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August 4, 1982

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ATTORNEY GENERAL OPINION NO. 82-165

Howard Schwartz
Judicial Administrator
Kansas Judicial Center
301 West Tenth
Topeka, Kansas 66612

Re: Automobiles and Other Vehicles -- Arrests, Citations, Procedures and Penalties -- Appearance Bonds; Use of Credit Cards

Synopsis: Chapter 44 of the Laws of 1980 amended K.S.A. 8-2107 to allow the use of a credit card to post bond on certain enumerated offenses. Such cards, issued by banks, allow the violator to deposit a draft with the arresting officer, which draft is returned upon the violator's appearance for further proceedings before the court, or, alternatively, is forfeited upon nonappearance. The withholding of a predetermined amount by the issuer of the card from the amount posted as bond is not a violation of the Truth-in-Lending Act, 15 U.S.C. §§1601 et seq., in that there is no credit transaction which is subject thereto. Neither is there a violation of anti-trust laws by virtue of two or more banks entering into agreements to purchase such drafts at such a discount, provided such agreements are drafted by a state agency and then presented to such banks for their signature. Cited herein: K.S.A. 1981 Supp. 8-2107, as amended by L. 1982, ch. 47, K.S.A. 16a-3-206, 16a-6-117, K.S.A. 50-101, 15 U.S.C. §1, 15 U.S.C. §1637, 12 C.F.R. 226.2, 12 C.F.R. 226.6, 12 C.F.R. 226.7.

* * *

Dear Mr. Schwartz:

As Judicial Administrator for Kansas, you request our opinion on two questions arising from the provisions of K.S.A. 1981

Supp. 8-2107 (as amended by L. 1982, ch. 47, §1). That statute provides, among other things, that persons given citations for certain traffic offenses may elect to post bond in lieu of surrendering their driver's license, as security for their appearance at a later date for a hearing. You raise two questions concerning potential violations of truth-in-lending or anti-trust laws due to a feature of the statute that allows such bonds to be posted by means of a credit card issued through a bank.

Although K.S.A. 1981 Supp. 8-2107 was amended by the 1982 Legislature (L. 1982, ch. 47), the amendment was minor and leaves intact the particular provisions which are the subject of your inquiry. At subsection (a), the statute provides that whenever any person shall be halted by a member of the state highway patrol or any other police officer under any of the violations set out at subsection (e), and is not given an immediate hearing, the officer may require the person to surrender his or her driver's license (in exchange for a receipt). As an alternative, subsection (c) provides:

> "In lieu of depositing a valid driver's license with the halting officer as provided in subsection (a), the person halted may elect to give bond in the amount specified in subsection (e) of this section for the offense for which the person was halted, and in the event such person does not have a valid driver's license, such person shall be required to give such bond. Such bond shall be subject to forfeiture if said person halted does not appear at the court and at the time specified in the written notice provided for in K.S.A. 1980 Supp. 8-2106. Such bond may be a cash bond, a bank card draft from any valid and unexpired credit card approved by the division or a guaranteed arrest bond certificate issued by either (1) a surety company authorized to transact such business in this state or (2) an automobile club authorized to transact business in this state by the commissioner of insurance. If any of the approved bank card issuers redeem the bank card draft at a discounted rate, such discount shall be charged against the amount designated as the fine for the offense. In the event such bond is not forfeited, the amount of the bond less the discount rate shall be reimbursed to the person providing the bond by the use of a bank card draft." (Emphasis added.)

Bank credit cards have been subject to the federal Truth-in-Lending Act (15 U.S.C. §§1601 et seq.) since the Act's enactment in 1969. Regulation Z, promulgated by the Federal Reserve Board to implement the Act, treats such cards as "open-end credit plans," and defines them at 12 C.F.R. §226.2(x), as follows:

> "'Open-end credit' means consumer credit extended on an account pursuant to a plan under which (1) the creditor may permit the customer to make purchases or obtain loans, from time to time, directly from the creditor or indirectly by use of a credit card, check, or other device, as the plan may provide; (2) the customer has the privilege of paying the balance in full or in instalments; and (3) a finance charge may be computed by the creditor from time to time on an outstanding unpaid balance."

Under Truth-in-Lending laws, disclosures are required at two stages. (15 U.S.C. §1637(a) and (b).) An initial disclosure must be made prior to the first transaction on the bank card account that details the general terms of the agreement. Included are such things as conditions under which a finance charge may be imposed, the method of determining the balance upon which a finance charge will be imposed, the method of determining the amount of finance charge, and identification of other charges that may be imposed as part of the plan, together with their method of computation. (12 C.F.R. §226.6.) The second stage involves disclosures in each periodic statement which include such terms as the outstanding balance in the account at the beginning of the statement period, specified information regarding each extension of credit during the period, the amount of any finance charge added to the account, and an identification of the amounts credited to the account during the period. (12 C.F.R. §226.7). It should be noted that the above are also the law of Kansas, by virtue of K.S.A. 16a-3-206 and 16a-6-117.

