



**Testimony Before the Senate Judiciary Committee
In Support of Senate Bill 16
on behalf of the Kansas Association of Insurance Agents**

*Presented by William A. Larson
January 21, 2015*

Mr. Chairman and Members of the Committee:

I am here today to testify in favor of Senate Bill 16 on behalf of the Kansas Association of Insurance Agents (KAIA). The KAIA is a statewide association of independent insurance agents representing more than 500 member insurance agencies who employ more than 2,500 insurance agents. I am the attorney for the KAIA and also a partner in the law firm of Larson and Blumreich, which engages in insurance defense work almost exclusively. I have been an insurance defense attorney since 1977.

Senate Bill 16 would amend KSA 40-908. The law currently states:

That in all actions now pending, or hereafter commenced in which judgment is rendered against any insurance company on any policy given to insure any property in this state against loss by fire, tornado, lightning or hail, the court in rendering such judgment shall allow the plaintiff a reasonable sum as an attorney's fee for services in such action including proceeding upon appeal to be recovered and collected as a part of the costs: Provided, however, That when a tender is made by such insurance company before the commencement of the action in which judgment is rendered and the amount recovered is not in excess of such tender no such costs shall be allowed.

Basically the statute provides that if a judgment is rendered against an insurance company on a policy insuring against loss by fire, tornado, lightning or hail and the insured is awarded more than the insurance company offered before suit, the insured is automatically entitled to attorney's fees.

KSA 40-908 was enacted in 1927. At that time insurance companies concentrated on specific lines of business, such as fire insurance, liability insurance, hail insurance and so on. The policies were sold separately. In the late 1950s and early 1960s insurance companies started selling bundled policies which included property damage coverage and liability coverage as well as other types of coverages all in one policy. Even so, because of the historical application of the statute, until recently, the statute was generally only applied where the insured brought suit against its insurance company for damage to a house or building and the contents of those structures.

Starting in 2006, with the case of *Lee Builders, Inc. v. Farm Bureau Mut. Ins Co.* (2006) and, more importantly, and more recently, in the case of *Bussman v. Safeco* (2014) the Kansas Supreme Court started applying the statute, in a very literal manner, to any claim made against an insurance company under any policy that included coverage for damage caused by fire, tornado, lightning or hail regardless of the nature of the claim.

For example, in the *Lee Builders* case the insured brought a claim against Farm Bureau claiming the insurance company had a duty to defend and indemnify it in a liability case brought against the insured. In the *Bussman* case the insured brought an underinsured motorist claim against Safeco. In neither case was there any claim against the insurance companies for property damage caused by fire tornado, lightning or hail. Nevertheless, in both cases, the Supreme Court found the insureds were entitled to attorney's fees because the literal language of the statute provided the statute applied to any claim brought under any policy that provided coverage for damage due to the four named perils.

-see reverse-

In *Bussman* the court conceded this was probably not the actual intent of the statute, but the court felt it had to follow the literal language of the statute. At one point the court in *Bussman* stated:

Perhaps most importantly for our purposes here, even where the court believes that the legislature has omitted a vital provision in a statute that precludes the intended result, if that omitted provision cannot be found under any reasonable interpretation of the language actually used, then the remedy lies solely with the legislature. See *Ft. Hays St. Univ. v. University Ch., Am. Ass'n of Univ. Profs*, 290 Kan. 446, 464-65, 228 P.3d 403 (2010).

The KAIA and others who support Senate Bill 16 believe KSA 40-908 should be amended to accomplish its original purpose which even the Supreme Court recognized. It was meant to apply to property damage cases where, in most cases, the damages are more easily determined as opposed to cases, such as uninsured or underinsured motorists cases, which are essentially tort cases, where such things as pain and suffering, mental anguish and disability are much or difficult to determine.

There is another statute which allows for attorney's fees if an insurance company is being unreasonable, KSA 40-256. It applies to any case against an insurance company where a company refuses to pay in bad faith and without just cause or excuse.

The effect of the Supreme Court's application of KSA 40-908 could well extend to non-property insurance cases other than just the two examples above. For example KSA 66-1,128 has been interpreted by the Appellate Courts to allow direct claims against insurance companies insuring motor carriers in trucking accident cases. This means that individuals that claim to be injured by the operator of a truck can sue the truck operator's insurance company, directly, without first having to get a judgment against the operator. The policies often include comprehensive physical damage coverage as well as liability coverage. A good argument can be made that, under the Supreme Court's current interpretation of KSA 40-908, a personal injury plaintiff in a trucking case could be entitled to attorney's fees automatically if he or she is awarded more than the insurance company offered before suit.

The Court's current interpretation of KSA 40-908 also affects settlements, not just judgments. In any case where KSA 40-908 is applicable a good plaintiff's attorney uses the threat of recovering attorney's fees as leverage, often successfully, to obtain a larger settlement.

For all these reasons and more the KAIA supports Senate Bill 16.