Illuminating the Boundaries of the Kansas Consumer Protection Act

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Since 1973, the Kansas Consumer Protection Act[1] (the KCPA) has served as a bulwark for Kansas consumers by prohibiting "deceptive" and "unconscionable" acts and practices of Kansas businesses. By allowing ordinary Kansas consumers to serve as private attorneys general,[2] the KCPA has empowered the buying public to prosecute violations of the statute through civil lawsuits and enforce its protections through the recovery of actual damages, civil penalties, and attorney fees.[3]

But the KCPA hasn't helped just consumers. In many ways, it has also helped honest businesses. As a general matter, if a marketplace allows participants to achieve higher profits through shady practices, then companies that choose to operate with honesty and integrity can find themselves at a competitive disadvantage; doing business in an honest, ethical manner tends to cost more. By creating powerful economic disincentives to engaging in deceptive and unconscionable acts and practices, the Act minimizes such practices, creates a more level playing field, and does not penalize ethical businesses for treating their customers fairly.

The Kansas legislature directed that the KCPA's provisions be "liberally construed" to protect consumers, which gives it a built-in flexibility to stretch and protect consumers in a wide variety of situations.[4] But because the KCPA has this built-in flexibility, and because the financial leverage in its structure can be so strong, it can be tempting to test how far the statute will stretch. Of course, every statute has its limits, and it is the job of courts to decide when the KCPA has been stretched too far. This article will focus on a few recent instances, with examples being presented from the U.S. Court of Appeals for the Tenth Circuit, the U.S. District Court for the District of Kansas, the Kansas Supreme Court, and the Kansas Court of Appeals. In each of these cases, the courts held that the KCPA had been stretched too far. As a result, these cases can serve as useful landmarks for current outer limits of the KCPA's coverage.

From the Tenth Circuit: *Hills v. Arensdorf* [5]

In this case of estate-planning-by-accountant, the Tenth Circuit offered guidance on when a consumer is "aggrieved" under the statute and held that a litigant cannot use the KCPA to enable recovery when she has no legal rights to enforce.

Douglas Hills held substantial interests in a farming business and other property. Just 12 days before his death, while recovering from a heart attack and just after learning of a terminal cancer diagnosis, he assigned his interests worth $10 million to his wife of 33 years in her capacity as a trustee of a 1986 unfunded trust. His accountant, Gerard Arensdorf, drafted and submitted the assignment at the wife's request, having relied on the wife's representations of what Douglas wanted as a final disposition of his assets. The assignment had the effect of disinheriting his children, Wendy and Brent, and overriding a prenuptial agreement that would have prevented his wife from receiving any farm assets. Twelve days later, he died intestate.

Wendy filed state and federal cases against only the wife to challenge the assignment's validity. The parties settled, agreeing the assignment was void *ab initio*, unenforceable, and did not transfer assets; as a result, Wendy and Brent received sole control of certain Douglas farming interests and his wife would receive a total of $1.35 million from the estate. Wendy got what she wanted, but at the considerable expense of "significant legal fees" and "extensive consideration to her step-mother."[6]

To recoup those losses, Wendy sued Arensdorf in federal court for legal malpractice (under a third-party-beneficiary theory) and for violation of the KCPA's prohibition against the unlicensed or unauthorized practice of law.[7] She alleged that Arensdorf, as an accountant, had committed legal malpractice and engaged in the unauthorized practice of law by drafting the assignment and presenting it to the Douglas. The trial court dismissed both claims as inadequately pleaded.[8] Wendy appealed.

