



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

January 6, 1977

ATTORNEY GENERAL OPINION NO. 77- 3

Mr. Nick A. Tomasic
District Attorney of the
29th Judicial District
Wyandotte County Courthouse
710 North Seventh
Kansas City, Kansas 66101

Re: Courts--Small Claims Procedure Act--Representation by Counsel

Synopsis: The provision of K.S.A. 61-2707(a) which forbids any party in an action under the small claims procedure act to be represented by counsel therein results in a denial of due process to the parties in any such proceeding before an associate district judge from and after January 10, 1977, unless and until provision is made for an appeal from such proceedings to a hearing *de novo* at which the parties may be represented by counsel.

* * *

Dear Mr. Tomasic:

K.S.A. 61-2707(a) provides that no party in an action under the small claims procedure act shall be represented by an attorney in such action. You inquire concerning the validity of this provision in those instances where actions under that act are tried by an associate district judge and which are appealable as of right to the court of appeals.

K.S.A. 61-2709 provides thus:

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"An appeal may be taken from a judgment under the small claims procedure act in the manner prescribed by the code of civil procedure for limited actions, . . ."

K.S.A. 61-2102(a) provides in pertinent part thus:

"An appeal from an action heard by a district magistrate judge shall be taken to a district judge or associate district judge of the county. An appeal from an action heard by a district judge or associate district judge shall be taken to the court of appeals." [Emphasis supplied.]

In an opinion to Representative Wallace Buck dated March 26, 1973, Attorney General Vern Miller concluded that the provision barring counsel in actions under the Small Claims Procedure Act was valid, relying on *Prudential Ins. Co. v. Small Claims Court, of the City and County of San Francisco*, 76 Cal.App.2d 465, 173 P.2d 38, 167 A.L.R. 820 (1946). There, the court stated thus:

"The first question presented is whether the prohibition against the appearance of lawyers renders §117g unconstitutional. It is urged that depriving a litigant of the right of counsel is a violation of due process. There can be little doubt but that in both civil and criminal cases the right to a hearing includes the right to appear by counsel, and that the arbitrary refusal of such right constitutes a deprivation of due process. . . . But that does not mean that the legislature cannot create a Small Claims Court where informal hearings may be held without the assistance of counsel, as long as the right to appear by counsel is guaranteed in a real sense somewhere in the proceeding. It is obvious that the plaintiff cannot object, although he has no right to appeal, because he has elected to commence the action in the Small Claims Court. If he desires an attorney he can sue, even on these small claims in the Justices or Municipal Courts. The defendant

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no legal cause for complaint because if he is dissatisfied with the judgment of the Small Claims Court he has a right of appeal to the Superior Court where he is entitled to a trial de novo."

In *Foster v. Walus*, 81 Idaho 452, 347 P.2d 120 (1959), the court held that where a defendant on appeal from the small claims court to the district court is entitled as of right to a trial de novo with the assistance of counsel therein, the requirement of due process is satisfied, and a statute barring attorney representation at the initial hearing in the small claims court proceeding is not unconstitutional. See also *Simon v. Lieberman*, 193 Neb. 781, 226 N.W.2d 781 (1975). In *Brooks v. Small Claims Court for the Downey Judicial District of Los Angeles County*, 105 Cal.Rptr. 785, 504 P.2d 1249 (1973), the court held that a statutory requirement that a party desiring to appeal from a judgment entered in the small claims court must furnish a bond or cash deposit in lieu thereof constituted an unconstitutional taking of property without due process because it was required prior to a due process hearing with a right to appear by counsel.

Thus, it appears that virtually all authority on the point holds that a prohibition against representation by counsel in a small claims proceeding is not unconstitutional, so long as the defendant is entitled as of right to a de novo hearing with the assistance of counsel on appeal therefrom. Indeed, there appears to be no authority to the contrary. Accordingly, it is my opinion that the denial of assistance of counsel to any defendant in any action under the small claims procedure act from which there is no appeal leading to a de novo hearing at which representation by counsel is permitted constitutes a denial of due process, and that any judgment rendered in such an action which is not appealable to a de novo hearing in which the defendant may appear with counsel is rendered in violation of the due process requirements of the United States Constitution. Thus, from and after January 10, 1977, it is my judgment that the provision of K.S.A. 61-2707(a) which forbids any party in an action under the small claims procedure act to be represented by counsel results in a denial of due process to such parties in a small claims proceeding before an associate district judge unless and until provision is made for an appeal therefrom to a hearing de novo at which the parties may be represented by counsel.

Yours very truly,



CURT T. SCHNEIDER
Attorney General