However, simply because a bank card is used to post an appearance bond, it does not necessarily follow that there is a transaction which is subject to the Truth-in-Lending Act. The standard for determining when the Truth-in-Lending Act applies was set out in Tom Benson Chevway Rental & Leasing, Inc. v. Allen, 571 S.W.2d 346 (Tex.Civ.App. 1978), cert. den. 442 U.S. 930. "To invoke the Truth-in-Lending Act and Regulation Z, four conditions must be satisfied:

> "'. . . First, there must [be] a "creditor" -- one who regularly extends or arranges for

> the granting of consumer credit. Second, the debtor must be a natural person. Third, the transaction must be a "consumer credit transaction" consisting of three component characteristics: (1) it must be a credit transaction; (2) it must require the payment of a finance charge or be payable in more than four installments; and, (3) it must be conceived for a consumer or agricultural purpose. Finally, the credit extension must not come within the statutory exemptions . . . ." Boyd, "Consumer Law," 8 Tex.Tech.L.Rev. 1077 (1977).'"

In our opinion, it is doubtful whether the issuance of a traffic citation and the subsequent posting of an appearance bond could be termed a consumer credit transaction within the scope of the Truth-in-Lending Act. Under the definition of "consumer credit" found at 12 C.F.R. §226.2(p), the credit must be extended in a situation where "money, property or service" is the subject of the transaction, categories which do not include the posting of a bond which is either returned to the violator or applied to his fine in the event of forfeiture. Neither the State nor the highway patrol or a police department can be deemed a seller, in that none is engaged in any form of sales activity within the ordinary course of business. Accordingly, in our opinion, the transaction contemplated by K.S.A. 1981 Supp. 8-2107(c) between a violator and a law enforcement agency is not within the scope of the Truth-in-Lending laws at either the state or federal level. We further note that any charge made to the violator by the bank card company would already be covered by disclosures made initially when the account was opened.

For your second inquiry, you raise the concern that banks which enter into a collective agreement, or which sign identical individual agreements, to service appearance bonds posted with credit cards may violate federal or state anti-trust laws. Specifically, 15 U.S.C. §1 provides in part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

K.S.A. 50-101, in declaring trusts to be against public policy, states:

> "A trust is a combination of capital, skill, or acts, by two or more persons, firms corporations, or associations of persons or either two or more of them, for either, any or all of the following purposes:

> "First. To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.
>
> "Second. To increase or reduce the price of merchandise, produce or commodities, or to control the cost or rates of insurance.
>
> "Third. To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.
>
> "Fourth. To fix any standard or figure, whereby its price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state." (Emphasis added.)

In our opinion, any problem of an antitrust nature could be avoided here by the imposition of a uniform agreement by an agency of the state, e.g., your office or the state banking board. It has been previously held that antitrust laws are not violated by acts which are authorized and regulated by state statute. North Little Rock Transportation Co. v. Casual Reciprocal Exchange, 85 F.Supp. 961, aff'd 181 F.2d 174 (D. Ark. 1949). Where the restraint is the result of valid governmental action, no violation can be found since §1 of Title 15 and K.S.A. 50-101 forbid only those trade restraints and monopolizations that are created, or attempted, by acts of individuals or combinations of individuals or corporations. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) rehearing denied 365 U.S. 875.

Therefore, if a state agency were to dictate the rate at which the banks will discount the credit extended for the appearance bond transaction, or were to draw up the agreement to which banks could become signatories, any resulting restraint would be the result of valid governmental action. See U.S. v. Southern Motor Carriers Rate Conference, Inc., 672 F.2d 469 (13th Civ. 1982) and Gas Light Company of Columbus v. Georgia Power Company, 313 F.Supp. (E.D. Georgia 1970). In the latter case, the district court held that the actions of a state-wide electric utility and a public utility holding company which allegedly constituted a conspiracy to eliminate gas as a competitive energy source, were not subject to anti-trust statutes, where the practices were the result of an order of the state public service commission,

pursuant to a comprehensive statutory scheme, and were subject to continuing regulation.

In conclusion, Chapter 44 of the Laws of 1980 amended K.S.A. 8-2107 to allow the use of a credit card to post bond on certain enumerated offenses. Such cards, issued by banks, allow the violator to deposit a draft with the arresting officer, which draft is returned upon the violator's appearance for further proceedings before the court, or, alternatively, is forfeited upon non-appearance. The withholding of a predetermined amount by the issuer of the card from the amount posted as bond is not a violation of the Truth-in-Lending Act, 15 U.S.C. §§1601 et seq., in that there is no credit transaction which is subject thereto. Neither is there a violation of anti-trust laws by virtue of two or more banks entering into agreements to purchase such drafts at such a discount, provided such agreements are drafted by a state agency and then presented to such banks for their signature.

Very truly yours,

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