

Approved January 27, 1986
Date

MINUTES OF THE House COMMITTEE ON Judiciary

The meeting was called to order by Chairman Joe Knopp at
Chairperson

3:30 ~~am~~ p.m. on January 21, 1986 in room 313-S of the Capitol.

All members were present except:

Representatives Duncan, Luzzati, Solbach and Teagarden were excused

Committee staff present:

Mike Heim, Legislative Research Department

Jan Sims, Committee Secretary

Conferees appearing before the committee:

Ron Todd, Assistant Commissioner of Insurance

Mike Mullins, President, Medical Protective Insurance Company

Ron Todd presented a history of the problems of the liability insurance industry in Kansas since the 1970's. He reviewed the enactment of a requirement for medical liability insurance and the establishment of the Health Care Stabilization Fund and Joint Underwriting Association in 1976. He reviewed the current administration of the Fund and the JUA. Mr. Todd stated that although the 1976 enactment was valid for the situation at the time, today's situation is affecting health care and will continue to do so in the future by causing physicians' early retirement, physicians' withdrawal from the practice of high risk specialties, physicians' moving from Kansas to other areas with less stringent malpractice insurance requirements, rising costs, increasing claims being filed and increasing payments being made from the Fund. Mr. Todd explained that Commissioner Bell appointed a Citizen Committee in January of 1985 to review the system with a view to supplementing the legislative committee. That report will be forthcoming shortly. The Citizen Committee's findings are very similar to those of the interim committee. These findings present a unique set of problems and requirements that should be addressed separately from other insurance issues; these include a need to place caps on awards; screening of claims; enforcement of procedures to eliminate malpracticing and negligent health care providers. Mr. Todd stated that this problem needs an entire package of proposals notwithstanding the fact that Governor Carlin has stated he cannot support any bill with a cap on awards. He stated that the committee recommends a cap based upon review of the rates in Indiana and Nebraska which have stabilized and in some instances have lowered since the introduction of caps. Mr. Todd reviewed structured settlements as they are currently allowed and stressed that these are allowed only in settlements and are not an option given to juries. Kansas juries currently must award lump sum awards. He explained that a \$1 million cap does not necessarily mean a limit of \$1 million damages. He stated that a cap alone is not enough to lower premiums; lower premiums will require the mandatory use of structured settlements and a better control on negligent practitioners. He stated that Commissioner Bell feels more comfortable at this time with a \$1 million cap rather than \$500,000. It is projected that the Fund premiums could be reduced by 21% with the implementation of a \$1 million cap eventually. The claims in the pipeline will prevent this reduction from being immediate. He stated that he cannot guarantee that the cap will lower premiums but feels certain it, along with the other recommendations of the committee, will have a positive effect on premiums. He stressed that this issue must be addressed now and not delayed and made a part of the total liability issue because of the social and economic issues and the availability of health care in the state being directly related to the malpractice issue. The law currently requires the purchase of liability insurance before being able to render care. This is not the same as other aspects of liability insurance.

Mike Mullins, President, Medical Protective Insurance Company appeared before the committee. He stated that his company writes professional liability coverage for approximately 40% of the state's M.D.'s. His company maintains a very conservative philosophy and does business only in states having legislation in harmony with the company philosophy. In that connection it has recently withdrawn from the states of Michigan and Illinois. He further stated that the company is currently expanding operations into Alabama, North Carolina and South Carolina in that those states offer a better profit motivation for companies of Medical Protective's type.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Judiciary,
room 313-S, Statehouse, at 3:30 ~~xxxx~~ p.m. on January 21, 1986

Mr. Mullins stated that he basically agrees with what was done in 1976 but pointed out to the committee that things have changed dramatically since that time. He stated that two primary things making the insurance industry nervous are frequency of claims and severity of claims. He said that the frequency of claims in Kansas has not drastically increased but there is a problem in Kansas with the severity of claims. This is due in part to more money being available now because of higher limits that were in the early stages of professional liability "giveaway" rates. Now that higher claims are being paid, premiums are rising and many companies are discontinuing the professional liability insurance business because those companies could not predict future loss payments and know how much to increase their premiums.

Mr. Mullins further testified that many special interest groups have caused premiums to increase. He cited attorneys' fees stating that 40% of judgments go to plaintiffs' attorneys and an amount equal to 33 1/3% of the judgment goes to defense counsel for costs. He stated that if all provider incompetence was eliminated the rates would not decrease considerably. Mr. Mullins stated that the public interest in malpractice actions has increased the number of cases filed and the larger amounts of awards and settlements. He stated that the public now has a "lottery mentality" toward this issue. Physicians have become target defendants, the public perceiving them to be wealthy. Mr. Mullins further testified that Kansas is now on a claims made basis concerning medical malpractice insurance and this has had an effect on insurance companies in that it has changed the amount of time a company is able to invest premiums and the amount of time potential awards are placed in the companies' reserves. Mr. Mullins was questioned by committee members about the investment income of insurance companies as related to premium increases. He responded that claims made policies require that claims are presented so quickly that investment income does not become an issue. When asked by the Chairman what Medical Protective would do concerning premiums of HB 2661 passed, Mr. Mullins replied that he has a special interest in Kansas as it is his home state and he has worked in Kansas within the insurance industry in Kansas for some time. He further replied that he would anticipate that the premiums in Kansas would stabilize in 2 to 3 years, cases in the pipeline keeping the change from being immediate. He stated that within the limitations of his position with his company he would keep the rates for Kansas at the current level for approximately 2 years.

The meeting was adjourned at 5:00 P.M.

