Approved February 26, 1988
Date

MINUTES OF THE SENATE COMMITTEE ON FINANCIAL INSTITUTIONS AND INSURANCE.

The meeting was called to order by Sen. Neil H. Arasmith at
Chairperson

9:00 a.m./~~p.m.~~ on February 25, 19 88 in room 529-S of the Capitol.

All members were present except:

Sen. Gannon - Excused

Committee staff present:

Bill Wolff, Legislative Research
Bill Edds, Revisor of Statutes

Conferees appearing before the committee:

Sen. Frank Gaines
Tom Bell, Kansas Hospital Association
Jerry Slaughter, Kansas Medical Society
Ron Todd, Kansas Insurance Department
Sen. Nancy Parrish
Chip Wheelen, Public Affairs, Kansas Medical Society

The minutes of February 24 were approved.

The hearing began on SB 630 dealing with subrogation rights under accident, health or sickness insurance policies. Sen. Frank Gaines, one of the authors, testified in support of the bill. He distributed copies of a letter from Blue Cross/Blue Shield explaining the background of the bill. (See Attachment I.) Sen. Gaines began with a definition of the collateral source rule which states that the fact that a person has hospitalization coverage cannot be revealed to the jury which results in double payments being made. Present law says that a policy cannot be written with a subrogation clause. The simple solution to this problem is a policy position in Kansas that all policies will have a subrogation clause which would prevent duplicate payments. With regard to the last section where attorneys fees are to be paid by the insurer, Sen. Gaines informed the committee that there is another bill pending that pays the fees out of the health care stabilization fund.

Tom Bell, Kansas Hospital Association, appeared to express his concerns about the bill. His organization does not disagree with Sen. Gaines' policy questions, but he feels that there are two ways to address the problem: (1) to allow subrogation or (2) to abolish the collateral source rule. He prefers the second alternative because: (1) Allowing subrogation will encourage litigation rather than discourage it, (2) It will increase the transaction costs in medical malpractice cases because it has the potential of involving more attorneys, and (3) It won't help the liability problem, but abolishing the collateral source rule will lower awards and, therefore, premiums.

Sen. Werts reminded Mr. Bell that the legislature tried to abolish the collateral source rule in the past but were told they could not do it and asked Mr. Bell if he didn't feel, therefore, this bill is appropriate. Mr. Bell said it had been determined that it could not be applied just to medical, but it could be abolished if it applied to all insurance. Sen. Werts then asked Mr. Bell if he feels there is anything wrong with subrogation, and Mr. Bell answered, "No". In questioning Mr. Bell, Sen. Karr determined that Mr. Bell's concerns are speculative at this point.

Jerry Slaughter, Kansas Medical Society, testified in opposition to SB 630 on the same grounds as stated by Mr. Bell.

Ron Todd, Kansas Insurance Department, distributed copies of an explanation of the background of why his department's administrative regulation is there and

the reason for the prohibition of subrogation. (Seee Attachment II.) Mr. Todd said this is strickly a public policy question. The Insurance Department has reviewed the language of this bill and has no problems with it. If the bill is passed, companies would have to resubmit all their policies. The concluded the hearing on SB 630.

Attention was turned to SB 624 concerning liability of the health care stabilization fund. Sen. Nancy Parrish testified in support of the bill. (See Attachment III.) She suggested two amendments on page six, line 210, of the bill: to add #5 and to delete #12. She suggested adding #5 because it deals with payment of attorney fees to defend the case and suggested deleting #12 because adding it has no affect.

The Chairman asked if there is a statute of limitation to file under tail coverage. Sen. Parrish said the statute of limitation is four years, but his can be expanded because it depends when the problem is discovered. The tail coverage will be available until the statute of limitations runs out. She added that doctors leave Kansas because the tail coverage is expensive and if they leave, Kansas will still cover them under the health stabilization fund, and they can start fresh in a new state.

Chip Wheelen, Kansas Medical Society, testified for Jerry Slaughter who will submit written testimony later. Mr. Wheelen said they are concerned about two things:
(1) A ten year period of time may not be accurate for equity in the program and
(2) The bill would not affect residents.

Sen. Karr asked how long he feels doctors should practice to be eligible for tail coverage benefits. Mr. Wheelen replied that he has no information as to an exact time, but Mr. Slaughter will provide this information.

Ron Todd said the Insurance Department is not a proponent or an opponent of the bill. However, he reminded the committee that when this fund was construed, one of the prime motivations was to provide tail coverage. It is a matter of public policy to make a limitation on it. He pointed out that the new language on page 6 may need to be amended to refer only to 3 and 4. The result of the new language is uncertain, and staff might want to look into it. Finally, he said there is a technical matter that needs to be considered regarding the effective date of July 1. The intent of this is not certain as to if it applies only for physicians active after this.

The chairman asked Sen. Parrish if she would object to Senate Bills 623 and 624 being put together. Sen. Parrish had no objections, but said there would be a policy decision in it as to if residents should be treated the same as health care providers. Marlin Rein of the University of Kansas stood to comment that SB 623 attracts physicians to Kansas, but the advantage of it may be lost if it is blended with SB 624. The Chairman said he had no problem then of leaving them separate. This concluded the hearing on SB 624. The Chairman said it would be considered next week.

The Chairman asked staff if the suggested amendment to SB 623 had been discussed with Mr. Fay. Staff said that Mr. Fay had concluded that an amendment was not necessary.

The meeting was adjourned.

SENATE COMMITTEE

ON

FINANCIAL INSTITUTIONS AND INSURANCE

OBSERVERS
(Please print)

DATE	NAME	ADDRESS	REPRESENTING
	Ken Bahr	Topeka	Kaiser Permanente
	Cheryl Dillard	Kansas City	Kaiser Permanente
	Vic Vasseand	LAWRENCE	University of Kansas
	Chip Wheeler	Topeka	KMS
	Tom Bell	Topeka	ICHA
	Ron Todd	"	Dept. of Insurance
	Marlin Rein	"	KU
	Nancy Parrish	"	State Senate
	Gary Pauley	Bloomington, Illinois	State Farm Ins. Co.

Blue Cross
Blue Shield
of Kansas

1133 Topeka Avenue
P.O. Box 239
Topeka, Kansas 66629

GENERAL BUSINESS
OR
PLAN 65 CLAIMS
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In-State
1-800-432-0216
Out-of-State
1-800-468-1216

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In-State
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In-State
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In-State
1-800-432-3531

February 24, 1988

Senator Frank Gaines
Capitol Building

Senator Dave Kerr
Capitol Building

RE: SENATE BILL NO. 630

Senator Gaines & Senator Kerr:

If Blue Cross and Blue Shield could discuss subrogation as an issue of principal at the committee hearings on SB 630, it would appear as a proponent.

Unfortunately, the availability of subrogation in health insurance policies has, perhaps needlessly, become a part of the "tort reform" or "medical malpractice insurance reform" issue. We have no particular stance on tort reform and while we have a great deal of concern for the impact on health care providers of increasing medical malpractice insurance rates, the debate on medical malpractice insurance reform has become so polarized that we, as an organization, have little of value to contribute to that debate.

