



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 86- 25

The Honorable Joe Knopp  
State Representative, 67th District  
Capitol Building, 175-W  
Topeka, Kansas 66612

Re: Monopolies and Unfair Trade -- Consumer Protection  
-- Disclaimer or Limitation of Warranties

Uniform Commercial Code -- Sales -- Implied  
Warranty of Merchantability

Synopsis: A licensed dealer in motor vehicles may also be licensed to act as a broker for such vehicles, and solicit sales for vehicles delivered to him on consignment. Such a broker is accordingly a supplier under the Kansas Consumer Protection Act (KCPA), K.S.A. 50-623 et seq., and any sale which he solicits is subject to the act. An implied warranty of merchantability attaches to the sale of any good when the seller is a merchant in goods of that kind, pursuant to the uniform Commercial Code, K.S.A. 84-2-104, 84-2-314. If the sale is also a consumer transaction under the KCPA, such implied warranty cannot be disclaimed. Therefore, the implied warranty of merchantability may not be disclaimed by a broker of motor vehicles, and any label or sticker which is required to be displayed by the Federal Trade Commission must reflect the existence of the warranty, and may not identify the transaction as an "As Is" sale. Cited herein: K.S.A. 50-623;

50-624; 50-627; 50-639; 84-2-104; 84-2-314;  
84-2-316; L. 1976, ch. 236, §1; 16 C.F.R. §455.

\* \* \*

Dear Representative Knopp:

You have requested our opinion concerning the scope of the Kansas Consumer Protection Act, K.S.A. 50-623 et seq., and the Uniform Commercial Code provisions regarding the implied warranty of merchantability, K.S.A. 84-2-314. Specifically, you have inquired whether a sale of a used vehicle through a licensed broker constitutes a consumer transaction, and whether the broker may display a statement to buyers in the vehicle with the notation "As Is -- No Warranties."

A consumer transaction is defined by the Kansas Consumer Protection Act (hereinafter KCPA), which states in relevant part at K.S.A. 50-624(c):

"'Consumer transaction' means a sale, lease, assignment or other disposition for value of property or services within this state . . . to a consumer or a solicitation by a supplier with respect to any of these dispositions." (Emphasis added.)

The scope of this broad definition seems self-evident. Whenever property or services are conveyed for value to a consumer, or when a supplier solicits patronage by a consumer, a consumer transaction has occurred. As stated in the 1973 Kansas Comment, "The only requirement is that the transaction involve a 'consumer.'" It is apparent that the legislature meant to include two types of transactions in this definition. The first is a disposition for value of property or services, and the second is a solicitation by a supplier to a consumer for such dispositions.

Within the first category, a consumer transaction occurs between the owner of a vehicle and the broker. The service rendered involves the marketing of the automobile, or its exposure to the buying public. Value is conferred on the broker in the commission by which he or she is compensated for the service.

Under the second defined category (i.e. solicitations), a consumer transaction occurs between the broker and the buyer if the broker is a "supplier" under the KCPA. K.S.A. 50-624(i) states:

"Supplier means a manufacturer, distributor, dealer, seller, lessor, assignee, or other person who, in the ordinary course of business, solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer." (Emphasis added.)

The term supplier is not limited in the ordinary sense of the word, as evidenced by this broad statutory definition. The legislative intent is clear that the coverage of the KCPA goes beyond sales. An indication of this was provided in 1976, when K.S.A. 50-623 was amended by striking the word "sales" to read:

"to protect consumers from suppliers who commit deceptive and unconscionable ~~sales~~ practices; . . . ." L. 1976, Ch. 236, §1.

It is our opinion that the transaction between a buyer and a broker falls within the solicitation category of the definition of consumer transaction.

This result is consistent with the express legislative purpose of the KCPA, which is enunciated in K.S.A. 50-623:

"This act shall be construed liberally to promote the following policies: . . . (b) to protect consumers from suppliers who commit deceptive and unconscionable practices; (c) to protect consumers from unbargained for warranty disclaimers; . . . ."

When a consumer enters onto a used car lot, he relies upon the knowledge and expertise of the dealer in advising him as to the relative merits of the vehicles he examines. The legal status of a particular vehicle (i.e. owned by the dealer or brokered by the dealer on behalf of another) may not be

disclosed to a consumer, and probably is not of particular importance even if disclosed. Rather, the consumer's decision whether to enter into a transaction regarding that particular vehicle will be influenced by the solicitations he receives from the dealer, and it is consistent with the KCPA to include dealers who act as brokers within the coverage of the law.

Your second inquiry concerns the potential liability of a dealer-broker for warranty disclaimers which may be made on a vehicle which he or she sells on a consignment basis. You also express concerns that consumers may be misled into thinking they have implied warranty rights when in fact such rights may not apply. Under the so-called Used Car Rule of the Federal Trade Commission (16 C.F.R. §455), sales of used cars must be accompanied by a window sticker which informs the buyer that the vehicle is either sold "As Is," with implied warranties only, or with express warranties. While the FTC has interpreted the Used Car Rule to apply to dealers who sell cars on consignment, you request our opinion as to the applicability of the KCPA and a section of the Uniform Commercial Code (K.S.A. 84-2-314) to such sales as well.

