

SENATE BILL No. 317

AN ACT concerning civil procedure; relating to business records subpoenaed by a party; relating to admissions of facts in limited actions; relating to worthless checks; relating to small claims; amending K.S.A. 61-2706 and K.S.A. 2003 Supp. 60-245a, 60-2610, 60-2611, 61-2703, 61-2713 and 61-3101 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 2003 Supp. 60-245a is hereby amended to read as follows: 60-245a. (a) As used in this section:

(1) "Business" means any kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

(2) "Business records" means writings made by personnel or staff of a business, or persons acting under their control, which are memoranda or records of acts, conditions or events made in the regular course of business at or about the time of the act, condition or event recorded.

(b) A subpoena duces tecum which commands the production of business records in an action in which the business is not a party shall inform the person to whom it is directed that the person may serve upon the attorney designated in the subpoena written objection to production of any or all of the business records designated in the subpoena within 14 days after the service of the subpoena or at or before the time for compliance, if the time is less than 14 days after service. If such objection is made, the business records need not be produced except pursuant to an order of the court upon motion with notice to the person to whom the subpoena was directed.

Unless the personal attendance of a custodian of the business records and the production of original business records are required under subsection (d), it is sufficient compliance with a subpoena of business records if a custodian of the business records delivers to the clerk of the court by mail or otherwise a true and correct copy of all the records described in the subpoena and mails a copy of the affidavit accompanying the records to the party or attorney requesting them within 14 days after receipt of the subpoena.

The records described in the subpoena shall be accompanied by the affidavit of a custodian of the records, stating in substance each of the following: (1) The affiant is a duly authorized custodian of the records and has authority to certify records; (2) the copy is a true copy of all the records described in the subpoena; and (3) the records were prepared by the personnel or staff of the business, or persons acting under their control, in the regular course of the business at or about the time of the act, condition or event recorded.

If the business has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit and shall send only those records of which the affiant has custody. When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name and address of the witness and the date of the subpoena are clearly inscribed. If return of the copy is desired, the words "return requested" must be inscribed clearly on the sealed envelope or wrapper. The sealed envelope or wrapper shall be delivered to the clerk of the court. *Thirty days after termination of the case, records which are not introduced in evidence or required as part of the record may be destroyed or returned to the custodian of the records who submitted them if return has been requested after notice is given.*

The reasonable costs of providing the copying of the records may be demanded of the party causing the subpoena to be issued. If the costs are demanded, the records need not be produced until the costs of copying are advanced.

(c) The subpoena shall be accompanied by an affidavit to be used by the records custodian. ~~The subpoena and affidavit shall be in substantially the following form:~~

Subpoena of Business Records

State of Kansas

County of _____

(1) You are commanded to produce the records listed below before

(Officer at Deposition)

(Judge of the District Court)

at _____

(Address)

in the City of _____, County of _____, on the _____ day of _____, 19____, at _____ o'clock _____ m., and to testify on behalf of the _____ in an action now pending between _____, plaintiff, and _____, defendant. Failure to comply with this subpoena may be deemed a contempt of the court.

—(2) Records to be produced. _____

—(3) You may make written objection to the production of any or all of the records listed above by serving such written objection upon

_____ at _____
(Attorney) (Attorney's Address)

(within 14 days after service of this subpoena) (on or before _____, 19____). If such objection is made, the records need not be produced except upon order of the court.

—(4) Instead of appearing at the time and place listed above, it is sufficient compliance with this subpoena if a custodian of the business records delivers to the clerk of the court by mail or otherwise a true and correct copy of all the records described above and mails a copy of the affidavit below to

_____ at _____
(Requesting Party or Attorney) (Address of Party or Attorney)

within 14 days after receipt of this subpoena.

—(5) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name and address of the witness and the date of this subpoena are clearly inscribed. If return of the copy is desired, the words "return requested" must be inscribed clearly on the sealed envelope or wrapper. The sealed envelope or wrapper shall be delivered to the clerk of the court. *Thirty days after termination of the case, records which are not introduced in evidence or required as part of the record may be destroyed or returned to the custodian of the records who submitted them if return has been requested after notice has been given.*

—(6) The records described in this subpoena shall be accompanied by the affidavit of a custodian of the records, a form for which is attached to this subpoena.

