Approved April 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 March 28, 1988 in room 313-S of the Capitol.

All members were present except:

Representatives Douville, Peterson and Vancrum

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:

Jerry Slaughter, Kansas Medical Society
Tom Sullivan, Kansas Trial Lawyers Association
Christel E. Marquardt, President Kansas Bar Association
Carol Renzulli, Lawrence

The minutes of March 15, 16, 17 & 21 were approved as of March 25, 1988.

Hearing on HCR 5049 -- Proposition to amend article 2 of the constitution of the state of Kansas by adding a new section thereto, relating to the legislative power to enact laws related to actions for personal injury or death.

Jerry Slaughter testified HCR 5049 is comprehensive and broad based. It states the legislature may make changes in the tort system which will not be invalidated by the courts. The amendment applies across-the-board to all personal injury actions, and thus is broader than medical malpractice only. He said the legislature must decide if it wants to adopt an across-the-board approach, or limit the application of this amendment to medical malpractice actions. The Medical Society feels HCR 5049 is absolutely essential to sustaining reforms enacted by this Legislature. He said it was important to let the people vote on this question, (see Attachment I.

Tom Sullivan testified the Kansas Trial Lawyers Association is opposed to HCR 5049 and he urged the Committee to reject it as unnecessary, unfair and offensive to the constitutionally guaranteed rights of all Kansans. It was his opinion most of the 1988 "tort reforms" have a very good chance of satisfying constitutional muster. He said S.B. 258 dealing with periodic payments and H.B. 2731, affecting punitive damages, are probably constitutional. The collateral source bill, H.B. 2693, as it left the House, would not fall to a constitutional challenge. He stated the Kansas Trial Lawyers Association believes that caps on noneconomic damages, including H.B. 2692, are unconstitutional. He said the Legislature has not exhausted all of the possible, less harmful, ways to address rising liability rates, (see Attachment II.

Christel E. Marquardt informed the Committee the Board of Governors of the Kansas Bar Association adopted a resolution stating HCR would permit adoption of arbitrary and capricious laws in disregard of hard won and time-honored constitutional provisions. She also stated they were opposed to HCR 5049 or to any similar resolution designed or intended to permit amendment, enactment, modification or repeal of any statute or rule of common law relating to the determination of liability or damages for personal injury or death in violation of existing constitutional guarantees. She asked the Committee to defeat HCR 5049, (see Attachment III.

Carol Renzulli explained that changing the state constitution is a major step, certainly not something one does without very serious consideration of all its ramifications. She said the constitutional amendment would abrogate two United States Constitutional Rights, trial by jury and the right of due process. She said she was opposed to changing the United States Constitution, (see Attachment IV).

The Committee meeting was adjourned at 5:00 p.m. The next meeting will be Tuesday, March 29, 1988 at 3:30 p.m. in room 313-S.

KANSAS MEDICAL SOCIETY
1300 Topeka Avenue · Topeka, Kansas 66612 · (913) 235-2383

March 28, 1988

TO: House Judiciary Committee

FROM: Jerry Slaughter
Executive Director

SUBJECT: HCR 5049; Amending the State Constitution Relating to Personal Injury Claims

The Kansas Medical Society appreciates the opportunity to appear today on HCR 5049, which was introduced at our request. We are the first to admit that amending the Constitution is a big step. But it is a step, we believe, that must be considered in light of where we have been over the last decade.

In the mid-70's Kansas physicians faced their first real problem in medical malpractice. While premiums were rising, the principal problem at that time was one of availability of insurance. After a lengthy study, our calls for reform of the tort system were rejected in favor of changes in the insurance system. The Legislature, apparently did not believe insurance company claims that the market was a highly volatile one with increasing frequency and severity of claims. Consequently, to solve the availability of insurance problem the Health Care Stabilization Fund was established to do two things: 1) provide insurance for health care providers; and 2) provide reliable data which would begin to answer the questions and suspicions many held about insurance company data. In conjunction with the establishment of the Fund, all malpractice insurance companies were required to report closed claim information to the state of Kansas.

We now have twelve years of data which conclusively shows that the medical malpractice insurance crisis is real, and it is worse now than it has ever been. The reams of data we've collected in the intervening years are proof that in medical malpractice insurance, the crisis was not manufactured by insurance companies. Further, it must be clear now that you can't solve the problem by merely tinkering with the insurance mechanism itself. The steady exodus of malpractice insurance companies from our state since the mid-70's is added evidence that medical malpractice insurance is not a lucrative line of business.

Had our calls for fundamental reform of the tort system been heeded back in the mid-70's, as Nebraska, Indiana and others did, this crisis would not have reached its current proportions.

Following the Legislature's attempt to solve the problem through the insurance mechanism, the latter years of the intervening decade have been spent on approaching the problem from two other perspectives, that of physician discipline and tort reform. The physician discipline, or quality assurance, approach was unprecedented in this country. It included significant

Attachment I

strengthening of the Board of Healing Arts authority, in addition to mandatory inter-professional reporting of incidents of negligence and unprofessional conduct. It also mandated risk management programs at every hospital in the state. In short, it established a system of reporting, investigation and disciplinary measures that goes well beyond that which is required of other professions in this state, and in this country.

It should be noted here that every bit of credible evidence available repeatedly points out that the malpractice crisis is not related to a problem of physician competence. You simply cannot solve the malpractice problem by "getting rid of the bad apples," despite what the legal profession and a very few others who are similarly uninformed like to believe.

