Approved March 16, 1987
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

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

3:30 ~~xxxx~~/p.m. on March 3, 1987 in room 313-S of the Capitol.

All members were present except: Representatives Bideau, Jenkins and Peterson, who were excused.

Committee staff present:
Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Jane Holt, Secretary

Conferees appearing before the committee:
Professor James M. Concannon, Kansas Bar Association
Paul Fleenor, Kansas Farm Bureau
David Litwin, Kansas Chamber of Commerce and Industry, Kansas Coalition on Tort Reform
Wayne Stratton, Kansas Hospital Association of Kansas Medical Society
Ted Fay, Kansas Insurance Department
Jerry Palmer, Kansas Trial Lawyers Association
Ron Smith, Kansas Bar Association
Pat Hubbell, Kansas Railroad Association
Jerry Southard, Kansas Power and Light Company
E. L. Lee Kinch, Attorney, Wichita
Ron Calbert, United Transportation Union

Hearing on H.B. 2475-"John Doe" pleadings in civil actions for discovery purposes.

Professor James Concannon testified H.B. 2475 is aimed primarily at the problem one faces when the expiration of statute of limitations is eminent. He suggested several amendments to improve H.B. 2475, (see Attachment I).

The hearing was closed on H.B. 2475.

Hearing on H.B. 2471-Consideration of payments from collateral sources in certain liability actions
H.B. 2472-Limit on non-economic damages in personal injury cases

Paul Fleenor testified in support of H.B. 2471 and H.B. 2472. He stated juries should not be kept in the dark when they decide actual damages and there should be a reasonable limit on non-economic damages. He also testified in support of H.B. 2452. The Kansas Farm Bureau supports a prohibition of filing of liability claims in circuits other than those whose jurisdiction includes the location of the event, (see Attachment II).

David Litwin testified in support of H.B. 2471 and H.B. 2472. He stated the significant limitation of the collateral source rules, a cap on non-economic loss and restrictions on the award of punitive damages are tort reform proposals that would do the most to moderate and improve our civil justice system, (see Attachment III).

Professor James M. Concannon testified on H.B. 2471. He submitted several suggested changes, (see Attachment IV). He also distributed copies of his testimony he presented to the Special Committee on Tort Reform and Liability Insurance on August 14, 1986, titled The Collateral Source Rule, (see Attachment V).

Wayne Stratton testified on H.B. 2471. He strongly supported modification of the collateral source rule. He said it is a mechanism for increasing jury awards. He stated it is appropriate that items which are subject to subrogation not be admissible. Mr. Stratton said he supports H.B. 2472. He recommended that the language in lines 45 and 46 should be left as it was originally.

Ted Fay informed the Committee he served as the attorney for the Citizens Committee to review legal liability problems in Kansas as they affect insurance. In

In regard to H.B. 2471, the Citizens Committee recommended that evidence of collateral sources be provided to the jury for their consideration in setting damages in personal injury cases. In regard to H.B. 2472, the Citizens Committee recommended that legislature establish reasonable caps for non-economic losses, (see Attachment VI).

Jerry Palmer recommended the Committee defer any action on H.B. 2471 at this time. A decision on the constitutionality of the Medical Malpractice Statute of Limitations enacted in 1985 will not be published prior to April 24 or possibly May 22. In regard to H.B. 2472 he stated it is, and always will be, unfair to arbitrarily cap any type of damage, (see Attachment VII).

Ron Smith testified on H.B. 2471 and H.B. 2472. He said the Kansas Bar Association opposes blanket change to the common law collateral source rules regarding other sources of reimbursement or indemification, and they also oppose limits on pain and suffering unless proponents can show clear and convincing public need for the change, and the change demonstrates clearly defined public benefits, (see Attachment VIII).

The hearing on H.B. 2471 and H.B. 2472 was closed.

Hearing on H.B. 2452-Venue of personal injury actions against utilities

Pat Hubbell testified in support of H.B. 2452. He stated the bill specifies that personal injury actions against public utilities, common carriers and transportation systems must be brought in the county of residence of the plaintiff or in the county in which the incident giving rise to the cause of action occurred, (see Attachment IX).

Jerry Southard testified in support of H.B. 2452. He said this bill provides the legislature with an opportunity to end a discriminatory practice that is employed for the purpose of producing maximum jury awards, and urged that the bill be approved, (see Attachment X).

E. L. Lee Kinch testified in opposition to H.B. 2452. He stated he opposed this legislation because it is incompatible with the prevailing venue notion that corporations ought to be subject to legal action in counties in which they transact business, (see Attachment XI).

Ron Calbert appeared in opposition to H.B. 2452. He testified the bill unfairly discriminates against only one class of plaintiffs and legal actions. He urged the Committee to vote no on this bill, (see Attachment XII).

The hearing was closed on H.B. 2452.

The meeting was adjourned at 5:35 p.m.

The next meeting will be Wednesday, March 4, 1987, at 3:30 p.m. in room 313-S.

GUEST REGISTER

DATE March 3, 1987

HOUSE JUDICIARY

NAME	ORGANIZATION	ADDRESS
Ron Calbert	United Transportation Union	New Tom
Jeff Rockett	St. Francis Med. Wichita	Topeka
Ron Smith	KS BAR Assoc	"
Barbara Ann	Speaker's Office	
Belva Ott	Dun & Bradstreet, Inc.	Wichita
Leroy Jones	B.L.E.	Overland Park
Lee Knight	Rather Mathis Rather Knight & Brown	Wichita Ks
Matt Lynch	Judicial Council	Topeka
Jill Ann Gaunt	" "	"
Marjorie VanBuren	Office of Judicial Administration	"
Kevin M H...	STUDENT	"
Pat Ashlell	Kansas Railroad Association	Topeka
Paul Hoferer	Santa Fe Southern Pacific Corp.	Topeka
Mike Germann	Kansas Railroad Association	Topeka
Gregory L. W. Hewson	Visitor	Wichita
Marta Fisher Kinderberger	Attny	Topeka
Paige Thalton	— KHA / KMS	Topeka
Jerry Slaughter	KAHS	TOPEKA
Tom Bell	Ks. Hosp Assn.	Topeka

TESTIMONY BEFORE HOUSE JUDICIARY COMMITTEE ON HB 2475
PROFESSOR JAMES M. CONCANNON
WASHBURN LAW SCHOOL
MARCH 2, 1987

HB 2475 would permit "John Doe" pleadings making persons parties to a lawsuit for some purposes but not others.

It is aimed primarily at the problem one faces when the expiration of statute of limitations is eminent. There may be persons a lawyer believes are liable for the claim but the lawyer has not been able to determine their names, e.g. a foreign corporation which is not registered in Kansas. There may be persons the lawyer believes might be liable for the claim but the lawyer has not been able to determine whether liability exists, either because of an inability to conduct discovery or because the client contacted the lawyer too late. If the lawyer names such a person in the action to guard against the limitations defense and it later turns out the person was not liable, the action unnecessarily has been made more complex and costly and the plaintiff's lawyer risks sanctions under K.S.A. 60-211 for filing unfounded claims. If the lawyer omits the person from the action and it later turns out the person was liable, an attempt to add the person by amendment pursuant to K.S.A. 60-215(c)(2) will succeed only if claimant shows the person learned of the action before the limitations period expired [Schiavone v. Fortune a.k.a. Time, Inc., ____ U.S. ____, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986)] and should have realized there was a mistake in naming parties.

HB 2475 permits the claimant to commence the action for statute of limitations purposes by using a fictitious name in the pleading and filing a separate statement which identifies the person and explains the reason he or she should be involved in the action. The person's identity would not be disclosed in public unless the person later is made a full party to the action. This not only would eliminate embarrassment to the person but presumably would prevent the pendency of the action from operating as a lien upon the person's realty pursuant to K.S.A. 60-2202 before the person is made a full party to the action. This latter point probably should be made explicit in the bill.

Subsection (b) also makes the person a party for purposes of discovery. Thus, all discovery devices could be directed to the person, not just the deposition, the subpoena for documents in connection with a deposition, and subpoena for business records as are currently available for non-parties. The main advantage would be the ability to serve interrogatories upon the person and requests for production of non-business records. The party "for purposes of discovery" language might be broad enough to permit use against a person who later is made a full party to the action of depositions taken before the person was made a full party but for which the person was served notice. See K.S.A. 60-232. While such a result would save costs of having to re-do depositions

Attachment I
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after the person is made a party, it would have the disadvantage of effectively forcing the person to bear the cost of being represented at the deposition even though he or she may never become a full party. Thus, you might decide to limit subsection (b) so these persons are parties "for purposes of discovery" only to the extent of having to respond to discovery requests.

SUGGESTIONS TO IMPROVE THE DRAFTING OF HB 2475

Line 33: "it difficult for the party or the party's attorney, after independent review of the facts and the law, to determine if a cause of action"

Line 36-7: "ments thereto or (3) ~~after the party's attorney's independent review of the facts and the law,~~ such person has been uncoo-"

Line 42: "interest that such person has in the claim ~~in the action.~~"

Line 47: "~~shall cause service of a copy of the pleading on such person and~~"

Line 51-4: "discovery. ~~A copy of such pleading and statement shall be served upon the person by restricted mail.~~ Such statement shall specify, to the best of the knowledge, information or belief of the attorney filing the pleading, ~~the information or belief~~ formed after reasonable inquiry, the"

Line 60-65: "upon order of the court for good cause shown. A copy of such pleading and statement shall be served upon the person by restricted mail. The filing ~~service~~ of a ~~copy of the~~ pleading pursuant to this ~~subsection~~ shall constitute ~~notice of suit~~ and commencement of the civil action against the person pursuant to K.S.A. 60-203 and amendments thereto solely for purposes of determining whether an action is timely filed under the applicable statute of limitations and only if a copy of the pleading and statement are served pursuant to this subsection within the time specified in K.S.A. 60-203, and amendments thereto, for service of process."

Line 66: "(c) At any time, any party to the action may move (1) to dismiss or"

Line 69: "fictitiously-named person a party to the action whose identity is"

Line 75-6: "action under this section shall either move (1) ~~for summary judgment~~ to dismiss~~ing~~ such person as a party to the action or (2) to"

Kansas Farm Bureau

PUBLIC POLICY STATEMENT

HOUSE COMMITTEE ON JUDICIARY

RE: H.B. 2471 - Concerning Certain Evidence
H.B. 2472 - Limiting Damages for Non-Economic Losses

March 3, 1987
Topeka, Kansas

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

Mr. Chairman and Members of the Committee:

My name is Paul E. Fleener. I am the Director of Public Affairs for Kansas Farm Bureau. Mr. Chairman we appreciate the opportunity to make a very brief statement in regard to two pieces of legislation concerning tort reform. We would like also to make a passing comment on a third issue, covered in yet another bill before your Committee.

In May, 1986, because of the intense interest in liability and tort reform we prepared a Research Paper for our members for their use in the comprehensive policy development process used in Farm Bureau. Every member of the Legislature received a copy of the paper which was prepared by our Student Intern, Mr. Kelly Welch. We received many **very favorable** comments on the scope, breadth and depth of this concise piece of writing on a sometimes complicated topic.

At the November 30, December 1-2, 1986 Annual Meeting of Kansas Farm Bureau the issue of tort reform was discussed at some length in the business meetings of the voting delegates from 105 county Farm Bureaus. The result of the discussion was the

Attachment II
House Judiciary 3/3/87

adoption of a policy position which is shown on the attached sheet. It is headed: **Tort Liability Reform.**

The two pieces of legislation which we are addressing today, House Bills 2471 and 2472, are measures which address some portion of the overall statement our members have made on Tort Liability Reform ... the so-called "collateral source rule," and a cap on non-economic damages.

The notion of "liability" has been expanded broadly in recent years. Legislators, judges and juries have been pushing out the frontiers of responsibility. The result has been that individuals, businesses and public agencies are being required to compensate injured people more readily, **and more generously**, than ever before. Clearly, individuals do bear the cost of the liability crisis. Consumers pay higher fees for health care, for education, for entertainment. They pay higher state and local taxes and higher prices for almost everything they purchase. Society is going to bear the cost, as well, for the countless products and activities that will no longer be available unless this "tort liability crisis" is met head-on.

Perhaps the biggest cost in all of the liability litigation is this: It is undermining the competitiveness of U.S. industry, and it is threatening the very existence of some business operations. Our society today has an almost irrational focus on litigation as the way to solve all problems. We are not here to point fingers at any one profession or service. We are here simply to tell you that farmers and ranchers across this state

have a felt need, more than a perception ... a genuine belief ... that something needs to be done **now** to reform the situation.

We ask you for an opportunity to make a brief statement. In order to keep it as brief as possible I will conclude by urging your support for the two measures we came to specifically address ... H.B. 2471 and H.B. 2472. We believe juries should not be kept in the dark when they decide actual damages. We want everyone to be reimbursed for their **actual** damages and if that is being done from several sources, the sum of those sources should add up to what the judge and jury believes to be the award that should be made not to reach into one deep pocket to settle it and then find later that others have been paying for that as well. Non-economic damages ... pain and suffering, mental anguish, mental stress ... are presently limitless. They are hard to prove or to contradict. Unfortunately, non-economic damages ... punitive damages ... depend almost entirely on the emotions of the moment and the interpretation of a judge or a jury. Surely pain and suffering deserve to be compensated but there needs to be a reasonable limit on awards.