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PRESENTATION ON
MEDICAL MALPRACTICE

BY
KANSAS INSURANCE DEPARTMENT

BEFORE HOUSE JUDICIARY COMMITTEE
JANUARY 21, 1986

attachment presented
after approval of
minutes

House Judiciary
1-21-86

INTRODUCTION - RON TODD, INSURANCE DEPARTMENT REPRESENTING THE COMMISSIONER OF INSURANCE.

I DON'T HAVE TO TELL YOU WE HAVE A PROBLEM WITH MEDICAL MALPRACTICE INSURANCE IN THIS COUNTRY. IT IS NOT A CONTRIVED PROBLEM. IT IS A REAL PROBLEM DEMANDING OUR MOST HONEST AND THOUGHTFUL CONSIDERATION. AND, IT IS A PROBLEM WHICH SINCERE, DEDICATED CITIZENS AND PUBLIC SERVANTS HAVE ADDRESSED AS MEMBERS OF THE CITIZENS COMMITTEE WHO WERE APPOINTED BY THE COMMISSIONER OR AS MEMBERS OF THE SPECIAL LEGISLATIVE COMMITTEE WHOSE RECOMMENDATIONS ARE NOW BEFORE YOU.

A DECADE AGO THE MEDICAL MALPRACTICE PROBLEM FIRST BECAME A SERIOUS CONCERN IN THE UNITED STATES. INSURANCE COMPANIES WHO WERE WRITING PROFESSIONAL LIABILITY INSURANCE LOOKED AT THEIR STATISTICS AND SAW THAT A SERIOUS PROBLEM WAS DEVELOPING. THE NUMBER OF MEDICAL MALPRACTICE CLAIMS WERE INCREASING DRAMATICALLY AND THE

DOLLAR AMOUNT OF THOSE CLAIMS WAS ALSO INCREASING AT AN ALARMING RATE.

PROFESSIONAL LIABILITY INSURANCE COMPANIES WERE INCREASING THEIR RATES AND MANY WITHDREW FROM KANSAS. MANY OF US REMEMBER THOSE YEARS VERY WELL. IT WAS CLEAR IN THE MID 1970'S THAT WE NEEDED TO ACT OR HEALTH CARE PROVIDERS WOULD BE LEFT WITH NO PROFESSIONAL LIABILITY INSURANCE. THIS WOULD HAVE BEEN A DISASTER FOR PROVIDERS AND FOR PERSONS INJURED BY MEDICAL MALPRACTICE AS WELL.

THE COMMISSIONER APPOINTED A COMMITTEE IN THE MID 1970'S TO ADDRESS THE "AVAILABILITY PROBLEM" WHICH IS WHAT WE WERE FACED WITH AT THAT TIME. NOT UNLIKE THIS YEAR, THAT COMMITTEE'S RECOMMENDATIONS WERE TRANSMITTED TO A SPECIAL INTERIM COMMITTEE AND, AS IT TURNED OUT, WERE OBVIOUSLY HELPFUL TO THE LEGISLATURE IN ARRIVING AT THE PACKAGE OF LAWS ENACTED BY THE 1976 LEGISLATURE.

TO INSURE THAT INSURANCE REMAINED AVAILABLE AND THAT INJURED PARTIES WERE PROTECTED, THE 1976 LEGISLATURE REQUIRED THAT ALL ACTIVE KANSAS HEALTH CARE PROVIDERS ACQUIRE AND MAINTAIN PROFESSIONAL LIABILITY INSURANCE. SECONDLY, THE LEGISLATURE ESTABLISHED A HEALTH CARE STABILIZATION FUND TO ACT AS AN EXCESS INSURANCE CARRIER FOR ALL ACTIVE KANSAS HEALTH CARE PROVIDERS. THE CONCEPT AT THAT TIME WAS THAT THE PRIVATE INSURANCE MARKET WOULD PROVIDE BASIC INSURANCE COVERAGE OF \$100,000/\$300,000 TO PROVIDERS WHILE THE HCSF COVERED LIABILITY ABOVE THOSE AMOUNTS. ADMINISTRATION OF THE HCSF WAS VESTED IN THE INSURANCE DEPARTMENT AND HAS REMAINED THERE WITH OUR 10 YEARS OF ADMINISTRATION, WE HAVE ACCUMULATED A GREAT DEAL OF EXPERIENCE.

THE 1976 LEGISLATURE ALSO CREATED A JOINT UNDERWRITING ASSOCIATION OFFICIALLY TITLED THE HEALTH CARE PROVIDERS INSURANCE AVAILABILITY PLAN. THIS PLAN WAS ESTABLISHED TO PROVIDE THE BASE INSURANCE COVERAGE OF \$100,000/\$300,000 IF A PROVIDER WERE UNABLE TO OBTAIN THIS PRIMARY INSURANCE COVERAGE FROM THE PRIVATE MARKETS.

THE PLAN IS ADMINISTERED BY WESTERN INSURANCE COMPANY AS AN INDEPENDENT CONTRACTOR UNDER THE SUPERVISION OF THE BOARD OF GOVERNORS OF THE PLAN.

IF I CAN BACK UP JUST A LITTLE BIT, I WANT TO REMIND YOU THAT, AS I SAID EARLIER, THE SUBJECT ADDRESSED BY THE LEGISLATURE IN 1976 WAS THE "AVAILABILITY" OF MEDICAL MALPRACTICE INSURANCE AND THE 1976 LEGISLATION DID WHAT IT WAS INTENDED TO DO.

