Approved Feb. 27, 1984
Date

MINUTES OF THE House COMMITTEE ON Insurance.

The meeting was called to order by Rep. Rex Hoy at
Chairperson

3:30 ~~a~~x~~x~~/p.m. on February 22, 1984 in room 521 S of the Capitol.

All members were present except:
No exceptions

Committee staff present:
Wayne Morris, Legislative Research
Gordon Self, Revisor's Office
Mary Sorensen, Committee Secretary

Conferees appearing before the committee:
Rep. Vancrum (Sponsor)
Larry Worrall
John Brookens
Kathleen Sebelius
Todd Sherlock
Wayne Stratton
Tom Whitaker
L. M. Cornish
Homer Cowan
Jerry Davies

Others Present:
See List (Attachment 1)

HB 2876, by Rep. Vancrum--Insurance coverage for punitive damages, was first on the agenda. Rep. Vancrum spoke in support of the bill. He said it replaces HB 2062, which he sponsored last year and which the committee reported favorably but it was withdrawn from the calendar and re-referred to the committee. He passed out written testimony (Attachment 2), which he read to the committee, and answered questions from the members.

Mark Beshears, representing Media Professional, Inc. introduced Larry Worrall, who spoke in support of the HB 2876. He said their organization would like to have insurance for punitive damages available in Kansas as so many members of the media are subject to lawsuits claiming punitive damages. He said that position is also supported by the Kansas Press Association and by the State Association of Broadcasters.

John Brookens, representing the Kansas Bar Association, then spoke in favor of HB 2876. He referred to the 1980 Supreme Court ruling in the Guarantee Abstract Case, which was discussed by Rep. Vancrum, and said that their organization supports the bill.

Kathleen Sebelius, of the Kansas Trial Lawyers Association, spoke briefly supporting HB 2876. She agreed with statements made by Rep. Vancrum and Mr. Brookens, and she had supported HB 2062 during the last session.

Todd Sherlock, representing the Kansas Association of Realtors, spoke next in support of HB 2876. Mr. Sherlock read from his written testimony (Attachment 3) in supporting the bill.

Jerry Slaughter, representing the Kansas Medical Society, introduced Wayne Stratton, General Counsel for the organization, who spoke in support of HB 2876. Mr. Stratton said that he also represented the Kansas Hospital Association, which also supported the bill. He said that health care providers were very liable to lawsuits where punitive damages could be sought and he felt that insurance coverage should be available if desired.

Tom Whitaker, representing the Kansas Motor Carriers Association, spoke to say their organization supports HB 2876.

L. M. Cornish, representing the Property and Casualty Insurance Companies of Kansas, said he would like to state that passage of this bill would be apt to encourage such unlawful actions if an individual knew that he could obtain the coverage from an insurance carrier, and he felt everyone should know that the public policy of this State would be changed if the bill is enacted.

Homer Cowan, representing the Western Insurance Companies of Fort Scott, KS, said their company had mixed feelings about the need for HB 2876. He said that if it passed all lawsuits, however frivolous, will seek punitive damages and insurance companies will need to increase reserves for any claim that is filed.

HB 2833, No-Fault automobile insurance, pip benefits and tort threshold increased, was up for rebuttal and sur-rebuttal.

Rep. Spaniol asked the committee members to read a letter directed to him by William E. Garrelts of Wichita (Attachment 4) suggesting possible amendments or changes to HB 2833.

L. M. Cornish, representing the Property and Casualty Insurance Companies of the State of Kansas, spoke in support of HB 2833, to respond to the testimony of opponents to the bill last week. He passed around copies of an article from the Wall Street Journal of November 16, 1983, concerning No-Fault insurance in various states (Attachment 5) and referred to it in his testimony, re-stating his support of HB 2833. He then passed around copies of an Editorial in the Topeka Capital Journal on February 17, 1984, referring to Chief Justice Burger's speech about the courts being overcrowded with pending cases. (Attachment 6). He referred to HB 2833 and compared it with the present no-fault statute. There were questions from the committee which Mr. Cornish answered.

Jerry Davies, representing Farmers Alliance Mutual Insurance Company passed around a statement from James Ketcherside, Executive Vice President, setting out his rebuttal to testimony by opponents of HB 2833 (Attachment 7). This statement had a copy of an editorial in the Wichita Eagle Beacon which also referred to Chief Justice Burger's speech.

Homer Cowan, representing the Western Insurance Companies of Fort Scott, then spoke in rebuttal. He referred to the letter from Mr. Garrelts of Wichita, and said the threshold should be moved up enough that it will not be a target.

John Brookens, representing the Kansas Bar Association, then spoke in response to the rebuttal testimony just presented. He asked the committee members to read his testimony from last week in opposition to HB 2833. He said the present threshold benefits people, not lawyers, and asked that HB 2833 not be reported favorably.

Rep. Turnquist asked if the Insurance Department had taken a stand on HB 2833. Dick Brock said they had proposed HB 2248 last year and had supported it, but have no position on this bill.

The meeting adjourned at 4:55 PM.

