

M I N U T E S

SPECIAL COMMITTEE ON JUDICIARY-A

October 17-18, 1977
Room 532 - State House

Members Present

Senator Elwaine Pomeroy, Chairman
Representative Eugene Gastl, Vice-Chairman
Senator Don Allegrucci
Senator Paul Burke
Senator James Francisco
Representative Doug Baker
Representative Ward Ferguson
Representative Robert Frey
Representative Neal Whitaker

Staff Present

Art Griggs, Revisor of Statutes Office
Paul Purcell, Kansas Legislative Research Department

October 17, 1977
Morning Session

Chairman Pomeroy called the meeting to order at 9:00 a.m. and directed the Committee's attention to the Committee Report drafts. The Committee reviewed, and discussed the drafts for Proposals 30, 32, 34, 35, and 36. Staff was directed to make certain changes and to duplicate the altered drafts for review in the afternoon. With regard to Proposal No. 30 - Delegation of Legislative Authority - Senator Francisco expressed concern about the way fines are imposed under the system of rules and regulations. He said that he wanted no fines to be levied for violations of rules and regulations not reviewed by the Legislature. He said he was referring, for the most part, to temporary rules and regulations. He also said that as a policy matter there should be no fines for violations of rules and regulations only fines for violations of statutes. Senator Pomeroy pointed out that if there was no way of enforcing rules and regulations there was no reason to have them. Representative Ferguson said the new Joint Committee on Rules and Regulations was reviewing all rules and regulations now and this was not a serious problem anymore. It was pointed out that in the Kansas Criminal Code there is a provision for a defense of mistake or ignorance of a rule or regulation.

Afternoon SessionProposal No. 31 - Mental Illness Statutes

Staff reviewed draft 7 R.S. 1638. Senator Burke moved to make optional that an order of protective custody be signed by a parent or by a police officer or some other person with a statutory right. Representative Frey seconded the motion and it passed. Representative Ferguson then moved to introduce the bill as amended. Representative Frey seconded the motion and it passed.

The Committee then reviewed the revised Committee Report drafts for Proposals 30, 32, 34, 35, and 36 and approved each as revised.

The November meeting was set for November 18.

October 18, 1977
Morning Session

Proposal No. 29 - Product Liability

The first conferee was Mr. Fletcher Bell, Commissioner of Insurance. He said he was not sure he could say that there is no crisis in the product liability insurance area. He noted that according to the Insurance Information Institute Report Kansas is the third largest state in the nation in the number of cases commenced in a federal district court with regard to product liability suits. Kansas is behind only the states of Pennsylvania and Texas. Kansas is the second largest state in the percentage of increase from 1974 to 1976. Kansas went from 19 in 1974 to 53 in 1975 to 228 in 1976 and is second only to Nevada. In 1976, Missouri had 85 cases filed, Nebraska 37, Colorado 38, and Oklahoma 93.

Referring to a pooling mechanism, he said that the primary problem solved with the medical malpractice pool was the availability of coverage. Cost was a secondary problem in the medical malpractice field. Commissioner Bell said the reverse is true with product liability. The problem with product liability is cost as it relates to the insurance mechanism. A state fund will not address the problem at all. He said the pooling mechanism is not the approach to the product liability problem and that another approach is needed. Since the problem is not the same as the medical malpractice problem it should not be approached in the same way. With product liability, cost of insurance is the major problem and a pooling fund will not address this problem at all.

The Commissioner said that in April he had established a voluntary group - the Kansas Insurance Advisory Committee - to deal with hard to place risks. As of October 1, 1977, 37 risks had been considered by the Committee. Fifteen of the 37 were taken care of if they wanted insurance (which, he said, meant if they could afford it).

Senator Allegrucci said that a number of lawsuits in federal district courts were by Kansas consumers against out of state manufacturers. He asked how this problem could be solved. Commissioner Bell said he did not know and that this was the most frustrating situation he had ever encountered. He noted that a friend of his asked him if he did not think that some problems are incapable of being solved at this level and his response was "I had not thought about that." The Commissioner said it was going to have to take a combination of efforts. He said that he suggested a blue ribbon task force and that the situation is going to worsen and that something needed to be begun right now but that he could not tell the Committee what to do because he did not have the solution.

Representative Ferguson asked about the non-admitted insurers and Commissioner Bell said that in 1976 in the non-admitted market (surplus lines only), out of a total of \$10.5 million, \$4 million plus was designated as product liability premiums only. He said that this was large for just product liability and that this number is increasing. Also the reluctance to write these policies will continue. He said he did not know what it would take to alleviate the situation.

Senator Francisco asked why the Commissioner could not put a clamp on the increase of premiums being charged for product liability insurance to these little retailers doing nothing but handling the products where the retailers had no claim in the past but where some of them had experienced a 2,000 percent increase in premium. Commissioner Bell said one of the real problems is the insurance companies' inability to predict future loss. He said he could not stop the rate increases because this would further restrain the market. Further, he maintained that this would not solve the problem because product liability coverage initially has been drastically underpriced and the carriers slowly awakened to the situation and now see their potential liability. He said that insurance companies will always put their money only in those areas where they can reasonably predict their losses.

