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ATTORNEY GENERAL OPINION NO. 90- 22

The Honorable Vernon L. Williams
State Representative, Ninety-First District
State Capitol, Room 431-N
Topeka, Kansas 66612

Re: Automobiles and Other Vehicles--Licensure of Vehicle Sales and Manufacture--Brokers

Synopsis: 1990 Senate Bill No. 486, in prohibiting the practice of automobile brokering, is invalid in that it places arbitrary and unreasonable limitations on the conduct of a legitimate business. Cited herein: K.S.A. 1989 Supp. 8-2404; 1990 Senate Bill No. 486; L. 1955, ch. 172.

* * *

Dear Representative Williams:

You request our opinion regarding the validity of 1990 Senate Bill No. 486 as it attempts to prohibit the business of brokering new and used vehicles in the state of Kansas.

It is well settled that the legislature may, pursuant to the State's police power, enact statutes to protect the public health, safety and morals, preserve and promote the public welfare, and even prohibit unequal and unfair competition. State v. Consumers Warehouse Market, 183 Kan. 502 (1958). However, "[w]hile the police power is wide in its scope and gives the legislature broad power to enact laws to promote the health, morals, security and welfare of the people, and further, that 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 police power enact unequal, unreasonable and oppressive legislation or that which is in violation of the fundamental law." Gilbert v. Mathews, 186 Kan. 672, 677 (1960). In Gilbert, the Kansas Supreme Court was called upon to determine whether then-existing sections of the "new goods public auction law," L. 1955, ch. 172, constituted a valid exercise of police power in promoting the public health, safety and welfare of the people of the state, or whether instead these provisions were unreasonable, arbitrary, discriminatory or confiscatory and imposed solely for the purpose of limiting or eliminating competition for the benefit of persons engaged in selling goods other than at auction. The court began its discussion with the following statements:

> "While there are no Kansas cases specifically in point, it is universally recognized that the business of an auctioneer and of selling merchandise at auction is a legitimate business which cannot be prohibited directly or indirectly. However, the right to sell at auction is not absolute but may be withheld unless there is compliance with reasonable regulations. The business is affected with a public interest and is subject to reasonable legislative restriction and regulation to prevent abuses and frauds. Requirements for the licensing of auctioneers and auctions as well as other regulations which are reasonable and not wholly arbitrary have long been upheld. The right to regulate and license the business does not, however, include the right to prohibit it directly or, in effect, to adopt unreasonable and unfair regulations, or such regulations as would be oppressive or highly injurious to the business." 186 Kan. at 676.

The court recognized the potential problems associated with "here today and gone tomorrow" merchants, and that "[t]he legislature may well have found there are greater opportunities for deception and fraud in such sales than in those from established places of business [and] that those who conduct such auctions require more policing and are a greater burden to the community since they assume no responsibility

for its welfare." 186 Kan. at 680. Nevertheless, the court held the subject provisions invalid in that they placed "arbitrary and unreasonable limitations, regulations and impositions on the conduct of a lawful business, and [were] designed to be so oppressive and unreasonable that [they prohibited] the conduct of such lawful business." 186 Kan. at 686. The court stated that "[a]buses may, and probably do, grow up in connection with the auction business and are adequate reason for regulation but this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way." 186 Kan. at 689.

We believe the Gilbert case is on all fours with the issue here presented. 1990 Senate Bill No. 486 is offered as consumer protection/dealer protection legislation, but rather than attempting to further regulate brokers of new and used vehicles, it totally outlaws the conduct of that business except when "performed or authorized within the requirements or scope of any other category of license. . . ." S.B. 486, §§ 1 (ff), 3(v). Proponents of the bill contend that it is needed to eliminate unfair competition, to maintain the current automobile distribution system, and to protect consumers from fly-by-night sellers who are not responsible for the product sold. Minutes of the Senate Committee on Transportation and Utilities, Jan. 25, 1990, and attachments. Again, we do not believe these purposes justify completely outlawing an otherwise legitimate business concern. We think it interesting to note the United States Supreme Court in 1966 found concerted efforts by General Motors Corporation and its franchised dealers in Los Angeles, California to exclude vehicle brokers from the market in that area were unlawful restraints of trade under the Sherman Antitrust Act. United States v. General Motors Corporation, 384 U.S. 127, 16 L.Ed.2d 415, 86 S.Ct. 1321 (1966). Staff of the Federal Trade Commission (FTC) have taken the position that the prohibition of brokering would, be of more harm than benefit to consumers. Comments of the Staff of the Federal Trade Commission on Prohibition of Automobile Brokering, House Bill 4390 (S-6), Before the Senate Committee on Commerce and Technology, General Assembly of the State of Michigan, September 29, 1988; Opinion letter dated March 21, 1989 from staff of the FTC to the Honorable Aldo A. DeAngelis, Senate Assistant Minority Leader, State of Illinois. Finally, we note the following: brokers are currently required to be licensed and to maintain an established place of business which cannot also be a residence; K.S.A. 1989 Supp. 8-2404(a), (k); the director of vehicles may when issuing a new or renewal license require information relating to a broker's

solvency "or other pertinent matter commensurate with the safeguarding of the public interest" to use in determining the fitness of the broker to engage in business, K.S.A. 1989 Supp. 8-2404(c); applicants for brokers' licenses must furnish and maintain a bond in the amount of $15,000 "as indemnity for any loss sustained by any person by reason of any act by the licensee in violation of any act which constitutes grounds for suspension or revocation of the license", K.S.A. 1989 Supp. 8-2404(i); brokers are considered suppliers under the Kansas consumer protection act and thus are subject to that act's provisions, Attorney General Opinion No. 86-25; manufacturers' warranties generally must be honored by franchised dealers of the manufacturer regardless of where or from whom the vehicle was purchased. Other potential problems associated with the business of brokering vehicles, such as coverage by the lemon law and the ability to trace brokered vehicles in the event of a safety recall, may and should, in our opinion, be achieved by less drastic measures.

In conclusion, 1990 Senate Bill No. 486 is invalid in that it places arbitrary and unreasonable limitations on the conduct of a legitimate business.

Very truly yours,

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