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April 25, 2012

ATTORNEY GENERAL OPINION NO. 2012- 11

The Honorable Thomas C. Owens
State Senator, Eighth District
State Capitol, Rm. 559-S
Topeka, Kansas 66612

RE: Procedure, Civil—Rules of Civil Procedure—Parties; Capacity; Real Party
in Interest

Procedure, Civil—Exemptions—Wage Garnishment; Assignment of
Account

Synopsis: The Legislature has distinguished between a creditor who *sells or assigns* a debt to a collection agent or agency for collection and a creditor who *places* a debt with a collection agent or agency for collection. When a creditor sells or assigns a debt to a collection agent or agency, the assignee is the real party in interest to file suit against the debtor and may sue in its own name under the real party in interest statute, K.S.A. 2011 Supp. 60-217(a)(1); but, the assignee cannot garnish the debtor's wages under K.S.A. 60-2310(d). The assignee must also comply with applicable laws governing debt collection. When a creditor places a debt with a collection agent or agency for collection, there is no assignment and the creditor is the real party in interest to file suit against the debtor under K.S.A. 2011 Supp. 60-217(a)(1) and can garnish the debtor's wages under K.S.A. 60-2310(d). Cited herein: K.S.A. 2011 Supp. 16a-2-301, 60-217, K.S.A. 60-2310.

* * *

Dear Senator Owens:

As State Senator for the Eighth District, you ask whether the conclusion in Attorney General Opinion No. 79-100 conflicts with the real party in interest statute, K.S.A. 2011

Supp. 60-217(a)(1). The 1979 opinion did not address that statute. Rather, the opinion interpreted a 1979 amendment to K.S.A. 1978 Supp. 60-2310(d), the provision prohibiting a creditor's assignee from garnishing a debtor's wages. To address your request, an understanding of the history of both statutes is necessary. Our analysis begins with the real party in interest statute.

K.S.A. 2011 Supp. 60-217, the real party in interest statute

K.S.A. 2011 Supp. 60-217(a)(1) states:

An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

- (A) An executor;
- (B) an administrator;
- (C) a guardian;
- (D) a conservator;
- (E) a bailee;
- (F) a trustee of an express trust;
- (G) a receiver;
- (H) a party with whom or in whose name a contract has been made for another's benefit; and
- (I) a party authorized by statute.

Nearly identical language appeared in the Code of Civil Procedure adopted one year after statehood¹ as well as intervening versions of the Code.² One suggested interpretation of K.S.A. 2011 Supp. 60-217(a)(1) is that the creditor is the real party in interest because the creditor has the contractual relationship with the debtor and that the list of exceptions in (A) through (I) is exclusive. Under such interpretation, an assignee cannot sue in the assignee's name to collect the debt. As discussed below, case law does not support this interpretation.

The real party in interest statute has had few substantive changes for nearly 150 years.³ Thus, we review interpretations by the Kansas Supreme Court of prior versions as it relates to the collection of a debt by the creditor's assignee. The first cases to address this issue are *Krapp v. Eldridge*,⁴ *Stewart v. Price*,⁵ and *Manley v. Park*.⁶

¹ G.S.1862, §§ 80-26 (real party in interest) and 80-28 (exceptions).

² See K.S.A. 60-217 (1963); G.S. 1949, 60-40; and G.S. 1909, 95-5618 (real party in interest) and 95-5618 (exceptions).

³ The Legislature added the following classifications to the list of exceptions: a bailee, a conservator, and a receiver. L. 2010, Ch. 135, § 84; L. 1965, Ch. 354, § 2; L. 1963, Ch. 303, § 60-217, respectively.

⁴ 33 Kan. 106 (1885).

⁵ 64 Kan. 191 (1902), *rev'd* 68 Kan. 400 (1904).

⁶ 68 Kan. 400 (1904).

