

Approved March 1, 1988
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

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

3:30 ~~xxx~~/p.m. on February 15, 19 88 in room 313-S of the Capitol.

All members were present except:

Representative Peterson, who was excused

Committee staff present:

Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee:

Representative Kerry Patrick
Jerry Slaughter, Kansas Medical Society
Larry McMullin, Attorney, Kansas City, Missouri

The minutes of February 8 and February 9 were approved.

The Chairman announced the Attorney General requests the Committee introduce a bill dealing with curbing the travel promotion industry, (see Attachment I).

Representative Vancrum moved and Representative Crowell seconded to introduce the bill requested by the Attorney General. The motion passed.

Representative Shriver requested the Committee introduce a bill regarding public records for guardianship to comply with federal laws. The bill was proposed by the Kansas Advocacy and Protective Services.

A motion was made by Representative Solbach to introduce the bill requested by Representative Shriver. The motion was seconded by Representative Whiteman. The motion passed.

Hearing on: H.B. 2679 - Voluntary malpractice insurance; disclosure of limits to patients
H.B. 2680 - Health Care Stabilization Fund abolished
H.B. 2801 - Concerning civil procedure; relating to exemptions from process

Representative Patrick testified H.B. 2679 and H.B. 2680 abolishes the state mandate of insurance coverage for all health care providers; permits health care providers and their professional associations to form self insurance groups; abolishes the Health Care Stabilization Fund (HCSF) and sets a cutoff date for claims filed against the HCSF as of July 1, 1988. The State Insurance Commissioner is given authority to make assessments over the next three years to pay out all previous claims on the fund. H.B. 2802 exempts from legal process an additional \$100,000 of the health care provider's assets from attachment or service of process if the health care provider during the last five years has not had three or more judgments entered against him, or entered into out of court settlements exceeding \$1.5 million in medical malpractice actions. He also suggested several amendments to these bills. (Attachment II)

Jerry Slaughter stated the Kansas Medical Society appreciates what Representative Patrick is trying to do and they agree with the concepts of his bills. They are concerned however that if the HCSF is abolished there isn't any other excess coverage insurance company that would write this type of insurance in Kansas. He recommended phasing out the HCSF over a five year period and then doing away with the mandatory insurance.

Larry McMullin testified there is no state fund in Missouri. The large insurance companies withdrew from Missouri in the late 1970's and Missouri doctors formed their own professional liability insurance companies. There are now three or four doctor owned mutual insurance companies and two-thirds of the doctors in Missouri are covered by these companies. Over the years premiums have increased and are comparable to the premiums charged by large insurance companies.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,
room 313-S, Statehouse, at 3:30 ~~xxx~~/p.m. on February 15, 1988

The Kansas Coalition for Tort Reform submitted a letter to the Committee stating they are submitting to the Committee the cumulative testimony before the Judiciary Committee, the 1986 Interim Committee and the Bell Commission, over the past three years, supporting the proposition that problems exist not only in medical malpractice but in areas of general liability as well. The materials will be submitted tomorrow afternoon, (see Attachment III).

The Committee meeting was adjourned at 5:05 p.m.

The next meeting will be Tuesday, February 16, 1988 at 3:30 p.m. in room 313-S.

GUEST REGISTER

DATE Feb. 15, 1988

House Judiciary

NAME

ORGANIZATION

ADDRESS

GERHARD METZ

KCCJ

TOROKA

CLIFF HECKATHORN

KHIA

✓

KEVIN ROBERTSON

HS CONSULTING ENGRS

TOROKA

Lori Callahan

Am. Ins. Assoc.

Toroka



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

An Act regulating travel promoters.

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

Section 1. Purpose:

The Legislature finds and declares that certain advertising, sales and business practices of travel promoters have worked financial hardship upon the people of this state; that the travel business has a significant impact upon the economy and well-being of this state and its people; that problems have arisen which are peculiar to the travel promoter business; and that the public welfare requires regulation of travel promoters in order to eliminate unfair advertising, sales and business practices; to establish standards which will safeguard the people against financial hardship and to encourage competition, fair dealing and prosperity in the travel business.

Section 2. Definitions:

a) "Travel promoter" means a person who sells, provides, furnishes, contracts or, arranges, or advertises that he or she can or may arrange, or has arranged, wholesale or retail air or sea transportation either separately or in conjunction

Attachment I

with other services. Travel promoter does not include: (1) an air carrier, (2) a sea carrier, or (3) an officially appointed agent of an air carrier who is a member in good standing of the Airline Reporting Corporation.

b) "Air carrier" means a transporter by air of persons subject to regulation as an air carrier by any governmental agency.

c) "Ticket or voucher" means a writing which is itself good and sufficient to obtain the entire air or ocean transportation, or both, for which the passenger has contracted.