—(7) If the business has none of the records described in this subpoena, or only part thereof, the affidavit shall so state, and the custodian shall send only those records of which the custodian has custody. When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

—(8) The reasonable costs of copying the records may be demanded of the party causing this subpoena to be issued. If the costs are demanded, the records need not be produced until the costs of copying are advanced.

—(9) The copy of the records will not be returned unless requested by the witness.

Clerk of the District Court

[Seal of the District Court]

Dated _____, 19____.

Affidavit of Custodian of Business Records

State of _____

County of _____

—I, _____, being first duly sworn, on oath, depose and say that:

—(1) I am a duly authorized custodian of the business records of _____ and have the authority to certify those records.

—(2) The copy of the records attached to this affidavit is a true copy of the records described in the subpoena.

—(3) The records were prepared by the personnel or staff of the business, or persons acting under their control, in the regular course of the business at or about the time of the act, condition or event recorded.

Signature of Custodian

—Subscribed and sworn to before the undersigned on _____.

Notary Public

My Appointment Expires: _____

Certificate of Mailing

—I hereby certify that on _____, 19____, I mailed a copy of the above affidavit to _____ at _____

(Requesting Party or Attorney) (Address of Party or Attorney)
by depositing it with the United States Postal Service for delivery with postage prepaid.

Signature of Custodian

—Subscribed and sworn to before the undersigned on _____.

Notary Public

My Appointment Expires: _____

(d) Any party may require the personal attendance of a custodian of business records and the production of original business records by causing a subpoena duces tecum to be issued which contains the following statements in lieu of paragraphs (4), (5), (6), (7) and (8) of the subpoena form described in subsection (c):

—The personal attendance of a custodian of business records and the production of original records is required by this subpoena. The proce-

~~dures for delivering copies of the records to the clerk of the court shall not be deemed sufficient compliance with this subpoena and should be disregarded. A custodian of the records must personally appear with the original records.~~

(e) Notice of intent to request the issuance of a subpoena pursuant to this section where the attendance of the custodian of the business records is not required shall be given to all parties to the action at least 10 days prior to the issuance thereof by the party requesting issuance of the subpoena. A copy of the proposed subpoena shall also be served upon all parties along with such notice. In the event any party objects to the production of the documents sought by such subpoena prior to its issuance, the subpoena shall not be issued until further order of the court in which the action is pending. If receipt of the records makes the taking of a deposition unnecessary, the party who caused the subpoena for the business records to be issued shall cancel the deposition and shall notify the other parties to the action in writing of the receipt of the records and the cancellation of the deposition.

After the copy of the record is filed, a party desiring to inspect or copy it shall give reasonable notice to every other party to the action. The notice shall state the time and place of inspection. *Thirty days after termination of the case*, records which are not introduced in evidence or required as part of the record ~~shall~~ *may* be destroyed or returned to the custodian of the records who submitted them if return has been requested *after notice has been given*.

Sec. 2. K.S.A. 2003 Supp. 60-2610 is hereby amended to read as follows: 60-2610. (a) If a person gives a worthless check, the person shall be liable to the holder of the check for the amount of the check, the incurred court costs, the incurred service charge, interest at the statutory rate and the costs of collection including but not limited to reasonable attorney fees, plus an amount equal to the greater of the following:

- (1) Damages equal to three times the amount of the check but not exceeding the amount of the check by more than \$500; or
- (2) \$100.

The court may waive all or part of the attorney fees provided for by this subsection, if the court finds that the damages and other amounts awarded are sufficient to adequately compensate the holder of the check. In the event the court waives all or part of the attorney fees, the court shall make written findings of fact as to the specific reasons that the amounts awarded are sufficient to adequately compensate the holder of the check.

(b) The amounts specified by subsection (a) shall be recoverable in a civil action brought by or on behalf of the holder of the check only if: (1) Not less than 14 days before filing the civil action, the holder of the check made written demand on the maker or drawer for payment of the amount of the check, the incurred service charge and accrued interest; and (2) the maker or drawer failed to tender to the holder, prior to the filing of the action, an amount not less than the amount demanded.