The remaining side of the triangle, that of tort reform, has not yet been fitted in place. It is not because the Legislature has not tried. In fact, for the last several years the Legislature has attempted to enact some basic reforms of the civil justice system, but for all practical purposes, they have been invalidated by the courts. Over the years, every credible organization which has studied the medical malpractice problem has called for reform of the tort laws which govern these cases. The reforms we are suggesting are hardly novel or over-reaching. They are concepts that have been implemented in other states and have shown to produce results. However, unless these reforms are given an opportunity to work by the courts, they simply cannot have the intended benefit, which brings us to the reason you are considering a constitutional amendment today.

Believe me, we would prefer that it not take an amendment to our Constitution to allow some basic reforms to take effect. Reforms similar to the ones you considered earlier this year have been upheld in many other states, including California, whose $250,000 cap on non-economic damages was upheld by the United States Supreme Court.

All we're saying is that we should give tort reform a chance. If it takes a constitutional amendment to do that, then that is what we must do. It simply makes no sense for the Legislature to continue to pass, by overwhelming majorities, basic and fair reforms to try to deal with the medical malpractice problem, and then have the courts continue to strike down those enactments. It is clearly a game the Legislature cannot win.

The longer health care providers are bounced back and forth between the Legislature and the courts without a resolution to the problem, the greater are the stakes for the people of Kansas. We have shown in our earlier testimony on the tort reform measures that the medical malpractice crisis is causing serious dislocations of physician services, especially in rural areas. For the third consecutive year the number of full-time practicing physicians in Kansas has decreased, and the number dropping high-risk services such as obstetrics, is increasing at an accelerating rate.

If the courts persist in interpreting our State Constitution to say that basic reform of the civil justice system is not allowed, then the Legislature must make a choice. The question is this: Should the people of this state have an opportunity to change their Constitution to allow the Legislature to enact some basic reform of the civil justice system?

Last Fall, we surveyed the public on this issue, and 85% of those surveyed said they wanted the opportunity to vote on a constitutional amendment which would change the malpractice laws. (It was interesting to note that in the same survey, when asked who benefits most from malpractice suits, 67% of the respondents said lawyers are the major beneficiaries of malpractice suits.)

HCR 5049, the amendment you are considering today is comprehensive, and broadly-based. It states clearly that the Legislature may make changes in the tort system which will not be invalidated by the courts. The amendment applies across-the-board to all personal injury actions, and thus is clearly broader than medical malpractice only. The Legislature must decide if it wants to adopt an across-the-board approach, or limit the application of this amendment to medical malpractice actions. Either way, we support the concept because we feel it is absolutely essential to sustaining reforms enacted by this Legislature.

A point needs to be emphasized here. The trial lawyers often allege that individuals who have been injured through a physician's negligence in the past, or who potentially could be injured in the future, are not adequately represented in this process. Nothing could be further from the truth. The KTLA is an active, well-financed and able advocate, and they have created the Malpractice Victims Coalition to further organize opponents of tort reform. Of course, there are those who argue that plaintiff's lawyers have such a significant financial stake in the outcome of tort reform efforts, that they are really more interested in maintaining the status quo for their own sake, and not those they purport to be advocates for. Nevertheless, it is abundantly clear that should a constitutional amendment make it to the ballot, the interests of individuals who are "potential victims of malpractice" will be more than adequately represented.

The issue is fundamentally this: Should the people be given an opportunity to vote for tort reform? While it is a big step, in light of the current environment, it is one we believe you must seriously consider. Some would suggest that this amendment would give the Legislature the authority to run roughshod over the rights of individuals. That assertion is ridiculous. The legislative process is one of compromise, as evidenced by the tort reform bills which this committee substantially amended earlier this session. I do not believe any future legislature will act irresponsibly, or with indifference to the rights of individuals when considering tort reform legislation.

What this amendment will allow the Legislature to do, in effect, is to construct reasonable solutions to a compelling public problem. The medical malpractice crisis simply cannot be adequately addressed within the confines of the current Supreme Court's interpretation of our State Constitution. The Constitution is a dynamic document and should reflect the needs of the people to deal with contemporary problems.

We should be reminded that the Constitution does not belong to the legal profession, nor to the Legislature exclusively. The Constitution belongs to the people of this state, and they must have access to it if it is to be representative of their needs. However, the people cannot change the Constitution, unless you give them the right to vote. We believe the medical malpractice crisis is of such importance that the people should have the opportunity to determine how medical malpractice and other personal injury claims are handled by the tort system. We urge your favorable consideration of this amendment. Thank you for the opportunity to appear today.

KANSAS TRIAL LAWYERS ASSOCIATION

112 West Sixth, Suite 311, Topeka, Kansas 66603, (913) 232-7756

March 28, 1988

TO: Members, House Judiciary Committee

FROM: Thomas E. Sullivan, President

SUBJECT: HCR 5049

The members of the Kansas Trial Lawyers Association are opposed to HCR 5049 and urge you to reject it as unnecessary, unfair and offensive to the constitutionally guaranteed rights of all Kansans.

You have been asked to deal with special interest legislation for doctors annually in recent years. But a special interest constitution is repugnant to those of us who cherish our individual rights. No state in the union has amended its constitution to further the advertised goals of tort reformers. Surely Kansas citizens do not want to give up these rights to benefit any special class of individuals.

Our founding fathers created a system of democracy with specific powers given to the three branches of government. We all know that the purpose of this seperation of powers is to provide checks and balances, so that no one branch will decide the laws under which we live.

