

Kansas

CONSUMER PROTECTION
ACT

AN ACT DESIGNED FOR
CONSUMER PROTECTION



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T T. STEPHAN
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KANSAS CONSUMER PROTECTION ACT

Revisor's Note:

The Kansas Comments following sections of the Kansas Consumer Protection Act were prepared by Barkley Clark, Associate Dean and Professor of Law at the University of Kansas School of Law, who also served as consultant to the committees considering the proposed legislation. These comments, in the nature of Revisor's Notes, have been edited by the Office of Revisor of Statutes, primarily to reflect current Kansas statutory references.

Law Review and Bar Journal References:

Cited in note concerning the Lanham Trademark Act, 14 W. L. J. 330 (1975).

Act cited in note on implied warranty of habitability, Kansas Consumer Protection Act, 22 K. L. R. 666, 682, 683 (1974).

Act cited in discussion of consumer protection in Tenth Judicial District, William P. Coates, Jr., 44 J. B. A. K. 67 (1975).

Act discussed in note, "A New Kansas Approach to an Old Fraud," consumer protection, Kansas consumer protection act, Polly Higdon Wilhardt, 14 W. L. J. 623, 624 (1975).

Discussed in article with reference to UCC §§ 2-316, 2-719, 2-102 and 2-318, "Beefing Up Product Warranties: A New Dimension In Consumer Protection," Barkley Clark, Michael J. Davis, 23 K. L. R. 567, 594, 595, 596, 597, 599, 602, 603 (1975).

50-623. Kansas consumer protection act; purpose; construction. This act shall be construed liberally to promote the following policies:

(a) To simplify, clarify and modernize the law governing consumer transactions;

(b) to protect consumers from suppliers who commit deceptive and unconscionable practices;

(c) to protect consumers from unbargained for warranty disclaimers; and

(d) to provide consumers with a three-day cancellation period for door-to-door sales. [L. 1973, ch. 217, § 1; L. 1974, ch. 230, § 1; L. 1976, ch. 236, § 1; July 1.]

KANSAS COMMENT, 1973

This act, entitled the Kansas Consumer Protection Act, replaces the 1968 Buyer Protection Act (former K. S. A. 50-601 to 50-616), which in broad terms had rendered unlawful any deception or misrepresentation in connection with the sale of merchandise. Under this act, prior Kansas law is both broadened and made more specific. Private remedies are provided in addition to public enforcement by the attorney general; under the Buyer Protection Act, no private remedies were available. Whereas the old Buyer Protection Act covered only merchandise, this act covers the sale of services and real estate as well. Finally, new substantive provisions are added relating to disclaimers

of warranty and cancellation of home solicitation sales. Section 50-623 provides interpretative guidelines and describes the general scope of the act.

Law Review and Bar Journal References:

Discussed in note on landlord-tenant implied warranty of habitability, 22 K. L. R. 666, 682 (1974).

Cited in discussion of consumer protection in Tenth Judicial District, William P. Coates, Jr., 44 J. B. A. K. 67, 71 (1975).

Subsection (c) discussed in note, "A New Kansas Approach to an Old Fraud," on consumer protection, Polly Kigdon Wilhardt, 14 W. L. J. 623, 637, 638 (1975).

This and following sections mentioned in comment, "U. C. C.—Limitations on Personal Injury Damages for Breach of Warranty," 14 W. L. J. 714 (1975).

50-624. Definitions. As used in this act: (a) "Agricultural purpose" means a purpose related to the production, harvest, exhibition, marketing, transportation, processing or manufacture of agricultural products by a natural person who cultivates, plants, propagates or nurtures the agricultural products. "Agricultural products" includes agricultural, horticultural, viticultural, and dairy products, livestock, wildlife, poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured products thereof.

(b) "Consumer" means an individual who seeks or acquires property or services for personal, family, household, business or agricultural purposes.

(c) "Consumer transaction" means a sale, lease, assignment or other disposition for value of property or services within this state (except insurance contracts and securities regulated under federal or state law) to a consumer or a solicitation by a supplier with respect to any of these dispositions.

(d) "Final judgment" means a judgment, including any supporting opinion, that determines the rights of the parties and concerning which appellate remedies have been exhausted or the time for appeal has expired.

(e) "Merchantable" means, in addition to the qualities prescribed in K. S. A. 84-2-314, in conformity in all material respects with applicable state and federal statutes and regulations establishing standards of quality and safety.

(f) "Person" means an individual, corporation, government, governmental subdivision or

agency, business trust, estate, trust, partnership, association, cooperative or any other legal entity.

(g) "Property" includes real estate, goods, and intangible personal property.

(h) "Services" includes:

(1) Work, labor and other personal services;

(2) privileges with respect to transportation, hotel, and restaurant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals and cemetery accommodations; and

(3) any other act performed for a consumer by a supplier.

(i) "Supplier" means a manufacturer, distributor, dealer, seller, lessor, assignor, or other person who, in the ordinary course of business, solicits, engages in, or enforces consumer transactions, whether or not he or she deals directly with the consumer. [L. 1973, ch. 217, § 2; L. 1974, ch. 230, § 2; L. 1976, ch. 236, § 2; July 1.]

Subsection (a):

This definition of "agricultural products" is derived from the Agricultural Marketing Act of 1946, 7 U. S. C. section 1626. Though the definition of "agricultural products" is broad, the operative definition is "agricultural purpose" and this is narrowed by the requirement that the person dealing with the agricultural products be one who cultivates, plants, propagates, or nurtures the agricultural products. Agricultural transactions are generally covered by this act, except with respect to home solicitation sales.

Subsection (b):

This definition of "consumer" is intentionally broad. It covers not only individuals who seek or acquire goods, services or real estate for personal, family or household purposes, but also sole proprietors such as farmers and business people. The term is broader than the definition of "buyer" in the Buyer Protection Act.

Subsection (c):

This act covers sales, leases, assignments and any other disposition for value of tangible personal property, real estate, services, and intangible property. The only requirement is that the transaction involve a "consumer." The only consumer transactions not covered by this act are insurance contracts and securities. The legislature felt that securities fraud is adequately dealt with in the Kansas Blue Sky Law (K. S. A. 17-1252 to 17-1275), and that insurance fraud is adequately covered by K. S. A. 40-2402 to 40-2411; dual regulation in these two areas was felt to be undesirable.

Subsection (d):

This act very broadly defines "goods" as a term of art to include real estate and intangible personal property.

Subsection (f):

1. The home solicitation sale provisions of article 3 single out for special treatment sales in which the transaction is solicited face-to-face at a residence of the buyer. An underlying consideration is the belief that in a significant proportion of such sales the buyer is induced to sign a sales contract by high pressure techniques. The act recognizes that many buyers in such cases may be unwilling parties to the transaction and gives to them a limited right to cancel the sale. The right of cancellation applies only to "home solicitation sales."

2. The definition of "home solicitation sale" differentiates between those types of transactions which have been the subject of particular abuse and those which have not. Although high pressure salesmanship can be practiced anywhere, the underlying theory of this act is that the sale in the home is particularly susceptible to such methods. In order to fit the definition, there must be personal solicitation at the residence of the buyer. Door-to-door sales made by bank credit card are included as "sales" even though they might for some purposes be considered "loans" by the credit card issuer. In certain cases, real estate and insurance transactions may be included.

3. Business and agricultural sales are excluded, although such transactions are covered by other provisions of this act, at least where the debtor is not an organization. Certain transactions not within the policy of section 18, such as a sale initiated by the buyer, are excluded from the definition of "home solicitation sale" although they may involve some negotiation at the buyer's home. The \$25 minimum figure is included to exempt small-ticket transactions where the trouble of complying was felt to outweigh the protection given to the consumer.