Senator Francisco commented that the risk was very small and since the Commissioner was at the top of the insurance regulation business of the state he needed to find some solution. Senator Francisco then related a story about a businessman in Wichita and suggested that a statute of limitation might be a feasible solution. Commissioner Bell responded that \$78 was very low and that he did not know the national experience on that particular product. He cited the case of a Kansas City, Missouri, manufacturer of helmets that went out of business and said he was not even sure that Congress could solve the problem. Commissioner Bell said that there was no law that could be enacted in this area that would not restrict the rights of some of the residents of Kansas. He offered for consideration the possibility of allowing a Kansas citizen when bringing an action to be allowed the option of bringing the action in Kansas where Kansas law applied or in another state where the manufacturer is located if the law of that other state would

be more advantageous. But he added that no one had suggested to him anything that would work completely and that more often he had received comments that any given proposed solution would not work. He said he did not envy the Legislature's task. He said that putting a lid on rates without statistics to back up the lid would not address the issue. He said that a statute of limitation was one possibility but there were probably others that could be done before that.

The Chairman asked what significance there was to being an admitted insurer and Commissioner Bell said that that allowed a plaintiff to get service of process but in no way meant that any control over them was gained nor did such a status allow imposition of any surplus requirements. He said that once a company is admitted it means that they have met standards of the statute and if they become insolvent there is a guaranty fund to provide for those losses. Additionally, if a resident of this state has a claim or a dispute the Insurance Commissioner can help resolve it. The Commissioner can look at the company to see if their decisions have been arbitrary. With product liability, he said, we are talking about Lloyds of London, a brokerage house of many firms not recognized by law and so not admissible. But any company can write any policy it wants although it is not admitted.

Senator Francisco suggested passing a law that would prohibit an insurance company from selling any insurance unless that company sold product liability insurance.

Representative Frey said that if a plaintiff has the option of choosing a forum the result will be that a Kansas consumer has little or no remedy in Kansas and will have to go somewhere else.

Ron Todd, Assistant Commissioner of Insurance said the issue is why should Kansas be the first state to start something new while other states are doing nothing about the problem.

Representative Frey said that he would have a hard time selling such a suggestion to the people because this would say a consumer has no remedy in Kansas - that the people would see this as the selling out of the Kansas consumer because the consumer would have to go to another state to seek redress.

Senator Pomeroy asked the Commissioner if he would have it be in the home state of the manufacturer. Mr. Todd said yes and Commissioner Bell interjected that this was only a thought that had come up yesterday and that it was not to be considered a proposed solution.

Senator Allegrucci said that the figures given were meaningless and that rates are being set on a national basis. Mr. Todd said that the rates will not stabilize as long as the law is unpredictable.

Representative Ferguson noted that auto insurance rates used to be set by the geographical area in which an insured lived. He asked if there was any rating structure for product liability insurance. Commissioner Bell said the answer to that question was no at least none to his knowledge. The danger with something like this is how it would be broken down. He said the Insurance Commission is looking at this as is the National Association of Insurance Commissioners (NAIC).

Senator Francisco said he was interested in what information federal district courts keep particularly information about amounts of awards. He also said that when you talk to people one of their concerns is the amount of money lawyers are getting in these lawsuits. He said there should be a statute of limitations covering the reasonable life of a product. He also said there should be limitations on the amounts of an award. He said the only people saying this would not work are the people directly affected by it.

Senator Burke asked what percentage of suits are settled before trial. Commissioner Bell said this information was released last Friday and he had not had time to digest the information yet. Senator Burke asked if classification by product had any relevance in determining rates and Commissioner Bell said it did.

Representative Frey said he had to take issue with Senator Francisco's generalizations. He said he had not seen one consumer expressing concern and that he had seen only manufacturers, retailers, or litigators complaining. He said he had never had one letter from a consumer complaining or expressing dissatisfaction with the law. He said if this was typical of the various regions of the state the only conclusion could be that the business atmosphere in Kansas could not be much better.

Senator Francisco said that while he had been on two standing and two interim committees dealing with this problem only attorneys had appeared against proposed solutions and that no consumers had ever appeared for or against.

The next conferee was Mr. Jim James, the Judicial Administrator. He passed out copies of the Unified Judicial Department's civil case statistical reporting form. He said that on July 1, 1977, the Unified Judicial Department commenced collecting data on product liability cases and he mentioned that in the next couple of days the first three months' report would be in. He said that data collection is an expensive program and burden on the clerks is kept in mind. He commented that before July 1, no data was collected on product liability cases.

