Approved February 25, 1987
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative Robert S. Wunsch at
Chairperson

3:30 ~~a.m.~~/p.m. on February 9, 1987 in room 313-S of the Capitol.

All members were present except:
Representatives Duncan, Jenkins, Shriver and Solbach, who were excused.

Committee staff present:
Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes Office
Mary Jane Holt, Secretary

Conferees appearing before the committee:
Bev Bradley, Kansas Association of Counties
Chip Wheelen, Kansas Legislative Policy Group
Patricia Baker, Senior Legal Counsel, Kansas Association of School Boards
Ron Smith, Kansas Bar Association
Jim Kaup, League of Kansas Municipalities
Jerry Palmer, Attorney, Kansas Trial Lawyers Association
Larry Magill, Jr., Executive Vice President, Independent Insurance Agents of Kansas
David Litwin, Kansas Chamber of Commerce and Industry, and Kansas Coalition on Tort Reform
William Sneed, Legislative Counsel, Kansas Association of Defense Counsel

Continuation of Hearing on H.B. 2023-Kansas Tort Claims Act Amendments, Proposal No. 29

Bev Bradley testified in support of H.B. 2023. She also informed the Committee of the Attorney General's Opinion No. 86-173 which states "there is no exception under the Kansas Tort Claims Act which would exempt a county from liability for claims arising from the sale of chemicals as required by the noxious weed laws". She proposed an amendment which would include any action of a local governing body required by statute, (see Attachment I).

Chip Wheelen stated the Legislative Policy Group supports the provisions of H.B. 2023 and recommends the bill for passage. He suggested the word "personnel" in line 79 should be replaced or deleted. He also supported the formation of interlocal risk management cooperatives, (see Attachment II).

Patricia Baker appeared in support of H.B. 2023 and requested a favorable report on this bill, (see Attachment III). She proposed changing the word in line 85 from "degree" to "level" for clarification purposes. She also endorsed the concept of risk pooling for public bodies as a risk management tool.

Ron Smith distributed comments received from members of the Kansas Bar Association on provisions of H.B. 2023, (see Attachment IV). He also included a review of three issues raised by the League of Kansas Municipalities on Thursday, February 5, concerning the placement or nonplacement of traffic control devices; requiring a written notice of a claim as a prerequisite to bringing a Kansas Tort Claims Act lawsuit; and statutory reversal of the Fudge decision.

Jim Kaup presented the Committee with a memorandum from E. A. Mosher, Executive Director, League of Kansas Municipalities, (see Attachment V) in which Mr. Mosher requested subsection (c) be deleted and subsection (b) be left in its existing statutory form. The League will request a separate bill be introduced in the Senate which will address joint public entities which provide risk management and loss coverage services, through a

governmentally created, owned and managed public agency.

Mr. Kaup distributed amendments to H.B. 2023 that were proposed at the hearing on this bill on February 5, 1987. In Section 2, expanding personal immunity for municipal officers; in Section 3, broadening the response of the Interim Committee to the Fudge v. Kansas City decision; and in Section 8, prohibiting juries from being informed a municipality can pay punitive damage awards against employees, (see Attachment VI).

Jerry Palmer stated the Kansas Trial Lawyers Association does not oppose new Section 2 or the community service work provision. They helped with the amendments and feel the amendments will have some impact. They oppose the Fudge amendment starting on line 78. They oppose the words "degree of discretion" in line 85. He also stated they are opposed to the structured settlement amendment on page 9. In regard to proposals that have been made by the League of Kansas Municipalities, he said they were opposed to amendments concerning claims procedures and punitive damages.

Larry Magill, Jr. offered an amendment concerning the tort claims $500,000 cap. He suggested amending the Tort Claims Act to state that public entities must affirmatively waive the cap in advance of a claim, (see Attachment VII). He had another amendment he did not recommend which would have addressed the section exempting public entity group self-insurance pools from the insurance laws and regulations since this provision is being withdrawn from the bill.

There being no other conferees, the hearing on H.B. 2023 was closed.

The Chairman announced the Committee would hear H.B. 2040 at a later date.

Hearing on H.B. 2025-Punitive damage awards in civil actions, Proposal No. 29

David Litwin suggested there were some actions that could be taken to assure that punitive damages are awarded only where they are called for and in appropriate amounts. He listed bifurcation, require a higher standard of proof than "preponderance of the evidence, establish standards to guide the determination of the amount of damages in the second phase of the trial, establish some kind of objective limit on the amount of damages that can be imposed and award a substantial part of punitive damages to the state. (see Attachment VIII).

William Sneed testified in support of H.B. 2025. The Kansas Association of Defense Counsel has long been a proponent of reform relative to punitive damages. He encouraged the Committee review whether or not wanton conduct, as defined in PIK, should be utilized for punitive damages, (see Attachment IX).

William R. Sampson did not appear but his testimony was distributed to the Committee, (see Attachment X). A proposal to reform the law of punitive damages in the state of Kansas was attached to his testimony.

Ron Smith testified in support of the bill as drafted. However, he submitted amendments he believed strengthened the bill. One amendment covered the exception for medical malpractice liability actions in Section 1. The other amendment replaced subsection (d)(1)(2) on page 2, (see Attachment XI).

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,

room 313-S, Statehouse, at 3:30 ~~a.m.~~/p.m. on February 9, 1987.

Prepared testimony was received from Harriett Lange, Executive Director, Kansas Association of Broadcasters. Ms. Lange did not appear. In her testimony she urged the Committee to consider placing a cap on punitive damages that can be awarded, (see Attachment XII).

The hearing on H.B. 2025 was closed.

The Chairman announced the hearing on H.B. 2134 will be rescheduled.

The minutes of January 26, 27 and 28th were approved.

The meeting was adjourned at 5:20 p.m.

The next meeting will be Wednesday, February 11, 1987, at 3:30 p.m. in room 313-S.

GUEST REGISTER

DATE Feb 9, 1987

HOUSE JUDICIARY

NAME	ORGANIZATION	ADDRESS
Kay Bellcamp	Ks Supreme Court - Office of Judicial Admin	Ks. Judicial Center
Jim Robertson	SRS	2700 W. 6th Topeka
Ron Smith	Ks Bar Assoc	Topeka
Chip Wheelen	McCall & Assoc.	Topeka
Bob Bradley	KS Assoc. of Counties	Topeka
Larry Magill	Indep. Ins. Agents of Ks.	"
Jim Clark	Ks Co & DA's Assoc	Topeka
George Barbee	Ks. Consulting Engrs	Topeka
Lori Callahan	am. ins. assoc.	Topeka
Richard Harmon	KS Property/Casualty Assoc	Topeka
Scott Palmer	K.T.L.A.	Topeka
Bob Corkins	K T L A	Topeka
Richard Mason	KTCA	"
Phil Davidson	KTLA	"
Tim Boyd	KADC	Olathe
Bill Sneed	KADC	Topeka
Mary Sobolewski	Citizen - parent	Topeka
Mike Reecht	AT&T	Topeka
John W Smith	Dept of Revenue	Topeka
Jim Kaup	League of Municipalities	Topeka
Harold Lange	Ks. Assn. of Broadcasters	Topeka
Leroy Burnett	Co Com. Stevens Co	Hugoton
Ted Frey	KSD	Topeka

Kansas Association of Counties

Serving Kansas Counties

212 S.W. SEVENTH STREET, TOPEKA, KANSAS 66603 PHONE 913 233-2271

February 5, 1987

To: Representative Bob Wunch, Chairman
Members House Judiciary Committee

From: Bev Bradley, Legislative Coordinator
Kansas Association of Counties

Re: HB-2023

Thank you Mr. Chairman and members of the committee, I am Bev Bradley, Legislative Coordinator for the Kansas Association of Counties. I come before you today in support of HB 2023.

We appreciate the addition of language in portion(s) including "the performance of community service work." This has long been a concern for many county officials and is included in our legislative policy statement.

We do have another concern. The one for sale of chemicals for treatment of noxious needs. Attorney Generals' Opinion No. 86-173 which was requested by the Saline County Counselor states "there is no exception under Kansas Tort Claims Act which would exempt a county from liability for claims arising from the sale of chemicals as required by the noxious weed laws.

A copy of the summary from the Kansas Register is enclosed which also sites the statutes.

We would like to see an amendment which would include any action of a local governing body required by statute. In other words if the obligation is imposed by statute to sell chemicals for the treatment of noxious weeds, then some protection should also be afforded.

Mr. Steve Wiechman, Counselor for Kansas Association of Counties is also here today to offer further explanation if you would like. Thank you very much.

Attachment I
House Judiciary 2/9/87

State of Kansas

ATTORNEY GENERAL

Opinion No. 86-170

State Departments; Public Officers and Employees—Department of Administration—Competitive Bids. Representative William W. Bunten, 54th District, Topeka, December 15, 1986.

State contracts subject to K.S.A. 75-3739 may not be awarded on the basis of a proposal. For sales or purchases with an estimated value of over $2,000, the use of competitive sealed bids is specifically required. Contracts and purchases which have an estimated value of $2,000 or less may be made either upon competitive bidding or in the open market. In order to evaluate the actual cost of a product, bid specifications may include criteria such as cost, compatibility/capabilities, growth and contractor support to the extent that these factors represent demonstrable future costs to the state. As this is not mandatory, the fixing of bids in such a manner is to be left to the sound discretion of the director of purchases. Cited herein: K.S.A. 75-3739; K.S.A. 75-3740, as amended by L. 1986, ch. 328, § 1; K.S.A. 75-3741b. JLM

Opinion No. 86-171

Cities and Municipalities—Cemeteries; Cities, Townships and Corporations—Acquisition of Property. Senator Don Montgomery, 21st District, Sabetha, December 15, 1986.

A township is given authority of condemnation for the purpose of acquiring cemetery property. However, condemnation is not a condition precedent to purchasing additional land. Cited herein: K.S.A. 12-1401; K.S.A. 80-101. JLM

Opinion No. 86-172

Automobiles and Other Vehicles—Uniform Act Regulating Traffic; Rules of the Road; Serious Traffic Offenses—Restrictions on Plea Bargaining in Prosecutions for Driving Under the Influence of Alcohol or Drugs. Timothy J. Chambers, Reno County Attorney, Hutchinson, December 15, 1986.

K.S.A. 1985 Supp. 8-1567(o) provides that no plea bargaining agreement may be entered into "for the purpose of permitting a person charged with a violation of" K.S.A. 8-1567 and amendments, or any parallel city ordinance, "to avoid the mandatory penalties established by [that] section." A plea negotiation agreement to reduce the charge from driving under the influence (K.S.A. 1985 Supp. 8-1567) to reckless driving (K.S.A. 1985 Supp. 8-1566) in exchange for a guilty plea would be in violation of this section if the purpose of the agreement is to allow avoidance of the mandatory penalties established for a DUI conviction. The conviction for a violation of K.S.A. 1985 Supp. 8-1567 is itself part of the mandatory penalties imposed under that section because of the effect such a conviction has on enhancing the sentence of a subsequent DUI conviction. Cited herein: K.S.A. 1985 Supp. 8-1566; 8-1567; 12-4415, as amended by L. 1986, ch. 185, § 1; 22-2908, as amended by L. 1986, ch. 185, § 2. JLM

Opinion No. 86-173

Agriculture—Weeds—Noxious Weeds; Control and Eradication; Duty of Counties to Provide or Sell Chemicals; Liability for Damages.

Procedure Civil—Actions Relating to Commercial Activity; Kansas Product Liability Act—Liability of Counties for Providing or Selling Certain Chemicals.

State Departments; Public Officers and Employees—Kansas Tort Claims Act—Liability of Counties for Providing or Selling Certain Chemicals. Constance M. Achterberg, Saline County Counselor, Salina, December 17, 1986.

There is no exception under the Kansas Tort Claims Act which would exempt a county from liability for claims arising from the sale of chemicals as required by the noxious weeds laws. Cited herein: K.S.A. 2-1314; 2-1322; 2-1323; 60-3301; 60-3302; 60-3305; 60-3306; 75-6101; 75-6103; 75-6104; 75-6105. RLN

ROBERT T. STEPHAN
Attorney General

Doc. No. 004903

State of Kansas

DEPARTMENT OF ECONOMIC DEVELOPMENT

NOTICE OF HEARING ON THE 1987 KANSAS SMALL CITIES CDBG PROGRAM

A public hearing on the proposed final statement of community development objectives and use of funds for the Kansas Small Cities Community Development Block Grant (CDBG) Program for 1987 will be held at 10 a.m. Thursday, January 8, in Room 514-S, State Capitol, Topeka.

Copies of the following proposed final statement are available during working hours at the KDOC Small Cities CDBG Program offices, 400 W. 8th, Suite 500, Topeka 66603. Written comments on the proposed final statement will be received for consideration in preparation of the final statement by the Kansas Small Cities CDBG Program through January 8.

Proposed Final Statement of Community Development Objectives and Projected Use of Funds
Kansas Small Cities Community Development Block Grant Program 1987

I. Purpose

This proposed final statement of community development objectives and projected use of funds concerns the 1987 distribution of approximately $14 million in Community Development Block Grant (CDBG) funds from the U.S. Department of Housing and Urban-Rural Recovery Act of 1984 (amended 1974 HUD Act). As the designated state administering

Article 13.—WEEDS

Cross References to Related Sections:
Agricultural chemical act, see ch. 2, art. 22.

2-1301.
History: R.S. 1923, § 2-1301; Repealed, L. 1937, ch. 1, § 12; Feb. 26.

Source or prior law:
L. 1895, ch. 359, § 1.

2-1302 to 2-1305.
History: L. 1895, ch. 359, §§ 2 to 5; R.S. 1923, §§ 2-1302 to 2-1305; Repealed, L. 1937, ch. 1, § 12; Feb. 26.

2-1306.
History: R.S. 1923, § 2-1306; Repealed, L. 1937, ch. 1, § 12; Feb. 26.

Source or prior law:
L. 1895, ch. 359, § 6; L. 1913, ch. 257, § 1.

2-1307 to 2-1310.
History: L. 1895, ch. 359, §§ 7 to 10; R.S. 1923, §§ 2-1307 to 2-1310; Repealed, L. 1937, ch. 1, § 12; Feb. 26.

2-1311 to 2-1313.
History: L. 1931, ch. 5, §§ 1 to 3; Repealed, L. 1937, ch. 1, § 12; Feb. 26.

2-1314. Noxious weeds; control and eradication; listing. It shall be the duty of persons, associations of persons, the secretary of transportation, the boards of county commissioners, the township boards, school boards, drainage boards, the governing body of incorporated cities, railroad companies and other transportation companies or corporations or their authorized agents and those supervising state-owned lands to control the spread of and to eradicate all weeds declared by legislative action to be noxious on all lands owned or supervised by them and to use such methods for that purpose and at such times as are approved and adopted by the state board of agriculture. The term noxious weeds shall mean kudzu *(Pueraria lobata)*, field bindweed *(Convolvulus arvensis)*, Russian knapweed *(Centaurea picris)*, hoary cress *(Lepidium draba)*, Canada thistle *(Cirsium arvense)*, quackgrass *(Agropyron repens)*, leafy spurge *(Euphorbia esula)*, burragweed *(Franseria tomentosa and discolor)*, pignut *(Hoffmannseggia densiflora)*, musk (nodding) thistle *(Carduus nutans L.)*, and Johnson grass *(Sorghum halepense)*.

History: L. 1937, ch. 1, § 1; L. 1945, ch. 3, § 1; L. 1961, ch. 4, § 1; L. 1963, ch. 6, § 1; L. 1972, ch. 4, § 1; L. 1975, ch. 427, § 1; L. 1981, ch. 8, § 1; July 1.

Research and Practice Aids:
Agriculture⇐8.
C.J.S. Agriculture §§ 24 et seq.
Am. Jur. 2d Agriculture § 45.

2-1314a. Same; weeds not declared noxious. County commissioners, township boards and city officials shall have the power to cooperate with landowners in their respective jurisdictions in the treatment and eradication of weeds, which have not been declared noxious by legislative action. Chemicals and labor used in the treatment of weeds as authorized by this section shall be supplied by the county, township or city to the landowner at actual cost and equipment and machinery so used shall be charged at the actual cost of operation.

History: L. 1945, ch. 3, § 2; L. 1947, ch. 7, § 1; April 8.

Cross References to Related Sections:
Agricultural chemical act, see ch. 2, art. 22.

2-1314b. Same; declaration of multiflora rose as noxious authorized. (a) The board of county commissioners of any county may declare the multiflora rose *(Rosa multiflora)* to be a noxious weed within the boundaries of such county. In such event, all of the provisions of article 13 of chapter 2 of the Kansas Statutes Annotated which pertain to the control and eradication of noxious weeds shall apply to the control and eradication of the multiflora rose within any such county.

(b) If the board of county commissioners of any county does not declare the multiflora rose to be a noxious weed within the boundaries of such county, a petition requesting the secretary of the state board of agriculture to declare the multiflora rose to be a noxious weed within the boundaries of such county, signed by not less than 5% of the qualified electors of the county, may be filed with the county election officer of the county. Upon receipt of any such petition, the county election officer shall certify the sufficiency of the petition and submit it to the secretary of the state board of agriculture. Thereupon, the secretary of the state board of agriculture may declare the multiflora rose to be a noxious weed within the boundaries of such county. In such event, all of the provisions of article 13 of chapter 2

county commissioners said person shall within thirty days file a written notice of appeal with the clerk of the district court of the county and thereupon an action shall be docketed in the district court and be tried the same as other actions. Upon the final determination of any change in the account, if any, the county or city clerk shall correct the records in his or her office in accordance therewith.

History: L. 1937, ch. 1, § 8; Feb. 26.

Research and Practice Aids:

Weeds, eradication, appeal, Vernon's Kansas Forms §§ 91-93.

2-1322. Purchase and use of equipment and chemicals; sale of chemicals, price; charges for use of machinery and equipment; record of purchases, sales and charges. The board of county commissioners, or the governing body of incorporated cities, cooperating with the secretary of the state board of agriculture, shall purchase or provide for needed and necessary equipment and necessary chemical material for the control and eradication of noxious weeds. The board of county commissioners of any county or the governing body of any city may use any equipment or materials purchased as provided for in this section, upon the highways, streets and alleys, for the treatment and eradication of weeds which have not been declared noxious by legislative action. The board of county commissioners shall sell chemical material to the landowners in their jurisdiction at a price fixed by the board of county commissioners which shall be in an amount equal to not less than fifty percent (50%) nor more than seventy-five percent (75%) of the total cost incurred by the county in purchasing, storing and handling such chemical materials, and may make such charge for the use of machines or other equipment and operators as may be deemed by them sufficient to cover the actual cost of operation. However, once the tax levying body of a county, city or township has authorized the maximum tax levy prescribed by K.S.A. 2-1318, the board of county commissioners may collect from the landowners in their jurisdiction an amount equal to seventy-five percent (75%) but not more than one hundred percent (100%) of the total cost incurred by the county in purchasing, storing and handling of chemical materials used in the control and eradication of noxious weeds. Whenever official methods of eradication adopted by the state board of agriculture are not used in applying the chemical material purchased, the board of county commissioners may collect the remaining portion of the total cost thereof from the landowner. The board of county commissioners, township boards, and the governing body of cities shall keep a record showing purchases of material and equipment for control and eradication of noxious weeds. The board of county commissioners and the governing body of cities shall also keep a complete itemized record showing sales for cash or charge sales of material and shall maintain a record of charges and receipts for use of equipment owned by each county or city on public and private land. Such records shall be open to inspection by citizens of Kansas at all times.

