

Approved April 1, 1986
Date

MINUTES OF THE House COMMITTEE ON Judiciary

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

3:30 ~~xxx~~ a.m./p.m. on February 3, 1986 in room 313-S of the Capitol.

All members were present except:
Representatives Adam, Buehler, Duncan and Teagarden were excused.

Committee staff present:
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Jan Sims, Committee Secretary

Conferees appearing before the committee:

Ron Todd, Assistant Commissioner of Insurance
Bob Arbuthnot, Kansas Trial Lawyers Association
Jerry Slaughter, Kansas Medical Society

The Chairman announced that there will be a meeting tomorrow, February 4, 1986, in Room 313-S upon the adjournment of the House for those proposing amendments to HB 2661.

Ron Todd, Assistant Insurance Commissioner appeared before the committee and spoke to the issues of HB 2661 which concern the Health Care Stabilization Fund. He gave a brief summary of the fund which is administered by the Insurance Department. He said the Insurance Department supports the concept of the entire bill and the Fund provisions in particular but it has some problems with the implementation of the bill if passed. There is not enough time to have all provisions go into effect by July, 1986. Mr. Todd gave a brief outline of what coverage the Fund provides currently and what it is still providing under the old law, pointing out that it defends claims to different limits depending on the time of the claim as relates to the law changes. He said that the Fund currently has a \$19 million cash balance but cautioned that this is not enough inasmuch as the 1984 unfunded liability was in excess of \$47 million. More collections must be made for the Fund's future liability. The actuarial estimate is that there would be a reduction in the Fund surcharge of 5-10% in the first year after passage of HB 2661 with a maximum reduction of 25-26% in 5 to 7 years when the claims in the pipeline have been dealt with. Mr. Todd spoke to the Department's position relative to experience rating and averaging of rates of the various companies currently writing professional liability insurance as it pertains to funding for the Fund. He indicated that an experience rating could not be implemented by this July. Mr. Todd presented the findings and recommendations of the Board of Governors of the Health Care Stabilization Fund.

Jerry Slaughter of the Kansas Medical Society appeared before the Committee. He handed out an updated list of his association's proposed amendments to HB 2661 correcting the list he presented last week pertaining to peer review. He stated that most of the amendments are technical in nature and he would elaborate on them at tomorrow's meeting. He said that nothing will help premiums this year. The companies writing professional liability insurance in Kansas have already made their formal requests for increases and they are in the 30% range. He stated that selection already exists in today's insurance market as evidenced by the selection of insureds by Medical Protective and St. Paul with the balance going to the JUA. He pointed out that the JUA premiums are rated. For this reason he opposes the level surcharge provision. (Attachment 1)

Bob Arbuthnot of the Kansas Trial Lawyers Association appeared before the committee. He presented his association's position on this issue (Attachment 2).

The Chairman announced that the minutes of the committee meetings of January 22, 23, 27, 28, 29 and 30 were presented for approval. Rep. Harper moved that they be approved. Motion seconded by Rep. Whiteman. Motion carried on a voice vote.

The Chairman adjourned the meeting at 5:05 P.M.

2/3 Slaughter

Proposed Amendments to HB 2661 Concerning Peer Review, Risk Management and Reporting

Recommendations of the Kansas Medical Society
January 28, 1986

Amendment No. and Rationale:

1. Purpose Clause. Adding a purpose clause shows that the legislature is acting to solve a crisis situation, which might help in upholding the constitutionality of the bill.
2. This amendment clarifies the section on risk management as it relates to disapproval of a medical care facility's risk management plan.
3. This amendment makes it clear that the legislature does not intend to create a new cause of action against a medical care facility for its risk management activities.
4. This amendment is intended to tie the various reporting requirements of the act together.
5. This amendment makes it clear that it is appropriate for the committee reviewing the incident to make recommendations regarding the privileges of the person in question.
6. This amendment is also intended to tie the various reporting requirements contained throughout the bill together for consistency.
7. This amendment clarifies the fact that a health care provider who is simply acting as a consultant within a medical care facility should not be subject to the reporting requirements of Section 3.
8. This amendment will make it possible for the Board of Healing Arts to know the names of licensees who have been referred to Impaired Provider Committees.
9. This amendment simply gives the Impaired Provider Committee the flexibility to designate someone to conduct the investigation directed by the licensing agency.
10. This amendment makes it clear that even though a facility may not consider the fact a person is participating in an impaired provider program, it may consider the impairment itself and how it affects the person's practice.