We say that the subrogation issue may have needlessly become a part of the medical malpractice insurance reform debate with a specific purpose, in reference to one of Senator Gaines' constituents. That man, the owner of a business in Augusta, had an employee who was involved in a tragic car wreck. Blue Cross paid the medical expense of that employee under the owner's group health insurance policy. It is likely that the insurance company of the other driver involved in the accident will also pay the medical expense for that employee under the other driver's liability policy. The employer's reaction was that to charge his claims experience with a duplicated recovery, and to increase his group's health insurance rates because of that duplicated recovery, was improper.

Attachment I

It may be improper as a policy matter, but Kansas insurance regulations currently prohibit health insurance companies from subrogating -- from recovering their claims payments from persons at fault in situation of loss.

The important point of the employer's story, for your committee and SB 630, is that it has nothing to do with medical malpractice insurance reform. Subrogation is a practice which applies in all circumstances of other party liability, and to blend subrogation into the medical malpractice insurance reform debate tends to obscure that fact.

It is worth observing to your committee that 38 states permit subrogation in health insurance; Kansas is among the 12 states which do not. That is, 38 states have determined that subrogation in health insurance is an appropriate means to avoid duplicate recoveries.

As a matter of principal, Blue Cross and Blue Shield believes duplicate recoveries of medical expense is improper. Whether that is avoided best by abrogation of the collateral source rule or by a subrogation right in health insurers is a matter of policy.

In considering the policy, your committee should consider this: probably half of all Kansans are or could be covered under a health care program containing a subrogation right.

Why?

- Medicare has a right of subrogation, and more than 10% of the state's population is covered by Medicare.

- Some percentage of Kansans are covered by Medicaid, which also has a subrogation right.

- A large number of Kansans are covered by self-insured programs which are not subject to the Kansas insurance regulation prohibiting subrogation. Such self-insured programs can and do include subrogation provisions. Nationally, some sources estimate that 50% of employees are covered by self-insured arrangements. In Kansas, Blue Cross has identified that the fact that, for example, at least 30% of persons in Sedgwick County are covered by self-insured arrangements.

- A fair-sized percentage of Kansans are covered by insurance contracts issued outside of Kansas in states where subrogation is allowed. That is, these are employees who work for a national employer with its headquarters in another state. Because the Kansas regulation addresses only contracts issued in Kansas, such employees' coverage frequently includes a subrogation provision. For example, if K-Mart provides benefits for its employees under an insurance contract, subrogation is allowed in Michigan in health insurance contracts as it is in 37 other states. Thus, a K-Mart employee in Topeka or Wichita or Hays has a subrogation provision in his health insurance coverage.

Who does this leave without a right of subrogation? Kansas employers too small to self-insure.

We have observed that the collateral source rule legislation permits a judge to prevent a jury from hearing about health insurance payments where the payor has a right of subrogation. That is, that legislation recognizes the existence of subrogation rights in some health coverages. It therefore seems to us that regardless of the efficiency or inefficiency of subrogation compared to abrogation of the collateral source rule, to have a situation where only health insurers are prohibited from using subrogation clauses while Medicare, Medicaid, self-insurers, and insurers issuing policies outside of Kansas can exercise subrogation rights has an unequal impact, an impact which appears to fall largely upon small Kansas employers.

We want to recognize at this point as we did at the beginning of this letter that many persons are adversely affected by medical malpractice insurance premium levels. The plight of the community with an insufficient supply of OB/Gyn's, for example, cannot be ignored. At the same time, we do not believe that whether health insurers have a right to subrogation, in view of the widespread existence of other forms of health coverage having a right of subrogation, is an integral part of tort reform or medical malpractice insurance reform.

If, then, we have a position on SB 630, it is as follows:

- Subrogation in health insurance should be divorced as a matter of public policy from tort or medical malpractice insurance reform.

- The ability to engage in subrogation, and the benefits which result from avoidance of duplicate recoveries on health care program premiums, should be extended to what may well be the minority, the Kansas employers who are to small to self-insure.

We would observe to the committee that subrogation is not a panacea for containing health insurance costs. Because of the existence of no-fault (the benefits of which Kansas insurers can exclude), the comparative fault doctrine (which contains recoveries where both parties share in fault), and the fact that most cases are settled (which reduces the recoveries and requires compromises on the part of all interested parties), the claims savings from subrogation provisions in health insurance policies would be limited -- but only to the same extent that claims savings for Medicare, Medicaid, self-insureds, or multi-state employer contracts currently containing subrogation provision are limited.

Apart from tort reform or medical malpractice insurance reform, we think that subrogation -- if available to some to help reduce their health care premiums -- should be available to all Kansans.

Sincerely,

William H. Pitsenberger
General Counsel

WHP:kr

STATE OF KANSAS

KANSAS
INSURANCE DEPARTMENT

420 S.W. 9th

Topeka 66612 913-296-3071
1-800-432-2484

FLETCHER BELL
Commissioner

March 5, 1984

The Honorable Elwaine Pomeroy, Chairman
Senate Judiciary Committee
Statehouse, Room 143-N
Topeka, Kansas 66612

Re: K.A.R. 40-1-20

Dear Senator Pomeroy:

In testimony given on Senate Bill No. 758 and Senate Bill No. 760 in your committee on Thursday, March 1, 1984, Kansas Administrative Regulation 40-1-20, which places a prohibition on subrogation clauses in contracts of certain accident and health insurance policies, was discussed. At that time, your committee requested that we provide you with our authority for promulgating the aforementioned regulation and our authority for implementing it. In that regard, we offer the following comments.

K.A.R. 40-1-20 provides as follows:

> Insurance companies; subrogation clauses prohibited for certain coverages. All insurance companies are prohibited from issuing contracts of insurance in Kansas containing a "subrogation" clause applicable to coverages provided for reimbursement of medical, surgical, hospital or funeral expenses, authorized by K.S.A. 40-103, 40-216, 40-1110, 40-2201, 40-2208, 60-217(a), effective January 1, 1966; amended January 1, 1967.

This regulation was promulgated in 1966, amended in 1967 and has been subject to review by the Legislature on many occasions since that time. The regulation was promulgated to reflect what has always been and still is considered to be the law in the State of Kansas regarding subrogation of accident and health insurance.

As background to discussing K.A.R. 40-1-20, it is necessary to review the law concerning subrogation generally. The question of whether the rights of subrogation are applicable to accident and health coverages as set out by recognized rules from time immemorial since the right of subrogation both equitable and contractual is a right which carries over from common law. While in many instances, an insurer has the right of subrogation, this right of subrogation is not unlimited. A review of the law clearly indicates that an insurer insuring against loss by reason of personal action or death resulting from an accident is not entitled to be subrogated in equity or at common law. In Appleman on Insurance, Volume 3, § 1675, p. 495, it states "Subrogation rights are common under policies of property or casualty insurance, wherein the insured sustains a fixed financial loss, and the purpose is to place that loss ultimately upon the wrongdoer . . . In personal injury contracts, however, the exact loss is never capable of assertainment. Life and death, health, physical well-being, and such matters, are incapable of exact financial estimation . . . the General rule is, therefore, that the insurer is not subrogated to the insured's rights or to the beneficiary's rights under contracts for personal insurance. . . ."

Attachment II

The right of subrogation is applicable to liability insurance, theft insurance, and guarantee insurance but it is not applicable in life and accident insurance which are not indemnity contracts. (See Connecticut Mutual Life Insurance Company v. Railway Company, 25 Conn. 265; Anheuser-Busch v. Starley, 28 Cal.2d 347, 170 P.2d 448; Gatzweiler v. Milwaukee Railroad Company, 136 Wis. 34, 116 N.W. 663).

