Approved: August 25, 2011
(Date)

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The Chairman called the meeting to order at 9:35 A.M. on February 16, 2011, in Room 548-S of the Capitol.

All members were present, except Senator Donovan, who was excused

Committee staff present:
Lauren Douglass, Kansas Legislative Research Department
Robert Allison-Gallimore, Kansas Legislative Research Department
Jason Thompson, Office of Revisor of Statutes
Tamera Lawrence, Office of Revisor of Statutes
Theresa Kiernan, Committee Assistant

Conferees appearing before the committee:
Ed Klumpp, KS Assn of Chiefs of Police, KS Sheriffs Assn, KS Peace Officers Assn
Jennifer Roth, Kansas Assn. of Criminal Defense Lawyers
Eric Stafford, The Kansas Chamber
Christopher E. Appel, Attorney, Washington, D.C.
Katy S. Nitcher, District Court Trustee, Seventh District, Lawrence, KS
N. Russell Hazlewood, Kansas Association for Justice, Wichita

Others attending:
See attached list.

The Chairman announced that he was modifying the procedure for the submission of testimony for all future meetings of the committee, as follows: Unless advance arrangements are made, 30 copies of written testimony must be submitted to Room 559-S no later than 24 hours preceding the time of the hearing. (Testimony may be submitted after the deadline, but the Daily Agenda might not reflect that such testimony has been submitted.)

The Chairman opened the hearings on **SB 159 -- Parole and postrelease supervision for violent offenders and sex offenders**.

Jason Thompson, Staff Revisor, reviewed the bill.

Senator Pilcher-Cook testified in support of **SB 159** (Attachment 1). She stated that the bill was introduced in response to a holding in a 2009 Kansas Supreme Court case, *State v. Bennett*. She stated that the bill would:

- Add conditions of supervision for certain violent and sex offenders serving on parole or post-release supervision. Offenders must agree in writing to be subject to search or seizure at any time of the day or night with or without a search warrant and without cause
- Sex offenders must agree in writing not to possess pornographic materials

Senator Pilcher-Cook distributed copies of balloon amendments to the bill (Attachment 2).

Ed Klumpp testified in support of **SB 159** (Attachment 3). He stated that the bill applies to the worst criminal offenders; he suggested that the committee consider expanding the bill's application.

Senator Kelly asked whether a probation officer might conduct a suspicion-less search under current law. Mr. Klumpp responded, Yes.

Jennifer Roth testified in opposition to **SB 159** (Attachment 4). She expressed concern with the retroactivity of the provisions as they apply to persons currently on parole. She stated it is not good public policy.

The Chairman called the committee's attention to the fiscal note for **SB 159**.

The Chairman closed the hearings on **SB 159**.

The minutes of the Judiciary Committee at 10:30 a.m. on February 16, 2011, in Room 548-S of the Capitol.

The Chairman opened the hearings on **SB 106 -- Consumer protection act**.

Jason Thompson, Staff Revisor, reviewed the bill.

Eric Stafford testified in support of **SB 106** (Attachment 5). He stated that the bill would protect businesses from frivolous lawsuits filed by individuals who have suffered no real harm.

Christopher E. Appel testified in support of **SB 106** (Attachment 6). He stated the bill amends the Kansas consumer protection act (KCPA), as follows:

- Provide consistency between Kansas and Federal law
- Provide that conduct authorized or permitted by a government agency is outside the scope of the KCPA
- In order to recover damages for violation of KCPA, a plaintiff must show the violation caused the plaintiff to enter into the transaction
- The measure of damages for a private plaintiff is the actual out-of-pocket loss

The Chairman announced that the hearings on **SB 106** would continue after the conclusion of the hearings on **SB 160**, which follow immediately.

The Chairman opened the hearings on **SB 160 -- Collection of child support payments**.

Jason Thompson, Staff Revisor, reviewed the bill.

Senator Lynn, the sponsor of the **SB 160**, expressed her support for the bill.

Katy S. Nitcher testified in support of **SB 160** (Attachment 7). She stated that the bill would allow for the collection of past due child support in non Title IV-D cases in the same manner provided for collection in Title IV-D cases. Ms. Nitcher included copies of balloon amendments to the bill in her testimony.

The Chairman closed the hearings on **SB 160**.

The Chairman re-opened the hearings on **SB 106 -- Consumer protection act**.

Russell Hazlewood testified in opposition to **SB 106** (Attachment 8). He stated that if enacted, the bill would:

- Abdicate the responsibility for safeguarding Kansas consumers to a bureaucracy in Washington, D.C.
- Make the KCPA in applicable to almost every transaction
- Repeal KCPA protections for small businesses and farmers
- Make it nearly impossible for consumers to enforce the KCPA
- Appear to make the KCPA only to pre-transaction misconduct
- Facilitate dishonest marketing of goods and services

Meeting adjourned at 10:29 A.M. The next meeting is scheduled for February 17, 2011.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2/16/11

NAME	REPRESENTING
Kathy Wittner	Douglas County Lt Tee
Kevin Brown	Cap Ins Group
Sarah Green	Kansas Dept. of Ag
Alan Tucker	Sen Haley (intern)
Natalie Haag	Security Benefit
Sean Miller	Capitol Strategies
Derek Hein	Hein Law Firm
T.J. Cahill	Sen Dennis Pyle
Patrick Vogelsberg	KCDAA
Xiao Zhang	Sen Olsen

SENATE BILL No. 159

By Senator Pilcher-Cook

2-9

sb159_balloon.pdf
RS - JThompson - 02/15/11

AN ACT concerning crimes, punishment and criminal procedure; relating to parole and postrelease supervision for violent offenders and sex offenders; conditions; amending K.S.A. 2010 Supp. 22-3717 and repealing the existing ~~section~~; also repealing K.S.A. 2010 Supp. 22-3717c.