The Uniform Commercial Code (UCC) defines a merchant as follows:

"Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill. (Emphasis added.) K.S.A. 84-2-104.

The implied warranty of merchantability (K.S.A. 84-2-314) attaches to goods sold by a seller who is a merchant regarding goods of that kind. While K.S.A. 84-2-316 allows the warranty to be excluded, such exclusions are void for consumer transactions. K.S.A. 50-639.

In our opinion, a dealer-broker in used cars falls within the definition of merchant underscored in the statute. Our opinion in this regard is consistent with the holding in Powers v. Coffeyville Livestock Sales Co., Inc., 665 F.2d 311 (10th Cir. 1981). In Powell it was held that since the auctioneer regularly sold merchandise of a particular kind, he "[held himself] out as having the knowledge and skill to conduct such sales." 665 F.2d at 312. As he was thus a merchant, though generally acting as an agent for another, using traditional agency principles an auctioneer could be liable for breach of implied warranty of merchantability.

By analogy, a broker is similarly situated. The dealer-broker regularly selling used vehicles holds himself out as having knowledge and skill to conduct sales of automobiles, i.e. a merchant. He may therefore be liable for breach of implied warranties, under the UCC, unless such are disclaimed. However, as noted above, such disclaimers are prohibited in the KCPA for consumer transactions.

As noted previously, brokers are "suppliers" under the KCPA. The act makes two references to suppliers disclaiming implied warranties. K.S.A. 50-627 provides in part:

"(a) No supplier shall engage in any unconscionable act or practice in connection with a consumer transaction

. . . .

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

. . . .

"(7) that the supplier excluded, modified or otherwise attempted to limit either the implied warranties of merchantability and fitness for a particular purpose or any remedy provided by law for a breach of those warranties." (Emphasis added.)

K.S.A. 50-639 states in part:

"(a) Notwithstanding any other provisions of law, with respect to property which is the subject of . . . a consumer transaction in this state, no supplier shall (1) Exclude, modify or otherwise attempt to limit the implied warranties of merchantability and fitness for a particular purpose . . . ." (Emphasis added.)

An exception to this rule is provided in subsection (c), which states:

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

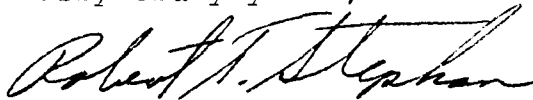
This exception, as noted in the 1973 Kansas Comment, is a realistic limitation on a supplier's liability. However, the supplier is given the burden of showing knowledge by the consumer, with the exception intended for sales where the defects are the basis for discounting the price of the item. It is not intended to be a license for "as is" sales in all circumstances. In our opinion, brokers may not sell vehicles "as is" as a general practice.

We perceive strong policy reasons supporting this result. The public protection afforded by the KCPA would be seriously eroded by allowing this exception to its applicability. This point is best illustrated by a hypothetical. Assume that a dealer-broker (DB) sells a new vehicle to a customer (C), and that C has an older car he wishes to use as a trade-in for the purchase of the new vehicle. If DB takes title to the trade-in and puts the vehicle on his lot, he will obviously be liable for the implied warranties under the KCPA should it be sold to another consumer. If, however, he were able to put

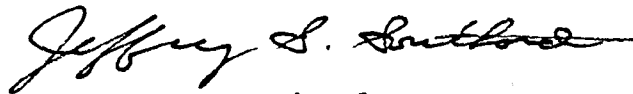
that trade-in on his lot "as is" in his capacity as a broker, he could easily defeat the KCPA by not taking title to the trade-in. Instead, C would retain title to the car, and DB, as a broker, could still put the car on his lot. A purchaser of the vehicle would be unaware of DB's liabilities. While we do not infer or suggest that this practice is used by broker-dealers, the illustration is helpful to show the need to keep the scope and coverage of the KCPA intact.

In conclusion, a licensed dealer in motor vehicles may also be licensed to act as a broker for such vehicles, and solicit sales for vehicles delivered to him on consignment. Such a broker is accordingly a supplier under the Kansas Consumer Protection Act (KCPA), K.S.A. 50-623 et seq., and any sale which he solicits is subject to the act. An implied warranty of merchantability attaches to the sale of any good when the seller is a merchant in goods of that kind, pursuant to the uniform Commercial Code, K.S.A. 84-2-104, 84-2-314. If the sale is also a consumer transaction under the KCPA, such implied warranty cannot be disclaimed. Therefore, the implied warranty of merchantability may not be disclaimed by a broker of motor vehicles, and any label or sticker which is required to be displayed by the Federal Trade Commission must reflect the existence of the warranty, and may not identify the transaction as an "As Is" sale.

Very truly yours,



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