HEALTH PROVIDERS IN KANSAS HAVE PROFESSIONAL LIABILITY INSURANCE AVAILABLE. WE HAVE A PROBLEM TODAY BUT IT IS NOT ONE OF AVAILABILITY. THE COST MAY BE PROHIBITIVELY HIGH, BUT THE INSURANCE IS AVAILABLE TO THEM. IF ALL PRIVATE INSURANCE COMPANIES WITHDRAW FROM KANSAS, PROVIDERS WILL STILL BE ABLE TO OBTAIN INSURANCE THROUGH THE JUA, AND THE HEALTH CARE STABILIZATION FUND WILL CONTINUE TO PROVIDE EXCESS COVERAGE FOR ALL ACTIVE KANSAS PROVIDERS. TODAY, OUR PROBLEM ISN'T "AVAILABILITY" -- OUR PROBLEM IS COST.

THE HEALTH CARE STABILIZATION FUND IS A NONPROFIT ENTITY. IT EMPLOYS SOME OF THE BEST DEFENSE FIRMS IN THE STATE TO REPRESENT PROVIDERS WHO ARE SUED FOR MALPRACTICE. IT ATTEMPTS TO SETTLE CASES THAT SHOULD BE SETTLED, AND TO TRY CASES THAT SHOULD BE TRIED. BUT IN THE END THE PAYMENTS MADE FROM THE HCSF TO PAY AWARDS AND JUDGMENTS MUST BE PASSED ON TO THE PROVIDERS. THERE IS NO GOVERNMENT MONEY IN THE HCSF. ALL THE MONEY TO FUND THE HCSF IS PROVIDED BY THE PHYSICIANS, HOSPITALS, PHARMACISTS, PODIATRISTS, OPTOMETRISTS, PHYSICAL THERAPISTS AND OTHER PROVIDERS COVERED BY THE ACT.

IT IS HARD TO IMAGINE NOW THAT AT THE TIME THE 1976 ACT WAS ENACTED THERE HAD NEVER BEEN A MEDICAL MALPRACTICE JUDGEMENT IN KANSAS FOR \$500,000. LET ME ASSURE YOU THAT THIS IS NO LONGER THE CASE.

IN 1984, THE LEGISLATURE TOOK SOME REMEDIAL ACTION TO HELP PROTECT THE HCSF FROM ESCALATING COSTS. A CAP OF \$3,000,000 WAS

PLACED ON FUND COVERAGE. PREVIOUSLY, THE FUND HAD UNLIMITED LIABILITY. PRIMARY INSURANCE LIMITS WERE INCREASED FROM \$100,000/\$300,000 TO \$200,000/\$600,000. THE LEGISLATURE ALSO ACTED TO PLACE THE HCSF ON A MORE TRADITIONAL INSURANCE ACCRUAL BASIS INSTEAD OF THE "CASH" BASIS ESTABLISHED IN 1976.

SPECIFICALLY, IN 1976, THE LAW PREVENTED THE HCSF FROM ASSESSING A SURCHARGE IF THE HCSF HAD ASSETS IN EXCESS OF \$10,000,000. THE FUND ALSO ASSESSED PROVIDERS ONLY ENOUGH TO PAY FOR CLAIMS PAID FROM THE FUND. THE LAW DID NOT PROVIDE A MEANS TO RESERVE FOR FUTURE LIABILITIES ON AN ACTUARIALLY SOUND BASIS. IN 1984, THE FUND WAS PERMITTED TO ACCUMULATE SUFFICIENT SURCHARGES TO PAY ANTICIPATED FUTURE OBLIGATIONS AND THE \$10,000,000 CEILING WAS REMOVED.

IN 1985, THE LEGISLATURE AGAIN ADDRESSED THE MEDICAL MALPRACTICE PROBLEM. SOME LIMITATIONS WERE PLACED ON PUNITIVE DAMAGE AWARDS IN MEDICAL MALPRACTICE CASES. THE 1985 ACT ALSO PERMITTED EVIDENCE OF COLLATERAL SOURCES TO BE GIVEN TO THE JURY FOR THEIR CONSIDERATION.

IF ANOTHER SOURCE HAD ALREADY PAID PART OR ALL OF THE CLAIMANT'S BILLS, THE JURY WAS ALLOWED TO BE TOLD ABOUT THESE PAYMENTS.

TODAY, OUR MEDICAL MALPRACTICE COMPENSATION SYSTEM IS UNDER CONSIDERABLE STRESS. INSURANCE PREMIUMS AND SURCHARGES HAVE ESCALATED TO SUCH AN EXTENT THAT IT IS AFFECTING HEALTH CARE IN THIS STATE. SOME PHYSICIANS ARE WITHDRAWING FROM HIGH RISK AREAS OF MEDICINE, SOME ARE RETIRING EARLY, SOME I AM TOLD ARE MOVING TO OTHER STATES. IN RURAL AREAS, A PHYSICIAN WHO DELIVERS ONLY A FEW BABIES EACH YEAR IS UNABLE TO CHARGE ENOUGH TO COVER THE ADDITIONAL COSTS PHYSICIANS MUST PAY FOR INSURANCE TO COVER OBSTETRICS. THE RESULTS ARE UNFORTUNATE. RURAL PHYSICIANS MAY STOP DELIVERING BABIES AND LIMIT THEIR PRACTICES TO LESS RISKY AREAS.

FOR WHATEVER REASONS, THE TRENDS IN MEDICAL MALPRACTICE ARE CLEAR. THE NUMBER OF CLAIMS CONTINUES TO INCREASE. ONE HUNDRED

(100) CLAIMS WERE FILED AGAINST THE HCSF IN FISCAL YEAR 1981, 124 IN 1982, 156 IN 1983, 179 IN 1984 AND 230 IN FISCAL YEAR 1985.