Finally, Mr. Chairman, our overall policy statement supports a prohibition of "filing of liability claims in circuits other than those whose jurisdiction includes the location of the event ..." We believe this certainly relates to more than public utilities and common carriers. There is a good rationale why lawsuits should be tried in the county where the action arises. There may be extenuating circumstances, from time to time, when a

change of venue is necessary to bring justice to the case. A change of venue would not seem to us to be appropriate for every case that is filed, every incident that arises. We would support the legislation regarding venue, and ask that it be **broadened** so that in any case the **general rule** would be to require the filing of a liability lawsuit in the county which is the location of the event from which the liability claim arises, or is the county of residence of the plaintiff.

Thank you for the opportunity to appear on these pieces of legislation today.

Tort Liability Reform

The indiscriminate filing of tort liability claims through lawsuits, and the sometimes excessive judgments that are rendered, is a phenomenon that is costing Farm Bureau members, and others, much money. It is not uncommon for plaintiffs in such cases to be awarded multi-million dollar judgments.

To alleviate the tremendous economic pressure that this places on Farm Bureau members, local governments, and others, we support adoption of the following comprehensive tort reform measures:

* Mandate structured settlements for large monetary judgments;
* Cap non-economic damages;
* Reform court procedures and/or jury instructions to:
  - — Inform the jury that judgments are non-taxable,
  - — Perform calculations that reduce future damages to present value,
  - — Review contingency fee arrangements,
  - — Reform the collateral source rule to mandate revealing other sources of compensation for damages available to the plaintiff;
* Enact a maximum seven-year statute of limitations on liability claims;
* Prohibit the filing of liability claims in circuits other than those whose jurisdiction includes the location of the event from which the liability claim arises, or the plaintiff's home address; and
* Prohibit any person from filing a liability claim if the person is trespassing or breaking a law at the time of an injury.

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

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

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

HB 2471 and 2472

March 3, 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 appear on behalf of the Kansas Coalition for Tort Reform and the Kansas Chamber of Commerce and Industry. We appreciate the opportunity to testify in support of HB 2471 and HB 2472.

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; Wichita Area Chamber of Commerce; Kansas Motor Carriers Association; Kansas Society of Architects; Kansas Medical Society; Kansas Hospital Association; 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 Engineering Society; Kansas Motor Car Dealers Association; Kansas Lodging Association; Kansas Petroleum Council; Kansas Independent Oil and Gas Association; American Insurance 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.

Attachment III
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I think it is fair to say that it was the liability insurance crisis (which, incidentally, from reports we receive from the business community, widely continues to plague our members) which drew everyone's attention to problems in the court system. There certainly is a direct and proximate relationship between the insurance crisis and civil justice problems, but it cannot be overemphasized that in our view, every proposed "tort reform" that we support should be enacted primarily because it is good public policy. Insurance considerations are certainly pertinent, but public policy factors are paramount.

If I may, let me first turn my attention to HB 2472, the proposed $250,000 cap on noneconomic loss. KCCI feels, as does the great majority of the members of the Coalition for Tort Reform, that the most essential single proposed reform of our civil justice system that is of general applicability is a reasonable cap on noneconomic damages. This is not at all to imply that other pending bills and proposals are not vital, but only to emphasize the significance of this particular reform.

Intangible kinds of loss - such as pain and suffering, anguish, stress, loss of consortium - are certainly very real and can entail much suffering. Such loss demands fair compensation - we have no quarrel at all with that. The problem is, what is "fair" or "reasonable" in this context. Such kinds of damage are subjective and cannot be assigned an objective dollar value. As a result, juries cannot be given very precise instructions on this category of damage, and conversely there are few controls to limit their discretion. The consequence is verdicts that are sometimes unreasonably high, and vary enormously from case to case, even those involving similar injuries.

The evidence that is available points to pain-and-suffering damages as the key ingredient in the acknowledged huge increase in the average size of jury verdicts in personal injury cases that has occurred throughout the United States. For some reason, or more likely for a complex of reasons, juries in many cases today are simply awarding much more money than ever before for intangible kinds of damages. But the result is unpredictable in any given case.

Attached to this testimony is a New York Times editorial on this topic from July 1986. It relates a case - certainly extreme in size but still all too representative of the trend - in which a woman was seriously injured as a result of medical malpractice. Her actual damages were set at $7 million, no small amount. But the jury set pain and suffering at $58 million. The editor pertinently asks:

> "By what measure could even such suffering be worth $58 million? What manner of life does the jury intend to confer on the ailing 56-year-old woman - and on her heirs, who suffered no injury whatever?"

The editor then notes that plaintiffs' attorneys might counter that such a manifestly excessive award would probably be reduced by the trial judge or on appeal. But that is cold comfort, and very uncertain. The degree to which a verdict can be reduced by a trial or appeals court is limited by the fact that the scope of review is restricted. A judge is not permitted to ask whether he or she would have awarded such an amount, but can upset a verdict only where it is clearly capricious and unreasonable.

In another case reported in the media last year, a Texas gas-field worker was seriously injured in an accident. Verdict: $64 million, mostly punitive and pain-and-suffering damages. A juror interviewed later said:

> "I went along with it (the big verdict) because I figured it would be reduced by a judge or on appeal."

Another juror in the same case:

> "I look at the federal deficit, and it's not too hard to understand that too many people are leaning on the taxpayer. I personally felt the company should pay or the (plaintiff) would be a tax debt the rest of his life."

The successful attorney for the plaintiffs, apparently in awe even of his own verdict, said: "Money is losing its meaning." These case accounts graphically illustrate the dangers inherent in allowing unlimited awards and boundless jury discretion.

We submit that a defendant should not have to face such total uncertainty. It is unfair and illogical. Moreover, the spectre of huge noneconomic loss awards is a major obstacle to settlement of many cases. In the words of the federal government's Tort Policy Working Group's 1986 Report:

> "Noneconomic damages also can serve as a significant obstacle in the settlement process. Plaintiffs and defendants often can agree quickly on the amount of economic damages, but disagree sharply on non-economic damages. Plaintiffs frequently have unrealistic expectations of non-economic damages in the hundreds of thousands or millions of dollars to which defendants simply are unwilling to agree. Plaintiffs thus often reject settlement offers that from the standpoint of compensation for economic damages are quite reasonable." Report at p. 67.

Moreover, news reports of astronomical verdicts are made when they are entered. The chances that a subsequent reduction would be reported with the same exposure are remote. Thus this kind of verdict whets the appetite of the public, encouraging unrealistic expectations and blocking settlements in future cases.

This runs against the important public policy favoring early resolution of disputes. Litigants are better off settling before trial, thus avoiding prolonged involvement in a civil justice system that, all agree, spends much more deciding who wins a case than it does in compensating injured people. It is also very much in the interest of taxpayers to encourage settlement, since we pay all of the fixed costs of the court system.

Turning from broader public policy considerations to insurance factors, since noneconomic awards are the primary cause of the rapid increase in verdict size, unless one believes that the insurance crisis was fabricated and the result of a wide conspiracy to fix prices, I submit it is obvious that placing some reasonable outside limit on intangible loss recoveries will inevitably have a substantial long-term moderating effect. The industry suffered a 179% increase in paid losses on commercial liability lines during the period 1979 to 1985, vastly outstripping the growth in GNP, Consumer Price Index, or any other pertinent index. This represents what they actually paid out, and is completely unaffected by arguments about whether the carriers charged too little or too much, or about how much they earned on their investments. This trend can result from one factor only - the alarming increase in judgments, and in settlements based on the size of litigated judgments.

Conversely, creation of a reasonable cap must inexorably have a stabilizing and moderating effect on cost and availability of insurance over the long term. Again,

assuming one does not attribute the crisis to a conspiracy. As for that charge, it strikes me as incongruous that in an industry with over 3,000 active carriers, collusion should be charged by those very parties that in the same breath charge the industry with excessive competition only a few years back in the form of vigorous price slashing.

Finally, since only one year ago the Kansas Legislature itself enacted a $250,000 cap on noneconomic damages in medical malpractice actions, this legislature evidently believed that this was justified by public policy considerations. I respectfully submit that the same reasoning applies to the broader problem as well.

I would note that while the $250,000 cap in HB 2472 and the medical malpractice legislation seems a reasonable compromise, the important point is that any reasonable cap would probably have the intended effects. So, for example, in 1986 our sister state of Colorado passed a general limit of $250,000, but authorizes the trial judge to increase this up to a maximum of $500,000 if he or she "finds justification by clear and convincing evidence therefor." This approach makes an extra allowance for the most extreme cases. A copy of the bill is attached.

It should also be noted that an award for $250,000 in noneconomic loss would still be entirely in addition to full compensation for all actual loss, including medical expenses, lost earnings, etc.

Turning to HB 2471, the collateral source limit bill, significant limitation of the collateral source rule is also one of the highest priorities of the Coalition for Tort Reform, along with a cap on noneconomic loss and restrictions on the award of punitive damages. These three proposals together represent the essence of the generic tort reform package, and the proposals that would do the most to moderate and improve our civil justice system.

We also support enactment of HB 2471, or any other version of collateral source reform that will reduce double recoveries while at the same time protecting the legitimate interests of injured people.

Courts have justified the collateral source rule by reasoning that a wrongdoer should not benefit from the happenstance that a claimant has prudently insured him or herself, and conversely that the rule is an inducement to people to insure themselves. This was sound doctrine when we did not have a vast array of benefits supplied by government, employers and others, and when the doctrine of contributory negligence barred liability where a plaintiff contributed to an accident.

Today, however, with comparative negligence the rule, with most people enjoying a wide array of medical and other benefits often requiring no initiative and no payment by the beneficiaries, and with jury verdicts higher than ever before, the traditional rationale for the collateral source rule has been severely undermined and we can no longer afford the luxury of double recoveries and overcompensation. Again, in the words of the Tort Policy Working Group;

> "In an era when collateral sources of income were financed largely by the plaintiff himself, the collateral source rule may have been sensible. Today, however, when many collateral sources are provided or subsidized by the government or by third parties (such as employees, who often are required by law to provide certain collateral benefits), the traditional justification is called into question. Increasingly, the collateral source rule simply permits a windfall recovery by the plaintiff." Report at p. 71.

Thus, with the traditional public policy underpinnings of the collateral source rule compromised, and with the certainty that this rule does allow double, windfall recoveries, public policy considerations strongly suggest modification or repeal of the rule.

As for insurance considerations, again, the crisis has shown vividly that while social burdens can continue to be imposed on the liability insurance base, there is a cost which must sooner or later be paid. Clearly, to the extent that collateral source benefits are withheld from the knowledge of juries, awards are needlessly increased, and insurance premiums are inexorably impacted upward. The choice we face seems clear.

I would add that we are not bound to any one version of the collateral source modification. However, I suggest that to have different versions of the modification for medical malpractice on the one hand and other tort cases on the other, serves no

logical purpose. Also, we would agree that where subrogation rights exist - that is, where the provider of the benefits to claimant has a right to reimbursement from any damage award - the collateral source rule can legitimately be left in place to the extent that subrogation operates.

Thank you again. If there are any questions, I will be please to try to answer them.

The New York Times

Founded in 1851

ADOLPH S. OCHS, Publisher 1896-1935
ARTHUR HAYS SULZBERGER, Publisher 1935-1961
ORVIL E. DRYFOOS, Publisher 1961-1963

ARTHUR OCHS SULZBERGER, Publisher

A M ROSENTHAL, Executive Editor
SEYMOUR TOPPING, Managing Editor
ARTHUR GELB, Deputy Managing Editor
JAMES L. GREENFIELD, Assistant Managing Editor

MAX FRANKEL, Editorial Page Editor
JACK ROSENTHAL, Deputy Editorial Page Editor

LANCER PRIMIS, Exec. V.P., General Manager
RUSSELL T. LEWIS, Sr. V.P., Circulation
J. A. RIGGS JR., Sr. V.P., Operations
HOWARD BISHOW, V.P., Employee Relations
ERWIN LINKER JR., V.P., Advertising
JOHN M. O'BRIEN, V.P., Controller
ELISE J. ROSS, V.P., Systems

The $65 Million Malpractice Question

All New York loves a lottery, and the best game in town takes place in the courtroom. That's what Agnes Mae Whitaker, a victim of medical malpractice, discovered recently. She drew a jury that gave her $65 million — but it's not the kind of luck the rest of us should toast.