Section 3.

A travel promoter shall not advertise that air or sea transportation is or may be available unless he or she has, prior to the advertisement, contracted for the transportation advertised with the air carrier or sea carrier.

Section 4.

A travel promoter shall not receive money or other valuable consideration in payment for air or sea transportation or any other services offered by the travel promoter in conjunction with transportation unless at the time of receipt of payment the travel promoter furnishes to the person making payment a written statement clearly and conspicuously setting forth the following information:

a) The name, business address and telephone number of the travel promoter;

b) The amount paid, the date of payment, the purpose of the payment made, and an itemized statement of the balance due, if any;

c) The location of the bond required by this article.

d) The name of the carrier with which the travel promoter has contracted to provide the transportation, the type of equipment to be used, and the date, time and place of each departure;

e) The conditions, if any, upon which the contract between the travel promoter and the passenger may be canceled, and the rights and obligations of all parties in the event of such cancellation;

f) The conditions, if any, upon which the contract between the travel promoter and the carrier may be canceled, and the rights and obligations of all parties in the event of such cancellation.

g) A statement in eight point boldface type that upon cancellation of the transportation through no fault of the passenger, all sums paid to the travel promoter for services not performed in accordance with the contract between the travel promoter and the passenger will be promptly refunded by the travel promoter to the passenger or to the party who

contracted for the passenger, unless the passenger otherwise advises the travel promoter in writing.

h) A detailed description of any other services provided in conjunction with the transportation.

Section 5.

a) In the event the transportation contracted for is canceled through no fault of the passenger, the travel promoter shall promptly return to the passenger all moneys paid for services not performed and goods not delivered in accordance with the contract, unless the passenger otherwise advises the travel promoter in writing.

b) Any material misrepresentation of the date, time, place of all departures or arrivals or type of aircraft or ocean carrier or similar occurrence shall be deemed to be a cancellation necessitating the refund required by this section.

Section 6.

a) No person shall act as a travel promoter unless:

1. He or she has deposited and at all times keeps on deposit with the _____, or a bank in this state approved by the _____, cash or securities satisfactory to the _____ in an amount of \$500,000; and

2. He or she submits a list to the commissioner of the names and addresses of his or her selling agents.

3. In lieu of the deposit of cash or securities, he or she may give surety bond in an amount equal to that required for the deposit of cash or securities, in a form satisfactory to the _____ and issued by a company authorized to do business in this state, which bond shall run to the State of Kansas and be filed with the _____. The deposit of cash or securities or surety bond shall be for the protection and benefit of passengers and to secure the faithful performance of the obligations of the travel promoter in respect to the providing, furnishing, contracting, arranging or advertising of travel. The aggregate liability of the surety for all breaches of the conditions of the bond shall, in no event, exceed the amount of the bond. The surety on the bond shall have the right to cancel the bond upon giving 30 days' notice to the _____ and thereafter shall be relieved of liability for any breach of condition occurring after the effective date of the cancellation. The Attorney General or any aggrieved party may enforce claims against such deposit of cash or securities or surety bond. So long as the depositing person is not in violation of this act, such person shall be permitted to receive all interest and dividends on the deposit and shall have the right to substitute other securities satisfactory to the _____. If the deposit is made with a bank, any custodial fees shall be paid by such person.

4. A copy of the bond shall be filed with the Office of the Attorney General.

Section 7.

a) Upon payment in full by the passenger for air or sea transportation and any related services with a credit card or with cash, the travel promoter shall issue and deliver the ticket or voucher to the passenger or his or her designated agent within 48 hours.

b) Upon payment in full by the passenger for air or sea transportation and any related services with a check, the travel promoter shall issue and deliver the ticket or voucher to the passenger or his or her designated agent within 48 hours of the time the passenger's payment is credited to the travel promoter's account.

c) Tickets, vouchers, or receipts shall be deemed to have been delivered if they have been turned over to an independent third-party delivery service or the United States Postal Service for regular delivery.