THE DOLLAR VALUE OF AWARDS AGAINST THE HCSF HAS ALSO CONTINUED TO ESCALATE. THE FUND HAD PAID CLAIMS AGAINST IT OF \$1.7 MILLION IN 1981; \$3 MILLION IN 1982; \$6.5 MILLION IN 1983; \$10.4 MILLION IN 1984 AND \$13.1 IN 1985.

WE SEE NOTHING IN THESE OR ANY OTHER AVAILABLE STATISTICS THAT IS ENCOURAGING. WE HAVE NO EVIDENCE TO SUGGEST THAT THESE INCREASES WILL BE REVERSED ANYTIME SOON, UNLESS LEGISLATION IS ENACTED TO CORRECT THE PROBLEMS.

IN JANUARY OF 1985, WE BECAME SO CONCERNED ABOUT THE MEDICAL MALPRACTICE PROBLEM THAT THE COMMISSIONER APPOINTED A CITIZENS COMMITTEE TO REVIEW THE TORT SYSTEM AND MAKE RECOMMENDATIONS. HE APPOINTED THIS COMMITTEE IN ORDER TO RENEW A DIALOGUE BETWEEN HEALTH CARE PROVIDERS AND TRIAL LAWYERS THAT HAD VIRTUALLY ENDED BY EARLY

1985. THE CITIZENS COMMITTEE INCLUDED A NUMBER OF LAWYERS, AMONG THEM THREE DISTINGUISHED LAWYERS WHO NORMALLY REPRESENT INJURED PERSONS IN MALPRACTICE ACTIONS, PROMINENT PHYSICIANS, OTHER HEALTH CARE PROVIDERS, REPRESENTATIVES OF THE INSURANCE INDUSTRY, AND A NUMBER OF PUBLIC MEMBERS. THE COMMITTEE HAD REPRESENTATIVES FROM LABOR, THE AMERICAN ASSOCIATION OF RETIRED PERSONS, A UNIVERSITY PROFESSOR, A LIBRARIAN, AND BUSINESS LEADERS. WE EXPECTED THE COMMITTEE TO DISCUSS THE MALPRACTICE ISSUE ENERGETICALLY AND IN DEPTH. WE BELIEVE THEY DID JUST THAT, AND WE BELIEVE THE STATE OF KANSAS OWES A CONSIDERABLE DEBT TO THE 25 MEMBERS OF THE COMMITTEE WHO MET EACH MONTH FOR NEARLY ONE YEAR ON A VOLUNTARY BASIS WITHOUT PAY.

THE FINAL DRAFT OF THE WRITTEN REPORT OF THE COMMITTEE IS EXTENSIVE AND CONTAINS MOST OF THE FACTS AND STATISTICS NEEDED TO UNDERSTAND THE KANSAS PROBLEM. THE REPORT IS MORE THAN 80 PAGES IN LENGTH AND CONTAINS 100 FOOTNOTES. WE ARE ADVISED THAT AS SOON AS

THE MINORITY REPORTS ARE COMPLETED THE FULL REPORT WILL BE AVAILABLE FOR YOUR CONSIDERATION.

AS YOU PROBABLY KNOW, THE INTERIM COMMITTEE OF THE LEGISLATURE REVIEWED THE PRELIMINARY RECOMMENDATIONS OF THE CITIZENS COMMITTEE AND ADOPTED MANY OF THE SAME RECOMMENDATIONS. THAT IS A TRIBUTE TO THE HARD WORK OF THE COMMITTEE, BUT I THINK IT IS ONLY FAIR TO NOTE THAT MEMBERS OF THE INTERIM COMMITTEE WORKED JUST AS HARD IN REACHING THEIR DECISIONS.

BEFORE YOU BEGIN TO STUDY THE RECOMMENDATIONS OF THE INTERIM COMMITTEE, LET ME FIRST COMMENT ABOUT THE GENERAL DIRECTION BOTH THE CITIZENS COMMITTEE AND THE INTERIM COMMITTEE OF THE LEGISLATURE WERE TAKING.

1. BOTH COMMITTEES BELIEVE THAT MEDICAL MALPRACTICE PRESENTS A UNIQUE SET OF PROBLEMS THAT DESERVE TO BE ADDRESSED

SEPARATELY FROM LIABILITY PROBLEMS FACING OTHER MEMBERS OF THE INSURANCE BUYING PUBLIC.

2. BOTH COMMITTEES SEE THE SOLUTIONS TO MEDICAL MALPRACTICE AS REQUIRING A PACKAGE OF CHANGES. TO REDUCE MEDICAL MALPRACTICE COSTS, BOTH COMMITTEES RECOMMEND CAPS ON AWARDS AND SCREENING PANELS TO ELIMINATE UNMERITORIOUS CASES AND TO ENCOURAGE EARLY SETTLEMENT OF VALID CASES. THE THIRD RECOMMENDATION OF BOTH COMMITTEES INVOLVES ENFORCING STRICTER PROCEDURES TO ELIMINATE MEDICAL MALPRACTICE FROM THE SYSTEM AND CONTROL INCOMPETENT PROVIDERS.

I BELIEVE IT IS CRUCIAL TO RETAIN THIS ENTIRE PACKAGE. THE DETAILS MAY BE ALTERED BUT I THINK A PROPERLY DESIGNED CAP IS AN INTEGRAL PART OF THE PACKAGE AND MUST BE INCLUDED AS PART OF ANY SOLUTION.

