Approved March 28, 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 18, 1988 in room 514-S of the Capitol.

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

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:

Margaret Post Ahrens, Kansas Chapter, Sierra Club
Mike Snider, Kansas Head Injury Association, Wichita
Ted Fay, Health Care Stabilization Fund
Matt Lynch, Kansas Judicial Council
Ron Smith, Kansas Bar Association

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.

Margaret Post Ahrens, Kansas Chapter, Sierra Club, testified in opposition to House Bill 2731. She stated the Sierra Club works to protect our natural resources; our air, land and water. Because improper handling of hazardous materials pose a threat to those resources, and thus, threaten citizens and the economy

Tort Reform Bills

of the state, Kansas Sierrans have had a long standing interest in state policy relating to the manufacture, storage, shipment and disposal of hazardous materials. A copy of her statement is attached (See Attachment I).

Mike Snider, Wichita, Kansas Head Injury Association, testified 10 years ago he was a respiratory therapist. Four year ago his youngest brother suffered a serious head injury in an accident with a drunk driver. After two operations to relieve pressure in his brain, he was transferred to a rehabilitation center. Mr. Snider explained the Kansas Head Injury Association sends out a newspaper that goes out to about 5,000 people in the state. The association provides counseling to families who have a head injury in their family. They promote better and higher standard of living for people who have survived. He is opposed to the house bills basically because of caps on pain and suffering damages. The catastrophic expenses to the family. In his family the expenses incurred to date from October 1 to January, 1985 was $200,000; from January, 1985, to 1987 for rehabilitation treatment was $347,491,22. His family has already incurred over $500,000 in medical expenses to date. He said he has no ax to grind the way the insurance companies handled the situation. The attorney agreed to reduce the fee. His father had the best health insurance he had every seen with the Federal Health Insurance Association. In spite of all of this, to provide his brother with a reasonable standard of living by the time he is 35, they will be bankrupt. His brother will need long term care. They are greatful for the treatment doctors give him. His brother has a serious learning difficulty with memory. Our problem is the actual damages, the pain and suffering damages, it is hard to put a price on that. We want him to be restored to the best possible life that he can. He still can't live on his own. As far as predictability of damages in the future, we still don't know what the future medical bills would be. Mr. Snider said, if my brother were injured under this law, he would have difficulty in meeting the expenses even though his parents have had the best insurance, it is still not enough in the future to provide him with a reasonable standard of living 10 years down the road. A committee member inquired, if these bills were in place, how would this have affected your brother's case? Mr. Snider replied, if there is money needed, I don't see how it can be there. The committee member inquired about the area of future collateral sources. Mr. Snider replied, the award for future medical expenses and damage would be prorated over a number of years of yearly benefit. Under these bills in place the medical treatment might not be enough to cover those bills. That money should be made available or put in that trust fund for when that person needs it. Another commitee member inquired, purchase an annuity contract that has a clause that relates to that? Mr. Snider replied, yes, if you can predict how much would be needed, that would be easier. I encourage that kind of thing to be considered.

Ted Fay, Health Care Stabilization Fund, appeared representing Fletcher Bell, the Kansas Insurance Commissioner. Mr. Fay testified, we totally understand the frustration of health care providers in the state. If you enact the tort legislation that would allow medical malpractice claims to be filed within two years from the time the injury became ascertainable, those cases will not show up in the system before three or four years from

now so things are not going to get better, they are going to get worse. The cost of manadatory insurance in this state is going up to such an extent that marginal providers are going to be under more and more pressure. We have to give that bad news to the health care providers in the state. In regard to House Bill 2661, the doctors are still going to want to get insurance. You have to make provisions for our liabilities. Senate Bill 629 would do that. We are concerned about dates in the bill. There is a cut off of July, 1991, and that might not be long enough. The total package of insurance, if you do away with the fund, is going to be higher than it is now. I anticipate, if you do away with the fund, 50% of the doctors in Kansas will not have access to liability insurance close to the amount of one million dollars. The day following Mr. Mullin's speech, Kim Yelkin, Senior Government Affairs Officer for St. Paul Fire and Marine Insurance Company, testified that St. Paul will provide excess insurance for their customers, but will not write excess insurance over any other company unless they control the defense of all claims. It is unlikely St. Paul will write excess insurance for any private insurance companies subject to these conditions. They would prefer having a five year plan so we could have money on hand to pay all obligations of the fund. You wil not have private insurance markets return to the State of Kansas. There has been discussion of a two tier optional fund coverage selection alternative. This alternative would permit a Kansas Health care provider to select between two separate levels of fund coverage. As a result, physicians who cannot afford higher surcharges could select a lower level of coverage. To work, the lower level will necessarily have to be low enough to result in substantial cost savings. In response to a question from a committee member, Mr. Fay replied, the fund isn't going to be bankrupt. They will assess against the doctors. Five years from now we hope to be able to tell you we have $175 million in the fund so we can pay off our obligations and close the fund. Copies of his two handout are attached (See Attachments II).

Matt Lynch, Kansas Judicial Council, presented the recommendation of the Judicial Council Civil Code Advisory Committee on The Modification or Elimination of The Collateral Source Rule. A copy of the report is attached (See Attachment III). Mr. Lynch testified the advisory committee recommends against modification of the collateral source rule. He recommended the committee give attention to matters that Professor Concannon raised concerning collateral source.

Ron Smith, Kansas Bar Association, submitted a record of minutes taken verbatim of the House Floor Debate on the tort reform issues. He also submitted a transcript of proceedings held February 22, 1988, before the House Judiciary Committee concerning House Bill 2693 and Senate Bill 258. Copies of these handouts are attached (See Attachments IV). Mr. Smith testified, with regard to collateral source rule, try if you can to think of the broad picture and not just medical malpractice. The major concerns of the bar is with this group of bills; it touches all intentional tort cases. Comparative negligence is the foundation of tort law in the state, and it is unlike negligence rules in other states. In regard to punitive damage, House Bill 2731, to send punitive damages over to the state; it is a theory the state should benefit from punishment. The state should abolish

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all of the cost of prosecution if that sort of thing is adopted. He referred to the U.S. Supreme Court case Bankers Casualty v. Crenshaw; a $20,000 insurance policy was not paid on in Arkansas. The decision could come down this year, which will be binding on all states. The original intent of House Bill 2731 will bring doctors under punitive damage law passed last year. There was a suggestion to do away with wanton conduct. That would require new claims to be determined. If convictions have jail problems for crime on books, there is a question of the position a prosecuter would take on that type of suit. Ought to leave wanton conduct standard in there. The new definition that deals with dispictable conduct is open for a lot of difficulty. He referred to the attached computer chart indicating punitive damages was an issue on appeal. He said there were only about 160 of them. Through 1986 only about 40 cases of punitive damages were affirmed on appeal. If you want to read every case that deals with punitive damages you can do that. The chart indicates we are dealing with a lot of real estate cases. Copies of his three handouts plus the chart are attached (See Attachments V).

The chairman announced the committee will work on the tort bills on Monday. Staff will make available instruction on punitive damages and wanton conduct.

The meeting adjourned.

Copy of the guest list is attached (See Attachment VI).

A copy of testimony of the Kansas Natural Resource Council is attached (See Attachment VII).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-18-88

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Mike Oxford	1430 Topeka Av.	KACEH
Barbara Snider	Topeka	Mo Pac Lines
Margaret A Arens	Topeka	Ks Chap Sierra Club
[illegible] Mound	"	Ks Assoc P/C Cos
Pam Scott	Topeka	Ks Insurance Dept
Neil Day	Topeka	KID
Chip Wheeler	Topeka	KMS
Charlene Simmons	Topeka	Ks Natural Resource Council
Matt Lynch	"	Jud. Council
GERHARD METZ	"	KCCI
Michael Wolff	"	KTLA
Michael Snider	"	Kansas Head Injury Assn.
Joe Wright	Overland Park	Farmers Ins. Group
[illegible]	Topeka	KRA
Bob Corkins	Topeka	KTLA
Barb Reinert	"	KPOA
HAROLD RIEGER	TOPEKA	KMOA
KMS / KHA	Topeka	KMS / KHA
Tom Bell	"	KHA
Terry SLAUGHTER	TOPEKA	KMS
L. Haaven	"	Cap-Journal

Att. VI

I am Margaret Post Ahrens, representing the 2000 members of the Kansas Chapter of the Sierra Club. The Sierra Club works to protect our natural resources: our air, land and water. Because improper handling of hazardous materials pose a threat to those resources, and thus, threaten citizens and the economy of the state, Kansas Sierrans have had a long-standing interest in state policy relating to the manufacture, storage, shipment and disposal of hazardous materials. "Tort Reform" legislation has state-wide policy implications relating to hazardous materials in that the degree to which the state protects the health and safety of her citizens, the more she prevents reckless handling of potentially dangerous materials.

HB 2731 states the terms under which a Kansas citizen may sue for punitive (punishment) damages. Under the proposed bill, in the event of a personal injury from hazardous materials, Kansans would have to prove the right to punitives based upon a standard of "willful conduct, fraud or malice". This standard as defined in Section 6 exceeds the standards of the law for other punitives which require "reckless, wanton, willful or intentional" conduct. "Malice" is defined in HB 2731 as "despicable" conduct, a term not even recognized in the law.

The Sierra Club is seriously concerned about this greater burden of proof in HB 2731, protecting those who harm others.

We also object to the fact that the bill prevents recovery against financially responsible parties who are involved in causing harm to others. Our understanding of Section 2,d,1 is this. If a truck driver who makes $30,000 a year is involved in a spill of hazardous materials and is found by the courts to be guilty of "willful conduct, fraud or malice" as here defined, his principal cannot be touched. Those injured would have to prove that the corporation, or

Att. I

principal, "authorized" the "willful conduct, fraud or malice" involved. The maximum amount recoverable for punitives would be $30,000. What if the principal, in the interest of cost savings, puts marginal efforts into the training of truck drivers responsible for transporting hazardous materials? What if the principal is lax in managing packaging or loading of the materials before the spill occurs? Under HB 2731, internal management and general policies of a principal would not be questioned because the principal is exonerated before its policies are examined.

We do not believe that a legislature charged with responsibility for establishing policy to protect the welfare of the state intends to pass a bill that will, instead of reforming medical malpractice matters, give a signal to those manufacturing, storing, handling, transporting and disposing of hazardous materials; that they can operate in Kansas with little fear of punishment for recklessness.

TESTIMONY REGARDING

SENATE BILL NO. 626

BY

TED FAY, ATTORNEY

HEALTH CARE STABILIZATION FUND

ON BEHALF OF

FLETCHER BELL, COMMISSIONER OF INSURANCE

BEFORE THE

SENATE JUDICIARY COMMITTEE

MARCH 15, 1988

Att. II

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

IN CONSIDERING SENATE BILL NO. 626, THE COMMISSIONER ASKED THAT I DISCUSS ITS IMPACT ON THE HEALTH CARE STABILIZATION FUND. SENATE BILL NO. 626 SEEKS TO TREAT ALL SIMILAR CAUSES OF ACTION THE SAME INCLUDING THOSE ARISING OUT OF MEDICAL MALPRACTICE. THE BILL, IF ENACTED, APPEARS TO CURE ANY POTENTIAL EQUAL PROTECTION CHALLENGES UNDER THE KANSAS SUPREME COURT'S MOST RECENT INTERPRETATION. THE BILL, HOWEVER, WOULD HAVE A SERIOUS DETRIMENTAL IMPACT ON THE HEALTH CARE STABILIZATION FUND.

THE BILL WOULD REPEAL THE EXISTING STATUTE OF REPOSE, LIMITING MEDICAL MALPRACTICE CLAIMS FROM BEING FILED MORE THAN FOUR YEARS AFTER THE DATE OF THE INCIDENT. IF ENACTED, SENATE BILL NO. 626 WOULD ALLOW MEDICAL MALPRACTICE CLAIMS TO BE FILED WITHIN 2 YEARS FROM THE TIME THE INJURY BECAME ASCERTAINABLE, BUT NO LONGER THAN 10 YEARS FROM THE DATE OF THE INCIDENT CAUSING THE INJURY.

OBVIOUSLY, THE INCREASED PERIOD OF TIME FOR FILING MEDICAL MALPRACTICE ACTIONS WILL INCREASE THE HEALTH CARE STABILIZATION FUND'S EXPOSURE TO LIABILITY. THE LONGER PERIOD OF TIME TO FILE A CLAIM WILL ALSO MAKE IT MORE DIFFICULT TO PREDICT FUTURE LOSSES.

Bob's file

TESTIMONY REGARDING

SENATE BILL NO. 629

BY

TED FAY, ATTORNEY

HEALTH CARE STABILIZATION FUND

ON BEHALF OF

FLETCHER BELL, COMMISSIONER OF INSURANCE

BEFORE THE

SENATE JUDICIARY COMMITTEE

MARCH 15 , 1988

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

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

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

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

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

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

LET ME DISCUSS THESE ITEMS IN ORDER:

I. MANDATORY INSURANCE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SHOULD THE 1976 AVAILABILITY SYSTEM BE ENDED?

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

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

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

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

1. THE FUND MUST HAVE A REASONABLE METHOD TO PAY ITS EXISTING OBLIGATIONS AND THOSE FOR WHICH IT MIGHT BECOME LIABLE ON CLAIMS FINALIZED AFTER TERMINATION; AND
2. THERE MUST BE SOME REASONABLE CERTAINTY THAT ADEQUATE INSURANCE MARKETS OR MECHANISMS WILL EXIST FOR MOST PROVIDERS IN THE PRIVATE MARKETS ONCE THE FUND AND PLAN ARE ENDED.

FIRST, APPROXIMATELY FIVE YEARS WILL BE REQUIRED TO FUND EXISTING LIABILITIES. THE EXACT TIME PERIOD WILL DEPEND UPON THE LOSS EXPERIENCE FOR THE FUND DURING THE COMING YEARS. THE FUND ACTUARIES, HOWEVER, SHOULD BE ABLE TO TARGET FIVE YEARS FOR FULL FUNDING AND HOPEFULLY MEET THIS OBJECTIVE. THE FUND PRESENTLY HAS

APPROXIMATELY $40 MILLION IN CASH WITH MORE THAN $100 MILLION OF LIABILITIES.

WE NOTE THAT SENATE BILL 629, AT LINES 0379-0380, TERMINATES THE FUND'S COLLECTION OF SURCHARGE PAYMENTS AS OF JULY 1, 1991. WE PROJECT THAT THIS TIME FRAME WILL BE INSUFFICIENT TO FUND EXISTING CASES. IN ADDITION, WE ARE CONCERNED ABOUT THE TERMINATION OF THE FUND'S OBLIGATION TO PROVIDE TAIL COVERAGE AFTER JULY 1, 1988. SUCH A LIMITATION MAY LEAVE HEALTH CARE PROVIDERS EXPOSED TO LIABILITY DESPITE THE FACT THEY HAVE ALREADY PURCHASED TAIL COVERAGE.

THERE IS ALSO SOME QUESTION ABOUT THE ADMINISTRATION OF CASES FILED PRIOR TO THE CUT-OFF DATE THAT ARE UNRESOLVED. IT IS NOT CERTAIN HOW SUCH CASES WOULD BE HANDLED, OR WHO WOULD BEAR THE LIABILITY FOR THESE CASES.

SECOND, EVERY EFFORT SHOULD BE MADE TO CREATE NEW PRIVATE INSURANCE MARKETS FOR HEALTH CARE PROVIDERS DURING THE FIVE YEAR PERIOD NEEDED TO FUND EXISTING OBLIGATIONS. SOME PROVIDERS, SUCH AS PHARMACISTS, SHOULD HAVE NO PROBLEM FINDING AVAILABLE INSURANCE. OTHER PROVIDERS, SUCH AS THOSE IN HIGH RISK AREAS, WILL PROBABLY

NEVER BE ADEQUATELY COVERED IN THE PRIVATE MARKET UNLESS SPECIAL INSURANCE IS MADE AVAILABLE THROUGH PROVIDER OWNED COMPANIES.

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

THE DAY FOLLOWING MR. MULLEN'S SPEECH, KIM YELKIN, SENIOR GOVERNMENT AFFAIRS OFFICER FOR ST. PAUL FIRE AND MARINE INSURANCE COMPANY, TESTIFIED THAT ST. PAUL WILL PROVIDE EXCESS INSURANCE FOR THEIR CUSTOMERS, BUT WILL NOT WRITE EXCESS INSURANCE OVER ANY OTHER COMPANY UNLESS THEY CONTROL THE DEFENSE OF ALL CLAIMS. IT IS UNLIKELY ST. PAUL WILL WRITE EXCESS INSURANCE FOR ANY PRIVATE INSURANCE COMPANIES SUBJECT TO THESE CONDITIONS.

SMALLER INSURANCE COMPANIES MAY WRITE INSURANCE UP TO REASONABLE LIMITS FOR SOME KANSAS HEALTH CARE PROVIDERS, BUT IT IS HIGHLY UNLIKELY THEY WILL WRITE MORE THAN A SMALL PERCENT OF THE MARKET.

THESE SMALL COMPANIES WILL ALSO BE SUBJECT TO THE UPS AND DOWNS OF THE REINSURANCE MARKETS. THIS MEANS INSURANCE COVERAGE FOR PROVIDERS WILL COME AND GO BASED UPON THE VAGARIES OF NATIONAL AND INTERNATIONAL REINSURANCE MARKETS. THESE MARKETS HAVE HISTORICALLY BEEN SUBJECT TO THE SWINGS OF TRADITIONAL INSURANCE CYCLES.

THE INSURANCE DEPARTMENT BELIEVES THAT THE ABRUPT TERMINATION OF THE FUND COULD LEAVE AS MANY AS FIFTY PERCENT OF THE PHYSICIANS IN KANSAS WITHOUT INSURANCE. EVEN A TERMINATION WITH FIVE YEARS WARNING COULD LEAVE SUBSTANTIAL NUMBERS OF PHYSICIANS WITHOUT INSURANCE UNLESS NEW COMPANIES ARE PERSUADED TO ENTER THE MARKET. IT IS THE INSURANCE DEPARTMENT'S OPINION THAT PRIVATE INSURANCE COMPANIES WILL NEVER ENTER THE KANSAS MARKET IN SUFFICIENT NUMBERS AND AT AFFORDABLE COSTS AS LONG AS MEDICAL MALPRACTICE LOSSES CONTINUE TO BE UNPREDICTABLE. THEREFORE, THE MOST REASONABLE SCENARIO TO PROVIDE INSURANCE TO ALL PROVIDERS WILL BE PROVIDER OWNED COMPANIES WITH LONG RANGE EXCESS INSURANCE ARRANGEMENTS WITH PRIVATE COMPANIES SUCH AS ST. PAUL. EVEN THESE WOULD, I SUSPECT, EXERCISE SOME FORM OF UNDERWRITING SELECTIVITY.

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

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

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

IV. OPTIONAL LEVELS OF COVERAGE

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

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

INITIAL ACTUARIAL ESTIMATES SUGGEST THAT $100,000 OF FUND COVERAGE MIGHT BE APPROXIMATELY ONE HALF THE COST OF $1 MILLION OF COVERAGE. BECAUSE OF THE TAIL COVERAGE PROBLEMS AND THE AMORTIZATION OF PAST DEFICIENCIES THE $100,000 COVERAGE MAY BE HIGHER, AT LEAST INITIALLY, UNLESS THE LAW WAS CHANGED TO PERMIT THE PROVIDER SELECTING THE LOWER LEVEL TO ASSUME HIS OR HER OWN TAIL FOR THE AMOUNT BETWEEN $100,000 AND THE HIGHER COVERAGE LEVELS OF THE FUND.

THE ADVANTAGE OF THE TWO OTHER OPTIONAL ALTERNATIVES IS THAT PROVIDERS WILL RECEIVE SOME RELIEF FROM HIGH SURCHARGES. WHETHER IT

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

ON THE DOWNSIDE, THE INSURANCE DEPARTMENT HAS NO WAY TO PREDICT WHICH PROVIDERS OR HOW MANY WILL ELECT THE LOWER LIMITS. THIS UNCERTAINTY WILL MAKE IT DIFFICULT TO ESTABLISH AN APPROPRIATE SURCHARGE. THIS PROBLEM, HOWEVER, IS PREFERABLE TO THE ELIIMINATION OF ALL MANDATORY INSURANCE. AS LONG AS HEALTH CARE PROVIDERS ARE REQUIRED TO MAINTAIN SOME LEVEL OF FUND COVERAGE, THE OPPORTUNITY WILL EXIST FOR THE FUND TO CORRECT ACTUARIAL MISTAKES OR, IF NECESSARY, TO REPEAL THE LEGISLATION. IF MANDATORY INSURANCE IS TOTALLY ELIMINATED, THE PROVIDERS WILL BE OUT OF THE SYSTEM AND IT

WILL BE VIRTUALLY IMPOSSIBLE TO RETURN THEM, IF IT IS NECESSARY, TO CORRECT MISTAKES.

V. CONCLUSION

THE KANSAS INSURANCE DEPARTMENT UNDERSTANDS AND APPRECIATES THE FRUSTRATION OF ALL THOSE WHO HAVE WAITED PATIENTLY FOR TORT REFORM MEASURES TO STABILIZE PREMIUMS AND SURCHARGES IN KANSAS, ONLY TO HAVE THESE MEASURES STRUCK DOWN BY THE COURTS. THE INSURANCE DEPARTMENT HAS SUPPORTED THESE TORT REFORM MEASURES AND IS EQUALLY FRUSTRATED. WE ALSO UNDERSTAND WHY SOME PROVIDERS, IN THEIR FRUSTRATION, WISH TO PRACTICE WITHOUT INSURANCE. NEVERTHELESS, RASH ACTIONS MUST NOT BE TAKEN THAT MIGHT PRECIPITATE A WORSE CRISIS. PAST OBLIGATIONS MUST BE PAID AND THE FOUNDATION LAID FOR THE INSURANCE COVERAGE THE MAJORITY OF PROVIDERS WILL DEMAND WHEN THE FUND IS ELIMINATED. THE DEPARTMENT BELIEVES THAT THE FUND HAS SETTLED CASES REASONABLY DURING THE LAST DECADE, IN VIEW OF THE HOSTILE CLAIMS ENVIRONMENT. THE FUND HAS DONE THIS WHILE HOLDING DOWN OVERHEAD COSTS. THERE IS NO DOUBT THAT WITH THE ELIMINATION OF THE FUND AND THE PLAN, PROVIDERS INSURANCE COSTS FOR ANYTHING CLOSE

TO COMPARABLE COVERAGE WILL INCREASE FOR PROVIDERS -- NOT DECREASE. PROVIDERS, HOWEVER, MUST MAKE THIS DECISION AND CHART THEIR OWN FUTURE.

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

2. THE INSURANCE DEPARTMENT RECOMMENDS AGAINST THE ELIMINATION OF THE HEALTH CARE STABILIZATION FUND AND THE HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN UNTIL ALL EXISTING OBLIGATIONS CAN BE PAID WITH CURRENT ASSETS PLUS INVESTMENT INCOME, AND UNTIL INSURANCE IS AVAILABLE TO PROVIDE MOST PROVIDERS PROFESSIONAL LIABILITY COVERAGE.

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

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

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

THE KANSAS INSURANCE DEPARTMENT MUST AGAIN ADVISE THE PUBLIC, THE LEGISLATURE AND HEALTH CARE PROVIDERS, THAT TINKERING WITH THE

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

3-18-88

REPORT OF THE JUDICIAL COUNCIL CIVIL CODE ADVISORY COMMITTEE AS REQUESTED BY THE 1986 SPECIAL COMMITTEE ON TORT REFORM AND LIABILITY INSURANCE ON THE MODIFICATION OR ELIMINATION OF THE COLLATERAL SOURCE RULE

ADVISORY COMMITTEE MEMBERS:

Marvin E. Thompson, Chairman
Judge Mary Beck Briscoe
Emmet A. Blaes
Judge Terry L. Bullock
Professor Robert C. Casad
Senator Franklin D. Gaines
Morris D. Hildreth
Justice Robert H. Miller
Leonard O. Thomas
Donald W. Vasos
Professor William Westerbeke
Ronald P. Williams

Approved by the Judicial Council January 8, 1988

Att. III

REQUEST FOR STUDY

In January of 1987, Representative Joe Knopp, chairman of the Special Committee on Tort Reform and Liability Insurance, requested on behalf of the special committee that the Kansas Judicial Council study the issue of modifying or eliminating the collateral source rule (See Appendix A). The Judicial Council referred the study to the Civil Code Advisory Committee.

In its study of the collateral source rule, the Civil Code Advisory Committee reviewed the available literature, proposals introduced during the 1987 legislative session, testimony given before legislative committees and the opinion of the Kansas Supreme Court holding abrogation of the collateral source rule in the area of medical malpractice liability actions to be unconstitutional as a violation of equal protection. In addition, representatives of the Commissioner of Insurance, Kansas Chamber of Commerce and Industry, the Kansas Trial Lawyers Association, the Kansas Association of Defense Counsel and the Kansas Bar Association and Professor James Concannon of the Washburn University School of Law were invited to meet with the advisory committee. (Although the Association of Defense Counsel did not respond to the committee's invitation, the committee did have the benefit of a position paper on the collateral source rule prepared at the request of the Association of Defense Counsel and submitted in 1984.)

The advisory committee was also aware that approximately 28 states have enacted legislation modifying the collateral source rule. In 15 of those states (including Kansas), modification of

the rule has been confined to medical malpractice actions. In the 13 jurisdictions where modification of the rule applies in other tort actions besides medical malpractice, the statutes vary as to the types of benefits considered, whether deductions are left to the discretion of the jury or are made by the court, the conditions under which benefits will be considered, and the treatment of subrogated benefits.

References are made in this report to 1987 Senate Bill 391 and K.S.A. 1986 Supp. 60-3403 (See Appendix B). The advisory committee paid particular attention to these two approaches to modification of the collateral source rule. S.B. 391 carried over to the 1988 session in the Senate Judiciary Committee. Although K.S.A. 60-3403 applied to medical malpractice actions only (and was held unconstitutional by the Kansas Supreme Court), the committee recognized that its approach to modification of the rule could be extended to all personal injury actions.

COLLATERAL SOURCE RULE

The collateral source rule is of common law origin and has long been recognized by the courts of Kansas. The rule is defined in the Second Restatement of Torts, § 920A, as follows:

> (2) Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.

In Allman v. Holleman, 233 Kan. 781, Syl. ¶ 8, 667 P.2d 296 (1983), the Kansas Supreme court stated the rule as:

"The collateral source rule provides that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer."

The benefits to which the collateral source rule applies are described in Comment c. to Restatement of Torts (second) § 920A:

> c. The rule that collateral benefits are not subtracted from the plaintiff's recovery applies to the following types of benefits:
>
> (1) Insurance policies, whether maintained by the plaintiff or a third party. Sometimes, as in fire insurance or collision automobile insurance, the insurance company is subrogated to the rights of the third party. This additional reason for keeping the tortfeasor's liability alive [that is, not diminishing the tortfeasor's liability] is not necessary, however, as the rule applies to insurance not involving subrogation, such as life or health policies.
>
> (2) Employment benefits. These may be gratuitous, as in the case in which the employer, although not legally required to do so, continues to pay the employee's wages during his incapacity. They may also be benefits arising out of the employment contract or a union contract. They may be benefits arising by statute, as in worker's compensation acts or the Federal Employers' Liability Act. Statutes may subrogate the employer to the right of the employee, or create a cause of action other than by subrogation.
>
> (3) Gratuities. This applies to cash gratuities and to the rendering of services. Thus the fact that the doctor did not charge for his services or the plaintiff was treated in a veterans hospital does not prevent his recovery for the reasonable value of the services.
>
> (4) Social legislation benefits. Social security benefits, welfare payments, pensions under special retirement acts, all are subject to the collateral-source rule.

It has been stated that the collateral source rule developed due to a collision between two basic principles of tort law: first, that a wrongdoer must pay the reasonable value of all harm the wrongdoer causes; and second, that an injured party is entitled to full recovery but is not entitled to double recovery. The collateral source rule subordinates concerns with double recovery to the first principle.