Subsection (h):

This definition, as well as the definition of "warranty" in subsection (m), is intended to expand the warranty obligations of a seller of merchandise. They incorporate in large part the definitions and concepts in the Uniform Commercial Code (UCC). The definition of "merchantable" now includes compliance with statutes designed to set standards for products sold or furnished to consumers. This could include the safety provisions for automobiles under the federal law, standards of grading for meat and food stuffs, useful life of products that are so dated, and the like. On the other hand, it is recognized that what is "merchantable" may not involve obligations in excess of those appropriate to the goods, *i. e.*, an antique automobile is not rendered "unmerchantable" simply because its useful life is substantially shorter than that of a new car. In short, the definitions of "merchantable" and "warranty" are limited by section 50-639 (d) of this act.

Subsection (i):

The term "organization" would include corporations, trusts, estates, partnerships, cooperatives and associations. The definition is important in determining which buyers are protected by the act.

Subsection (j):

The term "person" is all-embracing to include both natural persons and organizations.

Subsection (k):

The term "services" is broadly defined to include work, labor, the granting of privileges, and other acts which do not directly involve the sale of goods, real estate or intangibles.

Subsection (l):

In addition to manufacturers, wholesalers, and dealers, debt collection agencies and advertising agencies fall within this definition. No direct contact with the consumer is required. Section 50-635 should be consulted in order to ascertain the conduct by suppliers which is exempt from the act.

Revisor's Note:

Kansas Comment, subsection (f) no longer applicable. For home solicitation sales, see 50-640.

Law Review and Bar Journal References:

Mentioned in "The New Kansas Consumer Legislation," Barkley Clark, 42 J. B. A. K. 147, 190 (1973).

Discussed in note on landlord-tenant implied warranty of habitability, 22 K. L. R. 666, 682 (1974).

Discussed in note, "A New Kansas Approach to an Old Fraud," consumer protection, Polly Higdon Wilhardt, 14 W. L. J. 623 (1975).

50-625. Waiver; agreement to forego rights; settlement of claims. (a) Except as otherwise provided in this act, a consumer may not waive or agree to forego rights or benefits under this act.

(b) A claim, whether or not disputed, by or against a consumer may be settled for less value than the amount claimed.

(c) A settlement in which the consumer waives or agrees to forego rights or benefits under this act is invalid if the court finds the settlement to have been unconscionable at the time it was made. The competence of the consumer, any deception or coercion practiced upon the consumer, the nature and extent of the legal advice received by the consumer, and the value of the consideration are relevant to the issue of unconscionability. [L. 1973, ch. 217, § 3; Jan. 1, 1974.]

KANSAS COMMENT, 1973

Unlike the UCC (K. S. A. 84-1-102 (3)), which broadly permits variation by agreement, this act starts from the premise that a consumer may not in general waive or agree to forego rights or benefits under it. Compare K. S. A. 84-9-501 (3). Waiver or other variation is specifically provided for in some sections, such as section 50-640 (a) (5) relating to home solicitation transactions in an emergency; in the absence of such a provision, however, waiver or agreement to forego must be part of a settlement, and settlements are subject to review as provided in this section.

50-626. Deceptive acts and practices. (a) No supplier shall engage in any deceptive

act or practice in connection with a consumer transaction.

(b) Deceptive acts and practices include, but are not limited to, the following, each of which is hereby declared to be a violation of this act:

(1) Representations made knowingly or with reason to know that:

(A) Property or services have sponsorship, approval, accessories, characteristics, ingredients, uses, benefits or quantities that they do not have;

(B) the supplier has a sponsorship, approval status, affiliation or connection that he or she does not have;

(C) property is original or new, if such property has been deteriorated, altered, reconditioned, repossessed or is second-hand or otherwise used to an extent that is materially different from the representation;

(D) property or services are of particular standard quality, grade, style or model, if they are of another which differs materially from the representation; or

(E) the consumer will receive a rebate, discount or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers or otherwise helping the supplier to enter into other consumer transactions, if receipt of benefit is contingent on an event occurring after the consumer enters into the transaction;

(2) the intentional use, in any oral or written representation, of exaggeration, innuendo or ambiguity as to a material fact;

(3) the intentional failure to state a material fact or the intentional concealment, suppression or omission of a material fact, whether or not any person has in fact been misled;

(4) disparaging the property, services or business of another by making, knowingly or with reason to know, false or misleading representations of material facts;

(5) offering property or services without intent to sell them;

(6) offering property or services without intent to supply reasonable, expectable public demand, unless the offer discloses the limitation;

(7) making false or misleading representations, knowingly or with reason to know, of fact concerning the reason for, existence of or

amounts of price reductions, or the price in comparison to prices of competitors or one's own price at a past or future time;

(8) falsely stating, knowingly or with reason to know, that a consumer transaction involves consumer rights, remedies or obligations;

(9) falsely stating, knowingly or with reason to know, that services, replacements or repairs are needed;

(10) falsely stating, knowingly or with reason to know, the reasons for offering or supplying property or services at sale or discount prices. [L. 1973, ch. 217, § 4; L. 1976, ch. 236, § 3; July 1.]

KANSAS COMMENT, 1973

1. Subsection (a) generally prohibits any deceptive practice in a consumer transaction. It is modeled after section 5 of the Federal Trade Commission Act and the old Kansas Buyer Protection Act. The acts and practices listed in subsection (b) are treated as *per se* deceptive, and are merely illustrative of the acts and practices which violate the act as set forth in the broadly worded subsection (a). The old Buyer Protection Act contained no list of *per se* deceptive practices, but relied on general language.

2. Subsection (b) (1) (A) forbids such conduct as misrepresenting the durability or components of a product, or the efficacy of a service.

Subsection (b) (1) (B) would, for example, preclude a seller from holding himself out as an authorized dealer, or having received a favorable rating from an organization like Underwriters' Laboratories, when such was not the case.

Subsection (b) (1) (C) forbids such conduct as misrepresenting that returned goods which were used by the original purchaser are unused. On the other hand, repossessed goods which were never used by the consumer might be represented as new.

Subsection (b) (1) (D) forbids such conduct as misrepresenting that a superseded style or model is the latest style or model of a product, or that a particular product, service, or intangible is the equivalent of another product, service, or intangible; misrepresenting that a two-ply tire is the equivalent of a four-ply tire would be an example.

Subsection (b) (1) (E) forbids referral commission arrangements in which a consumer is to receive future commissions based upon events which occur after the time at which he enters into a related consumer transaction. The old Buyer Protection Act outlawed only those referral sales involving a cash price in excess of \$50; there is no dollar minimum under this subsection. Since this subsection includes cash referral sales as well as credit transactions, its scope is somewhat broader than the parallel provision in the Kansas Consumer Credit Code (K. S. A. 16a-3-309).

Subsection (b) (2) is intended to cover those cases where the supplier goes beyond innocent "puffing" expected by the consumer.

Subsection (b) (3) makes it clear that the act

covers not only affirmative misrepresentation, but omissions of fact as well.

Subsection (b) (4) is aimed at unfair trade practices flowing from competition among suppliers.

Subsections (b) (5) and (6) outlaw "bait and switch selling." This is a practice by which a supplier seeks to attract customers through advertising bargains which he does not intend to sell in more than nominal amounts. In order to induce acquisition of unadvertised items on which there is a greater mark-up, acquisition of the "bait" is discouraged through various artifices, including disparagement and exhaustion of an undisclosed miniscule stock. A supplier who is willing to sell all of the advertised items that he has in stock can avoid violating this subsection by disclosing that he has only "limited quantities" available. However, in the absence of such a willingness and disclosure, the existence of a violation should be determined on the basis of such objective factors as the representations made, and, in view of reasonably expectable public demand, the reasonableness of the quantity of the advertised goods, services, or intangibles available.