3. I MENTION CAPS BECAUSE CAPS WERE THE MOST CONTROVERSIAL ISSUE BEFORE THE INTERIM COMMITTEE. THE GOVERNOR HAS ALREADY SUGGESTED THAT HE CANNOT SUPPORT ANY BILL THAT CONTAINS A CAP. I HOPE HE WILL KEEP AN OPEN MIND ON THIS ISSUE UNTIL HE UNDERSTANDS HOW THE PROPOSED CAP WILL WORK. A PROPER CAP WILL REASONABLY ACCOMMODATE BOTH PRESENT AND FUTURE MEDICAL AND/OR CUSTODIAL EXPENSES OF INJURED PERSONS. THEREFORE, WE CAN HAVE A CAP WITHOUT HARM TO THE WELL-BEING OF INJURED PATIENTS. THE INJURED PATIENT MAY NOT RECEIVE EVERYTHING HE NOW GETS UNDER THE TORT SYSTEM AND HE MAY NOT RECEIVE HIS COMPENSATION IN THE SAME FORM, BUT WE BELIEVE HIS NEEDS WILL BE REASONABLY ACCOMMODATED. IT IS BECOMING INCREASINGLY CLEAR THAT THE VAST MAJORITY OF KANSAS CITIZENS RECOGNIZE THE NEED FOR CAPS. THE INSTITUTE FOR PUBLIC POLICY AND BUSINESS RESEARCH OF THE UNIVERSITY OF KANSAS IN ITS SECOND ANNUAL PUBLIC OPINION SURVEY OF KANSAS (1986), FOUND THAT 73.8% OF THE KANSAS CITIZENS

SUPPORT A LIMIT ON THE AMOUNT OF DAMAGES THAT CAN BE AWARDED IN ANY MEDICAL MALPRACTICE CASE.

4. WHY HAS A CAP BEEN RECOMMENDED?

BACK IN THE MID 1970'S WHEN KANSAS WAS WORKING TO SOLVE THE INSURANCE AVAILABILITY PROBLEM A FEW STATES ATTEMPTED TO GO BEYOND THE AVAILABILITY OF INSURANCE TO SOLVE THE ROOT CAUSE OF THE PROBLEM. TWO OF THESE STATES WERE INDIANA AND NEBRASKA. BOTH OF THESE STATES ENACTED A \$500,000 CAP ON MEDICAL MALPRACTICE AWARDS. BOTH STATES HAVE SURVIVED THE LAST DECADE WITH VIRTUALLY NO MAJOR MEDICAL MALPRACTICE PROBLEMS. INSURANCE PREMIUMS AND SURCHARGES IN INDIANA ARE SIGNIFICANTLY LOWER THAN OUR RATES IN KANSAS. THE SITUATION IN NEBRASKA WAS SO GOOD THAT THAT STATE HAS RECENTLY INCREASED THEIR CAP TO \$1,000,000. AFTER 10 YEARS OF EXPERIENCE, THE CAPS APPEAR TO HAVE WORKED.

5. HOW DO CAPS WORK?

TO UNDERSTAND CAPS, YOU MUST UNDERSTAND HOW MEDICAL MALPRACTICE CASES WORK TODAY. NEARLY 1/3 OF ALL OF THE MONEY INCURRED BY THE HCSF IS PAID ON TRAGIC CASES FOR BRAIN DAMAGED BABIES. THESE BABIES REQUIRE EXTENSIVE MEDICAL AND CUSTODIAL CARE. NO ONE DEALING WITH THESE CASES CAN HELP BUT BE DEEPLY MOVED BY THESE TRAGEDIES. SOMETIMES THESE TRAGEDIES OCCUR THROUGH NO FAULT OF MEDICINE. SOMETIMES THEY ARE NOT PREVENTABLE BY ANY HUMAN MEANS. SOMETIMES THEY ARE THE RESULT OF MISTAKES MADE BEFORE AND DURING DELIVERY. WE ARE CONCERNED ABOUT THE FUTURE MEDICAL AND CUSTODIAL EXPENSES FOR ALL OF THESE BABIES. HOWEVER, MEDICAL MALPRACTICE ONLY EXISTS, WHEN THE BRAIN DAMAGE IS THE RESULT OF A PROVIDER'S NEGLIGENCE.

TODAY WE ARE ABLE TO PROVIDE FOR FUTURE MEDICAL AND CUSTODIAL CARE WITH THE USE OF STRUCTURED SETTLEMENTS. THIS MEANS THAT WE COMPUTE THE AMOUNT OF MONEY NEEDED IN THE FUTURE AND PAY AN ANNUITY COMPANY TO GUARANTEE PAYMENT OF THESE FUTURE EXPENSES. THE ANNUITY

COMPANY WILL GENERALLY ONLY CHARGE A FRACTION OF THESE EXPENSES. IT IS NOT UNCOMMON, FOR EXAMPLE, FOR AN ANNUITY TO BE OBTAINED TO PAY 5 OR 6 MILLION DOLLARS OF FUTURE EXPENSES AT A COST OF FAR LESS THAN \$500,000. THIS IS POSSIBLE BECAUSE THE ANNUITY COMPANY TAKES INTO CONSIDERATION THE TIME VALUE OF MONEY AND MORTALITY FACTORS.

UNFORTUNATELY, JURIES DO NOT PRESENTLY HAVE THE ABILITY TO PAY CERTAIN SUMS EACH YEAR FOR THE LIFE OF THE BABY. THEY MUST AWARD A LUMP SUM. THEIR CALCULATION OF THE AMOUNT NEEDED IS PURE GUESSWORK AND THEREIN LIES A SIGNIFICANT PART OF THE PROBLEM.

WE USE STRUCTURED SETTLEMENTS EXTENSIVELY. TODAY, HOWEVER, THEY ARE ONLY AVAILABLE WITH THE AGREEMENT OF THE PARTIES. THERE IS NO PROCEDURE FOR COURTS TO ALLOW PAYMENT FOR LIFE, WITH PAYMENTS TO STOP UPON THE DEATH OF THE INJURED PARTY.

