

MINUTES OF THE SENATE JUDICIARY COMMITTEE

Chairman Tim Owens called the meeting to order at 9:38 A.M. on February 17, 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:

Donn Teske, Kansas Farmers Union, President  
Stephanie Mickelsen, Deputy Secretary State, Business Services  
Kevin Roberts, Kansas Dental Association  
Randy Downing, Vice President of Government Affairs, Dr. Pepper/Snapple

Others attending:

See attached list.

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

Jason Thompson, Staff Revisor, reviewed the bill.

Donn Teske testified in opposition to **SB 106 (Attachment 1)**. He stated he is concerned that agriculture would be excluded the protections of the KCPA. In addition, the bill would completely neutralize the KCPA for those consumers remaining under the KCPA.

Written testimony in support of **SB 106** was submitted by: Christopher E. Appel, Washington D.C. (**Attachment 2**) and P.D. Villarreal, GlaxoSmithKline (**Attachment 3**).

Written testimony in opposition to **SB 106** was submitted by: Anna Lambertson, Kansas Health Consumer Coalition (**Attachment 4**), Jim Welch, Office of Attorney General (**Attachment 5**) and Sharon Werner (**Attachment 6**).

The Chairman called the committee's attention to the fiscal note for **SB 106**.

The Chairman closed the hearings on **SB 106**.

The Chairman opened the hearings on **SB 96 -- Business entities; resident agents; articles of incorporation and certificates of good standing.**

Jason Thompson, Staff Revisor, reviewed the bill.

Stephanie Mickelsen testified in support of **SB 96 (Attachment 7)**. She stated that the bill would:

- Require a foreign entity to state, on their application, that they are in good standing in their home state (as of the date of application) in lieu filing a certificate of good standing
- Add a statement to the resident agent formation document of a corporation, LLC, LP, LLP that the entity notified the resident agent of his appointment and that the resident agent accepted the appointment
- Allow an LLC, LP, and LLP to reinstate its articles of incorporation after forfeiture due to a loss of the entity's resident agent by filing a certificate of reinstatement and paying any fees and penalties due to the Secretary of State

Ms. Mickelsen requested the committee to amend the bill to delay the effective date until July 1, 2012.

In response to Senator Vratil's question relating to verifying whether or not a foreign corporation is in good standing, Ms. Mickelsen stated the office would not be doing such verification.

## CONTINUATION SHEET

The minutes of the Judiciary Committee at 9:38 a.m. on February 17, 2011, in Room 548-S of the Capitol.

The Chairman called the committee's attention to the fiscal note for **SB 96**.

The Chairman closed the hearings on **SB 96**.

The Chairman opened the hearings **SB 104 -- Kansas tort claims act; charitable health care providers**.

Jason Thompson, Staff Revisor, reviewed the bill.

Kevin Roberts testified in support of **SB 104** (Attachment 8). He stated the bill would amend the definition of the "charitable health care provider" contained in the Kansas Tort Claims Act. In regard to a charitable health provider who provides dentistry services and dental hygienist services, the bill would delete references to specific Kansas Administrative Regulations, which have been repealed, and insert the more general reference to "rules and regulations adopted by the Kansas Dental Board."

Senator Bruce asked, "Why are those services defined by rules and regulations and not by statute?"

Mr. Roberts stated, "It provides flexibility as the practice of dentistry changes."

Senator Vratil added, "It is more prudent that the Kansas Dental Board define "dentistry services" and "dental hygienist services" than it is for the Legislature to do so."

The Chairman called the committee's attention to the fiscal note for **SB 104**.

The Chairman closed the hearings on **SB 104**.

The Chairman opened the hearings on **SB 164 -- Plastic bulk merchandise containers; sales, records; civil penalties**.

Jason Thompson, Staff Revisor, reviewed the bill.

Randy Downing testified in support of **SB 164** (Attachment 9). He stated that the bill would impose certain requirements relating to the sale of plastic bulk merchandise containers and the records that must be kept in relation thereto. The bill provides for a civil penalty up to \$10,000 for each violation. The bill is patterned after laws in Texas, California and Maryland.

Senator Owens asked whether retailers or the plastic container distributors are taking steps to protect themselves.

Senator Umbarger stated this is an issue that should be addressed in a contract between the distributor and retailer.

Senator Vratil raised concerns with proof of ownership of the bulk containers. In addition, he felt the bill could not be enforced.

Senator Pilcher-Cook asked whether the retailer could pay a deposit.

Mr. Downing replied that retailers do not want to pay deposits.

Senator Bruce asked that action be deferred until information is provided to the committee

relating to steps taken by the industry to mitigate losses or protect their own interests.

Senator Owens stated that payment of deposits has become a cost of doing business and that it is an issue to be settled by business not the legislature.

Written testimony in support of **SB 164** was submitted by Michael R. Murray on behalf of the Kansas Food Dealers Association and the Retail Grocers Assn. of Greater Kansas City (Attachment 10).

The Chairman closed the hearings on **SB 164**.

The Chairman called the committee's attention to additional written testimony provided by Norman

CONTINUATION SHEET

The minutes of the Judiciary Committee at 9:38 a.m. on February 17, 2011, in Room 548-S of the Capitol.

Williams, Chief of Police, City of Wichita, in support of **SB 135 -- Kansas racketeer influenced and corrupt organization act** (Attachment 6).