Attachment 1
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11. This amendment would broaden the exemption to include all the members of such organizations, not just Impaired Provider Committees.
12. This amendment, like No. 11, would broaden the confidentiality provisions.
13. Instead of creating a new statutory action against a medical care facility, this amendment would simply reflect the legislature's intent that employees be free to make the reports required by the act.
14. This amendment is intended to strengthen and clarify the section related to anti-trust immunity. It also makes it clear that such immunity is extended to all types of peer review activity.
15. Subsections (2) and (3) are unreasonably restrictive, and in rural areas could present severe problems in instances when a member of a licensee's family needs a prescription.
16. These three sections all represent additional grounds for discipline by the Board of Healing Arts. They should be deleted because they all contain ambiguities about the types of acts that could be grounds for discipline. The sections are also redundant because physicians are already required to report much of this information. Finally, it is unreasonable to discipline a physician for simply having entered into a settlement, many of which are of nuisance value, and outside the licensee's control.
17. This amendment simply clarifies an ambiguity that existed in the original draft of the bill.

Amendments Suggested By The Healing Arts Board:

Attachment A - The KMS generally supports this new section which is intended to broaden the subpoena power of the Board as it relates to investigations. The amendment suggested on page 2 of Attachment A is intended to clarify that peer review and risk management records are also protected under the Act.

Attachment C - The amendments suggested to the language on Attachment C are merely intended to clarify the sections.

Attachment D - The KMS generally supports the addition of (cc) to Section 34. However, we have reservations about the new section suggested and feel it may be unnecessary since the Board already has the authority to limit a license.

INSURANCE REFORM NOT TORT REFORM

Mr. Chairman, I am Bob Arbuthnot, representing the Kansas Trial Lawyers Association.

We are really talking about costs of liability insurance and what is going to happen to these costs depending on what happens in the legislative process. By controlling and lowering the costs of liability insurance for doctors, we can increase their bottom line and still preserve the fundamental rights of people by using the court system to recover damages which are legally due them for malpractice.

I would like to draw a very brief parallel with this cost problem and the cost problem of three major industries in Kansas which you wrestle with on a daily basis in the Legislature, and which due to lack of return on investment, are causing some real concern in state government at this time.

1. Agriculture and Related Industries.

(Basic in Kansas).

2. Oil and Gas Industry.

3. Aircraft Industries.

When your market dries up or is shrinking due to demand, price, or otherwise, you must adjust your costs in order to survive. The dramatic, increasing cost of liability insurance is affecting many wide-spread people, groups and businesses in

addition to the medical profession that we are concerned with here today.

Approximately half of you on the Committee are lawyers. What has happened to the cost of your liability insurance? All of you are elected legislators. What has happened to your liability cost as a farmer, business man or homemaker? Your liability goes up because you are an elected official. You have more exposure. I learned about this the hard way - the Insurance Department.

Today we are concerned with the costs of liability insurance in the medical profession. In spite of reform measures and legislation these costs continue to get higher. We seriously need to look very close and hard for ways to control these insurance costs other than by disallowing the citizens of Kansas (that you represent) to protect themselves through the court system from medical negligence by a very few in the medical profession.

I. Crisis. There are many statistics and interpretations of these statistics. Use them wisely. Commissioner Bell's July 1, 1985 Report (recent) on Health Care Stabilization Fund - only 940 claims filed in 9 years for 2.5 million people - 100 per year - 135 payments made. Review of Health Care Stabilization Fund created in 1976 by the Legislature to provide excess coverage over \$100,000 (now \$200,000), had a \$10 million upper limit on dollars to be collected from doctors.

This is doctors' money paid into Fund and managed by the State Insurance Department, and cost of management is charged to the Fund. The surcharge is simply a certain set percent of primary premium charge, and is paid into the Fund to purchase \$3 million of coverage for doctors.