IT IS ESSENTIAL IN CONSIDERING CAPS THAT YOU UNDERSTAND THAT A 1,000,000 CAP DOES NOT NECESSARILY MEAN THAT NO MORE THAN \$1,000,000 OF DAMAGES WILL BE PAID.

WE STRONGLY AND SINCERELY BELIEVE THAT WITH THE CONTINUED USE OF STRUCTURED SETTLEMENTS AND THE USE OF STRUCTURED AWARDS AND JUDGMENTS WE CAN FUND REASONABLE AND NECESSARY DAMAGES IN CASES ARISING NOW OR IN THE FORESEEABLE FUTURE.

WHILE, AS I HAVE STATED, THE \$1,000,000 CAP WILL ALMOST CERTAINLY PROVIDE FOR ALL REASONABLE DAMAGES, IS THE CAP, ALONE, ENOUGH TO HELP CONTROL INCREASING PREMIUMS? THE ANSWER IS NO. OTHER ELEMENTS OF THIS SUMMER'S WORK ARE NEEDED, NOT THE LEAST OF WHICH IS REINFORCEMENT OF THE EFFORTS TO DETECT AND DISCIPLINE HEALTH CARE PROVIDERS WHO NEED ATTENTION AND THE MANDATORY USE OF STRUCTURED AWARDS AND JUDGMENTS.

ALSO, WE HAVE THE EXPERIENCE OF INDIANA AND NEBRASKA TO SUGGEST THAT A \$500,000 TOTAL CAP WORKS. THE CITIZENS COMMITTEE AND THE INTERIM COMMITTEE WERE APPARENTLY CONCERNED THAT A \$500,000 CAP MIGHT NOT MEET ALL REASONABLE EXPENSES. SOME, INCLUDING COMMISSIONER BELL, FEEL MORE COMFORTABLE WITH A \$1,000,000 CAP. BUT, THE IMPORTANT CONSIDERATION IS THAT WE BELIEVE REASONABLE DAMAGES INCURRED AS A RESULT OF MEDICAL MALPRACTICE WILL BE PAID.

AT THIS POINT, IT IS APPROPRIATE TO COMMENT BRIEFLY ON WHAT EFFECT THE PROPOSED CAP ON AWARDS MAY HAVE ON FUTURE RATES AND SURCHARGES. WE HAVE ALREADY REQUESTED THE ACTUARIES USED BY THE FUND TO GIVE US AN ESTIMATE OF THE EFFECT OF THE TOTAL PACKAGE OF PROPOSALS. WE FEEL SUCH AN ESTIMATE WILL BE AVAILABLE SOMEWHAT LATER IN YOUR DELIBERATIONS.

HOWEVER, DURING THE INTERIM COMMITTEE MEETINGS THE ACTUARIES PROVIDED A LIST OF DIFFERENT RESULTS BASED UPON A NUMBER OF POSSIBLE CAPS. OF COURSE, THE FIRST YEAR BENEFITS WILL BE MINOR SINCE MANY

CASES WILL REMAIN IN THE PIPELINE FOR MANY YEARS. HOWEVER, WHEN THESE CASES WERE ELIMINATED, THE ACTUARIES ESTIMATE HCSF SURCHARGE REDUCTIONS OF ONE-HALF FOR A \$500,000 CAP AND APPROXIMATELY 21% FOR A \$500,000 CAP WITH \$1,000,000 CAP ON FUTURE MEDICALS.

WE DO KNOW THAT INDIANA HAS A \$500,000 OVERALL CAP AND A NEUROSURGEON IN INDIANA, AT THE TIME OF THE CITIZENS COMMITTEE, PAID A BASE PREMIUM OF \$8,544 WITH A SURCHARGE OF APPROXIMATELY 75% OR \$6,408 FOR A TOTAL OF \$14,952. IN KANSAS, A NEUROSURGEON PAYS \$12,267 WITH A SURCHARGE OF 110% OR \$13,493 FOR A TOTAL OF \$25,760. IF KANSAS IMPOSED A \$500,000 CAP ONE MIGHT EXPECT THE PREMIUM AND SURCHARGE TO BE THE SAME AS INDIANA. WITH A \$1,000,000 CAP, THE PREMIUM AND SURCHARGE WILL BE HIGHER.

WE SHOULD MENTION THAT QUESTIONS WERE RAISED AS TO WHY A CAP ON AWARDS IS NECESSARY AT \$1,000,000 IF THE PAYMENTS FROM THE HCSF CAN BE CAPPED AT \$1,000,000, A PROVISION WHICH IS ALSO CONTAINED IN THE PROPOSAL BEFORE YOU. THESE TWO POINTS ARE OF IMPORTANCE BECAUSE OF

THEIR RELATIONSHIP TO BOTH THE 1976 AND 1984 LEGISLATIVE BACKGROUND. FIRST, IF ONLY THE HCSF PAYMENTS ARE CAPPED, IT DOES NOT AFFECT TOTAL AWARDS AGAINST THE PROVIDER. THEREFORE, IT CREATES MUCH THE SAME AVAILABILITY PROBLEM THAT EXISTED IN THE 1970'S WHERE ESPECIALLY HIGH RISK PROVIDERS WOULD STILL NEED HIGHER LIMITS OF INSURANCE WHICH ARE NOT GENERALLY AVAILABLE IN THE INSURANCE MARKET, AND TO THE EXTENT IT IS AVAILABLE, IS VERY EXPENSIVE.