GUEST LIST Attachment 1

COMMITTEE: House Insurance DATE: Feb. 22, 1984

NAME	ADDRESS	COMPANY/ORGANIZATION
[illegible]	Topeka	Kan Bar Assn
Joan Knox	"	"
Jerry Davies	McPherson	Farmers Alliance Mut Ins Co.
David Chartrand	Overland Park	Kansas Alliance for No-Fault
Steve Montgomery	Topeka	KTLA
Homer Cowan Jr	Ft Scott, Ks	The Western Ins. Co.
Gary E. Beatty	Mission, Ks	State Farm
Larry Worrell	OVERLAND PARK, KS	MEDIA / PROFESSIONAL
MARK BESHEARS	Topeka	MEDIA / Prof. INSUR.
Chas E. Matheny	Lawrence KS	Media / Professional
[illegible]	Hutchinson Ks	Alliance
[illegible]	Topeka	AIA

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Atch. 1

GUEST LIST

Attachment 1

COMMITTEE: House Insurance

DATE: Feb. 22, 1984

NAME	ADDRESS	COMPANY/ORGANIZATION
Connie Barker	McPherson	Farm & Country Ins Co
Powell Schmidt	McPherson	Farmers Alliance
L M Cornish	Topeka	Ks Assoc of P/C
Dick Brock	Topeka	Ins Dept
Ron Todd	"	Ins dept.
Terry Slaughter	Topeka	KS Medical Society
Page Shalz	Topeka	KMS
Frank L. Gentry	"	KS Hosp Assoc
Todd Sheloula	"	KAR
Page 2		

BOB VANCRUM
REPRESENTATIVE, TWENTY-NINTH DISTRICT
OVERLAND PARK
9004 W. 104TH STREET
OVERLAND PARK, KANSAS 66212
(913) 341-2609
STATE CAPITOL, ROOM 115-S
TOPEKA, KANSAS 66612
(913) 296-7655

STATE OF KANSAS

TOPEKA

HOUSE OF
REPRESENTATIVES

Attachment 2

COMMITTEE ASSIGNMENTS
VICE-CHAIRMAN: FEDERAL AND STATE AFFAIRS
MEMBER: ASSESSMENT AND TAXATION
JUDICIARY

TESTIMONY OF ROBERT J. VANCRUM

ON HB 2876 - THE VICARIOUS LIABILITY FOR PUNITIVE DAMAGES BILL

Thank you Mr. Chairman and members of the Committee for giving me an opportunity to appear here today. HB 2876 for those of you who were on the committee last year is merely the provisions of HB 2062 with the amendment which you added in committee at my suggestion. I appreciate your action in amending and reporting this bill favorably last year. The purpose of having a new bill is to not confuse persons who see the bill with rather substantial changes in it.

For those of you who were not on the committee last year, the purpose of HB 2062 is rather simple. The bill would merely reverse the 1980 Supreme Court ruling in the Guarantee Abstract Case, in which the Supreme Court of Kansas stated that the public policy of Kansas does not permit an insurance company to reimburse an employer for punitive damages assessed against the employer due to the intentional acts of his employees or agents, even if he had no prior knowledge of the acts and had no way to prevent the same. I want to emphasize that nothing in this bill requires insurance companies to write this coverage and requires employers to carry coverage. It merely states that if insurance companies choose to write the coverage, they will have to pay off in accordance with policy terms.

Att. 2

Let me give you a brief example of instances in which this provision comes into play. Suppose a trucking company employs a driver for several years who then by his negligence causes an accident which causes serious injuries to the motorist. If a jury finds negligence, both he and the company are obligated to pay damages. The company of course did not authorize him to drive negligently, but they can at least obtain insurance to cover this liability. However, if the jury is sufficiently impressed that the driver's actions were in reckless disregard of the law or rights of other motorists or if they find that he intentionally assaulted another individual, a jury might be permitted to award not only actual but punitive damages intended to "punish" the wrongdoer against the trucking company. In such a case the trucking company still did not authorize the actions and in fact may not have even been aware of them but in such a situation the Kansas Supreme Court ruling states that we are not going to permit insurance companies to reimburse the company, even if they have written an insurance policy which claims to cover punitive damages.

The overwhelming majority of states permit the reimbursement of punitive damages to the innocent employer. The 1980 Kansas decision is so far out of the main stream of usual case law that most policies written by national companies on their face appear to provide coverage in this situation. Nevertheless,

When faced with such claims, the insurance companies routinely deny coverage for such damages in Kansas.

The situation is even more critical with regard to the owners of commercial real estate who employ security guards and other personnel to enforce reasonable rules of behavior upon the public using these premises. The case is also severe in the case of medical groups where each member may be personally liable for punitive damages arising out of alleged malpractice by other members even though some of them did not authorize or even know of the acts.

You are going to hear this afternoon from the realtors, the motor carriers and the Kansas Medical Society, each of whom I believe will express support for the concepts in this bill.

I would be happy to answer any of your questions concerning the workings of this bill.

Attachment 3

KANSAS ASSOCIATION OF REALTORS®

REALTOR®

Executive Offices:
3644 S. W. Burlingame Road
Topeka, Kansas 66611
Telephone 913/267-3610

HOUSE INSURANCE COMMITTEE

Mr. Chairman and members of the Committee, my name is Todd Sherlock and I represent the Kansas Association of REALTORS. My association very much supports House Bill 2876, a bill concerning coverage of liability for certain punitive or exemplary damages.

Many commercial Realtors strongly favor such a proposal. The bill will allow for the employer to obtain insurance in the event that he is held liable for punitive damages assessed against him because of the intentional or reckless conduct of his employees, without the prior knowledge of the employer. Without such insurance protection, the employer is left wide open to acts done without his knowledge by his agent. The Kansas Association of REALTORS feels the employer ought to have the right to purchase and benefit from such insurance coverage.

We feel this legislation is in the best interest of the employer as well as the public that such legislation may ultimately effect. In addition, insurance companies offering punitive liability insurance to employers under present law are under no obligation to fulfill their obligations when a claim for damages is made. To permit the sale of punitive liablility insurance without a means for an employer to collect on that insurance makes very little sense.

The Kansas Association of REALTORS urges your support of House Bill 2876.

Att. 3

Attachment 4

February 15, 1984

Insurance Committee of the House
State House - 280 W.
Topeka, KS 66612

Attn: Dennis Spaniol, Vice-Chairperson

RE: REVISIONS TO KANSAS AUTOMOBILE INJURY REPARATIONS ACT
HOUSE BILL #2833

After our discussion of potential problems or changes to this Act, I thought I would write you, in the event our schedules didn't match, for me to appear before the Committee next week.

