

TESTIMONY

TO: The Honorable Forrest Knox, Chair
And Members of the House Financial Institutions Committee

FROM: Whitney Damron
On behalf of Persels & Associates, LLC

RE: HB 2793 - An Act concerning the Kansas credit services organization act; relating to the exemptions therefrom.

Date: April 30, 2012

Good morning Chairman Knox and Members of the Committee. I am Whitney Damron and I appear before you today on behalf of Persels & Associates, LLC in support of HB 2793 clarifying that the exemption provided to attorneys from regulation under K.S.A. 50-1116 et. seq., applies not only to individual attorneys, but their law firms and related business entities.

By way of information to the Committee, Persels & Associates, LLC is a national law firm headquartered in Maryland with attorneys in 48 states, including four in Kansas. They provide limited scope representation to clients, including debt settlement services.

Before beginning my prepared remarks, I wish to thank Chairman Knox and the Committee for accommodating our request for legislation to clarify this matter. We understand introducing legislation during the Veto Session is not routinely done and we would not be here today but for a recent decision by the Kansas Court of Appeals that we believe to be contrary to legislative intent. After considering the potential ramifications of that decision, we met with a number of legislators in both the House and Senate and received encouragement to seek a legislative clarification of this matter this year.

Background: 2004 Legislative Session.

In 2004, the Office of the State Bank Commissioner (OSBC) requested introduction of SB 509 to require registration of Credit Service Organizations (CSO's) under the proposed Kansas Credit Service Organization Act. As introduced by OSBC Deputy Commissioner Kevin Glendening, SB 509 contained an exemption from the proposed CSO Act for attorneys.

The bill was adopted with the exemption intact and is in statute as follows:

K.S.A. 50-1116. Kansas credit services organization act; citation; scope. (a) K.S.A. 50-1116 through 50-1135, and amendments thereto, shall be known and may be cited as the Kansas credit services organization act.

(b) Any person licensed to practice law in this state acting within the course and scope of such person's practice as an attorney shall be exempt from the provisions of this act.

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Furthermore, in the succeeding definition section, the following appears in subsection (f):

K.S.A. 50-1117(f) "Person" means any individual, corporation, partnership, association, unincorporated organization or other form of entity, however organized, including a nonprofit entity.

We believe the exemption provided to attorneys under the Credit Services Organization Act is clear on its face and requires no further definition or clarification. However, that position is not shared by the Deputy Commissioner for the Division of Consumer and Mortgage Lending for Office of the State Bank Commissioner (OSBC).

In an action brought by the Deputy Commissioner, he has interpreted the exemption for attorneys found in the CSO act very narrowly and in a manner we believe to be contrary to legislative intent. Specifically, the Deputy Commissioner has held the exemption applies only to an individual attorney and not to a law firm (i.e., law firm, partnership, LLC, corporation, etc.). Most attorneys practice in a firm of one kind or another, even solo practitioners.

This interpretation by the Deputy Commissioner of the OSBC is central to an enforcement action against Persels. However, the ruling made by a Shawnee County District Court in 2011 and recently sustained through a decision handed down by the Kansas Court of Appeals (March 23, 2012) has a material impact on all attorneys and law firms in Kansas and as a result, we believe this issue should be clarified by the Kansas Legislature before the actions of the OSBC are affirmed by a court of final jurisdiction.

I have reviewed the minutes of the Senate Committee on Financial Institutions and Insurance and House Financial Institutions hearings on SB 509 from 2004. Only in the House committee is the issue of the attorney exemption ever discussed. A motion was made to remove the exemption, but failed and the bill was passed as proposed by the OSBC (see attachments).

There is no definition of attorney, law firm or related term or terms in the CSO Act. There have been no rules and regulations promulgated on this or any other matter related to the CSO Act, other than K.A.R. 17-25-1, which sets certain fees for CSO's. And, there have been no changes to the CSO Act in statute since its enactment in 2004.

If left unchallenged, we believe this incorrect interpretation of K.S.A. 50-1116 will have a material impact on attorneys and the clients they serve. Attorneys engage in debt settlement efforts on behalf of clients on a routine basis, whether negotiating debts as bankruptcy counsel, effecting lien releases, serving as plaintiff or defense counsel in Workers Compensation cases, litigation settlement or assisting both personal and business clients, among countless other real-world, yet routine legal scenarios. It is a contradictory position that "an individual attorney" can be exempt under the act, as they are "individually licensed," but their firm, whether a corporation, partnership, LLC or other entity which they work for can be held in violation of the CSO Act, since they cannot be licensed.