and section 247 of chapter 136 of the 2010 Session Laws of Kansas

sections

21-4603b and

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

Section 1. K.S.A. 2010 Supp. 22-3717 is hereby amended to read as follows: 22-3717. (a) Except as otherwise provided by this section; K.S.A. 1993 Supp. 21-4628, prior to its repeal; K.S.A. 21-4635 through 21-4638, *prior to their repeal; K.S.A. 21-4624, prior to its repeal; K.S.A. 21-4642, prior to its repeal; sections 260, 263, 264 and 265 of chapter 136 of the 2010 Session Laws of Kansas*, and amendments thereto; K.S.A. 8-1567, and amendments thereto; ~~K.S.A. 21-4642~~ *section 266 of chapter 136 of the 2010 Session Laws of Kansas*, and amendments thereto; and ~~K.S.A 21-4624~~ *section 257 of chapter 136 of the 2010 Session Laws of Kansas*, and amendments thereto, an inmate, including an inmate sentenced pursuant to K.S.A. 21-4618, *prior to its repeal, or section 276 of chapter 136 of the 2010 Session Laws of Kansas*, and amendments thereto, shall be eligible for parole after serving the entire minimum sentence imposed by the court, less good time credits.

(b) (1) Except as provided by K.S.A. 21-4635 through 21-4638, *prior to their repeal, and sections 260, 263, 264 and 265 of chapter 136 of the 2010 Session Laws of Kansas*, and amendments thereto, an inmate sentenced to imprisonment for the crime of capital murder, or an inmate sentenced for the crime of murder in the first degree based upon a finding of premeditated murder, committed on or after July 1, 1994, shall be eligible for parole after serving 25 years of confinement, without deduction of any good time credits.

(2) Except as provided by subsection (b)(1) or (b)(4), K.S.A. 1993 Supp. 21-4628, prior to its repeal, ~~and~~ K.S.A. 21-4635 through 21-4638, *prior to their repeal, and sections 260, 263, 264 and 265 of chapter 136 of the 2010 Session Laws of Kansas*, and amendments thereto, an inmate sentenced to imprisonment for an off-grid offense committed on or after July 1, 1993, but prior to July 1, 1999, shall be eligible for parole after serving 15 years of confinement, without deduction of any good time

credits and an inmate sentenced to imprisonment for an off-grid offense committed on or after July 1, 1999, shall be eligible for parole after serving 20 years of confinement without deduction of any good time credits.

(3) Except as provided by K.S.A. 1993 Supp. 21-4628 prior to its repeal, an inmate sentenced for a class A felony committed before July 1, 1993, including an inmate sentenced pursuant to K.S.A. 21-4618, *prior to its repeal, or section 276 of chapter 136 of the 2010 Session Laws of Kansas*, and amendments thereto, shall be eligible for parole after serving 15 years of confinement, without deduction of any good time credits.

(4) An inmate sentenced to imprisonment for a violation of subsection (a) of K.S.A. 21-3402, *prior to its repeal, or subsection (a) of section 38 of chapter 136 of the 2010 Session Laws of Kansas*, and amendments thereto, committed on or after July 1, 1996, but prior to July 1, 1999, shall be eligible for parole after serving 10 years of confinement without deduction of any good time credits.

(5) An inmate sentenced to imprisonment pursuant to K.S.A. 21-4643, *prior to its repeal, or section 267 of chapter 136 of the 2010 Session Laws of Kansas*, and amendments thereto, committed on or after July 1, 2006, shall be eligible for parole after serving the mandatory term of imprisonment without deduction of any good time credits.

(c) (1) Except as provided in subsection (e), if an inmate is sentenced to imprisonment for more than one crime and the sentences run consecutively, the inmate shall be eligible for parole after serving the total of:

(A) The aggregate minimum sentences, as determined pursuant to K.S.A. 21-4608, *prior to its repeal, or section 246 of chapter 136 of the 2010 Session Laws of Kansas,* and amendments thereto, less good time credits for those crimes which are not class A felonies; and

(B) an additional 15 years, without deduction of good time credits, for each crime which is a class A felony.

(2) *(A)* If an inmate is sentenced to imprisonment pursuant to K.S.A. 21-4643, ~~and amendments thereto~~ *prior to its repeal*, for crimes committed on or after July 1, 2006, *but prior to July 1, 2011,* the inmate shall be eligible for parole after serving the mandatory term of imprisonment.

(B) If an inmate is sentenced to imprisonment pursuant to section 267 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto, for crimes committed on or after July 1, 2011, the inmate shall be eligible for parole after serving the mandatory term of imprisonment.

(d) (1) Persons sentenced for crimes, other than off-grid crimes, committed on or after July 1, 1993, or persons subject to subparagraph (G), will not be eligible for parole, but will be released to a mandatory

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to 10 years but any such deferral shall require the board to state the basis for its findings.

(2) Inmates sentenced for a class A or class B felony who have not had a parole board hearing in the five years prior to July 1, 2010, shall have such inmates' cases reviewed by the parole board on or before July 1, 2012. Such review shall begin with the inmates with the oldest deferral date and progress to the most recent. Such review shall be done utilizing existing resources unless the parole board determines that such resources are insufficient. If the parole board determines that such resources are insufficient, then the provisions of this paragraph are subject to appropriations therefor.

(k) Parolees and persons on postrelease supervision shall be assigned, upon release, to the appropriate level of supervision pursuant to the criteria established by the secretary of corrections.

