Approved March 21, 1988
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Robert Frey at
Chairperson

10:00 a.m./~~p.m.~~ on March 15, 1988 in room 514-S of the Capitol.

All members were present~~except~~: Senators Frey, Hoferer, Burke, Feleciano, Gaines, Langworthy, Parrish, Steineger, Talkington, Winter, Yost.

Committee staff present:
Gordon Self, Office of Revisor of Statutes
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Jerry Slaughter, Kansas Medical Society
Wayne Stratton, Kansas Medical Society General Counsel
Gerhart Metz, Kansas Chamber of Commerce and Industry
Harry Williford, Boeing Military Airplanes, KCCI
Melba Ellis, McCune

Senate Bill 625 - Actions where exemplary or punitive damages recoverable.

Senate Bill 626 - Statute of limitations, actions involving health care providers.

Senate Bill 627 - Pain and suffering damages in personal injury actions.

Senate Bill 628 - Civil actions, purchase of annuity contracts for future economic losses.

Senate Bill 629 - Health care stabilization fund abolished.

Senate Bill 631 - Medical malpractice liability actions, attorney fees, noneconomic damages, annuity contracts.

House Bill 2692 - Damages for noneconomic loss in personal injury actions limited to $250,000.

House Bill 2693 - Collateral source benefits admissible.

House Bill 2731 - Exemplary damages in civil suits.

House Bill 3052 - Civil procedure and evidence relating to collateral source benefits.

Jerry Slaughter, Kansas Medical Society, testified that every bit of credible evidence available repeatedly points out that the malpractice claim frequency and severity problems are not related to lack of physician competence. You simply cannot solve

Tort Reform Bills

the malpractice problem by getting rid of the bad apples. A majority of physicians in the state have been sued, and those delivering high risk services such as obstetrics are sued frequently. The continuing spiral of premiums, driven by the combined effect of increased frequency and severity of claims, has accelerated the loss of physician services, especially in our rural areas. The debate over whether the various tort reforms should be tied to a promise of lower premiums seems to us to be a diversion at this point. We sincerely believe, and the available evidence seems to show, that these reforms over the long run will help stabilize the volatile liability climate, and provide a basis for hope that the premium spiral will end. We urge you to act favorably on these bills, and reject any attempts to weaken their impact. Copies of his handouts are attached (See Attachments I).

Wayne Stratton, Kansas Medical Society General Counsel, testified on House Bill 2731, House Bill 2693 and House Bill 3052. House Bill 2731, the punative damage bill, is of some interest to health care providers because in some jurisdictions plaintiffs will allege punative damages. You have a subjective type of fact finding. He said he had trouble with one amendment of the House committee concerning the definition of malice, the words "dispictable conduct". It is not judiciously determined as to what the meaning is. I don't think that amendment is much improvement to what the existing law is. The definition of malice is fine; the balance of the phrase can get us into a lot of difficulty. In regard to House Bill 2692, the noneconomic damages of $250,000, the original version of this was the medical malpractice approach. Plaintiffs' attorneys will ask for $250,000 and then ask for other damages by another name instead of pain and suffering. I am concerned with this bill that it would accomplish what we we want it to accomplish. I hope the cap would be on all economic damages. In regard to House Bill 2693, collateral source, they favor the original version of the bill. He said credit should be given for any deduction for any fault. Several other provisions weaken the effect of the bill. The wording "reasonably expected" was changed to "reasonably certain" and that is a high burden. The change where the provisions of the act apply to causes of action accruing on or after July 1, 1988. This can be dealt with by the severability clause. Concerning House Bill 3052, this bill weakens the effect of the collateral source statute. It should not discriminate from those that are more seriously injured than those who have fewer bills. A committee member inquired, there is a pain and suffering noneconomic loss bill in California, and it has been declared constitutional, is this effective in reducing medical malpractice premiums? Mr. Strattion replied, we have bills that have been passed that have helped medical malpractice premiums. In California their premiums have increased less rapidly. A committee member inquired about the issue before the supreme court now concerning House Bill 2661? Mr. Stratton replied the Chief Justice reported the hearing will be on March 25, and he doesn't know if they will have a decision of its constitutionality before the end of this session or not.

Gerhart Metz, Kansas Chamber of Commerce and Industry, introduced Harry Williford, Boeing Military Airplanes.

Tort Reform Bills

Mr. Williford testified The Boeing Company endorses three tort reform proposals which are before this committee. They are House Bill 2731, House Bill 2692 and House Bill 2693. Boeing also has involvement with insuring for claims of environmental concern. Due to the current conditions existing in the commercial insurance marketplace, the Company has been unable to obtain the limits of insurance desired. Boeing is a self-insurer for employee medical and dental costs. With 23,000 employees in this state, that represents over $45 million per year of benefit payments to health providers and druggists in Kansas. A copy of his statement is attached (See Attachment II). A committee member inquired, how long have you self-insured on your health care programs? Mr. Williford replied ever since we started. Another committee member inquired if the increases are a result of insurance providers? Mr. Williford replied the procedures that practitioners follow are to protect themselves from liability. Another committee member inquired, in a situation where there is negligence and the health care providers results are in medical costs, those directly relating to that negligence, who should pay for that resultant medical care? Mr. Williford replied, we help pay for that. The providers insurance coverage should pay for that. Cost of those premiums do follow through. Another committee member inquired, should you pay that or that doctor that was responsible to pay for that? Mr. Williford said the desirability is those insurance costs become part of his practice.

Mr. Metz then introduced Edward Seaton, The Manhattan Mercury. Mr. Seaton testified we are a family owned business that operates 10 daily newspapers in small cities and towns as well as seven radio stations and one network television station. Four of the dailies and four radio stations are in Kansas. He summarized by saying that the insurance crisis is affecting more than obstetricians and neurosurgeons. In our case, it's not going to put us out of business. But if all our costs, or even a significant share of them, had increased as have our insurance costs, we would be facing going out of business. My own view is that reform of the civil justice system offers the best hope of controlling these costs resulting from the litigation crisis in the liability field. A copy of his statement is attached (See Attachment III).

Melba Ellis, McCune, testified I am here representing 8,000 Kansans who signed a petition in favor of limits being set on liabilities. We are here to try to prevent the endangered branch of health care called obstetrics from becoming obsolete for women in Kansas. On behalf of the 8,000 Kansans who signed in favor of limiting liabilities, give tort reform a chance to work. A copy of her statement is attached (See Attachment IV). A committee member stated, we feel frustrated. In going back the way it used to be, when we put a price tag on human life of twentyfive thousand dollars, would you like to go back to that? She replied, I don't know. The committee member inquired, is $250,000 a viable compromise? She replied, I don't know that you can put a price tag on that. It should not cost many thousands of dollars because someone along the line might sue. The committee member inquired do you think you could live with putting the statute of limitation at two years? She replied, yes. Another committee member inquired, what would you think if we pass a law that every doctor buy the insurance he thinks he needs? She replied, it wouldn't make any difference to the

patients. Another committee member inquired, would people share your view with the same set of facts to apply to a carnival operator with a ride that has not been taken care of? She replied you have to use your heads. We are losing our freedoms because people won't go into a field because of the insurance. There are people standing around out there waiting to sue. The other people need to be taken into consideration. Another committee member inquired, if we do away with health insurance, would that solve all your problems? She replied, the petition is an issue of the people seeking health care.

The meeting adjourned.

A copy of the guest list is attached (See Attachment V).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-15-88

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Melba Ellis	Box 269 McCune 66753 KS	Tort Reform Petition
Theresa VanBeceleare	1711 N. Grand Pittsburg KS	" "
Maryann Blanano	413 W. 9th Pitts. KS. 66762	Tort Reform Petition
J. GRAHAM	TOPEKA	KBI
HARRY WILLFORD	WICHITA, KS	Boeing Military Airp
EDWARD SEATON	MANHATTAN, KS.	THE MANHATTAN MERCURY
Ron GACHES	WICHITA	Boeing
Wayne Stratton	Topeka	KHA
Matt Lynch	Topeka	Judicial Council
Pam Scott	Topeka	Insurance Dept
Ned Frey	Topeka	KID
Julie Nelson	Topeka	KLSI
Ron CALBERT	NEWTON	U.J.U.
Tom Whitaker	Topeka	Ks Motor Carriers Assn
Barbara Spida	Topeka	Pete McGill & Assoc
Ken Schmidt	Lawrence	KS Rural Center
Gerhard Neyz	Topeka	KCCI
Tom Bell	"	KHA
Paul E. Fleener	Manhattan	Kansas Farm Bureau
HAROLD E. RIEGER	TOPEKA	KAOMW
Bob Corkins	Topeka	KTLA
Richard Man	"	"
Lori Goodman	Topeka	Am. Ins. Assn
Ron Smith	"	Ks Bar Assoc
L.W. Comish	"	Lathrop P/C Ins Cos.

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GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-15-88

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Jim Gregory	PO Box 95 Wichita	Beech Aircraft
Mike Germann	Topeka	Ks Railroad Association
Lee Wright	Overland Park	Farmers Ins Group
Randy Kitchens	Lawrence,	Intern, Sen. Hardage
Ron Goodeyon	Topeka	Intern, Rep. Francisco
M. Hauver	"	Cap-Journal

3-14-88
3-15-88

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

March 14, 1988

TO: Senate Judiciary Committee

FROM: Jerry Slaughter
Executive Director

SUBJECT: Tort Reform Issues and House Bills 2692, 2693 and 2731

The Kansas Medical Society appreciates the opportunity to appear today on the subject of tort reform and the medical malpractice liability insurance crisis.

It is not with great pleasure that we are back again in front of this committee. Beginning with the 1985 legislative session, stretching through the subsequent interim study, and culminating in HB 2661 enacted in 1986, this Legislature undertook the most comprehensive study of the medical malpractice liability crisis since the original study in 1976. The long procession of witnesses and conferees, the reams of testimony and the months of deliberation resulted in a unique and comprehensive approach to solving the medical malpractice problem.

During the House hearings on this issue we submitted the complete record (a summary of it from our brief in Bell is enclosed; Attachment A) of the hearings, meetings and deliberations from 1985 and 1986 which led this Legislature to enact overwhelmingly the reforms which now, for all practical purposes, have been gutted by the courts. That record contains compelling evidence that a crisis truly existed two years ago, and it formed the basis for the Legislature's action. The reasons, or rationale, for the 1985 and 1986 reforms is even more compelling today, as our projections on premium costs, loss of physician services, and a steadily deteriorating liability environment have come true.

A point needs to be made here. During the 1986 study, working with the special interim committee, we developed a comprehensive quality assurance package that was then, and is still today, unprecedented across the country. It requires mandatory inter-professional reporting of incidents of negligence and unprofessional conduct. It also mandated risk management programs at every hospital in the state. It strengthened the Healing Arts Board's power to investigate and discipline physicians. In short, it established a system of reporting, investigation and disciplinary measures that is without equal among

Att. I

other professions in this state, and in this country. It amounted to a sort of quid pro quo, wherein the Legislature, in essence, asked the profession to accept greater accountability and peer review in matters of competence, in return for tort reform progress. After two years, the only part of the package which remains is the commitment physicians and hospitals made to peer review and quality assurance activities.

