

MINUTES

SPECIAL COMMITTEE ON MEDICAL MALPRACTICE

November 7-8, 1985
Room 514-S, Statehouse

Members Present

Representative Joe Knopp, Chairman
Senator Jack Walker, Vice-Chairman
Senator Roy M. Ehrlich
Senator Paul Feleciano
Senator Frank D. Gaines
Senator Jeanne Hoferer
Senator Nancy Parrish
Senator Jack Steineger
Senator Robert Talkington
Senator Eric Yost
Representative Marvin Barkis
Representative William Brady
Representative J. Frank Buehler
Representative Rex Hoy
Representative Ruth Luzzati
Representative Michael O'Neal
Representative Vincent Snowbarger
Representative John Solbach
Representative Dale Sprague
Representative Thomas Walker

Staff Present

Mike Heim, Kansas Legislative Research Department
Emalene Correll, Kansas Legislative Research Department
Melinda Hanson, Kansas Legislative Research Department
Mary Ann Torrence, Revisor of Statutes Office
Mary Hack, Revisor of Statutes Office
Mary Jane Holt, Secretary

Others Present

Jack R. Cooper, M.D., Johnson County Medical Society, Fairway
Walter Darling, Division of Budget
Pat Davis, Division of the Budget and Governor's Office
Jerry Slaughter, Kansas Medical Society
Sherman A. Parks, Jr., Kansas Chiropractic Association
Don Strole, Kansas Board of Healing Arts
Harold E. Riehm, Kansas Association of Osteopathic Medicine
Patricia Henshall, Office of Judicial Administrator
Richard Harmon, Domestic Insurance Companies
Loretta Class, United Way and League of Women Voters
Jim Schwartz, Coalition on Health
Harold C. Pitts, Topeka Retired Teachers Association
Warren T. Culver, Ophthalmologist, Lawrence
Marsha Hutchison, Kansas Medical Society
Michele Hinds, Kansas State Nurses Association
James W. McBride, United Way
J. G. Hollowell, Lawrence
Jackie Console, Shawnee County Medical Auxiliary
Jerry Howard, KSNT-TV
Ron Smith, Kansas Bar Association

Others Present (continued)

Lori Callahan, American Insurance Association
Mark Bennett, Jr., American Insurance Association
Kathleen Sebelius, Kansas Trial Lawyers Association
Ted Fay, Kansas Department of Insurance
Derenda Mitchell, Kansas Department of Insurance

November 7, 1985
Morning Session

The Chairman called the meeting to order at 10:00 a.m. and announced the Committee would be considering bill drafts today. The consideration of caps on awards and limits on the Health Care Stabilization Fund are on the agenda for tomorrow.

The Committee discussed the dates for the next Committee meeting. It was decided to leave the next meeting, as scheduled, on Wednesday, November 20, and Thursday, November 21.

Jerry Slaughter, Kansas Medical Society, handed out a memorandum dated November 7, 1985 stating the Medical Society's recommendations on award limitations and screening panels, (Attachment I), and a copy of an article entitled "Constitutionality of Malpractice Cap is Upheld," from The National Law Journal, dated October 28, 1985 (Attachment II).

Staff reviewed bill draft RS 1591. This bill would amend K.S.A. 7-121b regarding approval of attorney fees. The bill incorporates the canons of ethics regarding attorney fees.

After Committee discussion, Representative Solbach moved that bill draft RS 1591 be recommended for passage as prepared. Senator Walker seconded the motion.

Representative O'Neal made a substitute motion amending bill draft RS 1591 to require the attorney fees be approved by the judge after an evidentiary hearing and prior to final disposition of the case by the district court. Such requirement would also be applicable to the court of appeals and the supreme court. Representative Snowbarger seconded the motion and the motion passed.

Senator Walker moved that bill draft RS 1591 be approved for passage, as amended. The motion was seconded by Representative Snowbarger and passed.

Staff reviewed bill draft RS 1590 concerning interest on judgments. The proposed bill would amend the interest rate on judgments on and after July 1, 1986 to a rate equal to the annual T-bill rate settled immediately prior to the date of judgment.

