Approved 3-24-86
Date

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL & STATE AFFAIRS

The meeting was called to order by REPRESENTATIVE ROBERT H. MILLER at
Chairperson

1:30 a.m./p.m. on March 20, 1986 in room 526S of the Capitol.

All members were present except:

Representative Sughrue
Representative Grotewiel

Committee staff present:

Lynda Hutfles, Secretary
Mary Torrance, Revisor's Office
Raney Gilliland, Research

Conferees appearing before the committee:
Representative Cloud
Representative Francisco
Dave Litwin, Kansas Chamber of Commerce & Industry
Charles Belt, Wichita Area Chamber of Commerce
Glenn Cogswell, Kansas Council for the Alliance of Insurance
Richard Harman, Kansas Association of Property & Casualty Companies
Representative Joe Knopp
Ron Smith, Kansas Bar Association
Dudley Smith, Kansas Bar Assocation
Kathleen Sebelius, Kansas Trial Lawyers
Gene Ralston, Kansas Trial Lawyers

The meeting was called to order by Chairman Miller. Attention was called to next weeks agenda and the Chairman said that as bills are referred to the committee more bills will be added to the agenda.

Representative Goosen made a motion, seconded by Representative Sallee, to approve the minutes of the March 19 meeting. The motion carried.

Representative Walker submitted a subcommittee report on HB2805-Community Right to Know. The subcommittee recommendation was that no action be taken during the 1986 session. See attachment A.

Representative Walker made a motion, seconded by Representative Barr, to adopt the subcommittee report. The motion carried.

A letter from Judge James Buchele was distributed to the committee in opposition to HB2961 which prohibits cash deposit appearance bonds. See attachment B.

HB ~~2981~~ 2918 - Regulating contingency fees

Representative Cloud, co-sponsor of the bill, explained the bill which places a cap on attorney contingency fees. Representative Cloud told the committee that there is a liability crisis that goes far beyond just medical malpractice. There are firm examples of accountants, farmers, small manufacturers, etc., who have found it impossible to secure liability insurance or have found that the cost to secure that liability insurance has esculated beyond their reach. Representative Cloud distributed a balloon of the bill with some suggested amendments. See attachment C.

There was discussion as to what the percentages of the net amount recovered should be and how to go about setting these percentages.

There was a question as to whether the bill was addressing problems in the insurance industry or frivolous law suits.

Representative Francisco expressed his support of the intent of this bill. It not only addresses the problem in the medical profession, but also in the aviation industry and all other types of cases where numerous lawsuits are being instituted. See attachment D.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON Federal & State Affairs,

room 526S, Statehouse, at 1:30 a.m./p.m. on March 20, 1986

Paul Fleener, Kansas Farm Bureau Farmers & Ranchers, gave testimony in support of the concept contained in HB2918 to modify contingent fee arrangements. See attachment E.

Dave Litwin, Kansas Chamber of Commerce & Industry, gave testimony in support of the bill. He stated that in order to reduce costs of the system and increase the percentage of money spent on that system that reaches injured plaintiffs, as well as for reasons of fairness reasonable regulation is called for. He suggested there be a change in the percentages. The maximum 50% allowed up to $200,000 seemed quite high at the upper ranges, and conversely the 15% limit on recoveries over $200,000 may be too restrictive. See attachment F.

Charles Belt, Wichita Area Chamber of Commerce, gave testimony in support of the concept of the bill. This support is not intended to single out lawyers contingency fees, but is a factor in the liability crisis at hand.

Glenn Cogswell, Kansas Council for the Alliance of Insurance, gave testimony in support of the bill. The Council is committed to tort reform, a cap is another rung on the ladder. This is not a prohibition against contingent fees, but a limitation. The Council supports a cap on contingent fees.

Richard Harman, Kansas Association of Property & Casualty Companies, gave testimony in support of the concept of the bill. He stated they believe that some juries inflate the award anticipating attorneys will receive 1/3-½. This is a public policy issue. By limiting the attorneys contingency fees, they feel the injured party will get more.

The Chairman asked that Mr. Cogswell & Mr. Harman submit written testimony for the record.

Representative Joe Knopp gave testimony in opposition to the bill. He said Judiciary did have hearings on this bill and he is all for tort reform. This bill breeches ethical responsibility. He said that he has found no relationship between liability problems and contingent fees. A 25%-50% contingency fee may be too much, but in very complex cases it may not be enough.

Ron Smith, Kansas Bar Association, introduced Dudley Smith of the Bar.

Dudley Smith, Vice-Chairman of the Legislative Committee of the Kansas Bar Association, gave testimony in opposition to the bill. He said it is important to note that the proposed bill applies to all tort cases without limitation. He explained several reasons for opposing the bill. He distributed copies of his statement along with a subcommittee report by the Kansas Bar Association Prospective Legislative committee which was submitted to the Kansas Bar Association Executive Council. See attachment G & H.

Kathleen Sebelius, Kansas Trial Lawyers, gave testimony in opposition to the bill. She urged the committee to try to gather data on what the costs and fees paid are on both sides. The contingency fee is the key to the courthouse door for people who could not otherwise afford to go and defend their legal rights. It is in the public interest and should be preserved. See attachment I.

Gene Ralston, Kansas Trial Lawyers, told the committee he was on Judge Bullock's committee to study this subject. He said that the courts are studying attorneys fees and are going to make attorneys get paid reasonable fees in accordance with ethics. He told the committee about a case he is working on that he has spent 3,000 hours on, has had $87,000 in expenses, and has had to borrow money to pay his office staff (approx. 30 people). The potential settlement in this case is about $1 million. After you reach cases in this high category, they get more difficult because the defendants know they have greater quality of representation. If you reduce the fees, quality goes down.

The meeting was adjourned.

A subcommittee of the House Federal & State Affairs Committee, consisting of Representatives Tom Walker, Ken Grotewiel and Ginger Barr, was directed to review HB2805. The subcommittee submits the following report. The subcommittee met twice with a number of interested parties. At the first meeting, the various parties described their particular interest in the bill and indicated some of the types of provisions they wanted to see included in the bill. The subcommittee directed staff to review community right to know legislation in other states. The subcommittee spent a good deal of time attempting to determine who should be under the bill (i.e., who would be required to report on chemicals) and what chemicals should be included for reporting.

At the second meeting, there was general discussion of the issues by members of the subcommittee, other legislators, and the concerned parties. A representative of the Kansas Chamber of Commerce and Industry distributed an alternative bill for review by the subcommittee and other interested parties. In addition, staff reviewed a memorandum which summarized the community right to know legislation in all other states with such legislation.

After reviewing the information submitted to the subcommittee, the members of the subcommittee recommended that no action be taken on HB2805 or on similar legislation in the 1986 session. The reasons for the subcommittee's action are:

1. There are changes occurring in federal requirements for community right to know, and it appears to be premature for the state to take action at this time.

2. In addition, there are some complex issues involving the types of businesses that might be brought under such a law and the types of chemicals that would be covered which require considerable time to study.

3. There is considerable disparity of opinion among the various parties interested in this issue over who should be covered, what materials should be included, and whether the focus of the legislation should be emergency preparedness or community right to know.

4. There is an unresolved question over who should be placed in charge of collecting and disseminating information about chemicals in a community (i.e., a centralized versus decentralized system).

Representative Tom Walker, Chairman

Representative Ginger Barr

Representative Ken Grotewiel

H. F&SA
3/20/86

ATTACHMENT A

B

District Court of Kansas
Third Judicial District

Shawnee County Courthouse
Topeka, Kansas 66603

Chambers of
James P. Buchele
Judge of the District Court
Division Twelve

(913) 295-4405
C. Jeanette Christian, C.S.R.
Official Reporter
Judy A. McCurry
Administrative Assistant

19 March 1986

The Honorable Robert H. Miller
State Representative
State Capitol Building
Topeka, KS 66612

HOUSE BILL 2961

Dear Representative Miller:

My trial schedule prohibited me from attending the Federal and State Affairs Committee hearing on House Bill 2961 earlier this week. I wish to state by opposition to this bill for the following reasons.

The proponents of this bill are objecting to the practice of cash deposit surety on bail bonds which has been adopted in at least three judicial districts in this state. To date I am not aware of any problems with the cash deposit surety bail bonds as used in Kansas and would like to stress several advantages.

The population of persons charged with crimes includes a high proportion of unemployed and others of marginal financial means. When these persons pay a professional bail bondsman for their release their limited funds are often depleted and the Court must appoint counsel to be paid from the state indigent defense fund.

Under the cash deposit system a defendant can assign the deposit to his retained attorney thereby saving the taxpayers the expense of paying court appointed counsel.

The refundable cash deposit if not used for attorney fees at the conclusion of his case will be available to the defendant or his family to pay debts, child support or other necessities. Money paid to a bail bondsman is gone forever.

