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April 27, 2012

To: The Kansas House of Representatives Financial Institutions Committee

From: W. Thomas Gilman
Counsel for Persels & Associates, LLC and Consumer Law Associates, LLC

Re: HB 2793

To the Chairperson and Members of the Committee:

On March 23, 2012 in Case No. 11-106115, the Kansas Court of Appeals issued its decision in *Consumer Law Associates, LLC, et al. v. Stork.* The Court made the following finding.

> 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.

The exemption at K.S.A. 50-1116(b) provides:

> 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. (Emphasis added.)

The word "person" is defined in the act as follows:

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

Prior to the decision in *Stork*, and based on the exemption and the use of the term "person" in the exemption, it was thought that both Kansas licensed attorneys **and the firms for whom they work** were exempt from the provisions of the Kansas Credit Services Organizations Act (KCSOA).

Stork changes that. Now, many Kansas law firms - those that work with debtors to attempt to negotiate settlements with their creditors and avoid bankruptcy filings and those that represent injured persons and attempt to compromise debts owed to medical providers - may be subject to the limitations ***and penalties*** imposed by the KCSOA.

Permitting individual lawyers, but not their law firms, to be exempt causes unworkable conditions for lawyers and their firms. If the *Stork* decision is not changed, the following unworkable conditions would arise:

(a) A law firm could not delay payment for the purpose of increasing interest, costs, fees, or charges payable by the consumer. K.S.A. § 50-1121(a) (2005). Under this provision, a law firm could not advise a client to stop paying high interest credit cards and begin saving money to buy a car for cash that would be exempt under K.S.A. § 60-2304(c) (2005), a common practice among law firms that assist consumer debtors.

(b) A law firm could not operate as a collection agency. K.S.A. § 50-1121(j) (Supp. 2005). Does this mean that a law firm that helps consumer debtors could not also have a practice where it tries to collect debts for its other clients?

(c) A law firm could not receive or charge any fee in the form of a promissory note or other promise to pay. K.S.A. § 50-1121(k) (2005). Would a law firm that charged its client on an hourly basis have to stop representing its client the moment the client did not pay the firm pursuant to their contract, but promised to pay as soon as she could?

(d) A law firm could not accept or receive any reward, bonus, premium, commission or any other consideration for the referral of a consumer to any person or related entity. K.S.A. § 50-1121(l) (2005). A law firm would be prohibited from referring a client who was injured in an accident to a law firm that handles those types of cases and receiving a referral fee that would otherwise be proper under the Kansas Rules of Professional Conduct. *See* Kan. Sup. Ct. Rule 226, KRPC Rule 1.5(g)

(e) A law firm could not lend money or provide credit to a consumer. K.S.A. § 50-1122(n) (2005). In short, a law firm could not advance costs for its client.

(f) A law firm could not structure a debt management services agreement in any manner that would result in a negative amortization of any of the consumer debts. K.S.A. § 50-1121(p) (2005). That means prioritizing debts nondischargeable in bankruptcy over those that can be discharged would be illegal.

(g) A law firm could not build up funds over time in its trust account to pay priority or nondischargeable debts. K.S.A. § 50-1122(b)(2) (2005).

(h) A law firm would be limited in the amount of fees it could charge even though the fees would otherwise comport with the Kansas Rules of Professional Responsibility. A personal injury law firm's contingent fee would be limited to the amount allowed by statute if a lawyer in the firm agreed to negotiate reduced payments to his client's medical providers, a practice nearly universal among the plaintiffs' bar. Fees would be limited to a one-time consultation fee not exceeding $50 and any credit report obtained would have to be paid from that fee. An additional fee of $20 per month or $5 per month per creditor could also be charged. K.S.A. § 50-1126 (2005). What law firms could afford to stay in business at these rates? How will Kansas consumers benefit from having limited choices available for assistance in debt counseling or recovery of damages if they are negligently or intentionally injured when law firms that currently offer these services abandon those practice areas?

(i) A law firm would have to obtain a surety bond. K.S.A. § 50-1119 (2005).

(j) A law firm would have to provide a credit education program. K.S.A. § 50-1120 (2005).

(k) A law firm would be required to disclose that it may receive compensation from the consumer's creditors. K.S.A. § 50-1120(c)(7) (2005). How can a firm receive compensation from an adverse party?

(l) A law firm would be required to disclose that it may not solicit other services from its client. K.S.A. § 50-1120(c)(8) (2005). Is the firm prohibited from providing other legal services to its clients while it is providing credit services? A law firm could not write a will for a person for whom it is also negotiating a credit card debt.

(m) A law firm would be prohibited from advertising prior to registration. K.S.A. § 50-1121(f) (2005). That means a lawyer, individually, can advertise but a law firm cannot.

(n) A law firm would be prohibited from taking a security interest. K.S.A. § 50-1121(o)(2005). A firm cannot assert an attorney lien, but an individual lawyer can. If money is collected on that lien, can the lawyer share it with the law firm's partners?

(o) A law firm may no longer "[u]se any communication which simulates in any manner *a legal or judicial process*, or which gives the false appearance of being authorized, issued or approved by a government, governmental agency *or attorney-at-law*." K.S.A. § 50-1121(s) (Supp. 2005).

If a law firm failed to abide by these rules, it would be subject to *criminal penalties, actual damages, punitive damages and attorney fees.* K.S.A. § 50-1131 (2005).

We ask that the legislature act to clarify that its intent has always been to include both lawyers and their law firms within the exemption at K.S.A. 50-1116(b).

Sincerely and respectfully,

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