To address this matter, we have proposed adding language into K.S.A. 50-1116 (b) that clarifies the attorney exemption to the Credit Services Organization Act applies to an attorney "*and such person's law firm.*" And, in the definition section of K.S.A. 50-1117 (f), defining the term "law firm" to include "*a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in legal services organization or the legal department of a corporation or other organization.*"

The definition of a “law firm” is taken directly from the Kansas Rules of Professional Responsibility, which were promulgated by the Kansas Supreme Court.

We appreciate the opportunity to seek clarification of this matter by the Kansas Legislature and will be available to address questions or concerns throughout its consideration.

Thank you.

Whitney Damron

Attachments:

- Minutes of the Senate Committee on Financial Institutions and Insurance (2004/SB 509).
- Minutes of the House Financial Institutions Committee (2004/SB 509).
- Letter addressed to the Kansas Supreme Court by eight attorneys in regard Court of Appeals decision on Consumer Law Associates, LLC et. al v. Stork case.

MINUTES OF THE SENATE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE

The meeting was called to order by Chairperson Ruth Teichman at 9:30 a.m. on February 18, 2004 in Room 234-N of the Capitol.

All members were present except:
Senator David Adkins- Absent

Committee staff present:
Bill Wolff, Legislative Research
Ken Wilke, Office of the Revisor of Statutes
Nancy Shaughnessy, Committee Secretary

Conferees appearing before the committee:
Kathy Olsen, KBA
Carmen Aldritt, Dept. Of Motor Vehicles
Tom Whitaker, KS..Motorcarriers Assoc.
Bill Henry, KS. Credit Union
Jeff Witherspoon, Consumer Credit Counseling
Todd Bruner, Consumer Credit Counseling
Kevin Glendening, Kansas Banking Commission

Others attending:
See Attached List.

The Chair opened the hearing on **SB 380—Liens for wrecker and towing services; notice to lienholder**, and introduced Kathy Olsen of the KBA as a proponent on the bill. (Attachment 1)

The goal in drafting the bill was to provide a more timely notice to lienholders once a vehicle in which the lienholder had a security interest had been towed. The KBA has worked with the towing industry and the Division of Motor Vehicles and brings forward amendments which will create a uniform system of notification procedures that all persons who tow vehicles could rely on and which all owners and lienholders would be timely notified.

Carmen Aldritt, Division of Motor Vehicles testified (Attachment 2) as a proponent of **SB 380**. The Division supports the bill with no reservations. They believe it is a win-win situation for all involved.

Tom Whitaker with the KS Motor Carriers Association testified (Attachment 3) as a proponent. KMCA has worked with the Banker's Association on this and supports the legislation with the indicated amendments.

Bill Henry of the Kansas Credit Union Association testified as a proponent on **SB 380**. (Attachment 4) The uniformity in this legislation is probably the most outstanding part of the bill. It is helpful to all parties concerned.

Hearing no questions, the Chair closed the hearing on **SB 380** and opened the hearing on **SB 509—Credit Service organizations; inclusion of debt management services**.

Kevin Glendening of the State Banking Commission, testified as a proponent on the bill. (Attachment 5) **SB 509** is intended to update and expand the protections contained in our present credit services organization (CSO) law to better address and, reduce or prevent potential problems reflective of how these programs are marketed in today's environment. The Bill 1) will expand the definition of a CSO 2) establishes the terms and conditions under which a CSO may engage in debt management activities with a consumer and 3) strengthens the enforcement tools available to foster compliance with the law.

Jeff Witherspoon, of Consumer Credit Counseling Service of Salina/Wichita. (Attachment 6) The agency serves over 1200 clients in debt management. There is a problem which is occurring in the debt management programs coming in from out of state. They are not nonprofit organizations and are

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MINUTES OF THE SENATE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE at 9:30 a.m. on February 18, 2004 in Room 234-N of the Capitol.

presenting themselves as such to consumers. The passage of this legislation would allow our agency to charge a nominal fee for services and regulate the industry to protect the State consumers.

Todd Bruner, Bd. Chair, CCS of Salina/Wichita (Attachment 7) testified as a proponent on SB 509. He is a consumer advocate and has twenty years experience. The bill will level the playing field and make all organizations accountable for the services they provide.

Senator Barnett inquired about what the fee structure looked like. Mr. Glendening indicated there was no fee cap on current law, due to the very sparse type of regulation that has occurred to date.

Senator Buhler had a question regarding when "debt management service" turned into "asset management." His concerns were about how many persons/organizations might be able to call themselves a "debt management service" under this new legislation.