Subsection (b) (7) parallels the FTC Deceptive Pricing Guides which proscribe former price comparisons (former price must be actual, bona fide price at which article was offered on a regular basis for a reasonably substantial period of time in the recent, regular course of business), competitor price comparisons (advertised higher price must be price at which substantial sales are being made by other sellers in the same trade area), and comparable value comparisons (other merchandise must be of essentially similar quality and obtainable in the area). However, general pricing claims or descriptions, such as "good prices," are not proscribed.

Subsection (b) (8) proscribes statements such as one asserting that an installment contract must be paid in full irrespective of a defense, or that a supplier can garnish exempt wages.

Subsection (b) (9) forbids such conduct as misrepresenting that a television picture tube must be replaced or that a roof needs repair.

Subsection (b) (10) forbids conduct such as representations that a sale is for "seasonal clearance" or to facilitate "going out of business," when such is not the case.

Law Review and Bar Journal References:

Section discussed in "The New Kansas Consumer Legislation," Barkley Clark, 42 J. B. A. K. 147, 152, 189 (1973).

Cited in discussion of consumer protection in Tenth Judicial District, William P. Coates, Jr., 44 J. B. A. K. 67, 71 (1975).

Subsections (a) and (b) cited in note, "A New Kansas Approach to an Old Fraud," consumer protection, Polly Higdon Willhardt, 14 W. L. J. 623 (1975).

50-627. Unconscionable acts and practices. (a) No supplier shall engage in any unconscionable act or practice in connection with a consumer transaction. An unconscionable act or practice violates this act whether

it occurs before, during or after the transaction.

(b) The unconscionability of an act or practice is a question for the court. In determining whether an act or practice is unconscionable, the court shall consider circumstances of which the supplier knew or had reason to know, such as, but not limited to the following:

(1) That said supplier took advantage of the inability of the consumer reasonably to protect his or her interests because of his or her physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factor;

(2) that when the consumer transaction was entered into, the price grossly exceeded the price at which similar property or services were readily obtainable in similar transactions by like consumers;

(3) that when the consumer transaction was entered into, the consumer was unable to receive a material benefit from the subject of the transaction;

(4) that when the consumer transaction was entered into, there was no reasonable probability of payment of the obligation in full by the consumer;

(5) that the transaction he or she induced the consumer to enter into was excessively one-sided in favor of the supplier; and

(6) that he or she made a misleading statement of opinion on which the consumer was likely to rely to his or her detriment. [L. 1973, ch. 217, § 5; L. 1976, ch. 236, § 4; July 1.]

KANSAS COMMENT, 1973

1. Section 50-627 forbids unconscionable advertising techniques, unconscionable contract terms, and unconscionable debt collection practices. As under the UCC (K. S. A. 84-2-302), unconscionability typically involves conduct by which a supplier seeks to induce or to require a consumer to assume risks which materially exceed the benefits to him of a related consumer transaction. It involves over-reaching, not necessarily deception. The old Buyer Protection Act had no such provision. "Knowledge or reason to know" often will be established by a supplier's course of conduct.

2. Subsection (b) (1) includes such conduct as selling an English-language encyclopedia set for personal use to a Spanish-American bachelor laborer who does not read English, or using legal verbiage in a manner which cannot be readily comprehended by a low-income consumer who both reads and speaks English.

Subsection (b) (2) includes such conduct as a

home solicitation sale of a set of cookware to a housewife for \$375 in an area where a set of comparable quality is readily available to such a housewife for \$125 or less.

Subsection (b) (3) includes such conduct as the sale of two expensive vacuum cleaners to two poor families whom the salesman knows, or has reason to know, share the same apartment and the same rug.

Subsection (b) (4) includes such conduct as the sale of goods, services, or intangibles to a low-income consumer whom the salesman knows, or has reason to know, does not have sufficient income to make the stipulated payments.

Subsection (b) (5) includes such conduct as requiring a consumer to sign a one-sided adhesion contract which is loaded too heavily in favor of the supplier, even though some or all of the contract terms are lawful in and of themselves.

Subsection (b) (6) applies to misleading subjective expressions of opinion on which a supplier should reasonably expect a consumer to rely to his detriment. For example, a violation of this subsection would occur if a prospective purchaser asked a supplier what the useful life of a paint job was and the supplier, with reason to know that repainting would be necessary within two years, responded, "in my opinion the paint will wear like iron." Overt factual misstatements expressed in form of opinion are dealt with by 50-626's proscription of deceptive consumer sales practices. For example, a violation of 50-626 would occur if a prospective purchaser asked a supplier what the useful life of a two-year paint job was and the supplier responded, "in my opinion repainting will not be necessary for five years."

Law Review and Bar Journal References:

Section discussed in "The New Kansas Consumer Legislation," Barkley Clark, 42 J. B. A. K. 147, 152, 189 (1973).

Cited in discussion of consumer protection in Tenth Judicial District, William P. Coates, Jr., 44 J. B. A. K. 67, 71 (1975).

Subsections (a) and (b) mentioned in "A New Kansas Approach to an Old Fraud," consumer protection, Polly Higdon Wilhardt, 14 W. L. J. 623, 627, 628 (1975).

50-628. Duties of the attorney general.

(a) The attorney general shall:

(1) Enforce this act throughout the state;

(2) cooperate with state and local officials, officials of other states and officials of the federal government in the administration of comparable statutes;

(3) mail information concerning final judgments to persons who request it, for which the attorney general may charge a reasonable fee to cover the expense;

(4) receive and act on complaints;

(5) maintain a public file of:

(A) Final judgments rendered under this act that have been either reported officially or made available for public dissemination

under K. S. A. 50-630 (a) (3); and

(B) consent judgments; and

(6) report annually on or before January 1 to the governor and legislature on the operations of his or her office and on the acts or practices occurring in this state that violate this act.

(b) The attorney general's report shall include a statement of the investigatory and enforcement procedures and policies of the attorney general's office, of the number of investigations and enforcement proceedings instituted and of their disposition, and of the other activities of the office and of other persons to carry out the purposes of this act. [L. 1973, ch. 217, § 6; Jan. 1, 1974.]

KANSAS COMMENT, 1973

This section emphasizes that the attorney general's informational duties are as important as his enforcement duties. There were no comparable provisions in the old Buyer Protection Act.

Law Review and Bar Journal References:

Powers of attorney general mentioned in discussion of new consumer legislation in Kansas, Barkley Clark, 42 J. B. A. K. 147, 189 (1973).

Cited in discussion of consumer protection in Tenth Judicial District, William P. Coates, Jr., 44 J. B. A. K. 67, 103 (1975).

50-629. General powers of the attorney general. The attorney general may conduct research, hold public hearings, make inquiries and publish studies relating to consumer sales acts or practices. [L. 1973, ch. 217, § 7; Jan. 1, 1974.]

KANSAS COMMENT, 1973

This section illustrates the consumer education techniques which may be employed by the attorney general.

Law Review and Bar Journal References:

Powers of attorney general mentioned in discussion of new consumer legislation in Kansas, Barkley Clark 42 J. B. A. K. 147, 189 (1973).

50-630. Rule-making requirements. (a) The attorney general may:

(1) Adopt as a rule a description of the organization of his or her office stating the general course and method of operation of the office and methods whereby the public may obtain information or make submissions or requests;

(2) adopt rules of practice setting forth the nature and requirements of all formal and

informal procedures available, including a description of the forms and instructions used by the attorney general or his or her office; and

(3) make available for public inspection all rules, written statements of policy, and interpretations formulated, adopted or used by the attorney general in discharging functions.