In answer to Committee questions, Ron Smith, Kansas Bar Association, stated the Bar Associations suggestion was that the T-bill rate on the date of judgment would be the post-judgment interest rate for the duration of the judgment.

Senator Walker moved to approve conceptually bill draft RS 1590 and directed staff to ensure the bill draft does set one post-judgment interest rate for the duration of the judgment. Representative Walker seconded the motion.

An amendment was made to have the T-bill rate published in the Kansas Register. The motion, as amended, passed.

Staff reviewed for the Committee, alternatives for mandating admissibility and penalties for pretrial settlement conferences (Attachment III).

Senator Gaines moved to accept mandating settlement conferences by statute. Representative Buehler seconded the motion and the motion passed.

Representative Sprague moved that the court require a settlement conference be held not more than 30 days following the discovery deadline. The motion was seconded by Senator Gaines.

An amendment was proposed by Representative Solbach which stated "but prior to the court ruling upon a motion for summary judgment." A vote was taken and the motion and amendment passed.

Senator Yost moved that settlement conferences be conducted by a judge other than the trial judge. Senator Gaines seconded the motion and the motion passed.

Representative Barkis requested the Bar Association and the Trial Lawyers Association furnish the Committee, at the next meeting, recommendations for when settlement conferences should be held.

Representative Solbach moved to adopt the admissibility section of settlement conferences with the addition of "in conjunction with or during" and "shall not be communicated to the trial judge." Representative Barkis seconded the motion and the motion passed.

In regard to the section on penalties, Senator Gaines moved to strike the words "at trial" and "on a per diem basis" in (1) and (2) and to include "reasonable" before attorney fees in (1) and (2). Senator Hoferer seconded the motion and the motion passed.

Representative Snowbarger moved to approve the settlement conference proposal, as amended, for drafting. Senator Gaines seconded the motion and the motion passed.

Staff reviewed proposed bill draft RS 1596 concerning the qualifications of expert witnesses. This bill states no person shall qualify as an expert witness unless at least 75 percent of such person's professional time within a five-year period preceding the incident giving rise to the action is devoted to actual clinical practice in the same profession in which the defendant is licensed, and in the same specialty if the defendant is a specialist.

Staff stated "health care provider" is not defined in the proposed bill.

Representative Snowbarger made a motion directing staff to draft proposed legislation to prohibit expert witnesses testifying on a contingent fee basis. Representative O'Neal seconded and the motion passed.

Representative Barkis recommended changing the 75 percent of such person's professional time within a five-year period to 50 percent of such person's professional time within a two-year period. Also the standard of care given by a health care provider should be the standard of care given by a licensee in the healing arts. The expert witness should also be a doctor.

A motion was made by Senator Walker and seconded by Representative Solbach that staff be directed to redraft the proposal on expert witnesses incorporating the concepts discussed by Representative Barkis and staff. The motion passed.

The Committee recessed for lunch.

Afternoon Session

Staff reviewed the proposed bill draft on itemized verdicts.

It was suggested by a Committee member that this proposal should not pertain to only medical malpractice liability actions. The Chairman proposed the Committee consider only medical malpractice legislation at this meeting.

Senator Walker moved to approve proposed bill draft RS 1597. Senator Gaines seconded the motion. The motion passed.

Staff reviewed proposed bill draft RS 1595, averaging the premium surcharge for the Health Care Stabilization Fund. Staff questioned whether it was appropriate to use the term "health care provider," i.e., should the rate be averaged for medical doctors and doctors of osteopathy, or for all health care providers?

In answer to a Committee question, staff replied the Citizen's Committee's recommendations were the same as in bill draft RS 1596.

A motion was made by Representative Barkis to approve the proposed bill draft RS 1595. Senator Gaines seconded the motion and the motion passed.

Copies of 1985 S.B. 382 were distributed to the Committee. Staff explained this bill is in the Senate Financial Institutions and Insurance Committee and allows an insured to pay a premium finance company monthly payments for their annual surcharge to the Health Care Stabilization Fund. The bill also allows refunding of the unearned surcharge premium from the Health Care Stabilization Fund.

Staff inquired whether, under a claims made policy, when a physician is no longer practicing and does not have basic coverage, should a refund be made from the Fund, since the Fund would be liable for tail coverage.