It should also be noted that every bit of credible evidence available repeatedly points out that the malpractice claim frequency and severity problems are not related to lack of physician competence. You simply cannot solve the malpractice problem by "getting rid of the bad apples." A majority of physicians in the state have been sued, and those delivering high risk services such as obstetrics are sued frequently.

It is convenient for lawyers to blame the liability crisis on incompetent physicians. However, the truth is that many claims represent unintended, adverse outcomes resulting from difficult clinical decisions made by competent physicians for whom less than perfect conditions and extraordinary circumstances are a fact of life. And, in many cases, what is considered an adverse outcome is judged so by a public whose expectation of perfection by the medical community is unrealistic.

Since 1986, after a brief respite, premiums have gone up substantially in the wake of Farley, and now the Theis decision in the Bell case (testing award limits in HB 2661). We estimate most physicians will pay premiums which are, on average, 70% higher than they were in 1987. Some, like family physicians doing obstetrics, insured by Medical Protective, will face increases in excess of 100%. Since 1984, that same physician has had to absorb an increase in liability costs of over 256%. Where will this end?

The number of claims filed continues to climb also. We estimate 360 new cases will be filed this fiscal year, double the number filed in 1984 (see graphs in Attachment B). Some statistics from the St. Paul company which insures over a third of all Kansas physicians help illustrate a problem in this area. The frequency of claims against Kansas physicians insured by St. Paul rose from 9.8 claims in 1982 to 14.2 claims per 100 doctors in 1986, a 45% increase. For all doctors insured by St. Paul countrywide over the same period, the frequency of claims rose from 13.5 to 17.2 claims per 100 doctors, a 27% increase. Clearly, the frequency of claims filed in Kansas is accelerating much more rapidly than it is nationwide.

Claim severity, the other key determinant in setting rates has also risen from $38,000 per claim in 1984, to $108,000 in 1986, a 184% increase. Again, data from St. Paul shows that for the period 1982-86, claim severity in Kansas rose 78%, compared to a 25% increase countrywide. In fact, for St. Paul-insured physicians, claim severity in Kansas is significantly higher than the national average. Nationally, malpractice claim severity has risen roughly twice as fast

as the Consumer Price Index. This trend can be explained only partially by the fact that medical care prices have risen more rapidly than consumer prices in general, because medical expenses typically account for only about one-quarter of reported economic loss in malpractice cases closed with payment (P. Danzon; 1986 Report on Frequency and Severity of Medical Malpractice Claims).

The continuing spiral of premiums, driven by the combined effect of increased frequency and severity of claims, has accelerated the loss of physician services, especially in our rural areas. A look at the 1986 Kansas Medically Underserved Areas Report which tracks physician manpower trends, emphasizes the point that access to care is becoming a problem. For the second straight year the number of full-time equivalent practicing physicians in Kansas has decreased. Our files and the newspapers are replete with examples of physicians dropping high risk services such as obstetrics, or leaving our state altogether, in order to lower their liability costs. The fact is, a Kansas physician could move to any of three of our bordering states, or many others for that matter, and obtain the same level of coverage at a much lower premium (see Attachment C). We are also driving the young physicians training at our medical school to other states, where their premiums are considerably less.

Clearly, the liability crisis is causing serious dislocations of basic health care services. All the rhetoric about trampling individual rights and tampering with the "sacred" tort system, will be scant comfort to an expectant mother in rural Kansas when she can't find a physician to deliver her baby.

Before I comment on the need for the specific legislation in front of you, I would like to touch on the widely quoted "study" done by the Office of Judicial Administration on jury verdicts in tort cases. That report concluded "jury verdicts in the overwhelming majority of cases in the state are quite modest. ..."

First, it is folly to base any conclusions about jury awards in Kansas on the strength of this report, which covers essentially only one year of data. Significantly, only state courts are included, as the report does not cover the sizable number of tort cases which are tried in the federal courts in Kansas.

A closer look at the report does provide some useful information, however. The median verdict reported of $15,750 for all tort cases greatly undervalues the significance of large verdicts, especially in the area of medical malpractice, which had a median award of $210,000. The report only mentioned in passing the average (mean) award of $96,458 for all tort cases, compared to the average for medical malpractice awards of $398,572. Using the average, or mean, is more useful in assessing the significance of large awards, which by their nature will always be relatively few in number. This is because awards drive settlement levels, and the specter of the occasional multi-million dollar award keeps many claims from ever going to a jury trial.

Consequently, to get a true picture of the effect of jury awards on the system, one must not only have more than one year's data on hand, but settlements must also be studied. For example, in FY 1987, HCSF data show that 50 medical malpractice cases were settled at a total cost of $11.9 million, the largest being $2.5 million.

In summary, the judicial administrator's study vastly underestimates the problem in the area of medical malpractice litigation. Any conclusions drawn from the report are speculative at best, and in truth, probably meaningless because of the narrow focus and limited information presented.

Why are we asking you to re-enact tort reform, this time across the board? Quite simply, because the Supreme Court in Farley indicated that constitutional objections to abolishing the collateral source rule could be overcome by applying the legislation to all personal injury claims. We have taken that concept and extended it to a limit on non-economic damages, changes in punitive damages, and periodic payment of awards.

It should be noted that the concepts in the bills before you are not new. We are not breaking new ground. In fact, these concepts were overwhelmingly adopted by the Legislature in 1985 and 1986. Of significance is the fact that we are not proposing any limits on economic damages, even though that was the cornerstone of HB 2661 in 1986. While some may be reluctant to apply these reforms across the board, it apparently must be done if you want to address the medical malpractice crisis with tort law changes.

The debate over whether the various tort reforms should be tied to a promise of lower premiums seems to us to be a diversion at this point. Our own example in Kansas is a good case in point. Our opponents point to higher premiums even after the 1985 and 1986 reforms were adopted, and conclude that tort reform doesn't work. However, given the fact that the reforms have been tied up in the litigation process, and have not been applied to any cases "in the pipeline," it is not surprising that premiums continue to rise. In fact, the surcharge collected by the Health Care Stabilization Fund was actually held down by about 20% for the last two years, in anticipation of claims savings as a result of the reforms enacted in 1985 and 1986. Obviously, now that the Court has retroactively invalidated those reforms, the surcharge will have to be increased to an estimated 155% this July 1 to make up the shortfall.

The only thorough analysis of the effect of various tort reforms on claim costs has been done by Patricia M. Danzon, for the Rand Corporation. In 1986 she reported that states which enacted collateral source offsets had reductions in claim frequency by 14%, and claim severity by 11-18%. She also reported that the average impact of various laws which cap awards has been to reduce claim severity by 23%. Professor Danzon noted that since many of the reforms were under challenge and therefore might not have been enforced or applied in all cases, the estimates reported may actually understate the full, long-term impact of a reform once it has been declared constitutional.

It is this research, plus the evidence from other states where tort reform has had an opportunity to work, which seem to indicate that tort reform does have a corresponding, stabilizing bottom line. In fact, over the years, every credible organization (including the United States General Accounting Office Study) which has studied the medical malpractice problem has called for reform of the tort laws which govern these cases. Our general counsel, Wayne Stratton, is with me today to discuss the specifics of the bills you are considering and our rationale for the changes contained in them.

Although the issue is not a subject of the hearings today, I must raise the question of a constitutional amendment. Given the Farley decision and the Theis opinion in the Bell case, one is led to the inescapable conclusion that a constitutional amendment must accompany these bills, else they will be brushed aside by the Supreme Court in the Bell appeal currently underway. We have introduced a constitutional amendment, currently being held in House Judiciary, in order that the issue have a chance to be thoroughly discussed.

In the meantime, it seems our only option is to proceed along the guidelines laid down for us by the Court in Farley. Bear in mind that watered-down versions of these bills will yield watered-down results, which is why we support the bills with some amendments which Mr. Stratton will explain in a moment.

We sincerely believe, and the available evidence seems to show, that these reforms over the long run will help stabilize the volatile liability climate, and provide a basis for hope that the premium spiral will end. We urge you to act favorably on these bills, and reject any attempts to weaken their impact. Thank you for your consideration, and for the opportunity to appear today.

JS:nb

Attachments

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 7

KANSAS MALPRACTICE VICTIMS
COALITION, et al.,
Plaintiffs,

vs. Case No. 86 CV 1700

FLETCHER BELL,
Defendant.

THE KANSAS MEDICAL SOCIETY AND
THE KANSAS HOSPITAL ASSOCIATION'S RESPONSE
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Although plaintiffs have denominated their motion as one for summary judgment, in reality the proper procedural posture of the case is that of a trial on the record. At a hearing in this matter held August 23, 1987 it was agreed that the record consists of the legislative history of H.B. 2661, and items of which this court may take judicial notice. As a brief submitted for the purposes of a trial on the record a statement of uncontroverted facts is unnecessary.

The record in this case consists of the minutes of testimony and attachments before the Special Interim Committee on Medical Malpractice, the minutes of testimony and attachments before the House and Senate Judiciary Committees on H.B. 2661.

In 1976 the Kansas Legislature was confronted with the problem that medical malpractice liability insurance was becoming unavailable. The Legislature addressed this need by enacting laws that shortened the statute of limitations, modified the collateral source rule, established a screening panel procedure, established a mandatory insurance requirement and created the Health Care Providers Stabilization Fund. In the early 1980's it became evident that these reforms had not alleviated the crisis, in part because the most effective provision was declared

unconstitutional by the Kansas Supreme Court (See Wentling v. Medical Anesthesia Services, 237 Kan. 503, 701 P.2d 939 (1985)) and more importantly because the frequency and severity of claims continued to rise.

The 1985 Legislature again addressed the issue of medical malpractice insurance. Costs of the mandatory policy and surcharge to the Fund virtually made insurance unaffordable. The insurance companies who had offered policies were threatening to pull out of the state because of losses. Health care providers discussed leaving the state, eliminating high risk procedures and early retirement. See Testimony before the House and Senate Judiciary Committees on Senate Bill 110. Extensive legislation was proposed to combat these problems, but the legislature felt a more thorough investigation of the issues was warranted. Id.

Responding to testimony of proponents and opponents in 1985, the legislature created a special interim committee to study the issue in depth. Fletcher Bell also convened a citizens committee to study the insurance aspects of the crisis. Statutes abolishing the collateral source rule and limiting punitive damages were enacted. Id.

With interim committee reports, recommendations and proposals in hand, the Kansas Legislature met in 1986 and enacted H.B. 2661. H.B. 2661 is a legislative scheme designed to resolve the medical malpractice liability crisis as the Legislature found it to exist. The legislative findings establish this crisis as reality and the factual record confirms the finding. The legislative findings and responses were not made casually. The Special Committee, and House and Senate Judiciary Committees received a thorough education on the existence of a problem and the best solutions.

