Kansas Court of Appeals confirms inapplicability of Kansas Consumer Protection Act claims against regulated banks.

By Matthew A. Spahn

In a decision having a far-reaching impact on regulated banks doing business in Kansas, on November 17, 2017, the Kansas Court of Appeals affirmed that claims cannot be brought against regulated banks under the Kansas Consumer Protection Act ("KCPA"). *See White v. Sec. State Bank*, 2017 Kan. App. Unpub. LEXIS 957 (2017).

The KCPA is a Kansas law that was created, in part, to "protect consumers from suppliers who commit deceptive and unconscionable practices." K.S.A. 50-623(b). To prevail on a KCPA claim, a plaintiff must prove that it is a "consumer" under the KCPA, that the defendant is a "supplier" under the KCPA, and that the defendant engaged in a deceptive or unconscionable act or practice that aggrieved the plaintiff.

The KCPA defines a supplier 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 customer." K.S.A. 50-624(l). The same section of the statute, however, states "[s]upplier does not include any bank, trust company or lending institution which is subject to state or federal regulation with regard to disposition of repossessed collateral by such bank, trust company or lending institution." *Id.*

In *White*, the plaintiffs asserted fourteen KCPA claims against Security State Bank and its president related to their loan transactions with the Bank for the family farm. The Whites alleged that the Bank had engaged in a pattern of unconscionable, deceptive, and fraudulent behavior to exploit the Whites during the loan transactions.

At the district court level, the White's KCPA claims were dismissed. In dismissing the claims, the district court determined that the Bank was excluded from the KCPA's definition of "supplier" because it was regulated. The Court of Appeals affirmed the dismissal of the KCPA claim.

On appeal, there was no disagreement that the Bank was regulated. Thus, the critical issue was whether the exclusion in the definition of supplier was application to the Bank considering that no "disposition of repossessed collateral" was at issue.

The Whites challenged the district court's legal conclusion and argued that the exclusion of banks from the definition of suppliers is expressly limited to only those occasions when the bank is actually disposing of repossessed collateral.

In contrast, the Bank argued that the bank exclusion applied whenever a regulated bank is involved in any transaction, regardless of whether that matter involves disposing of repossessed collateral. The Bank contended that regulated banks must comply with federal and state regulations which already protect consumers from deceptive and unconscionable practices by

banks. Thus, the KCPA's exclusion of regulated banks as suppliers is a recognition that consumers receive protection from other statutory or regulated sources.

The Court of Appeals agreed with the Bank's interpretation of the definition of supplier. The Court stated:

> A plain reading of the statutory language persuades us that the interpretation proposed by the Whites is too narrow. The basic text of the supplier exclusion does not limit its application to only those times when the bank is actively disposing of repossessed collateral. Rather, based on the plain language, if a bank is generally subject to regulations pertaining to disposition of repossessed collateral, the bank is excluded as a supplier under the nomenclature and reach of the KCPA.

2017 Kan. App. Unpub. LEXIS 957, at *18. In support of its plain reading interpretation of the definition of supplier, the Court of Appeals relied upon two opinions issued by the U.S. District Court for the District of Kansas. In the 2016 case *Larkin v. Bank of Am., N.A. (In re Larkin)*, Judge Robert Nugent noted that "[i]n every instance where a bank's status as 'supplier' under the KCPA was directly before it, the United States District Courts have held that regulated banks are excluded from the definition, regardless of whether the case actually involves a disposition of repossessed collateral." 553 B.R. 428, 444 (Bankr. D. Kan. 2016). Judge Nugent observed:

> Wittingly or not, the Legislature has created a sizeable hole in the KCPA through which banks . . . can slip, regardless of their conduct. While the 'guiding principle' of the KCPA is to protect consumers from suppliers who commit deceptive and unconscionable acts, a goal that requires liberal construction, that only goes as far as the words that are contained in the statute. I cannot interpret words that aren't there or replace them with others. Adopting the [plaintiffs'] interpretation would effectively rewrite the 'regulated bank' exclusion in the definition of 'supplier.' That is a task for the Kansas Legislature, not me."

553 B.R. at 444-45.

In reaching his ruling in *Larkin*, Judge Nugent had relied on Judge J. Thomas Marten's statutory interpretation in *Kalebaugh v. Cohen, McNeile & Pappas, P.C.*, 76 F. Supp. 3d 1251 (D. Kan. 2015). In *Kalebaugh*, the plaintiff argued that the KCPA only excludes banks, trust companies, and lending institutions when the issue at hand is the "disposition of repossessed collateral." Judge Marten disagreed with this narrow reading and concluded, "the court cannot extrapolate this meaning from the plain language of the statute. The court therefore concludes that Discover Bank is not a supplier under the KCPA if it is subject to state or federal regulation." *Id.* at 1260; *see also Ellis v. Chase Bank USA, NA*, 2017 U.S. Dist. LEXIS 183866, at *9 (D. Kan. Nov. 7, 2017) (in a case decided after the *White* decision, U.S. District Judge Daniel D. Crabtree, in granting a Motion to Dismiss, took judicial notice that Chase Bank was federally regulated and as a result, was not a "supplier" under the KCPA).

In sum, the decision in *White* adopting the rationale of the U.S. District Court for the District of Kansas confirms that KCPA claims cannot be brought against regulated banks, trust companies or lending institutions.