The written demand shall be sent by first class mail, to the person to be given notice at such person's address as it appears on such check, draft or order or to the last known address of the maker or drawer. The written demand shall include notice that, if the money is not paid within 14 days, triple damages in addition to an amount of money equal to the sum of the amount of the check, the incurred service charge, court costs, accrued interest, the costs of collection, including but not limited to, reasonable attorney fees unless the court otherwise orders, may be incurred by the maker or drawer of the check.

Notice required by subsection (b)(1) shall state the exact amount and date due, as well as an estimate of the amount that may be incurred if the amount demanded is not paid by the specified date.

(c) Subsequent to the filing of an action under this section but prior to the commencement of a dispositional hearing by the court, the defendant may tender to the plaintiff as satisfaction of the claim, an amount of money equal to the sum of the amount of the check, the incurred service charge, accrued interest, the costs of collection including, but not limited to, reasonable attorney fees and court costs. The plaintiff shall include in the petition a statement alleging that the defendant may tender such amount as satisfaction of the claim as provided in this subsection. If

the amount alleged in the petition is tendered to the plaintiff in full satisfaction of the debt prior to the commencement of the dispositional hearing by the court, the case shall be dismissed by the plaintiff. For purposes of this subsection only, the amount tendered as satisfaction of the claim shall not include triple damages or damages of \$100 as provided in subsections (a)(1) and (2). For purposes of this subsection, a dispositional hearing means a trial or other hearing by the court in which the plaintiff is seeking the entry of judgment against the defendant. The court may waive all or part of the attorney fees provided for by this subsection, if the court finds that the ~~damages and other amounts awarded are~~ *amount tendered* is sufficient to adequately compensate the holder of the check. In the event the court waives all or part of the attorney fees, the court shall make written findings of fact as to the specific reasons that the ~~amounts awarded are~~ *amount tendered* is sufficient to adequately compensate the holder of the check.

(d) If the trier of fact determines that the failure of the defendant to satisfy the dishonored check was due to economic hardship, the court may waive all or part of the damages provided for by this section, but the court shall render judgment against defendant for not less than the amount of the dishonored check, the incurred court costs, service charge, ~~costs of restricted mail~~ and the costs of collection, including but not limited to reasonable attorney fees, unless otherwise provided in this subsection. The court may waive all or part of the attorney fees provided for by this subsection, if the court finds that the damages and other amounts awarded are sufficient to adequately compensate the holder of the check. In the event the court waives all or part of the attorney fees, the court shall make written findings of fact as to the specific reasons that the amounts awarded are sufficient to adequately compensate the holder of the check.

(e) Any amount previously paid as restitution or reparations to the holder of the check by or on behalf of its maker or drawer shall be credited against the amount for which the maker or drawer is liable under subsection (a).

(f) Conviction of giving a worthless check or habitually giving a worthless check, as defined by K.S.A. 21-3707, and amendments thereto, shall not be a prerequisite or bar to recovery pursuant to this section.

(g) The service charge on a check which is dishonored by the drawee because the maker or drawer had no deposits in or credits with the drawee or has not sufficient funds in, or credits with, the drawee for the payment of each check, order or draft in full upon its presentation, shall not exceed \$30.

(h) As used in this section, “giving a worthless check” means the making, drawing, issuing or delivering or causing or directing the making, drawing, issuing or delivering of any check, order or draft on any bank, credit union, savings and loan association or depository for the payment of money or its equivalent:

- (1) With intent to defraud or in payment for a preexisting debt; or
- (2) Which is dishonored by the drawee because the maker or drawer had no deposits in or credits with the drawee or has not sufficient funds in, or credits with, the drawee for the payment of such check, order or draft in full upon its presentation; and
- (3) for which the maker or drawer has not tendered to the holder’s agent the amount of money demanded and within the time allowed by the demand required in subsection (b).