The legislative facts of H.B. 2661 are as follows.

1. The Interim Special Committee on Medical Malpractice met fourteen times. At each meeting, a number of representatives from legal, medical, insurance and victims groups were present. See Minutes of Special Committee on Medical Malpractice, July 1-

2, 1985, July 18-19, 1985, August 15-16, 1985, September 12-13, 1985, October 10-11-1985, November 7-8, 1985, November 20-21, 1985.

2. At its first meeting the committee was educated in the present law relating to medical malpractice and was told how the Insurance Department and Board of Healing Arts operate. They were told that the Fund was in financial jeopardy and that its assets must be preserved. They were also told that insurance was becoming unaffordable and the underlying reasons for those increases. The committee was also cautioned that tort reform was not the answer, although other conferees believed tort reform was a viable alternative. See Testimony before Special Committee, July 1-2, 1985.

3. The committee heard a synopsis of the views of medical providers, the insurance industry, the legal profession and consumer groups. Id.

4. The insurance industry testified regarding their losses in Kansas in spite of increased reates. The insurance companies discussed insurance availability and statutes in other states that have afforded relief. See Testimony before Special Committee, July 18-19, 1985.

5. During the third committee meeting, the committee heard testimony from judges concerning methods of settlement. Members of the plaintiff and defense bar testified about their roles and concerns relating to medical malpractice actions. See Testimony before Special Committee, August 15-16, 1985.

6. The effectiveness of the Board of Healing Arts in disciplinary actions was discussed along with the need for effective peer review. Id.

7. The Kansas Medical Society presented options for the committees recommendation. Physicians and others testified about the high costs of premiums and that physicians were retiring early, leaving practice and eliminating procedures as a result. Victims, the Kansas Bar Association and K.T.L.A. testified that caps and other tort reform measures would not help rising

premiums, and that there was no crisis, just bad doctors. These groups presented alternative remedies. See Testimony before Special Committee, September 12-13-1985.

8. The Special Committee was advised of Fletcher Bell's Citizens Committee findings and recommendations. Those recommendations included caps and screening panels. The K.B.A. stated that were opposed to caps. See Testimony before Sepcial Committee, October 10-11, 1985.

9. Based on the evidence presented to it the Special Committee recommended caps, annuities, screening panel modifications, expert witness qualifications and peer review reporting statutes. See Proposal 47.

10. On January 13, 1986 the House Judiciary Committee heard testimony regarding the activities and conclusions of the Interim Committee. See Testimony before the House Judiciary Committee, January 13, 1986.

11. The House Judiciary Committee met thirteen times and heard evidence from legal, medical, insurance, victims and consumer groups. See Minutes of the House Judiciary Committee, January 12, 21, 22, 23, 27, 28, 1985, February 3, 4, 10, 11, 12, 13, 17, 1985.

12. The insurance industry presented evidence of financial losses, rising premium and decreased availability. The reasons behind the crisis were cited as the frequency and severity of claims. The insurance industry testified that if H.B. 2661 was passed that it could hold the line or reduce premiums and could increase availability. See Testimony before House Judiciary Committee, January 22-23, 1986.

13. The ability of the Board of Healing Arts to police negligent physicians was discussed. The Kansas Medical Society advocated strong peer review and risk management laws. K.T.L.A. told the committee that they were concerned about repeated suits against the same provider. See Testimony before House Judiciary Committee, January 27-28, 1986.

14. The House Judiciary Committee heard testimony from Jimmy Browning, M.D. that physicians were leaving their practices, particularly in rural areas. See Testimony before House Judiciary Committee, February 10, 1986.

15. Members of the Kansas Medical Malpractice Victims Coalition told the committee that caps would deprive them of their day in court, and about their own experiences. Id. The committee was also told caps were arbitrary and would not work. See Testimony before House Judiciary Committee, February 11, 1986.

16. Robert Hunter, appearing at the request of Governor Carlin, told the committee that the insurance crisis was manufactured. See Testimony before House Judiciary Committee, February 12, 1986.

17. Jerry Slaughter told the committee that the state run insurance company (JUA) was broke and had lost $7 million. The Fund is almost broke (having $19 million to cover and $47 million of claims in the pipeline) therefore this is not an insurance company rip-off, and bad doctors are not the cause of the problem. Id.

18. Anne Wigglesworth, a Wamego obstetrician, said that much of her work is now defensive medicine which raises consumer costs. The malpractice crisis has also affected her relationship with her patients. 25% of the physicians in Wamego have left or retired due to premiums. Id.

19. Dotson Bradbury, administrator of Greenwood County Hospital stated that of three general practitioners one has discontinued obstetric services and the other two are considering discontinuation of obstetrics. If this happens the citizens of the area will suffer. See Testimony before House Judiciary Committee, February 12, 1986.

20. Joe Knopp, Chairman of the House Judiciary Committee Testified in favor of caps and delineated the findings of the House Committee with regard to H.B. 2661. See Testimony before Senate Judiciary Committee, March 25, 1986.

21. The Senate Judiciary Committee heard testimony from the legal, medical, insurance, victims and consumer groups over six sessions. See Minutes of the Senate Judiciary Committee, March 25, 26, 27, 28, 31, 1986; April 1, 1986.

22. Consumer and citizen groups such as the Kansas Farm Bureau, A.A.R.P. and K.C.C.I. testified in favor of H.B. 2661. The governor's representative, K.B.A., K.T.L.A., malpractice victim representatives testified in opposition to the bill. See Testimony before the Senate Judiciary Committee, March 25-26, 1986.

23. All of the above facts were before the 1986 Kansas Legislature. Their proper and appropriate solution was to pass H.B. 2661.

I. THE PROPER ANALYSIS

1. Section 18 and Due Process.

Section 18 of the Kansas Bill of Rights states that "[a]ll persons...shall have remedy by due course of law and justice administered with delay." KAN. CONST. BILL OF RIGHTS § 18. Thirty-seven states, including the states that have upheld medical malpractice legislation, have similar provisions, all apparently derived from the Magna Carta.[1]

The purpose of Section 18 is to insure that there is judicial means of enforcing rights or redressing wrongs. Neeley v. St. Francis Hospital and School of Nursing, Inc., 192 Kan.

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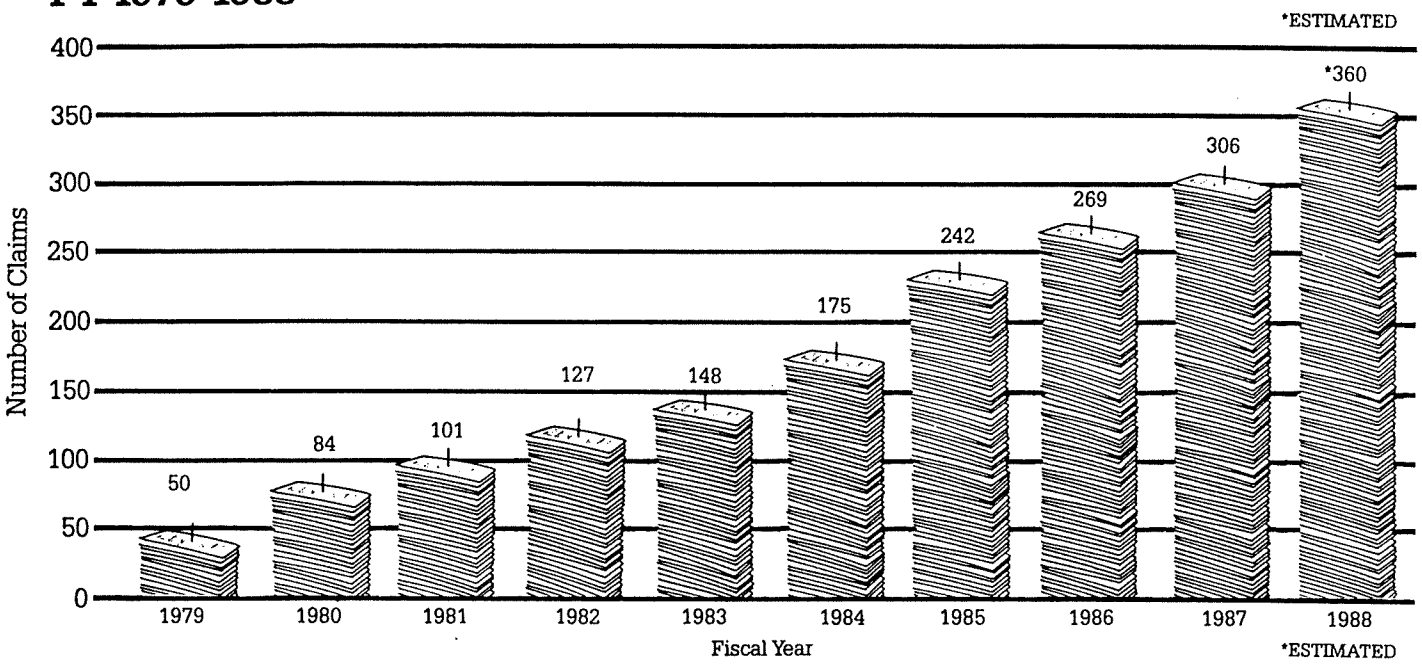
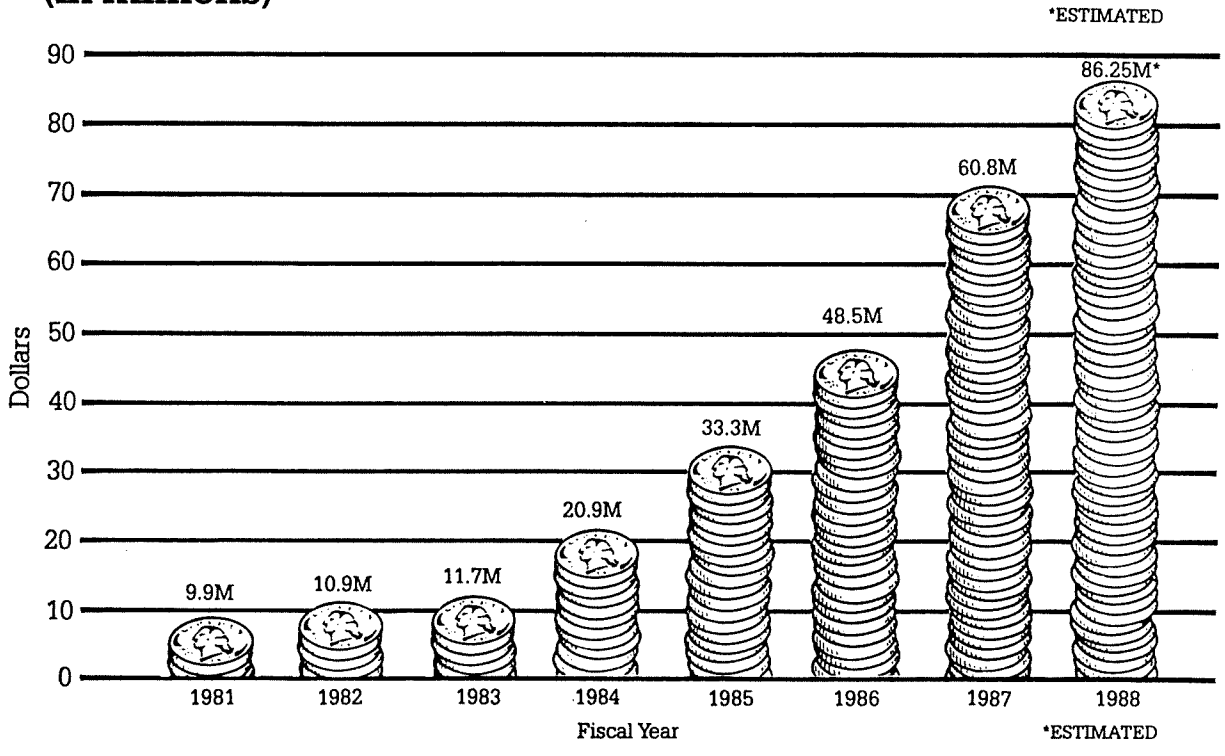
[1]Included in these thirty-seven states are Florida, Indiana, Maryland, Nebraska, Ohio and Wisconsin which plaintiffs expressly assert in their brief contain no such clause. See Okla. Const. art. 2, § 6. See Ala. Const. art. 1, § 13; Ark Const. art. 2, § 13; Colo. Const. art. 2, § 6; Conn. Const. art. 1, § 12; Del. Const. art. 1, §9; Fla. Const., Declaration of Rights § 4; Idaho Const. art. 1 § 18; Ill. Const. art 3, § 19; Ind. Const. art 1. § 12; Kan. Const., Bill of Rights § 18; Ky. Const. § 14; La. Const. art. 1, § 6; Me. Const. art. 1, § 19; Md. Const. Declaration of Rights art. 19; Mass. Const. pt. 1, art. 11; Minn. Const. art 1, § 8; Miss. Const. art 3, § 24; Mo. Const. art. 1, § 14, Mont. Const. art. 3, § 6; Neb. Const. art. 1, § 13; N.H. Const. pt. 1, art. 14; N.C. Const. art. 1, § 35; N.D. Const. art. 1, § 22; Ohio Const. art. 1, § 16; Ore. Const. art. 1, § 10; Pa. Const. art. 1, § 11; R.I. Const. art. 1, § 5; S.C. Const. art. 1, § 15; S.D. Const. art. 6, § 20; Tenn. Const. art. 1, § 17; Tex. Const. art. 1, § 13; Utah Const. art. 1, § 11; Vt. Const. ch. 1, art. 4; W. Va. Const. art. 1, § 17; Wis. Const. art. 1, § 9; Wyo. Const. art. 1, § 8.

