Approved March 4, 1988
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

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

3:30 a.m./p.m. on February 16, 1988 in room 313-S of the Capitol.

All members were present except:
Representatives Sebelius, Snowbarger and Peterson, who were 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:
Ted Fay, Kansas Insurance Department
Thomas L. Bell, Kansas Hospital Association

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 Bideau requested the Committee reintroduce as a Committee bill 1987 H.B. 2006, amending the code for the care of children, that was recommended for passage by this Committee last year and killed by the House because of its fiscal impact.

Representative Bideau moved and Representative Douville seconded to reintroduce 1987 H.B. 2006. The motion passed.

A statement supporting tort reform and H.B. 2690, H.B. 2691, H.B. 2692 and H.B. 2693, from the Kansas Railroad Association, and accompaning testimony of July 10, 1986, was distributed to the Committee, (see Attachment I).

Ted Fay informed the Committee if mandatory insurance is eliminated, but the fund and the plan retained on a voluntary basis, the fund will not only lose the base of providers necessary to remain fiscally solvent, but will also be subject to a ruinous adverse risk selection situation. The Insurance Department opposes the elimination of mandatory insurance unless the Health Care Stabilization Fund (HCSF) and the Health Care Provider Insurance Availability Plan (Plan) are also terminated. They also recommend against the elimination of the HCSF and the Plan until existing obligations can be paid with current assets plus investment income, and until insurance is available to provide most providers professional liability coverage. They recommend against the retention of the Plan if mandatory insurance and the HCSF are eliminated. If the HCSF and the Plan are terminated the Insurance Department recommends a five year plan to fully fund the existing obligations of the HCSF (see Attachment II).

Thomas L. Bell testified doing away with mandatory insurance is of some concern because it could have the effect of transferring more risks to hospitals. He stated the disclosure requirements could also create problems for hospitals. If the HCSF is abolished, there must be provisions for adequate funding of outstanding claims, and there must be some source of insurance for Kansas health care providers to turn to, (see Attachment III).

The hearing was closed on H.B. 2679, H.B. 2680 and H.B. 2802.

The Chairman distributed proposed amendments to H.B. 2731, (see Attachment IV). He also distributed proposed amendments to H.B. 2693, (see Attachment V).

The Committee meeting adjourned at 4:45 p.m.

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

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

GUEST REGISTER

DATE Feb. 16, 1988

Judiciary Committee

NAME	ORGANIZATION	ADDRESS
Jon Josserand	KU	Lawrence
Lori Callahan	Am. Ins. Assn.	Topeka
Gerhard Metz	KCCI	Topeka
Jeff Rockett	St Francis - Wichita	Topeka
Paul Cummings	intern	
Ken Bahr	Charter Hospital	Topeka
Julie Nelson	KS. League of Savings	Topeka
John Peterson	Ks Assn of Prof Psychologists	Topeka

KANSAS RAILROAD ASSOCIATION

920 S.E. QUINCY
P.O. BOX 1738
TOPEKA, KANSAS 66628

913-357-3392

PATRICK R. HUBBELL
SPECIAL REPRESENTATIVE-PUBLIC AFFAIRS

MICHAEL C. GERMANN, J. D.
LEGISLATIVE REPRESENTATIVE

February 15, 1988

The Honorable Robert S. Wunsch
Chairman, House Judiciary Committee
Statehouse
Topeka, Kansas 66612

Re: <u>H.B.'s 2690, 2691, 2692 and 2693</u>

Dear Chairman Wunsch:

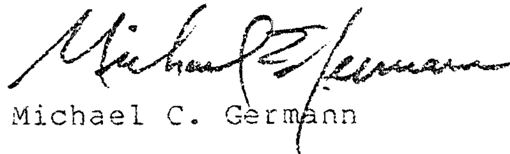
We did not wish to burden the Committee this session with unnecessarily duplicative testimony on the subject of tort reform. Therefore, we chose not to request time in front of the Committee to present the railroad industry's position on tort reform issues.

However, the rail industry does support tort reform, and the Kansas Railroad Association is on record as supporting tort reform efforts in Kansas. The Kansas Railroad Association testified on July 10, 1986, before a Special Committee of the Kansas Legislature on the subject of tort reform and liability insurance. A copy of the statement which was presented at that time is attached.

The Kansas Railroad Association specifically supports 1988 House Bills 2690, 2691, 2692 and 2693.

Under separate cover, please find 30 copies of this letter and its attachment. If this communication would be of value to Members of the Committee, please feel free to distribute the accompanying copies.

Very truly yours,



Michael C. Germann

MCG:kmm

Attachment as indicated

Attachment I

KANSAS RAILROAD ASSOCIATION

920 S.E. QUINCY
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PATRICK R. HUBBELL
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MICHAEL C. GERMANN, J. D.
LEGISLATIVE REPRESENTATIVE

Statement of the
Kansas Railroad Association

Presented to the Special Committee
on Tort Reform and Liability Insurance,
The Honorable Joe Knopp, Chairman

Statehouse
Topeka, Kansas
July 10, 1986

* * * * * *

Mr. Chairman and Members of the Special Committee:

My name is Mike Germann. I am a representative of the Kansas Railroad Association. I want to thank the Chairman and the Members of this Special Committee for permitting me to appear today and express some of my industry's concerns with certain trends occurring in the civil justice system.

These trends have been emerging for a number of years but received little attention until the insurance crisis developed. Studies of the insurance crisis have been undertaken recently by a number of legislatures, by special governmental task forces, by insurance regulatory agencies, and by independent groups. Almost universally, these studies have found that one of the underlying causes of the insurance crisis is the increasingly unpredictable nature of the civil justice system.

These studies have found that the number of lawsuits and the size of jury awards are increasing at an alarming rate. The findings of these studies are supported by statistics from the railroad industry. Personal injury claims of railroad employees decreased 47% during the period from 1979 to 1985. However, during this period of declining claims the number of employee personal injury lawsuits increased more than 69%, and the total dollars paid out in judgments increased 292%.

These statistics reflect the concerns of the railroad industry with the civil justice system. We are principally a self-insured industry. We believe there is in fact a crisis, but for our industry it is not an insurance crisis. From our vantage point the civil justice system has gotten out of kilter.

Some of the problems with the civil justice system were addressed in an article recently published in the Wichita Business Journal. James Frierson, a lawyer, a professor of management at East Tennessee State University, and the author of the article, wrote: "Judgments for pain and suffering and punitive damages are a major cause of the huge increase in the number of lawsuits, the size of judgments and the extreme variations in the amounts awarded in different lawsuits. They are a major reason why attorneys' fees are so lucrative in personal injury cases."

The civil justice system should be fair, and it should be predictable. Frierson touched on the fairness and the predictability of the system when he wrote: "A personal

injury claim in Ohio might bring a $1 million pain and suffering award, while an identical case in Alabama might result in only a $25,000 judgment . . . . The result appears to depend upon which attorney was used, which court heard the case, the jury that was selected and pure luck."

A blameless person, injured by the tortious conduct of another, should have complete restitution of all economic losses, including attorneys' fees to prosecute the claim, but the law should not attempt to do the impossible. It is impossible to place a correct dollar amount on physical pain and mental suffering. It is therefore reasonable and fair that money awards for pain and suffering be limited by statute.