(b) Rules and regulations adopted by the attorney general pursuant to this section shall be governed by the provisions of article 4 of chapter 77 of the Kansas Statutes Annotated. [L. 1973, ch. 217, § 8; Jan. 1, 1974.]

KANSAS COMMENT, 1973

This section provides for procedural rule-making by the attorney general with respect to internal operations of his office. Such regulations are to be governed by the general statute dealing with rules and regulations promulgated by the state agencies. There were no comparable provisions in the old Buyer Protection Act. Under this act, the attorney general has no substantive rule-making power.

Law Review and Bar Journal References:

Powers of attorney general mentioned in discussion of new consumer legislation in Kansas, Barkley Clark, 42 J. B. A. K. 147, 189 (1973).

Mentioned in note, "A New Kansas Approach to an Old Fraud," consumer protection, Polly Higdon Wilhardt, 14 W. L. J. 623, 634 (1975).

50-631. Investigatory powers of the attorney general. (a) If, by the attorney general's own inquiries or as a result of complaints, the attorney general has reason to believe that a person has engaged in, is engaging in or is about to engage in an act or practice that violates this act, the attorney general may administer oaths and affirmations, subpoena witnesses or matter and collect evidence.

(b) If matter that the attorney general subpoenas is located outside this state, the person subpoenaed may either make it available to the attorney general at a convenient location within the state or pay the reasonable and necessary expenses for the attorney general or his or her representative to examine the matter at the place where it is located. The attorney general may designate representatives, including officials of the state in which the matter is located, to inspect the matter on his or her behalf, and the attorney general may respond to similar requests from officials of other states.

(c) Service by the attorney general of any notice requiring a person to file a statement or

report, or of a subpoena upon any person, shall be made personally within this state, but if such cannot be obtained, substituted service therefor may be made in the following manner:

(1) Personal service thereof without this state; or

(2) the mailing thereof by certified mail to the last known place of business, residence or abode within or without this state of such person for whom the same is intended; or

(3) in the manner provided in the code of civil procedure as if a petition had been filed; or

(4) such service as the district court may direct in lieu of personal service within this state.

(d) The attorney general may request that an individual who refuses to comply with a subpoena, on the ground that testimony or matter may incriminate the individual, be ordered by the court to provide the testimony or matter. Except in a prosecution for perjury, an individual who complies with a court order to provide testimony or matter after asserting a privilege against self-incrimination to which the individual is entitled by law, may not be subjected to a criminal proceeding or to a civil penalty to the transaction concerning which the individual is required to testify or produce relevant matter. This subsection does not apply to civil sanctions imposed under K. S. A. 50-634 (a) (2).

(e) If any person willfully fails or refuses to file any statement or report required by this act, or obey any subpoena issued by the attorney general, the attorney general may, after notice, apply to the district court and, after a hearing thereon, the district court may issue an order:

(1) Granting injunctive relief restraining the sale or advertisement of any merchandise by such persons; or

(2) vacating, annulling or suspending the corporate charter of a corporation created by or under the laws of this state or revoking or suspending the certificate of authority to do business in this state of a foreign corporation or revoking or suspending any other licenses, permits or certificates issued pursuant to law to such person which are used to further the allegedly unlawful practice; or

(3) granting such other relief as may be

required, until the person files the statement or report, or obeys the subpoena. [L. 1973, ch. 217, § 9; Jan. 1, 1974.]

KANSAS COMMENT, 1973

This section sets forth the investigatory powers of the attorney general in enforcing this act. These provisions derive in part from powers given to the attorney general in the old Buyer Protection Act (former K. S. A. 50-604 to 50-611), although the investigatory powers in this act are broader.

Law Review and Bar Journal References:

Powers of attorney general mentioned in discussion of new consumer legislation in Kansas, Barkley Clark, 42 J. B. A. K. 147, 189 (1973).

Cited in discussion of consumer protection in Tenth Judicial District, William P. Coates, Jr., 44 J. B. A. K. 67, 73, 104 (1975).

Subsection (a) mentioned in note, "A New Kansas Approach to an Old Fraud," consumer protection, Polly Higdon Wilhardt, 14 W. L. J. 623, 634 (1975).

50-632. Remedies of the attorney general. (a) The attorney general may bring an action:

(1) To obtain a declaratory judgment that an act or practice violates this act;

(2) to enjoin, or to obtain a restraining order against a supplier who has violated, is violating, or is otherwise likely to violate this act; or

(3) to recover actual damages on behalf of consumers by reason of violations of this act; and

(4) to recover reasonable expenses and investigation fees.

(b) In lieu of instigating or continuing an action or proceeding, the attorney general may accept a consent judgment with respect to any act or practice declared to be a violation of this act. Such a consent judgment shall provide for the discontinuance by the person entering the same of any act or practice declared to be a violation of this act, and it may include a stipulation for the payment by such person of reasonable expenses and investigation fees incurred by the attorney general. The consent judgment also may include a stipulation for restitution to be made by such person to consumers of money, property or other things received from such consumers in connection with a violation of this act and also may include a stipulation for specific performance. Any consent judgment entered into pursuant to this section shall not be deemed to admit the violation, unless it does

so by its terms. Before any consent judgment entered into pursuant to this section shall be effective, it must be approved by the district court and an entry made thereof in the manner required for making an entry of judgment. Once such approval is received, any breach of the conditions of such consent judgment shall be treated as a violation of a court order, and shall be subject to all the penalties provided by law therefor.

(c) In any action brought by the attorney general, the court may without requiring bond of the attorney general:

(1) Make such orders or judgments as may be necessary to prevent the use or employment by a person of any practices declared to be a violation of this act;

(2) make such orders or judgments as may be necessary to compensate any person for damages sustained;

(3) make such orders or judgments as may be necessary to carry out a transaction in accordance with consumers' reasonable expectations;

(4) appoint a master or receiver or order sequestration of assets whenever it shall appear that the defendant threatens or is about to remove, conceal or dispose of property to the damage of persons to whom restoration would be made under this subsection and assess the expenses of a master or receiver against the defendant;

(5) revoke any license or certificate authorizing that person to engage in business in this state;

(6) enjoin any person from engaging in business in this state; or

(7) grant other appropriate relief. [L. 1973, ch. 217, § 10; Jan. 1, 1974.]

KANSAS COMMENT, 1973

1. Subsection (a) authorizes the attorney general to obtain declaratory and injunctive relief in addition to the recovery of actual damages on behalf of individual consumers. Recovery of actual damages does not include a class action; the latter is available, however, to an aggrieved consumer as a private remedy in certain limited cases under K. S. A. 1975 Supp. 50-634 (d). In those actions which are proper for the attorney general, he may recover reasonable expenses and investigation fees.

2. Subsection (b) authorizes the attorney general to terminate investigative and enforcement proceedings upon acceptance of a consent judgment, which does not in itself constitute an admission of any violation. If the terms of the judgment are breached

by the supplier, however, the breach will be treated like any other violation of a court order. Fees and expenses, as well as provisions for restitution, may be included in a consent judgment under this subsection. This provision is somewhat analogous to the "assurance of discontinuance" established in the old Buyer Protection Act.

3. Subsection (c) provides for broad and flexible remedies available to the attorney general when he recovers a judgment against violators of the act.

Law Review and Bar Journal References:

Powers of attorney general mentioned in discussion of new consumer legislation in Kansas, Barkley Clark, 42 J. B. A. K. 147, 189 (1973).

