Powerful Powers Under the Kansas Power of Attorney Act

The Economic Loss Rule in Kansas and its Impact on Construction Cases
Let Your Voice be Heard!

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Our Mission:
The Kansas Bar Association is dedicated to advancing the professionalism and legal skills of lawyers, providing services to its members, serving the community through advocacy of public policy issues, encouraging public understanding of the law, and promoting the effective administration of our system of justice.

The Kansas Bar Association and the members of the Board of Editors assume no responsibility for any opinion or statement of fact in the substantive legal articles published in The Journal of the Kansas Bar Association.

Publication of advertisements is not to be deemed an endorsement of any product or service advertised unless otherwise indicated.

Why I Like Being a Lawyer

It is 7:30 on Thursday night, and I am still at the office. I am 60 years old, and I've been practicing law for 32 years. I have a stack of work on my desk that has to be completed no later than yesterday. I love being a lawyer.

I have never ceased to be amazed that I have the privilege to represent clients in every court in Kansas, give legal advice (even if not always followed), and be an advocate. There seems to be a certain amount of notoriety that comes with being a lawyer. We certainly have been bombarded with lawyer bashing. But, basically, we lawyers are problem solvers. The real satisfaction of being a lawyer is being part of a just resolution to a legal problem.

It is now 8 p.m., time to close the office for the evening. Tomorrow morning I can start another day of being a Kansas lawyer practicing with great lawyers across our state. (I can't really be 60 years old, can I?)

Independency of the Judiciary

As many of you know, the Kansas Bar Association has announced the formation of a commission on maintaining and promoting an independent Kansas judiciary. The interest and enthusiasm for the initiative by Kansas Bar Association membership has been impressive.

The commission will study how to respond to partisan and unfair criticism of judges in Kansas and how to counter special interest, partisan judicial evaluations.

But, it appears the broader problem is a lack of understanding and respect for our system of justice. The KBA can be at the forefront in providing educational opportunities and information to the public about our system of justice.

Parting Thoughts

My long-time partner Lou Clothier, as well as Mike Mogenson, have covered for me throughout the year during my absences from the office while I have been working on, attending, and dealing with KBA duties. Kelly Egli, who joined our firm in April 2005, has also helped out. I also want to thank Sharon Jones (who has been with us for about 20 years), senior legal secretary; Kristi Lake, our business manager; and our newest staff member, Jacqueline Thorne, receptionist, who joined us full time in March 2005. I previously thanked Becky Leos and will thank her again. And finally, special thanks to Marti, my wife, law partner, and legislator for all of her support, patience, and valuable insight.

It's been a great year, and I learned a lot. I am grateful and feel honored to have had the chance to serve the KBA as president for the year 2004–2005. Jeff Alderman, René Eichem, Deana Mead, Susan McKaskle, and the rest of the staff at the KBA have been great to work with. I want to thank each of them for all of their help while I have been KBA president. I also want to thank the officers and the Board of Governors. It has been a pleasure to work with you. Congratulations and best wishes for a successful year to Rich Hayse as he takes over as the Kansas Bar Association president.

Michael P. Crow can be reached by e-mail at mikecrow@ccblegal.com or by phone at (913) 682-0166.

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THE JOURNAL OF THE KANSAS BAR ASSOCIATION
Topeka Attorney Enjoys Being a World Traveler

By Beth Warrington, KBA publications coordinator

The summer before graduating from high school, Topeka-native Wayne Probasco and his friend, Steve Daniels, hitchhiked to California. Originally, the plan was to become wealthy by working in the shipyards, but instead they spent their time vacationing. Now at 79, Probasco, a solo practitioner, is still traveling the world, sightseeing, mountain climbing, marathon running, and motorcycling.

“I always had an interest in the outdoors, travel, and history,” said Probasco, who has visited every European country except Norway and Albania.

After high school, Probasco spent 17 months in the U.S. Air Force, where he was a gunner on a B-29 bomber during World War II. He then attended Washburn University under the G.I. Bill and earned his bachelor's degree in 1950 and his juris doctorate in 1951.

Being a solo practitioner has allowed him to indulge in his love of travel with the occasional month-long trip as well as shorter trips lasting only a few weeks. He still practices with a limited caseload.

Before traveling, Probasco said he uses the “Let's Go” or “Lonely Planet” travel guides to help set the agenda. He tends to stay at small local hotels or bed and breakfasts, which he said is one of the best ways to save money.

“You have to have a lot of free time and money to travel,” he said.

One of Probasco’s more memorable journeys took him to the site of one of the modern era’s most historic events, the fall of the Berlin Wall in 1989. He and his wife, Lou, who is also a Topeka attorney, had been watching the news coverage and decided to visit the wall as soon as they could in order to witness the historical event.

When the Probascos arrived in Berlin, the wall was still being torn down. He and Lou used sledgehammers to help dismantle the wall and managed to save some of the broken pieces to bring home as souvenirs.

In 1992, Probasco spent two nights in Vladivostok, Russia, after the city reopened to visitors. From there he spent nearly seven days on the Trans-Siberian Express to Moscow, logging more than 6,000 miles from start to finish.

He said watching the countryside was very tiresome and uneventful through western Russia, but “you had to realize this country was so worn and tired after communism.”

In 2002, he and Lou were in London, where they visited the grounds at Wimbledon. After taking a tour, they noticed people camping outside the grounds. Their guide explained that the first 500 people in line could get tickets to the tennis matches the following day.

“We put up a tent and spent the night,” he said. “The camaraderie was a picnic.”

He said the atmosphere that evening was like a party, with grilling, drinking, and having a good time, but it was lights out for everyone at 10 p.m.

The next morning, event organizers provided breakfast of cereal and coffee to all of the campers, who stood in line for hours in hopes of getting tickets. Probasco and Lou managed to procure center court seating.

“They were great, great tickets,” he said. “Last year we did it again, taking family with us, and then we went on to Paris and Rome.”

His traveling companions include Lou; daughters, Paula, Kristi, and Jennifer; son, Jeff; and his 11 grandchildren.

The Probascos once traveled to Peru, where they started their journey at Machu Picchu, an ancient Incan city northwest of Cuzco. From there they took a bus to Lake Titicaca, a boat to Bolivia, a train across the Andes Mountains to Chile, and a 2,000-mile bus ride to Santiago, Chile.

(continued on Page 8)
‘I Love Being a Lawyer’ is Crow’s Mantra

By Susan M. McKaskle, Journal managing editor

“I love being a lawyer” is the mantra of KBA President Mike Crow. He brings this ideal not only to his practice of law, but also to his service to the KBA.

“I believe that the KBA and Kansas Bar Foundation contribute much to the profession and the betterment of society,” he said.

Crow credits 1997 KBA President John C. Tillotson for encouraging him to become more involved with the KBA.

“John has been my mentor with the KBA,” Crow said. “He encouraged me to run for District 2 Representative in 1995 and then for an officer’s position in 2001.”

Crow has served on the KBA Board continuously since 1995.

The KBA had a number of accomplishments during Crow’s tenure. Two that came to fruition during his term were the reciprocity ruling and the announcement from Gov. Sebelius proclaiming May as “Jury Appreciation Month.”

“It is important to note that the Kansas Bar Association has been working toward these goals for a number of years,” Crow said. “The real credit goes to the KBA Board of Governors and staff, the Reciprocity Task Force, past KBA presidents, our judicial system, and many others.”

Crow, accompanied by Edwin H. Bideau III, chair of the KBA Unauthorized Practice of Law Task Force, appeared before the Kansas Supreme Court to submit the task force’s report and formal recommendations for the Court to define the practice of law in Kansas.

The original KBA recommendations on reciprocity were presented to the Court by KBA Immediate Past President Dan Sevar. Crow was active during the attorney review phase and the subsequent Court hearing.

The independence of the Kansas judiciary became a focal point for many in the state during Crow’s term.

“As KBA members know, there have been recent attacks on the independence of the Kansas judiciary,” Crow said. “The KBA has formed a commission to support their independence, and we need to follow through on this important issue.”

Crow is a member of the KBA Raising the Bar, Membership, and Nominating committees; the KBA Fee Dispute Resolution and Ethics Grievance panels; and the Annual Meeting Planning Task Force. He is also a volunteer for “Project Call Up,” a program where KBA members volunteer to draft basic wills and durable powers of attorney for the families of those affected by war. Although these are all activities that added to the contributions Crow made to the KBA during his presidency, he felt his administration had a central focus.

“My time as president focused on increasing membership,” Crow said. “The newly formed Membership Committee deserves a great deal of credit. I am pleased that we have been very successful in that endeavor.”

As part of his focus on membership, Crow felt it was important to increase member benefits. In October, he successfully added a health insurance option to the growing list of member benefits.

Part of the duties of the KBA president is getting to know the presidents of other state bar associations.

“Nothing like lawyers trading thoughts and ideas,” Crow said. “Those discussions led to forming task forces on lawyer advertising, independency of the judiciary, and juror appreciation.”

Crow’s wife, Marti, and their daughter, Jennifer, are also KBA members. Marti was able to attend the Missouri and Oklahoma bar associations’ annual meetings with Crow, despite her duties as a member of the Kansas House of Representatives.

“Marti, like me, loves the KBA,” Crow said. “She has good ideas. Her input on legislative issues of interest to lawyers was vital.”

Jennifer, who lives in Topeka, is a 2001 graduate of Washburn University School of Law. She is the Governor’s Legislative Liaison to the Senate.

“The Kansas Bar Association made great strides under the leadership of President Crow,” said KBA Executive Director Jeffrey Alderman. “From day one, he focused on serving the membership and profession, and we all benefited from his great ideas and dedication.”

Crow may be stepping down as KBA president at the 2005 KBA Annual Meeting, but his active support of the goals of the KBA and the prestigious practice of law will undoubt­edly continue throughout his career.
Washburn Law Trial Teams Successful Nationally

By Tad Layton, Coffman, DeFries & Northern P.A., Topeka

The Washburn University School of Law Trial Advocacy Teams recently earned national recognition. The outstanding team of William Burris, Brette Hart, Nicholas Purifoy, and Thomas Trunnell finished as national semi-finalists in the 2005 Association of Trial Lawyers of America Student Trial Advocacy Competition (ATLA STAC)

held at West Palm Beach, Fla., April 7-10, 2005. In finishing as one of the top four trial teams in the nation, Washburn Law received national attention for its trial program and great respect and praise from tournament directors, attorneys, judges, and other student competitors and their coaches.

The ATLA STAC is the premier civil trial competition in the United States. Mock trials started in February in 14 cities across the country where 224 teams from 138 law schools faced each other in regional competitions. Only the top team from each region earns the right to compete in the National Finals held in West Palm Beach. See information about other regional winners at: atla.org/members/lawstud/STAC/2005regionalwinners.aspx.

In the three preliminary rounds of trials at the national finals, Washburn Law defeated Loyola University Chicago School of Law, 2000 National Champion; Cumberland School of Law Samford University, 2004 Quarter-Finalist; and the University at Buffalo Law School. Washburn Law emerged from the preliminary rounds with Baylor Law School and the University of North Carolina School of Law as the only undefeated teams. Washburn swept Cumberland in the quarter-finals, 3-0, earning a number one ranking in the semi-finals (Baylor, No. 2; Barry University School of Law, No. 3; St. Johns, No. 4). Washburn was narrowly defeated by St. Johns in the semi-finals by just one ballot. Baylor defeated St. Johns to win the 2005 National Trial Championship.

Also noteworthy is that Washburn's national finals team earned the right to compete in Florida only after defeating the other Washburn Law Trial Team of John (Todd) Hiatt, Christina Waugh, Michael Burbach, and Brandi Studer in what was an all-Washburn final round of the Denver Regional. It is accurate to say that Washburn Law is home to several of the top student trial advocates in the United States.

The Washburn Law Trial Teams are coached by Tad Layton of Coffman, DeFries & Northern P.A., Topeka, and are products of Washburn Law's innovative Center for Excellence in Advocacy (washburnlaw.edu/centers/advocacy).
Probasco's other travels have taken him across the globe to India; scuba diving in the Caribbean; to Egypt to see the pyramids; from Portugal to Morocco; and to the United Arab Emirates, Dubai, Singapore, and Bangkok.

With all of his travels, Probasco managed to find the time to take on another adventure: mountain climbing. His first climb was Longs Peak in Estes Park, Colo., and that was just the beginning. On one such journey, Probasco scaled the Himalayas in Nepal.

“We started out at 10,000 feet and then climbed to the Mount Everest base camp at about 18,500 feet,” he said. “There was absolutely no heat at all, just kerosene to cook the food.”

He spent about three weeks staying on the same route where some of the best climbers begin their ascent up Mount Everest.

“This is where the ‘big deal guys’ started,” he said. “If you know the book, ‘Into Thin Air’ by Jon Krakauer, that was the same route we were on.”

He has also climbed Mount Kilimanjaro in Tanzania, Mount Kinabalu in Borneo, and Mount Whitney in California, just to name a few.

Next, Probasco decided to give marathon running a try at the age of 54. In 1981, he and his friend, Terry Jacquith, completed their first marathon in Lincoln, Neb. The next year, both men ran a marathon in Stockholm, Sweden. During that marathon, they noticed that the 11,000 to 12,000 spectators would start clapping sporadically as they ran by; unbeknownst to them, they were running next to Ingemar Johansson, the 1959 world heavyweight-boxing champion.

As time has passed, Probasco has also taken on another mode of traveling: motorcycles.

“I have done quite a bit of riding here in the U.S.,” he said. “My son said we have taken nine trips and have traveled through California; Washington, D.C.; New York; Maine; Mexico; and Canada.”

One of the more extensive motorcycle road trips that Probasco has taken was with his high school traveling companion, Daniels, from Topeka to Panama City, Panama, in 1978.

“Steve and I rode our 175ccs to the Panama Canal,” he said. “We couldn’t sell our motorcycles due to the country’s customs laws, so you had three options: one, give it to the government; two, ship it out; or three, ride it out.”

Probasco gave his motorcycle to the government because he couldn’t grasp the idea of riding it back, while Daniels shipped his back.

He is showing no signs of slowing down with his world travels. Later this summer, Probasco plans on taking another motorcycle trip; his destination is currently unknown.
What a year!

By Eric Kraft, KBA Young Lawyers Section president

As you read this, I will be preparing to go to Vail, Colo., to attend the KBA Annual Meeting, where I will end my term as the president of the Young Lawyers Section. It will be a bittersweet day. I have immensely enjoyed my term in office; it has enabled me to meet and work with some great people and true professionals from all over the country. I have attempted to utilize that experience to benefit our section, but I have also been the beneficiary of many of those benefits myself. These benefits are too numerous to list here; however, I can offer my appreciation to many of the people who I have come to admire for their contributions to our profession.

As president of the YLS, I received the distinct opportunity to serve on the KBA Board of Governors and on its Executive Committee. In that capacity, I sat through numerous inane discussions, but I also helped to shape the identity of the larger bar. I met a number of very dedicated lawyers who were not only willing to give me a seat at the table but were also willing to listen to young lawyers’ concerns and ideas. That’s not to say that all of these ideas were immediately accepted, but the board never dismissed any idea just because it came from the YLS. In fact, I have learned that many bar associations do not give their young lawyers sections a seat on their board of governors, let alone a vote, and a spot on the executive committee. By simply providing these opportunities, the KBA has been receptive to the YLS for many years. For all of these things, I thank each and every board member for your continued support of the YLS.

I would also like to thank President Mike Crow for his encouragement of the YLS. Mike has been a great backer of the YLS and its goals this year. We couldn’t have done all that we set out to do this year without his support and guidance. Mike has also performed an outstanding job in his term as the KBA president. After serving in my position, which is admittedly less work than that of the KBA president, I can truly appreciate the limited amount of time you have to implement the goals you set in June. Mike has performed admirably and should be commended.

I would be remiss to suggest that my job could have been accomplished without Jeff Alderman, René Eichem, and the rest of the KBA staff. Jeff was a fantastic addition to the KBA and has rejuvenated the bar. I can attest that the entire atmosphere at bar meetings, CLEs, and within the bar offices has vastly improved since Jeff’s arrival. He is also a big supporter of the YLS and for that, I thank him. René has been our principal liaison in the KBA. She is a very enthusiastic and energetic supporter of the YLS and has been there for us around every corner. But neither of these bar leaders could do their jobs without an outstanding staff. The staff at the KBA is an outstanding amalgamation of talented people who work solely to serve Kansas attorneys. I would list them all, but I don’t have the room to do so. Besides, you need to get to the bar offices and discover this great group of people for yourself.

Additionally, I need to thank the YLS Executive Committee. You all have shown me that the YLS is in good hands for the future. Mark my words, your future bar leaders of tomorrow are in this group, and I will be proud to sit with them at future bar events. I couldn’t have accomplished anything this year without their help.

Finally, I would also like to recognize the YLS membership. Repeatedly, I have been amazed by the generosity, time, and commitment you show your communities, your profession, and the KBA. After each column, it seemed that I got another call, e-mail, or other communication that let me know that you were all there, ready and willing to help out. Keep up the good work! We young Kansas attorneys have a lot for which we can be proud.

This has been a difficult and an exciting year, personally and professionally. I have endured a lot but have gained much in the form of wisdom, experience, and knowledge. To my friends, thank you. I have appreciated all of your support these past months. Of course, my wife, Jennifer, and son, Jackson, have sacrificed their time with me to enable my involvement this year in the KBA YLS. I truly appreciate and love them both for making those sacrifices to grant me the indulgence of serving the YLS. It is with that gratitude that I fade into the ambiguity of YLS past presidents and bid you farewell.

Kraft is an associate with the law firm of Duggan, Shadwick, Doerr & Kurbaum P.C. in Overland Park and can be reached at ekraft@kc-dslaw.com or by calling (913) 498-3536.
Client confidentiality has special meaning to lawyers and their clients. But these days it seems that lawyers are the only ones keeping secrets, well, secret. Maybe it’s just me, but as best I can tell, our culture puts no stock in the notion that some things are private and should remain that way. We seem to reward those who are willing to tell the world what used to be privileged, personal, “none of your business” type of details. That is certainly true in places like Hollywood and Washington, D.C., where networks make kiss-and-tell stories prime time news.

Apart from the legal profession, there have always been a few other safe harbors of confidentiality. But lately I’m not so sure about those. Take the penitent/priest privilege for instance. What you say to your priest is off limits. So far, so good so you say. But that’s hardly true in our home. The teenagers under our roof get together before the annual trip to the confessional. Because most of their transgressions have a “spokes and hub” type of conspiracy, they get their stories straight — swear words, talking back to parents, slugging the kid sister. That way they ensure that they don’t do anything truly horrible: committing sins while confessing sins.

Another example came to mind recently. During the election of the new pope, the cardinals were sworn to secrecy. The penalty was excommunication, which I think is like a lifetime in hell or Columbia, Mo.: cardinals’ choice. Yet the day before the election, The New York Times ran a huge story that claimed to have interviewed almost half of them “on background” where they expressed their choices. This allowed the Times to do exit polling before the polling.