As pointed out in *Krapp* and *Stewart*, prior to the adoption of the Code, common law prohibited the transfer of a chose in action;⁷ thus, a court of law allowed only the creditor, who had the equitable interest, to sue the debtor for collection. However, courts of equity disregarded the prohibition and permitted the assignee, who had the legal title, to sue in the assignee's name to collect the debt; thus, the question was whether the adoption of the Code reflected the rule in courts of law or courts of equity.⁸

In *Krapp*, the Court found that the adoption of the Code departed from the common law prohibition applied by courts of law.⁹ The court held:

Where the owner of an account or claim transfers and assigns, in writing, the same to another person, such other person may maintain an action thereon in his own name, when the account or claim becomes due; and it is immaterial to the debtor whether the claim was given or sold to the assignee.¹⁰

Fifteen years later the Court revisited the issue in *Stewart*. There, the assignee brought a cause of action in his own name against a debtor on an account that a creditor had assigned for collection. Regarding the real party in interest provision and the list of exceptions, the Court stated:

Section 26 of the civil code (Gen. Stat. 1901, § 4454), provides that "Every action must be prosecuted in the name of the real party in interest except as otherwise provided in section 28." It is not contended by either party that the case falls within any of the exceptions. It must, therefore, be considered solely with reference to the meaning of section 26. In examining this provision, it will be observed that it does not say that it is the person in whose name the right of action stands, or the person who holds the legal title thereof, that may prosecute the action, but that "every action must be prosecuted in the name of the real party in interest." . . . Is the real party in interest the person who is to be benefited or injured [the creditor], or the person who holds the legal title to the thing in action [the assignee]?¹¹

Based upon case law in Indiana and Nebraska, the Court concluded that an assignee of a debt owed to a creditor is not the real party in interest and cannot maintain an action in the assignee's name to collect the debt where the assignee agreed to pay the debt to the assignor when collected. The Court then overruled the decision in *Krapp*.¹²

⁷ A chose in action means the right to bring an action to recover a debt, money, or thing; in Kansas, all choses in action, except torts, are assignable. *Bolz v. State Farm Mutual Automobile Ins. Co.*, 274 Kan. 420, 423 (2002).

⁸ 33 Kan. at 108 and 64 Kan. at 197 (concurring opinion), respectively.

⁹ 33 Kan. at 107.

¹⁰ 33 Kan. at 107, Syl. No. 3.

¹¹ 64 Kan. at 193.

¹² *Id.* at 193-95, 196.

The dissenting opinion in *Stewart* noted that the majority opinion expressed the viewpoint of the minority jurisdictions on real party in interest statutes.¹³ The dissent pointed out that the purpose of the Code was to adopt the equity rule by permitting "the assignee holding the legal title to a chose in action to bring suit in his own name, instead of that of the original promisee or his personal representative, and without joining with him such original promisee."¹⁴

Two years later in *Manley* the Court adopted the reasoning of the dissenting opinion and overruled *Stewart*.¹⁵ The *Manley* Court stated:

When the owner of a note, for reasons satisfactory to himself, assigns it to another, thereby vesting in him the full legal title, the assignee becomes, so far as the debtor is concerned, the real party in interest. The original owner is still the person to be finally benefited by the litigation, but his legal demand is no longer against the maker of the note, but against the person to whom he has assigned it. When the obligor is sued by such assignee (no claim as innocent purchaser being involved), he can make any defense he could have made against the assignor; he is fully protected against another action; and in no way is it a matter of the slightest concern to him what arrangement between the plaintiff and the original creditor occasioned the assignment. This being true, it would be a sacrifice of substance to form to permit the defendant to defeat the action by showing a failure of consideration for the transfer, or that the plaintiff was bound to account to his assignor for a part or all of the proceeds. We hold that the objection to the judgment urged on the ground that plaintiff was not the real party in interest is untenable.¹⁶

Thus, it has been stated that "[t]he meaning and object of the real party in interest provision would be more accurately expressed if it read: An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced."¹⁷ The Court has consistently followed *Manley* when interpreting the real party in interest statute for assignees.¹⁸

We note that your request states that a creditor gives a collection agent or agency a "limited assignment" of a debt "for collection purposes." Attorney General Opinion No. 79-100 did not use the term "limited assignment." If this term means the creditor did not relinquish all legal title or control over the debt, it is contrary to the rule of assignment adopted by the Kansas Supreme Court.