Addressing punitive damages, Frierson wrote: "[P]unitive damage judgments are a major cause of the inconsistency of court judgments." The awarding of punitive damages in a private lawsuit is an attempt to impose a penalty for a defendant's "outrageous conduct" or "reckless action" against society.

The imposition of punitive damages in the infancy of the civil justice system was a reasoned approach to dealing with the "outrageous conduct" or the "reckless action" of a defendant. However, as the criminal law has developed and as the civil justice system has evolved, particularly the area of administrative law, the awarding of punitive damages in private civil proceedings no longer appears appropriate.

We believe a number of areas of the civil justice system warrant careful study and serious consideration. We urge

this Special Committee to devote a portion of the interim to the following issues: non-economic damages; punitive damages; venue and transfers; structured settlements; collateral sources; and alternative dispute resolution.

Thank you for the opportunity to present our statement. I will try to answer any questions which you may have.

TESTIMONY REGARDING

HOUSE BILL 2679 AND HOUSE BILL 2680

BY

TED FAY, ATTORNEY

HEALTH CARE STABILIZATION FUND

ON BEHALF OF

FLETCHER BELL, COMMISSIONER OF INSURANCE

BEFORE THE

HOUSE JUDICIARY COMMITTEE

FEBRUARY 15, 1988

Attachment II

I AM TED FAY, THE ATTORNEY FOR THE HEALTH CARE STABILIZATION FUND, AND I AM HERE TODAY REPRESENTING FLETCHER BELL, THE KANSAS INSURANCE COMMISSIONER.

IN 1976, THIS STATE ENACTED THE HEALTH CARE PROVIDER INSURANCE AVAILABILITY ACT IN ORDER TO MAKE MEDICAL MALPRACTICE INSURANCE AVAILABLE TO KANSAS HEALTH CARE PROVIDERS.

HEALTH CARE PROVIDERS IN KANSAS REQUESTED THIS 1976 ACT BECAUSE MANY PROVIDERS, PARTICULARLY IN HIGH RISK AREAS, COULD NOT OBTAIN EXCESS INSURANCE AT THE LEVELS OF COVERAGE THEY DESIRED.

ONE OF THE PROVISIONS OF THE 1976 ACT CREATED THE HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN AND THE HEALTH CARE STABILIZATION FUND. THE <u>PLAN</u> GUARANTEED PROVIDERS THEY COULD OBTAIN PRIMARY LEVELS OF COVERAGE EVEN IF NOT AVAILABLE IN THE PRIVATE INSURANCE MARKETS. THE <u>FUND</u> PROVIDED EXCESS INSURANCE COVERAGE ABOVE PRIMARY LIMITS.

SINCE 1976, THE KANSAS LEGISLATURE HAS AMENDED THE 1976 ACT MANY TIMES TO FINE TUNE ITS PROVISIONS. THIS LEGISLATURE HAS ALSO ENACTED COMPREHENSIVE MEDICAL MALPRACTICE LEGISLATION IN 1985

(SENATE BILL 110) AND AGAIN IN 1986 (HOUSE BILL 2661) IN AN ATTEMPT TO CONTROL SKYROCKETING MEDICAL MALPRACTICE COSTS.

TODAY, HEALTH CARE PROVIDERS, THE INSURANCE DEPARTMENT, MANY LEGISLATORS AND OTHERS ARE FRUSTRATED. THE MAJOR COST SAVINGS MEASURES IN THE 1985 AND 1986 ACTS HAVE BEEN HELD UNCONSTITUTIONAL AND IT MUST APPEAR TO MANY THAT LITTLE REAL PROGRESS HAS BEEN MADE TO HOLD DOWN SPIRALING MEDICAL MALPRACTICE COSTS.

IN THEIR FRUSTRATION, A NUMBER OF PROVIDERS WISH TO ELIMINATE MANDATORY INSURANCE AND THE HEALTH CARE STABILIZATION FUND. SOME PROVIDERS WISH TO PRACTICE WITHOUT INSURANCE, SOME PROVIDERS WISH TO SELF-INSURE, WHILE OTHERS SIMPLY WANT THE OPPORTUNITY TO SEEK OTHER INSURANCE.

WE ARE WELL AWARE THAT MESSENGERS ARE SOMETIMES KILLED FOR BEARING BAD NEWS. THE INSURANCE DEPARTMENT IS IN THAT POSITION NOW. WE HAVE WORKED FOR AND SUPPORTED COST SAVING MEASURES FOR MEDICAL MALPRACTICE. WE HAVE SPOKEN THROUGHOUT KANSAS FOR MANY YEARS WARNING OF THE IMPENDING PROBLEM, NOT ONLY IN MEDICAL MALPRACTICE, BUT OTHER TROUBLESOME LIABILITY AREAS AS WELL. WITHOUT

MEANINGFUL LEGISLATION AND JUDICIAL UNDERSTANDING THE HEALTH CARE STABILIZATION FUND MUST CONTINUE TO PASS ALONG ITS COSTS TO HEALTH CARE PROVIDERS EVEN WHEN IT IS CLEAR THESE COSTS WILL LIKELY CAUSE SERIOUS DISLOCATIONS IN THE HEALTH CARE COMMUNITY IN THIS STATE.

IT WOULD BE TEMPTING TO TURN IN THE MESSENGER'S UNIFORM BEFORE MATTERS GET WORSE. THE DIFFICULTY, HOWEVER, IS THAT MANDATORY INSURANCE, THE HEALTH CARE STABILIZATION FUND AND THE HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN CANNOT BE ELIMINATED WITHOUT A SUBSTANTIAL AMOUNT OF ADVANCED PREPARATION.

LET ME DISCUSS THESE ITEMS IN ORDER:

I. MANDATORY INSURANCE

MANDATORY INSURANCE WAS REQUIRED IN 1976. IT WAS ENACTED BECAUSE IT WAS BELIEVED THERE COULD BE NO PLAN CREATED CONSTITUTIONALLY UNLESS THERE WAS MANDATORY INSURANCE. IN ADDITION, THE FUND'S ACTUARIAL VIABILITY REQUIRED A FULL RANGE OF HEALTH CARE PROVIDER PARTICIPANTS. THE KANSAS PROVIDERS WISHED TO USE KANSAS ONLY EXPERIENCE IN ESTABLISHING RATES AND THE 1976 LEGISLATION WAS

CONDUCIVE TO SERVING THIS PURPOSE. THE BELIEF WAS THAT KANSAS DIDN'T HAVE A SERIOUS MEDICAL MALPRACTICE PROBLEM, YET KANSAS PROVIDERS WERE PAYING FOR THE PROBLEMS IN OTHER STATES. KANSAS HAD TOO FEW PROVIDERS TO PERMIT A KANSAS ONLY COMPANY WITHOUT ALL PROVIDERS PARTICIPATING IN THE SYSTEM. MANDATORY INSURANCE OR SOME EQUALLY POWERFUL INCENTIVE HAD TO BE A CONDITION PRECEDENT TO THE CREATION AND CONTINUATION OF THE FUND. IF MANDATORY INSURANCE IS ELIMINATED, BUT THE FUND AND PLAN RETAINED ON A VOLUNTARY BASIS, THE FUND WILL NOT ONLY LOSE THE BASE OF PROVIDERS NECESSARY TO REMAIN FISCALLY SOLVENT, BUT WILL ALSO BE SUBJECT TO A RUINOUS ADVERSE RISK SELECTION SITUATION. KANSAS CANNOT NOW DO WHAT IT WAS WISE ENOUGH TO AVOID IN 1976.