A motion was made by Representative Solbach and seconded by Senator Walker to endorse S.B. 382 and recommend its passage. The motion passed.

The Committee considered proposed bill draft RS 1603. This bill was patterned after an Arizona law, except for the penalty section which is from Florida law.

During Committee discussion, a Committee member stated the State Board of Healing Arts does not have authority over hospitals. The State Department of Health and Environment has authority over hospitals and should be the agency to levy fines.

Senator Gaines moved to strike in Section 1(a) "The state medical society or any component society thereof or." Senator Feleciano seconded the motion and the motion passed.

Senator Gaines made a conceptual motion that Section 1(c) should be changed so the Secretary of the Department of Health and Environment is given the authority to suspend or revoke licenses as well as impose a fine not to exceed \$1,000 per day for every day receipt of the report exceeds 30 days. The motion passed.

A Committee member recommended deleting the words "such society" in line 5 of Section 1(a).

Senator Gaines made a motion to approve proposed bill draft RS 1603 with the proposed recommendations and amendments. Representative Solbach seconded the motion and the motion passed.

The Committee considered proposed bill draft RS 1607 which mandates reporting by licensees.

A motion was made by Representative Snowbarger to insert the word "such" between the words "possesses" and "knowledge" in the last sentence of Section 1(a). The motion was seconded by Representative O'Neal. The motion passed.

Representative Sprague moved to substitute the word "official" for the word "proper" in the last sentence of Section 1(a). Senator Steineger seconded the motion. The motion passed.

Staff explained the proposed bill draft was recommended by the Board of Healing Arts and the Division of Legislative Post Audit.

In regard to proposed bill draft RS 1604, staff reported this bill addresses reporting to the appropriate state licensing agency and the State Department of Insurance, by self-insurers, insurers, or joint underwriting associations who provide professional liability insurance coverage to health care providers licensed in Kansas, any written or oral claim or action for damages for medical malpractice within 30 days of receipt of notice of the claim or action. This bill was proposed by the Kansas Medical Society.

A conceptual motion was made by Representative Sprague that the information should not be disclosed through the Board of Healing Arts or the Insurance Commissioner's office. Reports should be filed within 30 days except the Board of Healing Arts could follow-up on later information as it develops. The motion was seconded by Senator Feleciano. The motion passed.

Staff suggested the term "health care provider" should be defined. After Committee discussion it was decided the definition of health care provider would be as defined for the Health Care Stabilization Fund.

A motion was made by Senator Steineger and seconded by Senator Feleciano that the imposing of penalties should be under the jurisdiction of the Insurance Commissioner. The penalties would be revocation or suspension of license or certificate, and up to \$1,000 a day fine. The motion passed.

It was discussed that closed claims are reported to the appropriate licensing agency.

Senator Walker moved to approve proposed bill draft RS 1604, as amended. Senator Gaines seconded and the motion passed.

Staff handed out a balloon on K.S.A. 65-2836. K.S.A. 65-2836 lists the grounds for revocation, suspension, or limitation of healing arts licenses. This balloon would add failure to maintain a policy of professional liability insurance and failure to pay the annual premium surcharge.

A motion was made by Representative Walker and seconded by Representative Sprague approving of the additions to K.S.A. 65-2836, and that a bill draft be prepared. The motion passed.

Staff reviewed 1985 S.B. 375. The bill would assess civil fines against licensees violating the Kansas Healing Arts Act. The amounts assessed should not exceed \$5,000 for the first violation, \$10,000 for the second violation, and \$15,000 for the third violation and for each subsequent violation. This bill was recommended by the Board of Healing Arts.

A motion was made by Senator Walker and seconded by Senator Steineger to amend S.B. 375 on line 0026 by substituting the State General Fund for the Healing Arts Fee Fund, to report this bill favorably, as amended, and to urge its adoption. The motion passed.

H.B. 2573 increases the membership on the Board of Healing Arts from 13 to 15. The additional two members would be from the general public.

A motion was made by Representative Solbach and seconded by Representative O'Neal recommending favorable action of H.B. 2573 be taken.

Representative Sprague moved to amend Section 1(a) by deleting the language specifying the manner by which the selection of board members are made and leaving the selection of the board members to the discretion of the Governor. Senator Steineger seconded the motion. The motion passed.