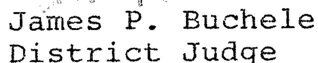
ATTACHMENT B
H. F&SA
3/20/86

It is my opinion that bail bondsmen tend to greatly overstate their significance and contribution to the criminal justice system. For example, the most frequent reason that people fail to appear in court is due to mistake or forgetfulness. These people usually show up upon receipt of a letter or telephone call. Those who leave the state intending to run are usually apprehended by law enforcement authorities. Very few real fugitives are ever actually apprehended by bail bondsmen.

Last year, the House Judiciary Committee made a study of cash deposit surety bonding. A bill which would have encouraged a wider use of cash deposits was recommended for passage by the committee but died on the House calendar. House Bill 2961 seeks to do the opposite of this study and recommendation.

This fact alone should cause the committee to pause relative to the merits of this bill. In any event, absent a demonstrated problem in those districts which use cash deposit bonds, I feel the Legislature should not pass this bill.

Sincerely,



James P. Buchele
District Judge

jmc

C

THURSDAY, MARCH 20, 1986

TESTIMONY BEFORE THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE ON HB 2918

BY REPRESENTATIVE STEPHEN R. CLOUD

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I APPEAR BEFORE YOU THIS AFTERNOON, URGING YOU TO ACT FAVORABLY ON HB 2918 WHICH PLACES A VERY LIBERAL CAP ON ATTORNEY CONTINGENCY FEES. I FREELY ADMIT TO YOU THAT THIS BILL IS TOUGH MEDICINE. I DO NOT UNDERESTIMATE THE ORGANIZED OPPOSITION THAT WILL BE FIGHTING TO DEFEAT THIS BILL. BUT, LADIES AND GENTLEMEN OF THE COMMITTEE, I WOULD SUBMIT TO YOU THAT WE MUST FACE HEAD ON A VERY SERIOUS CRISIS IN OUR COUNTRY: A CRISIS THAT CRIES OUT FOR A SOLUTION. I BELIEVE THAT HB 2918 IS A PART OF THAT SOLUTION.

THE HOUSE OF REPRESENTATIVES HAS RECENTLY PASSED LEGISLATION ADDRESSING THE MEDICAL MALPRACTICE INSURANCE CRISIS THAT EXISTS IN THIS STATE. I CONTEND THAT WE HAVE A LIABILITY CRISIS THAT GOES FAR BEYOND JUST MEDICAL MALPRACTICE. WE HAVE FIRM EXAMPLES OF ACCOUNTANTS, BANK DIRECTORS, THE DEPARTMENT OF HEALTH AND ENVIRONMENT, FARMERS, AND SMALL MANUFACTURERS WHO HAVE FOUND IT IMPOSSIBLE TO SECURE LIABILITY INSURANCE OR HAVE FOUND THAT THE COST TO SECURE THAT LIABILITY INSURANCE HAS ESCALATED BEYOND THEIR REACH.

THE REASON FOR THIS CRISIS IS THAT WE LIVE IN A SOCIETY THAT HAS GONE LITIGATION MAD. THE AVERAGE JURY AWARD IN THE GREATER KANSAS CITY AREA HAS GONE FROM AN AVERAGE AMOUNT OF $39,853 IN 1980 TO $535,017 IN 1985. THAT INCREASE REPRESENTS A ONE THOUSAND TWO HUNDRED FORTY TWO PERCENT INCREASE.[1] ACCORDING TO THE AMERICAN TORT REFORM ASSOCIATION, 16.6 MILLION LAWSUITS WERE FILED IN THIS COUNTRY LAST YEAR ALONE. THESE LAWSUITS CLAIMED A TOTAL OF 60 BILLION DOLLARS. IN FEDERAL COURTS, PRODUCT LIABILITY SUITS ALONE JUMPED 600 PERCENT IN TEN YEARS: FROM 1,579 IN 1974 TO 10,745 IN 1984.

[1]Greater Kansas City Jury Verdict Service

ATTACHMENT C
H. FJSA
3/20/86

IN THE FIELD OF ACCOUNTING, I HAVE ONE SPECIFIC EXAMPLE OF A VERY GOOD CERTIFIED PUBLIC ACCOUNTING FIRM WHO PAID $750 LAST YEAR FOR LIABILITY INSURANCE AND THIS YEAR WILL PAY $8,200 WITHOUT ONE LIABILITY CLAIM BEING MADE AGAINST THE FIRM. AS OFFICER AND DIRECTOR, LIABILITY INSURANCE BECOMES NONEXISTENT OR, IN THE BEST CASE SCENERIO, VERY, VERY EXPENSIVE, WE SEE PEOPLE WHO HISTORICALLY HAVE AGREED TO SERVE ON THE BOARDS OF OUR LOCAL BANKS ARE NOW REFUSING TO SERVE AND, IN SOME CASES, EVEN RESIGNING FROM EXISTING BOARDS.

OUR VERY OWN KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT HAS HAD TO MAKE VERY DIFFICULT BUDGETARY DECISIONS REGARDING WHAT TYPE OF VACCINE THEY WOULD CONTINUE TO OFFER OUR CITIZENS DUE TO THE PRODUCT LIABILITY CRISIS. THE COST PER DOSE OF DPT VACCINE (DIPTHERIA-PERTUSSIS-TETANUS) HAS GONE FROM 12¢ IN 1982, TO 26¢ IN 1983; TO 96¢ in 1984, TO $2.25 IN 1985; TO AN ESTIMATED $3.84 PER DOSE IN 1986. THIS REPRESENTS AN INCREASE IN NECESSARY MONIES FROM THE STATE GENERAL FUND FROM $10,000 TO $193,060. TO OFFSET THAT STAGGERING INCREASE, KDHE HAS DECIDED TO TERMINATE THE VACCINE PROGRAM FOR TUBERCULOSIS. I QUOTE FROM A RECENT MEMO FROM A MANUFACTURER OF THESE VACCINES TO KDHE. "YOU SHOULD BE AWARE THAT VIRTUALLY ALL OF THE ADDITIONAL REVENUE GENERATED BY THESE PRICE INCREASES WILL BE DEVOTED TO LIABILITY COSTS AND MAY NOT BE ADEQUATE FOR THAT PURPOSE IF CURRENT TRENDS AND JURY VERDICTS CONTINUE."

ON TOP OF ALL THE OTHER PROBLEMS THAT OUR FARMERS ARE FACING TODAY, THEY NOW ARE FINDING IT VERY DIFFICULT TO SECURE LIABILITY INSURANCE FOR THEIR FARMS. MANY INSURANCE AGENTS ARE FINDING IT NECESSARY TO CONTACT NUMEROUS INSURANCE COMPANIES IN AN EFFORT TO FIND ONE WHO WOULD BE WILLING TO OFFER LIABILITY INSURANCE TO THEIR CLIENTS.

THE SMALL MANUFACTURER, WHO IS THE LIFEBLOOD OF OUR JOB OPPORTUNITIES IN KANSAS, CONTINUE TO STAGGER UNDER THE UNBELIEVABLE COSTS OF PRODUCT LIABILITY FOR THE GOODS THAT THEY PRODUCE. THE KANSAS CHAMBER OF COMMERCE AND INDUSTRY'S BOARD OF DIRECTORS UNANIMOUSLY ADDED TORT REFORM TO ITS LIST OF MAJOR LEGISLATIVE OBJECTIVES FOR THE 1986 SESSION OF THE KANSAS LEGISLATURE.

THE FOLLOWING QUOTE IS FROM THE JANUARY 1986 EQUAL EMPLOYMENT COMPLIANCE UPDATE. "WHILE PENZOIL COUNTS THE BILLIONS IT INTENDS TO COLLECT FROM TEXACO, A SMALLER BUT EQUALLY STARTLING JURY AWARD HAS BEEN MADE AND UPHELD BY THE TRIAL JUDGE IN AN AGE DISCRIMMINATION ACTION BROUGHT UNDER STATE LAW THAT PROVIDED FOR FULL COMPENSATORY AND EXEMPLARY DAMAGES. IN RAWSON vs SEARS ROEBUCK AND COMPANY 615 F. Supp. 1546, THE JURY AWARDED FIVE MILLION DOLLARS FOR PAIN, SUFFERING AND HUMILIATION, BOTH PAST AND FUTURE AND, TEN MILLION DOLLARS FOR EXAMPLARY DAMAGES TO AN INDIVIDUAL WHO ALLEGED AGE DISCRIMMINATION."

AS I HOPE YOU CAN SEE, THE PROBLEM GOES FAR BEYOND JUST MEDICAL MALPRACTICE. IT STRETCHES THROUGHOUT THE ENTIRETY OF OUR SOCIETY. TO ATTEMPT TO REACT TO THESE PROBLEMS, A RECENT CALIFORNIA CITIZEN'S COMMISSION ON TORT REFORM MADE THE FOLLOWING REPORT, "A STATUTE SHOULD BE ENACTED PLACING A QUANTITATIVE LIMITATION ON CONTINGENCY FEES THAT WOULD EMPOWER THE JUDICIAL COUNSEL TO AMEND THE CEILINGS AS CONDITIONS CHANGE. IN ANY EVENT, CONTINGENCY FEES SHOULD BE CALCULATED AFTER THE DEDUCTION OF PLAINTIFF'S NON-RECOVERABLE COSTS. THE INITIAL SCHEDULE SHOULD LIMIT FEES TO 40% ON THE FIRST $50,000 OF THE NET AWARD, AND 25% OF THE REMAINDER."

