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Private Right of Action for Selling Unregistered Securities in Kansas

The Kansas Uniform Securities Act (K.S.A. 17-12a101 through 17-12a703) regulates the promotion of speculative securities to protect investors. Enforcement of the Act may be handled by the Kansas Securities Commissioner, but private actions are also authorized in certain circumstances.

A security is any proof of ownership or debt assigned a value and may be sold. Common types of securities are stocks, bonds, and options. The rules regarding “crowdfunding” as a security were relaxed after the JOBS (Jumpstart Our Business Startups) Act was passed in 2012. The JOBS Act allows everyone the ability to invest in startups, with investment caps based on one’s income.

As a general rule, it is unlawful to sell unregistered securities in Kansas. There are two exceptions to that rule:

- The security is a federal covered security, or
- The security, transaction, or offer is exempted from registration.

The purpose of a civil action under the Kansas Uniform Securities Act is to allow recovery by the purchaser. There is separate liability for each person who directly or indirectly controls a liable seller and each broker-dealer who materially aids in the sale. A broker-dealer who materially aids in the sale of unregistered securities is liable to the buyer for damages resulting from the sale unless the broker-dealer can prove it did not know and could not with exercising reasonable care have known the facts supporting liability.

In a private action filed under the Act, the following damages may be recovered:

- The purchaser may recover the consideration paid for the security, less any income received on the security, and interest from the date of purchase at the rate provided for interest on judgments by [K.S.A. 16-204](#), costs, and reasonable attorneys' fees determined by the court, upon the tender of the security, or for actual damages;
- The tender may be made any time before entry of judgment. Tender requires only notice in a record of ownership of the security and willingness to exchange the security for the amount specified;
- A purchaser that no longer owns the security may recover actual damages;
- Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, and

interest from the purchase date at the rate provided for interest on judgments by [K.S.A. 16-204](#), and amendments thereto, costs, and reasonable attorneys' fees determined by the court.

The Kansas Supreme Court addressed private actions under the Act in *Klein v. Oppenheimer*, 281 Kan. 330, 130 P.3d 569 (2006). The primary issue in that case was the liability of a clearing-broker for the sale of unregistered securities. The plaintiff sued Oppenheimer seeking damages, interest, costs, and attorney fees. The Court held that Oppenheimer was a broker-dealer as defined by the Act and that Oppenheimer materially aided in the sale of unregistered securities in Kansas. However, the case was remanded to the trial court whether Oppenheimer knew, or by exercising reasonable care could have known, whether the securities were unregistered. The burden of proving the existence of an exemption falls on Oppenheimer.

For more information, please contact me at 816-527-9444, marina@kennyhertzperry.com, or online at www.kennyhertzperry.com. For more information on Kennyhertz Perry's Financial Services practice group, please visit: [Kennyhertz Perry Financial Services Practice Group](#).

About Kennyhertz Perry: Kennyhertz Perry is a business and litigation law firm representing clients in highly-regulated industries. Founded by two veteran Kansas City attorneys, John Kennyhertz and Braden Perry, Kennyhertz Perry brings a unique mix of top law firm quality expertise, practical experience, and pragmatic business solutions.