This system of government has served us well and has proved to be a model for self-government throughout the world. The Kansas Legislature should not act to change our constitution's principles which form the very bedrock of our form of democracy.

Specifically, HCR 5049 would render moot Articles 1, 5 and 18 of the Kansas Constitution as they pertain to personal injury victims. These articles are reproduced for your information and attached to our written testimony.

With these constitutionally guaranteed individual rights in mind, let's take a moment to consider how they would be destroyed by HCR 5049. The proposal would empower legislators to....

amend,
enact,
modify, or
repeal....

Attachment II

in whole or in part....

any statute, or
any rule of common law....

directly, or
indirectly....

as to the determination of liability,
measurement of damages, or
limitations of damages....

for suits or claims for personal injury or death

against persons,
entities, or
classifications thereof.

Additionally, it implies that it would be appropriate public policy to limit damages for actual, out-of-pocket losses suffered by victims of negligence.

We think you will agree that with such a constitution, victims of negligence will have no constitutionally guaranteed rights related to their ability to recover for damages incurred. Wouldn't it be easier, and cleaner, to simply repeal Articles 1, 5 and 18 of the Kansas Constitution?

What will happen if our constitution is gutted by HCR 5049? We believe "tort reforms" being considered during this session will not be reflected in reduced premiums for doctors. Won't physicians, then, still be upset in 1989? What does the Kansas Medical Society have in store for victims in the 1989 Session? What does their wish list look like that will once and for all limit the rights of victims sufficiently, and create enough immunity for their members, to truly impact premiums?

If for no other reason, HCR 5049 should be defeated because the Legislature has not yet considered alternative solutions to liability insurance problems.

First, in our opinion, most of the 1988 "tort reforms" have a very good chance of satisfying constitutional muster, even in view of Judge Theis' District Court decision on the 1986 medical malpractice limitations. We feel that SB 258, dealing with periodic payments, and HB 2731, affecting punitive damages, are probably constitutional. And the collateral source bill, HB 2693, as it left the House, would not fall to a constitutional challenge. We continue to hold the view, however, that caps on noneconomic damages, including HB 2692, are unconstitutional. The bottom line, then, is that KTLA believes it is possible to enact constitutional "tort reforms", even though we can never support their provisions from the victim's point of view.

It is also appropriate to ask if the State has done everything in its power to reduce the true cause of rising malpractice premiums, medical malpractice itself. A recent study by the Public Citizen Health Research Group has concluded that Kansas has fallen to the bottom third in the nation in terms of serious disiplinary actions against physicians. And a recent editorial in the Atchinson Daily Globe suggested a better system of evaluating physician competence would do more to eliminate medical malpractice, and subsequently lower premiums, than changes to the civil justice system. Shouldn't these issues be addressed before we ask voters to change the Constitution?

We also would urge the Legislature to take a better look at the insurance delivery system. We are not convinced the commercial insurance industry is an innocent bystander in this debate. A number of the nation's attorneys general agree, as evidenced by their suit against five major companies and ISO alleging the current liability "crisis" was actually manufactured to justify rate increases.

It is interesting to note that just this morning the Senate Financial Institutions and Insurance Committee, on a voice vote, killed HB 2971, the Insurance Reform Act of 1988. Why did they not, as 122 House members did, want to give our Commissioner of Insurance more authority to insure rates are not excessive, inadequate of unfairly discriminatory?

KTLA has suggested the Legislature link the 1988 "tort reform" bills to reduced premiums, yet that concept has been voted down. Why? Is it because no one really believes that these "reforms" will eventually show up as reduced insurance premiums, particularly for doctors?

Our association has also presented to the entire Legislature, and specifically to this Committee, alternative ways to deal with the cost of insurance that has become a legitimate concern to some doctors, especially those in obstetrics and rural Kansas. The Medical Society rejects these suggestions out-of-hand, perhaps because they've been led to believe that if the bill doesn't have "tort reform" in the title, it can't possibly help.

Without listing these potential solutions to you again, let me simply re-state the willingness of our members to pursue actions that can be taken by the State of Kansas to solve these problems.

Fueling the call for a constitutional amendment is the Medical Society's claim that doctors are leaving the state in record numbers. They would have us believe that their members are scouting out other states where they might be able to get a reduction in their insurance rates and therefore leave the State of Kansas for greener pastures.

Well, we've looked at those "greener pastures". Oklahoma appears to have the lowest malpractice rates for physicians of all the states bordering Kansas. The obvious conclusion is that Oklahoma surely has the toughest "tort reform" laws around us. Just the opposite is true.

Oklahoma has no caps on noneconomic damages, no limits on attorney fees, no limits on punitive damages, no periodic payment law, no screening panels, no expert witness restrictions, no modification of the collateral source rule...in other words, as far as "tort reform", no greener pasture.

Our State has not exhausted all the possible, less harmful, ways to address rising liability insurance rates. We haven't even definitively outlined the problem itself. Our constitutional rights do not have to be relinguished.

Proponents of HCR 5049 feel that our civil justice system is out of control. We encourage the members of this Committee to ask, "Whose control?".

Constitution of the State of Kansas

ADOPTED AT WYANDOTTE, JULY 29, 1859, AS AMENDED

BILL OF RIGHTS

§ **1.** **Equal rights.** All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.

§ **5.** **Trial by jury.** The right of trial by jury shall be inviolate.