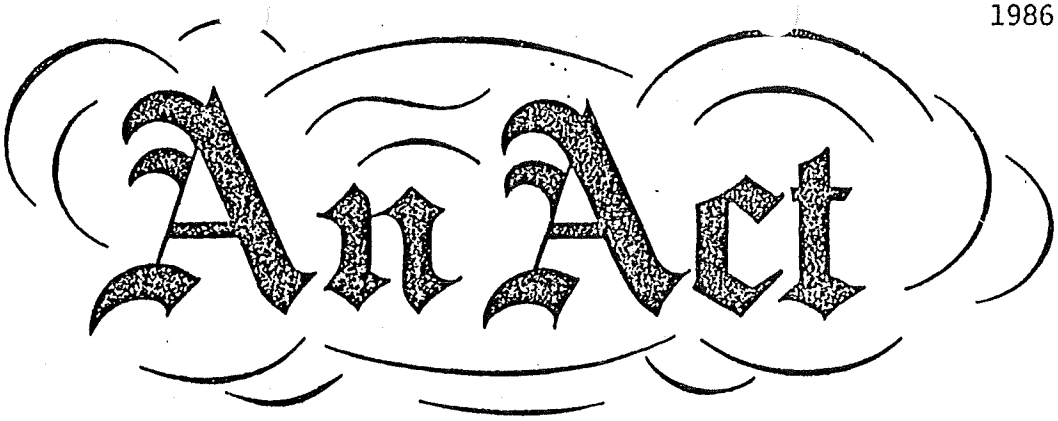
Ms. Whitaker's suffering is beyond dispute. The doctors at Lincoln Hospital failed to diagnose an intestinal constriction. The jury found that they so neglected its treatment that an infection developed, requiring removal of most of the small intestine. To cover the patient's lost earnings, past medical bills and the care she will continue to require, the jury awarded her $7 million. But that award — startling in itself — is dwarfed by the additional grant of $58 million for "pain and suffering."

That is where justice is lost to luck. By what measure could even such suffering be worth $58 million? What manner of life does the jury intend to confer on the ailing 56-year-old woman — and on her heirs, who suffered no injury whatever? Why should stupendous sums go to those who manage to fix legal blame on a source like the City of New York that can at least ostensibly "afford" to pay? Why should all other citizens ultimately bear its cost in inflated taxes and liability insurance premiums?

Hold on, say the malpractice lawyers. That huge award, perhaps the nation's largest to date, won't ever be paid. The city is already moving to have the trial judge set it aside, and if he doesn't, the appeals court will surely knock it down. Perhaps. But the public hears mostly about the initial $65 million, not the reduced amount eventually paid. That feeds the lottery mentality in a big way.

Patients rush to press even marginal claims. Lawyers eagerly take promising cases for contingency fees. Insurers, warned of how a jury's emotions might be inflamed, settle out of court for increasing amounts. And doctors perform costly, often unnecessary "defensive medicine."

Why not cool the lottery fever at a stroke by capping pain and suffering awards at a few hundred thousand dollars, as some states are doing? Governor Cuomo and the Democrats of the State Assembly have resisted that idea, saying no study has precisely quantified how such a cap would reduce costs. That's true. But there is broad agreement that a limit would, eventually and inevitably, have some beneficial effect. Ms. Whitaker's luck only dramatizes the need for trying it now.



SENATE BILL NO. 67.

BY SENATORS Hefley, Beatty, Brandon, Durham, Fowler, Glass, McCormick, Meiklejohn, P. Powers, R. Powers, Strickland, and Traylor;
also REPRESENTATIVES Schauer, Brown, Entz, K. Williams, Owens, Allison, Armstrong, Berry, M.L. Bird, Bledsoe, Bryan, Carpenter, Dambman, Fish, Gillis, Hume, Minahan, Mutzebaugh, Philips, Scherer, Swenson, Taylor-Little, and Younglund.

CONCERNING DAMAGE AWARDS IN CIVIL ACTIONS.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Part 1 of article 21 of title 13, Colorado Revised Statutes, as amended, is amended BY THE ADDITION OF A NEW SECTION to read:

13-21-102.5. Limitations on damages for noneconomic loss or injury. (1) The general assembly finds, determines, and declares that awards in civil actions for noneconomic losses or injuries often unduly burden the economic, commercial, and personal welfare of persons in this state; therefore, for the protection of the public peace, health, and welfare, the general assembly enacts this section placing monetary limitations on such damages for noneconomic losses or injuries.

(2) As used in this section:

(a) "Derivative noneconomic loss or injury" means nonpecuniary harm or emotional stress to persons other than the person suffering the direct or primary loss or injury.

(b) "Noneconomic loss or injury" means nonpecuniary harm for which damages are recoverable by the person suffering the direct or primary loss or injury, including pain and

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

suffering, inconvenience, emotional stress, and impairment of the quality of life.

(3) (a) In any civil action in which damages for noneconomic loss or injury may be awarded, the total of such damages shall not exceed the sum of two hundred fifty thousand dollars, unless the court finds justification by clear and convincing evidence therefor. In no case shall the amount of such damages exceed five hundred thousand dollars.

(b) In any civil action, no damages for derivative noneconomic loss or injury may be awarded unless the court finds justification by clear and convincing evidence therefor. In no case shall the amount of such damages exceed two hundred fifty thousand dollars.

(4) The limitations specified in subsection (3) of this section shall not be disclosed to a jury in any such action, but shall be imposed by the court before judgment.

(5) Nothing in this section shall be construed to limit the recovery of compensatory damages for physical impairment or disfigurement.

SECTION 2. Article 20 of title 13, Colorado Revised Statutes, as amended, is amended, BY THE ADDITION OF A NEW PART to read:

PART 5
ACTIONS AGAINST ARCHITECTS, ENGINEERS,
AND LAND SURVEYORS

13-20-501. Actions against architects, engineers, and land surveyors - certificate of review required. (1) In every action, whether by complaint, counterclaim, or cross claim, for damages or indemnity based upon the alleged professional negligence of a person licensed to practice architecture pursuant to article 4 of title 12, C.R.S., or of a person registered and licensed to practice engineering pursuant to the provisions of part 1 of article 25 of title 12 C.R.S., or of a land surveyor certified pursuant to part 2 of article 25 of title 12, C.R.S., or of a firm, partnership, or corporation by or through which such person was practicing at the time that he was alleged to have been professionally negligent, on or before the date of service of the complaint, counterclaim, or cross claim against any such person, firm, partnership, or corporation, the plaintiff's or complainant's attorney shall file the certificate specified in subsection (2) of this section.

(2) A certificate shall be executed by the attorney for the plaintiff or complainant declaring one of the following:

(a) That the attorney has reviewed the facts of the case, has consulted with at least one architect, professional engineer, or land surveyor who is licensed to practice and practices in this state or who teaches at an accredited college or university and is licensed to practice in this state, in the same discipline as the person or persons alleged to have been professionally negligent, and who the attorney reasonably believes is knowledgeable in relevant issues involved in the particular action and that he has concluded on the basis of such review and consultation that there are reasonable and meritorious grounds for the filing of such action. The person consulted on whose opinion the attorney's certificate is based shall not be a party to the litigation. He shall be identified in such certificate.

(b) That the attorney was unable to obtain the consultation required by paragraph (a) of this subsection (2) because a statute of limitations would impair the action and that the certificate required by paragraph (a) of this subsection (2) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph (b) the certificate required by paragraph (a) of this subsection (2) shall be filed within sixty days after the filing of the complaint, counterclaim, or cross claim.

(c) That the attorney has consulted with not less than five architects, engineers, or land surveyors, whichever discipline is applicable, and that none of such persons will certify that there are reasonable and meritorious grounds for the filing of the action pursuant to paragraph (a) of this subsection (2). Such persons shall be identified in the certificate executed by the attorney.

(3) The failure to file a certificate in accordance with this section shall be grounds for dismissal of the complaint, counterclaim, or cross claim.

SECTION 3. Part 1 of article 21 of title 13, Colorado Revised Statutes, as amended, is amended BY THE ADDITION OF THE FOLLOWING NEW SECTIONS to read:

13-21-111.6. Civil actions - reduction of damages for payment from collateral source. In any action by any person or his legal representative to recover damages for a tort resulting in death or injury to person or property, the court, after the finder of fact has returned its verdict stating the amount of damages to be awarded, shall reduce the amount of the verdict by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company, or fund in relation to the injury, damage, or death sustained; except that the

verdict shall not be reduced by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated by a benefit paid as a result of a contract entered into and paid for by or on behalf of such person. The court shall enter judgment on such reduced amount.

13-21-111.7. Assumption of risk - consideration by trier of fact. Assumption of a risk by a person shall be considered by the trier of fact in apportioning negligence pursuant to section 13-21-111. For the purposes of this section, a person assumes the risk of injury or damage if he voluntarily or unreasonably exposes himself to injury or damage with knowledge or appreciation of the danger and risk involved. In any trial to a jury in which the defense of assumption of risk is an issue for determination by the jury, the court shall instruct the jury on the elements as described in this section.

SECTION 4. Severability. If any provision of this act or the application thereof to any person or circumstances is held invalid, such 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 declared to be severable.

SECTION 5. Repeal. 13-21-111 (4), Colorado Revised Statutes, as amended, is repealed.

SECTION 6. Effective date - applicability. This act shall take effect July 1, 1986, and shall apply to civil actions commenced on or after said date.

SECTION 7. Safety clause. The general assembly hereby

finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Ted L. Strickland
PRESIDENT OF
THE SENATE

Carl B. Bledsoe
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Marjorie L. Nielson
SECRETARY OF
THE SENATE

Lee C. Bahrych
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

APPROVED May 23, 1986 6:13 P.M.

Richard D. Lamm
GOVERNOR OF THE STATE OF COLORADO

WASHBURN UNIVERSITY OF TOPEKA
School of Law
Topeka, Kansas 66621
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TESTIMONY ON HB 2471
HOUSE JUDICIARY COMMITTEE
PROFESSOR JAMES M. CONCANNON
WASHBURN LAW SCHOOL
MARCH 3, 1987

Subsection (b) is virtually identical to section 60-471 (b) which was part of the health care act of 1976. It properly implements the crucial principle I discussed in my summer testimony: Evidence of collateral source payments must be wholly inadmissible to the extent the claimant is obligated by contract or under principles of subrogation to repay those amounts out of whatever the claimant recovers in the action.

However, by carrying forward most of present section 60-3403 (b)-(c), subsections (c) and (d) of HB 2471 contradict subsection (b). If evidence of collateral payments for which there is a right of subrogation is ruled inadmissible under subsection (b) those payments should not be referred to at all at trial. Redrafting to eliminate the contradiction would be as follows:

Lines 45-46: "reimbursement or indemnification ~~and the extent to which the right to recovery is subject to a lien or subrogation right.~~"

Lines 50-52: "tion specified in subsection (a) **and which have been ruled admissible under subsection (b)** ~~; and (2) the extent to which such reimbursement or indemnification is offset by amounts or rights specified in subsection (b)~~. If, after consideration of such factors,"

Subsection (d) of HB 2471 commendably addresses the problem I discussed at length last summer of the interaction of the collateral source rule and the comparative negligence statute. However, it is not as clear as it might be. Hopefully, its last sentence would be read as requiring the jury to determine separately both the total damages the claimant suffered [including collateral benefits admitted under subsection (b)] and the amount of collateral source payments, leaving it to the judge to make any actual reduction in the award after applying the comparative negligence statute. That's the way it ought to be. However, the last sentence could also be read as requiring the jury to deduct collateral source payments from the net recovery

Attachment IV
House Judiciary 3/3/87

to which the claimant is entitled under the comparative negligence statute. That would be unworkable since the net recovery is determined by the judge only after the jury's verdict is returned.

A second problem, as under current law, is that the section leaves it up to each individual jury without any standards at all to decide whether or not to reduce damages because of collateral source payments. It seems to me that if the legislature decides it is good public policy to abolish the collateral source rule then it ought to require the appropriate reduction. My re-draft of lines 45-57 thus would read something like this:

"reimbursement or indemnification ~~and the extent to which the right to recovery is subject to a lien or subrogation right~~.

"(d) In ~~determining damages in~~ any action for personal injury or death, the trier of fact shall ~~consider~~ **separately determine: (1) The total amount of damages sustained by the claimant, including any reimbursement or indemnification specified in subsection (a) and proved by evidence admitted under subsection (b); and (2) the amount of** ~~extent to which~~ damages awarded ~~will~~ **that** duplicate reimbursement or indemnification specified in subsection (a) **and proved by evidence admitted under subsection (b)**~~; and (2) the extent to which such reimbursement or indemnification is offset by amounts or rights specified in subsection (b)~~. ~~If, after consideration of such factors, the trier of fact determines that the damage award should be reduced, t~~**The latter** amount ~~by which such damages are reduced~~ shall be applied **by the court first to offset** ~~any portion of~~ the amount **by which the total award of damages has been diminished** ~~for which the claimant is liable~~ pursuant to K.S.A. 60-258a and amendments thereto **due to negligence attributed to the claimant, then to diminish the amount of damages awarded against each defending party in proportion to that party's fault.**"

If the legislature wishes to continue jury roulette to determine whether the collateral source rule will apply, subsection (d)(2) of my draft could be changed to read: "(2) the amount by which the damages awarded should be reduced because of duplicate reimbursement or indemnification specified in subsection (a) and proved by evidence admitted under subsection (b)."

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August 14, 1986

The Collateral Source Rule

Testimony before 1986 Special Committee on Tort Reform and Liability Insurance
Professor James M. Concannon

The Collateral Source Rule historically applied in all Kansas tort cases as part of our common law. It developed because of a collision between two of the most basic principles of tort law: first, that a wrongdoer must pay the reasonable value of all harm the wrongdoer causes; and second, that an injured party is entitled to full recovery but is not entitled to double recovery.