Although malpractice claims were increasing during the early 80's and major sums of money were being paid to victims, Health Care Providers in Kansas paid no surcharge for three years ('81, '82, '83). The surcharge in '80 was 15%. At that time the Fund had \$10 million, and the surcharge was removed.

What happened? In the primary market with high interest rates, premiums were kept low to get investment of capital funds. Capital - high earnings - then dramatic lower interest rates - Premiums were too low, and interest rates dropped, so money ran out to cover rising costs.

1984 - Senate Bill 507 - The Medical Community and Insurance Commissioner's Office urged passage. 507 was designed to make the Fund actuarially sound. It was needed to pay off debts and to stabilize the medical liability insurance situation.

1. Raised Primary Coverage \$200,000 (from \$100,000.
2. Capped liability of Fund at \$3 million.
3. Allowed at 80% surcharge on providers. Very expensive after years of low payment.

II. Crisis of Affordability.

There is much confusion over the pricing and rate setting of liability insurance, but a few items are quite clear. The economic problem is national and not local, and all rates have risen in spite of the variety of state laws. It is not limited to Health Care Providers, but is affecting rates for diverse groups.

The role of investment income in the medical malpractice insurance industry has caused tremendous fluctuations in the market. Malpractice claims are paid relatively slowly, and with high interest rates in the 1980's, the investment gains on premiums were substantial. The product was underpriced (insurance) to encourage the purchase and investment of capital. A rapid decline in interest rates shook the property/casualty insurer because premiums were suddenly too low and investments were not yielding the high returns. This caused enormous malpractice premium increases for doctors and other groups.

III. Ways to Lower Rates.

In reality, malpractice insurance in Kansas has a cap, a specific ceiling. It has had since the creation of the Fund. Primary coverage insurers know that their company has a maximum liability of 200,000 per claim. Why with such predictable and certain liability limits are rates continuing to rise?

It doesn't matter if the case is worth \$20 million or \$250,000, they will only pay \$200,000. The Fund is separate; but, Kansas doctors' malpractice rates and surcharge for excess

insurance are based on primary coverage, so they are closely tied together.

Between 1980 and 1984, the Medical Protective Company collected \$12.1 million from Kansas Health Care Providers. During those years they paid approximately \$5 million in losses. The St. Paul Insurance Company during those years collected \$18.8 million in premiums and paid out \$6.1 million in losses. This appears to be an excellent return on the investment.

IV. Fairness and Recommendations.

The theory of insurance is to spread the risk among as many parties as possible to make the costs to everyone as low as possible. Unfortunately, for doctors in Kansas and across the nation, the insurance companies have moved to compound the problem for so-called high risk doctors. Currently, doctors are being divided into smaller and smaller classifications, further driving up the premium for surgical specialities.

A. We urge the Legislature to consider a recommendation to reduce the current 9 or 10 or more classifications to 3 categories.

1. Doctors with no surgery.
2. Doctors with minor surgery.
3. Doctors with major surgery.

This should average surcharges and make the cost of insurance more predictable by spreading the risks within groups to make insurance more affordable in most categories.

The grouping would redistribute the 4,000 Kansas doctors into larger groups, and by doing so, could help alleviate the financial pressure in the small surgical classifications: such as neurosurgery, where the larger claims show up.

B. We recommend the liability of the Fund be reduced from \$3 million to \$1 million. This would substantially reduce the surcharge. No other state in the nation requires doctors to purchase over \$1 million of insurance.

C. A rating experience factor should be added to the surcharge for those providers with claims, settlements or judgments against them. This should reduce the costs for doctors with clean records.

D. Averaging surcharges - rather than exact percentage of primary coverage, doctors with a class would pay the same surcharge.

E. The premium burden under the Fund could be ultimately reduced by better monitoring of insurance rates and data. Several states have moved in this direction and have good legislation in this regard. H.B. 2661 contains some, but not all of these recommendations. Monitoring rates and reducing the number of classes of doctors would be good additions to the bill.

The malpractice issue has been raised in 1986, in Kansas, and throughout the country, based on the high cost of insurance for some medical specialists. The Legislature has been asked to solve this problem in order to ensure continued affordable and accessible health care for Kansas citizens.