ITEM: THRESHOLD OF THE ACT: In the many hundred injury cases I see each year, most persons have little inconvenience and full recovery, until after their medical costs exceed the average of $1,850. level. I would therefore recommend for now and in the years to come, we consider a $2,000. monetary threshold.

Reference: Line #180 and #189.
Change $5,000. to $2,000.

ITEM: MEDICAL BENEFITS: In the majority of accidents, the proposed (basic) $5,000. in coverage would be adequate. There are still enough serious accidents where new medical services, such as "CAT scans" and multiple medical services are needed, that this figure is inadequate. I would propose a medical coverage level of no less than $10,000.

Reference: Line #0068
Change $5,000. to $10,000.

ITEM: REHABILITATION BENEFITS: When this item is needed, it usually involves a traumatic injury and sometimes a complex recovery. I have found it seldom involved, but when involved, a better protection level is needed, as full Medical and Occupational services are needed. I would propose a level of no less than $20,000.

Reference: Line #0111
Change $5,000. to $20,000.

ITEM: ANY ACTION FOR TORT: The change proposed on Page #5 on the threshold levels to recover from a wrong-does has a real problem in definition; that could take years to clarify by the Courts, and cause the public undue confusion. (IMPORTANT)

Reference: Lines #183 and 184

DELETE: within reasonable medical probability.

Attach. 4

ADD: causing definable changes or conditions in one's ability to continue as before.

This lets the medical profession tell us in clear probabilities of any degree of disability to a part or the person as a whole, within the American Medical Association's guidelines.

I have only a few additional questions to inquire:

Line #0048: "Highway": I have worked a number of public and private "parking lot" accidents, and wonder if this category should be added.

Line #0062 or #0063:

"Injury": Would it be beneficial to add the term "occupancy" to the category of those persons covered.

Line #0083: "Monthly Earnings" We need to clarify the term (or time) covered, and should add after the sentence, "regularly employed." This coverage shall extend for one (1) year after the date of accident.

My intent in this overview on the proposed changes is to consider only the best interests of the public by those of us who see the complexities of these accident cases every day.

William E. Garrelts
2534 W. 24th North
Wichita, KS 67204

Past President: Kansas Claims Association
Wichita Claims Managers Council

Past Chairman: Committee on Insurance Arbitration

Member of: Committee on Special Arbitration (and others)

ml-2/S1

WALL STREET JOURNAL
Nov. 16, 1983

Attachment 5

Insurance Hassle

No-Fault Auto Policies Are Widely Attacked As Costly, Ineffective

Suits, High Premiums Cited; Defenders Say No-Fault Hasn't Really Been Tried

Crash Victim Likes Coverage

By Mary Williams
Staff Reporter of The Wall Street Journal

A decade ago, no-fault auto insurance was a celebrated consumer cause. Twenty-six states, and later the District of Columbia, passed so-called no-fault laws with the intent of lowering insurance premiums, speeding up claims and unclogging the courts.

Today, disenchantment with the laws is spreading. A drive to scrap no-fault is afoot in Pennsylvania; another was recently fought back in the District of Columbia. Bills to change the law have become almost an annual rite in Massachusetts, Kansas and Colorado. New Jersey did amend its law this year. Nevada tried to in 1979—and wound up throwing out the whole system.

Some Gripes

Consider these complaints:

—Of the 10 states with the most expensive average auto premiums, six have no-fault laws on the books. (No-fault can't bear unequivocal blame, though, since factors like population density and the generosity of coverage in each state affect cost.)

—Claude C. Lilly III, the director of Florida State University's Center for Insurance Research, says that no-fault coverage costs more, and its cost rises faster, than ordinary auto-insurance premiums do—faster, too, than the consumer price index. (Mr. Lilly gets $150 an hour from the Pennsylvania Trial Lawyers Association, a strong opponent of no-fault, to do his research.)

—Most state no-fault laws are set up in a way that encourages lavish medical treatments for minor injuries. That adds to the cost of premiums.

—No-fault laws haven't weeded out lawsuits as they were supposed to. According to the Association of American Trial Lawyers, more litigation goes on today in many of the states with no-fault laws than went on before the laws were passed. (In several states, however, it was the trial lawyers themselves who blocked passage of stronger no-fault laws that undoubtedly would have weeded out many suits.)

—Eighteen states make people buy no-fault medical coverage even though they already have extensive health insurance. Others encourage the purchase. At best, that means people are buying something they may not need. At worst, it means people in crashes can sometimes get reimbursed twice. Then everybody's premiums go up.

'Unsuspecting Public'

"No-fault was foisted upon an unsuspecting public primarily as a means of reducing the cost of insurance," concludes a report by the Pennsylvania Trial Lawyers Association, the group that leads the repeal parade in that state. "The claimed advantages of no-fault have simply not materialized."

As a matter of fact, no-fault auto insurance hasn't materialized, either. True no-fault insurance has never been adopted anywhere, so no one can say whether it would work. But many measures have been put on the books under the name of "no-fault," and it is their spotty performance that has been giving no-fault insurance its shaky reputation.

"No-fault was probably a very reasonable idea in principle, but what we have isn't no-fault at all," says Scott Harrington, an assistant professor of insurance at the University of Pennsylvania's Wharton School.

Says J. Robert Hunter, the president of the National Insurance Consumers Organization: "The fault with no-fault isn't no-fault. The fault with no-fault is faulty no-fault."

Pure no-fault was devised in 1919 and promoted heavily in the 1960s. It was supposed to replace the old way of doing things, called the "tort liability system." In tort liability, a driver who got hit would sue the person who ran into him and try to collect from the other's insurance company. The suing driver could try to recover his doctor bills; if he wanted, he could also decide what his "pain and suffering" had cost him and sue for that, too.