The collision will arise when, for example, the injured party's spouse is a nurse who provides the injured party with nursing care at no cost. It is now impossible to give effect to both basic principles. If the wrongdoer is forced to pay the reasonable value of nursing care, the injured party receives a double recovery, i.e. a recovery for an amount the injured party did not spend. If we deny double recovery, then the wrongdoer receives a windfall, paying less than the value of the harm the wrongdoer has caused. The nurse-spouse intends to confer a benefit upon the injured party but the wrongdoer becomes the ultimate beneficiary.

Since the mid-1800's the law has resolved this problem by applying the Collateral Source Rule. The Rule is simply this: Payments made to the injured party or benefits conferred upon the injured party from collateral sources will not reduce the wrongdoer's liability and are not admissible in evidence. A source is collateral when it is other than the wrongdoer, i.e. it is collateral to the wrongdoer. The rationale most frequently articulated is that if we have to give a windfall to someone we should give the windfall to the innocent party rather than the wrongdoer. It has also been argued that forcing the wrongdoer to pay for harms actually caused increases the deterrent effect tort law is meant to have.

Attachment V
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To abolish the Collateral Source Rule is to allow these collateral payments to reduce the liability of the wrongdoer. To date, the Rule has been modified by the legislature only in medical malpractice actions. The 1976 legislature adopted minor changes as K.S.A. 60-471, a statute later held unconstitutional. A more comprehensive modification of the rule was made in 1985 and is codified as K.S.A. 60-3403. The rule continues to apply in other tort actions.

There are a number of categories of collateral sources:

(1) Insurance policies whether maintained by the plaintiff or by a third party such as a parent, spouse or employer. Included are fire insurance, collision automobile insurance, health insurance, and life and accident insurance.

(2) Employment benefits. These may be gratuitous, as when the employer continues to pay the employee's wages during incapacity although the employer is not legally required to do so. They may also be benefits arising out of the employment contract or a union contract, such as for sick pay. They may be benefits arising by statute, as in Worker's Compensation or the Federal Employers' Liability Act.

(3) Gratuities. This applies both to cash gifts such as payments from a public fund created to aid the victim and to the rendering of services. Thus, the fact that the nurse-spouse or a doctor do not charge for their services or that the plaintiff was treated in a veterans hospital does not prevent recovery of the reasonable value of the services.

(4) Social legislation benefits. Social Security benefits, welfare payments, pensions under special retirement acts, etc.

(5) Kansas has invoked the Collateral Source Rule as authority to exclude evidence that a plaintiff-spouse in a wrongful death case has remarried prior to trial. Pape v. Kansas Power & Light Co., 231 Kan. 441, 647 P.2d 320 (1982).

Within these categories, a further distinction needs to be drawn. Sometimes the provider of the collateral payment has a right of subrogation created either by law or by contract. What this means is a right of reimbursement: the provider of the payment is entitled to reimbursement out of the first dollars received by the injured party from the wrongdoer. In fire insurance, collision automobile insurance or no fault insurance, the insurance company is said to be subrogated to the rights of the injured party. An employer who pays Worker's Compensation

is given by statute certain subrogation rights. Reimbursement rights sometimes are provided by social legislation. Sometimes the party with reimbursement rights may bring an action against the wrongdoer even if the injured party does not. Sometimes there is no such right.

A strong argument can be made that the Collateral Source Rule should be abolished when the provider of the collateral payment does not have a right of subrogation or reimbursement. Let's use the example of Blue Cross-Blue Shield or another health insurance provider and assume it has paid plaintiff's medical bills. If the total claim against defendant is less than the limits of defendant's liability insurance, there is not likely to be much added deterrence from requiring defendant also to pay plaintiff's medical bills--they will be paid by defendant's liability insurer, not defendant. Further, since there is no right of reimbursement, the injured party will now be compensated twice. We legitimately could decide double recovery is undesirable because the combined premiums for plaintiff's health insurance and defendant's liability insurance theoretically are higher when both policies pay the same loss. An insurance actuary could tell whether this factor is actually considered in calculating premiums, but it can be argued as a matter of societal policy that we can only afford to have one insurance policy making the payment and we should thus designate either the health insurance coverage or the liability insurance coverage as primary.

Of course, one alternative would be to retain the Collateral Source Rule but create a subrogation right in the health insurer. Then ultimate responsibility would fall on the liability insurer and health insurance premiums we all pay would theoretically be reduced. However, the public outcry is not that health insurance premiums are too high but that liability insurance premiums are too high. Thus, the other alternative is to abolish the Collateral Source Rule for health insurance payments so that the ultimate responsibility falls on the health insurer. Health insurance premiums will not change from current levels but liability insurance premiums theoretically will be reduced. There is also a solid economic analysis supporting this alternative, making health insurance primary. Since the health insurer by contract must pay in the first instance, leaving the loss there avoids the cost of shifting that loss to the liability insurance carrier through the legal system, by litigation, settlement, etc. Lower liability insurance premiums admittedly would benefit the wrongdoer but also would benefit innocent insureds as well.

The best argument that double recovery should be retained is primarily a practical one. Even a full recovery in tort litigation as a practical matter does not make the injured party whole. Under the American Rule, parties normally pay their own litigation costs and attorney fees and the injured party does so

out of the damage award. The Collateral Source Rule by permitting double recovery provides money to pay those costs and fees, thus allowing the award to come closer to making the injured party whole.

It can also be argued that the injured party is entitled to double recovery when the injured party has paid the premiums for health insurance, either directly or in exchange for lower wages in employer financed plans. The argument is that the wrongdoer should not benefit from prior payments plaintiff has made for plaintiff's own protection. The flaw in this argument is that few people buy health insurance with an expectation of double recovery which would be frustrated by abolition of the Collateral Source Rule. However, there are some equities behind this argument. If we eliminate double recovery by making health insurance primary, the wrongdoer at least should be required to reimburse the injured party for those premiums paid by the injured party to provide the collateral benefit. Without that, the injured party really would not receive a full recovery, which they do expect when buying health insurance. K.S.A. 60-3403 recognizes this principle when it admits evidence not only of health insurance payments but also of amounts paid to secure the collateral benefits.

I hope you have noticed that the only criticism of the Collateral Source Rule is that it permits double recovery with the attendant economic costs caused by double recovery. I hope you also have noticed that double recovery occurs only when the provider of the collateral payment does not have a right of subrogation.

To the extent that subrogation or reimbursement rights exist, e.g. in the employer who has paid Worker's Compensation benefits, the Collateral Source Rule is fully defensible. By creating the right of subrogation, the legislature has decreed the loss ultimately should fall on the liability insurance carrier rather than upon the Worker's Compensation carrier. The Collateral Source Rule forces the liability insurer to pay in full for the plaintiff's losses and the right of subrogation forces plaintiff to repay amounts advanced by the Worker's Compensation carrier thereby preventing double recovery by the injured party. Now, of course, the legislature could abolish subrogation rights (except those conferred by federal law) and then abolish the Collateral Source Rule as well, making Worker's Compensation coverage ultimately responsible rather than the liability insurance carrier. The question simply is: Where do we want to place the cost. To the extent subrogation rights remain, however, you pretty much have to keep the Collateral Source Rule. If the Collateral Source Rule is abolished but subrogation rights retained, the innocent injured party would receive less than a full recovery from the liability insurance carrier but still would have to repay the

provider of the collateral payment. The innocent party in essence would be paying for the privilege of being hurt.

K.S.A. 60-471 properly recognized that the Collateral Source Rule must be retained when there are subrogation rights and should be abolished only when it results in double payment. It provided that if there was a subrogation or reimbursement right, evidence of the collateral source payment was inadmissible and could not be used to reduce the damages recoverable. K.S.A. 60-3403 in a somewhat more haphazard way also recognizes this principle. It admits evidence both of the collateral source payment and of the extent to which the right to recovery is subject to a lien or subrogation right.

Carrying out the principle that the Collateral Source Rule should be abolished only when it actually results in double recovery also is complicated by our comparative negligence statute. Let me give an example. Under current law assume a plaintiff has suffered $50,000.00 in total damages in an automobile accident but has received health insurance benefits of $20,000.00 of that total. Because of the Collateral Source Rule, the jury will not learn of the $20,000.00 health insurance payment and presumably will return a verdict finding plaintiff's total damages to be $50,000.00. If plaintiff is found to be 40 percent at fault and defendant is found to be 60 percent at fault, plaintiff recovers a judgment against defendant for $30,000.00 (.60 X $50,000.00). Here, the $20,000.00 health insurance payment covers the $20,000.00 of damages attributable to plaintiff's fault and there is no double recovery. Plaintiff bought health insurance with the goal of making himself or herself whole in the event of a loss and it makes sense to credit collateral payments to amounts attributable to the fault of the injured party.

In this example let us suppose that we abolish completely the Collateral Source Rule and allow the jury to learn of the $20,000.00 health insurance payment. Presumably, the jury then would return a verdict finding plaintiff's damages to be $30,000.00 ($50,000.00 minus the $20,000.00 plaintiff already received). If plaintiff again is 40 percent at fault and defendant is 60 percent at fault, the comparative fault statute requires these percentages to be applied to the $30,000.00 net damage award returned by the jury rather than the $50,000.00 actual damages. Plaintiff will receive judgment against defendant for $18,000.00 (.60 X $30,000.00). Plaintiff's total recovery will be $38,000.00 ($18,000.00 from defendant and $20,000.00 from health insurance). Defendant's fault is actually responsible for $30,000.00 of plaintiff's total loss (.60 X $50,000.00). Abolition of the Collateral Source Rule would enable defendant to escape paying $12,000.00 of the loss defendant caused. By contrast plaintiff would be forced to absorb $12,000.00 damages without reimbursement even though plaintiff's goal in purchasing health insurance was to make

himself or herself whole even if plaintiff was partially at fault. Abolishing the Collateral Source Rule in this comparative fault example cannot be justified as preventing double recovery. Instead it prevents full recovery, giving the defendant's insurance carrier a windfall and forcing the injured party to bear a greater portion of the loss than is warranted by the injured party's fault.

K.S.A. 60-3403 is defective in failing to take into account the impact of comparative fault on the Collateral Source Rule. Perhaps the number of medical malpractice cases in which the plaintiff is assessed a percentage of fault is small. If so, the defect in K.S.A. 60-3403 will lead to injustice only occasionally. However, the potential for injustice is great if the same statute is adopted for tort cases generally where plaintiffs often are partially at fault. Any statutory change should provide that collateral source payments will be credited first to that portion of total damages attributable to the fault of the injured party and of the party who has provided the collateral payment. The damages awarded against the defendant should be reduced to the extent collateral payments exceed the share of total damages attributable to plaintiff's fault and that of the party who provided the collateral payment. In our prior automobile example, the $20,000.00 health insurance payment would equal the damages attributable to plaintiff's fault and there would be no reduction in the $30,000.00 judgment against defendant. If, instead, plaintiff was 10 percent at fault and defendant was 90 percent at fault, current law requires judgment to be entered against defendant for $45,000.00 (.90 X 50,000.00 total damages). Plaintiff keeps the $20,000.00 health insurance payment and enjoys a double recovery windfall of $15,000.00. Under my proposal for modification of the rule, the $20,000.00 health insurance payment plaintiff received would be applied first to offset the $5,000.00 damages attributable to plaintiff's fault (.10 X $50,000.00), then to reduce the award against defendant by the remaining $15,000.00. Judgment would be for $30,000.00 rather than $45,000.00. The evil of double recovery would be avoided but defendant's insurance carrier would not receive a windfall as under K.S.A. 60-3403.

Primarily because the impact of the comparative negligence problem cannot be determined before the jury assesses fault and determines the total amount of damages, it seems to me the reduction of damages to account for collateral source payments should be done by the judge, rather than by the jury. The jury should continue to return a verdict determining what plaintiff's total damages are without any reduction for collateral payments. Collateral payments then could be deducted by the judge alone. Ordinarily, the parties can be expected to stipulate to the amount of past payments in money and there will be no factual dispute. If the extent of future damages is uncertain because the duration of disability is uncertain, the extent of future collateral payments may also be uncertain. Here, the jury which determines future damages could separately determine by an

answer to a separate question on the verdict form the value of future collateral payments. The ultimate crediting of the future collateral payments against the judgment should be done by the judge based upon the jury's answer. The same procedure could be followed if it is necessary to determine the value of unliquidated past collateral benefits such as gratuitous services.

Present law in K.S.A. 60-3403(c) takes a different approach in medical malpractice cases, making reduction a jury decision which cannot take account of the determination of fault. The statute also mandates that in determining damages, the trier of fact "shall consider" both the extent to which damages awarded will duplicate collateral source payments and also the extent to which the award is subject to subrogation rights. The statute articluates no principled way for the jury to "consider" these factors and the jury is left without guidance to choose among the ways suggested by skillful lawyers in their closing arguments. In essence, the statute leaves it to the jury, and jury by jury, to decide whether to apply the Collateral Source Rule or not. The predictability needed for any change in the Collateral Source Rule to impact insurance rates is lost.

The Department of Commerce Draft Uniform Product Liability Law proposed that reduction of damages to account for collateral source payments be done by the judge. Its analysis explained that the proposal:

> does not alter existing law that prohibits the defendant from introducing in evidence the fact that the plaintiff has been indemnified by a collateral source. That approach was rejected because it would leave the trier of fact in the role of balancing the delicate policy elements that surround proposals calling for abolition of the Collateral Source Rule. Also, that approach would reduce the potential benefit of Collateral Source Rule modifications in that it would increase transaction costs and lower predictability and consistency in the allocation of collateral benefits. 44 Fed. Reg. 3018 (Jan. 12, 1979).

