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To: Representative Lance Kinzer, Chairman
Members of the House Judiciary Committee

From: Callie Jill Denton
Director of Public Policy

Date: February 13, 2012

RE: HB 2629 Concerning the Kansas product liability act (OPPOSED)

The Kansas Association for Justice (KsAJ) is a professional association of attorneys. KsAJ opposes HB 2629.

The Kansas Product Liability Act is intended to protect consumers. It already contains statutory defenses to assure fairness and protection for sellers of both new and used products. HB 2629 goes too far. It unnecessarily shields sellers of defective products from liability. The protection of Kansas citizens from injury is a far more important consideration for the Legislature than protecting businesses that negligently sell defective or dangerous products.

The current law already has a "seller's defense" at K.S.A. 60-3306 that protects sellers of new and used products from strict liability. Sellers will not be held strictly liable if they meet the following five-part test:

- (1) The seller had no knowledge of the defect at the time of sale. But, the law does not permit a seller to turn a blind eye to a defective product.
- (2) The seller could not have discovered the defect exercising reasonable care. The seller currently has to exercise reasonable care in assuring used products are not defective before reselling them. Courts look at the facts of a case to determine if the seller was reasonably careful.
- (3) The seller was not a manufacturer.
- (4) The manufacturer was subject to service of process in Kansas.
- (5) A judgment against the manufacturer is reasonably certain to be satisfied.

The current law is a good balance. It protects both sellers of used products and the purchaser, who has an expectation that the used product they buy is not unreasonably dangerous.

HB 2629 is a significant departure from the policy in the current law. HB 2629 creates a new defense for retail sellers of used products. Under HB 2629, sellers would no longer be accountable for knowing that

used products were defective at the time of sale, or exercising reasonable care in discovering defects in a used product. Under HB 2629, sellers must only demonstrate that the product was used and that it was sold in substantially the same condition as it was acquired for resale, even if a defect causes permanent injury or death.

It is important to know that the “seller’s defense” in K.S.A. 60-3306 is not the only protection for sellers of used and new products in the product liability act. In addition, there is a presumed 10 year “useful safe life” of a product to protect against old and dilapidated products, K.S.A 60-3303. Sellers are not liable for harm caused after the product’s “useful safe life” has expired.

The provisions of K.S.A. 60-3305 give further protection for sellers. Even if a product causes injury, it may be deemed not defective under K.S.A. 60-3305 if the product, at the time of manufacture, was in compliance with legislative regulatory standards or administrative regulatory safety standards.

HB 2629 targets the Kansas Supreme Court’s decision in *Gaumer v. Rossville Truck and Tractor Company, Inc.*, ___ P.3d ___, 2011 WL 3524197 (Kan. Aug. 12, 2011). Mr. Gaumer’s father purchased a used hay baler “as is”. The hay baler was missing a safety shield which was part of its original equipment. A week after it was purchased, the baler malfunctioned. While Mr. Gaumer was inspecting the baler, he slipped, and his left hand entered the baler through an entry in the machine that the missing safety shield would have covered. Mr. Gaumer suffered an amputation of his left arm just below his elbow. The Supreme Court ruled in favor of Mr. Gaumer, holding that the Kansas Products Liability Act does not distinguish between sellers of new and used products, and that RT&T was strictly liable for the sale of a dangerously defective product and the resulting harm to Mr. Gaumer.

The Court’s decision in *Gaumer* did not reverse previous Kansas case law interpreting the Kansas Product Liability Act. Instead, the Court reviewed legislative history of the Kansas Product Liability Act, the Restatement 2nd, and common law to find the defendant strictly liable in *Gaumer*. They also considered the public policy of deterring negligent conduct and protecting consumers, as well as the impact on sellers by affirming that sellers of used products are strictly liable under the Act.

Kansas is not an outlier in holding sellers of used goods strictly liable. Six states, including Texas, have applied strict liability to nearly all sellers of used products. Other states have applied strict liability when the product has been remanufactured or repaired, or have applied strict liability under certain circumstances, such as when the seller had knowledge of the defect. Only five states have decisions generally rejecting strict liability against sellers of used products.

Preserving the integrity of the current product liability act is important. There are strong public policy rationales for a vital consumer protection act: achieving maximum protection for Kansas citizens that are injured by dangerous and defective products; discouraging the selling of defective and dangerous products that would be harmful to the public; and protection of consumer expectations which are critical to a robust economy.

HB 2629 would erode the Kansas consumer act and undermine the policy behind it. KsAJ respectfully requests that the House Judiciary Committee take no action on HB 2629.