The distinction in subrogation between accident and health and other insurance coverage is further set forth in the Circuit Court of Appeals in Crab Orchard Improvement Company v. Chesapeake Railway Case, 115 F.2d 277. In that case the court stated the principle that "in view of the close connection between indemnity principles and principles of subrogation but where indemnity is not present as in life insurance or accident insurance, the subrogation feature has no application."

While Kansas law has not directly addressed the question of subrogation of accident and health insurance, in Ellis County v. International Harvestor Company, 174 Kan. 357, 255 P.2d 117, it holds that subrogation is a normal incident of indemnity insurance. However, since accident and health insurance is not considered to be indemnity insurance, there is no right of subrogation. Couch on Insurance 2d, Volume 16, Section 61:8. As such, inasmuch as there is no right of subrogation to accident and health insurance arising by operation of law through common law or equity, it is a right which must be either judicially or statutorily created. It should be remembered that subrogation is a right of action only and must be established by judicial process. See U.S. Miller v. Union Insurance Society, (CCA) 39 F.2d 25.

Therefore, inasmuch as Kansas has not created a statutory right of subrogation for accident and health insurance, the regulation was promulgated to reflect the existing law. This regulation was promulgated in 1966 when the Insurance Department was requried to draft regulations to state general policy positions.

It is our position this regulation does not establish any new law, nor create or take away any right an insurer had at common law or in equity. It merely reflects the law as it exists in Kansas. Although the regulation was first promulgated in 1966, it reflects the position that can be traced back as far as 1941 when K.S.A. 40-1110 was enacted. This statute allowed for medical, surgical, hospital and funeral benefits to be provided in an automobile liability insurance policy. While these benefits were provided in the policy, no right of subrogation was allowed. In 1957, when this statute was amended to authorize insurers to offer uninsured motorist coverage in their automobile liability policies, the Legislature specifically provided that the uninsured motorist coverage could be subrogated. They did this by adding a proviso to the statute that specifically gave the insurers the right to subrogate uninsured motorist benefits. However, what is perhaps more important is that the legislature did not authorize subrogation of the accident and health benefits already provided. Instead, when the Senate Insurance Committee was presented with a proposal to allow subrogation of accident and health coverage, they rejected it. The reason it was necessary to specifically authorize subrogation of uninsured motorist coverage by statute was because based upon the nature of the uninsured motorist coverage provided, it would not have been subject to subrogation without specific statutory authorization. As such, the Legislature chose to authorize subrogation of these

benefits, yet chose not to authorize subrogation of the accident and health benefits. When the offer of uninsured motorist coverage was made mandatory in 1968 by the enactment of K.S.A. 40-284, the Legislature again specifically authorized the subrogation of uninsured motorist benefits by enacting K.S.A. 40-287.

Although accident and health benefits could not be subrogated at common law or in equity, this is not to say they cannot be subrogated. They can be subrogated if the Legislature authorizes it. To our knowledge, there are two instances in Kansas law where accident and health payments are allowed to be subrogated by statute. These are in the workers' compensation and Kansas no-fault law where the Legislature has specifically enacted legislation to allow for this right. These rights of subrogation have been provided for in K.S.A. 44-532 and K.S.A. 44-504 of the Workers' Compensation Act and K.S.A. 40-3113a of the Kansas Automobile Injury Reparations Act.

In regard to the subrogation of personal injury protection benefits, there has recently been a question regarding to what extent these benefits can be subrogated. As you are no doubt aware, the Kansas Automobile Injury Reparations Act requires that certain accident and health benefits be provided as personal injury protection benefits in an automobile liability insurance policy. For example, the law requires the policy to provide $2,000 in medical benefits and rehabilitation benefits, $650 per month in disability benefits and survivors benefits, $1,000 in funeral benefits, and $12.00 per day in substitution benefits. K.S.A. 40-3113a allows for the subrogation of these personal injury protection benefits by the insurer to the extent that they duplicate the tort recovery. Therefore, although these benefits are subject to subrogation, they are only subject to subrogation if they, in fact, duplicate the tort recovery. Pursuant to a case just recently decided by the Kansas Supreme Court on January 13, 1984, the Supreme Court limited the right of subrogation to these benefits. See State Farm v. Kroeker, 234 Kan. 636.

Other questions have arisen concerning the extent of subrogation of these personal injury protection benefits. Some insurers provide personal injury protection benefits in amounts in excess of that required to be provided by the statute. For example, some policies will provide medical benefits of $25,000, etc. The question involved whether or not these additional benefits were subject to subrogation. It was thought by many, including our Department, that subrogation only applied to the personal injury protection benefits that were "required" to be provided at law. This would be the minimum benefits required. Others believed that the subrogation provision went to all benefits denominated as "PIP benefits". It was our position that "only the minimum benefits required to be provided were subject to the subrogation provision of K.S.A. 40-3113a and that any benefits provided in excess of those amounts were just "excess" accident and health coverage provided pursuant to K.S.A. 40-1110. Based upon the history of the law of subrogation on these benefits and the administrative regulation in question, K.A.R. 40-1-20, it was our position that these benefits were not subject to subrogation. This issue was presented to the House Judiciary Committee on April 5, 1982. After hearing questions regarding the subrogation of these additional benefits, the judiciary committee advised that they were in agreement with the interpretation of the law of our Department which prohibited the subrogation of these additional benefits based upon the administrative regulation. We have attached a copy of that letter and the minutes of the meeting for your review.

Because of our understanding of the law, we feel that it was appropriate to promulgate Kansas Administrative Regulation 40-1-20. The Commissioner is cloaked with the responsibililty under K.S.A. 40-103 to "make all reasonable rules and regulations necessary to enforce the laws of the State relating thereto." K.S.A. 40-216 requires that the Commissioner be assured that all contracts of insurance or indemnity that shall be issued or delivered in this State to comply with the requirements of the laws of this State. K.S.A. 40-1110, K.S.A. 40-2201 and K.S.A. 40-2208 provide for the issuance of insurance in this State that provides coverage for medical, surgical, hospital and funeral expenses. K.S.A. 40-1110 provides that this insurance coverage can be added to a bodily injury liability policy such as automobile insurance while K.S.A. 40-2201 provides that this coverage can be included in an accident and sickness policy. K.S.A. 60-217(a) of the Kansas Code of Civil Procedure provides that an action shall be brought by the real party in interest. With the insurer not having a right of subrogation at common law for these type of benefits, such a right of action could not be assigned to them. (See prior statute, K.S.A. 60-401.)

In summary, this regulation has been in effect for over eighteen (18) years and merely reflects the status of the Kansas law concerning subrogation of accident and health insurance benefits. We do not consider the promulgation of this regulation to constitute a policy decision by this Department as it only reflects the law as it is. Rather, in our opinion, it would have been a major policy decision had we attempted to promulgate a regulation which allowed for subrogation of accident and health coverage.

We wish to emphasize that the issuance of the regulation did not change any prior state policy nor did it restrict the then existing rights of any party concerned. To our knowledge, insurance companies have never been permitted to subrogate accident and health benefits paid under Kansas contracts except as is specifically permitted by Legislative enactment such as in workers' compensation, uninsured motorist coverages and personal injury protection benefits (No-Fault Law). Further, it has always been our position that we could not approve the use of such subrogation provisions in insurance contracts issued in Kansas unless the Legislature specifically so provided.