IN ALL HONESTY, WE CANNOT GUARANTEE A \$1,000,000 CAP WILL BE SUFFICIENT TO CONTROL PREMIUMS. HOWEVER, WE HAVE ADMINISTERED THE HCSF FOR THE PAST 10 YEARS, AND BASED UPON OUR EXPERIENCE, WE THINK A ONE MILLION DOLLAR CAP TOGETHER WITH OTHER RECOMMENDATIONS OF THE INTERIM COMMITTEE WILL WORK TO STABILIZE AND EVENTUALLY REDUCE PREMIUMS.

YOU MUST BEAR IN MIND, HOWEVER, THAT THERE ARE HUNDREDS OF MEDICAL MALPRACTICE CASES ALREADY IN THE SYSTEM, AND THEY MAY NOT BE SUBJECT TO A CAP PASSED BY THIS LEGISLATURE. IT WILL TAKE FIVE TO

SEVEN YEARS FOR THESE CASES TO WORK THROUGH THE SYSTEM. HOWEVER, EVEN IMMEDIATELY, CAPS WILL HELP CHANGE THE ATMOSPHERE IN KANSAS, AND, IN TIME, SHOULD PROVIDE A REASONABLE SOLUTION FOR OUR MEDICAL MALPRACTICE PROBLEM.

SEVERAL ISSUES THAT FREQUENTLY AROSE DURING THE DELIBERATIONS OF BOTH THE LEGISLATIVE INTERIM COMMITTEE AND OUR CITIZENS COMMITTEE DESERVE COMMENT AT THIS TIME.

1. HIGH INSURANCE RATES ARE ESPECIALLY DIFFICULT FOR RURAL PHYSICIANS WHO PAY THE SAME TOTAL PREMIUMS AS URBAN PHYSICIANS BUT GENERALLY HAVE FEWER PATIENTS OVER WHICH TO SPREAD THE COST. A LARGE CONCERN IS THAT SUCH RURAL DOCTORS HAVE OR WILL STOP DELIVERING BABIES, FOR EXAMPLE, TO ACHIEVE A LOWER RATING, QUIT ENTIRELY OR RETIRE MUCH EARLIER IN AREAS WHERE THE PUBLIC HAS NO OTHER ACCESS TO LOCAL SERVICES.

BECAUSE OF MANY PROBLEMS TO ANY SOLUTION PROPOSED, THE RECOMMENDATIONS BEFORE YOU DO NOT PROPOSE ANY DIFFERENT RATING BASE FOR RURAL DOCTORS. THIS IS BECAUSE OF DIFFICULTY IN APPLYING A SEPARATE RATING CLASSIFICATION TO SUCH DOCTORS BECAUSE THE ACTUARIAL RATING BASE IS NOT LARGE ENOUGH. IN ADDITION, RURAL PHYSICIANS TODAY DO NOT SEEM IMMUNE FROM HAVING THE SAME STANDARD OF CARE APPLIED TO THEIR ACTIVITIES AS IS APPLIED TO URBAN PHYSICIANS, ESPECIALLY WHEN SUCH CASES ARE REMOVED TO FEDERAL COURTS. CONSEQUENTLY, IT IS BELIEVED THAT AN OVERALL STABILIZATION OF RATES BROUGHT ABOUT BY THE CONCEPT INCORPORATED IN THE INTERIM LEGISLATIVE COMMITTEE'S PACKAGE WOULD BE THE BEST IMMEDIATE ANSWER TO THIS SITUATION.

2. IN ANY DISCUSSION OF MEDICAL MALPRACTICE CLAIMS, ONE ISSUE ALWAYS RAISED IS THAT THERE WOULD NOT BE A SIGNIFICANT PROBLEM IF INCOMPETENT PROVIDERS WERE ELIMINATED FROM PRACTICE. WE FEEL THE PROPOSAL BEFORE YOU DOES CONTAIN

REASONABLE CHANGES THAT ENCOMPASS THE MANY ISSUES RAISED BEFORE BOTH THE INTERIM LEGISLATIVE COMMITTEE AND THE CITIZENS COMMITTEE. HOWEVER, WE WISH TO STRESS THAT THESE PROPOSALS ALONE WILL NOT ELIMINATE THE MEDICAL MALPRACTICE INSURANCE PROBLEM AND BOTH AFOREMENTIONED COMMITTEES RECOGNIZED THIS BY THEIR RECOMMENDATION OF A "PACKAGE" OF CHANGES. THE FACT THAT SOME PROVIDERS HAVE MULTIPLE INSURANCE CLAIMS IS NOT UNUSUAL. FOR EXAMPLE, HOSPITALS AND OTHER PROVIDERS IN HIGH RISK CATEGORIES WILL HAVE MORE EXPOSURE TO CLAIMS BECAUSE OF THE VERY NATURE OF THE SERVICES INVOLVED. ALSO, IF A PARTICULAR PROCEDURE RESULTS IN INSURANCE CLAIMS, FURTHER CLAIMS WILL RESULT EVEN IF SUCH PROCEDURE IS NO LONGER FOLLOWED IF IT WERE GENERALLY USED A NUMBER OF TIMES. WE ALL HOPE CONTINUED EFFORTS TO REDUCE "MALPRACTICE" ARE SUCCESSFUL BUT THESE EFFORTS ALONE WILL NOT ELIMINATE INSURANCE CLAIMS.

3. OTHER ISSUES THAT WERE DISCUSSED BEFORE YOUR COMMITTEE LAST YEAR WERE THOROUGHLY PRESENTED TO AND DISCUSSED BY BOTH THE LEGISLATIVE COMMITTEE AND CITIZENS COMMITTEE AND ADDRESSED, AS WELL, BY THE PROPOSAL BEFORE YOU NOW. THESE ISSUES INCLUDE: INFORMATION TO BE FURNISHED TO THE BOARD OF HEALING ARTS; PAST HCSF SURCHARGES; RATE SUBSTANTIATION FURNISHED TO THE INSURANCE DEPARTMENT BY INSURERS; AND, LOSS EXPERIENCE FURNISHED TO THE INTERIM COMMITTEE.