THIS WAS ADOPTED ON A VOTE OF 21-1 BY THE CALIFORNIA COMMISSION. A SUBSEQUENT BILL IN THE CALIFORNIA LEGISLATURE WAS PASSED AND WAS FOUND TO BE CONSTITUTIONAL.

OUR VERY OWN KANSAS CITIZEN'S COMMITTEE FOR THE REVIEW OF THE TORT SYSTEM RECENTLY ADOPTED THE FOLLOWING STATEMENT. "THE CITIZENS COMMITTEE IS CONVINCED THAT THE CONTINGENT FEE ARRANGEMENT IS AN IMPORTANT MEANS TO INSURE THAT PERSONS UNABLE TO PAY NORMAL ATTORNEY FEES AND COSTS HAVE A RIGHT TO OBTAIN ADEQUATE REPRESENTATION. THE CITIZENS COMMITTEE BELIEVES, HOWEVER, THAT A 25% LIMITATION ON CONTINGENT ATTORNEY FEES FOR AWARDS IN EXCESS OF $100,000 IS APPROPRIATE AND REASONABLE. THE 25% LIMITATION IS COMPARABLE TO THAT PRESENTLY IMPOSED BY K.S.A. 45-536 (1983) OF THE KANSAS WORKERS COMPENSATION ACT. ON BALANCE, THE CITIZENS COMMITTEE RECOMMENDS 25% AS A REASONABLE LIMITATION ON ATTORNEY CONTINGENT FEE CONTRACTS."

HB 2918 SIMPLY PUTS A 50% CAP ON THE FIRST $200,000 OF THE NET AMOUNT RECOVERED AND A 15% CAP ON THAT PORTION OF THE NET AMOUNT RECOVERED WHICH EXCEEDS $200,000. THIS WILL ALLOW PLAINTIFFS TO ACTUALLY RECEIVE A HIGHER PERCENTAGE OF VERDICTS AND SETTLEMENTS. CANON 2 OF THE CODE OF PROFESSIONAL RESPONSIBILITIES UNDER K.S.A. 7-125 CLEARLY FORBIDS EXCESSIVE LEGAL FEES. "THE TOTAL FEE OF THE LAWYERS DOES NOT CLEARLY EXCEED REASONABLE COMPENSATION FOR ALL LEGAL SERVICES THEY RENDER TO CLIENT." THE HOUSE JUDICIARY COMMITTEE RECEIVED TESTIMONY THAT ON ONE PARTICULAR CASE INVOLVING A 1.2 MILLION DOLLAR VERDICT, THE ATTORNEY WAS GOING TO RECEIVE BETWEEN 30 AND 40 PERCENT. I WOULD SUBMIT TO YOU THAT FOUR HUNDRED TO FIVE HUNDRED THOUSAND DOLLARS "CLEARLY EXCEEDS REASONABLE COMPENSATION FOR ALL LEGAL SERVICES". TESTIMONY WAS ALSO HEARD WHICH INDICATED THAT SOME PLAINTIFFS ATTORNEYS CHARGED LARGE CONTINGENCY FEES TO FINANCE CASES THAT THEY EITHER HAVE LOST IN THE PAST OR THAT THEY ANTICIPATE THEY WILL LOSE IN THE FUTURE. I WILL SUBMIT TO YOU THAT THIS PROCEDURE CLEARLY VIOLATES THE CODE OF ETHICS. WHEN A CLEAR NEED HAS BEEN DEMONSTRATED FOR A PLAINTIFF AND A VERDICT HAS BEEN AWARDED, IT IS OUR RESPONSIBILITY TO MAKE SURE THAT PLAINTIFF RECEIVES AS HIGH A PERCENTAGE AS IS POSSIBLE OF THE VERDICT AMOUNT. HB 2918 WOULD DO JUST THAT.

I URGE YOU TO RECOMMEND HB 2918 FAVORABLE FOR PASSAGE AND TAKE, AT LEAST, ONE SMALL STEP TOWARDS TORT REFORM WHICH THIS COUNTRY SO DESPARATELY CRIES OUT FOR.

THANK YOU.

HOUSE BILL No. 2918

By Representatives Cloud, DeBaun, Dyck, Fox, Friedeman, Goossen, Guldner, King, R.H. Miller, Neufeld, Rolfs, Sand, Smith and Spaniol

2-12

018 AN ACT concerning civil procedure; relating to certain liability
019 claims; placing limitations on attorney fees charged in con-
020 nection therewith; prescribing the form of judgment to be
021 entered for certain damages awarded therefor.

022 *Be it enacted by the Legislature of the State of Kansas:*
023 Section 1. As used in this act:
024 (a) "Contingent fee arrangement" means an agreement for
025 legal services of one or more attorneys, including any associated
026 or forwarding counsel, under which compensation, contingent in
027 whole or in part upon the successful accomplishment or dispo-
028 sition of the subject matter of the agreement, is to be in an
029 amount which either is fixed or is to be determined under a
030 formula.
031 (b) "Future damages" means damages to be incurred after a
032 settlement agreement or judgment is entered.
033 (c) "Liability claim" means any claim for damages arising out
034 of the tortious conduct of another, including any product liability
035 claim as defined by K.S.A. 60-3302 and amendments thereto.
036 (d) "Net amount recovered" means the gross amount re-
037 covered under a settlement agreement or judgment, including
038 amounts recovered for interest or court costs, less any amounts
039 recovered for expenses or disbursements connected with en-
040 forcement of the claim or prosecution of the action on the claim.
041 (e) "Person" means any individual or entity.
042 (f) "Structured settlement" means a plan for the payment of a
043 settlement or judgment which provides for the payment of
04 [illegible]unts to be received by the claimant on an installment basis,
045 whether by direct periodic payments or by payments under an

0046 annuity contract.
0047 Sec. 2. (a) Except as otherwise authorized by K.S.A. 44-536
0048 and amendments thereto, in any matter in which a person asserts
0049 a liability claim, a contingent fee arrangement shall not provide
0050 for a fee which exceeds~~:~~ the following percentages of the net amount recovered unless, after hearing, the court finds unusual circumstances or expenses which warrant greater fees:

(1) 33 1/3% of the first $250,000;
(2) 25% of the next $250,000;
(3) 20% of the next $500,000; and
(4) an amount set by the court for any portion exceeding $1 million.

0051 ~~(1) Fifty percent of the first $200,000 of the net amount~~
0052 ~~recovered; and~~
0053 ~~(2) fifteen percent of that portion of the net amount recovered~~
0054 ~~which exceeds $200,000.~~
0055 ~~(b) In any matter in which a person asserts a liability claim,~~
0056 ~~any portion of such person's attorney fees which is based on a~~
0057 ~~structured settlement shall be payable in installments at the time~~
0058 ~~of, and in proportion to, payments received under the structured~~
0059 ~~settlement.~~
0060 ~~(c)~~ (b) No contingent fee arrangement shall be enforceable un-
0061 less reduced to writing and signed by the parties to it.
0062 Sec. 3. (a) In any action in which a person asserts a liability
0063 claim, the judge shall require the jury to return special verdicts
0064 in the form of special written findings upon the issues of the
0065 amount of damages incurred for future losses and the period of
0066 time during which it is anticipated that such losses will be
0067 incurred.
0068 ~~(b) In any matter in which a person asserts a liability claim,~~
0069 ~~any amount recovered for future damages under a settlement~~
0070 ~~agreement or judgment shall be paid in the form of a structured~~
0071 ~~settlement over the period of time during which it is anticipated~~
0072 ~~that the future damages will be incurred.~~

(b) In any action in which a person recovers future damages for a liability claim, the verdict shall not reduce such damages to their present value and the jury shall be instructed to that effect. The court shall reduce such damages to their present value and shall enter judgment, with respect to such damages, for an annuity contract which has a present value equal to the present value of such damages and which, to the greatest extent possible, will provide for the payment of benefits over the period of time specified in the verdict in the amount awarded by the verdict for future damages.

0073 Sec. 4. The provisions of this act shall apply only to claims
0074 arising on or after July 1, 1986.
0075 Sec. 5. This act shall take effect and be in force from and
0076 after its publication in the statute book.

D

STATE OF KANSAS

KENNETH FRANCISCO
REPRESENTATIVE, NINETIETH DISTRICT
SEDGWICK COUNTY
ROOM 281-W, STATE CAPITOL
TOPEKA, KANSAS 66612

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: COMMERCIAL AND FINANCIAL INSTITUTIONS
LOCAL GOVERNMENT
PENSIONS, INVESTMENTS AND BENEFITS
JOINT COMMITTEE ON EDUCATIONAL PLANNING

March 20, 1986

I commend the sponsors of this Bill; it not only addressed the problem in the medical profession but also in the aviation industry and all other types of cases where numerous lawsuits are being instituted.