(l) The Kansas parole board shall adopt rules and regulations in accordance with K.S.A. 77-415 et seq., and amendments thereto, not inconsistent with the law and as it may deem proper or necessary, with respect to the conduct of parole hearings, postrelease supervision reviews, revocation hearings, orders of restitution, reimbursement of expenditures by the state board of indigents' defense services and other conditions to be imposed upon parolees or releasees. Whenever an order for parole or postrelease supervision is issued it shall recite the conditions thereof.

(m) Whenever the Kansas parole board orders the parole of an inmate or establishes conditions for an inmate placed on postrelease supervision, the board:

(1) Unless it finds compelling circumstances which would render a plan of payment unworkable, shall order as a condition of parole or postrelease supervision that the parolee or the person on postrelease supervision pay any transportation expenses resulting from returning the parolee or the person on postrelease supervision to this state to answer criminal charges or a warrant for a violation of a condition of probation, assignment to a community correctional services program, parole, conditional release or postrelease supervision;

(2) to the extent practicable, shall order as a condition of parole or postrelease supervision that the parolee or the person on postrelease supervision make progress towards or successfully complete the equivalent of a secondary education if the inmate has not previously completed such educational equivalent and is capable of doing so;

(3) may order that the parolee or person on postrelease supervision perform community or public service work for local governmental agencies, private corporations organized not-for-profit or charitable or social service organizations performing services for the community;

(4) may order the parolee or person on postrelease supervision to

Parolees and persons on postrelease supervision are, and shall agree in writing to be, subject to search or seizure by a parole officer, special enforcement officer or other law enforcement officer at any time of the day or night, with or without a search warrant and with or without cause.

pay the administrative fee imposed pursuant to K.S.A. 22-4529, and amendments thereto, unless the board finds compelling circumstances which would render payment unworkable; ~~and~~

(5) unless it finds compelling circumstances which would render a plan of payment unworkable, shall order that the parolee or person on postrelease supervision reimburse the state for all or part of the expenditures by the state board of indigents' defense services to provide counsel and other defense services to the person. In determining the amount and method of payment of such sum, the parole board shall take account of the financial resources of the person and the nature of the burden that the payment of such sum will impose. Such amount shall not exceed the amount claimed by appointed counsel on the payment voucher for indigents' defense services or the amount prescribed by the board of indigents' defense services reimbursement tables as provided in K.S.A. 22-4522, and amendments thereto, whichever is less, minus any previous payments for such services.~~.~~

; and

(6) shall order that the parolee or person on postrelease supervision agree in writing to be subject to search or seizure by a parole officer, special enforcement officer or other law enforcement officer at any time of the day or night, with or without a search warrant and with or without cause.

(n) If the court which sentenced an inmate specified at the time of sentencing the amount and the recipient of any restitution ordered as a condition of parole or postrelease supervision, the Kansas parole board shall order as a condition of parole or postrelease supervision that the inmate pay restitution in the amount and manner provided in the journal entry unless the board finds compelling circumstances which would render a plan of restitution unworkable.

(o) Whenever the Kansas parole board grants the parole of an inmate, the board, within ~~10~~ *14* days of the date of the decision to grant parole, shall give written notice of the decision to the county or district attorney of the county where the inmate was sentenced.

(p) When an inmate is to be released on postrelease supervision, the secretary, within 30 days prior to release, shall provide the county or district attorney of the county where the inmate was sentenced written notice of the release date.

(q) Inmates shall be released on postrelease supervision upon the termination of the prison portion of their sentence. Time served while on postrelease supervision will vest.

(r) An inmate who is allocated regular good time credits as provided in K.S.A. 22-3725, and amendments thereto, may receive meritorious good time credits in increments of not more than 90 days per meritorious act. These credits may be awarded by the secretary of corrections when an inmate has acted in a heroic or outstanding manner in coming to the assistance of another person in a life threatening situation, preventing injury or death to a person, preventing the destruction of property or taking actions which result in a financial savings to the state.

(s) The provisions of subsections (d)(1)(A), (d)(1)(B), (d)(1)(C) and

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(d)(1)(E) shall be applied retroactively as provided in subsection (t).

(t) For offenders sentenced prior to the effective date of this act who are eligible for modification of their postrelease supervision obligation, the department of corrections shall modify the period of postrelease supervision as provided for by this section for offenders convicted of severity level 9 and 10 crimes on the sentencing guidelines grid for nondrug crimes and severity level 4 crimes on the sentencing guidelines grid for drug crimes on or before September 1, 2000; for offenders convicted of severity level 7 and 8 crimes on the sentencing guidelines grid for nondrug crimes on or before November 1, 2000; and for offenders convicted of severity level 5 and 6 crimes on the sentencing guidelines grid for nondrug crimes and severity level 3 crimes on the sentencing guidelines grid for drug crimes on or before January 1, 2001.

(u) An inmate sentenced to imprisonment pursuant to K.S.A. 21-4643, *prior to its repeal, or section 267 of chapter 136 of the 2010 Session Laws of Kansas,* and amendments thereto, for crimes committed on or after July 1, 2006, shall be placed on parole for life and shall not be discharged from supervision by the Kansas parole board. When the board orders the parole of an inmate pursuant to this subsection, the board shall order as a condition of parole that the inmate be electronically monitored for the duration of the inmate's natural life.

(v) Whenever the Kansas parole board or the court orders a person to be electronically monitored, the board or court shall order the person to reimburse the state for all or part of the cost of such monitoring. In determining the amount and method of payment of such sum, the board or court shall take account of the financial resources of the person and the nature of the burden that the payment of such sum will impose.