System Had Flaws

Tort liability wasn't an evenhanded system. The Federal Department of Transportation found in 1970 that, on the average, insurance companies were paying small claimants more than four times their medical bills but were paying the victims of catastrophic crashes only 30% of the amount of their bills.

No-fault proposed something new, called "first-party coverage." A crash victim would go straight to his own insurance company, instead of the "third party" company that insured the other driver. His own company would reimburse him for his medical bills. The law would set limits on how much he could get, though. And he couldn't claim a cent for pain and suffering.

The idea was to promise first-party coverage to everybody, from the innocent Sunday-school teacher run down in a crosswalk to the wild-eyed teen-ager joyriding in his father's car. Such a broad system would cost insurance companies more than tort liability, and no-fault adherents proposed to make up for this by taking away a driver's right to sue. That would save the insurers money, the reasoning went, because they wouldn't need so many lawyers or have to shell out for enormous "pain and suffering" claims.

Pure no-fault, then, was a two-sided bargain: first-party coverage on one side, the denial of the right to sue on the other. The

Please Turn to Page 22, Column 2

Att. 5

I. ırance Hassle: No-Fault Auto Policies Attacked As Costly, Ineffective; Is the Fault Faulty No-Fault?

Continued From First Page

concept drew widespread support, but state legislators found the first side much easier to enact than the second.

There were simply too many problems with taking away a person's right to sue. Opponents argued that the hypothetical Sunday-school teacher shouldn't be denied the chance to clobber the hooligan who knocked her down. They said the fear of lawsuits made the hooligans—and everybody else—drive more safely. Besides, they said, if crash victims weren't allowed to recover the cost of their pain and suffering along with their medical bills, they would be getting cheated.

"Medical benefits are only a small fraction of the need," says William A.K. Titelman, a lobbyist for the Pennsylvania Trial Lawyers Association. "What about the young pianist who has a promising future on the stage whose hands are injured? You'd look up the medical benefits for her: Hand—$500. This is fundamentally offensive to the Western concept of justice."

No-fault proponents argued back that lawyers like Mr. Titelman opposed no-fault insurance only because it would take away their right to make money on lawsuits.

It was left up to the states to resolve the conflict. Nine of them responded by setting up "no-fault" systems that provide first-party coverage but don't take away the driver's right to sue for whatever amount of pain and suffering he feels he sustained. These systems really aren't no-fault.

The other states also permit pain-and-suffering suits but restrict them. They, too, don't limit the amount that crash victims can sue for, but they do impose a system of thresholds—criteria that victims have to meet before they can file their suits. Some states make the thresholds tough, others easy. The easier thresholds are behind most of the no-fault debates these days.

Suits Are Common

The reason: They don't prevent enough lawsuits. In Colorado, Kansas, Massachusetts, Utah and Georgia, for instance, people can file pain-and-suffering suits as soon as they spend more than $500 at the doctor's. In Connecticut, they can sue after spending $400. Rising health-care costs make it easy to spend the requisite sum and go scooting off to court. Insurance companies claim that people get unnecessary treatments just so they can sue.

"You don't have to stretch your morals very far to get past the thresholds, if you know what I mean," says James A. Stahly, a spokesman for State Farm Mutual Automobile Insurance Co.

And with many people padding their doctor bills, then suing for pain and suffering, insurance companies don't save enough money to pay for first-party benefits. When the system can't finance itself, consumers have to, through higher premiums.

Pennsylvania is a good example. It has one of the most generous no-fault laws in the country. A crash victim there has guaranteed, unlimited medical coverage. Pennsylvania also has a $750 threshold. The state has the eighth-highest average auto-insurance premiums in the country, because the system doesn't pay for itself.

It wasn't supposed to be that way. From 1970 to 1973, Pennsylvania tried to put pure no-fault on the books. It got nowhere. "The trial bar was so adamantly opposed that it was impossible," says Otis W. Littleton, the legislature's director of Republican research and the chief drafter of the bills.

Actuaries Consulted

So the lawmakers gave up their pure no-fault ideas and started thinking about thresholds. They had to figure out which threshold would limit lawsuits just enough to pay for first-party coverage. They brought in an actuarial firm to help decide.

The firm came up with a number of plans, each offering a level of coverage paired with a threshold. The legislature picked a plan, Mr. Littleton says: a $750 threshold and $25,000 of coverage for every driver. Then the lawmakers decided that $25,000 sounded chintzy and raised the coverage to infinity—but didn't make the corresponding restriction on lawsuits to pay for it. Mr. Littleton says that everyone knew the system was out of whack but figured it could be changed later. It never was.

Colorado has had similar problems with its system of a $500 threshold and $25,000 of compulsory medical coverage. Colorado's insurance commissioner, J. Richard Barnes, says that because of inflation in health costs, the threshold should be seven times as high.

New Jersey was in even worse straits until it changed its law in October. It limped along, trying to pay unlimited medical benefits and letting anyone sue who rang up more than $200 of medical bills. Its premiums have been the highest in the country, and some companies have refused to write auto insurance in the state. Under the October change, New Jersey drivers can choose less-expensive insurance with a $1,500 threshold, but the $200 threshold is still available.

Not every no-fault state is so imbalanced. Michigan, for instance, has a system that is as generous as Pennsylvania's, paying unlimited first-party benefits. But to reduce lawsuits, it uses a "verbal threshold"—a description of the injuries a driver must suffer before he can set foot in court. It's a tough measure. "You darn near have to have an amputation" to get into court, says Thomas H. Hay, the chairman of the Michigan Trial Lawyers Association's task force on no-fault. "A broken bone, no matter how bad the fracture, isn't going to make it."

Michigan's lawyers don't like the no-fault law, Mr. Hay says, but they concede that it seems to work. When it was adopted in 1973, 9.9% of Michigan lawsuits involved auto negligence, they say. By the 1980-81 court year, the figure had fallen to 5.4%.