History: L. 1937, ch. 1, § 9; L. 1945, ch. 3, § 5; L. 1957, ch. 7, § 7; L. 1976, ch. 6, § 2; L. 1979, ch. 5, § 2; July 1.

Cross References to Related Sections:

Agricultural chemical act, see ch. 2, art. 22.

2-1323. Penalty for violations. Any person, association of persons, corporation, county or city or other official who shall violate or fail to comply with any of the provisions of this act and acts amendatory thereof or supplemental thereto shall be guilty of a misdemeanor and shall be punished upon conviction thereof by a fine of not less than fifty dollars ($50) nor more than five hundred dollars ($500) for each count.

History: L. 1937, ch. 1, § 10; L. 1957, ch. 7, § 8; June 29.

2-1324. Invalidity of part. Should it be decided upon final judicial hearing that any section or clause of this act is invalid such decision shall only apply to the section or clause so found to be invalid and shall not invalidate the entire act.

History: L. 1937, ch. 1, § 11; Feb. 26.

Research and Practice Aids:

Statutes⇐64(2).
C.J.S. Statutes §§ 96 et seq.

2-1325. Unlawful acts; disposal of screenings and materials. It shall be unlawful for any person, company or corporation to sell, offer for sale, barter, give away or otherwise dispose of any screening or offal material containing seeds of weeds mentioned in K.S.A. 2-1314 unless such screen-

(t) any claim for damages arising from the performance of manditory act imposed by statute other than those damages arising from actual fraud or actual malice.

KLPG
Kansas Legislative Policy Group
301 Capitol Tower, 400 West Eighth, Topeka, Kansas 66603, 913-233-2227
TIMOTHY N. HAGEMANN, Executive Director

February 5, 1987
TESTIMONY
to
HOUSE JUDICIARY COMMITTEE
HB 2023

Mr. Chairman and members of the Committee, I am Chip Wheelen of Pete McGill and Associates. We represent the Kansas Legislative Policy Group which is an organization of County Commissioners from rural areas of the State. We appear today in support of the provisions of House Bill 2023.

As you know, this bill is the product of a great deal of discussion and deliberation during the 1986 interim. We appreciate the endeavors of the Special Committee on Tort Reform and Liability Insurance and extend our thanks to those of you who served as members. You may also be aware that 1987 HB 2023 is somewhat similar to 1986 HB 3114 which passed the House by a vote of 91 - 34.

For those reasons, I will not dwell upon the merits of each proposed amendment to the Tort Claims Act. Instead, we wish to communicate that our Commissioners are very concerned regarding the availability and cost of commercial liability insurance.

Attachment II
House Judiciary 2/.9/87

Because of those concerns, some Boards of County Commissioners are considering organization of risk pooling arrangements in accordance with the Interlocal Cooperation Act. We believe that enactment of HB 2023 would clarify the intent of the 1979 Legislature and would facilitate the formation of interlocal risk management cooperatives. In addition, passage of HB 2023 might improve the availability of commercial liability coverage for local units of government which select that option.

For those reasons, we respectfully request that you recommend HB 2023 for passage. Thank you for your time and consideration.

KANSAS ASSOCIATION OF SCHOOL BOARDS

5401 S. W. 7th Avenue Topeka, Kansas 66606
913-273-3600

TESTIMONY ON HOUSE BILL NO. 2023
BEFORE THE HOUSE JUDICIARY COMMITTEE

BY

PATRICIA E. BAKER, SENIOR LEGAL COUNSEL
Kansas Association of School Boards

February 5, 1987

Mr. Chairman, members of the committee, I appreciate the opportunity to appear before you on behalf of the members of the Kansas Association of School Boards. I appear in favor of the passage of House Bill 2023, which limits the liability of individual members of governing bodies without limiting the right of those aggrieved to recover damages.

Members of our 304 boards of education serve without pay and essentially as volunteers in support of public education. They are charged by the constitution and the laws of the State of Kansas to insure the availability and delivery of education to our young. Serving on a school board has become a time consuming job that requires a great deal of knowledge and information. We wish to continue to have the best possible candidates run and be elected to serve this important function.

This committee, as well as many others, have heard the testimonies over the last few years regarding the increase in numbers and types of lawsuits filed against public bodies and the individual office holders. House Bill 2023 would prohibit a finding of individual liability against members of the governing body, while protecting a plaintiff's rights under the Kansas Tort Claims Act to recover damages from the governmental entity.

Attachment III
House Judiciary 2/9 /87

Just as individual legislators are not held liable for votes on measures before this body, we believe that members of local governing boards should not be subjected to individual liability unless their actions are willful and malicious.

A proposal similar to House Bill 2023 was passed by both houses of the legislature last year and sent to the Governor. The bill was vetoed because a second subject matter was amended to the bill in the waning hours of the legislature. We ask that you respond to the needs of local government, especially public education governing bodies, and again recommend House Bill 2023 favorably for passage.

Session of 1987

HOUSE BILL No. 2023

By Special Committee on Tort Reform and Liability Insurance

Re Proposal No. 29

12-15

AN ACT concerning governmental entities and their employees; relating to liability for certain acts and omissions; amending K.S.A. 75-6102, 75-6104, 75-6105, 75-6108 and 75-6112 and K.S.A. 1986 Supp. 75-6111 and 75-6116 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 75-6102 is hereby amended to read as follows: 75-6102. As used in K.S.A. 75-6101 through 75-6118, and amendments thereto, unless the context clearly requires otherwise:

(a) "State" means the state of Kansas and any department or branch of state government, or any agency, authority, institution or other instrumentality thereof.

(b) "Municipality" means any county, township, city, school district or other political or taxing subdivision of the state, or any agency, authority, institution or other instrumentality thereof.

(c) "Governmental entity" means state or municipality.

(d) "Employee" means any officer, employee, servant or member of a board, commission, committee, division, department, branch or council of a governmental entity, including elected or appointed officials and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation. "Employee" does not include an independent contractor under contract with a governmental entity. "Employee" does include former employees for acts and omissions within the scope of their employment during their former employment with the governmental entity.

(e) "Community service work" means public or community

Note that the definition of community service work includes persons placed on diversion. This can be for DUI, or a variety of other lesser misdemeanors or felonies.

Attachment IV
House Judiciary 2/ 9/87

service performed by a person (1) as a result of a contract of diversion entered into by such person as authorized by law, (2) pursuant to the assignment of such person by a court to a community corrections program, (3) as a result of suspension of sentence or as a condition of probation pursuant to court order, (4) in lieu of a fine imposed by court order or (5) as a condition of placement ordered by a court pursuant to K.S.A. 38-1663 and amendments thereto.

New Sec. 2. (a) A member of a governing body of a municipality who is acting within the scope of such member's office shall not be liable for damages caused by the negligent or wrongful act or omission of such member or governing body.

(b) Nothing in this section shall be construed to affect the liability of a municipality for damages caused by the negligent or wrongful act or omission of its governing body or a member thereof and the negligence or wrongful act or omission of a member of a governing body, when acting as such, shall be imputed to the municipality for the purpose of apportioning liability for damages to a third party pursuant to K.S.A. 60-258a and amendments thereto.

(c) This section shall be part of and supplemental to the Kansas tort claims act.

Sec. 3. K.S.A. 75-6104 is hereby amended to read as follows: 75-6104. A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:

(a) Legislative functions, including, but not limited to, the adoption or failure to adopt any statute, regulation, ordinance or resolution;

(b) judicial function;

(c) enforcement of or failure to enforce a law, whether valid or invalid, including, but not limited to, any statute, regulation, ordinance or resolution;

(d) *adoption or enforcement of, or failure to adopt or enforce, any written personnel policy which protects persons' health or safety unless a duty of care, independent of such policy, is owed to the specific individual injured;*

KBA fully supports Section 2.

Obviously, the most significant amendment is that contained in Section 3(d), intending to overturn Fudge. When I had previously written to you, I expressed a general sentiment that overall, the Kansas Tort Claims Act seemed to be balanced and effective in terms of protecting the municipal treasury consistent with a governmental entity's civil responsibility towards its citizens. To some extent at least that was due to a claimant's ability to seek redress of grievances when government transgressed on the rights of the governed by exceeding or violating its own personnel policies. For example, virtually every fire department trains its personnel according to guidelines issued by the National Fire Protection Association. The NFPA issues a series of "red books" that represent the state of the art in fire science, and clearly benefit society as a whole. The red books cover the entire gamut of firefighting, including personnel, equipment, and techniques and procedures. If the amendment was adopted, there would be no incentive to comply with the provisions of the NFPA. There are innumerable examples of local authorities adopting standards promulgated by a national organization. For example, municipal water departments also comply with procedures and recommendations promulgated by the American Water Works Association, etc. These national standards are established for the purpose of promoting the safe and efficient operation of a municipal activity. I would have to surmise that municipalities found that they were not effective as national associations in promulgating procedures and standards.

(e) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion be abused *and regardless of the degree of discretion involved*;

~~(e)~~ *(f)* the assessment or collection of taxes or special assessments;

~~(f)~~ *(g)* any claim by an employee of a governmental entity arising from the tortious conduct of another employee of the same governmental entity, if such claim is (1) compensible pursuant to the Kansas workmen's compensation act or (2) not compensible pursuant to the Kansas workmen's compensation act because the injured employee was a firemen's relief association member who was exempt from such act pursuant to K.S.A. 44-505d at the time the claim arose;

~~(g)~~ *(h)* the malfunction, destruction or unauthorized removal of any traffic or road sign, signal or warning device unless it is not corrected by the governmental entity responsible within a reasonable time after actual or constructive notice of such malfunction, destruction or removal. Nothing herein shall give rise to liability arising from the act or omission of any governmental entity in placing or removing any of the above signs, signals or warning devices when such placement or removal is the result of a discretionary act of the governmental entity;

~~(h)~~ *(i)* any claim which is limited or barred by any other law or which is for injuries or property damage against an officer, employee or agent where the individual is immune from suit or damages;

~~(i)~~ *(j)* any claim based upon emergency preparedness activities, except that governmental entities shall be liable for claims to the extent provided in article 9 of chapter 48 of the Kansas Statutes Annotated;

~~(j)~~ *(k)* the failure to make an inspection, or making an inadequate or negligent inspection, of any property other than the property of the governmental entity, to determine whether the property complies with or violates any law or regulation or contains a hazard to public health or safety;

1. The "degree of discretion" amendment in subsection 3(e) does appear to be a distant cousin of the phrase "a little pregnant." I don't know for sure, but I think there may be a line of federal cases under the Federal Tort Claims Act which discusses the amount or nature of an employee's discretion.

Why should someone with discretion wide enough to perpetrate an outrageous violation of an individual's civil rights enjoy the same immunity held by an official who must carry out his or her job in a particular fashion?

~~(k)~~ *(l)* snow or ice conditions or other temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of the governmental entity;

~~(l)~~ *(m)* the plan or design for the construction of or an improvement to public property, either in its original construction or any improvement thereto, if the plan or design is approved in advance of the construction or improvement by the governing body of the governmental entity or some other body or employee exercising discretionary authority to give such approval and if the plan or design was prepared in conformity with the generally recognized and prevailing standards in existence at the time such plan or design was prepared;

~~(m)~~ *(n)* failure to provide, or the method of providing, police or fire protection;

~~(n)~~ *(o)* any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing such injury;

~~(o)~~ *(p)* the natural condition of any unimproved public property of the governmental entity;

~~(p)~~ *(q)* any claim for injuries resulting from the maintenance of an abandoned cemetery, title to which has vested in a governmental entity pursuant to K.S.A. 17-1366 through 17-1368, and amendments thereto, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing the injury; ~~or~~

~~(q)~~ *(r)* the existence, in any condition, of a minimum maintenance road, after being properly so declared and signed as provided in K.S.A. ~~1982 Supp.~~ 68-5,102 *and amendments thereto; or*

(s) any claim for damages arising from the performance of community service work other than damages arising from the operation of a motor vehicle.

The enumeration of exceptions to liability in this section shall not be construed to be exclusive nor as legislative intent to waive

Is there a possibility that with this subsection (s), the municipalities will use persons placed into diversion or community service work to do what the regular employees can do, and if the persons on community service work are negligent, the city is immune under KTCA when if a regular employee of the city committed the same act, the city would not be immune?

Does "operation of a motor vehicle" (Line 153) mean when the community service worker is operating a municipality's vehicle, or someone else is operating the vehicle?

Example: Community service worker, a mechanic, is detailed to fix the brakes on a school bus as part of his community service work sentence probation. He is negligent. The following Monday, the bus is transporting children and is hit because the brakes fail. Is the USD immune? Would the USD be immune if a regular employed mechanic of the school district had negligently fixed the brakes?

mental entity has entered into a pooling arrangement or agreement pursuant to subsection (b)(2) and has waived, by ordinance or resolution of its governing body, the limitation on liability provided in K.S.A. 75-6105 and amendments thereto, in which case the limitation on liability shall be fixed at the amount specified in such ordinance or resolution.

(b) Pursuant to the interlocal cooperation act, municipalities may enter into interlocal agreements providing for:

(1) The purchase of insurance to provide for the defense of employees and for liability for claims pursuant to this act; or

(2) pooling arrangements or other agreements to share and pay expenditures for judgments, settlements, defense costs and other direct or indirect expenses incurred as a result of implementation of this act including, but not limited to, the establishment of special funds to pay such expenses. ~~With regard to establishing and maintaining such pooling arrangements or other agreements to share in expenditures incurred pursuant to this act, governmental entities and employees or agents thereof shall not be required to be licensed pursuant to the insurance laws of this state.~~

(c) Any pooling arrangement or other agreement authorized by subsection (b)(2) shall not be construed to be an insurance company or to be otherwise subject to the laws of this state regulating insurance or insurance companies.

Sec. 7. K.S.A. 75-6112 is hereby amended to read as follows: 75-6112. (a) Upon motion of a municipality against whom final judgment has been rendered for a claim within the scope of this act, the court in accordance with subsection (b) may include in such judgment a requirement that the judgment be paid in whole or in part by periodic payments. Periodic payments may be ordered paid over any period of time not exceeding ~~ten~~ *10* years. Any periodic payment upon becoming due and payable under the terms of the judgment shall constitute a separate judgment. Any judgment ordering any such payments shall specify the total amount awarded, the amount of each payment, the interval between payments and the number of payments to be paid under the judgment. Judgments paid pursuant to this section shall bear

Municipalites Claim:

I. KIRMA pooling is good. Expect 20% to 50% savings on premium.

II. "Therefore the very sharp increases in premiums charged by the insurers over the last two years is probably not caused by actual Kansas municipal loss experience, but rather by the overall poor loss ratios experienced by the insurance industry and perhaps by the poor loss experience by public entities in other states.

III. "Municipal insurance available is not as severe a problem in Kansas as it is in many other states. Only 15% of the respondents indicated difficulty in obtaining insurance during the most recent renewal period."

IV. "There were no wholesale policy cancellations during the time period surveyed. Most cancellations that did occur were for general liability and public official's liability coverage."

V. 60% of Kansas municipalities have never had claim filed against them. 72% have never paid on any claim.

Observations:

1. why the need to further restrict the Kansas Tort Claims Act, such as in Section 3(d).

2. New pooling arrangement -- getting Kansas municipalities away from national-based liability policies into a Kansas-only claims system (KIRMA) will dramatically help costs of insurance.

interest as provided in K.S.A. 16-204~~,~~ and amendments thereto. For good cause shown, the court may modify such judgment with respect to the amount of such payments and the number of payments to be made or the interval between payments, but the total amount of damages awarded by such judgment shall not be subject to modification in any event and periodic payments shall not be ordered paid over a period in excess of ~~ten (10) years~~ *10 years unless a structured settlement has been approved by the court upon a finding that it is in the best interests of the parties.*

(b) A court may order periodic payments only if the court finds that:

(1) Payment of the judgment is not totally covered by insurance coverage obtained therefor; and

(2) funds for the current budget year and other funds of the municipality which lawfully may be utilized to pay judgments are insufficient to finance both the adopted budget of expenditures for the year and the payment of that portion of the judgment not covered by insurance obtained therefor.

Sec. 8. K.S.A. 1986 Supp. 75-6116 is hereby amended to read as follows: 75-6116. (a) If an employee of a governmental entity is or could be subject to personal civil liability on account of a noncriminal act or omission which is within the scope of the employee's employment and which allegedly violates the civil rights laws of the United States or of the state of Kansas, the governmental entity:

(1) Shall provide for the defense of any civil action or proceeding which arises out of the act or omission and which is brought against the employee in the employee's official or individual capacity, or both, to the extent and under the conditions and limitations provided by K.S.A. 75-6108 and amendments thereto for the defense of actions and proceedings under the Kansas tort claims act*; and*

(2) may reimburse the employee attorney fees, costs and expenses incurred in defending a claim for punitive or exemplary damages in such action or proceeding to the extent and under the conditions and limitations provided by K.S.A. 75-6108 and amendments thereto for reimbursement of such fees, costs

1. Section 5 and section 8 would make it clear that a governmental entity may reimburse its employee for attorney fees, costs and expenses in the defense of a claim for punitive damages, both in civil rights cases and other cases. We think these changes would be helpful, since from a practical standpoint defense counsel cannot sort out and separate the defense as against punitive and non-punitive damage claims. Thus, the present practice here at least is to provide a defense against both types of claims.

and expenses incurred in defending a claim for punitive or exemplary damages under the Kansas tort claims act. ~~If the employee's act or omission giving rise to the action or proceeding was not the result of actual fraud or actual malice and the employee reasonably cooperates in good faith in defense of the action or proceeding;~~

(b) The governmental entity, subject to any procedural requirements imposed by statute, ordinance, resolution or written policy, shall pay or cause to be paid any judgment or settlement of the claim or suit, including any award of attorney fees, and all costs and fees incurred by the employee in defense thereof *if:*

(1) The governmental entity finds that the employee reasonably cooperated in good faith in the defense of the action or proceeding;

(2) the trier of fact finds that the action or proceeding arose out of an act or omission in the scope of the employee's employment; and

(3) the trier of fact does not find that the employee acted or failed to act because of actual fraud or actual malice.