Proponents of the rule contend that this is appropriate for a variety of reasons. Highly summarized, they are as follows:

> Requiring the wrongdoer to pay for all the harm the wrongdoer causes serves the deterrent purpose of tort law. Furthermore, in a capitalistic society, the real risk of injury resulting from some economic activity should be borne by those who engaged in that activity.
>
> Persons should not be penalized for or discouraged from purchasing collateral source benefits such as insurance.
>
> As to many collateral source benefits, the injured party has paid for the benefit, either directly or as part of his or her compensation for employment. Consequently, there is no double recovery. Even if there is a double recovery, it is preferable that any windfall go to the injured person as opposed to the wrongdoer.
>
> In regard to gratuitous benefits, the donor intends to confer a benefit on the injured person, not on the wrongdoer.
>
> The existence of collateral source benefits provide greater inducement to the injured person to settle a case without the necessity of litigation.
>
> As a practical matter, full recovery in tort does not make the injured party whole. The injured party has to pay litigation costs and attorney fees out of the damage award.
>
> Opponents of the rule contend:
>
> The receipt of collateral source payments and damage awards for the same item of expense represents double recovery and overcompensation.

To the extent an injured person receives collateral source payments, that person has not been damaged.

Widespread liability insurance eliminates the fault and deterrent aspects of tort law and reduces liability insurance to a compensatory scheme for accident victims.

Making liability insurance primary for compensation purposes results in increased transaction (litigation) costs.

Using the collateral source rule to compensate injured persons for litigation expenses and attorney fees is indirect and not accurately attuned to the problems sought to be cured. The amount and availability of collateral benefits received in any case are fortuitous and bear no relation to the extent a purely compensatory damage award falls short of making the injured person whole.

People do not purchase collateral benefits for the purpose or with the expectation of obtaining a double recovery in the event of liability on the part of a third party. Abolition of the rule does not deprive an injured person of his or her bargain.

COMMITTEE RECOMMENDATION

The advisory committee finds the existence of double recovery and the arguments for and against the rule to be highly debatable issues. Regardless of the merit of the respective positions concerning the collateral source rule, it is the opinion of the advisory committee that any potential benefits resulting from identification and prevention of double recovery are, in all likelihood, outweighed by the costs and complexities encountered in altering the collateral source rule. Accordingly, the advisory committee recommends against modification of the collateral source rule. The remaining sections of this report address the costs and other areas of concern associated with modification or elimination of the rule.

ADDITIONAL LITIGATION COSTS

Modification of the collateral source rule will require the development of evidence in regard to a number of new issues. The number of new issues will vary with the particulars of the rule modification involved.

Naturally, it will be necessary to present evidence as to the admissible collateral source benefits. Presenting evidence as to benefits already paid or received may not create too much difficulty. However, greater difficulty will be encountered in developing evidence as to future benefits. As recognized by § 4 of 1987 S.B. 391, eligibility for future collateral source payments will become an issue. In regard to future health insurance benefits, the advisory committee was provided with the example of a disasterously injured child whose future medical care depends on the parents maintaining continuous medical insurance coverage. It was noted that eligibility for future benefits will likely be affected by the child reaching age 21 and not being able to acquire coverage for the preexisting injury, or by a change of employment for the child's parents with resulting new "waiting periods" and exclusions. Eligibility for and the extent of future, governmental collateral source benefits would also appear to be an area which would invite a fair amount of conjecture and speculation.

Evidence as to subrogation and other obligations to reimburse collateral source benefits will also be required. Under S.B. 391, this would occur at the pretrial conference. If

the approach taken in K.S.A. 60-3403 is followed, evidence as to subrogation rights and liens must be developed and presented to the jury.

Costs paid or to be paid in the future to secure a collateral source benefit also become an issue. Again, the cost of future benefits such as health insurance would seem to involve a fair amount of speculation. S.B. 391 speaks of amounts paid by the claimant or by anyone on behalf of the claimant. It is arguably unclear whether or not this includes such items as that portion of the health insurance premium paid by the employer. Another issue in regard to costs of securing collateral source benefits concerns the period of time to be applied in considering such costs. S.B. 391 directs the judge to determine the relevant time period for considering such costs and to instruct the jury that the damages awarded must include the costs of securing collateral benefits. A logical basis for determining the relevant time period is not readily discernable by the advisory committee. K.S.A. 60-3403 is silent as to the relevant time period and makes the issue of costs a matter for jury consideration.

The development of evidence as to collateral benefits and the costs of securing such benefits, particularly as to future benefits and costs, would require the utilization of expert witnesses such as providers of collateral benefits, economists and actuaries. It would be necessary to depose these expert witnesses with a resulting increase in trial preparation costs, attorney fees and expert witness fees.

There are also costs in terms of time and inconvenience as to those persons who are needed as witnesses for the purpose of developing evidence as to the new issues injected by modification of the collateral source rule.

Finally it might be noted that the increased costs resulting from modification of the rule cause the risk of closing the courthouse doors to injured persons with few, if any, resources.

COMPARATIVE NEGLIGENCE

Professor Concannon has articulated for the legislature and the advisory committee the perceived injustice which will result if modification of the collateral source rule does not take into account the comparative negligence statute. Professor Concannon advocates that, if the collateral source rule is to be modified, collateral source benefits first be applied to that portion of the damages attributable to the claimant before any credit is given to the tortfeasor. His position is based on the theory that collateral source benefits are intended to compensate the claimant's losses and there is no double recovery until the combination of collateral benefits and damages awarded against a tortfeasor exceed the total damages suffered by the claimant.

In understanding the differing results reached depending upon whether the (A) collateral source rule is retained, (B) the rule is abolished or (C) Professor Concannon's approach is taken, it might be helpful to consider the following example: $50,000

in total damages; plaintiff 30% at fault; defendant 70% at fault; plaintiff receives collateral payments of $20,000 in the form of health insurance benefits.

COMPARISON OF RESULTS

	(A) Collateral Source Rule	(B) Abolition of Rule	(C) Professor Concannon's Approach
Total Damages	50,000	50,000	50,000
Deduction of Benefits Under (B)		20,000	
Defendant's Share of Damages	35,000 (70% of 50,000)	21,000 (70% of 30,000)	35,000 (70% of 50,000)
Deduction for Excess Benefits Under (C)			5,000 (Collateral Benefits [20,000] Minus Plaintiff's Share of Damages [15,000])
Damages Awarded Against Defendant	35,000	21,000	30,000
Collateral Benefits Received by Plaintiff	20,000	20,000	20,000
Total Compensation Received by Plaintiff	55,000	41,000	50,000

(A) Under the collateral source rule, the $20,000 in health insurance benefits would not be considered in determining damages. $35,000 (70% of $50,000) would be awarded against the defendant and plaintiff would receive $20,000 in collateral benefits for total compensation of $55,000.

(B) If the rule is abolished, presumably the $20,000 in benefits would be deducted from the $50,000 in damages, resulting in an award of $21,000 (70% of $30,000) against the defendant. Plaintiff would receive total

compensation of $41,000 ($21,000 from defendant and $20,000 in health insurance benefits) and would bear an uncompensated loss of $9,000.

(C) Under Professor Concannon's approach, damages would initially be determined without reference to the collateral benefits. Defendant's share of the damages would be $35,000(70% of 50,000) and plaintiff's share would be $15,000 (30% of $50,000). The collateral benefits would first be applied to plaintiff's share of the damages, leaving $5,000 to be deducted from defendant's liability which would accordingly be reduced to $30,000. (It might be noted that under this approach, if there are multiple defendants, the "excess" collateral benefits would be applied to the defendants' liability in proportion to their respective percentages of fault.)

Again, Professor Concannon's approach is based on the concept that there is no double recovery due to collateral benefits until the injured person has been made whole. Apparently, there are those who believe that double recovery due to collateral benefits can occur prior to the time the injured person is made whole. They would argue that the defendant's percentage of fault should be applied to each item of damages and any collateral benefits should be applied to particular items of damages. Using the example above and assuming that the plaintiff suffered $20,000 in medical damages and $30,000 in other damages, the argument would be that the defendant is responsible for $14,000 (70% of $20,000) in medical expenses and since these have been compensated by the plaintiff's health insurance, the defendant's ultimate liability is 70% of the non-medical damages (70% of $30,000 = $21,000).

If there is a double recovery due to the collateral source rule in the example cited above (and a majority of the advisory committee is not convinced that there is), Professor Concannon's

approach is more reasonably related to the basic purposes of tort law; deterrence and compensation. Deterrence (prevention of injuries), requires that the defendant pay for the damages caused by the defendant's negligence. (It should be remembered that under our system of individual fault, the defendant is not asked to pay more than those damages attributable to his or her fault.) Before departing from this principle of deterrence and responsibility on the part of the defendant, Professor Concannon's approach would require that the other basic principle of the tort system, compensation of the injured person, be met by making the injured person whole.

Under our comparative negligence statute, the injured person must bear as a loss those damages attributed to an immune, unavailable, unknown or insolvent defendant. For the purpose of making the injured person whole, collateral source benefits should be applied to such damages as well before any credit is given to the tortfeasor from whom recovery can be obtained. It would be illogical to apply collateral source benefits to damages attributable to the fault of the plaintiff and not to apply such benefits against losses the plaintiff must bear due to no fault of his or her own.

There is the practical problem, however, of identifying insolvent defendants at the time damages and percentages of fault are determined. The following example attempts to illustrate the ramifications of this problem: $50,000 in damages; D_1 (Solvent Defendant) 40% at fault; D_2 (Insolvent Defendant) 30% at fault; plaintiff 30% at fault; plaintiff receives $22,000 in collateral

benefits. Without considering collateral benefits, the respective shares of damages would be: D_1 - $20,000 (40% of $50,000); D_2 -$15,000 (30% of $50,000); plaintiff - $15,000 (30% of $50,000). The logical extension of Professor Concannon's approach to double recovery would result in collateral benefits first being applied to losses which must be borne by the plaintiff (in the example, the damages attributable to the plaintiff and the insolvent defendant) before any credit is given against the liability of a defendant against whom recovery can be made. In this example, the collateral benefits ($22,000) do not exceed the damages attributable to the plaintiff and insolvent defendant ($30,000). Consequently, there would be no reduction in the liability of D_1. Plaintiff would receive $20,000 from D_1 and $22,000 in collateral benefits and would suffer an uncompensated loss of $8,000 ($50,000 damages minus $42,000 compensation). If the insolvent defendant cannot be identified, there would be "excess" collateral benefits of $7,000 ($22,000 in benefits minus $15,000 in damages attributable to plaintiff). These excess benefits would be applied against the liability of the defendants in proportion to their respective percentages of fault. The liability of D_1 would be reduced by $4,000 (4/7 of $7,000) to $16,000. The liability of D_2 would be reduced by $3,000 (3/7 of $7,000) to $12,000. Plaintiff would receive $38,000 in total compensation ($16,000 from D_1; 0 from D_2 since D_2 is insolvent; and $22,000 in collateral benefits) and would bear an uncompensated loss of $12,000. As can be seen, the failure to identify insolvent defendants and apply collateral benefits to the share of damages

attributable to such defendants will result in the appropriation of collateral benefits by solvent defendants before the injured person is made whole.

WORKERS' COMPENSATION

When workers' compensation is payable because of injuries for which a third party may also be liable, the injured worker has a right to receive workers' compensation and also pursue a remedy against the third party [44-504(a)]. In the event of recovery against the third person, the employer or the employer's insurer is subrogated to the extent of compensation and medical aid provided by the employer [44-504(b)]. The employer's subrogation right is diminished by the percentage of the damage award attributed to the negligence of the employer [44-504(d)].

Under S. B. 391, workers' compensation benefits are admissible unless the claimant makes a showing at pretrial conference that there is an obligation to reimburse. In any case in which there is a recovery against the third party, there will be an obligation to reimburse the employer. However, the extent of the obligation is not known until the jury determines percentages of fault. The fact that workers' compensation benefits are included in the list of potentially admissible collateral sources would seem to indicate that S.B. 391 envisions informing the jury of the amount of such compensation which is not subrogated and having such unsubrogated portion deducted from the award. It appears impossible to tell the jury the amount of unsubrogated

workers' compensation benefits since that cannot be determined until the jury has heard the case and determined percentages of fault.

Workers' compensation is intended to be a substitute, exclusive remedy for injuries arising out of the employment relationship. It is not intended to be a substitute for damages caused by a negligent third party. By way of example, assume a case in which claimant suffers $100,000 in total damages and receives $30,000 in workers' compensation benefits. Assume further that at trial, the employer is found to be 50% negligent and the third party 50% negligent. Under the present law, the claimant would receive $65,000 ($50,000 damages from the defendant plus $30,000 workers' compensation minus $15,000 due to the employer's subrogation right). The third-party tortfeasor pays $50,000 and the employer has, in effect, paid $15,000 in workers' compensation. As to that portion of the claimant's damages attributable to the employment relationship, the claimant has received the appropriate, proportionate amount under the exclusive remedy of workers' compensation. As to that portion of the claimant's damages attributable to the negligence of a third party, the claimant has also received the appropriate amount. There is not a double recovery. Due to the fact of subrogation, an injured worker can never be made whole, much less receive a double recovery, due to workers' compensation benefits.

However, if Professor Concannon's approach to identifying double recovery is followed, it would be appropriate to consider the unsubrogated workers' compensation benefits along with other collateral source benefits in determining whether or not the claimant has been made whole.

PERSONAL INJURY PROTECTION BENEFITS (PIP)

When personal injury protection benefits are payable under circumstances creating a legal liability against a tortfeasor, the payor of the benefits is subrogated to the extent that duplicative personal injury protection benefits are provided. This right of subrogation is reduced by the percentage of negligence attributable to the injured person. (K.S.A. 40-3113a) Under S.B. 391, the same problem exists with PIP benefits as exists with workers' compensation, in that the amount of the benefit which is subrogated cannot be determined until percentages of fault are allocated. This appears to be another situation in which there is arguably no "double recovery" since the PIP insurer is subrogated to the extent that tortfeasors are negligent.

REDUCTIONS FOR COLLATERAL SOURCES

Under the approach taken in K.S.A. 60-3403, it is up to each individual jury to determine (1) if collateral sources will be deducted from awards, (2) whether the cost of securing collateral benefits will be added to awards, and (3) whether subrogation rights or liens will be taken into account in rendering awards.

This approach leaves each individual jury in the role of balancing the delicate policy elements that surround proposals calling for abolition of the collateral source rule and of determining whether subrogation rights will be given proper recognition and effect. Whether the policy of modifying the collateral source rule is to prevent double recovery or to reduce damage awards for the purpose of lowering certain liability insurance costs, the approach taken under 60-3403 would seem to undermine the likelihood that the policy will be consistently applied. Professor Concannon has noted that, under such an approach, the predictability needed to impact insurance rates is lost. Where subrogation rights exist, the provider of the collateral benefits is entitled to reimbursement out of any damages awarded against a tortfeasor. Consequently, there is no double recovery. The approach taken in 60-3403 appears to needlessly create the risk that a particular jury will misapprehend the nature and effect of subrogated interests.

Senate bill 391 does direct the jury to deduct collateral source benefits, to include in awards the cost of securing the benefits, and does theoretically, keep the jury from considering subrogated collateral source benefits. However, due to the complexity of the issues and the interplay with the comparative negligence statute it does seem more reliable to allow the jury to determine total damages, percentages of fault, the amounts of collateral source benefits, and the costs of securing those benefits and then allow the judge to make the appropriate calculations and deductions.

The prejudicial impact of introducing evidence as to collateral source benefits would seem to be akin to that of introducing evidence of insurance on the part of the defendant. Some advisory committee members prefer that deductible collateral source benefits be spelled out with sufficient particularity to allow the judge to make the appropriate deductions without the necessity of presenting evidence to the jury. Other committee members expressed doubt that certain factual questions as to collateral source benefits and the cost of such benefits can be avoided or handled in such a manner.

ECONOMIC IMPACT

Under S. B. 391, to the extent that admissible collateral source benefits exceed the costs of securing those benefits, tort feasors and their insurers are relieved of liability. Theoretically, the costs of the tortfeasor are reduced and there is a benefit to the producers and consumers associated with the tortfeasor's activity. This savings will be offset to the extent that there are additional litigation costs associated with the injection of collateral source issues.

On the other hand, claimants who were entitled to receive admissible collateral source benefits will receive less total compensation. To the extent that collateral source benefits are admissible, actual damages resulting from the activity of the tortfeasor will not be attributed to that activity. Theoretically, this will result in decreased deterrence and a misallocation of resources. Under the approach taken in K.S.A. 60-3403,

there is the added dimension that juries may not render awards sufficient to reimburse subrogated interests. (To the extent that this happens, claimants are receiving even less compensation and tortfeasors are realizing an even greater reduction in their liability.) To the extent that subrogated collateral source benefits are not reimbursed, the costs of such benefits would theoretically increase.

As a practical rather than a theoretical matter, it is uncertain what impact modification of the collateral source rule would have. Certainly, some claimants would receive less total compensation. As to the impact on liability insurance premiums, there is little evidence to work with. In past legislative hearings, representatives of the insurance industry have been reluctant to state that modification of the collateral source rule will result in any reduction in liability insurance premiums. However, the actuarial consultants to the Kansas Insurance Department did estimate that elimination of the collateral source rule modification contained in K.S.A. 60-3403 would result in a 5% increase in the total liabilities subject to funding by the Health Care Stabilization Fund in fiscal year 1987/1988.

It was suggested to the advisory committee that individual claimants may be able to lessen the impact of modification of the collateral source rule by voluntarily entering into pretrial subrogation agreements with providers of collateral benefits. Under S.B. 391, such agreements would prohibit evidence of and deductions for the collateral payments covered by the agreements.

It was also suggested that unions and large self-insured employers might similarly contract away the effect of S.B. 391 as part of collective bargaining.

CONSTITUTIONAL ISSUES

Two statutes modifying the collateral source rule in the area of medical malpractice have been before the Kansas Supreme Court and both have been held unconstitutional as violations of equal protection. Wentling v. Medical Anesthesia Services, 237 Kan. 503 (1985) (violates equal protection clause of both U. S. Constitution and Kansas Bill of Rights); Farley v. Engelken, 241 Kan. 663 (1987) (violates equal protection clause of Kansas Bill of Rights). However, in the more recent case of Farley, the concurring and dissenting opinions (representing five of the justices) indicate that modification of the collateral source rule does not affect a "fundamental" right, the rational relationship test should be applied in equal protection challenges to legislation modifying the collateral source rule and modification of the collateral source rule in all tort cases would not violate the equal protection clauses of either the Kansas or the U. S. Constitutions.

Nonetheless, the advisory committee does not believe that the constitutionality of legislation modifying the collateral source rule in all tort cases is assured. First, the Farley decision did not determine whether or not modification of the collateral source rule violates § 18 of the Kansas Bill of Rights (due process clause) which provides that "All persons, for

injuries suffered in person, reputation or property, shall have a remedy by due course of law, and justice administered without delay. Second, modifications of the collateral source rule may still be subject to equal protection challenges based on any internal distinctions such legislation might make in regard to collateral benefits that will or will not be considered. In this regard, while the concurring opinion in Farley did indicate that the rational basis test would be appropriate in any equal protection challenge, the opinion did include the statement that "Equal justice requires that all who are injured by another's negligent act have an equal right to compensation from the negligent tortfeasor, regardless of any classification that the legislature has attempted to impose."

CONCLUSION

It is the opinion of the advisory committee that modification of the collateral source rule will result in a significant increase in litigation costs. Furthermore, assuming there is double recovery due to the collateral source rule, modification of the rule should (1) take into account the effect of comparative negligence, (2) properly address partially subrogated collateral benefits such as workers' compensation and PIP benefits, (3) exclude consideration of subrogated collateral benefits and (4) assure that appropriate reductions for collateral benefits are made from damage awards. Both S.B. 391 and the approach taken under K.S.A. 60-3403 contain deficiencies in regard to these matters. Modification of the rule will

result in reduced compensation for a number of injured persons and will theoretically have an adverse impact on the deterrent effect of the tort law in exchange for an uncertain impact, if any, on the cost of liability insurance. Accordingly, the advisory committee recommends against modification of the collateral source rule.

"APPENDIX A"

JOE KNOPP
MAJORITY LEADER

STATE OF KANSAS

TOPEKA

HOUSE OF
REPRESENTATIVES

ROOM 381-W, CAPITOL BUILDING
TOPEKA, KANSAS 66612-1591
(913) 296-2302

January 13, 1987

Honorable Justice Robert Miller
Kansas Judicial Council
Judicial Center
Topeka, KS 66612

Dear Justice Miller:

The Special Committee on Tort Reform and Liability Insurance requests that the Kansas Judicial Council study the issues of modifying or eliminating the collateral source rule and instructing juries about the taxability of awards. The committee did not have the time or expertise to thoroughly research the implication of these propsed changes.

The Special Committee would appreciate the Judicial Council's consideration of this matter.

Yours truly,

Joe Knopp

Representative Joe Knopp
Chairman
Special Committee on Tort Reform
and Liability Insurance

JK/pas

"APPENDIX B"

Session of 1987

SENATE BILL No. 391

By Committee on Ways and Means

3-18

AN ACT concerning civil procedure; concerning certain evidence; repealing K.S.A. 1986 Supp. 60-3403.

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

Section 1. As used in this act:

(a) "Claimant" means any person seeking damages in a personal injury action, and includes the heirs at law, executor or administrator of a decedent's estate.

(b) "Collateral source benefits" means any of the following benefits which were or are reasonably expected to be received by a claimant, or by someone for the benefit of a claimant, for expenses incurred or reasonably expected to be incurred as a result of the occurrence upon which the personal injury action is based: (1) Any benefits received as a result of any medical or other insurance coverage, or any benefit in the nature of insurance coverage, except life or disability insurance coverage; and (2) any workers' compensation benefit, military service benefit plan, employment wage continuation plan, welfare benefit program or other publicly funded benefit plan or program provided by law.

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

(d) "Personal injury action" means any action for personal injury or death.

Sec. 2. Evidence of collateral source benefits received, or evidence of collateral source benefits which are reasonably expected to be received in the future, shall be admissible in any personal injury action, except as provided in section 3.

Sec. 3. As a condition precedent to presenting evidence of

any collateral source benefit pursuant to section 2, the party against whom claim is made in any personal injury action shall make disclosure of such evidence at a pretrial conference. Upon such disclosure, the claimant shall be allowed an opportunity to show that an obligation exists to reimburse the person or entity which has paid or will be paying such collateral source benefit from any damages awarded in such action. The claimant shall specify in such showing the amount of any such obligation. If the court determines that there is an obligation to reimburse any person or entity, the court shall order that any evidence of the receipt of such collateral source benefit shall not be admissible.

Sec. 4. When evidence of a collateral source benefit is admitted pursuant to section 2, the claimant may present evidence of the cost of such benefit, and may present evidence whether the claimant or claimant's parents, guardians or other responsible persons with a custodial interest in the claimant will likely remain eligible for such payments. Such evidence of such cost or eligibility for such payments may cover whatever period of time is found by the court to be reasonably related to securing the collateral source benefit obtained.

Sec. 5. In any case in which evidence of the receipt of any collateral source benefit is admitted, the jury shall be instructed that such evidence, together with the evidence of the cost of the collateral source benefit shall be considered by it in determining the amount of damages sustained by the claimant. The jury shall further be instructed that the damages awarded shall not include any amounts paid by collateral source benefits; however, the award shall include the cost of securing the collateral source benefit. In trials to the court, the court shall make similar findings.

Sec. 6. The provisions of this section shall apply to any action pending or brought on or after July 1, 1987, regardless of when the cause of action accrued.

Sec. 7. K.S.A. 1986 Supp. 60-3403 is hereby repealed.

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

60-3403. Evidence of collateral source payments and amounts offsetting payments; admissibility; effect. (a) In any medical malpractice liability action, evidence of the amount of reimbursement or indemnification paid or to be paid to or for the benefit of a claimant under the following shall be admissible: (1) Medical, disability or other insurance coverage except life insurance coverage; or (2) workers' compensation, military service benefit plan, employment wage continuation plan, social welfare benefit program or other benefit plan or program provided by law.

(b) When evidence of reimbursement or indemnification of a claimant is admitted pursuant to subsection (a), the claimant may present evidence of any amounts paid to secure the right to such reimbursement or indemnification and the extent to which the right to recovery is subject to a lien or subrogation right.

(c) In determining damages in a medical malpractice action, the trier of fact shall consider: (1) The extent to which damages awarded will duplicate reimbursement or indemnification specified in subsection (a); and (2) the extent to which such reimbursement or indemnification is offset by amounts or rights specified in subsection (b).

(d) The provisions of this section shall apply to any action pending or brought on or after July 1, 1985, regardless of when the cause of action accrued.

History: L. 1985, ch. 197, § 3; July 1.

Tort Reform Issues
RECORD OF MINUTES
VERBATIM
February 25, 1988
Transcribed by the Kansas Bar Association

House Floor Debate:

Rep. Knopp: Mr. Speaker, I move the House resolve itself into a committee of the whole for the purpose of considering those items under the heading of General Orders.

Speaker Braden:You've heard the motion. All those in favor say "Aye", opposed "Nay", the motion is adopted. The Chair appoints for the purpose of presiding over the Committee the gentleman from McPherson, Rep. Sprague.

Chairman Sprague: Good morning everyone. I trust that today's work will be very productive and kept in a very organized fashion. The first order of business will be HB 2731. I recognize Rep. Wunsch.

Wunsch: Thank you very much, Mr. Chairman. There were amendments to the bill I would move we adopt the committee report.

Chair: All those in favor indicate by saying "Aye", opposed same sign, motion carried. You may proceed.

Wunsch: Thank you Mr. Chairman. HB 2731 is the third time around for punitive damage action in the area of tort liability. The first time we passed a bill which was really Section 1 of this bill I just call your attention to Section 1 of the bill. It is an identical reproduction of the medical malpractice punitive bill that was passed a couple of years ago. The only distinction in Section 1 is that it says that that bill and its provisions terminate July 1, 1988.

The second section of the bill is a reprinting of the punitive damages action that we passed last year dealing with all other tort liability other than medical malpractice. And it's just repeated as Section 2 verbatim except that it says that it expires as of July 1, 1988. The third section of the bill, and that is the important section beyond July 1, 1988, basically reprints Section 2 with the inclusion of medical malpractice being combined with all other tort liability. The reason for doing that is because of the following decision this past summer which said that we cannot separate tort liability classes but must treat them all together.

Thus Section 3 combines medical malpractice with all other tort liability and suggests that all tort liability will now come under the punitive damage language of Section 3 which is basically a reiteration of Section 2 which was the punitive damage act that we passed last year. As a review for you, the bill that we passed last year places a cap on punitive damages of $5 million or 100% of the wrongdoer's annual income, the greatest of which was over the last five years, or if profit was intended to be made by the wrongdoer's action it can be 1 1/2 times the anticipated profit to be derived by the wrongdoer from his or her punitive action.

Att. IV

The bill also, as both bills did in prior years, bifurcates the hearing. The jury makes a decision that punitive damages are appropriate in a particular case. With that determination once made by the jury, then the judge would have a hearing independent of the jury and decide on the amount of punitive damages that would be attributable to the action. So it's a bifurcated hearing and that bifurcation was in both bills that we passed in prior years.

The bill's Section 3 provides criteria for the judge to use in determining the amount of the damages. The reason we used last year's punitive damage bill over the medical malpractice bill was, in my opinion we'd had two or three years to work on this bill and the criteria that we inserted in the 1987 enactment were better than that which we addressed in the medical malpractice punitive damage bill of the year before. It seems to work a little bit better. That's basically what the bill is. It was amended in committee and there will be amendments offered today to adjust or change those committee amendments, but let me discuss with you for a moment what those committee amendments did. We provided that at the time of the initial filing of a lawsuit no longer could you plead and claim punitive damages. Under the present system, you file a lawsuit and you allege that you are entitled to actual damages in excess of $10,000, and at some point in time you're probably going to have to express those actual damages in an exact amount greater than the overall generalization of $10,000. But you also come along and allege a pending action against the wrongdoer. And experience dictates that oftentimes the punitive allegation is not one with which the plaintiff really intends to prevail, but is used often as an intended club to generate a settlement in these cases.