Placing limitations on attorney fees charged on a contingency fee basis is an exercise of the State's police power for the promotion of the health and welfare of the public. Courts will not uphold such an exercise of police power if it operates in an arbitrary and unreasonable manner.

Other Proponents of attorney fee regulation say: "that modification of contingency fee schedules is necessary to ensure that the injured Plaintiffs receive a fair share of the awards". (Comment by Donald Steffes, President, the Philco Group of Insurance Companies)

The Contingency Fee System often pays such large awards that lawyers can afford to lose several cases if they can win one even occasionally, and that's wrong. We must do something to ensure that the injured party receives their fair share of these awards. After all, they're what insurance is all about, not income for attorneys.

The most important person is the client. The attorney should not receive 'excessive profit' for representing the injured party. This Bill attempts to provide for reasonable costs (fee + expenses) and insure that a client receives a majority of the settlement.

In a recent case which was litigated in Wichita, Kansas - you can see the un-equitable example of the lesser amount going to the client who was the injured party.

$250,000 settlement
100,000 attorney fee
75,000 expenses
75,000 to client

This example is typical of most contingent fee cases. The above case happened to be a personal injury case but in Wichita we also see that the Aviation Industry is suffering because of products liability cases. In most cases, the client only receives a remainder of the settlement, not a majority of the settlement which the injured party is entitled to.

Currently, the legal contingency fee attitude has been one of the "blank check". By this, I mean there is no incentive to keep costs down.

ATTACHMENT D
H. F+SA
3/20/86

Under the "contingent fee arrangement" the client does not pay out "his own money"; if the case is lost, the client pays nothing, if the case is won the settlement pays. So the decision making process concerning costs is anything goes, resulting in the "blank check" or carte blanche attitude.

In contrast, we see that on a "fixed-fee arrangement", the client consulted as to expenses and all costs. The client evaluates and approves the costs incurred on his/her ability to pay. Regardless of the outcome the costs must be paid, so the decision process is a very careful one by the client.

Perhaps it would be appropriate to look at the medical profession and what it has done about the "blank check" attitude. In previous years, this profession too, had the "blank check" attitude. The physicians would order just as many tests, etc. that they could 'just to make sure'. But with escalating medical costs and increases in testing procedures - to bring the costs down Medicare enacted the DRG (Diagnosis Related Grouping) system. This DRG was a system developed to reduce costs and fix fees at a reasonable rate. Similarly, BC/BS has incorporated a similarly fixed fee schedule for tests, etc., which has resulted in a fixed fee and reduced costs. The provider does not usually have the right to collect over and above what the insurance pays. Legal contingency fees similarly can be fixed.

We are running the risk of creating an insuranceless socity because the threat of liability suits has caused insurers either to drop coverage or charge high and unaffordable rates. (Grant DuBois, Chairman, National Coalition for Litigation Cost Containment)

Contingency fees, which often amount to 40-50% or more of the money awarded to victims, are principally responsible for the explosion of hugh verdicts and the logjams in our courts (Grant DuBois)

Opponents feel that lawyers would refuse to take cases if the contingency fees were limited. However, not all lawyers would refuse; some lawyers would, but not all. Both nationally and in Kansas, statistics show the numbers of practicing lawyers are increasing. Hence, the oversupply of lawyers assure us that someone would take the case, if the case had merit. Perhaps, if there were a reluctance to take the case, it would be a signal to the Plaintiff that the case did not have sufficient merit.

In closing, I would point out that several states have statutes that cap attorney fees using a sliding scale of some type. Many of these statutes have been challenged and the courts have upheld them as being constitutional.

With HB 2918, the client would receive a large share of the settlement and is this not appropriate for the injured party? This Bill would also remove the financial incentive to ask for larger awards than necessary by providing for a reasonable professional fee and a resonable amount for legal process.

Additionally, in some legal areas today fees and costs are approved and fixed; these areas include probate, class action suits, discrimination cases, and antitrust cases. Hence, there is legal precedent for fixed fees that are reasonable.

STATE OF KANSAS

KENNETH FRANCISCO
REPRESENTATIVE, NINETIETH DISTRICT
SEDGWICK COUNTY
ROOM 281-W, STATE CAPITOL
TOPEKA, KANSAS 66612

TOPEKA

HOUSE OF
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JOINT COMMITTEE ON EDUCATIONAL
PLANNING

1. Typical contingency fee case - actual amounts involved.

Wichita, Kansas	$250,000	settlement
	100,000	attorney fee
	75,000	expenses
	75,000	remainder to client

Litigation expenses = expert witness + professional fee + depositions, etc. This amount is not usually public, a private contract between attorney and client usually exists. There is wide flexibility in the contract and the contract can take any form --it may stipulate that the expenses will be paid after the contingent fee is taken out.

Court costs = service fees, cost of filing, etc.

2. Areas where professional fees and costs are limited. Probate Court, Class Action Suits, Discrimination Cases, Antitrust cases. Hence we do have legal precedent for limiting fees in this country.

3. The legal profession in Kansas is increasing just as the legal profession is increasing nationally. There is no shortage of lawyers. As of July, 1985, 6,022 active attorneys and 1,325 inactive.

4. Attorneys should be encouraged to function in a cost affective manner.

5. The fixed cost schedules adopted by Medicare and BC/BS are good cost containment measures and are examples to be followed in reducing costs in the legal profession.

6. Of interest: As reported in the Wall Street Journal, November 1, 1985, page 20, members of the Los Angeles Bar Association, fell victim to the insurance crisis. They could not get themselves protected by any malpractice coverage. Ironically, they had to go to Lloyd's of London for a policy that cost twice as much for one-tenth the protection. Perhaps the Kansas Legal Profession is headed the same way.

7. Should the costs incurred be paid by the attorney out of the contingency fee, this would encourage the attorney to function in a more cost affective manner. It also might eliminate unnecessary "razzle-dazzle" and concentrate on the facts of the case.

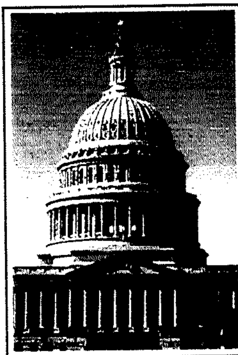
by MORTIMER B. ZUCKERMAN
Chairman and Editor-in-Chief of *U.S.News & World Report*

THE NATIONAL LOTTERY

An epidemic of costly litigation is sweeping the country, and the time to halt it is now.

Witness the efforts of lawyers after any disaster, such as an airplane crash or the tragedy at Bhopal, India. They rush to the scene and descend upon the distraught survivors and relatives. They rent movie houses and auditoriums to make their pitch for clients. In law offices all over the country, lawyers are hard at work finding and convincing people to file suit. It used to be that lawyers tried to persuade their clients to settle disputes. No longer.

The pot of gold for lawyers is a huge fee or a participation of up to 50 percent in court awards. Staggering court awards in cases whose results seem to violate common sense have made it worthwhile for the lawyers. Recently, a man attempted suicide by jumping in front of a New York subway train. He sued the Transit Authority because the train stopped in time to save his life but not quite soon enough to avoid some physical damage to him. He collected more than $600,000.



And what about the tenant, celebrating his birthday on a Sunday afternoon, who drowned when he drunkenly tried to walk along the bottom of his apartment-house swimming pool in the full view of his wife and 15 close friends? His wife successfully sued the landlord's insurance company.

The result? Soaring premiums for liability insurance to cover this increased and indeterminate financial exposure. Legal costs and insurance have become an increasing component of the price of goods and services. Even the availability of some consumer services is being curtailed.

Personal-injury awards, especially jury awards, are out of touch with reality. They are often based on estimates of how much money the defendants have rather than whether they are at fault. The awards have become a means to redistribute wealth rather than a measure of fault or a deterrence to undesirable conduct. It may appear to a jury that an insurance company, individual, corporation or government with "deep pockets" is paying the claim. The truth is that millions of "little pockets" are actually paying the cost either through higher prices for products and services or through higher insurance bills.

It is time to re-examine the manner in which the nation's judicial system deals with injured parties.

First, a method must be developed to tilt the judicial system against increased litigation. One approach would be to compensate a successful defendant for the cost of the defense against an unsuccessful plaintiff. The obvious benefits would be a more serious and thoughtful analysis of a claim prior to bringing a lawsuit and a reduction in the number of frivolous claims. It would also bring pressure to bear on achieving a reasonable settlement of the matter prior to running up large legal fees.

Second, the states should follow the example of California in limiting contingent fees to lawyers. These fees theoretically balance economic power for those who cannot afford the cost of bringing a case on an hourly basis. In practice, however, contingent fees have fostered an atmosphere of a no-cost lottery for clients. The California bill caps the contingency fees at 40 percent of the first $50,000 of the settlement, ranging downward to 10 percent of any award above $200,000.

Third, damages awarded for "pain and suffering" and other noneconomic losses should be capped. California has set a limit of $250,000, controlling the awards in medical-malpractice suits for such vague matters as grief, mental distress, etc.