Meeting adjourned at 10:25 A.M. The next meeting is scheduled for February 18, 2011.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Feb. 17, 2011

NAME	REPRESENTING
Ed Kump	KACP/KSA/KPOA
Whitney Jann	KS Bar Assn.
Eric Stafford	KS Chamber
CHRIS APPEL	ATRA
Finn Lambertson	KS Health Consumer Coalition
<del>Tom Kumpke</del>	<del>KS Health Consumer Coalition</del>
Jacob Graybill	KSAJ
Russ Hazlewood	KSAS
Dana Teske	KS Farmers Union
Lauren DeMott	KS Farmers Union
Bret Arnold	Pinegar + Smith
Diane Mear	KSOS
Stephanie Mickelsen	KSOS
Jeff Bottley	Polski's by guest
Janiene Nash	guest
Cynthia Smith	SCUTS
John Bottley	Bottley & Assoc
Jennifer Roth	KACOL

**PLEASE CONTINUE TO ROUTE TO NEXT GUEST**

## SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: February 17, 2011

[illegible]



Donn Teske  
President, Kansas Farmers Union  
901 W. First St.  
Box 1064  
McPherson, Ks. 67460  
785-770-0336  
[dteske@bluevalley.net](mailto:dteske@bluevalley.net)

2-16-11

Judiciary committee

SB 106; An act concerning consumer protection.

Thank you Chairman Owens, ranking minority member Haley, for allowing me to speak before you today.

Kansas Farmers Union wishes to speak in opposition to SB 106, the proposed amendments to the Kansas Consumer Protection Act.

As KFU president I want to address agriculture being specifically targeted by the amendments for elimination from the act. The blatant intent of these proposed amendments targeting the producers of the largest economic driver in Kansas, agriculture, is disturbing. Especially in today's ag environment of high input costs and devastating mechanical repair costs. When a product is promoted as doing a certain task it had better darn well do what they say it will or that farm may not be there next year.

Why is agriculture excluded? Kansas's farmers will be worse off by being excluded from the Consumer Protection Act.

But I guess that it's really a moot point if the rest of the amendments pass as well which completely neutralize the Kansas Consumer Protection Act anyway. At least that's what smart people tell me it will do.

One thing that I noticed when I looked over the make-up of the Judiciary committee is that there is a whole BUNCH of lawyers in front of me right now. This is the point where I have to hold back my natural desires to include a lawyer joke and focus instead on the issue. The issue is that there are a whole lot of people in front of me who are smarter than I am and know what the written laws actually do. So if you willingly go forward with the proposed amendments you are doing so with a full awareness that you are intentionally doing away with the Kansas Consumer Protection act and declaring "open season" by the vultures out there that feed on the gullible.

Wouldn't it be better social responsibility to just do away with the Kansas Consumer Protection act and tell the public "buyer beware" than to gut it with hidden legalize but with hints of protection?

Thank you for your time.

Senate Judiciary

2-17-11  
Attachment 1

**WRITTEN TESTIMONY OF CHRISTOPHER E. APPEL, ESQ.  
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**ON BEHALF OF THE  
AMERICAN TORT REFORM ASSOCIATION**

**SUPPORTING S.B. 105, AN ACT TO AMEND THE INTEREST RATE ON  
JUDGMENTS IN CIVIL ACTIONS**

**BEFORE THE KANSAS  
SENATE JUDICIARY COMMITTEE**

**FEBRUARY 16, 2011**

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. 105. Kansas law relating to the interest on civil judgments presently far exceeds prevailing interest rates, placing an undue burden on businesses. This burden is punitive in nature, and imposes a level of punishment unconnected to any specific wrongful conduct which is the traditional lynchpin for punitive recovery. S.B. 105 corrects this unfair result by providing a more reasonable and uniform determination of the annually-adjusted judgment interest rate.

### **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.

### **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 that the current law in Kansas regarding judgment interest unfairly exceeds prevailing interest rates and imposes a punitive burden on businesses. ATRA believes that S.B. 105 is sound legislation which responds to an imbalance in the civil justice system and promotes fair compensation.



### **S.B. 105 Would Promote Consistent and Fair Interest on Kansas Judgments**

Plaintiffs in Kansas who win favorable verdicts are often entitled to recover interest on the damages they are awarded to account for the time delay in receiving monies owed to them. Such recovery may come in the form of pre-judgment interest (*i.e.* interest from the time a harm is suffered or claimed until the judgment is awarded) or post-judgment interest (*i.e.* interest for the time spent appealing a judgment). The basic reason for this recovery is the “time value of money,” which reflects the notion that getting a dollar today is generally worth more than getting a dollar tomorrow because of a number of factors, for example, inflation.

For over a century, Kansas has statutorily prescribed a rate of interest which may be applied to a civil judgment to compensate for the time value of money. Over time, this annual rate of interest has been changed from a flat rate of 6% to a flat rate of 15% (to reflect market rates in existence around the time of the enacted change), and ultimately to a variable rate based upon a common interest rate benchmark, the Federal Reserve discount rate. Currently, Kansas law states that the judgment interest rate is generally the Federal Reserve discount rate plus an additional 4%. For example, if the prevailing interest rate was 2%, a civil defendant owing pre- or post-judgment interest would, on an annual basis, owe 6%, or triple this amount. Thus, as a practical matter, the defendant would pay a 200% mark-up or premium on the judgment interest annually, which can have effect of overcompensating the plaintiff for the time value of money.