Doctors are supposed to embrace patient confidentiality too. Litigation is replete with waivers, of course. Yet even outside the personal injury context it’s no sure thing. Hospital elevators are chock full of admonitions to physicians about maintaining patient confidentiality. Attorneys need no reminding. Think about it. When was the last time you were at a law firm and saw on the elevator a “do not discuss your client’s guilt in this elevator” reminder?

So I think it’s cool that our profession is one where we can hold secrets. Where what we do is really no one’s business but those who pay our bills. So while this column was still circling my brain, I had another reminder of how our profession is so old-fashioned. I was at the KCI airport in one of the “holding pens” where there is no food, drink, or bathroom but lots of security personnel performing “special screenings.” I was waiting for my flight on Southwest Airlines. Southwest makes money these days because it’s the plane of choice for the textbook “sales guy.” “Sales guys” are a rare breed of professional. Nothing they do is secret. They take great pleasure in using their cell phones in public, especially in tight spaces. They always talk loud, as if they are making a sales pitch to the AARP. And so as luck would have it, “sales guy” was dialing for dollars while he stood on my toes. I heard every second of his call. So did boarding groups A, B, and C.

The call went like this: “Skip. Biff here. Got your voice mail. Let’s network right away. I’ll arrange an RFP. Please FedEx it to my home ASAP.” As he babbled he used one of those ear phones that curled around across his face like a scene from “Star Trek, the Lost Generation.” A less informed bystander was probably impressed by it all. He may have concluded this guy just called Bill Gates and sold him a new software system. But the actual translation was this: “Let’s get a pizza delivered to my apartment and watch professional wrestling. I got a new water bed. It’s cool.”

Long ago, people only made phone calls in a phone booth. It had a door that shut firmly. It even had a big thick book in it, with every phone number you needed. Phone booths have disappeared everywhere, save one place. The country courthouse. How refreshing.

About the Author
Matthew Keenan grew up in Great Bend and attended the University of Kansas, where he received his B.A. in 1981 and his J.D. in 1984. Of five children raised by Larry and Mona Keenan, four are attorneys: Marty and Tim practice with Larry in Great Bend, and sister Beth is a tax attorney for Blackwell Sanders in Kansas City, Mo. For the last 20 years Matt has practiced with Shook, Hardy & Bacon. In his spare time he writes columns for the Kansas City Star Neighborhood News, which is published in the Johnson County editions of the paper. He has a Web site with some of his writings over the years, www.matthewkeenan.com. He and his wife, Lori, live in Leawood, but spend most of their time running a cab service for their four children. Keenan has been a member of the Kansas Bar Association since 1984.
Plans Underway for Fellows Recognition and Awards

Please note that the Board of Trustees of the Kansas Bar Foundation has voted to postpone this year’s Fellows Dinner, which had originally been scheduled for Saturday, June 11, at the KBA Annual Meeting in Vail, Colo.

We have tentatively rescheduled the Fellows Dinner for Friday, Sept. 23, 2005, in Wichita. Those added to the published roll of fellows and those who have reached a new contribution level will be honored at the dinner. A special Robert K. Weary Award recipient will also be announced at the dinner. Details of the dinner will follow later.

Foundation members are still encouraged to attend the upcoming KBA Annual Meeting as all fellows will be recognized at the new “Changing of the Guard” Dinner Dance on Friday, June 10.

Thank you for your continued support of the Foundation’s charitable and educational activities. Together we can make a difference.

Volunteers Needed for Elder Law Hotline

What is the Elder Law Hotline?

The Kansas Elder Law Hotline, which is funded in part by the Kansas Bar Foundation and Kansas Bar Association, provides Kansas senior citizens access to an attorney to advise them about legal questions in civil cases and referrals to other resources for additional assistance. The hotline is available to persons who live in Kansas who are age 60 or older.

How does it work?

All volunteers with malpractice insurance will be listed in a special elder law referral panel of the Kansas Bar Association’s Lawyer Referral Service at no charge. Volunteers will be referred elder law clients from his or her area with cases such as probate, estate planning, guardianship/conservatorship, personal injury, etc. LRS rules (including remitting 10 percent of fees more than $300) apply to the elder law referral panel. Individuals must pay the Lawyer Referral Service registration fee to be listed on other area of practice panels.

Volunteer now!

The Elder Law Hotline asks that attorneys volunteer a three and one-half hour block of time every other month. Calls will be transferred to the volunteer’s office along with demographic information about each client. To volunteer for the Elder Law Hotline, contact the Kansas Bar Association at (785) 234-5696 and request an application.

Still Time to Join Lawyer Referral Service

In 2004, Lawyer Referral Service referrals generated more than $1.2 million in client fees for lawyers who participated in the program. The service has become a convenience for people who need a lawyer, but do not know how to locate one.

Lawyer Referral Service staff refer clients in a variety of areas of law. The most common referrals are made in the areas of divorce, medical malpractice, and contested custody. The LRS receives its clients from multiple sources, including yellow page advertisements, Kansas Legal Services, the courts, and other attorneys.

For more information about the KBA Lawyer Referral Service or to request an application, please contact Bar headquarters at (785) 234-5696. An application can also be downloaded at www.ksbar.org/LRS/LRS-app.pdf.
Thinking Ethics

Obtaining Valid Waivers of Conflicts of Interest

By professor Sheila Reynolds, Washburn University School of Law

Nonwaivable conflicts

A prerequisite to any client waiver is a “lawyer waiver,” that is, a decision by the lawyer that the lawyer will be able to provide adequate representation to the client or clients, despite the conflict.1 That decision is not subjective, but must be made from the objective standpoint of a reasonable lawyer.2 If a reasonable and disinterested lawyer would conclude that one or more of the affected clients should not consent to the conflicted representation, the conflict is nonwaivable. In many situations, the interests of clients are so different that one lawyer cannot advocate the interests of one without impairing the interests of the other. An example is joint representation of co-defendants in a criminal case, whose defenses and plea bargains could render their representation constitutionally ineffective.3 Another example is representation of buyer-seller in a complex real estate transaction, where both parties should receive extensive, independent advice about protection of their rights and interests in the transaction.4 Joint representation of opposing parties in litigated matters is not permitted, even with client consent.5

Consultation with the client

For a client conflict waiver to be valid, a lawyer must consult with the client about the nature of the conflict, communicating enough information for the client truly to appreciate the material and reasonably foreseeable ways that the interests of the client could be adversely impacted by the waiver. The Restatement of Law Governing Lawyers, §122, Comment c(i) explains in detail what information should be discussed, which will vary depending upon the nature of the risks involved. For multiple client situations, examples include:

- the interests of the lawyer and other client giving rise to the conflict;
- contingent, optional, and tactical considerations and alternative courses of action foreclosed or made less available by the conflict;
- information that will have to be revealed to obtain the consent of the other client or that cannot be kept confidential;
- reservations a disinterested lawyer would have if that lawyer were representing only the client being advised; and
- the fact that the lawyer will have to withdraw from representing all clients if consent is later revoked because the risks become too great.6

For former client conflicts, the former client should be made aware that:

- the consent will allow the lawyer to proceed adversely to the former client,
- the fact that the lawyer possesses the former client’s confidential information and what measures may be taken to protect it, and
- the right of the former client to refuse to consent.

Clients should be given a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns.

Written documentation of client waivers

Although the Kansas ethics rules do not currently require that conflict waivers by clients be in writing,7 a lawyer should always obtain a written consent for purposes of clarity and proof. Written confirmation of a waiver is not a substitute, however, for first thoroughly discussing the nature and risks of the conflict with the client.

Consent to future conflicts

Although Kansas has not decided the issue, most authorities agree that waivers of objections to future conflicts are not per se unethical and may be upheld if the future matter is adequately identified, the client is adequately sophisticated, and the waiver is reasonably recent.8 For example, a law firm is asked by large corporation B for legal advice on an intellectual property matter. The firm does not expect legal business from B beyond this discrete matter. The firm asks B to agree to waive objection to future workers’ compensation claims against B for other firm clients, even during the current representation.

ABA Formal Ethics Op. 93-372 recognizes such waivers may be valid if the particular conflict is contemplated with sufficient clarity so that consent can reasonably be viewed as having been fully informed when given. Comment 22 to the 2002 ABA Model Rule 1.7 states that “the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater likelihood that the client will have the requisite understanding.7 The Restatement of Law Governing Lawyers §122, Comment d states that the client should possess sophistication in the matter in question and have the opportunity to receive advice from an independent lawyer.

About the Authors

Sheila Reynolds is a law professor at Washburn University School of Law, where she teaches Professional Responsibility, Legal Malpractice Seminar, and Law Clinic. She serves on the KBA Legal Ethics Advisory Committee, the KBA’s Ethics 2000 Task Force, and the Judicial Council’s forms committee. She co-authored two chapters of the KBA’s “Legal Ethics Handbook” (1996 and Supp. 2001) and the chapter on Ethical Considerations in Representing an Impaired Client for the KBA “Long-Term Care Handbook” (1999 and Supp. 2001).

FOOTNOTES

1. KRPC 1.7(a)(1) and (b)(1).
2. Id. at 278 Kan. 506, 509, 102 P.3d 1140, 1143 (2004).
3. KRPC 1.7, Comment titled “Conflicts in Litigation.”
4. Restatement of Law Governing Lawyers, §122, Comment g(iv), Illustration 11.
5. Id., [Rule 1.7(a)] prohibits representation of opposing parties in litigation.
6. KRPC 1.9 prohibits representation of a client in the same matter with

which the client’s interests are materially adverse to a former client. Thus, a lawyer cannot simply withdraw from representing one client (who then becomes a former client) and continue to represent the other client in the same matter.

7. The ABA 2002 amendments to the Model Rules of Professional Conduct require that conflict waivers be in writing. The Kansas Bar Association Board of Governors has recommended this change be adopted by the Kansas Supreme Court.

Members in the News

CHANGING POSITIONS

Lindsay D. Aaron has joined Pearman and Galamba L.C., Overland Park.
Heath Anderson, Jana Croft, Timothy Larigan, Jacob Lowry, Matthew Wright, and Judy Yi have joined Polsinelli Shalton Welte and Suelthaus P.C., Kansas City, Mo., as associates. Joanne Joiner has joined the firm as of counsel.
Richard F. Chatfield-Taylor has joined Chevron USA Inc., Lenexa.
Dollie LeAnna Cramer has joined the Kansas Department of Social and Rehabilitation Services, Hutchinson.
Emily Donaldson has joined Stevens and Brand LLP, Lawrence.
Gary T. Eastman has joined Corporate Counsel Group LLP, Kansas City, Mo.
Amy D. Ecker has been named a member of Cozen O'Connor, Wichita.
Susan K. Ellis has been named a partner of the firm in Kansas City, Mo.

Ruth A. Ritthaler has joined the Kansas City Bar Association's Robert C. Welch Volunteer Project Award.
Biff Finucane Coffey Holland and Day LLP, Kansas City, Mo., has merged with Atlanta-based Fisher and Phillips LLP.
Michael J. Davis, Lawrence, has been named interim dean of the University of Kansas School of Law.
Nola Tedesco Foulston, Wichita, has been accepted as an associate member of the American Academy of Forensic Sciences.

Joni Franklin-Breitenbach, Wichita has been appointed by Gov. Kathleen Sebelius to serve on the Kansas Lottery Commission for a four-year term.

CHANGING PLACES

Bottaro, Morefield and Kubin L.C. has moved to 1001 E. 101st Terrace, Ste. 120, Kansas City, MO 64112.
Foulston Siefkin LLP has moved to Commerce Bank Center, 1551 N. Waterfront Parkway, Ste. 100, Wichita, KS 67206.
The Law Office of Autumn Fox P.A. has moved to 203 N. Broadway, Abilene, KS 67402.
Joe Little has formed Joe Little P.O., Box 158, 930 N. Washington, Auburn, KS 66402.
Shawna R. Miller has formed Miller Law Office LLC, 316 Pennsylvania Ave., P.O. Box 107, Holton, KS 66436.
Pendleton and Sutton LLC has a new address, 1031 Vermont St., Ste. B, Lawrence, KS 66644.
Corbin J. Pratt and Terry L. Unruh have formed Unruh and Pratt, 100 N. Broadway, Ste. 510, Wichita, KS 67202.
Hon. Jon S. Willard and the Municipal Court of Olathe have moved to 1200 S. Harrison, Olathe, KS 66061.

“Jest Is For All” by Arnie Glick

If you ask me, someone should bring a products liability case against the manufacturer of that cheese dispenser!”

THE JOURNAL OF THE KANSAS BAR ASSOCIATION

JUNE 2005 – 13
Top 10 Things to Possibly, Maybe, or Perhaps Consider While in Law School

By Jerry Wallentine, University of Kansas School of Law

10. Construct a three-year plan for your courses.
Throughout my coursework, my favorite class has been Advanced Litigation. While a friend desired to take the class, he was unable to because he had not taken the prerequisite classes. Do not let this happen to you. Decide early on the area of law that you prefer to focus on. In fact, wise planning could help you graduate from law school with a certificate of specialty in a particular area.

9. Be flexible when planning your courses.
Even the best-laid plans can go awry. The list of potential obstacles is quite lengthy: the class is already full, the time conflicts with other required courses, the course is not offered, and any number of other impediments. Lesson learned: be flexible and have alternative plans. Besides, law school is a great time to experiment with different legal subjects and see where your interests lie. To provide for flexibility, get all requirement classes out of the way as soon as possible.

8. Study in a group.
Having a group of peers to keep you accountable in your studies is invaluable. It is helpful to have a group in which you can regularly discuss any class topics that are still eluding you. In addition, long after graduation, these same people will serve as resources for you.

7. Study by yourself.
Whenever I tried to study with my friends, we wasted too much time discussing issues off-topic. When we did discuss the class subject, it was often over issues that most of the group understood but with which one individual was struggling. This seemed like an inefficient way to study. Besides, you will be taking the test on your own, so you might as well study on your own.

6. Use commercial materials.
Did I just say that? Yes! Think this one through with me. You could spend three hours reading cases and still be left confused. On the other hand, you could spend one hour reading a commercial synoptic exposition about the case that directly explains what you need to understand.

5. Don’t overuse commercial materials.
While the commercial outlines may help you understand some things, there is no replacement for tedious study of the actual text and cases. This will train your mind to think like a lawyer and come to conclusions like a judge. If you are simply told what to think, your mind is not being challenged and developed. Learn to think critically by forcing yourself to undergo the rigorous process of analyzing legal documents. In addition, some commercial materials may simply add more to your already encompassing study load.

4. Get an outline from a 2L or 3L.
During my first year at law school, I did not use anybody else’s outline. However, the next year, I referred to other people’s outlines to develop my own. This vastly improved my understanding of the material, as I was able to follow along in the outline as I listened to the professor’s lecture.

3. Be wary of using an outline from a previous student.
Outlines can be misleading for a number of reasons: human error, timeliness, and relevance. First, just because the outline is coming from a previous student does not mean that the student fully grasped the material or was able to convey his understanding in the outline. Second, the law changes and old outlines could not possibly consider recent changes. Finally, certain outlines may not be relevant. You are not just taking “Contracts.” Rather, you are taking “Contracts with Professor So-and-So.” Compose your own; the construction process is crucial for true learning.

2. Keep perspective — law school is important.
With Privilege Comes Responsibility. Yes, I got this concept from the Spider-Man movies. Hollywood blockbuster hits are not typically the greatest resource for truth, but this line is true. If you are planning or are currently attending law school, you are privileged. Many people would love to have the same opportunity. For me, law school seemed like a distant dream. I already had an established career with a wife and three children. Fortunately, the doors of opportunity opened, and I seized the chance to enter law school, an exciting and challenging phase in my journey. Once you begin, enjoy the journey. Instead of falling into the trap of dreading class, remember how fortunate you are and take advantage of the opportunity to study and train for a legal career. Law school will open up various doors, so give these three years your best shot. Your GPA will largely determine where you can get that first job upon graduation. Many firms are concerned with your class rank. Therefore, you need to perform.

1. Keep perspective — law school isn’t everything.
Even though you are in law school, be a holistic person. Do not neglect your social, spiritual, mental, and physical needs. Use law school to learn and develop, but do not allow it to consume you. Enjoy the experience.

About the Author
Jerry Wallentine is a third-year law student at the University of Kansas School of Law and appreciates the opportunity to experience the challenge of law school. He has enjoyed being a pastor for the past 10 years.

He has three bright, young children, ages 2, 5, and 6. He says, “Law school would not be even remotely possible if it wasn’t for Christ’s blessing and my amazing wife who has strengthened me.”
The Board of Governors of the Kansas Bar Association held its recent regularly scheduled business meeting on Friday, April 22, at the Leavenworth Riverfront Community Center in Leavenworth. At the meeting, the Board discussed and/or took action on the following items:

President Michael Crow called the meeting to order and welcomed all board members. The minutes of the previous meeting were accepted, as was the treasurer's report, which included a review of last year's audited financial statements.

- The Office of Judicial Administration announced a new court rule that would require the use of special cover sheets for court filings. Additional details regarding this rule can be found in this month's journal on Page 40.

- The director of the Kansas Lawyers Assistance Program (KALAP) briefed the board regarding its mission of service to Kansas attorneys and law students who are having personal difficulties, which adversely affect their practice of law. These difficulties may include physical or mental illness, substance abuse, or emotional distress. To contact KALAP, please call (888) 342-9080 or visit their Web site at www.kalap.com.

- President Crow advised that the Kansas Supreme Court had not yet responded to the mandatory malpractice disclosure proposal and Unauthorized Practice of Law Committee recommendations.

- President Crow reviewed procedures for this year's Board of Governors elections and thanked the candidates for their willingness to serve.

- The board approved a request from the KBA Legal Assistants Committee to change their name to the Paralegal Committee.

- There was some discussion regarding the recent attacks on the judiciary in Kansas. President Crow announced that he would soon unveil a formal commission to study ways to maintain and improve judicial independence and to formulate ways to combat unwarranted attacks on the judiciary. The commission will be asked to investigate the recent decline in civility and respect toward the justice system and to respond with steps to restore traditional esteem and confidence by all elements of society.

- The board approved the recommendations of the Awards Committee for this year's KBA Awards. Information regarding the recipients will appear in the July/August issue of the journal.

- The board approved a one-year lease proposal from the Kansas Bar Foundation for the Kansas Law Center.

- Legislative Counsel Jim Clark gave a legislative update. He was pleased to report that the KBA's efforts lobbying against a bill that would require Senate confirmation of Kansas Supreme Court Justices and a House version that would provide for a direct election were working and it did not appear either would be brought to their respective floors for a vote. Another legislative effort opposing Senate Bill 102 that would repeal the collateral rule was also successful. Members are always encouraged to visit the KBA Web site at www.ksbar.org to view official legislative positions of the Bar as well as provide their input.

- It was noted that preparations were still being made for this year's KBA Annual Meeting, which will be held June 9-11 in Vail, Colo. The board was advised that the KBF Fellows Dinner had been moved to September.

- The Board received an update on membership, including renewal timelines and recruitment strategies. Overall, membership was higher when compared to the previous year.

- Young Lawyer Section President Eric Kraft briefed the board on various young lawyer initiatives, including a proposal to establish a KBA YLS Justice Gernon Memorial Scholarship Award. The board felt this was a wonderful idea and pledged their support.