~~*(w) (1) On and after July 1, 2011, for any inmate who is a violent offender or sex offender, as defined in K.S.A. 22-4902, and amendments thereto, whenever the Kansas parole board orders the parole of such inmate or establishes conditions for such inmate placed on postrelease supervision, such inmate shall agree in writing to be subject to search or seizure by a parole officer, community correctional services officer or other law enforcement officer at any time of the day or night, with or without a search warrant and with or without cause. Nothing in this subsection shall be construed to authorize parole officers, community correctional services officers or other law enforcement officers to conduct arbitrary or capricious searches or searches for the sole purpose of harassment.*~~

~~*(2) The provisions of this subsection shall be applied retroactively to every violent offender or sex offender, as defined in K.S.A. 22-4902, and amendments thereto, who is on parole or postrelease supervision on July 1, 2011. The parole board shall obtain the written*~~

strike

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~~agreement required by this subsection from such offenders as soon as practicable.~~

~~(x)~~ *(1) On and after July 1, 2011, for any inmate who is a sex offender, as defined in K.S.A. 22-4902, and amendments thereto, whenever the Kansas parole board orders the parole of such inmate or establishes conditions for such inmate placed on postrelease supervision, such inmate shall agree in writing to not possess pornographic materials. As used in this subsection, "pornographic materials" means:*

(A) Any obscene material or performance depicting sexual conduct, sexual contact or a sexual performance; and

(B) any visual depiction, including any photograph, film, video, picture or computer or computer-generated image or picture, whether made or produced by electronic, mechanical or other means, of sexually explicit conduct.

(2) The provisions of this subsection shall be applied retroactively to every sex offender, as defined in K.S.A. 22-4902, and amendments thereto, who is on parole or postrelease supervision on July 1, 2011. The parole board shall obtain the written agreement required by this subsection from such offenders as soon as practicable.

Sec. 2. K.S.A. 2010 Supp. 22-3717 and 22-3717c are hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

(w)

Sec. 2. Amend section 247 of chapter 136 of the 2010 Session Laws of Kansas (attached)
Renumber sections accordingly

21-4603b,

and section 247 of chapter 136 of the 2010 Session Laws of Kansas

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Sec. 2. Section 247 of chapter 136 of the 2010 Session Laws of Kansas is hereby amended to read as follows: Sec. 247. (a) Except as required by subsection (c), nothing in this section shall be construed to limit the authority of the court to impose or modify any general or specific conditions of probation, suspension of sentence or assignment to a community correctional services program. The court services officer or community correctional services officer may recommend, and the court may order, the imposition of any conditions of probation, suspension of sentence or assignment to a community correctional services program. For crimes committed on or after July 1, 1993, in presumptive nonprison cases, the court services officer or community correctional services officer may recommend, and the court may order, the imposition of any conditions of probation or assignment to a community correctional services program. The court may at any time order the modification of such conditions, after notice to the court services officer or community correctional services officer and an opportunity for such officer to be heard thereon. The court shall cause a copy of any such order to be delivered to the court services officer and the probationer or to the community correctional services officer and the community corrections participant, as the case may be. The provisions of K.S.A. 75-5291, and amendments thereto, shall be applicable to any assignment to a community correctional services program pursuant to this section.

(b) The court may impose any conditions of probation, suspension of sentence or assignment to a community correctional services program that the court deems proper, including, but not limited to, requiring that the defendant:

(1) Avoid such injurious or vicious habits, as directed by the court, court services officer or community correctional services officer;

(2) avoid such persons or places of disreputable or harmful character, as directed by the court, court services officer or community correctional services officer;

(3) report to the court services officer or community correctional services officer as directed;

(4) permit the court services officer or community correctional services officer to visit the defendant at home or elsewhere;

(5) work faithfully at suitable employment insofar as possible;

(6) remain within the state unless the court grants permission to leave;

(7) pay a fine or costs, applicable to the offense, in one or several sums and in the manner as directed by the court;

(8) support the defendant's dependents;

(9) reside in a residential facility located in the community and participate in educational, counseling, work and other correctional or rehabilitative programs;

(10) perform community or public service work for local governmental agencies, private corporations organized not for profit, or charitable or social service organizations performing services for the community;

(11) perform services under a system of day fines whereby the defendant is required to satisfy fines, costs or reparation or restitution obligations by performing services for a period of days, determined by the court on the basis of ability to pay, standard of living, support obligations and other factors;

(12) participate in a house arrest program pursuant to section 249 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto;

(13) order the defendant to pay the administrative fee authorized by K.S.A. 22-4529, and amendments thereto, unless waived by the court; or

(14) in felony cases, except for violations of K.S.A. 8-1567, and amendments thereto, be confined in a county jail not to exceed 60 days, which need not be served consecutively.

(c) In addition to any other conditions of probation, suspension of sentence or assignment to a community correctional services program, the court shall order the defendant to comply with each of

the following conditions:

(1) The defendant shall obey all laws of the United States, the state of Kansas and any other jurisdiction to the laws of which the defendant may be subject;

(2) make reparation or restitution to the aggrieved party for the damage or loss caused by the defendant's crime, in an amount and manner determined by the court and to the person specified by the court, unless the court finds compelling circumstances which would render a plan of restitution unworkable. If the court finds a plan of restitution unworkable, the court shall state on the record in detail the reasons therefore;

(3) (A) pay a ~~probation or community correctional services~~correctional supervision fee of ~~$25~~$60 if the person was convicted of a misdemeanor or a fee of ~~$50~~$120 if the person was convicted of a felony. In any case the amount of the ~~probation or community correctional services~~correctional supervision fee specified by this paragraph may be reduced or waived by the judge if the person is unable to pay that amount;

(B) the ~~probation or community correctional services~~correctional supervision fee imposed by this paragraph shall be charged and collected by the district court. The clerk of the district court shall remit all revenues received under this paragraph from ~~probation or community correctional services~~correctional supervision fees to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the state general fund, a sum equal to 41.67% of such remittance, and to the correctional supervision fund, a sum equal to 58.33% of such remittance;