TO EXPLAIN HOW ADVERSE RISK SELECTION WORKS, IF MANDATORY INSURANCE WAS ELIMINATED, PRIVATE INSURANCE CARRIERS, RISK RETENTION GROUPS AND RISK RETENTION PURCHASING GROUPS COULD ENTER THE KANSAS MARKET AND WRITE INSURANCE FOR PROVIDERS IN EVERY CLASS BELIEVED TO CONSTITUTE THE LOWEST RISK OF LOSS. OBVIOUSLY, PRIVATE COMPANIES WILL NOT KNOWINGLY OR WILLINGLY WRITE PROVIDERS WHO THEY BELIEVE

CONSTITUTE A HIGHER THAN AVERAGE RISK. THIS MEANS THE HIGHER RISK PROVIDERS WILL REMAIN IN THE FUND AND WILL EVENTUALLY CAUSE PER CAPITA LOSSES TO INCREASE. THESE INCREASES WILL DRIVE EVEN MORE PROVIDERS FROM THE FUND TO THE PRIVATE MARKETS ONCE AGAIN INCREASING PER CAPITA LOSSES IN THE FUND.

ADVERSE RISK SELECTION, IN THE CASE OF THE FUND, WILL BE AGGRAVATED BY TWO UNIQUE PROBLEMS.

FIRST, THE FUND IS PRESENTLY RESPONSIBLE FOR "TAIL COVERAGE" FOR KANSAS PROVIDERS WHO BECOME INACTIVE. IF A PROVIDER RETIRES, RESIGNS OR DIES THE FUND PROVIDES THIS INACTIVE PROVIDER FIRST DOLLAR LIABILITY AND DEFENSE.

IF MANDATORY INSURANCE IS ELIMINATED BUT THE FUND REMAINS, PROVIDERS WILL BE ABLE TO RECEIVE LOWER FIRST YEAR RATES WITH A PRIVATE COMPANY BECAUSE THE FUND WILL BE RESPONSIBLE FOR EXISTING LIABILITIES REGARDLESS OF WHEN A SUIT IS FILED. THE NEW COMPANY WILL RECEIVE THEIR NEW CUSTOMER FRESH AND WITHOUT SIN, THANKS TO THE FUND.

OBVIOUSLY, AS THE YEARS GO BY, THE PROVIDER'S NEW INSURANCE CARRIER WILL BE FORCED TO RAISE THEIR RATES AS THE PROVIDER ACCUMULATES YEARS OF LOSS EXPERIENCE UNDER THE NEW COMPANY POLICY.

WILL PROVIDERS REALIZE THAT INITIAL COST SAVINGS ARE SIMPLY THE RESULT OF THE FUND COVERING THE TAIL? ONE WOULD THINK SO, YET OVER AND OVER AGAIN PROVIDERS MOVE FROM KANSAS AND BELIEVE THAT THEY HAVE ACHIEVED TREMENDOUS SAVINGS IN MEDICAL MALPRACTICE COSTS. OFTEN THE DOCTOR IS SIMPLY LOOKING AT HIS OR HER FIRST YEAR PREMIUM THAT IS LOW BECAUSE THE FUND IS PROVIDING THE TAIL. MANY PHYSICIANS SEEM TO ONLY SEE FIRST YEAR SAVINGS AND DO NOT LOOK AHEAD TO SEE WHAT THEIR INSURANCE WILL COST THREE YEARS IN THE FUTURE NOR DO THEY REALIZE OR CONSIDER THAT IN EVERY STATE EXCEPT KANSAS THEY WILL NEED TO PURCHASE TAIL COVERAGE AT A CONSIDERABLE EXPENSE WHEN THEY LEAVE THE OTHER STATE OR RETIRE.

I AM CONVINCED THAT IF MANDATORY INSURANCE IS ABOLISHED BUT THE FUND RETAINED, MANY PHYSICIANS WILL LEAVE THE FUND TO OBTAIN LOWER COST FIRST YEAR COVERAGE EVEN THOUGH THEIR INSURANCE COSTS MUST RATCHET HIGHER IN THREE OR FOUR YEARS.

SECOND, THE FUND, THROUGH NO ONE'S FAULT, HAS SUBSTANTIAL UNFUNDED LIABILITIES ARISING FROM TWO SOURCES.

THE FUND IS PRESENTLY AMORTIZING THE DEFICIENCIES THAT WERE CREATED PRIOR TO 1984 WHEN THE FUND WAS ON A PAY AS YOU GO BASIS. IN 1984 WHEN THE FUND WAS CONVERTED TO AN ACTUARIALLY SOUND BASIS, THE COMMISSIONER WAS REQUIRED BY STATUTE TO AMORTIZE THIS DEFICIENCY. HE ELECTED TO DO SO OVER A TEN YEAR PERIOD. APPROXIMATELY FIVE YEARS REMAIN IN THIS ORIGINAL SCHEDULE.

HEALTH CARE PROVIDERS MUST PAY A HIGHER SURCHARGE FOR APPROXIMATELY FIVE MORE YEARS UNTIL THE FUND WILL HAVE ENOUGH CASH ON HAND (ADJUSTED FOR INTEREST INCOME) TO PAY FUND OBLIGATIONS. THIS OBLIGATION IN FY 1988 CONSTITUTED APPROXIMATELY $6.5 MILLION OF THE TOTAL SURCHARGE OF $28.8 MILLION. THIS TRANSLATES TO 22.5% OF THE CURRENT 90% SURCHARGE.

ADDITIONALLY, THE SURCHARGE HAS BEEN MAINTAINED AT A LOWER LEVEL DURING THE LAST FEW YEARS BECAUSE OF THE MEDICAL MALPRACTICE LEGISLATION ENACTED IN 1985 AND 1986. IF THE MAJOR COST SAVINGS PROVISIONS OF THESE ACTS ARE UNCONSTITUTIONAL, AND WE ALREADY KNOW

THAT THE MODIFICATIONS OF THE COLLATERAL SOURCE RULE WERE HELD UNCONSTITUTIONAL BY THE KANSAS SUPREME COURT IN THE FARLEY DECISION, THEN THESE PAST DEFICIENCIES WILL ALSO HAVE TO BE AMORTIZED AND ASSESSED IN THE SURCHARGE IN FUTURE YEARS.

IF MANDATORY INSURANCE IS ELIMINATED BUT THE FUND RETAINED, HEALTH CARE PROVIDERS WILL BE PERMITTED TO WALK AWAY FROM THEIR PAST OBLIGATIONS AND THE FUND WILL ALMOST CERTAINLY BECOME INSOLVENT.

AS A RESULT, THE INSURANCE DEPARTMENT HAS NO CHOICE BUT TO OPPOSE ANY EFFORT TO ELIMINATE MANDATORY INSURANCE UNLESS THE HEALTH CARE STABILIZATION FUND AND THE HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN ARE ALSO TERMINATED.

II. ELIMINATION OF MANDATORY INSURANCE, THE HEALTH CARE STABILIZATION FUND, AND HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN

SHOULD THE 1976 AVAILABILITY SYSTEM BE ENDED?