Mr. Glendening responded that point had been considered and their intent was not to cast a broad net. The bill has been worded to refer to a "business" rather than an individual.

Senator Salmans inquired as to whether passage of this bill would require the Commission to hire another FTE to monitor this legislation. The short answer is No to that question, however the Commission is in need of additional manpower whether this legislation is passed or not.

The Chair closed the hearing on SB 509. She then called for additional discussion on SB 392—Authorizing the Committee on surety bonds and insurance to competitively negotiate certain contracts, and asked Dr. Wolff to comment on meeting updates with Senator Oleen who brought the bill to the Committee. (Attachment 8)

Dr. Wolff commented that there were three statutes that needed to be cross-referenced with language in SB 392 so that there would be no problems with the other statutes. The revisor will also be working on some language in the first line that would define the agencies that can purchase insurance. The Chair indicated that as soon as those changes were made and brought to the Committee, they would take action on the bill.

Senator Helgerson requested that when the amendments are prepared, he would like a copy to the Committee and a day or so to look it over before there is a vote.

The Chair then indicated that she wished to discuss SB 347—Prohibiting counting an insurance related inquiry as an insurance claim. The Chair stated that there had been some questions and some concerns and that she had asked the two parties (KID and Industry lobbyists) to meet and create some language that works for everyone. The Chair further indicated that the Commissioner wanted to stand on her bill as it is and asked Jarrod Forbes, KID if she was correct in her statement. He answered in the affirmative.

The suggested changes the insurance lobbyists were proposing had to do with adding definitions for consumer, reporting agency and to amend section B to make the language more broad. Additionally, how to distinguish between an inquiry and a claim and the undue restrictions on underwriting.

The Chair stated that the Insurance Commissioner feels that the way the bill is presented provides excellent protection for the consumer and it is a consumer friendly bill. She concluded her remarks by stating that she was ready to entertain a motion.

Senator Steineger made a motion to move the bill out favorably. Senator Helgerson seconded. The entire Committee did not vote and the Chair asked for a show of hands. All in favor, four; all opposed to moving the bill out 4. The Chair voted in favor of moving the Bill out. The motion passes.

Senator Helgerson stated he seconded the motion as a courtesy, but was unhappy that the two parties involved had not worked harder to make this work. Senator Buhler concurred and stated that a 5-4 vote out of Committee going to the floor would be headed for trouble.

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MINUTES OF THE SENATE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE at 9:30 a.m. on February 18, 2004 in Room 234-N of the Capitol.

The Chair also indicated that she was disappointed there was not some movement and expressed her concern to the industry and the Kansas Insurance Department.

The meeting adjourned at 10:45 AM

The next meeting is scheduled for Feb. 18th, 2004 approximately 4:00 pm

Approved: March 26, 2004
Date

MINUTES OF THE HOUSE FINANCIAL INSTITUTIONS COMMITTEE

The meeting was called to order by Chairman Ray Cox at 3:30 p.m. on ~~March 15, 2004~~ in Room 527-S of the Capitol.

All members were present except:

Representative Larry Campbell- excused
Representative Rob Boyer- excused
Representative Tom Burroughs- excused
Representative Vaughn Flora- excused

Committee staff present:

Bruce Kinzie, Revisor's Office
Bill Wolff Legislative Research Department
Maggie Breen, Secretary

Conferees appearing before the committee:

Kevin Glendening - Office of State Bank Commissioner
Jeff Witherspoon - Consumer Credit Services, Inc.
Karen Hiller - Housing and Credit Counseling, Inc.

Others attending:

See Attached List.

Chairman Cox opened the hearing on SB 509 - Credit service organizations: inclusion of debt management services.

Proponents:

Kevin Glendening, Office of State Bank Commissioner, said the bill addresses some additional language to our existing Credit Services Organization Act. The law is outdated, woefully inadequate, and doesn't really serve its purpose. SB 509 is the attempt to update the language, by expanding the definition of what a credit service organization is, in order to address the market place today. It defines practices by stating required and prohibited activities regarding how business with consumers is to be done. Finally, to ensure that laws are complied with, it increases the enforcement tools available to his office. It takes a proactive step that should help to ensure Kansas consumers receive both adequate information concerning what can and cannot be done in regard to their credit situation, and provides protections against deceptive practices. (Attachment 1)

Representatives Grant, Brunk and Cox asked questions.