If we can provide any further information or answer any questions, we will be happy to do so.

Very truly yours,

Fletcher Bell
Commissioner of Insurance

Ron Todd
Assistant Commissioner

RT:kn
cc: All Senate Judiciary Committee Members
LE/042

LEGAL MEMORANDUM

SUBJECT: Validity of K.A.R. 40-1-20

BY: William W. Sneed, Chief Attorney
Special Assistant Attorney General

Michael J. Dutton, Attorney
Special Assistant Attorney General

DATE: April 5, 1984

In an April 2, 1984 meeting, the Kansas Insurance Department was advised that the Attorney General was considering ruling K.A.R. 40-1-20 invalid. The Department was provided a copy of the proposed opinion holding the regulation was improperly promulgated. Having carefully reviewed the proposed opinion, we must respectfully disagree with its findings and conclusions. We offer this legal memorandum in response to the proposed opinion and as our explanation of why we feel the regulation was properly promulgated and is valid.

K.A.R. 40-1-20 is a regulation first promulgated by the Kansas Insurance Department as a response to K.S.A. 77-415 in 1965. The regulation provides:

> "All insurance companies are prohibited from issuing contracts of insurance in Kansas containing a 'subrogation' clause applicable to coverages providing for reimbursement of medical, surgical, hospital or funeral expenses. (Authorized by K.S.A. 40-103, 40-216, 40-1110, 40-2201, 40-2208, 60-217(a); effective Jan. 1, 1966; amended Jan. 1, 1967)."

There are two central issues which need to be addressed in this memorandum. First, if K.A.R. 40-1-20 is voided by the Attorney General, must the Kansas Insurance Department approve subrogation clauses relative to accident & health insurance policies? Second, is K.A.R. 40-1-20 a valid regulation pursuant to Kansas law?

In regard to the first issue, whether the Department must approve subrogation of accident & health benefits, we offer the following comments. At the present time, accident & health insurers in Kansas do not subrogate on the benefits provided in their policies. If this regulation is held invalid, those same accident & health insurers, such as Blue Cross/Blue Shield corporations and others, will most assuredly seek, through policy endorsement, language to provide them with the right of subrogation on these accident & health benefits. It is our understanding from the meeting we had with the Attorney General's staff and from the language in the draft opinion, the Attorney General is not saying our position on the law prohibiting subrogation of accident & health benefits is incorrect, but that K.A.R. 40-1-20 is invalid because there was not a proper basis for the promulgation of the regulation. This is an important point to establish so that our Department will know how to deal with insurers who

file endorsements to their policies seeking approval of language to allow for subrogation. If the Attorney General does not disagree with our position on the law regarding subrogation of accident & health benefits generally, then it would appear that we would be able to deny approval of such contract langauge. However, if the Attorney General disapproves our regulation based upon the opinion that our position on the law of subrogation of accident & health benefits is in error, then it would not appear that we would have a basis for denying such language. At the current time, it is our understanding that the rationale for voiding our regulation is that the implementing statutes cited do not provide a basis for our promulgating this regulation and that the Attorney General does not disagree with our position on the law of subrogation of accident & health benefits. Therefore, it is our opinion that it would not be inappropriate to disapprove subrogation clauses relative to accident & health policies if the regulation is voided.

In the April 2nd meeting, we were advised that the request for the Attorney General Opinion on K.A.R. 40-1-20 was made by Senator Pomeroy. He made this request after he had inquired of this Department about the regulation and after we had provided him with a written response in a March 5, 1984 letter. Apparently, the Attorney General's staff examined the regulation and our letter of March 5, 1984, and determined that the regulation had been promulgated in large part to codify what we consider to be existing common law which prohibited the subrogation of benefits provided under accident & health contracts because such contracts were not considered contracts of indemnity.

In the letter which we provided to Senator Pomeroy, we offered an in-depth discussion of common law in regard to subrogation of accident & health contracts. Because we did so, our letter may have unfortunately over-emphasized this aspect as dealt with by the regulation and under-emphasized the basis for the promulgation of the regulation. The reason this was done was to respond to the request by Senator Pomeroy regarding the subrogation of accident & health insurance generally. The request made by Senator Pomeroy arose out of a meeting regarding Senate Bill No. 758 and Senate Bill No. 760, which offered changes to the tort laws of Kansas. In discussions had concerning these bills, the question arose regarding whether and under what circumstances accident & health benefits could be subrogated. The subrogation of these benefits was explained, and reference was made to the regulation. It was at that time that Senator Pomeroy requested explanation of the regulation. As such, we felt it important to provide him with a broad scope of discussion regarding subrogation as opposed to a broad discussion of the reasons and basis for implementing the regulation. It is necessary to understand the context of the request as made by Senator Pomeroy so one can understand the emphasis we placed upon our respective answer. This is extremely important in light of the fact that validity of K.A.R. 40-1-20 has now been challenged on the basis that the implementing statutes do not constitute a proper basis for promulgation of this regulation.

With the preceding information provided as a background, let us respectfully submit our position that K.A.R. 40-1-20 is a valid regulation and that the six statutes cited as authorizing the regulation constitute a sound and statutorily sufficient basis for the promulgation of the regulation, as permitted by K.S.A. 40-103.

K.S.A. 40-103 provides that the Commissioner of Insurance shall have the power to make all reasonable rules and regulations necessary to enforce the laws of this State relating to insurance. K.A.R. 40-1-20 is such a regulation. What constitutes a rule and regulation is set forth in K.S.A. 77-415(4), to wit:

> "A standard, statement of policy or general order, including amendments or revocations thereof, of general application and having the effect of law, issued or

adopted by a state agency to implement or interpret legislation enforced or administered by such state agency or to govern the organization or procedure of such state agency."

K.A.R. 40-1-20 is a regulation which falls within this definition because it represents a statement of policy of general application, adopted by the Insurance Department to interpret and implement legislation enforced and administered by our Department. The statement of policy of general application the regulation deals with is the issue of subrogation of accident & health insurance benefits. The legislation that the regulation has been adopted to interpret and implement is K.S.A. 40-2201, et seq, and K.S.A. 40-1110.

The statutes of Article 22 of the Insurance Code, are the uniform policy provisions of accident & health policies that are allowed to be written in Kansas. The uniform policy provisions, as set forth in these statutes, have been in effect since 1951. The statute which is cited as the basis for the implementation of K.A.R. 40-1-20 is K.S.A. 40-2201, which defines the term "policy of accident & sickness insurance" and reflects the policy as is specifically set forth in the remaining statutes of Article 22. In essence, what Article 22 provides is the required and permissible provisions, allowed by the Kansas Legislature, in a policy of accident & health insurance. If a policy provision is contrary to the required or permissive provisions, then it is not permitted in a policy of accident & health insurance in Kansas. It is for this reason we believe K.S.A. 40-2201, et seq., constitutes an express basis for the promulgation of K.A.R. 40-1-20.