One of the great principles of American jurisprudence has been access to justice through the court system. But the right to swing your arm stops at the point of another man's chin. The right to access to the courts must not be permitted to bury our society under a mountain of legal pleadings that raise insurance bills for all. To permit this abuse is to turn the courts into a national lottery in which the winning names are the lawyers and certain plaintiffs who are picked by judges and juries, while each of us, every day, is the loser. ■

Ka[illegible]s Farm Bureau

PUBLIC POLICY STATEMENT

HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE

RE: H.B. 2918 - Regulating Contingency Fees

Topeka, Kansas
March 20, 1986

Presented by:
Paul E. Fleener, Director
Public Affairs Division

Mr. Chairman and Members of the Committee:

My name is Paul E. Fleener. I am the Director of Public Affairs for Kansas Farm Bureau. We appreciate the opportunity to make a brief statement in support of the concept contained in H.B. 2918 to modify contingent fee arrangements.

The piece of legislation before you is an appropriate vehicle for addressing one portion of the resolution adopted at the most recent (Nov. 24-26, 1985) Annual Meeting of Kansas Farm Bureau. Farmers and ranchers who were delegates to that Annual Meeting from the 105 counties in Kansas adopted a policy position relating to **Health Care and Professional Liability.** As you might suspect that policy position focuses on the increased incidence of medical malpractice claims which our members believe is going to work to the detriment of Kansans because of the adverse effects on and costs to health care providers. Included in a list of items which our members believe would help improve the situation as regards medical malpractice is this statement: **Modify and restrict the use of the contingency fee system by the legal profession.**

ATTACHMENT E H. F&SA 3/20/86

We do not come to you today asking that you repeal the use of contingent fees. We do suggest that modification is in order and H.B. 2918 does seek to modify the use of contingent fee arrangements.

In a paper prepared for the Health Care Financing Administration ... a branch of what was then (June, 1980) called the U.S. Department of Health, Education, and Welfare ... Patricia Munch Danzon wrote on **Contingent Fees for Personal Injury Litigation.** The author indicates in the paper: "There is a long tradition of hostility toward contingent fees. A number of states have recently restricted their use in medical malpractice cases, in response to the rise in frequency and severity of malpractice claims. Opponents of contingent fees claim that giving lawyers the right to finance litigation makes them stir up cases, hoping for excessive financial reward. They also claim that the lawyer's financial stake creates a conflict of interest between lawyer and plaintiff."

Mr. Chairman, and Members of the Committee, we do not suggest to you that contingent fees are the disease. They may well be a symptom. We believe it is proper for this Committee and the Legislature to treat **all** symptoms, as well as to seek out and to find a cure for the disease.

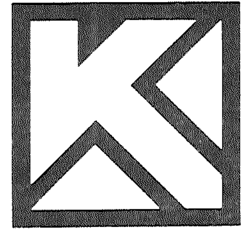
In conclusion, again quoting from Patricia Danzon, "if the objective of ceilings or outright prohibition of contingent fees is to reduce the amount paid out through the malpractice liability system, some success in achieving this goal is probable."

We ask this Committee to give careful consideration to meeting the objectives of reducing the cost in malpractice and other liability problem areas by careful consideration of H.B. 2918. To the extent you believe ... as many Kansans do believe ... that a modification in contingent fees will reduce the amount paid out through the malpractice liability system, and to the extent you believe H.B. 2918 adequately assists in achieving those reductions, we ask your support for this measure.

Thank you for the opportunity to appear.

F

LEGISLATIVE TESTIMONY



Kansas Chamber of Commerce and Industry

500 First National Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321

A consolidation of the Kansas State Chamber of Commerce, Associated Industries of Kansas, Kansas Retail Council

HB 2918

March 20, 1986

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

House Federal and State Affairs Committee

by

David Litwin

Mr. Chairman, members of the committee. My name is David Litwin, representing the Kansas Chamber of Commerce and Industry.

> The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.
>
> KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.
>
> The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

At its meeting last month, the KCCI Board of Directors adopted a policy pertaining to liability insurance cost and availability and tort reform. A copy is appended to this testimony.

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In both the medical and general liability insurance spheres, virtually all who have studied the situation objectively conclude that there are at least two distinct causes of the current crisis: factors involving management and marketing within the liability industry, and soaring costs of our civil justice system. There is no question that shortsighted pricing and other factors in the insurance industry have contributed to the crisis, but it is equally certain that a fundamental cause is runaway costs in our tort system. Both must be addressed.

Thus, for example, Karl Koch, Executive Vice President of the National Association of Insurance Commissioners, testified before a joint subcommittee of this Legislature only last month that the crisis stems not only from insurance industry trends, but from "a trend in the civil justice system which has increased the claims costs of insurers and reduced their defenses against claims as well as caused a mind set by many consumers to sue at the slightest opportunity."

There are endless data available to illustrate the extent of the problem in the civil justice system. For example, the number of million dollar verdicts nationally in 1983 was greater than during the entire period 1962 to 1977. The number of lawsuits in state courts increased almost 25% in only the four-year period 1977 to 1981. The sum total of these and many other data is simply that the system is nearing the breaking point, with the costs of defense so high and the process so lengthy that countless dubious cases are settled early just to avoid defense costs, and many innocent defendants are practically bankrupted by the costs of establishing their innocence through jury verdicts. Worse still, the system fails to give adequate compensation to many innocent injured plaintiffs.

The result of the twin streams of a civil justice system running out of control and a liability insurance industry that has not always managed itself well is the

liability crisis. How serious is it? We are in the midst of polling our 3,000 members to find out how their liability coverage situation is, but in the meantime we have no reliable data for Kansas. However, the U.S. Chamber of Commerce, over 90% of whose members are small businesses, earlier this month released preliminary returns from its national survey of its members. Fourteen percent stated they have been unable to renew or secure any coverage at all. Fifty-one percent report increases in premium ranging from 100% to over 500%, with another 17% between 50% and 100%.

There is no question but that reforming the civil justice system is a complex, multifaceted undertaking. Numerous issues must be examined, including punitive damages, the extent to which increased reliance on mediation and informal arbitration might shorten and simplify the determination of many cases, discovery abuse and the soaring costs of discovery procedures, and other issues as well. It is equally clear that one of these issues is counsel fees, and particularly - but certainly not exclusively - the matter of the size of plaintiff attorneys' contingent fees.

Let me say at the outset - we are not by any means arguing for abolishing the contingent fee arrangement. We'll accept the argument of its proponents that it's "the poor person's ticket to court," and no doubt that is the case in many instances. The question, rather, is how much is enough? How large a fee must a plaintiff's attorney have in prospect in order to be interested in prosecuting a case diligently? Must an attorney be a full participating partner in his client's case?

We suggest that both in order to reduce costs of the system and increase the percentage of money spent on that system that reaches injured plaintiffs, as well as for reasons of fairness, reasonable regulation is called for.

Many authorities have noted that there is not equal bargaining power in the

typical contingent fee scenario. Most clients will agree to whatever fee the attorney proposes, since they are usually on unfamiliar turf and often have had little or no prior contact with civil litigation.

Moreover, in many cases there is no real element of "contingency," and the main issue is damages. This is especially true today, after many defenses have either been abolished or restricted. Grant P. DuBois, writing in the December 1985 issue of the American Bar Association Journal, states:

> "The contingency risk of loss that justified a one-third to 40 percent share of a plaintiff's verdict for a trial attorney in the 1950s and 1960s no longer exists. Negligence trials today focus primarily on apportionment of damages, not on whether there is liability. ...What ever happened to the plaintiff's risk of loss? Most defense trial lawyers would have to pause before remembering the year their states abolished contributory negligence, assumption of risk or the automobile guest statutes as defenses. Instead we have strict liability, total comparative negligence and broadened application of punitive damages. The doctrine of caveat emptor has disappeared, and judicial distinctions among trespasser, licensee and invitee are long gone. During the last 20 years the personal injury trial has become a personal road to riches for the plaintiff's attorney. Verdicts and settlements in the millions, unthinkable before the 1970s, are now commonplace. ...The fact is that the risk of loss to the personal injury plaintiff has faded away...But the risk of loss to the defendant and its insurer has become almost prohibitive. Nonmeritorious cases are settled more often and for more than they are worth; some insurance risks have become unratable. This may not have occurred to the California Supreme Court when it created products liability without fault with the justification of 'spreading the risk.' Excessive verdicts, particularly punitive, necessitate costly posttrial motions and appeals."

We believe that the proposed rule is very reasonable and would restore some balance. One suggested change...The maximum 50% allowed up to $200,000 seems quite high at the upper ranges, and conversely the 15% limit on recoveries over $200,000 may be too restrictive. We suggest you consider a scale that doesn't drop off quite so precipitously at the upper end, or allow such high fees at the lower end. For example, Rule 1:21-7 of the New Jersey Supreme Court, one of the first entities to regulate contingency fees, allows up to a third on the first $250,000, 25% on the next $250,000, 20% on the next $500,000, and on recoveries over $1 million, the attorney must apply to the court, which will allow a "reasonable" fee.

However, the foregoing is only a suggestion that the committee might consider. We endorse the bill and believe it would go far toward achieving its purpose.