The settlement is generated by reason of the fact that a doctor or whoever is being sued cannot insure himself from liabiilty in the area of punitive damages. You cannot buy insurance to protect yourself against punitive damages. Therefore, if an allegation is made that you are guilty of punitive damages, the insurance company will advise you that they cannot defend you on that because you have no coverage. You then will generally make the demand on the insurance company at some point that you want that case settled within the policy limits of the actual damage so as to rid yourself of the possible liability of a punitive damage verdict. You make demands on your own company to get rid of the case, because you don't want to have to go to the trouble of defending yourself and having the exposure of your own assets to the punitive damage claim.

That's the intended reaction at the time of the filing of the petition by the plaintiff. The plaintiff hopes to get you in that position so that this will be the club that will be used to provide a settlement for the client case. Therefore, in addition to that it has over the past proven to be an embarrassment to any defendants to be accused of having engaged in punitive action when really everybody knows or has a good idea that there is no proper punitive allegation in that case. You can always say that the plaintiff can be acused of filing a frivolous claim. Let's say you can't prove that the plaintiff's claim was frivolous, but it was there and used sort of as a club and it is also used as an embarrassment because when the press picks up the filing of this petition, the press always says that punitive damage was an element of the petition, which it should, because that's what the petition reflects.

That's an embarrassment to many defendants who know that their actions were not punitive. At the time settlement occurs, or a verdict occurs, the public very seldom knows that there was no punitive part involved in the settlement, but they remember that the doctor or the nurse or the other defendant had been sued for punitive damages and they assume there was some punitive action on the part of the defendant as the result of there being a settlement. We'll take the immediate sting out of the filing of a petition for punitive damages if we delay the allegation of punitive. And that's what the amendment suggests should happen. That if, in the trial of a lawsuit, after it's once filed, it is discerned that there are certain elements of the case that will justify a punitive damage claim to be filed you come in and ask the judge for permission to amend your petition and make allegation of the punitive part of the claim. The judge finding a substantial probability that that element exists will allow you to amend your petition. That way we get rid of the up front embarrassment on many occasions we get rid of the up front club and we still have an opportunity for the plaintiff to engage in proper seeking of punitive damage recovery. That's one of the amendments to the bill.

There are some time frames in which that motion for amendment must be filed. There will be amendments that are going to address that time frame, so I will not go into them at this point. And await the passage or defeat of those various amendments that will address the time frame that's in this bill.

We also have changed the definition of some of these respects of punitive damage. Wanton conduct has previously been an element under which you could assert a punitive damage claim.

It was the opinion of the committee that wanton conduct is oftentimes misunderstood or the public and the juries really don't understood the word wanton and even though they read the description of it they think it is more in terms of an ordinary negligence situation and were fearful that they might engage in granting punitive damages within the wanton conduct element that really don't deserve punitive damage awards. So we have stricken the words "wanton conduct" and the definition that follows. We have added words of actions which are despicable in nature. The committee felt that use of the word "despicable" was more understandable with the public than the use of the word "wanton". Whatever is despicable to you and me, we pretty well know that we despise something from happening. We think, the committee thinks, that we can understand what we despise better than what we are asked to determine to be wanton. I dare say many of us know the definition of "wanton", but probably every one of us today knows what we despise. And that's the reason we're putting in the element of despicable conduct in lieu of wanton conduct. Those are basically the changes that were made by the committee in amending this bill. Otherwise the bill is exactly like we passed it last year dealing with other tort liability automobile cases slip and fall. Section 3 takes effect July 1, 1988, when Sections 1 and 2 no longer are effective. So up until July 1, 1988 we have the existing punitive damage law in effect. After July 1, 1988 we have the new punitive damage enactment taking place encompassing all elements of tort liability. I think Mr. Chairman that pretty well explains the bill, and I would yield to Rep. O'Neal for an amendment.

Chairman Sprague: Rep. O'Neal.

O'Neal: I have a short amendment, Mr. Chairman. I'll just have the clerk read it.

Chairman Sprague: The clerk will read.

Clerk: On page 6 by striking lines 218 through 220 and inserting: On or before the date of the pretrial conference held on the matter.

Chairman Sprague: Do you wish to explain?

O'Neal: Thank you Mr. Chairman. What this amendment does, it addresses some of the concern we had in committee that we were not able to resolve by the amendments that were offered in committee. As Bob explained, we have a procedure where punitive damages, a claim for punitive damages would now be claimed by way of an amendment to the pleadings after the case has been filed. Currently the bill has in it a claim that that claim for punitive damages be made within two years after the date that the case is filed and not less than nine months before the date the matter is first set for trial. There are probably some inequities in that particular time frame, although that is current law in at least one other state. To alleviate that particular problem, what this amendment would do is say as long as you make your claim or call your motion requesting a claim for punitive damages by the pretrial conference that that would be sufficient. The court can then rule on that at the pretrial conference that the claimant's going to come in and if the parties are going to need a little additional, the court can grant it. So this alleviates some of the problems that were addressed in having a claim on file for a while. The plaintiff maybe doesn't discover or realize that there are reasons for filing a claim until after the two-year period of time. So I believe this is a friendly amendment. I stand for questions.

Chairman Sprague: Rep. Solbach.

Solbach: I commend you for bringing this amendment down. It does make the problem a little bit better. I support your amendment and urge everyone to vote for it. It takes out a procedural glitch that could deny someone their right to recover punitive damages based upon the court's schedule and nothing else, without regard to the merits of the claim or anything else and I'm glad to see you offering it. I have an additional amendment that I would like to offer that would insert the words in there "without good cause" saying that the court shall not grant a motion without good cause allowing for this if the motion is made after the pretrial hearing so it would still allow a judge to grant this motion if there was good cause shown why it wasn't made before the pretrial hearing. It's your motion that's on the floor, my motion I think fits in with yours and I just came down to tell you I think yours is certainly an improvement and I will support it.

O'Neal: Thank you John.

Chairman Sprague: Are there any further questions? Seeing none, you may close.

O'Neal: I move my amendment, Mr. Chairman.

Chairman Sprague: You've all heard the motion. All those in favor indicate by saying "Aye". Opposed same sign. Motion carried. Mr. Solbach.

Solbach: I would offer an amendment Mr. Chairman that fits in with the amendment that was just passed. It amends the same paragraph but it doesn't amend the language that Rep. O'Neal struck out or inserted. It merely allows the judge to allow a motion for punitive damages or motion to amend for punitive damages to be granted if there is good cause to show why that motion was not made prior to the pretrial hearings. There are a number of reasons that it might not have been made before then. The pretrial hearing might have been scheduled very early in the case, it may have been scheduled before any discovery was done. The discovery of the intentional or the despicable conduct might not occur until after the pretrial hearing. The judge with this amendment would still deny any motions to amend that were brought to the court after the pretrial hearing unless the plaintiff could show good cause as to why the motion was not filed before the pretrial hearing. It leaves some discretion with the court so that we don't work an arbitrary hardship or injustice upon someone who has a meritorious case. I would agree with Chairman Wunsch that this procedure helps to build fairness into the law. I don't agree with all of this punitive damages bill, but I think this procedure with Rep. O'Neill's amendment and with this amendment does build fairness into the law and protects both the plaintiff and the defendant. I'd be happy to stand for questions on the amendment that I'm offering. I'd ask that a reading be waived unless if I've explained it sufficiently in the eyes of the chairman.

Chairman Sprague: Is there any objection to waiving the reading of the amendment? I see none. Are there any questions on the amendment? Rep. O'Neal.

O'Neal: John, I appreciated the support on my amendment. I do have a concern about yours, and I'll state it, and we'll just leave it up to the body to decide. The difference between, the reason why we want to have the issue of punitive damages resolved one way or another in terms of whether it's going to be a claim to the petition or not ____ pretrial conference is that if there's going to be a claim for punitive damages there is a potential new attorney going to be in that case. If a punitive damage claim is raised then the plaintiff is going to have the opportunity to have independent counsel on that issue of punitive damages because the insurance counsel does not have coverage and is not representing the plaintiff on that particular claim.

If we leave it open there's a chance that a new attorney will have to get involved in the case which will delay the case months and months while he is getting up to speed. If we can identify, and all our claims should be identified by the time of the pretrial conference, then if that motion is granted you have time between the pretrial and the date of trial to get new counsel if new counsel is going to be in-

volved into the case and get prepared. And so for that reason I think we need a definite cutoff date and I think the pretrial conference is the clear date and for those reasons only I would oppose the motion.

Solbach: Would you stand for a question yourself if the chair will allow me? Mike, at a pretrial conference is it not the practice to set up the discovery process and put deadlines for discovery?

O'Neal: No, that's a discovery conference, John. A pretrial conference is a different subject. Often at pretrial conferences there is still discovery that needs to be done and judges often will set times. Sometimes there's no discovery conference, but you merely have a pretrial conference and the judges will set six months or three months or nine months to get the discovery done, during which time new facts can come to light.

Solbach: Is that not possible?

O'Neal: It is. The difference is, John, the distinction I was making is those amendments made at a pretrial conference usually do not involve the addition of new parties or new litigants or new attorneys that have to get involved in the process. This one would.

Solbach: OK. I'd like to emphasize that--well, I'll speak to that later on. Is there any other questions?

Chairman Sprague: Rep. Wunsch.

Wunsch: I'll just call attention to the body that John's scenarios are unending and when things could and could not happen and in most instances if not all instances, his scenarios are merely examples of when something might need to be done, but in general they're not going to happen. And we've extended through this amendment of Rep. O'Neill's the time for filing these motions up to the day of the pretrial. The pretrial is the time when the judge says, "What amendments do you have to your pleadings?" And if there are any amendments then they should be offered, and in large cases that involve perhaps a punitive potential, that pretrial's going to be a long time after the filing of that initial case. The discovery, to a great extent, has been completed and it really begs the issue of suggesting that there should be another opportunity to file a motion at some future time. I really don't think we're cutting off any substantial rights. I think John's is just another pinhole that we don't need in the system. We've given an ample opportunity for the claim for punitive damage to arise, discovery has occurred, and in all due respects to Rep. Solbach and his equitable approach to most everything, I would urge the body to reject the amendment.

Solbach: And just how much respect am I due, Mr. Chairman?

Chairman Sprague: Well, Chairman Wunsch, do you wish to close?

Wunsch: Uh, yes if there are no further questions.

Solbach: Chairman Wunsch and I often disagree and I note in committee that he is often wrong, and I think I would disagree with some of the things he has said down here, but his comments also contained some arguments and some facts and some points that were true and I think what he said was more true than not true and I realize that this is a process of compromise and quite frankly he has convinced me somewhat that although my amendment would have been more important if O'Neill's amendment hadn't gone on, it is less important because Mr. O'Neill's amendment did go on, so that in the interest of fairness and compromise and settling for half a loaf, I'm going to withdraw my amendment if my colleagues in the legislature will consent to that action.

Chairman Sprague: Does anybody want to dissent? Seeing now the motion is withdrawn. Are there any furthers? The Chair recognizes Rep. Roy.

Roy: Thank you very much, Mr. Chairman. I have an amendment which I wish to offer.

Chairman Sprague: Do you wish to have it read? The clerk will read.

Clerk: On page 5 in line 175 proceed _____ ____ by inserting "wanton conduct." On page 8 by striking all lines 282-305. On page 9 by striking lines 306 and 307, in line 308 by striking 7 and inserting "6"; also in line 308 by striking 60-3401. In line 310 by striking 8 and inserting 7 in the title in line 20 by striking 60-3401.

Chairman Sprague: Would you care to explain?

Roy: Certainly. I'll be happy to explain. I have noticed this morning we seem to have probably the greatest degree of attention we've had from this body on any issue this year, and that's commendable and it's also very important inasmuch as these may be among the most important policy decisions that this body addresses this year.

This particular amendment speaks to the types of conduct for which punitive damages may be awarded. Under current law, those types of conduct are willful conduct, wanton conduct, fraud or malice. As Chairman Wunsch explained to you, this bill strikes "wanton" conduct and replaces "wanton" conduct with "despicable" conduct. This particular amendment would restore "wanton" conduct. I do this for a number of reasons. The first reason is the term "despicable" is defined nowhere in Kansas law. By striking "wanton" and inserting "despicable" in the short term what this body is doing is something it is attempting to avoid today, and that is increased litigation. We're going to be seeing a lot of lawyers across the street willing to give their opinions to the court of what constitutes despicable conduct. There's also the question as to whether or not by substituting "wanton" for "despicable" we are tightening up the definition under which punitives may be awarded or loosening the definition. There are various types of instances that constitute wanton conduct.

It should be kept in mind that under the common law we also allow punitive damages for fraud, fraudulent and intentional torts. This bill keeps those. We also allow punitive damages where there is

malice in the form of intentional tort. This bill retains that. But for conduct where the person may not be specifically identified or where the conduct may be reckless disregard, this bill may strike obtaining punitive damages in those instances.

The "wanton and reckless" standard was developed in the common law for that type of negligence where there is no specific harm to an identifiable person, but where the conduct itself, if carried out, will cause harm in violation of the public's general right or safety.

Now you've heard the legal side of it. You say, "What are some examples?" Examples would be an intoxicated driver. A drunk driver. We have dozens of bills every year, and this year is no exception, where we want to get tough with drunk drivers. When someone becomes intoxicated and places himself behind the wheel and rolls on down the road, and causes injury to another, they then have acted recklessly, with indifference about what their intoxicated state may produce.

By removing "wanton" we may be removing any barriers under civil liability to that kind of behavior. You may say, "Well, we're going to tighten the criminal statutes and we'll take care of those folks anyway." We may be tightening the criminal statutes with regard to drunk driving, but we're not filling up our state prisons and we are not filling up our county jails with drunk drivers. As a matter of fact, the common response is diversion, which leaves no criminal penalty whatsoever. And if an injured party that might seek restitution under criminal remedies has available no criminal remedy because of diversion. The remedy then becomes civil law. To make an example of that drunk driver, or to punish that drunk driver, for their behavior, punitive damages become the remedy. And wanton conduct covers that sort of punitive behavior. I would stand for any questions.

Chairman Sprague: Are there any questions? Rep. Wunsch.

Wunsch: Thank you Mr. Chairman and I don't have any questions, but I do have a comment to the body. I would urge the body not to buy the argument that the "despicable conduct" that we have in the bill suggests that anybody can get away with being drunk and causing an accident if punitive damages are a part of that activity.

Despicable is certainly that which happens when a drunk driver hits someone. It says that if you are despicable, if you're carrying on your conduct with a willful, and if you drank and got yourself drunk, you've certainly intoxicated yourself willfully, and conscious disregard for the rights of others. A drunk driver does not enjoy immunity from his conscious actions by virtue of being drunk. He is treated as if he were sober because he cannot beg off by saying he was drunk and those were not his conscious actions. What he does in a drunken state is what he is expected--he has the same standard of care as if he were sober. And if he willfully intoxicates himself and he consciously drives and causes an accident he comes within the definition of "despicable conduct" which I think you and I better understand when we say "despicable" than when we say "wanton".

And don't be afraid of passing or defeating this amendment that you have done anything to relieve a drunk driver from any claim for anything. I urge you to defeat the amendment.

Chairman Sprague: Are there further questions? Seeing none, you may close.

Roy: Thank you very much. Again, one is a defined term within Kansas law. We are being asked to throw out years and years of case law to define that term and utilize it in instances of drunk driving, possibly in instances of someone not securing a dangerous animal, say a pit bull terrier, of instances, possibly, of toxic chemical contamination of ground water. There are three points really I think it's important to leave with you when we discuss why are we changing punitive damages in the context of insurance difficulties. It's said to change this is partly the answer to address rising insurance costs. I'd like to make three points on that. Punitive damages are not insurable, punitive damages are not insurable, punitive damages are not insurable. This particular bill will in no way affect insurance costs.

I think it's important to retain the standards that we have, that we not open up interpretation of punitive damages to a whole new course in body of case law and litigation and I ask for your support of this amendment.

Chairman Sprague: You've heard the motion. All those in favor indicate by saying "Aye". Opposed same sign. The "No's" appear to have it. The division has been called for, the clerk will open the roll and you may cast your vote. Has everyone had an opportunity to vote who wishes to vote? The roll is still open. The clerk will close the roll and take a tally. 53 for, 69 against. The motion fails. The Chairman recognizes Rep. Adam.

Adam: Thank you Mr. Chairman. I have an amendment. It's short, so perhaps the clerk could read it.

Chairman Sprague: The clerk will read, please.

Clerk: On page 6 in line 213 by striking "substantial".

Chairman Sprague: You may explain.

Adam: If some of---if you all were listening to Bob when he said the initial explanation, uh, he said to you that the procedure to be used now when you want to file to be able to receive some punitive damages is that you have to file an amended pleading after you file your initial pleading you have to go back and file later. In the language that we use in this section the court is asked to make a determination on that amended pleading in regard to the punitive by deciding if there is a substantial probability that the plaintiff will prevail.

In the committee there was some discussion about what "substantial probability" meant. I think there was a general feeling that we didn't want to make this a unusually stiff burden on the plaintiff. We just wanted some kind of threshold that they would have to meet in order to be able to say that there will be punitive possible. What I've done here is take out the word "substantial" and I've done it for several reasons. One reason is I think it's confusing. This language exists nowhere else in our statutes and I think that it's going to be

just left up to the particular judge to decide what that language means.

In some cases they may use a less standard and in others they may use a greater standard. But I think it's going to be confusing and I think it's going to cause inequities across the state. I've had my secretary look up the word "substantial" and these are some of the meanings that it has in the dictionary: of or having substance; material; not imaginary; real; solidly built; ample; sustaining; considerable in amount, etc. I think you can see that there is a diverse group that they could choose from. The other reason I've offered this amendment is more substantial, if I could use that expression, substantial reason is I think there is a question about the constitutionality of doing that for the following reason. We have the 7th Amendment in our federal Constitution which requires that a person has a right to a jury trial.

In the Kansas Constitution it's in Section 5 of the Bill of Rights and it says "the right to trial shall be inviolate; cannot be compromised". I think if we put this language in there we are saying that the judge has the right to make a critical decision about something that really belongs to the jury. And I think to ensure that we're not getting into a constitutional problem here we should take out the word "substantial". So I would appreciate your support on this amendment.

Chairman Sprague: Are there questions? Rep. Wunsch.

Wunsch: Thank you Mr. Chairman. Rep. Adam convinced me before she got to her constitutional arguments so I won't comment on that. I think she has a good amendment. We did debate it in committee. We couldn't come down on anything, but if you'll look at the bill _____ line 213 clearly removes the word "substantial" still leaves the task of the judge to find that there's a probability that the plaintiff will prevail. Probability in my opinion is sufficient and it doesn't need to be the word "substantial" in there so I would rise in support of her motion. To amend.

Chairman Sprague: Are there further questions? Seeing none, you may close.

Adam: Once again, this would just remove the word "substantial". It will make it more clear I think to the court. It will be more uniform application of this statute and I think it clears up what could be constitutional problems. With that I urge your support.

Chairman Sprague: You've heard the motion, all those in favor indicate by saying "Aye". Opposed same sign. Motion carries. Are there further questions on the bill? Seeing none, Rep. Wunsch, you may close.

Wunsch: Thank you Mr. Chairman. I--

Chairman Sprague: Hold it, hold it. We do have another one. I'm sorry. Rep. Adam again.

Adam: I do have another amendment.

Chairman Sprague: Do you wish the clerk to read? The clerk will read.

Clerk: On page 9 after line 307 by inserting new Sect 7: This act shall not apply to any claim in Chapter 61 of the Kansas Statutes Annotated and by renumbering the remaining sections accordingly.

Chairman Sprague: You may explain your amendment.

Adam: This relates to the small claims statute that we have in our statutes, Chapter 61. In that statute, some of you I know are familiar with that, you can file a claim for a small amount. You can also ask for punitives if you can make a case for that. The total amount of award has to be $5,000 or less. That includes both your actual damages, what you actually lost, say because somebody did something to you and it become a punitive thing that you would punish the person for it because they deliberately did something to you they shouldn't have. Then in most cases that can only result in an award of $5,000.

What this amendment does is just take that chapter out of this whole issue so that you would still be allowed to have a punitive damage if you can convince the judge of that. This small claims chapter allows a quick kind of way to get some recovery.

Often it takes less than nine months because there's kind of a quick discovery process and you don't go through the same more lengthy process you do if you go through a full jury trial. This amendment means that this is a quick method of resolving disputes will still be available for plaintiffs without the amendment I think plaintiffs with small tort claims must use Chapter 60 where the costs are more long and there's a more extended procedure. Are there any questions?

Chairman Sprague: Are there any questions? Rep. Wunsch.

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Tape Change

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Wunsch: . . . $5,000 be under the same construction as any claim because you cannot exceed the cap. If we pass your amendment you're going to be dealing in different definitions of punitive damages because we have just changed some of the elements if we pass this bill of punitive damage and Chapter 60 and we intend for it to apply in Chapter 61 and if her amendment goes on then we have different definitions of punitive damages, one for 61 and one for 60 and that should not happen. And with a cap of $5 million certainly being sufficient to cover the $5,000 cap within Chapter 61 I really don't see any good reason for her amendment and without seeing a good reason--she's going to withdraw?

Adam: Bob has convinced me that this is not going to be subject to this anyway so I will withdraw so we can maintain our very agreeable disposition here today.

Wunsch: Thank you.

Chairman Sprague: Is there objection to withdrawing the amendment? Rep. Solbach.

Wunsch: Apparently there is an objection.

Solbach: I'd like to ask a question. So I see what you're doing. This would put the definition of drunk driving back under the definition of conduct under which someone could be sued for punitive damages back under the common law definition for Chapter 61 cases?

Adam: I don't know.

Solbach: Does anyone know?

Chairman Sprague: What was the answer? Rep. Wunsch, would you be into that question? So that doesn't make that change?

Adam: I believe not.

Solbach: On the strength of Ed Rolfs' testimony I'll withdraw my objection.

Chairman Sprague: Thank you, Rep. Solbach. Do I see any further objection to the withdrawal of the amendment? Seeing none, it is withdrawn. Are there any further questions on the bill as a whole? Rep. Charlton.

Charlton: Rep. Wunsch. Do you believe that the passage of this bill will stem the rise in the cost of liability insurance?

Wunsch: Stem the rise. No.

Charlton: Do you--

Wunsch: But it will grant a peace of mind to the doctor or the nurse that we have done something to help them in the punitive area which they are uninsured-able-about.

Charlton: Then I think you've answered my second question, do you believe that passage of this bill will reduce premium costs for liability insurance.

Wunsch: It would be nice if it did, but the probability of it is probably more possible than probable.

Charlton: Thank you.

Chairman Sprague: Further questions on the bill? Rep. Baker.

Baker: Thank you. I don't serve on a judiciary committee, so I'm not always aware of all the testimony that everyone else has been apprised of, so about a week ago I called Rep. Wunsch's office and asked for some testimony that had come through the committee on both sides, but I could kind of see who out there was for and against it and have a real-

ly better understanding of what was happening here. One of the groups that showed some great deal of concern with this piece of legislation were the environmental groups and in asking around I came upon a case that might have some interest to you. It occurred out by Lyons, Kansas. It was some farm land, the apples from out there was contaminated with salt by a salt company. The farmers all went together and filed a suit. They were compensated in the range of $2-$3 million for their losses. The judge in the case ordered the salt company to clean up that land. He gave them the time frame of 18 months or something to do so. The company did nothing. They sat on their hands and refused to clean up this apple firm. As a result of that the judge put $10 million punitive damage award on them. The test for damages in farm land is loss of rental value. Punitive damages is the only way that we have to place control on any company that comes in and does that kind of thing.

The other area that I kept thinking about was this area of abusing our natural resources here in our state. Hazardous wastes as you all know are transported back and forth across this state by out-of-state companies constantly. With the enactment of this kind of legislation, they would almost be able to come through our state with hazardous waste and dump it anywhere with impunity. Let me read you some of the totals of hazardous wastes and materials that are transported. The Chemical Manufacturers' Association estimates that the chemical industry produces more that 250 million tons of materials annually, most of which are hazardous. According to the Fertilizer Institute, 16 million tons of one type of hazardous material, anhydrous ammonia, are used each year in the production of inorganic fertilizers. Perhaps the most chilling statistic in this area, however, concerns energy related products. The Department of Energy estimates that 16 million barrels of petroleum are consumed every day in the production of gasoline, fuel oil, jet fuel, and other petroleum products.

These are only a few of the thousands of hazardous materials transported in the course of the country's daily business. Materials often refined and transported several times before finally reaching their destination of ultimate consumption. And they're trucked right across the state every day. Yesterday in economic development we heard a bill, HB 2908, that deals with the use of gaming funds for preservation of our natural resources. What I'm saying to you right now is that if we enact this legislation we're going to have to put a lot more money into preservation of our natural resources than has ever been suggested by HB 2908. I want you to consider that very hard before you vote on this bill.

Chairman Sprague: Is there anything further on the bill? Seeing none, you may close, Rep. Wunsch.

Wunsch: Thank you, Mr. Chairman. In response to Rep. Baker, let me suggest to you that we did talk to members of the Sierra Club about their concerns in connection with the intentional aspects of the other punitive damage bill that was introduced in this legislature and we assured them that we did not intend to the extent possible to have a bill that came out of this committee, our committee or out of this House that had intentional in it as the only element for punitive damages. We told them the language we were going to use. We asked them to

review it and get back with us if they had any concern about the language of "despicable" and doing away of "wanton". We never again heard from them.

I think they came as the result of fliers that had been sent out in connection with the environment and we welcome them there in our office because we had not thought of that aspect. But not hearing from them again suggests to me that they are satisfied with what we are doing and we've got a bill in here that says one and a half times of the amount of profit that might be earned by a company in its actions. So if a company does something of a nature that Rep. Baker is talking about and it exceeds damages of $5 million by virtue of the profit that they gained from their actions, the award can be one and a half times that profit. So we think we've got it pretty well covered and with that Mr. Chairman I move that when the committee arise that it report HB 2731 as amended favorable for passage.

Chairman Sprague: You've all heard the motion. All those in favor indicate by saying "Aye". Opposed same sign. Motion carries.

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Debate on HB 2692
Limits on Noneconomic Loss

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Chairman Sprague: For the purposes of hearing HB 2692 the Chair would recognize Rep. Snowbarger and I would also like to thank the body for its attention. You've been doing an excellent job today.

Snowbarger: Thank you, Mr. Chairman. HB 2692 is the cap on noneconomic damages. I would just for those who have not read through the bill yet let me explain why it's as long as it is. Section 1 of the bill is the cap on noneconomic damages and on economic damages that was contained in HB 2661 which we passed out in 1986. The change that's made in that section has to do with when that would sunset. We will sunset that provision as of July 1, 1988. It would not be used for positive action after that point in time.

Section 2 of the bill is the provision that we passed last year for pain and suffering damages, the limitation on pain and suffering damages, for other personal injury accidents besides medical malpractice. Again the only change in that section is that we sunset that as of July 1, 1988. For all positive action occurring after that point in time we would use new Section 3, and that's really the heart of the bill. New Section 3 applies to all personal injury actions accruing on or after July 1, 1988. That's not actions BROUGHT on or after July 1, 1988, but accruing before that point in time. They might be brought after July 1, 1988. The bill provides for a limit of $250,000 on noneconomic damages.

Noneconomic damages include pain and suffering, disability, disfigurement, loss of consortium. In new Section 3 and the section that will become law as of July 1, 1988 there is no cap on economic damages. No cap on loss of income. No cap on expenses that arise out of the injury. No cap on medical care, nursing care, special equip-

ment, special supplies. The only cap is on the noneconomic damages pain and suffering, disability, disfigurement, loss of consortium. With that Mr. Chairman I stand for questions.

Chairman Sprague: The Chair recognizes Rep. Vancrum.

Vancrum: Mr. Chairman I've got an amendment. I think I can explain it.

Chairman Sprague: Is there any objection to waiving reading of the amendment? Seeing none, you may appear.

Vancrum: Mr. Chairman, members of the body. As you may recall, I have now over a couple of years risen in opposition to placing an overall cap on noneconomic damages. I've got a confession that I'll be brief here, but I've got a confession that about fifteen years ago I was a trial lawyer. About eight years ago before I came up here I was a tax lawyer. Now I don't know what I am.

But in any event, pain and suffering is one element of noneconomic loss but noneconomic loss includes a number of other elements that I'd like to focus on just one minute. If you limit noneconomic loss generally, you're also putting a limit on the jury's ability to award damages for such things as disability, disfigurement, and there are I suppose some cases of mental anguish.