An examination of Article 22 will demonstrate why we believe this is the case. Under K.S.A. 40-2203(A), the required provisions of every accident & health insurance policy delivered or issued for delivery in this State are set forth. These provisions must be provided in the language of the statute. However, insurers may use different wording if approved by the Commissioner of Insurance so long as the language is not less favorable, in any respect, to the insured or beneficiary. As one can see, there are twelve required provisions set forth in subparagraph (A) that must be included in policies of accident & health insurance delivered or issued for delivery in this State. In subparagraph (B), insurers are authorized to incorporate certain other provisions in their contracts of accident & health insurance. There are eleven "other provisions" which are permitted under subparagraph (B). All of the provisions set forth in K.S.A. 40-2203 constitute a legislative drafting of required and permissible provisions allowed in an accident & health insurance policy as defined in K.S.A. 40-2201. The right of subrogation is not provided in either the required provisions of subparagraph (A) or of the "other provisions" as set forth in subparagraph (B). And, in subparagraph (B)(4) and (5) where other insurance provisions are permitted, it is specifically provided that, "In applying the foregoing policy provision no third party liability coverage shall be included as 'other valid coverage'." This represents a clear legislative decision not to allow accident & health insurance policies as set forth in K.S.A. 40-2203 to pro-rate or to in any way reduce their obligation as provided in subparagraph (B)(4) and (5). The fact that the Legislature recognized that there may be available third party liability coverage but did not provide the accident & health insurance a right of subrogation, is clear evidence that the Legislature feels that such a provision is not warranted.

The fact that a subrogation provision is left out of K.S.A. 40-2203(A) and (B) is significant when examining K.S.A. 40-2203(C) and K.S.A. 40-2204. In these statutes, it very clearly states that if a provision is not in a section, or is inconsistent, it shall be omitted from the policy. In K.S.A. 40-2204, it is provided that while there may be certain other policy provisions permissible, no policy provision not subject to K.S.A. 40-2203 shall be allowed which will make

a policy "less favorable in any respect to the insured or the beneficiary and the provisions thereof which are subject to this act." (Emphasis added). It is very clear that a right of subrogation is not allowed under K.S.A. 40-2203. It is also very clear that the effect of such a provision would make the policy less favorable to the insured or the beneficiary. It would be less favorable to the insured because the benefits provided under the policy would be less because the insured would have to pay benefits back from proceeds recovered from a liability carrier.

To assure these policy forms were properly filed as required under K.S.A. 40-216, the Legislature enacted K.S.A. 40-2203(G), which gave the Commissioner the authority to make such reasonable rules and regulations concerning the procedure for the filing or submission of policies subject to this Act as are necessary, proper or advisable to the administration of this Act. As the law was amended and updated, the purpose was set forth in K.S.A. 40-2216 in 1976 to "provide reasonable standardization and simplification of terms and coverages . . . and to eliminate provisions contained in individual accident and sickness insurance policies . . . which may be misleading or unreasonably confusing in connection with either the purchasing of such coverages or with the settlement of claims . . ." (emphasis added). Certainly, the subrogation provision could be considered confusing for the insured when attempting to settle one's claim since it would require re-payment.

As a result of the legislative drafting of the provisions allowed to be permitted in a policy of accident & health insurance delivered or issued for delivery in Kansas pursuant to K.S.A. 40-2203, we believe it is very clear that subrogation of accident & health insurance benefits is not allowed in Kansas. If such subrogation was to be allowed, it would have to be included in those provisions enacted by the Legislature in K.S.A. 40-2203. The fact that provisions regarding subrogation of accident & health benefits are not specifically or expressly identified as being impermissible does not mean the Legislature failed to consider this issue. The Legislature cannot be expected to list every impermissible provision that could be submitted in a policy of accident & health insurance. This would be impossible. The Legislature enacted K.S.A. 40-2204 as a provision to handle this matter.

We believe K.S.A. 40-1110 also gives us a sound basis for the promulgation of K.A.R. 40-1-20. This statute, which was enacted in 1941, allows for medical, surgical, hospital, and funeral benefits to be provided in an automobile liability insurance policy. This statute was and is a fire & casualty statute. It was necessary to enact it to allow fire & casualty insurers and their respective agents to sell accident & health coverage in their policies. Otherwise, if the statute had not been enacted, the accident & health coverage could only be sold or provided by accident & health insurers and their agents, and would be subjected to the provisions of K.S.A. 40-2201, et seq. This would have meant that an in-depth endorsement specifically complying with Article 22 would have been required to be attached to the automobile policy even though it only authorized the limited medical payment coverage. Since this was considered impractical, pursuant to K.S.A. 40-2208(4), K.S.A. 40-1110 was exempted. The fact that K.S.A. 40-1110 was exempted from Article 22 does not mean the underlying principles were inapplicable to the coverage provided in K.S.A. 40-1110, however. Instead, the general principles, including subrogation, were still inapplicable. Therefore, while accident & health benefits were allowed to be provided in a policy of automobile insurance, no right of subrogation was extended. This is very apparent when K.S.A. 40-1110 is examined. The limited medical payments coverage does not provide for subrogation. In 1957, when the statute was amended to authorize insurers to offer uninsured motorist coverage in their automobile liability insurance policies, the Legislature specifically provided that the uninsured motorist coverage could be subrogated. They did this by adding a proviso to the statute that specifically gave the insurers the right to subrogate the uninsured motorist benefits. At the time the subrogation of uninsured motorist

benefits was proposed, a proposal was made to allow for subrogation of accident & health benefits. However, when the Senate Insurance Committee was presented with this proposal, they rejected it.

From the discussion we had with representatives of the Attorney General's staff and from the draft language we reviewed, it would appear that the rationale for invalidating K.A.R. 40-1-20 is that they feel it is without an express basis in statute and because it represents an effort by our office to legislate policy rather than to merely administer it. We strongly disagree that the regulation is without basis in statute or that we are attempting to legislate policy. To the contrary, in 1965, when the Legislature defined a rule and regulation as being "a standard, statement of policy or general order . . . of general application . . .," we conscientiously attempted to put into regulation those positions of broad general application. At that point in time, our Department was contacted by the then Attorney General and we were requested to provide them with a list of all of the Department's current regulations and positions, and submit the same for their review. We did so and the Attorney General provided us with a list of those positions that they advised us to promulgate as regulation. We then promulgated those positions into regulations, included those with our then.current regulations, which included K.A.R. 40-1-20, we submitted it to the Attorney General and received their approval. It was reviewed at that time in light of the same statutes as are now being considered and it was held to be valid. It is important to note that none of these statutes upon which the regulation is based have been altered or amended in any significant way since the 1966 approval of the regulation. Therefore, this is not a policy-making decision or legislative effort by the Commissioner, it is purely an administrative attempt to comply with the rules and regulations as mandated by the Legislature.

We firmly believe the basis for the promulgation of this regulation is clearly and expressly grounded in the statutes and passes the stringent tests imposed by judicial review. We recognize the broad language of the many judicial decisions that have struck down certain administrative regulations both in Kansas and in other jurisdictions. The broad language which is set forth in some of these opinions must be used with caution in applying them to other cases with different factual situations.

We have carefully reviewed all the cases cited and the language quoted in the draft opinion and, after having done so, we believe that the promulgation of K.A.R. 40-1-20 was within our authority and properly carried out. We find nothing in those cases which addresses a situation similar to the facts and statutes involved with the promulgation of K.A.R. 40-1-20. The cases cited involve situations where the administrative agency was clearly acting beyond its power.