Representative Solbach made a motion stating no two of the public members could be from the same congressional district. Representative Luzzati seconded the motion. The motion passed.

Representative Solbach moved to recommend H.B. 2573 favorably, as amended. Representative Sprague seconded the motion and the motion passed.

Staff distributed proposed bill draft RS 1622 concerning risk management. Also distributed was a portion of the Medical Society's bill draft on a reporting system.

Jerry Slaughter responded to a question from the Committee that Section 22 of their bill was drafted for peer review. The bill was drafted in response to the Committee's concerns that physicians should be more actively involved in reporting incidents. The draft requires any licensed health care provider or any other person to report any information that a licensee has committed an act that is or may be below the applicable standard of care.

The Committee decided to table these two proposals until tomorrow or until the next meeting to allow the Committee members time to study both of them, and to give staff time to work with the proposals. It was suggested that language could be incorporated in RS 1622 to allow hospitals to discipline or suspend privileges and to provide immunity from antitrust suits.

Staff was directed to check with the Kansas Medical Society and work on wording for the proposal.

The Committee adjourned until 9:00 a.m., Friday, November 8, 1985.

November 8, 1985
Morning Session

The meeting was called to order by the Chairman, Representative Joe Knopp, at 9:00 a.m. The Chairman announced the Committee would take under consideration the issue of caps on awards.

A Committee member stated that possibly the Legislature had done enough already and should wait and see what results would be obtained from legislation already passed and legislation that has been proposed. He also expressed his concern that the Committee had not received a satisfactory answer as to why insurance premiums are as high as they are. It was noted that a \$50 million settlement had recently been reached in California in a suit by doctors against malpractice insurers for premiums' overcharges.

Senator Steineger moved that the Committee take no action at this time on the issue of caps, and go on to the Health Care Stabilization Fund. Representative Solbach seconded the motion.

A Committee member suggested several alternatives to imposing caps. They were creating a medical panel of Kansas doctors with the authority to remove the surcharge or any part of it from doctors who would have to quit all or part of their practices due to the high cost of insurance. He also suggested the surcharges could be picked up by increasing the surcharges for the rest of the doctors. Other possibilities would be to pay the surcharges out of the State General Fund, a mill levy on the local level, or have everyone that goes to a hospital pay a fee for medical malpractice insurance.

Another Committee member stated a 1 percent insurance premium tax on insurance companies on all insurance written in Kansas would raise \$27 million, which would be 2 1/2 times what it costs to defend and pay all claims in Kansas for one year. He suggested a quarter of a percent (1/4 percent) insurance premium tax, be placed in a fund which would be used to reduce medical malpractice insurance premiums. He estimated \$5 million to \$7 million would be generated each year by the tax.

A motion was made by Senator Gaines proposing a \$500,000 lid for current economic and medical expenses, and a \$500,000 lid, to be structured, for future economic losses and future medical expenses, and that staff prepare a bill draft covering this proposal. Senator Talkington seconded the motion. The motion was then clarified to provide the second \$500,000 cap would cover future medical expenses and custodial care costs only.

During Committee discussion itemized jury verdicts were examined in regard to the lids, and the fact that the lid would not be revealed to the jury.

A Committee member said society cannot afford to pay for everything bad that happens to someone.

A Committee member explained in a couple of years the Legislature can reexamine the lids to see if they need adjusting.

A vote was taken on the motion before the Committee and the motion passed 12 to 7.

Senator Talkington made a conceptual motion that if the jury finds over 25 percent above what the Fund offered, the Fund would be liable for reasonable attorney fees and costs. For purposes of awarding reasonable attorney fees the figure to be used for cases that exceed the limit will be the amount actually awarded by the jury and not the judgment rendered. The motion was seconded by Senator Gaines. The motion passed.

The Committee recessed for lunch.

Afternoon Session

The Committee considered limits on the Fund.

Senator Steineger moved to reduce the limits of the Health Care Stabilization Fund to \$1,000,000 per occurrence. Representative Snowbarger seconded the motion and the motion passed.

Senator Steineger moved to place a \$3,000,000 aggregate limit per year on the Health Care Stabilization Fund. The motion was seconded by Representative O'Neal. The motion passed.