The Tenth Circuit found no error in the dismissal of either the third-party-beneficiary theory[9] or the KCPA claim.[10] For the KCPA claim, the court found that Wendy was "not aggrieved because she lacked enforceable legal rights in the farm assets that Arensdorf's allegedly unauthorized legal work could have adversely affected."[11] The court reasoned that a person is aggrieved "only if (1) the defendant's violation 'adversely affected the [person's] legal rights"; and (2) there is 'a causal connection between the [violation] and the claimed injury.'"[12] The court reasoned further that Wendy had "no enforceable rights in the property," noting there was no evidence that Douglas had granted her an interest that she could enforce, and that Kansas does not recognize a "right to inherit" as an enforceable interest.[13] The court concluded that "Wendy's expectations about how Douglas would distribute the farm assets did not give her any 'legal rights' that Arensdorf's purported KCPA violation could have adversely affected."[14]

From the U.S. District Court for the District of Kansas: *Marksberry, et al. v. FCA US LLC* [15]

In this automobile warranty case, the District of Kansas offered guidance on what conduct can be considered "deceptive" and what conduct rises to the level of "willful" under the KCPA. This case provides guidance for analyzing claims regarding automobile warranties.

In October 2009, Marksberry bought a new 2009 Dodge Ram 1500 as his daily driver. It served him well for 11 years and 80,000 miles, with one noted exception that cost him $1,324.

FCA had advertised the truck as coming with a Lifetime Powertrain Limited Warranty. Ads stated that it "lasts as long as you own your vehicle," and "is always there to keep you working." All ads directed consumers to see a dealer for a copy of the warranty details. In addition, the window stickers directed consumers to see the owner's manual or a dealer for a copy of the warranty details.

The warranty itself indicated that limitations applied, including that to keep the warranty alive the owner would have to get a powertrain inspection within 60 days of each purchase-date five-year anniversary; the warranty book provided a log in which to record those inspections. Marksberry did not ask for a copy of the warranty details before purchase but received the warranty book at purchase.

In 2014, Marksberry brought the truck to an authorized dealer for maintenance during the 60-day window. The dealer did not perform the powertrain inspection during that visit.[16] As a result, the warranty expired on or about Jan. 1, 2015, presumably unbeknownst to Marksberry. He learned of its expiration in May 2016, when he brought the truck to an Olathe dealer regarding an engine "ticking noise." The dealer found and replaced two broken exhaust manifold bolts, normally covered by the warranty. Lacking a warranty, he paid $1,324 for the repair.

In November 2018, Marksberry filed suit in state court, alleging a KCPA violation (among other things), and amended in November 2019 to include class-action claims. FCA removed the case to federal court and eventually obtained an order of summary judgment. In doing so, the court disagreed with Marksberry on what conduct can be "deceptive" and "willful" under the KCPA.

First, Marksberry had alleged FCA deceptively represented the warranty. He argued that by definition "lifetime" warranties cannot expire. But the court found otherwise, noting that "even a lifetime warranty, [can have] requirements associated with it."[17] The court reasoned that getting the inspection was the requirement to keep the warranty alive, and Marksberry failed to get it.[18] Marksberry also argued the falsity of the ads stating that the warranty "last as long as you own your vehicle." Again, the court found no falsehood, reasoning that all ads indicated that restrictions applied and directed consumers to see a dealer and/or owner's manual for details.[19] The court admonished: "Plaintiff cannot pick and choose what language to read from the Warranty advertisements."[20]

Second, Marksberry had contended there was ambiguity between the warranty's name and its inspection requirement, but the court disagreed.[21] It reasoned that the modifier "Limited" in the Warranty name indicated limitations; the Warranty itself included the word "limited"; and the door sticker stated that certain restrictions applied to warranties and directed buyers to see the dealer or manual for details.[22]

Third, Marksberry had urged that FCA omitted the inspection requirement from its marketing. The court again disagreed, stating "Plaintiff cannot place his head in the sand and then argue that Defendant concealed something from him."[23] It reasoned the ads indisputably directed consumers to the dealer or the owner's manual for details on the warranty, and the sticker and warranty itself indicated limitations.[24] In short, where such belts and suspenders exist, there could be no concealment.