With no further business, the meeting was adjourned. The next meeting of the board was scheduled for Saturday, June 11, in Vail, Colo. To receive a complete copy of these minutes, or if any member should have any questions, please contact Jeffrey Alderman at (785) 234-5696 or via e-mail at jalderman@ksbar.org.
On April 29, the Kansas Bar Association hosted a champagne reception to honor 150 new attorneys following the spring swearing-in ceremony at the Topeka Performing Arts Center.

KBA President Mike Crow congratulated the new attorneys on their achievement and welcomed them to the legal profession.

"I am pleased to see such a fine group of new attorneys who will be practicing in Kansas," Crow said. "Our state and our law schools attract the best and brightest lawyers in the nation, and I'm honored to be able to extend to each of you a complimentary one-year membership to the Kansas Bar Association and the KBA Young Lawyers Section."

YLS President Eric Kraft also welcomed the new attorneys and encouraged them to actively participate in the section.

"The Young Lawyers Section is your passport into the KBA," he said, "and can provide you with innumerable opportunities to network with judges, lawyers, and other professionals from every part of Kansas and across the United States."

Gerald L. Goodell, chairman of the Kansas Board of Law Examiners, called the roll; Carol Green, clerk of the Kansas Supreme Court, administered the Kansas Oath; and Dennis Smarker, deputy clerk of the Federal Court, administered the Federal Oath. Chief Justice Kay McFarland, Kansas Supreme Court, presided with justices Donald L. Allegrucci, Robert E. Davis, Lawton R. Nuss, Marla J. Luckert, and Carol A. Beier; and Judge Sam A. Crow, senior district judge for the United States District Court for the District of Kansas.

After Chief Justice McFarland addressed the group, the full Court stood and congratulated the new attorneys individually.

The KBA-sponsored reception was held immediately following the ceremony, and new attorneys were able to visit with members of the Court and representatives of the Kansas, Topeka, and Wichita bar associations; the Women Attorneys Association of Topeka, the Kansas Women Attorneys Association, and the Kansas Trial Lawyers Association.

The KBA also sponsored a drawing, and the following new admittees won door prizes: Connie Jo Haden, Basehor, Kan., a "Kansas Legal Research and Reference Guide;" Bradley Lane Hemsley, Topeka, a KBA CLE voucher; Karyn Delynn Lopez, Kansas City, Mo., a boom box; and Brad Allen Oliver, Fairview, N.C., a DVD/CD player.

KBA President Mike Crow drew names, distributed the prizes, and then took a moment to pose with each winner. (top l-r) Connie Jo Haden, Basehor, Kan., and Bradley Lane Hemsley, Topeka. (below l-r) Karyn Delynn Lopez, Kansas City, Mo., and Brad Allen Oliver, Fairview, N.C.

and Judge Sam A. Crow, senior district judge for the United States District Court for the District of Kansas.

After Chief Justice McFarland addressed the group, the full Court stood and congratulated the new attorneys individually.
W hile the discussion of bills is of necessity cursory, it was thought that since the bills are effective July 1, and a few are already in effect, a notice of new legislation passed by the 2005 Legislature would be of some benefit to practitioners.

Civil Procedure

SB 50 changes statutory references to “Soldiers and Sailors Civil Relief Act” to “Service Members Civil Relief Act.” Effective July 1.

HB 2457 was originally a Kansas Judicial Council proposal to change service of process requirement from “certified mail” to “return receipt delivery,” but was amended in the Senate to radically change the supersedeas bond requirement. The bill ultimately went to conference committee, which agreed to the following:
1. Judgments under $1 million, bond set at the full amount of judgment.
2. Above $1 million, bond set at $1 million plus 25 percent of judgment above $1 million.
3. Appellee may increase bond on showing that appellant is dissipating or diverting assets, but bond may not exceed amount of judgment.
4. Appellant may get bond reduced for good cause shown. Effective July 1.

Corporations

SB 5 applies the definition in the Uniform Trade Secrets Act to all statutory references to trade secrets. Effective July 1.

SB 37 is a technical or “trailer” bill to last year’s SB 29, which bifurcated the franchise tax into a tax based on equity or net worth and a separate franchise fee. Bill eliminates extensions of time for filing annual reports and eliminates reporting of residential addresses for officers/directors of corporations. Also eliminates reporting of par value and number of shares. Effective July 1.

SB 121 makes technical changes to the Charitable Organizations and Solicitations Act, such as raising the minimum for filing copy of tax returns and financial statements to $500,000. Effective July 1.

HB 2168 amends the Uniform Commercial Code to include demand drafts in definition of check. Effective July 1.

Courts

SB 36 gives the Kansas Supreme Court (Supreme Court) authority to order fingerprinting and background checks for bar applicants. (Original bill signed by the governor omitted giving the Court additional authority to allow Presidents College School of Law graduates to take the bar, corrected in HB 2261.) Effective July 1.

SB 43 was a school finance cleanup bill that was locked in conference committee until the last day of the session. Although SB 181, which creates a three-judge panel to hear all cases alleging a violation of Article 6, could only muster seven votes in the Senate and died, the language creating a special judicial procedure for school finance was quickly added to the bill, and the Conference Committee Report passed out of the Senate 37-2. It had already passed the House by a substantial margin. Effective July 1.

Substitute HB 2261 was originally a bill amending the authority to search incident to arrest. The original language was struck and provisions added granting the Supreme Court authority to admit graduates of the Presidents College School of Law. The bill also requires the Office of Judicial Administration to implement a policy in each judicial district regarding who can be present at Child in Need of Care proceedings. Effective July 1.

HB 2262 amends K.S.A. 60-206 to add holidays observed by the Supreme Court to the list of legal holidays for purposes of computation and extension of time. Effective July 1.

HB 2320 authorizes the Supreme Court to spend money from the State General Fund or from any other special revenue fund, including donations, to acquire and install a replica of the Seal of Justice in the old Supreme Court room in the Capitol. Effective July 1.

HB 2478 postpones the schedule for adding Court of Appeals judges by one year. Effective July 1.

Criminal Law and Procedure

SB 27 places capsule forms of ephedrine and pseudoephedrine in Schedule V, which requires sale only by pharmacists and prohibits sale to a specific customer of more than four packages in a seven-day period. Bill also raises bail for meth-related crimes and prohibits local governments from enacting contradicting or supplemental legislation. Effective on publication in the Kansas Register, except for sections 1 and 2, which became effective June 1.

SB 72 establishes new crimes of trafficking and aggravated trafficking, related to slavery or involuntary servitude; the former a level 2 person felony, the latter a level 1. Bill also amends worthless check statutes to raise monetary threshold consistent with those made to theft and other property crimes. Effective July 1.

SB 82 extends the rape shield to any judicial proceeding, currently limited to the trial. Also adds unlawful voluntary sexual relations to list of crimes to which shield applies. Effective July 1.

SB 147 raises the statute of limitations for all crimes that previously had a limit of two years to five years. Also amends sexual exploitation of a child to define the crime to include each image, rather than each disc or tape. Effective July 1.

SB 148 eliminates the five-year look-back period for prior DUI convictions, diversions, and even arrests. Effective July 1.

HB 2087 establishes new forms of identity theft crimes, including vital records identity fraud, except for fake ID cards used by minors for alcohol or tobacco purchases; and identity fraud, where false information is used to obtain identification documents. Identity theft is also broadened to include any benefit, not just economic gain. Raises penalty for all identity crimes to level 8 nonperson felony. Effective July 1.

HB 2128 amends the expungement statutes by: eliminating expungement for all forms of rape and abuse of a child, including forcible rape and aggravated sexual battery to list of juvenile offenses that cannot be expunged; and allowing greater access to records by state agencies. Effective July 1.

(continued on next page)
HB 2180 adds crime of fleeing or eluding to list of inherently dangerous felonies for involuntary manslaughter crime. Effective July 1.

HB 2380 establishes the Child Rape Protection Act, which requires physicians performing abortions on minors younger than 14 to preserve fetal tissue and submit to KBI. Failure to do so is a class A misdemeanor. Effective July 1.

HB 2385 eliminates special qualifications for admission of photographs of stolen property into evidence in criminal cases. Also adds preliminary breath tests to implied consent statute. Effective July 1.

Employment

HB 2141 amends definition of probable cause for employee drug/alcohol testing to include instances where employer had written policy in place, testing in the normal course of medical treatment, where worker gave written consent prior to accident but then refused testing, and where state or federal law requires post-accident testing. Effective July 1.

HB 2142 redefines accident to establish date for repetitive or cumulative injuries. Effective July 1.

Family

SB 7 requires the custodial parent to notify noncustodial parent when custodial parent is convicted of child abuse or is on the offender registry, or if residing with someone in those categories. Bill creates a rebuttable presumption that such custody is not in the best interests of the child and that such events constitute a material change of circumstances for custody modification. Effective July 1.

HB 2268 establishes the Uniform Interstate Enforcement of Domestic Violence Protection Act, which allows for registering a foreign or domestic protection order with the local sheriff, who is to verify its authenticity and request the initiating jurisdiction enter the order into the National Crime Information Center and other databases. Effective July 1.

HB 2269 establishes the Uniform Interstate Enforcement of Domestic Violence Protection Act, which allows for registering a foreign or domestic protection order with the local sheriff, who is to verify its authenticity and request the initiating jurisdiction enter the order into the National Crime Information Center and other databases. Effective July 1.

Government

SB 26 changes the statutory holidays by eliminating Lincoln’s and Washington’s birthdays and adding Martin Luther King Jr. Day and Presidents Day. Effective July 1.

SB 77 makes racial profiling unlawful; requires law enforcement agencies to adopt policy prohibiting profiling, including annual training, discipline of violators, and public education on the right to file a complaint; requires independent citizen advisory board for cities of the first class; and allows for complaint with Kansas Human Rights Commission as well as a civil action. Effective July 1.

SB 78 is a comprehensive revision of the open records law. It extends the life of Kansas Open Records Act exceptions to July 1, 2010; exempts security measures from subpoena or discovery in any kind of action; shields private records that are required to be submitted to public agencies; adds a “clearly unwarranted invasion of personal privacy” exemption; removes public employee salaries and other records from exemption; and requires open records access to any nonprofit entity that receives any kind of public funds. Effective July 1.

House Sub. SB 195 extensively changes laws dealing with firearms, including: allowing sheriff to seize firearms for delinquent income, drug, sales, or compensating use taxes; requiring firearm training of law enforcement officers, including retired officers authorized to carry firearms; allowing sale of confiscated weapons to federally licensed firearm dealers; and, last but not least, prohibiting local governments from departing from state statutes governing sale, possession, transporting, or storage of firearms and declaring those already in existence to be null and void. Effective July 1.

HB 2139 amends fence viewing statute to require majority vote of county commissioners for any action, and, if county boundaries are involved, allows for appointment of additional commissioner. Also allows commissioners to appoint a designee. Effective July 1.

HB 2309 replaces the 150,000 population requirement with list of specific counties for which enforcement of county resolutions may be pursued on special docket in district court. Effective July 1.

Litigation

SB 180 requires the Kansas Judicial Council (Council) to publish forms separately. Effective July 1.

SB 258 is a Kansas Judicial Council (Council) proposal that removes legal forms from the statutes and gives the Council authority to publish such forms separately. Effective July 1.

Real Estate

SB 112 attempts to clear up confusion regarding effective date for attachment of mechanic’s liens. Requires that the material be furnished at the site and, if an earlier lien is paid in full or discharged, the commencement date for all other claimants begins on the date of the next unsatisfied lien, without relating back to the earlier lien. Effective July 1.

SB 178 exempts service contracts for residential property or consumer goods from regulation as insurance. Further, bill excludes such contracts from containing provisions regarding consequential damages unless caused by failure of service or repair rendered under the contract; further, such contracts may not cover provisions for damages that would otherwise be covered under property or liability insurance. Effective July 1.

SB 215 establishes a commercial real estate broker lien, applicable to real estate containing more than four residential units. Lien becomes effective when broker procures a willing and able purchaser and files notice of lien prior to actual conveyance of the property. Also applies to leases if lien is recorded within 90 days of lessee taking possession. Bill also contains provisions regulating title insurance. Effective July 1.
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Since 1935, Legal Directories Publishing Company has provided the members of the legal profession with the most accurate reference directory available. That very first paperback was the just the beginning of what has become a nationwide, multivolume staple of law offices everywhere. From one volume to five, from 125 pages to more than 2,000, we have grown up alongside the profession itself. In 2005, we will commemorate the 70th Anniversary of that initial publication, and in the spirit of celebration, we would like to express a heartfelt thanks to all of the men and women who have supported us along the way.

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We’re the blue book.
I. Introduction

Tillie Flinn was probably already dead when on Jan. 13, 1988, Martha Flanders obtained five checks in the total amount of $135,791.32 in exchange for withdrawing certificates of deposit (CDs), which were owned by Tillie, from Capitol Federal Savings. Martha was the wife of Tillie's nephew, James, and both Martha and James had been appointed Tillie's attorneys in fact under a power of attorney document that had been "clipped" from the June 1, 1987, issue of Family Circle magazine. Not surprisingly, Martha and James spent all the money received for their personal use, and those funds were incapable of being traced. Litigation ensued, resulting in the Kansas Supreme Court decision found in Bank IV Olathe v. Capitol Federal Savings & Loan Association.¹

The decision in Bank IV absolved Capitol Federal of any liability for Martha cashing Tillie's CDs. The Court determined Capitol Federal had only to review the document to:

- compare the signature of the power of attorney with Tillie's signature on file;
- obtain proper identification of the attorney in fact; and
- determine that the requested transaction was within the scope of the power of attorney presented.²

Did Martha and James improperly appropriate Tillie's funds for their own use? Is a durable power of attorney a license to steal? Do third parties have any further duty to investigate proposed acts by attorneys in fact pursuant to a power of attorney under the new power of attorney act? What protections, if any, exist for vulnerable principals?

The new Kansas Power of Attorney Act (KPOAA/Act) helps answer the foregoing questions and many more. The public policy is declared in the new Act in the following provision:

It is the policy of this state that an attorney in fact acting pursuant to the provisions of a power of attorney granting general powers shall be accorded the same rights and privileges with respect to the personal welfare, property, and business interests of the principal, and if the power of attorney enumerates some express subjects or purposes, with respect to those subjects or purposes, as if the principal was personally present and acting or seeking to act; and any provision of law and any purported waiver, consent, or agreement executed or granted by the principal to the contrary shall be void and unenforceable.³

Powers of attorney are commonplace and useful devices. They are used in a variety of contexts from real estate transactions to representation before taxing authorities. An important and often utilized use of power of attorney is within the estate planning context in planning for a client's possible incapacity.

FOOTNOES
2. 250 Kan. 541, 546.
In the past, power holders often encountered difficulty in exercising the authority granted under a power of attorney with third parties. The KPOAA, which became effective July 1, 2003, was enacted to update KPOAA statutes and to increase acceptance by third parties of power holders' use of powers of attorney. This article will provide an overview of the KPOAA and offer practice suggestions to Kansas attorneys. Attorneys are reminded that Health Care Powers of Attorney are covered by statutes found at K.S.A. 58-625 et seq.

II. General Requirements.

The KPOAA governs all powers of attorney other than health care powers of attorney. Most often, powers of attorney are drafted with the intent to be a durable power of attorney. A durable power of attorney survives the principal's subsequent incapacity and even the later uncertainty as to whether the principal is dead or alive. The KPOAA sets forth several general requirements that must be adhered to in order for a power of attorney to be a durable power of attorney.

A. Definitions.

Eleven definitions are contained within the KPOAA. Included as a defined term is “durable power of attorney.” A durable power of attorney must either meet the requirements of the KPOAA or:

- be durable under the law where executed;
- be durable under the law of the place of residence of the principal; or
- be durable under the law of a place designated by the document, if that place has a reasonable relationship to the purpose of the instrument.

B. Required language.

Powers of attorney are drafted with either immediate powers or “springing” powers. Springing powers indicate that the agent's authority does not “spring” until the occurrence of certain conditions or events (such as a principal's inability to meaningfully comprehend events or communicate) or at some moment measured in time (e.g., July 1, 2006, or “when I arrive in Tibet”). The KPOAA provides the following two alternative “magic” clauses, one of which must be included for a document to be a durable power of attorney:

This is a durable power of attorney and the authority of my attorney in fact shall not terminate if I become disabled or in the event of later uncertainty as to whether I am dead or alive.

The second clause, while not statutorily designated as such, appears to be the “magic” language for a “springing” durable power of attorney.

Springing powers of attorney are more often scrutinized by third parties, and, thus, present agents with possibly less effective powers. Third parties, unless possessed with actual knowledge of the event, condition or occurrence causing authority to “spring” may balk at the presentation of a springing power of attorney by an agent. To remedy this, the KPOAA permits the agent to execute an affidavit, which allows the person providing the affidavit to rely on the effectiveness of the power of attorney.

C. Written

In order for a power of attorney to be a durable power of attorney, the authority granted by the principal must be in writing and it must be denominated a “durable power of attorney.” Further, the document must be signed by the principal, dated, and acknowledged in the manner prescribed by K.S.A. 53-501 et seq. and amendments thereto.

D. Recorded power of attorney.

The KPOAA provides for recording an executed power of attorney as an alternative to the common practice of executing multiple originals. A power of attorney does not need to be recorded, but if recorded in the same manner as a conveyance of land is recorded, a certified copy of the...
recorded power may be admitted into evidence.\(^{11}\) In the event a power of attorney is recorded, any revocation of the recorded power of attorney must also be recorded in the same manner for the revocation to be effective.\(^{12}\)

### III. Attorneys in Fact

Attorneys in fact may be an individual, corporation, or other legal entity (including, presumably, limited liability companies, limited liability partnerships, and limited partnerships).\(^{13}\) The KPOAA does not provide standards or mechanisms by which attorneys in fact become qualified to act, instead leaving these issues to the power of attorney document.\(^{14}\) As a result, if a person is not “qualified to act as an attorney in fact under a power of attorney” such person is subject to removal without, however, limiting either the protections afforded third parties or the duties owed by the nonqualified attorney in fact to the principal.\(^{15}\)

#### A. Multiple

The KPOAA permits the appointment of more than one attorney in fact. The principal may elect to require the attorneys in fact to act jointly or may provide for a succession of priority as to the authorization of the named attorneys in fact.\(^{16}\) Not surprisingly, however, where the power of attorney is silent as to whether multiple attorneys in fact must act in concert, the KPOAA requires the attorneys in fact to act jointly.\(^{17}\)

#### B. Powers

1. **General powers.**

   Attorneys make a common practice of drafting long lists of powers specifically authorized to the agent under a power of attorney. While practical considerations suggest this practice should continue (and enumeration of specific powers does not limit the general authority granted, unless otherwise provided in the power of attorney), the KPOAA provides that if the proper language is utilized, an agent shall have the authority to take every action and exercise each power a non disabled adult may carry out through an agent specifically authorized with respect to any and all matters whatsoever.\(^{18}\) In order to convey such general powers, the power of attorney must state in substance that it grants “general powers for general purposes” or does not by its terms limit the power to the specific subject or purposes set out in the instrument.\(^{19}\)

   An often discussed problem in transacting a principal’s affairs under a power of attorney is difficulty in achieving acceptance of authority to act with financial services companies or government agencies such as the Farm Services Administration or Social Security Administration. The 2004 amendments to the KPOAA permit an attorney in fact vested with general powers to execute additional powers of attorney required by any governmental agency or other legal entity on behalf of the principal, naming such attorney in fact as the attorney in fact authorized to enter into any transaction with such agency or legal entity.\(^{20}\)

2. **Optional powers.**

   The KPOAA identifies 13 powers, which, if desired, must be included within the power of attorney. The first six enumerated optional powers permit the attorney in fact to create, alter, and amend the disposition of the principal’s property.\(^{21}\) Generally, however, an agent has a duty, absent express authorization in the power of attorney otherwise, to exercise a high degree of care in maintaining, without modification, any estate plan that the principal may have in place, including, but not limited to, beneficiary designations, joint tenancy or tenancy by the entirety, trust arrangements, wills, or codicils.\(^{22}\) Therefore, if a principal wishes to include authority for the attorney in fact with regard to the disposition of the principal’s property, consideration should be given as to whether additional authorization should allow the agent to depart from existing dispositive arrangements. Additional powers available, but only if expressly included, are powers to:

   - nominate a guardian or conservator for the principal, including naming the attorney in fact;
   - designate one or more substitute, successor, or additional attorneys in fact; and
   - delegate any or all powers.\(^{23}\)

   The remaining optional powers are discussed below.