§ **18.** **Justice without delay.** All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.

For Further Information:
Sidney M. Wolfe, M.D.
202-872-0320

PUBLIC CITIZEN HEALTH RESEARCH GROUP

STATE MEDICAL LICENSING BOARD DOCTOR DISCIPLINARY ACTIONS IN 1986

MARCH 1988

Health Research Group 2000 P Street, NW Washington, D.C. 20036

STATE MEDICAL BOARD DOCTOR DISCIPLINARY ACTIONS:1986

Overall U.S. Trends

As can be seen in table 1 (below), in 1986, state licensing boards took 1277 serious disciplinary actions against U.S. physicians (M.D.'s). This represented an increase of 188 such actions over the previous year or an increase of 17%. Although an improvement over 1985, it is much smaller than the improvement between 1984 and 1985, when the number of serious actions increased 345, from 745 to 1089, an increase of 46%.

With a total of 538,008 non-federal M.D's in the U.S. as of December 31, 1986, the average rate of doctor discipline for the country is only 2.37 serious disciplinary actions (suspension, revocation or probation) per 1000 M.D's.

Thus, the improvement in the amount of discipline continues, albeit with a much smaller jump than was seen the previous year. More importantly, the amount of discipline, as will be discussed later, falls far short of capturing most of the doctors who are practicing substandard medicine in this country. The absence, in most if not all states, of the maximum effort to discipline doctors is one of the most serious threats to the health of American patients.

TABLE 1
SERIOUS DISCIPLINARY ACTIONS[1]
AGAINST U.S. PHYSICIANS[2] (M.D.s)
1984-1986

YEAR	1984	1985	1986
SERIOUS ACTIONS	745	1089	1277
CHANGE FROM PREVIOUS YEAR	--	+345	+188
PERCENT	--	+46%	+17%

---

[1] Serious disciplinary actions include revocations and suspension of license and probation.
All data from the Federation of State Medical Boards.

[2] U.S. Physician data from *Physician Characteristics & Distribution in the U.S.* A.M.A. 1987 (December 31, 1986 Data).

State by State Ranking

The number and rate per 1000 M.D.'s of serious disciplinary actions for each state and the District of Columbia in 1986 can be seen in table 2 on the following page along with a comparison with 1985.

Better News

It is of interest that 8 of the top 20 states in 1986 were not in the top 20 in 1985. These include West Virginia, Colorado, Hawaii, Minnesota, New York, Illinois, Wisconsin and Alaska. Of these 8 states, 4--West Virginia, Hawaii, New York and Wisconsin--all more than doubled the number of serious doctor disciplinary actions from 1985 to 1986. Most notable of these is New York state, which increased the number of serious doctor disciplinary actions from 60 in 1985 to 167 in 1986.

The increase in disciplinary actions in New York can be attributed to this serious problem--New York ranked 40th in 1985 --being attacked by two prominent New York public officials. In January, 1986, New York City Council President Andrew Stein held public hearings which focused on the miserable record of the State in disciplining doctors. Governor Mario Cuomo has also, during the last several years, been concerned about his state's poor performance in doctor discipline and helped to initiate reforms to improve the amount of discipline. The results of these efforts are clearly beginning to show.

In addition to the significant improvement in these 8 states, there was the maintenance of top 10 ranking in Georgia, Indiana, Iowa, Utah, Oregon, Oklahoma and Kentucky. Following on the heels of legislation to strengthen doctor discipline which went into effect in mid-1986, Massachusetts also improved significantly, moving from 39th to 28th mainly on the strength of just 6 months of enforcing the new laws.

Worse News

At the other end of the scale, six states which were not in the bottom 20 states in 1985 fell to the bottom 20 in 1986. These include Arkansas, Kansas, Louisiana, Rhode Island, Washington and Pennsylvania.

Maintaining their relatively low ranking in the bottom 20 were such large states as Texas, Alabama, Tennessee, Connecticut, Michigan and Maryland.

California, once a model for doctor discipline, with the Board of Medical Quality Assurance which came into existence in the 1970's, has fallen on hard times with doctor disciplinary actions about one-half of what they were in the early 1980's. It is believed that this reflects the current governor's lack of