(C) this paragraph shall apply to persons placed on felony or misdemeanor probation or released on misdemeanor parole to reside in Kansas and supervised by Kansas court services officers under the interstate compact for offender supervision; and

~~(C)~~(D) this paragraph shall not apply to persons placed on probation or released on parole to reside in Kansas under the uniform act for out-of-state parolee supervision; ~~and~~

(4) reimburse the state general fund for all or a part of the expenditures by the state board of indigents' defense services to provide counsel and other defense services to the defendant. In determining the amount and method of payment of such sum, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of such sum will impose. A defendant who has been required to pay such sum and who is not willfully in default in the payment thereof may at any time petition the court which sentenced the defendant to waive payment of such sum or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may waive payment of all or part of the amount due or modify the method of payment. The amount of attorney fees to be included in the court order for reimbursement shall be the amount claimed by appointed counsel on the payment voucher for indigents' defense services or the amount prescribed by the board of indigents' defense services reimbursement tables as provided in K.S.A. 22-4522, and amendments thereto, whichever is less~~.~~;

(4) be subject to searches of the defendant's person, effects, vehicle, residence and property by court service officers, community correctional services officers and other law enforcement officers based on reasonable suspicion of the defendant violating conditions of probation or criminal activity; and

(5) be subject to random, but reasonable, tests for drug and alcohol consumption as ordered by a court services officer or community correctional services officer.

(d) There is hereby established in the state treasury the correctional supervision fund. All moneys credited to the correctional supervision fund shall be used for the implementation of and training for use of a statewide, mandatory, standardized risk assessment tool or instrument as specified

by the Kansas sentencing commission, pursuant to K.S.A. 75-5291, and amendments thereto, and for evidence-based offender supervision programs by judicial branch personnel. If all expenditures for the program have been paid and moneys remain in the correctional supervision fund for a fiscal year, remaining moneys may be expended from the correctional supervision fund to support offender supervision by court services officers. All expenditures from the correctional supervision fund shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the chief justice of the Kansas supreme court or by a person or persons designated by the chief justice.

STATE OF KANSAS

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Testimony by Senator Mary Pilcher Cook
Senate Judiciary Committee – in support of **HSB 159**
Tuesday, February 15, 2011

Chairman Owens, and members of the committee:

Thank you for the hearing on the Probation-Parole Supervision bill. The formulation of this proposed statute was in response to the Kansas Supreme Court decision in *State v. Bennett,* which rested on a series of U.S. Supreme Court decisions (see http://www.kscourts.org/Cases-and-Opinions/opinions/supct/2009/20090130/98038.htm).

The U.S. Supreme Court has stated that a person's reasonable expectation of privacy depends on the level of freedom that person enjoys in society. Probationers, parolees and prisoners retain more limited privacy than do free citizens.

In addition, the Court stated that incarcerated prisoners have no reasonable expectation of privacy and can be searched at any time for any reason; parolees have some expectation of privacy, but it is greatly diminished. Further, probationers have a greater expectation of privacy than parolees, but it is "not unlimited." This range of privacy rights has been developed by the U.S. Supreme Court over twenty years in three cases: *Griffin v. Wisconsin*, *United States v. Knights*, and *Samson v. California*.

In *Samson*, the U.S. Supreme Court upheld a California law requiring parolees to submit to suspicionless searches as long as these searches are not arbitrary or capricious.

The U.S. Court of Appeals for the Tenth Circuit applied Kansas law on the issue of parolee searches in *United States v. Freeman*, and reached the conclusion that Kansas law did not authorize suspicionless searches because Kansas statutes lacked the provisions authorizing such searches. The Kansas Supreme Court agreed with the federal court's interpretation and concluded that given current Kansas law, "parolees in Kansas have an expectation that they will not be subjected to suspicionless searches."

HB 159 would correct this problem in statute, by specifically authorizing suspicionless searches on parolees by corrections and law enforcement officers.

Senate Judiciary
2-16-11
Attachment 2

The U.S. Supreme Court's decisions in *Griffin* and *Knights* held that searches of probationers based on reasonable suspicion satisfied the Fourth Amendment. The Kansas Supreme Court stated that because probationers have a greater expectation of privacy than parolees, "searches of probationers in Kansas must also be based on a reasonable suspicion."

SB 159 allows corrections and law enforcement officers to conduct searches of probationers with reasonable suspicion. It is important to note that a judge would have extra latitude in what type of searches could be carried out for probationers, as the Kansas Supreme Court refers to the Court of Appeals' opinion stating, "the sentencing judge's comments and ultimate order during sentencing provide that either community corrections or law enforcement officers can conduct searches at any time for potentially any reason."

Public safety would be greatly enhanced with SB 159 with little to no fiscal impact, and this legislation would give 1) both corrections and law enforcement officers a tool for keeping Kansas citizens safer, 2) an incentive for the probationer and parolee to conduct themselves with greater caution so as not to break the law and 3) it gives the probationer and parolee a tool for communication and resistance against their peers when faced with temptation. The overall effect of SB 159 would be a reduction in the recidivism rate and an improvement in the rehabilitation rate. I respectfully ask for your support.

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(316)733-7301

Kansas Sheriffs Association
PO Box 1853
Salina, KS 67402
(785)827-2222

Kansas Peace Officers Association
PO Box 2592
Wichita, KS 67201
(316)722-8433

Testimony to the Senate Judiciary Committee
In Support of SB159
February 15, 2011

Chairman Owens and Committee Members,

The Kansas Association of Chiefs of Police, the Kansas Sheriffs Association and the Kansas Peace Officers Association supports SB159. This bill would add the authority for law enforcement officers to search parolees of certain violent and sex crimes. This bill has been well researched and complies with existing case law on the matter. It is important as we proceed to be sure we do not cause any harm to the existing search authority of the parole officers and court services officers.