When judgment interest does not fairly reflect the actual time value of money, the excess amount paid in interest essentially acts as a penalty. Because an award of judgment interest is generally unrelated to the merits of a claim or conduct of the parties, the result is a form of punishment that is unconnected to any willful, wonton or reckless misconduct. Such intentional action is traditionally a prerequisite for allowing punitive recovery. Hence, with an unbalanced

and inflated rate of interest on judgments, a case involving a simple and inadvertent breach of contract would give rise to a measure of punitive damages. Conversely, a case in which punitive damages were appropriately awarded based on the defendant's willful misconduct would give rise to a measure of double punishment that is similarly unjust.

The fundamental purpose of S.B. 105 is to more closely place each party in the same position they would have been but for the time spent litigating a matter. A related objective is to not penalize civil defendants merely for asserting their legal rights. S.B. 105 would reduce the potential for Kansas courts to unfairly award damages which are punitive in nature where there is no wrongful conduct, or punishment has already been meted out by the court. It would accomplish this simply by reducing the current, arbitrary 4% rate increase above the Federal Reserve discount rate to a more modest 1% increase. This would ensure that plaintiffs are being fairly compensated for the time value of money, as the rate would remain above the Federal Reserve discount rate (which takes into account inflationary pressures), but that they are not being overcompensated.

S.B. 105 would also provide greater uniformity for judgment interest in Kansas. The state presently has a varied set of rules relating to interest on judgments. While defendants in most cases pay post-judgment interest at a rate equal to the Federal Reserve discount rate plus 4%, in other situations they are required to pay a flat rate of 12% (for limited actions) and 10% (for judgments arising from a duty to support another person). In addition, Kansas allows pre-judgment interest at a 10% rate, though it has been left to the courts to determine when pre-judgment interest should apply. S.B. 105 would simply provide a uniform rate for judgment interest payments.

In addition, S.B. 105 would codify the distinction Kansas courts have made between liquidated and unliquidated damages such that pre-judgment interest is available only for liquidated claims. See *Farmers State Bank v. Prod. Credit Ass'n of St. Cloud*, 755 P.2d 518, 528 (Kan 1988). A liquidated amount is one that is "definitely ascertainable by mathematical computation." *Kansas Baptist Convention v. Mesa Operating Ltd. P'ship*, 898 P.2d 1131, 1142 (Kan. 1995). Unliquidated damages are those that the plaintiff cannot measure at the time of injury, such as future lost income, pain and suffering, and projected medical expenses. S.B. 105 makes clear that pre-judgment interest should not apply to unliquidated damages.

### Conclusion

Kansas law should be amended to more fairly tie the rate of judgment interest to the Federal Reserve discount rate, establish a uniform rate for judgment interest, and prohibit pre-judgment interest awards on unliquidated damages. S.B. 105 would achieve these basic objectives and more closely place litigants in the same position they would have been in if payment was received at the time of judgment. It would also not penalize defendants who have resolved to assert their legal rights in court.



Senator Tim Owens  
Chair, Senate Judiciary Committee  
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Re: Support for SB 106

Chairman Owens and members of the Committee,

I am writing on behalf of GlaxoSmithKline (GSK), a global pharmaceutical and vaccine manufacturing company. GSK encourages you to pass SB 106, which seeks to clarify and better define important consumer protection provisions in Kansas law and will promote consistency and fairness in litigation.

First, SB 106 seeks to codify into statute a commonsense Kansas Supreme Court ruling that says that in order for a consumer to recover damages for a violation of the Kansas consumer protection act ("Act"), the consumer must prove the violation *caused* him or her to enter into the transaction that resulted in his or her loss. The bill also seeks to clarify that the measure of damages for private plaintiffs under the Act is their out of pocket loss. The Act currently provides no guidance for determining damages in a private action. SB 106 will bring clarity and predictability to the measure of damages in consumer protection act cases.

SB 106 also provides that the Act does not cover conduct that is regulated or permitted by the state or federal government. This bill seeks to bring Kansas in line with the majority of state legislatures which recognize that consumer protection laws were meant to address situations where product safety is not already regulated by the government.

Furthermore, SB 106 seeks to promote consistency between federal and state consumer protection laws, so federal and state regulators do not work at cross purposes and so businesses can reasonably rely on what behaviors are considered acceptable and what are not.

Clarity and predictability in the law is extremely important to fostering a strong economy, as businesses can make better investment and development choices when they have clear guidance on the legal rules they seek to follow.

GSK strongly encourages you to pass SB 106.

Sincerely,

A handwritten signature in dark ink that reads "P.D. Villarreal" followed by a stylized flourish.

P.D. Villarreal  
Senior Vice President of Global Litigation  
GlaxoSmithKline

Senate Judiciary  
2-17-11  
Attachment 3



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**Testimony in Opposition to SB 106 before the Senate Judiciary Committee  
Anna Lambertson, Executive Director, Kansas Health Consumer Coalition  
February 16, 2011**

Mr. Chair and Members of the Committee:

I appreciate the opportunity to provide testimony this morning before your committee. My name is Anna Lambertson and I am the Executive Director of the Kansas Health Consumer Coalition (KHCC). KHCC is a statewide non-profit organization with the mission to advocate for affordable, accessible and quality health care in Kansas. Our statewide membership includes consumers, advocates and health-care professionals. We oppose Senate Bill 106 because we feel that the changes the bill proposes to the consumer protection act could strip health consumers in Kansas of vital protections against deceptive or unfair debt collection practices.

The issue of medical debt has been a priority of our organization for several years, as we have increasingly heard stories from consumers struggling to pay their mounting medical bills. As the economy has suffered, the profile of consumers defaulting on medical debt or receiving uncompensated care has changed. The burden of medical debt is no longer felt only by lower-income families, but is increasingly a burden being carried by Kansans with moderate to upper incomes as well.