TABLE 2

SERIOUS DISCIPLINARY ACTIONS AGAINST M.D.S (REVOCATIONS, SUSPENSIONS AND PROBATIONS) BY STATE LICENSING BOARDS, 1986

RANK 1986	RANK 1985	STATE	SERIOUS ACTIONS PER 1000 M.D.S	SERIOUS ACTIONS 1986	SERIOUS ACTIONS (1985)	NUMBER OF DOCTORS
1	3/4	GEORGIA	6.94	73	(48)	10,524
2	7	INDIANA	6.53	57	(39)	8,731
3	6	IOWA	5.93	26	(20)	4,384
4	21	WEST VIRGINIA	5.62	19	(7)	3,381
5	2	UTAH	5.43	17	(19)	3,128
6	8	OREGON	4.76	28	(25)	5,877
7	3/4	OKLAHOMA	4.21	21	(23)	4,994
8	10	MISSOURI	3.80	38	(39)	9,996
9	5	KENTUCKY	3.56	22	(28)	6,188
10	24/25	COLORADO	3.41	24	(14)	7,028
11	32	HAWAII	3.19	8	(4)	2,506
12	13/14	VIRGINIA	3.17	39	(42)	12,311
13	24/25	MINNESOTA	3.15	30	(19)	9,535
14	12	IDAHO	2.98	4	(5)	1,341
15	15	SOUTH CAROLINA	2.90	16	(17)	5,522
16	40	NEW YORK	2.89	167	(60)	57,779
17	30	ILLINOIS	2.86	73	(44)	25,537
18	41/42	WISCONSIN	2.82	26	(9)	9,234
19	49-51	ALASKA	2.76	2	(0)	724
20	22	FLORIDA	2.69	75	(55)	27,851
21	27/28	OHIO	2.67	58	(39)	21,744
22	29	MAINE	2.60	6	(4)	2,306
23	9	NEW JERSEY	2.59	49	(76)	18,883
24	1	NEVADA	2.39	4	(16)	1,676
25	20	D.C.	2.36	9	(8)	3,819
26	27/28	MISSISSIPPI	2.34	8	(6)	3,416
27	35	NORTH CAROLINA	2.21	26	(17)	11,783
28	39	MASSACHUSETTS	2.12	42	(22)	19,766
29	13/14	NORTH DAKOTA	1.76	2	(4)	1,136
30	31	CALIFORNIA	1.70	121	(121)	71,349
31/32	16	ARIZONA	1.64	12	(22)	7,303
31/32	17	ARKANSAS	1.64	6	(9)	3,664
33	19	KANSAS	1.57	7	(10)	4,460
34	44	DELAWARE	1.55	2	(1)	1,290
35	18	LOUISIANA	1.54	13	(21)	8,453
36	49-51	MONTANA	1.51	2	(0)	1,323
37	45	NEW MEXICO	1.46	4	(2)	2,735
38	49-51	NEBRASKA	1.45	4	(0)	2,762
39	33/34	TEXAS	1.40	41	(44)	29,207
40	36	ALABAMA	1.27	8	(9)	6,323
41	11	RHODE ISLAND	1.21	3	(9)	2,489
42	26	WASHINGTON	1.09	11	(19)	10,079
43	33/34	TENNESSEE	1.08	10	(14)	9,285
44	41/42	SOUTH DAKOTA	1.00	1	(1)	1,004
45	23	PENNSYLVANIA	0.95	27	(57)	28,476
46	48	CONNECTICUT	0.92	9	(4)	9,833
47	38	MICHIGAN	0.80	14	(22)	17,543
48	43	MARYLAND	0.73	11	(12)	15,000
49	46	VERMONT	0.68	1	(1)	1,469
50	47	NEW HAMPSHIRE	0.47	1	(1)	2,149
51	37	WYOMING	0.00	0	(1)	706

commitment to actions which used to upset some doctors when they were more likely to get disciplined than they are now.

Implications

Based on published studies, we estimate that well over 100,000 Americans are injured or killed each year as a result of negligence by doctors. Even though the 1986 total of 1277 serious doctor disciplinary actions is better than in any previous year, it falls very short of catching most of the incompetent doctors in this country. In most states, the majority of disciplinary actions are for drug and alcohol problems, only a fraction being for incompetence.

The disparity between states with higher rates of doctor discipline and states with only a fraction of these higher rates is cause for alarm by the residents of the low-discipline states. Since there is no evidence that doctors settle in certain states depending on how competent they are, differences in the rate of doctor discipline reflect differences in how serious states are about disciplining doctors.

For the larger number of people living in those states which do not yet take doctor discipline very seriously, there should be serious concern. People in these states are much more likely than people in high-rate doctor discipline states to be injured or killed by doctors still on the loose because they haven't been "caught". What might be unacceptable medical practice in one state just goes by the state licensing boards in another.

If all states had a rate of serious doctor disciplinary action of 5.4 per 1000 doctors, a rate achieved or surpassed in all of the top 5 states, the total number of M.D.'s with serious disciplinary actions in 1986 would have been 2905, 1628 more doctors than the 1277 who were actually the subject of serious disciplinary actions in 1986.

Doctor Discipline and Medical Malpractice

We continue to believe that until the rate of doctor discipline in this country significantly increases, there is no realistic possibility of a major decrease in the amount of medical malpractice. At the heart of the so-called medical malpractice crisis, other than the manipulative efforts of the insurance industry, is actual malpractice, patients being injured or killed by negligent physician behavior.

In every state where it has been studied--Florida, Pennsylvania, Michigan and, most recently, Maryland--a tiny fraction of doctors accounts for a disproportionate share of malpractice payouts. In Maryland, for example, over a ten-year period, 1% of the doctors accounted for 54% of the malpractice payouts.

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KANSAS
Atchison Daily Globe

MAR -8. 1988
MAR -8. 1988

Malpractice antidote

In college, students who disliked a teacher were fond of saying, "Those that can't do, teach."

In a sense, that old saying may need to be given a new meaning. Doctors who can no longer do their work properly, should not be doing their work at all, and in doing that, they would serve to teach a lesson to their colleagues.

Such a requirement is being proposed for doctors in New York. There, a state advisory panel is recommending that doctors undergo stringent review every nine years to prove that they have kept up with advances. Doctors who failed the recertification test or were found not to have kept up with medical advances could be suspended from practicing altogether, have their practices restricted, or be referred for disciplinary charges.

Doctors who are certified in specialties, such as family practice, would not have to undergo the review so long as they kept current their certification.

Such a system would serve the public, because doctors who had not kept up their knowledge would not be practicing medicine for long.

And it could serve the medical community as well. In Kansas, malpractice insurance premium rates have gone sky high. Conventional wisdom blames the jury system for making outlandish damage awards.