¹³ *Id.* at 201.

¹⁴ *Id.* at 203.

¹⁵ 68 Kan. at 400, Syl. 1 and 2.

¹⁶ *Id.* at 401-02.

¹⁷ *Torkelson v. Bank of Horton*, 208 Kan. 267, 270 (1971), quoting 3A Moore's Federal Practice (2nd ed. 1970) § 17.02, p. 53.

¹⁸ *Id.* at 269-70; *First National Bank of Topeka v. United Telephone Ass'n*, 187 Kan. 29, 34-36 (1960) (also cites other cases following rule adopted in *Manley*); and *Rullman v. Rullman*, 81 Kan. 521, 523-24 (1910).

The Kansas cases clearly state the rule to be that an assignment passes all of the assignor's title or interest to the assignee, and divests the assignor of all right of control over the subject matter of the assignment. . . . If the assignor proceeds to collect the sum due on an assigned chose, the moneys so coming into his hands are regarded as trust funds belonging to the assignee, who may recover the same either in action for money had and received or *in tort for conversion*.¹⁹

Thus, no legal authority exists for a "limited assignment" that does not pass the creditor's legal interest in the debt to the collection agent or agency; as such, the collection agent or agency is not a real party in interest.

Based upon the above analysis, if the creditor *assigned* the debt by relinquishing the legal title and control to the collection agent or agency for the purpose of collection, the creditor no longer owns or controls the debt and the assignee may sue in the assignee's name under K.S.A. 2011 Supp. 60-217(a)(1). However, if the creditor retains the legal title and control of the debt, the creditor has not assigned the debt but has merely *placed* it with the collection agent or agency for collection. Under those circumstances, the collection agent or agency is not an assignee and is not a real party in interest who can file a suit in its own name under K.S.A. 2011 Supp. 60-217(a)(1).

K.S.A. 60-2310(d), Assignment of an account and wage garnishment

The Legislature has placed limitations on wage garnishments since the late 1800s.²⁰ However, the provision that concerns this opinion and our 1979 opinion was not added until 1913.²¹ It provided:

[I]f any person, firm or corporation sells or assigns his account to any person or collecting agency, or sends or delivers the same to any collector or collecting agency for collection, then such person, firm or corporation or the assignees of either shall not have nor be entitled to the benefits of this act.²²

The Kansas Supreme Court first interpreted the above language in *Losier v. Sherman*.²³ In *Losier*, the creditor placed a delinquent account with a collection agency for collection; after securing a small payment from the debtor, that agency returned the account to the creditor. The creditor then sued the debtor and sought garnishment of the debtor's wages. The debtor contended that the above statutory provision prohibited the creditor from garnishing his wages; the creditor responded that the statutory

¹⁹ *Patrons State Bank and Trust Company v. Shapiro*, 215 Kan. 856, 861 (1974). Citations omitted.

²⁰ G.S. 1868, Ch. 80, § 490; G.S. 1889, Ch. 80, § 4589; G.S. 1901, Ch. 80, Art. 20, § 4967; and G.S. 1909, Ch. 95, Art. 20, § 6127.

²¹ L. 1913, Ch. 232, § 2.

²² *Id.* Last Codified in G.S. 1935, § 60-3495.

²³ 157 Kan. 153 (1943).

prohibition was an unconstitutional bill of attainder.²⁴ Noting that the provision had been in effect for nearly 30 years, the Court rejected the creditor's argument, stating:

When the debt here involved was incurred, the creditor was bound to take notice of the conditions under which he could seek by garnishment process to levy on the earnings of his debtor if the debtor became in default. The statute conferred a right on the creditor of which he could avail himself if he observed its terms and conditions. The choice was his, and it may not be said the proviso in question is in any sense a bill of attainder.

Nor do we agree with [the creditor] that since the account has been returned to the creditor it is immaterial it previously had been sent to a collection agency. To so hold would be to write into the proviso a condition which the legislature did not see fit to include. If such a condition is to be a part of our statutes pertaining to garnishment, it should be placed there by the legislature.