Representative Ferguson said that D (1) and (2) on the form might be sources of confusion for clerks. Mr. James said it was his belief that if there was injury it would be a product liability case, if not, it would be a contract case. Representative Ferguson said that there would probably still be confusion and Mr. James agreed that such could be the case.

Representative Whitaker asked about getting data on professional liability from the report form and Mr. James indicated consideration could be given to that.

Senator Pomeroy asked what would be involved in getting information on product liability cases before July 1, 1977, and Mr. James said it really could not be done.

The next conferee was Mr. L. M. Cornish, representative of the Kansas Association of Property and Casualty Insurance Companies. Regarding the feasibility of a pooling mechanism for product liability lines he said the insurance companies share the view of the Insurance Commissioner that a pooling mechanism is an unworkable product. He said that the insurance companies will solve anything they recognize to be a problem and that the role of the insurance companies in the product liability area was merely one of being a stakeholder. He said that medical malpractice was a local problem and product liability insurance premiums was not. He said that 95 percent of the claims arise elsewhere than on products manufactured in Kansas and because of this a pooling mechanism will not work. He commented that there were really three solutions. First, there is a need for better loss control on the part of the manufacturer, i.e., there is a need for better safety programs and fewer defects. Second, there is a need for some tort reform. Third, the insurance industry must be more cooperative in rendering voluntary assistance in solving the problem, e.g., the Advisory Committee referred to by Commissioner Bell. He said that this still leaves the affordability problem although the availability problem is thereby solved. He said that a pool goes to availability but would have no effect on premium costs because the cost remains the same to underwrite the risks and pay the claims. He stated that some problems cannot be solved and that there are people who cannot be insured. He said it was a fact that certain types of loss control can result, at least foreseeably, in a manufacturer's being uninsurable.

Senator Burke asked Mr. Cornish what he had said about tort reform and Mr. Cornish said that tort reform was seen as a part of the solution.

Representative Ferguson asked how long it would take for an insurance company to recoup its losses and whether this affects the premium. Mr. Cornish said the companies never recoup their losses, they merely spread the loss over a long period of time.

Representative Francisco said that the Committee appears to realize that there is a problem but that no solution has been agreed on.

Representative Frey said that the Committee should not recommend legislation setting up a pooling mechanism as an alternative.

Senator Burke asked what Representative Hoagland had asked for at the last meeting. Art Griggs said one thing he had wanted the Committee to look at was the closed container legislation of other states. He said that no statutes were found but that there was a lot of case law in the area and he described the state of the law under each of three different theories. Senator Burke said the retailer should be left in the chain to satisfy a claim not satisfied by a manufacturer but that some consideration should be given to the amount of profit the defendant makes. He said the Committee should continue to explore the idea of the liability of a seller v. the liability of a manufacturer.

Art Griggs then pointed out that it was not possible to locate the two cases on appeal Representative Hoagland had alluded to.

Representative Ferguson suggested that the comparative negligence statute could be changed to a comparative fault statute applicable not only to negligence but also to the product liability area and to the retailer - manufacturer situation.

Senator Burke asked why the closed container theory was valid when something sealed harmed the consumer but invalid when applied to a retailer who sold a bolt that broke and injured a consumer. He asked how much culpability was a retailer to have.

Representative Ferguson noted that there are three areas of liability: the manufacturer's liability, the retailer's liability, and the liability where both the manufacturer and retailer are culpable. Representative Ferguson made a conceptual motion that the comparative fault concept be amended to include the manufacturer and distributor of products. Senator Burke seconded the motion and it passed.

Senator Francisco said that he would still like to see a statute of limitations. He asked about passing a law that would require the judicial system to supply information about the age of a product, the amount of an award, what the litigation costs were, and the average award for pain and suffering. He said that maybe what was needed was a blue ribbon committee to work with Jim James to get this information. He said that it was important for this Committee to do something and, at the very least, a statute of limitation would be valuable. Senator Burke said that it was not really a statute of limitation that was needed but that there ought to be a prohibition on lawsuits concerning products that had been used beyond their useful life.

Representative Baker noted that it is not the lawyers who are giving excess verdicts but it is the jury that is doing so.

Afternoon Session

Proposal No. 33 - Court Costs

Julie Mundy reviewed the District Court Personnel Study for Committee members.

The Committee then reviewed bill draft 7 R.S. 1567. It was noted that this bill draft would basically do away with the bookkeeping aspects. Representative Frey said that this did not have much relationship to the many things the Committee had heard. He then moved that the bill be adopted. Representative Ferguson seconded the motion and it passed.

Proposal No. 29 - Product Liability

The Committee reviewed the comparative fault draft. Senator Burke then moved to recommend the bill. The motion was seconded by Senator Francisco and it carried.

The minutes of the August 25 and 26 meeting were approved.

There being no further business the Chairman adjourned the meeting at 4:30 p.m.

Prepared by Paul J. Purcell

Approved by Committee on:

December 16, 1977
(date)

PJP/dmb