While we don't have data on the exact number of Kansans with medical debt, national reports demonstrate that the numbers are rising. Between 2005 and 2007, the percentage of working-age Americans who struggled to pay their medical bills rose from 34 percent to 41 percent. Most of these adults had insurance. Sixty-one percent of those with medical debt or problems paying their bills were insured at the time care was provided.

In our state, Kansans struggling to pay their medical bills are often unable to afford basic necessities, such as food, heat or rent. They also forego additional medical care, which further exacerbates their health condition.

For these hard-working adults, abusive or overreaching debt collection practices add stress to their already weighty burden. Most consumers take responsibility for their financial obligations and wish to make good on their debt. These consumers could be tricked by unscrupulous collection agencies into making payments on debt that was calculated inaccurately, already covered by their insurance, or not their debt to begin with.

The Kansas consumer protection act serves as an invaluable governor of deceptive, abusive or overreaching collection practices. If a collection agency uses unscrupulous methods to either calculate or collect on debt, the act provides the consumer with a tool to enforce the protections it affords.

We believe that Senate Bill 106 amends the consumer protection act by striking key portions, such as civil penalties, that can encourage consumers to enforce the act. The bill could also strip consumers of their ability to seek private enforcement of the act or assistance in enforcement of the act from the offices of a district attorney or the attorney general. If passed, Senate Bill 106 could leave consumers with little recourse than to turn to federal resources.

We ask you to vote no on Senate Bill 106.

Senate Judiciary

2-17-11  
Attachment 4



STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

**DEREK SCHMIDT**  
ATTORNEY GENERAL

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Testimony in Opposition to Senate Bill 106  
Presented to the Senate Judiciary Committee  
By Jim Welch, Deputy Attorney General for Consumer Protection

February 16, 2011

My name is Jim Welch. I am the Deputy Attorney General for the Division of Consumer Protection in the office of Attorney General Derek Schmidt. I submit written testimony in opposition to Senate Bill 106.

Senate Bill 106 proposes several dramatic changes to the Kansas Consumer Protection Act. Our office opposes this legislation for several reasons:

- It would substantially reduce the universe of Kansans whose consumer transactions are protected by the requirements of the KCPA by narrowing the definition of "consumer." Under this proposed new definition, even a mom-and-pop business that attempts to seek protection under the KCPA, either through a complaint to the attorney general or through a private cause of action, would be denied relief. Moreover, because even "sole proprietorship" would be eliminated from the definition of "consumer," any future consumer protection actions filed by our office would be necessarily subject the court to investigating the conduct of the consumer to ascertain whether he or she was acting in a business capacity or not.
- This bill also would have the effect of prohibiting the attorney general from prosecuting any consumer protection action against an out-of-state supplier. That is because, almost by definition, an out-of-state supplier who sells to a Kansas consumer is engaged in interstate commerce and subject to the jurisdiction of the Federal Trade Commission. Transactions within the FTC's jurisdiction are excluded from KCPA enforcement actions under this proposed bill. It seems rather peculiar to restrict the attorney general to prosecuting only Kansas companies or other suppliers for KCPA violations – while excluding out-of-state companies from the attorney general's enforcement.
- It would impede the State of Kansas from participating in most multi-state consumer protection actions. That is because the proposed bill provides that the KCPA does not apply to entities that also are regulated by the Federal Trade Commission – as most multi-state entities are. Most of the consumer recoveries the attorney general's office has received in recent years have come from multi-

Senate Judiciary

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Attachment 5

state actions and, consequently, the negative fiscal impact of this proposal on both Kansas consumers and the State of Kansas is substantial.

- It raises serious constitutional questions arising under the doctrine of separation of powers. The bill attempts to cause Kansas state courts to use federal common law and the actions of a federal agency in interpreting the Kansas Consumer Protection Act. If this provision is to have any meaning, it necessarily has the effect of causing Kansas courts to delegate to federal government entities the authority to interpret Kansas law. It is likely that constitutes an unlawful delegation of Kansas sovereign authority.
- The bill also substantially limits the ability of Kansas consumers to bring private causes of action under the KCPA. While that does not have a direct effect on the enforcement efforts of the Office of the Attorney General, it is likely that the office will see an increased number of complaints as private remedies become less available.

Our office was not aware of this proposal until after it was introduced. Consequently, we are not aware of what has motivated it or what its intent is. To the extent that concerns exist about the current KCPA or its application, we would be happy to visit with interested parties. The Attorney General makes that sort of communication with Kansans a priority.

We would ask, however, that this committee not advance this proposal.

**Office of the District Attorney  
Eighteenth Judicial District of Kansas**  
*at the Sedgwick County Courthouse*  
535 N. Main  
Wichita, KS 67203

**Nola Foulston**  
*District Attorney*

**Sharon Werner**  
*Chief Attorney  
Consumer Fraud Division*

**Testimony Opposing SB 106  
Submitted On Behalf of the  
Office of District Attorney Nola Foulston  
18<sup>th</sup> Judicial District**

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

On behalf of the Office of District Attorney Nola Foulston, 18<sup>th</sup> Judicial District, thank you for the opportunity to submit written testimony to this committee regarding Senate Bill 106.

Our office desires to bring to this committee's attention certain concerns regarding Senate Bill 106 which proposes amendments to the Kansas Consumer Protection Act (KCPA) specifically K.S.A. 50-623, 50-634 and 50-636 and K.S.A. 2010 Supp. 50-626 repealing the existing sections.