3. **Powers precluded.**

   The KPOAA prohibits an attorney in fact from exercising four specific powers. An attorney in fact may not:

   - make, amend, or revoke a will for the principal;
   - make, modify, or revoke a living will declaration, do not resuscitate order, or a health care power of attorney;
   - force the principal to take action or refrain from taking action against the principal’s will; and
   - undertake any actions specifically forbidden by the principal while not under any disability or incapacity.\(^{24}\)

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\(^{13}\) K.S.A. 2004 Supp. 58-651(a).


\(^{15}\) Id.


\(^{17}\) Id.


\(^{19}\) Id.

\(^{20}\) Id.


4. Powers that survive the principal's death. Interestingly, the KPOOA permits three “postmortem” powers, but only if expressly enumerated in the power of attorney. Despite the principal's death, if expressly authorized an attorney in fact may:

- give or withhold consent to an autopsy or postmortem examination;\(^25\)
- make a gift or decline to make a gift of the principal's body,\(^26\) and
- pay reasonable expenses of funeral and burial or disposition of the principal's body.\(^27\)

C. Titled property.

When an attorney in fact possesses the principal's property or manages financial accounts of the principal, the attorney in fact is required to keep such property and accounts distinct from all other property and accounts so that it is clear such property and accounts belong to the principal.\(^28\) The segregation of property required by the KPOOA is satisfied if the attorney in fact holds the principal's property in any of the following ways:

1. if the property is held in the name of the principal;
2. if the property is held in the name of the attorney in fact as attorney in fact for the principal; or
3. if the attorney in fact is a state or national bank or trust company in a nominee name as provided in K.S.A. 9-1607, and amendments thereto.\(^29\)

D. Duties/obligations.

Unless the attorney in fact has expressly agreed in writing to act for the principal, the appointed attorney in fact has no duty to act.\(^30\) However, if the attorney in fact agrees in writing to act, that agreement is enforceable without regard to whether there is consideration supporting that agreement.\(^31\)

Furthermore, absent a written agreement to act, acting in one or more transactions does not obligate an attorney in fact to act for the principal in subsequent transactions.\(^32\) Once an attorney in fact elects to act, that attorney in fact must act in the interest of the principal and avoid conflicts of interest that impair the ability of the attorney in fact to so act.\(^33\) The KPOOA goes even further to reference the duties a trustee has to trust beneficiaries and imposes the same obligations on the attorney in fact to the principal. As a result, an attorney in fact has a fiduciary obligation to exercise the powers conferred in the best interests of the principal and to avoid self dealing and conflicts of interest.\(^34\)

In addition to those duties discussed elsewhere in this article, an attorney in fact has a duty to:

1. keep property and accounts separate;\(^35\)
2. invest in accordance with Kansas Uniform Prudent Investor Act and to use special skills on behalf of principal;\(^36\)
3. keep in regular contact with the principal, to communicate with the principal and to obtain and follow the instructions of the principal;\(^37\) and
4. exercise authority with that degree of care that would be observed by a prudent person acting in a fiduciary capacity.\(^38\)

Attorneys in fact may also be accountable to court appointed fiduciaries of the principal, such as a guardian or conservator, or even the principal's personal representative upon the commencement of an estate administration.\(^39\)

Finally, the principal, acting individually, and the attorney in fact may enter into an agreement that expands or limits these duties and liabilities.\(^40\)

E. Compensation.

The KPOOA includes a default rule, which, unless the power of attorney directs otherwise, provides that an attorney in fact is entitled to reasonable compensation for services rendered to the principal as attorney in fact.\(^41\)

IV. Modification/Termination.

Just as a principal may wish to utilize a “springing” power of attorney, a principal may wish to craft a “sunset” on the authority of an attorney in fact to act under the power of attorney. The KPOOA permits a power of attorney to terminate an attorney in fact’s authority upon the occurrence of a future event, condition, or contingency as determined in a manner prescribed in the power of attorney.\(^42\) Moreover, although a power of attorney must be in writing, an attorney in fact is obligated to follow the written and oral instructions and modifications of a principal.\(^43\)

As between the principal and the attorney in fact, a power of attorney is modified or terminated:

31. Id.
32. Id.
34. Id.
39. K.S.A. 2004 Supp. 58-656(e) and (g).
a. on the date shown in the power of attorney;\(^{44}\)
b. when the principal, either orally or in writing, terminates the power of attorney;\(^{45}\)
c. when the principal's legal representative modifies or terminates the power of attorney in writing;\(^{46}\)
d. when a written notice of modification or termination is filed by the principal or principal's legal representative in the office of the register of deeds in the county of the principal's residence or, if the principal is a nonresident, in the county in which is located any property described in the power of attorney if the termination of the power of attorney results from:
1. an attorney in fact's failure to qualify;
2. an attorney in fact files a petition for divorce, annulment, or separate maintenance (unless the power of attorney provides otherwise); or
3. the principal's death.\(^{53}\)

g. upon the act of filing any action for annulment, separate maintenance, or divorce if the attorney in fact is the principal's spouse;\(^{50}\)
h. a power, which is not durable is suspended during any period of the principal's incapacity."\(^{51}\)

If an event occurs and merely terminates an attorney in fact's authority to act, rather than terminating the power of attorney, and if the power of attorney designates a successor attorney in fact or a procedure by which a successor is designated, then the authority in the power of attorney shall continue and vest in the successor.\(^{52}\) Note, however, the authority is terminated altogether and a successor may not continue to act under the power of attorney if the termination of the power of attorney results from:
1. on the date shown in the power of attorney;\(^{44}\)
2. when the principal executed the power of attorney at the time the principal was subject to duress, undue influence, or fraud, or the power of attorney was for any other reason void or voidable, if the appears to be regular on its face;\(^{13}\)
3. the principal's estate plan or other provision for distributions of assets at death, as provided in subsection (a) of K.S.A. 2004 Supp. 58-656, and amendments thereto;
4. whether any future event, condition or contingency making effective or terminating the authority conferred in a has occurred;
5. whether the principal is disabled or has been adjudicated disabled;
6. whether, at the time the principal executed the power of attorney, the principal was subjected to duress, undue influence, or fraud, the power of attorney was for any other reason void or voidable, if the appears to be regular on its face;\(^{13}\)
7. whether the principal had legal capacity to execute the power of attorney at the time the power of attorney was executed;
8. whether the authority granted in a power of attorney has been modified by the principal, a legal representative of the principal, or a court;
9. whether the authority of the attorney in fact has been terminated, except by an express provision in the showing the date on which the power of attorney terminated;
10. whether the power of attorney, or any modification or termination thereof, has been recorded, except as to transactions affecting real estate;
11. whether the principal had legal capacity to execute the power of attorney at the time the power of attorney was executed;
12. whether, at the time the principal executed the power of attorney, the principal was subjected to duress, undue influence, or fraud, or the power of attorney was for any other reason void or voidable, if the appears to be regular on its face;\(^{13}\)
13. whether the principal is alive;
14. Whether the principal and attorney in fact were married at or subsequent to the time the power of attorney was created and whether an action for annulment, separate maintenance, or divorce has been filed by either party; or

15. The truth or validity of any facts or statements made in an affidavit of the attorney in fact or successor with regard to the ability or capacity of the principal, the authority of the attorney in fact or successor under the power of attorney, the happening of any event or events vesting authority in any successor or contingent attorney in fact, the identity or authority of a person designated in the power of attorney to appoint a substitute or successor attorney in fact or that the principal is alive.\[54\]

Therefore, if a third person is entitled to rely on the authority of the attorney in fact under K.S.A. 2004 Supp. 58-658, as between the principal and the third person, the acts and transactions of the attorney in fact are binding on the principal and the principal’s successors in interest.\[55\]

Just in the same way that a principal and attorney in fact may do so, a principal and a third person may enter into a written agreement setting forth their duties and liabilities as between themselves and their successors and, by so doing, expand or limit the application of the KPOOA.\[56\] Despite the foregoing, however, the principal and a third person are precluded from restricting by agreement the right of a principal to act with respect to the third person by an attorney in fact.\[57\]

Termination of a power of attorney presents a difficult issue for third persons to confront when dealing with attorneys in fact acting under a power of attorney. Therefore, the KPOOA permits a principal and a third person to enter into an agreement in writing establishing how termination of authority under a power of attorney is handled. However, to the extent a principal and a third person do not otherwise agree in writing, as between a principal and a third person the authority granted in a power of attorney terminates upon:

1. The date specified, if any, in the power of attorney;
2. The date when the third person acquires actual knowledge of the death of the principal; or
3. The date when the third person acquires actual knowledge that the authority granted in the power of attorney has been suspended, modified, or terminated.\[58\]

VI. Principal/Attorney in Fact Relationship.

If an attorney in fact and principal do not depart from the KPOOA, an attorney in fact must act within the protected “safe havens” of the KPOOA to avoid liability exposure to both the principal and the principal’s successors in interest.

A. Good faith.

An attorney in fact is relieved of any liability to the principal and the principal’s successor in interest where an attorney in fact:

1. Acts in good faith;
2. Acts in accordance with K.S.A. 2004 Supp. 58-656; and
3. Acts without actual knowledge of the death of the principal or without constructive knowledge that the authority in the power of attorney has been modified or terminated.\[59\]

B. Bad faith.

An attorney in fact is liable to the principal or the principal’s successors in interest, or both, where the attorney in fact does any of the following that causes damages:

1. Acts in bad faith;
2. Acts fraudulently or otherwise dishonestly; or
3. Acts after receiving notice that the power of attorney has been revoked or terminated.\[60\]

Where an attorney in fact causes damages by acting in “bad faith,” the attorney in fact is exposed to potential damages including both attorneys fees and punitive damages.\[61\]

VII. Court Actions.

Although the KPOOA leaves some issues open regarding court proceedings under the act, it does provide instruction regarding several possible court actions.

A. Accountings.

A principal who is not disabled, or a principal whose capacity has been restored may waive or approve (in writing by a filing with the court) an attorney in fact’s accounting, which, in turn, permits the court to waive or approve such accounting without a hearing.\[62\] Additionally, such accounting may be waived or approved by all creditors and distributees of a deceased principal’s estate whose claims or distributions have not been fully satisfied.\[63\] Although an accounting is not required as a

(continued on next page)
matter of course, a nondisabled principal, a disabled principal's legal representative, an adult member of the principal's family, or any person interested in the welfare of the principal may petition the court for an accounting.64

**B. Disability determinations.**

Where there is a dispute whether the principal is a disabled person,65 the principal, the principal's attorney in fact, an adult member of the principal's family, or any person interested in the welfare of the principal may petition the district court in the county where the principal is then residing to determine whether the principal is a disabled person.66 Where a principal is disabled, upon petition by the principal's legal representative, adult member of the principal's family, or any interested person, the court may:

1. Order the attorney in fact to exercise or refrain from exercising authority in a durable power of attorney in a particular manner or for a particular purpose;
2. modify the authority of an attorney in fact under a durable power of attorney;
3. declare suspended a power of attorney that is a nondurable power of attorney;
4. terminate a durable power of attorney;
5. remove the attorney in fact under a durable power of attorney;
6. confirm the authority of an attorney in fact or a successor attorney in fact to act under a durable power of attorney; and
7. issue such other orders as the court finds will be in the best interest of the disabled principal, including appointment of a conservator for the principal.67

**C. Breach of duty.**

In addition to other available remedies (for instance, those found at K.S.A. 2004 Supp. 58-657(g)) where a principal is a disabled person and the attorney in fact has breached duties, or there is a reasonable likelihood of a breach of duties, the court may issue an order:

1. that some or all of the authority in a durable power of attorney be suspended or modified,
2. that a different attorney in fact be authorized to exercise some or all of the powers in the durable power of attorney, and
3. that a new person be designated as attorney in fact.68

The court may require the person petitioning for such orders to file a bond or otherwise indemnify either the attorney in fact or the principal for the expenses, including attorneys fees, with respect to such proceeding.69 A court may issue emergency orders without a hearing but such emergency orders shall not exceed 30 days.70 Otherwise, immediate relatives (notably, a term not defined in the KPOAA) and other persons known by the petitioner to be interested in the welfare of the principal must be notified of the petition and hearing.71

**D. Limitations of actions.**

Attorneys representing attorneys in fact should review with their clients the advantages to disclosing transactions and accountings in order that the statute of limitations "clock" may start ticking.

1. **If disclosed.** When matters are disclosed to the principal or, if disabled, to the principal's guardian or conservator, unless an action is commenced within two years after receipt of the account or statement, a cause of action shall be barred.72
2. **No disclosure.** If the principal is disabled and has no guardian or conservator to whom the attorney in fact may disclose matters, the cause of action shall not be barred until one year after the removal of the principal's disability or incapacity, one year after appointment of a conservator of the principal, or one year after the death of the principal.73

**E. Exclusion to limitation of actions.** The limitations previously described shall not, however, apply to an attorney in fact's fraud, misrepresentation, or concealment related to the settlement of any transaction involving the agency relationship of the attorney in fact with the principal.74

**VIII. Existing Powers of Attorney.**

Powers of attorney executed prior to the effective date of the KPOAA remain valid as do the actions taken by attorneys in fact under such powers of attorney.75 Likewise, the duties of attorneys in fact under pre-KPOAA powers remain.

**IX. Other Issues.**

**A. Court actions.**

The KPOAA does not provide clear instruction as to whether an action brought under the Act is brought pursuant to Chapter 59 or Chapter 60. The KPOAA defines "court" as the district court, but speaks no further to the issue.76 While reasonable interpretations could be made either way, it is apparent the KPOAA does not conclusively answer the matter. Additionally, no instruction is given as to whether a case is captioned "In Re ___" or captioned as an adversarial matter. Moreover, no guidance is given as to the filing fee to be paid in actions brought pursuant to the KPOAA.

An action may be brought by any person interested in the welfare of the principal.77 While the KPOAA defines

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65. "Disabled" means a person who is wholly or partially disabled as defined in K.S.A. 77-201, and amendments thereto, or a similar law of the place having jurisdiction of the person whose capacity is in question. K.S.A. 2004 Supp. 58-651(c).
69. Id.
70. Id.
71. Id.
73. Id.
74. Id.
76. Id.
the principal's family, it provides no standard of any sort to determine whether the petitioner is justifiably interested in the welfare of the principal or merely meddling in a principal's affairs. Finally, the 2004 amendments to the KPOAA attempt to clarify that in an action brought pursuant to the KPOAA following an attorney in fact's fiduciary misconduct, the court "may allow payment or enter judgment." Unfortunately, this amended provision leaves unanswered what types of judgments or payments may be allowed.

B. Lack of enforcement mechanism.

The KPOAA does not contain a provision whereby an attorney in fact may bring an action to force a third party to accept an attorney in fact's authority to transact the affairs of the principal. Anecdotal evidence continues to grow indicating many government agencies (i.e., Social Security Administration, Veterans Administration, Farm Service Agency) are very reluctant, and may even refuse altogether, to honor an agent's authority under a power of attorney. Some states have included with power of attorney statutes, enforcement mechanisms whereby the unreasonable refusal by a third party permits the recovery of damages and attorney fees.81

C. Conveyance of homesteads.

Article 15, Section 9 of the Kansas Constitution provides that a homestead shall not be alienated without the joint consent of husband and wife, when such relation exists. Therefore, where a principal wishes to authorize an agent to transfer or convey a homestead owned with the principal's spouse, close attention to detail is required in drafting the power of attorney document. Previously, the Kansas Title Standards had established four requirements in order for an agent to convey a homestead where owned by a marital couple. At standard 6.12, in order for an agent's purported conveyance to be accepted, the power of attorney must specifically:

1. state that by the execution of said power of attorney, it is the intention of the parties that said act shall constitute the joint consent required by Article 15, Section 9 of the Kansas Constitution; and
2. the power of attorney must also be executed by both husband and wife in the same instrument.82

As a result, separate powers of attorney executed by a husband and wife in separate documents authorizing the conveyance of the homestead did not satisfy title standard 6.12. When initially enacted, the KPOAA provided where a principal was married, both spouses could sign the power of attorney to satisfy the joint consent requirement (which is consistent with title standard 6.12 requirements). The 2004 amendments to the KPOAA specifically authorize the attorney in fact to transfer the principal's homestead, but only if expressly authorized in the power of attorney. Specifically, as amended, the statute now permits conveyance of the homestead of a married principal where the spouse either signs the power of attorney at the time the principal signed the power of attorney or the spouse consents to alienation of the homestead by separate instrument, including a separate power of attorney.83

As amended, an agent is authorized, if the authority is expressly granted in the power of attorney, to give consent on behalf of the principal to the sale, gift, exchange, or other alienation of the principal's homestead if three conditions exist:

1. the principal's spouse has also consented to such alienation,
2. the power of attorney specifically describes the homestead by legal description and street address, and
3. the principal's spouse states such consent to alienation of the homestead in a written document duly acknowledged by the spouse.84

X. Conclusion.

Attorneys with estate planning clients may be tempted to view powers of attorney drafted for clients as merely "add-ons" to the substantive dispositive documents such as wills and trusts. However, the KPOAA is further evidence of the increasing use of powers of attorney and planners should carefully review these documents with their clients to ensure that powers of attorney are drafted consistent with the KPOAA, consistent with the client's wishes, and in a manner which third-parties will honor.

Is a power of attorney a license to steal? No, since the KPOAA clearly states that agents have liability to their principals as a fiduciary. However, as the Court in Bank IV concluded, and the KPOAA establishes, third-parties have only limited responsibilities to investigate. The KPOAA, moreover, clearly provides wide latitude for an agent to act on behalf of a principal and affords great protection to third parties in that regard. Thus, the ultimate responsibility rests with the principal to select trustworthy attorneys in fact. As a result, Kansas lawyers (whether representing principals, agents, or third parties) should be prepared to advise clients accordingly.

