STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

January 10, 2018

ATTORNEY GENERAL OPINION NO. 2018-2

The Honorable Blaine Finch
State Representative, 59th District
101 W. Second St.
Ottawa, KS 66067

Re: Unfair Trade and Consumer Protection—Consumer Protection—Kansas Consumer Protection Act—Deceptive Acts and Practices; Unconscionable Acts and Practices

Unfair Trade and Consumer Protection—Consumer Protection—Miscellaneous—Method of Payment; Express Authorization Required

Synopsis: A utility may violate the Kansas Consumer Protection Act (KCPA) by engaging in deceptive or unconscionable conduct related to a program whereby customer bills are rounded up to the next dollar and the proceeds donated to charity. Whether deceptive or unconscionable acts or practices occur in a particular consumer transaction is a question of fact. Cited herein: K.S.A. 50-623; K.S.A. 2017 Supp. 50-624; 50-626; K.S.A. 50-627; 50-6,105.

* * *

Dear Representative Finch:

As the State Representative for the 59th District, you ask our opinion on "whether an entity, public or private, may establish a 'voluntary' charitable contribution program where a customer is automatically enrolled unless the customer takes action to be removed from or opt out of the program." Specifically, you ask whether it is a violation of

the Kansas Consumer Protection Act (KCPA)[1] for a utility company to round up a customer's utility bill and give the proceeds to a charity without an affirmative authorization from the customer. This type of program is also known as an "opt-out" program because a person automatically participates in it unless that person takes action to opt out.

The KCPA, among other things, is intended to "protect consumers from suppliers who commit deceptive and unconscionable practices."[2] For the purposes of the KCPA, a "supplier" is generally defined as "a manufacturer, distributor, dealer, seller, lessor, assignor, or other person who, in the ordinary course of business, solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer."[3] A "consumer transaction" generally means "a sale, lease, assignment or other disposition for value of property or services within this state . . . to a consumer; or a solicitation by a supplier with respect to any of these dispositions."[4]

A utility company, whether public or private, falls into the KCPA's definition of "supplier" because it sells utility services to consumers.

Deceptive acts and practices

Deceptive acts and practices are listed in K.S.A 2017 Supp. 50-626, but that list is expressly "not limited to" the enumerated examples.[5] Statutory examples of deceptive acts and practices include "the willful use, in any oral or written representation, of exaggeration, falsehood, innuendo or ambiguity *as to a material fact*"[6] and "the willful failure to state a material fact, or the willful concealment, suppression or omission *of a material fact*."[7]

A violation of K.S.A. 2017 Supp. 50-626 requires deception, which is defined as "[t]he act of deliberately causing someone to believe that something is true when the actor knows it to be false."[8] A deceptive act or practice can occur even if no consumer has in fact been misled.[9]

"Whether a deceptive act or practice has occurred under the [KCPA] is not a question of law for the court, but rather a question of fact for the jury to decide."[10] Therefore, we are unable to provide a general opinion as to whether an opt-out utility bill round-up

[1] K.S.A. 50-623 *et seq*.
[2] K.S.A. 50-623(a) and (b).
[3] K.S.A. 2017 Supp. 50-624(l).
[4] K.S.A. 2017 Supp. 50-624(c).
[5] K.S.A. 2017 Supp. 50-626(b) ("Deceptive acts and practices include, but are not limited to, the following . . . ").
[6] K.S.A. 2017 Supp. 50-626(b)(2) (emphasis added).
[7] K.S.A. 2017 Supp. 50-626(b)(3) (emphasis added).
[8] Black's Law Dictionary (10th ed. 2014).
[9] K.S.A. 2017 Supp. 50-626(b).
[10] *Via Christi Regional Medical Center, Inc. v. Reed*, 298 Kan. 503, 520 (2013), quoting *Manley v. Wichita Business College,* 237 Kan. 427, Syl. ¶ 2 (1985).

program constitutes a deceptive act or practice under the KCPA as a matter of law; each determination of a deceptive act or practice depends on the facts of an individual case.

However, we believe the inclusion of an opt-out round-up program on a consumer's utility bill would be considered a "material fact" for the purposes of K.S.A. 2017 Supp. 50-626(b)(3), which prohibits "the willful failure to state a material fact, or the willful concealment, suppression or omission of a material fact." Within the context of the KCPA, "[a] matter is material if it is one to which a reasonable person would attach importance in determining his choice of action in the transaction involved."[11]

In our opinion, a reasonable person would attach importance to the amount of their utility bill being affected by a program that automatically rounds up the consumer's utility bill and gives the proceeds to a charity without that consumer's advance affirmative consent. Even if that increase is less than $1.00, we believe a reasonable person would find such an increase to be of importance to them. We also believe a reasonable person would attach importance to having his or her money used to support a charity selected by the utility supplier, not the consumer.