We think that the portion of the statute quoted above means just what it says, and if a creditor sees fit to send or deliver his account to a collector or collecting agency, he shall not be entitled to the benefits of the statute permitting garnishment of a portion of the earnings of his debtor, as provided in the statutes above mentioned.²⁵

The next challenge to the prohibition occurred in *Miller v. Keeling*.²⁶ The creditor in that case assigned a debt to a collection agent; the collection agent filed a lawsuit in his own name against the debtor. After obtaining a judgment, the collection agent sought to garnish the debtor's wages.²⁷ The Court adopted the reasoning in *Losier* to reject the collection agent's arguments that the provision was unconstitutional because it violated the Contract Clause.²⁸ In rejecting the collection agent's argument that the provision also violated the Equal Protection Clause, the Court stated:

[T]he remedy of garnishment is made available to all creditors-provided they observe its terms. The choice is theirs. The general rule is that exemption laws are to be liberally construed in favor of those intended to be benefited and favorable to the objects and purposes of the enactment, and, with respect to the exemption of wages or earnings, it has been said that the purpose of such exemption is to protect a class of persons who are largely dependent on their wages for support, as well as their families and dependents who look to them for a living, and that such a statute should receive a liberal construction rather than one which would defeat

²⁴ *Id.* at 155-56.

²⁵ *Id.* at 156.

²⁶ 185 Kan. 623 (1959).

²⁷ *Id.* at 624.

²⁸ *Id.* at 627.

the benevolent object aimed to be accomplished. In enacting the specific proviso in question perhaps the legislature had in mind to protect the dependents of wage earners from repeated harassment by "professional collection agencies." Be that as it may—it was within the province of the legislature to enact the proviso, and it is not invalid on either of the grounds asserted.²⁹

The provision in the current Code of Civil Procedure was enacted in 1963³⁰ and codified in K.S.A. 60-2310(d). The only change made in the 1963 provision was amending the last two words "this act" to "garnishment."³¹ This amendment was challenged in *Wagner v. Mahaffey*.³²

In *Wagner*, the debt collector purchased a note from the creditor and obtained judgment against the debtor. When the bill collector threatened garnishment proceedings against the debtor's wages, the debtor threatened to sue for wrongful garnishment, resulting in the bill collector filing for a declaratory judgment.³³ On appeal, the Court held that the language used in the current Code was not an alteration in meaning from that of the prior law; thus, its decision in *Miller* applied to the bill collector's claim that the provision violated the Equal Protection Clause.³⁴

The 1979 amendment to K.S.A. 60-2310(d) resulted in Attorney General Opinion No. 79-100.

Attorney General Opinion No. 79-100

The 1979 amendment deleted from K.S.A. 60-2310(d) the phrase, "or sends or delivers the same to any collector or collecting agency for collection."³⁵ No substantive changes have been made to the remaining language since then.

In the 1979 opinion, we said that an assignment, in its technical legal sense, requires an assignor to transfer completely the account being transferred, thereby relinquishing any control over or ownership in such account.³⁶ However, if a creditor placed an account with a third party for collection purposes only, the creditor did not divest ownership or control over such account.³⁷ Based on these differences, we concluded that the wage garnishment prohibition now found in K.S.A. 60-2310(d) did not apply to situations where a creditor retained ownership of or control over the account and placed the account with a third party for collection purposes. Thus, the wage garnishment prohibition in K.S.A. 60-2310(d) applied only to situations where a creditor assigned an

²⁹ *Id.* at 627-28 (citations omitted).

³⁰ L. 1963, Ch. 303, § 60-2310.

³¹ L. 1963, Ch. 303, § 60-2310(d).

³² 195 Kan. 586 (1965).

³³ *Id.* at 587.

³⁴ *Id.* at 591-92.

³⁵ L. 1979, Ch. 183, § 5.

³⁶ Citing 6A C.J.S. Assignments § 43 (1975) and *Turner v. Williams*, 114 Kan. 769, 774 (1923).