About the Author

Matthew H. Hoy is a partner with Stevens and Brand LLP, Lawrence. His practice focuses in the areas of estate planning and administration, real estate, business planning, and taxation. He is a member of the Kansas and Missouri bar associations, the KBA Legislative Committee, and the KBA and ABA Real Property, Probate and Trust Sections. He is the author of the chapter "Planning for Real Property, Including the Residence" for the four volume treatise "Advising the Elderly Client" published by Thomson West. Hoy received his bachelor's, Masters of Business Administration, and Juris Doctor degrees from the University of Kansas.

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81. See CAL. PROB. CODE §4306(a); FLA. STAT. ANN. §709.08(11).
82. Kansas Title Standards (Sixth Ed.) §6.12.
84. Id.
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Fax and e-mail submissions will not be accepted.
The Economic Loss Rule in Kansas and its Impact on Construction Cases

By Kevin J. Breer and Justin D. Pulikkan

I. Introduction.

The distinction between contract and tort law is still sometimes blurred, although the application and evolution of the economic loss rule is helping to clarify it. The economic loss rule prevents a plaintiff who has only suffered economic losses from recovering from a defendant based on a tort theory of strict liability or negligence. Instead, the plaintiff is left to rely on contract law for recovery of the losses, usually in the form of breach of contract or breach of express or implied warranty. The economic loss rule, therefore, helps to clarify the boundary between the overlapping theories of tort law and contract law by barring the recovery of purely economic loss in tort.

Economic loss is a "result of the failure of the product to perform to the level expected by the buyer, which is the core concern of traditional contract law." Economic loss is defined as the "loss of the bargain, repair and replacement cost, loss of profits, and/or goodwill, including diminution in value." A cause of action based upon tort does not exist when the plaintiff has not suffered any personal injuries.
The economic loss rule can be justified for three reasons: (1) it maintains a "fundamental distinction between tort and contract law;" (2) it protects commercial party’s freedom to “allocate economic risk by contract;” and (3) it encourages “the parties best situated to assess the risk of economic loss” and to “assume, allocate, or insure against the risk.”

The economic loss rule is based on the premise that “contract law and the law of warranty, in particular, is better suited than tort law for dealing with purely economic losses in the commercial arena.” Where the contracting party is permitted to proceed in tort while claiming damages, which do not include personal injury or damage to “other property,” that party “is in effect rewriting the agreement to obtain a benefit that was not part of the bargain.”

The economic loss rule can be justified for three reasons: (1) it maintains a “fundamental distinction between tort and contract law;” (2) it protects commercial party’s freedom to “allocate economic risk by contract;” and (3) it encourages “the parties best situated to assess the risk of economic loss” and to “assume, allocate, or insure against the risk.”

The primary motivation behind the economic loss rule is the fear that allowing a party to proceed in tort would result in “crushing useful activity by a liability.”

Almost every breach of contract involves actions or inactions that can be conceived of as a negligent or intentional act. If left unchecked, the incessant tide of tort law would erode and eventually swallow contract law. ... [I]f tort law and contract law are to fulfill their distinctive purposes, they might be distinguished where it is possible to do so. The economic loss doctrine serves the basis for such a distinction. ... Allowing a party to a broken contract to proceed in tort where only economic losses are alleged would eviscerate the most cherished virtue of contract law, the power of parties to allocate the risks of their own transactions.

Although the economic loss rule has historically applied to product liability cases, the rule has been applied in commercial transaction disputes, construction disputes, and even professional negligence. The rule has been applied not only to bar a plaintiff from making tort claims, such as general negligence, but also to bar claims of negligent misrepresentation and intentional misrepresentation.

This article will address the history of the economic loss rule, its application in a few key Kansas cases, its use in construction litigation, and its most recent evolution in Kansas as an application to residential construction cases.

II. The History and Development of the Economic Loss Rule.

A. Seely v. White Motor Co.

The economic loss rule is a judicially created doctrine, which was first articulated by the California Supreme Court in Seely v. White Motor Co., in 1965. The plaintiff, Seely, bought a White Motor Co. (White) truck from Southern Truck Sales for use in his heavy duty hauling business. White warranted the truck to be free from defects in material and workmanship under normal use and service. Unfortunately, the truck “bounced violently.” For 11 months, Southern Truck Sales made several unsuccessful attempts to remedy the defect.
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White appealed. However, argued that the trial court erred in awarding Seely money for lost profits and for money paid toward the purchase price. The truck, characterizing Seely's claim as a tort to the facts of the case. The Court noted that one purpose of strict liability is to prevent a manufacturer from defining the scope of his responsibility for harm caused by his products. Under a strict liability analysis, manufacturers are generally liable for damages of an "unknown and unlimited scope." Under a contract analysis, however, a manufacturer is liable only on the basis of the contract. The Court stated:

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.

B. East River Steamship Corp. v. Transamerica Delaval Inc.

Following the landmark decision in Seely, the economic loss rule gained widespread acceptance in a majority of jurisdictions. The U.S. Supreme Court, however, first applied the economic loss rule in East River Steamship Corp. v. Transamerica Delaval Inc. In East River, Seatrail Shipbuilding Corp. (Seatrail) contracted with several of its wholly-owned subsidiaries to build four oil tankers. Seatrail then contracted with Transamerica to design, manufacture, and supervise the installation of high-pressure turbines for the tankers. As each ship was completed, the ships were chartered to various other Seatrail subsidiaries. One of the subsidiaries was East River Steamship Corp. After the ships began sailing, the turbines were discovered to have a defective component that damaged the turbine engine.

at 148.

19. Id. at 147-48.

20. Id. at 148.

21. Id.

22. Id.

23. Id. at 151-52.

24. Id. at 151.

25. Id. at 150-51.

26. Id. at 151-52.

27. Id. at 151.

28. See Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280, 287 (3rd Cir. 1980) (noting that a large majority of courts following Seely have adopted the economic loss rule); Casa Clara

Condominium Ass'n Inc. v. Charley Toppino & Sons Inc., 620 So.2d 1244, 1246 (Fla. 1993) (noting that a majority of jurisdictions have adopted the economic loss rule). For a comprehensive list of jurisdictions that have adopted or applied the economic loss doctrine, see Christopher Scott D'Angelo, The Economic Loss Doctrine: Saving Contract Warranty Law from Drowning in a Sea of Torts, 26 U. Tol. L. Rev. 591, 609 (1995); or William K. Jones, Product Defects Causing Commercial Loss: See Ascendancy of Contract Over Tort, 44 U. Miami L. Rev. 731, 799 (1990) (Appendix).


30. Id. at 860.

31. Id. at 859-60.

32. Id. at 859-61, 867.

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East River and Seatrain's other chartering subsidiaries filed suit against Transamerica, alleging strict liability for design defects, the cost of repair, and lost income while the tankers were out of service.\textsuperscript{33} Initially the plaintiffs alleged claims of breach of contract and warranty in addition to the tort claims. However, due to the statute of limitations on the contract claims, the plaintiffs proceeded solely on the tort claims. Transamerica moved for summary judgment, arguing that it was not liable in tort.\textsuperscript{34} The district court granted Transamerica's motion and the 3rd U.S. Circuit Court of Appeals affirmed.\textsuperscript{35}

Like the Seely Court before it, the U.S. Supreme Court considered whether injury to a product itself is the kind of harm that should be protected by products liability or left entirely to contract law. The Court noted that products liability law grew out of the public policy chat people need more protection from dangerous products than is afforded by the law of warranty and contracts.\textsuperscript{36} The East River Court also recognized the growing tension between products liability and contract law. The Court noted that products liability law grew out of the public policy that people need more protection from dangerous products than is afforded by the law of warranty and contracts. However, the Court acknowledged that if products liability were extended too far, contract law would “drown out in the sea of tort[s].”\textsuperscript{37}

Ultimately, the East River Court adopted the approach taken in Seely and held that East River could not recover in tort on the grounds that “a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself.”\textsuperscript{38} In reaching its decision, the Court reasoned that, unlike traditional “property damage” cases where the defective product damages “other property,” there was no damage to “other property” because the defective turbine component damaged only the turbine itself.\textsuperscript{39} The Court reasoned that the injury suffered by plaintiffs — the failure of the product to function properly — was the essence of a contract or warranty action in which a contracting party could seek the benefit of its bargain.\textsuperscript{40}

The East River Court provided three reasons for denying recovery in tort for the damage to the turbine engines. First, the Court reasoned that when a product injures only itself, the justifications for imposing tort duty are weak because the traditional tort concern for product safety is reduced.\textsuperscript{41} Second, damage to the product itself is best understood as a warranty or contract claim because the product has not met the customer's expectations. In other words, the customer has received “insufficient product value or quality,” which is the “hallmark” of express and implied warranties.\textsuperscript{42} Alternatively, the customer could reject the product or revoke its acceptance and sue for breach of contract. The Court believed that contract law was well suited to these kinds of commercial controversies because parties may set the terms of their own agreements and allocate risk through negotiation and insurance.\textsuperscript{43} Finally, the Court found that a contract or warranty action is preferred because it places a limitation on liability, as opposed to a tort action, that could subject the manufacturer to unlimited liability.\textsuperscript{44} The Court, therefore, affirmed the district court and refused to allow East River to proceed in tort.\textsuperscript{45}

III. Kansas Decisions Applying the Economic Loss Rule.

A. Koss Construction v. Caterpillar Inc.

In 1998, the Kansas Court of Appeals adopted the economic loss rule in Koss Construction v. Caterpillar Inc.\textsuperscript{46} The facts in Koss are strikingly similar to the facts in East River. In Koss, the plaintiff purchased a vibratory roller from Martin Tractor Co. Inc. The roller

(continued on next page)
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was manufactured by Caterpillar Inc. A year after the purchase, the roller caught fire during a highway project and was significantly damaged. Koss alleged that the fire was caused by defective hydraulic hoses. Koss brought suit against Martin Tractor and Caterpillar for the damage to the roller, alleging claims based on strict liability, negligence, and implied warranty of merchantability.

The district court dismissed the negligence and strict liability claims against Caterpillar. On appeal, Koss argued that the district court had erred and that damages to a defective product are recoverable under negligence or strict liability theories. The Kansas Court of Appeals adopted the economic loss rule, noting that a majority of jurisdictions had adopted the rule. Like the courts in Seely and East River before it, the Koss court held that a purchaser of defective goods may not bring suit in tort where the only injury consists of damage to the product itself.

The Koss court stated:

The intermediate positions, which essentially turn on the degree of risk, are too indeterminate to enable manufacturers easily to structure their business behavior. Nor do we find persuasive a distinction that rests on the manner in which the product is injured. We realize that the damage may be qualitative, occurring through gradual deterioration or internal breakage. Or it may be calamitous. (Citations omitted.) But either way, since by definition no person or other property is damaged, the resulting loss is purely economic. Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain—traditionally the core concern of contract law.

In an attempt to avoid application of the economic loss rule, Koss characterized the damage to the roller as injury to "other property." Koss alleged that the defective product was the hydraulic hoses and sought recovery for damages to "other" parts of the roller because they were "other property."

The Koss court rejected such a characterization and applied an "integrated systems approach," referring to East River's observation that most simple machines had component parts and where one defective part caused damage to another part within the same product, it was not damage to "other property."

B. Jordan v. Case Corporation.

In Jordan v. Case Corporation, the Kansas Court of Appeals extended the economic loss doctrine to include consumer purchases. The facts in Jordan are similar to the facts in Koss. Jordan purchased a Case combine with a Cummins engine from a dealer. The Cummins engine was defective and caught fire. The combine was destroyed along with Jordan's unharvested wheat. Jordan brought an action against Case and sought to recover for the damage to the combine (but not for damages for the unharvested crops) based on claims of implied warranty, strict liability, negligence, and res ipsa loquitur. The trial court granted summary judgment in favor of Case based on the Court of Appeals decision in Koss.

On appeal, Jordan attempted to distinguish Koss and argued that the engine was not a component part of the combine. The Jordan court disagreed and held that the Cummins engine was not "other property," but was part of the combine. Jordan also argued the economic loss rule was only applicable to "commercial buyers of defective goods.

The Court of Appeals was not swayed by the argument and found the policy decisions in East River that focus on "commercial buyers" apply equally in consumer transactions. The Jordan court, therefore, affirmed the district court's decision granting summary judgment in favor of Case.

IV. Application of the Economic Loss Rule to Construction Cases.

In his article on the economic loss rule in construction litigation, Sydney Barrett Jr. discussed the rule, stating:

Decisions upholding the economic loss rule in construction claims recognize that 'the right of
the parties to make their own bargain as to economic risk is impaired by extending a tort duty to avoid economic harm to others. The members of the construction industry, perhaps more than any other business, depend upon 'contracts and contract law to protect their economic expectation.' The fees charged by architects, engineers, contractors, developers, and vendors are set in relation to their liability exposure, which is controlled in turn by their contracts. To the extent that tort law imposes duties beyond or contrary to those contractual arrangements, the party must either increase its fee to cover the added risk or choose not to provide the services at all. 60

The economic loss rule has been consistently applied in a wide variety of construction cases in other states. In Redarowicz v. Ohlendof, 61 the Illinois Supreme Court considered whether a homebuyer's claim against the builder could be brought in tort or whether it lay in contract. In Redarowicz, the plaintiff homeowner sued the builder under several theories, including negligence, for the cost of repairing certain defects in the home. The Illinois Supreme Court held that the homeowner could not recover in tort for solely economic losses resulting from the homebuilder's alleged negligence. In denying the claim for negligent construction, the Court stated:

The plaintiff is seeking damages for the cost of replacement and repair of the defective chimney, adjoining wall and patio. While the commercial expectations of the buyer have not been met by the builder, the only danger to the plaintiff is that he will be forced to incur additional expenses for living conditions that were less than what was bargained for. The complained of economic losses are not recoverable under a negligence theory. 62

In Casa Clara Condominium Association Inc. v. Charley Toppino & Sons Inc., 63 the Florida Supreme Court considered whether a condominium association could recover economic losses from a concrete supplier through a claim for negligent construction. In Casa Clara, Charley Toppino & Sons provided concrete for several construction projects, including the plaintiff's condominiums. Because some of the concrete contained a high amount of salt, the reinforcing steel that was inserted into the concrete rusted, causing some of the concrete to crack and break. 65 The condominium association brought suit against Toppino alleging breach of implied warranty, products liability, negligence, and violation of a building code. The circuit court dismissed all of the claims against Toppino.

On appeal, the district court applied the economic loss rule and held that condominium association could not bring suit against Toppino in tort because its claims were barred by the rule where no "other property" was damaged and no person was injured. 66

The Florida Supreme Court affirmed and held that the association's tort claims were, likewise, barred by the economic loss rule, stating:

Plaintiffs find a tort remedy attractive because it often permits the recovery of greater damages than an action on a contract and may avoid the conditions of the contract. [Citation omitted.] The distinction between tort recovery for physical injuries and warranty recovery for economic loss rests on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. [Citation omitted.] An individual consumer, on the other hand, should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. 67

In Sensenbrenner v. Rust, Orling & Neale, Architects Inc., 68 the Virginia Supreme Court also addressed whether a plaintiff-home buyer could bring an

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61. 441 N.E.2d 324 (Ill. 1982).
62. Id. at 327 (emphasis added). Likewise, the Illinois Supreme Court in Focraft Townhome Owners As'n v. Hoffman Roofing Corporation, 449 N.E.2d 125 (Ill. 1983), held that a plaintiff could not seek damages for negligent construction where the plaintiff alleged that the builder failed to construct their condominium in a workmanlike manner, because the damages sought were merely for the diminished value of the property and the cost of repairing the construction defects. Id. at 127. The Illinois Supreme Court held that a plaintiff-buylor of a condominium could only seek damages under a theory of contract, where the plaintiff buyer did not sustain any personal injury and the losses were solely economic. Id.
63. 620 So.2d 1244 (Fla. 1993).
64. Id. at 1245.
65. Id.
66. Id.
67. 620 So.2d at 1246.
68. 374 S.E.2d 55 (Va. 1988).
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action for negligent design where the plaintiff did not suffer any personal injuries and the losses were solely economic. In Sensenbrenner, plaintiffs entered into a contract with O'Hara & Co. to construct a new home in Alexandria, Va. Plaintiffs filed suit and alleged that, due to negligent design, water pipes broke and eroded the soil under a pool, which then eroded the foundation of the house. The plaintiff’s suit against the defendant was based entirely upon several theories of negligence. O’Hara moved to dismiss the suit on the grounds the plaintiffs had failed to state a claim upon which relief could be granted. O’Hara argued that the plaintiff’s damages were solely for economic losses and that there could be no recovery in tort. The district court agreed and dismissed the complaint.

On appeal, the plaintiffs argued that district court had erred by dismissing their case and specifically argued that their damages were not purely economic damages, but damages for injury to “other property.” The Virginia Supreme Court disagreed, holding that the damages claimed by the plaintiffs were merely “disappointed economic expectations” and, therefore, were “pure economic loss damages.”

Noting the importance of maintaining a distinction between tort law and contract law in a construction context, the Virginia Supreme Court held that the plaintiffs could not recover in tort for their “disappointed economic expectations.” In so doing, the Court stated:

The controlling policy consideration underlying tort theory is the safety of persons and property — the protection of persons and property from losses resulting from injury. The controlling policy consideration underlying the law of contracts is the protection of expectations bargained for. If that distinction is kept in mind, the damages claimed in a particular case may more readily be classified between claims for injuries to persons or property on one hand and economic losses on the other.

The plaintiffs here allege nothing more than disappointed economic expectations. They contracted with a builder for the purchase of a package. The package included land, design services, and construction of a dwelling. The package also included a foundation for the dwelling, a pool, and a pool enclosure. The package is alleged to have been defective — one or more of its component parts was sufficiently substandard as to cause damage to other parts. The effect of the failure on the substandard parts to meet the bargained-for level of quality was to cause a diminution in the value of the whole, measured by the cost of repair. This is purely economic loss, for which the law of contracts provides the sole remedy.

Recovery in tort is available only when there is a ‘breach of a duty to take care for the safety of the person or property of another’

[citations omitted]. The architect and the pool contractor assumed no such duty to the plaintiffs by contract, and the plaintiffs’ complaint alleges no facts showing a breach of any such duty imposed by law.

In Selzer v. Brunsell Brothers Ltd., the Wisconsin Court of Appeals considered whether the economic loss rule applied to a homeowner’s claims against a window manufacturer. In Selzer, the homeowner purchased windows for the installation in his home based upon recommendations of his architect. About seven years after the windows were installed, Selzer discovered wood rot in several of the window frames and also noticed rot in the siding below several of the windows. Selzer brought suit against several defendants, including the manufacturer of the windows. Selzer claimed that the window manufacturer breached its express and implied warranties and fraudulently misrepresented the quality of its windows. Selzer also made claims for intentional misrepresentation, strict liability, and negligent misrepresentation against the manufacturer of the windows. The window manufacturer moved for summary judgment on all claims, which the trial court granted. Selzer appealed.