**Section I. Brief Overview**

Senate Bill No. 106 contains five sweeping revisions to the KCPA which represents a clear step in the wrong direction for consumer protection in this State.

**Section II. Brief Historical Perspective**

Since its inception, the Kansas Consumer Protection Act ("KCPA"), which was closely modeled after the Federal Trade Commission Act, has been under attack by unscrupulous suppliers decrying the act is overly broad and should be limited or preempted by other federal and state legislation.

The current proposal for new legislation found in Senate Bill No. 106 (SB 106) is no different, and ostensibly denotes a step back in time toward Kansas' old Buyer Protection Act of 1968 ("BPA") which limited protection to consumers.

In 1973, after a nationwide push spearheaded by the Federal Trade Commission ("FTC"), Kansas, like the majority of States, adopted its version of the newly proposed uniform consumer protection laws. This new legislation was codified under K.S.A. 50-623 *et seq.*, and became known as the Kansas Consumer Protection Act (KCPA).



The KCPA currently extends its reach to protect Kansas consumers in many different areas of commerce including: (1) receipt of unsolicited merchandise and credit cards; (2) the sale of merchandise or services; (3) waivers or agreements to forego legal rights; (4) unbargained-for warranty disclaimers; (5) unconscionable practices; (6) advertising; (7) telemarketing; (8) home solicitations; (9) real estate transactions; (10) automobile lemon law; (11) collision damage waivers; (12) invention promotion services; (13) handling of credit card information; (14) no-call list; (15) lease-purchase agreements; (16) prize notifications; (17) assistive devices for major life activities; (18) slamming and cramming by telecommunication providers; (19) profiteering from disasters; (20) commercial electronic mail; (21) sale of cigarettes; (22) fair credit reporting; (23) loan brokers; and (24) credit services organizations.<sup>1</sup>

The KCPA provides that the Attorney General or the District or County Attorney shall have the authority to enforce its provisions. Virtually all of the provisions listed under the KCPA contain subject matter that is also regulated to some degree by other state and federal statutes and/or agency regulation, including by the FTC. This overlap was contemplated by both the FTC and our legislature when enacting our consumer protection law. The version intentionally chosen by our legislature did not include the language now proposed under SB 106<sup>2</sup>, but rather enjoined “all types of deceptive trade practices. . . [and declared unlawful] false, misleading, or deceptive acts or practices in the conduct of any trade or commerce,” not just those prohibited or declared to be a violation of Section 5(a) (1) of the FTC Act (15 U.S.C. 45(a) (1), as HB 2795 ostensibly now seeks to accomplish.

At the time of the creation of the KCPA, our legislature understood and incorporated this important interplay between state and federal statutes and agencies and the KCPA.

### **Section III. Question Presented:**

**Would passage of SB 106 adversely impact protections afforded to consumers under the Kansas Consumer Protection Act?**

***Yes, these provisions literally eviscerate consumer protection in this state.*** Each of these newly proposed sections is discussed below.

### **Section IV. Analysis**

It is important to understand there is established law that states have the right and authority to police deceptive and unfair business practices existing or coming within their borders, irrespective of what the FTC or federal courts ultimately decide. There is a ceiling on state regulation when in conflict with federal law which precludes states

<sup>1</sup> See K.S.A. 50-617 through K.S.A. 50-1132.

<sup>2</sup> “[I]t is the intent of the legislature in construing this act [KCPA], courts shall be guided by the policies of the Federal Trade Commission and interpretations given by the Federal Trade Commission and federal courts to section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).”

from abrogating federal law by lessening standards, not setting stricter standards.

As discussed above, in 1973 our legislature adopted its own version of a uniform consumer protection law as encouraged by the FTC. Now our legislature, through proposed Section 2(b) and (c), wants to do exactly the opposite of what our legislature intended in 1973 by (1) giving deference to the policies and interpretations of the FTC and (2) essentially giving back to the FTC regulation of consumer issues in Kansas by providing that the KCPA shall not apply to transactions otherwise regulated by the FTC or any other regulatory body acting under authority of the United States.

#### **A. Section 2(b)**

Section 2 (b) provides:

*It is the intent of the legislature than in construing the Kansas consumer protection act, courts shall be guided by the policies of the federal trade commission and interpretations given by the federal trade commission and the federal courts to section 5(a) (1) of the federal trade commission act, 15 U.S.C. section 45 (a) (1).*

The word “guided” when read in conjunction with proposed Section 2 (c) looks more like “bound” by the policies and interpretations of the FTC. FTC rules and decisions are only guiding, not binding. States are not prohibited from adopting consumer protection legislation or rules that are more restrictive than those of the FTC. Thus, the proposed language is not needed. Additionally, the FTC has the tall task of reviewing deception and unfair trade practices on a national level. The policies and interpretations issued by the FTC are shaped not by the need to protect consumers within the borders of a particular state but by sweeping enforcement of “big picture” issues. Only the Kansas legislature and Kansas courts are appropriately positioned to “guide” the protection of Kansas consumers.

#### **B. Section 2(c)**

Section 2 (c) curbs state consumer protection enforcement as it provides:

“The Kansas consumer protection act shall not apply to actions or transactions otherwise permitted or regulated by the federal trade commission or any other regulatory body or officer acting under statutory authority of this state or the United States.” (Emphasis supplied).