But where conventional wisdom misses the boat in the first place is that mistakes are most likely to be made by the careless and ill-prepared.

Restricting the practices of those physicians lessens the chances for mistakes, and that means fewer malpractice suits would be filed.

That, in turn, would mean that malpractice rates would have another controlling factor placed on them.

Four Big Insurers Charged With Scheme To Limit Commercial Liability Coverage

By PETER WALDMAN
And BEATRICE E. GARCIA
Staff Reporters of THE WALL STREET JOURNAL

Seven state attorneys general, citing dozens of alleged secret meetings, dinner parties and behind-the-scenes threats, charged four of the nation's largest insurers with conspiring to manipulate the availability and cost of commercial liability coverage.

In separate antitrust lawsuits filed in federal court in San Francisco, the top prosecutors of Alabama, California, Massachusetts, Minnesota, New York, West Virginia and Wisconsin alleged that a conspiracy of giant insurance companies caused the so-called liability crisis earlier this decade by colluding to jack up prices and limit the scope of insurance coverage. The basic thrust of the accusations is that a few of the largest insurers jointly pressured the rest of the industry to go along with certain policy-writing changes that made it much tougher for public agencies, businesses and nonprofit organizations to buy liability insurance.

Named as defendants in the suits were Hartford Fire Insurance Co., Hartford Conn., a unit of ITT Corp.; Allstate Insurance Co., Northbrook, Ill., a unit of Sears, Roebuck & Co.; Aetna Life & Casualty Co., also in Hartford, and Cigna Corp., Philadelphia. Also named were the Insurance Services Office Inc., a New York-based trade group, and a number of major London-based reinsurance companies and their U.S. brokers.

In news conferences across the country, the seven attorneys general denounced the alleged conspirators, blaming them for afflicting day-care centers, recreational facilities and other public and private services with unnecessary anguish and in some cases, bankruptcy.

"International conspiracies resulted in policies so shrunken in scope, so reduced in value to the customer, that they can hardly be described as insurance at all," said New York Attorney General Robert Abrams.

California's attorney general, John Van de Kamp, said: "It was the public and the consumer who paid the price for this collusive exercise in corporate greed."

Companies Respond

A spokesman for Aetna Life called the action "another political move by political officeholders who have consistently opposed any and all efforts to address the real problems of the nation's liability system." The spokesman added that "any business decisions made by Aetna executives are made independently."

A spokesman for Allstate said the company hadn't seen the suit but stressed that "Allstate is not now, and never has been, involved in a conspiracy to fix prices or constrain the market."

A Cigna spokesman said the company doesn't comment on litigation, but pointed out that Cigna's policy is to conduct business "in conformity with all state, federal and foreign antitrust laws."

Stephen Martin, vice president for government relations at Hartford, said, "These charges are totally without substance."

In New York, a spokesman for the Insurance Services Office, the trade group that coordinates industrywide policy standards and that is alleged in the suits to have been a focal point of the conspiracy, called the accusations "unfounded and meritless." He added that the group has "conducted its operations properly and legally."

EC's Steel-Production Forecast

BRUSSELS—Steel production in the European Community will rise to 32 million tons in the second quarter from about 31 million tons in the prior three months, the 12-nation group predicted.

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TESTIMONY OF CHRISTEL E. MARQUARDT
President of the Kansas Bar Association
before the Kansas Judiciary Committee

March 28, 1988

Mr. Chairman, Members of the House Judiciary Committee. I am Christel Marquardt. I practice law in Topeka and currently serve as President of the almost 5,000 member Kansas Bar Association.

Representatives of our association have appeared before the legislature on numerous issues over the years. Never, in recent memory, has KBA appeared on an issue more significant than HCR 5049.

In sum, HCR 5049 changes the fundamental balance of important principles of power between our three branches of government - executive, legislative and judicial, in return for the political expediency of the moment. Indeed, it places you in the unique position of choosing between expediency and principle.

The Kansas Bar Association supports the principles of our Constitution, those of due process and equal protection, over expediency and special interests, and opposes HCR 5049.

The KBA's Board of Governors met in Wichita this past Friday. They reviewed and discussed this HCR 5049. KBA's Board is composed of elected lawyers and judges from throughout the state's 11 districts in Kansas. They represent all areas of legal practice. By a unanimous vote, the Board of Governors

Attachment III

wanted me to relay to you the following resolution:

> WHEREAS, HCR 5049 would permit adoption of arbitrary and capricious laws in disregard of hard won and time-honored constitutional provisions; and,
>
> WHEREAS, HCR 5049 would encourage endless attempts by special interest groups to obtain advantages permitted by the prevailing political climate;
>
> NOW, BE IT THEREFORE RESOLVED by the Board of Governors of the Kansas Bar Association that the KBA is unequivocally opposed to HCR 5049 or to any similar resolution designed or intended to permit amendment, enactment, modification or repeal of any statute or rule of common law relating to the determination of liability or damages for personal injury or death in violation of existing constitutional guarantees.
>
> BE IT FURTHER RESOLVED, that the KBA pledges its energies and resources to defeat HCR 5049 or any similar politically expedient and unprincipled legislation.

Mr. Chairman, this is not a fight between lawyers, doctors and insurance companies. It is not a quest for tort reform or a fight against it. HCR 5049 is a blatant, self-interest pursuit for political power.