Finally, the court discussed the willfulness standard under K.S.A. 50-626(b)(2) and (3) and found no evidence that FCA intended to harm consumers through its advertisements about the warranty or through the warranty itself. Rather, the court found that the ads "intended to inform consumers that the warranty had specific details.[25] Further, the court noted that Marksberry had the burden to show FCA knew he bought the truck under a mistake about the warranty, but could not and did not provide evidence of any such efforts.[26] And Marksberry could not meet his burden by saying that FCA provided no evidence of trying to understand Marksberry's knowledge of the warranty.[27]

From the Kansas Supreme Court: *In re: Huffman* [28]

In this original proceeding in discipline, the Kansas Supreme Court suspended attorney Donna L. Huffman for two years because of her representation of a married couple in litigation involving the failed refinancing of their home.[29] In this case, the Kansas Supreme Court offered guidance on what can happen to both consumers and their lawyers when the KCPA is overleveraged or outright abused.

In 2008, spouses R.B. and S.B. secured a variable-rate mortgage for a $185,000 home. Wells Fargo serviced the loan and later obtained the paper from the original lender. The couple sought to refinance for a lower interest rate, and in May 2009 the parties agreed on terms. Wells Fargo set closing for June 2009 and notified R.B. On the closing date, Wells Fargo submitted the papers for a "clear to close," received a complete decision, and approved the transaction. But for reasons unknown, R.B. never signed the papers. Mistakenly believing the transaction had closed, Wells Fargo filed a mortgage release and sent the couple a payoff letter. A week later, Wells Fargo realized R.B. had failed to sign the papers and tried in vain to reach him to discuss and correct the error. For the next four months, Wells Fargo sent statements consistent with the lower interest rate.

In October 2009, Wells Fargo marked the refinanced loan for deletion because closing never happened. It wrote to R.B., explaining the prior mortgage payoff was a mistake and Wells Fargo would continue to hold its lien on the property and expect payment at the original mortgage rate. Two weeks later, Mortgage Electronic Registration Systems (MERS) executed and filed a "Caveat as to the Existence of Mortgage Lien Due to Erroneous Release of Mortgage" to memorialize the error and Wells Fargo's continued lien and payment expectation.

In October 2010, Huffman filed suit on behalf of R.B. and S.B. against MERS and its individual agent for violations of the KCPA and other claims. The defendants removed the case to federal court. In December 2010, Wells Fargo began foreclosure proceedings, but later dismissed that action and moved to intervene in the federal case.

In April 2011, before Wells Fargo intervened in the federal case, Huffman presented a "settlement offer" to MERS. In it, she claimed the exposure of MERS and its agent under the KCPA was more than $15 million, but she was authorized to settle the case for $750,000. Suffice it to say, the offer was not accepted, and procedural wrangling, exhaustive discovery, and extensive motion practice ensued.[30]

In October 2012, the district court granted summary judgment for MERS. It noted that Huffman had calculated her client's potential recovery under the KCPA as being more than $49 million."[31] It also noted that because "the communications between [R.B. and S.B.] and Wells Fargo were financial communications relating to a mortgage obligation," the KCPA did not apply."[32] Following the outright rejection of the KCPA and other claims Huffman had asserted in vain, the district court ordered R.B. and S.B. pay the defendants $289,096.00 in attorneys' fees and $9,204.15 in costs pursuant to the mortgage. The district court noted that the fee request was justified based on the "barrage of discovery propounded by plaintiffs, and that the court [was] forced to admonish plaintiffs against the repetition of losing arguments."[33] The Tenth Circuit affirmed, with one judge noting to Huffman during oral argument that he had "never seen a case as poorly put together as this one."[34]

From the Kansas Court of Appeals: *Hernandez v. Pistotnik*[35]

In this car-wreck case, the Kansas Court of Appeals offered guidance on who can be considered an "aggrieved" consumer in the context of attorney advertising.