Thank you again for the opportunity to testify, I'll be happy to answer any questions.

Kansas Chamber of Commerce and Industry
Tort Reform Policy

February 1986

The Kansas Chamber of Commerce and Industry supports reforms which, in medical malpractice actions, would impose caps on damage awards with the exception of past and future medical expenses and other out-of-pocket costs, provide for structured awards of future economic loss, require itemization of jury awards, make decisions of pretrial screening panels admissible in evidence, require expert witnesses to be active in clinical practice, establish mandatory settlement conferences, link postjudgment interest rates to the yield of United States Treasury bills, require evidentiary hearings on the reasonableness of attorneys' fees, and reduce the exposure of the Health Care Stabilization Fund.

KCCI further supports, in principle, the enactment of provisions which would curtail the activities of impaired health care providers, accelerate and improve practitioner discipline, impose mandatory requirements concerning the reporting of malpractice incidents, immunize good faith reporting of such incidents, require the implementation of peer review and risk management programs, and impose civil fines for malpractice.

KCCI further believes that there is an equally serious crisis in the cost and availability of liability insurance in a wide range of industries and professions and for public entities, and in the cost of litigating tort claims. KCCI believes that reforms that are necessary and appropriate in the medical malpractice area should, on the whole, be adopted in these more general spheres as well, and urges the legislature to enact remedial legislation as soon as possible. Such legislation should include provisions that would eliminate or significantly restrict the award of punitive damages, place caps on awards for pain and suffering, authorize structured awards, limit attorney contingent fees, eliminate the collateral source rule, eliminate discovery abuse and control discovery costs, provide for alternate dispute resolution in appropriate cases, limit venue shopping in tort actions, and effect such other procedural and substantive reforms as may be necessary.

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HB 2918

House Federal & State Affairs Committee

March 20, 1986

Statement of the Kansas Bar Association

Mr. Chairman. Members of the House Federal & State Affairs Committee:

I am Dudley Smith, Vice Chairman of the Legislative Committee of the Kansas Bar Association, and a partner in the firm of Fisher, Patterson, Sayler and Smith in Topeka, Kansas.

The issue of regulation of contingent fees was studied by a Special Committee of the Litigation Section of KBA, chaired by former House Majority Leader John Hayes of Hutchinson. The menbers of that committee included the late Don Bell of Wichita,Deanna Watts Hay of Topeka, Harold Greenleaf of Liberal, and Nelson Toburen of Pittsburg. Their report to the committee and the Executive Council is enclosed. It was adopted by the council in January 1985 and forms the basis of our legislative policy.

It is important to note that the proposed bill applies to all tort cases without limitation. It applies to cases where insurance companies sue to

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enforce subrogation rights, automobile accident cases, etc. Since it appears to preempt the judicial power to regulate the reasonableness of contingent fees it may well set the standard fee in future contingent fee cases. Many cases do not justify such a fee.

The bill applies the contingent fee to the "net amount recovered," a term that by definition does not include expenses of suit unless they are part of the recovery. Few cases include as part of the damages or recovery the expenses of suit or disbursements made by counsel.

The Kansas Bar Association opposes the proposed bill for a number of reasons.

1. Contingent fees provide access to the judicial system to all classes of people, without regard to their ability to pay. Those most in need of legal representation, the injured and poor, can have their potential cases reviewed by competent counsel and obtain representation in court litigation where it is determined that the client's claim is worthy of being brought in court.

2. No sound reason has been demonstrated for the statutory regulation of attorney fees in any tort cases, nevermind all tort cases. There is no factual basis in the record of any committee in this legislature to justify the proposed legislation. No other professional or non-professional group in the state of Kansas has its charges of fees regulated by statute.

3. The Rand Corporation study reflects the reduction in litigation

that occurs as a result of the screening process that necessarily occurs in contingent fee cases.

4. If a compelling need for regulation of attorney fees were shown, the matter should be brought to the attention of the Supreme Court, which has inherent power to control the fees of lawyers practicing in this state. Currently the Supreme Court is considering such a rule. The legislature can input into this process if necessary. Certainly other interested groups will provide such input. The Supreme Court should be permitted to complete its work before a decision is made as to the propriety of HB 2918.

5. The proposed legislation discourages structured settlements. Lawyers often suggest structured settlements to their clients for a variety of legitimate reasons, such as: Tax reasons for the client; Minor plaintiffs; Incompetent persons; Spendthrifts; and, where there is concern that relatives or friends of the client will dissipate the recovery if the client is not protected. But most lawyers are not in the financial position to work for years for the benefit of a client and be forced to accept his fee over the lifetime of the client. Builders, contractors, retailers, manufacturers, doctors, insurance brokers and no other worker, professional or non-professional, is required by law to be paid for his work in this manner. Lawyers forced to accept fees over the lifetime of the client would in most cases be foolish to suggest a structured settlement. The bank that holds the lawyer's mortgage, and the grocer who feeds his family will not wait to be paid in installments over the lifetime of the client. Lawyers faced with working for years only to receive payment for their services as required by

this bill will be slow to suggest structures to clients who otherwise might benefit from such settlements.

For all of these reasons the Kansas Bar Association believes that the proposed contingent fee legislation is not in the interest of the public, and should not be passed out of the committee.

Section 3(b) of HB 2918 would require that portion of settlements or judgments recovered for future damages to be paid by structured settlement over the period of time which the future damages are incurred. Unfortunately, this provision assumes that structured settlements will always be available, that insurance companies will remain solvent and able to make such future payments, and that there are mechanics by which the parties can agree upon which insurance company will issue the annuity policy. In fact, parties are often unable to assure that such assumptions are true, and structured settlements cannot be made.

How do you resolve the problem where the paying party refuses to purchase the annuity from insurance company X, the only company that the injured party will accept as having a reasonable chance of surviving economic crisis over the period of the structure? What do you do when the parties cannot agree upon who will guarantee the payments?

Section 3(b) is clearly unworkable and should not be passed out of committee.

Special Committee
of the
Kansas Bar Association's
Litigation Section

SUBCOMMITTEE REPORT
to the
KBA Prospective Legislation Committee
and
KBA Executive Council

CONTINGENT FEE CONTRACTS LIMITATIONS

December 31, 1984

Preface:

Whether to impose limitations on contingent fee contracts is becoming an issue proponents of "tort reform" believe could bring about substantial and substantive changes to the practice of law, although the goals of tort reform remain somewhat ill-defined.

As a result, a growing public debate on contingency fee contracts has emerged. This is reflected in the attitudes and statements of some members of the Kansas legislature. As a result of this debate, the Kansas Bar Association's Litigation Section appointed a 1984 special subcommittee to study the contingent fee contract system and make recommendations to the KBA Legislative Committee as to what position, if any, the KBA should maintain regarding contingent fee proposals.

It should be noted from the outset that one member of the Special Subcommittee does not concur that there is a growing public debate on contingent fee contracts because no formal grievances have been filed with the Kansas Disciplinary Administrator, Arno Windscheffel, and that to state that there is a growing public debate gives the improper impression of wide-spread discontent. The member therefore objects to the use of the phrase "growing public debate" as being erroneous.

Misconceptions about contingent fee contracts have generated controversy. The 1984 Legislative session saw a floor attempt to amend Kansas statutes to limit contingent fee contracts in <u>all</u> civil matters to 25%. The amendment was narrowly defeated. Certain interest groups already indicate a desire to offer "reform" legislation in this arena. The Profession must be in a position not only to <u>react</u> to such challenges to traditions in the practice of law, but <u>act</u> with measured analysis of the role contingent fee contracts play in our system of civil justice. Lawyers must be willing to examine our practices to eliminate actual problems which

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might exist. While the KBA will not be stampeded into irrational action, neither can it remain reclusively ambivalent about such issues. It is within this charge that the Contingent Fee Subcommittee operated.

The Subcommittee had benefit of numerous law review articles, court rules and cases as well as a 1976 survey of the states and their systems for regulating contingent fee contracts. The Subcommittee is indebted to the American Bar Association, the Kansas Trial Lawyers Association, and the Defense Research Institute for pertinent authoritative articles on the subject.

Inquiries were made of the Kansas Disciplinary Administrator concerning complaints received from the public about contingent fees. Mr. Windscheffel advised that his office has received some complaints, most of which concern misunderstandings as to whether expenses of litigation were deducted before or after application of the contingent fee to the recovery. While there were indications of express dissatisfaction, especially where the expenses of litgation amounted to one half or more of the award, Mr. Windscheffel acknowledged that to date of the inquiry, no formal complaints concerning contingent fee contracts had been filed by the public with his office.

GENERAL CONCLUSIONS

All members of the Subcommittee are of the opinion that contingent fee contracts provide a positive service to the public and benefit the clients served by the contingent fee system. Often such contracts are the only method many deserving claimants can use to obtain access to the judicial system to determine substantial and substantive rights. Substantial alteration of, or punitive regulation towards, the contingent fee contract system may act to preclude otherwise meritorious claims from the judicial system, thus disenfranchising a large portion of our citizens. Such exclusions have important negative social implications. The regulation of contingent fee contracts, if any regulation is desirable, is therefore best left with the Judicial branch of government.