It was suggested by a Committee member that a panel of attorneys be assigned to evaluate every case that comes before the Health Care Stabilization Fund that exceeds \$200,000 to increase the credibility of the Fund.

Senator Steineger moved that the Insurance Department advise the Committee on this matter at the next meeting and that staff draft proposed legislation setting up a panel of three attorneys that would be assigned to evaluate every case before the Fund that exceeds \$150,000. The motion was seconded by Representative Walker. The motion passed.

Derenda Mitchell explained the Fund Board of Governors is an advisory board whose task is to advise and make recommendations to the Legislature, to evaluate medical procedures on a case, and to help with decisions on financial expenses of the Fund.

Senator Steineger moved that the Board of Governors shall review and approve a rating plan for physicians who are paying into the Fund, as developed by the Insurance Department. Senator Gaines seconded the motion and the motion passed.

The Chairman instructed staff to include this language in bill draft RS 1595.

Senator Steineger moved to amend his motion to include "if the Board of Governors determines due to the number of claims filed against a health care provider and the outcome of those claims that an individual health care provider presents a material risk of significant liability to the Fund, the board of governors is authorized by a vote of a majority of the members thereof, after notice and an opportunity for hearing, to terminate the liability of the Fund for all claims against the health care provider for damages for death or personal injury arising out of the rendering of or the failure to render professional services after the date of termination. The date of termination shall be thirty (30) days after the date of the determination by the board of governors. The board of governors, upon termination of the liability of the Fund under this subsection, shall notify the licensing or other disciplinary board having jurisdiction over the health care provider involved of the name of the health care provider and the reasons for the termination." The motion was seconded by Senator Gaines. The motion passed.

The Committee discussed screening panels. The Kansas Medical Society recommended all claims be reviewed by a screening panel and the panel opinion would be admissible evidence if a lawsuit is filed. The Kansas Bar Association stated if an expert witness testifies there is negligence, then a screening panel is not necessary.

Senator Talkington moved to leave the screening panel law the way it is under current law, except to make the results admissible. The rules of evidence would apply. Representative Snowbarger seconded the motion.

Representative Brady made a substitute motion requiring a mandatory screening panel, if requested, with the results admissible at trial if the plaintiff does not have an expert witness that meets the qualifications of expert witnesses in bill draft RS 1596. The motion was seconded by Senator Steineger. A vote was taken and the motion lost.

The Committee voted on the original motion by Senator Talkington and the motion passed.

Senator Steineger moved to amend the present screening panel law concerning the membership of the screening panel. He proposed two doctors and one lawyer. One doctor would be designated by each side. The lawyer would be selected by the judge, as set forth in the current law. The lawyer would be the Chairman and would vote only to break a tie. Senator Feleciano seconded the motion. The motion failed.

In answer to questions from the Committee, Jerry Slaughter explained the panel members receive \$35 a day plus mileage and expenses. The Medical Society proposes each panel member be paid a total of \$150 plus reasonable travel expenses and the Chairman be paid a total of \$250 plus reasonable travel expenses.

Representative Solbach moved that the costs of the screening panel be paid by the winner and that compensation for panel members be as proposed by the Medical Society. The motion was seconded by Senator Talkington. The motion passed.

A Committee member expressed his concern about medical corporations having to pay for medical malpractice insurance as well as each individual doctor of the corporation.

Jerry Slaughter explained that if the physician is held liable the corporation can be forced to tender its limits before the Fund is involved. The Medical Society proposes allowing insurance companies to sell a corporate policy that does not cover a health care provider already required to carry the limits as provided by law, however, acts of nurses and other employees would be covered.

Derenda Mitchell explained under the laws of Kansas a corporation comprised of doctors is defined as a health care provider. If the amount of damages are in excess of the doctor's primary policy limits, then the corporate policy also covering him has to pay before the Fund is liable.

A motion was made by Representative Solbach to direct staff to draft a bill using the recommendations of the Medical Society concerning the liability of medical corporation for malpractice insurance. Senator Yost seconded the motion. The motion passed.

A Committee member suggested requiring only a corporation policy and not require the physicians in the corporation to carry individual policies.