"We recognize that some citizens are better off," says Mr. Hay. "They get prompt payment. And they have the right, in the serious cases, to continue with a lawsuit."

Others are more enthusiastic. Boasts Michigan's deputy insurance commissioner, Jean Carlson, "We have a real no-fault law, and it works great."

But Michigan's program doesn't satisfy the insurance industry, which is trying to make the threshold even more severe. The effort could make the trial lawyers turn around and lobby for total repeal, Mr. Hay says.

One Man's Experience

One person who thinks that no-fault has worked well is James R. Guernsey, a 33-year-old Pennsylvanian who was riding in a van that hit a hole in the road and crashed in 1971. Mr. Guernsey was paralyzed; he has lost the use of his legs, arms and hands. But today he is still working, running two delicatessens in the Philadelphia suburbs. He attributes his comeback to Pennsylvania's unlimited medical coverage. For him, even costly, trouble-ridden, watered-down no-fault insurance has proved a boon.

Mr. Guernsey can recite his medical bills from memory: hospital, $100,000; rehabilitation center, $65,000; remodeling of his home, $50,000; two wheelchairs, $11,500; a special van, $15,000; a 24-hour attendant, $50,000 a year for the rest of his life; medication $4,000 a year. Prudential Insurance Co. of America paid the whole thing—"no qualms, no nothing," says Mr. Guernsey.

"Anything that happens to me because of my accident that wouldn't have happened to me before is covered under the no-fault;" he says. "There's no way I would have been able to afford it myself."

Yet Mr. Guernsey is doing what any other accident victim might be tempted to do in a pseudo-no-fault state. He has filed three lawsuits.

KANSAS CITY STAR
March 2, 1983

Time for Missouri no-fault insurance

A concept of automobile insurance coverage which deserves serious attention in Missouri is no-fault. Proposals to enact a law never have gotten very far, despite adoption of no-fault in some form by 25 other states, including Kansas, and the District of Columbia. Trial lawyers particularly have opposed no-fault because it limits the right to sue, and that cuts into a profitable source of some lawyers' income.

No-fault laws do away with the costly expense of determining in court who is responsible in an automobile accident. Insurance monies which now go to pay lawyers' fees are used instead to compensate victims for their medical expenses and loss of wages. A motorist's own insurance company pays his expenses.

Missouri Insurance Director Donald Ainsworth has introduced legislation this session which ought to get proper consideration. Under his plan, a motorist would be covered with a maximum of $25,000 in medical expenses for a two-year period; work losses amounting to $13,000 for one year, and death benefits of $2,000. The injured person could not sue until he surpassed the threshold of payment. However, a motorist could sue for non-economic losses in cases of death, or serious and permanent disfigurement or injury.

This law would cut down on the amount of litigation, and thus free up backlogged courts to handle other types of cases. For the injured motorist, the benefits are in the faster recovery of his expenses and less hassle. The expensive, time-consuming investigation to determine who is at fault and who will pay is eliminated in most cases. Motorists who deserve compensation but do not get it through the current, often lopsided legal representation process are able to recover under no-fault.

In Kansas, changes have been proposed to increase both the amount of medical coverage and the threshold limit required before someone can sue. These proposals make sense in light of the fact that inflation and higher medical costs have put these aspects of the 1974 law out of date.

The proposed Missouri law, like that in effect in Kansas, does not cover property damage, which probably makes it more palatable to some legislators. It is possible the specific medical benefits delineated in the law should be increased, although motorists would be free to purchase additional coverage if they thought the amounts were too low. Whatever changes might be made in this legislation, the General Assembly should give no-fault its thorough consideration. The idea is not exactly revolutionary—it is working elsewhere. Its adoption is overdue in Missouri.

NO-FAULT AUTO INSURANCE

In the late 1960s there was a growing public discontent, shared by many auto insurance companies, with the traditional legal methods of compensating injured victims of auto accidents. Although most auto insurance policies did make available coverages to protect policyholders for medical expenses and other out-of-pocket losses, recovery of other major damages through liability coverages was generally dependent on the injured or deceased person not having caused or contributed to the accident.

Determining who was legally at fault for an accident sometimes involved an expensive and time-consuming investigation on the part of insurers and the parties involved. In disputed cases where legal counsel represented the claimant and the insurance company, attorney fees and congested court dockets further increased expenses and delays. Inadequate liability coverage limits in some instances (and an increasing number of negligent drivers who had no liability insurance at all) worked additional hardships on seriously injured accident victims.

No-Fault Insurance—The Concept

Reacting to the increasing problems in the existing legal system, legislatures in a number of states debated whether the no-fault concept (which in a somewhat different form had been operative for workers' compensation insurance for many years) could be successfully applied to automobile insurance. The writings of researchers were widely read by lawmakers, insurance industry leaders, the legal profession, and others.

The theory of no-fault is quite simple. Basically, the aim was to reduce the number of automobile accident cases in the tort-liability system. The dollar savings resulting from this reduction in tort litigation (and the costs associated with it—including attorney's fees), would be accumulated and used to pay the new and generous first party no-fault benefits designed to compensate victims for essentially all of their actual economic loss. It was believed that if the non-serious cases could be removed from the tort system, through the use of what has come to be known as a "threshold," the substantial overpayment of such claims settled pursuant to the nuisance theory (settlement was less expensive than defense in court) would be eliminated. This dollar savings would more than make up for the new costs of the required no-fault payments. Simply stated, the intended result of no-fault was to compensate most, if not all, accident victims for their economic loss, while allowing those who were seriously injured to pursue a cause of action in tort to receive compensation for pain and suffering—all this without having to raise rates.