WHATEVER ELSE IS SAID ABOUT THE 1976 SYSTEM, IT IS UNDENIABLE THAT THE FUND AND THE PLAN ACCOMPLISHED THE ONLY OBJECTIVE INTENDED BY THE LEGISLATURE WHEN THE HEALTH CARE PROVIDER INSURANCE

AVAILABILITY ACT WAS ENACTED: ALL HEALTH CARE PROVIDERS IN KANSAS HAVE INSURANCE AVAILABLE!

IF, HOWEVER, HEALTH CARE PROVIDERS BELIEVE THE USEFULNESS OF THE FUND AND PLAN HAVE ENDED, THEN IT IS PERHAPS TIME TO BEGIN A PROGRAM TO END THIS SYSTEM.

THERE ARE, HOWEVER, TWO REQUIREMENTS TO COMPLETE THIS PROCESS:

1. THE FUND MUST HAVE A REASONABLE METHOD TO PAY ITS EXISTING OBLIGATIONS AND THOSE FOR WHICH IT MIGHT BECOME LIABLE ON CLAIMS FINALIZED AFTER TERMINATION; AND

2. THERE MUST BE SOME REASONABLE CERTAINTY THAT ADEQUATE INSURANCE MARKETS OR MECHANISMS WILL EXIST FOR MOST PROVIDERS IN THE PRIVATE MARKETS ONCE THE FUND AND PLAN ARE ENDED.

WE HAVE ALREADY DISCUSSED THE PROBLEM OF FUNDING THE FUND'S PRESENT LIABILITIES. APPROXIMATELY FIVE YEARS WILL BE REQUIRED TO MEET THIS OBJECTIVE. THE EXACT TIME PERIOD WILL DEPEND UPON THE LOSS EXPERIENCE FOR THE FUND DURING THE COMING YEARS. THE FUND ACTUARIES, HOWEVER, SHOULD BE ABLE TO TARGET FIVE YEARS FOR FULL

FUNDING AND HOPEFULLY MEET THIS OBJECTIVE. THE FUND PRESENTLY HAS APPROXIMATELY $40 MILLION IN CASH WITH MORE THAN $100 MILLION OF LIABILITIES.

DURING THE COMING FIVE YEAR PERIOD NEEDED TO FUND OBLIGATIONS, EVERY EFFORT SHOULD BE MADE TO CREATE NEW PRIVATE INSURANCE MARKETS FOR HEALTH CARE PROVIDERS. SOME PROVIDERS, SUCH AS PHARMACISTS, SHOULD HAVE NO PROBLEM FINDING AVAILABLE INSURANCE. OTHER PROVIDERS, SUCH AS THOSE IN HIGH RISK AREAS, WILL PROBABLY NEVER BE ADEQUATELY COVERED IN THE PRIVATE MARKET UNLESS SPECIAL INSURANCE IS MADE AVAILABLE THROUGH PROVIDER OWNED COMPANIES.

MIKE MULLEN, PRESIDENT OF MEDICAL PROTECTIVE INSURANCE COMPANY, TESTIFIED BEFORE THIS COMMITTEE TWO WEEKS AGO, THAT HIS COMPANY WILL NOT WRITE INSURANCE IN KANSAS ABOVE $200,000 PER PROVIDER. HE IMPLIED HIS COMPANY WILL LEAVE KANSAS IF THE FUND IS ELIMINATED. MEDICAL PROTECTIVE INSURES APPROXIMATELY 40% OF ALL KANSAS PHYSICIANS, INCLUDING MANY RURAL PHYSICIANS.

THE DAY FOLLOWING MR. MULLEN'S SPEECH, KIM YELKIN, SENIOR GOVERNMENT AFFAIRS OFFICER FOR ST. PAUL FIRE AND MARINE INSURANCE

COMPANY, TESTIFIED THAT ST. PAUL WILL PROVIDE EXCESS INSURANCE FOR THEIR CUSTOMERS, BUT WILL NOT WRITE EXCESS INSURANCE OVER ANY OTHER COMPANY UNLESS THEY CONTROL THE DEFENSE OF ALL CLAIMS. IT IS UNLIKELY ST. PAUL WILL WRITE EXCESS INSURANCE FOR ANY PRIVATE INSURANCE COMPANIES SUBJECT TO THESE CONDITIONS.

SMALLER INSURANCE COMPANIES MAY WRITE INSURANCE UP TO REASONABLE LIMITS FOR SOME KANSAS HEALTH CARE PROVIDERS, BUT IT IS HIGHLY UNLIKELY THEY WILL WRITE MORE THAN A SMALL PERCENT OF THE MARKET. THESE SMALL COMPANIES WILL ALSO BE SUBJECT TO THE UPS AND DOWNS OF THE REINSURANCE MARKETS. THIS MEANS INSURANCE COVERAGE FOR PROVIDERS WILL COME AND GO BASED UPON THE VAGARIES OF NATIONAL AND INTERNATIONAL REINSURANCE MARKETS. THESE MARKETS HAVE HISTORICALLY BEEN SUBJECT TO THE SWINGS OF TRADITIONAL INSURANCE CYCLES.

THE INSURANCE DEPARTMENT BELIEVES THAT THE ABRUPT TERMINATION OF THE FUND COULD LEAVE AS MANY AS FIFTY PERCENT OF THE PHYSICIANS IN KANSAS WITHOUT INSURANCE. EVEN A TERMINATION WITH FIVE YEARS WARNING COULD LEAVE SUBSTANTIAL NUMBERS OF PHYSICIANS WITHOUT INSURANCE UNLESS NEW COMPANIES ARE PERSUADED TO ENTER THE MARKET.

IT IS THE INSURANCE DEPARTMENT'S OPINION THAT PRIVATE INSURANCE COMPANIES WILL NEVER ENTER THE KANSAS MARKET IN SUFFICIENT NUMBERS AND AT AFFORDABLE COSTS AS LONG AS MEDICAL MALPRACTICE LOSSES CONTINUE TO BE UNPREDICTABLE. THEREFORE, THE MOST REASONABLE SCENARIO TO PROVIDE INSURANCE TO ALL PROVIDERS WILL BE PROVIDER OWNED COMPANIES WITH LONG RANGE EXCESS INSURANCE ARRANGEMENTS WITH PRIVATE COMPANIES SUCH AS ST. PAUL. EVEN THESE WOULD, I SUSPECT, EXERCISE SOME FORM OF UNDERWRITING SELECTIVITY.

THE INSURANCE DEPARTMENT BELIEVES THAT ANY ATTEMPT TO ELIMINATE THE FUND AND THE PLAN PRIOR TO COMPLETION OF THE TWO CONDITIONS ABOVE WOULD RESULT IN THE FUND'S INSOLVENCY AND WOULD LEAVE MANY KANSAS PROVIDERS WITHOUT INSURANCE. IF THIS OCCURRED, THE RESULTANT CRISIS COULD MAKE OUR PRESENT CRISIS APPEAR ALMOST PLEASANT BY COMPARISON.

