STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

CURT T. SCHNEIDER
Attorney General

April 23, 1975

Opinion No. 75-181

Honorable Fletcher Bell
Insurance Commissioner
State Office Building
Topeka, Kansas

Dear Mr. Bell:

You have asked whether the events described below constitute a violation of any law, specifically the Kansas Insurance Code or Regulations, or the Kansas Criminal Code.

A summary of the situation you have described is as follows:

> The automobile of the complainant who was insured by Farmers Insurance Group was struck by an automobile driven by the decedent who was insured by Farm Bureau Insurance. The only damages in controversy are those done to the vehicle of the complainant. The vehicle in question is a 1964 Chevrolet. The complainant proceeded adjusting the damage to his vehicle through his insurance company, Farmers Group. This process included obtaining two statements from persons in the auto business that the 1964 Chevrolet was worth $2,000.00 and obtaining two estimates from auto repair shops both valuing the damage at approximately $1,850.00. Farmers Group, through its adjustor, agreed to pay the complainant approximately $1,850.00 and allowed him to keep his automobile. Farmers Group then tendered this amount to the complainant and proceeded against the driver of the other vehicle, insured by Farm Bureau. Farm Bureau then sent an adjustor to review the damage and make an estimate. Farm Bureau's adjustor, reviewed the damage

personally and gave an estimate of approximately $850.00 which was later revised upwards to approximately $1,100.00 because of some hidden damage. Farm Bureau then agreed to settle with Farmers Group for $1,100.00. This offer of settlement was accepted by Farmers Group inasmuch as it felt that Farm Bureau was correct and that they had overpaid their insured. The primary reason given for the difference between the two estimates was that the Farmers Group estimates were based on the price of all new parts whereas the Farm Bureau estimate was based on the price of used parts to replace the damaged parts of the ten year old vehicle. The complainant feels that the lower estimate was fraudulently or collusively obtained. The assumed facts are that Farm Bureau's adjustor spoke with the body shop foreman of a local Chevrolet dealer who indicated that the 1964 Chevy in question could be repaired for the amount of the adjustor's estimate. The foreman indicated that he was not interested in doing the work because he did not feel based upon his personal knowledge of the complainant that he could please him. The shop foreman did not see the vehicle but accepted the estimate of the adjustor as he had often done in the past. The other repair shops in the area were contacted by the adjustor. These businesses indicated that they would accept this particular adjustor's estimate without examining the vehicle.

As opposed to examining all of the statutes and regulations which could conceivably be in issue, we choose to scrutinize the above described activity for the existence of fraud. The determination of whether or not the events in question are lawful turns primarily on the presence or lack of fraud. The rule that fraud is never presumed and must be established is so well settled that citations are superfluous. This rule applies, a fortiori, where the persons involved are not in a confidential relationship, Reeder v. Guaranteed Foods, Inc., 194 Kan. 386, 399 P.2d 822 (1965). Fraud is usually lacking in representations of value, or of the price paid for property by the vendor where there is no confidential relation between the parties, and the property is subject to full inspection by the vendor, Elerick v. Reid, 54 Kan. 579, 38 Pac. 814 (1895). A recent Kansas case, Fox v. Wilson, 211 Kan. 563, 507 P.2d 252 (1973), contains a good discussion of the evidence and burden of proof required in actions for fraud. It is there held that person claiming fraud must prove it by a preponderance

of the evidence and the evidence should be clear and convincing. Proof by preponderance refers to the quantum of evidence whereas clear and convicing refers to the quality of the evidence.

Application of these authorities to the assumed facts of this particular situation discloses that no confidential relationship has been established between the parties. The representation which the complainant contends is fraudulent is a representation as to the value of parts and labor needed to repair a damaged automobile. Here the damage was open to the inspection of all parties who were dealing at arms length. The general rule in this situation is that there is no actionable misrepresentation for statements as to value.

Based upon this reasoning we cannot conclude as a matter of law that the representation was fraudulent. The events described above do not merely as a matter of law reflect a violation of any law contained in the Kansas Insurance Code or the Kansas Insurance Regulations or the Kansas Criminal Code.

Very truly yours,

Curt Schneider

CURT T. SCHNEIDER
Attorney General

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