By and large the overwhelming percent of the awards, I believe this is held out to be statistically true, for noneconomic loss or in the pain and suffering category. I support limiting pain and suffering but I cannot support eliminating the other elements of noneconomic loss.

Now let me tell you just very briefly, because all of us I'm sure would come down somewhat differently on this. I'll tell you how I distinguish between the two. Pain and suffering is in the category of damages and I've seen jury cases where the plaintiff's counsel will come in and make a very eloquent and very logically correct argument, about how much is an appropriate amount for one hour of this person's going to feel for the rest of their lives and then go down to a minute and a second. The plain fact is that you can never adequately compensate for pain and suffering. And therefore I can see some kind of an arbitrary cap or arbitrary limit.

I think that disability and disfigurement is a considerably different deal. To say that a person who has been rendered a quadriplegic because of the negligence of a driver because of the wanton recklessness of an individual or because in fact of an intentional act, that person's been rendered a quadriplegic and is going to be disabled for the rest of their life, I think a jury should be able to distinguish in their award between that and pain and suffering damages.

It's for that reason that I offer an amendment that very simply changes noneconomic loss to pain and suffering with regard to all positive action with the exception of a medical malpractice which we handled previously. Thank you.

Chairman Sprague: Are there questions on the amendment? Rep. Sebelius.

Sebelius: Thank you Mr. Chairman. I rise in support of this amendment and I know that this area sometimes is very confusing because it's all lumped in noneconomic loss and that seems very intangible to people, and I wanted to give you just two cases that were tried in the last six months in Kansas which kind of illustrate the point that Rep. Vancrum is making. One was a case of a nine-year-old boy who stepped off a school bus and was hit as he was crossing the street by a speeding driver who passed the school bus.

The boy was in a coma for three or four weeks and suffered all kinds of injuries, but in addition he had suffered some severe scrapes and burns and went through a procedure which is very much like a burn victim's so he got in the scrub tank and they took him off his arm will be withered and never grow again and he has severe recurring pain all the way down his spinal column which he will have for the rest of his life. In that situation there is a great deal of distinction between disability and disfigurement which he will suffer in the loss of the use of his right arm and the way it looks and the pain he has suffered. Those are two very different elements and I suggest that by capping this kind of noneconomic cap you have cut off a significant recovery for that child and the ability that he might have to use some specialized equipment to have a full and productive life. The other cases were product liability cases dealing with a plastic molding machine in a factory in north central Kansas. This machine has some severe problems and now has been removed from the factory, but prior to its removal three different workers suffered a similar injury. Their hand is caught in the production machine, mangled, burned and very badly damaged.

All three of these workers went through a series of procedures trying to save their hand and all three ultimately lost their hand. The hand had to be amputated and again I would point out that in their situation there is lost wages, there is a medical bill, there is a certain amount of actual damages. But those people suffer lifetime disability and disfigurement from the loss of an important bodily part that's separate and apart from the pain of the procedure and the lifetime of pain that they will share, so I urge you to support this amendment. I think that those people who feel that pain and suffering should have a cap because it's an arbitrary figure might want to support the bill as is, but these are very different elements and by applying the cap across the board I think you would really cause significant problems to all kinds of injury victims in Kansas.

Chairman Sprague: Are there further questions on the amendment? Rep. Snowbarger.

Snowbarger: Mr. Chairman I'd just like to make a few comments about the amendment. What we're doing here with the tort reform measures is trying to state for the state of Kansas a public policy that is going to make awards in personal injury cases hopefully a little more predictable, hopefully a little more stable. That's a difficult thing to do. We're all faced with the extreme cases that come up, bad things that happen to people, but what we're dealing with in this bill are the kinds of things that are extremely difficult to put a monetary value on in the first place. How much is the loss of a hand? How much is the

withering of an arm? It's difficult to put money damages on that. How much is a scar worth?

In all of those situations we're dealing with things that aren't very susceptible of putting a dollar figure on them and therefore they are unpredictable. If you come with an extremely sympathetic case in one situation, either because of the way it happened or who it happened to, you may get a real high award on disability or disfigurement.

The same situation with a less sympathetic plaintiff, you might get a lower award. All we're trying to say is that the upper end, and very frankly this upper end does not affect very many cases at all. We don't know exactly how many cases because we haven't had itemized jury verdicts long enough. We put that into effect last year. We're talking about things it's difficult to place a value on.

Yes, it's difficult to say what dollars pain and suffering is worth, but it's just as difficult to say, with any measure of success, what a disability is worth. What disfigurement is worth. What loss of consortium is worth. We've already done this in other parts of our law. In our worker's compensation law. We tell you what the loss of an arm is worth. We tell you what the loss of a finger or toe is worth. And you're paid that amount. That's all you get. We've chosen as part of public policy in the state of Kansas to put limits on that. We're here arguing today about the disability disfigurement pain and suffering of those who remain alive.

We haven't shown that same concern for those who die. In a wrongful death accident, for these same noneconomic damages, it's $100,000. That's what your life is worth, $100,000. And yet here we're saying for $250,000 we're trying to compensate for all the rest of these. And I think that's a fair amount. I'd like to suggest to you also that changing this from noneconomic damages to pain and suffering opens a tremendous loophole in this law. If your intention is to try to put limits on those noneconomic injuries that are not very well measured in money value, you're opening up a tremendous loophole here if you just put pain and suffering.

Both the speakers before me tried to indicate to you that if you've got a disability, we're not compensating you for that. That is not true. We have not limited the economic damages done to you by that disability. Those workers who couldn't operate the same machine in the same manner because they lost a hand, we're compensating them for that. The person that loses their leg in an automobile accident and can no longer play football or baseball as a special athlete, we're compensating them for that. That affects their ability to earn their income and we are compensating to the full value of economic damages.

I suggest to you that the other component of disability and disfigurement is exactly what we are trying to cap under pain and suffering, but it comes in under another name. We call it mental anguish. How does mental anguish differ from pain and suffering? How does mental anguish differ from the suffering part of that? Maybe we can distinguish it from the pain. I suggest to you that it's a way around the cap in situations where you're at a disability or disfigurement case. It's my estimation that we limit this only to pain and suffering and we don't put any cap on that mental anguish aspect of this. It really defeats the purpose of the bill. One other thing I'd like to point out to the body.

In HB 2661 the cap that was placed in that bill was on noneconomic damages. It was not pain and suffering, it was not economic damages. When you voted on that two years ago, on the floor of the house you voted 99 to 24 for noneconomic damage cap. When it came back from conference committee, the vote was 113 to 10. We have voted for this before, and we have recognized the value of that limitation on noneconomic damages as opposed to pain and suffering, and I urge your support for the noneconomic concept and defeat of this amendment. Thank you.

Chairman Sprague: Rep. Solbach.

Solbach: Vince, would you yield for a question or two? You compared what we are doing here to worker's compensation. The worker's compensation system is the worker's compensation system a fault-based system?

Snowbarger: No.

Solbach: Are you advocating that we go to a no-fault system in the area of medical malpractice and other liability claims?

Snowbarger: Not yet.

Solbach: If you go to a doctor and you take your child to a doctor and the doctor performs the correct procedure correctly but your child still has a bad result, how much can your child recover if the doctor committed no negligence?

Snowbarger: Nothing.

Solbach: What if you're at work and you're injured at work because of your own mistake and your employer was not negligent? Can you recover in that instance?

Snowbarger: Are you indicating that it's negligence as opposed to intentional conduct?

Solbach: I'm talking about an employment related injury that is your fault, not your employer's fault. Can you recover under your employer's worker's compensation insurance carrier, even though it's your fault?

Snowbarger: I'd have to yield to those who do more work in the worker's compensation area. I think there's some intentional injuries I could cause myself that might not be compensable.

Solbach: An accident that is your fault. Well, I'll answer your question.

Snowbarger: Why don't you answer your question the way you'd like me to answer it, but don't put me in--

Solbach: OK. I've got a couple more questions for you if you would. I think you know that in a worker's compensation situation you don't

have to prove fault. Everybody gets compensated. It doesn't make any difference who's fault it is. In medical malpractice or in any other liability situation a person is not entitled to damages simply because they were injured. They have to prove that they wouldn't have been injured except for the negligence of someone else. So your worker's compensation comparison is invalid. They're totally separate systems. We're not advocating that we go to that kind of system in medical negligence. It would be far more expensive in medical malpractice premiums and other premiums would be far higher if we went to such a system. Vince,

Snowbarger: I'm sorry, John. I didn't hear the question on that last one so I thought you were done.

Solbach: Well, you asked me to answer it, so I did.

Snowbarger: I don't think so.

Solbach: How much data do we have that shows what pain and suffering or noneconomic awards are in Kansas? Do we have any statistics that tell us that?

Snowbarger: Well, I indicated to the body in I think my last remarks that we don't have good data on that yet because we just put in the itemized jury verdicts either last year or the year before and those statistics are not yet available to us.

Solbach: Do you think that we might want to wait until we see if there's a problem before we fix a problem that might not be there?

Snowbarger: Are you asking me if I think we ought to wait?

Solbach: Yeah.

Snowbarger: No.

Solbach: OK. Do you have any evidence that we have a problem here of excessive verdicts in the area of noneconomic damages or pain and suffering?

Snowbarger: I think the large awards that have been issued in some of the medical malpractice cases include a large portion of noneconomic damages in them and we have seen in other states--California, Indiana--they've been able to hold down premiums. Particularly in Indiana where they've got a $250,000 cap. I believe it's $500,000 cap overall in Indiana.

Solbach: Would such a cap be constitutional in Kansas under the most recent district court decision?

Snowbarger: Not yet.

Solbach: Do we have--

Snowbarger: We haven't had any Supreme Court decision on caps.

Solbach: We have had the Supreme Court gather data on jury verdicts in Kansas. Do you recall what their conclusion was?

Snowbarger: I don't believe they've--. They've indicated there's not a problem, I believe.

Solbach: That's right.

Snowbarger: But it was not done based on the itemized jury verdicts over a long period of time. It includes only a very few of the catastrophic cases that we're having to deal with and insurance companies are going to have to deal with these, have to deal with the possibility of a large number of verdicts.

Solbach: OK. This morning I heard on the radio that the Supreme Court has thrown out an award they granted to Jerry Falwell for $200,000 in noneconomic damages I believe. But that was only for mental anguish. He wasn't disfigured, he wasn't burned over 60% of his body, he wasn't disabled. I would just make a couple of points. We don't have any data; we're gathering that data currently, to see what awards are for noneconomic damages.

The data that we have on overall verdicts in this state indicates that Kansas is not a state where excessive verdicts are being rendered.

I have asked, in the four years that I have served on the Judiciary Committee, the special interim committee on tort reform, and the special committee on medical malpractice, for the proponents of tort reform to bring back one case where they believe there was an excessive verdict, and that excessive verdict was out on appeal. Just one case. One Kansas case so that we would know that one exists so that we would know what one looks like. So that we could look at the components of that case and see why it was excessive. To see why the jury awarded more money than the injured person was entitled to.

In the four years that I've been asking for that one case, just one case in Kansas, no one has brought forward one single case where they could make that claim and substantiate that claim. The cases that potentially would have fit into that category were reversed on appeal or they were denied in some other way, or the verdict was reduced. And the research that's been done by our Supreme Court in looking at the jury verdicts that were rendered in Kansas in the last two years show conclusively that we do not have an excessive verdict problem in Kansas. Those verdicts were very reasonable. We hear about million dollar awards or multi-million dollar awards and we think to ourselves, gosh that's an awful lot of money. We say to ourselves, how could anyone possibly need a million dollars to take care of themselves in a personal injury case?

Ladies and gentlemen, we are currently spending in Winfield State Hospital, on 368 children down there, an average of $70,000 a year apiece. Those children have a life expectancy of 10 years. The State of Kansas, given inflation and the medical price index, the State of Kansas is going to pay out over $1 million for each one of those children.

For those who have a life expectancy of 20 years, the State of Kansas will pay out nearly $5 million, and for those with a life expectancy of 30 or 40 years, State dollars going for the care of one of those children will exceed $10 million actually paid out. Now when we reduce that to current value it's not that much. But these injuries that are being paid are real injuries. They are not hypothetical and they are not based on excessive jury verdicts.

There is no evidence in Kansas that we have excessive jury verdicts and the evidence that we have indicates there are not excessive jury verdicts. On the issue of pain and suffering we have no data at all. Thank you for your kind patience.

Chairman Sprague: Rep. Shriver.

Shriver: Thank you Mr. Chairman. I'll rise in support of Rep. Vancrum's amendment. I want to clarify that this is Rep. Vancrum's motion before us. This is the same amendment that Rep. Vancrum and I had drafted on previous legislation last year before this body. I think it's always been overwhelmingly supported by both sides of the aisle. It's the fair thing to do and we should support Rep. Vancrum's amendment. Thank you.

Chairman Sprague: Any further questions on the amendment? Seeing none, you may close, Rep. Vancrum.

Vancrum: I apologize for this going on so long, except I think it is a very important issue. I just want to make two points in closing. An argument has been made that, you know, remedying these types of damages, a loss of a hand, or disfigurement, is no different than is done in worker's comp. Well, there is one big difference. We made a decision a number of years ago, most states in this country did, that for worker's comp damages we were going to cut off the right to a jury trial. We were going to put statutorily in law what the amount would be and we eliminated all the discussions as what if somebody was at fault or not.

Now, we haven't done that with regard to all negligence cases and I hope to God we never do. The right to a jury trial is precious in this country, and no one is suggesting that we go to a statutory "this is all it's going to be" type approach.

Except that if you put a limit like this on damages such as disability and disfigurement and you apply it to all cases of neglignece and intentional harm, you have taken the issue away from the jury in many cases.

The argument has been made that all these damages are in essence speculative and hard to determine. Ladies and gentlemen, that's why we have juries. That's why we have people just like you and I and just like the public at large sitting in determination of what the damages ought to be. If my amendment passes and all we're talking about is pain and suffering I am prepared to vote for this bill as I have always voted for limiting pain and suffering. If not, my vote is and will be No. I ask you to vote Yes for this amendment.

Chairman Sprague: You've heard the motion. All those in favor say Aye, those opposed No. Ayes appear to have it. Division has

been called for. Open the rolls and cast your vote. ... Close the roll and take the tally. 75-42 against, the motion passes. Rep. Charlton.

Charlton: Can you answer my simple question, again, Rep. Snowbarger. If we pass this bill do you think it will reduce the cost of liability insurance?

Snowbarger: Over the long run, yes.

Charlton: Over the long run. You're telling me that you think it will not only stop the premiums from rising, but they will be reduced?

Snowbarger: I think it is so out of hand we have no quick fix available. I think over the long period of time this will bring stability to the tort system.

Charleton: Thank you.

Chairman Sprague: Any further questions? Rep. Barr.

Barr: I have a question. Under current law, if there is a big claim the judge feels is excessive, does the judge have the right to make that claim lower?

Snowbarger: He has the power to do so, yes.

Barr: So if we are having excessive claims in Kansas . . . I guess I should ask do you think we have excessive claims in Kansas?

Snowbarger: I think there have been some, yes.

Barr: Why haven't the judges taken their power to reduce the claims?

Snowbarger: I'll try to recall, I think it was when we were having the medical malpractice interim in 1985, we had judges come to us and indicate in our hearings they were reluctant to do anything different than what the jury said. And therefore they did not use the power they now have.

Barr: Could it be the judges didn't think . . . think the verdicts were excessive?

Snowbarger: I'm glad you didn't stop there.

Barr: Well that is my next question--

Snowbarger: that Judges didn't think--

Barr: Yeah.

Snowbarger: I don't care to comment on that. One of the problems with 'excessive' is the standard is it shocks the conscious of the court. Not whether beyond reasonable, but whether it shocks the con-

scious. That's a pretty high standard. That's why judges are going to be reluctant to say juries have gone so far beyond it shocks the conscious.

Barr: But we still have a current law that allows them to do so--

Snowbarger: If they cared to, but they don't care to.

Barr: Ok. Are we on the bill as a whole?

Chairman Sprague: Yes.

Barr: One other question. On this cap down here, the million dollar cap, in line 31.

Snowbarger: Right.

Barr: If somebody is making a salary of $500,000 per year, this would cap it; they could only receive a million dollars?

Snowbarger: That's correct, that's current law.

Barr: Okay. Thank you.

Chairman Sprague: Further questions on the bill as a whole? Seeing none, you may close.

Snowbarger: I just move that when the committee rise and report it report HB 2692 as amended favorable for passage.

Chairman Sprague: You've heard the motion. All those in favor say Aye, those opposed say No? Motion carries.

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Debate on HB 2693
Collateral Source Rule Change

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Chairman Sprague: For purposes of carrying HB 2693, the chair recognizes Rep. O'Neal. There were committee amendments.

Rep. O'Neal. Mr. Chairman and members of the body, HB 2693 is part of the tort reform package we have all talked about since 1985. It's the collateral source rule. It's an amendment to the rule we had at common law that evidence of damages paid by collateral source were not admissible. In 1985, in response to the medical malpractice insurance crisis, 86 members of this body passed changes in the collateral source rule.

In July of 1987 the Supreme Court, in the Farley decision, struck down a provision in that law on the basis not that the collateral source rule was bad but because it was not given uniform application to all other civil law suits. HB 2693 does a number of things and the first thing it does is it corrects the constitutional defect found to

exist that was identified by the Supreme Court. This bill would apply uniformly to all civil actions involving personal injury.

There has been much debate since 1985 about the application of the change in the collateral source rule. The second thing HB 2693 does is it addresses some of the legitimate concerns that were raised about the legislation we passed in 1985. HB 2693 is a better bill than 86 members of this legislature passed in 1985 in that it provides on the one hand predictability which is needed to determine how much effect this is going to have reduction of malpractice insurance; and on the other hand, it provides more liberality when it comes to compensating the plaintiff. It takes into consideration the effect of comparative fault and how comparative fault of the plaintiff and others who are not defendants effects what the plaintiff will recover and it compensates them for that and does not reward the defendant.

We received a great deal of help on this particular draft from Professor Jim Concannon, from the Washburn Law School, who appeared before our commmittee this year in support of a change in the collateral source rule. I will not read his testimony but it is here for anyone who wants to read it. He says there is a reason why we need to have a change now and that is because before the advent of insurance defendants were having to pay awards out of their own pocket and plaintiffs were having to pay for damages out of their own pocket unless they could get the defendant to pay them for them.

Now we have insurance that takes care of many of those needs; we have collateral sources. This bill makes it clear that collateral sources that have a subrogation interest attached will not be considered. We have also addressed the issue of giving the plaintiff credit to the extent that they have paid for that collateral source. So we have a definition in the bill for net collateral source benefits.

The jury considers what the collateral source payments were that caused the damages to be paid for, it disregards anything that would constitute a lien, it also deducts the amount of any costs to the plaintiff for obtaining that collateral source and then the judge makes the application, makes the reduction only after applying the rules relating to comparative fault. I would be happy to go through some examples but I'm not sure the body as a whole really cares to hear all the examples.

Those of you that are interested in what your constituents are saying. Sixty-seven percent of your consituents polled statewide say that they want changes in the collateral source rule to prevent the double recovery that exists when a jury awards for damages that they thought were not paid that were in fact paid, and a prime example of that is BC and BS. We were told in committee of a case that was just settled in the Health Care Stabilization Fund where a million dollars of the settlement had already been paid by BC and BS and would not have to be repaid, so there was a one million dollar windfall that has very a direct impact on premiums. The questions asked if what we are doing here is going to have any affect on reduction of premium rates; this one has already been identified as one that impacts premiums and there have been premium reductions in past years on the benefit and on the faith that our 1985 legislation would be allowed to apply to cases. Unfortunately, even though the companies responded, the Health Care Stabilization responded, the Supreme Court struck that down and we have

not had the benefit of that law applying to one single case. We attempt to correct that problem in HB 2693.

Mr. Chairman, I know there will be questions concerning the bill and I would stand for questions at this time.

Chairman Sprague: Rep. Heinemann.

Rep. Heinemann. I have an amendment.

Chairman Sprague: Clerk will read.

Clerk: On page 4, by striking lines 123 and 124 and inserting in lieu thereof the following: causes of action accruing on or after July 1, 1988."

Heinemann: Thank you Mr. Chairman. This particular amendment, I think, follows what we've done in these other bills. In the other bills we made it quite clear that there is a starting date of July 1, 1988 and I think we could run into a serious problem in this particular bill if we don't include it.

The basic reason is that this bill deals with a substantive law change and that is the reason we have that starting point in all these other bills is that when you change the substantive law, you've got to have point in time certain. Traditionally, with a rule of evidence, you can change it and we are presuming that this is a rule of evidence and I contend, and I think others can contend very clearly, that this is a substantive change because we are affecting a legal right -- not a rule of evidence but a legal right -- as to what you can now collect from the defendant. I think we say it right in the bill in lines 99 and 100; that the amount by which the legal right to recover is limited be the application of this and that is clearly a substantive right.

The other reason, whether you buy a constitutional argument or not is just basically fairness, that we're changing the rules in the middle of the game as far as cases that are currently set maybe to go to trial. Beginning before July 1, you have a different rule than you do after. I think we run a risk that this could set back the reforms we are trying to pass here because it could be one more reason for a court to possibly say what we try to do here is not appropriate.

Chairman Sprague: Rep. O'Neal, on the proposed amendment.

Rep. O'Neal. Thank you Mr. Chairman. I wish I had known about the amendment because I think I could have saved some time. We had this question come up and we've asked the legislative research department to do the necessary research to answer that question for us... is there anything wrong with us putting it in the bill that would have application to cases that are already pending. What would happen, the legislative research department has given us three cases that I have here that I'd be happy to share, that if, for any reason, the court feels that it should have prospection application only; in other words, it should only apply to cases July 1, 1988 they will simply give just give it prospective application; they will not strike down the rule, we won't have to come back here and change it. We've got it set up now so that

if that one clause is not struck down, it would apply to the cases we want it to apply to in 1985. If it doesn't, the court will simply only apply it to the July 1, 1988 cases forward and we will kill two birds with one stone. The way it's set up right now takes care of that problem and I would urge you to vote down the amendment.

Chairman Sprague: Rep. Shriver.

Rep. Shriver. Thank you Mr. Chairman. I rise in support of this amendment. In the committee, I had quite a substansive amendment on the collateral source bill that is basically Professor Concannon's draft, that my motion covered several areas of the collateral source bill not just the starting date of July 1 as Rep. Heinemann is offering. That amendment was adopted by the Judiciary committee; they felt it was a fairer approach of what the bill we brought out was, however, due to a couple of people having to leave the committee, or one of them went to sleep I think it was... the motion to pass the bill out favorable with my amendments which were actually Professor Concannon's, did not prevail and the bill stayed in committee and made some other changes in it.

To me, the July 1 changing date was the most important part of the Concannon draft that is different from the bill here today. I had the amendment drafted to change it to July 1, 1988 and Rep. Heinemann also had one drafted and since he sits on one side of the aisle and I sit on the other, I thought it'd be much much better to have someone on this side of the aisle to offer the amendment. The important thing about all these tort reform bills we have up here before us is that I think it gave soul to the people that this is medical malpractice tort reform, it is not, it covers every facet of tort reform. Ninety percent of the major cases never get to trial; they are settled out between the attorneys for the defense and plaintiff and I beleive you're changing the rules by going back and picking up these cases that are already in the pipeline. I think it's only fair that they start because of the negotiation part of it that it start July 1 of 1988 and in cases filed from that point on. I urge your support of Rep. Heinemann's amendment; if it goes on, I will support the bill. Thank you very much.

Rep. Knopp. I must oppose Rep. Heinemann's amendment because it doesn't do exactly what Rep. Shriver just mentioned; it talks in terms of causes of action that accrue on or after July 1. So we aren't talking about cases that are filed, we are talking about causes of action that accrue which means that it may be two or three before a case is ever brought...maybe three or four years before a judgement is ever rendered before we'd have any position effect on the collateral source rule on judgements and therefor on rates.

On the other issues that have come before us, pain and suffering etc., I submit that there hasn't been actuary proof to show that they will have a significant impact. But on collateral source there is that significant proof; there is a track record. In 1985 when we passed it, it had an impact on rates and as the Health Care Stabilization Fund and the surcharge impose, as well as the primary carriers, I took that into account and saw that it would have an impact. Therefore, to the extent

that we are changing the rules in the middle of the game for a number of cases, I'm still willing to say that in order to get some immediate relief in the medical malpractice area. And therefore, I think this is a significant issue that you ought to look at very closely... to it's impact on medical malpractice and the soaring rates that we are seeing now. And to the extent that it may have a detrimental impact on a number of cases outside the medical malpractice area, I don't think it's unfair. The rule is unfair and changing the rules is unfair and therefore, I have no problem in doing it. I would urge that you defeat this amendment and vote no.

Rep. Whiteman. Thank you Mr. Chairman. I rise in support of the amendment. During all the debate on these bills today, I think there are two important pieces of information that you need to know as a Rep. to do a fair and just job on voting on these bills. The first piece of information was presented when we had the two representatives from the two medical malpractice insurance carriers who write insurance in Kansas and we cross-examined them thoroughly. The most one could say as far as what the package of these bills would do to reduce premiums was (one said) that maybe it might reduce the malpractice premiums by 5% but there was no guarantee that it would do it. So that the effect of these bills is going to be negligible upon reducing medical malpractice premiums. In fact, it's a situation where we are doing something without the correct information and I voted for Rep. Wunsch's amendment yesterday to do the study of the jury verdicts that would give us actual proof. But here we are marching towards tort reform two or three or four, whatever it is, and we still don't have any guarantees that any of these actions will actually reduce medical malpractice premiums. But the testimony in committee was the effect on premiums would be negligible; it will be less than 5% and yet we are making these massive changes. I support this amendment, I think it's fair and equitable to do that. The other fact you need to note is that the evidence in the committee hearing was that the one thing that is driving the jury verdicts is not the medical malpractice premiums. The one thing that is driving jury verdicts higher is the high cost of medical care and once we get a handle on the high cost of medical care, the $600 per day which is the average it takes to be hospitalized in the state of Kansas for every day you're in the hospital, when we get a control on those hospital and health care costs, then we will have a significant impact on the insurance premiums that are being paid. Until we do that, what we're doing here on the floor of the House today, is going to have a negligible effect on malpractice premiums. Because of that testimony in committee, I'm supporting this amendment because I think it would make it fair and equitable and I would request that you support it also.

Rep. Wunsch. Thank you Mr. Chairman, I was running an errand for Rep. O'Neal to get some of those cases that we found that the Supreme Court suggested to leave the bill as it is is not an improper way to approach this subject. I rise in opposition to the amendment because we just as well try to take advantage of the collateral source laws as they were passed a few years ago because the premiums were paid upon the strenghth of those laws in affect. Those cases are now pending should the Supreme Court conclude that this bill is a matter of substance, not procedure and suggests that we must start the bill from a

collateral source aspect from its publication in the statute book and we can't deal with pending claims, they will merely say so. They will not throw the bill out from a constitutional standpoint. We'll have the bill just as the amendment now suggests but to defeat the amendment is to give us an opportunity and the fund an opportunity to deal with those cases now pending under the collateral source law as we previously passed it in the medical malpractice world. Therefore, I urge you defeat the motion.

Rep. Vancrum. I rise in support of the amendment having supported this in committee. Let me tell you though that I didn't support it in committee because I'm opposed to what Rep. Wunsch and O'neal are trying to do; my concern is strictly a concern that this is going to be viewed as a substantive change and that if you try to apply it to causes of action that are currently out there, that are accrued, injuries that have occured, that you're going to just simply get struck down again. I will support the amendment.

Rep. Solbach. Thank you Mr. Chairman. I don't see how anyone could possibly view this as something other than a substantive bill. It is a rule of evidence but this rule of evidence in cases where there are collateral sources will make sure that those collateral sources cannot be used by the plaintiff to offset his costs of litigation so that he can at least walk away from the courthouse having been made whole and having received the verdict the jury gave him. It's going to reduce his jury verdict in every single case and it's going to insure that he does not receive the full verdict that the jury gave him. That is substantive. Some of his medical costs will be taken away and some of his other actual damages will be taken away in every single case where there are collateral sources; that is substantive.