III. <u>CAN MANDATORY INSURANCE AND THE HEALTH CARE STABILIZATION FUND BE ELIMINATED BUT THE PLAN RETAINED?</u>

IF THE HEALTH CARE STABILIZATION FUND IS ELIMINATED, THE HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN WILL LOSE ITS SOURCE OF

FUNDING. TO DATE, THE FUND HAS PAID MORE THAN $8 MILLION OF THE PLAN'S LOSSES. FURTHERMORE, WITHOUT MANDATORY INSURANCE, THE LEGAL BASIS FOR THE PLAN IS UNCLEAR. FINALLY, THERE ARE TOO FEW MEDICAL MALPRACTICE INSURANCE COMPANIES LEFT IN THE KANSAS MARKET TO SUPPORT AN ASSIGNED RISK PLAN OR JOINT UNDERWRITING ASSOCIATION FOR MEDICAL MALPRACTICE.

IV. OPTIONAL LEVELS OF COVERAGE

ALTHOUGH NOT ADDRESSED IN THE TWO BILLS UNDER CONSIDERATION, THERE HAS BEEN DISCUSSION OF A TWO TIER OPTIONAL FUND COVERAGE SELECTION ALTERNATIVE.

THIS ALTERNATIVE WOULD PERMIT A KANSAS HEALTH CARE PROVIDER TO SELECT BETWEEN TWO SEPARATE LEVELS OF FUND COVERAGE. AS A RESULT, PHYSICIANS WHO CANNOT AFFORD HIGHER SURCHARGES COULD SELECT A LOWER LEVEL OF COVERAGE. TO WORK, THE LOWER LEVEL WILL NECESSARILY HAVE TO BE LOW ENOUGH TO RESULT IN SUBSTANTIAL COST SAVINGS.

INITIAL ACTUARIAL ESTIMATES SUGGEST THAT $100,000 OF FUND COVERAGE MIGHT BE APPROXIMATELY ONE HALF THE COST OF $1 MILLION OF COVERAGE. BECAUSE OF THE TAIL COVERAGE PROBLEMS AND THE

AMORTIZATION OF PAST DEFICIENCIES THE $100,000 COVERAGE MAY BE HIGHER, AT LEAST INITIALLY, UNLESS THE LAW WAS CHANGED TO PERMIT THE PROVIDER SELECTING THE LOWER LEVEL TO ASSUME HIS OR HER OWN TAIL FOR THE AMOUNT BETWEEN $100,000 AND THE HIGHER COVERAGE LEVELS OF THE FUND.

THE ADVANTAGE OF THE TWO OTHER OPTIONAL ALTERNATIVES IS THAT PROVIDERS WILL RECEIVE SOME RELIEF FROM HIGH SURCHARGES. WHETHER IT IS ENOUGH RELIEF TO APPEAL TO PROVIDERS CANNOT BE PREDICTED. IT IS ALSO NOT KNOWN IF PROVIDERS, WHEN PERMITTED TO REDUCE FUND COVERAGE, WILL WANT TO BE COVERED FOR THE SMALLER LIMITS OF $100,000 FUND COVERAGE AND $200,000 PRIMARY COVERAGE. SOME MAY ELECT THE LOWER LIMITS AND OBTAIN EXCESS INSURANCE IN THE PRIVATE MARKETS. IF THIS OCCURS, WHICH IS UNLIKELY, IT WOULD INDICATE THAT PRIVATE COMPANIES WISH TO ASSUME A LARGER ROLE IN KANSAS. THIS WOULD BE ENCOURAGING NEWS.

ON THE DOWNSIDE, THE INSURANCE DEPARTMENT HAS NO WAY TO PREDICT WHICH PROVIDERS OR HOW MANY WILL ELECT THE LOWER LIMITS. THIS UNCERTAINTY WILL MAKE IT DIFFICULT TO ESTABLISH AN APPROPRIATE

SURCHARGE. THIS PROBLEM, HOWEVER, IS PREFERABLE TO THE ELIIMINATION OF ALL MANDATORY INSURANCE. AS LONG AS HEALTH CARE PROVIDERS ARE REQUIRED TO MAINTAIN SOME LEVEL OF FUND COVERAGE, THE OPPORTUNITY WILL EXIST FOR THE FUND TO CORRECT ACTUARIAL MISTAKES OR, IF NECESSARY, TO REPEAL THE LEGISLATION. IF MANDATORY INSURANCE IS TOTALLY ELIMINATED, THE PROVIDERS WILL BE OUT OF THE SYSTEM AND IT WILL BE VIRTUALLY IMPOSSIBLE TO RETURN THEM, IF IT IS NECESSARY, TO CORRECT MISTAKES.

V. CONCLUSION

THE KANSAS INSURANCE DEPARTMENT UNDERSTANDS AND APPRECIATES THE FRUSTRATION OF ALL THOSE WHO HAVE WAITED PATIENTLY FOR TORT REFORM MEASURES TO STABILIZE PREMIUMS AND SURCHARGES IN KANSAS, ONLY TO HAVE THESE MEASURES STRUCK DOWN BY THE COURTS. THE INSURANCE DEPARTMENT HAS SUPPORTED THESE TORT REFORM MEASURES AND IS EQUALLY FRUSTRATED. WE ALSO UNDERSTAND WHY SOME PROVIDERS, IN THEIR FRUSTRATION, WISH TO PRACTICE WITHOUT INSURANCE. NEVERTHELESS, RASH ACTIONS MUST NOT BE TAKEN THAT MIGHT PRECIPITATE A WORSE CRISIS. PAST OBLIGATIONS MUST BE PAID AND THE FOUNDATION LAID FOR THE

INSURANCE COVERAGE THE MAJORITY OF PROVIDERS WILL DEMAND WHEN THE FUND IS ELIMINATED. THE DEPARTMENT BELIEVES THAT THE FUND HAS SETTLED CASES REASONABLY DURING THE LAST DECADE, IN VIEW OF THE HOSTILE CLAIMS ENVIRONMENT. THE FUND HAS DONE THIS WHILE HOLDING DOWN OVERHEAD COSTS. THERE IS NO DOUBT THAT WITH THE ELIMINATION OF THE FUND AND THE PLAN, PROVIDERS INSURANCE COSTS FOR ANYTHING CLOSE TO COMPARABLE COVERAGE WILL INCREASE FOR PROVIDERS -- NOT DECREASE. PROVIDERS, HOWEVER, MUST MAKE THIS DECISION AND CHART THEIR OWN FUTURE.

1. THE INSURANCE DEPARTMENT STRONGLY RECOMMENDS AGAINST THE ELIMINATION OF MANDATORY INSURANCE UNLESS THE HEALTH CARE STABILIZATION FUND AND THE HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN ARE ALSO ELIMINATED.

2. THE INSURANCE DEPARTMENT RECOMMENDS AGAINST THE ELIMINATION OF THE HEALTH CARE STABILIZATION FUND AND THE HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN UNTIL ALL EXISTING OBLIGATIONS CAN BE PAID WITH CURRENT ASSETS PLUS INVESTMENT

INCOME, AND UNTIL INSURANCE IS AVAILABLE TO PROVIDE MOST PROVIDERS PROFESSIONAL LIABILITY COVERAGE.

3. THE INSURANCE DEPARTMENT RECOMMENDS AGAINST THE RETENTION OF THE HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN IF MANDATORY INSURANCE AND THE HEALTH CARE STABILIZATION FUND ARE ELIMINATED.