d) Where the travel promoter is unable to issue tickets or vouchers upon payment as set forth in subdivisions (a), (b) and (c), the travel promoter may comply with this section by either: (1) forwarding to the air or sea carrier, or provider of related services the portion of the sum paid by the passenger which is required by the air or sea carrier or provider of related services from the travel promoter in order

to provide the transportation or services purchased by that passenger. The travel promoter may not offset or reduce the amount forwarded by any amounts due or claimed in connection with any other transaction, or (2) by complying with either the provisions of Section 4 and 5, and subdivisions (a), (b) and (c) of Section 6, or depositing directly into a trust account in a federally insured bank or savings and loan association the portion of the amount paid by the passenger which is required by the air or sea carrier or provider of related services from the travel promoter in order to provide the transportation or services purchased by the passenger. The travel promoter may not offset or reduce the amount deposited by any amount due or claimed in connection with any other transaction.

e) There is no violation of this section if (1) compliance with this section was rendered impossible as a direct result of an unforeseen condition beyond the travel promoter's control, and, (2) the travel promoter complied with this section or made restitution to the passenger within 30 days after receiving the passenger's payment.

A travel promoter has the burden of producing evidence to establish this exception, ~~in a criminal action, and the burden of proof to establish this exception in a civil action.~~

Section 8.

If any provision of this article or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

Section 9.

This section shall be a part of and supplemental to the Kansas Consumer Protection Act.

Section 10.

Any violation of the provisions of this act shall be deemed a violation of the Kansas Consumer Protection Act.

Section 11.

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

KERRY PATRICK
 REPRESENTATIVE, TWENTY-EIGHTH DISTRICT
 JOHNSON COUNTY
 10009 HOWE DRIVE
 LEAWOOD, KANSAS 66206



TOPEKA

HOUSE OF
 REPRESENTATIVES

COMMITTEE ASSIGNMENTS
 MEMBER: ENERGY AND NATURAL
 RESOURCES
 LABOR AND INDUSTRY
 LOCAL GOVERNMENT

To: House Judiciary Committee

Date: February 15, 1988

Re: House Bills 2679, 2680 & 2802-Medical Malpractice
 Crisis

I. Brief Description of the Bills-

a. HB 2679 & HB2780-

1. Abolishes the state mandate of insurance coverage for all health care providers. Permits them to go bare if they choose to do so.

2. Abolishes the Health Care Stabilization Fund (HCSF) and sets a cutoff date for claims filed against the HCSF of July 1, 1988 so after that date the HCSF is out of the insurance business. State Insurance Commissioner is given authority to making assessments over next three years to pay out all previous claims on the fund.

3. Permits Health Care Provider(s) and their professional associations to form self insurance groups Any type of health care provider self insurance shall be under the regulation of the Commissioner of Insurance.

4. Requirement of disclosure to patients of amount, if any, of any liability coverage or self insurance coverage on a form approved by the Commissioner of Insurance.

b. HB2802- the 'public' will be providing a \$100,000 'insurance' policy to all qualified health care providers by exempting from legal process as a result of a successful medical malpractice action an additional \$100,000 of the health care providers assets from attachment or service of process.

In order for the health care provider to qualify for this free 'insurance' policy he/she during the last five years; 1) must not have had three or more judgments entered against such person or 2) entered into out of court

Attachment II

settlements exceeding \$1.5 million in medical malpractice actions.

This is a very brief overview of the bills and I will be happy to answer any more detailed questions after I have finished. Discussions that I have had with the Insurance Department have lead me to believe the ideas contained in them are workable but Mr. Todd feels some technical amendments are needed, if they are to be effectively implemented.

II. Policy & Philosophy

After years of intense study, we honestly don't know the reason for the medical malpractice crisis. Experts say it is due to ever changing technology, drugs that increase the age expectancy, changes in our social structure, changes in our legal system, etc.

For example, we have initiated many changes in the health care delivery system to contain costs. A year ago, these were being hailed as the solution to the health care cost spiral. Recent studies have shown that the savings are not as they were projected to be and now the experts are being sent back to the drawing board to come up with new solutions. There are no easy answers or we would have found them by now.

The dilemma facing America and Americans is: How can we afford quality health care? We cannot afford medical insurance, and then again we cannot afford to live without it. This is the 'crisis' and it is best analyzed I believe as an economic question not simply as a legal or social one. Although in certain rural areas with a family practitioner who delivers a few babies a year, the problem is probably more of a social than an economic problem.

If we view the problem through these glasses then we can get a better focus on the solution. We need to set aside any considerations that this is just a clash between lawyer and health care provider. Our focus should be on what is the best solution within our power to affect this "crisis",

so our citizens are provided with the best possible health care delivery system at the most affordable cost.

Wrapped up and intertwined in this "crisis", is part of the age old problem of dealing with the problem of 'pain and suffering'. Our current public policy mandates that any health care provider must carry an amount of insurance so the recipient will be made financially whole from womb to the tomb under almost any circumstances.