The proposals of the insurance industry and the medical society are quite simple. Limit the rights of victims and problem will be solved. Before the Kansas Legislature adopts their suggestions, it's only reasonable to weigh these recommendations against the evidence at hand.

Will the problem be "solved" if you adopt all the provisions in H.B. 2661? We think the clear answer is no, and therefore, urge you to look for real solutions.

FACT: Indiana has the most severe laws on malpractice in the country. The laws have been in place for 10 years. As it was shown to the Interim Committee this summer by a representative from the Indiana Fund:

- * the Indiana Fund is insolvent.
- * cases take longer to process than in Kansas, with a mandatory screening panel.
- * there are more claims (almost double) per capita than in Kansas.
- * Indiana pays more per claim with a flat \$500,000 cap than in Kansas with an open system.

FACT: Neither the representative from St. Paul or Medical Protective would give you assurances that H.B. 2661 will "solve" the insurance problem.

St. Paul said Kansas suits are within national average in severity and frequency. He refused to make future predictions, and said that their national decision to limit new doctors was in place even in states with major "tort reform".

The Medical Protective representative said that he would urge primary rates to stabilize for two years, but couldn't give any guarantees. What happens in the future?

FACT: This fall, the Fund actuaries told the Interim Committee that if nothing were passed in the 1986 Legislature, they predicted that the surcharge would be lowered by 10% (p. 847 in your Interim Report). In fact, the proposal to lower the Fund liability to \$1 million, and the proposal to cap victims' awards at \$1 million are identical as far as the Fund surcharge is concerned.

FACT: In the Kansas Tort Claims Act, passed in 1978, parties are limited to a recovery of \$500,000. This "cap" has not alleviated the insurance pressure on Kansas municipalities. They have experienced reduced coverage, dramatic increases in rates and inability to buy insurance in spite of the cap on awards.

FACT: The surcharge of the Fund is high in 1986 due to two causes:

1. inadequate rating during the existence of the Fund
(p. 833 in report).

2. rise in claim awards which correlates to the extraordinary high cost of medical care and services, which has risen at about 11% per year since 1980, much higher than the consumer price index.

SUMMARY.

If we can bring down costs in the health care system, it will automatically lower awards to malpractice victims. Large awards are reflective of the extraordinarily high cost of health care in the 1980s.

We must concentrate on better business and risk management, more fairness, lower limits of liability in the Fund and all the other factors that could control costs in the future before we take away the inherent right of victims to attempt, through our court system, to recover damages done to them.

Thank you.