As a minor, Yudi Hernandez suffered grave physical injuries in a car wreck, including a medically induced coma and a tracheostomy. Because her father spoke no English and could not read, Yudi's sister asked a friend for recommendations on a lawyer. The friend suggested attorney Brad Pistotnik, knowing his advertisements. Yudi's sister went to Brad's office and met with his brother, attorney Brian Pistotnik, after which she recommended to her father that he hire Brian Pistotnik for Yudi's case. Yudi's father did so, and Brian Pistotnik exclusively worked the case.

As a result of Brian's work, the defendants' insurers tendered their respective policy limits totaling $150,000. But before Yudi's father accepted the offers, he fired Brian Pistotnik and hired attorney Steve Brave. Brian timely filed an attorney's lien for $49,499 in attorney fees and $1,504 in costs. Brave settled Yudi's case and obtained no funds beyond the already-tendered policy limits. Ostensibly, the money was paid directly to Yudi's father, with nothing for Yudi. However, when Brave delivered a check for the net settlement funds to Yudi's father, he endorsed the check to Yudi, and the funds were deposited in her personal bank account.

Brian filed suit against Yudi's father to enforce his attorney lien. Brave filed a separate action in Yudi's name against both Brad and Brian Pistotnik for fraud and KCPA violations based on alleged misleading television ads.

The district court dismissed Yudi's claims against Brad on summary judgment. It held that Yudi could not establish a triable fraud claim, because there was no evidence she or her dad relied on a deceptive advertisement. It further held Yudi was not "aggrieved" and thus had no standing to bring a KCPA claim, regardless of whether a misrepresentation could be demonstrated, because she herself never saw an allegedly deceptive ad.

On appeal, the panel agreed that Yudi was not "aggrieved" and thus lacked standing to bring a KCPA claim. Noting there is no statutory definition for "aggrieved," the court revisited prior decisions that help define the term. Specifically, *Finstad v. Washburn University* established that the KCPA does not recognize as "aggrieved" a consumer "who is neither aware of nor damaged by a violation of the Act."[36] In granting summary judgment for the University, the court in *Finstad* reasoned that some students knew nothing of the alleged false statement, and none relied on that statement.[37] Thus, the students did not show the requisite causal connection between their damage and the alleged false statement.[38] The Court of Appeals in *Welch v. Centex Home Equity Company*[39] later clarified that *Finstad* holds only that there must be a causal connection between defendant's conduct and plaintiff's harm.[40] Citing *Via Christi Regional Medical Center, Inc.*[41] *v. Reed* and *Schneider v. Liberty Asset Management*[42], the panel noted that a consumer need not establish measurable monetary damages to be aggrieved, but there must be damage related to the alleged misrepresentation.[43]

Given those standards, the Kansas Court of Appeals first found no showing that Brian's lien caused Yudi injury.[44] The panel reasoned that filing the lien was lawful and Yudi did not allege the lien itself contained any misrepresentation. Furthermore, Yudi was not a party to Brian's lawsuit to enforce the lien, Yudi never paid any amount sought in the lien, and she received all the personal injury settlement funds due her.[45] In short, Yudi suffered no legal harm because of the lien.

As for the KCPA claim, the panel assumed without deciding that misrepresentations in advertising could prevent a client who relied on those ads from selecting a different lawyer.[46] Even under that permissive standard, the court found no evidence to support a KCPA claim based on Brad's advertisements, reasoning that Yudi did not rely on the ads and played no part in the decision to hire Brian Pistotnik.[47] The court also ruled out a claim based on an assumed indirect reliance theory, reasoning that no evidence showed that the advertisements led Yudi's father – her agent – to hire Brian Pistotnik.[48] The panel noted that Yudi's father hired Brian at the suggestion of Yudi's sister, and there was no evidence she conveyed any information from a deceptive advertisement.[49] Thus, the court concluded that there was no causal connection between any alleged advertising misrepresentations and Yudi's claimed harm of no fair opportunity to choose a different lawyer.[50]