No-Fault Auto Insurance—Its Many Varieties

On January 1, 1971, Massachusetts became the first U.S. state to enact an auto no-fault law. In the next five years 24 other states enacted some form of auto no-fault insurance legislation. However, of the total of 25 states, the laws of only 17 states included "threshold" limitations on the right to recover "general damages." The other eight states legislated only that Personal Injury Protection coverage (commonly called PIP) be required or at least be made available to protect a policyholder for actually incurred expenses up to specific per-person dollar limits. Three states included provisions in their laws for auto property damage no-fault. Later Florida and Massachusetts rescinded those provisions, with only Michigan retaining this feature as of the time of this writing.

The laws of many of the no-fault states were soon challenged in the courts, with various interest groups contending that the limitations on the right to claim and sue if necessary for "general damages" was a deprivation of a constitutional right. In general, the state supreme courts upheld the constitutionality of the no-fault laws. The exception was Illinois, where the law was struck down in 1972, largely on technical grounds.

In spite of the fact that about half of the states in the U.S. passed auto no-fault legislation in the relatively short span of a half-decade, many differences exist between the various state laws. Often the differences are the result of what individual legislatures regarded to be the local needs of their own states.

For example, the scope of the Personal Injury Protection coverage varies widely with some states requiring only a few thousand dollars of first party no-fault coverage, while other states such as Michigan, New Jersey and Pennsylvania require unlimited medical expense coverage and several thousands of dollars of coverage for wage losses and other expenses. The tort thresholds (used to remove cases from the tort system) also differ greatly between states.

No-Fault Insurance—The Dollar Threshold

The majority of states employ a dollar threshold--that is, individuals are prevented from suing in tort to recover for pain and suffering, unless their medical expenses exceeded a certain dollar amount. The dollar threshold has failed in most states because it offers an inviting "target" at which the victim, his doctor, and his lawyer can take careful aim. All three have a substantial economic interest in witnessing the utilization of no-fault medical benefits to the extent necessary to cross the threshold: the victim because such gives him a chance at the "pot of gold" at the end of the tort liability rainbow, his lawyer because he takes 30% to 50% of the "pot of gold" from the victim in the form of contingent fees, and the doctor because auto insurers pay the costs of medical services rendered to an auto accident victim.

Thus, dollar thresholds encourage over-utilization of first party benefits, and such over-utilization, in turn, produces larger third party or tort liability judgments for pain and suffering, since pain and suffering awards are generally tied by way of a multiplier to the level of actual economic loss.

Ultimately, both first and third party costs increase beyond all expectation, and the people must simply be asked to pay more in the form of increased auto insurance rates.

(continued)

SOURCE:

Allstate Insurance Co.
"Insurance Handbook
for Reporters"
1979, pp. 22-27.

No-Fault Insurance—The Disability Threshold

While the dollar threshold represents the predominant tort restriction mechanism in effect in most no-fault states today, other approaches have been tried, including what is known as the disability threshold. A disability threshold provides that a victim may not sue in tort unless he has been disabled (defined differently in various state plans) from the accident for a specific period of time. While perhaps a disability threshold is more difficult to abuse than a dollar threshold, it suffers from the same infirmities because, again, it offers a target (a specific time period) to the victim, his doctor, and his lawyer. Moreover, it must be remembered that it is not economically painful for the victim, under a no-fault scheme, to remain disabled for a considerable period of time because he is, at the same time, being compensated for all his medical expense as well as most, if not all, of his lost wages. Thus, he experiences little or no out-of-pocket loss while he waits long enough to qualify to pursue a cause of action in tort. Thus, the disability threshold approach, while perhaps superior to the dollar threshold, still suffers from fundamental and fatal flaws.

No-Fault Insurance—The Verbal Threshold

The other major type of tort threshold is what has come to be known as the "verbal threshold." Here victims are allowed to sue in tort only if their injuries meet certain verbal descriptions of the types of injuries which should, as a matter of policy, render one eligible to seek to recover for pain and suffering in a cause of action in tort.

The verbal threshold was invented to cure the "target" problems inherent in a dollar threshold, and it appears today that a verbal threshold holds out the best chance of meeting the original intent of no-fault which is to compensate most victims for all of their economic loss without having to increase insurance rates substantially.

No-Fault Insurance—Multiple Recoveries

One other problem that has not been addressed by many legislatures is the opportunity for injured persons to realize multiple recoveries for the same expenses. This creates the invitation to profit from unnecessary medical treatment and over-extended absence from work. When opportunities exist to duplicate an insurance recovery for the same expenses, the ultimate result is that higher premiums must be charged to cover such duplicate benefits.

No-Fault Insurance—Basic Idea Is Good

Legislatures in several major states have not enacted auto no-fault legislation partly as a result of the lack of success of such laws in other states. The basic idea of auto no-fault insurance is good. The motoring public needs financial protection to cover the large expenses that can result from an auto accident, and it needs the protection as promptly as possible when expenses are incurred. Premium dollars should be returned as much as possible in the form of benefits to meet a victim's needs, and [illegible] be mitigated by costly investigations and attorney fees.

Improvement of existing state no-fault laws are entirely possible when legislators, insurers, the medical and legal questions are found. Allstate has pledged to work to help find those answers, to improve no-fault laws now on the books, and to help enact new state laws, so that the vast majority of the population soon will benefit from modern no-fault state automobile insurance laws designed on the basis of the most contemporary knowledge available.

Attachment 6

The Topeka Capital-Journal **Opinion** Friday, February 17, 1984

Editorials

In God We Trust

Disorder in the court . . .

Warren Burger has thrown down the gauntlet. In effect, the chief justice of the United States Supreme Court has told the nation's lawyers to clean up a growing mess themselves before it reaches the point where someone else feels compelled to step in.

Burger pulled no punches in his annual address to the American Bar Association in Las Vegas. He described the American legal system as "too costly, too painful, too destructive, too inefficient for a truly civilized people."