HCR 5049 would allow this legislature to make what recent Cornell University Law Review calls "naked preferences" in the law. Instead of three balanced governmental branches operating in all areas, in regulating personal injury recoveries and accompanying insurance laws, the legislative power in Kansas would be nearly absolute. It could prefer one type of person

over others; create causes of action for some, but not others; limit recoveries for some but not others. It is not right, nor just, nor wise.

There are three cornerstones of justice that set this country apart from any other country in the world. First, is the right to equal justice under law, that the law rules supreme in the land. Men and women -- whether legislators or not, whether influential or not -- are guaranteed equal protection of the law; this resolution takes away equal protection.

Second, we have a constitutional right to due process. That means, before our property or personal rights can be taken from us, a lawfully appointed tribunal must hear the case and make a decision. This means a hearing in accord with principles of judicial procedure must be held to insure fairness to all parties. HCR 5049 takes away due process.

Third, the right to a jury trial is guaranteed, especially in common law rights of action. HCR 5049 takes away the right to jury trial.

HCR 5049 assumes, Mr. Chairman, that the Kansas legislature cannot now discriminate in the laws that it makes. That has never been the rule in Kansas. Equal protection is a part of our Constitution, however, even today the equal protection clause is not absolute. You, the Legislature can create classes and discriminate against individuals or groups, so long as the

classification is not arbitrary or capricious. It can be unfair, so long as there is a "rational basis" for the unfairness.

However, HCR 5049 says the legislature, not the courts, will decide what constitute justice, and what evidence is appropriate to establish justice for those injured or killed. There is no pretext of fairness. No need to show a valid public purpose. The legislature could decide that three doctors, instead of 12 jurors, could decide medical malpractice cases. Legislatures could decide that plaintiffs in medical malpractice cases must pay a $10,000 filing fee, or post trial bonds, when plaintiffs in other cases do not. Even if the designed purpose is to shut off all medical malpractice cases, the constitution would not protect such plaintiffs. Due process would rest on legislative whim.

HCR 5049 says the right to trial by jury may be abolished or altered for certain causes of action. The purpose of the right to trial by jury is "to protect the individual from oppression." (Heasty v. Pierpont, 146 Kan. 517 (1939), at 520). The Kansas Supreme Court said:

> The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude and every encroachment upon it has been watched with great jealousy. One of the strongest objections originally taken against the constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted this right was secured by the 7th Amendment to the Constitution proposed by Congress; and which received an assent of the people so general as to establish its

> importance as a fundamental guarantee of the rights and liberties of the people. (Heasty, p. 521)

The danger of HCR 5049 is that it allows legislatures to arbitrarily create classes of people and regulate them differently solely on which litigant this legislature wants to benefit, reward, or punish. The argument would always be the "common good" of the people. Conceptually, the amendment would allow the legislature -- whether you exercise the power or not -- to say that college educated plaintiffs can collect more personal injury damages than non-college educated plaintiffs. Or that KU graduates should be immune from paying damages while the K-Staters should not.

With the new grant of legislative power, under HCR 5049, what would distinguish the 1989 Kansas Legislature from England's Parliament of 1776 which arbitrarily chose which colonists to benefit, reward, or punish?

Thomas Jefferson in a letter to James Madison said:

> The executive power in our government is not the only, perhaps not even the principal object of my solicitude. The tyranny of the legislature is really the danger most to be feared, and will continue to be so for many years to come.

If Jefferson, and the framers of all that we traditionally think is America, recognized the power of a government to misuse its power, why can't we?

You or your colleagues may say, "We'll use the power

responsibly." Maybe that is true. However, each of you is but one vote. You cannot predict how your colleagues will vote on school finance this week, let alone future issues of personal injury law. The conservative legislature of today can be replaced by a liberal one in the next election. People in favor today can be disfavored tomorrow.

Our own state history teaches us, as Lord Acton wrote, "Power corrupts. And absolute power corrupts absolutely." Read the minutes of the 1859 Wyandotte Constitutional convention. Our ancestors were not anxious to give broad legislative power. Convention Delegate Hutchinson -- for whom the current city is named -- told the Wyandotte Constitutional convention on July 15, 1859:

> If there is any one thing more clear than another, it is that wherever a government attempts to protect the people it does so at the wrong time or for the wrong class. In the history of Kansas we find the proof. We came here as a weak people: it was the duty of the government to lend us its protection. Troops were sent here, not to protect the weak, but to defend the strong. Human power is vain-glorious -- it is dangerous in the hands of weak men. We may claim that by placing power in certain departments, people will have benefit of it; but we have no evidence of this ...We should have these first principles in view: that a constitution may be prepared by us that will not only be an honor to posterity, but that shall accord with the intelligence and advancement of the age.

Mr. Chairman, HCR 5049 raises other problems:

1. HCR 5049 creates more political problems for

legislators. Rather than relieving tort reform political pressures, passage of this amendment heightens such pressures. Every interest group who loses a case will come to the legislature for a new remedy, or immunity, or a change in procedural laws. Political pressures will escalate, not abate.

2. It destroys the balance of power between the three branches of government that were so carefully examined at the time the Kansas Constitution was adopted. Article One in the Kansas Bill of Rights guarantees our citizens equal protection, your HCR 5049 changes that fundamental right.

3. Even if you ill-advisedly change the Kansas Constitution, you cannot change the protections of the United States Constitution. HCR 5049 is in direct conflict with the guarantees of equal protection and due process guaranteed by the United States Constitution.