(c) Notwithstanding any other provision of law to the contrary, a governmental entity may pay any part of a judgment taken against an employee of the governmental entity that is for punitive or exemplary damages for the violation of the civil rights laws of the United States if the governmental entity finds that:

(1) The action or proceeding arose out of an act or omission in the scope of the employee's employment;

(2) the employee reasonably cooperated in good faith in the defense of the claim; and

(3) the employee's act or omission was not the result of actual fraud or actual malice.

~~(b)~~ *(d)* A municipality may pay for the cost of providing defense, judgments and other costs involving actions for alleged civil rights violations in the same manner as that provided in the Kansas tort claims act.

~~(c)~~ *(e)* In actions described in subsection (a), a claim against the state or an employee of the state may be compromised or

2. I would bet the amendment on page 11, subsection (c), which allows a municipality to pay the punitive damages incurred by an employee who violates federal civil rights laws was prompted by Wichita police chief Lamunyon's fracas with Judge Thies. As you may recall, Lamunyon was determined in a bench trial to have been guilty of gross and wanton conduct. I believe punitive damages were assessed against the City of Wichita and Lamunyon personally, in the amount of $50,000 and $10,000 respectively. I believe the case is presently on appeal, but it would appear Lamunyon's or the City of Wichita's attorneys have asked their representatives on the Special Committee for this provision. I would like to hear the rationale for allowing a government entity to pay an employee's punitive damage liability for violating federal civil rights law and not for other tortious conduct. If my memory served me correctly, the Newport News case, decided by the United States Supreme Court in the mid-1970's has conclusively established that a municipality or governmental entity cannot be held liable for punitive damages. Notwithstanding this precedent, this statute permits municipalities to voluntarily incur vicarious liability of sorts for such damages. I would certainly ask the Kansas League of Municipalities, or their counsel, if a governmental entity has the right, absent this provision, to pay such damages if it chose to; and why, in light of Newport News would such legislation be desirable.

2. Section 8 would also allow a governmental entity to pay a judgment for punitive damages against an employee if the entity finds the employee was not acting fraudulently or maliciously. This doesn't make sense to us, since under Kansas law we think the jury would have to find either malice or fraud to assess punitive damages, and that the entity would not be in a position to reject this finding by the jury once made.

Subsection (c) (LINE 360) does not prevent the city from paying punitive damages in Section 8(b) (LINE 347).

Subsection (c) says that not withstanding any other provision of law -- including subsection 8(b)(3) -- the entity MAY pay any part of a judgment for punitive damages for civil rights laws. All the government entity has to do is make a finding (LINE 364) that the employee's act was not the result of actual fraud or malice (LINES 370-371). IT APPEARS TO ALLOW THE ENTITY TO MAKE THIS INDEPENDENT DECISION REGARDLESS WHETHER A TRIER OF FACT HAS RULED THE ACT WAS FRAUDULENT OR MALICIOUS.

(1) Placement or nonplacement of traffic control devices

The most recent case is Finkbiner v. Clay County, ___ Kan.___ (No. 58,390, 1986). Clay county, and a township, were sued for failing to place a sign showing that a county road was coming to a "T" intersection. On 4-3 decision, the majority held:

> "The manual on Uniform Traffic Control Devices provides the standards for placing signs. It is then a matter of professional judgment rather than governmental discretion as to whether a certain sign should be placed. (Syl. §1)"

The discretionary duty exception to liability under the KTCA could not be invoked. The effect of the proposed 1986 statute is to overrule Finkbiner and create a statutory exemption for liability for professional judgment by county engineers.

The has not been such statutory exemptions for liability in our state's history. The Finkbiner decision chronicles the common law development of this governmental duty regarding safe streets:

> "Historically, the common law placed a duty on governmental entities to keep their streets reasonably safe for use. [citations omitted] Before 1887, counties and townships, being quasi-corporate subdivisions of the state, were not liable in damages for any injuries sustained because of the negligence of their officers or employees in the construction or maintenance of highways. In 1887, the legislature, by enactment of L. 1887, ch. 237, saw fit to make counties and townships liable, under certain enumerated circumstances. KSA 68-301 (Weeks) (repealed, L. 1979, Ch. 186, §33) imposed liability for defects on county and township roads. [citations omitted]"

Finkbiner also cites some pre-Tort Claims Act litigation:

> "In Grantham v. City of Topeka, 196 Kan. 393 . . . (1966), this court held that the means selected by the state or city in control and regulation of traffic under the police power is a governmental function. We said a governmental entity is not liable for the negligent acts of its officers or employees in the performance of a governmental function; however, an exception is recognized with respect to defects in public streets on the theory they are necessary for public use at all times and under all circumstances."

The policy issue by this subsection of the bill appears to be whether Finkbiner, as continuation of the case law, is appropriately retaining the pre-Tort Claims Act exception for liability for negligent road repair announced in Grantham--especially in light of the 1979 Kansas Tort Claims Act.

The League of Municipalities would like to statutorily promote such negligence to full governmental immunity. The entities cannot argue that Finkbiner creates new liability (unless one argues the 1979 Tort Claims Act was supposed to have immunized Grantham-like claims); it appears to be reaffirmation of the court's Grantham policies.

(2) League Request: require written notice of claim as prerequisite to bringing KTCA lawsuit.

Response: bureaucratic in nature and impact, since by the League's admission it is not intended to affect statute of limitation. Very few cases arise without the city or county having some idea that it is "out there." If people are filing lawsuits without justification against cities, the city can use KSA 60-211 sanctions against them.

(3) ~~III.~~ Statutory Reversal of the Fudge Decision

The dilemma created by Fudge v. City of Kansas City, ___ Kan. ___ (no. 58,240, 1986) is found in the third syllabi:

> "Where police officers are subject to a specific mandatory set of guidelines to use with regard to handling intoxicated persons, the officers and the employing municipality are subject to liability under the Kansas Tort Claims Act for the failure to follow those guidelines."

Absent the written guidelines, the Court's first syllabi would control:

> "As a general rule, the duty of a law enforcement officer to preserve the peace is a duty owed to the public at large. Absent some special duty owed an individual, liability will not lie for damages. [emphasis added Citing Robertson v. Topeka, 231 Kan. at 363]"

The policy question is whether entities should be encouraged to provide written guidelines for their officers, or that encouragement be dampened by the threat of liability if the guideline is not followed. The interim committee has chosen to encourage promotion of guidelines by immunizing negligent disregard of those guidelines.

First, Fudge could be viewed as imposing on governmental units no more responsibility to follow appropriate guidelines than product liability defendants. For example, under KSA 60-3304(a), if a manufacturer complies with written governmental policies, guidelines, or safety standards the product is not deemed defective, and the burden is on the claimant to show a "reasonably prudent product seller" could and would have taken additional precautions." Further, if the injury causing aspect of a product was in compliance with "a mandatory government contract specification" then it is an absolute defense to liability. [60-3304(d)] In Fudge, the written guidelines were not followed, yet the governmental unit asks that it be immunized anyway.

A second policy question is whether a city should be immune for liability when employees violate the city's own written guidelines designed to protect the public from recognized dangers.

Third, such immunization of Fudge type decisions may create situations where claimants may use §1983 civil rights actions to a greater extent. There is already a growing body of federal case law where §1983 actions are used as the basis of liability in wrongful death cases and personal injury actions caused by local governments precisely because local state laws have immunized state liability. [See, generally, Steven Steinglass, Wrongful Death Actions and Section 1983, 60 Indiana Law Journal 4 (1985).]

The 1871 Civil Rights Acts were enacted primarily because state and local governments were causing wrongful or illegal personal and pecuniary injury to citizens. Does it make sense to hold a police officer who, against department policy, negligently fires his weapon into a crowd, killing a bystander, liable under federal §1983 actions, yet in state court if the same officer recklessly drives his police car to an accident--in violation of internal guidelines--and runs the plaintiff down--that governmental immunity should lie?

The elusive savings the governments acquire for state actions may be added to the federal court column. Also available in §1983 actions is attorney fees paid by the losing defendant.

> The legal outcome in the Fudge decision against the City of Kansas City could easily have been prevented if the police officers on the scene had simply followed their written guideline for handling a drunk. There would be no need to come to the legislature asking for "special immunity" for this outcome.

League of Kansas Municipalities

PUBLISHERS OF KANSAS GOVERNMENT JOURNAL/112 WEST SEVENTH ST., TOPEKA, KANSAS 66603/AREA 913-354-9565

TO: House Committee on Judiciary
SUBJECT: Certain Provisions of Section 6 of HB 2023--Tort Claims Act Revision
FROM: E.A. Mosher, Executive Director
DATE: February 9, 1987

For several reasons, we recommend the deletion of subsection (c) on page 8 of HB 2023, lines 287 to 290, which would specifically provide that public pooling of public liability risks is not private insurance. Further, we suggest that the sentence beginning on line 281 be restored, thus leaving subsection (b) in its present statutory form.

When subsection (c) was proposed this last summer by the League's Task Force on Tort Liability, it was believed to be a needed change to serve the public interest. However, as a result of a letter of January 28, 1987 from the Kansas Commissioner of Insurance, the League is proposing a separate bill dealing with joint public entities which provide risk management and loss coverage services, through a governmentally created, owned and managed public agency. A separate bill will be introduced in the Senate soon to deal with this question, including public agency pooling arrangements for various governmental risks, including risks under the Kansas Tort Claims Act and the federal Civil Rights Act.

Rather than jeopardize the passage of the important other provisions of HB 2023, we suggest subsection (c) be deleted and subsection (b) be left in its existing statutory form.

As an aside, we wish to inform you that there is a group of Kansas cities, with secretariat services provided by the League, which is attempting to form what is known as the Kansas Intergovernmental Risk Management Agency (KIRMA). KIRMA would be a legal, public entity, created under the Interlocal Cooperation Act. A considerable amount of time and effort has been spent to date in developing KIRMA. We are convinced that it will provide municipal loss coverages equal to or better than anything else available in the private market, that it can do so while providing substantial public savings, that it will be operated on a sound and safe basis as good or better as any private company under state regulation, and that the participating municipalities, through KIRMA, will be able to greatly improve their risk management and loss prevention activities, particularly in the liability area--an important objective of KIRMA.

Finally, we acknowledge that striking subsection (c) will not resolve the concerns of those who oppose public pooling of public risks. It does change the arena for debate on this issue to other bills, including HB 2109, sponsored by the Kansas Association of School Boards and the coming Senate bill sponsored by the League.

Attachment V
House Judiciary 2/9/87

League of Kansas Municipalities

PUBLISHERS OF KANSAS GOVERNMENT JOURNAL/112 WEST SEVENTH ST., TOPEKA, KANSAS 66603/AREA 913-354-9565

TO: Chairman Bob Wunsch and Members of the House Judiciary Committee
FROM: Jim Kaup, League Attorney
DATE: February 9, 1987
SUBJECT: Amendments to HB 2023--The Kansas Tort Claims Act

Attached is the proposed language for certain of the amendments to HB 2023 proposed by the League before this Committee on February 5. An explanation of the rationale for each amendment is also attached.

The attached covers:
(1) Section 2--expanded personal immunity for municipal officers.
(2) Section 3--broadening the response of the Interim Committee to the Fudge v. Kansas City decision.
(3) Section 8--prohibiting juries from being informed a municipality can pay punitive damage awards against employees.

The League's proposed amendment to the Tort Claims Act to clarify a claimant's duty to give written notice of claim to a municipality before filing a tort claims lawsuit will be set out at length in a separate memorandum to the Committee. That memo will be distributed later this week.

Finally, the League will request that the League-sponsored language relating to risk pooling (Section 6, lines 287:290 of HB 2023) be struck from the bill for reasons detailed in a separate document to be distributed to this Committee on this date.

Attachment VI
House Judiciary 2/9/87

New Sec. 2. (a) A member of a governing body of a municipality who is acting within the scope of such member's office shall not be liable for damages caused by the negligent or wrongful act or omission of such member or governing body.

~~(b)~~ (c) Nothing in this section shall be construed to affect the liability of a municipality for damages caused by the negligent or wrongful act or omission of its governing body or a member thereof and the negligence or wrongful act or omission of a member of a governing body, when acting as such, shall be imputed to the municipality for the purpose of apportioning liability for damages to a third party pursuant to K.S.A. 60-258a and amendments thereto.

~~(c)~~ (d) This section shall be part of and supplemental to the Kansas tort claims act.

(b) A member of any appointive board, commission, committee or council of a municipality, when holding such membership on a noncompensated basis, or for only nominal compensation, shall not be liable for damages caused by the negligent or wrongful act or omission of such member or board, commission, committee or council.

or of any appointive board, commission, committee or coun or a member thereof

or a member of a board, commission, committee or council

Purpose of Amendment to Section 2.

As drafted, Section 2 of HB 2023, at lines 53:66, creates blanket personal immunity from tort liability for governing body members of municipalities. This personal immunity would shield mayors, councilmembers, county commissioners, school board members, township trustees and other elected officials from tort claims judgments against their personal assets, but would retain liability for the "employing" municipality itself.

It is the League's belief that this grant of individual tort immunity will help allay the fears of citizens that by holding public office they run the risk of losing their personal assets. The League also believes that the sound public policy behind this exemption limited to governing body members should be extended to citizens who consent to appointment to serve on committees and other bodies, and who so serve on a nonsalaried basis.

Many municipalities, in any given year, will appoint numerous citizens to a multitude of boards such as planning commissions, boards of zoning appeals, occupational licensing boards, advisory committees for parks, recreation, industrial and economic development, street parking, health, public facilities, trees, etc. Usually such positions are uncompensated, or at best appointees receive only reimbursement for actual expenses, thus these appointees are in nearly every sense of the word "volunteers".

Because the same public policy arguments favoring tort immunity to encourage persons to run for elective office also apply to encouraging persons to accept appointive office the League proposes language which would extend the same immunity granted governing body members to cover appointees who serve on boards, commissions, committees or councils and who receive, at most, nominal compensation for such public service.

Sec. 3. K.S.A. 75-6104 is hereby amended to read as follows: 75-6104. A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:

(a) Legislative functions, including, but not limited to, the adoption or failure to adopt any statute, regulation, ordinance or resolution;

(b) judicial function;

(c) enforcement of or failure to enforce a law, whether valid or invalid, including, but not limited to, any statute, regulation, ordinance or resolution;

(d) *adoption or enforcement of, or failure to adopt or enforce, any* ~~*written personnel*~~ *policy which protects persons' health or safety unless a duty of care, independent of such policy, is owed to the specific individual injured;* [governing an employee's discharge of duties

Purpose of Amendment to Section 3.

New subsection (d) in Section 3 of HB 2023 is the Interim Committee's response to the Fudge v. City of Kansas City decision by the Kansas Supreme Court (239 Kan. 369, 720 P.2d 1093 (1986)). As drafted, HB 2023 would negate the impact of the Fudge decision in those cases where an employee was subject to a "written personnel policy" but did not otherwise owe a duty of care to the person injured.

The League's concern is that the phrase "written personnel policy" is so narrow in its meaning that it will not cover all, perhaps not even most, Fudge-type tort liability cases. "Personnel policies" for most municipalities mean rules relating to employee rights, privileges and obligations in the employer-employee relationship. For example, hiring, evaluation, disciplining and termination procedures, as well as salary schedules and employee benefits are common features of "personnel policies".

The language of HB 2023 arguably would not cover situations where the "policy" at issue--the policy which the employee failed to comply with--relates to job performance. This is the classic Fudge-type situation: the employee does not follow the standard operating procedure in a given situation (in Fudge, Kansas City Police Department General Order 79-44, placing alcohol incapacitated persons into protective custody) and subsequently there is a tort. The Kansas City police procedures manual may not be viewed by a court as a "personnel policy". It is a set of procedures for the employee to follow in the performance of his or her job. Compliance, on noncompliance, with that set of procedures is relevant to an assessment or evaluation of that employee's performance.

The League's amendment would expand the usefullness of subsection (d) to cover, we believe, all the fact situations brought into question by the Fudge decision. The amendment states that a policy that governs how an employee is to do his or her job cannot be the basis for the finding of a duty of care to an injured person. The duty of care, which must exist for tort liability to attach, must be found outside of the existence or nonexistence of a policy such as the one the police officers in Fudge were subject to.

AMENDMENT TO SEC. 8 OF HB 2023
(K.S.A. 1986 Supp. 75-6116)

(c) Notwithstanding any other provision of law to the contrary, a governmental entity may pay any part of a judgment taken against an employee of the governmental entity that is for punitive or exemplary damages for the violation of the civil rights laws of the United States if the governmental entity finds that:

(1) The action or proceeding arose out of an act or omission in the scope of the employee's employment;

(2) the employee reasonably cooperated in good faith in the defense of the claim; and

(3) the employee's act or omission was not the result of actual fraud or actual malice.

(e) ~~(b) (d)~~ A municipality may pay for the cost of providing defense, judgments and other costs involving actions for alleged civil rights violations in the same manner as that provided in the Kansas tort claims act.

~~(c) (e)~~ In actions described in subsection (a), a claim against the state or an employee of the state may be compromised or settled for and on behalf of the state or employee under the conditions and procedures provided by K.S.A. 75-6106 and amendments thereto for settlements of actions pursuant to the Kansas tort claims act.

~~(d) (f)~~ Nothing in this section or in the Kansas tort claims act shall be construed as a waiver by the state of Kansas of immunity from suit under the 11th amendment to the constitution of the United States.

(d) The possibility that a governmental entity may pay that part of a judgment that is for punitive or exemplary damages or attorney's fees or other costs related thereto shall not be disclosed in any trial in which it is alleged that an employee of that entity is liable for punitive or exemplary damages, and such disclosure shall be grounds for mistrial.

(f)

(g)

Purpose of Amendment to Section 8

Section 8 of HB 2023 would allow municipalities to pay all or part of a judgment for punitive damages awarded against an employee in a federal civil rights act lawsuit. The decision by a governing body to compensate the employee for such judgments would be discretionary (permissive) and could be made only after making certain findings regarding the employee's conduct and the action causing the damages.

The proposed amendment to HB 2023, the addition of new subsection (d), is technical in nature. The League believes that juries should not be advised that punitive damage awards can be paid by the defendant's employing-municipality. We fear such disclosure could lead to increased awarding of punitive damages. The League's amendment would prohibit the disclosure at trial of the employing-municipality's limited authority to pay for punitive damage awards. Violation of this prohibition would constitute grounds for mistrial.

Testimony on HB 2023
Before the House Judiciary Committee
February 5, 1987
By: Larry W. Magill, Jr., Executive Vice President
Independent Insurance Agents of Kansas

The Independent Insurance Agents of Kansas has 620 member agencies across the state employing approximately 2,500 people, the majority licensed as insurance agents. We are independent insurance agents because we are free to represent a number of different insurance companies offering our professional advice, the best product and the most competitive cost we can find in the open marketplace to our clients.