STATISTICS

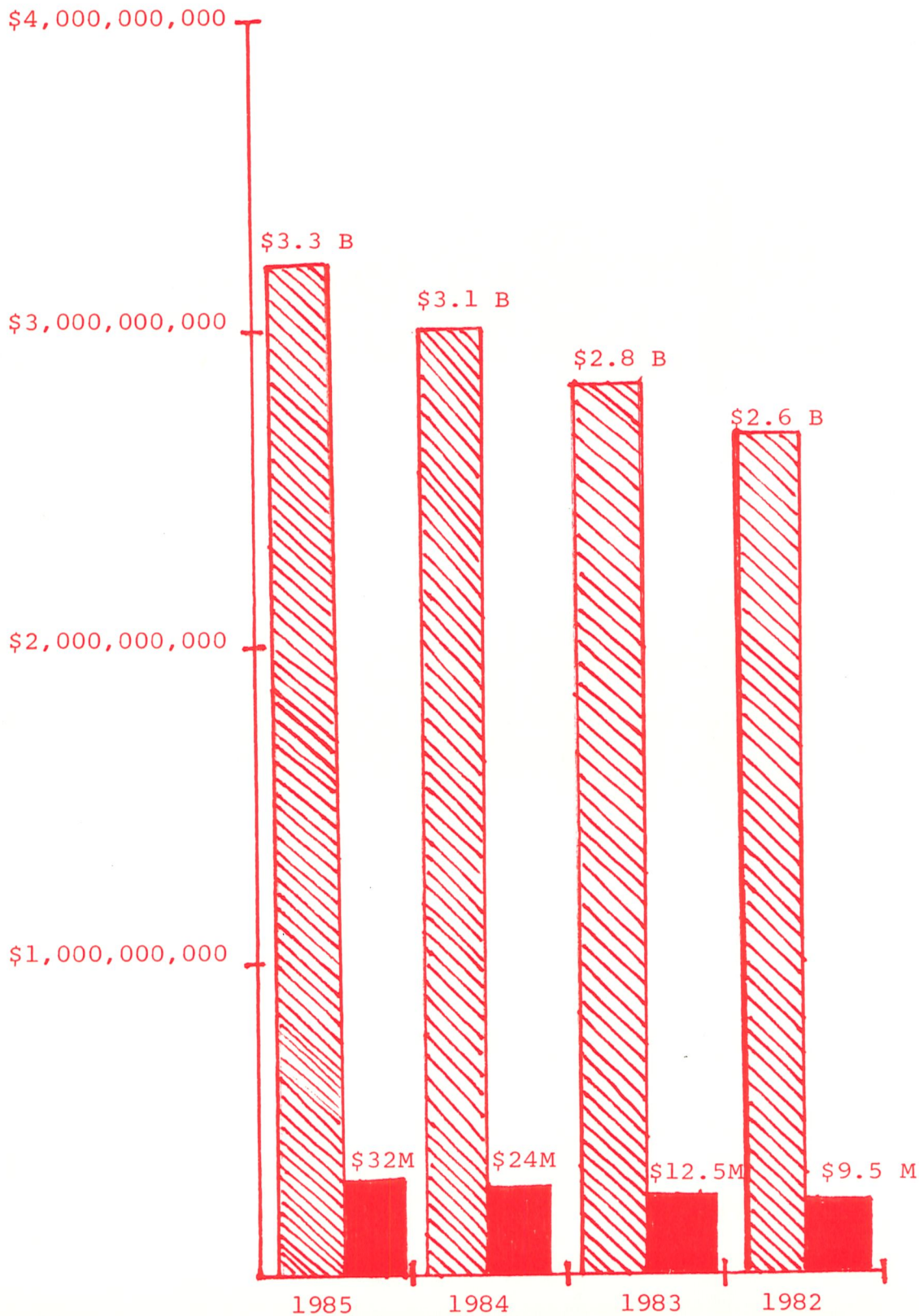
1. 1986: There is a problem in Kansas for some doctors with the rising cost of malpractice insurance premiums. Since the legislative discussion of malpractice insurance was prompted by insurance rates, the actual dollars paid by Kansas doctors are important to examine. As of July 1, 1985, only 15% of health care providers pay over \$10,000 for insurance, and 40% of Kansas doctors pay less than \$5,000 per year. This purchases \$3.2 million worth of coverage for acts of medical negligence.
2. Malpractice claims are .18% of total civil filings.
3. 68 doctors are responsible for 30% of claims between 1976 and 1985 (p. 832 of Interim Report).
4. Kansas and national - malpractice premiums are less than 1% of the total Health Care dollar.
5. Kansas doctors will pay approximately 4% of their "after expense before taxes" income in malpractice in 1985.
6. Small claims since 1976: 77% were settled for less than \$10,000 - only 8 awards over \$1 million.
7. Insurance Jargon - 1975-1983.

"Incurred but not reported losses" are accounting figures used by the insurance companies. This money is still in the company.

"Losses paid" is money actually used to settle claims.

Nationally, malpractice underwriters have earned \$7.3 billion in premiums, \$1.7 billion in investment income. They have paid out \$1.5 billion.