Sec. 3. K.S.A. 2003 Supp. 60-2611 is hereby amended to read as follows: 60-2611. In any civil action to enforce payment of or to collect upon a check, order or draft on any bank, credit union, savings and loan association or depository for the payment of money or its equivalent, payment upon which such instrument has been refused because of insufficient funds or no account, the party prevailing on such cause of action shall be awarded reasonable attorney fees. Such fees shall be assessed by the court as costs against the losing party. The fees shall not be allowed unless the plaintiff offers proof during the trial of such action that prior to the filing of the petition in the action demand for payment of the check, order or draft had been made upon the defendant by ~~restricted~~ *first class* mail not less than 14 days prior to the filing of such suit.

Sec. 4. K.S.A. 2003 Supp. 61-3101 is hereby amended to read as

follows: 61-3101. (a) When an answer has been filed in an action or if the defendant appears and disputes the claims in the petition commenced pursuant to the provisions of the code of civil procedure for limited actions, any party may submit to any other party a written request for that party to admit:

(1) The genuineness of any relevant document described in and attached to the request; or

(2) the truth of any relevant matter of fact set forth in the request. The request shall be in a form which will permit the party to whom it is submitted to answer the questions on the request form under oath. A request for admissions may not contain more than 10 requests unless permission of the court is obtained to increase the number.

(b) Each of the matters requested shall be deemed to be admitted for purposes of the pending lawsuit, unless within 15 days after the request is served, the party to whom the request is directed submits to the party propounding the request either:

(1) A sworn statement denying specifically the matters requested; or

(2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part.

(c) If the answering party cannot truthfully admit or deny a request, the party shall set forth in detail the reasons why. If the answering party denies a request, the denial shall be in good faith and shall fairly address the substance of the request. If in good faith the answering party can deny only a part of the request or qualify a request, the party shall specify which part is admitted and qualify or deny the remaining part. If the answering party objects to a request, the party shall notify the court and the party propounding the request and schedule a hearing on the objection to be held within 10 days after making the objection.

(d) *The judge may permit withdrawal or amendment of any admission made by nonresponse when the party to whom the admissions were sent shows good cause for failure to respond and shows evidence that the admission is not true and the party who obtained the admission fails to satisfy the judge that withdrawal or amendment will prejudice such party in maintaining such party's action or defense on the merits. In the event such withdrawal or amendment is made by the party to whom the admissions were sent at trial, the party who obtained the admissions shall be allowed a continuance of the trial setting. Any admission made by a party under this section is for the purpose of the pending action only and is not an admission by such party for any other purpose nor may it be used against such party in any other proceeding.*

Sec. 5. K.S.A. 2003 Supp. 61-2703 is hereby amended to read as follows: 61-2703. As used in this act:

(a) "Small claim" means a claim for the recovery of money or personal property, where the amount claimed or the value of the property sought does not exceed ~~\$1,800~~ \$4,000, exclusive of interest, costs and any damages awarded pursuant to K.S.A. 60-2610 and amendments thereto. In actions of replevin, the verified petition fixing the value of the property shall be determinative of the value of the property for jurisdictional purposes. A small claim shall not include:

(1) An assigned claim;

(2) a claim based on an obligation or indebtedness allegedly owed to a person other than the person filing the claim, where the person filing the claim is not a full-time employee or officer of the person to whom the obligation or indebtedness is allegedly owed; or

(3) a claim obtained through subrogation.

(b) "Person" means an individual, partnership, limited liability company, corporation, fiduciary, joint venture, society, organization or other association of persons.

Sec. 6. K.S.A. 61-2706 is hereby amended to read as follows: 61-2706. (a) Whenever a plaintiff demands judgment beyond the scope of the small claims jurisdiction of the court, the court shall either: (1) Dismiss the action without prejudice at the cost of the plaintiff; (2) allow the plaintiff to amend the plaintiff's pleadings and service of process to bring the demand for judgment within the scope of the court's small claims jurisdiction and thereby waive the right to recover any excess, assessing the costs accrued to the plaintiff; or (3) if the plaintiff's demand for judg-

ment is within the scope of the court's general jurisdiction, allow the plaintiff to amend the plaintiff's pleadings and service of process so as to commence an action in such court in compliance with K.S.A. 61-1703 and amendments thereto, assessing the costs accrued to the plaintiff.