Kevin said that Chairman Cox asked a question earlier relative to bonding. He said that they require surety bonds on basically everything they license: mortgage people; finance companies; payday lenders; everybody across the board. Based on the most current information they have, the cost of the bonds range from \$5 and \$10 per \$1,000 of coverage. Chairman Cox pointed out that opponents, who could not be present today but have submitted written testimony, have suggested the use of insurance rather than bonds. Kevin said with insurance the "errors and omissions" people just line up to receive the money whereas the bond is payable to his department.

Jeff Witherspoon, Executive Director of Consumer Credit Services, Inc., said his agency currently has about 1,200 clients on a Debt Management Plan. These plans are used by consumers to help avoid bankruptcy and to repay their debt obligations. Last year they helped counsel and educate 8,000 Kansans through financial counseling and education programs. A "new breed" of credit counseling agencies has emerged. These out of state agencies are taking advantage of Kansas consumers. They do this through high fees and inaccurate promises. They do not offer any educational programs or services, yet present themselves as non-for-profit agencies. This bill will help protect Kansans from being taken advantage of. It will also level the playing field. His agency would be allowed to charge a small nominal fee for services. (Attachment 2)

Chairman Cox asked Jeff where he received his funding. He said the majority, 70%, of his funding comes

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MINUTES OF THE HOUSE FINANCIAL INSTITUTIONS COMMITTEE at 3:30 p.m. on March 15, 2004 in Room 527-S of the Capitol.

from creditors called a fair share donation, which they receive when they are able to assist clients in paying their bills. They also receive grant money and about 10% from fees.

Karen Hiller, Housing and Credit Counseling, Inc., urged the committee to support SB 509. She said she and Jeff are providing true comprehensive nonprofit credit counseling services across the state. Every day her office receives calls from people who are desperate. At least a couple of times a week, they are contacted by folks who have already gotten hooked up with unscrupulous credit counseling people and have already lost money to them. They were already vulnerable or deeply in trouble when they contacted these unscrupulous agencies for help and then they are just been offered a settlement plan or been required to pay a big fee up front. She said they find themselves helpless to help those people who have already been taken advantage of by the bud guys. Her agency actual goes through the clients budget and provides support and follow up sessions as well as education for the client and their family. She spoke in full support of the bill and said Kevin has done a great job in trying to address the problems out there. (Attachment 3)

Representative Wilk asked why in Section 1 (b) everyone had to be licensed except an attorney? Karen said she thought it was because the prior statute allows attorneys to do this already and that statute is being amended but allowed to stay on the books.

This point was discussed.

Opponents:

John Berglund - Association of Independent Consumer Credit Counseling Agencies (AICCCA) - Written Only (Attachment 4)

David C. Jones, Ph. D., AICCCA - Written Only (Attachment 5)

Representative Dillmore said it was unfortunate that the opponents couldn't be present because in John Berglund's testimony on page 3, the 4th paragraph, he's talking about not-for-profits not being allowed to compete with for-profits doing any normal business. He really wished the gentleman was here so he could understand what he's saying because we need to be careful about that. It really doesn't make any sense at all to him. What about credit unions and what about co-ops?

Representative Brunk expressed concerned regarding the fees and the big spread in the bond requirements. He was concerned that we might penalize the good citizens who were trying to run good businesses.

Kevin said our fees are the lowest among the surrounding states and the bond requirements were set up with a broad range and the details would be determined by rules and reg. They are looking at what some of the other states have done and will set it up on a tiered system based upon the volume of activity the company is doing.

Chairman Cox closed the hearing on SB 509.

He then said he would work SB 379, Sub for SB 380, SB 392, SB 508 and SB 509.

SB 379 - Asset forfeiture; notice to lienholder.

Representative Dillmore made a motion to pass SB 379 favorably. Representative Dreher seconded the motion. The motion carried.

Sub for SB 380 - Liens for wrecker and towing services; notice to lienholders.

Representative Wilk made a motion to amend Sub for SB 380 by adding the word "or city" on page 4, line 35, and adding on page 3, item "(d) The provisions of this section shall apply to any motor vehicle which has been impounded as provided in K.S.A. 8-1567, and amendments thereto." Representative Lane seconded the motion. The motion carried.

Representative Grant made a motion to pass Sub for SB 380 as amended. Representative Dillmore seconded the motion. The motion carried.

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MINUTES OF THE HOUSE FINANCIAL INSTITUTIONS COMMITTEE at 3:30 p.m. on March 15, 2004 in Room 527-S of the Capitol.

SB 392 - Authorizing the committee on surety bonds and insurance to competitively negotiate certain contracts.

Representative Goico made a motion to pass SB 392 favorably. Representative Grant seconded the motion. The motion carried.