The US Supreme Court upheld a California statute providing this authority in Samson vs. California, 547 US 843 (2006). The Tenth Circuit ruling in *United States v. Freeman*, 479 F.3d 743, 748 (10th Cir. 2007) expresses the importance of a state statute to apply the provisions of Samson when they state, "*Samson* does not represent a blanket approval for warrantless parolee or probationer searches by general law enforcement officers without reasonable suspicion; rather, the Court approved the constitutionality of such searches only when authorized under state law. Kansas has not gone as far as California in authorizing such searches, and this search therefore was not permissible in the absence of reasonable suspicion." 479 F.3d at 748." (emphasis added) They also stated, "In *Samson v. California*, 126 S. Ct. 2193 (2006), the Supreme Court extended the principle of *Knights* to uphold a warrantless search of a parolee even in the absence of reasonable suspicion, where the parolee had signed a parole agreement that allowed parole officers or other peace officers to search the parolee "with or without a search warrant and with or without cause." *Id.* at 2196. . . Parolee searches are therefore an example of the rare instance in which the contours of a federal constitutional right are determined, in part, by the content of state law." (emphasis added)

The passage of this bill will provide an additional tool for law enforcement officers. Many times law enforcement confronts these parolees at odd hours of the night or on weekends when the availability of a parole officer is more scarce. Without this bill, law enforcement asking a parole officer to conduct a search can also be problematic if the court rules the search by a parole officer was conducted simply at the request of a law enforcement who otherwise did not have authority to conduct the search themselves. It appears to have no fiscal cost, it does not create a new law violation requiring DOC bed space, and it is supported by case law.

As proposed this bill restricts the application to the worst of offenders. This is a restriction case law does not require and it may be wise to consider expanding it to other felons on parole as well. It is our belief passage of this bill will encourage parolees to stay clean. The more they feel the chances are high for detection of returning to crime, the more likely they will not do so. And certainly this will give law enforcement a tool to identify a parolee that does return to the commission of crimes more quickly and thus minimize further victims.

We urge you to support SB159 and recommend it favorable for passage to the full Senate.

Ed Klumpp
Legislative Liaison
E-mail: eklumpp@cox.net

Senate Judiciary
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Attachment 3

Senate Judiciary Committee
SB 159
Testimony of Jennifer Roth - Opponent
February 15, 2011

Chairman Owens and Members of the Committee:

In *State v. Bennett*, 288 Kan. 86 (2009), the Kansas Supreme Court held that requiring a probationer to submit to random, suspicionless searches violates the probationer's constitutional rights under the 14th Amendment to the U.S. Constitution and Sect. 15 of the Kansas Constitution Bill of Rights. In so doing, the Court looked at twenty years of U.S. Supreme Court precedent, including *Samson v. California*, 547 U.S. 843 (2006), which involved a California law authorizing suspicionless searches of parolees. The *Bennett* Court also considered *U.S. v. Freeman*, 479 F.3d 743 (10th Cir. 2007), which held a warrantless search of a parolee under Kansas law must be supported by reasonable suspicion:

> *Samson* does not represent a blanket approval for warrantless parolee or probationer searches by general law enforcement officers without reasonable suspicion; rather, the Court approved the constitutionality of such searches only when authorized under state law. Kansas has not gone as far as California in authorizing such searches, and this search therefore was not permissible in the absence of reasonable suspicion.

Freeman, 479 F.3d at 748.

"Kansas' procedures for parole supervision specifically inform parolees that they have an expectation that searches will not be conducted unless an officer has a (reasonable) suspicion that such a search is necessary to enforce the conditions of parole. Put another way, parolees in Kansas have an expectation that they will not be subjected to suspicionless searches." *Bennett*, 288 Kan. at 98.

SB 159 takes on *Freeman* and *Bennett* and treats Kansas like California.

It is important to note that in *Samson* (decided in 2006 for an incident occurring in 2002), the issue was whether a California law was constitutional. The Court determined that California's legislature made its decision to pass a suspicionless search law because of its particular problem with the number of and success of its parolees. As of November 2005, California had 130,000 parolees. *Samson*, 547 U.S. at 853. In contrast, as of February 11, 2011, Kansas had 7,009 parolees.[1]

California's recidivism rate early in the decade was 68-70% - the highest recidivism rate in the nation. *Samson*, 547 U.S. at 853-54. In contrast, FY 2010 in Kansas, there were 163 people admitted to KDOC for new felony convictions while on post-release (and 1,083 conditional violators, which includes "a significant number of cases in which the offender was officially returned with no new sentence, but actually had been convicted of a new felony offense").[2] When Kansas' model re-entry programs were fully funded, "[r]ecidivism rates — the percent of

[1] (http://www.doc.ks.gov/publications/pop/POP%2002-11-2011.PDF).
[2] (http://www.doc.ks.gov/ publications/StatProfile-FY2010-online.pdf).

ex-convicts committing new crimes — had in 2007 plunged statewide to 2.2 percent, less than half the recidivism of the early part of the decade."[3]

"The California Legislature has concluded that, *given the number of inmates the State paroles and its high recidivism rate*, a requirement that searches be based on individualized suspicion would undermine the State's ability to effectively supervise parolees and protect the public from criminal acts by reoffenders." *Samson*, 547 U.S. at 854 (emphasis provided).

This is Kansas, not California. Kansas has different demographics. As of December 31, 2009, the total California Department of Corrections and Rehabilitation population was 297,406, including 155,641 in institutions and camps. Also in 2009, California prisons had 45,016 felon new admissions.[4] As of February 11, 2011, Kansas had 9,054 people in prison.[5]

Furthermore, Kansas has different values. It has a different philosophy about how to use corrections dollars. Kansas has been a model to the other 49 states as far as our programs for parolees and use of corrections dollars are concerned.