If the advocates of change are correct under this mandate, we are insuring/providing protection not only for the results of malpractice but for bad results, and matters beyond the health care provider's control. I believe this is current public policy which we have made is saying; whatever goes wrong no matter who is to blame there will be private mandated insurance on health care providers to take care of you no matter what the cost. Personally, I wish this policy would have worked but it didn't and no amount of tinkering with the basic legal structure I believe, as long as you have mandated insurance requirements, will prove workable in terms of reducing cost.

Finally, this philosophy on first blush might seem cold and harsh but I don't think it is. For, if by using this type of analysis and bringing down cost, we: 1) make the system more affordable thus more people can readily purchase health care services and 2) free up resources to be invested by consumers and government in more productive arenas. If this can be accomplished this will lead to a higher standard living for all.

III. Some observations on the Economic and Social cost of continuing and/or eliminating the mandate of insurance coverage:

1. The mandate increases the depth of the "deep pocket" and results in increased litigation because the:

a. the mandate of both primary insurance and excess coverage through forced membership into the state insurance monopoly, has simply created an ever increasing

pool of money from which to pay out judgments and settlements. It's acted as a floor and not as a ceiling.

b. changes in societal attitudes that I'm not suing the doctor but the insurance company.

c. changes in negligence and 'causation' type of standards over past 15 years

2. The mandate increases the Cost-not only to health care providers but to the patients as reflected in higher direct care costs and indirect costs in the form of defensive medicine so as to avoid litigation caused by the existence of the mandate.

3. 'Good' doctors, forced to pay into a mandated insurance fund, are subsidizing 'bad' doctors who are their competitors for patients. Without this coverage 'bad' doctors are forced out of business sooner, and the public is provided with better health care services since free market forces allowed to work. Why should we continue to subsidize 'bad' doctors?

4. The abolition of the mandate transfers a greater degree of the malpractice risk to the hospitals. They have a greater incentive to see that 'bad' doctors are weeded out and to police themselves. Thus the patient should be provided better health care service. The Board of Healing Arts cannot do an adequate job of policing the quality of care in each and every hospital. By transferring a greater economic incentive to hospitals to police themselves, the patient should get better care.

5. The mandate imposes on health care providers a cost that we impose on no other group of businessman in society. The reason we do not extend this mandate to other businessman is simply the cost involved would clearly drive up inflation, make American produced goods noncompetitive in world markets and divert precious capital resources to a nonproductive use. If this reasoning applies to other sectors of business, then why not to health care providers.

6. The mandate prevents any form of price competition by precluding the option of going bare or self insuring:

a. The ability of health care providers to self insure nationwide has been greatly aided by some recent Federal legislation so it is a viable alternative. See Attachment A.

b. Abolishment of the HCSF- coupled with self insurance provision, the ability to go bare, and free 'insurance' policy should inject a healthy dose of competition for sale of different type of policies resulting in lower prices.

c. let the health care provider weigh the risk and make the economic decision that is in his/her best interest.

d. under the proposed legislation if a health care provider goes bare he/she must tell the patient of the decision to do so. If the patient doesn't like this, he/she is free to choose another health care provider. With this knowledge, they can make the decision as to whether or not to assume such a risk.

e. Assume that hospitals require insurance coverage as a condition of it's increased risk for the health care provider to practice there.

1. In Urban Areas-if it is set too high with the glut of hospital beds the doctor can always seek to be affiliated with another hospital. Because of this competition between hospitals, it should help at arriving at the optimum mix of needed malpractice coverage for all concerned.

2. In Rural Areas-hospitals have less leverage to require to high of level of coverage for if it is an underserved area they might drive the health care provider from that area and the hospital will generate even less revenue.

Conclusion:

1) A health care provider who loses too many patients from lack of adequate insurance protection then he/she is free to go back and purchase some level of insurance so as to attract back patients.

2) If in the health care providers economic judgement, he/she has the need to carry malpractice insurance at all times let him/her have the freedom to decide as to the amount and kind of coverage he/she wants to have.

Let the market place decide through freedom of choice what is the appropriate amount of insurance to have as a result of patient, health care provider and hospital interaction not as result of some state mandate that might not best meet the needs of the local community.

IV. Availability Of Medical Malpractice Insurance-Concern of Kansas Medical society that it be available:

a. This question is answered through the passage of HB 2802 where the public is giving every qualified health care provider a free \$100,000 'insurance' policy.

b. It will always be available if the health care provider is willing to pay a high enough price. We should not be interested in seeing to it that a health care provider is guaranteed keeping all of his/her assets just because of the kind of business that he/she is in. If the cost is too high, then like any other businessman, the health care provider can make the decision on the same economic criteria that every other businessman must go through.