PREMIUM INFORMATION



% of Premiums to Health Care Costs: .96% .78% .44% .36%

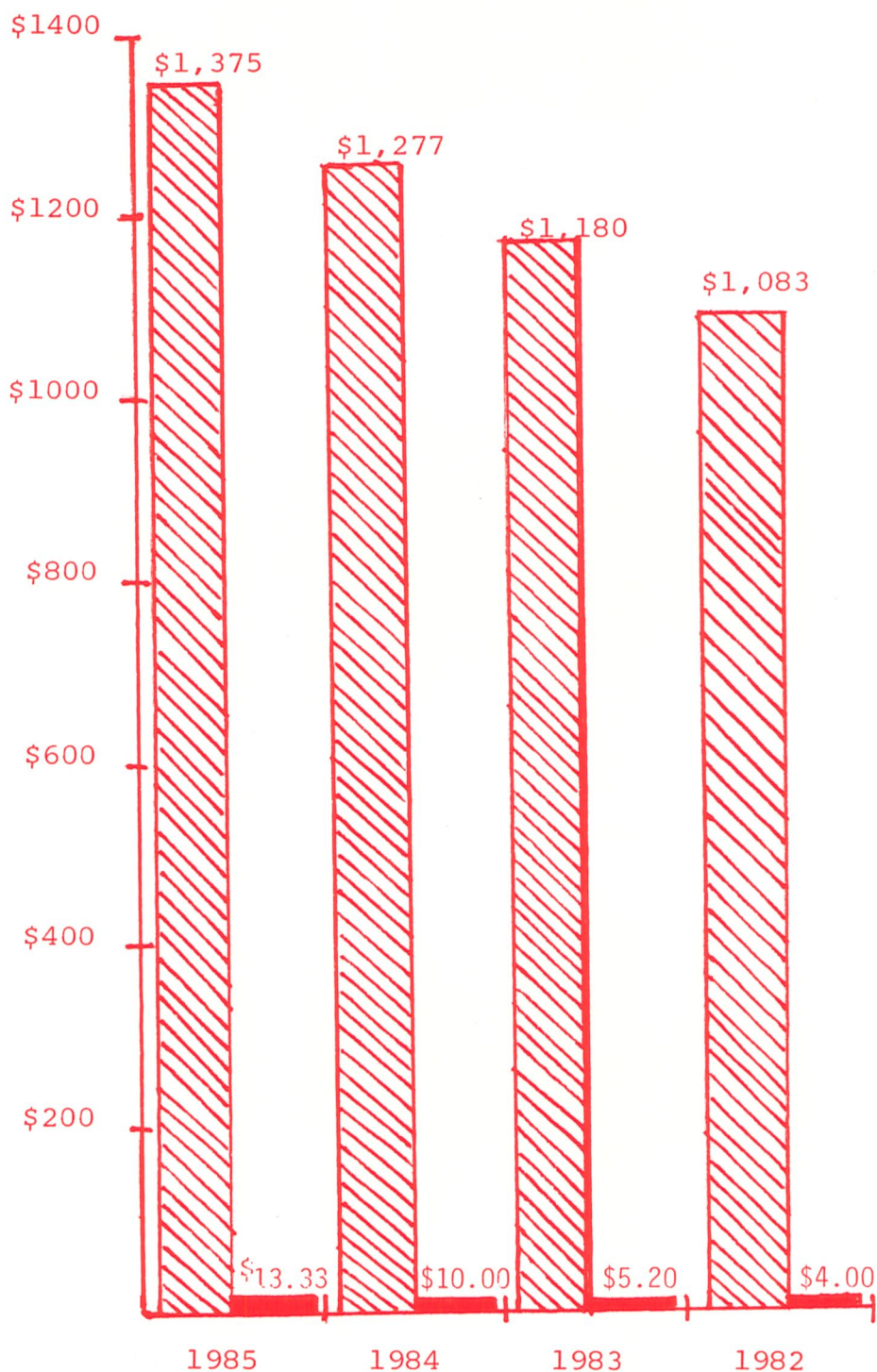
■.....Total Malpractice Premiums Paid by Health Care Providers.

▨.....Total Personal Health Care Costs in Kansas.

The above statistics show that malpractice premiums in Kansas represent less than 1% of the total health care costs in Kansas. For three years (1981, 1982, 1983), doctors in Kansas paid no surcharge for Fund insurance.

KANSAS

Per Capita Expenditures.



.....Per Capita Health Care Expenditures in Kansas.

.....Per Capita Share of Malpractice Premiums.

This graph shows the amount, per person, spent on health care in Kansas. Then the total amount of the health care premiums are divided among the citizens in Kansas. If malpractice were abolished and every dollar was returned to the citizens of Kansas, in 1985 citizens would get a total of \$13.33, in exchange for losing their legal rights.

KANSAS PREMIUMS
(1980- 1984)