4. Some make the deceptively simple argument: "Let the people decide." The Kansas Bar Association does not fear the public's right to decide important questions, if the public is given <u>full</u> and <u>accurate</u> information. The unfortunate fact is that the public will not be told. They will vote believing what the media and those with the largest amounts of money to buy media time want them to believe.

As an example, the media has perpetuated the idea that there is a crisis which mandates "tort reform" - a change in our civil

justice system. Further, the media attributes lawyers as being the cause of the problem.

Last Wednesday, the front page headline story in the Topeka edition of U.S.A. TODAY read - "Insurers Gypped Us, Eight States Charge." The WALL STREET JOURNAL the same day carried an article entitled "Four Big Insurers Charged with Scheme to Limit Commercial Liability Coverage."

The stories recounted secret meetings, dinner parties, and behind-the-scene threats of four of the nation's largest insurers conspiring to manipulate the availability and cost of commercial liability coverage.

California's attorney general stated:

> It was the public and the consumer who paid the price for this collusive exercise in corporate greed.

Rates went crazy because insurers boycotted certain coverages. The articles states that a conspiracy of giant insurance companies caused the so-called liability crisis by colluding to jack-up prices and limit the scope of insurance coverage.

Our Topeka paper did not carry one single line about these lawsuits. We obviously are not getting the facts. You are not getting the facts.

5. The temporary dissatisfaction with present pricing structures of medical malpractice insurance is not a valid reason

to change our most basic fundamental constitutional guarantees.

6. The Kansas Supreme Court has existed for 127 years. Dissatisfaction over decisions by a small group is not grounds for discarding this critical balance of power where citizens' rights are at stake. Because a small group of citizens are pushing so vehemently for such a far-reaching change should be adequate caution to this legislature.

7. The explanation to the Resolution under your consideration is totally misleading to voters.

A constitutional amendment is a request by the legislature for an additional grant of power from the people. Yet, this explanation does not accurately reflect the type of power the legislature wants to acquire, the reason it needs such power, nor its enormous importance.

The following language more accurately reflects what Section 1 may do, and will not mislead:

> This proposed amendment would allow the legislature to arbitrarily discriminate between litigants. Equal protection of the law, due process of law, and the right to trial by jury could be abolished or restricted if the legislature so chose. Those with power or influence with the legislature and who have powerful lobbyists might have more favorable laws enacted for their benefit, or be granted immunity from personal injury lawsuits. Those without power or legislative influence may not. A vote for this amendment could mean the legislature will not allow you to sue for damages if someone else injures or kills you, or your loved one, of if you sue, you may not recover your full damages.

If you pass this resolution you will be grossly unfair to Kansas citizens.

There is pending legislation on the issues of:

- Punitive damage awards
- Evidence of Collateral Source
- Periodic payment of judgments and
- Limits in non-economic loss

Let the system work as it was intended by the framers of the Constitution -- don't take away our fundamental rights.

Please defeat HCR 5049.

I am not a lawyer but I believe I can enunciate the concerns laymen have with a tort reform constitutional amendment. There are those of us who believe that changing our state constitution is a major step, certainly not something one does without very serious consideration of all its ramifications.

In the State of Kansas, to make a change in our state constitution we must receive a two-thirds majority of the House of Representatives, a two-thirds majority of the Senate and a majority of the popular vote. These are very serious majorities. The reason they are necessary is because the framers intended to make changing our constitution as difficult as possible. They wanted to make sure that our constitution would not be changed every year as successive special interest groups gained money, power, or both.

The constitutional amendment with which we are dealing today has some very severe implications, not the least of which is the abrogation of two fundamental United States Constitutional Rights. These are trial by jury elucidated in Section 7 of the Bill of Rights and Section 5 awarding every citizen the inviolate right to due process.

These are Sections 5 and 18 in our State Constitution respectively.

I know that several other states have changed their constitutions to reflect tort reform. It is inconceivable to me that at some point the Federal Supreme Court will not have to decide the question, properly framed: Which constitution prevails - the Federal (United States) or the State? If we are going to rule in favor of the State, will the result not consist of abridging the federal Bill of Rights? I was reminded the other day that the rule for 200 years has been that states could give their citizens <u>more</u> rights than the Federal Constitution spells out, but states may <u>not</u> abrogate those rights guaranteed to us under the Federal Constitution.

As mild as some of us who supported the ERA amendment found, it is far easier to propose constitutional amendments than it is to get them passed. The problem inherent in the tort reform amendment is that it would, of necessity, require a Federal Constitutional amendment which would substantially repeal two

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fundamental rights on which this country was founded.

Some of the ramifications of tort reform to which I alluded earlier are admittedly the extremes possible under such a regime. But do we want "no fault" plumbers, electricians, architects, contractors, polluters of drinking water, toxic waste dumpers, polluters of the air, or companies which provide dangerous working conditions? It was this body of tort law that has helped clean up our air and water, made those who dump toxic waste clean up their mess, has given legal recourse to those who suffer from asbestosis, Black Lung disease, Dalcon Shield injuries, not to mention those who were victims of the Three Mile Island and Love Canal disasters.

In Hugo Black's biography, I read he always carried a tattered copy of the United States Constitution in his inner coat pocket. I, too, cherish that Document. It became a living document when I fought and continue to fight for rights for minorities. While there is breath in my body, I will struggle to keep that Bible of the Body Politic, the United States Constitution, inviolate.

Carol Renzuli
Lobbyist N/A