On appeal, the Wisconsin Court of Appeals held that Selzer’s contract and false advertising claims were barred by the statute of limitations. The court also held that Selzer’s strict liability and misrepresentation claims were barred by the economic loss rule, stating:

Nevertheless, we conclude that Selzer’s misrepresentation claims are barred by the economic loss doctrine. The economic loss doctrine recognizes that contracts and torts encompass distinct areas of law that are intended to resolve different types of claims, and that doctrine seeks to maintain this distinction. [Citations omitted.] The rationale underlying the doctrine is that claims

69. Id. at 56.
70. Id.
71. Id. at 57-58.
72. Id.
74. Id. at 810.
75. Id.
76. Id.
77. Id. at 815-16.
concerning strictly 'economic' losses (damages suffered because a product does not perform as intended, including damage to the product itself or monetary loss caused by the defective product) are best governed by the contractual obligations of the parties. [Citations omitted.] Allowing buyers and sellers to allocate the risk of these losses by contract promotes an efficient, predictable market place. [Citations omitted.] On the other hand, claims concerning personal injury or damage to property other than the product itself are best governed by tort law, an area of law intended to protect people from misfortunes that are unexpected and overwhelming. [Citations omitted.]

V. Application of the Economic Loss Rule in Kansas to Construction Cases.

Kansas courts have also had the opportunity to apply the Economic Loss Rule to construction cases, both in a commercial and residential construction contract.

A. Northwest Arkansas Masonry Inc. v. Summit Specialty Products Inc.

In Northwest Arkansas Masonry Inc. v. Summit Specialty Products Inc., plaintiff, Northwest, brought a suit alleging products liability against the supplier, manufacturer, and packager of Type-S Masonry Cement. Like the plaintiffs in Koss and Jordan, the plaintiff in Northwest Arkansas Masonry argued that defendant's allegedly defective Type-S Masonry Cement damaged "other property," specifically, plaintiff's cement wall. The jury found in favor of Northwest. Following the trial, the court entered judgment as a matter of law in favor of both the manufacturer and packaging company. The trial court set aside the jury verdict on the basis that the damages awarded by the jury were barred by the economic loss rule as set forth by the U.S. Supreme Court decision in East River and the prior Kansas decision in Koss Construction.

On appeal, Northwest argued that damage caused by a product to "other property" is not barred by the economic loss rule. The Kansas Court of Appeals disagreed with Northwest's characterization of its damages as harm to "other property." In holding that the damages to Northwest's wall were not damages to "other property," the Court of Appeals stated:

Several jurisdictions apply the integrated system approach in construction and building defect cases. These cases are persuasive and consistent with the approach taken in Koss and Jordan. For example, recovery under a products liability action was barred when defective roofing products...
and design resulted in substantial repair and replacement costs. [Citation omitted.] Removal and replacement of untreated plywood, shingles and other components of a builder's roof system were not recoverable damages to other property when the builder had to replace chemically treated plywood that was failing to maintain strength and structural integrity. [Citation omitted.] Paving blocks were determined integrated systems and the cost to repair and replace incurred because of defective cement ingredients could not be recoverable under a products liability claim. [Citation omitted.] Where faulty cement caused reinforcing steel inserted in concrete to rust causing concrete to break and crack off, the homeowner's tort claim was barred because the damage was economic loss as no property other than the structure built with the defendant's cement sustained damage. [Citation omitted.] These cases stand for the proposition that when component materials become indistinguishable parts of a final product, and there is harm resulting from a defective component of the product, the product itself has caused the harm. 84

The Northwest court, therefore, held that the economic loss rule barred Northwest's claim for damages to its cement wall. In so holding, the court solidified the application of the "integrated systems approach" and reinforced the policy for applying the economic loss rule to cases where the plaintiff has suffered no physical injury nor damage to other property, stating:

The damages claimed by Northwest are economic losses resulting from failed economic expectations and not damage to other property. Northwest purchased the cement and made it into mortar. Northwest integrated the mortar and other components into a final product — the masonry wall. The damages claimed by the cost of additional materials were repair and replacement costs and occurred as a result of tearing down the wall because the mortar made with the cement that the jury found defective failed to meet the required bonding strength. Therefore, under both the Kansas Product Liability Act and relevant case law addressing the economic loss rule as applied to construction or building product defects, the trial court did not err in barring Northwest's strict liability claim by granting [defendant's] motion for judgment as a matter of law. 85

Prendiville claimed that the water infiltration was a result of negligent construction of the house, specifically the installation of the Dryvit siding. 88 Prendiville also alleged that defendants breached their warranty and violated the Kansas Consumer Protection Act. 89 Defendants filed a motion for summary judgment, arguing that the negligence claim was barred by the economic loss rule. The district court agreed and granted the summary judgment motion because Prendiville's damages were to the home alone. 90

On appeal, Prendiville argued that the economic loss doctrine did not apply in a "residential construction context" because a house is not a "product" and the new home sale contract was for the delivery of "services." 91 Prendiville specifically argued that the negligent services were the cause of the damages and that this was not a "defective product" case. 92

The Kansas Court of Appeals disagreed and held that the economic loss rule applies in residential construction cases regardless of whether a house is deemed to be a "product" or not, and that the rights and liabilities of the parties should be governed by the contract and express warranty rather than in tort. 93

Furthermore, like the plaintiffs in Kosi and Jordan, Prendiville attempted to argue that the damage he was seeking was to "other property" and not to the Dryvit exterior. 94 The Court of Appeals saw through Prendiville's argument and noted that Kansas courts had adopted the "integrated system approach," which recognizes that damage to a component of the "integrated system" to either the system as a whole, or to the system components, is not "damage to other property, which precludes the application of the economic loss doctrine." 95

84. Id. at 743-44 (emphasis added).
85. Id. at 745.
87. Prendiville, 32 Kan. App. 2d at 436.
88. Id. at 436.
89. Id.
90. Id. at 437-38. For reasons not explained in the Opinion, the claims for breach of contract and violation of the Kansas Consumer Protection Act were dismissed without prejudice by Prendiville.
91. Id. at 441.
92. Id. at 442.
93. Id. at 441-42.
94. Id. at 446-47.
95. Id. at 446 (citing Northwest Arkansas, 29 Kan. App. 2d at 744).
In so holding, the court stated:

Buying a house is the largest investment many consumers ever make, and homeowners are an appealing, sympathetic class. If a house causes economic disappointment by not meeting a purchaser's expectations, the resulting failure to receive the benefit of the bargain is a core concern of contract, not tort, law. There are protections for homebuyers, however, such as statutory warranties, the general warranty of habitability, and the duty of sellers to disclose defects, as well as the ability of purchasers to inspect houses for defects. Coupled with homebuyers' powers to bargain over price, these protections must be viewed as sufficient when compared with the mischief that could be caused by allowing tort recovery for purely economic losses.96

VI. Conclusion.

Kansas courts do not recognize a cause of action for negligent construction where there is no personal injury or damage to other property. The economic loss rule, which bars such a claim, helps to maintain the distinction between contract law and tort law. Although it is tempting to allow a homeowner to proceed in tort against a construction company, courts should continue to apply the economic loss rule so that parties to a construction contract can allocate their risks accordingly.96

96. Id. at 445 (quoting Casa Clara v. Charley Toppino & Sons, 620 So.2d 1244, 1247 (Fla. 1993)).

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Pulikkan is licensed to practice law in Kansas, Missouri, and Illinois.
New Supreme Court Rule Mandates use of new Cover Sheets

A new Supreme Court rule has been adopted, mandating the use of new cover sheets for all Kansas court case filings. The rule is effective July 1, 2005.

According to the Office of Judicial Administration, the new Supreme Court Rule 123 facilitates case filings in several ways:

**Statewide Consistency**
- allows for a statewide electronic format;
- provides a step toward electronic filing capabilities;
- prosecutors using the Kansas Prosecutors System will be able to generate pleadings from FullCourt;
- attorneys will only have to keep track of one form rather than multiple forms based on the county;
- other government agencies, local and state, will also have one form rather than multiple forms based on the county; and
- will streamline the transfer of information between the clerk’s office and attorneys.

**Party Identification**
- helps determine parties for matching criminal history and
- by streamlining the transfer of this party information, the clerks will have the information they need to mail notices in a timely manner.

**Confidentiality**
- promotes privacy interests of lawyers’ clients and also victims, witnesses, and other parties to the case.

**Statistical Subtypes**
- allows for the attorney, rather than the clerk, to make the legal determination about the particular subtype of the case they are filing;
- provides for more detailed information about the types of cases being filed, in accordance with national standards;
- standardizes the information for the collection of data, and
- saves the clerk time, allowing cases to be filed more quickly.

The Rule and forms are available online at: www.kscourts.org by following the link under “What’s new.”

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IN THE SUPREME COURT OF THE STATE OF KANSAS
ADMINISTRATIVE ORDER NO. 194
Re: Rule Requiring Use of Cover Sheets and Privacy Policy
Regarding Use of Personal Identifiers in Pleadings

The attached Supreme Court Rule 123 is hereby adopted.

ADOPTED BY ORDER OF THE COURT this 5th day of May, 2005.

Kay McFarland
Chief Justice

(a) Effective July 1, 2005, for the filing of all new cases, the clerks of the district courts shall require the submission of a cover sheet. The cover sheets should be in substantially the same form as Exhibit A hereto. The judicial administrator may exclude certain cases from this requirement.

(b) Parties filing new cases seeking divorce, child custody, child support, or maintenance shall furnish to the clerk on the cover sheet Social Security numbers for the parties and for the parties’ children, if known, and dates of birth for parties and children.

(c) Pursuant to the court’s authority recognized in K.S.A. 45-221(a)(1), Social Security numbers and dates of birth supplied to the district court in connection with a cover sheet shall remain confidential and are not to be released to the public.

(d) The cover sheet should not be retained in court case files, is not subject to Rule 108, and may be shredded or otherwise destroyed within a reasonable time after the case is entered into the case information system.

(e) Unless otherwise required by law, parties and their attorneys are directed to refrain from including, or shall partially redact where inclusion is necessary, the following personal identifiers from all pleadings filed with the court, including exhibits thereto, unless otherwise ordered by the court:

1. Social Security numbers. If an individual’s Social Security number must be included in a pleading, only the last four digits of that number shall be used.
2. Dates of birth. If an individual’s date of birth must be included in a pleading, only the year shall be used.
3. Financial account numbers. If financial account numbers are relevant, only the last four digits of these numbers shall be used.

The parties and counsel are solely responsible for redacting personal data identifiers. The clerk will not review each pleading for compliance with this Rule.
All opinion digests are available on the KBA members-only Web site at www.ksbar.org, and we send out a weekly eJournal informing KBA members of the latest decisions. If you do not have access to the KBA members-only site, please contact member services, at info@ksbar.org or at (785) 234-5696. You may go to the courts' Web site at www.kscourts.org for the full opinions.

Supreme Court

Attorney Discipline

IN RE GERALD E. HERTACH
ORIGINAL PROCEEDING IN DISCIPLINE
DISBARMENT
NO. 92,838 – APRIL 22, 2005

FACTS: Respondent, who was in private practice in a Hutchinson firm, was convicted of two counts of participation in a prohibited contract, Class B misdemeanors, in violation of KSA 75-4304(b). The criminal charges were based on respondent's business dealings with Reno County's privately operated jail annex in which he was an undisclosed principal.

At the plea hearing, respondent and three other related defendants were ordered to pay restitution of $750,000 and to present a workable restitution plan. However, by the date of sentencing, Hertach had not provided such a plan, nor did he have the apparent ability to pay restitution. He was sentenced to two consecutive terms of six months in jail, based on a finding that he had engaged in deceitful conduct founded on deliberate greed. The court agreed to consider a motion for parole after 90 days served if respondent provided a workable restitution plan, but he never did and served the full 12 months in jail instead.

A hearing panel of the Board of Discipline found violations of KRPC 8.4 (b) (criminal misconduct) and (c) (misconduct involving dishonesty, fraud, deceit, or misrepresentation) and SCR 211 for failure to file a timely answer to the formal disciplinary complaint. Several aggravating and mitigating factors were found. The panel unanimously agreed that ABA Standard for Imposing Lawyer Sanctions section 5.11 applied and recommended disbarment with proof of repayment of profits required prior to future reinstatement. Respondent filed exceptions to certain findings and recommendations in the Final Hearing Report.

HELD: The Supreme Court found competent evidence in the record to support the panel's factual findings of violations and factors in aggravation and mitigation. The Court examined ABA Standard 5.11 and found disbarment to be appropriate pursuant to Standard 5.11 (b).

IN RE JIMMIE A. VANDERBILT
ORIGINAL PROCEEDING IN DISCIPLINE
ONE YEAR DEFINITE SUSPENSION
NO. 93,394 – APRIL 22, 2005

FACTS: Respondent, an attorney from Oskaloosa, stipulated to allegations of misconduct arising out of his service as Jefferson County Attorney. A disciplinary panel found violations of KRPCs 1.1 (competence), 1.3 (diligence), 1.16 (d) (termination of representation), 3.2 (expediting litigation) and 8.4 (d) (misconduct prejudicial to the administration of justice) and (g) (misconduct adversely reflecting on fitness to practice law). The underlying facts involved failure to file appellate briefs and misuse of a county cellular telephone and debit card. The panel found three aggravating factors and two mitigating factors were present.

In a split decision, the majority recommended a six-month definite suspension followed by a one-year period of probation incorporating seven required conditions. The remaining panel member filed a report concurring in the findings of fact and conclusions of rules violations but recommending that respondent be sanctioned by published censure as recommended by the Disciplinary Administrator. No exceptions were filed.

HELD: The Supreme Court found the findings of fact and conclusions of rules violations to be undisputed and adopted them. However, the Court disagreed with both recommended sanctions and concluded that a one-year definite suspension from the practice of law was the appropriate discipline.

Civil

ADMINISTRATIVE LAW AND PROCEDURE — LICENSES
CROSS V. KANSAS DEPT. OF REVENUE
RILEY DISTRICT COURT — AFFIRMED
NO. 92,051 – APRIL 29, 2005

FACTS: Cross was arrested for driving under the influence. Administrative hearing officer affirmed the suspension of Cross’ license. On petition for review she claimed K.S.A. 8-1020(g) limit on witnesses who may be called for administrative hearing denied her due process and was unconstitutional on its face. District court found no denial of due process, and found Cross had no standing to facially attack the statute. Cross appealed; appeal transferred to Supreme Court.
CHILD SUPPORT, SETTING ASIDE JUDGMENT, AND ATTORNEY FEES
IN RE MARRIAGE OF LEEDY

SEDGWICK DISTRICT COURT – JUDGMENT OF THE COURT OF APPEALS AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
JUDGMENT OF THE DISTRICT COURT IS AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.
NO. 90,378 – APRIL 22, 2005

FACTS: Dana Leedy, n/k/a Dana Wassar, and Robert Leedy were married in 1990 and had three children, born in 1993, 1995, and 1997. Wassar and Leedy were divorced in 1999. Wassar was given primary residential custody of the children, and Leedy was ordered to pay a fixed amount of child support beginning Jan. 1, 1999. By February 2002, Leedy owed $5,619 in unpaid child support and $874.05 in unpaid medical expenses. District court found Leedy in contempt and ordered him to pay $857 in attorney fees to Wassar. Leedy filed a motion to set aside the child support, claiming it wasn’t supported by the child support worksheets and there were calculation errors. Wassar admitted overstating child care expenses and the existence of errors and did not object to the amounts for 2001 being set aside. The trial court sustained Leedy’s motion and ordered the parties to recalculate the child support using actual childcare expenses and medical expenditures. In March 2003, the trial court found Leedy had overpaid his child support by $1,730.77, and that Wassar had overstated the costs beginning in January 2000 and had ceased to have any day care costs after August 2002. The trial court adjusted Leedy’s child support payments beginning February 2003 to reflect correct figures, corrected the amount of medical expenses to $364.05, and denied Leedy’s request to set aside the order for attorney fees. Wassar appealed the recalculation of child support and arrearage, and Leedy cross-appealed the award of attorney fees. Court of Appeals concluded the trial court improperly recalculated Leedy’s child support for approximately three years and remanded for directions to limit relief to one retroactive year. Court of Appeals affirmed the refusal to set aside the order of attorney fees.

ISSUES: Did the trial court err in granting relief pursuant to K.S.A. 60-260(a) to correct the child support payments? Did the trial court abuse its discretion in awarding attorney fees?

HELD: Court affirmed in part and reversed in part. Court stated that the March 2003 order was not an order that merely clarified what the court actually decided in February 2002 and, therefore, the Court of Appeals correctly concluded that the trial court’s March 2003 order was not authorized by K.S.A. 60-260(a) as a clerical mistake. Court held that Wassar should have disclosed the childcare costs as a matter of equity and Wassar’s failure to disclose resulted in a judgment against Leedy for an arrearage of thousands of dollars that he in fact did not owe. Court found Wassar’s failure to disclose the error constituted misconduct that would support relief from judgment under K.S.A. 60-260(b)(3) and an order setting aside judgment on this basis could be upheld. Court also held Leedy’s request for relief for overstated childcare expenses was made within a reasonable time. Court stated Leedy merely asserted that the Court of Appeals erred in upholding the trial court’s refusal to set aside the award of attorney fees, but offered no reason why the rationale was unsound. Court found no abuse of discretion in awarding attorney fees.

STATUTES: K.S.A. 60-260(a), (b), -1610; K.S.A. 2004 Supp. 60-1610(a)(1)

CIVIL PROCEDURE, SUBSTITUTION OF PARTY, AND AMENDMENT OF PLEADINGS
BACK-WENZEL V. WILLIAMS
SEDGWICK DISTRICT COURT
JUDGMENT OF THE COURT OF APPEALS REVERSING THE DISTRICT COURT IS REVERSED.
JUDGMENT OF THE DISTRICT COURT IS AFFIRMED.
NO. 90,701 – APRIL 22, 2005

FACTS: In December 2000, Back-Wenzel was injured in a car accident involving Williams. Williams died in July 2001 from conditions unrelated to the accident. On Dec. 12, 2002, three days before the statute of limitations expired, Back-Wenzel filed a petition against Williams alleging his negligence in the accident. The district court found service was obtained on Williams by residential service on Dec. 17, 2002. Three months later, on March 13, 2003, Williams’ insurance company notified Back-Wenzel that Williams had died. The district court found that 90 days to obtain service had expired, but ordered an extension to April 17, 2003. On April 1, Back-Wenzel filed a petition to appoint special administrator of Williams’ estate to accept service. On April 8, Williams’ attorney filed a motion to dismiss, claiming the district court lacked subject matter and personal jurisdiction and that Back-Wenzel failed to state a claim for relief. Back-Wenzel did not respond. On April 18, one day after the extension to obtain service expired, the district court denied Back-Wenzel’s motion to substitute and granted Williams’ motion to dismiss without prejudice because Williams’ pre-suit death precluded subject matter jurisdiction. Back-Wenzel appealed, and the Court of Appeals reversed.

ISSUES: Did the district court err in dismissing the case and refusing to allow the special administrator to serve as the defendant?

HELD: Court reversed the Court of Appeals decision and affirmed the district court’s dismissal. Court stated that a motion to substitute under K.S.A. 60-225 cannot be used to substitute a party who died before commencement of the action. Court also stated that a motion that is clearly a motion to substitute under K.S.A. 60-225 cannot be used to substitute a party who died before commencement of the action.