**First**, proposed Section 2 (c) takes away our State Attorney General’s and District and County Attorneys’ enforcement powers in any instances where the FTC or any other regulatory agency or officer acting under color of state or federal statute has authority. **This is far reaching and will have a greater impact than can be addressed herein.** Many consumers within our state will simply slip through the cracks. **The KCPA was designed with FTC input, to help create a safety net for consumer protection at the state level.** The FTC and other state agencies are not equipped to do much more than administrative enforcement which often requires a compliant supplier. The KCPA gives authority to the State Attorney General or District

or County Attorney to file a civil action with an injunction in local courts in order to quickly stop predatory business practices. This process is relatively swift and provides for immediate consumer redress. The proposed language eliminates much of the individual consumer remedy and consumers would be relegated to filing independent civil actions against wrongdoers.

**Second**, proposed Section 2 (c) which provides the KCPA shall not apply in transactions otherwise regulated by the FTC or other regulatory body or officer of the United States, represents an affirmative nod to preemption even though where state consumer protection is concerned, there is widely held presumption against federal preemption because this is an area falling within states' traditional police powers. In areas that states have traditionally occupied, their police powers are generally not superseded absent clearly expressed and manifest purpose of Congress to do so.

**Third**, The Federal Trade Commission Act of 1914 (15 U.S.C §§ 41-58, *as amended*) started the Federal Trade Commission, a bi-partisan body of five members appointed by the President, authorized to issue cease and desist orders to large corporations to curb unfair trade practices. The Federal Trade Commission Act does not give individuals a private cause of action. Despite no private cause of action for individuals under the FTC Act, proposed Section 2(c) would not allow individual consumers to file an action under the KCPA because it is an area regulated by the FTC.

**Fourth**, the FTC Act and many other federal and state statutes regulate business practices that involve consumers but may not necessarily provide redress or restitution for the individual consumer and may not provide a private cause of action. Thus, because Section 2 (c) provides that the KCPA "shall not apply to actions or transactions otherwise permitted or regulated by the federal trade commission or any other regulatory body or officer acting under statutory authority of this state or United States" a Kansas consumer would have no action under the KCPA and may have no private cause of action whatsoever; or, if a private cause of action was allowed, the consumer would be required to file a private federal or state action – the cost of which is generally prohibitive to individual consumers who are victims of deceptive or unconscionable practices by a supplier.

### **C. Section 3**

Section 3 further amends K.S.A. 50-624 eliminating all provisions relating to agriculture and protection of our farmers, husband and wife transactions, family partnerships, sole proprietorships and all transactions for any purpose other than person, family or household purposes. Kansas is an agricultural state. These consumers are currently included in the KCPA as often they do not have the necessary resources to fight scam artists.

### **D. Section 4**

Section 4 amends K.S.A. 50-634 (2) (b) and limits individual consumer remedies predicated only upon suffering an actual loss as a result of a violation. This is further defined as the difference between the amount paid by the consumer for the goods or service and the actual market value of the good or service that the consumer actually received. This provision also eliminates suits against suppliers who commit

unconscionable acts or practices "before or after the transaction" as currently allowed under K.S.A. 50-627.

This is bad public policy as it eliminates the ability of the Kansas Attorney General or any District or County Attorney to stop violations until consumers are actually damaged. An example is a remodeling or roofing company who engages in door to door sales but fails to include in its contract the mandatory three day right to cancel. These events could not be the subject of a KCPA action stopping such practices unless and until a consumer actually signed a contract and suffered actual damages.

Additionally, this hurts the consumer because often times a supplier's conduct is quite egregious and widespread, yet an individual consumer's loss might be minor or difficult to quantify. In such instances, consumers are reluctant to report and pursue enforcement against the supplier because they know there will be little to compensate them for their time and effort in pursuing and helping to police such conduct.

#### **E. Section 5**

Proposed Section 5 repeals the current K.S.A. 50-636 (Civil penalties) and makes a violator only liable to pay civil penalties to the state or county, rather than to either the aggrieved consumer or state or county. Often, a consumer's actual damages are nominal but it is the prospect of a civil penalty that convinces the supplier to suspend its deceptive practices. Where a consumer files a private KCPA action, there would be no award of civil penalties to the state or county as neither is a party and a nominal award to the consumer would do little to stem pervasive deceptive practices and, thus have a chilling factor on a consumer's decision to pursue an action against an unscrupulous supplier. This results in bad policy for all consumers, upstanding Kansas businesses, and the state as a whole.

#### **VI. Conclusion**

These proposed amendments are not innocuous. Make no mistake about this legislation - it undercuts and/or eliminates our State courts' ability to declare what acts or practices constitute unfair and deceptive acts within our own borders; instead those at the federal level will decide what constitutes unfair or deceptive business practices within our state. Passage undoubtedly eviscerates the ability of the Kansas Attorney General, the District and County Attorneys to police unfair and deceptive trade practices affecting our local consumers by virtually conceding preemption by the FTC or other state agencies where there exists any regulation of a particular consumer matter.

Thank you for your time, attention and consideration in this matter.

Respectfully submitted,

Sharon Werner  
Assistant District Attorney  
Chief Attorney, Consumer Fraud Division  
Eighteenth Judicial District

TESTIMONY OF THE SECRETARY OF STATE

ON SB 96

DATE: February 16, 2011

Mr. Chairman and Members of the Committee:

The secretary of state appreciates the opportunity to appear today to brief the committee and answer questions relating to SB 96, a bill regarding business entity filings. The bill has three parts:

1. Foreign Applications. We recommend that when a foreign entity files with us, they state on their application that they are in good standing in their home state on the date of filing, instead of submitting a certificate of good standing (CGS) from the home state.