Our association would like to see two amendments made to HB 2023, both dealing with insurance aspects of the Tort Claims Act. The first amendment would be an improvement to the original language in the Tort Claims Act as it was passed in 1979, but is not critical.

The second amendment would be critical to our support of the bill.

The present wording of the Tort Claims Act beginning on line 262 of HB 2023 waives the $500,000 cap on a public entity's liability if they purchase insurance in excess of that limitation, in which case the limitation on liability shall be fixed at the amount for which insurance coverage has been purchased. Proposed new language in HB 2023 would change this automatic waiver, but only for pools. We would like to see the automatic waiver changed in all cases.

A great deal of confusion still exists among public entities and their advisers including their insurance agents over the $500,000 cap and what coverage limits a public entity should carry on liability insurance. This confusion arises because of the federal court cases

under the Federal Civil Rights Act, section 1983, involving alleged discrimination, wrongful discharge and other employee-related suits and because of the potential out-of-state exposure. Most public entities have an out-of-state exposure when they send people to meetings where the Kansas Tort Claims lid of $500,000 does not apply.

The other factor that affects this problem involves the way insurance is normally purchased for high or excess limits. In most cases, very high limits of coverage, limits in excess of $1 million, are provided under umbrella or excess liability policies that apply over and above virtually all or all of a public entity's insurance policies. This is normally the least expensive way to obtain the excess limits and avoid potential gaps in coverage for the public entity.

However, if the entity purchases an umbrella or excess liability policy over their automobile liability, general liability, public official and other liability coverages, they automatically waive their $500,000 cap under the Kansas Tort Claims Act for all claims, not just for those exposures where the cap does not apply, federal civil rights actions and out-of-state lawsuits.

In our view, this undermines the legislative intent of the $500,000 cap and the automatic waiver wording that is in present law. We do not believe the legislature considered the out-of-state exposure or federal civil rights actions and the way insurance policies are normally written when the original law was passed.

One possible solution would be to convince an excess insurer to attach a manuscript endorsement to their policy just providing the excess coverage where the Kansas $500,000 cap does not apply.

Unfortunately, the companies we have approached have so far refused to draft and use such an amendment. One carrier's underwriter told us that he thought it would be "illegal" under the Kansas Tort Claims Act. Other possible reasons might include that Kansas is a small market and the carriers do not want to take the time and effort to draft a special endorsement; or the carriers may be concerned that the courts would not interpret the wording of such a manuscript endorsement according to their intent. For whatever reason, we have not been successful in convincing either of the two insurance companies we have approached to draft such an endorsement. It is my understanding that the Chicago Insurance Company did provide excess coverage on this basis at one time, but they have since pulled out of the market in Kansas.

A second, and preferable approach in our view, would be to amend the Tort Claims Act to state that public entities must affirmatively waive the cap in advance of a claim. This approach has the advantages of:

1. Preserving the legislative intent regarding the cap and the assumption that public entities would not waive the cap unless they voluntarily wanted to carry more coverage than $500,000.

2. It would eliminate a lot of confusion about what to recommend to entities as far as limits of liability are concerned.

3. It would protect the public entity's experience in Kansas from large shock losses and preserve the integrity of the $500,000 cap while at the same time allowing them to protect themselves from huge awards under either federal civil rights or out-of-state actions.

4. It would <u>hopefully</u> convince umbrella insurers to charge less based on the limited exposure and <u>may</u> make excess coverage more readily available in the Kansas market. Umbrellas and excess liability are generally judgement rated and often involve non-admitted markets outside of the Insurance Department's control.

Attached to my testimony is a balloon copy of a proposed amendment that would accomplish this.

Our second more critical concern is with both the old language on lines 281-286 and the new wording on lines 287-290 which would completely exempt public entity group self-insurance pools from the insurance laws and regulations. Our association is not opposed to individual self-insurance or group self-insurance, but there is a major distinction between the two. Group self-insurance through pools is, in effect, the formation of an assessible mutual insurance company with all the inherent risks to the public of insolvency and claims handling abuses that insurance regulation is intended to prevent.

Insurance is simply a mechanism for spreading the losses of a few among many. In other words, premiums are collected from a large number of insureds with a homogeneous exposure to loss in order to pay for the losses experienced by a few members of that group. Whether the product is offered by an insurance company, pool, a captive insurance company or a risk retention group, the product is the same, insurance. And the company assuming the risk is an "insurance company".

It would be ill advised public policy to allow complete exemption from Insurance Department regulatory control for anyone wishing to form these assessible mutual insurance companies. The two basic goals of insurance regulation are insolvency protection for the public and protection of the consumer including injured third parties and workers.

It is not surprising that there is a great deal of interest today in pools or group self-insurance or risk retention groups or captive insurance companies or any of the other alternative insurance mechanisms. We have been through one of the worst insurance industry

cycles in history with seven years of "soft" pricing (steadily decreasing costs) followed by an insurance market "crash" in 1984 and drastically increased costs since then. We sympathize, as agents, with the buyers that have been hit with these dramatic cost increases.

But we feel that there should be one statute, perferably in the insurance code under Chapter 40, dealing with all types of Kansas public entity pools setting forth what lines of coverage may be group self-insured and what Insurance Department regulatory controls and safeguards will apply.

Present law is confusing. The Interlocal Cooperation Act, K.S.A. 12-2901 et seq., allows public entities to pool, but does not specifically exempt those pools, in our opinion, from insurance laws and regulations. The Kansas Tort Claims Act under K.S.A. 1986 supp. 75-6111 on lines 277-286 allows pooling for general liability and automobile liability exposures. The group self-insurance workers' compensation law, K.S.A. 44-581, allows all types of group workers' compensation self-insurance once the group meets very specific requirements. At least one group of eastern Kansas public entities has already formed a group workers' compensation self-insurance pool under this law and are considering the formation of a western Kansas pool at the present time.

The group workers' compensation statute clearly recognizes that these pools are essentially assessible mutual insurance companies and applies reasonable Insurance Department regulatory controls to them.

The final act that has a bearing on pooling is the Federal Risk Retention Act, especially after the 1986 amendments. That law allows a pool to operate countrywide for general liability only once it has been

approved in one state as an insurance company. The pool must, however, comply with minimum Insurance Department regulatory controls and reporting requirements in each state it chooses to operate in. The Kansas Insurance Department has requested HB 2129 to implement the authority it has been granted under the Federal Risk Retention Act.

The total exemption as contemplated in HB 2023 would allow anyone to form these assessible mutual insurance companies, not just the League of Kansas Municipalities or the Kansas Association of School Boards, who would, I'm sure, act responsibily. For example, I have attached to my testimony correspondence that has been sent to all public entities in the state by KPAIRS, the Kansas Public and Interlocal Risk Services group. To our knowledge, they have not filed with the Attorney General's office nor has the Insurance Department seen anything substantive from them and yet they have been soliciting public entities in Kansas for some time now.

The legislature only need look at the disastrous results of the Health Care Stabilization Fund to see how quickly claims can imperil the solvency of one of these group self-insurance programs. Basically, the Health Care Stabilization Fund is a state run insurance company and at one time had nearly $40 million of unfunded claims liabilities that caused many to question its insolvency. The problem has since improved, but there still remains approximately $20 million of claims reserves that must be funded. Public official liability with the potential federal civil rights actions represents just as severe a liability exposure as medical malpractice.

There is no guaranty fund protection for these groups, nor is it feasible. But that is a good reason for careful control of these

"insurance companies".

To give you an idea of what the present exemption wording accomplishes as well as what we would consider minimum regulatory control, the following 11 items should be considered in any bill allowing the formation of public entity pools:

1. Filing of annual certified audits by the pool.

2. Filing of rates and insurance coverage forms with the Kansas Insurance Department.

3. Filing of information on the specific or stop-loss excess insurance and aggregate excess insurance purchased by the pool subject to Department approval as to adequacy.

4. Subject the pools to the Unfair Trade Practices and Unfair Claims Practices Act in the current insurance code.

5. Require the pool to file their plan for providing loss control and safety engineering services with the Department. This is particularly important since these activities protect workers from obvious dangers as well as members of the general public.

6. Payment of the Kansas domestic premium tax of 1% or, at least, a conscious decision by the Kansas legislature to forego this income currently being received.

7. A requirement that the pools participate in the workers' compensation and auto assigned risk plans if these coverages are provided by the pools. This would provide a "level playing field" among all "insurance companies".

8. A requirement for an actuarial review of claims reserving practices which would be filed with the Insurance Department annually.

9. A requirement that the agent's licensing statutes apply since coverage will be sold by these pools.

10. A prohibition against withholding dividends or other refunds due a public entity that wishes to withdraw from the plan to avoid "locking in" public entities to the pool.

11. In lieu of the minimum capitalization requirement, at least some review by the Insurance Department of whether the plan has a large enough premium base coupled with

adequate exc s insurance to reasonably pect to assume the risk of loss by line of coverage.

We have not suggested joint and several liability for all members of a public entity pool, although that is required under the group workers' compensation self-insurance law. This means that if one of these "insurance companies" fails, the individual public entity's claims would fall back on them and could cause serious problems for small local governments with small tax bases. I have attached a copy of a newsletter item on South Tuscon, Arizona, which nearly declared bankruptcy because of an uninsured very substantial police professional liability claim. Ultimately, the plaintiffs compromised a judgement to avoid the mess that bankruptcy proceedings would have involved.

Public entities that are approached by these groups are going to assume Insurance Department approval and control of their activities. Taxpayers deserve some protection from potentially tremendous increases in local tax rates to pay for unfunded liabilities. We urge you to favorably consider our two amendments. Thank you.

entity, in its discretion, may provide requested defense for any of its employees who failed to make a request within the time prescribed by this subsection.

(f) Notwithstanding any other provision of law to the contrary, a governmental entity may reimburse an employee such reasonable attorney fees, costs and expenses as are necessarily incurred in defending a claim against the employee for punitive or exemplary damages if the governmental entity finds that:

(1) The action or proceeding arose out of an act or omission in the scope of the employee's employment; and

(2) the employee reasonably cooperated in good faith in the defense of the claim.

Sec. 6. K.S.A. 1986 Supp. 75-6111 is hereby amended to read as follows: 75-6111. (a) A governmental entity may obtain insurance to provide for (1) its defense, (2) for its liability for claims pursuant to this act, including liability for civil rights actions as provided in K.S.A. 75-6116 and amendments thereto, (3) the defense of its employees, and (4) for medical payment insurance when purchased in conjunction with insurance authorized by (1), (2) or (3) above.

Any insurance purchased under the provisions of this section may be purchased from any insurance company or association. In the case of municipalities any such insurance may be obtained by competitive bids or by negotiation. In the case of the state, any such insurance shall be purchased in the manner and subject to the limitations prescribed by K.S.A. 75-4114~~,~~ and amendments thereto, except as provided in K.S.A. 1986 Supp. 76-749 *and amendments thereto.* With regard to claims pursuant to the Kansas tort claims act, insurers of governmental entities may avail themselves of any defense that would be available to a governmental entity defending itself in an action within the scope of this act, except that the limitation on liability provided by subsection (a) of K.S.A. 75-6105 and amendments thereto shall not be applicable where ~~the contract of insurance provides for coverage in excess of such limitation in which case the limitation on liability shall be fixed at the amount for which insurance coverage has been purchased or, where~~ *the govern-*

AMENDMENT #1:

AMENDMENT #1 (CONT.):

mental entity has ~~entered into a pooling arrangement or agreement pursuant to subsection (b)(2) and has~~ waived, by ordinance or resolution of its governing body, the limitation on liability provided in K.S.A. 75-6105 and amendments thereto, in which case the limitation on liability shall be fixed at the amount specified in such ordinance or resolution.

(b) Pursuant to the interlocal cooperation act, municipalities may enter into interlocal agreements providing for:

(1) The purchase of insurance to provide for the defense of employees and for liability for claims pursuant to this act; or

(2) pooling arrangements or other agreements to share and pay expenditures for judgments, settlements, defense costs and other direct or indirect expenses incurred as a result of implementation of this act including, but not limited to, the establishment of special funds to pay such expenses. ~~With regard to establishing and maintaining such pooling arrangements or other agreements to share in expenditures incurred pursuant to this act, governmental entities and employees or agents thereof shall not be required to be licensed pursuant to the insurance laws of this state.~~

AMENDMENT #2:

~~(c) Any pooling arrangement or other agreement authorized by subsection (b)(2) shall not be construed to be an insurance company or to be otherwise subject to the laws of this state regulating insurance or insurance companies~~.

Sec. 7. K.S.A. 75-6112 is hereby amended to read as follows: 75-6112. (a) Upon motion of a municipality against whom final judgment has been rendered for a claim within the scope of this act, the court in accordance with subsection (b) may include in such judgment a requirement that the judgment be paid in whole or in part by periodic payments. Periodic payments may be ordered paid over any period of time not exceeding ~~ten~~ *10* years. Any periodic payment upon becoming due and payable under the terms of the judgment shall constitute a separate judgment. Any judgment ordering any such payments shall specify the total amount awarded, the amount of each payment, the interval between payments and the number of payments to be paid under the judgment. Judgments paid pursuant to this section shall bear

KANSAS PUBLIC AND INTERLOCAL RISK SERVICES

P. O. BOX 1364
TOPEKA, KANSAS 66601
(913) 357-8212

December 5, 1986

Dear Public Official:

The skyrocketing cost of liability insurance has hurt the budgets of all public bodies. Kansas public bodies have consistently had low loss ratios as a group. Kansas should not have to subsidize other states that do not have low loss ratios. Unfortunately when Kansas public bodies purchase traditional insurance, Kansas does subsidize other states.

Kansas Public and Interlocal Risk Services has been formed, under Kansas Statutes, to offer Kansas public bodies the opportunity to control insurance costs to a greater degree than ever before, and to do it for lower cost.

As you read the enclosed materials describing the program, consider returning the nomination form. I hope you will be interested in participating on the board.

Applications for coverage will be following shortly. Please fill them out as soon as possible so we can provide quotations, especially if you are a January renewal.

Merry Christmas and a Happy New Year.

James I. Seaman

James I. Seaman
Administrative Coordinator

KANSAS PUBLIC AND INTERLOCAL RISK SERVICES

FACT SHEET

Q. Who owns or controls KPAIRS?

A. KPAIRS is owned by the cities, counties and schools that are members. It is controlled by a Board of up to seven (7) persons who are nominated by cities, counties and schools in Kansas. It is a local government risk pool established by Intergovernmental Contracts under KSA 75-6111.

Q. Most of the insurance industry is switching to "claims made" coverage. What type of coverage is offered by KPAIRS?

A. KPAIRS will offer "occurrence" coverage, and in addition will offer coverage for civil rights and pollution. Further, all board members, commissions, employees, and teachers of the member are covered.

Q. Will the money held in reserve stay in Kansas, and what happens to the interest?

A. The money held in reserve for KPAIRS will be kept in a Kansas bank and all the interest belongs to KPAIRS and its members.

Q. Some insurance agents are helpful at the local level. May local agents participate?

A. A city, county or school may choose to work with a local insurance agent or work directly with KPAIRS.

Q. Who will service any of the claims a member might have?

A. It is anticipated that the board will contract with American Risk Pooling Consultants, Inc., who, in conjunction with Constitution State Service Company (a wholly-owned subsidiary of The Travelers) will handle all claims. Local claims adjusters will be used, as with any insurance company.

Q. Who will be reviewing the amounts set for claims reserves and the overall financial condition of KPAIRS?

A. A major actuarial firm will be contracted with to serve as actuaries for the Pool and the national firm of Peat, Marwick, Mitchell & Co. will conduct the annual audit and prepare the annual financial statement.

Q. How can we participate in KPAIRS?

A. First, you may be interested in serving on the board of directors. If so, please fill out the nomination form and return it to KPAIRS. Second, application forms will be mailed soon; return the form to KPAIRS for a quotation.

Q. What are the major advantages of the KPAIRS program?

A. KPAIRS will offer coverages that many insurance companies no longer offer. In addition, there will be a more reasonable pricing. There is no profit for stockholders, it all belongs to the cities, counties and schools.

Q. How do we find out more about KPAIRS?

A. Contact:

KPAIRS
c/o Jim Seaman
P. O. Box 1364
Topeka, KS 66601
Telephone: (913) 357-8212

KANSAS PUBLIC AND INTERLOCAL RISK SERVICES

COVERAGES AVAILABLE

Broad Form Liability (Occurrence Basis)

- EMT
- Assault and Battery
- Civil Rights
- Land Fill
- Weed Control and Pest Control Pollution
- Volunteer Fire Department
- Broad Form Contractual
- All Employees, Commissions and Volunteers
- Up to $2,000,000 in Limits

Police Professional Coverage (Occurrence Basis)

- Jails
- Civil Rights
- Up to $1,000,000 Limits

Public Officials Errors & Omissions (Occurrence Basis)

- Up to $1,000,000 Limits

Schools

- Athletic Participants
- School Board Errors & Omissions
- Up to $1,000,000 Limits

Automobile Liability and Physical Damage

- Standard Forms
- Up to $1,000,000 Limits Liability
- Up to $500,000 Limits Physical Damage (any one location)

KANSAS PUBLIC AND INTERLOCAL RISK SERVICES

AT-LARGE AND ALTERNATE BOARD MEMBERS

NOMINATION FORM

NAME: _____

ADDRESS: _____

CITY: _____ STATE: _____ ZIP: _____

TELEPHONE: (___) _____ YEARS IN CURRENT POSITION: _____

TITLE: _____

ELECTED _____ OR APPOINTED _____

POPULATION: IF CITY OR COUNTY, NUMBER OF RESIDENTS: _____

IF SCHOOL, NUMBER OF STUDENTS _____

HOMETOWN NEWSPAPER : _____

ADDRESS: _____

CITY: _____ STATE: _____ ZIP: _____

IS THE NOMINEE OR ANY MEMBER OF HIS OR HER FAMILY AN AGENT OR EMPLOYEE OF AN INSURANCE COMPANY? _____YES _____ NO

SIGNATURE: _____ DATE: _____

TITLE: _____

RETURN TO: KANSAS PUBLIC AND INTERLOCAL RISK SERVICES
c/o JIM SEAMAN
P. O. BOX 1364
TOPEKA, KANSAS 66601

KANSAS PUBLIC AND INTERLOCAL RISK SERVICES

AT-LARGE AND ALTERNATE BOARD MEMBERS

NOMINATION NOTICE

Kansas Public and Interlocal Risk Services is a liability Pool established under Kansas Statute Annotated 75-6111. The Pool will provide coverage for cities, counties and schools in the state.

Applications for coverage will be mailed to you soon and quotations for coverage should start in December, 1986.