4. IF THE MAJORITY OF HEALTH CARE PROVIDERS WISH TO TERMINATE THE HEALTH CARE STABILIZATION FUND AND THE HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN, THE INSURANCE DEPARTMENT RECOMMENDS A FIVE YEAR PLAN TO FULLY FUND THE EXISTING OBLIGATIONS OF THE HEALTH CARE STABILIZATION FUND AND TO ESTABLISH NEW INSURANCE MARKETS, EITHER THROUGH THE PRIVATE SECTOR OR THROUGH PROVIDER OWNED COMPANIES, FOR KANSAS PROVIDERS. THE INSURANCE DEPARTMENT RECOMMENDS AGAINST THE ELIMINATION OF MANDATORY INSURANCE, THE FUND AND THE PLAN UNTIL FUND OBLIGATIONS CAN BE PAID AND ADEQUATE INSURANCE IS AVAILABLE FOR THE MAJORITY OF KANSAS HEALTH CARE PROVIDERS.

5. THE INSURANCE DEPARTMENT NEITHER RECOMMENDS FAVORABLY OR UNFAVORABLY A PLAN FOR OPTIONAL LEVELS OF FUND COVERAGE. WE SIMPLY HAVE INSUFFICIENT DATA TO ASSESS THE IMPACT OF SUCH A CHANGE UPON THE OVERALL SYSTEM.

THE KANSAS INSURANCE DEPARTMENT MUST AGAIN ADVISE THE PUBLIC, THE LEGISLATURE AND HEALTH CARE PROVIDERS, THAT TINKERING WITH THE FINANCING MECHANISM FOR MEDICAL MALPRACTICE WILL NEVER SOLVE THE MEDICAL MALPRACTICE PROBLEM IN KANSAS. THE CAUSE OF THE MEDICAL MALPRACTICE PROBLEM IS THE FREQUENCY AND SEVERITY OF CLAIMS TOGETHER WITH THE PERCENT OF MONEY THAT MUST BE PAID FOR ATTORNEYS' FEES AND ADMINISTRATIVE EXPENSES. UNLESS AND UNTIL THOSE TWO ELEMENTS ARE ADDRESSED REALISTICALLY AND EFFECTIVELY, THE PROBLEM WILL CONTINUE.

Memorandum

Donald A. Wilson
President

February 16, 1988

TO: House Judiciary Committee

FROM: Thomas L. Bell, Vice President

SUBJECT: H.B. 2679, 2680

The Kansas Hospital Association appreciates the opportunity to comment on H.B. 2679 and 2680. Together these two bills abolish the Health Care Stabilization Fund and the mandatory professional liability insurance requirement for health care providers.

We feel Representative Patrick has raised a number of valid points concerning the effects of mandatory insurance and the Health Care Stabilization Fund. We also think his emphasis on an economic analysis of the problem helps shed some light on the issues. We do, however, feel that the problem should not be discussed solely on an economic basis. As this committee has often heard, there are many other factors involved.

In one sense, H.B. 2679 is not an issue for Kansas hospitals because these institutions will undoubtedly continue to carry insurance if they can obtain it. On the other hand, doing away with the mandatory insurance requirement is of some concern because it could have the effect of transferring more risk to hospitals.

In addition, the disclosure requirements of H.B. 2679 could create problems. There are approximately 350,000 discharges per year in Kansas hospitals, and this bill would require continuing notification for each of those individuals.

With regard to H.B. 2680, we feel there are two things that must be assured before the Health Care Stabilization Fund is abolished. First, there must be provisions for adequately funding outstanding claims. For this reason, it would not be reasonable to cut off the Fund's liability immediately. Second, there must be some source of insurance for Kansas health care providers to turn to. Presently, there are basically three companies that insure Kansas hospitals. Two of those companies, however, will not write new business. Further, as of January 1, 1989, there will only be two companies in Kansas, one of which we assume will be writing new business. Therefore, we think it would be a mistake to abolish the Health Care Stabilization Fund when Kansas health care providers face such a potential availability problem.

Thank you for your consideration.

TLB:mkc

Attachment III

1263 Topeka Avenue • P.O. Box 2308 • Topeka, Kansas 66601 • (913) 233-7436

Session of 1988

HOUSE BILL No. 2731

By Committee on Judiciary

1-29

0017 AN ACT concerning civil procedure; relating to exemplary damages in civil actions; amending K.S.A. 1987 Supp. 60-3402 and 60-3701 and repealing the existing sections.

K.S.A. 60-209 and 60-3401,

0020 *Be it enacted by the Legislature of the State of Kansas:*

0021 Section 1. K.S.A. 1987 Supp. 60-3402 is hereby amended to read as follows: 60-3402. (a) In any medical malpractice liability action in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted to the court to determine the amount of such damages to be awarded.

0029 (b) At a proceeding to determine the amount of exemplary or punitive damages to be awarded under this section, the court shall hear evidence of the financial condition of any party against whom such damages have been allowed. Such evidence may include the party's gross income earned from professional services as health care provider but shall not include any such income for more than five years immediately before the act for which such damages under this section are awarded. At the conclusion of the proceeding, the court shall determine the amount of exemplary or punitive damages to be awarded, but not exceeding the amount provided by subsection (d), and shall enter judgment for that amount.

0041 (c) In any medical malpractice liability action where claims for punitive damages are included, the plaintiff shall have the burden of proving by clear and convincing evidence in the initial phase of the trial, that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice.

Attachment IV

0046 (d) No award of exemplary or punitive damages shall exceed
0047 the lesser of: (1) Twenty-five percent of the annual gross income
0048 earned by the party against whom the damages are awarded from
0049 professional services as a health care provider, as determined by
0050 the court based upon the party's highest gross annual income
0051 earned from such services for any one of the five years immedi-
0052 ately before the act for which such damages are awarded; or (2)
0053 three million dollars.
0054 (e) If exemplary or punitive damages are awarded pursuant
0055 to this section, 50% of such damages recovered and collected
0056 shall be paid to the party awarded them and 50% shall be paid to
0057 the state treasurer for deposit in the state treasury and shall be
0058 credited to the health care stabilization fund established pursu-
0059 ant to K.S.A. 40-3403 and amendments thereto.
0060 (f) In no case shall punitive damages be assessed pursuant to
0061 this section against:
0062 (1) A principal or employer for the acts of an agent or em-
0063 ployee unless the questioned conduct was authorized or ratified
0064 by a person expressly empowered to do so on behalf of the
0065 principal or employer; or
0066 (2) a professional corporation for the acts of a shareholder of
0067 that corporation unless such professional corporation authorized
0068 or ratified the questioned conduct.
0069 (g) The provisions of this section shall apply only to an action
0070 based upon a cause of action accruing on or after July 1, 1985 *and*
0071 *before July 1, 1988.*
0072 Sec. 2. K.S.A. 1987 Supp. 60-3701 is hereby amended to read
0073 as follows: 60-3701. (a) In any civil action in which exemplary or
0074 punitive damages are recoverable, the trier of fact shall deter-
0075 mine, concurrent with all other issues presented, whether such
0076 damages shall be allowed. If such damages are allowed, a sepa-
0077 rate proceeding shall be conducted by the court to determine the
0078 amount of such damages to be awarded.
79 (b) At a proceeding to determine the amount of exemplary or
.080 punitive damages to be awarded under this section, the court
0081 may consider:
0082 (1) The likelihood at the time of the alleged misconduct that