Rep. O'Neal. I hadn't planned to speak on this again but after the comments by Rep. Solbach, I think we need to set the record straight. The collateral source bill that you are considering does not reduce awards by collateral sources in every single case. There will be many cases in which the collateral source because of adjustments made for comparative fault the plaintiff will be made whole because there was comparative fault applied to either the plaintiff or other parties. I challenge Rep. Solbach on that and I would not have spoke unless he came down here and made that statement. It does not apply that way. I encourage him to read the bill closely.

All we are doing with this particular bill, in the form that it is in, and there is no liability in doing that, is we are trying to have effect given to the laws we passed in 1985. The only reason they were struck down is because the court said they did not apply to all cases; not that there was something wrong with the collateral source rule. They denied it on equal protection grounds. What we're providing is an opportunity for the court to say, when they look at this bill, O.K., you've cleared up the problem; it applies to all cases and now we will start putting into effect the tort reform legislation that you passed in 1985. If they don't do that and they say you can only make it apply July 1, that's fine; we don't have to come back here and change the bill. This is best straight up way of doing it. If you pass the amend-

ment today, you're simply wiping out any opportunity for the tort reform we passed in 1985 to have any effect on any of the cases already in the pipeline for 1985, 1986 and 1987.

Incidentally, someone asked about whether there was any impact; a representation was made that maybe there only about a 5% impact. Dani and Associates study, that all of you have available, said that as a result of the tort reforms we passed in 1985, 1986 and 1987 premiums were reduced by 21%. Unfortunately, the court has not allowed that to apply to one single case and therefore, we actually didn't collect enough premiums in 1985, 1986 and 1987. Have your doctors talk to you about that. Not only are they looking at increases for next year but they are looking at increases that would help compensate for what the court did not allow us to do in our legislation in '85, '86' and '87. That's dramatic. I oppose the motion.

Chairman Sprague: Further questions on the motion to amend? ... Seeing none, Rep. Heinemann you may close.

Rep. Heinemann. I think we've had a good discussion of the issue and I think it's quite clear that what we're dealing with is substantive law and with substantive law, we can't retroactively change it. Looking in the bill itself, it says the amount by which the legal right to recover was limited by this act. You have a fairness argument if you're changing it, we normally do it and set it up at a day one. I think this way this bill will not have to run through all of those extra constitutional problems that everything else has incurred. For that reason I move my amendment.

Chairman Sprague: You've heard the motion, all those indicate by saying Aye, no's the same sign. The no's appear to have it. Division was called for. ... The tally is 59 to 58. The motion passed. Back on the bill as a whole, the Chair recognizes Rep. Williams.

Rep. Williams. I don't have an amendment to offer, but I have some comments I'd like to make about the bill. I don't agree with the so called net or gross collateral sources. I don't put much faith in that survey that says 67% of the people in this state understand what collateral resources are; I don't think everyone in this House understands what collateral resources are so I don't put much faith in that survey.

I don't understand why a person plans ahead, pays a premium for an insurance policy and then something happens that they cannot collect. The proceeds from that policy for an incident that occured which is coverable under the policy. The medical society and others contend that the plaintiff receives a windfall or a double recovery when some of his medical expenses or loss of income are covered by insurance of one kind or another for which the plaintiff is paid either directly or indirectly.

I would contend that this bill would shift that so called windfall from the rightful owner to the tortfeasor by reducing his liability for the damages by the amount of the collateral resource. I think this is wrong; I think this is bad policy. When I must choose between awarding the innocent but prudent victim who has paid for or earned those collateral resources and the person or institution inflicting harm, then I will choose to protect the innocent victim. I think

the only amendment I could have offered that might have been helpful for this bill would be to strike the enacting clause.

Rep. Peterson. I would like to ask Rep. O'Neal some questions. Just like Rep. Williams said, I don't think a lot of people understand just exactly how collateral source works; if an automobile accident occurs and lets say there is 100% liability on the defendant, and the plaintiff has $10,000 in medical bills and $8,000 of those medical bills are covered by insurance and paid, what would be the procedure; would they be able to prove the $10,000 in medical bills or only $2,000?

Rep. O'Neal. It depends on whether or not the medical bills that were paid were subrogable or nonsubrogable. In other words, the jury is only advised of those damages that were paid for which the plaintiff has no obligation for which to repay.

Rep. Peterson. If it was just straight hospitalization not subrogated then the plaintiff would only be able to prove $2,000 of his/her $10,000 damages?

Rep. O'Neal. That's correct because $8,000 has already been paid by another source.

Rep. Peterson. O.K. So when the judge instructs the jury and uses the instructions in PIK 900, how will that instruction read--'you will be able to consider $2,000 in medical bills in arriving at your verdict or $10,000?'

Rep. O'Neal. The jury would be instructed on how to compute what a collateral source is and how to compute the deduction that should be made from that collateral source for the cost of the collateral source and they will be asked to say on the verdict form what the net collateral source benefit was. They will aslo be asked to tell us what the actual damages were. But to tell the Judge what the deduction would be they will be asked to compute the net collateral source benefit which would be that benefit that was paid that the plaintiff has no obligation to repay less what the jury found the cost of that benefit to the plaintiff was.

Rep. Peterson. Will this reduce in essence, by the judge or the jury, the verdict of the jury.

Rep. O'Neal. Yes. It will have the effect of doing that in those cases where damages have been paid by a collateral source.

Rep. Peterson. O.K. If, in the same example, the individual who was injured in the accident came to your office and you told them, 'look, you've got $10,000 in medical bills and I know your insurance company is going to pay $8,000 but if you pay it or have them pay it, you're going to get a smaller verdict. My advice would be not to pay it and lets go into court with $10,000 in damages.' How are we going to get around that problem?

Rep. O'Neal. I don't think you're going to advice them that way. Are you saying that you would actually advise your client to do that? And not avail themselves to the benefit of an insurance policy that they have purchased?

Rep. Peterson. No. I said if they came into your office. You said you do plaintiffs work. Would you advise them of how you measure damages under your bill that it will be reduced by the amount of benefits that are paid?

Rep. O'Neal. I'm going to tell them that they will have no right to a double recovery for their medical expenses in that particular example.

Rep. Peterson. So, in essence, you will have to advise them of what this new collateral source rule does and the size of their verdict will be measured accordingly.

Rep. O'Neal. That is my legal obligation to explain to my client what their remedies are, yes.

Rep. Peterson. Are we encouraging then, if they ask you,'what happens if I don't pay those bills? Can I claim them all?' What are you going to say?

Rep. O'Neal. They don't have to pay the bills. That's the whole part of collateral source. collateral source means a bill paid other than by the plaintiff but on the plaintiffs behalf; they have a policy that covers it. I suppose they could write BC and BS and say, 'Oh, don't bother paying that bill, I'm going to get it paid by somebody else.' And that's their business.

Rep. Peterson. O.K. But if the bill isn't paid by the time they go into court, they can claim the entire bill and there is no reduction, not set off, right?

Rep. O'Neal. I'm not sure I follow your question.

Rep. Peterson. Well, I think everybody else does. I want to ask you again about a bill you filed that was heard in Federal and State Affairs the other day where the court in DUI cases, automobile cases, is allowed to assess restitution against the drunk driver. Now, is that restitution by way of medical bills, property damage, lost wages, pain and suffering, non-economic loss, mental-emotional distress, disfigurement and things of that nature?

Rep. O'Neal. Historically, restitution has been actual out-of-pocket unreimbursed expenses that a victim of a crime has incurred.

Rep. Peterson. How does this bill and the damages assessed by the court figure into the collateral source? Is it a collateral source that further reduces a verdict?

Rep. O'Neal. Yes it could.

Rep. Peterson. O.K. So conceivably, if the judge ordered enough to be paid by the defendant, the insurance company wouldn't be on the hook for anything.

Rep. O'Neal. You must keep in mind that in the criminal case you are recovering from the very defendant in the criminal case that you would recover from in the civil case and that's exactly what you want to accomplish.

Rep. Peterson. But isn't this then a form of double recovery on the part of the victim? From the insurance company in the civil case and from the judge in a criminal case?

Rep. O'Neal. You forget that it's not the insurance company that is the defendant, it's the named party that actually caused the harm and it would not be a double recovery; it would be paid in the criminal case and it would be deducted in the civil case so no double recovery will be achieved. The purpose of HB 2693 would have been achieved.

Rep. Peterson. If the plaintiff is awarded by the court under HB 2952, which is your DUI bill, $10,000 in restitution and that was the exact amount that the jury gave him, would he receive $10,000 or would he receive $20,000?

Rep. O'Neal. The jury tells us how much the damages were.

Rep. Peterson. I just asked you a simple question, does he receive $10,000 or $20,000? Does he receive from both courts?

Rep. O'Neal. He cannot receive a double recovery for the actual damages that he sustained. That's the purpose of the bill.

Rep. Peterson. So then HB 2952 has no force in effect.

Rep. O'Neal. Yes it does.

Peterson. How does it penalize that individual for the restitution? Is the insurance company going to pay it or is the insurance company off the hook?

O'Neal. The criminal defendant in this particular case would have to pay restitution to the extent that there is not already insurance coverage for it.

Peterson. Thank you. I think you can see that what Rep. Williams was saying down here and what I particularly believe in are true that an individual who pays a premium for hospitalization, for any type of collateral source which can be wages which can be either paid for through a private plan or which can be part of a bargaining tool in a union agreement that they be paid for sick time; that that is bought and paid for by them and should be a property right that they retain without being penalized for it. And Professor Concannon's testimony in the judiciary committee is available to everyone and I'll just read you

one sentence, he agrees that something should be done in this area but HB 2963 is an ill-conceived and grossly unfair way to make a change.

Rep. Wunsch. I would suggest to the body that what was just read was a one sentence taken out of context because after the testimony of Professor Concannon, HB 2693 was rewritten by various parties and what he suggests to you is HB 2693 in it's bared introduction but bones and that's not an accurate statement and it's certainly a misrepresentation of what we have before us here today; and I think it's sort of a fraud that's trying to be played upon us.

Rep. Solbach. I don't know if Professor Concannon would still stand by that statement but it is perhaps equally misleading to tell you that HB 2693 has been amended so that it takes care of Professor Concannon's concerns because it doesn't. There are still a lot of things in here that are quite different from what Professor Concannon advocated. This bill still has reasonably certain in it instead of vested certain and there are a number of other things that are different; and Professor Concannon may still in part agree with the statement he made about the original HB 2693... in defense of Rep. Peterson... and perhaps the chairman, fairly misstated the record a little bit there.

Rep. O'Neal could you respond to a question or two or would you yield to them? We've got collateral source benefits here defined as everything except three things: 1) life insurance, 2) disability insurance and 3) benefits gratuitously bestowed. Is there anything else that is not a collateral source in this bill?

O'Neal. No.

Solbach. O.K. So if your child was injured by the negligence of someone else and you paid for that childs medical expenses, the childs physical therapy, the childs wheelchair, the childs special transportation needs, before you went to court, those expenses you paid would be a collateral source because the father of that child, you have an obligation to take care of the child and the defendants verdict would be reduced by the amount of money that you've paid for those expenses and other things that were necessary because of the injury. Tell me why that won't work that way.

O'Neal. I don't agree with that. Because their benefits are gratuitously bestowed.

Solbach. They are not gratuitously bestowed because you have an obligation as the parent of that child to provide those benefits under the law.

O'Neal. I disagree with you John, on what is meant by gratuitous in this particular bill.

Solbach. Well do we have a definition of gratuitous in here someplace that could clear it up for me?

O'Neal. Well I assumed that you had read the bill by now John.

Solbach. I have and I haven't been able to find it but sometimes you can find things that I can't and I wonder if you have.

O'Neal. There is no definition of gratuitous. Solbach interrupted, I assume you have read the bill. O'Neal, I have something to do with the bill, yes John.

Solbach. Well, I'd like to point out how broad this collateral source definition is and that it includes everything; any asset or benefit that's out there except for three things; those three we talked about before. Anything else that the plaintiff has will be used to reduce the amount of money the defendant has to pay. And if the negligent party injures someone, well I'll give Bill Roy credit for this quote, "The principle behind this bill is he who injures the well-healed or well-insured is without fault". This precludes you from buying any kind of an insurance policy to protect yourself for the litigation expenses you might incur or other expenses you might incur in recovering the damages suffered by you at the hands of the negligent party because it doesn't make any difference when you buy those. If you buy those, they will automatically be taken and applied to the amount of money the defendant has to pay; and you will not have the benefit of those collateral sources that you consciously went out there and purchased for the protection of yourself.

One of the reasons that collateral sources have not been relevant in personal injury cases is because there are always litigation costs that have to be paid out of the plaintiffs recovery. Attorneys fees are not allowed, in other words, the courts cannot order or the jury cannot order the defendant to pay the attorneys fees. The plaintiff has to pay his own attorneys fees out of whatever money is awarded. The plaintiff has collateral sources under the current law; he can use those collateral sources to take care of those expenses and still walk away from the courthouse with the money that the jury awarded him. Under this bill, those collateral sources that he would have used to pay his litigation costs are taken from him and given to the defendant who can use them to pay his litigation costs; and the plaintiff walks away from the courthouse less than whole.

I have an amendment that seeks to address that problem. It's very short and I've explained it; you might have the clerk read it for clarification. Clerk: on page 3 in line 105 after the period by inserting the judge may reduce the collateral source benefits that are credited to the defendant by the amount of the plaintiffs litigation costs.

Rep. Solbach: I'll be happy to stand for any questions.

Rep. O'Neal. John, as I understand your amendment, you would be having the defendant pay the plaintiffs attorneys fees, is that correct?

Solbach. Nope, I would be having the plaintiff left with enough of his collateral sources so that he could pay his actual costs of litigation.

O'Neal. What are those costs of litigation?

Solbach. They could be expert witness fees... O'Neal interrupted, attorneys fees? Solbach replied, attorneys fees would be a big portion of that.

O'Neal. Is the plaintiff going to pay the defendants attorneys fees if the plaintiff does not prevail?

Solbach. The plaintiffs will not pay the plaintiffs attorneys fees if the plaintiff does not prevail.

O'Neal. Well you're having the defendant pay a portion of plaintiffs attorneys fees in this amendment.

Solbach. No Michael, that's not what that amendment does and you know very well that's not what that amendment does. That amendment keeps in the hands of the plaintiff sufficient collateral sources to pay his litigation costs; then the collateral sources that are left over would go to the defendant to reduce the verdict.

O'Neal. If that's the case, then you're now saying that we should have jury awarding damages not to compensate for actual damages but to compensate for the attorneys fees that plaintiff pays, why don't we just disclose to the jury the attorneys fees?

Solbach. It'd be fine with me I suppose but we are taking away the resources the plaintiff would otherwise have to pay his litigation costs. When that defendant walks out of that courtroom, his attorneys fees and litigation costs will be covered by his insurance; the cost of the award would be covered by his insurance. But when the plaintiff walks away he no longer has the collateral sources to offset the costs of litigation. Those sources are taken from him and given to the defendant. This allows him to keep enough of his collateral sources to pay his transaction costs. So he can leave the courthouse with the damages the jury said he should have, based on loss.

Chairman Sprague: Rep. Wunsch.

Wunsch: Thank you. Will you answer a question?

Solbach: Yes.

Wunsch: We talked about this last night on television a little bit. It was a similar question to what was asked of you on that show, It's Your Turn. Let me see if I understand. You're not in support of this bill, are you?

Solbach: I think I could support a collateral source bill--

Wunsch: No, no. This bill. The one before you.

Solbach: As it is now before us, no.

Wunsch: For those of us who might support the bill, you're suggesting that if the support of this bill is legitimate, that those collater-

al sources that would be deductible and amount to a double recovery, and a double recovery should not be had, you want to provide plaintiff's attorney with payment from those collateral source that the majority if we adopt this bill think should not go to anybody. Isn't that right?

Solbach: If this bill is adopted, those collateral source will go to the defendant to benefit the defendant to reduce his costs, probably litigation costs--

Wunsch --No, no--

Solbach: Maybe I'm not --

Wunsch: Defendant doesn't bear any litigation costs if he's insured.

Solbach: No, but the insurance company has to pay litigation costs. Defense attorneys in medical malpractice cases at least collect about twice in fees what plaintiffs attorneys do.

Wunsch: Do you want the trial lawyers to be paid out of the collateral source aspects of this bill we're debating? Is that what you're suggesting?

Solbach: The plaintiff's attorney is going to get paid whether or not there is collateral sources there. The question is whether the plaintiff can take advantage of his collateral sources to pay his legal fees. . . . [[Tape change]]

* * *

Solbach: My amendment doesn't allow double recovery. It allows single recovery. My amendment assures we don't shift the pendulum too far in one direction. It stops it in the middle. If you want to stop double recovery, take the collateral sources. Take the collateral resources that result in double recovery. But leave enough there for the victim to pay his out of pocket expenses for legal fees and costs of bringing that litigation. If you don't, then he'll have to reduce his own award by the amount of his litigation costs. And he'll be left with only 70% or 60% of the amount of money that the jury said he needed to compensate for damages. This amendment still leaves the concept in the bill of double recovery for this purpose.

Wunsch: Do you remember the question, John?

Solbach: Last night?

Wunsch: No, a moment ago.

Solbach: I had a hard time thinking of an answer.

Wunsch: Then, let me make a comment. What John seems to be saying to me is, this collateral source bill is intended to make a plaintiff whole.

Solbach: Yes.

Wunsch: Not take away any of the damages he has suffered. He might get it from two different sources, but it's to make him whole. This amendment in addition to making him whole would pay his attorney. That's the substance of it. So the collateral source effect of this bill is almost negligible. If the bill has merit, you're stripping it of any of its consequences if you all the plaintiff attorney to be paid out of the collateral sources that don't go to the injured party when he is made whole. You're giving him a 140% of whole, if the fee is, say, 40%. Thank you. I'd urge the body to defeat the amendment.

Solbach: Bob, I don't take any medical malpractice cases. I know about them because I'm in the legislature. I do understand the impact because of counsel of the chairman and a little legal education. As I understand, Bob, you take plaintiff's work, don't you?

Wunsch: Sure. In a small town, you take a little of everything that's legitimate that comes in your door.

Solbach: But you're not an ambulance chaser, of course.

Wunsch: No.

Solbach: When you take a personal injury case where someone was injured by a drunk driver, for example, there is some question whether you can recover, but it looks good, uh, what do you charge for a fee? A contingent fee?

Wunsch: Sure.

Solbach: What is normal reasonable charge?

Wunsch: In my office? My practice? Probably a third.

Solbach: So you tell your clients 'I will take your case if I get one third of the recovery. If you win? Now we do have some medical bills that have been paid by your insurance company, but those won't be credited to the defendant, so if you pay my fee if we win, you'll still get the full amount of dollars the jury awards you for your damages.' Is that not correct?

Wunsch: I think that's correct.

Solbach: If you take all the collateral sources away from him, before the Wunsch law firm can get paid, then the claimant has to reduce his recovery in order to pay you, doesn't he? And that drunk driver walks away from the courthouse paying only 68% of the damages the jury said he inflicted on the plaintiff. That's unfair. This amendment does not allow double recovery. All the extra collateral

sources could go to the defendant. But at least those necessary to pay the litigation costs could stay with the victim so he could pay the litigation costs and still take what the jury awarded him. Thank you for your help, Bob.

Chairman Sprague: Any other questions on the amendment? Seeing none, you may close.

Solbach: I hope everyone understands what I'm trying to do. The bill, as it currently works, we essentially take away the collateral sources of the victim of a drunk driver and give them to the drunk, or the drunk's insurance company to reduce their costs. But we leave the plaintiff without the resources to pay his court costs and he cannot walk away from the courthouse and be made whole. This amendment would correct that situation so that at least the plaintiff could keep his collateral sources necessary to pay his costs of litigation. I urge you to support the amendment.

Chairman Sprague: You've all heard the motion. All those in favor, say Aye. Those Opposed, No. Nos appear to have it. Division is called. [They vote. Clerk takes the tally; 53-66 motion fails.] Any other questions on the bill as a whole? Rep. Laird.

Laird: I'll just take about two minutes of your time. I've watched this medical malpractice lawyer verses doctor debate for several years now. It's kind of, well I won't say amusing, but not once this morning have we mentioned what I consider to be the culprit of the whole affair. I hate to see the doctors beating up on the trial lawyers and vice versa. When you really think about it shouldn't be a debate between them. When you think about it you can't blame high rates of malpractice premiums on trial lawyers because trial lawyers don't cause malpractice, unless of course they're performing surgery or doing something else; they come in after the fact, don't they? I'm not saying they come in with white hats. They come in after the fact. So you really can't say they cause malpractice.

You have to look at what's going on in the country. In today's edition of the Christian Science Monitor, "California Car Insurance Revolt," is a headline. They're having a number of referendums there. People are sick and tired of higher car insurance premiums there. I mentioned something to the insurance commissioner's lobbyists the other day 'what are you doing about car insurance premium increases' and they said nothing.

Just recently we had an arson case here in Topeka where an insurance company failed to pay off an arson case. A woman was charged with arson and she subsequently beat the charge and was found innocent and that was several months ago and the woman has still not been reimbursed by the insurance company for her house. I've submitted a bill that many of you know about prohibiting bad faith on the part of insurance companies; they hate to settle these claims.

Now we come to insurance companies and medical malpractice. And this is from the Kansas Trial Lawyers Association publication: and they mention testimony before the House Judiciary committee in the last few weeks. And it supports the conclusions that these bills are not going to lower malpractice premiums. 'The national government affairs

director for St. Paul Fire and Marine Insurance Company told the committee that Kansas' 1985 and 1986 medical malpractice reforms were among the best she had ever seen anywhere. When asked how much those reforms had allowed St. Paul to lower the rates, she said 5%.' I thought that was generous of them. 'St. Paul then asked for a 75% rate hike the next year.'

All of you received the same mailing within the past four weeks an article by the chairman and chief executive officer of St. Paul Fire and Marine; he said, medical malpractice, 'when other companies were pulling out of it, we continued covering medical malpractice and we have just made a killing in it.' I think there is a 400% increase in their profits in it.

Why hasn't Representatives O'Neal, Wunsch, and Solbach and all these great attorneys mentioned something about the insurance companies? I don't think I've heard anything about that. We're letting them off the hook.

The chief executive officer of Medical Protective, the state's largest carrier of medical malpractice, said, 'None of the 1988 bills will have a significant impact on the rates.' I don't have the authority or the power to order an investigation on why Medical malpractice rates are going up, but apparently it isn't because doctors and trial lawyers. It has to be something else. We need to discuss that. I don't think it is any secret that I'm voting no on all these bills. You ought to do the same.

Chairman Sprague: Rep. Sebelius.

Sebelius: Following the comments of Rep. Laird, I'd like to make a few followup remarks and offer an amendment. You've heard statements on the floor from both Rep. Knopp and Rep. O'Neal to urge you to vote for the bill to have an effect on insurance premiums. Rep. Knopp said this would help Doctors. Their premiums they're paying, and even though it may hurt some people whose cases are in the pipeline it would really have an effect on doctors. All along these measures have been promoted on grounds they would help stem the costs of insurance. I have an amendment which would help to have that cause enacted in Kansas. It's a fairly lengthy amendment, I think I can explain it.

Chairman Sprague: Try to explain it. We'll see if anyone wants it read.

Sebelius: This language is currently in law in New York. It does have practical application. Insurance companies have not stopped writing premiums in New York. It does not require rate reductions. What it requires is that 90 days after this collateral source law goes into effect every company writing casualty insurance in Kansas must file a new rate structure with the Commissioner. The commissioner then has an opportunity to approve the new rate or ask for a further modification within 30 days. The final provisions says the commissioner then on a yearly basis must file a report with the legislature on how these tort reform bills have affected premiums. Again, there is no mandatory rate reduction required. All the companies have to do is report if they take Tort reform into account in setting their rates. They can

file the same rate, a lower rate, or a higher rate. If we intend to somehow indicate to our constituents that somehow we are passing these bills in order to lower insurance rates, it is important to have a legislative mandate to the companies writing insurance that that is what the intention is. Indeed, if there is any link between these procedures and insurance premiums in Kansas, we would like to know that as soon as the law goes into effect.

You've heard testimony that companies came before our committee and indicated what they felt old House bill 2661 would do to their rates. Two companies said they it wouldn't have any effect; St. Paul said about a 5% effect. For us to make an effective judgment on what we've done, this is an important measure to see if there is any correlation between what companies charge for premiums and what we pass here in the legislature.

Chairman Sprague: Objections to waiving the reading of the amendment? I see none. Questions?

O'Neal: Looking at HB 2693 it looks to me that all we're amending is Chapter 60 of the code of civil procedure. I have doubts the amendment is germane. I would challenge it on the basis it is not germane.

Chairman Sprague: Rules chairman, please.

Rules Chairman Rep. Roe: Mr. Chairman, I'd have to rule the amendment is not germane. The bill deals with the code of civil procedure and collateral source benefits. The amendment deals with the Commissioner of Insurance and amended rate filings. It is not even the same subject.

Sebelius: I'd like to challenge the ruling of the Chair. It is incredible to me--

Chairman Sprague: You might let the chair rule first.

Sebelius: I'm sorry. I still have the tire tracks from the Judiciary Committee all over me.

Chairman Sprague: I'll rule the amendment is not germane. Now you can speak to it.

Sebelius: I'd like to challenge that ruling. It is incredible to me that since most of the debate we have heard here today deals directly with insurance premiums that we hope one of these days might be lowered, could be, alleviated by this bill, that we would find something directly linking insurance premiums to this bill would not be germane. I would urge the body to overrule the chair. This particular measure just requires insurance companies to take note of the changes in this bill when filing their rates. If we really don't feel that these bills are going to make a difference in premiums, any rate reduction or any, any correlation between insurance rates and what we're passing, then I suggest that most of the reasons that people are urging you to pass these bills are irrelevant.

Chairman Sprague: Mr. O'Neal, do you wish to speak to it? No. The question now arises whether the ruling of the chair should be sustained. All in favor say Aye, opposed same sign. Division has been called for. [Clerk takes tally on electronic board.] 68-46 against, the chair is sustained. (Sebelius amendment ruled nongermane.) Other questions on the bill? Rep. Peterson.

Peterson: I forgot to mention when I was down here last time how we're going to handle future medical, future lost income, how they're going to be brought down to present value, how they're going to be allocated to the individual plaintiffs, how much they're going to be reduced, whether it is by percentage and I think you can see by all of the things that are involved that this is a complicated issue which has not been treated in a way it deserves. I would move we strike the enacting clause.

Chairman Sprague: Anyone further on the bill? I'm sorry. Did you make a motion? Is there debate on the motion? Seeing none, close.

Peterson: I just move the motion.

Chairman Sprague: All in favor say Aye, Opposed same sign. Nos appear to have it. Division is . . . Roll Call is called for. Seeing 25 hands, the roll is open and you may vote. [Clerk takes tally.] 40 in favor, 75 against, the motion fails. Rep. Shriver indicates he would like to be recorded as voting No. Had you not voted? So noted. The chair is reminded he did not ask if there are those who wanted to change their vote, my apologies. We do have a subcommittee which is out. Why don't we reopen the roll. Cast your vote again. [Takes second tally.] Roll is open. Everybody had an opportunity to cast their vote? Anyone wish to change their vote? Rep. Bowden, voted Aye. Cribbs, Aye. Neufeld, Nay. Anyone else? Clerk record the vote, 32 Aye, 88 Nay, motion fails. On the bill as a whole? Seeing none, Rep. O'Neal you may close on the bill.

O'Neal: Mr. Chairman, we've spent a lot of time. I move when the committee rise to report it report HB 2693 as amended favorable for passage.

Chairman Sprague: Roll call has been requested, seeing 25 hands. The roll is open. . . . Clerk will close the role. Anyone desire to change their vote? . . . Take the tally. 74 in favor, 44 against, the motion passes.

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Debate on SB 258
Periodic Payment of Judgments

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Chairman Sprague: The next bill is Senate bill 258, there were committee amendments, the chair recognizes Rep. Wunsch.

Wunsch: Thank you, Mr. Chairman. I move the adoption of the committee report.

Chairman Sprague: You have the motion. All those in favor, Aye; opposed, no, the motion passes.

Wunsch: Senate Bill 258 is a bill the Senate dealt with last year, and passed it out of the Senate 40-0. It was in the House Judiciary committee last year and we did not have time to work it. It is fairly involved bill in all of its aspects. We've worked it this session, and it is before you in its amended form.