Discussed in note on landlord-tenant implied warranty of habitability, 22 K. L. R. 666, 683 (1974).

Cited in discussion of consumer protection in Tenth Judicial District, William P. Coates, Jr., 44 J. B. A. K. 67, 70, 104, 105 (1975).

Subsection (a) discussed in note, "A New Kansas Approach to an Old Fraud," on consumer protection, Polly Higdon Willhardt, 14 W. L. J. 623, 637 (1975).

Discussed in comment, "U. C. C.—Limitations on Personal Injury Damages for Breach of Warranty," 14 W. L. J. 714 (1975).

50-633. Coordination with other supervision. (a) If the attorney general receives a complaint or other information relating to noncompliance with this act by a supplier who is subject to other supervision in this state, the attorney general shall inform the official or agency having that supervision. The attorney general may request information about suppliers from the official or agency.

(b) The attorney general and any other official or agency in this state having supervisory authority over a supplier shall consult and assist each other in maintaining compliance with this act. Within the scope of their authority, they may jointly or separately make investigations, prosecute suits and take other official action they consider appropriate.

(c) The county attorney or district attorney may investigate, institute and commence actions under this act in the same manner as provided for the attorney general. It shall be the duty of the county attorney or district attorney to lend to the attorney general such assistance as the attorney general may request in the investigation, commencement and prosecution of actions in the district court of his or her county pursuant to this act, or the county attorney or district attorney may institute and prosecute actions hereunder in the same manner as provided for the attorney general. [L. 1973, ch. 217, § 11; Jan. 1, 1974.]

KANSAS COMMENT, 1973

This section coordinates the attorney general's powers with other administrative supervision of suppliers, as well as with local prosecuting authorities. The duties of prosecuting attorneys are carried forward from the old Buyer Protection Act (former K. S. A. 50-614), with the exception of any need to file a final report upon disposition of a case.

Law Review and Bar Journal References:

Powers of attorney general mentioned in discussion of new consumer legislation in Kansas, Barkley Clark, 42 J. B. A. K. 147, 189 (1973).

Cited in discussion of consumer protection in Tenth Judicial District, William P. Coates, Jr., 44 J. B. A. K. 67, 69 (1975).

Mentioned in "A New Kansas Approach to an Old Fraud," consumer protection, Polly Higdon Wilhardt, 14 W. L. J. 623, 624 (1975).

50-634. Private remedies. (a) Whether a consumer seeks or is entitled to damages or otherwise has an adequate remedy at law or in equity, a consumer aggrieved by an alleged violation of this act may bring an action to:

(1) Obtain a declaratory judgment that an act or practice violates this act; or

(2) enjoin or obtain a restraining order against a supplier who has violated, is violating or is likely to violate this act.

(b) A consumer who is aggrieved by a violation of this act may recover, but not in a class action, actual damages or a civil penalty as provided in K. S. A. 50-636 (a), and amendments thereto, whichever is greater.

(c) Whether a consumer seeks or is entitled to recover damages or has an adequate remedy at law, a consumer may bring a class action for declaratory judgment, an injunction and appropriate ancillary relief, except damages, against an act or practice that violates this act.

(d) A consumer who suffers loss as a result of a violation of this act may bring a class action for the actual damages caused by an act or practice:

(1) Violating any of the acts or practices specifically proscribed in K. S. A. 50-626, 50-627 and 50-640, and amendments thereto, or

(2) declared to violate K. S. A. 50-626 or 50-627, and amendments thereto, by a final judgment of any district court or the supreme court of this state that was either officially reported or made available for public dissemination under K. S. A. 50-630 (a) (3) by the attorney general ten (10) days before the consumer transactions on which the action

is based, or

(3) with respect to a supplier who agreed to it, was prohibited specifically by the terms of a consent judgment which became final before the consumer transactions on which the action is based.

(e) Except for services performed by the attorney general, the court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed if:

(1) The consumer complaining of the act or practice that violates this act has brought or maintained an action he or she knew to be groundless and the prevailing party is the supplier; or a supplier has committed an act or practice that violates this act and the prevailing party is the consumer; and

(2) an action under this section has been terminated by a judgment, or settled.

(f) Except for consent judgments, a final judgment in favor of the attorney general under K. S. A. 50-632 is admissible as prima facie evidence of the facts on which it is based in later proceedings under this section against the same person or a person in privity with him or her. [L. 1973, ch. 217, § 12; L. 1974, ch. 230, § 3; L. 1976, ch. 236, § 5; July 1.]

KANSAS COMMENT, 1973

1. Subsection (a) permits a consumer to obtain appropriate declaratory and injunctive relief regardless of whether he recovers or has standing to recover damages. The Buyer Protection Act contained no private remedies at all.

2. Under subsection (b), an aggrieved consumer may recover the greater of his actual damages or the civil penalties as set forth in section 50-636 (a); section 50-636 (a) gives the court discretion to award up to \$2,000 for each violation of the act. There is no minimum civil penalty, as is the case under certain provisions of the Kansas Uniform Consumer Credit Code (K. S. A. 16a-5-201).

3. Under subsection (c), an aggrieved consumer may bring a private class action for declaratory and injunctive relief. The term "appropriate ancillary relief" would, for example, include an action for rescission of contracts entered into by the class. No class actions for damages are allowed under this subsection.

4. The only class actions for damages available under the act are provided for in subsection (d). Such a private class action, if based on the statute, must be based on violation of a specific proscription found in sections 50-626, 50-627, 50-639 and 50-640. The purpose for this provision is to limit liability to violations of which the supplier can clearly be apprised in advance. Actions declared by a court at a later time to be violative of the act are not sub-

ject to a retroactive class action remedy. Those violations subject to class action include the deceptive acts and practices set forth in 50-626 (b), the acts or practices made *per se* unconscionable under 50-627 (b), violation of the warranty disclaimer prohibition in 50-639, and violations of the home solicitation sale provisions under 50-640. Conversely, a practice which for the first time was held to be deceptive under 50-626 (a), or unconscionable under 50-627 (a), would not be subject to retroactive class action liability.

Class action liability may also attach prospectively to any violation of 50-626 or 50-627 as determined by the final judgment of a Kansas district court or the Kansas Supreme Court, so long as the supplier is on constructive notice of the decision by its being reported or its being previously filed in the attorney general's office under 50-627 (a) (5) (A) and 50-630 (a) (3). In addition, violation of the terms of a consent judgment by a supplier who was a party to the judgment triggers class action liability under subsection (d) (3).

5. Under subsection (c), the court may award a reasonable attorney's fee to certain prevailing parties in litigation under 50-634. This provision should be compared with 50-632 (a) (4), where the attorney general in a public enforcement action is authorized to recover reasonable expenses and investigation fees. Under this subsection, if a consumer has brought or maintained an action which he knew to be groundless, a reasonable attorney's fee can be awarded by the court to a supplier. On the other hand, if a supplier is found to have violated the act through judgment or final settlement, the court may award a reasonable attorney's fee to the consumer.

6. Subsection (f) is comparable to 15 U. S. A. § 16 (a), which makes final judgments in government antitrust proceedings admissible in subsequent actions by private parties. The subsection is not intended to forestall the application of principles of collateral estoppel which preclude a supplier from relitigating the facts established in an action by the attorney general.

Law Review and Bar Journal References:

Discussed in "The New Kansas Consumer Legislation," Barkley Clark, 42 J. B. A. K. 147, 189, 190 (1973).

Discussed in note on landlord-tenant implied warranty of habitability, 22 K. L. R. 666, 683 (1974).