Currently Kansas has a variety of requirements for the CGS from the home state: Corporations submit a CGS dated within 90 days of the foreign application date (K.S.A. 17-7301); LLCs and LPs submit a CGS but have no date requirement for that CGS (K.S.A. 17-76, 121 and 56-1a502(b), respectively); and LLPs are not required to submit a CGS (K.S.A. 56a-1102). Kansas law does not require a CGS with annual report filings or with most amendment filings. Throughout most of a company's existence in Kansas, the public ascertains a company's filing status in their home state by contacting the home state. We do not manage a foreign company's home state filing status in Kansas, and if we were informed of a change in their home state status, we have no authority under the law to address that or change their filing status here.

Removing the requirement for the CGS and adding the requirement for the statement would:

- \* Create uniformity in the foreign application filing requirements for foreign entities.
- \* Require the filer to state that the entity is in good standing **on the date** they file with Kansas. The broad date requirements or the lack of date or CGS requirements under current law do not provide the public with clear information about their home state status on the date of filing with Kansas. The statement on the foreign application is signed under penalty of perjury. The public always has the option to check with the home state to confirm that the entity is on file and in good standing in the home state.
- \* Enable foreign entities to file online. Customers ask us every week when we will offer the foreign application filing online. We can build a complete filing online if the CGS is not required. The CGS requires a manual review; the foreign application can be programmed with thorough business rules that enable the filer to complete the filing online without additional review by the filing office.

2. Resident Agents. We recommend adding a statement to the formation document requirements for corporations, LLCs, LPs, LLPs that the filer notified the named resident agent, and that the resident agent accepted the appointment.

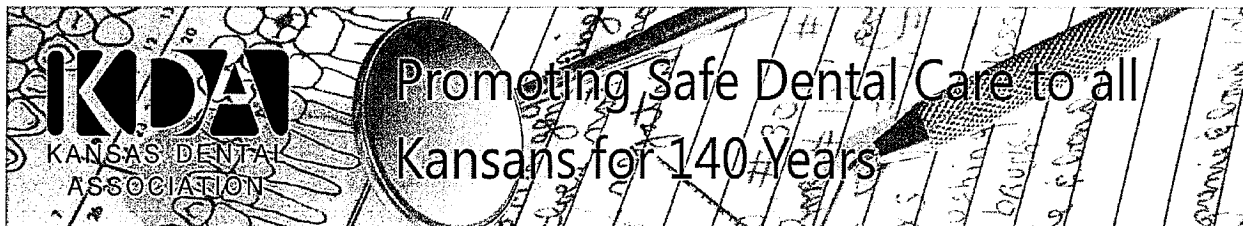
We have been surprised to hear from many resident agents who were never notified that they had been appointed. This law would provide some direction and education to make sure that this communication takes place. When this communication does not take place, and the unknowingly named resident agent does not wish to perform that duty, he or she must file a resignation and pay a fee to be removed from the company's record.

3. Reinstatements. We recommend that LLCs, LPs, and LLPs be permitted to reinstate after a loss of a resident agent as corporations are permitted to do. Under current law, if these entities forfeit for failure to appoint a resident agent after a resignation or death or other loss, they must form new companies—they cannot reinstate. These entities can reinstate after a failure to file an annual report. It seems the reinstatement provision in law should cover a failure to file a resident agent amendment if it also covers the failure to file an annual report—the resident agent filing and the annual report are both filings to update the public record.

We are requesting a delayed effective date for this bill, of July 1, 2012, so that we may program these changes in requirements in our filing system.

I appreciate the opportunity to appear today and would be happy to answer questions.

Stephanie Mickelsen, Deputy Assistant Secretary of State, Business Services  
Kansas Secretary of State



Date: February 17, 2011

To: Senate Committee on Judiciary

From: Kevin J. Robertson, CAE  
Executive Director

RE: SB 104 – Charitable Healthcare Provider Act

Chairman Owens and members of the committee I am Kevin Robertson, executive director of the Kansas Dental Association (KDA) representing 1,250, or some 77% of the state's licensed dentists.

I am pleased to appear before you today in support of SB 104 which is simply clean up language for the Charitable Healthcare Provider Act. The language on page 2, lines 16-28 was passed by the 2003 legislature after it had been worked out and agreed upon by the KDA and the Kansas Trial Lawyers Association prior to the first Kansas Mission of Mercy (KMOM) Dental Project in Garden City in February 2003. This language provides immunity to licensed dentists and dental hygienists working at a KMOM free dental clinic.

Since 2003 the annual KMOM free dental clinic administered by the KDA's own Kansas Dental Charitable Foundation (KDCF) has provided dental care to 19,400 patients totaling \$9.75 million. We just completed our 10<sup>th</sup> KMOM at the State Fairgrounds in Hutchinson on January 21-22, 2011. Each KMOM Dental Project consistently provides about 1,700 patients with around \$1 million in free dental care per year.

KMOM has never received a government grant or tax-based support with the exception of local law enforcement or government facilities that from time to time are donated for the event. It costs approximately \$60,000 annually to put on a KMOM and nearly half of the dentists in Kansas have participated in at least one KMOM event.

February 17, 2011

My name is Randy Downing. I am the Vice President of Government Affairs for the Dr Pepper Snapple Group.

I come before the Senate Judiciary Committee today representing the Kansas Beverage Association to ask for your support of Senate Bill 164.