Virtually no one associated with the courts escaped a dressing-down from the chief justice. "The entire legal profession — lawyers, judges, law teachers — have become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers of conflict."

He asked the ABA to take the lead in finding ways to reduce the tremendous overcrowding of court dockets and to rebuild lost public esteem. In focusing on the image problem, Burger touched what may be a sore point with the lawyers. However, he's absolutely correct. The people's image of attorneys has been tarnished by a variety of reasons: memories of Watergate, in which so many of the central figures were lawyers; personal experiences with courtroom delays; a legal system so complicated laymen often feel threatened, rather than protected, by it, and the public's perception of lawyers as "hired guns" (Burger's phrase).

Perhaps among the most important themes Burger addressed is that "going to court" has become one of the country's favorite pastimes; too many frivolous lawsuits are filed, sometimes more at the urging of lawyers hoping for a jackpot jury award than at their clients' sense of having been wronged.

Or, to put it another way, as Burger did in a speech last summer in London, the United States needs more lawyers "who understand that access to justice does not invariably mean access to courtrooms."

In a country of laws, it is most critical that the legal system put its house in order. Every year for the last several, Burger has spoken forcefully for court reforms. Some progress has been made, but there is still far to go.

. . . and part of the answer

While the Chief Justice of the U.S. Supreme Court has called for a virtual overhaul of the nation's legal system, the Chief Justice of the Kansas Supreme Court would settle for three additional appeals court judges, at least for now.

Alfred Schroeder told a joint legislative committee that the backlog in the Kansas Court of Appeals is creating a morale problem among judges on the state's newest court, which was created in 1977. It takes almost a year for a case to be heard and ruled on by the appeals court, he said.

Supreme Court Justice David Prager emphasized to the committee that delay is the No. 1 problem. More than 1,000 cases were filed last year with the appeals court. If the judges worked every day of the year, they would have to hear and rule on three cases a day just to stay even, let alone reduce the rest of the backlog, another 750 cases.

It's clear that if the present rate continues, the appeals court will be hopelessly buried in cases before this year is out.

Adding three more judges to the appeals court, as Schroeder and his colleagues on the high court unanimously urged, would add more than $320,000 to the state budget. That's a lot of money, but the question really is, can we afford not to have these judges?

Under the present overburdened system, cases are delayed more than a year. Surely that is not what the Constitution means in its mandate for swift and sure justice.

Three more appeals court judges will not solve the problem entirely, but it will go further toward that goal than maintenance of the status quo.

Atch 6

Attachment 1

FARMERS ALLIANCE MUTUAL INSURANCE CO. P.O. Box 1126 McPHERSON, KANSAS 67460 (316) 241-2200

FEBRUARY 22, 1984

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE

THANK YOU FOR THE OPPORTUNITY TO REAPPEAR BEFORE YOUR COMMITTEE AND AGAIN EMPHASIZE THE IMPORTANCE OF PASSING H.B. 2833. THE REFORMATION OF THE KANSAS NO-FAULT LAW AS SET OUT IN H.B. 2833, WILL BE A TREMENDOUS VICTORY FOR THE PURCHASERS OF AUTOMOBILE LIABILITY INSURANCE IN THE STATE OF KANSAS.

EVEN THE TWO COUPLES WHO SPOKE TO THE COMMITTEE AS PART OF THE KANSAS TRIAL LAWYERS OPPOSITION TO THE BILL WERE NOT CRITICAL OF THE NO-FAULT SYSTEM. THEIR CRITICISM WAS LEVELED AT THE DELAY CAUSED BY THE NEED TO DETERMINE FAULT BEFORE SETTLEMENT COULD BE MADE.

THAT IS WHY THE NO-FAULT SYSTEM IS SO EFFECTIVE IN THE LESS SERIOUS CASES, BECAUSE PROVING FAULT WHICH CAUSES DELAY, IS NOT NECESSARY.

Atch. 7

H.B. 2833 WOULD HAVE PROVIDED MORE MONEY WITHOUT DELAY TO THE INJURED CONFEREES WHO TESTIFIED FROM THEIR OWN INSURANCE CARRIERS, AND THE COUPLES WOULD NOT HAVE HAD TO SHARE THEIR RECOVERIES WITH AN ATTORNEY.

H.B. 2833 ALLOWS MORE BENEFITS TO BE PAID TO THE INJURED PARTY MORE QUICKLY AND MORE EFFICIENTLY. ALSO, I WOULD LIKE TO POINT OUT THAT THE FARMERS ALLIANCE MUTUAL INSURANCE COMPANY DID NOT REQUIRE INJURED CLAIMANTS TO HIRE ATTORNEYS ON THE 47 CLAIMS TOTALLING $632,000 OF BODILY INJURY PAYMENTS AS ALLEGED BY MR. BROOKENS. HIS MATH IS CORRECT. WHAT HE FAILS TO EXPLAIN IS THAT THE ORIGINAL DEMAND FOR PAYMENT ON THESE 47 FILES AMOUNTED TO $1,824,543. THE $632,000 WAS THE ULTIMATE DETERMINATION OF THE REAL VALUE OF THE CLAIM. UNFORTUNATELY, THE INJURED PARTY HAD TO SHARE 35 TO 40 PERCENT OF THIS WITH AN ATTORNEY IN ORDER TO ARRIVE AT A REALISTIC SETTLEMENT OR AWARD. WE BELIEVE IN THE TORT SYSTEM AND FEEL IT IS VITAL TO OUR JUDICIAL SYSTEM. THOSE THAT ARE SERIOUSLY INJURED SHOULD HAVE A RIGHT TO RECEIVE COMPENSATION FOR PAIN AND SUFFERING.