I would ask you that if you really want to understand the purpose of this bill, that you look at SB 258 and read the first few lines of the bill. It tells you the purpose of the bill. 'To alleviate the practical problems incident to unpredictability of large future losses, it will effectuate more precise awards for damages for actual losses, it will pay damages as the trier of fact finds the losses will accrue, and assure the payment of damages will more nearly serve the purpose for which they were made.' That is sum and substance the purpose of this bill.

It is a society bill. It will provide for money awarded to an injured party, that money will be there when those damages that injured party suffered will accrue. It assures the money will be there. The bill prescribes in the second section various definitions, in the fourth and fifth sections, the jury, in dealing with future damages, will find future damages based upon a current value of those damages. It says the jury will be informed not to be concerned about the fact that it is only based on current damages, on current values. When you're speaking of ten, fifteen years in advance, you're still finding you are still finding the expense of that operation or that wheelchair based upon a current value. The jury need not fear that because within this bill is a formula that will apply current values and apply an annual rate of assessment that will build this amount of damages up to what you would expect the cost of that damage to be when it is needed in ten or fifteen years; it will be inflated up to that value by virtue of sections 5, 7 and 10 in the bill. The jury will be advised that they not need be worried about the inflationary factor in their decision. Five, seven and Ten take care of that. Section 6 says past damages will be paid in a lump sum. We're only dealing with future damages.

The bill further says that in certain instances when it is evident that this procedure is too complicated because the amount of money involved in the case is not of sufficient size to engage in this future expectation of awards, and inflation of prices, the judge can rule this bill not applicable if he finds the terms of it to be insufficient, the amount of the money involved, to be insufficient in dealing with the act. And that is a safeguard in connection with small claims, small cases that will be before us. I think that provision is constitutional in all senses, and we need not worry about the constitutionality.

There is another provision that suggests that as between the plaintiff and the attorney, whatever contact they have made between the plaintiff and the attorney, as long as the agreement is satisfactory and approved by the court, the attorney fee is not so great that it gets disapproved by the court, because you know in medical malpractice actions, the courts must approve fee contracts, but once the fees are approved, however he or she agreed to handle it when future damages are

proven, the contract will take care of it and we will not need to worry about how that attorney will be paid.

There are three or four ways in which this structured settlement can be paid. One is an annuity. One is through other insurance. One is a bond executed by a qualified insurer. One is an agreement by one or more qualified insurers to guarantee payments on the judgements. We anticipate with medical malpractice however, the most useable element of structured settlement will be through the annuity.

There are some other elements of this bill and that is, and one very important aspect of this bill, is the future damages that are noneconomic, those for pain and suffering, if a person dies short of the life expectancy of the injured person, and there are remaining payments out there for the pain and suffering suffered by the injured party, those payments terminate upon death. What does not terminate on death is the economic aspect of the award. If an injured party was awarded X amount of dollars for his loss of earnings and he dies short of his expected lifetime, the amount of the economic damages that are awarded for the future will survive to his heirs. It is only the medical costs that will not be incurred after his death that terminates and the pain and suffering that would have occurred after he died unexpectedly that will terminate. So the heirs will receive the economic loss in the event the individual does not survive the normal life expectancy found by the jury.

There are some technical oversights in this bill as it came out of committee. We had a bill drafted, to approach SB 258 and to address HB 2690, which was the House bill. We were trying to put the two bills together, thinking they would make a better bill together than separately. The bill we came down on and passed is SB 258, both balloons, the balloon of melded 258 and 2690 had some technical deficiencies. But we do not propose to affect those technical deficiencies on the floor. We think they are purely technical and can be addressed in conference.

There may be some other aspects of this bill that need to be addressed in conference and that is regarding the inflationary factor, and whether or not an annuity can be purchased with that inflationary factor occurring annually. We're told by some it can be handled; we're told by others that it cannot be handled; what we propose on the passage of this bill is getting it into conference and spending more time making sure the annuity provision of the bill can be handled by the annual adjustment. If it cannot, then we will build into this bill through the conference committee language that will allow these annuities to be purchased and become a part of the savings in the medical malpractice area. The cost of these annuities are going to create and generate some savings in the [Health Care Stabilization] Fund and there will have to be less premiums paid.

I don't think there is any question about this bill having an affect on premiums. It has to have an effect on the amount of money it takes to pay out to fund a five million or ten million dollar judgment that may only cost $750,000 or a million to buy the protection that the jury says should be awarded to the plaintiff. Any questions?

Chairman Sprague: Any questions? Seeing none, you may close.

Wunsch: I move when the committee arise it report SB 258 as amended favorable for passage.

[The committee rose and reported progress for the day. The four bills passed the House on February 25th. See the House Journal for votes and explanations of vote.]

BEFORE THE HOUSE JUDICIARY COMMITTEE

IN RE: HOUSE BILL 2693 and)
SENATE BILL 258)

_T_R_A_N_S_C_R_I_P_T_

Proceedings held February 22, 1988

State Capitol Buiding
Topeka, Kansas

_I_N_D_E_X_

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CHAIRMAN WUNSCH: Let's go back to where we were when we adjourned on Wednesday, 2693. The bill was amended and the floor is open for further discussion and amendments.

COMMITTEE MEMBER: Mr. Chairman, I spent some time since our last meeting looking fiercly at both the amendments that were adopted which I voted for on House Bill 2693 which was primarily a balloon that had been suggested by Professor Concannon and the balloon that we never got discussed which had been submitted. Today I have -- I passed out a new balloon which is in front of you at the table.

CHAIRMAN WUNSCH: This the one that has your name up at the righthand corner.

COMMITTEE MEMBER: Well, it has Bob. Which Bob that means, I assume it's probably me. The balloon that's before you is a balloon in essence that had been before us before with two or three changes. The principal thing that had bothered me about this balloon previously was the reference to collateral source benefits being considered if they were reasonably expected to be received by a claimant and the thing that I liked most about-- at least one of the things that I liked most about Professor Concannon's is the use of the terminology vested and certain and spending some time over the weekend thinking about this, I think that to confine it to vested benefits is probably going to -- right, confining it to vested interests is going too far. I think

that reasonably certain, though, which I inserted in lines 26, 42 and -- I'm sorry-- and in the balloon language that was after line 52 really addresses that language as far as at least I would want to go. If that language were to read reasonably certain, then only those collateral source benefits that were reasonably certain of being received would be considered offset against the plaintiffs' recovery. That's one item.

CHAIRMAN WUNSCH: That's one change in the balloon that we've previously had in front of us.

COMMITTEE MEMBER: Number two. If you'll look at line 47, the balloon I think, I think this is a drafting error-- the balloon had deleted shall be admissible at the end of line 47 and I think that is really intended to be in there. It probably could have been corrected by Reviser.

CHAIRMAN WUNSCH: Just depends on which one you have. It's there in many and it's not there in others.

COMMITTEE MEMBER: Number three, and I really think it's a separate policy issue is in Section 5 where this particular balloon would apply this change in the collateral source only to those actions that were occurring on or after July 1st 1988. That had been in Professor Concannon's balloon in Section 7, I believe. I really favor that as well, but I think just to (inaudible). I would offer this balloon with the change to reasonably certain and at this

time at least without the change that would apply only to those causes of action occurring after July 1. But for purposes of this motion I'm moving the balloon as you see it without the change to Section 5.

CHAIRMAN WUNSCH: Your balloon that you handed out, those of you that have it, do you have the extra pages that look like this?

COMMITTEE MEMBER: No, two pages.

CHAIRMAN WUNSCH: Then that's not the full balloon that we've had previously.

COMMITTEE MEMBER: Does it have the same Section 5?

CHAIRMAN WUNSCH: What you received Thursday is what you intend to offer with the addition of making it read reasonably certain?

COMMITTEE MEMBER: That's correct.

CHAIRMAN WUNSCH: Let's pass these down. Those are the extra pages, in legal size typewritten language is what was, has been on the balloon since we started these balloons floating around. So, the balloon that's revised to February 18 in the upper righthand corner, the balloon without Bob's name on it, is four pages and Bob is suggesting that in addition to that balloon that you see on lines 26, the words reasonably -- the word expected is to be changed to certain and in line 42 the word expected is to be changed to certain and on the second page in the righthand balloon portion the

fourth line is reasonably certain as opposed to reasonably expected.

COMMITTEE MEMBER: That's correct.

CHAIRMAN WUNSCH: Is there a second to the motion?

COMMITTEE MEMBER: Second.

CHAIRMAN WUNSCH: Been moved and seconded. Representative Sebelius.

COMMITTEE MEMBER: I'm confused.

CHAIRMAN WUNSCH: What's your confusion?

COMMITTEE MEMBER: When we left the discussion on collateral source we were working with the Concannon balloon. I understood you to make the motion to amend those two portions, but is that the only difference between this draft and this draft, the recent reasonably certain one?

COMMITTEE MEMBER: No, I'm also, in effect I'm substituting this balloon with the change to reasonably certain.

CHAIRMAN WUNSCH: 2693 if this motion passes will be the bill that's before you and Wednesday's amendment will not be there.

COMMITTEE MEMBER: That's clearer, thank you.

COMMITTEE MEMBER: I can explain if you want.

CHAIRMAN WUNSCH: Representative Solbach.

COMMITTEE MEMBER: Yeah, let me just follow up on Kathleen. We had two drafts. I think we committee members

knew one as the Concannon draft and we knew the other one as the medical society draft. Call it what you will, is this the medical society draft that we're looking at here?

CHAIRMAN WUNSCH: No, it's a balloon off the bill that they asked us to introduce, 2693.

COMMITTEE MEMBER: I think this balloon was not the medical society's.

CHAIRMAN WUNSCH: No, it was not, the balloon was not, the bill 2693 by its number was the bill that they asked us to introduce. The balloon is a combination of a lot of people's input, including representative or, including Professor Concannon after he heard what -- after he read it. Representative Douville.

COMMITTEE MEMBER: Could you read what Section 5 will now provide so I'll understand clearly?

COMMITTEE MEMBER: Well, Section 5 as I am moving it, Mr. Chairman--

COMMITTEE MEMBER: How will it read?

CHAIRMAN WUNSCH: Yes, unless you'd like for Mike who drafted it to tell him what it says.

COMMITTEE MEMBER: Arthur, Section 5, the new language on Section 5 is the mechanism to incorporate the suggestion made by Professor Concannon that any collateral source rule should take into consideration the effect of comparative fault before you make the reduction for any

collateral, net collateral source benefits and that is done by saying that with respect to the collateral source bill, the amount of the judgment for past damages would be reduced by the net collateral source benefits received, but only to the extent that the benefits exceed the amount by which the judgment was reduced pursuant to Subsection A. Subsection A is where the judge reduces the judgment by virtue of the comparative fault of the plaintiff and then it also goes on, and the extent to which it exceeds the amount by which the legal right to recover such judgment was limited by the applications of C and D and 6258-C and-D are those reductions where you have parties that have been brought into the case not at the request of the plaintiff but at the request of the defendant for purposes of comparison of fault, many times referred to as a phantom defendant rule, where the defendant can obtain the benefit of having somebody else's negligence compared. To that extent and to the extent a phantom defendant gets assigned a percentage of fault, the plaintiff's ability to collect for that percentage of damages has been eliminated and so Professor Concannon says the plaintiff should not be penalized in that case and so the formula, it would only be to the extent by which the net collateral source benefits exceed the amount by which the judgment has been reduced by those amounts and then there will be a similar deduction as it relates to what is found by

way of future damages.

COMMITTEE MEMBER: And where is it applicable to all actions accruing on or after July 1st, '88?

COMMITTEE MEMBER: That's in new Section 6.

COMMITTEE MEMBER: And I'm not moving that amendment at this time.

COMMITTEE MEMBER: That is not a part of this particular motion.

CHAIRMAN WUNSCH: Representative Sebelius.

COMMITTEE MEMBER: Thank you, Mr. Chairman. Mike, in the section that you just went over with Art Douville, Section 5, I have two drafts in front of me. At one point we eliminated not only the -- I mean we dealt with the comparative situation but also eliminated from consideration immune parties, insolvent or bankrupt parties or other parties unlikely to pay full or proportionate judgment. The new draft, if I read it correctly by Representative Vancrum, doesn't have those exceptions, so that a plaintiff would bear the full cost-- could lose collateral benefits as well as bear the full burden of his or her loss to an immune party or bankrupt party, is that correct?

COMMITTEE MEMBER: I haven't moved that yet.

COMMITTEE MEMBER: I'm just trying to make sure there, with four different sets of language, what exactly we are doing. Was it your intention to do the comparative -- I

mean there are two different drafts of how you would consider comparative. One is considerably more narrow. The one that's passed out on the new sheet reads to me to be considerably more narrow than what Professor Concannon and a variety of people had suggested where you would allow the proportionate claim from the immune parties and bankrupt parties and somebody who's not going to pay to be taken off before the plaintiff lost that share of collateral benefits. The new draft doesn't do that, so, theoretically you would not only lose your share of negligence going to the immune party, but you'd lose the collateral benefits as well. The plaintiff gets a double whammy, in other words, in the new draft the way I read it. Is that correct?

COMMITTEE MEMBER: Well, let me preface it by saying that the language you have in front of you in the balloon, Section 5 that I just read to you, was presented to Professor Concannon at the conclusion of the hearings on Thursday for him to, for his review and he has agreed that this language does what he had suggested be done. What you are suggesting is a policy question and under current, under current law, 6258 A on comparative fault in subsection D it states that no defendant will have to pay more than their proportionate share of fault. If you were to adopt as you suggested the language that would have the solvent defendant basically pay for that portion of collateral source benefits

that are attributable to an immune or insolvent or otherwise defendant that refuses to pay, you would be having the defendant pay more than his proportionate share of the judgment, which is specifically precluded by subsection D at 6258-A.

COMMITTEE MEMBER: But I think it's important that the committee understand what we're doing. To say the jury isn't aware of this, they are to subtract all the collateral source benefits even from those parties which are not going to pay anything to the plaintiff, if we don't include the immune defendants, they could lose the collateral sources attributed to that immune defendant plus never recover a dime from the defendant to begin with. So, you don't recover any money to pay for those collateral sources, but the collateral sources are subtracted from your net award and the jury doesn't know who's immune and who's not immune.

CHAIRMAN WUNSCH: Well, if it was -- make it a question.

COMMITTEE MEMBER: Right?

CHAIRMAN WUNSCH: Thank you.

COMMITTEE MEMBER: That would, that would be the case here but that is the case under current laws where the plaintiff cannot recover from those that are insolvent.

COMMITTEE MEMBER: Well, the current law doesn't subtract collateral sources either.

COMMITTEE MEMBER: But it would subtract them insofar as they exceed, the net benefits exceed the amount by which the judgment was reduced for phantom defendants and the negligence of the plaintiff himself or herself and that's exactly what Professor Concannon was getting at.

CHAIRMAN WUNSCH: And let's bring a little order to this because what Representative Vancrum moved does not include that which you've been discussing for the last few minutes.

COMMITTEE MEMBER: Well, I thought it included Section 5.

CHAIRMAN WUNSCH: No, that's your own balloon you prepared and we've got so many balloons circulating--

COMMITTEE MEMBER: I didn't prepare any balloons.

CHAIRMAN WUNSCH: Well, Jack did and that's not what we have before us. We have before you the balloon that you got Thursday afternoon, Section 5, 6 and 7 as you received them Thursday afternoon and the only addition to that balloon is the change of the word certain to expected in the three places we have discussed and that's the motion before us. Representative Solbach.

COMMITTEE MEMBER: Yes, Mr. Chairman, is the motion before us to adopt only those two words?

CHAIRMAN WUNSCH: I'll repeat it again. The motion is the whole balloon that you had last Thursday that we let

Representative Shriver motion on top of Wednesday and then we were going to take that up and his motion passed, so, we didn't take the balloon up. The balloon we've had for probably a week before you and we passed it out again Thursday so you would know it. We have one word change in three places and the whole balloon, if passed right now, will be the bill.

COMMITTEE MEMBER: Okay, Mr. Chairman, that's the same balloon that you passed out to us that's titled or in the corner--

CHAIRMAN WUNSCH: I have no idea what you have in your hand.

COMMITTEE MEMBER: Well, it says revised 2/18/88. That's the one we're working from.

CHAIRMAN WUNSCH: If the back two pages have the Sections 5, 6 and 7. Well, it should have--

COMMITTEE MEMBER: No, it has Section 5 only.

CHAIRMAN WUNSCH: You renumber them.

COMMITTEE MEMBER: Right now what we have on the table, am I not correct, is the Concannon draft that was adopted on Representative Shriver's motion and then, and then as further amended by Representative Vancrum's motion to take out the threshold?

CHAIRMAN WUNSCH: That's what's on the table right now.

COMMITTEE MEMBER: That's what's on the table?

CHAIRMAN WUNSCH: That's correct.

COMMITTEE MEMBER: To avoid confusion and to let us know I think what we're voting on on each of these little things because each of them have a different substantive effect, I would respectfully request that the question be divided so that we can vote on each one of these things one at a time, if the chairman would. I think the question is divisible.

CHAIRMAN WUNSCH: I don't think the question is divisible and I will not. The balloon is clear. It's all encompassing, one part is dependent upon the other. It's all of Professor Concannon's ideas built into 2693 as those who are interested in 2693 heard his testimony and offered some of those amendments, then some of us have offered our own thoughts. It's a combination of many thoughts. They are all dependent one upon the other and there is no reason to separate them.

COMMITTEE MEMBER: If I may comment on that, Mr. Chairman.

CHAIRMAN WUNSCH: You comment quickly.

COMMITTEE MEMBER: I'll try to make it very brief. We've got one motion by Representative Vancrum to change the words to reasonably certain. That's different from what's in, what's currently before us on the table and that's not--

CHAIRMAN WUNSCH: You understand that, don't you?

COMMITTEE MEMBER: Yes, I understand that, but that's not dependent upon anything else in this bill. I grant that a lot of this language is interlocking and that if it is--

CHAIRMAN WUNSCH: You're arguing with the rule of the chair, is that what you're doing? Should you move that the chair be sustained?

COMMITTEE MEMBER: I will, Mr. Chairman, if you'd like.

CHAIRMAN WUNSCH: Well, either do that or let's get on with it.

COMMITTEE MEMBER: I'll challenge the ruling of the chair and then explain why if I can get a second.

CHAIRMAN WUNSCH: Not hearing any second, let's proceed.

COMMITTEE MEMBER: Second.

CHAIRMAN WUNSCH: Who was the second? I didn't hear you.

COMMITTEE MEMBER: Okay, so, that's one question. Then we've got this language that is interlocking which would be a separate question. We've got what the bill applies to, the bill on the table applies to all actions accruing after January 1, 1988. This bill applies to any action that is pending or brought on or after July 1, 1988. In other words,

could apply to an action that's, that happened two years ago. Those are at least three questions that are clearly separate and divisible here and for the sake of procedure, I think we ought to separate them because they are clearly separate issues.

CHAIRMAN WUNSCH: Is there further comment? Representative Vancrum.

COMMITTEE MEMBER: Well, I strongly disagree. I think the chairman's motion is correct and furthermore, unless the balloon is adopted as a package, there is no place to put reasonably certain in the balloon. I mean I think we'll get an opportunity to address all the issues at once, if you want to. I mean if you, if you dislike one of the sections of the balloon after this amendment is adopted, which is identical, identical to the balloon that Representative O'Neal never got to offer or we never got to vote on, if you disagree with it, well, you simply make a motion to change it; but if you divide the issue, the change that I had on reasonably certain will never get addressed.

CHAIRMAN WUNSCH: You're right, the motion is to challenge the rule of the chair.

COMMITTEE MEMBER: Is the question shall the chair be sustained?

CHAIRMAN WUNSCH: The question is shall the chair be sustained in saying the question is not divisible. All in

favor of sustaining the chair, signify by saying aye. Opposed, no. The motion carried. Is there further discussion on the motion? Representative Shriver.

COMMITTEE MEMBER: Thank you, Mr. Chairman. I'm probably not going to support the motion even though I do tend to agree with most of it. However, without changing the date as in the balloon that Representative Vancrum handed out was the effective date of occurring on or after July 1st 1988, without that being part of the motion, I have a difficult time supporting this. Had the July 1st, '88, came up first, I would have supported this and the changes. I'm not opposed to the changes that Representative Vancrum has outlined in his balloon, but without that other I would not support it at this time.

CHAIRMAN WUNSCH: Is there any further discussion? The motion then is to adopt the balloon as moved by Representative Vancrum. All in favor signify by saying aye. Opposed no. The motion carries. Is there further discussion on the bill? Representative Vancrum.

COMMITTEE MEMBER: Okay, just to, so that I and others can understand where we are at this particular time, there's been some confusion. All I have done is move the changes in those three lines the chairman described to reasonably certain, so, we currently have a bill that is, first of all, a jury determination of collateral source as

opposed to a judge determination, which had been in the Concannon version. We furthermore have a bill that is applicable to any action I gather, Mike, any action brought or any action that has not gone to trial by July the 1st, is that right?

COMMITTEE MEMBER: That's correct.

COMMITTEE MEMBER: Well, I think there are at least two other policy issues which I'd like to quickly address. One of them is the issue of applying this to pending causes of action. You know, if all we were talking about here were causes of action in medical malpractice where we have heard there is some crisis, I never could say that word, forget it, some crisis, the issue would be a little bit different. Also, if we did not have Judge Theis's opinion, which seems to tell me, if it's sustained on appeal, that there is some serious question as to whether or not you can change what appear to be common law rights midstream, I really think that in the interest of having this bill sustained by the courts that we should apply it only to actions accruing on or after July 1st, 1988, and I would move that change which is now in Section 6.

COMMITTEE MEMBER: Second.

CHAIRMAN WUNSCH: It's been moved and seconded that the pencilled changes that you see in the draft occurring on or after July 1, 1988, and the lines stricken be a new part

of this bill. Is there any discussion?

COMMITTEE MEMBER: Is that accruing or occurring?

CHAIRMAN WUNSCH: I said occurring. Accruing. Any discussion? Representative O'Neal.

COMMITTEE MEMBER: I'm going to oppose Bob's motion, maybe not for the obvious reasons, but I'll explain why. We had a collateral source bill that applied to doctors and the only reason it was struck down was criticism by the court that it was not applied uniformly to all other professions or all other tort actions and but for that fact that collateral source rule would have applied to cases as far back as 1985 after the bill was passed. I understand what Representative Vancrum is saying about other causes of action but this is a problem that the Supreme Court has thrust upon us. It is not as if there is, we're dreaming this up for the first time. If this was the first time we were running a collateral source bill I would agree that we should probably have it apply only to cases that cause of action accrued on or after a certain date. But we've been invited by the Supreme Court to correct what they conceive to be a constitutional problem in '85 and by correcting that I believe we should have the benefit of the legislation we passed in '85. One other thing I would point out is this particular provision does not need a severability clause. If for any reason the Supreme Court would decide this provision

cannot be applied retroactively it will simply be applied prospectively, so, we really loose nothing by attempting to achieve the benefit of the collateral source rule of the last two years and for that reason I would oppose the motion.

CHAIRMAN WUNSCH: Further discussion? Representative Solbach.

COMMITTEE MEMBER: Well, some might argue that the collateral source rule is just a rule of evidence, that it has no substantive effect, but if it was just a rule of evidence and had no substantive effect and did not affect the substantive rights of individual Kansas citizens there would be no reason to change it in the first place. I think it's clear that the court will find that this is substantive and not merely procedural and you cannot retroactively apply a substantive change in the law. That makes it clearly unconstitutional. We can hang our hat, I suppose, on the scenario offered to us by Representative O'Neal that there is a severability clause in here. If the court finds it unconstitutional it will simply take it out and let the rest of the bill stand, but we've taken an oath to support the constitution of the United States and support the constitution of Kansas and I think we should take that seriously and take provisions out of a piece of legislation that are clearly unconstitutional. I don't think we've had anyone who's come before us and said that this is merely a

procedural matter that does not affect substantive rights and I would hope that you would, that we would support Representative Vancrum's motion.

CHAIRMAN WUNSCH: Representative Snowbarger.

COMMITTEE MEMBER: I think I'm going to oppose the motion as well but primarily 'cause I think there's a middle ground here that makes a little more sense to me and that might be if we had it for any action brought on or after July 1, 1988. I guess at that point you always risk the people running into court at the last minute to try to beat that one deadline, but I am concerned about cases that are going to extend out as long as four years when you talk about accrued after that point in time, so, I'm going to oppose the motion.

CHAIRMAN WUNSCH: Further discussion? The motion, I think you understand the motion is to add the words of the pencilled balloon there on line 54 and strike the other language, accruing on or before July 1, 1988. All in favor signify by saying aye. Opposed, no. Chair's in doubt. Ayes raise your hands, please. Nine. No? 11 to 9, defeated. Is there a further motion? Seeing none, then let's bring this bill up for a vote. Bill is amended -- Representative Vancrum?

COMMITTEE MEMBER: Well, Mr. Chairman, I want to point out, I'm going to make a motion here in a minute, but I'm going to point out that, you know, we have adopted Mike

O'Neal's draft which is a jury determination of collateral source as opposed to what we had in Concannon's original draft, which was a judge determination. The thing I'm still concerned about here and I thank the committee for taking the time with what may have been only one or two people's hang-up with regard to this balloon, reasonably certain I think helps a great deal in satisfying my criticism. Still, I remain concerned that where you have a jury determination the judge is going to look behind that in many cases and look to whether or not the collateral source benefit evidence that was offered was reasonably certain and, of course, the judge can always change by means of a post trial remedy, post trial motion and grant a new trial. I would have preferred, very frankly, that we were talking about a judge determination. I can see that there isn't any point in this committee in offering that particular amendment, in any event, it's contrary to what's been adopted. Nevertheless, I think that I can in good conscience move and do move that this bill be reported without recommendation.

CHAIRMAN WUNSCH: Is there a second? Second, it's been moved and seconded that the bill be approved without recommendation -- reported as approved without recommendation -- as reported without recommendation -- reported without recommendation. Is there any discussion? Representative O'Neal.

COMMITTEE MEMBER: Bob, I'm not sure this will change anything in your thinking, but just to correct something, the balloon responds to what Professor Concannon was saying needs to be a mandatory offset by the judge and that we have responded to by, and if you'll remember when we were talking with Professor Concannon and speculating about how we can move to that, to that level ground, we asked whether or not the jury could be asked to simply return a special verdict telling us what in addition to what the damages are, what they found to be the collateral source benefits. Concannon says it's got to be a judge set-off because you've got to take into consideration the effect of comparative fault and some of these other things we've addressed and, so, what this does is it has the jury tell us what the collateral source benefits are and to that extent you're right, the jury is making that determination, but the actual set-off is done by the judge which provides the certainty and predictability in the system that Professor Concannon thought was necessary. I will reiterate that we have, we have taken this balloon and put it past Professor Concannon and he is quite satisfied with it, not that that would change anything, but what we have here is a combination of the jury participating in determining what the benefit is, but then it isn't a mandatory set-off. With the medical society original bill it's totally a jury function. The jury

determined what the collateral source was, what the set-off was and they actually set-off that amount before the verdict and that's what Professor Concannon found so objectionable. I think we've met those suggestions and criticisms by Professor Concannon at least to his satisfaction.

CHAIRMAN WUNSCH: I'd want to suggest to the committee that I think in your changing of reasonably certain, it was there to begin with under reasonably expected but you have better facilitated a judge involvement in this case because if the judge doesn't find the evidence of future collateral sources to be reasonably certain, he doesn't admit the evidence. Now, that's judge involvement before ever it gets to the jury and I think you've facilitated that even more than it was already in there and, so, it seems like to me we've gone a long way to resolve the concerns of the various conferees and it would probably be unfortunate if we suggested that Professor Concannon's idea was reported to the floor without recommendation.

COMMITTEE MEMBER: Mr. Chairman.

CHAIRMAN WUNSCH: Representative Sebelius.

COMMITTEE MEMBER: I just have a question so I understand. Could Representative Vancrum indicate to me what would likely be the difference between vested and certain and reasonably certain? What benefit would fall into the vested and certain category or into the reasonably certain category

which would not be able to be included -- I'm trying to understand the differential between those two terms and I'm not sure I do. What have we included now that we would not have included with vested interest?