(b) Whenever a defendant asserts a claim beyond the scope of the court's small claims jurisdiction, but within the scope of the court's general jurisdiction, the court may determine the validity of defendant's entire claim. If the court refuses to determine the entirety of any such claim, the court must allow the defendant to: (1) Make no demand for judgment and reserve the right to pursue the defendant's entire claim in a court of competent jurisdiction; (2) make demand for judgment of that portion of the claim not exceeding ~~\$1,800~~ \$4,000, plus interest, costs and any damages awarded pursuant to K.S.A. 60-2610 and amendments thereto, and reserve the right to bring an action in a court of competent jurisdiction for any amount in excess thereof; or (3) make demand for judgment of that portion of the claim not exceeding ~~\$1,800~~ \$4,000, plus interest, costs and any damages awarded pursuant to K.S.A. 60-2610 and amendments thereto, and waive the right to recover any excess.

Sec. 7. K.S.A. 2003 Supp. 61-2713 is hereby amended to read as follows: 61-2713. (a) The petition shall be in substantially the following form:

In the District Court of _____ County, Kansas.

Plaintiff
vs. _____ No. _____

Defendant

PETITION PURSUANT TO CHAPTER 61 OF THE KANSAS
STATUTES ANNOTATED

Statement of claim:

I, _____, having read the instruction below, hereby assert the following claim against _____, defendant:

Demand for judgment:

Based on the claim stated above, judgment is demanded against defendant as follows:

1. Payment of \$_____, plus interest, costs and any damages awarded under K.S.A. 60-2610 and amendments thereto.

2. Recovery of the following described personal property, plus costs: _____. This property has an estimated value of \$_____.

Instructions to plaintiff:

1. State the claim you have against the defendant in the space provided. Be clear and concise.

2. Your total claim against defendant may not exceed ~~\$1,800~~ \$4,000, not including interest, costs and any damages awarded under K.S.A. 60-2610 and amendments thereto. If you are seeking the recovery of personal property, the value of that property shall be based on your estimate of its value under oath.

3. You must be present in person at the hearing in order to avoid default judgment against you on any claim defendant may have which arises out of the transaction or occurrence which is the subject to your claim against the defendant.

4. You must make demand for judgment in one or both of the spaces provided above.

5. Except as provided by law, neither you nor the defendant is permitted to appear with an attorney at the hearing.

6. You may not file more than 10 small claims under the small claims procedure act in this court during any calendar year.

7. After completing this form, you must subscribe to the following oath:

I, _____, hereby swear that, to the best of my knowledge and belief, the foregoing claim asserted against the defendant (including the estimate of value of any property sought to be recovered) is a just and true statement, exclusive of any valid claim or defense which defendant may have.

[Signature] _____
Plaintiff

Subscribed and sworn to before me this _____ day of _____,
~~19~~ (year).

[Signature] _____
Judge (clerk or notary)

(b) The summons shall be in substantially the following form:

In the District Court of _____ County, Kansas.

Plaintiff
vs. _____ No. _____

Defendant

SUMMONS
(Small Claims Procedure)

To the above-named defendant:

You are hereby notified that the above-named plaintiff has filed a claim against you under

the small claims procedure of this court. The statement of plaintiff's claim and demand for judgment against you are set forth in the petition which is served upon you with this summons.

A trial will be held on this matter at _____ o'clock _____m. on the _____ day of _____, ~~19~~ (year), at _____.

(Place of hearing and address)

You must be present in person at the trial or a judgment by default will be entered against you. Except as otherwise provided by law, neither you nor the plaintiff is permitted to appear with an attorney.

If your defense is supported by witnesses, books, receipts or other papers, you should bring them with you at the time of the hearing. If you wish to have witnesses summoned, see the judge or clerk of the court at once for assistance.

If you admit the claim, but desire additional time to satisfy plaintiff's demands, you must be present at the trial and explain the circumstances to the court.