Cited in note, "A New Kansas Approach to an Old Fraud," consumer protection, Polly Higdon Wilhardt, 14 W. L. J. 623, 632, 633, 636 (1975).

Subsection (b) cited in comment, "U. C. C.—Limitations on Personal Injury Damages for Breach of Warranty," 14 W. L. J. 714 (1975).

50-635. Application of 50-626 to 50-638.

(a) This article [°] does not apply to:

(1) A publisher, broadcaster, printer or other person engaged in the dissemination of information or the reproduction of printed or pictorial matter so far as the information or matter has been disseminated or reproduced on behalf of others without actual knowledge

that it violated this article; or

(2) claim for personal injury or death or claim for damage to property other than the property that is the subject of the consumer transaction.

(b) A person alleged to have violated this act has the burden of showing the applicability of this section. [L. 1973, ch. 217, § 13; Jan. 1, 1974.]

* "This article," apparent reference to 50-626 to 50-638.

KANSAS COMMENT, 1973

Subsection (a) (1) exempts from this act disseminators of information unless they commit a violation of this act on behalf of others with actual knowledge that they are violating the act or unless they commit a violation on their own behalf; this basically tracks with the old Buyer Protection Act (former K. S. A. 50-602). Subsection (a) (2) has primary application to product liability claims, and was not included in the old Buyer Protection Act. To the extent that joinder is appropriate, there is no intent to bar the joinder of a product liability claim with a related claim for violation of this act.

Law Review and Bar Journal References:

Subsection (a), (2) discussed in note, "A New Kansas Approach to an Old Fraud," on consumer protection, Polly Higdon Wilhardt, 14 W. L. J. 623, 637 (1975).

50-636. Civil penalties. (a) Except as limited by K. S. A. 50-639, and amendments thereto, the commission of any act or practice declared to be a violation of this act shall render the violator liable to the aggrieved consumer for the payment of a civil penalty, recoverable in an individual action, including an action brought by the attorney general or county attorney or district attorney, in a sum set by the court of not more than two thousand dollars (\$2,000) for each violation.

(b) Any person who willfully violates the terms of any injunction or court order issued pursuant to this act shall forfeit and pay a civil penalty of not more than ten thousand dollars (\$10,000) per violation, in addition to other penalties that may be imposed by the court, as the court shall deem necessary and proper. For the purposes of this section, the district court issuing an injunction shall retain jurisdiction, and in such cases, the attorney general, acting in the name of the state, or the appropriate county attorney or district attorney may petition for recovery of civil penalties.

(c) In administering and pursuing actions under this act, the attorney general and the county attorney or district attorney are authorized to sue for and collect reasonable expenses and investigation fees as determined by the court. Civil penalties or contempt penalties sued for and recovered by the attorney general shall be paid into the general fund of the state. Civil penalties and contempt penalties sued for and recovered by the county attorney or district attorney shall be paid into the general fund of the county where the proceedings were instigated. [L. 1973, ch. 217, § 14; L. 1974, ch. 230, § 4; L. 1976, ch. 236, § 6; July 1.]

KANSAS COMMENT, 1973

This section sets forth allowable civil penalties for violations of the act. Although no minimum civil penalty is provided for, the court retains discretion under subsection (a) to award up to \$2,000 to an aggrieved consumer in a non-class action. The purpose of this provision is to encourage enforcement of the act by a consumer acting as his own "private attorney general." Under this section, however, public enforcement authorities may also recover the penalties on behalf of the state or county. There was no such provision under the old Buyer Protection Act. Willful violations of injunctions or court orders give rise to much larger civil penalties. Any civil penalty recovered by the attorney general under subsections (a) or (b) is to be paid into the general fund of the state or the county, whichever is applicable.

Revisor's Note:

No change was made in section in 1974.

Law Review and Bar Journal References:

Mentioned in "The New Kansas Consumer Legislation," Barkley Clark, 42 J. B. A. K. 147, 191 (1973).

Mentioned in discussion of consumer protection in Tenth Judicial District, William P. Coates, Jr., 44 J. B. A. K. 67, 104 (1975).

50-637. Powers of receiver; effect of receivership. (a) When a receiver is appointed by the court pursuant to this act, he or she shall have the power to sue for, collect, receive and take into his or her possession all the property and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description, including property with which such property has been commingled, if it cannot be identified in kind because of such commingling, and to sell, convey and assign the same and hold and dispose of the proceeds

thereof under the direction of the court. Any person who has suffered damages as a result of the use or employment of any practice declared to be a violation of this act and submits proof to the satisfaction of the court that he or she has in fact been damaged, may participate in the distribution of the assets.

(b) Subject to an order of the court terminating the business affairs of any person who is the subject of receivership proceedings held pursuant to this act, the provisions of this act shall not bar any claim by a consumer against any person who has acquired any money or property, real or personal, or anything of value by means of any practice herein declared to be a violation of this act. [L. 1973, ch. 217, § 15; L. 1976, ch. 236, § 7; July 1.]

KANSAS COMMENT, 1973

This section provides for the mechanics of a receivership in connection with a court action for violation of the act. There was a comparable provision in the old Buyer Protection Act (former K. S. A. 50-609).

50-638. Venue. Every action pursuant to this act shall be brought in the district court of any county in which there occurred an act or practice declared to be a violation of this act, or in which the defendant resides or has his or her principal place of business. If the defendant is a nonresident and has no principal place of business within this state, then the nonresident defendant can be sued either in the district court of Shawnee county or in the district court of any county in which there occurred an act or practice declared to be a violation of this act. [L. 1973, ch. 217, § 16; Jan. 1, 1974.]

KANSAS COMMENT, 1973

This section on venue is basically the same as that found in the old Buyer Protection Act (former K. S. A. 50-613), except that a nonresident defendant may be sued not only in Shawnee county but also in the district court of any county where the violation occurred. This somewhat broader concept of venue is consistent with the idea of delegating public enforcement authority to local prosecuting officers in given cases.

Law Review and Bar Journal References:

Cited in discussion of consumer protection in Tenth Judicial District, William P. Coates, Jr., 44 J. B. A. K. 67, 72 (1975).

Discussed in note, "A New Kansas Approach to an

Old Fraud," on consumer protection, Polly Higdon Wilhardt, 14 W. L. J. 623, 635 (1975).

50-639. Disclaimer or limitation of warranties; liabilities; attorney fees, when; section inapplicable to seed for planting. (a) Notwithstanding any other provisions of law, with respect to property which is the subject of or is intended to become the subject of a consumer transaction in this state, no supplier shall:

(1) Exclude, modify or otherwise attempt to limit the implied warranties of merchantability and fitness for a particular purpose; or

(2) exclude, modify or attempt to limit any remedy provided by law, including the measure of damages available, for a breach of implied warranty of merchantability and fitness for a particular purpose.

(b) Notwithstanding any provision of law, no action for breach of warranty with respect to property subject to a consumer transaction shall fail because of a lack of privity between the claimant and the party against whom the claim is made. An action against any person for breach of warranty with respect to property subject to a consumer transaction shall not of itself constitute a bar to the bringing of an action against another person.

(c) A supplier may limit his or her implied warranty of merchantability and fitness for a particular purpose with respect to a defect or defects in the property only if the supplier establishes that the consumer had knowledge of the defect or defects, which became the basis of the bargain between the parties. In neither case shall such limitation apply to liability for personal injury or property damage.

(d) Nothing in this section shall be construed to expand the implied warranty of merchantability as defined in K. S. A. 84-2-314 to involve obligations in excess of those which are appropriate to the property.