It was discussed by the Committee members that the same amount of money would be needed, and the insurance companies would just reprice their policies on corporations to include what the individual doctors had been paying.

Jerry Slaughter explained to the Committee the Medical Society proposes that before physicians can receive tail coverage from the Fund that they must pay into the Fund for three consecutive years.

Senator Steineger moved that staff prepare a bill draft concerning tail coverage using the recommendations of the Medical Society for consideration by the Committee. The motion was seconded by Representative Hoy. The motion passed.

Representative Snowbarger moved to prohibit contingent compensation for witnesses based upon the outcome. The motion was seconded and passed.

A Committee member expressed concern about protecting the Fund against having to pay all of the fines for attorney fees when it was a problem of the primary carrier that the case was not settled properly to avoid the penalty.

Representative O'Neal made a motion that a bill draft be prepared to cover the Fund against penalties in cases where the primary carrier did not properly attempt to settle the claims. Senator Steineger seconded the motion and the motion passed.

The minutes for September 12 and 13 and October 10 and 11, 1985 were approved by consensus.

The Committee meeting was adjourned until Wednesday, November 20, 1985 at 10:00 a.m.

Prepared by Mike Heim

Approved by Committee on:

Jan 13, 1986
(Date)



KANSAS MEDICAL SOCIETY

1300 Topeka Avenue · Topeka, Kansas 66612 · (913) 235-2383

November 7, 1985

TO: Special Committee on Medical Malpractice

SUBJECT: Award Limitations and Screening Panels

As the committee approaches its final deliberations on the malpractice problem, I wanted to take this opportunity to briefly review our recommendations.

Quality assurance activities, better claims handling, strengthened peer review and the many other improvements you have previously discussed will certainly help. However, to expect any long-term substantial relief from rapidly escalating premiums, the tort system simply must be asked to accommodate some change also. High awards, which drive settlements upward, cannot continue without having a devastating effect on future premiums and insurance availability. We believe our recommendations for limiting awards will adequately compensate injured patients, and at the same time provide much needed predictability and stability to the system.

I have briefly summarized our recommendations for award limitations and screening panels below:

Awards

1. Overall damages, except amounts for future medical care and related benefits, would be limited to \$500,000 per claim.
2. An additional \$500,000 would be available to pay awards for future medical care and related benefits which exceeded the limitation described above. Although our original draft did not include it, we would support a provision that requires any amounts for future damages to be structured.
3. Damages for non-pecuniary losses, such as "pain and suffering," would be limited to \$100,000 per claim.
4. The exposure, or liability, of the Health Care Stabilization Fund, would be \$800,000 per claim (for a per claim total of \$1 million, including the basic limits of \$200/600,000).

11/7-8/85
Attachment I

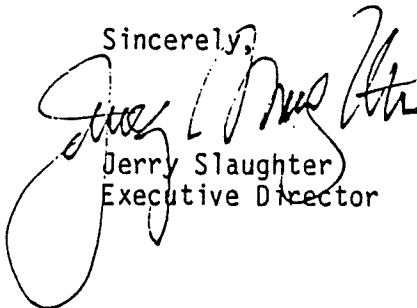
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Screening Panels

Our proposal blends current Kansas law and Indiana law to create screening panels which would review all medical malpractice claims before they are filed as lawsuits. The panels would each consist of three health care providers and an attorney chairman. The panel would evaluate the medical evidence presented to determine whether the provider did or did not meet the appropriate standard of care. The panel opinion would be admissible in evidence if a lawsuit is subsequently filed. Whenever the panel unanimously decides that the provider did meet the appropriate standard of care and the claimant decides to file a lawsuit, the claimant then must first submit his case to an expert and file an affidavit to this effect.

I appreciate your consideration of these comments and would be happy to answer any questions.

Sincerely,



Jerry Slaughter
Executive Director

JS:nb

Constitutionality of Malpractice Cap Is Upheld

By DAVID LAUTER

National Law Journal Staff Reporter

WASHINGTON — Laws that limit the amount plaintiffs may recover in tort actions do not violate the federal Constitution, the Supreme Court ruled last week in a major blow to plaintiffs' attorneys.