Public officials should be pleased with the limits of coverage, the broadness of coverage, and pricing.

While each city, county or school that joins the Pool will be eligible to nominate a general board member, nominations for at-large board members are also being taken.

Board meetings should be limited to two or three per year.

Please fill out the attached Nomination Form and return it before December 15, 1986.

You will be notified of appointment as either an at-large or at-large alternate member before the end of December, 1986.

RISK & APPRAISAL MANAGEMENT

WILLIAM A. WARD
Director

212 South Market / Wichita, Kansas 67202
(316) 265-1322

December 19, 1986

Mr. Robert Renn
Renn & Company, Inc.
209 S. Washington
Wellington, KS 67152

Dear Bob:

I am enclosing some material on the Workers Compensation Self-Insured Program. When you get to the page on structure, the Property and Casualty Trust Fund is under consideration but would not be set up until the Comp. Trust is established.

We have made some presentations and have been very well received. Our hope is to get sufficient interest with about fifteen to twenty entities to have a joint meeting of all those interested to make another presentation and to start the study by them for establishing the trust. We hope to have this meeting in the latter part of January or the first part of February of 1987. We will be happy to come and have a meeting with your Commissioners of the city and the county to give them a preliminary explanation of what we are attempting to do.

Have a good Christmas, and I will talk to you before the new year holiday.

Sincerely,

William A. Ward

William A. Ward

WAW/cmc

Enclosure

COVERAGE

WPRS, Inc. would propose to provide Workers' Compensation coverage through the establishment of a self-funded pool. The pool would be composed of two parts, a claims fund and an administrative fund.

The claims fund would receive 70 to 80% of the premium dollars contributed by the membership. The fund would be used exclusively for the payment of claims. The claims fund would be protected in three ways. First through specific reinsurance. The fund would pay claim expenses on any single claim up to a specified limit. Should the claim exceed the specific reinsurance limit, reinsurance would then pay. The second level of protection would be provided through aggregate reinsurance. Aggregate coverage would pay claims if all of the monies allocated to the claims fund had been exhausted up to a fixed amount. The third level of protection would be provided through the purchase of an AD&D policy. This policy would limit the claims fund liability in the case of death or dismemberment to $10,000.

The specific reinsurance attachment point, the aggregate attachment point and the aggregate limit are negotiated items with the reinsurance company. WPRS will collect all membership loss data, prepare an actuarial study, and market the proposed pool to a variety of reinsurance companies. Specific limit would be statutory, aggregate limit $5,000,000 and liability $100,000. The administrative fund would receive 20-30% of premium dollars. The administrative fund pays all expenses except claims, such as reinsurance, claims handling, loss control marketing/administration and any applicable state taxes.

Premiums will be developed in a similar manner to the commercial policies. Estimated salaries will be applied to classifications using current classification rates to develop manual premium. Each members' experience modification will then be applied to determine a standard premium. A normal premium will then be developed using a premium discount between 5% - 20%.

An audit will be performed at year-end to reconcile any differences between estimated premium and actual premium.

Any funds remaining at year-end in the administrative fund will be applied as an offset against future years administrative expenses. Any funds remaining in the claims fund may be distributed to the membership in the form of a dividend after one year from the close of the policy period. Dividends would be available to any member whose premiums exceeded incurred losses. Calculations of dividend would be developed on a pro-rata basis.

AAM8SFP

PHILOSOPHY

WPRS believes all legitimate claims should be paid fairly and promptly. Questionable claims should be investigated to determine appropriateness and denied if found to be illegitimate. Subrogation should be pursued in all cases where opportunities exist. Claims must not only be handled through payment, but must be managed to set realistic reserve and to reduce costs wherever possible. Rehabilitation should be used to return injured employees into productive positions. We have found that costs can be reduced when contact with injured employees is made as quickly as possible. Therefore we attempt to make contact within 48 hours of notice of accident with employees.

Loss Control is the key to a self-funded program. A well defined and visible program that has the support of upper management will positively impact the frequency of loss and ultimately the severity of loss. Our loss control representatives are experienced in developing programs for public entities. Programs are developed that are realistic and have proven track records. We take a three tiered approach: First, programs are designed to raise the awareness of safety trustwide. Second, to concentrate on specific problems that are identified by the trust, by members or through review of monthly statistical trends. Third, to anticipate areas where problems are common, such as chlorine seminars prior to swimming pool operation, or confined space entry, or grass cutting season, or back injuries caused by improper lifting techniques. We have video equipment which we use to film actual work situations and have employees review and comment on their safety practices.

Our statistical reports provide the state-of-the-art in monitoring of claims. The reports will be used by our loss control people to quickly identify loss trends by member, by department and by cause. These reports will alleviate any guessing and identify quickly what and where problems exist.

THE RISK MANAGEMENT LETTER

Volume 6, Number 5 November 1986

Because this topic is important to many of our readers, we are devoting most of this issue to the Risk Retention Act.

The New Risk Retention Act

In November, President Reagan signed into law the Liability Risk Retention Act of 1986. This law amends the Product Liability Risk Retention Act of 1981, enacted to provide relief for insurance buyers during the product liability insurance crisis of the late 1970's. The 1981 Act limited its application to products and completed-operations liability. The 1986 version expands the provisions to apply to most liability coverages. Workers' compensation, employers liability, personal lines and property coverages are excepted from the new law.

The 1981 Act — An Overview

The Product Liability Risk Retention Act of 1981 (the 1981 Act) authorized two mechanisms for group treatment of products and completed-operations liability risks:

1. Risk retention group for joint self-funding (pooling), and
2. Purchasing groups for joint purchase of insurance.

Risk Retention Groups Defined

A risk retention group is essentially a group-owned insurer whose primary activity consists of assuming and spreading the liability risks of its members. It need be licensed in only one state, but may insure members of the group in any state. The jurisdiction in which it is chartered regulates the formation and operation of the group's insurer. This is a major advantage, as it enables the group to operate nationwide, without having to comply with the licensing requirements of the other states in which it does business. Such requirements include:

- Capital and surplus requirements.
- Assessments and regulation by insolvency guarantee associations.
- Countersignature requirements.
- Discriminatory taxes or laws.

Risk retention groups are not exempted from:

- Unfair claim settlement practice laws.
- Non-discriminatory taxes.
- Residual market mechanisms (i.e., assigned risk pools for product liability).
- Registration with state insurance commissioners.
- Filing of data such as losses and expenses.
- Solvency examination by state commissioners.
- Compliance with orders in delinquency proceedings.

Purchasing Groups Defined

A 1981-Act purchasing group consists of entities which jointly purchase products and completed-operations liability insurance and associated general liability coverages. As respects these coverages, the 1981 Act exempted purchasing groups from state requirements such as

- Minimum number of members,
- Minimum period of existence,
- Minimum percentage participation of members, and
- Local countersignature requirements.

In summary, the 1981 Act eliminated or mitigated certain provisions in state insurance laws which imposed onerous restrictions on group self-insurance programs, or which prohibited the group purchase of liability insurance.

The 1986 Act

During the campaign for expansion of the 1981 Act, various groups, most notably the National Association of Insurance Commissioners (NAIC), influenced the drafting of the 1986 Act. The NAIC's involvement arose out of each insurance commissioner's desire to regulate the solvency of risk retention groups operating in his/her state when the groups are domiciled and admitted in another state. As a result, the 1986 Act expanded application to most liability insurance lines (not just products liability), while establishing controls to encourage the responsible conduct of insurance operations by risk retention groups.

Risk Retention Group Requirements

Major provisions of the new 1986 Act affecting risk retention groups include:

1. A risk retention group must:
   a. Be owned by its members,
   b. Provide insurance for its members,
   c. Limit membership to those persons or organizations exposed to liability for similar or related risks (homogeneous risks), and
   d. Be chartered and licensed as a liability insurer under the laws of at least one state.
2. Procedural requirements for a risk retention group are:
   a. Groups must submit a business plan or feasibility study to the insurance department of the chartering state, and
   b. Copies of this plan or study must be submitted to the insurance department of each other state in which the group will be doing business.
3. Groups must file with the insurance commissioner of each state in which the group is doing business a copy of the annual financial statement it filed in the chartering state. The statement must (a) be certified by an independent public accountant, and (b) include an opinion on the adequacy of loss reserves by a qualified loss reserve specialist or board-certified actuary.

A PUBLICATION OF WARREN, McVEIGH & GRIFFIN, INC.
Independent Risk Management, Claims, Actuarial and Employee Benefits Consultants
General Offices: 1420 Bristol Street North, Newport Beach, California 92660 • (714) 752-1058
Northern California: 1700 Montgomery Street, San Francisco, California 94111 • (415) 433-6974
Chicago: Two Mid America Plaza, Suite 800, Oakbrook Terrace, Illinois 60181 • (312) 954-2320

Reid 1-29-86

Other provisions give states limited regulatory control over risk retention groups. For instance, existing state financial responsibility requirements are not preempted by the 1986 Act, providing those requirements do not discriminate against groups. Another provision exempts groups from SEC and "Blue Sky" laws respecting the registration of securities for sale.

The foregoing are general guidelines for organizing and operating groups within the scope of the 1986 Act. No attempt is made in this short article to cover all aspects of the Act.

Purchasing Group Requirements

Purchasing groups received the same expanded application to most liability lines as did risk retention groups. Requirements imposed in the 1981 Act are, by and large, continued in the 1986 amended Act.

Purchasing groups must give advance notice of intention to operate to the insurance departments of those states in which they will be doing business. Those states cannot, however, interfere with the establishment or operation of purchasing groups, provided the group conforms with provisions of the 1986 Act.

Conclusion

The 1986 Risk Retention Act is a substantive response to the current availability/affordability liability insurance crisis. For small- and medium-sized insurance buyers, the legislation provides a good framework for establishing risk funding pools and group purchasing programs for most types of liability risks and insurance.

The 1986 Act eliminates the need for using a "front company" for an association captive program. However, excess liability insurers may be reluctant to write coverage directly above a newly formed risk retention group. Also, those requiring evidence of insurance are not required to accept the security of a risk retention group. When security through conventional insurers is required, a front company may be necessary. However, we predict that many properly managed risk retention groups eventually will be recognized widely as sound insurance operations.

Each risk retention group is responsible for the success of its insurance programs. Successful programs will include the following characteristics:

- Capitalization consistent with risk exposure.
- Prudent funding (premium) levels.
- Professional underwriting management.
- Professional claims and loss control management.
- Long-term commitment

Congress has responded to the needs of commerce and industry for alternative methods to obtain liability protection. Used judiciously, RRG's and PG's should serve the needs of many businesses.

* * * * *

The preceding article was written by Gregory Ryan, President of Strategic Risk Management, Inc., Glendale, California, a consulting firm specializing in the development of group risk-funding approaches.

Watch the Fine Print

In our August issue we noted that many insurers are using modified versions of the 1986 ISO CGL claims-made policy. As an example consider the following.

We recently saw a claims-made policy, effective 6/24/86, which used what appeared to be the ISO claims-made policy form. The bottom of the form says, "Copyright, Insurance Services Office, Inc., 1982, 1984."

Close inspection revealed that this was an early edition of the policy form. It did not include the five-year extended reporting provision added to the most recent ISO edition, after heavy pressure by regulators and consumer-oriented groups.

This policy, written by a non-admitted insurer, was amended by an endorsement titled only "Endorsement," which restricted the unlimited tail to 24 months (that's very bad).

As we stated previously, it is essential that you read your policy to determine which version of the claims-made CGL form is being utilized by the insurer.

* * * * *

New Publications

Warren, McVeigh & Griffin, Inc. and Griffin Communications, Inc. announce new services designed to help you stay current on important insurance topics.

The Old And New CGL Forms: A Practical Comparison

This easy-to-read, indexed reference provides a unique word-by-word comparison of the 1973 ISO CGL form and the BFCGL endorsement with the 1986 ISO CGL claims-made and occurrence forms.

The 1973 CGL policy form and the Broad Form Comprehensive General Liability (BFCGL) endorsement are reproduced by section, followed by an analysis on how the 1986 ISO CGL claims-made and occurrence forms compare to that particular section.

Cross-references also are provided, directing readers to those sections of the 1986 CGL forms where the comparable or new wording being discussed can be found.

The Umbrella Book — Now Three Volumes

This regularly updated publication has expanded to three volumes. New features include:

—**Comparison of Primary Forms.** The provisions of many of the primary forms being introduced by insurers differ from those found in the latest ISO CGL forms. These primary forms are compared and coverage differences highlighted.

—**Claims-Made Comparison Charts.** In addition to the charts currently used to compare occurrence coverage, new charts have been added comparing features of the 1986-87 claims-made umbrella and excess forms.

—**Question and Answer Format.** This service has been introduced in Umbrella Notes to provide a format for sharing answers to many of the questions raised by our subscribers.

For additional information, contact Pete Ligeros or Elizabeth Geyer at the Newport Beach office.

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FEBRUARY 1984

GOOD NEWS FROM SOUTH TUCSON

A plan has finally been developed by the City of South Tucson which is acceptable to Roy Garcia and will close the 4½ year saga that began in 1978. The settlement, with a value of about $3 million, will probably complete the city's financial reorganization in U.S. Bankruptcy Court.

According to *The Arizona Daily Star*, the terms of the settlement are:

- South Tucson will pay about $160,000 to the State Compensation Fund for Garcia's medical bills.
- $70,000 cash followed by $10,000 payments each month for the next 12 months from its General Fund.
- $40,000 per year starting May 1, 1986 and continuing through May 1, 1995.
- A planned bond sale, if completed, would have the $1.5 million proceeds pass directly to Garcia.
- South Tucson believes it has a claim against an insurance broker and others arising from its inadequate liability insurance coverage ($100,000). South Tucson has assigned 90% of any recovery from that claim, up to $10 million in compensatory damages, to the Garcias.

Due to the fact that the settlement was approved by the South Tucson City Council in an emergency meeting, some people have claimed that this might violate the State of Arizona's open meeting law. (Editor's Note: What more could happen? We are personally pleased that both parties, after all of these years, could come to an amicable agreement.)

ARIZONA MAKES THE NEWS AGAIN!

On February 9, 1984, a Pima County (Tucson)jury awarded $5 million to a 12-year old permanently brain damaged boy and an additional $1.5 million to the boy's parents. The judgment was against two doctors, two nurses, and the State of Arizona. What makes this of interest to us is that it is believed to be the first such case against a Poison and Drug Information Center which is operated by a state agency. The center operates an emergency hot line for treatment of poisonings. It was alledged that it was negligent in advice it gave to one of the doctors.

The chances are very great that the State of Arizona will appeal this judgment. If the decision holds, it is feared that the center will be the legal scapegoat for liability in accidental poisonings. The broader impact of this decision on the other 27 regional poison-control centers in the country and the more than 600 poison-information centers in the United States, is still to be determined. We will try to keep you informed on other developments in this case.

SALE! SALE! SALE!

We have found several boxes of our paperback book *Contractual Insurance Agreements for Utilities* by Richard Grennan. We feel that this book will help its readers understand insurance requirements of contracts even if you are not a utility — it has broad applications.

The book regularly sold for $17.95 plus $2.00 for postage and handling. A clearance sale will be held to April 1 — $10.00 each plus $2.00 postage and handling. Send your check, payable to Risk Management Publishing Company, for $12.00 and we will get the book to you by return mail. (Prepaid orders only, please.)

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

HB2025

January 27, 1987

KANSAS CHAMBER OF COMMERCE AND INDUSTRY
Testimony Before the
House Judiciary Committee
by
David Litwin

Mr. Chairman, members of the committee. My name is David Litwin, and I appreciate the opportunity to testify in support of HB 2025 on behalf of the Kansas Coalition for Tort Reform and the Kansas Chamber of Commerce and Industry, a member of the Coalition.

The Kansas Coalition for Tort Reform is a federation of diverse groups that share the view that certain changes in our civil justice system are needed for two general purposes: 1) to make that system more efficient, more just, and less costly, and 2) to provide, over the long term, a more stable environment that would permit the writing of high quality liability insurance at affordable rates.

The Coalition's membership includes the following: Kansas Chamber of Commerce and Industry; Kansas Farm Bureau; Kansas Contractors Association; Independent Insurance Agents of Kansas; Kansas Railroad Association; Kansas Motor Carriers Association; Kansas Society of Architects; Kansas Medical Society; Associated General Contractors of Kansas; Kansas Association of Broadcasters; Kansas Grain and Feed Dealers Association; Kansas Association of Property and Casualty Insurance Cos., Inc.; Kansas Consulting Engineers; Kansas Motor Car Dealers Association; Kansas Lodging Association; Kansas Petroleum Council; Kansas Independent Oil and Gas Association; Kansas League of Savings Institutions; Wichita Independent Business Association; Western Retail Implement and Hardware Association; Alliance of American Insurers; Kansas Telecommunications Association; National Federation of Independent Business/Kansas; Merrell Dow Pharmaceuticals, Inc., Overland Park; Hutchinson Division, Lear Siegler, Inc., Clay Center; Becker Corporation, El Dorado; The Coleman Co., Inc., Wichita; FMC Corporation, Lawrence; Puritan-Bennett Corp., Overland Park; and Seaton Media Group, Manhattan.

At the outset, let me make it clear that we do not advocate prohibition of punitive damages, although I would note that they are not allowed in several states. There are individuals and organizations in our society that are indifferent to the interests and rights of others, and where that indifference, or malevolence, results in harm to others, it does seem appropriate to add that extra sting not completely provided by compensatory damages. Hopefully, awards of punitive damages in appropriate amounts and where they are deserved will punish the transgressor and deter others from similar conduct.

On the other hand, punitive damages are very different than compensatory awards, in both their intent and their consequences. Under current Kansas law, they can be awarded without any regard to the amount of monetary damage, if any, suffered by plaintiff; they are a windfall to the plaintiff, awarded above and beyond the amount needed to make him or her whole for the injury; they are extraordinarily harmful to a defendant's reputation; they cannot be insured against, in general, as a matter of public policy; and the amount and frequency of such awards is unpredictable.

On the other hand, at least in theory, punitive damages cannot be assessed against a party unless it is proven that defendant acted malevolently or in gross disregard for others' rights. If that were the case, then one could say, if a party behaves according to civilized standards, he has nothing to fear.

Unfortunately, both the frequency and size of punitive awards have increased dramatically in recent years and, in the perception of many, they are imposed in many cases where their appropriateness is very doubtful and in excessive amounts. Thus in the business and professional world, increasing numbers of <u>good</u> corporate and individual citizens worry about large punitive damages being awarded <u>without justification</u>, and their fears are hardly groundless. There is a growing fear that with the advantage of hindsight, actions that seemed reasonable at the time will be later judged harshly and sanctioned by large punitive awards, since this is precisely what is happening.

The result is that many products and services that would benefit humankind are not reaching the market or are being withdrawn. In the end, we are all the losers.