(e) A disclaimer or limitation in violation of this section is void. If a consumer prevails in an action based upon breach of warranty, and the supplier has violated this section, the court may, in addition to any actual damages recovered, award reasonable attorney's fees and a civil penalty under K. S. A. 50-636, and amendments thereto, or both to be paid by the supplier who caused the improper disclaimer to be written.

(f) The making of a limited express warranty is not in itself a violation of this section.

(g) This section does not apply to seed for planting. [L. 1973, ch. 217, § 17; L. 1974, ch. 230, § 5; L. 1976, ch. 236, § 8; July 1.]

KANSAS COMMENT, 1973

1. Under the UCC (K. S. A. 84-2-310) a merchant may in some cases disclaim the implied warranty of merchantability which normally attaches to the sale of goods under K. S. A. 84-2-314. To be effective, such a disclaimer must be "conspicuous" (K. S. A. 84-1-201 (10)) and may not be unconscionable (K. S. A. 84-2-719). Although there are many Kansas cases giving effect to warranty disclaimers (see, e.g., *Allen v. Brown*, 181 K. 301, 310 P.2d 923 (1957)), the Kansas Supreme Court has evidenced sympathy with consumers whose installment contracts contain fine-print disclaimer provisions. See *Steele v. J. I. Case Co.*, 197 K. 554, 419 P.2d 902 (1966). Under subsection (a) (1), a supplier may disclaim neither express nor implied warranties. This does not greatly change the law with respect to the implied warranty of fitness for a particular purpose (K. S. A. 84-2-315) or an express warranty (K. S. A. 84-2-313); a supplier may avoid these warranties simply by not making them, but if he does make them he should abide by them. With respect to the implied warranty of merchantability, however, sales of a product "as is" "with no warranty express or implied," or with an express warranty "in lieu of all other warranties express or implied," are precluded except as provided in subsection (c).

2. Another provision often appearing in boiler plate forms is one which limits the remedy a consumer has for breach of an express warranty. Subsection (a) (2) prohibits any exclusion or modification of the remedies the consumer otherwise has at law. Nothing, of course, prohibits a supplier from giving additional remedies, such as replacement or repairs. These, however, may not displace the other remedies found in the UCC and elsewhere. Under the UCC (K. S. A. 84-2-719 (3)), limiting consequential damages for personal injury is *prima facie* unconscionable; subsection (a) (2) extends this concept to remedy limitations generally.

3. Subsection (b) eliminates *sones* and for all the concepts of "vertical" and "horizontal" privity. "Vertical privity" has in some states precluded a warranty suit by a consumer against a manufacturer or distributor with whom he had no direct contractual relationship in the purchase of a defective product. Since the Kansas Supreme Court has already eliminated any such barrier by judicial decision (*Chandler v. Anchor Serum Co.*, 198 K. 571, 426 P.2d 82 (1967)), this subsection does not substantially change present Kansas law. "Horizontal privity" has in some states precluded a warranty suit against a seller by any plaintiff other than the immediate purchaser of a defective product; for example, bystanders who are injured by the product have been barred from a warranty action because of the absence of any contractual relationship. Under the Kansas version of the UCC (K. S. A. 84-2-318), a seller's warranty extends "to

any natural person who may reasonably be expected to use, consume, or be affected by the goods and who is injured in person by breach of the warranty." This broad language has eliminated most "horizontal privity" barriers to claimants injured by defective products. Subsection (b) would carry the UCC approach one step further to include suits brought by bystanders who suffer property or economic loss as a result of a defective product. For example, under this subsection, the owner of a parked car which is damaged by another parked car whose handbrake was defective could sue the dealer, distributor or manufacturer without the barrier of "privity." Such a claimant would be a third party beneficiary of the implied warranty of merchantability which arose as a result of a prior consumer sale.

4. Subsections (c) and (d) establish realistic limitations on a supplier's liability for breach of warranty. Under subsection (c), a supplier may disclaim implied warranties (except with respect to personal injury or property damage) if he can establish that the consumer had actual knowledge of a defective condition which became the basis of the bargain. This provision is intended to cover sales of "marked down" or "irregular" goods which are sold "as is" and where the consumer is aware of the defective condition; disclaimers in such sales will of course often be reflected in lower prices. Subsection (d) makes it clear that the concept of implied warranty is a relative one: A 1949 Ford is not unmerchantable simply because it requires more maintenance than a new car. Similarly, this section is not intended of itself to give rise to implied warranties which otherwise may not exist under the law at the present time, e. g., an implied warranty in the sale of real estate.

5. In interpreting this section on warranty disclaimers, careful attention should be given to the related definitions of "merchantable" and "warranty" under section 50-624.

Law Review and Bar Journal References:

Discussed in "The New Kansas Consumer Legislation," Barkley Clark, 42 J. B. A. K. 147, 191, 192 (1973).

Discussed in note on landlord-tenant implied warranty of habitability, 22 K. L. R. 666, 682 (1974).

Cited in discussion of consumer protection in Tenth Judicial District, William P. Coates, Jr., 44 J. B. A. K. 67, 71, 72 (1975).

Cited in comment, "U. C. C.—Limitations on Personal Injury Damages for Breach of Warranty," 14 W. L. J. 714 (1975).

CASE ANNOTATIONS

1. Referred to; action to recover on implied warranty; application of commercial code; contract upheld. *Christopher and Son v. Kansas Paint and Color Co.*, 215 K. 185, 195, 215 P.2d 709. Modified 215 K. 510, 511, 525 P.2d 620.

50-640. Door to door sales; cancellation; required disclosures; notice of cancellation; definitions. (a) *Consumer's right to cancel.* Except as provided in subsection (c) (1) (C), in addition to any right otherwise to

revoke, a consumer has the right to cancel a door-to-door sale made within this state until midnight of the third business day after the day on which the consumer signs an agreement or offer to purchase which includes the disclosures required by this section.

(b) *Required disclosures.* In connection with any door-to-door sale made within this state, it constitutes an unfair and deceptive act or practice within the meaning of K. S. A. 50-626, and amendments thereto, for any seller to:

(1) Fail to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, Spanish, for example, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in boldface type of a minimum size of 10 points, a statement in substantially the following form:

"YOU THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT."

(2) Fail to furnish each buyer, at the time he or she signs the door-to-door sales contract or otherwise agrees to buy consumer property or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and be easily detachable, and which shall contain in 10-point boldface type the following information and statements in the same language, Spanish, for example, as that used in the contract:

NOTICE OF CANCELLATION

(Enter date of transaction)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY

TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY PROPERTY DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY, IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE PROPERTY AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE PROPERTY AVAILABLE TO THE SELLER, AND IF THE SELLER DOES NOT PICK SUCH PROPERTY UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION YOU MAY RETAIN OR DISPOSE OF THE PROPERTY WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE PROPERTY AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE PROPERTY TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO

_____ (Name of Seller)

AT _____ (Address of Seller's Place of Business)

NOT LATER THAN MIDNIGHT OF _____

_____ (Date)

I HEREBY CANCEL THIS TRANSACTION.

_____ (Date)

_____ (Buyer's Signature)

(3) Fail, before furnishing copies of the "notice of cancellation" to the buyer, to complete both copies by entering the name of

the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

(4) Include in any door-to-door sale contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this section including specifically his or her right to cancel the sale in accordance with the provisions of this section.

(5) Fail to inform each buyer orally, at the time he or she signs the contract or purchases the property or services, of his or her right to cancel.

(6) Misrepresent in any manner the buyer's right to cancel.

(7) Fail or refuse to honor any valid notice of cancellation by a buyer and within ten (10) business days after the receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

(8) Negotiate, transfer, sell, or assign any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the property or services were purchased.

