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ATTORNEY GENERAL OPINION NO. 87- 126

The Honorable Vernon L. Williams  
State Representative, Ninety-First District  
2402 Coolidge Avenue  
Wichita, Kansas 67204

Re: Automobiles and Other Vehicles--Licensure of  
Vehicle Dealers and Manufacturers--Brokers

Synopsis: 1987 Senate Bill No. 115, if passed into law, would prohibit vehicle brokers from conducting business within the State of Kansas. We do not believe that this proposed prohibition is reasonable under the circumstances in that it is so oppressive that it prohibits the conduct of a lawful business for stated purposes that may be achievable by less oppressive means. For this reason we believe 1987 Senate Bill No. 115 in its current form would offend the guarantees of equal protection found in the United States and Kansas Constitutions. If, however, the legislature could show a substantial relationship between the prohibition and the promotion of public health, safety and welfare, and that the prohibition is necessary to achieve such goal, 1987 Senate Bill No. 115 may be able to withstand constitutional challenge. Cited herein: 1987 Senate Bill No. 115; K.S.A. 8-2401; K.S.A. 8-2402; Kan. Const., Bill of Rights, §§1, 2, U.S. Const., Fourteenth Amendment.

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Dear Representative Williams:

As State Representative for the Ninety-First District, you request our opinion regarding the constitutionality of 1987 Senate Bill No. 115. Specifically, you inquire as to whether a law prohibiting automobile brokers from conducting business in the State of Kansas can survive constitutional scrutiny.

1987 Senate Bill No. 115 amends the Vehicle Dealers' and Manufacturers' Licensing Act, K.S.A. 8-2401 et seq. The term "broker" is defined in Section 1(ff) of the bill as follows:

"Broker' means any person who, for commission, money or other thing of value, is engaged in the business of: (1) Selling or buying vehicles ~~or mobile homes~~ for other persons as an agent, middleman or negotiator; or (2) bringing buyers and sellers of vehicles ~~or mobile homes~~ together, but such term shall not include any person engaged in a business in which the acts described in this subsection are only incidentally performed. . . ." (Emphasis added.)

Section 2(q) of 1987 Senate Bill No. 115 provides:

"From and after the effective date of this act, no person shall act as a broker in the sale of any new or used vehicle."

Thus, section 2(q) would have the effect of outlawing automobile brokers in the State of Kansas if 1987 Senate Bill No. 115 is passed into law.

The State, through the exercise of its police power, may enact laws to promote the health and welfare of its citizens. However, a law which is unreasonable and arbitrary is not a proper and valid exercise of that police power, and may violate constitutional equal protection guarantees.

The Fourteenth Amendment to the federal constitution prevents the states of the union from denying to any person within their jurisdiction the equal protection of the laws. The Kansas Supreme Court has held that the provisions of the

Kansas Constitution declaring that all men are possessed of equal and inalienable natural rights and that all free governments are instituted for the equal protection and benefit of the people are the Kansas counterparts to the equal protection guarantees found in the Fourteenth Amendment. Kan. Const., Bill of Rights, §§1, 2; Stephens v. Snyder Clinic Association, 230 Kan. 115 (1981).

The basic principles which must be applied in determining the constitutionality of a statute are set forth in City of Baxter Springs v. Bryant, 226 Kan. 383, 385-86 (1979);

"The constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution. [Citations omitted.]

"In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it and if there is any reasonable way to construe the statute as constitutionally valid, that should be done. [Citations omitted.]

"Statutes are not stricken down unless the infringement of the superior law is clear beyond substantial doubt. [Citations omitted.]

. . . .

"The propriety, wisdom, necessity and expedience of legislation are exclusively matters of legislative determination and courts will not invalidate laws, otherwise constitutional, because the members of the court do not consider the statute in the public interest of the state, since, necessarily, what the views of members of the court may be upon the subject is wholly immaterial and it is not the province nor the right of courts to determine the wisdom of legislation touching the public interest as that is a legislative function with which courts cannot interfere. [Citations omitted.]"

State ex rel. Schneider v. Kennedy,  
225 Kan. 13, 20-21 (1978)."

The fixed rule and basic standard by which the validity of all exercises of the police power is tested is set forth in State v. Pendarvis, 181 Kan. 560, 566 (1957), in which the court states,

"The police power of the state extends only to such measures as are reasonable and . . . all police regulation must be reasonable under all circumstances."  
See also City of Junction City v. Mevis, 226 Kan. 526, 535, 535 (1979).

In Delight Wholesale Co. v. City of Overland Park, 203 Kan. 99, Syl. ¶4 (1969), the limitation on the police power was stated as follows:

"While the police power is wide in its scope and gives a governmental body broad power to enact laws to promote the health, morals, security and welfare of the people, and further, a large discretion is vested in it to determine for itself what is deleterious to health, morals or is inimical to public welfare, it cannot under the guise of the police power enact unreasonable and oppressive legislation or that which is in violation of the fundamental law." See also Gilbert v. Mathews, 186 Kan. 672, 677 (1960); Little v. Smith, 124 Kan. 237 (1927).