The legislature should provide clear standards, as it did not do in Section 60-3403, for when damage awards will be reduced by collateral source payments and when they will not. If clear standards are provided, the judge rather than jury can best be relied upon to carry out the legislative mandate.

In summary, assuming that the Collateral Source Rule is to be modified, K.S.A. 60-3403 is flawed in these respects:

(1) failure to state clearly the effect of subrogation rights;

(2) failure to account for comparative fault;

(3) failure to have the judge implement the modification.

K.S.A. 60-3403 has one excellent attribute which should be retained in any general legislation. Subsection (a) clearly states which collateral source payments are considered and which are not. The 1985 legislation was restricted to money payments which duplicate allowable elements of damages. Thus the 1985 legislation kept the current rule for the gratuitous provision of services as by the nurse-spouse. This was wise. Trials would be complicated and juries perhaps confused if we have to litigate the value of gratuitous services rendered. Also, we do not want to discourage people from helping those in need. Indeed, for this reason gratuitous payments also were excluded. Evidence of remarriage in wrongful death cases likewise was not included, consistent with the Legislature's approach to specific legislation on this topic.

The 1985 Legislature specifically decided not to reduce damages by the amount of life insurance. People often purchase life insurance to provide their families with a better standard of living after they die and not merely to replace lost earnings. Dollar-for-dollar reduction of damages because of life insurance payments might frustrate carefully considered personal financial plans.

In short, you must consider separately each type of collateral source because separate policy considerations are involved. Legislation must be drafted carefully to insure that it fully eliminates the evil of double recovery but is not so broad that it leads to injustice.

PRESENTATION OF:

TED F. FAY
KANSAS INSURANCE DEPARTMENT

ON HOUSE BILL NO. 2471 AND HOUSE BILL NO. 2472
BEFORE HOUSE JUDICIARY COMMITTEE

MARCH 3, 1987

Attachment VI
House Judiciary 3/3/87

MR. CHAIRMAN, I AM TED FAY, REPRESENTING THE KANSAS INSURANCE DEPARTMENT. ON FEBRUARY 26, 1986, FLETCHER BELL, THE KANSAS INSURANCE COMMISSIONER, APPOINTED A CITIZENS COMMITTEE TO REVIEW LEGAL LIABILITY PROBLEMS IN KANSAS AS THEY AFFECT INSURANCE. THE COMMITTEE ISSUED ITS REPORT AND RECOMMENDATIONS ON OCTOBER 17, 1986. SAJJAD HASHMI, THE DEAN OF THE SCHOOL OF BUSINESS, EMPORIA STATE UNIVERSITY, SERVED AS CHAIRMAN OF THE CITIZENS COMMITTEE.

THE COMMITTEE WAS MADE UP OF INSURANCE CONSUMERS AND REPRESENTATIVES OF SELF-INSURED GROUPS HAVING CLOSE CONNECTIONS WITH KANSAS. A LIST OF THE NAMES OF COMMITTEE MEMBERS HAS BEEN PROVIDED TO YOU. MEMBERS REPRESENTED COMPANIES SUCH AS HALLMARK CARDS, COLEMAN, INC., BEECH AIRCRAFT, FMC CORPORATION, PETROLEUM, INC., FARMLAND INDUSTRIES, McNALLY PITTSBURG, INC., AND PURITAN-BENNETT CORPORATION. MEMBERS WERE ALSO APPOINTED TO REPRESENT PROFESSIONAL AND BUSINESS GROUPS SUCH AS THE KANSAS ASSOCIATION

OF SCHOOL BOARDS, HEAVY EQUIPMENT CONTRACTORS, K-NEA, KANSAS BANKERS ASSOCIATION, KANSAS SOCIETY OF CPA's, AND THE KANSAS ENGINEERING SOCIETY. ADDITIONALLY, A MEMBER FROM THE PRESS, A CITY CLERK, A MANAGER OF A DAY DAY CENTER, AND A PUBLIC MEMBER WERE APPOINTED. THESE MEMBERS REPRESENTED A DISTINGUISHED CROSS-SECTION OF THE CONSUMERS WITH INSURANCE AND SELF-INSURANCE DIFFICULTIES.

I SERVED AS THE ATTORNEY FOR THE CITIZENS COMMITTEE AND WILL ATTEMPT TODAY TO GIVE YOU THE OPINIONS AND RECOMMENDATIONS OF THE CITIZENS COMMITTEE ON EXPANSION OF THE COLLATERAL SOURCE RULE AND CAPS ON NON-ECONOMIC DAMAGES, WHICH SUBJECTS THIS COMMITTEE IS PRESENTLY CONSIDERING RESPECTIVELY IN HOUSE BILL NO. 2471 AND HOUSE BILL NO. 2472.

PRIOR TO DISCUSSING THESE SPECIFIC PROVISIONS, LET ME FIRST POINT OUT THAT THE CITIZENS COMMITTEE WAS NOT ONLY CONCERNED WITH INCREASING INSURANCE PREMIUMS IN DIFFICULT LIABILITY

AREAS, BUT EQUALLY CONCERNED WITH THE SOFTNESS OF INSURANCE CAPACITY WHICH HAS FORCED NUMEROUS COMMERCIAL RISKS INTO SELF-INSURANCE OR SELF-INSURANCE POOLS.

LIABILITY PROBLEMS, SOME MEMBERS OF THE COMMITTEE KNEW FROM EXPERIENCE, IMPACT AS SERIOUSLY UPON THESE SELF-INSURANCE MECHANISMS AS UPON INSURANCE PREMIUMS. IN OTHER WORDS, THE CITIZENS COMMITTEE BELIEVED THAT LIABILITY PROBLEMS ARE NOT JUST AN INSURANCE PROBLEM. THEY ARE ALSO A PROBLEM FOR INDIVIDUALS AND BUSINESSES THAT SIMPLY CHOOSE TO BE SELF-INSURED OR WHO CAN NO LONGER OBTAIN INSURANCE AT ACCEPTABLE COST AND ARE FORCED -- OR BELIEVE THEY ARE FORCED -- TO SELF-INSURE.

COLLATERAL SOURCE RULE -- HOUSE BILL NO. 2471

RECOMMENDATION 6 OF THE CITIZENS COMMITTEE REPORT PROVIDES:

"RECOMMENDATION 6: THAT EVIDENCE OF COLLATERAL SOURCES BE PROVIDED TO THE JURY FOR THEIR CONSIDERATION IN SETTING DAMAGES IN PERSONAL INJURY AND WRONGFUL DEATH ACTIONS."

THE RATIONALE GIVEN BY THE COMMITTEE FOR THIS RECOMMENDATION NOTED THAT THE COLLATERAL SOURCE RULE IS A COMMON LAW RULE CREATED BY THE COURTS IN THE NINTEENTH CENTURY. THE RULE IS STATED IN THE RESTATEMENT (SECOND) OF TORTS AS FOLLOWS:

"PAYMENTS MADE TO OR BENEFITS CONFERRED ON THE INJURED PARTY FROM OTHER SOURCES ARE NOT CREDITED AGAINST THE TORTFEASOR'S LIABILITY ALTHOUGH THEY COVER ALL OR A PART OF THE HARM FOR WHICH THE TORTFEASOR IS LIABLE."

WHEN CREATED, FEW INDIVIDUALS HAD OUTSIDE SOURCES TO COMPENSATE THEM FOR EXPENSES INCURRED OR EARNINGS LOST DURING A DISABILITY. THERE WERE FEW, IF ANY, GOVERNMENT PROGRAMS, AND

PRIVATE, FIRST PARTY ACCIDENT AND HEALTH AND DISABILITY PROGRAMS, OR PUBLICLY SPONSORED SOCIAL ASSISTANCE PROGRAMS HAD NOT REACHED THE POPULARITY THEY ENJOY TODAY. GENERALLY, AN INJURED PERSON'S ONLY RECOURSE WAS TO THE TORT SYSTEM. AT THAT TIME, COURTS FELT IT WAS INAPPROPRIATE TO PENALIZE THE MINORITY OF PRUDENT PEOPLE WHO, AT THEIR OWN EXPENSE, PURCHASED INSURANCE THAT PAID BENEFITS UPON AN INJURY. THE RATIONALE SEEMED TO BE THAT IF THERE IS TO BE A WINDFALL, IT IS MORE JUST FOR THE PLAINTIFF TO PROFIT FROM IT THAN FOR A TORTFEASOR TO BE RELIEVED OF HIS OR HER FULL RESPONSIBILITY FOR HIS OR HER WRONGDOING.

THE COMMITTEE POINTED OUT THAT THE ARGUMENTS TO RETAIN OR ABOLISH THE COLLATERAL SOURCE RULE INVOLVE TWO CONFLICTING PRINCIPLES. THE FIRST IS THAT A DEFENDANT SHOULD PAY FOR ALL DAMAGES FLOWING FROM HIS OR HER WRONGFUL ACT. THE SECOND PRINCIPLE IS THAT A PLAINTIFF IS ENTITLED TO FULL COMPENSATION, BUT IS NOT ENTITLED TO A DOUBLE RECOVERY RESULTING IN A

WINDFALL. THE COMMITTEE FOUND THE SECOND PRINCIPLE THE MORE EQUITABLE ONE.

THE CITIZENS COMMITTEE REPORT POINTS OUT THAT THE ORIGINAL JUSTIFICATION FOR THE COLLATERAL SOURCE RULE HAS LITTLE VALIDITY IN TODAY'S SOCIETY. TODAY, NUMEROUS INSURANCE AND GOVERNMENT PROGRAMS ARE AVAILABLE TO ASSIST AN INJURED PERSON. IN MANY CASES TODAY, AN INJURED PARTY HAS LITTLE OR NO OUT-OF-POCKET EXPENSE.

THE COMMITTEE FOUND THAT SCHOLARLY ANALYSIS OF THE COLLATERAL SOURCE RULE IN RECENT YEARS HAS GENERALLY BEEN CRITICAL OF THE RULE. THE COMMITTEE'S REPORT CITED THE FIRST PARAGRAPH OF A LEADING ARTICLE WRITTEN NEARLY TWENTY YEARS AGO BY JOHN G. FLEMING, PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA, BERKLEY, 54 LAW REVIEW 1478 (1966).

"HIGH RANKING AMONG THE ODDITIES OF AMERICAN ACCIDENT

LAW IS THE SO-CALLED 'COLLATERAL SOURCE' RULE WHICH ORDAINS THAT, IN COMPUTING DAMAGES AGAINST A TORTFEASOR, NO REDUCTION BE ALLOWED ON ACCOUNT OF BENEFITS RECEIVED BY THE PLAINTIFF FROM OTHER SOURCES, EVEN THOUGH THEY HAVE PARTIALLY OR WHOLLY MITIGATED HIS LOSS. STANDING ALONE, THIS LOOKS PERHAPS UNEXCEPTIONAL ENOUGH. ITS STING LIES IN THE COROLLARY THAT THE PLAINTIFF MAY ORDINARILY KEEP BOTH THE DAMAGES AS WELL AS THE COLLATERAL BENEFIT AND THUS TURN HIS PLIGHT INTO A BANANZA."

PROFESSOR FLEMING WENT ON TO CONCLUDE THE COLLATERAL SOURCE RULE SHOULD BE ABOLISHED.

THE CITIZENS COMMITTEE ALSO REFERRED TO K.S.A. 60-340 WHICH LARGELY ABOLISHED THE COLLATERAL SOURCE RULE IN MEDICAL MALPRACTICE CASES AND QUESTIONED THE REASON THE COLLATERAL SOURCE RULE SHOULD NOT BE ABOLISHED FOR ALL CASES.

HAVING DECIDED TO RECOMMEND THE ABOLISHMENT OF THE COLLATERAL SOURCE RULE, THE COMMITTEE NEXT CONSIDERED THE APPROPRIATE WAY TO HAVE COLLATERAL SOURCES CONSIDERED. ON AUGUST 5, 1986, JUDGE TERRY L. BULLOCK, DISTRICT JUDGE, SHAWNEE COUNTY DISTRICT COURT, TESTIFIED BEFORE THE COMMITTEE. HIS REMARKS WERE SO WELL RECEIVED AND SO INSIGHTFUL THAT THE CITIZENS COMMITTEE ATTACHED HIS WRITTEN TESTIMONY AS AN EXHIBIT TO THEIR REPORT.

JUDGE BULLOCK FOUND THE COLLATERAL SOURCE RULE TO BE A CLOSE PHILOSOPHICAL QUESTION. HE ASKED, HOWEVER, IF THE RULE WAS ABOLISHED THAT THE COMMITTEE NOT RECOMMEND THAT THE EVIDENCE BE ADMISSIBLE AT TRIAL. JUDGE BULLOCK FEARED THIS EVIDENCE MIGHT CONFUSE AND DELAY THE TRIAL. JUDGE BULLOCK SUGGESTED INSTEAD A MATHEMATICAL SUBTRACTION BY THE JUDGE FROM THE AWARD FOLLOWING THE VERDICT.