This suspicionless search law proposed in SB 159 is not the only way to meet the goals of reintegration and public safety – in fact, it is arguably counter to both. "Petitioner observes that the majority of States and the Federal Government have been able to further similar interests in reducing recidivism and promoting reintegration, despite having systems that permit parolee searches based upon some level of suspicion." *Samson*, 547 U.S. at 855 (dissent by Justice Stevens, joined by Justices Souter and Breyer). As *Freeman* points out, the DOC has the ability to provide for searches. It does provide for searches. In addition, the *Samson* dissent mentions that the majority "seems to acknowledge that unreasonable searches 'inflic[t] dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into productive society." *Samson*, 547 U.S. at 865.

This suspicionless search law proposed in SB 159 does not appear to be widespread among states. "With only one or two arguable exceptions, neither the Federal Government nor any other State subjects parolees to searches of the kind to which petitioner was subjected." *Samson*, 547 U.S. at 863 (dissent). While I did not have time to review other states' laws or parole policies to see what effect, if any, *Samson* has had, I did some review of cases. I found at least one state that rejected *Samson*'s reasoning on state constitutional grounds (*State v. Ochoa*, 792 N.W.2d 260 (Iowa Dec 17, 2010)) and one state that refused to find its law allows suspicionless searches (*U.S. v. Rivera*, 727 F.Supp.2d 367 (E.D.Pa. Jul 22, 2010) ("Pennsylvania law does not permit parole officers to poke around in parolees' private spaces because they are curious or because they believe that parolees may be hiding something.")

For all of the reasons and evidence presented above, I encourage you to reject SB 159. Thank you.

Jennifer C. Roth

Jennifer C. Roth
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[3] (http://www.mcclatchydc.com/2010/04/04/91592/economys-toll-kansas-cuts-its.html#).

[4] (http://www.cdcr.ca.gov/Reports_Research/ Offender Information_Services_ Branch /Annual/CalPris/CALPRISd2009.pdf).

[5] (http://www.doc.ks.gov/publications/pop/POP% 2002-11-2011.PDF/).

Testimony before the Senate Judiciary Committee
SB 106– Consumer Protection Act
Presented by Eric Stafford, Senior Director of Government Affairs

achieve more

Wednesday, February 16, 2011

Chairman Owens and members of the Committee:

We appreciate the opportunity to provide testimony in support of Senate Bill 106. My name is Eric Stafford. I am the Senior Director of Government Affairs for the Kansas Chamber.

The Kansas Chamber is pleased to support Senate Bill 106 which tightens the Kansas Consumer Protection Act to protect businesses from frivolous lawsuits by individuals who have suffered no real harm. Kansas is one of four states plus the District of Columbia which currently allows lawsuits regardless of whether or not any person has actually been misled, deceived or damaged.

From software packaging to MP3 players, lawsuits have been brought against companies when the consumer suffered no "loss." The proposed changes to the Kansas Consumer Protection Act included in SB 106 will prevent similar baseless suits from being filed in Kansas.

SB 106 preserves the intent of consumer protection laws which were created to prevent deceptive practices and protect consumers who purchase a product with a value that was portrayed differently through advertisements. The Kansas Chamber is asking the Kansas legislature to protect Kansas businesses against the threat of frivolous lawsuits while maintaining the state's ability to stop unfair or deceptive practices.

Thank you for the opportunity to speak to you in support of Senate Bill 106. I would be happy to answer any questions.

The Kansas Chamber, with headquarters in Topeka, is the leading statewide pro-business advocacy group moving Kansas towards becoming the best state in America to do business. The Chamber represents small, medium and large employers all across Kansas.

THE KANSAS CHAMBER
835 SW Topeka Blvd. Topeka, KS 66612 785.357.6321

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Attachment 5

WRITTEN TESTIMONY OF CHRISTOPHER E. APPEL, ESQ.

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ON BEHALF OF THE
AMERICAN TORT REFORM ASSOCIATION

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

BEFORE THE KANSAS
SENATE JUDICIARY COMMITTEE

FEBRUARY 16, 2011

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Attachment 6

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

Background

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

ATRA's Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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February 15, 2011

Mr. Chairman Tim Owens and Members of the Senate Judiciary Committee:

Thank you for this opportunity to provide testimony on behalf of the court trustees across the State of Kansas supporting the passage of Senate Bill 160 which will assist in the enforcement of child support orders across Kansas.

Two primary agencies across the State of Kansas enforce support orders, those entities that contract with SRS for enforcement services and court trustee offices. An individual who is owed child support can seek collection assistance from SRS and their contractors or from a local court trustee office. The purpose behind SB 160 is to allow all individuals owed child support to equally take advantage of enforcement measures regardless of which agency enforces their case.

There are two types of trustee offices: those who only enforce non-IV-D cases or, for lack of a better term, a regular support case, and those who enforce both IV-D cases and regular cases. To illustrate, my office, the Douglas County District Court Trustee office, only enforces regular cases; we do not have the IV-D contract. By contrast, the Johnson County District Court Trustee Office, for example, has the IV-D contract and enforces both regular cases and IV-D cases. Under the current law, children in regular cases lack certain enforcement tools available in IV-D cases. Additionally, trustee offices that have the IV-D contract cannot treat all children in their caseload equally. The end result is not all children have the full complement of enforcement tools in Kansas. Senate Bill 160 addresses these inequities

First, I will address the proposed amendment regarding how income withholding orders are served on employers. K.S.A. 23-4,107(f)(2) currently allows only a IV-D agency to use alternate methods of service acceptable to the employer in lieu of personal service or registered mail. Current technology allows trustees to fax or e-mail income withholding orders to employers resulting in faster commencement or termination of income withholding. The court trustees are simply seeking the same tools for non-IV-D cases, i.e., regular cases, as allowed in IV-D cases. Additional smaller benefits are sheriff's offices are removed from the loop in serving orders by personal service or registered mail and courts benefit from cost savings as fewer registered mailers are purchased.