COMMITTEE MEMBER: Is she asking me to yield for a question, I gather.

CHAIRMAN WUNSCH: Your legal opinion of the word vested.

COMMITTEE MEMBER: It's only my opinion and I'm not sure it's worth a whole lot either. It's worth what you pay for it I guess. Vested to me means that the person is beyond certainty going to have that benefit in the future, okay? That, for instance, a disability benefit or more specifically perhaps a health insurance benefit will last, if you will, in perpetuity or for the rest of that person's life. It's my belief that a lot of the health insurance policies are bought for a term certain and that, you know, in the strictest sense there is no such thing as a vested benefit in most types of health care insurance. That's one thing that does trouble me a little bit about tying it all the way down to vested; but even other benefits, I mean I'm not sure that disability insurance benefits are vested in the technical sense of the term. I do think that reasonably certain really speaks to very many of the same issues and as far as I am concerned, I think that in order to be certain a health insurance benefit

of the group type, one of the factors that would have to be taken into consideration at least by the trior of fact would be whether or not a group health insurance policy terminates on termination of employment.

CHAIRMAN WUNSCH: And vested would mean something that you can't lose. There's no way anybody can take that right away from you.

COMMITTEE MEMBER: Let me speak to --

CHAIRMAN WUNSCH: Yes.

COMMITTEE MEMBER: And this is, I'm, this is going to be in lieu of closing.

CHAIRMAN WUNSCH: Thank you.

COMMITTEE MEMBER: My thinking on this particular subject with regard to moving this bill without recommendation, I don't want anyone to think that I'm playing games with this particular thing, that I'm moving a bill out that I know that I won't support because I don't do that, at least not knowingly. I still have some doubts about this particular bill. I mean I can't in good conscience say that I'm entirely comfortable with it. One thing that bothers me a little bit, and I agree with you, Mike, is the issue of the jury making this determination and whether or not what you're going to get is a whole lot of motions for new trial that are granted, which, of course, doesn't do anybody any good. I'm a lot more comfortable with the bill right now with

reasonably certain in there than I would have been with the balloon before and I think you're exactly right, I think the judge will be making some of these determinations on evidentiary basis and I think that's appropriate. I think the judge should have a role in that and still and all, there are issues here such as ones that Kathleen Sebelius raised earlier with regard to insolvent defendants that I really want to think about some more and that's why I make the motion without recommendation.

CHAIRMAN WUNSCH: Further discussion? Representative Solbach.

COMMITTEE MEMBER: Well, I hate to support sending this to the floor of the house in its current form. Reasonably certain is very troublesome to me. If a person is going to have their award reduced because there's a reasonable certainty that they'll receive some benefit in the future, you know, what is that? A 60/40 chance or a 52/48 chance? It's either going to be there or it's not going to be there and we're dealing here with individual victims' rights. We're not dealing here with some average or some -- we don't want things to come out good on the average, we want them to come out good and right and just in every case and how can we do that when we've got something in here that is so nambly-pambly as reasonably certain, although Bob, your amendment was better than what was in there before. I

compliment you on that. It's curious that the different aspects of this bill were not divisible when a division of the question was called for in the beginning, but that afterwards they are divisible, so, we passed into some magic world where suddenly the provisions of the bill are divisible and we can discuss them one at a time. I also think it's very clear that something is going to come out of this committee today. I would prefer that it be something else. Perhaps for the record we should offer every amendment that's conceivable, but I think by the adoption of this, by a majority of the committee, that pretty well rules out the, what I thought was a very clean amendment that we had before us when we walked into this committee room today. So, I'm going to reluctantly support the motion before us to send this to the floor without recommendation. I believe that's the best that we can say for this bill.

CHAIRMAN WUNSCH: Further discussion? All those who-- you said you would close, so, those in favor of reporting the bill favorably -- reporting the bill to the floor without recommendation, excuse me-- I always want to get that word favorably in there. I guess it just kind of slips off my tongue-- without recommendation, signify by saying aye. Opposed no. The nos appear to have it. Division has been called for. The ayes please raise your hand. Four, seven, eight. Nos? The nos have it. It's been

moved to report House Bill 2693 as amended favorably for passage. Representative Douville seconds. Is there any discussion? All in favor signify by saying aye. Opposed no. The motion passes.

Now, I guess it's the prerogative of the chair, as you all are aware, to violate his own rule, so, the other day I overruled Representative Whiteman's request for some conferee to give us his or her opinion on a motion that we had before us, but I'm going to ask that we receive some testimony in connection with the punitive, or the periodic payment bill. We have Senate Bill 258 and House Bill 2690 before us and we're going to have hearings, combined hearings on those bills and they are, that bill is the most technical of any we've had of the four and we had some testimony before on that bill, on those two bills, the structured settlement; but as we, some of us got into it further we needed more edification and have sought it out and what we have, at least what I have gained I want to pass on to you. So, Steve Fabert, an attorney here in Topeka, has been -- he looked at this over the weekend and is going to give us a review of 258 - 2690 for purposes of having us better understand the two opposing bills and they're dramatically opposite of each other and he'll give us his impression of what they both do, give us some suggestions as to how we can end up with a bill whichever direction we want to go, the direction of 2690 or

the direction of 258 and then tying, allowing, which I think we'll take time, we will work the bill, see if we can't come up with some consensus, but let me introduce to you Steve Fabert -- Representative Sebelius.

COMMITTEE MEMBER: Mr. Chairman, just a question. Were other conferees invited to come in today or notified the hearings were to be held?

CHAIRMAN WUNSCH: No. Steve.

MR. FABERT: Yes, Mr. Chairman. I'm not here as a lobbyist or as anyone who has any interest in the outcome of this legislation other than as a practicing attorney. My-- really, my first exposure to the proceedings, the techniques you used to draft these bills is probably today. What I'm more accustomed to doing is try to justify after the fact what your finished version looks like. I've been involved in quite a bit of litigation on constitutional attacks on prior bills, especially past versions of the collateral source bill, so, I think I'm a little more aware and a little more concerned about the practical application of these bills than I am about their direct impact on any special interest group or even on the general population. I'm more interested on what these bills might do to the practice of law and the trial of lawsuits and especially the need to appeal cases and do them over again if there is confusion in the way these bills are written.

Now, I was requested last week to take a look at a number of different proposals about periodic payment of judgments. I have looked not only at the uniform act which as I understand it and as it appears to me substantially what Senate Bill 258 is, I've also looked at a series of modifications to Senate Bill 258. I have looked at proposed amendments to the uniform act proposed by the NSSTA, the National Structured Settlement Trade Association. I have looked at a draft of what could have been a proposal for a complete rewrite of Senate Bill 258. I think I've looked at a total of six or seven different versions addressing this problem which mainly try to mix or match versions of the original uniform act with various suggestions on how to modify the uniform act and this morning I spent a lot of work specifically comparing the provisions of Senate Bill 258 with House Bill 2690 and it appears to me that you can, you can all best understand the differences between those bills by dividing each of them into three separate categories. You've got about 18 or 19 sections in each of those bills, but those sections can be boiled down to two types of procedural issue -- excuse me, two types of substantive issue and a whole series of more or less procedural technical aspects.

The procedural questions I think can be dealt with completely separately from the substantive and also the two substantive aspects can probably be separated from each other

and you can make up your minds as to whether to have a simplified or a complicated procedure for the application of this statute. You can make up your mind whether to have a simplified or a more complicated substantive impact on the way jury trials are handled and you can make your mind up as to whether to have a simplified or complicated effect on judgments being entered after a jury tile is over.

What I would like to do is just to very quickly summarize what I think the impact would be of the adoption of the original version of Senate Bill 258 on trial practice and where I think there might be some constitutional problems with that bill as originally drafted and then compare that to what I percieve to be the impact of House Bill 2690.

As a general rule you can expect to have heightened scrutiny in the courts of any bill that addresses these subjects. We still do not have any consensus among the State and federal judges as to whether in fact so-called heightened scrutiny levels of analysis apply to this kind of bill, but in fact no matter what level, technical level of constitutional analysis you use, these statutes will be looked at very closely in practice because they have a tendency to take dollars away from injured plaintiffs and any bill that has a tendency to take any dollars away from injured plaintiffs will be looked at very closely by many judges both at state and federal level.

Now, as I understand it both from the comments to the uniform act and simply the structure of the bill, there are some perceived problems in current jury system that both of these bills are intended to have some impact on. One of the perceived problems is the unpredictability of awards and there is no question there is unpredictability in awards. If you were to look at the history of some of the larger dollar amounts awarded here in the State of Kansas in the last five years, you would find, for instance, that to my personal knowledge at least three, possibly five of the multi-million dollar judgments entered in the last five years were for amounts at least ten times in excess of plaintiff's last settlement demand and I think that indicates that the jurys are doing things even the attorneys don't expect them to do and when experienced trial counsel trying to settle a case come up with figures widely at variance of what the jury does, you've definitely got to (inaudible).

Now, what these two bills attempt to focus on is a specific aspect of the unpredictability problem. It's not just demographic differences from county to county and courthouse to courthouse, but there are specific objective reasons why jury awards cannot be predictable and two of those are future damages and the costs inherent in inflation. We are more and more having to have jurys assess awards for damages that are not yet calculable and one of the major

reasons for that is that medical science has progressed to the point where the doctors can continue to give successful treatment after the time of trial. When medicine was a lot more primitive, by the time trial, the trial date came up, the victim would either be entirely healed or he was dead or his condition was at least stabilized and the assessment of damages was being made retrospectively only simply because the doctors ran out of techniques to use to try to assist a patient. Well, now that's not true. We have more and more instances where the doctors can continue to render effective medical care into the future. So long as they can continue to do that and so long as we continue to have our jury system, the jury will still have to make a single assessment of damages and in that assessment of damages they will have to predict what future medical expenses will be. That's getting more and more uncertain just because of the nature of medicine.

Now, we've also seen inflation and economic upheaval over the last couple of decades and that makes it very difficult to assess damages because a jury is expected to predict both the cost of future medical care and other expenses incidental to an injury and also the level of future lost earnings in the event you've got a plaintiff who's lost the ability to earn income and dependent upon what economic testimony you may present at trial, you can get wildly

different findings as to what the probable effect inflation will be on both expenses and lost earnings over a span of decades. All you have to do is visualize the problem confronting a jury when they have a badly injured minor whose life span could last six, seven or eight decades into the future in assessing what impact a disabling injury might have on that individual and that is a severe problem if we are to continue to require jurys to assess a single lump sum amount of damages to be paid immediately upon completion of the trial.

Now, as I read the uniform act and as I, that is Senate Bill 258 and as I read House Bill 2690, these are two attempts to address the same problem through different aspects of the jury trial system. The problem can be addressed either at the trial stage in trying to modify the role the jury plays in assessing damages or it can be attacked after the jury verdict comes in and in modifying the way judgments are paid or both. The uniform act attempts to address both procedures at trial and the method for paying judgment once it's completed. As I read House Bill 2690, it mainly attempts to address what happens after the verdict has been brought in and attempts to do relatively little to change the method by which the jury makes its findings of fact.

In our present jury system what the jury is

required to do is to listen to expert testimony, usually from economists or professors of some kind or other expert on both the subject of future inflation and the impact inflation will have on future expenses and future earnings and also on the earning power of a lump sum award and the jury is to extrapolate outward what the future damages would be and then turn around and interpolate inward and reduce the present value of what those future numbers would be and come up with some number which would then be paid to the plaintiff in a lump sum and in theory that plaintiff would then be entitled to take that money and do whatever the plaintiff sought fit, hopefully invest it in some profitable source of income, and then to pay those future expenses and to pay bills in lieu of earnings in the future.

The uniform act which has basically been drafted up as Senate Bill 258 as I read it attempts to take the whole issue away from the jury by substituting a system of uniform techniques for paying judgments over time, for reducing future damages to present value at fixed rates of interest and to simply get the economists and the testifying experts out of the business of trying to ameliorate the impact of these changes over time. The system that SB 258 would put into place would be one where the jury is told to assess all damages no matter what year they might come due in in terms of today's dollar. Let's say that a jury hears medical

testimony that an orthopedic joint surgery needs to be done 20 years from now probably. Rather than trying to assess the costs of that surgery by guessing what hospital fees and doctors fees would be 20 years from now and then bring that back to present value, SB 258 would have the jury assess damages in today's dollars for that same procedure. If that procedure is presently available, the damages would be the cost of doing that procedure today. A judgment would then be entered for those dollars, ten years into the future if the medical testimony is it will be ten years before that surgery is needed. Then take into account the fact that there is inflation in the real world and in order to try to give the plaintiff enough money to actually pay for that surgery if it is needed ten years from now, every judgment for future benefits would have applied to it on an annual basis a form of cost of living index. The judgments would be increased on an annual basis by a formula that's set out in the bill that's linked to current interest rates.

As an alternative, the defendant in a case of that kind under SB 258 could pay a lump sum up front, the future payments would be reduced to a present value in accordance with a fixed interest rated, a fixed compound interest rate rather than an interest rate to be assessed as a question of fact from case to case either by the court or the jury. Now, it appears to me to be very important to the

constitutionality of a bill of that kind that there be a linkage between taking the issue of inflation away from a jury and imposing it in somewhere else. If you were to pass a bill that absolutely prohibited an award of damages that takes into account the fact that inflation exists, the courts would probably strike it down as unconstitutional, at least if it were applied retroactively. I believe they would certainly strike it down as unconstitutional. But if you shift the means for calculating effective inflation from one part of the process to the other you may pass muster. You may, not certainly, but may. House bill 2690, for instance, shifts the determination of discount rate to the court, to the trial judge on a case by case basis based on testimony, whereas SB 258 has a fixed rate applicable to all cases statewide without an opportunity for the judge to make a determination on a case by case basis. But both bills and common law allow that determination to be made somewhere or other, whether it's by the jury, the trial judge or by general rule adopted statewide. Likewise, it will probably be necessary to have some kind of discount rate to reduce judgments to present value in certain instances because some cases just will not be proper cases for payment over time. There will be circumstances where the defendant doesn't have the money to pay over time, there will be circumstances where neither the defendant nor the plaintiff want the judgment to

be paid over time and in that case you need to have a way to reduce future damages down to present value by means of a discount rate. That discount rate likewise is something you can either entrust to a jury or you can entrust it to the court or you can adopt the rule that applies across the board.

One other aspect of future damages both these bills addresses is incorrect predictions of future losses. One of the most obvious places where a prediction may be wrong is where you have a badly injured or seriously ill plaintiff who will incur very substantial future medical expenses if he or she survives, but a desparately ill or injured person also has a tendency to die. So, if they die and a jury has awarded very substantial probable future medical expenses, there will be a contradiction between expectation and fact. Now, you can either allow that to happen, that's what our current system is. If a million dollars of future medical are awarded today and the plaintiff dies next week, that million dollars of judgment is paid, it goes to the estate or the heirs of the decedent, but the judgment is paid nonetheless.

Now, it appears that both bills attempt to relieve the burden of uncertainty in part by having some of those incorrect predictions modified at a later date. As I read both bills, each of them attempts to prevent the payment of

future elements of expense while continuing to pay future elements of lost income. If we could take an example of an award of future pain and suffering of a hundred thousand dollars, an award for future medical expenses of a hundred thousand dollars and in the same case an award of future lost income of a hundred thousand dollars all spread over a 20 year time period. If that plaintiff were to die halfway through that time period under both bills as I read them, you would cease making payments for the pain and suffering, you would cease making payments for medical expenses, but you would continue to make payments for losses of income and the apparent intent here is to try to keep the dependents of the injured person from going on public assistance or otherise losing the benefit of the income that they could be led to expect after an award of that kind is entered.

The uniform act provides for numerous techniques for paying off a judgment if one is entered for future periodic payments. Basically it's a question of posting some form of assurance that the money will be there when the payment comes due, whether that's by a surety bond, whether that's by a guaranteed contract, the purchase of an annuity or any other commercially available technique. Under HB 2690, the sole technique for assuring payment is the purchase of an annuity. As I read that bill, that's an important aspect of the bill. The main thrust of HB 2690 is to make

sure that the judgments are fixed and predictable in amount as of the date the judgment is entered so that an annuity can be readily purchased on the commercial market.

That result cannot be achieved with SB 258. SB 258 trades off certainty at the verdict stage for uncertainty at the post verdict stage. By adding an annual cost of living type of increase to judgments for future payments, SB 258 creates a great deal of uncertainty the longer the period of time is those payments will come in and would create a potentially insurmountable obstacle to the purchase of an annuity for the payment of those judgments.

I think you can mix or match provisions of these bills and come up with at least two different versions of a constitutionally acceptable bill. You might be able to come up with more than two different versions of a constitutionally acceptable bill, but it appears to me that there are at least two different versions. I think the provisions in SB 258 for thresholds for not applying the bill until a certain dollar level of damages is reached are unnecessary, potentially unworkable and potentially unconstitutional. I do not see any undue hardship on the jury trial system in the State of Kansas with having a simplified procedure of special verdicts and judgments for future payments being applied in every personal injury case where there are future damages. We already have special

verdict forms that are fairly complicated. If anything, trial procedures will be simplified under SB 258 procedures because there will be no need to present at trial expert testimony about the expected inflation rate and discount rate problems. You would cut out that aspect of expert testimony, which is a significant expense on litigants as well as a burden on the courts. It's not unusual to have a full day or two days of trial in a serious personal injury case devoted exclusively to economic experts.

So, with SB 258 if it were applied uniformly to every personal injury case where future damages could be expected, that could be done without unduly burdening the judicial system. Procedurally a lot of SB 258 is drawn from the uniform act which is drafted for use in all 50 states. We have a much more stream-lined set of procedural rules here in Kansas than are present in most cases. Many of the provisions of SB 258 could be completely chopped out and left out. There are sections that talk about indemnity and contribution rights between parties. We don't have to worry about that here in Kansas because we don't have joint judgments. There are provisions in SB 258 for taking care of future subrogation rights and I am, I am not able to think of a situation where we would have future payments of benefits that would be subject to subrogation rights, so, the bills can be put together to give basically what I see are two

distinct goals to be achieved.

One is to change the jury trial system. You can either do that or not do that as you see fit. If you change the jury trial system, I would suggest that you do it by taking the economic problem completely away from the jury. That would mean the adoption of the substantive provisions of SB 258, which is the bill that takes the problem out of the province of the jury altogether and turns it into a question of statewide rules of law applicable to every case. That would do away with 14th Amendment objections to the bill. That would do away with what I percieve to be some real potential headaches in partially altering the way jury verdicts are arrived at.

As I see HB 2690, it is an attempt to modify jury trial procedures only in part. The jury is still involved in the economic question, but they're only involved in trying to assess the effect of inflation. The court then decides what the proper discount rate is in HB 2690 to reduce the jury's findings of future damages down to a present value should that be necessary. I think that would be a mistake because that would effectively preclude effective cross-examination of economic experts. Economic experts typically are cross-examined about unduly pessimistic predictions of future inflation by getting them to admit that the interest rates are proportionately high during periods of high inflation,

but that testimony is really only relevant where the jury is also assessing discount rates. If a jury is only looking at inflation rates, then the testimony you expect to use to cross-examine an expert doesn't even come in.

So, if a jury is only looking at inflation rates, which I think is what they're doing in HB 2690, there's going to be a tendency to push the dollar awards up higher, and I think that's a mistake. I think the legislative purpose behind both these bills is to try to keep jury awards down as low as possible and then pay them in as reasonable a fashion as possible.

I would therefore suggest that in making your decision you opt entirely one way or the other, either don't touch the jury system at all and leave it entirely up to the jury to decide the economic questions or adopt the system that's shown in SB 258 of taking the question completely away from the jury and turning it into a uniform rule applicable statewide.

The other severable substantive provision in these two bills relate to the methods of paying judgments once a verdict comes in. Under HB 2690, the only technique for payment is an annuity. Under SB 258, virtually any financially solvent guarantor would be a sufficient back up for the entry of a judgment for future payments. I think there's a need for more flexibility than just to require the

purchase of an annuity. There are times when annuities might not be economically practical or might not be economically available when other forms of compensation are available. Most defendants have liability insurance policies available. The amount of compensation available under those liability insurance policies is readily determinable by the court and should be just as good a means of guaranteed future payment as the purchase of an annuity, so long as the companies are sufficiently solvent. So, I would suggest that you try to keep the options open and stick with the SB 258 version of the types of security that should be posted to pay future judgments.

Now, as I understand it, both these bills propose substantially identical post-judgment modifications in the event the jury turns out to be wrong and certain predicted losses do not take place. As I read these bills, although the language is not identical, the effect would be the same. The jury is to make separate findings of expected future expenses, expected future lost income and expected future intangible losses such as pain and suffering and that under both bills there would be a cessation of future payments of future expenses and future intangibles in the event the plaintiff dies, but there would be no cessation of future benefits for lost income. I think that substantive provision is something you can address completely separately from the

rest of these bills. You can put that in or take that out as you see fit. I don't see it as a necessary part of the underlying structure of either one of these bills.

Now, the sponsors of the bills may have completely different views. They may feel that there is a definite purpose to be served in making some of these future payments stop at a future date, but from the point of view of a trial practice and from the point of view of applying these bills in the court and from point of view of constitutionality, I don't think there's any reason that you can't sever those provisions from each other. I do think that it's important that you not put in a severability clause that would permit separation of the issues that refer to how much power the jury has versus what is done with the verdict afterwards.

SB 258 has three aspects that should always go together, those being that the jury be required to find damages from present value, that there be a fixed discount rate to reduce judgments to present value and that there be an annual increase of an escalator type on future payment judgments. All three of those sections should either be adopted together or not at all and I think it would be a mistake to enact this bill with a general severability clause in it which would permit the courts to decide to keep one or two of those three and reject the other one or two. All three of those I think are intended to be an essential

nucleus of a package that the uniform act authors intended to put together.

Now, I have, as a result of my discussions last week with counsel for the Kansas Bar Association and some meetings over the weekend with some plaintiffs' counsel and some other defense counsel, I have reduced some of my thoughts to writing and I wrote a letter to counsel for the Kansas Bar Association. I think he will make available to all the members copies of that letter where I go into considerably more depth and detail on exactly which sections of the bills seem to have constitutional aspects and which ones belong together and which ones can be severed from each other, so, perhaps that will give you an opportunity to review this in much more detail at a later time; but, I feel overall it is extremely important that whichever version you opt for, whether you, whether you make the act applicable to all cases, whether you decide to leave the jury system unaltered but change the method of payment of judgments or whether you decide to significantly change the method of presenting evidence to jurys, you need to be very, very clear on the record exactly what your legislative intent is. It is a major problem in litigating constitutionality of these bills to have conflicting statements in the record of what the proposed or supposed effect of the bill will be.

A great deal of unnecessary time was spent briefing

the constitutionality of the collateral source rule the last time it came up in discussing whether in fact there was an expected direct impact on doctors' medical malpractice premiums. Now, I personally think that was a red herring that just wasted a lot of time. It may have been a hoped-for result on the part of the sponsors of the bills and many of the legislators who voted for it, but it's more important not to address what you hope for but to state what minimum goals you practically expect to be achieved by your bill. You can then comment on top of that and say that we also hope that over and above these minimally predictable practicable goals will also have a [salutory effect on a number of other problems but these bills are very hard to defend in the courts if the only legislative history is a hope or an expectation that there may be some beneficial effect on an outcome.

I would also point out that whatever you do, you should try not to make it as apparently one-sided as some past bills have been. Any time a bill comes out of the legislature which on its face appears to grant benefits only to defendants and appears to impose burdens only on plaintiffs, even if in fact that's not true, if it appears that way, there will be judges in this state who will impose the strictest level of scrutiny on that bill. I had a very difficult time trying to convince Judge O'Connor in Kansas

City that there were additional real beneficial effects of the collateral source statute over and above what was stated in the comments of the sponsors of the bill in the legislative history. Judges are not willing to address the real practical effect of these bills in the real world. They'd much prefer to look at the suggested effects in the legislative history and then decide on their own whether those suggestions are accurate or innacurate.

So, I would suggest that whichever side any of you fall on, being in favor of leaving the jury system intact or in favor of streamlining it for greater predictability or if you're in favor of making future benefits subject to termination on death of a plaintiff or not, whichever side you fall on those issues, please be as explicit as possible in the nature of your objection. If you think it's not going to work, please say on the record that you don't think it's going to work and why you don't think it's going to work. If you just think it's a bad idea, you think that if it works it's bad public policy, please state that because it will make life so much easier for the judges and attorneys who have to litigate these questions of constitutionality later on.

Now, my, my only definite recommendation here today is that from the point of view of trial practice, my only definite objection is to the one provision of HB 2690 which

splits the issue of economic facts between the jury and the judge. HB 2690 allows a jury to make a determination of how high the damages might go based on inflation, then it goes on to say that the judge is to make a separate fact determination of how low to bring those damages back down by applying the correct discount factor. From a pure trial practice point of view I think that it is a major mistake. I think that will greatly increase the unpredictability of the amount of jury verdicts and I have no way of explaining to you whether there's a hope that that unpredictability can be offset by the reduced cost of paying those judgments over time.

Our present system is one where the jury gets to hear all of the expert testimony on the economic issues, both pro and con. If the jury is going to listen to the economists at all, they'll listen to them both on the subject of how high inflation goes and how high interest rates go. If the jury is to continue to hear any evidence on that subject, it should continue to hear all evidence on that subject.

Now, that also brings me to my only suggestion to try to make either one of these bills as proof against constitutional attack as possible. I think if you're going to get either one of these bills past constitutional attack it needs to be applicable to every case. That's my personal

opinion. It needs to be applicable to every case unless you can come up with a very good reason why it should not be applied to some specified category of cases, otherwise you will just create 14th amendment problems, you will create equal protection of laws problems.

Secondly, if constitutionality is the only thing you're worried about, then don't tamper with the jury and reject SB 258, but if that's the only thing you're interested in, because the United States Constitution guarantees a right to a trial by jury, if you're going to start tampering with the jury system at all you might as well do a very thorough job. If you make any changes at all you will subject this bill to heightened scrutiny in the courts, so, don't do that unnecessarily. If you're going to change the nature of the findings that jurors make, change it for a good reason. I do not see any good reason short of the adoption of the rule of SB 258 for incurring that potential constitutional problem. I think SB 258 is a sufficient probable improvement which benefits both the plaintiffs and defendants in streamlining jury trials that it should pass constitutional muster, but if you're worried that this bill might not pass constitutional muster and you're satisfied with the present jury system, then leave the jury's role as fact-finder completely alone. Then you won't have that problem. You won't have helped anybody, but then you won't hurt anybody either with regard

to how jury trials are run.

Also, if the only thing you're worried about is constitutionality, be absolutely sure to make the provisions about cessation of payments in the future be prospective only. I have no hesitation in predicting for you that there are enough judges in this state who will strike down either one of these bills as unconstitutional if you try to cut off payments of future damages to individuals who have already suffered their injuries and there's a lot of room for debating that on the constitutional level, but my prediction in fact is that if you pass either version of these two bills with a provision that individuals who've already suffered an injury have a potential for losing future benefits because this bill has gone into effect, at least that section of the bill will be stricken as unconstitutional. Those are really the only comments I think I can make that would be helpful to any of you unless there are some questions.

CHAIRMAN WUNSCH: Steve, we haven't seen the letter. Does it enumerate the two approaches that you have suggested and tells us which aspect of 258 and 2690 should go in the two different approaches?

MR. FABERT: I have done two things for you, Mr. Chairman. I dictated a narrative letter that summarized what each bill I believe does in practice, what the constitutional challenges would be to each and an attempt to compare the

practical effect of each bill as they would relate to the stated purpose of the bill. Now, I've also very quickly by hand just over the noon hour made a quick list of how some relatively simple amendments to HB 2690 could produce a bill that I think would be an optimum bill, also a checklist of which sections of SB 258 could be kept with minor amendment to produce a bill that would have an optimum result and a good chance of passing constitutional muster. I can have those typed up or copied for all of you and I'm sure it would probably greatly assist in conjunction with the letter in deciding how to redraft either one of these bills.

CHAIRMAN WUNSCH: To follow the concept of 2690 we have to amend into it which provisions of 258?

MR. FABERT: If we start with House Bill 2690 I would suggest that you keep Sections 1, 2 and 3.

COMMITTEE MEMBER: Point of order Mr. Chairman.