THE CITIZENS COMMITTEE UNDERSTOOD JUDGE BULLOCK'S CONCERN,

BUT VOTED TO RECOMMEND THAT COLLATERAL SOURCES BE GIVEN TO THE JURY AT TRIAL. THE CITIZENS COMMITTEE WISHED TO BE CONSISTENT WITH THE MEDICAL MALPRACTICE BILL. THE COMMITTEE ALSO FELT A JURY SHOULD HAVE THE OPPORTUNITY TO DISREGARD COLLATERAL SOURCES IN THOSE CASES WHERE AN AUTOMATIC DEDUCTION FOR COLLATERAL SOURCES WOULD CREATE AN INJUSTICE.

CAP ON NON-ECONOMIC LOSSES -- HOUSE BILL NO. 2472

RECOMMENDATION 11 OF THE CITIZENS COMMITTEE REPORT PROVIDES:

> "RECOMMENDATION 11: THAT THE LEGISLATURE ESTABLISH REASONABLE CAPS FOR NON-ECONOMIC DAMAGES."

IN THE RATIONALE FOR THIS RECOMMENDATION, THE CITIZENS COMMITTEE ACKNOWLEDGED THAT NON-ECONOMIC LOSSES ARE REAL ENOUGH. THE PROBLEM ARISES FROM THE SUBJECTIVITY OF NON-ECONOMIC DAMAGES. SINCE NON-ECONOMIC LOSSES ARE

SUBJECTIVE AND THE ASSIGNMENT OF A MONETARY VALUE TO IT IS ESSENTIALLY ALSO SUBJECTIVE AND ARBITRARY, AWARDS FOR NON-ECONOMIC DAMAGES ARE UNPREDICTABLE. THIS UNPREDICTABILITY MAKES IT VERY DIFFICULT TO WRITE INSURANCE OR TO SELF-INSURE AT APPROPRIATE PREMIUM OR COST LEVELS, AND ALSO SOMETIMES RESULTS IN PAIN AND SUFFERING AWARDS THAT ARE SO HIGH THEY RESULT IN UNREASONABLE PREMIUM INCREASES.

THE CITIZENS COMMITTEE CITED FROM THE FEBRUARY 1986 STUDY OF THE FEDERAL TORT POLICY WORKING GROUP, NOTING THAT THE SUBJECTIVITY AND RESULTING UNPREDICTABILITY OF NON-ECONOMIC LOSS AWARDS LEADS TO "AWARDS FOR SIMILAR INJURIES VARY(ING) IMMENSELY FROM CASE TO CASE, LEADING TO HIGHLY INEQUITABLE LOTTERY-LIKE RESULTS." THE REPORT ALSO OBSERVES THAT THIS "LOTTERY MENTALITY," THAT IS, THE HOPE FOR A HIGH JUDGMENT DUE TO PAIN AND SUFFERING, OFTEN IMPEDES EFFORTS AT REASONABLE SETTLEMENTS, THUS, SPURRING NEEDLESS LITIGATION.

THE CITIZENS COMMITTEE NOTED THAT THE FEDERAL GROUP RECOMMENDED A CAP OF $100,000, WHILE THE KANSAS LEGISLATURE ESTABLISHED A $250,000 CAP ON NON-ECONOMIC LOSSES FOR MEDICAL MALPRACTICE CASES. THE CITIZENS COMMITTEE DID NOT RECOMMEND A SET DOLLAR CAP, BUT RECOMMENDED "THE LEGISLATURE ESTABLISH A REASONABLE CAP THAT WILL COMPENSATE INJURED PARTIES FAIRLY, BUT WILL PREVENT UNREASONABLE WINDFALLS."

I BELIEVE, FROM THE DISCUSSIONS HELD BY THE CITIZENS COMMITTEE, THAT THE $250,000 CAP IN HOUSE BILL NO. 2472 IS WITHIN THE RANGE CONSIDERED APPROPRIATE BY THE COMMITTEE.

MEMO

TO: HOUSE JUDICIARY COMMITTEE

FROM: JERRY R. PALMER OF THE KANSAS TRIAL LAWYERS ASSOC.

DATE: MARCH 3, 1987

RE: HB-2471 - COLLATERAL SOURCE
HB-2472 - CAP ON NON-ECONOMIC DAMAGES
HB-2410 - JURY INSTRUCTIONS REGARDING TAX IMPLICATIONS

HB-2471 - Collateral Source

We would recommend that the Committee defer any action on this bill at this time. The Medical Malpractice Statute of Limitations enacted in 1985 (1985, SB-110) has been the subject of much litigation. Two federal judges found it constitutional, two federal judges found it unconstitutional. Many different district court judges had a similar disagreement over the constitutionality of the bill. Rulings of constitutionality and unconstitutionality in separate cases were appealed to the Supreme Court of Kansas and they were argued in a combined case.

On Friday, February 20, 1987 the Court ordered a re-hearing before the Court as presently constituted for Friday, March 27 with briefs due on an additional issue of the constitutional vagueness of the statute due by March 13. The Order indicates that all issues, though, will be re-argued. Informed sources indicate that of the six judges who sat on the original panel who will sit on this panel, there was a division of three to three on the constitutionality with the swing vote being Justice Allegrucci the new member of the Court. In the ordinary course of events it could not be expected that a decision will be published prior to April 24 and quite possibly in a case of this magnitude, May the 22nd.

It seems reasonable that the legislature should wait until this issue is decided and the Supreme Court has spoken on the constitutionality of this provision as to its strengths and weaknesses before trying to deal with the subject in a more generic way. It must also be remembered that the Supreme Court ruled unconstitutional the Collateral Source Rule that was enacted in 1974 for medical malpractice cases.

Substantively we think there are things wrong with this bill that were problematic with the Medical Malpractice Collateral Source Rule, the chief thing being that a person who has done wrong and negligently injured a person should not be

able to take advantage of those things which the person has protected themselves against by securing insurance or those benefits provided by the military or employers for the benefit of their employees. It discriminates against those who must contract to insure their risks in favor of those who are wealthy enough to self insure. There are a number of workability issues and almost impossible proofs that one would have to go through in dealing with the subject of future benefits.

For example, what federal or state benefits will be available to disabled people in the future, be they either greater or less than those that are in existence today? Will the military plan of benefits and free medical services at military hospitals continue for military dependents? What happens if an employer should lay off an employee and thereby terminate the plan benefits with the only benefits being available are the more limited benefits under "extended coverage?" What happens if an employer should change to a PPO or an HMO? How many years of insurance premiums does the person admit into evidence? The problems are severe and enumerable and the trial of these cases becomes extremely complex as the insurance contracts and the future actions of employers and the future variabilities in employment and the future ability of governmental entities chose to respond to people's medical and disability needs include great uncertainties, especially in these times.

HB-2472 - $250,000 Cap on Non-Economic Damages

The Interim Committee that studied this proposal decided to not recommend it. Much testimony was taken as to the cause of the "crisis of 1986" and it was found that the rapid acceleration of insurance premiums and the unavailability of coverage of 1985 and 1986 was tied to industry practices independent of any change either in the volume of litigation or in the size of litigation and awards. The crisis had peaked, the insurance companies were making embarrassingly high profits, and the need simply was not shown to limit the liability on awards. It is difficult for us to imagine what type of pain and suffering or total non-economic damages in excess of $250,000 can be experienced by a person, unless the facts of an individual case are presented.

I think that in order to make that decision you would have to hear a burn victim tell the story of their ordeal--going through the tanking, facing social ostracism, the pain of rehabilitation. Likewise, to hear a quadriplegic or a paraplegic or a close relative of such a person describe what that means. People are more than money machines that need repair and replacement of the lost earning capacity when they are negligently injured. It is and always will be unfair to

arbitrarily cap any type of damage. The only limitations on awards for these type of losses should be those imposed by the jury that hears all the facts in a given case, or by the judge who heard the case or by a reviewing court. Arbitrary limitations are just that--arbitrary and per se unreasonable. The filings of the Aetna Insurance Company in Florida indicated that they would not reduce their rates for a similar cap on non-economic damages. The information from the Insurance Services office and State Farm indicates that caps will have either no effect or insubstantial effects on premiums. If there is no impact on premiums (and there is no reason to impact premiums) then there certainly is no reason to arbitrarily decide in this legislative body for all time the total amount of non-economic damages involved in future catastrophic injury cases.

HB-2410 - Jury Instructions Regarding Tax Implications

The bill in its present form is a very indefinite bill and basically should read

> If the defense attorney asks the court to tell the jury that the award would not be taxable, then the judge should do it.

The problem is that the tax laws change. Further, there are bills that are being worked on in this legislative session involving the model periodic of payment of judgment acts and itemized jury verdicts which may well impact whether all or a portion of a verdict will be taxable. Further, a jury verdict entered in one year which is paid in another may have different tax implications from year to year. This statute probably is unconstitutionally vague.

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March 2, 1987
HB 2471

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

> KBA Opposes blanket change to the common law Collateral Source Rule regarding other sources of reimbursement or indemnification, unless proponents can show clear and convincing public need for the change, and the change demonstrates clearly defined public benefits. The purpose of negligence law is compensation but also deterrence of wrongdoing in an orderly society, a purpose which is seriously eroded by this bill.

I know it doesn't make sense that if you injure me, and my Blue Cross pays my medical care, that your liability insurance should also pay those damages. That is the effect of the collateral source rule. Proponents of the bill claim the rule has outlived its usefulness and purpose with health and accident insurance being around. What they forget is the purpose behind the rule.

HB 2471 is part of a debate between influential segments of society that want to change the rules regarding how our society deals with negligent behavior. Proponents of this bill sum up their argument with the basketball rule: no harm, no foul.

The push for this bill comes from those who want to see health and accident coverage replace liability insurance as the primary method of

Attachment VIII
House Judiciary 3/3/87

paying for injuries in this country. Health insurance is purchased to protect against high costs of health care. Liability insurance is purchased by those who feel they may injure others. This debate is of mammoth proportions. If they succeed in shifting the impact of risk, the costs of negligence will be spread among all those paying for health insurance. Instead of tort-feasors of similar kinds spreading the risk of injury among themselves, government is forcing the victims to absorb these costs.

Oliver Wendell Holmes Jr., in his 1881 treatise "The Common Law" wrote that compensation should not be viewed as the sole rationale of negligence law. We can always insure ourselves against the negligence of others, he said. Holmes could see little reason for a government-operated system of compensation.

Workers compensation is a government-operated system of compensation. You don't determine negligence. The legislature schedule payments for certain injuries, and pay it. The employee has given up his right to sue for pain and suffering and punitive damages in order to receive prompt, administrative payments for job-related injury.

Personal Injury protection benefits in auto no fault laws are a form of government-mandated compensation. If you are in an accident you get paid certain damages without proving fault.

People who don't like litigation are quick to point out that anyone can insure themselves against accidents much cheaper than compensation through the legal system. That is, of course, if the insurance is available and affordable. Therefore, they argue, the collateral source

rule is irrelevant in 1987. They are right as far as their analysis has gone, but they have lost sight of the purpose of negligence law.

Society over the years has said that if you negligently injure someone else, you will provide the compensation so the injured party does not become a ward of the taxpayer. HB 2471 alters that foundation. In lines 27-28, it says that the jury will be reminded that taxpayers will pay for some of the damages. When the jury has sat there for days listening to the evidence of the damages the plaintiff suffered it will be interesting indeed to see the reaction of those taxpayers when defense counsel reminds them the plaintiff can go on welfare in order to get his damages paid.

The Collateral Source Rule is not a rule promoting duplicate compensation. It bars considerations of the plaintiff's own resources. It puts the wealthy person and the poor person on the same footing in the eyes of the law. The defendant is not put at a disadvantage by the rule because his obligation all along has been to pay for the damages he caused. The defendant does not pay double; if he pays at all, the defendant pays only once!

The Collateral Source Rule is a rule of deterrence. What Holmes said is that if legislature discards the "deterrence factor" of the legal system without putting something in its place for the injured party, they destroy the reason for negligence law. But Holmes was considering the overall impact and importance of the negligence doctrines on social values. The collateral source rule regulates and deters negligent conduct more than it acts to compensate the plaintiff.

Keep in mind that our 49% comparative negligence rule is a rule of compensation. The plaintiff recovers damages so long as he is not at least 50% liable in his own injury. That rule changed our old contributory negligence doctrine. The 49% rule does not deter negligence.

Our several liability statute also imposes a requirement that is compensatory in nature. The defendant pays only his proportionate share of the plaintiff's loss. The several liaiblity rule does not deter negligence.

It is the collateral source rule and potential for unlimited damages that makes us be careful in our daily lives.

If, as proponents argue, the negligence law ought to compensate only those injured who have not insured themselves, then the wealthy and upper middle class of this country can never be injured if you measure injury only in those terms.

Ironically, while it is the wealthy and privileged in our society who sometimes criticize the tort system most, HB 2471 is codifying wealth-based discrimination in that tort system. The unemployed and penniless ner-do-well will have full benefit and protection of the tort system while the wealthy and middle class may not.

There is no criminal deterrent substitute for civil negligence law. The criminal law is not about to make it a felony or impose heavy fines for ordinary, common automobile accidents where there is no intentional wrongdoing. Nor will this legislature enact tough criminal fines on companies who make defective products that cause injury, or people who pollute our land. The criminal code was never meant to cover and discipline the everyday commercial conduct in our society.