Later, in Delight Wholesale Co. v. City of Prairie Village, 208 Kan. 246, Syl. ¶2 (1971), the Kansas Supreme Court said,

"The police power is wide in scope and gives the governmental body broad powers to enact laws to promote the health, morals, security, and welfare of the people. Broad discretion is vested in the governing body to determine for itself what is deleterious to the health or morals, or which is inimical to public welfare. However, the governing body does not possess plenary power to pass

legislation that is arbitrary, oppressive, and capricious, and which bears no substantial relationship to the public safety and welfare."

In the above mentioned Delight Wholesale Co. cases, city ordinances which had the effect of prohibiting a legitimate business operation were struck down as being unreasonable and arbitrary. The prohibitive ordinances were not proper and valid exercises of police power and were held to violate the 14th Amendment to the Constitution of the United States and Section 1 of the Bill of Rights of the Constitution of the State of Kansas.

The brokering of vehicles, specifically automobiles, has been a legitimate business in Kansas for several years. However, the right of doing business is not absolute and may be regulated or withheld, if necessary, for public safety and welfare. In the present case it is necessary to determine whether the prohibition of a legitimate business, automobile brokering, is reasonably necessary to protect the general welfare of the citizens of Kansas.

The proponents of 1987 Senate Bill No. 115 feel that the prohibition on automobile brokers is necessary to combat fraud and to protect consumers from such things as odometer tampering. These proponents also feel that possible sales tax revenue could be lost due to the brokering of automobiles. See Attachment #1 of the March 30, 1987 House Transportation Committee minutes. These concerns, however, do not appear to be substantiated as there is no documented evidence contained in the legislative history of 1987 Senate Bill No. 115 which supports these conclusions.

As mentioned earlier, the brokering of automobiles has been, and is currently, a legitimate business. Brokers are licensed and regulated pursuant to the Vehicle Dealers' and Manufacturers' Licensing Act, K.S.A. 8-2401 et seq. Within K.S.A. 8-2402 is a declaration of public policy pertaining to this Act. K.S.A. 8-2402 provides:

"It is hereby declared to be the public policy of this state to provide for fair and impartial regulation of those persons engaged in manufacturing, distributing or selling of vehicles or mobile homes. The provisions of this act which are applicable to such activities shall be

administered in such a manner as will continue to promote fair dealing and honesty in the vehicle industry or the mobile home industry and among those engaged therein without unfair or unreasonable discrimination or undue preference or advantage. It is further declared to be the policy of this state to protect the public interest in the purchase and trade of vehicles and mobile homes, so as to insure protection against irresponsible vendors and dishonest or fraudulent sales practices." (Emphasis added.)

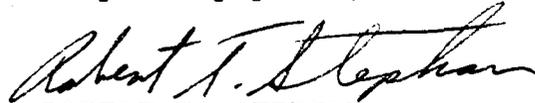
This declaration of public policy seeks to put all parties concerned on equal footing. A plain reading of K.S.A. 8-2402 would seem to weigh against a total ban or prohibition which is imposed only on one particular market participant, such as the automobile brokers. This type of prohibition would be compatible with K.S.A. 8-2402 only if such a ban is truly to protect consumers against "irresponsible vendors and dishonest or fraudulent sales practices." Based on the available evidence, it does not appear that automobile brokers present any more of a threat to consumers than do any other persons or entities who facilitate the sale of automobiles. This type of total prohibition of a legitimate business would seem to be an arbitrary exercise of the State's police power since it clearly discriminates against one market participant while aiding another, and since the adoption of further regulatory statutes could satisfy the consumer protection goals of the legislature. Furthermore, in the case of Fairmont Creamery Co. v. Minnesota, 274 U.S. 1, 47 S.Ct. 506, 71 L.Ed. 893, 897 (1926), it was said:

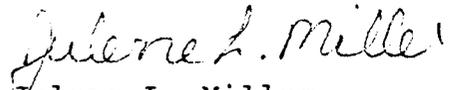
"It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught."

In conclusion, it is our opinion that 1987 Senate Bill No. 115, Section 2(q) would be an invalid exercise of the State's police power because, based on the available information, the prohibition on automobile brokers does not appear to be reasonably related to the protection of the public welfare. Rather, the provision is arbitrary and unreasonable in that it

is so oppressive that it prohibits the conduct of a lawful business, i.e. automobile brokers, for stated purposes that may be achievable by less oppressive means. Thus, it is our opinion that 1987 Senate Bill No. 115 in its current form violates the Constitution of the United States and the State of Kansas.

Very truly yours,

  
ROBERT T. STEPHAN  
Attorney General of Kansas

  
Julene L. Miller  
Deputy Attorney General

RTS:JLM:jm