Conclusion

As the four decisions discussed above show, the boundaries of the Kansas Consumer Protection are not limitless. Federal and state courts have recently been providing useful guidance on who can be considered "aggrieved" under the statute; they have been (perhaps) affirming the outer boundaries of what act and practices can be considered "deceptive" and "willful;" and they have been confirming that when the KCPA is overleverage or abused, it can backfire in dramatic fashion for both lawyer and client. In addition, these decisions highlight the enduring ability of the KCPA, and the willingness of courts, to protect consumers who really have been harmed and punish businesses who really have caused harm. The Kansas Consumer Protection Act remains a valuable piece of legislation for both consumers and honest businesses.

1 K.S.A. 50-623 *et seq*.

2 *Alexander v. Certified Master Builders Corp*., 268 Kan. 812, 821-22, 1 P.3d 899 (2000) (citing Clark, *The New Kansas Consumer Legislation*, 42 J.K.B.A. 147, 189 (Fall 1973)).

3 K.S.A. 50-634(b), (e); K.S.A. 50-636.

4 K.S.A. 50-623.

5 Case No. 21-3118, 2022 U.S. App. LEXIS 21913 (10th Cir. Aug. 8, 2022).

6 *See Hills, et al. v. Arensdorf*, Consolidated Cases No. 5:20-cv-04037-TC-JPO and 5:20-cv-04074-TC-JPO, Memorandum and Order [docket 62], p. 5.

7 K.S.A. 50-6,142.

8 The trial court assumed, but did not decide if Kansas recognizes a cause of action for legal malpractice against a nonlawyer; the Tenth Circuit did the same. *See* Case No. 21-3118, 2022 U.S. App. LEXIS 21913, n. 5.

9 *Id*. at *8.

10 *Id.* at *9.

11 *Id.* at *11.

12 *Id*. at *9 (quoting *Schneider v. Liberty Asset Mgmt.*, 45 Kan. App. 2d 978, 985 (Kan. Ct. App. 2011).

13 *Id.* at 9-10.

14 *Id.*

15 Case No. 19-2724-EFM-JPO, ___F.Supp.3d___, 2022 U.S. Dist. LEXIS 103602 (D. Kan. June 9, 2022).

16 The decision does not indicate if Marksberry and the dealership discussed the powertrain inspection when he presented ~~it~~ the truck for maintenance.

17 2022 U.S. Dist. LEXIS 103602, *9.

18 *Id.*

19 *Id.* at *10.

20 *Id.*

21 *Id.* at *12.

22 *Id.*

23 *Id.* at *13.

24 *Id.*

25 *Id.* at *13-14.

26 *Id.* at *15.

27 *Id.*

28 315 Kan. 641 (2022).

29 The Supreme Court quoted the record below extensively, but without providing page numbers.

30 In the disciplinary proceeding, it was noted that Huffman made 318 discovery requests to the defendants. *Id.* at 651.

31 *Id.* at 648-49.

32 *Id.* at 650.

33 *Id.* at 651.

34 *Id.* at 653.

35 58 Kan. App. 2d 501 (2020).

36 *Id.* at 506 (quoting *Finstad*, 252 Kan. 465, 473 (1993)).

37 *Id.* (citing *Finstad* at 472).

38 *Id.* (citing *Finstad* at 473-74).

39 Nos. 95,981 and 96,585, 178 P.3d 80, 2008 Kan. App. Unpub. LEXIS 256 (Kan.Ct.App. Mar. 14, 2008).

40 *Id.*, at *6.

41 298 Kan. 503, 314 P.3d 852 (2013).

42 45 Kan. App. 2d 978, 251 P.3d 666 (2011).

43 *Hernandez*, 58 Kan. App. 2d at 507.

44 *Id.*

45 *Id.*

46 *Id.* at 508.

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*