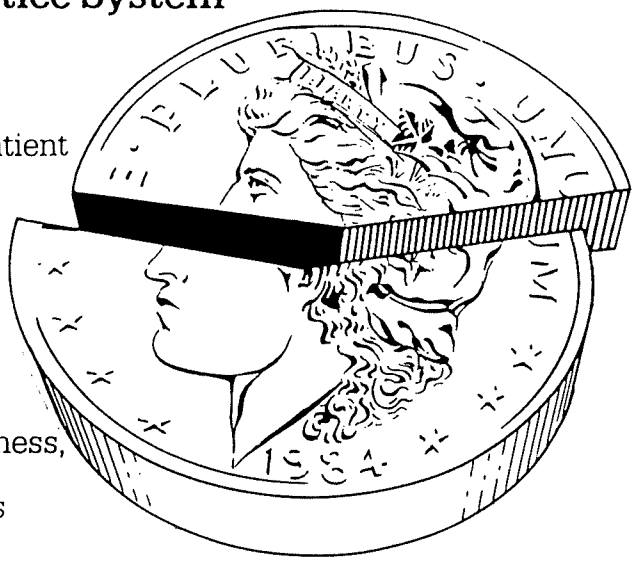
Malpractice Claims Filed FY 1979-1988



Medical Malpractice Premiums Paid in Kansas, FY 1981-1987 (in millions)

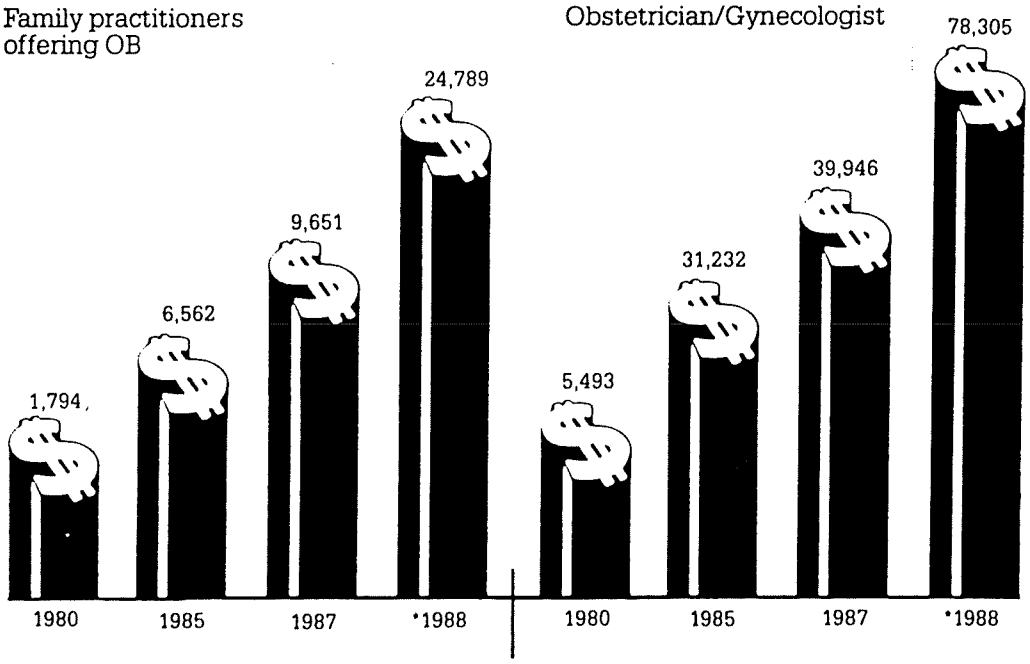


Transaction Costs in the Malpractice System



Source: Kansas Medical Society

Average Malpractice Premiums for Family Practice and OB/GYN



Source: Kansas Commissioner of Insurance. Figures include calculated assessments for Health Care Stabilization Fund. *1988 figures are estimates based on applications for rate increases submitted to the Commissioner of Insurance.

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

Comparison of Medical Malpractice Liability Insurance Premium Rates
January 1988

Introduction

KMS is often asked whether Kansas premiums for medical malpractice liability insurance are higher or lower than premiums in surrounding states. The fact of the matter is that it is impossible to make truly valid comparisons because circumstances differ from state to state. There are so many variables, often reflecting different laws, that the more one tries to analyze the differences, the more difficult it becomes to control variables and ascertain what significant factors determine why premiums are higher or lower in one state versus another.

There are simplistic comparisons available. Attachment A is an example of such a comparison which reflects premium rates for class 4 physicians insured by St. Paul Fire and Marine Insurance Company as of July 1, 1987. St. Paul's class 4 includes general or family practice physicians not primarily engaged in major surgery and emergency practice physicians who do not perform major surgery.

At first glance, the comparison map depicts Kansas in a favorable position, and Nebraska even better. The asterisk footnote explains why; the rates cited are for only $200,000/$600,000 coverage, whereas most of the others are for $1 million coverage - a significant difference. We have added our own note at the bottom of the page to explain that in order to equate Kansas with most of the other states, it is necessary to add a 90 percent surcharge for 1987 (and an estimated 150% surcharge for 1988), thereby reflecting $1 million/$3 million coverage.

Kansas

The St. Paul rate reflected on the comparison map was not the lowest Kansas rate in 1987. The Medical Protective Company, which insures about the same number of Kansas physicians that St. Paul does, offered the same $200,000/$600,000 coverage for only $4,105. When adjusted to reflect the 90% surcharge to finance the Health Care Stabilization Fund, the rate equated to $7,800 for $1 million coverage.

The Medical Protective rate was, however, artificially low in 1987. That company had avoided premium increases following enactment of medical malpractice liability reforms in 1986. A recently approved rate adjustment will result in an average 54 percent increase in 1988 premiums charged by the Medical Protective Company. Thus, the 1988 Medical Protective rate is $6,240 for the primary coverage, plus an estimated $9,360 HCSF surcharge (effective 7/1/88), for a total of $15,600, a 100% increase.

Another important consideration that should be kept in mind is the uniqueness of Kansas' method of providing "excess insurance." While the health care provider must find a commercial insurance carrier or resort to the Health Care Providers Insurance Availability Plan for the first layer of $200,000 per occurrence and $600,000 aggregate coverage, the remaining layer of coverage of $1 million per occurrence is purchased from the state by way of a surcharge added to the commercial premium. The surcharge which is levied by the Insurance Commissioner and credited to the Health Care Stabilization Fund, includes a premium component which prepays the insureds future tail coverage. By contrast, in most states when a physician retires, he or she must purchase an insurance policy to cover any liability that may arise as a result of exposures to risk during the time when the physician was practicing medicine. The tail coverage benefit of participating in the Kansas HCSF can be an important consideration for a health care provider who is planning for retirement.

Finally, it should be noted that Kansas statute requires insurance coverage for health care providers as a condition of licensure. Some would argue that this legal mandate spreads risk among all health care providers, thus resulting in slightly lower premium rates for them all. Others would counter that this creates a captive market of insurance customers as well as a reasonably assured guarantee of recovery, combined with the HCSF "deep pocket." This, of course, tends to apply upward pressure on settlements and awards which then contributes to the never ending loss-premium spiral that plagues physicians and ultimately, the consumers of health care services.

Nebraska

The situation in Nebraska is similar to Kansas but there are some important differences. There is a statutory requirement that health care providers be insured for at least $200,000/$600,000 coverage but any excess coverage is optional. An insured may purchase up to $1 million coverage by participating in a state administered fund. The state fund is financed by a surcharge on the commercial premium but the surcharge may not exceed a 50 percent rate. For example, a maximum 50 percent surcharge added to the rate cited in Attachment A would result in a total premium of $10,902 for $1 million coverage (compared to the 1987 Kansas cost of $18,162 with St. Paul).

The St. Paul Company is the principal insurer in Nebraska. About two-thirds of Nebraska's physicians are insured by St. Paul. Because of its loss experience in Nebraska, the St. Paul Company has requested a ten percent reduction in medical malpractice premium rates.