Example of my business; 1) only one company willing to write this type of insurance in Kansas and 2) increase in premiums about the same percentage increase in last 10 years as in medical malpractice insurance.

c. It's not the Legislature's business to keep every doctor in business and have all their assets protected. Look at AH Robins and Texaco.

V. HB2802-Why provide this 'insurance' policy for health care providers and for no other individuals or groups in Kansas Society? The answer is the type of economic services provided by health care providers are unique and special so they should get 'special' treatment from our system. WHY?

1. The type of economic service they provide is unique most often of crisis in nature that one cannot live without. It isn't similar to the purchase of a fungible good such as a tire, a loaf of bread or a trip on an airplane.

2. Health care providers are a type of a regulated monopoly or utility for we limit who can be a health care provider in order to protect the public. And if this is the case, doesn't the public have a right to enact legislation to protect it's economic investment in the monopoly franchise it has given out?

VI. Suggested Amendments

1. In HB2802

a. language clarifying that the additional exemption from service of process is applicable to a plaintiff who has a judgment against a health care provider only as a result of a medical malpractice action.

b. Perhaps some language needs to be added to make clear that it applies only to civil actions filed after the effective date of the act.

2. In HB 2679 & 2680-Insurance Department states that some additional language is needed to better implement self insurance aspects of the bills.

3. In HB2679- language is needed in lines 92-104 making it clear that disclosure not needed if patient has not returned to see the health care provider during a 12 month period.

4. In HB2680-language was omitted which gives the Insurance Commissioner the power levy an additional assessment to those in the HCSF as of July 1, 1988 if all claims have not been reduced to final judgment or settlement by June 30, 1981.

Thank you very much Mr. Chairman for having a hearing on these bills and to the Committee for the courtesy shown me during my presentation. I'd be happy to try and answer any questions which they may have on my presentation or the Bills.

ALTERNATIVE INSURERS get off to a slow but steady start.

Some 40 industry groups—ranging from appliance manufacturers to trial lawyers—have formed cooperative risk-retention groups to issue insurance, says Karen Cutts of the Risk Retention Reporter. That's not the rush that some expected when the enabling legislation was passed in 1986 in response to the insurance crisis. A softer insurance market and a tough state regulatory climate have slowed growth, explains Daniel Dinur of the American Contractors Insurance Group.

But industry insurance-purchasing groups, also established under the act, are flourishing. Some 200 have been formed. And that, some say, bodes well for the future of risk-retention groups. "In the long haul we see purchasing groups as the first step in setting up a pool," says Harley Bierce of the American Trucking Assurance Alliance. Risk-retention groups are growing at a rate of three or four a month, says the Risk Retention Reporter.

A tight medical-malpractice market spurs much of the growth, with 30% of risk-retention groups in health care.

BRIEFS: Wood Knapp Video markets its video "1987: The Unforgettable Year" to new parents by recording their child's name, birthdate and birthplace on the tape. . . . "Can't Buyout Love," a Beatles take-off, is part of this year's Follies by the University of Pennsylvania's Wharton School.

—LYNN ASINOF

KANSAS COALITION FOR TORT REFORM

500 Bank IV Tower
One Townsite Plaza
Topeka, Kansas 66603-3460
Phone: (913) 357-6321

15 February 1988

The Honorable Robert Wunsch
House Committee on the Judiciary
State Capitol, Room 175-W
Topeka, KS 66612

Dear Chairman Wunsch.

I should like to take this opportunity to express on behalf of the Kansas Coalition for Tort Reform the strongest support for House bills 2690, 2691, 2692 and 2693, which the Coalition believes to represent the best possible means to tort reform currently before this committee.

It has come to my attention that allegations are being made to the effect that no case has been made establishing a problem in the civil justice system outside of the area of medical malpractice. Nothing could be further from the truth. My predecessor Mr. David Litwin testified often and ably in support of the proposition that problems exist not only in medical malpractice but in areas of general liability as well. To set the record straight and lay to rest any future assertions that the Kansas Coalition for Tort Reform has not been forthcoming with evidence in support of its position, members of the Coalition respectfully request that the record reflect the introduction of the cumulative testimony before this committee, the 1986 interim committee and the Bell commission over the past three years.

Because of the time involved in copying such a volume of materials we shall be unable to proffer the evidence until tomorrow afternoon. Thank you for this opportunity to correct any misapprehension of the Coalition's participation in this effort.

Very truly yours,

GERHARD METZ

cc: House Judiciary Committee

Attachment III