Indeed, people in the business and professional communities have the most to be concerned about in this sphere. A Rand corporation study of punitive awards in San Francisco and Chicago found that the average size of awards against individuals increased about 100% from 1960 to 1984, but over 400% against businesses. There were about 250 awards in these jurisdictions against individuals compared with only about 140 against businesses, but the business awards totaled almost five times as much as those against the individuals.

Some would assert that here in the nation's heartland, punitive damages are so rarely awarded that we needn't be concerned. This assertion is untrue. There was testimony before the interim Committee on Tort Reform and Liability Insurance that in the past couple of years, there have been several punitive judgments in the area of $1 million or more in Kansas. Just the other day, another punitive verdict of $1 million was entered in Kansas, against a business defendant.

I am not suggesting that these particular awards were or were not improper. I am suggesting that those who would foreclose any thinking about the subject at all based on the belief that we don't have big punitive damage awards in Kansas are ducking reality.

Indeed, research shows that in the Kansas City area, which includes portions of Kansas and Missouri, in 1980 there were 31 punitive awards totaling about $900,000; in 1984 there was the same number, but they aggregated over $20 million, an increase of over 2,000 percent.

The challenge, then, is to take appropriate measures to see to it that punitive damages are awarded only where they are called for, and in appropriate amounts. There are a number of established steps that can be taken to help achieve these goals. They include:

1. Bifurcation. This means having the initial issue of deciding whether punitive damages are appropriate determined first, and the amount decided later, normally by

the judge. As a law review article states:

> "This scheme offers several advantages over allowing the jury to determine such awards. First, it would reduce the probability that punitive damages awards might be unduly influenced by emotion, since most judges are presumably more detached in their deliberation and therefore more likely to render objective damages assessments. Additionally, evidence of the defendant's wealth that could prejudice the jury on the issue of liability could then be excluded from jury consideration. Further, judges would be able to call upon their experience in criminal sentencing...in evaluating the need for punishment and deterrence in particular cases..."

This latter point is incisive. Punitive damages are regarded as quasi-criminal, and they are the equivalent of the sentence in a criminal case. Yet while we have the jury determine guilt in a criminal case, we recognize that the judge is better qualified to impose sentence.

The bill under consideration creates bifurcation, a very important first step. But it then undermines itself by having the jury determine the amount of damages in the second stage of the trial. I submit this is self-defeating and if bifurcation is good policy, let's implement in a way that is most likely to achieve the desired end.

2. Requiring a higher standard of proof than "preponderance of the evidence". Since a punitive award is really a fine, it makes sense to require a standard of proof that's higher than what is normally required in civil proceedings. The bill would require "clear and convincing evidence" of entitlement to damages. This is a helpful innovation.

3. Establish standards to guide the determination of the amount of damages in the second phase of the trial. The bill lists 7 considerations that are very relevant, such as the profitability of the misconduct and whether damages have already been imposed in other cases.

4. Establish some kind of objective limit on the amount of damages that can be imposed. The bill fails in this regard. We suggest there be some kind of standard, such as limiting punitives to a multiple of actual damages (e.g., they could not exceed three times the amount of compensatory damages), a flat ceiling, or a formula, such as this legislature already adopted in the medical malpractice legislation, L.

1985, c. 179. The latter bill limits punitive awards to the lesser of 25% of defendant's highest income during the five preceding years or $3 million.

5. Award a substantial part of punitive damages to the state. Since punitives are like a fine, and are a windfall not necessary to compensate a plaintiff for his or her loss, it is illogical to allow plaintiff to receive all of an award. Fines vindicate the public interest, and they go to the state treasury. Perhaps a successful plaintiff should be given something to compensate for his costs and trouble in vindicating the public interest, but not all of the award. The medical malpractice legislation awards 50% to the state, and we think this is a good and appropriate figure.

On the whole, then, we support the bill, but urge it be amended as I have suggested to add further assurance that it will achieve its intended effect, namely to increase the probability that punitive damages will be awarded only where deserved and in proper amounts.

I submit that the provisions of the medical malpractice punitive damage limitation should be engrafted onto this bill. In both arenas, the goal is identical. It seems strange to provide a full plate of procedural safeguards only for medical malpractice cases, since both the problem and the desired solution are the same.

Thank you for your consideration. If there are any questions, I will be happy to answer them.

MEMORANDUM

TO : The House Judiciary Committee

FROM : William W. Sneed, Legislative Counsel
Kansas Association of Defense Counsel

RE : House Bill 2025

DATE : January 27, 1987

On behalf of the Kansas Association of Defense Counsel, please be advised that we are in support of House Bill 2025 relating to punitive damages. KADC has long been a proponent of reform relative to punitive damages. As discussed through the Interim Summer Committee, there are many views on exactly how punitive damages should be awarded. Although the Bill is a compromise in certain areas, we believe that such changes encompassed in the Bill, for public policy purposes alone, are needed.

Although we have mentioned this in prior legislative hearings, we would again reassert that the Committee strongly review whether or not wanton conduct, as defined by PIK, should be utilized for punitive damages. Our Association understands that wanton conduct in certain instances should provide for punitive damage relief. However, because of its definition, it is possible to utilize the wanton conduct definition to cover a broad range of activities that may or may not be applicable to punitive recovery. Again, we simply bring this up for the Committee's

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review when discussing the Bill, and do not in any way wish to infer that changes in the definition of "wanton" would make this Bill and the intentions behind it fail.

Respectfully submitted,

William W. Sneed

A PROPOSAL TO REFORM THE LAW OF PUNITIVE DAMAGES IN THE STATE OF KANSAS

Introduction

It is a well-established principle in Kansas and a majority of other jurisdictions that:

> Punitive damages by definition are not intended to compensate the injured party. . . [R]ather, [their purpose is to] punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct.

McDermott v. Kansas Public Service Co., 238 Kan. 462, 464, 712 P.2d 1199, 1201 (1986) (quoting Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67 (1981)).

Because punitive damages are specifically intended to punish and deter extreme conduct similar to criminal sanctions, a number of courts and commentators consider an award of such damages as an imposition of a quasi-criminal penalty. See McDermott, 238 Kan. at 467, 712 P.2d at 1203 (recognizing penal nature of punitive damages). See also Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 8 (1982) (discussion of punitives as quasi-criminal remedy). As long ago as 1886 in Boyd v. United States, 116 U.S. 616, 634, and as recently as 1983, in Smith v. Wade, 461 U.S. 30, 59 (Rehnquist, J., dissenting), the United States Supreme Court recognized the quasi-criminal nature of punitive damages. Although a number of authorities consider punitive damages to be so

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similar to criminal sanctions as to warrant constitutional protections afforded to a criminal defendant, see, e.g., Schmidt, The Constitutionality of Punitive Damages: A Challenge for the Judiciary, For the Defense 20 (Feb. 1985), and Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269 (1983), courts have refused to recognize that punitive damages approach the same severity as criminal sanctions warranting constitutional safeguards. See McDermott v. Kansas Public Service Co., 238 Kan. 462, 467, 712 P.2d 1199, 1203 (1986).

Even though courts have firmly held that punitive damages are not as severe as criminal sanctions and do not therefore require equal constitutional safeguards, a strong case could be made that some form of added safeguards are necessary to protect the rights of the quasi-criminal defendant. It has been noted that the character of punishment "is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." United States v. Chouteau, 102 U.S. 603, 611 (1880). Accordingly, Justice Rehnquist observed in Smith v. Wade, 461 U.S. at 59, that "although punitive damages are 'quasi-criminal', their imposition is unaccompanied by the types of safeguards present in criminal proceedings. This absence of safeguards is exacerbated by the fact that punitive damages are frequently based upon the caprice and prejudice of jurors." Id. (Citations omitted.) The Justice went on to add that the Court in the past had observed that "punitive damages may be employed to punish unpopular defendants, and . . . that juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." Id. (Citations omitted.) Because punitive damages are considered quasi-criminal, standing halfway

between the civil and the criminal law, see Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 8 (1982), and given the potential for abuse, some form of safeguards standing halfway between the civil and criminal law recognizing the quasi-criminal nature of punitive damages are necessary.

As the dollar amounts of punitive awards continue to climb, see Robert Stewart, Crime and Corporate Punishment, Corporate Report 50 (May 1985) (punitive awards in Kansas City area citing Greater Kansas City Jury Verdict Service; 1980--31 verdicts, $886,000; 1983--34 verdicts, $2.2 million; 1984--31 verdicts, $20 million), several states have recognized the seriousness of punitive damages by adopting specific legislation which provides safeguards. See, e.g., Colo. Rev. Stat. § 13-25-127 (requiring proof beyond a reasonable doubt); Minn. Stat. Ann. § 549.20 (Supp. 1978) (requiring clear and convincing evidence standard); and Ore. Rev. Stat. § 30.925 (1979) (clear and convincing evidence standard, showing of prima facie case, and list of specific guidelines to be followed in awarding punitive damages). Such safeguards are a necessary response given the potential of punitive damage awards of not only punishing a defendant, but also damaging it financially to the point of bankruptcy. See Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1322 (1976). See also Sales, The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel, 14 St. Mary's L.J. 351, 381 (noting bankruptcy filings of Johns-Manville). As the Kansas Supreme Court recently noted, "the purpose of punitive damages is to sting, not to kill, a defendant." McDermott v. Kansas Public Service Co., 238 Kan.

462, 467, 712 P.2d 1199, 1203 (1986). Our laws should reflect a commitment to that principle.

It is particularly significant to note that the Kansas legislature recognized the seriousness of punitive damages and the potential for abuse by adopting legislation in 1985 which establishes specific procedural safeguards when punitive damages are involved in any medical malpractice case. See 1985 Kan. Sess. Laws ch. 197, p. 951 (court to determine amount of award, clear and convincing evidence standard, specific definition of elements, award limit). Although the legislature limited this reform to medical malpractice cases, there is no reason why any defendant (doctor, manufacturer or property owner) should not be afforded similar protections. It is in this context that the following statute is proposed.

A Proposal to Reform the Law of Punitive Damages in the State of Kansas

Purpose: The purpose of this bill is to establish and clarify the substantive law of punitive damages of the State of Kansas. It is intended as a statement of the public policy of this State and is the law that should be applied to any civil action within this jurisdiction in which there is a claim for punitive damages. Further, because any civil action against a Kansas citizen in which a claim is made for punitive damages involves the potential punishment of that Kansas citizen, including corporations and businesses domiciled in Kansas, which matter is of significant concern to this state, Sections 1, 2, 3, and 4 are declared to be substantive law, and not merely procedural. They shall therefore apply to all civil actions in which punitive damages are sought against a Kansas citizen outside the State of Kansas.

Section 1.(a) Punitive damages shall be allowed in civil actions only upon a showing by plaintiff that the acts of the defendant constituted willful conduct, fraud or malice.[1]

(b) "Willful conduct" means an act performed with a designed purpose or intent on the part of a person to do wrong or to cause an injury to another.

The term "willful conduct" shall also include behavior caused by or contributed to by marijuana, a narcotic drug, or a controlled substance, as those terms are defined in K.S.A. Section

65-4101, or by alcoholic liquor, as that term is defined in K.S.A. Section 41-102.

(c) "Fraud" means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant to deprive a person of property or legal rights or otherwise cause injury.

(d) "Malice" means a state of mind characterized by an intent to do a harmful act without a reasonable justification or excuse.[2]

Section 2.(a) In order to recover, plaintiff must prove by clear and convincing evidence[3] that defendant's conduct satisfies the requirements of Section 1.(a).

(b) To be clear and convincing, evidence should be "clear" in the sense that it is certain, plain to the understanding and unambiguous. It must also be "convincing" in the sense that it is so reasonable and persuasive as to compel the trier of fact to believe it.[4] Proof by clear and convincing evidence is far more persuasive than proof by a mere preponderance of the evidence.

Section 3.(a) In any civil case the issues of liability for compensatory damages and liability for punitive damages, if any, shall be determined separately.[5]

(b) The trier of fact shall first determine defendant's liability for compensatory damages and, when appropriate, the amount of such damages.

(c) Should the trier of fact award compensatory damages against the tortfeasor, the claimant may then move for permission to submit evidence in support of a claim for punitive damages.[6]

(d) Before allowing the trier of fact to hear any evidence on the issue of punitive damages, the trial court shall first determine in a separate hearing whether claimant has established a prima facie case for punitive damages,[7] which hearing may, upon motion of the claimant, occur before trial.

(e) If the trial court determines that claimant has established a prima facie case, evidence on the issue of punitive damages may then be offered, and the trier of fact shall then determine whether punitive damages should be awarded.

Section 4.(a) If the trier of fact determines that punitive damages should be awarded, the trial court shall determine the amount of the damages.[8]

In making this determination, the court shall consider:

(1) The likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct;

(2) The degree of the defendant's awareness of that likelihood;

(3) The profitability of the defendant's misconduct;

(4) The duration of the misconduct and any intentional concealment of it;

(5) The attitude and conduct of the defendant upon discovery of the misconduct;

(6) The financial condition of the defendant; and

(7) The total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct including, but not limited to, compensatory and punitive damage awards to persons in situations similar to the claimant's and the severity of the criminal penalties to which the defendant has been or may be subjected.[9]

Section 5.(a) In no case shall punitive damages be assessed if compensatory damages are not awarded, or where only nominal damages are awarded.[10]

Section 6.(a) No discovery of the defendant's financial condition shall occur until after the trial court determines that claimant has established a prima facie case for punitive damages.[11]

(b) Evidence regarding defendant's financial condition shall not be admitted until after the trier of fact has determined that punitive damages should be awarded.[12]

Section 7.(a) Punitive damages can properly be awarded against a master or principal because of an act done by an employee or agent only if:

(1) The master or principal authorized the doing and the manner of the act, or

(2) The employee or agent was unfit and the master or principal had actual knowledge of that before the act was committed, or

(3) The employee or agent was employed in a managerial capacity and was acting in the scope of employment, or

(4) The master or principal or a managerial agent of the master or principal ratified or approved the act.[13]

Section 8. This act shall have both prospective and retrospective application to all claims and causes of action in the State of Kansas, whether or not they have arisen at the time this act becomes effective; and it is the specific intent of this act that it apply to all claims and causes of action pending upon the effective date of this act.

Section 9. If any provision of this act or its application to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

FOOTNOTES

[1] The elements outlined in this section are very similar to elements established by the Kansas common law regarding the type of conduct that warrants punitive damages. See, e.g., Hess v. Jarboe, 201 Kan. 705, 443 P.2d 294 (1968).

[2] In 1985, the Kansas Legislature recognized the definitions in §§ 1(b)-(d) as proper definitions of conduct warranting punitive damages in medical malpractice actions. 1985 Kan. Sess. Laws, Ch. 197, p. 951. There is no reason why these definitions provided in the medical malpractice actions should not be equally applied to claims for punitive damages in any other type of action. Problems of vagueness and ambiguity are no less a problem in other actions than they are in the area of medical malpractice. It is only fair and consistent with the idea of deterrence that the manufacturer, city government, or any potential defendant, in addition to the doctor, should be able to know with a degree of certainty what conduct could result in an award of punitives.

[3] As at least two jurisdictions have statutorily recognized, the "clear and convincing" standard is appropriate as punitive damages are best understood as injecting a quasi-criminal element into a civil case. See Minn. Stat. Ann. § 549.20 (Supp. 1978) and Ore. Rev. Stat. § 30.925 (1979). This standard represents a sensible compromise between the "preponderance of evidence" standard of civil litigation and the "beyond a reasonable doubt" standard of the criminal law. As punitive damages fall in between, the middle standard is warranted. See Owen,

Crashworthiness Litigation and Punitive Damages, 4 Journal of Products Liability 221, 226 (1981) ("It seems both fair and logical to require the imposition of quasi-criminal punishment, standing halfway between the civil and the criminal law, be supported by a standard of proof halfway between the civil law's "preponderance of the evidence" and the criminal law's "proof beyond a reasonable doubt"). See also Model, Uniform Product Liability Act § 120(a) and Analysis (U.S. Dept. of Commerce 1979) 44 Fed. Reg. 62,714, 62,748-49 (1979).

In addition, it should be noted that the "clear and convincing" standard is no stranger to our civil system as it is required in various actions where it has been determined that a higher standard of proof is warranted. See, e.g., Nordstrom v. Miller, 227 Kan. 59, 605 P.2d 545 (1980) (fraud); and Kan. Stat. Ann. § 60-401(d) (1981) (required to establish falsity of an instrument or conveyance). Conduct warranting a quasi-criminal penalty is just as serious and should be imposed accordingly. See 1985 Kan. Sess. Laws, Ch. 197, p. 951 (recognizing "clear and convincing" as proper standard for any medical malpractice action claiming punitive damages).

[4] P.I.K.2d Inst. 2.11 n.6 (1977). For other definition, see Nordstrom v. Miller, 227 Kan. 59, 605 P.2d 545 (1980).

[5] Bifurcation is well known to the Kansas court system. For a number of years, judges have been authorized by statute to order separate trials for any claim or issue when such a bifurcation would further convenience, avoid prejudice, or be conducive to expedition or economy. Kan. Stat. Ann. § 60-242(b) (1983).

Although the statute makes clear that such an order is discretionary, case law indicates that bifurcation is generally advantageous when the question of punitive damages is involved. See, e.g., Betts v. General Motors Corp., 236 Kan. 108, 689 P.2d 795 (1984), and Tilley v. International Harvester Co., 208 Kan. 75, 490 P.2d 392 (1971). In Betts, the Kansas Supreme Court approvingly noted the trial court's reasons for bifurcation.

> The court pointed out the advantages of a bifurcated trial in terms of jury comprehension of the issues, economy of court time, and reducing the trial expenses to the parties. It noted that the additional expenses of time and resources might be unnecessary if determination of the fault issues made the damages issues moot or enhanced the prospects of settlement.

Betts, 236 Kan. at 116, 689 P.2d at 801-02.

Bifurcation is particularly warranted in product liability cases in order to avoid confusion on the clearly distinct issues of liability. In such cases, liability for compensatory damages is strictly applied focusing on the condition of the product and not the conduct of the manufacturer. See Sales, The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel, 14 St. Mary's L.J. 351 (1983). The fact that a manufacturer's liability is a products action is based on strict liability focusing on the condition of the product and not on the manufacturer's conduct is the cornerstone of the argument that punitive damages are not appropriate in product liability actions. Id. at 369-371. Punitive damages, on the other hand, are based entirely on the conduct of the tortfeasor. A separation of such

issues in this context, in particular, is unquestionably warranted.

In addition, it could be argued that bifurcation provides a necessary safeguard in separating the determination and imposition of a quasi-criminal penalty from the traditional civil question of liability for compensatory damages. Because of the inherent differences between punitive and compensatory liability, it stands to reason that the two questions should remain separate to emphasize both the distinction and the more serious nature of the quasi-criminal penalty.

