have to do is amend the felony pretrial hearing statute with authority to hold such conferences in serious misdemeanors, on motion of either the prosecution or the defense.

CONCLUSION

Our alternative recommendation meets the need of the KBI and Highway Patrol without creating new immunities or limitations on relevant evidence.

Thank you.

KANSAS BAR ASSOCIATION

Legislative Information for the Kansas Legislature

TO: **Members, Senate Judiciary Com.**

FROM: **Ron Smith, KBA General Counsel**

SUBJ: **SB 340**

SUMMARY

The Board of Governors opposes SB 340 as it intrudes on the basic need for courts to determine which evidence is relevant to a given proceeding. We also believe lesser alternatives can bring about the same result.

BACKGROUND

This bill restricts the right of defendants to attack the credibility and reliability of DUI breath testing. It is an unfortunate development in our criminal procedure that rather than sit down and discuss procedural issues in pretrial conferences, prosecutors or defense counsel seek legislative limitations on admissible evidence.

Whether to admit or disallow evidence in a criminal trial is a judicial decision based on the facts and circumstances at the time, and is a difficult item for you to legislate. That is why we have judges. The proponents of this bill argue that a few judges are making wrong decisions regarding admissibility of breath tests. That may be. In this bill, prosecutors are asking you to referee the problem which more appropriately belongs in continuing legal education classrooms. The answer is better judicial training, not this legislation.

Legislative Role. The legislature's historic role is to decide what activities constitute a crime and define it, along with the punishment. Whether to admit or disallow evidence in a criminal trial is an inherent power of the court.[1] While the legislature has power to creates codes of evidence in civil and criminal matters, historically that has not been done very often without input from the judiciary, via the Judicial Council. This power is also available within the Supreme Court's rule making power, although it often defers to the legislature.[2]

This legislative analysis is provided in a format easily inserted into bill books. We hope you find this convenient.

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For years in Kansas our courts have held that "it is not within the power of the legislature to exclude from the courts that which proves the truth of a case, nor, on the other hand, compel them to receive that which is false in character."[3]

When judicial and legislative rules collide, judicial rules control.[4]

SB 340 legislatively delegates the power to determine operating protocols that constitute minimum evidence requirements from the judicial branch to the executive branch (KDHE). *Line 26-27.* The prosecutor is a member of the executive branch. The bill thus puts in the hands of the executive branch the power to determine what constitutes minimum evidentiary requirements in all instances and under all circumstances, the facts not withstanding.

Essentially section 1(a) states that if law enforcement is satisfied that there is a "sufficient evidentiary foundation," that is all that is necessary and the test should be admitted whether or not strong persuasive arguments are present against such admission. It is impossible for legislators to anticipate all the ways that a blood alcohol test could be rendered evidentiarily worthless before, during, and after the taking of the test. SB 340 says that defendants can attack the credibility of the test, but they cannot ask a judge to strike it from the evidence to be considered by a jury, no matter how poorly taken the testing procedure has become.

Protocols. Note the requirement in lines 26-28 concerning KDHE determination of operating protocols. KDHE has nine different blood alcohol test machines for which they write protocols — how to operate them properly. As of 1990, these protocols were on departmental letterhead but were not rules and regulations of the Department. Thus there is no public input.

Operators of breath test devices must make certain the accused has not taken anything by mouth (e.g. eating, drinking, smoking, medication, etc.), or has not vomited liquid from his stomach into the mouth, for at least 15 minutes prior to the test. Anything in the mouth can throw off the accuracy of the results.

The officers testify to all this when they "lay their foundation for admissibility." This is covered in Section 1(a)(3).

Section 1(b) states, however, that when the prosecutor complies with subsection (a), the evidence of the test is admitted at that point.

There is a difference between evidence which is "admissible" and evidence which is "admitted." All relevant evidence is admissible and, unless there is sufficient reason against admission, it is admitted. However, *when* it is admitted is important. SB 340 says it must be admitted before there is any opportunity to cross-examine the officers about the testing procedure or results.

Prosecutors know that once the evidence of the breath test is into evidence it is hard for a jury to ignore it, even if later admonished to do so by a judge.

Bench Trials. Many DUI cases are bench trials, with no jury. In such instances judges sit as both judge and jury. In such cases, to tell the judge what evidence must or must not be received into evidence raises Separation of Powers considerations.

Barnhart. SB 340 is inconsistent with what has been called the "Barnhart Defense." Statutes require that after completion of the police's BAT test, the accused must be informed of his right to consult with an attorney and to secure additional testing to show from independent means a different test result.[5]

The Kansas Supreme Court has held the legislature intended to "ensure that a person arrested for DUI was made aware, by the required notice procedure, of his statutory rights."[6]

The legislature enforces this right through K.S.A. 8-1104, which provides that the accused must be notified of the right. If the officer refuses to permit the person tested to obtain such additional testing, even properly taken BAT results are inadmissible.[7]

SB 340 precludes a Barnhart defense. Unless the question of the officer's post-testing conduct is resolved prior to trial, the issue is presented to the judge during trial. Most DUI cases are misdemeanors and misdemeanors do not allow a formal pretrial conference structure. Thus SB 340 would preclude a Barnhart defense because the offending test results are admitted into evidence under section (b) before the defense has the ability to present, through cross examination of the officer or others, testimony about the post-test conduct of law enforcement.

How does a judge effectively exclude from the jury's hearing and consideration testimony about the BAT once it is admitted into evidence?

RECOMMENDATION:

Again the simpler solution to the problems outlined here would be to have a pretrial conference procedure for serious misdemeanors similar to that required in all felonies. At that conference the judge can decide issues such as the basis for objection to the test results. The court can issue orders based on the decision. Prosecutors and defense counsel are then bound by those orders. It makes for a smoother trial and may have the effect of showing the lawyers the weaknesses of their cases and encourage a plea bargain if that is appropriate.

CONCLUSION

SB 340 is inconsistent with current DUI defenses allowed by statute.

FOOTNOTES

1. *State v. Quick*, 226 Kan. 308, 597 P.2d 1108, at 1111-1112 (1979).
2. *State v. Mitchell*, 234 Kan. 185 (1983).
3. *Mo Pac. Railway Co. v. Simonson*, 64 Kan. 802 (1902).
4. *Mitchell, id.*
5. K.S.A. 1991 Supp 8-1001(f)(1)(I).
6. *Barnhart v. Kansas Dept. Of Revenue*, 243 Kan. 209 , 755 P.2d 1337 (1988).

7. *Barnhart, id.*, P.2d at 1340. Further, "If the suspect is not given this opportunity for additional testing, the state's test is not competent evidence." *State v. George,* 12 Kan. App. 2d 649, 754 P.2d 460 (1988).