RATIONALE

Certainly the Legislature has the power to regulate the practice of law, and contingent fee contracts are part of that practice. Such power is shared with the Judicial branch of government. The vast majority of states do not legislatively regulate contingent fee contracts. The practice of law must be flexible in order to serve the wide variety of clients needing legal services. Contingent fees are part of this requirement of flexibility. The primary question then becomes which branch of government can more flexibly regulate such contracts, if regulation is needed in order to promote the public good?

The Legislature has already regulated some aspects of contingent fee contracts. Workers Compensation claimant attorneys may receive a 25% statutory maximum of the non-medical recovery as the attorney's fee.

But more often, the Legislative has granted the Courts the primary responsibility of regulating contingent fee contracts. Courts have inherent powers to review fee contracts of counsel. Since 1976, Kansas courts have had specific authority to review fee contracts of both parties in medical malpractice litigation (KSA 7-121b). If the court feels the contract's overall effect is improper, the court can unilaterally alter the final fee of counsel--notwithstanding contract provisions to the contrary.

Courts have not hesitated to act where there is clear duty to act. The Code of Professional Conduct (KSA 7-125) makes it improper to represent someone charged with criminal conduct using a contingent fee basis. The ultimate sanction for attorneys--disbarment proceedings--can and have been used when violations occur (see in re Steere, 217 Kan. 276).

Every person who has gone to an attorney for a legal matter has the right to have the "reasonableness" of a fee contract judicially determined. The Courts have the power to make such determinations on the spot, within the context of the existing lawsuit. If given a statute against which contracts are measured, separate additional lawsuits might become necessary to determine "reasonableness," adding more lawsuits to the system.

Proposed new rules of Professional Conduct are being considered by the Kansas Supreme Court. The new rules on fees prohibit the use of contingent fee contracts in domestic relations as well as criminal matters. If codified, the same disciplinary sanctions and the same trial court overview of such matters, remain. Therefore, the Subcommittee believes that the public's conception that contingent fee contracts are unregulated, or that such contracts somehow fuel our litigous nature, is erroneous.

Contingent fee contracts are often blamed for the existence of spurious litigation. A closer examination indicates that the opposite may be true. Since if the lawsuit is unsuccessful the entire cost of the litigation falls on the attorney, there is no incentive provided by the existence of contingent fee contracts to spur such litigation.

The Kansas Supreme Court has the inherent power to regulate the conduct and fees paid to the officers of its courts. This includes contingent fee contracts. Some states have court rules on contingent fee maximums, normally on a reverse sliding scale basis. The Kansas Supreme Court has not elected to promulgate such rules, but certainly can if in its regulatory discretion it determines a need exists. If the

Court elects to make such rules, the Committee recommends the Court reject the concept of flat precentages and instead adopt a standard discussed by the Court in Schultz v. Phillips Petroleum Co., 235 Kan., at page 223:

> "The amount of attorneys fees should be within the sound discretion of the trial court based upon guidelines established by this court."

This case discusses various criteria against which contingent fee contracts can be measured, including the time spent, the contingent nature of success, the amount involved, the result achieved, and the responsibility assumed.

Because flexibility of regulation is critical, the Court-supervised system, if implemented, could establish an organization to which could be delegated the investigative authority to determine whether individual contracts are abusive in effect. This organization could advise the Court on recommendations for control of abuse, which can be implemented by Court rules.

If the Court undertakes a more visible regulation of contingent fee contracts, the Subcommittee believes it should consider a "floor" amount in controversy below which the Court would not exercise its authority, unless specifically requested. When we think of regulation of contingent fee contracts we automatically assume the regulation is of large personal injury contracts. Many smaller plaintiff's cases, however, are often unwritten contingency fee contracts. To require trial court approval of such contracts would slow the judicial docket to an unreasonable pace. The Supreme Court could determine the appropriate "floor."

Finally, the Subcommittee suggests that the concepts of "tort reform" and contingent fee contract regulation" are mutually exclusive. The Contingent Fee Subcommittee of the Litigation Section, Kansas Bar Association, is not convinced that regulation of the latter will achieve the former, even if we assume tort reform is desirable. The contention that contingent fee contracts cause our society to be more litigation-prone is difficult to support.

Respectfully Submitted,

John F. Hayes, Chairman

Donald A. Bell

Nelson E. Toburen

Deanne Watts Hay

Harold K. Greenleaf

TESTIMONY ON H.B. 2918

Kathleen Gilligan Sebelius

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE:

The contingent fee is the key to the courthouse door for people who could not otherwise afford to go and defend their legal rights. It is in the public interest and should be preserved.

A contingent fee contract is an agreement in which the lawyer agrees to represent the client in exchange for a percentage of any money received by settlement or judgment in a case. If the client's case is meritorious and the lawyer is able to obtain money for him, the lawyer is entitled to the agreed-upon percentage as an attorney's fee. If no money is received in the case, then the client owes the lawyer no legal fees whatsoever.

In the United States today, the contingent fee is the predominant legal fee arrangement in personal injury litigation, will contests, the collection of overdue commercial accounts, stockholders' suits, class actions, tax practice and condemnation proceedings.

In examining the reasons for the existence of contingent fees, it is helpful to picture the usual situation out of which a contingent fee contract arises in a personal injury case. The client may well be a lower or middle income individual who has never had an occasion to hire an attorney before. He has been injured and has lost his principal source of income. He

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has substantial medical bills and may have expenses for property damage (such as an automobile) which may or may not be covered in part by some private insurance. If this individual ever was in a financial condition in which he could afford to hire an attorney on an hourly basis, he is certainly not able to do it now. In this unfortunate circumstance, he faces the tremendous problem of attempting to assert and prove a liability claim against someone, usually while he is still incapacitated by the injury. His need for competent legal counsel is obvious, as is his inability to hire an attorney on any basis other than a contingency. A tremendous social need is thereby served by the contingency arrangement: it provides access to the judicial process to all individuals who are unable to hire attorneys on an hourly fee basis. On the other hand, if the individual can afford to hire an attorney on an hourly fee basis, and prefers to do so, that type of arrangement is almost always available, too.

The contingent fee makes it possible for anyone in our society to get the best lawyer. The client need not be a rich man. He need only have a good case.

The contingent fee provides the incentive to attract the best lawyers and to impel them to use their skills and their imagination to obtain a good result for the client. It also has the effect of encouraging lawyers to improve the law, itself. The incentive is there to make the law better, to make the recovery more adequate.

The contingent fee serves the interests of society because it encourages efficiency, economy, and speed. The lawyer has

no incentive whatsoever to create work. Just the opposite. The lawyer has every incentive to minimize the amount of work done and the amount of expense incurred. Thus, the contingent fee encourages less work, less delay, and less paper. In that respect it is just the opposite of the time-charge basis of billing which encourages more work, more expense, more paper, more delay.

The basic problem with the contingent fee is that it has not been used for the defense of cases. If the contingent fee could be adapted to the defense of cases, so that defense lawyers were result-oriented, instead of time-oriented, then expense and the delay of litigation would be reduced.

The contingency fee system has a host of critics, who have argued that the system is unfair, that it encourages litigation and that lawyers take more than a reasonable share of the winnings. None of those arguments have been supported by objective data from the numerous studies examining tort law and the effects of legislative changes.

* the 1973 report of the HEW Commission on Medical Malpractice found that the contingency fee arrangement operates as an effective screening device against groundless liability suits - since the lawyer who loses collects nothing. In its survey the Commission found that plaintiffs' lawyers believed that medical liability cases were the most difficult of all personal injury suits. The prospect of spending a great deal of time pursuing a suit that would ultimately be lost caused medical liability attorneys to reject 88% of all prospective plaintiffs. Since that study was done, however, physician-

owned insurance companies have observed that plaintiffs' lawyers have become more proficient in developing and pressing professional liability cases;

* Patricia Danzon, in her work with the Rand Corporation, found limiting contingency fees had no effect on frequency of cases filed and an uncertain effect on the severity of awards;

* The American Medical Association and the American Bar Association have agreed in studies published during the past year that capping contingency fees won't reduce the number of suits.

Some argue that attorneys overreach the client by taking too high a percentage of the client's recovery. The most common percentage is 1/3 of the settlement or judgment, although the percentage can be either lower or higher depending on the individual lawyer and the difficulty of the case. Studies have shown that the average lawyer's hourly rate in a non-contingent case compares closely with the contingent fees for cases won. The hourly contingency figure does not count the hours spent on cases lost, since no fees are paid on those cases.

Insurance company statistics show that for every premium dollar collected, approximately 30¢ goes to the insurance company for profits, taxes, management costs, sales commissions, etc. The next 35¢ goes to the insurance company for accident investigation, claims adjusters, expert witnesses, legal defense and trial costs. The last 35¢ goes to the plaintiff to pay for lost income, medical expenses, property loss

and other damages and the plaintiff's expert witnesses, court costs, investigators and lawyers' fees.