The ruling came in the form of a dismissal of a challenge to California's \$250,000 cap on medical malpractice recoveries for pain and suffering and other "non-economic" damages. Potentially, however, the decision could affect fields as varied as medicine and libel law.

The justices ruled, with only Justice Byron R. White dissenting, that the constitutional challenge to the limit raised "no substantial federal question" and declined to hear oral arguments in the case, *Fein v. Permanent Medical Group*, 85-19.

Normally when the high court re-

fuses to hear arguments in a case, the decision does not settle the merits of the claim and does not set a precedent. But when, as in this instance, the case is brought to the court as an appeal, rather than as a petition for certiorari, a decision to dismiss the case for lack of a federal question is a ruling on the merits and does bind lower courts.

So although the ruling was not accompanied by any opinion, it remains a major blow to plaintiffs' attorneys on an issue in which they had been having considerable success.

Plaintiffs' attorneys have won rulings in five states — New Hampshire, Ohio, Illinois, Texas and North Dakota — that struck down limits on malpractice recoveries. State appellate courts, interpreting both their own and the federal Constitutions, have held that damage limits unconstitutionally discriminate among litigants in a way that denies some victims the equal protection of the laws.

Conversely, lawyers say, the decision will bolster arguments by defense groups — doctors concerned with mal-

practice, newspaper publishers with libel law, chemical manufacturers with "toxic torts" — that legislatures should consider more laws to limit recoveries.

While the high court's decision does not alter provisions in state constitutions that may bar damage limitations, the ruling would appear to end the argument that such limits might violate federal rights.

Defense groups have concentrated their efforts on obtaining limits on non-economic damages such as pain and suffering, fright, humiliation and mental distress which, they claim, juries frequently use as unjustified substitutes for punitive damages. The California Supreme Court ruling that the justices declined to review, and similar rulings by the Indiana and Nebraska Supreme Courts, have upheld limits on such non-economic damages.

The case that the court refused to consider was brought by a lawyer who works for the California legislature. The attorney, Lawrence Fein, sued his

doctors for failure to diagnose a condition that led to a heart attack. A jury awarded him \$1.3 million, which included \$500,000 for non-economic damages. The state trial judge reduced the non-economic award to the \$250,000 statutory maximum, and the state Supreme Court rejected Mr. Fein's challenge to the law.

Justice White, the only member of the court to issue a written statement on the case, argued that the court should consider "whether due process requires a legislatively enacted compensation scheme to be a quid pro quo for the common law or state-law remedy it replaces, and if so, how adequate it must be."

* * *

11/7-8/85

Attachment II

Settlement Conferences

Mandate

Alternative 1: By court rule

In any medical malpractice liability action, the court shall require a settlement conference prior to the trial of the action. Such conference shall be conducted in accordance with rules of the supreme court.

Alternative 2: By statute

(a) In any medical malpractice liability action, the court shall require a settlement conference to be held {at least _____ weeks prior to trial} {not more than _____ days after the filing of the petition}.

(b) The settlement conference shall be conducted by {a judge other than the trial judge} {the trial judge}. The attorneys who will conduct the trial, all parties and all persons with authority to settle the claim shall attend the settlement conference unless excused by the court for good cause.

Admissibility

Offers, admissions and statements made {in conjunction with} {during} the settlement conference shall not be admissible at trial or in any subsequent action {and shall not be communicated to the trial judge}.

Penalties

In lieu of assessment of costs pursuant to K.S.A. 60-2002 and amendments thereto:

(1) If, during the settlement conference, a defendant proposes an offer of settlement which is rejected by the plaintiff and the judgment at trial is at least 25% less than such offer, the defendant shall be entitled to recover reasonable costs and attorney fees incurred {on a per diem basis} from the date of the offer.

(2) If, during the settlement conference, a plaintiff proposes an offer of settlement which is rejected by the defendant and the judgment at trial is at least 25% greater than such offer, the plaintiff shall be entitled to recover reasonable costs and attorney fees incurred {on a per diem basis} from the date of the offer.

The court in its discretion may relieve any party of the penalty imposed by this subsection if the witnesses, exhibits or evidence presented at trial were not reasonably available at the time of the settlement conference to the party against whom the penalty would otherwise be assessed.

M. J. L.
11/15/85