Therefore, it is our opinion that an opt-out utility bill round-up program may violate K.S.A. 2017 Supp. 50-626 under certain circumstances, such as if a utility supplier knowingly conceals from its consumers the existence of an opt-out round-up program, the ability of the consumer to opt out or the process by which the consumer may opt out, or the specific purpose for which the charitable contribution would be used. As noted above, however, whether a deceptive act or practice has occurred depends on the facts of each individual case.

Unconscionable acts and practices

Unconscionable acts and practices are proscribed by K.S.A. 50-627. That statute does not directly define unconscionable acts and practices, but rather outlines a non-exclusive list of circumstances that the court must consider in determining whether a particular act or practice is unconscionable.[12] These circumstances include:

> (1) The supplier took advantage of the inability of the consumer reasonably to protect the consumer's interests because of the consumer's physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factor;
>
> (2) when the consumer transaction was entered into, the price grossly exceeded the price at which similar property or services were readily obtainable in similar transactions by similar consumers;

[11] *Farrell v. General Motors Corp.*, 249 Kan. 231, 244 (1991), quoting *Griffith v. Byers Construction Co.*, 212 Kan. 65, 73 (1973).
[12] K.S.A. 50-627(b).

> (3) the consumer was unable to receive a material benefit from the subject of the transaction;
>
> (4) when the consumer transaction was entered into, there was no reasonable probability of payment of the obligation in full by the consumer;
>
> (5) the transaction the supplier induced the consumer to enter into was excessively onesided in favor of the supplier; [and]
>
> (6) the supplier made a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment. . . . [13]

Explanatory sections titled "Kansas Comment, 1973" follow the various statutes in the KCPA. These comments were added when the KCPA was first enacted in 1973.[14] The comment following K.S.A. 50-627 provides additional guidance as to the types of practices that may be considered unconscionable:

> Unconscionability typically involves conduct by which a supplier seeks to induce or to require a consumer to assume risks which materially exceed the benefits to him of a related consumer transaction. It involves over-reaching, not necessarily deception.

In other words, "there must be some element of deceptive bargaining conduct present as well as unequal bargaining power to render the contract between the parties unconscionable."[15]

"The issue of whether an act is unconscionable under the KCPA is a question of law subject to unlimited review. However, the determination of whether an act is unconscionable ultimately depends upon the facts of the case."[16] Kansas courts have found certain practices to be unconscionable, such as an owner of a storage facility renting an unavailable unit to consumers then denying the consumers access to that unit,[17] and a seller convincing a consumer to buy a horse based solely upon the seller's false representations that the horse had received specific training.[18] Both of these cases involved a supplier making deliberately false or misleading statements to a consumer without which the consumer transaction would not have occurred.

---

[13] K.S.A. 50-627(b).
[14] L. 1973, Ch. 217. The Revisor's Note preceding the KCPA states, "[t]he Kansas Comments following sections of the Kansas Consumer Protection Act were prepared by Barkley Clark, Professor of Law at the University of Kansas School of Law, who also served as consultant to the committees considering the proposed legislation."
[15] *State ex rel. Stovall v. DVM Enterprises, Inc.*, 275 Kan. 243, 251 (2003).
[16] *Dodson v. U-Needa Self Storage, LLC*, 32 Kan.App.2d. 1213, 1218 (2004). *See also* K.S.A. 50-627(b) ("The unconscionability of an act or practice is a question for the court.").
[17] *Id.*
[18] *State ex rel. Kline v. Berry*, 35 Kan.App.2d 896 (2006).

Kansas courts have clarified that not every undesirable outcome in a consumer transaction is evidence of unconscionable conduct:

> Transactions that merely appear unfair, or in retrospect are bad bargains, do not necessarily state a claim under the Kansas Consumer Protection Act. Where a record is devoid of any evidence of deceptive or oppressive practices, overreaching, intentional misstatements, or concealment of facts, there are no grounds for a claim of unconscionability under the Kansas Consumer Protection Act.[19]

We believe a utility failing to make reasonable efforts to notify customers about the commencement of an opt out utility bill round up program and not providing a refund policy for customers who do not become immediately aware of such a program are examples of conduct that a reviewing court would likely find deceptive or oppressive. The presence of deceptive or oppressive conduct may render an opt-out utility bill round up program an unconscionable act and practice under the KCPA. As previously indicated, the determination of whether an act is unconscionable depends upon the facts of each case.