Simply put, without the collateral source rule, why should I worry about my negligence if I won't have to pay very much if I injure somebody?

If I can get the legislature to limit pain and suffering awards, too, then I won't have to insure myself much at all. I won't have to worry about lawyers, claimants, judges or juries. I'm truly free of moral and legal restraints society has imposed over the decades which govern my negligence.

This bill fits the classic Western definition of socialism. By reducing jury awards by the medical insurance purchased by or for the victim, we are socializing the responsibility for paying for negligent injury on medical insurance which some 180 million Americans have benefit of. Society in general will pay rather than the negligent tort-feasor. There are Western nations that believe in that socialistic philosophy, Sweden, France, England, and especially New Zealand. The U. S. has generally not copied their social policies.

New Zealand has no tort system. Every injury is compensated based on a scheduled injury approach. If you lose an arm, you get so much, regardless of whether you are unemployed or a concert pianist.

If this legislature thinks public policy should change the court system like New Zealand, then be up front about it and begin working on a pure compensation system for paying for accidental injuries in this state. You won't have to worry about a collateral source rule, or pain and suffering. Go ahead. You will find, for example, as in New Zealand, that you do not need to have for-profit insurance corporations anymore. You can do what New Zealand has done; create a state-owned

Public Service Insurance Corporation, from which everyone buys their insurance. Insurance agents will all work for the state, for a salary rather than commissions. You will find, however, that as expensive as the negligence system is alleged to be, your scheduled injury approach is even more expensive.

The absence of a collateral source rule loosens the moral and legal restraints on elements of our society at a time when modern technology has found an infinite variety of new ways to kill and maim our neighbors. Consumer products are more dangerous. Chemicals we breath and ingest are more toxic. Transportation systems are faster, and more lethal. We have an infinite variety of medicines, many of which can kill. The groundwater systems someone pollutes today is difficult to reclaim. And you are saying with 2471 that if the plaintiff indirectly insures himself against such eventualities, the negligent tort-feasor doesn't have to. That is a policy with far-reaching ramifications.

You'd better have good, well-documented reasons for doing what you are doing.

To abrogate the collateral source rule is to abolish the deterrent purpose of civil negligence law. The judges first used the Rule in Kansas in 1872. The wisdom of their rule was recognized in a 1978 Rand Corporation study which said:

> "The negligence system makes a great deal more sense if it is understood primarily as a means to deter careless behavior rather than compensate its victims. By finding fault it sends all providers of services and products a signal that discourages future carelessness and reduces future damages."

Practical Problems

1. Lines 20-21 do not exclude medical malpractice actions from the bill. Apparently, the Medical Society and its allies now agree that KBA was right in 1985 and 1986 when we said that separate treatment of health care providers as privileged tort-feasors entitled to special legislative treatment was unconstitutional.

> The briefs filed in the Kansas Supreme Court argue that doctors should be treated differently by the law because they are the only profession required to maintain high levels of liability insurance. HB 2471 says that anyone -- whether required to insure or not, whether self-insured or not, has a right to reduce the plaintiff's damages. You'd better have a good, well-documented reason for making this change.

2. What is the constitutionally required "rational basis" for HB 2471? If this bill passes, the Kansas Supreme Court will ask Legislative Counsel Bob Coldsnow that question one of these days. What will he answer? That tort reform advocates want to test the outer limits of the Kansas Legislature's willingness to restrict the rights of recovery regardless of merit? You'd better give him more to work with than the 20-minutes here today. High insurance premiums themselves are not a rational basis for this change because CPAs, bankers, officers and directors, and even lawyers have high liability premiums, and HB 2471 won't help at all. We heard testimony in House Insurance committee that Kansas auto insurance premiums are 40th in the nation in terms of comparative costs. We've heard the personal lines of insurance are not having affordability and availability problems. If high premiums are the reason, why does HB 2471 allow large self-insured corporations or those without insurance at all to benefit from this law?

> As the Kansas Supreme Court said in Ernest v. Faler, 237 Kan 125 (1985), "The Kansas Legislature cannot use a cannon

to kill a cockroach." HB 2471 is overkill. It goes too far.

3. Some of you love to remind me that legislatures rather than courts make the state's public policy. KBA conducts considerable CLE during the summer and fall, trying to discuss with lawyers and judges what your laws mean. HB 2471 is somewhat ambiguous.

(a) Under current law, if an injured person's spouse is a registered nurse and performs gratuitous nursing services in the home, the defendant will pay the reasonable value of such services free of interference by HB 2471. However, those who provide nursing services indirectly through the purchase of health insurance are penalized by HB 2471. By what rational basis?

(b) HB 2471 in ordinary auto cases breaks the cardinal trial rule in Kansas: it mentions insurance to the jury. We have case law in Kansas that says that the use of the word "insurance" is forbidden during the trial of a damage action. To mention the word, regardless of context, is grounds for a mistrial. [Schmidt v. Farmers Elevator Mutual Insurance, 208 Kan. 308] I submit it is impossible to tell the jury about medical insurance, disability insurance, or key man insurance, or other insurance, without the jury coming back and asking the court "What about the defendant's insurance coverage?" And the court is going to have to say, the legislature's public policy won't allow me to tell you. (KSA 60-454)

(c) Subsection (d) attempts to implement a thoughtful policy first articulated by Professor Jim Concannon that the resources of the plaintiff ought first to be credited against the plaintiff's portion of their own injury. Under comparative negligence, if the Plaintiff has $100,000 in damages, but was 40% negligent, the plaintiff recovers only $60,000. Subsection (d) says that if the plaintiff has $25,000 of Blue Cross, that from the $40,000 the plaintiff must absorb, the full $25,000 is included.

Plaintiff #1	Plaintiff #2
$100,000 total damages	$100,000 T.D.
Plaintiff 0% at fault	Plaintiff 40% fault
$25,000 BCBS medical	$25,000 BCBS Medical
Jury is told about $25k	Jury told of 25k
Verdict (d) = $75,000	Verdict (d) = $60,000
Plaintiff 0% at fault	Plaintiff 40% at

absorbs 25% of Def. Neg. Def. only 75% liable.

fault absorbs 40% of damages. Def. is fully liable.

The impact of subsection (d) is that the more at fault plaintiffs are with their own injury, the greater the chance of holding the defendant more fully accountable for your injuries. That is the public policy of HB 2471.

(d) Lines 38 through 41 state that if a claimant must pay a subrogation interest or has an obligation to reimburse a previous payment from the jury award, the judge shall rule that such information shall not be admissible. That is contrary to the policy set forth in subsection (d)(2), which says the jury is told of it.

(e) Future Damages. The existence of future medical need is an issue separate from whether the claimant can secure medical insurance in the future to pay such care. This bill fails to recognize that problem. Lines 21-22 say that the "amount of reimbursement or indemnification paid or to be paid ..." shall be made known to the jury. Clearly this means that future medical insurance payments are to be used to offset the jury award for future medical care. In other words, you'll tell them that Blue Cross can pay up to a million dollars over the life of a injured child. And if the award for future medical care is less than a million, the jury doesn't need to worry about compensating future medical care.

POLICY QUESTION: How is the defendant to know whether the victim will remain eligible for Blue Cross payments into the future unless the jury awards money to pay those BCBS premiums?

1. Blue Cross tells me that payments for a catastrophically injured child's future medical care is contingent on the parent maintaining Blue Cross coverage continuously through age 21. At 21, the child may not be able to qualify for his or her own Blue Cross plan because of preexisting injury caused by the tort-feasor.

   Legal Catch-22: Unless the jury gives the plaintiff money to pay future BC/BS premiums, the jury award will be inadequate because it deducts from the award the amount of Blue Cross medical payments expected to be made. HOW IS THE JUDGE GOING TO INSTRUCT THE JURY ON THAT INCONSISTENT PUBLIC POLICY?

(f) POLICY QUESTION: HB 2471 allow "add-backs" on amounts paid by the person to secure the right to the collateral payments. Subsection (c), line 44, uses the word "paid"; it does not say "paid or to be paid." Thus, under line 22, the payments of future medical care by Blue Cross can be used to reduce the defendant's responsibility, but the plaintiff is precluded from introducing evidence to show what he'll have to pay in the future to keep receiving those Blue Cross payments. Why would public policy want to unfairly handle the system of add-backs by distinguishing between whether the premiums paid were for current medical care benefits, or to secure the right to future medical care?

If you are confused, then you understand why the 1986 Summer Interim Committee on Tort Reform decided to give this issue to the Judicial Council for more study. I hope you'll recommend HB 2471 adversely until you get some input from the judicial council.

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March 1, 1987
HB 2472

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

> KBA Opposes limits on pain and suffering unless the proponents can show clear and convincing public need for the change, and the change demonstrates clearly defined public benefits.
>
> KBA believes the better public policy alternative for 1987 is (1) implement an itemized jury verdict system for all Kansas personal injury actions, (2) control larger verdict costs through implementation of the Model Periodic Payment of Judgments Act, SB 258; and (3) begin gathering the statistics on pain and suffering settlements and verdicts through our court system.

There is not much positive which can said about this bill.

1. The cap on pain and suffering is predictably unfair to catastrophically injured victims of negligence. In this bill, the insurance industry and its allies would substitute a system which equates justice with business profit, that justice cannot afford verdicts where pain and suffering exceed $250,000. That is an equation not acceptable even in this imperfect world.

2. Fundamental fairness requires that before the legislature limits pain and suffering awards, the legislature should possess strong evidence that (a) excessive verdicts are being rendered in Kansas; (b) pain and suffering elements within those verdicts are out of balance with other actual damages; (c) the citizens of Kansas under-

stand what the Legislature is attempting to do and approve; and (d) there is a compelling public policy purpose for this legislative regulation.

3. The Kansas legislature has failed to put money into a Court project lawyers and the courts can begin providing you with Kansas tort law statistics. It is ironic that you'll limit rights of recovery without supportive statistics, but won't put $35,000 into compiling these very statistics you would find useful in public policy deliberations.

4. The limit destroys both the compensatory and the deterrent value of the tort system. Not only does it not fully compensate for catastrophic injury suffered, defendants can make bottom-line business decisions that intentionally or unintentionally allow products or their negligence to injure people.

5. The bill allows defendants to "lo-ball" settlement offers below their true value because plaintiffs will be told if you go to trial and win, you can't get more than $250,000 pain and suffering regardless how horrible the defendant's actions. True negotiation of a pre-trial settlement is harmed. We may see more litigation since defendants have their upper liability capped.

6. If SB 258, the Model Periodic Payment of Judgments Act were enacted, it would allow cheaper costs for large verdicts paid over time without the need for artificial limits.

7. The benefits which are allegedly to flow from such reduced damages do not and will not flow to the wrongdoer, nor indeed to the public by way of reduced insurance premiums. Given what is happening

in other state litigation, the Kansas legislature is justified in assuming that any benefit of this law would simply flow to the insurance companies themselves.

8. The recent ABA commission which included general counsel of leading insurance companies, recommended no pain and suffering limit to the 1987 ABA convention. They feel trial and appellate courts should make better use of powers of remittitur or additur. Remittitur -- "judicial reduction of the jury award" -- has been used significantly [Korman v. Public Service Truck Renting Inc., 497 NYS 2d 480 (1986)] where a $500,000 pain and suffering verdict was reduced to $50,000 based on an appellate court's evaluation that the proof would not support the amount of the jury's verdict. HB 2021's itemized verdicts will give the Kansas Supreme Court similar ability. See Morris v. Francisco, 238 Kan. 71 (1985).

9. HB 2472 creates inconsistent public policy. FELA (Federal Employer Liability Act) cases do not follow state limits on liability. Only Congress can create such limits. Dodd v. Missouri-Kansas-Texas Railroad, 354 Mo 1205 (1946). If an employee of a railroad is injured on the job and rendered paraplegic, the employee has unlimited rights to recovery for pain and suffering. If the same railroad injures someone in a crossing accident and that person is left paraplegic, why does the state impose limits on pain and suffering recovery in that instance? Especially if the railroad is self-insured for FELA cases as well as third party tort claims?

10. The Kansas comparative negligence statute (KSA 60-258a) already imposes a form of limitation on pain and suffering in our person-

al injury law. The plaintiff already absorbs the cost of an immune or insolvent defendant's portion of pain and suffering and already absorbs any proportionate part of his own pain and suffering caused by his own degree of negligence. Thus, the several liability rule in KSA 60-258a is already more restrictive in ALL Kansas cases than a limit on pain and suffering would be in most all other states!

11. Comparative negligence principles impose artificial barriers and burdens on recovery which can be exaggerated by limiting pain and suffering. Workers compensation awards do not compensate noneconomic loss. In third party actions (employees injured by plant machinery sue the manufacturer of the machine on a product liability theory) see the manufacturer pull the immune employer into the lawsuit to reduce manufacturer's liability. While an employer cannot pay pain and suffering, that portion of negligence attributed to the employer reduces the employee's total pain and suffering award. Limiting the total makes this problem even worse.

THE PRACTICAL EFFECT OF HB 2472

Apart from constitutional considerations, this legislation raises practical problems:

1. Why pick on "personal injury" actions? Lines 21-23 mean that a libel suit with pain and suffering and mental anguish will have unlimited liability, but if the newspaper's delivery truck runs down the plaintiff, the limit is imposed.