A few examples of why we believe the cited cases are inapplicable is in order. State ex rel. v. Columbia Picture Corporation, 197 Kan. 448 (1966), involves an extreme situation where an administrative agency attempted to promulgate through regulation a cure to some constitutional defects in its enabling legislation. As a result, the Supreme Court ruled that the regulations were void and that the acts of the administrative agency were beyond its power. The Court stated:

> "An administrative rule and regulation which goes beyond that which the Legisalture authorized, which is out of harmony with or violates the statute, or which alters, extends, limits or attempts to breathe life into the source of its legislative power, is said to be void. Likewise, the power to adopt rules and regulations is not the power to legislate in the true sense, and under the guise of a rule and regulation, legislation may not be enacted." 197 Kan. at 454.

Other cases can be cited wherein similar language is evoked. Willcott v. Murphy, 204 Kan. 640 (1970), involves a situation where the Director of the Alcoholic Beverage Contral promulgated a regulation that took away a clear right granted to its licensees by statute to sell a certain kind of beer. As such, the Court struck this regulation down as being legislative, rather than administrative. There is no clear right being taken away in K.A.R. 40-1-20.

A United States Supreme Court case is cited in the draft opinion immediately following language which reads, "However, a rule and regulation cannot be promulgated simply because it is in harmony with the statutes and common law, but instead must have a specific basis grounded in one or more statutes." U.S. v. Larianoff, 431 U.S. 864 (1977). After having reviewed this opinion, we find no applicability to the promulgation of our regulation. Furthermore, we believe the case may have been incorrectly cited because we can find no reference or basis for the above quoted sentence which refers to the statement that a regulation "must have a specific basis grounded in one or more statutes." The facts of the case certainly differ from the situation at hand in that the Department of Defense promulgated a regulation which clearly violated a Congressional act relating to when pay increases begin for certain military personnel who re-enlist.

We do not believe the 1978 case of the U.S. Customs Court has any applicability either. In CBS Imports Corporation v. U.S., 450 F.Supp. 724 (Cust.Ct. 1978), the Court struck down an interpretation of a statute by U.S. Customs officials who issued a bulletin (not a regulation) establishing criteria to determine the value of property that were more restrictive than the statute.

As such, we do not believe there are any cases cited in the draft opinion, nor have we found any in our own research, that should cause K.A.R. 40-1-20 to be voided. We admit that we have found broad judicial language that, when looked at without the benefit or knowledge of the facts of the case in which the language is cited and the facts of ours, could lead to an interpretation different from ours. However, when looking at these cases with the knowledge of all the facts, we do not believe they apply so as to void K.A.R. 40-1-20.

Rather, we have found some Kansas cases which, if reviewed in light of the facts of our case, support our position that the regulation is valid and was properly promulgated.

In Hartman v. State Corporation Commission, 215 Kan. 758 (1974), the Court held that a regulation which required certain information be provided to the Corporation Commission was valid even though the grant of authority for the promulgation of the regulation was not expressly provided in the statutes. The appellant made the normal arguments employed in attacking a regulation. It was argued the regulation did not carry out any statutory objective; it was outside the authority conferred on the administrative agency; it conflicted with the legislative authorization; it had no reasonable relation to its purpose; the statute applied to only current waste while the regulation applied to future waste; and, finally, that regulations of this kind in other States were based upon more specific enabling statutes. (at p. 766).

The Court dismissed all these arguments after looking at the broad authority granted the Corporation Commission in K.S.A. 55-604 and K.S.A. 55-704:

> "The foregoing statutes provide broad authority and direction to the corporation commission to prevent waste, including economic waste, in the production of oil and gas, to conserve these natural resources and to protect usable water as it may be affected by drilling for oil and gas. It has specific duties with respect to drilling, placement of pipe and abandonment and plugging of wells. To discharge all these

> responsibilities effectively the legislature must have been aware the commission would need certain information as to the holes drilled. Rule-making power was given the commission in carrying out its functions." (at p. 768). (Emphasis added).

This is important because the statutes the Court referred to are similar in scope to K.S.A. 40-103 and K.S.A. 40-2203(C) of the Insurance Code. In upholding the validity of the regulation, the Court held:

> "We need not labor the matter. The legislature has authorized the commission to adopt regulations for the prevention of waste and for the protection of all fresh water strata and oil and gas-bearing strata encountered in any well drilled for oil. We think the power to enact the rule in question is necessarily implied within those broad grants and the information required by the rule is reasonably related to the prevention of waste in the production of oil and gas and to the protection of usable water as it may be affected by such production." (at p. 770). (Emphasis added).

We believe the holding in this case has particular application to the examination of the validity of K.A.R. 40-1-20. The Court recognized that the Legislature had given the Corporation Commission broad authority and direction to prevent waste. Our statutes give us broad authority and specific direction regarding the approval of accident & health policies. The Court noted the rule-making power was given to the Commission to carry out its functions. So too have we been given such rule-making power. Most importantly, the Court did not require that the enabling statutes give the Commission a specific or express power to enact the rule in question. Rather, the Court held that ". . . the power to enact the rule in question is necessarily implied within these broad grants . . ." (at p. 770). (Emphasis added).

While we believe our power to enact K.A.R. 40-1-20 is express under K.S.A. 40-2201, et seq., (specifically K.S.A. 40-2203 and K.S.A. 40-2204) and K.S.A. 40-1110, if it is not express we feel most certain that it is necessarily implied by those statutes.

Finally, the Court required that the regulation was reasonably related to the statutes. We firmly believe our regulation meets this test which is to clarify or identify acceptable policy provisions filed in forms in Kansas.

Lindstrom v. St. Francis Hospital, 6 Kan.App.2d 948 (1980), also adds support for our position. At issue in Lindstrom was the validity of K.A.R. 49-20-1F which was a regulation defining the term "or other basis" as used in K.S.A. 44-313(c). The hospital in Lindstrom contended that such regulation was invalid for the reason that it went beyond that which the Legislature had authorized. The Kansas Court of Appeals, however, upheld the validity of the regulation. In support, the Court states that K.S.A. 44-325 directs the Secretary of Human Resources to adopt rules and regulations to administer and enforce the provisions of the Wage Act, and that "by clarifying the definition of wages by defining 'or other basis' and by prohibiting forfeiture clauses, the regulation complements the statute by closing up some apparent loopholes." (Emphasis added). It is our opinion that K.A.R. 40-1-20 complements our statutes.

In fact, we believe, K.A.R. 40-1-20 passes the judicial mustard under the stern tests set forth in State ex rel. v. Columbia Picture Corporation. K.A.R. 40-1-20 does not, under any circumstances, go beyond what the Legislature has authorized in K.S.A. 40-2203. It certainly is not out of harmony with or in violation of the statute. Nor does it alter, extend, limit, or attempt to breathe life into the source of its legislative power. To the contrary, K.A.R. 40-1-20 does exactly what an administrative regulation is intended to do under K.S.A. 77-415, which

is to set forth a statement of policy of general application adopted to implement or interpret the legislation administered by the Insurance Department, which, in this case, are the uniform policy provisions of K.S.A. 40-2203. It does nothing more than that.

The fact that these statutes do not specifically provide that subrogation is an impermissible provision does nothing to invalidate this regulation. We have found no judicial decisions which would require that an administrative regulation such as K.A.R. 40-1-20 would have to include an express provision specifically using the key language in question such as the term "subrogation." (The holding in Hartman is to the contrary). If this type of standard was placed upon the determination of the validity of a regulation, there would be absolutely no need for regulations. Such a requirement would make regulations a needless exercise couched in redundancy as it would repeat the content of the enabling statute. And, if the regulation is merely "repeating" the law, the Joint Committee on Rules and Regulations would not approve them. In fact, it is the Committee's firm position that no rule or regulation is needed or will be approved if it merely repeats the law.