Colorado

The situation in Colorado is very different from Kansas. There is no legal requirement that health care providers be insured for professional liability risks nor is there a state administered insurance fund. Physicians who apply for hospital privileges are normally required to have at least $1 million coverage, however. This is because it is a condition imposed by companies insuring hospitals.

The Colorado rate cited in Attachment A is somewhat misleading because the St. Paul Company insures only a modest ratio of Colorado physicians. About 80 percent of the doctors there are insured by the Colorado Physicians Insurance Company (COPIC). The COPIC premium for a physician in a risk classification analogous to St. Paul class 4 was $10,136 for $1 million coverage (this compares to the estimated 1988 rates for St. Paul of $23,898 and Medical Protective of $15,600, including HCSF surcharge).

Oklahoma

Circumstances in Oklahoma are more similar to Colorado than Kansas. There is no mandatory medical malpractice insurance requirement nor is there a state administered excess insurance fund. Most hospital insurers require that each medical staff have at least $1 million coverage or otherwise the insurer will not offer coverage for the hospital.

Again, the comparison map is misleading because St. Paul insures only a small ratio of Oklahoma physicians. Most doctors there (about 90 percent) are insured by the Physicians Liability Insurance Company (PLICO). The 1987 premium rate for a family practice physician who does not perform major surgery was only $3,910 for $1 million coverage.

Missouri

Missouri law does require $500,000 minimum medical malpractice liability coverage but only if the health care provider practices in a county with a population of 75,000 or more residents. Otherwise, there is no mandatory coverage but hospital insurers normally impose the requirement that medical staffs be insured. The State of Missouri does not administer an excess insurance fund.

The comparison map (Attachment A) is again misleading because St. Paul is not a major insurer in Missouri. In fact it was impossible to obtain a reasonably valid rate comparison for two principal reasons. First, Missouri law does not regulate medical malpractice insurance rates. Consequently it was not possible to locate a central agency that had access to 1987 rates being charged. Secondly, there are several companies offering medical malpractice coverage in Missouri; perhaps because rates are not regulated. One major Missouri insurer promised to send a copy of their rate schedule but at the time of this writing, has not.

Conclusion

Most Kansas physicians could re-locate to any one of three of our bordering states and obtain the same level of medical malpractice liability coverage at a lower premium. Nebraska and Oklahoma appear particularly attractive when compared to the Kansas situation.

Obviously a health care provider will consider numerous factors in addition to insurance rates when considering where to practice. An older Kansas physician thinking about retirement would certainly have a different perspec-

tive because of the tail coverage consideration. A mid-career Kansas physician would have to weigh the disadvantages of giving up an established practice to start over again in a neighboring state versus the advantage of lower insurance premiums. For the mid-career physician there would probably be personal considerations as well, like uprooting one's family and moving to a completely new community.

For a young physician who has recently completed a residency program, it would appear advantageous to establish one's practice in Nebraska, Colorado, or Oklahoma rather than Kansas. The cost avoidance attributable to lower medical malpractice insurance premiums would surely amount to adequate savings to finance the eventual cost of tail coverage upon retirement. The savings could amount to enough money to pay back one's financial obligation under the Kansas Medical Scholarship Program rather than comply with the agreement to practice in an underserved area of Kansas.

Update

Medical Liability Insurance Rate Comparisons

When The St. Paul's proposed rates are implemented, average premiums on an annual basis will range from $6,846 in Arkansas to $56,580 in the metro Chicago, Illinois, area. (See map.)

These average premiums are based on Class 4 doctor, mature claims-made rates for liability limits of $1 million/$3 million.

Proposed Rates

The St. Paul defines a Class 4 doctor as a family or general practitioner who performs major surgery or an emergency medicine physician who doesn't perform major surgery. Class 4 doctor rates reflect the average premiums charged for all physicians and surgeons insured by The St. Paul.

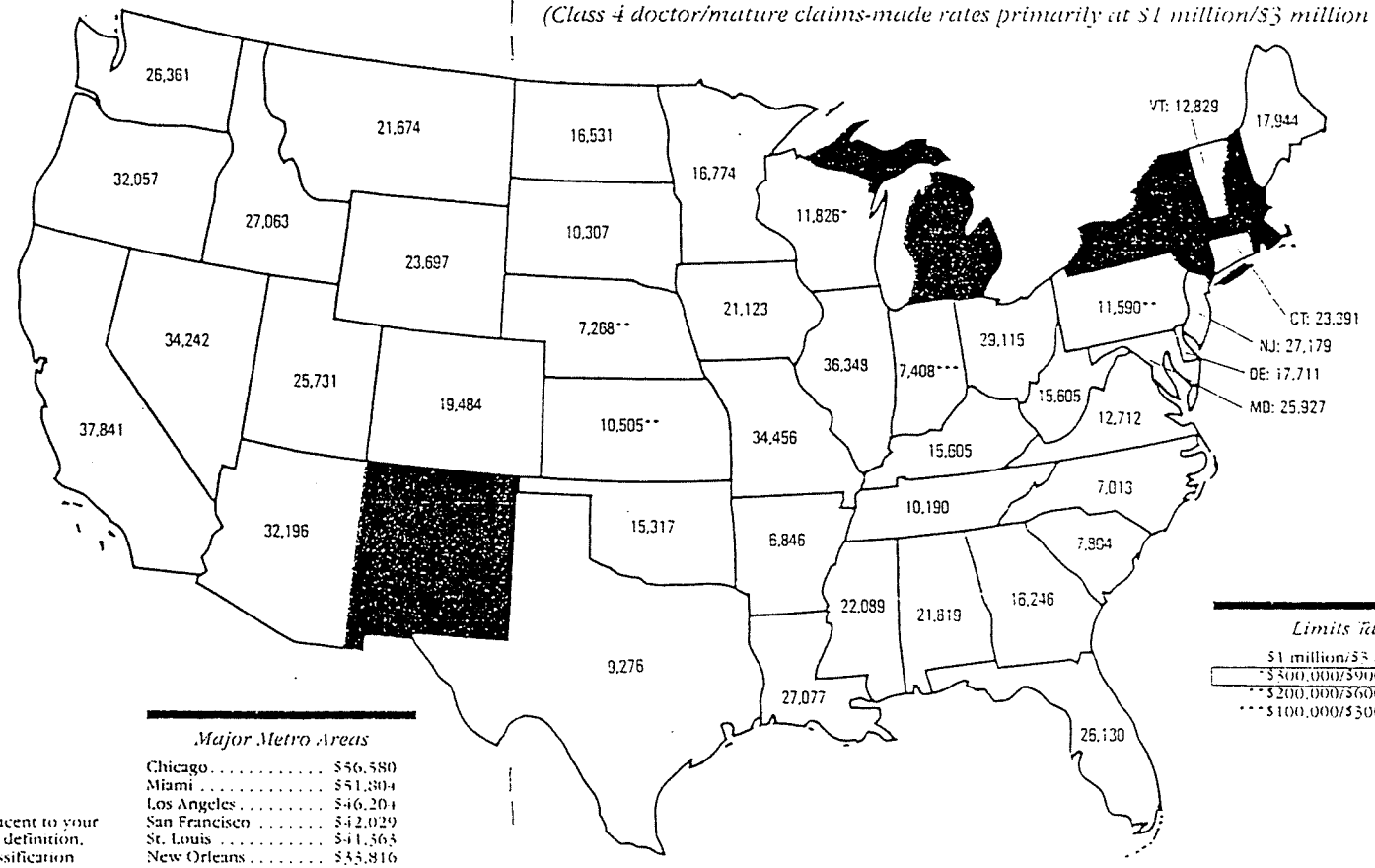
The map shows the proposed average rates on an annual basis for $1 million/$3 million limits of liability across the country (except in states where lower limits are mandatory). U.S. major metro areas, which reflect a separate St. Paul rating territory from the remainder of their state, are listed with their average rate in the chart below the map.

Individual premiums are not only affected by the state in which the physician practices but also the territory (if applicable), the limits of liability selected, the number of claims-made coverage years, and his or her specialty.

Rates by Specialty

Via last year's reply cards, many of you requested that we publish these proposed average rates for each of our nine rating classifications. Unfortunately, space does not permit us to do that on the adjacent map. However, you may compare your specialty's average rate by referring to the "Specialty By Rating Classification" chart on page 5. Adjacent to your rating class/specialty definition, you'll find rating classification relativities. Multiplication of your rating classification's relativity by your state's Class 4 Physician rate will produce a close approximation of your specialty's proposed average rate in your state.

St. Paul Fire and Marine Insurance Company
Proposed Physician & Surgeon Average Rates
On An Annual Basis After July 1, 1987
(Class 4 doctor/mature claims-made rates primarily at $1 million/$3 million limits)



Limits Table

$1 million/$3 million
*$500,000/$900,000
**$200,000/$600,000
***$100,000/$500,000

The St. Paul does not offer physician and surgeon medical liability insurance in these states.

Major Metro Areas

Chicago	$56,580
Miami	$51,804
Los Angeles	$46,204
San Francisco	$42,029
St. Louis	$41,563
New Orleans	$35,816
Washington D.C.	$30,529
Stamford	$30,127
New Haven	$27,715
Philadelphia	$22,335**
Philadelphia surrounding area	$18,540**
Houston	$13,849

Note: In order to equate Kansas to most other states (amounts not accompanied by asterisks), i.e., $1.0 million coverage, it is necessary to apply the HCSF surcharge. At the 1987 surcharge rate of 90%, Kansas premium is $19,960.00. At the 1988 estimated surcharge of 150%, the total premium would be $26,262.

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

Medical Malpractice: Position Statement of the Kansas Medical Society
January 1988

In 1985 and 1986, the Kansas Medical Society asked the Legislature to address the problem of an escalating medical malpractice crisis. At that time, premiums had risen to an all-time high, and many physicians, especially in rural areas, were being forced to either curtail high risk services, or consider locating elsewhere. Especially hard hit were physicians who delivered babies, a significant percentage of whom said they would be forced to drop those services if premiums went much higher.

The Legislature responded after extensive study, hearings and debate by enacting a comprehensive package of reforms. The legislation dealt with many aspects of the liability problem, but principally with tort reform and physician competence issues.

The physician competence, or quality assurance, provisions of the legislation established an unprecedented reporting, peer review, risk management and disciplinary system involving health care professionals, hospitals and state regulatory agencies. The medical profession supported strengthening the quality assurance network, even though it is widely acknowledged that the liability crisis is not a result of health care provider competency problems.

The tort reform provisions of the legislation held great promise to stem the rising tide of claim payments and stabilize escalating premiums. In fact, premium increases the last two years had been moderated significantly in anticipation of the legislation's effect on claims as they worked their way through the "pipeline." The key elements of the package were caps on awards, abolition of the collateral source rule, a requirement that large judgments be "structured" utilizing annuities, and many other related reforms.