[6] See infra n.10 (regarding requirement of award of actual damages prior to punitives).

[7] Professor David Owen, a recognized authority in the area of punitive damages, supports legislation that would require a plaintiff to establish a prima facie case for punitive damages before being allowed to proceed on the defendant's liability for such damages. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 53 (1982). Although Owen specifically refers to a California statute that requires a pretrial showing of a prima facie case not considering bifurcation, Cal. Civ. Code § 3295(c) (West 1981), his reasoning applies to our statute as plaintiff still is not allowed to proceed to the punitive damage stage without first establishing a prima facie case for such damages. Professor Owen reasons:

> Because a single punitive damages award can amount to millions of dollars and because the likelihood of such assessments is less predictable than compensatory damages awards, a prima facie ruling on punitive damages

> at an early stage will help avoid the unnecessary expenditure of considerable sums for the construction of an elaborate punitive damages defense.

Id. at 54.

Owen is further convinced that such a requirement is necessary as he recognizes that it is the "present day practice of seeking punitive damages in substantially all damage actions" prompting an explosion of punitive damage awards. Id. n.258 (citing Rosener v. Sears Roebuck & Co., 110 Cal. App. 3d 740, 762, 168 Cal. Rptr. 237, 250 (1980)).

Concluding, Owen argues that "[b]ecause of the growing frequency of punitive damage claims, and because such claims only infrequently are well supported, such a procedure should save time and expense . . . ." Id. at 54. It is only just that plaintiff be required to meet this hurdle of establishing a prima facie case given that (1) punitive damages are a windfall to plaintiff, (2) if plaintiff gets to this stage, he will already have been compensated, and (3) the expense of further defense and the potential loss that is faced by defendant is great.

[8] See 1985 Kan. Sess. Laws, Ch. 197, p. 952 (court to determine amount of punitive damage award in medical malpractice actions). However, it is important to note that the problems of excessive punitive awards which prompted this legislation are not necessarily unique to medical malpractice actions alone. As noted earlier, punitive damage awards have jumped significantly since 1980, according to the Greater Kansas City Jury Verdict Service. In 1980, 31 punitive damage verdicts totalled $866,000.

By 1984, thirty-one punitive damage verdicts were reported totalling $20,000,000. Stewart, Crime and Corporate Punishment, supra at 50. In 1985, one punitive damage award of $10,000,000 was awarded to a Kansas City plumbing company that had been excluded from the yellow pages. Id. As the Kansas Supreme Court recently noted, "the purpose of punitive damages is to sting, not to kill, a defendant." McDermott v. Kansas Public Service Co., 238 Kan. 462, 467, 712 P.2d 1199, 1203 (1986) (citations omitted).

To avoid such excessive awards, a number of authorities advocate that the judge rather than the jury should determine the amount of damages. Such procedure would bypass a jury that can best be described as often emotional, easily inflamed, and susceptible to prejudice. See Smith v. Wade, 461 U.S. 30, 59 (1983) (Rhenquist, J., dissenting) (citing Walther & Plein, Punitive Damages: A Critical Analysis, 49 Marq. L. Rev. 369 (1965) (punitive damages frequently based upon caprice and prejudice of jurors)). Professor Owen offers the following reasons for such a change:

> The best protection against excessive punitive damages awards would probably be to shift the responsibility for their measurement from the jury to the trial judge once the jury has determined that such damages should be assessed. This scheme offers several advantages over the traditional method of allowing the jury to determine such awards. First, it would reduce the probability that punitive damages awards might be unduly influenced by emotion, since most judges are presumably more detached in their deliberation and therefore more likely to render objective damages assessments. Additionally, evidence of the defendant's wealth that could prejudice the jury on the issue of liability could then be excluded from jury consideration. Further, judges would be able to call upon their experience in criminal

> sentencing, unavailable to jurors, in evaluating the need for punishment and deterrence in particular cases. Finally, trial judges usually have a more sophisticated appreciation than jurors of the often far reaching effects that punitive damages awards may have on the operations of particular corporate defendants.

Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1320-21 (1976).

In addition, it could be argued that the assessment of punitive damages, given their quasi-criminal nature, is similar to sentencing in a criminal process. Accordingly, the judge should be given the responsibility of imposing the quasi-criminal sanction once the jury has determined that punitive damages should be awarded as a means of providing defendant a quasi-criminal safeguard against a jury's possible abuse of its discretion. See Dworkin, Product Liability Reform and the Model Uniform Product Liability Act, 60 Neb. L. Rev. 50, 75 (1981): "Since the judge is assumedly less subject to emotional appeals, and is instructed to follow specific considerations in making the determination, extreme awards should be eliminated."

Two other commentators have offered the following support for giving the responsibility of assessing the amount of punitive damages to the judge:

> To increase the likelihood that damages will be applied in a principled manner, the judge, rather than the jury, should assess the sum of the damages. Although the judge is in no better position to decide whether the defendant's conduct was outrageous, the question of punishment calls for expertise. Delicate issues of economics and social policy are involved in deciding

the amount of punishment--issues with which the ordinary juror is likely to have little familiarity. Beyond being more aware of the public policy implications of the award of punitive damages, judges have more experience in meting out punishment. They are less likely to be impressed by the histrionics of counsel and so to be inflamed by passion or prejudice.

Mallor and Roberts, Punitive Damages: Toward a Principled Approach, 31 Hastings L.J. 639, 664 (1980).

The authors continue by adding:

This procedure would parallel the present practice in criminal trials in most states in which the sentence is imposed by the trial judge after conviction by the jury. This bifurcation of the adjudication and sentencing functions is designed to avoid the possibility that the jury's determination of guilt would be influenced by evidence of the defendant's character and personality. . . . This rationale would apply equally to a civil trial in which punitive damages are sought. Much of the information that is needed to impose a proper sum of damages may be too complex for the jury to evaluate effectively. Evidence of the defendant's wealth, while admissible in most states, may give rise to what one writer has dubbed the "Robin Hood" syndrome. Similarly, evidence of past or present criminal prosecution, or of other ongoing civil cases, may influence the jury and lead it to compromise any doubts it may have on the initial question of liability. Yet all of this information is vital for principled application of punitive damages. To avert the possibilities of compromise and overly harsh penalties, the questions of liability and punishment should be separated, and the judge provided with access to information that would otherwise be excluded.

Id. at 664-665.

[9] See Minn. Stat. Ann. § 549.20 (Supp. 1978) and Ore. Rev. Stat. § 30.925 (1979), which provide similar guidelines to be considered when awarding punitive damages. See also Model, Uniform Product Liability Act § 120(a) and Analysis, U.S. Dept. of Commerce, 44 Fed. Reg. 62,714, 62,748-49 (1979) (suggesting similar guidelines); Mallor and Roberts, Punitive Damages: Toward a Principled Approach, 31 Hastings L.J. 639, 667-69 (1980); and Owen, 74 Mich. L. Rev., 1257, 1314-19 (discussing the vagueness of standard used to measure the awards of punitive damages and the need for tighter guidelines similar to the ones outlined in the proposed statute).

Such guidelines are warranted given the nature of punitive damages. Because punitive damages involve an imposition of a quasi-criminal penalty, safeguards in the form of specific guidelines are necessary to check a possible abuse of discretion. See Electrical Workers v. Foust, 442 U.S. 42, 50 (1979) (citations omitted) (because of broad discretion both as to imposition and amount of punitives, impact of these windfall recoveries is unpredictable and potentially substantial). As one court noted, "since such damages are punitory [sic] and are assessed as an example and warning to others, they are not a favorite in law. . . ." Gilpin v. Ks. State High School Activities Assn., Inc., 377 F. Supp 1233, 1244 (D. Kan. 1973). The court stressed that punitive damages should be allowed only with caution and within a narrow limit. Id.

[10] This section simply codifies Kansas case law. See e.g., Stevens v. Jayhawk Realty Co., Inc., 236 Kan. 90, 689 P.2d 786 (1984), and Webber v. Patton, 221 Kan. 79, 81, 558 P.2d 130,

132 (1976) (citing Watkins v. Layton, 182 Kan. 702, 706, 324 P.2d 130 (1958), that before punitive damages may be awarded, a plaintiff must establish a right to recovery of actual damages).

[11] See Bryan v. Thomas Best & Sons, Inc., 453 A.2d 107 (Del. Super. 1982). In Bryan, the court held that there should be no discovery of defendant's financial condition until plaintiff could show a factual basis for his claims of punitive damages. The court reasoned that this would best balance defendant's right to privacy and to protections against harassment against plaintiff's need for this information. Id. Accord Leidholt v. District Court, 619 P. 2d 768 (Colo. Super. 1980), and Breault v. Friedli, 610 S.W.2d 134 (Tenn. App. 1980). See also Cal. Civ. Code § 3295(c) (West 1981) (statute requiring plaintiff to make a prima facie showing of manufacturer's liability for punitive damages before discovery of wealth may proceed); and Owen, supra n.2 (regarding possible savings of time and expense of discovery and construction of elaborate punitive damages defense).

[12] Section 6(b) would eliminate the risk of prejudice by the jury on the issue of liability by not allowing the jury to be influenced by the disclosure of the defendant's wealth. Although such risk is acceptable in the ordinary civil proceeding, given the quasi-criminal nature of punitive damages such as risk is not warranted. See Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1320 (1976) (noting the risk of prejudice by the jury upon discovery of defendant's wealth). See also Dubois, Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster, 43 Ins. Counsel Journal 344, 351 ("There is usually

great disparity between the parties' financial status which can create a Robin Hood-like state of mind in the jury room").

[13] This section is merely a codification of well-established Kansas case law. See Kline v. Multi-Media Cablevision, Inc., 233 Kan. 988, 666 P.2d 711 (1983).

KANSAS BAR ASSOCIATION

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February 9, 1987
HB 2025

Mr. Chairman. Members of the House Judiciary Committee. I am Ron Smith, KBA Legislative Counsel.

I. Changing the state's common law concerning imposition of punitive damages in personal injury actions is a delicate business.

II. Such change must be done carefully and with foresight.

III. KBA Supports HB 2025 as drafted, but reserves the right to withdraw that support if the bill is materially altered.

The interim committee on Tort Reform and Insurance has suggested this change. As drafted, KBA supports this bill.

The Problem

For the past two years, KBA has had an ongoing committee discussing litigation costs and delays. We've had our Legislative Committee looking at issues such as punitive damage reform.

We have done so because that while punitive damages are an important part of the civil justice system, the misuse of a claim for punitive damages causes some persons to have to duplicate defense costs,

Attachment XI
House Judiciary 2/9/87

and such misuse acts to force risk-adverse persons or businesses to concede actual economic loss in settlements rather than risk exposure to punitive liability. While experience shows appellate courts do not readily allow punitive claims to stand in Kansas without supportive evidence, the legal expense -- some of it uninsurable -- to get such courts to modify or reverse punitive awards is high, and is sometimes inappropriate.

Solutions

Some advocate abolition of punitive damages. They do so directly -- by outright abolition -- or indirectly, by such means as having the entire amount of punitive damages paid to the state general fund.

We think such positions are inappropriate. The purposes of civil punitive damages in Kansas are punishment and deterrence of the defendant and others who might engage in similar inappropriate conduct [Newton v. Hornblower, 224 Kan. 506 (1978)].

Our own unscientific research of Kansas appellate cases citing punitive damages awarded since 1976 in Kansas show that awards for punitive damages are heavily scrutinized by the appellate courts and if unsupported by evidence, they are overturned. In addition, corporations are the plaintiff in almost one fourth of the cases appealed concerning punitive damages, indicating that corporations seek punitive damages from other businesses quite often. About 5% of the cases

show government entities as plaintiffs. Average punitive damages awarded run less than $25,000. Amounts exceeding $100,000 were rare.

HB 2025 as drafted will do the following:

1. A bifuracted trial is required. While bifurcation is available now if the court agrees, they've not been readily wanting to make such bifurcations. We think bifurcation will be useful. In Phase I, the jury decides whether to award actual damages, and, based on the evidence, whether the defendant acted willfully, wantonly (which includes recklessly), or with fraud or malice. If the answer to that special question is "no," the defendant should not face punitive damages, and a second phrase is unnecessary.

   (a) If the jury decides that the defendant acted willfully, wantonly or with fraud or malice, and so states, it is doubtful that a second hearing is necessary, since if there are also actual damages awarded, for "other considerations" (such as no appeal) the plaintiff may agree to forego the opportunity to seek punitive damages.

   (b) The presence of bifurcation means that the award of actual damages will be done without the wealth of the defendant figuring into the actual damage award.

2. Subsection 1(b) allows evidence of mitigation of punitive damages to be considered by the jury that ordinarily is not allowed to go to the jury. For example, since the purpose of punitive damages is to "punish and deter" the conduct of the defendant, in mass tort cases or product liability cases, the defendant may want to show under subsection 1(b)(7) that he has been punished in other jurisdictions. Kansas courts have no current express authority to hear evidence of unrelated punitive damage judgments rendered in other jurisdictions as being

relevant to the question of remittitur or additur in a pending case where multiple punitive awards arise from a single wrong.

3. The claim must be proved by "clear and convincing evidence." Most claims based on fraud currently have this requirement. Some trial attorneys indicate claims for punitive damages often unofficially require extraordinary proof before juries award such damages. KBA does not believe the standard should be "beyond reasonable doubt;" that is a criminal code standard of evidence that is inappropriate in our civil code.

4. The change in subsection (d) is drawn from the 1985 medical malpractice code, which was done because of the peculiar relationship of a physician with a hospital or the physician's medical corporation or partnership; it does not appear to readily translate to other forms of punitive damages. Statutes allow insurance coverage for punitive damages awarded for vicarious liability of principles or employers for the tortious act of agents or employees. [Chapter 160, 1984 Kansas Session Laws.] The Kline v. Metromedia case sets forth a standard of what constitutes a "good faith" defense to vicarious liability for punitive damages. We suggest subsection (d) either be stricken, or (d) conform to the language of Kline, which is attached as an appendix.

5. Although not a condition of our support for this bill, the fact that this bill covers all punitive claims in civil actions ex-

cept medical malpractice claims means that medical malpractice punitive claims will be handled differently. Examples:

(a) The mitigation evidence in subsection 1(b) is unavailable to health care providers -- including hospitals.

(b) In Keltz v. Feltner, the Supreme Court of Kansas should decide the constitutionality of the 1985 SB 110, which included the physician's statute concerning punitive damages. That case is expected to be handed down this week. If 1985 SB 110 is overturned as unconstitutional, and this act doesn't doesn't include medical malpractice actions, we'll have created two standards of handling punitive damage claims.

Other Issues

Punitive damages should NOT be split with the state general fund, or for any other use, unless determined voluntarily by the plaintiff. To require any portion of the award to go to the state creates unnecessary conflicts of interest between plaintiffs counsel and the plaintiff. Further, the state does not participate in the costs of discovery of relevant evidence leading to successful prosecution of the punitive claim; the state therefore has no basis for getting part of the award.

Conclusion

KBA supports this legislation. We believe our suggested amendments strengthen it.

Some appendixes are provided.

Session of 1987

HOUSE BILL No. 2025

By Special Committee on Tort Reform and Liability Insurance

Re Proposal No. 29

12-15

AN ACT relating to civil procedure; concerning punitive damages.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) In any civil action [except medical malpractice liability actions,] in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted by the same trier of fact to determine the amount of such damages to be awarded.

(b) At a proceeding to determine the amount of exemplary or punitive damages to be awarded under this section, the trier of fact may consider:

(1) The likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct;

(2) the degree of the defendant's awareness of that likelihood;

(3) the profitability of the defendant's misconduct;

(4) the duration of the misconduct and any intentional concealment of it;

(5) the attitude and conduct of the defendant upon discovery of the misconduct;

(6) the financial condition of the defendant; and

(7) the total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, compensatory and punitive damage awards to persons in situations similar to those of the claimant

(((The committee should probably reconsider 1985 SB 110's limitations on punitive damages against health care providers, for the following reasons:

1. If the Kansas Supreme Court in Fretz v. Keltner overturns 1985 SB 110 in February, and does so in a manner that overturns the medical malpractice punitive damage act, HB 2025 would not apply to physicians alleged to be liable for punitive damages.

2. Further, if the committee decides to delete "wanton conduct" from HB 2025, SB 110 kept wanton conduct against physicians. It will make proving punitive damages against health care providers easier than other defendants.

and the severity of the criminal penalties to which the defendant has been or may be subjected.

At the conclusion of the proceeding, the trier of fact shall determine the amount of exemplary or punitive damages to be awarded and shall enter judgment for that amount.

(c) In any civil action where claims for punitive damages are included, the plaintiff shall have the burden of proving, by clear and convincing evidence in the initial phase of the trial, that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice.

(d) ~~In no case shall punitive damages be assessed pursuant to this section against:~~

~~(1) A principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer; or~~

~~(2) an association, partnership or corporation for the acts of a member, partner or shareholder unless such association, partnership or corporation authorized or ratified the questioned conduct.~~

(e) As used in this section the terms defined in K.S.A. 60-3401 and amendments thereto shall have the meaning provided by that statute.

(f) The provisions of this section shall apply only to an action based upon a cause of action accruing on or after July 1, 1987.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

"Punitive damages can be awarded against a master, principal or employer because of an act done by an servant, agent or employee under this section only if: (1) the master, principal or employer authorized the doing and the manner of the act;

(2) the servant, agent or employee was unfit and the master, principal or employer had actual knowledge of that before the act was committed;

(3) the servant, agent or employee was employed in a managerial capacity and was acting within the scope of employment; or

(4) the master, principal or employer or a managerial agent of the master, principal or employer ratified or approved the act."

(from Kline v Multimedia, Inc.)

The Insurability of Punitive Damages

By Steven G. Schumaier and Brian A. McKinsey

A young girl sustains serious injuries when she is struck by a drunk driver. She sues, and wins a judgment for both punitive and compensatory damages. Can the defendant driver now compel his automobile liability insurance carrier to pay the punitive damage portion of the award? Yes, he can, the Supreme Court of Tennessee held in *Lazenby v. Universal Underwriters,* 383 S.W. 2d 1 (1964).

Before the expansion of strict liability and the imposition of vicarious liability for punitive damages in products, automobile, malicious prosecution and false imprisonment cases, state courts found it unthinkable and immoral to permit insurance to cover intentional acts. Since the evolution of modern tort law, however, with punitive damages an increasingly common element of civil litigation, the public policy basis for disallowing their coverage by liability insurance may have become archaic.