SB 508 - Standard nonforfeiture law for individual deferred annuities

Representative Wilk made a motion to pass SB 508 out favorably and place it on the consent calendar. Representative Lane seconded the motion. The motion carried.

SB 509 - Credit service organizations; inclusion of debt management services.

Representative Dillmore made a motion to pass SB 509 favorably for passage. Representative Humerickhouse seconded the motion.

Representative Dillmore asked about the possibility of having the language in the bill reflect a range of fees and allowing adjustments to be made according to the rate of inflation. He suggested this be done for a certain period of time, in order to give regulators the authority to adjust the fees according to price inflation rather than have them have to come back every couple of years to receive fee increases.

Kevin said he believes that is included in the bill under provision for rules and regulation. Discussion followed.

Representative Wilk made a substitute motion to strike out subsection (b), on page 1, which would eliminate attorney's being exempt from the provisions of the act. Representative Brunk seconded the substitute motion.

Representative Dillmore said he didn't agree that attorneys should be included in the act. They are agents of individual clients and are empowered to handle their legal and financial affairs as directed by them over a much broader course of business than just whether they are going to file bankruptcy for them.

General discussion followed.

Representative Dillmore said he thought the amendment was a "deal killer," that it would be a good way to kill the bill.

Representative Wilk said he didn't agree that it was a deal killer. If that was the case, we'd have to include CPA's, accountants, bankers, and other folks that all have expertise. We're not excluding any of them. It's just attorneys. If we're going to do this and license this, we ought to include them all. He doesn't think the amendment kills the bill, he just thinks it levels the playing field.

The substitute motion failed.

The original motion carried.

Representative Grant made a motion to approve the March 10th committee minutes as written. Representative Wilk seconded the motion. The motion carried.

Meeting adjourned at 4:34 p.m.

The date of the next meeting is undetermined.

Since the committee did not meet again, the minutes were sent to committee members asking for additions or corrections by March 26th, with the understanding that if none were received they would be considered approved as written. None were received.

Redmond & Nazar, L.L.P.

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April 20, 2012

The Supreme Court of Kansas
Kansas Judicial Center
301 West 10th
Topeka, KS 66612-1507

Re: Review of the Decision in Consumer Law Associated, LLC, et al. v. Stork, decided March 23, 2012 (Case No. 11-106115-A)

To The Honorable Court:

The undersigned law firms and the Kansas Association for Justice request that the Kansas Supreme Court grant review of the referenced case to consider the following finding made by the Kansas Court of Appeals:

Individuals who are licensed to practice law in Kansas are exempt from regulation by the Office of Kansas State Bank Commissioner. The statutory exemption under K.S.A. 50-1116(b) does not apply to a limited liability company or any other entity that is not licensed to practice law by the Kansas Supreme Court.
Syl. 8.

This is an issue of first impression, whether a law firm, as opposed to individual licensed attorneys, are exempt from regulation by the Office of the Kansas State Bank Commissioner (OSBC) under the Kansas Credit Services Organizations Act, K.S.A. 50-1116 to 50-1135 (KCSOA). This ruling could require all law firms that have any attorneys that represent consumer debtors, including those that provide representation in bankruptcy, personal injury or compromise of debts, to register with the OSBC and be subject to all the limitations required by the KCSOA. This could be required even though the attorneys in such firms are duly licensed and admitted to practice law by this Court and the limitations required by the KCSOA are not required by this Court under the Kansas Rules of Professional Conduct.

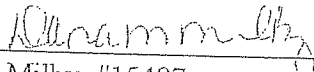
The undersigned law firms and the Kansas Association for Justice ask this Honorable Court to grant review to consider this issue.

Sincerely and respectfully,



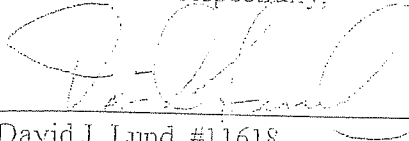
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Sincerely and respectfully,



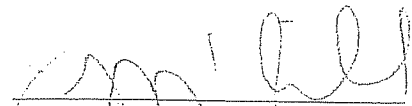
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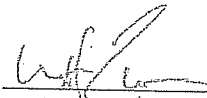
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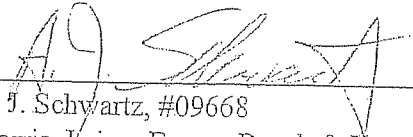
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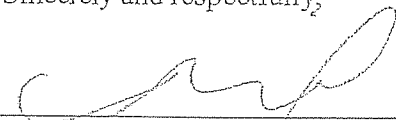
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Sincerely and respectfully,



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Sincerely and respectfully,



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