Unfortunately, on July 17, 1987, the Kansas Supreme Court in a split 4-3 vote, struck down the collateral source rule provision, holding that since the law did not apply across the board to all personal injury actions, it violated the equal protection clause of the state Constitution. That decision is significant because it likely indicates how the Court will rule in 1988 on the other tort reform provisions, such as the cap on awards.

The Court's ruling has had a devastating impact on the malpractice situation. Since the courts have kept the various reforms from being implemented during the litigation process, not one claim has been impacted, hence no savings have been realized (critics of tort reform disingenuously claim the reforms have failed to reduce losses and premiums, which is true as long as the courts prevent the implementation of the legislation). Consequently, malpractice insurers have to play "catch up" this year and raise premiums to account for the unrealized savings in claim costs.

Instead of premiums stabilizing, physicians and hospitals can expect the cost of mandatory liability insurance to increase as much as 70% on July 1, 1988. With a jump of that magnitude, the total premium collected from doctors and hospitals in 1988 will be as much as $86 million, up from $11 million in 1982. The dollars paid out in awards and settlements in 1988 will be as much as $30 million, up from $7 million in 1982. There will be an estimated 360 medical malpractice suits filed in 1988, almost three times the 127 suits filed in 1982.

As the number of suits and size of the claims have increased, so have premiums. In 1988 it is estimated that malpractice insurance, mandated by law for physicians, will cost a family physician who delivers babies as much as $18,000 to $24,000, and a surgical specialist or obstetrician as much as $70,000 to $90,000. These intolerably high premiums are one facet of the complex malpractice crisis Kansas faces.

The crisis is manifested in many ways. It increases the cost of medical care for everyone. The cost of malpractice insurance is borne by all of us, including patients of doctors who have never been sued. The notion that million-dollar verdicts are paid by rich insurance companies is absurd. All Kansans pay when juries grant huge awards to plaintiffs (and their lawyers).

The malpractice crisis has a profoundly corrosive effect on the doctor-patient relationship. The bond of trust and compassion which enhanced patient care in the past, is being driven out by an attitude that doctor and patient may be adversaries in the courtroom if results aren't perfect.

The malpractice crisis has already restricted availability of care, notably in obstetrics, which is the fastest growing area of malpractice litigation. In a recent survey of family physicians, less than half currently deliver babies, and another third were planning to drop obstetrics, principally because of malpractice pressures. In the near future, access to obstetrical care may be severely restricted in many areas of our state. Almost two-thirds of the obstetricians in Kansas have been sued, and experts estimate that a young obstetrician entering practice today can expect to be sued eight times during his or her career.

One of the most disturbing aspects of this whole problem is its effect on young people contemplating a medical career in Kansas. Our young physicians, among the best trained in the world, have resigned themselves to the fact that medical malpractice suits are inevitable. Unquestionably, medical malpractice insurance costs affect a physician's decision on where to locate a medical practice. As Kansas malpractice insurance rates escalate, it puts us at a competitive disadvantage for young, highly trained physicians.

Clearly, this crisis must be resolved. If not addressed immediately, there will be serious problems in access to high risk services, such as obstetrics, in many of our state's rural areas.

The Legislature acted properly and wisely when it enacted the tort reforms discussed eariler. It is the tort system, the sprawling network of lawyers, courts and rules of law, which must be changed if we hope to achieve a solution to the malpractice dilemma. Consider the following obvious weaknesses of our present tort system: there is no objective standard of liability; there is no definite measure of compensation; the entire process is conducted at a high level of emotion and subjectivity; the cost of litigation is enormous; there is no restraint mechanism to prevent unnecessary litigation; and the system encourages higher and higher awards.

In fact it is estimated that transaction costs - lawyers' fees, court costs, expert witness fees, etc., - consume over 50% of all the dollars paid out by insurance companies. There is something seriously wrong with a system which returns to the injured patient less than half the total dollars expended. Quite simply, the tort system compensates the wrong people - the lawyers and expert witnesses - not plaintiffs.

The Legislature should correct the constitutional deficiencies in the tort reform legislation passed earlier, by extending its provisions across the board to all personal injury lawsuits. If it appears that those changes still do not satisfy constitutional objections, the Legislature should place a constitutional amendment on the ballot so the people can vote on whether the Legislature ought to have the ability to enact these reforms. Further, serious consideration must be given to finding an alternative compensation system which has lower transaction costs, so that more of the dollars expended go to patients. Finally, either the required level of insurance must be substantially reduced, or the mandatory insurance provision repealed, so that physicians can make coverage decisions based on the cost of insurance and their own risk of exposure.

The Kansas Medical Society does not support anything that will relieve negligent physicians of their responsibility to injured patients. Our record and support of strengthened peer review and disciplinary systems is consistent. However, balance must be restored to the liability system or our state will face a crisis in access to vital medical services.

Malpractice Insurance Crisis

Just When Recovery Was In Sight,

Things Took A Turn For The Worse.

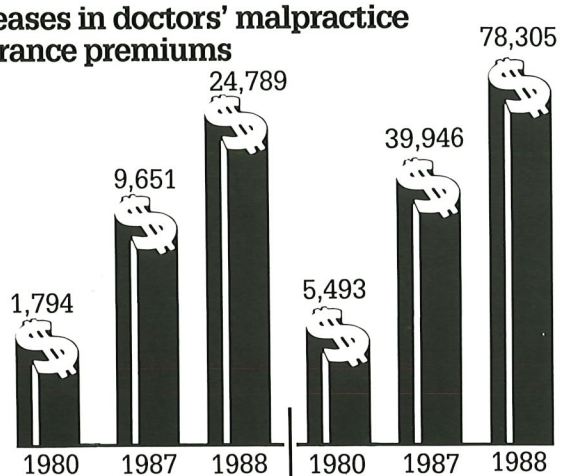
The brain drain – and the experience drain

When the malpractice insurance crisis in Kansas was raised two years ago, the number of claims filed in the previous fiscal year was a shocking 175.[1] And premiums for specialists like obstetricians were up in the $30,000 annual range.[2] Physicians around the state were questioning whether they could continue practicing.

Since then, the number of annual claims has nearly doubled.[3] So have premiums.[4] And physicians are no longer questioning – they're quitting. Not out of frustration or spite, but because they simply can't afford to work.

We've heard about the "brain drain" afflicting Kansas – how we lose a certain portion of our best and brightest students to other parts of the country.

Increases in doctors' malpractice insurance premiums



Source: Kansas Medical Society. Figures include calculated assessments for Health Care Stabilization Fund. 1988 figures are based on estimated rate increases.

Part of our population will always be attracted by other parts of the country – just as part of it will be kept here by Kansas' amenities. That's natural. But what's happening with physicians is that young people who've made the choice to study medicine and settle in Kansas find that they can't afford to.

Before a physician entering practice in Kansas treats one patient, he or she has to pay an insurance premium which can be as high as $30,000.[5] A medical student who has financed his or her education through the Kansas Medical Scholarship Program will often find it cheaper to pay his or her loans off in full and practice in a neighboring state than to go into practice here.

An endangered species – the family doctor

But at the same time that we're losing these young people, another brain drain is taking away physicians who've devoted their lives to serving Kansans.

Some physicians are retiring early. At 55 or 60, even though a doctor may have a number of good years left, a drastic increase in premiums one year may force him or her to finally say enough's enough, and leave medicine. And while in the past physicians might have used those years to train successors while reducing their own workloads, that option is no longer possible, either. That's valuable experience lost forever.

And doctors who remain in practice are often forced to restrict their practices. They give up areas such as obstetrics or surgery to lower their premiums.

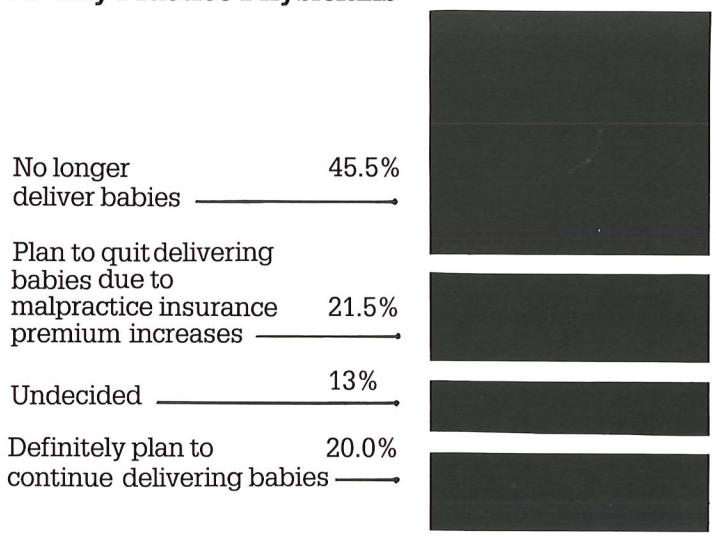
These are not isolated cases or possibilities. They're occurring every day among doctors in every part of Kansas, in big cities and small towns alike. 45.5% of family physicians surveyed who once delivered babies have quit doing so – and more than half said that malpractice premiums were one of the main reasons. And another 21.5% of the total said they would probably quit with this year's premium increases. That's nearly two out of every five family physicians still delivering babies today.[6]

That will have dire consequences for many Kansans. Of the family physicians surveyed who have given up obstetrics, 11% said their patients would have to travel more than 15 miles to find another doctor.[7]

High insurance rates and the fear of being sued are scaring medical students out of family practice ... as well as out of Kansas. Yet at least 20% of practicing family physicians in Kansas will retire in the next five years – more than the total output of all family practice residency programs in the state.[8] It's obvious that for many Kansans in small towns, the family doctor may soon be a figure of the past.

Medical students who've made the choice to practice in Kansas find that they can't afford to.

Family Practice Physicians



Source: Kansas Academy of Family Physicians survey of family practice physicians, 1987. Survey of 428 Kansas physicians with average of 17 years in practice.

1. Kansas Medical Society.
2. Kansas Medical Society.
3. Kansas Insurance Department.
4. Kansas Medical Society.
5. Kansas Medical Society.
6. Kansas Academy of Family Physicians survey of family practice physicians, 1987. Survey of 428 Kansas physicians with average of 17 years in practice.
7. Ibid.
8. Ibid.

Malpractice isn't the problem in the malpractice crisis

It would be one thing if the increased number of malpractice suits reflected changes in the quality of medicine Kansans receive.

That's a charge commonly leveled by the opposition – that the rise is due to a certain proportion of bad doctors. But the data overwhelmingly indicates that the change is not in medicine, but in society.

It's old news by now that Americans, even Kansans, go to court more often than ever before. If something goes wrong, we sue. And juries are frequently sympathetic.

And it is precisely the specialists – who rank among the most highly skilled and trained doctors – who are sued most often. Almost two-thirds of obstetricians surveyed have been sued at least once – many of them more than once.[1] And experts estimate that a young obstetrician entering practice can expect to be sued *eight times* during the first twenty years of practice.[2]

Yet paradoxically, while the number of suits filed against obstetricians has skyrocketed, maternal and neonatal care has improved significantly.[3] How can malpractice be increasing when quality is improving, too?