³⁷ Attorney General Opinion No. 79-100.

account, by relinquishing all ownership interest and control, to a third party. A Kansas federal district court has concurred with that interpretation of K.S.A. 60-2310(d).³⁸

The legislative history for the 1979 amendment supports the conclusion in Opinion 79-100. The proponent of the amendment, an attorney representing two credit unions, initially asked for repeal of K.S.A. 60-2310(d) arguing consumer debtors had protection under laws recently enacted by the state and federal governments.³⁹ Later, the proponent requested an amendment to K.S.A. 60-2310(d) by deleting the phrase "or sends or delivers the same to any collector or collecting agency for collection" so that a creditor who had placed a delinquent debt with an unsuccessful debt collector could garnish the debtor's wages after the debt collector returned the account to the creditor.⁴⁰

The 1979 amendment essentially followed the direction given in *Losier*—a legislative change authorizing the garnishment of a debtor's wages by a creditor who had placed an account with a collection agency for collection that was later returned to the creditor. However, the Legislature's refusal to repeal the prohibition against garnishing a debtor's wages by a collection agent or agency who was assigned a debt for collection kept intact the decisions of *Miller* and *Wagner*.

Debt Collection Laws

We want to emphasize that the above analysis does not mean a collection agent or agency can avoid compliance with laws applicable to debt collection. For example, the Kansas Uniform Consumer Credit Code, K.S.A. 16a-1-101 *et seq.*, governs retail installment sales, consumer credit, and consumer loans.⁴¹ Pursuant to K.S.A. 2011 Supp. 16a-2-301(1), only a supervised financial organization or a person licensed by the administrator⁴² can engage in the business of:

- (a) Making supervised loans;
- (b) taking assignments of and directly or indirectly, including through the use of servicing contracts or otherwise, undertaking collection of payments from debtors arising from supervised loans, but such person may collect for three months without a license if the person promptly applies for a license and such person's application has not been denied; or
- (c) taking assignments of and directly or indirectly, including through the use of servicing contracts or otherwise, enforcing rights against debtors arising from supervised loans, but such person may enforce for three months without a license if the person promptly applies for a license and such person's application has not been denied.

³⁸ *Bieber v. Associated Collection Services, Inc.*, 631 F. Supp. 1410, 1414-415 (1986).

³⁹ *Minutes*, Senate Judiciary Committee, February 22, 1979, Written Testimony, p. 4-5. t

⁴⁰ *Minutes*, House Judiciary Committee, March 22, 1979, Attachment No. 2, p. 3.

⁴¹ K.S.A. 16a-1-102(2)(a).

⁴² "'Administrator' means the deputy commissioner of the consumer and mortgage lending division appointed by the bank commissioner pursuant to K.S.A. 75-3135, and amendments thereto." K.S.A. 16a-1-301.

Thus, a collection agent or agency holding the legal interest of a consumer debt assigned by a creditor has no authority to collect that debt or enforce its term unless licensed under K.S.A. 2011 Supp. 16a-2-301(1)(a)-(b)⁴³ even though such collection agent or agency may qualify as the real party in interest under K.S.A. 2011 Supp. 60-217(a)(1).

Conclusion

The Legislature has distinguished between a creditor who *sells or assigns* a debt to a collection agent or agency for collection and a creditor who *places* a debt with a collection agent or agency for collection. When a creditor sells or assigns a debt to a collection agent or agency, the assignee is the real party in interest to file suit against the debtor and may sue in its own name under the real party in interest statute, K.S.A. 2011 Supp. 60-217(a)(1); but, the assignee cannot garnish the debtor's wages under K.S.A. 60-2310(d). The assignee must also comply with applicable debt collection laws. When a creditor places a debt with a collection agent or agency for collection, there is no assignment of the debt and the creditor is the real party in interest to file suit against the debtor under K.S.A. 2011 Supp. 60-217(a)(1) and can garnish the debtor's wages under K.S.A. 60-2310(d)

Sincerely,

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⁴³ *Independent Financial Inc. v. Wanna*, 39 Kan. App. 2d 733, 738-40 (2008).