Second, current state debt setoff law, K.S.A. 75-6202(b)(2), defines a "debt" to include any amount of support owed an individual who is receiving assistance in collecting that debt through a IV-D agency. This means that a child in a IV-D case can look to state tax refund interception, for example, to pay current or past due support while a child in a regular case is foreclosed from that enforcement tool. Senate Bill 160 merely includes cases enforced by trustees pursuant to K.S.A. 23-495, i.e., regular cases, within the definition of "debt." Trustee offices similar to the Douglas County Court Trustee could then use state debt setoff for a regular case, and trustee offices similar to the Johnson County Trustee would no longer discriminate between cases when considering state debt setoff as an enforcement tool.

Passage of Senate Bill 160 will result in a level playing field for all children of Kansas regardless of

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which agency enforces the support order or the designation of the support order. For these reasons, I ask for your support of the passage of the bill.

Thank you for the honor of presenting my testimony on behalf of court trustee offices across the State of Kansas.

Respectfully,

Katy S. Nitcher
Douglas County District Court Trustee

Katie Nitcher
District Court Trustee
Lawrence, KS

Session of 2011

SENATE BILL No. 160

By Senator Lynn

2-9

AN ACT concerning child support; relating to collection of support payments; amending K.S.A. 2010 Supp. 23-4,107 and 75-6202 and repealing the existing sections.

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

Section 1. K.S.A. 2010 Supp. 23-4,107 is hereby amended to read as follows: 23-4,107. (a) Any new or modified order for support shall include a provision for the withholding of income to enforce the order for support.

(b) Except as otherwise provided in subsection (j), (k) or (l), all new or modified orders for support shall provide for immediate issuance of an income withholding order. The income withholding order shall be issued without further notice to the obligor and shall specify an amount sufficient to satisfy the order for support and to defray any arrearage. The income withholding order shall be issued regardless of whether a payor subject to the jurisdiction of this state can be identified at the time the order for support is entered.

(c) Except as otherwise provided in this subsection or subsections (j) order, an income withholding order shall be issued by the court upon request of the obligee or public office, provided that the obligor accrued an arrearage equal to or greater than the amount of support payable for one month and the requirements of subsections (d) and (h) have been met. The income withholding order shall be issued without further notice to the obligor and shall specify an amount sufficient to satisfy the order for support and to defray any arrearage. The income withholding order shall be issued regardless of whether a payor subject to the jurisdiction of this state can be identified at the time the income withholding order is issued.

(d) Not less than seven days after the obligee or public office has served a notice pursuant to subsection (h), the obligee or public office may initiate income withholding pursuant to paragraph (1) or (2).

(1) The obligee or public office may apply for an income withholding order by filing with the court an affidavit stating: (A) The date that the notice was served on the obligor and the manner of service; (B) that the obligor has not filed a motion to stay issuance of the income withholding order or, if a motion to stay has been filed, the reason an

is receiving assistance in collecting that support under K.S.A. 39-756, and amendments thereto, or under part D of title IV of the federal social security act (42 U.S.C. § 651 *et seq.*), as amended; or

(3) owes a debt to a foreign state agency.

(b) "Debt" means:

(1) Any liquidated sum due and owing to the state of Kansas, or any state agency, municipality or foreign state agency which has accrued through contract, subrogation, tort, operation of law, or any other legal theory regardless of whether there is an outstanding judgment for that sum. A debt shall not include special assessments except when the owner of the property assessed petitioned for the improvement and any successor in interest of such owner of property; or

(2) any amount of support due and owing an individual, or an agency of another state, who is receiving assistance in collecting that support under *K.S.A. 23-495 or* K.S.A. 39-756, and amendments thereto, or under part D of title IV of the federal social security act (42 U.S.C. § 651 *et seq.*), as amended, which amount shall be considered a debt due and owing the district court trustee or the department of social and rehabilitation services for the purposes of this act.

(c) "Refund" means any amount of Kansas income tax refund due to any person as a result of an overpayment of tax, and for this purpose, a refund due to a husband and wife resulting from a joint return shall be considered to be separately owned by each individual in the proportion of each such spouse's contribution to income, as the term "contribution to income" is defined by rules and regulations of the secretary of revenue.

(d) "Net proceeds collected" means gross proceeds collected through final setoff against a debtor's earnings, refund or other payment due from the state or any state agency minus any collection assistance fee charged by the director of accounts and reports of the department of administration.

(e) "State agency" means any state office, officer, department, board, commission, institution, bureau, agency or authority or any division or unit thereof and any judicial district of this state or the clerk or clerks thereof. "State agency" also shall include any district court utilizing collection services pursuant to K.S.A. 75-719, and amendments thereto, to collect debts owed to such court.

(f) "Person" means an individual, proprietorship, partnership, limited partnership, association, trust, estate, business trust, corporation, other entity or a governmental agency, unit or subdivision.

(g) "Director" means the director of accounts and reports of the department of administration.

(h) "Municipality" means any municipality as defined by K.S.A. 75-1117, and amendments thereto.

23-495 or

7-4

KANSAS ASSOCIATION FOR JUSTICE

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www.ksaj.org

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

From: N. Russell Hazlewood

Date: February 16, 2011

RE: SB 106 Consumer Protection Act

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

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

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

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

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

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

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

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

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

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

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

268 Kan. at 822.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SB 106 would facilitate dishonest marketing of goods and services.

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

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

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