Perfect results simply can't be guaranteed

What's happening is this. The miracles of medical technology have produced unrealistic expectations. A premature baby who wouldn't have survived in 1975 can be saved today. Yet if that baby survives but suffers serious complications as a consequence of its risky situation, the doctor and hospital often get sued.

A surgical procedure might result in infection in 10% of cases. A new technique might reduce that to 4%. But the 4% of patients who get the infection only know that it's due to that new technique. Some may sue.

Put the responsibility where it belongs

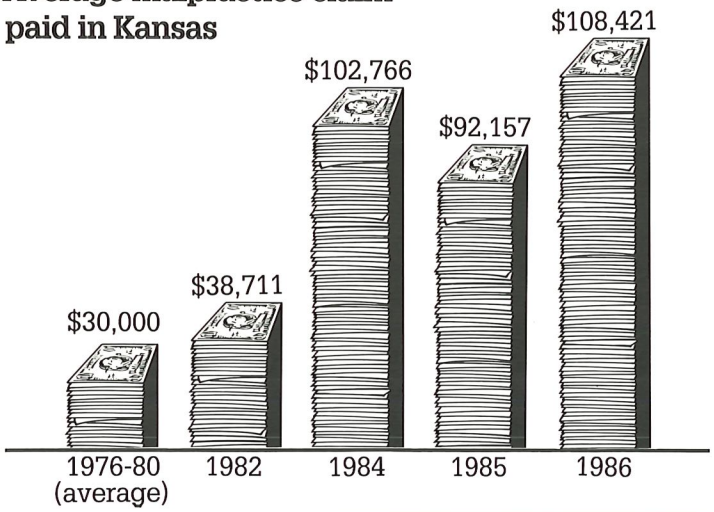
Just as they've attempted to place the blame for the increasing number of claims on "bad doctors," detractors have tried to paint the increase in premiums as "an insurance company ripoff."

Again, the facts prove otherwise. The fact that there are only a very few insurers willing to offer medical malpractice insurance in Kansas clearly refutes the "insurance company ripoff" argument. If malpractice insurance is so profitable, why haven't insurance companies been beating down the door to get in the state?

The truth is, insurance companies aren't the source of the problem. A tort system which gives a bigger share of the money to transaction costs than to injured patients is the problem – and the root of every part of this crisis.

If malpractice insurance is such a profitable area, why are only a few companies willing to offer it in Kansas?

Average malpractice claim paid in Kansas



Source: Kansas Medical Society, based on data obtained from Kansas Insurance Department.

1. Kansas Medical Society.

Part II Solutions for the Malpractice Crisis

In the last two years, the legislature enacted a program of tort reform to alleviate the malpractice crisis. The need for reform remains even greater today.

We have concentrated in this brochure on the problems caused by the malpractice crisis. But it is important that we ensure the right of patients injured by malpractice to have their day in court and receive adequate compensation. A reasonable reform package will actually serve injured patients better than the current system.

The result of the fair, reasonable reforms we propose will be greater justice for the few who are injured, and a future of progressive, accessible health care for all Kansans.

Option I: Apply tort reform across the board

On July 17, 1987, the Kansas Supreme Court ruled in the case of *Farley v. Engelken* that the abolition of the collateral source rule in medical malpractice cases violated the equal protection clause of the First Amendment to the state constitution because it did not apply equally to all personal injury actions.

This decision went against several previous precedents of this Court, as well as precedents of the U.S. Supreme Court, federal district courts, and courts in other states, which allowed something as fundamental as health care to be treated differently in court than other kinds of actions. The close 4-3 split and the dissenting minority opinion by Justice Holmes attest to the questions this decision raised.

Nevertheless, this same reasoning will almost certainly be used to reject other portions of the tort reform legislation overwhelmingly passed by the legislature in the last two years. Such decisions can only exacerbate the crisis.

One remedy would be to revise the challenged legislation so that it applies to *all* personal injury actions, and thus satisfies the "equal protection" test established by this Court.

We believe the reforms make good common sense, and that they would not reduce the rights of legitimate plaintiffs, but rather make our tort system as a whole more fair. Reforms such as caps on awards wouldn't even affect the majority of cases. But they would curb the intensely destructive effects of the few huge awards and settlements each year that are wrecking our system – while making a very few, very wealthy.

The reforms which should be reenacted include:

- **Abolition of the collateral source rule.** The collateral source rule allows "double recovery," which is plainly unfair. If someone's medical bills are being paid for by insurance, he or she should not be allowed to collect *more* money for those same bills from another source.

- **"Structure" large awards.** Instead of a ruinously large lump sum payment, insurers should purchase annuities which would cover the plaintiff's expenses as they are incurred. The smaller up front sum is then more manageable, yet the chance of a plaintiff being left destitute after a few years is much reduced as well. Again, this is simply a common sense alternative to the destructively large payouts that currently exist.
- **Caps on "pain and suffering."** Non-economic damages such as pain and suffering are often a significant part of large settlements and awards. When it's impossible to put a price tag on something so intangible, it becomes very easy to put a disastrously large one on it. And that's precisely what's happening.

Naturally, we want to do everything we can for an injured patient. But the consequences are being felt not only in the medical field but throughout society. When the only physician in town gives up practice; when a municipal swimming pool has to close, or a county fair events are cancelled, because the cost of liability insurance is too high; when lifesaving vaccines are no longer produced because of the fear of a bankrupting suit, to name just a few examples, the cost to society of unchecked awards has simply become too high.

While actual economic loss will be compensated fully, non-economic damages should be limited to reasonable amounts. It's a difficult, but necessary, decision if society is going to continue functioning.

Option II: Amend the constitution

The second option to achieve reform is obvious from the Court's decision: amend the state constitution to allow different kinds of personal injury cases to be treated differently under the law.

This is a major step, not to be taken lightly. But in view of the Court's majority posture on tort reform, it may be the only way to assure that progressive legislation is given a chance to work.

Conclusion

There are other changes which can be made in the system. The Kansas Medical Society, like many others across the country, is looking at changes in the way insurance is provided and in the way malpractice cases are adjudicated. These changes may someday hold promise to further relieve the problem while guaranteeing injured patients their rights.

But those are years away. For now, tort reform is the critical issue. As multimillion-dollar awards proliferate, and as premium rates skyrocket, every day physicians across Kansas give up specialties or leave practice entirely. And patients across Kansas are denied the services of the physician they've known and trusted for years.

It's a tragedy, not just for doctors or for people in rural communities, but for all Kansans.

The opposition talks vaguely of "other solutions." But as long as doctors cannot afford to keep practicing because of high rates, and as long as rates remain high because of an inefficient tort system, the only solution is to bring rates down by making the system more efficient and fair. It's a very simple equation.

The people of Kansas support reform. The legislature took the initiative twice before and passed legislation which resulted in quantifiable improvements.

For the sake of all Kansans, it's time to take that initiative again.

KMS

Kansas Medical Society

1300 Topeka Avenue • Topeka, Kansas 66612

Part I The Situation in Kansas

Two years ago, the people of Kansas recognized the growing crisis in our state's health care system brought on by a skyrocketing number of medical malpractice suits, and by the accompanying rise in malpractice insurance rates.

The Kansas legislature responded with reform legislation which for the first time started to turn the problem around in unmistakable, quantifiable ways. This included a change in the collateral source rule – allowing juries to know what compensation a plaintiff is already receiving, to prevent "double recovery"; caps on awards; structuring of large judgments over long periods of time, to make them more manageable; and better policing of the medical profession.

It is a matter of public record that this legislation would have worked. In anticipation of its effects, the two largest insurers, Medical Protective and St. Paul Fire & Marine, did not increase premiums in 1986, while the Health Care Stabilization Fund lowered its surcharge by 20%.

Court tests followed. Yet despite the fact that similar legislation had been upheld in states like Arizona, the state Supreme Court struck down the provision abolishing the collateral source rule on equal protection grounds. It is virtually certain that the most important remaining components of the reform package will also be rejected on the same grounds.

What's frustrating is that the reforms have not had a fair chance to work. As a result, insurance rates are again skyrocketing. Today's physicians will leave practice, depriving longtime patients of their services. And young people training at our medical schools will move to more hospitable states – all in the name of a tort system which returns less than 50¢ of every dollar expended to the patients it's supposed to be helping.

The public is aware of the problem and supports reform. This brochure describes the situation we face if we do not act again – and suggests the ways in which we can return health and sense to our health care system.

It is a matter of public record that this legislation would have had the intended effect. Malpractice insurance rates stabilized in 1986.

The malpractice insurance crisis threatens health care for everyone

Medical malpractice is something that affects a very small number of Kansas patients each year.

But the medical malpractice insurance crisis is something that affects every Kansan who needs the services of a doctor or hospital.

It affects your pocketbook. Studies show that malpractice insurance alone adds significantly to the cost of health care. And the cost rises when you consider indirect costs, such as the cost of "defensive medicine" – extra tests and procedures routinely ordered just in case they'll be needed in court at some point.

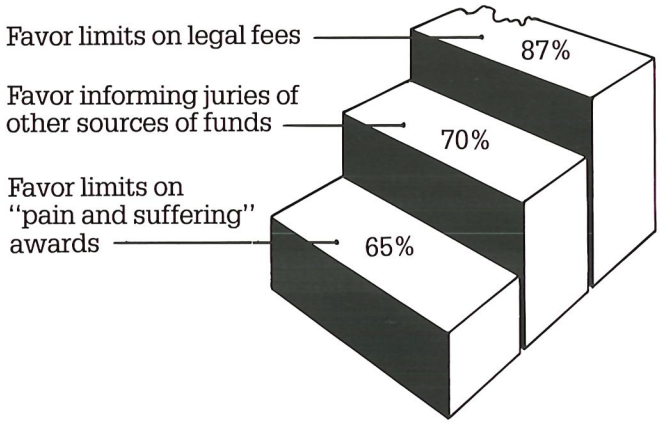
It also affects access to medical care. For people in urban areas, that can mean having to find a new doctor when an established relationship of many years is brought to a sudden end. For Kansans in rural areas, it can mean having no doctor in town at all.

Kansans understand the nature of the malpractice insurance crisis, and they support the reforms enacted in the past two years. In a 1987 survey 65% of Kansans surveyed favored limits on pain and suffering awards; 70% favored informing juries of collateral source funds; and 87% favored limiting legal fees.[1]

It is clear that tort reform to ease the malpractice insurance crisis is an issue of statewide concern and support.

In a 1987 survey, a clear majority of Kansans favored abolishing the collateral source rule and placing limits on "pain and suffering" awards.

Kansans' Attitudes Toward Malpractice Tort Reform



Source: Survey by The Research Partnership, November 11, 1987, of geographically representative random sample of 1250 Kansans. Survey conducted between October 19th and 26th, 1987.