ONE FINAL ISSUE THAT WE FEEL IS VERY IMPORTANT TO THE CURRENT CLIMATE SURROUNDING MEDICAL MALPRACTICE INSURANCE IS ITS RELATIONSHIP, IF ANY, TO OTHER LIABILITY INSURANCE MARKET PROBLEMS NOW EXISTING IN KANSAS AND ELSEWHERE. AS I AM SURE YOU ARE WELL AWARE, THE AVAILABILITY AND AFFORDABILITY OF MANY KINDS OF LIABILITY INSURANCE POLICIES ARE NOW CAUSING CONSIDERABLE TURMOIL AMONG AFFECTED CONSUMERS, INSURANCE REGULATORS, LEGISLATORS, AND THE INSURANCE INDUSTRY ITSELF THROUGHOUT THE UNITED STATES. IN GENERAL, THE UNDERWRITING LOSSES SUSTAINED BY THE ENTIRE PROPERTY AND

CASUALTY INSURANCE INDUSTRY IN THE UNITED STATES THE PAST SEVERAL YEARS (OVER 3.8 BILLION IN 1984) HAS CAUSED MOST OF THOSE COMPANIES TO:

- (1) GENERALLY RAISE RATES ON MOST COMMERCIAL INSURANCE RISKS THEY ARE OFFERING TO RENEW;
- (2) CANCEL OR NONRENEW MANY RISKS IN ORDER TO REDUCE THEIR VOLUME OF BUSINESS BECAUSE OF DRASTIC REDUCTION IN ACCEPTABLE SURPLUS TO PREMIUMS WRITTEN RATIOS; AND
- (3) NONRENEW RISKS FELT TO BE IN THE MOST HAZARDOUS LOSS CATEGORIES.

THE MOST CITED REASONS FOR THESE PROBLEMS ARE:

- (1) RECENT REDUCTIONS IN INVESTMENT INCOME OF THE INSURANCE COMPANIES CAUSED BY DECLINES IN INTEREST RATES;
- (2) UNAVAILABILITY OF REINSURANCE NECESSARY FOR THE POLICY LIMITS AND NUMBER OF POLICIES WRITTEN IN PAST YEARS; AND

(3) INCREASING UNPREDICTABILITY OF LIABILITY INSURANCE LOSSES AND THE AMOUNTS OF SUCH LOSSES.

WHAT I HAVE JUST DESCRIBED IS NOT ONLY A PROBLEM IN KANSAS, BUT NATIONWIDE, AND HAS EVEN RESULTED IN A MUCH LARGER NUMBER OF INSURERS BECOMING INSOLVENT. THERE ARE MANY THINGS THAT ARE BEING DONE BY THE INDUSTRY AND INSURANCE REGULATORS TO ADDRESS THESE PROBLEMS, AND SOME ACTION BY THE VARIOUS STATE LEGISLATURES MAY BE NECESSARY. THIS SITUATION HAS RESULTED IN THE QUESTION BEING RAISED THAT ANY CHANGES IN OUR MEDICAL MALPRACTICE INSURANCE STATUTES SHOULD BE DELAYED UNTIL THE ENTIRETY OF THE LIABILITY INSURANCE ISSUES CAN BE ADDRESSED. FOR THIS REASON, WE BELIEVE IT IS IMPERATIVE TO POINT OUT THAT THERE ARE SIGNIFICANT DIFFERENCES BETWEEN THE PROBLEM AREAS DESCRIBED THAT MAKE CONTINUED CONSIDERATION OF MEDICAL MALPRACTICE PROBLEMS ESSENTIAL. SOME OF THESE ARE:

- (1) THE SOCIAL AND ECONOMIC ISSUE OF AVAILABILITY OF HEALTH CARE THROUGHOUT THE STATE ARE DIRECTLY CONNECTED TO THE MEDICAL MALPRACTICE INSURANCE ISSUE AND DIRECTLY AFFECT ALL KANSANS;
- (2) PRESENT LAWS THAT REQUIRE HEALTH CARE PROVIDERS TO PURCHASE PROFESSIONAL LIABILITY INSURANCE;
- (3) MEDICAL MALPRACTICE INSURANCE RATES AND PREMIUMS HAVE BEEN CONSTANTLY INCREASING OVER RECENT YEARS, WHILE OTHER TYPES OF LIABILITY INSURANCE RATES (EXCEPT PRODUCTS LIABILITY) WERE GENERALLY STABILIZED OR REDUCED DURING THE LAST FIVE YEARS; AND
- (4) MEDICAL MALPRACTICE INSURANCE IS MORE SUSCEPTIBLE TO STATEWIDE ACTIONS AND SOLUTIONS THAN MANY OF THE OTHER LIABILITY SITUATIONS (SUCH AS PRODUCTS LIABILITY) BECAUSE MOST OF THE LIABILITY OCCURRENCES ARE WITHIN THE STATE.

SOME FINE TUNING WILL ALMOST CERTAINLY BE NECESSARY ON THE PROPOSALS BEFORE YOU. HOWEVER, THE GENERAL DIRECTION OF BOTH THE

CITIZENS COMMITTEE AND INTERIM COMMITTEE RECOMMENDATIONS IS CORRECT,
AND I RECOMMEND THE CONCEPTS SET FORTH IN THE INTERIM COMMITTEE'S
REPORT.