(9) Fail, within ten (10) business days of receipt of the buyer's notice of cancellation, to notify the buyer whether the seller intends to repossess or to abandon any shipped or delivered property.

(c) *Definitions.* For the purposes of the section the following definitions shall apply:

(1) *Door-to-door sale.* A sale, lease, or rental of consumer property or services with a purchase price of twenty-five dollars (\$25) or more, whether under single or multiple contracts, in which the seller or the seller's representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller. The term

"door-to-door sale" does not include a transaction:

(A) Made pursuant to prior negotiations in the course of a visit by the buyer to a retail business establishment having a fixed permanent location where the property is exhibited or the services are offered for sale on a continuing basis; or

(B) In which the consumer is accorded the right of rescission by the provisions of the consumer credit protection act (15 USCS 1635) or regulations issued pursuant thereto; or

(C) In which the buyer has initiated the contract and the property or services are needed to meet a bona fide immediate personal emergency of the buyer, and the buyer furnishes the seller with a separate dated and signed personal statement in the buyer's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the sale within three (3) business days; or

(D) Conducted and consummated entirely by mail or telephone; and without any other contact between the buyer and the seller or its representative prior to delivery of the property or performance of the services; or

(E) In which the buyer has initiated the contract and specifically requested the seller to visit the buyer's home for the purpose of repairing or performing maintenance upon the buyer's personal property. If in the course of such a visit, the seller sells the buyer the right to receive additional services or property other than replacement parts necessarily used in performing the maintenance or in making the repairs, the sale of the additional property or services would not fall within this exclusion; or

(F) Pertaining to the sale or rental of real property, to the sale of insurance or to the sale of securities or commodities by a broker-dealer registered with the securities and exchange commission.

(2) *Consumer property or services.* Property or services purchased, leased, or rented primarily for personal, family, or household purposes, including courses of instruction or training regardless of the purpose for which they are taken.

(3) *Seller.* Any person, partnership, corporation, or association engaged in the door-to-

door sale of consumer property or services.

(4) *Place of business.* The main or permanent branch office or local address of a seller.

(5) *Purchase price.* The total price paid or to be paid for the consumer property or services, including all interest and service charges.

(6) *Business day.* Any calendar day except Sunday, or the following business holidays: New year's day, Washington's birthday, memorial day, independence day, labor day, Columbus day, veteran's day, thanksgiving day, and Christmas day. [L. 1973, ch. 217, § 18; L. 1974, ch. 230, § 6; L. 1976, ch. 236, § 9; July 1.]

KANSAS COMMENT, 1973

1. A consumer has a right to cancel a home solicitation sale pursuant to subsection (a). The notice of cancellation must be in writing, given to the seller at the address stated in the agreement signed by the buyer, and given prior to midnight of the third business day after the day the buyer signs an agreement or offer to purchase which complies with subsection (b). These are the only formal requirements of the act with respect to the buyer's cancellation. This right to cancel is new to Kansas law.

Although the act does not require that a notice of cancellation be mailed, it is assumed that this will be the normal method of cancellation. Notice of cancellation is given at the time of mailing. The risk of non-receipt of a mailed notice of cancellation is placed on the seller, but the buyer has the burden of proving that the notice was properly mailed.

Goods and services are frequently sold to a buyer at his home because of an emergency. Common examples are emergency repairs to broken water pipes, furnaces, appliances and the like. Since such transactions may come within the definition of home solicitation sales, sellers may be reluctant to perform services or deliver goods before expiration of the 3-day cancellation period. Application of the right to cancel to emergency situations would have the undesirable effect of seriously deterring sellers from performing in time to deal with emergencies. Subsection (a) (5) therefore provides that the buyer may not cancel a sale if the stated conditions are met. The word "emergency" is not defined; the intention of the subsection is to protect the seller who in good faith relies on the statement of the buyer that an emergency exists and who performs immediately at the request of the buyer.

The right to cancel provided by subsection (a) is not exclusive. It in no way affects the right that the buyer may have independent of the act to revoke an offer to purchase which has not been accepted by the seller, or to rescind because of fraud, duress, breach of warranty or other causes.

2. The 3-day period for cancellation does not begin to run until the buyer signs a written agreement or offer to purchase complying with subsection (b). To comply, the agreement or offer must con-

tain the date on which the buyer actually signs it and the caption and statement required by subsection (b) (2). Under subsection (b) (3), the seller may use forms prescribed by the Federal Trade Commission in any statute, rule or regulation which becomes effective at the federal level; compliance with the federal form is compliance with this section. The purpose of subsection (b) (3) is of course to avoid duplication and overlap.

3. Under subsection (c) (1), the 10-day period during which the seller must tender to the buyer any payments and any evidence of indebtedness runs from the time the sale has been cancelled, *i. e.*, from the time the buyer delivers a written notice of cancellation to the seller or deposits the notice in a mailbox.

Under subsection (c) (2), if the seller took a trade-in as part of a home solicitation sale which has been cancelled he must tender the goods traded in. The risk of loss of damage to the goods rests with the seller. If he cannot tender the goods in substantially as good condition as when received, the buyer may elect to take in cash the trade-in allowance fixed by the parties in the contract. This provision is designed to protect the buyer where goods traded in have not been tendered or have been damaged. In such a case he is given an election to sue either for return of the goods or for the trade-in allowance.

As a means of assuring compliance by the seller, subsection (c) (3) provides that the buyer may retain possession of any goods delivered to him by the seller with respect to a sale cancelled under subsection (a) (1) until the seller complies with his obligations under subsection (c). While in possession of the goods the buyer has a lien as security for his claim against the seller.

4. Subsections (d) (1) and (2) state the obligations of the buyer in the case of a cancelled home solicitation sale. To protect the buyer from the seller who may seek to impose an obligation on the buyer by unreasonable delays in demanding delivery of the goods the seller must demand possession within a reasonable time and 30 days is presumed to be a reasonable time. Goods not demanded within a reasonable time become the property of the buyer without obligation to pay for them. To protect the seller the section imposes on the buyer a duty to take reasonable care of the goods while they are in his possession. Except for this duty of care, under subsection (d) (2) the goods delivered under a home solicitation sale are at the seller's risk both prior to and after cancellation by the buyer; a buyer may cancel a sale after destruction of the goods without his fault if the destruction occurred during the 3-day cancellation period.

With respect to home solicitation sales involving the sale of services it is not possible to restore the parties to their original positions if services have been performed prior to cancellation. Subsection (d) (3) discourages a seller from performing any services during the 3-day cancellation period by requiring him to act entirely at his own risk.

Law Review and Bar Journal References:

Mentioned in "The New Kansas Consumer Legis-

lation," Barkley Clark, 42 J. B. A. K. 147, 190 (1973).
Cited in discussion of consumer protection in Tenth
Judicial District, William P. Cortes, Jr., 44 J. B. A. K.
67, 71 (1975).

Discussed in note, "A New Kansas Approach to an
Old Fraud," consumer protection, Polly Higdon Wil-
hardt, 14 W. L. J. 623, 634 (1975).

50-641. [L. 1973, ch. 217, § 19; Re-
pealed, L. 1974, ch. 230, § 7; July 1.]

50-642. Citation of act. This act may be
cited as the Kansas consumer protection act.
[L. 1973, ch. 217, § 20; Jan. 1, 1974.]

50-643. Severability. If any provision of
this act or the application thereof to any per-
son or circumstances is held invalid, the inva-
lidity does not affect other provisions or ap-
plications of this act which can be given
effect without the invalid provision or appli-
cation, and to this end the provisions of this
act are severable. [L. 1973, ch. 217, § 21;
Jan. 1, 1974.]

END