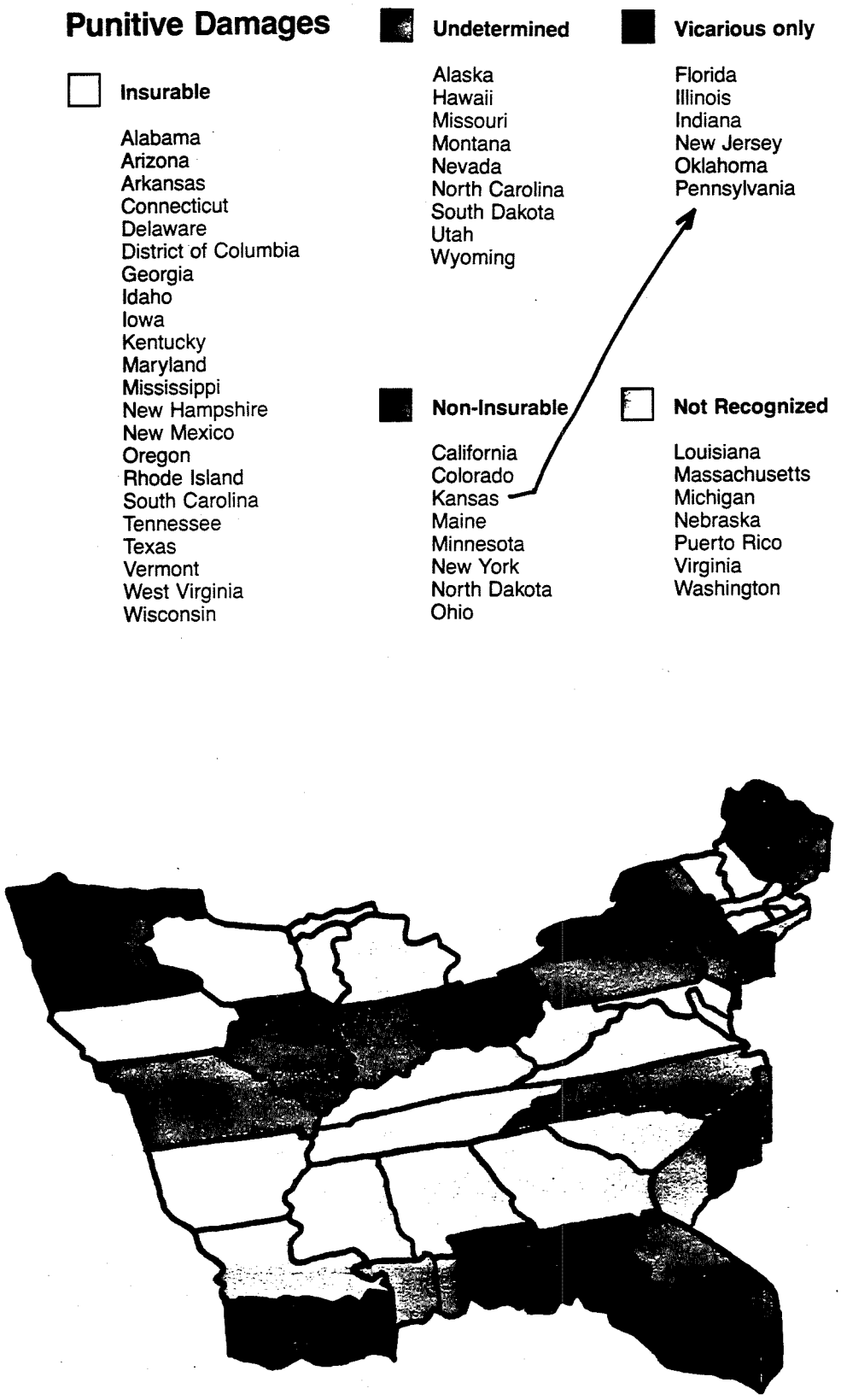
The trend is unquestionably in favor of the insurability of punitive damages. No jurisdiction has moved from insurability to uninsurability. At least 29 jurisdictions either allow the insurability of such damages without exception or, more frequently, allow it in cases of vicarious liability. Only 13 jurisdictions disallow any coverage as a matter of public policy. Some states have not decided the issue due to their non-recognition of punitive damages or, in at least two jurisdictions, due to the compensatory character of punitive damages.

In jurisdictions where the insurability of punitive damages is in limbo, an assault in favor of insurability is likely to be made when punitive damages are the only substantial damages involved—in malicious prosecution, false arrest and defamation cases, for example.

Arguments in favor of insurability also will be pressed when the punitive damages are vicariously imposed. In product liability cases, for example, the manufacturer may have had actual knowledge of the propensity of its product to cause harm, but may not have designed the product with the intent to injure. Similarly, even though an employer may have had knowledge of an employee's drunk driving record, it does not necessarily follow that it sent the employee on a mission to injure someone.

Privity and negligence

Initially, insurance contracts indemnified against loss caused by natural occurrences or negligence only, and then care-



ABA Journal graphic by Bob Fernandez

fully prescribed the conditions under which payment would be made. There was no strict liability.

In order to recover for injury from a defective product, the plaintiff had to prove privity and negligence. There was no civil rights litigation, no liability of public officials and little innovation in the standard liability insurance contract.

The traditional view against the insurability of punitive damages was capsulized by Judge Minor Wisdom in *Northwestern Casualty Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962):

"[T]he delinquent driver must not be allowed to receive a windfall at the expense of the purchasers of insurance, transferring his responsibility for punitive damages to the very people—the driving public—to whom he is a menace. We are sympathetic with the innocent victim here; perhaps there is no such thing as money damages making him whole.

"But his interest in receiving non-compensatory damages is small compared with the public interest in lessening the toll of injury and death on the highways; and there is such a thing as a state policy to punish and deter by making the wrongdoer pay."

Policy arguments against insuring punitive damages developed in an age of individual defendants acting intentionally or maliciously. It was argued that if the insurer paid the punitive damages, it was no deterrent to the manufacturer or distributor. On the other hand, it was argued that if the act was only a matter of actual knowledge of the defect and there was no intent to injure, there was no violation of public policy.

Change and response

The law changes with caution, but it changes. As society and technology change, the law responds. And in the wake of legal changes come challenges to insurance. The evolution of product liability law illustrates the point.

As technology moved from individual manufacturing to mass-produced and mass-marketed products, the law of product liability came out of the horse-and-buggy days, too.

Until quite recently, most jurisdictions required a plaintiff to prove privity of contract with the tortfeasor. This requirement has been almost completely abolished. *Henningsen v. Bloomfield Motors*, 161 A.2d 69 (N.J. 1960).

For many years, the almost exclusive ground for recovery for personal injuries was negligence. This set up serious obstacles of proof for plaintiffs. In most jurisdictions the inability to establish liability

for actual damages precluded an award of punitive damages.

As mass production began to mass produce injuries, however, American courts began to find that public policy was served best by holding the manufacturer of a defective product responsible for injuries caused by the product and to remove some obstacles of proof in order to achieve that result. *McPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.J. 1916). This eventually resulted in the judicial recognition of strict product liability in the vast majority of states. *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Calif. 1963).

Previously, if an employer's servant intentionally caused injury, neither the employer nor its insurer could be liable because such an act would be outside the scope of the servant's employment and respondeat superior would not apply.

In a product liability action, however, evidence of several other injuries by a defendant's product or the manufacturer's knowledge of the dangerousness of its product could meet the requisites for recovery of punitive damages, even though the defendant's liability for the personal injury was vicarious.

With the increasing availability of punitive damage awards, manufacturers and distributors sought ways to insure them.

Uniform net loss

The challenge to the noninsurability of punitive damages focused on a little clause that for decades has been used almost without change in liability insurance contracts: the "uniform net loss clause." It typically states that the insurance company will pay "*all sums* which the insured shall become legally obligated to pay arising from bodily injury or property damage. . . ." Because insurance companies are afraid to make any changes that could affect the marketing of their policies and because of the wealth of decisions interpreting the clause, it remains in general use.

Following the majority trend, however, courts are construing the UNL clause in favor of insuring punitive damages. As the courts attempt to dovetail old public policy with current tort trends, insurance companies are beginning to view their old friend, the uniform net loss clause, with more suspicion than respect.

All cases involving the insurability of punitive damages involve at least one of two questions: Is the coverage void against that state's public policy? Does the insurance policy provide for this coverage?

As one early English court noted, "Public policy is a very unruly horse and once you get astride it you never know where it will carry you." *Richard v. Mellish*, 2 Bing. (Eng.) 229. The same horse has carried different courts in different directions.

Denial on definition

The traditional route denied insurability of punitive damages based upon the term's definition. Punitive damages are imposed to punish a wrongdoer and to deter him and others from similar conduct. In *McNulty*, Wisdom reasoned that because punitive damages were not compensatory, assessing them against the insurance company would punish it instead of its insured. This ultimately would punish society as a whole by premium increases and defeat the raison d'etre of punitive damages.

The trend is unquestionably in favor of punitive damages. No jurisdiction has moved from insurability to uninsurability.

One court also noted that because the fact-finder may consider the wealth of a defendant in determining punitive damages, policy limits might also be admissible if those damages are insured. *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061 (Fla. 1983).

But the unruly horse has gone in the other direction at the same trot. In *Lazenby*, the leading case in favor of the insurability of punitive damages, the court argued essentially three points:

- Punitive damages have not conclusively been determined to be a realistic deterrent.
- The reasonable expectations of the insured should be given weight, and the average insured would assume that punitive damages are covered.
- Contracts should not be declared void as against public policy unless they are clearly and unambiguously void.

Some courts have held that the defendant was unaware that its act or omission could result in punitive damages and therefore, no public policy in favor of deterrence is compromised by allowing insurance. *First Bank (N.A.) - Billings v. Transamerica*, 679 P. 2d 1217 (Mont. 1984).

It has been observed that an insurance policy that only covers actual damages is almost worthless in cases such as false arrest, assault and battery, libel and slander, which often involve nominal actual damages but great potential punitive damages.

Proximate cause

Many decisions state that unless proximate cause can be shown between the fact of liability insurance and the subsequent act giving rise to punitive damages, it should not be assumed that insurance will lead to an increase in willful conduct. *Sinclair Oil Corp. v. Columbia Casualty Co.*, 682 P.2d 975, 981 (Wyo. 1984).

Some courts, addressing the concern that insuring punitive damages may promote willful conduct, have pointed out that the insurance company still can bring pressure to bear on its insured by exclusions or the threat of premium increase or policy cancellation. Others have noted that only those insureds who statistically face a similar risk would be affected by the higher premiums that Judge Wisdom feared punitive damage insurance would cause. *Cieslewicz v. Mutual Service Casualty Insurance Co.*, 267 N.W. 2d 595, 601 (Wis. 1978).

Compromise

Some decisions have reached a compromise, disallowing coverage for individual intentional acts while allowing coverage for punitive damages stemming from vicarious liability. As one court observed, "Certainly no social policy will be furthered by hindering the growth of businesses beyond that to which one man can personally attend. Without liability insurance coverage, a businessman can ill afford the risk of delegating responsibility to employees who may eventually commit some willful, wanton or malicious tort in the scope of his employment." *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1067 (Fla. 1983).

This view stems from the belief that when liability for punitive damages is vicarious, there is no employer conduct to deter. The potential exposure in excess of insurance, the cost of litigation and its adverse public relations effect is thought to be deterrent enough. Because the employee frequently cannot satisfy a judgment for punitive damages, it has been argued that it is no more unreasonable to have insurance to cover punitive damages than it is to shift liability from the employee to the employer.

Of course, this is one point on which the two camps markedly disagree. Opponents of punitive damage insurance argue that an employer will select, supervise and discipline its employees more carefully if it lacks that insurance. Proponents counter that the employee's tortious conduct may be a one-time occurrence that the employer could not control.

Looking at language

Another important public policy —enforcing contracts within the reasonable expectations of the parties—should be given priority, some state courts believe. Thus, the minute variations in the language of the uniform net loss clause determines what coverage is extended. *Schnuck Markets, Inc. v. Transamerica Insurance Co.*, 652 S.W. 2d 206 (Mo. App. 1983).

Two views emerge. The majority either holds that the clause is ambiguous and resolves the ambiguity against the insurer who created the ambiguity, or simply holds that punitive damages are covered because they always "arise" out of the underlying action for injury or damage. The minority view is that punitive damages are not covered because they cannot be said to be damages for bodily injury or property damage.

Survival of public policy

The unruly horse is likely to stand firm against the insurability of punitive damages only when the insured intended the injury, such as an unprovoked assault or an injury inflicted during the course of criminal conduct. Here alone the public policy argument should survive.

Gone are the days when insurance companies could rest assured that punitive damages would be excluded automatically on public policy grounds. Now insurance contracts should be worded specifically to include or exclude punitive damages as a covered risk. Otherwise, contract interpretation will be left to courts that are more inclined to construe language in favor of the insured.

Insurer and insured must examine the state law and the insurance policy itself to determine whether the policy covers punitive damages. A plaintiff's lawyer should determine whether his client's claim for punitive damages is insurable, and if not, whether it is collectible in the event of judgment.

The following points should be kept in mind:

- The insurability of punitive damages is determined by the law of the state in which the insurance contract was entered into, and not the place of the tort. Generally the place of the contract is the place where the insured is a resident, the policy was delivered and the first premium was paid.
- The public policy of the state in which the insurance contract was made may determine whether punitive damages are insurable. Many states, however, simply look to the language of the insurance policy and the nature of the tort insured.
- Specific exlusionary language in the policy will always control.

As the courts continue to find that punitive damage awards are covered by insurance awards, insurers will begin to dispose of the generalized uniform net loss clause. The courts are turning the "unruly horse" of public policy out to pasture in favor of the more reliable mount of contract interpretation.

Journal

Steven G. Schumaier and Brian A. McKinsey are partners in the Clayton, Mo., law firm of Schumaier, Roberts & McKinsey.

Subpoena limits

Lawyers seek protection

Concern over the issuance of subpoenas requiring criminal defense lawyers to testify against their clients prompted the ABA's House of Delegates to approve a resolution calling for judicial approval before subpoenas are issued.

The proposal was introduced by the ABA's Criminal Justice Section at the midyear meeting. It also urges courts to determine whether subpoenas are necessary by ensuring that the information sought is not protected by attorney-client privilege, is relevant to a grand jury investigation and can be gotten no other way. The court also is asked to make certain that the subpoena is not issued to harass the attorney, witness or client. When a subpoena is issued, the judge's ex parte findings should have no bearing on subsequent proceedings, the resolution advised.

The ABA will urge state and federal authorities to implement these principles.

The "[s]hocking incidence of grand jury subpoenas to attorneys . . . erodes the basic relationship of trust between the attorney and client," said Judge Sylvia Bacon, of the Superior Court of the District of Columbia, and a member of the Criminal Justice Section.

Bacon: The trust between attorney and client is being eroded.

But not everyone thinks the rules are necessary, or that defense lawyers have been deluged with subpoenas. Stephen Trott, assistant attorney general in the criminal division of the Justice Department, questioned the statistics. Of 147 subpoenas issued between August and December, only 13 were of trial lawyers, he said. The Justice Department already has subpoena guidelines, and the ABA's proposal would create "useless, unproductive work" for judges, he said.

In other action, the House approved Criminal Justice Section proposals that:

- Support federal legislation to help law enforcement agencies combat money laundering, or transactions designed to conceal criminally derived property. But the ABA opposes legislation backing a new crime of money laundering that does not contain the requirement that the offense be committed intentionally and knowingly.
- Support an amendment to the Federal Rules of Criminal Procedures that calls for an equal number of peremptory challenges for prosecution and defense in single-defendant criminal trials.
- Urge that turning prisons and jails private get no consideration until complex constitutional, statutory and contractual issues are resolved.

—Faye A. Silas

Punitive damages

Survey finds they're rare

Punitive damages are awarded infrequently, even less so in large amounts, according to preliminary findings of a new American Bar Foundation study.

Stephen Daniels, ABF project director, examined all compensatory and punitive awards in two dozen "reliable" jury verdict reporters from 1981 through 1983, with some 1984 cases included. Appellate, settled and judge-disposed cases were not included.

Here are some preliminary findings:

- Cobb County, Ga., juries gave punitive awards in 21.6 percent of cases in which plaintiffs recovered—the highest level for the courts studied. By contrast, juries in Cook County (Chicago), Ill., awarded punitive damages in only 2.2 percent of these cases. For most jurisdictions studied, jurors gave punitive awards in about 13 percent of cases.
- Cook County's median award for verdicts with a punitive component was $52,500 for 1982-83. There were 30 verdicts over $1 million and eight million-dollar punitive awards.
- New York City had a median jury award of $100,000, but only had two million-dollar punitive awards for 1981-1983.
- Los Angeles County had a median jury award of $69,000 for 1981-83. It had 78 million-dollar verdicts, of which 21 included million-dollar punitive awards.
- San Diego County had a median jury award of $50,000 for 1981-83, but for those with punitive damages, the median was $248,000. No million-dollar awards were given for punitive damages. There were six million-dollar verdicts.

Daniels: Median awards don't show a dramatic surge.

Average total awards have increased tremendously in the last few years, Daniels said. But 87 percent of the cases in Cook County for 1982-83 that he tabulated produced awards lower than the average. A better measurement, he thinks, is the median. The median awards don't reveal a dramatic surge, he said.

Most punitive damage awards are small in amount and involve cases of personal violence, contract, fraud, false arrest and insurance conflict, such as bad faith, Daniels said. Punitive damages were not awarded often in products liability and antitrust cases, he said.

Daniels' findings and conclusions may surprise insurers and manufacturers. Many have cited punitive damages in particular, rising compensatory damages in general and the cost of legal services as causing skyrocketing premiums, increased losses and cuts in insurance coverage.

Insurers and manufacturers often say that just one large punitive damage verdict can be devastating, Daniels said. But he stressed that these few large awards also skew the picture. Doctors and hospitals mainly fear pain and suffering awards, not punitive awards, he said.

—Cheryl Frank

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February 9, 1987

TO: HOUSE JUDICIARY COMMITTEE

FROM: Harriet J. Lange
Executive Director

RE: HB 2025

Our interest in HB 2025 is related to its application in libel cases and we would urge the committee to consider placing a cap on punitive damages that can be awarded.

Although the media for some time has had the "clear and convincing" standard apply in libel cases, it is interesting to note that over the past five years, 60 percent of media libel cases in the U.S. have included punitive damage awards. According to the Libel Defense Resource Center, the average amount of these punitive damage awards has been $3 million.

Punitive damages create uncertainty in media litigation, and the cost of litigating such cases is beyond the reach of most media organizations; not to mention the chilling effect that (the probablity of) punitive awards has on the concept of a "free and unfettered" press.

Although the broadcast media in Kansas takes seriously its responsibility of accurate reporting and serving the "public interest, convenience and necessity", libel litigation can occur at any time. We would urge your favorable consideration of removing the uncertaintly of libel litigation by devising a formula or standard which would place a cap on the amount of punitive damage awards.

HJL/

Attachment XII
House Judiciary 2/9/87