1. Survey by The Research Partnership, November 11, 1987, of geographically representative random sample of 1250 Kansans. Survey conducted between October 19th and 26th, 1987.

3-15-88

March 15, 1988

Testimony Before the
Senate Judicial Committee
Regarding Tort Reform
Presented by

Harry E. Williford
Boeing Military Airplanes

Thank you Mr. Chairman and Members of the Committee for this opportunity to endorse the tort reform proposals currently before your committee.

Boeing is a self-insurer for employee medical and dental costs. With 23,000 employees in this state, that represents over $45M per year of benefit payments to health providers and druggists in Kansas. These costs have increased in recent years - by medical practitioners, by hospitals, by pharmaceutical and appliance providers - because their costs of malpractice insurance have increased. Those increases are the result, primarily, of the insurance providers experience with tort award judgements. So, The Boeing Company endorses the ~~four~~ THREE tort reform proposals which have been brought before this committee.

Boeing also has involvement with insuring for claims of environmental concern. Due to the current conditions existing in the commercial insurance marketplace, the Company has been unable to obtain the limits of insurance desired. Further, the terms of certain coverages provided by the commercial market are similarly deficient with respect to broadness of coverage. To recognize these market inadequacies, Boeing has self-insured coverages unobtainable from the commercial market.

There is a broader context we have to recognize for the environmental concerns.

Att. II

There are two principle federal statutes regulating the generation, storage, transportation, disposal, and cleanup if improper disposal has occurred, of wastes posing environmental risks. The thrust of the first - the Resource Conservation and Recovery Act ("RCRA") - is to regulate hazardous waste "from the cradle to the grave." Every company which generates solid waste must determine if that waste is hazardous. If the solid waste is hazardous waste, the the company must comply with strict federal regulations governing the storage, transportation and disposal of the waste. The Act also establishes a system of government permits which all generators, transporters, and those who dispose of hazardous waste must obtain.

RCRA provides substantial civil and criminal penalties for violation of the statute, of EPA regulations, or of the requirements of any permit. Civil enforcement can be pursued either by an administrative compliance order or a suit in federal district court for conjunctive relief. Violations are subject to civil penalties of up to $25,000 per day.

While RCRA is designed to regulate the generation and disposal of hazardous waste, the Comprehensive Environmental, Response, Compensation and Liability Act, ("CERCLA" or "Superfund"), provides a mechanism for cleaning up already polluted sites. CERCLA provides a means to force "responsible parties" to undertake cleanup or pay for cleanup costs.

The standard of liability under CERCLA is strict, joint and several. In other words, a party's liability may be assessed without regard to fault, and each party may be liable for the entire cost of the cleanup.

Liability under CERCLA includes responsibility for removal and remedial costs, any costs incurred by others in responding to the release of hazardous waste, and for injury to natural resources. Treble damages may be imposed for failure to cooperate with the Government in cleaning up the facility.

For the most part, any type of environmental problem will be regulated by either or both RCRA and CERCLA and it seems doubtful that the additional deterrence offered by punitive damages awarded pursuant to state tort theories is required. The one arguable exception could be in the area of saltwater pollution that does not make its way to a navigable river that otherwise is subject to the Clean Water Act.

March 15, 1988

Testimony Before the

Senate Judiciary Committee

Offered by

Edward Seaton
The Manhattan Mercury

Thank you Mr. Chairman and Members of the Committee.

My name is Edward Seaton, and I am publisher of The Manhattan Mercury. I am here as a businessperson.

We are a family owned-business that operates 10 daily newspapers in small cities and towns as well as seven radio stations and one network television station. Four of the dailies and four radio stations are in Kansas.

I am going to relate to you the experience of only one of these--The Manhattan Mercury. But I assure you that its case is typical of all the others, both the other newspapers and the broadcast stations.

Furthermore, I think the case I intend to tell you about briefly is typical of general business--with perhaps one exception--because most of the insurance bought by newspapers is the same insurance that is bought by most other businesses.

At The Manhattan Mercury, in addition to medical insurance, we routinely purchase four separate insurance policies:

1. A large package policy covering all casualty and general liability exposures.

2. A commercial umbrella policy providing excess liability coverage.

att. III

3. A workman's compensation insurance policy, and

4. Libel insurance--which is the one exception needed by those of us in the news media.

Until 1985 our insurance concerns focused on the soaring costs of medical coverage. What has occurred since then with our various liability policies has made us think those 15 and 20 percent jumps in our Blue Cross charges were just minor rate creep.

In 1985 the cost our our large package policy jumped 40 percent. It went up another 10 percent in 1986. Fortunately, it stabilized on renewal last fall.

The same cannot be said for our commercial umbrella. It also went up 40 percent from 1984 to 1985. It went up another 43 percent from 1985 to 1986. And last fall, it jumped an additional 50 percent. That's 200 percent in just three years. And we have never had a claim.

Our workman's compensation isn't quite as bad. Since 1984 it's gone up only 89 percent. We've had no significant claims on it.

The worst case is our libel insurance. We've bought libel insurance for decades from Employers Reinsurance Corp. of Overland Park. But when the policy renewed in the summer of 1986, we were told we'd have to pay 359 percent more for coverage similar to what we'd had previously--not quite the same because the deductible was to be 10 times higher, from $2,500 to $25,000. We'd had no claims in many years.

When we shopped the market to see if we could do any better, we learned that most other companies writing libel coverage simply weren't taking on new customers.

Fortunately, we were ultimately able to buy coverage at a somewhat lower rate through a company organized by our national trade association--the American Newspaper Publishers Association. The only drawback is that it's one of those captured companies set up off-shore, in this case Bermuda, which gives me pause when I think what may happen if I ever have a claim.

In conclusion, I would simply summarize by saying that the insurance crisis is affecting more than obstetricians and neurosurgeons. Anyone in business is facing it. In our case, it's not going to put us out of business. But if all our costs --or even a significant share of them--had increased as have our insurance costs, we would be facing going out of business.

My own view is that reform of the civil justice system offers the best hope of controlling these costs resulting from the litigation crisis in the liability field.

Thank you.

3-15-88

ELECTED OFFICIALS OF THE STATE OF KANSAS:

We are here in representation of the ~~6,000~~ now 8000 Kansans who signed a petition in favor of limits being set on liabilities. Still many Kansans are unaware of the threat that recent proposed increases in medical malpractice premiums have brought to our state. This threat pertains to the availability and affordability of health care to the people of Kansas. At risk is the availability of health care in our rural areas, and of obstetrical care throughout the state. Doctors are choosing to cease practicing medicine entirely or to eliminate obstetrical care from their practice rather than pass the increase on to patients.

Who replaces these doctors when they decide to leave medicine or to stop delivering babies? Few, if any! Young physicians entering practice are leaving Kansas to practice in states where the problems facing them are not ones of high insurance rates and the fear of being sued. Most are choosing not to enter obstetrics at all.

We are here (in Topeka) to try to prevent the endangered branch of health care called obstetrics from becoming obsolete for women in Kansas. The doctor who has delivered their babies for years, and with whom they have built a lasting rapport and trust, is now telling them, "You must find someone else to deliver your next child." For some women this may be extremely difficult if they are considered "high risk", meaning they may have had gestational complications in past pregnancies. Obstetricians are screening their clients carefully to save themselves from what they might deem a possible lawsuit. Even if a woman's labor and delivery risks are not great she may still be turned away only because a doctor must limit his practice and schedule to no more than 15 to 20 deliveries per month. Women are being forced to seek doctors in neighboring cities or even states. Women living close enough to the state line choose to deliver their babies in other states and many do so. With these patients goes a great deal of revenue. Approximately $3,500 to $6,500 is lost to Kansas each time a woman goes out of state to deliver her baby.

Our state is clearly in a "malpractice crisis", malpractice insurance and increased premiums are pressuring our physicians to protect themselves and practice "defensive medicine." We, the people seeking health care, are the loosers.

Please reconsider striking down bills that protect so few (individuals filing lawsuits) and yet effect so many. Tort reforms protect so many more individuals from the increase in health care cost by limiting liabilities and thus keeping insurance premiums down. On behalf of the 6,000 Kansans who signed in favor of limiting liabilities, give tort reform a chance to work.

Petition Co-ordinators:

Mariann Blancho
413 W. 9th
Pittsburg, KS 66762

Melba Ellis
Box 269
Mc Cune, KS 66753

Theresa Van Becelaere
1711 N. Grand
Pittsburg, KS 66762

Att. IV

HOW LIABILITY AND MALPRACTICE CAN AFFECT A COMMUNITY

FACT: Most legislators deny the existence of a medical crisis. Perhaps the figures below will convince them that there is, at least, a revenue crisis.

FACT: Just six years ago, Pittsburg, Kansas, a city with a population of 19,000 had six family practice physicians providing obstetrical care. Since then, five have discontinued this service, and the last is hanging on another year hoping for tort reform legislation.

FACT: There are only two OB-GYN specialists available in Pittsburg, and all hopes of recruiting more are vanishing. One physician approached recently laughed and asked, "Haven't you heard? You don't go into practice in Kansas or Florida."

FACT: Joplin, Missouri, has only two hospitals delivering babies. Only one could release the statistical information requested, and those statistics were alarming. In that one hospital alone, 214 Kansas patients delivered babies, 41 of which were Pittsburg residents. These are people paying an average of $5,000 per delivery, meaning that our State lost, in the southeast region alone, approximately $1,070,000 in revenue. This figure represents medical care only, another $50,000 annually is lost on food, gifts, and other incidentals purchased out of state. Remember that these figures were only one hospital, and for obstetrical care only.

FACT: At the time of birth, a pediatrician is needed to attend the infant, so at $150 per patient, another $32,100 is lost. Next, add the charge for hospital nursery care at $1,500 per patient, and another $321,000 in revenue that should have stayed in Kansas is gone. Many patients then decide to continue with the out of state physician, withdrawing even more revenue. (Based on the 214 patient figure.)

FACT: The above figures represent normal and casarean births. Infants born out of state with serious medical problems are shipped to special enteres within that state equipped to handle crisis births. Many times the amount for their care represents as much as $100,000 per child.

FACT: Legislators consider this a battle of the triangle--physicians, attorneys, and insurance companies. The voice of the people must make them put a fourth corner on that triangle and make it a square. We are an important consideration in this battle. All across the State 6,000 people have signed a petition stating their support of tort reform. Signatures are continuing to come in daily.

FACT: Physicians do not pay malpractice premiums, patients do. Either by higher costs of service rendered or lack of available health care.

Please remember that the above revenue figures were representative of only a very small portion of Kansas. A more complete representation would need to account for the thousands of patients in other areas of our State who must seek obstetrical care elsewhere. When these are considered, the revenue dollars lost to bordering states is truly a staggering amount.

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Mariann Blancho
413 West 9th
Pittsburg, KS 66762

Melba Ellis
P. O. Box 269
McCune, KS 66753

Theresa VanBecelaere
1711 North Grand
Pittsburg, KS 66762