Therefore, based upon the above, it is our opinion that K.A.R. 40-1-20 was properly promulgated and is valid. We respectfully request that you give these arguments careful consideration when the validity of K.A.R. 40-1-20 is reviewed.

Respectfully submitted,

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April 20, 1984

ATTORNEY GENERAL OPINION NO. 84- 35

The Honorable Elwaine F. Pomeroy
State Senator, Eighteenth District
State Capitol, Room 143-N
Topeka, Kansas 66612

Re: Insurance -- Administrative Rules and Regulations -- Prohibition of Subrogation Clauses; Statutory Basis for Regulation

Synopsis: Pursuant to K.S.A. 40-103, the commissioner of insurance has authority to make all reasonable rules and regulations necessary to enforce the laws of this state relating to insurance. One such regulation, K.A.R. 40-1-20, prohibits the use of subrogation clauses in contracts of insurance which provide for reimbursement of medical, surgical, hospital or funeral expenses. While authorization for the promulgation of this rule and regulation is present in various statutes relating to insurance, the statutes cited in the regulation are not the statutes actually being implemented by the regulation. Accordingly, the rule and regulation is valid, but should be amended to correctly reflect the statutes being implemented. Cited herein: K.S.A. 40-103, 40-216, 40-287, 40-1110, 40-2201, 40-2203, 40-2204, 40-2208, 40-3113a, K.S.A. 1983 Supp. 44-504, 44-532, K.S.A. 60-217, K.S.A. 1983 Supp. 77-415, 77-416, K.A.R. 40-1-20.

* * *

Dear Senator Pomeroy:

As Chairman of the Senate Judiciary Committee, you request our opinion on a question concerning the validity of an admini-

strative rule and regulation. Specifically, you direct us to K.A.R. 40-1-20, which was promulgated by the commissioner of insurance. You express the committee's concern that this regulation is not based on specific statutory authority, and is therefore void as being an attempt by the commissioner to legislate rather than administer insurance laws.

The regulation at issue has been in effect since 1966, and has only been amended once, in 1967. As amended, it reads:

> "Insurance companies; subrogation clauses prohibited for certain coverages. All insurance companies are prohibited from issuing contracts of insurance in Kansas containing a 'subrogation' clause applicable to coverages provided for reimbursement of medical, surgical, hospital or funeral expenses. (Authorized by K.S.A. 40-103, 40-216, 40-1110, 40-2201, 40-2208, 60-217(a), effective January 1, 1966; amended January 1, 1967.)"

In a letter from the office of the commissioner of insurance, which you provide with your request, the presumed authority for the regulation is set forth. Briefly, it is as follows: (1) The regulation reflects what has always been the common law in Kansas and elsewhere, namely that accident or health insurance policies are not indemnity contracts and therefore are not subrogated as are property or casualty insurance; and (2) statutory authority exists in K.S.A. 60-217, which provides that actions shall be brought in the name of the real party in interest, and in various statutes in the insurance area (Chapter 40). Another memo from the Commissioner's office provides additional, albeit different, rationale, namely the existence of K.S.A. 40-2203 and 2204.

"Subrogation" is defined as the right of the insurer to be put in the position of the insured in order to pursue recovery from a third party who is responsible for the loss to the insured which the insurer has paid. As stated in Couch on Insurance 2d (rev. ed.) §61:18, p. 93 (1983):

> "Subrogation has the dual objective of (1) preventing the insured from recovering twice for the one harm, as would be the case if he could recover from both the insurer and from a third person who caused the harm, and (2) reimbursing the surety for the payment which it has made. A sounder approach to the problem is that a wrongdoer who is legally responsible for the harm should not receive the windfall of being absolved from liability

> because the insured had had the foresight to obtain, and had paid the expense of procuring, insurance for his protection; since the insured has already been paid for his harm, the liability of the third person should now inure for the benefit of the insurer. Stated simply, subrogation is a creature of equity having for its purpose the working out of an equitable adjustment between the parties by securing the ultimate discharge of a debt by a person who in equity and good conscience ought to pay it."

The commissioner notes in his letter that the Kansas courts have not addressed specifically the question of subrogation of accident and health insurance. The Kansas court has held that subrogation is a normal incident of indemnity insurance, in accord with common law practice. Ellis Canning Co., v. International Harvester Co., 174 Kan. 357 (1953). At this time, however, it is undetermined whether the Kansas courts would adopt the common law prohibition of subrogation in accident and health insurance policies, as has been done in other states. See, e.g., Harleysville Mutual Ins. Co. v. Lea, 2 Ariz.App. 538, 410 P.3d 495 (1966), Travelers Indemnity Co. v. Chumbley, 394 S.W.2d 418 (Mo. App. 1965). However, courts in some states have judicially determined not to follow the traditional rule [Liberty Mutual Ins. Co. v. Clark, 165 Ga.App. 31, 299 S.E.2d 76 (1983), Geertz v. State Farm Fire & Casualty, 451 P.2d 860 (Ore. 1969)], while in some states the common law has been replaced by statutory authority. Pate v. MFA Mutual Insurance Co., 649 P.2d 495 (Okla. 1982).

While Kansas does not have a blanket statute authorizing subrogation, separate statutes have been enacted in a number of areas, such as workmen's compensation (K.S.A. 44-504, 44-532), uninsured motorist coverage (K.S.A. 40-287) and personal injury protection benefits under the Kansas Automobile Injury Reparations Act (K.S.A. 40-3113a). In a recent case involving the latter, K.A.R. 40-1-20 was held to have been pre-empted in part, although the court did not find the regulation invalid in toto. Hall v. State Farm Mutual Automobile Insurance Co., 8 Kan.App.2d 475 (1983).

Given this background, we may turn to the authority for the regulation itself. K.A.R. 40-1-20 was issued under of the authority of the commissioner to make all reasonable rules and regulations necessary to enforce the laws of Kansas relating to insurance and insurance companies. K.S.A. 40-103. However, the commissioner's authority in this area is not absolute, for he may act only within the limits prescribed for him by the legislature. As stated by the court in Fidelity Life Association v. Hobbs, 161 Kan. 163, 170 (1946), certain legal principles are applicable

to the insurance commissioner: "One is that the legislature makes the law and that its fiats must be observed by him. Another is that the statute is the source of his power and all of his acts must be within the limits of the authority it confers upon him." In the area of rules and regulations, his power is administrative in nature, not legislative, and to be valid, must be within the authority conferred. State ex rel. v. Columbia Pictures Corporation, 197 Kan. 448 (1966). In addition, the commissioner has no general or common law powers. Woods v. Midwest Conveyor Co., 231 Kan. 763 (1982), 1 Am.Jr.2d Administrative Law. §70.

The rule and regulation lists six statutes as authority for the regulation, namely K.S.A. 40-103, 40-216, 40-1110, 40-2201, 40-2208, and 60-217(a). As noted above, K.S.A. 40-103 simply authorizes the commissioner to make rules and regulations necessary to enforce the insurance laws of Kansas, and does not speak to any substantive areas of policy. K.S.A. 40-216 allows the commissioner to require companies to file their policies with his office, but likewise is without substantive provisions as to their content. K.S.A. 40-1110, 40-2201 and 40-2208 do deal with specific provisions which must be included in certain types of insurance contracts, but do not expressly address the subject of subrogation, either as a grant of authority or a prohibition. Lastly, K.S.A. 60-217(a), contained in the Code of Civil Procedure, provides that the plaintiff in an action shall be the person who by the substantive law possesses the right to be enforced. According to Vernon's Kansas Rules of Civil Procedure, Vol. 2, §60-217.1 (1963), this statute "effects a purely procedural change" leaving the "substantive law as to what claims are assignable" unaffected.