**Problem:** Last year approximately 150,000 merchandise shells and pallets, with a replacement value in excess of \$4 million were stolen from just the members of the Kansas Beverage Association. Merchandise shell and pallet losses are much higher when you include other grocery products such as bakery, dairy and other store merchandise.

Every year, the food industry must pay the cost to replace these valuable bulk merchandise products. This is a multi-million dollar problem and ultimately the costs are passed along to the consumer in the form of higher food prices.

Last year, thousands of stolen merchandise shells and pallets were found in recycling facilities in Kansas. Beverage industry pallets (plastic and wood) are clearly identified with a company name such as Dr Pepper/Seven Up, Pepsi Cola or Coca Cola. Plastic shells are also color coded and stamped



with company names. It is easy to sell stolen shells and pallets to recyclers without ever identifying yourself. As such, this has become a simple way for many people to resell these stolen products.

**Solution:** SB164 is modeled after bills that have recently passed in Texas, California and Maryland. This legislation simply states that a recycler shall obtain the identity of anyone who tries to sell more than 10 beverage industry shells or pallets. This information must be kept for one year so that law enforcement can investigate those that are stealing these products.

Failure not to obtain seller information, maintain records or attempting to circumvent the statute will result in civil penalties and may result in criminal penalties depending on the purchase price of the pallets.

SB164 will help deter the theft of merchandise shells and pallets and will help law enforcement prosecute those who are reselling stolen merchandise shells and pallets to recyclers. As a result, it will help the food industry keep food costs low for all of the families in Kansas. Please support SB 164.

**Before the Senate Judiciary Committee  
Michael R. Murray, Capitol Advantage LLC  
On Behalf Of  
the Kansas Food Dealers Association and the Retail Grocers Association of Greater Kansas City  
SB 164  
February 16, 2011**

Mr. Chairman and Members of the Committee:

The Kansas Food Dealers Association and the Retail Grocers Association of Greater Kansas City are pleased to support for SB 164 which requires recyclers to obtain the identification of persons attempting to sell more than 10 plastic shells or pallets.

Thefts of this type are yet another cost of doing business which are passed on to the consumer. Passage of SB 164 will ultimately benefit the consumer in the form of stable or lower food prices.

Respectfully, we urge the Committee to support SB 164.

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Attachment 10



Dale Goter  
Government Relations Manager

# TESTIMONY

City of Wichita  
455 N Main, Wichita, KS. 67202  
Wichita Phone: 316.352.4876  
dgoter@wichita.gov

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Testimony of Chief of Police Norman Williams, City of Wichita

Members of the Senate Judiciary Committee:

Thank you for this opportunity to present supportive arguments for SB135 on behalf of the Wichita Police Department, the City of Wichita, and the Kansas Association of Chiefs of Police, all of whom support legislation proposed under SB 135.

It is a well known adage in law enforcement that 5% of society creates 95% of the crime. It seems there are certain people in society who literally try to "make a living" out of crime. Instead of looking for work or improving their education, these people spend their time selling drugs, committing fraud, stealing identities, committing robbery, or running with gangs. Some commit all of the above crimes.

We have reached a point in law enforcement and in this State that we must become more efficient with our time and resources due to budget constraints. Law enforcement can no longer afford randomization in how we do business – our work must become more focused and efficient. We must work to remove "career" criminals from the street who account for 95% of crime in our towns and cities.

No one wants to create laws that will simply fill prison beds. The valuable resource of a prison bed should be filled with violent criminals and those who choose to make "a living" committing crime in our communities. Our current laws regarding murderers and violent criminals are sufficient. The proposed SB 135 will allow us to more successfully prosecute those who have chosen to make crime their "career".

In the middle of 2006, the Wichita Police Department discovered a group of criminals involved in the Neighborhood CRIPS gang who were committing crimes such as drug and gun sales, Medicaid fraud, robbery, human trafficking, aggravated assault, and others. When investigators reviewed the criminal history of this group, it became clear they were looking at a criminal enterprise.

Senate Judiciary

2-17-11

Attachment 11

In other words, we saw multiple and repeated trips into the criminal justice system for this group accompanied with sporadic incarceration times, probation, and parole. After each of these trips into the justice system, they went right back to the business of committing crimes for the gang. Based on this information, we decided to use this historical information and attempt new prosecution under federal racketeering laws.

Because there was no State law for us to use, the Wichita Police Department had to get a federal law enforcement entity to "adopt" the case and run all documents and paperwork through. The FBI agreed to do this. In years 2006 and 2007, the investigation federally indicted over 28 individuals who were involved in the criminal enterprise. Every single one of these suspects had lengthy criminal records and had received multiple chances in the criminal justice system. Despite this, they chose to purposely continue lives of crime.

By indicting these suspects under the federal Racketeer Influenced and Corrupt Organization Act (RICO), we were able remove these subjects from the street, present to a judge their total criminal history and continued involvement in crime, and gain enhanced prison sentences which removed them from the city streets. This effort tangibly reduced street crimes committed by the CRIPS gang organization, saving lives and property as well as reducing the amount of time required to deal with these crimes.

Many of our cities and counties in the State of Kansas do not have the access to the federal system that was available to Wichita. Under SB 135, we would have a state remedy to deal with our recidivist criminals who operate in all areas of our State. Local law enforcement would no longer need federal "adoption" and could be more efficient in conducting these investigations through our local courts. This proposed law would also send a clear message to the criminals of this State that "career" criminals need to pay heed. It also sends a message to all law abiding citizens that this State is going to aggressively protect their safety.