0083 serious harm would arise from the defendant's misconduct;
0084 (2) the degree of the defendant's awareness of that likeli-
0085 hood;
0086 (3) the profitability of the defendant's misconduct;
0087 (4) the duration of the misconduct and any intentional con-
0088 cealment of it;
0089 (5) the attitude and conduct of the defendant upon discovery
0090 of the misconduct;
0091 (6) the financial condition of the defendant; and
0092 (7) the total deterrent effect of other damages and punish-
0093 ment imposed upon the defendant as a result of the misconduct,
0094 including, but not limited to, compensatory, exemplary and
0095 punitive damage awards to persons in situations similar to those
0096 of the claimant and the severity of the criminal penalties to
0097 which the defendant has been or may be subjected.
0098 At the conclusion of the proceeding, the court shall determine
0099 the amount of exemplary or punitive damages to be awarded and
0100 shall enter judgment for that amount.
0101 (c) In any civil action where claims for exemplary or punitive
0102 damages are included, the plaintiff shall have the burden of
0103 proving, by clear and convincing evidence in the initial phase of
0104 the trial, that the defendant acted toward the plaintiff with
0105 willful conduct, wanton conduct, fraud or malice.
0106 (d) In no case shall exemplary or punitive damages be as-
0107 sessed pursuant to this section against:
0108 (1) A principal or employer for the acts of an agent or em-
0109 ployee unless the questioned conduct was authorized or ratified
0110 by a person expressly empowered to do so on behalf of the
0111 principal or employer; or
0112 (2) an association, partnership or corporation for the acts of a
0113 member, partner or shareholder unless such association, part-
0114 nership or corporation authorized or ratified the questioned
0115 conduct.
0116 (e) Except as provided by subsection (f), no award of exem-
0117 plary or punitive damages pursuant to this section shall exceed
0118 the lesser of:
0119 (1) The annual gross income earned by the defendant, as

0120 determined by the court based upon the defendant's highest
0121 gross annual income earned for any one of the five years imme-
0122 diately before the act for which such damages are awarded; or
0123 (2) $5 million.
0124 (f) In lieu of the limitation provided by subsection (e), if the
0125 court finds that the profitability of the defendant's misconduct
0126 exceeds or is expected to exceed the limitation of subsection (e),
0127 the limitation on the amount of exemplary or punitive damages
0128 which the court may award shall be an amount equal to 1½ times
0129 the amount of profit which the defendant gained or is expected to
0130 gain as a result of the defendant's misconduct.
0131 (g) The provisions of this section shall not apply to any action
0132 governed by another statute establishing or limiting the amount
0133 of exemplary or punitive damages, or prescribing procedures for
0134 the award of such damages, in such action.
0135 (h) As used in this section the terms defined in K.S.A. 60-
0136 3401 and amendments thereto shall have the meaning provided
0137 by that statute.
0138 (i) The provisions of this section shall apply only to an action
0139 based upon a cause of action accruing on or after July 1, 1987 *and*
0140 *before July 1, 1988.*
0141 New Sec. 3. (a) In any civil action in which exemplary or
0142 punitive damages are recoverable, the trier of fact shall deter-
0143 mine, concurrent with all other issues presented, whether such
0144 damages shall be allowed. If such damages are allowed, a sepa-
0145 rate proceeding shall be conducted by the court to determine the
0146 amount of such damages to be awarded.
0147 (b) At a proceeding to determine the amount of exemplary or
0148 punitive damages to be awarded under this section, the court
0149 may consider:
0150 (1) The likelihood at the time of the alleged misconduct that
0151 serious harm would arise from the defendant's misconduct;
0152 (2) the degree of the defendant's awareness of that likeli-
0153 hood;
0154 (3) the profitability of the defendant's misconduct;
0155 (4) the duration of the misconduct and any intentional con-
0156 cealment of it;

0157 (5) the attitude and conduct of the defendant upon discovery
0158 of the misconduct;
0159 (6) the financial condition of the defendant; and
0160 (7) the total deterrent effect of other damages and punish-
0161 ment imposed upon the defendant as a result of the misconduct,
0162 including, but not limited to, compensatory, exemplary and
0163 punitive damage awards to persons in situations similar to those
0164 of the claimant and the severity of the criminal penalties to
0165 which the defendant has been or may be subjected.
0166 At the conclusion of the proceeding, the court shall determine
0167 the amount of exemplary or punitive damages to be awarded and
0168 shall enter judgment for that amount.
0169 (c) In any civil action where claims for exemplary or punitive
0170 damages are included, the plaintiff shall have the burden of
0171 proving, by clear and convincing evidence in the initial phase of
0172 the trial, that the defendant acted toward the plaintiff with
0173 willful conduct, ~~wanton conduct,~~ fraud or malice.
0174 (d) In no case shall exemplary or punitive damages be as-
0175 sessed pursuant to this section against:
0176 (1) A principal or employer for the acts of an agent or em-
0177 ployee unless the questioned conduct was authorized or ratified
0178 by a person expressly empowered to do so on behalf of the
0179 principal or employer; or
0180 (2) an association, partnership or corporation for the acts of a
0181 member, partner or shareholder unless such association, part-
0182 nership or corporation authorized or ratified the questioned
0183 conduct.
0184 (e) Except as provided by subsection (f), no award of exem-
0185 plary or punitive damages pursuant to this section shall exceed
0186 the lesser of:
0187 (1) The annual gross income earned by the defendant, as
0188 determined by the court based upon the defendant's highest
0189 gross annual income earned for any one of the five years imme-
0190 diately before the act for which such damages are awarded; or
0191 (2) $5 million.
0192 (f) In lieu of the limitation provided by subsection (e), if the
0193 court finds that the profitability of the defendant's misconduct

0194 exceeds or is expected to exceed the limitation of subsection (e),
0195 the limitation on the amount of exemplary or punitive damages
0196 which the court may award shall be an amount equal to 1½ times
0197 the amount of profit which the defendant gained or is expected to
0198 gain as a result of the defendant's misconduct.
0199 (g) As used in this section the terms defined in K.S.A. 60-
0200 3401 and amendments thereto shall have the meaning provided
0201 by that statute.
0202 (h) The provisions of this section shall apply only to an action
0203 based upon a cause of action accruing on or after July 1, 1988.
0204 Sec. ~~4.~~ K.S.A. 1987 Supp. 60-3402 and 60-3701 are hereby
0205 repealed.
0206 Sec. ~~5.~~ This act shall take effect and be in force from and
0207 after its publication in the statute book.

Insert Sec. 4, 5 and 6 attached
7. K.S.A. 60-209 and
60-3401,
8

New Section 4. No tort claim for punitive damages shall be included in a petition or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed. The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to K.S.A. 60-209, and amendments thereto. The court shall not grant a motion allowing the filing of an amended pleading that includes a claim for punitive damages if the motion for such an order is not filed within two years after the petition or initial pleading is filed or not less than nine months before the date the matter is first set for trial, whichever is earlier.

Sec. 5. K.S.A. 60-209 is hereby amended to read as follows: 60-209. (a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of any party to sue or be sued in a representative capacity, the party raising the issue shall do so by specific negative averment which shall include such supporting particulars

as are peculiarly within the pleader's knowledge.

(b) Fraud, mistake, conditions of the mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

(c) Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official document or act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special damage. When items of special damage are claimed, their nature shall be specifically stated. In actions where exemplary or punitive damages are recoverable, the amended

petition shall not state a dollar amount for damages sought to be recovered but shall state whether the amount of damages sought to be recovered is in excess of or not in excess of ~~ten-thousand dollars ($10,000)~~ $10,000.