However, while none of the above statutes provides a sufficient basis for the rule and regulation in question, it is our opinion that other statutes pertaining to insurance in fact do so. Specifically, K.S.A. 40-2203(A) sets forth provisions which are required in every policy of accident and health insurance issued or delivered in this state. In addition to the twelve provisions set forth therein, subsection (B) lists eleven additional items which may be included in the policy at the option of the insurer. In none of these provisions, either in the required or optional sections, is the right of subrogation in accident and health insurance policies permitted. To the contrary, in paragraphs (4) and (5) of subsection (B), which deal with the concept of "other valid coverage," third party liability coverage is not permitted. K.S.A. 40-2204 makes it clear that any other provision in a policy may not be less favorable to the insured than what is found in K.S.A. 40-2203. In that a subrogation clause would reduce the benefits which ultimately are received by a policy holder, it would be "less favorable," and so, not allowed.

While the existence of the above two statutes is not disclosed in the regulation, as is required by K.S.A. 1983 Supp. 77-416(a),

it is further our opinion that this omission, being a technical one, does not affect the validity of the regulation. In that it is based on authority provided by the legislature, K.A.R. 40-1-20 is a valid interpretation or implementation of legislation which is enforced by the Commissioner. K.S.A. 1983 Supp. 77-415. While the omission in the supporting citations should be remedied, this in not sufficient reason to void the regulation. See, e.g., State ex rel. v. Columbia Pictures Corp., supra.

In conclusion, pursuant to K.S.A. 40-103, the commissioner of insurance has authority to make all reasonable rules and regulations necessary to enforce the laws of this state relating to insurance. One such regulation, K.A.R. 40-1-20, prohibits the use of subrogation clauses in contracts of insurance which provide for reimbursement of medical, surgical, hospital or funeral expenses. While authorization for the promulgation of this rule and regulation is present in various statutes relating to insurance, the statutes cited in the regulation are not the statutes actually being implemented by the regulation. Accordingly, the rule and regulation is valid, but should be amended to correctly reflect the statutes being implemented.

Very truly yours,

Robert T. Stephan

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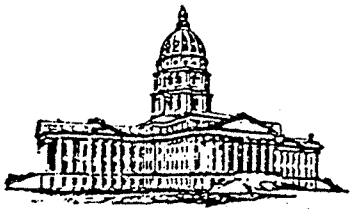

TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS
CHAIRMAN: ADVISORY COMMISSION ON JUVENILE OFFENDER PROGRAMS
MEMBER: ASSESSMENT AND TAXATION
JUDICIARY
EDUCATION
JOINT COMMITTEE ON SPECIAL CLAIMS AGAINST THE STATE

TESTIMONY ON S.B. 624
February 25, 1988

S.B. 624 is an attempt to modify the current statutory policy of paying all health care providers' tail coverages through the Health Care Stabilization Fund. The purpose of S.B. 624 is to reduce the liability of the Fund which would subsequently reduce the surcharges assessed to health care providers.

A brief background is necessary to understand the concept of tail coverage. As I understand, in the mid 70's when the Health Care Stabilization Fund was established, the legislature changed medical malpractice insurance coverage from "Occurrence" policies to "Claims-made" policies. "Occurrence" policies are ones in which the insurance company that carries the insurance at the time a medical malpractice incident occurs is liable for the claim. A "Claims-made" policy is one in which the insurance company that carries the insurance at the time the claim for damages is made, is liable for the claim. There is not a problem with tail coverage if the insurance policy is an Occurrence policy because the insurance carrier who provides the insurance at the time of the incident is still responsible 2 or 3 years later when the claim is filed.

But in the case of a "Claims-made" policy, tail coverage is important. For example, in 1980, Dr. X performs an operation at which time malpractice occurs. Company A is the insurance company for Dr. X in 1980. In 1982 Dr. X leaves the state of Kansas to practice in Arizona at which time he purchases insurance with Company B. In 1983, victim files medical malpractice suit against Dr. X. Neither Company A nor Company B is liable to cover Dr. X's case. Company A isn't liable because Dr. X didn't have coverage with Company A during 1983. Company B isn't liable because Dr. X didn't purchase tail coverage from Company B. Instead, the Health Care Stabilization Fund is liable for the tail coverage for not only active and inactive providers within the State but also non-resident providers.

Attachment III

Kansas is the only state in the U.S. that provides tail coverage. Our total premiums appear high in comparison to some other states, but included in the Kansas premium is tail coverage for the physician. The attached charts that were compiled by the Insurance Commissioner's office show Kansas rates in comparison to several other states.

There are several problems with providing tail coverage. First of all, by the Fund providing tail coverage, doctors inadvertently are encouraged to leave the state to avail themselves of lower premiums for at least the initial 2 to 3 years. Some of these doctors have lost their licenses in Kansas.

Out-of-state doctors tend to be unavailable to defend cases against themselves when it involves travel back to Kansas. This makes it difficult for the Fund to defend a case on behalf of an out-of-state doctor.

Providing tail coverage is not altogether an undesirable feature. It provides flexibility to doctors who want to change companies. It provides tail coverage for retired doctors no longer in practice.

Realizing the benefits as well as the pitfalls of the Tail Coverage, S.B. 624 provides that tail coverage will continue if the health care provider has participated in the fund for 10 or more years. Under S.B. 624, the Fund would no longer pick up the tail coverage for a young doctor practicing less than 10 years who decides the grass is greener and the medical malpractice premiums are less in the west. No longer would the Fund pay tail coverage for a doctor who leaves Kansas because he lost his license if that doctor had been practicing less than 10 years. Under S.B. 624 the Fund would pay tail coverage for retired doctors if they had practiced in Kansas 10 years or more.

COST COMPARISON FOR A FAMILY PRACTICE DOCTOR INSURED BY ST. PAUL

State	Total Coverage Limits	Total Cost	Additional Cost For Tail Coverage
Oklahoma	$1,200,000/$3,600,000	$10,310	$17,529
Nebraska	$1,200,000/$3,600,000	$11,760	$20,869
Indiana	$500,000	$16,578	$26,483
Kansas	$1,200,000/$3,600,000	$18,162	$0
St. Louis, MO	$1,200,000/$3,600,000	$46,267	$81,442
Los Angeles, CA	$1,200,000/$3,600,000	$51,740	$81,797

COST COMPARISON FOR A OB / GYN SPECIALIST INSURED BY ST. PAUL

State	Total Coverage Limits	Total Costs	Additional Cost For Tail Coverage
Oklahoma	$1,200,000 / $3,600,000	$32,232	$55,060
Nebraska	$1,200,000 / $3,600,000	$36,681	$65,483
Indiana	$500,000	$45,578	$37,515
Kansas	$1,200,000 / $3,600,000	$51,815	– 0 –
Colorado	$1,200,000 / $3,600,000	$66,818	$105,703
St. Louis, MO	$1,200,000 / $3,600,000	$143,092	$252,432
Los Angeles, CA	$1,200,000 / $3,600,000	$169,060	$267,719