Other provisions of the KCPA expressly declare certain practices to be unconscionable. K.S.A. 50-6,105(a) states that "[n]o supplier shall obtain or submit for payment . . . a check, draft or other form of negotiable instrument or payment order drawn on a person's checking, savings, share or similar account without the consumer's express authorization." As used in the statute, "express authorization" means "an express affirmative act by a consumer clearly agreeing to the payment by check, draft or other form of negotiable instrument or payment order drawn on a person's checking, savings, share or similar account."[20] K.S.A. 50-6,105(e) states that "[a] violation of subsection (a) is an unconscionable act within the meaning of K.S.A. 50-627. . . ." Put simply, Kansas law prohibits a supplier from automatically withdrawing money from a consumer's bank account without the consumer's express affirmative act of consent.

The general rule outlined in K.S.A. 50-6,105(a) does not apply to payments ". . . for the continuation of existing and recurrent services, services provided by a public utility as defined in K.S.A. 66-104[21] . . . services provided by a wireless carrier as defined in K.S.A. 12-5301 . . . or the collection of a preexisting debt . . . ."[22] The legislative history

---

[19] *State ex rel. Stovall v. ConfiMed.com, L.L.C.*, 272 Kan. 1313, Syl. ¶¶ 5 and 6 (2002).
[20] K.S.A. 50-6,105(b).
[21] K.S.A. 2017 Supp. 66-104(a) defines public utility as "every corporation, company, individual, association of persons, their trustees, lessees or receivers, that now or hereafter may own, control, operate or manage, except for private use, any equipment, plant or generating machinery, or any part thereof, for the transmission of telephone messages or for the transmission of telegraph messages in or through any part of the state, or the conveyance of oil and gas through pipelines in or through any part of the state, except pipelines less than 15 miles in length and not operated in connection with or for the general commercial supply of gas or oil, and all companies for the production, transmission, delivery or furnishing of heat, light, water or power." There are exceptions to this general definition that may apply to a particular utility. *See* K.S.A. 2017 Supp. 6-104(d) and (e).
[22] K.S.A. 50-6,105(a).

of the statute indicates that these exceptions were included to continue to allow consumers to enroll in automatic bill payment programs whereby the amount due is automatically transferred from the consumer's bank account without requiring the consumer to approve the payment each time.[23] These exceptions, however, are limited to the continuation of existing and recurrent services; services provided by a public utility; services provided by a wireless carrier; or the collection of a preexisting debt.

We note several items on a typical consumer's utility bill are subject to change each month, and may not be directly related to the amount of utility service received by the consumer. It is unclear whether a recurring charitable contribution included as part of a consumer's utility bill would be considered part of the utility's "services" such that the utility would not be required to obtain the consumer's express authorization prior to each withdrawal of funds to be donated to charity. However, we believe that a charitable contribution is less likely to be considered part of a utility's services than other items that might appear on a utility bill, such as municipal franchise fees. This is because collecting charitable contributions has no necessary connection to the ordinary activities of a public utility.

To date, there is no case law interpreting K.S.A. 50-6,105, and there have been no amendments to the statute since 2002 that could provide insight into the legislative intent.[24] We therefore cannot opine as a matter of law whether a utility bill round-up program constitutes an unconscionable act under K.S.A. 50-6,105. Instead, the question of whether including a charitable contribution in the amount withdrawn from a consumer's bank account as part of an automatic bill payment program without the consumer's express authorization for each withdrawal is unconscionable is a question of fact based upon the considerations discussed above.

Other factors

We note that public and private utilities are subject to oversight by a regulatory or governing body depending on the nature of the utility.[25] While our opinion is limited to the KCPA, other laws governing a particular utility could have a bearing a court's determination of whether a utility bill round-up program violates the KCPA. For example, in some instances, a statute provides that approval by the regulatory or governing body of a utility's proposed tariff schedule is prima facie evidence of reasonableness.[26] If a utility receives approval to institute an opt-out utility bill round-up program and include automatic charitable contributions in consumers' utility bills, such approval could serve as part of a defense against a KCPA claim.

Summary

[23] *Minutes*, Senate Committee on Financial Institutions and Insurance, January 31, 2001.
[24] L. 2002, Ch. 13, § 1.
[25] *See, e.g.*, K.S.A. 2017 Supp. 66-104 (defining which utilities are subject to supervision by the Kansas Corporation Commission (KCC)) and K.S.A. 2017 Supp. 66-104d (certain electric cooperative public utilities not subject to KCC supervision).
[26] *See, e.g.*, K.S.A. 66-115.

Whether a particular practice violates the KCPA depends on the facts of each consumer transaction. We believe that an opt-out utility bill round-up program would be considered a “material fact” for the purposes of K.S.A. 2017 Supp. 50-626 and K.S.A. 50-627. A KCPA violation may occur if there is evidence of deceptive or oppressive practices, overreaching, intentional misstatements, or concealment of facts with respect to a consumer transaction involving an opt-out utility bill round-up program.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Attorney General

/s/Sarah Fertig

Sarah Fertig
Assistant Attorney General

DS:AA:SF:sb