The average contingent fee is 1/3 of the settlement or judgment. This means that the plaintiff spends about 11¢ of the premium dollar for his legal costs, while the insurance companies spend 30¢-35¢. Attempts to limit the contingent fee are not really based on providing more of the award to injured persons. These actions are really attempts to limit the amount that the injured can spend to prove their cases in court. It is to the insurance industry's advantage to make it economically unfeasible to bring even the most justified lawsuits, because that would reduce the amount insurance companies must pay to injured claimants.

Finally, any client has and should continue to have the right to petition the court to determine whether the attorney's fee is excessive.

Kansas was one of the 12 states which passed a law in the mid-70's, giving the court the discretion, in medical malpractice cases, to determine reasonable attorney fees. During the last malpractice crisis, one decade ago, and in the last few years, eleven additional states have either required increased judicial supervision of attorney fees or specifically limited contingency fee arrangements. There is no state which has acted to limit the hourly fee or total amount collected by a defense attorney. Since these reforms have typically been promoted by the insurance industry and/or medical societies, that may be understandable.

The only rational way for a reasonable fee to be determined is through a flexible examination of all of the factors involved in a particular case. This should be done by agreement between the client and the attorney.

The contingent fee system provides legal representation not only for the poverty stricken, but also for the person temporarily disabled from working by an injury. It is a system in which the lawyer takes the risks, and the client pays nothing if the lawyer does not win the case. It is also a system which has benefited our society by encouraging the design of safe products and safe palces for employees to work.

Special Committee
of the
Kansas Bar Association's
Litigation Section

SUBCOMMITTEE REPORT
to the
KBA Prospective Legislation Committee
and
KBA Executive Council

CONTINGENT FEE CONTRACTS LIMITATIONS

December 31, 1984

Preface:

Whether to impose limitations on contingent fee contracts is becoming an issue proponents of "tort reform" believe could bring about substantial and substantive changes to the practice of law, although the goals of tort reform remain somewhat ill-defined.

As a result, a growing public debate on contingency fee contracts has emerged. This is reflected in the attitudes and statements of some members of the Kansas legislature. As a result of this debate, the Kansas Bar Association's Litigation Section appointed a 1984 special subcommittee to study the contingent fee contract system and make recommendations to the KBA Legislative Committee as to what position, if any, the KBA should maintain regarding contingent fee proposals.

It should be noted from the outset that one member of the Special Subcommittee does not concur that there is a growing public debate on contingent fee contracts because no formal grievances have been filed with the Kansas Disciplinary Administrator, Arno Windscheffel, and that to state that there is a growing public debate gives the improper impression of wide-spread discontent. The member therefore objects to the use of the phrase "growing public debate" as being erroneous.

Misconceptions about contingent fee contracts have generated controversy. The 1984 Legislative session saw a floor attempt to amend Kansas statutes to limit contingent fee contracts in <u>all</u> civil matters to 25%. The amendment was narrowly defeated. Certain interest groups already indicate a desire to offer "reform" legislation in this arena. The Profession must be in a position not only to <u>react</u> to such challenges to traditions in the practice of law, but <u>act</u> with measured analysis of the role contingent fee contracts play in our system of civil justice. Lawyers must be willing to examine our practices to eliminate actual problems which

might exist. While the KBA will not be stampeded into irrational action, neither can it remain reclusively ambivalent about such issues. It is within this charge that the Contingent Fee Subcommittee operated.

The Subcommittee had benefit of numerous law review articles, court rules and cases as well as a 1976 survey of the states and their systems for regulating contingent fee contracts. The Subcommittee is indebted to the American Bar Association, the Kansas Trial Lawyers Association, and the Defense Research Institute for pertinent authoritative articles on the subject.

Inquiries were made of the Kansas Disciplinary Administrator concerning complaints received from the public about contingent fees. Mr. Windscheffel advised that his office has received some complaints, most of which concern misunderstandings as to whether expenses of litigation were deducted before or after application of the contingent fee to the recovery. While there were indications of express dissatisfaction, especially where the expenses of litgation amounted to one half or more of the award, Mr. Windscheffel acknowledged that to date of the inquiry, no formal complaints concerning contingent fee contracts had been filed by the public with his office.

GENERAL CONCLUSIONS

All members of the Subcommittee are of the opinion that contingent fee contracts provide a positive service to the public and benefit the clients served by the contingent fee system. Often such contracts are the only method many deserving claimants can use to obtain access to the judicial system to determine substantial and substantive rights. Substantial alteration of, or punitive regulation towards, the contingent fee contract system may act to preclude otherwise meritorious claims from the judicial system, thus disenfranchising a large portion of our citizens. Such exclusions have important negative social implications. The regulation of contingent fee contracts, if any regulation is desirable, is therefore best left with the Judicial branch of government.

RATIONALE

Certainly the Legislature has the power to regulate the practice of law, and contingent fee contracts are part of that practice. Such power is shared with the Judicial branch of government. The vast majority of states do not legislatively regulate contingent fee contracts. The practice of law must be flexible in order to serve the wide variety of clients needing legal services. Contingent fees are part of this requirement of flexibility. The primary question then becomes which branch of government can more flexibly regulate such contracts, if regulation is needed in order to promote the public good?

The Legislature has already regulated some aspects of contingent fee contracts. Workers Compensation claimant attorneys may receive a 25% statutory maximum of the non-medical recovery as the attorney's fee.

But more often, the Legislative has granted the Courts the primary responsibility of regulating contingent fee contracts. Courts have inherent powers to review fee contracts of counsel. Since 1976, Kansas courts have had specific authority to review fee contracts of both parties in medical malpractice litigation (KSA 7-121b). If the court feels the contract's overall effect is improper, the court can unilaterally alter the final fee of counsel--notwithstanding contract provisions to the contrary.

Courts have not hesitated to act where there is clear duty to act. The Code of Professional Conduct (KSA 7-125) makes it improper to represent someone charged with criminal conduct using a contingent fee basis. The ultimate sanction for attorneys--disbarment proceedings--can and have been used when violations occur (see in re Steere, 217 Kan. 276).

Every person who has gone to an attorney for a legal matter has the right to have the "reasonableness" of a fee contract judicially determined. The Courts have the power to make such determinations on the spot, within the context of the existing lawsuit. If given a statute against which contracts are measured, separate additional lawsuits might become necessary to determine "reasonableness," adding more lawsuits to the system.

Proposed new rules of Professional Conduct are being considered by the Kansas Supreme Court. The new rules on fees prohibit the use of contingent fee contracts in domestic relations as well as criminal matters. If codified, the same disciplinary sanctions and the same trial court overview of such matters, remain. Therefore, the Subcommittee believes that the public's conception that contingent fee contracts are unregulated, or that such contracts somehow fuel our litigous nature, is erroneous.

Contingent fee contracts are often blamed for the existence of spurious litigation. A closer examination indicates that the opposite may be true. Since if the lawsuit is unsuccessful the entire cost of the litigation falls on the attorney, there is no incentive provided by the existence of contingent fee contracts to spur such litigation.

The Kansas Supreme Court has the inherent power to regulate the conduct and fees paid to the officers of its courts. This includes contingent fee contracts. Some states have court rules on contingent fee maximums, normally on a reverse sliding scale basis. The Kansas Supreme Court has not elected to promulgate such rules, but certainly can if in its regulatory discretion it determines a need exists. If the

Court elects to make such rules, the Committee recommends the Court reject the concept of flat precentages and instead adopt a standard discussed by the Court in Schultz v. Phillips Petroleum Co., 235 Kan., at page 223:

> "The amount of attorneys fees should be within the sound discretion of the trial court based upon guidelines established by this court."

This case discusses various criteria against which contingent fee contracts can be measured, including the time spent, the contingent nature of success, the amount involved, the result achieved, and the responsibility assumed.

Because flexibility of regulation is critical, the Court-supervised system, if implemented, could establish an organization to which could be delegated the investigative authority to determine whether individual contracts are abusive in effect. This organization could advise the Court on recommendations for control of abuse, which can be implemented by Court rules.

If the Court undertakes a more visible regulation of contingent fee contracts, the Subcommittee believes it should consider a "floor" amount in controversy below which the Court would not exercise its authority, unless specifically requested. When we think of regulation of contingent fee contracts we automatically assume the regulation is of large personal injury contracts. Many smaller plaintiff's cases, however, are often unwritten contingency fee contracts. To require trial court approval of such contracts would slow the judicial docket to an unreasonable pace. The Supreme Court could determine the appropriate "floor."

Finally, the Subcommittee suggests that the concepts of "tort reform" and contingent fee contract regulation" are mutually exclusive. The Contingent Fee Subcommittee of the Litigation Section, Kansas Bar Association, is not convinced that regulation of the latter will achieve the former, even if we assume tort reform is desirable. The contention that contingent fee contracts cause our society to be more litigation-prone is difficult to support.

Respectfully Submitted,

John F. Hayes, Chairman

Donald A. Bell

Nelson E. Toburen

Deanne Watts Hay

Harold K. Greenleaf