2. Is the $250,000 limit on pain and suffering to be applied before or after the deduction for comparative negligence of the plaintiff? Subsection (b) appears to indicate the "sum total" of $250,000 applies for all defendants, but one cannot tell if that means before or after the plaintiff's comparative negligence is determined.

3. Subsection (c) is redundant to HB 2021.

4. The $250,000 limit is per plaintiff. What is the pain and suffering limit in a class action under KSA 60-223 if you don't know who all the members of the class actually are, such as recent multi-district federal toxic shock litigation in Wichita. This type of per-plaintiff limit means that there will be less class action cases but more individual litigation, which runs up the costs of our court system.

5. Is the $250,000 limit applicable to "future" pain and suffering, too? If so, is the "sum total of $250,000" mean the "present value" of that future noneconomic loss, or the gross award for future pain and suffering not reduced to present value?

> Example: (a) A jury using an itemized verdict awards $600,000 for pain and suffering: $50,000 "present" pain and $550,000 for "future" pain and suffering. The present value of that $550,000 is, say, $225,000.
>
> (b) If the limit applies to the present value of future non-economic loss, then the plaintiff would recover $50,000 present pain and $200,000 of the $225,000 present value of the "future Pain and Suffering." If the limit applies to the "gross award" for future pain and suffering, is the $600,000 to be reduced to $200,000, and then further reduced to the "present value" of the $200,000 i.e. about $75,000?

6. The purpose of limiting noneconomic loss (pain and suffering) is to artificially shield the defendant from large damages in order to create a more favorable insurance climate. The purpose of several liability rule (KSA 60-258a) is to keep defendants from paying the liability of a codefendant. If both theories are enacted, the impact creates a severe and perhaps unfair restriction on the plaintiff's recovery.

> The Reagan Administration realized this in its Tort Policy Working Papers of the U.S. Justice Department and the product liability legislation the Administration sent to the 99th Congress. They recommended a limit on noneconomic loss, but that joint and several liability would still apply for all actual damages suffered by the plaintiff.

Before enacting this bill you need to know:

1. The average pain and suffering verdict and settlement in litigation in Kansas courts?

2. How would the bill make insurance more available, or cheaper? Should there be "linkage" between limits on pain and suffering and property-casualty premium reductions?

3. What is social goal for which the police power of the state is being exercised?

4. By what rationale is a $250,000 limit chosen? Is that rationale supported by solid evidence?

5. Are there other less restrictive alternatives available with similar impact on premiums and the insurance premium affordability problem without limiting the court system's ability to fully compensate individuals? To what degree were those options explored?

The Bottom Line

This bill asks you to make a business decision. That no matter the extent of injury, you are being asked to set valuations on pain and suffering at $250,000.

For the plaintiff living with horrible burns and disfigurement another 60 years, that is $11.42 per day. Over 50 years, that is $13.70 per day. Over 25 years, it is $27.40 per day.

There are corporations and some individuals who can pay these amounts out of their petty cash. That may be good business, but if a jury says pain and suffering is worth more than $250,000, HB 2472 not justice.

The Kansas Bar Association trusts the jury system. After hearing all the evidence, our neighbors know what an injury is worth. We trust them to do their job correctly. Appellate courts can correct any mistakes. This bill is poor public policy.

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PATRICK R. HUBBELL
SPECIAL REPRESENTATIVE-PUBLIC AFFAIRS

MICHAEL C. GERMANN, J. D.
LEGISLATIVE REPRESENTATIVE

Statement of the
Kansas Railroad Association

Presented to the House Committee
on Judiciary
The Honorable Robert S. Wunsch, Chairman

Statehouse
Topeka, Kansas
March 3, 1987

* * * * * * * * *

Mr. Chairman and Members of the House Committee on Judiciary:

My name is Pat Hubbell. I am the Special Representative - Public Affairs for the Kansas Railroad Association. I would like to thank you for giving me the opportunity to express the Railroad Association's support for House Bill No. 2452. I have asked Paul Hoferer, General Attorney for Santa Fe Southern Pacific Corporation, to accompany me today and be available to assist me in responding to any questions which you may have.

The railroad industry and other target corporations have been concerned for a number of years with disturbing trends in the civil justice system. Statistics compiled by the railroad industry reveal that the number of lawsuits filed and the size of jury awards in personal injury actions are increasing at an alarming rate. From 1979 through 1985 work-related injuries to

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railroad employees decreased 47%, but the number of personal injury lawsuits for work-related injuries filed by railroad employees increased by more than 69%. An even more shocking statistic, during this period of declining injuries, is that the total dollars paid out in judgments increased 292%.

These statistics are of great concern to Kansas railroads, because we are principally self-insured. We believe the Kansas Legislature must take action to return some balance to the civil justice system, and H.B. 2452 represents a step in that direction.

A civil justice system is not in balance which permits a plaintiff, whose cause of action arose in Elkhart and who is a resident of Newton, to bring suit in the District Court of Wyandotte County, some 455 miles from the location of the incident giving rise to the cause of action.

A civil justice system is not in balance which permits a plaintiff to bring suit in the District Court of Wyandotte County, but whose cause of action arose in La Plata, Missouri (172 miles from Kansas City), who resides in Niota, Illinois (284 miles from Kansas City), who was initially treated by a physician in Kirksville, Missouri, and who later was treated in hospitals located in Rochester, Minnesota, and Fort Madison, Iowa (a few miles from the plaintiff's residence).

Both of these cases were brought against the Santa Fe Railway Company ("Santa Fe") under the Federal Employers' Liability Act ("FELA") (45 U.S.C. §51). From 1981 through 1986 more FELA

actions were brought against Santa Fe in the state district courts of Kansas than in the Federal District Court for the District of Kansas. Of the FELA actions filed in the state district courts of Kansas from 1981 through 1986, all but two were filed in Wyandotte County District Court. A significant number of the actions filed in Wyandotte County District Court were managed by two non-Kansas law firms - - one located in Kansas City, Missouri, and the other located in Houston, Texas. In almost 40% of the FELA actions filed in Wyandotte County District Court, the plaintiff neither resided in Wyandotte County nor did the incident giving rise to the cause of action occur in Wyandotte County. Similar experiences are reported by other Kansas railroads.

The problem reflected in the statistics cited above is commonly known as "venue shopping." It is a national, as well as a local, problem. Late last year the Southern Pacific Transportation Company ("SP") removed its tracks at the points where its rail system entered and left Matagordo County, Texas. Because it is no longer "doing business" in Matagordo County, the SP can no longer be sued in Matagordo County under Texas law. Santa Fe took similar drastic action some fifteen years ago in Oklahoma by abandoning a line through Creek County, a forum notorious for plaintiff verdicts.

H.B. 2452 addresses the problem of "venue shopping" in Kansas. The bill would amend K.S.A. 60-606 to specify that personal injury actions against public utilities, common carriers

and transportation systems must be brought in the county of residence of the plaintiff or in the county in which the incident giving rise to the cause of action occurred. The fairness of this proposal is compelling, because:

(1) Persons having material knowledge or information about an incident giving rise to a cause of action normally reside near the location of the incident.

(2) If a lawsuit is filed in a location distant from the site where the incident occurred, legal process may not be available to compel the attendance of key witnesses.

(3) Witnesses who are willing to attend a trial held in a distant jurisdiction do so at a great loss of their own time, incur unnecessary expenses and lose income.

(4) An action brought in a distant jurisdiction, a jurisdiction having no particular interest in the controversy, adds to the congestion of that jurisdiction's docket.

(5) An action brought in a place distant from the location where the incident occurred forecloses the possibility of the jury viewing the scene of the incident.

We believe H.B. 2452 represents a fair balance between the interests of plaintiffs and defendants. We urge your favorable consideration of the bill. Paul and I will try to respond to any questions which you may have.

# # # #

TESTIMONY OF JEFFREY S. SOUTHARD,
DIRECTOR OF LITIGATION,
KANSAS POWER AND LIGHT COMPANY,
ON 1987 HOUSE BILL NO. 2452
BEFORE THE HOUSE JUDICIARY COMMITTEE,
MARCH 3, 1987

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to appear before you today to comment upon 1987 House Bill No. 2452, which is now before the Committee. I am the Director of Litigation for The Kansas Power and Light Company (KPL) and as such am involved in legal actions of all types affecting the Company. This bill would correct a current provision in Kansas law which is unfair to public utilities and common carriers.

The bill seeks to amend K.S.A. 60-606, which deals with civil procedure and concerns the venue for civil actions brought against public utilities. While there are a number of venue laws in Article 6 of Chapter 60, K.S.A. 60-606 is the only one which establishes special rules for a certain class of defendants. The statute provides that:

> "Any action brought against a public utility, common carrier, or transportation system for any liability or penalty or forfeiture, may be brought at any county into or through which such public utility, common carrier or transportation system operates regularly."

The proposed change would add a Subsection (b) to the statute, requiring lawsuits seeking damages arising out of personal injury to be brought in the county in which the injury

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occurred, or in the county where the plaintiff resided at the time of the injury. This change would make the venue for civil actions against public utilities and common carriers more consistent with the standard of care applied by juries to such defendants. By allowing a jury in one county to decide what is local good practice for another county 200 miles away, the present law is inherently unfair, and imposes a burden on public utilities and common carriers not shared by other corporate defendants.

Much has been said and written in the recent past concerning the existence of a "liability crisis." Many commentators have concluded that one of the contributing factors to this crisis is the practice of "venue shopping" by plaintiff's attorney solely to select the court in which he expects a jury to give the largest possible award.

My company has in the past few years been before juries in several instances where the venue selected by plaintiff had no connection whatever with the persons or facts of the case -- it was chosen solely for the size of the award to be expected, based on past experience. On two such occasions, the jury's award has been shockingly disproportionate to the damages suffered. One of the cases was reversed by the Kansas Supreme Court; the other is presently the subject of post-trial motions. I don't intend criticism of the attorneys; they are taking legitimate advantage of the law for the benefit of their

clients. But the result is sometimes grossly unfair. It should be the objective of the laws of civil procedure to make the opportunity for equal justice available to both sides of a lawsuit. Corporate defendants in personal injury cases bear a heavy burden to begin with. They are often perceived as possessing unlimited wealth and painted as lacking in concern for the safety of the public. Their management is considered remote and unaffected by the damage the company is alleged to have caused. These disabilities are inherent in civil litigation brought by an injured individual against most private business entities. But the law in its present form, which unfairly singles out public utilities and common carriers as the special victims of venue shopping, places an additional obstacle in the way of even handed justice.

This bill provides the legislature with an opportunity to end a discriminatory practice that is employed for the purpose of producing maximum jury awards. I urge its approval by this Committee.

ANALYSIS AND COMMENT
CONCERNING HOUSE BILL 2452

By E. L. Lee Kinch

House Bill 2452 amends K.S.A. 60-606, the venue statute applicable to public utilities and common carriers, by carving out an exception which applies only to actions for personal injuries and death. The present law provides that any action against a public utility or common carrier may be brought in any county into or through which the public utility or common carrier operates regularly. HB 2452 amends the existing law by providing that actions for damages arising out of personal injury or death shall be brought in either the county in which the injury occurred or in the county in which the Plaintiff resided at the time of injury.

The proposed amendment is not only inconsistent with the general rule of venue under K.S.A. 60-606 which permits the public utility or common carrier to be sued in counties in which they do business, but it is also inconsistent with the venue statute applicable to domestic and foreign corporations which provides that a corporation may be sued in the county "in which the Defendant is transacting business at the time of the filing of the Petition." (K.S.A. 60-604)

We oppose this amendment because it is incompatible with the prevailing venue notion that corporations ought to be subject to legal action in counties in which they transact business.

We oppose this legislation because it carves out an exception to the general venue rule which discriminates against only one class of plaintiffs, i.e., individuals who sue public utilities and common carriers as a result of personal injury or death.

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We oppose this legislation because it imposes inappropriate constraints upon the rights of individuals sustaining death and disability at the hands of public utilities and common carriers to select the most appropriate forum in which to prosecute their actions while retaining that right unimpaired for all other classes of plaintiffs.

We oppose this legislation because it ignores the existence of the doctrine of forum non conveniens which gives the trial judge discretion to dismiss the Plaintiff's case if the county in which the case is filed is found to be an inconvenient and inappropriate forum in which to try the case.

R. E. (RON) CALBERT
DIRECTOR CHAIRMAN

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KANSAS STATE LEGISLATIVE BOARD

STATEMENT RE: HOUSE BILL 2452

PRESENTED TO: HOUSE JUDICIARY COMMITTEE

STATEHOUSE

TOPEKA, KANSAS

MARCH 3, 1987

Mr. Chairman, and members of the committee, I am Ron Calbert, Director, Kansas State Legislative Board, United Transportation Union.

Mr. Chairman, I appear in opposition to HB 2452. The United Transportation Union opposes this bill because it unfairly discriminates against only one class of plaintiffs and legal actions, mainly, employees and individuals sustaining injury and death due to the negligence of common carriers and public utilities.

The bill is unnecessary because the existing law gives the trial courts discretion to dismiss a case if the place of trial is inappropriate.

We respectfully urge you to vote no on this bill.

Attachment XII
House Judiciary 3/3/87