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42 – JUNE 2005
DIVORCE AND SPOUSAL MAINTENANCE IN RE MARRIAGE OF HARBURTZ

SEDGWICK DISTRICT COURT – JUDGMENT OF THE COURT OF APPEALS AFFIRMING THE DISTRICT COURT IS REVERSED, JUDGMENT OF THE DISTRICT COURT IS REVERSED AND CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

No. 91,024 – April 22, 2005

FACTS: Nancy and Steven Harbutz were granted a divorce in September 2001. An arbitrator’s award ordered Steven to pay Nancy spousal maintenance in the amount of $450 a month until June 2007, terminable on Nancy’s death or remarriage and subject to modification for material change in circumstances. Steven filed a motion to modify maintenance after he lost his job in February 2002. By the time the judge heard the motion in May 2002, Steven had obtained a new job at a substantially reduced salary. Judge Dewey ruled that maintenance would be “terminated” at the time of the sale of the residence, but that he would reserve jurisdiction “to change this” and that it was not “a final order on spousal maintenance.” The journal entry of the hearing did not include any of the Dewey’s comments on continued jurisdiction or the finality of the order. The residence sold in October 2002. Steven filed a motion to terminate maintenance in February 2003 asking retroactive effect to November 2002. The district court never heard or decided Steven’s motion. A month later, Nancy lost her job and filed a motion to reinstate maintenance. Without the benefit of the transcript of the May 2002 hearing, Judge Powell ruled maintenance terminated at the time of the sale of the residence and the court had no jurisdiction to consider any modification of spousal maintenance. Without the benefit of the transcript, the Court of Appeals affirmed the district court.

ISSUE: Did the district court have jurisdiction to consider reinstatement of maintenance after the residence was sold?

HELD: Court reversed the district court. Court held that Dewey lacked jurisdiction under K.S.A. 60-1610(b)(2) to permanently terminate spousal maintenance during the time period originally set for its payment. Any termination that attempted during that time period was subject to further modification, and Powell was free to order that maintenance resume or continue upon an appropriate showing in a subsequent hearing. Court held that because Powell did not understand that he possessed this power, the case was reversed and remanded for his reconsideration.

STATUTES: K.S.A. 2003 Supp. 60-1610(b)(2)

DIVORCE, SUPPORT PAYMENTS, AND ATTORNEY’S LIENS IN RE MARRIAGE OF BROWN
GREENWOOD DISTRICT COURT
AFFIRMED AND REMANDED FOR PROCEEDING CONSISTENT WITH THIS OPINION

No. 90,307 – April 22, 2005

FACTS: Prior to the resolution of the divorce between Wayne and Katrina Brown, Katrina’s attorney (Lehecka) twice filed an attorney’s lien against her client’s anticipated property settlement and support payments. Approximately a year and a half after the divorce was granted, Wayne sent two checks made out to Katrina and Lehecka to satisfy his entire settlement and support obligation to the Kansas Payment Center. The payment center processed the checks without Lehecka’s knowledge or signature and sent all the proceeds directly to Katrina instead of sending them to Lehecka’s office as directed by the divorce court. Lehecka claimed wrongful payment to Katrina. The payment center challenged jurisdiction claiming Lehecka was required to intervene in the divorce action before he could recover his fees. The district court found that there were two payees listed on the checks from Wayne and that the payment center improperly processed the checks and paid all the proceeds to Katrina. Despite holding that the payment center lacked standing to argue that the payments to Katrina qualified as exempt property, the district court said an amount equal to four of the monthly maintenance payments was exempt because those four payments were not yet past due at the time of the district court’s final order on the property settlement and support. The district court ordered Katrina to indemnify the payment center in the amount of $19,003.25.

ISSUES: (1) Did the district court err in enforcing Lehecka’s attorney’s liens against the payment center because it was not an adverse party and because it received no notice of the liens? (2) Were Lehecka’s liens defeated when the checks passed through the payment center? (3) Did the payment center have standing to assert exemptions?

HELD: Court affirmed. (1) Court agreed with Lehecka that his liens were effective against Wayne, the adverse party in the divorce action. Lehecka’s liens attached to the money represented by the two checks before the checks were ever forwarded to the payment center. (2) Court held the payment center was bound to abide by the properly filed and noticed attorney’s liens. The payment center had constructive notice of the liens as the checks indicated an interest in Lehecka as one of the payees. The payment center had a duty to inquire as to Lehecka’s role and claim. (3) Court agreed with the district court that the payment center did not have standing to argue applicability of the exemptions claimed by the payment center on Katrina’s behalf. Court stated the payment center had no interest in the checks other than a temporary possessory interest. Court stated the district court could have raised the issue sua sponte, but the exemptions did not apply to the property settlement and all but four of the monthly maintenance payments were past due to Katrina when Wayne sent the check. Court remanded to the district court to permit Lehecka to recover on his liens against the entire amount of the property settlement and 16 months’ worth of the monthly maintenance payments. Court said the other four months’ worth of maintenance was exempt as current support payment. Court found no justification for an award of fees on appeal since it involved a novel issue of law.
FAILue TO EXHAUST ADMINISTRATIVE REMEDIES
JONES V. STATE OF KANSAS AND
EMPIRE INSURANCE COMPANY

SHAWNEE DISTRICT COURT – JUDGMENT OF THE
COURT OF APPEALS AFFIRMING THE DISTRICT COURT
IS AFFIRMED.

JUDGMENT OF THE DISTRICT COURT IS AFFIRMED
NO. 91,389 – APRIL 22, 2005

FACTS: Jones was sexually assaulted in August 1996 by
the son of Wes and Linda Kress, her foster parents. Jones
sued the Kresses and during the pendency of that lawsuit,
the Kresses and Jones learned for the first time that Social
and Rehabilitation Services (SRS) had failed to name
the Kresses as insured on an Empire liability policy that insured
Kansas foster parents. Jones alleged the Kresses had provided
care for her in reliance upon SRS’ agreement to obtain liability
insurance. Jones took judgment against the Kresses in the
amount of $100,000. The Kresses assigned to Jones any
breach of oral contract action they would have for failure to
provide insurance coverage. There is no record of any adminis-
tration proceedings filed by Jones. Instead, she pursued an
independent declaratory judgment action alleging breach of
contract against SRS and bad faith against Empire. The only
present claim is Jones’ allegation of the existence and validity
of the contract to provide insurance to the Kresses, $100,000
in damages, interest, costs, and fees. The district court dis-
misseo Jones’ lawsuit for failure to exhaust administrative
remedies and thus lack of jurisdiction. The Court of Appeals
agreed with the district court.

ISSUE: Did the district court err in dismissing Jones’ law-
suit for failure to exhaust administrative remedies?

HELD: Court affirmed. Court stated that in a case involv-
ing a breach of contract claim against a state agency, K.S.A.
77-612 permits a person to file a petition for judicial review
under the Kansas Judicial Review Act (KJRA) only after
exhausting all administrative remedies available within the
agency whose action is being challenged and within any
other agency authorized to exercise administrative review.
Court held the failure of SRS to obtain insurance for foster
parents qualifie as an “agency action” under K.S.A. 77-
602(b)(3) and is governed by the KJRA. Court held Jones
is entitled to neither the reversal nor the remand she seeks
because she failed to exhaust all administrative remedies
available to her for SRS’ alleged breach of contract before fil-
ning her declaratory judgment action, and no provision of the
KJRA preserves her right to do so now.

STATUTES: K.S.A. 75-5328a; K.S.A. 77-602(b)(3),
-603(a), -606, -607(b)(1), -612, -613(d)(1), (2), -621(c)

KANsAS OPEN RECORDS ACT, REGISTER OF DEEDS,
AND REDACTION

DATA TREE LLC V. BILL MEEK, SEDGWICK COUNTY
REGISTER OF DEEDS

SEDGWICK DISTRICT COURT – AFFIRMED
NO. 92,596 – APRIL 22, 2005

FACTS: Data Tree is in the business of collecting and pro-
viding real estate information and, in the course of such
business, gathers and disseminates facts obtained from public
records to its clients. First American attempted to gather the
public records from the Sedgewick County Register of Deeds
for sale to Data Tree and was required to sign an affidavit
prohibiting the selling or offering for sale any lists of names
and addresses derived from public records. First American
signed an affidavit under objection in order to receive the
public records. The Register of Deeds informed First
American they would be required to pay the cost of redact-
ing confidential information out of the microfilm of the
public records. Data Tree sued the Register of Deeds seeking
declaratory judgment that; (1) the Register of Deeds’ actions
were contrary to law and the duties of its office; (2) the
requested documents were public records which must be
disclosed and copied at a reasonable charge; and (3) alterna-
tively, the Register of Deeds must bear the costs of deleting
the personal information. The district court granted a
summary judgment in favor of the Register of Deeds finding
the Kansas Open Records Act (KORA) applied, but sensitive
information may be redacted before distribution to the pub-
lic and all costs of redaction were to be borne by Data Tree.

ISSUES: (1) Does the Register of Deeds have authority to
redact recorded information? (2) Do the privacy protections of
K.S.A. 2004 Supp. 45-221(a)(30) apply to the Register of
Deeds and is that a basis for denial of access to copies of
public records? (3) If redaction is required, is the cost borne
by the Register of Deeds? (4) Is Data Tree entitled to attor-
ney fees for denial of access?

HELD: Court affirmed summary judgment in favor of
the Register of Deeds. (1) Court held that it is beyond dispute
that the Register of Deeds’ office is a public agency and that
the documents filed for record in that office are public records.
(2) In considering the privacy concerns of K.S.A. 2004 Supp.
45-221(a)(30), the Court held that social security numbers are
considered information of a personal nature. Court stated
there was no reasonmother’s maiden names and dates of birth
do not fall within this privacy realm as well. Court found
the information sought by Data Tree is not being sought for
its public notice properties, but for commercial purposes and
the public interest to be served by releasing unredacted documents
is insignificant. Court held that where balancing the privacy
interests of the individual with the public’s need to know or
where disclosure of the personal or private information fails to
significantly serve the principal purpose of the KORA, nondisclosure
is favored if nondisclosure complies with other require-
ments of KORA. Court held that the Register of Deeds did
not abuse his discretion in determining that public disclosure
of the personal information within the documents requested
constituted a clearly unwarranted invasion of privacy. (3) Court
found KORA is silent on who bears the costs of redac-
tion. Court held KORA makes clear the legislative intent that
actual costs of furnishing copies of public records may be
recovered by the agency and that the person seeking the
records should bear the actual expense. Court held the district
court did not err in ruling the costs of producing records,
including the costs of redaction, are to be borne by Data Tree.
(4) Court agreed with the district court that the change in pol-
icy of the Register of Deeds from nonredaction to redaction
of social security numbers, mother’s maiden names, and dates of
birth from recorded instruments was not made in bad faith
and was taken during the ordinary course of his duties. Court
held the district court did not err in not awarding attorneys
fees to Data Tree because there was a “reasonable basis in fact
or law” for the actions of the Register of Deeds.

THE JOURNAL OF THE KANSAS BAR ASSOCIATION

LOAN REPAYMENT, CONVERSION, FRAUD, AND CONSUMER PROTECTION
BOMHOF V. NELNET LOAN SERVICES INC.
JEFFERSON DISTRICT COURT – AFFIRMED
NO. 92,112 – APRIL 22, 2005

FACTS: In June 1997, Bomhoff signed a consolidation loan application/promissory note to consolidate her student loans with Nelnet. Two months later, Bomhoff received a disclosure statement and repayment schedule for a loan of $19,902.38 at an annual interest rate of 8 percent with payments starting September 1997. Bomhoff made nine scheduled payments during the next two year period and received three separate periods of forbearance during which interest accrued on the principle. At the end of each forbearance period, the accrued but unpaid interest was capitalized and added to the principle and new repayment schedules were calculated and sent to Bomhoff. In November 1999, the principal due was $22,340.95 and from thereafter Bomhoff made the scheduled monthly payment. By January 2002, the principal was reduced to $21,146.69. Bomhoff made a couple payments greater than the monthly minimum and Nelnet applied the amounts greater than the interest to reduce her principal. In March 2002, Bomhoff made a $1,000 payment with a note stating to apply the $1,000 toward the principal on the loan. Nelnet first applied the payment to the accrued interest ($193.40) and the remainder ($806.60) to reduce the principal. When Bomhoff learned the full amount had not been applied to the principal, she sued Nelnet claiming the payments made in addition to her scheduled monthly payments were not deducted from the loan’s outstanding principal but were used instead by Nelnet to extend the due dates on the next payments in order for Nelnet to wrongfully collect interest income. The district court granted summary judgment in favor of Nelnet on all claims.

ISSUES: Did the district court err in granting summary judgment in favor of Nelnet? Was Nelnet’s conduct actionable as conversion, fraud, and violations of the Kansas Consumer Protection Act (KCPA)?

HELD: Court affirmed summary judgment to Nelnet. Court rejected Bomhoff’s conversion claim finding her account statements indicate that payments are applied first to outstanding interest and the remainder is applied to principal. Court held Nelnet did not convert any of Bomhoff’s funds because it did precisely what she authorized it to do, apply the $1,000 first to outstanding interest and then outstanding principal. Court found no actionable fraud because Bomhoff’s next payment due was not an untrue statement and that the amount over the outstanding interest applied to prepayment of future installments by advancing the next payment due date unless the borrower requests otherwise. Court found this advancement was a courtesy to the borrower by allowing a temporary relief from making a required monthly payment in addition to the extra lump sum pay-

ment. Court held there was no evidence Nelnet engaged in a deceptive or unconscionable act or practice under the KCPA.

STATUTES: K.S.A. 20-3018(c); K.S.A. 50-626, -627

RESTITUTION
TONGE V. WERHOLTZ
LEAVENWORTH DISTRICT COURT
REVERSED AND REMANDED WITH DIRECTIONS
NO. 93,329 – APRIL 22, 2005

FACTS: Tonge was incarcerated with the Department of Corrections when he escaped in July 1998. Tonge was apprehended and ordered to pay $1,956.75 for costs incurred by the state in regaining his custody. Following the proper administrative proceedings, the district court eventually upheld the restitution, but reduced it to $1,104.68. The Court of Appeals affirmed the district court’s change of the restitution amount. Tonge served his sentence, was released on bond and returned to prison on a technical violation. While incarcerated Tonge paid $290.64 toward his disciplinary restitution, leaving an unpaid balance of $814.04. In February 2003, Tonge was charged with new offenses in Geary County, was discharged from the old sentence, including the Saline County escape, and he was returned to the Department of Corrections (DOC) in June 2003. Upon return to incarceration, the DOC garnished Tonge’s trust account to pay the restitution previously ordered. The DOC denied Tonge’s two grievances where he complained the restitution order was unfair, unjust, improper, and not moderate for his living conditions and sought to set it aside. The district court concluded the DOC lacked authority to collect restitution from Tonge because the regulation used by DOC was not an effective regulation until after Tonge had completed his sentence. The district court enjoined the DOC from withholding funds belonging to Tonge as setoff or payment for restitution.

ISSUES: Is Tonge required to continue paying disciplinary restitution for an event when the incarceration related to that event has ended? Whether the DOC has authority to collect disciplinary restitution from an inmate who has been released from incarceration and because of another crime committed by that inmate, returned to incarceration?

HELD: Court reversed and remanded. Court stated the language of the Feb. 15, 2002, amendment to K.A.R. 44-12-1306(a)(3) specifically allows the DOC to continue collection of a previously imposed restitution order. Court stated that changing the method of collecting disciplinary restitution is a change in procedure and has no effect on the underlying disciplinary infractions or the amount of restitution ordered. The DOC articulates DOC policy and a change in enforcement of disciplinary restitution is within the DOC’s control as long as it does not exceed the DOC’s authority. Court held the amendment of K.A.R. 44-12-1306(a)(3) became effective on Feb. 15, 2002. The record showed Tonge was still incarcerated on that date, as he was not guidelines released until March 19, 2002. It is therefore clear the additional wording of the regulation allowing restitution owed to be collected upon any subsequent readmission of an inmate to a facility applies to Tonge notwithstanding the fact the restitution order and amount was determined as a matter of substance prior to the amendment of K.A.R. 44-12-1306(a)(3) effective Feb. 15, 2002. Court reversed with the instructions to deny Tonge the requested relief under his 60-1501 action.
FACTS: In November 1990, McGinley established a revocable trust with Bank of America (Bank) serving as trustee. Seven months after McGinley established her trust, she signed a letter directing the Bank to retain Enron stock held in trust. The letter also stated that McGinley agreed to exonerate the Bank from any loss it sustained for continuing to retain the stock and that she relieved the Bank from any responsibility for analyzing and monitoring that stock. The value of the Enron stock substantially increased from 1991 through 2000. At its height, the stock was worth nearly $800,000 in December 2000, representing 77 percent of the total market value of the trust. By March 2001 the shares amounted to 66 percent of the trust, by June 2002, 64 percent, by September 2001, 50 percent, and by December 2001, 2 percent, with a value of only $4,800. McGinley sued the Bank. The district court granted summary judgment in favor of the Bank finding McGinley released the Bank of all liability and any responsibility for monitoring or analyzing the stock.

ISSUE: Did the language in the trust and subsequent letter shield the Bank from liability for its inaction?

HELD: Court Affirmed. Court held that because a trustee followed written directions received from the grantor of a revocable trust regarding the property of the trust, it has complied with the prudent investor rule and is authorized to follow such written directions. Court stated that a court will not consider parol evidence to aid in the interpretation of a trust instrument and resulting letter that are clear and unambiguous on their faces. Court held the trust instrument and resultant letter were clear and unambiguous. Court stated clearly the better practice for the Bank would have been to communicate to McGinley the letter’s contents and effect to communicate to McGinley the letter’s contents and effect before she signed it, and notified her of evolving circumstances of Enron’s slow demise. However, the Court found no relevant authority showing the Bank had a legal obligation to do so under the facts of the case. Court stated the Bank was not required to override the decisions of McGinley when the circumstances evolved, i.e., to protect her from herself.


Criminal

STATE V. BUEHLER-MAY

FACTS: Buehler-May convicted of first-degree murder and other criminal charges. Sentence included a hard 50 sentence. On appeal, Buehler-May claimed trial court erred in: (1) denying motion filed on first day of trial to endorse psychiatrist as expert witness; (2) admitting gruesome and cumulative photographs; (3) not giving cautionary accomplice instruction to jury; (4) applying unconstitutional hard 50 sentencing statute; and (5) imposing hard 50 sentence based in part on factor found to be insufficient during sentencing of co-defendant.

ISSUES: (1) Endorsement of expert, (2) gruesome photographs, (3) accomplice jury instruction, (4) hard 50 sentencing scheme, and (5) hard 50 sentence

HELD: Request for endorsement of psychiatric witness was not timely under K.S.A. 22-3219(1), and no good cause demonstrated for late notice. Court has not previously considered effect of trial court’s failure to consider factors in State v. Bright, 229 Kan. 185 (1981), in deciding motion to endorse witness for testimony relative to defense of lack of mental state. Same rule for a late notice of alibi defense is applied. Also like alibi defense, notice requirement for presenting defense under K.S.A. 22-3219 does not infringe constitutional right to present such a defense.