(h) Pleading written instrument. Whenever a claim, defense or counterclaim is founded upon a written instrument, the same may be pleaded by reasonably identifying the same and stating the substance thereof or it may be recited at length in the pleading, or a copy may be attached to the pleading as an exhibit.

(i) Tender of money. When a tender of money is made in any pleading, it shall not be necessary to deposit the money in court when the pleading is filed, but it shall be sufficient if the money is deposited in the court at the trial, unless otherwise ordered by the court.

(j) Libel and slander. In an action for libel or slander, it shall not be necessary to state in the petition any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the claim arose, but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be not controverted in the answer, it shall not be necessary to prove it on the trial; in other cases it shall be necessary. The defendant may, in ~~his or her~~ such defendant's answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances admissible in evidence to reduce the amount of damages; and whether the defendant proves the

justification or not, the defendant may give in evidence any mitigating circumstances.

Sec. 6. K.S.A. 1987 Supp. 60-3401 is hereby amended to read as follows: 60-3401. As used in this act:

(a) "Claimant" means any person asserting a claim for damages in a medical malpractice liability action.

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

(c) "Health care provider" has the meaning provided by K.S.A. 40-3401 and amendments thereto.

(d) "Malice" means a state of mind characterized by an intent to do a harmful act without a reasonable justification or excuse or conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(e) "Medical malpractice liability action" means any action for damages for personal injury or death arising out of the rendering of or failure to render professional services by a health care provider.

~~(f)--"Wanton--conduct"--means--an--act--performed---with---a realization--of--the-imminence-of-danger-and-a-reckless-disregard or-complete-indifference-to-the-probable-consequences-of-the-act.~~

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

Session of 1988

HOUSE BILL No. 2693

By Committee on Judiciary

1-22

0017 AN ACT concerning civil procedure and evidence; relating to
0018 collateral source benefits; amending K.S.A. 1987 Supp. 60-258a and repealing the existing section; also repealing K.S.A. 1987 Supp. 60-
0019 3403.

0020 *Be it enacted by the Legislature of the State of Kansas:*

New

0021 Section 1. As used in this act:
0022 (a) "Claimant" means any person seeking damages in an
0023 action for personal injury or death, and includes the heirs at law,
0024 executor or administrator of a decedent's estate.
0025 (b) "Collateral source benefits" means ~~any of the following~~
0026 benefits which were or are reasonably expected to be received
0027 by a claimant, or by someone for the benefit of a claimant, for
0028 expenses incurred or reasonably expected to be incurred as a
0029 result of the occurrence upon which the personal injury action is
0030 based~~: (1) Any benefits received as a result of any medical or~~
0031 ~~other insurance coverage, or any benefit in the nature of insur-~~
0032 ~~ance coverage~~, except life or disability insurance ~~coverage; and~~
0033 ~~(2) any workers compensation benefit, military service benefit~~
0034 ~~plan, employment wage continuation plan, welfare benefit pro-~~
0035 ~~gram or other publicly funded benefit plan or program provided~~
0036 ~~by law~~

benefits or benefits gratuitously bestowed on the claimant. Such term shall not include services or benefits for which a valid lien or subrogation interest exists; however, nothing in this act shall be construed to create or modify lien or subrogation interests not otherwise allowed by law

0037 (c) "Cost of the collateral source benefit" means the amount
0038 paid or to be paid in the future to secure a collateral source
0039 benefit by the claimant or by anyone on behalf of the claimant.

If the amount of any benefit paid or to be paid is greater by reason of continuous cost over a period of time than it would have been without such continuous cost, evidence of such continuous cost is admissible in determining the "cost of the collateral source benefit."

(d) "Net collateral source benefits" means the sum of collateral source benefits after subtracting the cost of the collateral source benefit.

New

0040 Sec. 2. In any action for personal injury or death, evidence of
0041 collateral source benefits received, or evidence of collateral
0042 source benefits which are reasonably expected to be received in
0043 the future, shall be admissible.

New

0044 Sec. 3. When evidence of collateral source benefits is ad-
0045 mitted into evidence pursuant to section 2, evidence of the cost

Attachment V

0048 of the collateral source benefit ~~and the extent to which the right to recovery is subject to a lien or subrogation shall be admissible.~~ New

0048 Sec. 4. ~~In determining damages in any action for personal~~
0049 ~~injury or death, the trier of fact shall consider: (a) The extent to~~
0050 ~~which damages awarded will duplicate collateral source benefits~~
0051 ~~and (b) the cost of the collateral source benefit and any lien or~~
0052 ~~subrogation right.~~ New

In determining damages in an action for personal injury or death, the trier of fact shall determine the net collateral source benefits received and the net collateral source benefits reasonably expected to be received in the future. If the action for personal injury or death is tried to a jury, the jury will be instructed to make such determination by itemization of the verdict.

Sec. 5 (attached)

0053 Sec. ~~5.~~ 6 The provisions of this act shall apply to any action
0054 pending or brought on or after July 1, 1988, regardless of when
0055 the cause of action occurred.

0056 Sec. ~~6.~~ 7 K.S.A. 1987 Supp. 60-258a and 60-3403 ~~is~~ are hereby repealed.

0057 Sec. ~~7.~~ 8 This act shall take effect and be in force from and
0058 after its publication in the statute book.

Sec. 5. K.S.A. 1987 Supp. 60-258a is hereby amended to read as follows: 60-258a. (a) The contributory negligence of any party in a civil action shall not bar such party or such party's legal representative from recovering damages for negligence resulting in death, personal injury, property damage or economic loss, if such party's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, but the award of damages to any party in such action shall be diminished in proportion to the amount of negligence attributed to such party. If any such party is claiming damages for a decedent's wrongful death, the negligence of the decedent, if any, shall be imputed to such party.

(b) Where the comparative negligence of the parties in any such action is an issue, the jury shall return special verdicts, or in the absence of a jury, the court shall make special findings, determining the percentage of negligence attributable to each of the parties, and determining the total amount of damages sustained by each of the claimants, and the entry of judgment shall be made by the court. No general verdict shall be returned by the jury. With respect to the actions to which 1988 House Bill No. 2693 relates, the amount of the judgment for past damages shall be reduced by the amount of net collateral source benefits received, but only to the extent that such benefits exceed the amount such judgment was reduced pursuant to subsection (a), above, and the amount by which the legal right to recover such judgment was limited by the application of subsections (c) and (d), below, other than by virtue of claimant's settlement with or decision not to assert a legally enforceable claim against a named or an unnamed party. In the same manner, the amount of the judgment for future damages, if any, shall be reduced by the amount of net collateral source benefits found to be receivable in the future.

(c) On motion of any party against whom a claim is asserted for negligence resulting in death, personal injury, property damage or economic loss, any other person whose causal negligence is claimed to have contributed to such death, personal injury, property damage or economic loss, shall be joined as an additional party to the action.

(d) Where the comparative negligence of the parties in any ction is an issu and recovery is allowed a inst more than one party, each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of such party's causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.

(e) The provisions of this section shall be applicable to actions pursuant to this chapter and to actions commenced pursuant to the code of civil procedure for limited actions.