MR. BROOKENS STATED IN HIS OPPOSITION TO THIS BILL THAT THE KANSAS BAR ASSOCIATION SUPPORTS THE NO-FAULT SYSTEM AND THAT IT IS A GOOD DELIVERY SYSTEM. WE ARE ASKING THAT YOU ALLOW IT TO WORK EVEN BETTER BY VOTING IN FAVOR OF H.B. 2833.

I WOULD ALSO LIKE TO CALL YOUR ATTENTION TO THE ARTICLE AND EDITORIAL PUBLISHED IN THE WICHITA EAGLE-BEACON WHICH I HAVE ATTACHED TO MY STATEMENT. CHIEF JUSTICE WARREN BURGER OF THE U.S. SUPREME COURT IS QUOTED IN A RECENT SPEECH BEFORE THE AMERICAN BAR ASSOCIATION. CHIEF JUSTICE BURGER TOLD THE NATION'S LAWYERS TO LEAD A SEARCH FOR REFORMS, ESPECIALLY FRIVOLOUS LAWSUITS AND SAID THEY ADD CLUTTER TO THE NATION'S DOCKETS AND THUS DELAY ATTENTION TO THE PROCESSING OF REALLY MERITORIOUS CASES. IN THE EDITORIAL, THE EAGLE-BEACON CALLS FOR A TOTAL RETHINKING OF OUR LEGAL SYSTEM.

THANK YOU.

James L. Ketcherside

JAMES L. KETCHERSIDE
EXECUTIVE VICE PRESIDENT
FARMERS ALLIANCE MUTUAL INSURANCE CO.
McPHERSON, KANSAS

Burger Criticizes Lawyers For Eagerness to Do Battle

Associated Press

LAS VEGAS, Nev. — America's legal system, mesmerized by the thrill of courtroom battles, has grown "too costly, too painful, too destructive, too inefficient for a truly civilized people," Chief Justice Warren Burger said Sunday.

"Trials by the adversarial contest must in time go the way of the ancient trial by battle and blood," Burger said in a speech delivered at a meeting of the American Bar Association. He urged the nation's lawyers to lead a search for reforms.

In a speech that also attacked some forms of lawyer advertising and frivolous lawsuits, the nation's top-ranking judge said the legal profession has lost the public's confidence by sticking to its adversarial tradition.

"THE ENTIRE legal profession — lawyers, judges, law teachers — have become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers of conflict," Burger said.

"When we see costs of justice rising, when we see our standing in public esteem falling, something is wrong," he said.

Burger proposed an ABA-sponsored study, with non-lawyers participating, to recommend major changes in the nation's legal system.

"Doctors, in spite of astronomical medical costs, still retain a high degree of public confidence because they are perceived as healers," he said. "Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?"

IN HIS annual address to the ABA's winter convention, Burger returned to themes of lawyer competence and conduct that have marked his 15-year tenure as chief justice.

He touched off a furor in 1977 when he said that half the nation's lawyers may not be qualified to represent their clients in court.

Last summer, he said in a London speech that the United States desperately needs lawyers and law professors "who understand that access to justice does not invariably mean access to courtrooms."

On Sunday, Burger at times was conciliatory, telling the lawyers they have made important contributions to America and have improved the practice of law.

BUT, HE said, the profession has a long way to go.

Burger blamed the decline in public trust in lawyers on the rapid increase in their numbers, the willingness of some to advertise their services like used-car dealers and the absence of consistent disciplining of unethical attorneys.

"We see some lawyers using the same modes of advertising as other commodities from mustard, cosmetics and laxatives to used cars," Burger said.

Burger also attacked "absurd lawsuits" that only promote fat fees for attorneys.

"A few carefully considered, well-placed $5,000 or $10,000 penalties will help focus attention on the matter of abuses by lawyers," he said.

THE CHIEF justice, who also has frequently proposed changes to ease judges' workload, said the proliferation in lawyers is one of the problems.

There are more than 600,000 lawyers in the United States today, with about 35,000 new law school graduates joining their ranks each year. More than 300,000 lawyers are ABA members.

Despite what should be increased competition, the cost of hiring a lawyer is going up, Burger said.

"Increasingly in the past few years, critics have warned that lawyers must be careful not to price themselves out of the market," he warned.

THE LEGAL profession could suffer the same decline that hit the American auto industry "when the quality and price of the automobiles made in this country were found unacceptable," Burger said.

ABA President Wallace Riley said he did not think Burger's remarks were particularly harsh. He also said the ABA has been examining most of Burger's concerns and expressed doubts over the need for a new study.

The Wichita Eagle-Beacon
Tuesday, February 14, 1

Time to Rethink Legal System

Chief Justice Warren Burger, speaking from his unofficial other position as de facto head magistrate and senior proctor of the entire American system of justice, has told the nation's lawyers they ought to spend less time litigating and more time mediating. Many Americans — especially those who have ever found themselves suffering the high costs and frustratingly slow pace of adversary justice — will tend to agree.

Mr. Burger, in his annual address to the American Bar Association, said the heady practice of trials by courtroom combat has become "too costly, too painful, too destructive, too inefficient for a truly civilized people," and "must in time go the way of ancient trial by battle and blood." He suggested lawyers could improve their professional image by taking a lesson from the medical profession and try serving as "healers, not hired guns." He chided those involved in "absurd lawsuits" whose only purpose seems to be to promote fat fees for attorneys.

It now sometimes takes years for even the most deserving cases — those whose complexities obviously need careful judicial analysis — to get through courts. Frivolous lawsuits add clutter to the nation's dockets and thus delay attention to processing of really meritorious cases. Mr. Burger has good reason to be concerned as the presiding officer of the United States Supreme Court, which last year had to cull through some 5,000 of the most controversial cases in the legal cauldron.

Everyone needs to be concerned, because everyone bears the tax cost of an ever-expanding court system. And in an overburdened court system, everyone runs the risk of a resulting decline in the quality of justice dispensed.