No error in allowing challenged photographs to be admitted into evidence.

No clear error in not giving cautionary accomplice instruction where accomplice testimony corroborated Buehler-May’s statement, defense counsel cross-examined accomplice witnesses about their plea-agreements, and trial court instructed on witness credibility.

Kansas hard 50 sentencing scheme is not unconstitutional. Under facts, wrapping body in tarp and placing it in river is not sufficient evidence of particular depravity of mind to support application of K.S.A. 2004 Supp. 21-4636(f)(6). However, sufficient evidence of other aggravating factors supports conclusion that Buehler-May committed murder in especially heinous, atrocious, or cruel manner.

STATUTES: K.S.A. 2004 Supp. 21-4636(f) subsections (3)-(6); K.S.A. 22-3218, -3219(1), -4508, 60-404
STATE V. JONES
WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED
NO. 91,810 – APRIL 22, 2005

FACTS: Jones convicted of first-degree premeditated murder of victim found in his motel room. On appeal, Jones claimed trial court erred in not instructing jury on lesser-included offense of second-degree intentional murder. He also claimed state failed to prove premeditation beyond a reasonable doubt.

ISSUES: (1) Jury instruction on lesser included charge and (2) sufficiency of evidence of premeditation

HELD: Despite substantial evidence of premeditation, there was also enough evidence upon which jury could have reasonably convicted Jones of second-degree intentional murder. Jones was entitled to instruction on that crime. Reversible error not to have given that instruction. Strangulation cases in which instruction on second-degree intentional murder was not required are distinguished.

Sufficient evidence for rational fact finder to find Jones guilty of first-degree premeditated murder, thus no simple reversal of the conviction is warranted.

STATUTES: K.S.A. 21-3401, -3601(b)(1)

STATE V. ROBERTSON
BUTLER DISTRICT COURT – AFFIRMED
NO. 90,319 – APRIL 22, 2005

FACTS: Robertson convicted of first-degree murder, arson, and aggravated burglary for killing girlfriend’s mother and burning mother’s home. On appeal Robertson claimed: (1) trial court erred in not suppressing Robertson’s statement to police, (2) prosecutorial misconduct in closing argument, (3) insufficient evidence for first-degree premeditated murder, (4) jury should have been instructed on voluntary manslaughter, and (5) cumulative error denied him a fair trial. He also claimed insufficient evidence supported hard 50 sentence, and challenged constitutionality of hard 50 sentence.

ISSUES: (1) Motion to suppress, (2) prosecutorial misconduct, (3) sufficiency of evidence, (4) jury instruction, (5) cumulative error, and (6) hard 50 sentence

HELD: Under totality of circumstances, Robertson’s motion to suppress statements to law enforcement officers was properly denied.

No misconduct in prosecutor’s comments and use of overhead projector to show jury language on premeditation factors. Language used by prosecutor was a correct and often-repeated statement of Kansas’ law, and offered factors a jury may consider in determining whether Pattern Instructions for Kansas definition of “premeditation” was met.

There is ample evidence of premeditation in this case. Evidence did not support instruction on voluntary manslaughter. Even if error could be shown, “skip rule” in State v. Horn, 278 Kan. 24 (2004), would have precluded reversal because jury was instructed on first- and second-degree murder.

No error for cumulative error claim.

No abuse of discretion in district court’s weighing of one aggravating factor against the absence of any persuasive mitigating factors. Hard 50 sentencing statute is constitutional.

STATUTES: K.S.A. 2004 Supp. 21-4635, -4635(d), -4636(f)(3)-(5); K.S.A. 21-3403(a)

STATE V. MANSAW
WYANDOTTE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 90,340 – APRIL 22, 2005


ISSUES: (1) Motion to suppress, (2) sufficiency of evidence, and (3) speedy trial

HELD: Court of Appeals’ opinion is adopted and affirmed. No further discussion of any issue.

STATUTES: K.S.A. 65-4160(a)

STATE V. MANSAW
WYANDOTTE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 90,340 – APRIL 22, 2005

STATE V. MANSAW
WYANDOTTE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 90,340 – APRIL 22, 2005


ISSUES: (1) Motion to suppress, (2) sufficiency of evidence, and (3) speedy trial

HELD: Court of Appeals’ opinion is adopted and affirmed. No further discussion of any issue.

STATUTES: K.S.A. 65-4160(a)
appealed on question reserved, asking for plea to be set aside and case remanded for further proceeding.

ISSUE: Appeal on question reserved
HELD: Record is thin as to whether state actually reserved any questions at time of rulings, and issues sought to be raised are fact-specific and not of statewide importance. Appeal dismissed.

STATUTES: K.S.A. 2003 Supp. 21-4204(a)(4), 22-3602(b)(3); K.S.A. 8-1603, 20-3018(c), 21-3414(a)(2)(A) and (B)

STATE V. WHITE
BUTLER DISTRICT COURT
REVERSED AND REMANDED
NO. 90,661 – APRIL 22, 2005

FACTS: White convicted of first-degree murder shooting of son-in-law. On appeal, White claimed trial court violated White's right to present defense by refusing to allow White's expert to testify, by failing to instruct jury regarding defense of mental disease or defect, and by instructing jury that mental disease or defect was not a defense. White also claimed: K.S.A. 22-3220 unconstitutionally abrogated the insanity defense; prosecutor's misstatements of law in closing argument denied a fair trial; trial court erred in not instructing jury on heat of passion voluntary manslaughter and in instructing jury to consider voluntary manslaughter only if jury did not agree on first-degree murder; and cumulative error denied him a fair trial.

ISSUES: (1) Expert testimony and mental disease or defect defense, (2) constitutionality of K.S.A. 22-3220, (3) prosecutorial misconduct, (4) jury instructions, and (5) cumulative error
HELD: Adequacy of expert witness' proffered testimony regarding mental disease or defect defense in K.S.A. 22-3220 is issue of first impression. Similar issues examined in diminished capacity defense. White's expert would have testified that White had mental disease or defect, that people with this disease or defect can lack ability to premeditate and form intent, and that White's conduct on date of shooting was consistent with someone acting under that disease or defect. This testimony was integral to White's theory of defense and its exclusion denied him a fair trial. Failure to give instruction on mental disease or defect was error. District court's response to jury's question is moot.

No need to decide claim of prosecutorial misconduct, and repetition of prosecutorial error at new trial is highly unlikely.
No instruction on voluntary manslaughter on basis of heat of passion or sudden quarrel is needed unless evidence changes at retrial. Argument concerning confusing and conflicting instructions was rejected in State v. Robertson, 272 Kan. 1143 (2002), and State v. Davis, 275 Kan. 107 (2003).
Cumulative error issue is moot.
STATUTES: K.S.A. 21-8403(a) and (b), 22-3219, -3220, -3601(b)(1), 60-456

Appellate Practice Reminders ...
From the Appellate Court Clerk's Office

Briefs of Amicus Curiae
Before an amicus curiae brief can be filed, an application must be approved by the appropriate appellate court. The application must also be served on all counsel of record. See Rule 6.06. An amicus brief is to be filed no later than 30 calendar days prior to oral argument, though this deadline can be modified by order of the appellate courts.
A party has 20 calendar days to respond to an amicus brief. See Rule 6.06. The response is considered a reply brief and should have a grey cover and be no longer than 15 pages in length.

Transcripts and Docketing
The Kansas Supreme Court revised Rule 2.04 effective May 9, 2005, to take into account the occasional case where a transcript has been requested and completed prior to docketing. The certificate of completion should now be included with docketing if the transcript has been completed. This informs the appellate courts that a transcript was requested and finished prior to docketing; therefore, the appeal can move into the briefing stage.
Go to the Kansas Supreme Court Web site at www.kscourts.org, go to the bottom of the page, and click on “Rule Changes” to see this and other revised Supreme Court rules.
If you have any questions about these or other appellate court rules and practices, call the Clerk's Office and ask to speak with Jason Oldham, the chief deputy appellate clerk. 785-368-7170.
The trial court held that by failing to respond to the petition for distribution of sale proceeds, claiming they had acquired trial court foreclosed the mortgage and ordered the property barred from interest in the property. The property sold at the sale. U.S. Bank objected and requested the proceeds as well.

ISSUES: Are there genuine issues of material fact that preclude summary judgment even though both parties filed motions for summary judgment? Is the workers' compensation system Wheeler's exclusive remedy?

HELD: Court affirmed in part, reversed in part, and remanded with directions.

FACTS: Wheeler was employed by Smoky Hill Education Center and worked as a site coordinator and teacher in the Kansas Starbase program at Wichita's McConnell Air Force Base. Smoky Hill had contracted with the Kansas Air National Guard to employ and supervise the Kansas Starbase state director and employees. Wheeler was seriously injured when opening a truck hanger door while preparing for Starbase academy. Wheeler sued the state and several defendants. The claim against the state was based on negligence and a jury found the state 100 percent at fault. The Court of Appeals reversed the verdict for consideration of whether Wheeler was the state's statutory employee and thus subject to the Workers' Compensation Act, an issue raised by the defendants. Wheeler's exclusive remedy was argued by the defendants.

ISSUES: Is the workers' compensation system Wheeler's exclusive remedy?

HELD: Court affirmed in part, reversed in part, and remanded with directions. The trial court recognized the two ways in which a principal will be liable to the employee of a subcontractor under the workers' compensation system: (1) if the work being performed by the subcontractor's employee is a part of the principal's trade or business; or (2) if the work being per-
performed by the subcontractor’s employee is that which the principal has contracted to do for a third party. The first test is satisfied if the work being performed by the independent contractor and injured employee is necessarily inherent in and an integral part of the principal’s trade or business, or if the work being performed would ordinarily have been done by the employees of the principal. Court determined that as a matter of law, Wheeler had carried her burden to prove that the state was not her statutory employer under the first test. The state failed to come forward with evidence in either its summary judgment motion or its response to Wheeler’s partial summary motion establishing a genuine issue of material fact. Under the second test, court determined there was some indication that the state had contracted to operate the Starbase program, which encompassed those duties ultimately performed by Wheeler. Court held evidence exists that the National Guard Bureau had contracted with the state to operate the Kansas Starbase program and that the state had in turn contracted with Smoky Hill to administer the program and that Wheeler then became injured while carrying out the work of the Starbase program. Court held that evidence raised a genuine issue of material fact as to whether the work performed by Wheeler came within the “contracting out contracted work” provision of workers’ compensation statutes.

STATUTES: K.S.A. 44-501(b), (g), -503(a); K.S.A. 48-201

PUBLIC UTILITIES
BLUESTEM TELEPHONE CO. V.
KANSAS CORPORATION COMM’N
NEMAH KA DISTRICT COURT
AFFIRMED IN PART, VACATED IN PART,
REVERSED IN PART, AND REMANDED
NO. 92,754 – APRIL 8, 2005

FACTS: Rural telecommunication companies challenged Kansas Corporation Commission’s (KCC’s) distribution of Kansas Universal Service Fund (KUSF) payments. District court struck KCC’s per line method, finding K.S.A. 66-2008(e) clearly and unambiguously required all adjustments to KUSF support to be based on embedded costs and revenue requirements of local exchange carriers (LEC). District court also found K.S.A. 66-2009 required cost-based KUSF payments to carriers of last resort (COLR), and found competitively neutral standard of K.S.A. 66-2008(b) was not met by distributions to non-LEC carriers without evaluation of cost/expense information of such companies. KCC and rural telecommunication companies appealed.

ISSUES: (1) K.S.A. 66-2008(e) and embedded costs, (2) carriers of last resort, and (3) audit of nonrural carriers

HELD: District court’s interpretation of K.S.A. 66-2008(e) is affirmed. Statute is not ambiguous. Section (e) applies only to rural LECs that continue to operate on a rate of return basis. KUSF payments to such companies must be based on embedded costs, revenue requirements, investments, and expenses. District court’s striking of KCC’s per-line adjustment of KUSF for rural LECs is upheld.

District court lacked jurisdiction to determine calculation of COLR costs. District court’s interpretation of K.S.A. 66-2009 is vacated.

District court’s requirement that KCC calculate KUSF payments to nonincumbent and nonrate of return carriers based on embedded costs is reversed and issue is remanded to KCC for further proceeding concerning competitive neutrality of KUSF distribution in light of court’s interpretation of K.S.A. 66-2008(e).


RAILROAD CROSSING AND NEGLIGENCE
LIBEL V. UNION PACIFIC RAILROAD
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 92,696 – APRIL 15, 2005

FACTS: Libel suffered person injuries when her automobile ran into a Southwest Rail Industries (Southwest) railroad car at a crossing. Libel brought a negligence action against the Union Pacific Railroad Company (Union Pacific), which maintained the crossing and operated the train, a Union Pacific employee, and later she added Southwest. Southwest did not manufacture the rail car, but it was owned by Southwest and leased to another entity at the time of the collision. Union Pacific operated the train and Southwest did not have any control over the railcar at the time of the collision. Libel claimed Southwest, knowing the attendant risks, negligently failed to appropriately paint or place reflective or lighted markers on its rail car to warn persons such as Libel when it blocked an unguarded rail crossing. Libel settled with Union Pacific and its employee. The district court granted summary judgment to Southwest finding Southwest had no duty to warn.

ISSUES: Did the district court err in granting summary judgment to Southwest? Does federal law pre-empt state law on the issue of Southwest’s duty to warn? Did Southwest have a common law duty to provide visual warning on its rail car?

HELD: Court affirmed. Court held the district court erred in holding that federal law pre-empted state law on the issue of Southwest’s duty to warn. Court stated there is no applicable provision in the Federal Railroad Safety Act regarding reflectors or other devises to make rail cars more visible, and the trial court erred in so finding. Consequently, the district court examined Kansas law to determine if such a cause of action may be maintained at common law. Court stated Kansas common law imposes upon a railroad the duty to maintain safe grade crossings, but Libel already settled with the railroad and its employee. Court stated Libel’s claim involved the owner of the rail car that was a part of the railroad’s train, not the railroad itself. Court stated Libel failed to cite any case that places upon an owner of a rail car the duty to provide reflectors or similar warning devises or any case that characterizes a rail car without reflectors as unreasonably dangerous. Court held the common law is ever-changing, but that Libel’s case did not warrant the recognition of a heretofore undocumented cause of action. Court held district court did not err in granting summary judgment in favor of Southwest based upon the lack of a common law duty to warn in these circumstances.

STATUTES: K.S.A. 2004 Supp. 60-256(c); K.S.A. 77-109

THE JOURNAL OF THE KANSAS BAR ASSOCIATION
STATE V. DYER
CRAWFORD DISTRICT COURT – RESTITUTION ORDER VACATED AND CASE REMANDED WITH DIRECTIONS
NO. 91,447 – APRIL 1, 2005

FACTS: Dyer pled no contest to three charges of felony theft for stealing money from M&M Motors in the amounts of $1,000, $852.63, and $1,000. There was no agreement at the time regarding restitution. M&M claimed Dyer stole more than $250,000 (reduced by the state to $63,213.77 because of statute of limitations), plus attorney fees, accountant auditing fees, related expenses, and $38,000 for loans taken out by M&M to support business during the period of theft. Dyer suggested a restitution order of $64,937.60 would be fair and she would partially satisfy the order by surrendering her retirement plan worth nearly $46,000. The district court sentenced Dyer to three six-month sentences and granted probation conditioned on her paying restitution of $107,961.07. Dyer argued the district court could not order restitution in an amount beyond the total of the value of the damages she pled ($2,852.63).

ISSUE: Did the district court have authority to enter the amount of restitution?

HELD: Court vacated the restitution order and remanded to the district court to enter a restitution order consistent with its opinion. Court stated that a restitution order is predicated upon a causal link between the defendant’s unlawful conduct and the victim’s damages. The trial court may only order restitution for losses or damages caused by the crimes for which the defendant was convicted unless the defendant had agreed to pay for losses not caused directly or indirectly by the defendant’s crimes. Court held that Dyer acquiesced to a restitution order of $64,937.60 and actually proposed this amount as her alternative restitution plan. This is either a tacit agreement for restitution or a proposed alternative restitution plan that cannot now be complained of under the invited error doctrine.

STATUTES: K.S.A. 2004 Supp. 21-4603d, -4610

STATE V. ROBINSON
SALINE DISTRICT COURT – AFFIRMED
NO. 91,875 – APRIL 1, 2005

FACTS: Robinson was at home when police executed a search warrant for his apartment. Officers found a marijuana cigarette and drug paraphernalia. Robinson was advised of his Miranda rights, waived his rights and spoke with officers at the station. Robinson confessed to smoking the marijuana blunt found in the apartment. Robinson was convicted of felony possession of marijuana and misdemeanor possession of drug paraphernalia based on his confession. He was given probation.

ISSUES: Did the introduction of his statements to the police violate the Confrontation Clause? Did the district court error in requiring him to pay attorney fees and costs without considering his financial resources or the burden imposed?

HELD: Court affirmed. Robinson argued that he was unable to defend himself against his own statements without also relinquishing his Fifth Amendment privilege against self-incrimination and this would violate the doctrine of unconstitutional conditions. Court disagreed. Court stated the Confrontation Clause does not apply when a court is dealing with a defendant’s confession. Court held that under the facts of this case, where a defendant waived his right to remain silent with the police and then did not object when his statements were used to prove his crime, and even sought further testimony regarding his own statements during cross-examination of the officer, there was no error in the admission of his confession. Court held the sentencing court must first tax, as costs, the amount requested by State Board of Indigents’ Defense Services (BIDS) and then decide what, if
FORD DISTRICT COURT – REVERSED
NO. 91,985 – APRIL 22, 2005

FACTS: Duhon convicted of attempted possession of a controlled substance and delivery of a controlled substance. Facts included Green's acceptance of package mailed by Duhon and postal workers' alert to police about the package. On appeal Duhon claimed trial court erred in (1) not giving accomplice jury instruction, (2) not granting mistrial when Green commented on Duhon's prior arrest, and (3) not granting Duhon's motion to suppress evidence based on postal authorities' seizure of package without reasonable suspicion of drug contents. Duhon also claimed speedy trial violation under Interstate Agreement on Detainers Act (IADA) and claimed use of prior history to assign criminal history was unconstitutional.

ISSUES: (1) Accomplice testimony, (2) comment on prior arrest, (3) motion to suppress, (4) Interstate Agreement on Detainers Act, and (5) criminal history

HELD: Although Green did not request drug shipment, she became an accomplice when she accepted package knowing its contents. The failure to give accomplice jury instruction prejudiced Duhon and requires a new trial. Conviction is reversed.

Under facts, trial court correctly refused motion for mistrial where Green's statement was unsolicited by the state, jury was admonished, and there were no additional mention of Duhon's prior arrest or convictions.

Under totality of circumstances, there was reasonable suspicion to warrant removal of package from mail stream. Narcotics package profile used by U.S. Postal Service is not a violation of IADA. No error in denying Duhon's motion to suppress.

No speedy trial violation dating from Duhon's notice in compliance with IADA. His earlier communication with Douglas County did not start running the 180 days.

Criminal history claim is mooted by reversal and remand for new trial, and would be otherwise controlled by *State v. Ivory*, 273 Kan. 44 (2002).

STATUTES: K.S.A. 22-4401 et seq.
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