If you have a claim against the plaintiff, which arises out of the transaction or occurrence which is the subject of plaintiff's claim and your claim does not exceed ~~\$1,500~~ \$4,000, you must complete the form for "Defendant's Claim," which accompanies this summons, and return it to the judge or clerk of the court on or before the time set for the trial. If your claim against plaintiff exceeds ~~\$1,500~~ \$4,000, you may complete and return the form for "Defendant's Claim" on or before the time set for trial.

RETURN ON SERVICE OF SUMMONS

I hereby certify that I have served this summons:

(1) *Personal service.* By delivering a copy of the summons and a copy of the petition to each of the following defendants on the dates indicated:

_____, ~~19~~ (year) _____, ~~19~~ (year)

(2) *Residence service.* By leaving a copy of the summons and a copy of the petition at the usual place of residence of each of the following defendants on the dates indicated:

_____, ~~19~~ (year) _____, ~~19~~ (year)

(3) *No service.* The following defendants were not found in this county:

Dated: _____

(Signature and Title of Officer)

(c) The defendant's claim shall be in substantially the following form:

In the District Court of _____ County, Kansas.

Plaintiff
vs. _____ No. _____

Defendant

DEFENDANT'S CLAIM

Instructions:

1. As stated in the summons, if you have a claim against the plaintiff which arises out of the transaction or occurrence which is the subject of plaintiff's claim and your claim does not exceed ~~\$1,500~~ \$4,000, you must state your claim in the space provided below. If your claim against the plaintiff exceeds ~~\$1,500~~ \$4,000, you may state your claim in the space provided below. In determining whether or not your claim against the plaintiff exceeds ~~\$1,500~~ \$4,000, do not include interest, costs and any damages under K.S.A. 60-2610 and amendments thereto, but do include the value of any personal property sought to be recovered as determined by your estimate of its value under oath.

2. Be clear and concise in stating your claim.

3. If the value of your claim exceeds ~~\$1,500~~ \$4,000 (not including interest, costs and any damages awarded under K.S.A. 60-2610 and amendments thereto, but including the value of any personal property sought to be recovered, as determined by your estimate of its value under oath), the court must decide whether you may pursue your entire claim or only that portion not exceeding ~~\$1,500~~ \$4,000.

4. If your claim exceeds ~~\$1,500~~ \$4,000 and the court determines that you may not pursue the entire claim at the hearing, you have three alternatives: (1) Make no demand for judgment and reserve the right to pursue your entire claim in a court of competent jurisdiction; (2) make demand for judgment of that portion of your claim which does not exceed ~~\$1,500~~ \$4,000 and reserve the right to bring an action in a court of competent jurisdiction for any amount in excess thereof; or (3) make demand for judgment of that portion of your claim which does not exceed ~~\$1,500~~ \$4,000 and waive your right to recover any excess.

5. When completed, this form must be filed with the judge or the clerk of the court on or before the time stated in the summons for the trial.

Statement of claim:

I, _____, having read the instructions above, assert the following claim against _____ plaintiff:

Demand for judgment:

Based on the claim stated above, judgment is demanded against plaintiff as follows:

1. Payment of \$_____, plus interest, costs and any damages awarded under K.S.A. 60-2610 and amendments thereto.

2. Recovery of the following described personal property, plus costs: This property has an estimated value of \$_____.

I, _____, hereby swear that, to the best of my knowledge and belief, the above claim asserted against the plaintiff (including the estimate of value of any property sought to be recovered) is a just and true statement.

[Signature] _____

Plaintiff

Subscribed and sworn to before me this _____ day of _____, ~~19~~ (year).

[Signature] _____

Judge (clerk or notary)

Sec. 8. K.S.A. 61-2706 and K.S.A. 2003 Supp. 60-245a, 60-2610, 60-2611, 61-2703, 61-2713 and 61-3101 are hereby repealed.

Sec. 9. This act shall take effect and be in force from and after its publication in the statute book.

I hereby certify that the above BILL originated in the SENATE, and passed that body

SENATE adopted
Conference Committee Report _____

President of the Senate.

Secretary of the Senate.

Passed the HOUSE
as amended _____

HOUSE adopted
Conference Committee Report _____

Speaker of the House.

Chief Clerk of the House.

APPROVED _____

Governor.