CHAIRMAN WUNSCH: Yes.

COMMITTE MEMBER: Are you intending that we're going to take this down and try to work this bill without any written draft or any opportunity to discuss what--

CHAIRMAN WUNSCH: I think we'll have plenty of time to discuss it but we may try to work it. We've heard it before, we're familiar with it, we've had hearings and we've read it. I just thought Steve had a little different approach that was understandable to me and I wanted him to

offer it to you. Otherwise we wouldn't have had the benefit of his presentation and we are better informed now than we would have been thirty minutes ago or tomorrow without it, in my opinion. So, would you, 1, 2 and 3 of 2690 should remain to follow the concept of 2690, is that what you said?

MR. FABERT: In order to follow the concept of 2690, of course, 2690 should remain just as it is because I think that bill comes very close to achieving the goals that it's offered if the intended result is to have judgments that are in certain amounts so that annuities can be purchased. That bill I think is pretty well drafted and the only change I would suggest to House Bill 2690 would be to eliminate a provision that talks about having the judge find as a matter of fact what the discount rate is. I think it would be far, far preferable to have the jury act in the same manner as they have traditionally acted if the purposes and goals of HB 2690 are to be met.

CHAIRMAN WUNSCH: In other words, let the jury bring it back down to present value?

MR. FABERT: Yes, to have the jury be sole factfinder on economic problems and let them hear all the testimony and make all the judgments on -- that's my personal view and I say that because I think that's the only way to avoid a completely unpredictable likelihood of increased verdict amounts.

CHAIRMAN WUNSCH: Question of Representative Adam-- or Cannard (sp), excuse me.

COMMITTEE MEMBER: 2690, wasn't that where you said that it almost guaranteed that jury awards would go higher?

MR. FABERT: Yes, I think that that provision of 2690, the splitting of the factfinding process to allow jurys to look only at increasing costs and allow the judge separately to look at decreasing those costs, I think the net effect of that is to have the verdicts have upward pressure on them. I'm not saying that they would necessarily spiral up, but there would be a tendency for verdicts to be higher.

CHAIRMAN WUNSCH: But by doing as you suggested, leave both aspects to the jury, then if they go higher they're going to be brought down because the jury's going to conceivably-- because the jury is going to be the determiner of the present value as well as the gross value.

MR. FABERT: And we have our present system. I mean you would not be changing anything from the way it's currently done. All you would be changing is the actual cost of paying that judgment once a verdict has come in by allowing the judgment to be paid over time rather than paid as a lump sum up front.

CHAIRMAN WUNSCH: Representative Solbach.

COMMITTEE MEMBER: One of the benefits that I think we are hoping for is to reduce unnecessary trial costs,

unnecessary transaction costs. The system is, as it is currently structured makes the cost of bringing these actions so high that we have kind of a defacto threshold as I think I've heard you mention before because it costs so much to bring an action. 258 would bring down those transaction costs, is that correct?

MR. FABERT: 258 would bring back the costs incidental to the trial of a lawsuit. I make no prediction on whether it would bring down overall costs because I'm not sure what effect it would have on the cost of the payment. I assume because the National Structured Settlement Trade Association is in favor of it that it would bring down the cost of paying judgments. I assume that since defense bar generally are in favor of payments over time, it would bring down those costs, so I would predict it would be an overall decrease in litigation costs, specifically with regard to trials. SB 258 would eliminate the need for either plaintiffs or defendants to present expert testimony on inflation and interest rates and that can be a significant cost of a trial.

COMMITTEE MEMBER: Would that be less confusion to the jury then?

MR. FABERT: It certainly would be. In fact, there's a great deal of dissension among the courts on just how complicated jury findings ought to be. There are many

courts, including I believe the state courts in this state, that will not allow a jury to be informed of the potential income tax effects of a tort award simply because those concepts are too complicated for lay jurys to comprehend. If that's true then lay jurys probably should not be allowed to have anything whatever to do with predictions of future inflation and reduction of present value of those future predictions.

COMMITTEE MEMBER: Did I hear correctly, let's see, you had researched the constitutionality of some of these concepts thoroughly. You've been successful in convincing federal judges that some of these things were constitutional when other judges weren't --

MR. FABERT: Well, yes, in the last collateral source bill I think constitutionality was decided in sequence by no fewer than five or six different judges. When I briefed it the issue was pending in Kansas City before Judge O'Connor, Federal District Judge. At that time we already had a decision by Judge Kelly in Wichita that the statute was constitutional but trivial. We had a decision from Judge Theis, the Federal Judge in Wichita, that it was substantive and unconstitutional. We had a decision from Judge Saffels it was substantive and unconstitutional, then Judge O'Connor got it. I think there may have been one state court ruling in the interim there. Judge O'Connor got it and even in the

light of a two to one vote against it, we were able to convince him that bill was constitutional and served a rational purpose.

COMMITTEE MEMBER: Did I hear you correctly that you believe the purposes that we state we wish to achieve in 258 are sufficient to allow 258 to pass constitutional muster?

MR. FABERT: I think they are. I'm not willing to predict for you how many judges are going to agree with me because, of course, the Kansas Supreme Court did not agree with Judge O'Connor once they got the issue in Farley vs. Engleton case. They had the opportunity to look at substantially the same issues and same order as I presented them in Kansas City and they simply chose not to follow that strain or precedence.

COMMITTEE MEMBER: Did I hear you also say that you believe this provides benefits to both defendant and plaintiff?

MR. FABERT: I think the substantive aspect of 258 is beneficial to both plaintiffs and defendants.

COMMITTEE MEMBER: Do you have suggested amendments for 258 if we were to work off of it, would it be as simple to amend as the other bill would be?

MR. FABERT: Yes, yes.

COMMITTEE MEMBER: Do you have a recommendation as

to which bill we ought to look at if we want to come up with a law that is just, right and fair?

MR. FABERT: The procedure that I foresee is one of taking certain sections out of one bill and putting them in the other and keeping some of the sections that are common in both bills, so, from a purely practical point of view, unless there's a procedural reason to opt to amend one bill versus the other, I think from the point of view of understanding what's going on, you could start with either text. I find it difficult because I've been working from an amended version of SB 258. I find it difficult to start with that text and work away from it.

CHAIRMAN WUNSCH: We have the original 258.

MR. FABERT: If you work from the original text of 258 it's probably at least as simple to start with it is as it is to start with 258.

COMMITTEE MEMBER: If we want to keep the information going to the jury simple and let the judge do these calculations, we should work with 258. If we want all the information to go to the jury, then we work with 2690, would that be--

MR. FABERT: I don't really think it makes any difference. You can borrow and choose from each statute and reach identical outcomes by amending either statute.

CHAIRMAN WUNSCH: Representative Sebelius?

COMMITTEE MEMBER: Did I understand you to say that you thought there were constitutional problems with either version of these bills if we included in them some sort of provision for future payments to stop on death of plaintiff?

MR. FABERT: I think there's a constitutional problem only if that provision is made retroactive. I don't think there's a constitutional problem with a prospective change in the law of abatement which is what that pertains to. The legislature under the Kansas constitution and Kansas statutes has the authority to change the common law so long as they do not modify vested rights. If I chose to abolish outright a particular right to recover for an element of damages, you could do that prospectively. But in an instance where an individual is already injured, the traditional interpretation of the courts is that the measure of damages vests with the fact of injury, not with the award and not with the trial. At least that's the position that has been taken by many plaintiffs' counsel and it has been a successful position taken before a number of courts. There are countervailing authorities which would indicate that until the judgment is final it can be amended by the legislature at any time, in a case that's on appeal, for example, could be subjected retroactively to a bill of this kind. If you're interested in a practical outcome of not having to worry about that, then don't make it retroactive.

You might win that argument but I don't predict you would.

COMMITTEE MEMBER: Both these bills, if I'm correct, have a provision for abatement of future payments, not the income, but future expenses and pain and suffering payments.

MR. FABERT: That's correct.

CHAIRMAN WUNSCH: Is there any similar provision to allow the plaintiff to come back to a court and readjust what might be an insufficient medical payment, a bad guess on the part of the jury as to an operation needed in 1992 which is actually needed in 1990, is there a provision that the plaintiff had an equal power to come back in and adjust the the annuity or the payouts?

MR. FABERT: Under neither bill is there a technique for changing the defendant's obligation to pay in light of an insufficient award. Under SB 258 there is a technique which gives the plaintiff enough leeway to potentially take care of those problems. Under SB 258, benefits to be paid under an installment judgment would be assignable to health care practitioners in advance. So, you could at least post some sort of guarantee of future payment if medical attention was needed before the money had come in.

COMMITTEE MEMBER: That would be only if the health care provider would agree?

MR. FABERT: That would be entirely consentual

between the the health care provider and the plaintiff. But notice there is nothing in either one of these bills that will allow a plaintiff who has not convinced a jury to award the damage in the first instance to come back and get an enhanced award of damages. I might compare that to a provision in the law which does single out a special category of plaintiffs on just exactly that point. If you look at K.S.A. 60-513 (a), (b) and (c), set of statutes that appear between the two year Statute of Limitations and the one year Statute of Limitations, you'll see some special provisions about radiation injuries that, to the best of my knowledge, those provisions have never been applied anywhere in the State of Kansas, but they are an alternative technique. What that bill allows is an extended Statute of Limitations for the victims of radiation injuries and allows a subsequent retrial of damage issues in the event a plaintiff suffers a new and separate injury and that's what I read that bill to mean, if you come down with cancer later on as a result of radiation exposure. Now that's a completely separate technique that's not suggested by either one of these bills and which I'm sure would undoubtedly defeat the purpose of 2690. No question about that. It would probably be substantially at variance of SB 258, but it would definitely defeat the purpose of HB 2690 because if there's ever an opportunity to come back in and reopen the judgment, of

course, there would be no way to get anyone to guarantee the payment of that award. You would essentially have a brand new trial.

CHAIRMAN WUNSCH: Steve, let me reiterate again, if we were not to change the trial jury system, we could -- 2690 addresses that, but if we were to incorporate into 2690 the five elements of the ability to satisfy those judgments that exist in 258 as opposed to just the annuity aspect, would that be one of the aspects of 258 that should go into 2690 if we did not want to really tamper with the jury system?

MR. FABERT: If your choice is to leave the jury system, the technique for entering verdicts, the technique for trying cases and achieving the fact finding untouched, you would have to amend 2690 to take out a portion of Section 6 and take out a portion of Section 4.

CHAIRMAN WUNSCH: What portions of Section 6?

MR. FABERT: Section 6--

CHAIRMAN WUNSCH: Or 2690 you're talking about, Page 3?

MR. FABERT: Yes. Section at line 0083 and 0084 states that the court shall reduce the--(inaudible). That is half of the provision that bifurcates the process and let the jury decide how high the number goes and then gives the power to the judge to bring them back down to more reasonable level and the language in Section 4 would be at line 61, 62, and

63, which states that the finder of facts shall not reduce the damages awarded to present value. That language would have to come out if you would leave the present jury trial techniques untouched.

CHAIRMAN WUNSCH: So, 58 through 60 --

MR. FABERT: 61 through 63.

CHAIRMAN WUNSCH: 61 through 63 and then change the wording of 83 and 84 to make that a jury determination?

MR. FABERT: Yes, and you could simply take that language out and in the absence of any comments about changes to the jury system, you would have our current system. Now that, of course, would be a continuation of both the pros and cons of the present system. You would continue to have the need for a plaintiff to hire an expert to put on that testimony, but at least you would not be raising this new potential of an increase of verdict amounts.

CHAIRMAN WUNSCH: Well, that's what they do now, isn't it, they hire an economist?

MR. FABERT: The current system is to have substantial funds expended to find an individual who will testify as an expert on those subjects.

CHAIRMAN WUNSCH: Then if we also, to further accommodate that bill and allow for greater latitude in resolution of the verdicts or the judgments, couldn't we adopt the five categories of Section 8 in Senate Bill 258?

MR. FABERT: Yes, rather than limiting it to the annuity contract, you would want to adopt substantially the language of Section 8. I would suggest, however, that item number 5 be omitted from that list.

CHAIRMAN WUNSCH: Just 1 through 4?

MR. FABERT: Yes, because giving a trial judge unfettered discretion to define what a satisfactory form of security is I think renders you open to an attack on arbitrary grounds. There must be rational rules applied here and if a judge were going to make a determination on a case by case basis he needs guidance. Now, that problem could be cured later on in the bill where there's a reference to giving the commissioner of insurance authority to adopt regulations defining who a proper guarantor of these debts would be and that could be resolved by the adoption of regulations.

CHAIRMAN WUNSCH: What other aspects of 258 should go into the approach of 2690?

MR. FABERT: Sections 9 and 10 of SB 258 I think probably belong in a finished bill. Those are general procedural techniques for the posting of security. Those are procedural aspects that are probably going to be in virtually all cases and would belong in any bill.

MR. SMITH: Are you working off the original version?

CHAIRMAN WUNSCH: Yes, he's talking about the original version, 258.

MR. FABERT: And that's the original numbering of those sections, not the modified number, not the amended number.

CHAIRMAN WUNSCH: 9 and 10 of the originally numbered 258.

MR. FABERT: Now, there may be portion of 9 or 10 that could be objectionable to individuals. I consider them to be neutral. For instance, there's a provision here for sanctions against a defendant who elects to have this bill apply and then refuses to post security unreasonably, and that may be considered either contrary to public policy or unreasonable or unnecessary. So, I don't recommend that that sort of thing be adopted, but the substance of these sections I think certainly deserve to be in any finished bill.

CHAIRMAN WUNSCH: Is there any further?

MR. FABERT: Section 15 I think also -- section 15 allows the parties to agree to tailor their own judgment and have court approval of that judgment and to opt into or out of as many sections of the bill as they see fit and I think that would be an excellent provision to keep in any finished bill and of course, that would be necessary in virtually all wrongful death cases where there are multiple heirs and also in any case where one of the claimants is a minor, court

approval would be necessary, so, you probably should have a section authorizing court approval.

CHAIRMAN WUNSCH: Are there any other?

MR. FABERT: Then the last section that I would suggest belongs in any version of this bill is section 17 part A which authorizes the commissioner of insurance to establish rules and regulations to identify properly solvent companies to back the payments of these judgments. I would question the advisability of Section 17-b which relates to rules and regulations to require insurance companies to perform certain acts. I don't know how that can be enforced. Insurance companies are not parties to personal injury lawsuits and in order to enter some sanction or order against an insurance company you usually have to go through a garnishment proceeding and, so, that set of rules and regulations I don't think are necessary and ordinarily garnishment techniques would be used to get insurance companies involved.

CHAIRMAN WUNSCH: What other?

MR. FABERT: Those really are the only sections that I would suggest be incorporated whole. I would suggest that some of the language be cleaned up in the special verdict form. The fairly obvious intent of these bills, especially with regard to the abatement section, is to differentiate between lost income and predicted expenses that

never take place. But if you read the definitional section and the section on special verdict forms, that distinction is not followed through plainly. Instead a distinction is drawn between medical expenses and all other economic losses and I would advise that that be redrafted to show plainly what the underlying intent is, that the finance be separated between items of income versus items of expense and that is what the abatement section is about. Abatement of expense items but not income items.

CHAIRMAN WUNSCH: May I make this suggestion to members of the committee, we've heard that there are some possibilities of going the direction of 258 and going the direction of 2690. I'm going to suggest that if it's at all possible that a balloon be prepared in that, in those two directions if Jill can do that tonight.

COMMITTEE STAFF: So far I've just been taking notes to go in the direction--

CHAIRMAN WUNSCH: Well, he has notes that go both directions. Get those balloons prepared-- the time restriction that we're under is that the bill is desired to be out of committee and run Thursday. We're going to meet at 7 o'clock in the morning, adjourn this, be here at 7:00 tomorrow morning. We'll find you a secretary.

COMMITTEE MEMBER: This is very short notice, Mr. Chairman. I have a conflict that I can't be here tomorrow

morning. I would like to participate in this proceedings, it's not a regular scheduled committee time. I'd be willing to meet over the noon hour or I suppose I could -- I would ask the chairman to give us a little bit of time to look over these proposed amendments. It's a complicated matter. We have constitutional questions here.

CHAIRMAN WUNSCH: It surely is, but that is my thought, John, and I don't know whether it will work out. This is more complicated than the Senate passed 258 in a vote of 40 to nothing out of the Senate. They don't even know what's in the bill. We may not know what's in the bill either, but we've at least addressed it in a lot more intelligent fashion and we have some idea what we're doing and we know that it's involved. I want to just try to get a bill out of committee, get it down on the floor and if it comes off the floor, it will go into conference and probably at that point there'll be a lot of work done on it in conference.

COMMITTEE MEMBER: Mr. Chairman, would you allow the committee members to at least have access to these balloons during the day tomorrow and then perhaps take this bill up immediately when we meet at 3:30? That would at least, and we could get the bill out of here tomorrow but--

CHAIRMAN WUNSCH: I would if you would prevail upon your side to emergency this bill up so that it can be debated

on the floor Thursday.

COMMITTEE MEMBER: I will promise to prevail upon my side to do that, Mr. Chairman. I can't promise what my prevailing will result, but I will promise to prevail upon them.

COMMITTEE MEMBER: Mr. Chairman, I would suggest that, you know, I think you've laid out the best way to go and that is if possible get the balloons by morning and do it in the morning, but if that's not going to be then let's just stay tonight and work it. You know, if that does not fit the needs of the minority, ranking minority member then I think let's just stay tonight and do it.

COMMITTEE MEMBER: I think we need a little time to look at them.

COMMITTEE MEMBER: John, the obvious concern, I mean, you know, you sit there and say that, but the obvious need at this point in time is to get it on the bill, put a bill on the floor. We can sit here and talk about hypothetical things but let's wait until tomorrow night but unless we have a concensus that the bill can be emergencied up --

COMMITTEE MEMBER: Our track record on appeal to the Supreme Court is not very good. I'm beginning to be concerned about the credibility of this committee in working bills and taking enough time to at least carefully look at

them and determine whether they are constitutional or not. Now, I know there is a necessity to get things out of committee but I would like to think that as most of us are attorneys that we take adequate time to look at things before we just are hellbent to get something done for something's sake.

COMMITTEE MEMBER: In all due respect, I would have to say that our committee has spent more time on those matters than probably any committee I know and I don't think that's a fair criticism, you know. The situation we're in is that obviously the chairman needs to get a bill to the floor.

COMMITTEE MEMBER: Right, but an hour and a half is not sufficient to do that.

COMMITTEE MEMBER: I think we're either in terms of doing it late tomorrow or we do it tonight or early in the morning.

COMMITTEE MEMBER: Well, I don't see that we get the amendments in the morning and look at them early in the day why we can't expedite them the first 10 or 15 minutes tomorrow afternoon. At least justice will be served. We'll have an opportunity to look at these minutes.

COMMITTEE MEMBER: Well, the simple mechanical force features, in the absence of assurances from either side we can emergency it up, you know, are obvious.

COMMITTEE MEMBER: The numbers are obvious, too. I

mean you don't need assurances from my side to get the bill either out of this committee or voted on the floor of the House or emergencied up. I think our concern, my concern is that we get something that's constitutional and that we take a little bit more time than we have in the past to guarantee that it is done properly the first time so we don't have to come back and do it again.

COMMITTEE MEMBER: We all have concerns about the constitutionality.

CHAIRMAN WUNSCH: Well, let's discuss further, though, why don't we just, do you think that your side would allow an emergency of this bill?

COMMITTEE MEMBER: I don't see why we wouldn't allow an emergency of the bill if that was necessary.

CHAIRMAN WUNSCH: Well, it will be necessary unless we do it tonight or in the morning so that we can report the bill to the floor during the session.

COMMITTEE MEMBER: Mr. Chairman, I don't have any problem with passing the bill out tomorrow afternoon when we meet at 3:30 in the first 10 minutes, but, and I think that we can probably reach some consensus about the direction that we want to go and--

CHAIRMAN WUNSCH: In 10 minutes?

COMMITTEE MEMBER: During the day between the time we get the bill at 7:30 in the morning and the time that we

meet in the afternoon, there will be opportunities for all of us to look at the bills, to discuss it, there'll be opportunities for other people who haven't seen these things to look at them, people sitting in the audience now, other members of the public and by 3:30 we ought to be able to put something together and go.

CHAIRMAN WUNSCH: Of course, you're understanding that we're affording them greater opportunity than we would have had we worked the bill without doing what we did today.

COMMITTEE MEMBER: I would point out, Mr. Chairman, that it's, we're about half an hour over schedule right now and this bill was not on the agenda.

CHAIRMAN WUNSCH: The agenda says discussion and action on all bills previously heard. It was on the agenda.

COMMMITTEE MEMBER: I suppose perhaps--

CHAIRMAN WUNSCH: So, if you will, we will accept your assurance regardless of the outcome of this bill out of committee. You're saying we can't get that assurance?

COMMITTEE MEMBER: I know of no reason that the minority members would as a block stop an emergency of this bill up on Thursday if we take the time now to look at it and work it properly within this committee.

COMMITTEE MEMBER: Mr. Chairman, we'll be in sessions on Friday, I mean if we debate this on Thursday --

CHAIRMAN WUNSCH: I've already explained where we

are and when we want to get to the floor on this bill.

COMMITTEE MEMBER: You want it passed out of the house by Thursday, is that correct?

CHAIRMAN WUNSCH: In general orders.

COMMITTEE MEMBER: Can I just ask one single question just for purpose of clarifying? If we pass the bill out of committee tomorrow afternoon at 3:30 it would not be read in until Wednesday and so why couldn't it be debated on Thursday? What am I missing?

CHAIRMAN WUNSCH: Those of you know it better than I do. It has to be--

COMMITTEE MEMBER: But I think that's the point we're not clear on. You don't want final action on Thursday, do you? Is that where we're going?

CHAIRMAN WUNSCH: No, we're debating them on Thursday.

COMMITTEE MEMBER: So, if they're ready on Wednesday morning, is emergency action needed, Bob? Well, the committee report has to be in before we adjourn on tomorrow night.

CHAIRMAN WUNSCH: Those of you who know better than I, are we in error in saying that we can't do this Tuesday and still debate it Thursday?

COMMITTEE MEMBER: Mr. Chairman, I think it's safe to say that we recognize that you all have got a need to get

these out from your leadership and I would just as soon not raise any issues with our leadership that are not necessary.

CHAIRMAN WUNSCH: Then we will have the balloon at 7 o'clock available to you and we will adjourn this meeting until 7:30 in the morning and then we'll debate the bill.

(THEREUPON, the hearing concluded at 5:45 p.m.)

_C_E_R_T_I_F_I_C_A_T_E_

COUNTY OF SHAWNEE)
) ss:
STATE OF KANSAS)

I, Barbara J. Hoskinson, a Certified Shorthand Reporter in and for the State of Kansas, duly commissioned as such by the Supreme Court of the State of Kansas, do hereby certify that I was present at and reported in shorthand the foregoing proceedings had at the aforementioned time and place; further that the foregoing is a true and correct transcript of that portion of my notes requested transcribed.

IN WITNESS WHERREOF, I have hereunto affixed my official seal this 14th day of March, 1988.

Barbara J. Hoskinson

Barbara J. Hoskinson
Certified Shorthand Reporter

March 16, 1988
HB 2692

Mr. Chairman, Members of the Senate Judiciary Committee. I am Ron Smith, Legislative Counsel for the Kansas Bar Association.

While KBA opposes limits on noneconomic loss or pain and suffering, we recognize that in 1988, all that HB 2692 does is bring physicians under current law, K.S.A. 1987 Supp. 60-19a01. Since repeal of this law is not on the agenda, we're prepared to live with what the court decides as to the constitutionality of this bill.

To those of your colleagues who believe the limit should be on all noneconomic loss, I can only say we hope you'll resist that urge. There were 75 votes on the House floor to make the bill apply only to pain and suffering. Last year there were similar numbers for the identical amendment. The fact is we do not believe there are not 63 votes in the House for the bill to apply to all noneconomic loss.

There are other reasons why that would not be fair.

HB 2692 applies to <u>all tort-feasors</u>, not just doctors. The tortious activity of some tort-feasors do not have the socially redeeming qualities of physicians and hospitals. Doctors are sometimes negligent, but rarely if ever do they "intend" to harm someone. Not so with

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Att. IV

other defendants. Some of them intend to cause harm. Or they are malicious or reckless in the harm they do cause.

It is interesting that our comparative negligence law, K.S.A. 60-258a, does not give intentional tort-feasors benefit of the comparative negligence law; the intentional tort-feasor is still jointly and severally liable for all damages. If a defendant intends to harm another person, the defendant must pay all the plaintiff's damages without deduction for the percentages fixed to other codefendants or the plaintiff. [See Sieben v. Sieben, 231 Kan. 372 (1982).] HB 2692 is intended to apply as an artificial limit on intangible losses even if the defendant is an intentional tort-feasor. The intentional tortfeasor has never found favor in the law before. Now, apparently, HB 2692 and HB 2731 intend to reward intentional tortfeasors. We do not think it justified.

Second, a noneconomic loss cap would cap damages where permanent disability, paralysis or severe disfigurement. When those injuries occur, the jury's ability to determine total loss should not be impaired. An elderly person's ability to handle severe disfigurement is much different than a 5-year old child's. To say that $250,000 is enough for either defendant is a decision that properly rests with juries who have heard the evidence and seen the damages, not with legislatures.

There is the allegation that noneconomic loss awarded by juries is out of control, and therefore verdicts must be regulated. Our itemized verdict law has been in effect only since July 1, 1987. We do not have

a centralized statistical gathering system to conform or challenge that assertion.

Finally, Kansas Law already controls noneconomic loss:

- a $500,000 limit on losses for governmental entities is a limitation of sorts in that all damages are limited;
- wrongful death actions limit nonpecuniary loss of all heirs is limited to $100,000;
- The 1986 HB 2661 $250,000 limit on noneconomic loss in medical malpractice actions is still valid law unless overturned by the Supreme Court.
- K.S.A. 1987 Supp. 60-19a01(b) states "In any personal injury action the total amount recoverable by each party from all defendants for all claims for pain and suffering shall not exceed a sum total of $250,000." Left unlimited is disability, paralysis, or disfigurement.

  The practical effect of that language is when there is ONE plaintiff and MULTIPLE defendants and the noneconomic loss does not include disability, paralysis or disfigurement, the limit on pain and suffering for each defendant is less than $250,000. If there is one Plaintiff but five codefendants each 20% liable for damages, the practical limit is $50,000 each, not $250,000 -- even if the jury were to award a million dollars in pain and suffering.

- Comparative negligence principles which abolish joint and several liability (1974 K.S.A. 60-258a), act to limit noneconomic loss to the defendant's percentage of fault. Thus a million dollar noneconomic damage verdict where a defendant is assessed 10% of the liability means he only pays $100,000 of any noneconomic loss -- even with a $250,000 limit.

Actual Verdicts

Any statutory limitation applies only to cases going to trial. Caps do not apply in settlements. Defendants are free to fashion settlements in any manner they choose, if plaintiff agrees. In order to avoid higher liability, a defendant could agree to pay more than $250,000 for noneconomic loss in a really big case. Nothing in HB 2692 prevents that result.

Appendix "A" is a factual synopsis of the largest state jury verdicts of the 309 state verdicts in FY 1987. The Office of Judicial Administration prepared the information from Clerk files. As you can see, a $250,000 limit would affect few, if any, of these cases. Other limits already control.

Juror Poll

Few ordinary citizens, if asked properly, believe such long-lasting scarring injury -- dismemberment, paralysis, disfigurement or disability -- should be limited by a $250,000 limitation. KBA recently polled 506 recent civil trial jurors who handled all types of civil matters. When asked if they favored or opposed the legislature setting a limit on severe injury of this type at $250,000, 62% said No. Fourteen percent of the sample of jurors had relatives working in the medical community in Kansas. Of that group, 69% said NO to the limit. Of the 39% of the sample who said they were Republicans, 65% said NO to the limit. Of the 28% of the sample who were Democrats, 65% said NO. Of the 38% of the sample who were independents, 62% said NO to the limit. Thus, we can conclude from this poll that two of every three Kansans do not want this type of limit.

Finally, in a second poll we commissioned, out of six identified state legislative issues -- abortion, tax reform, highway construction, new jobs and improving the quality of education, when asked which of the six issues was most important to Kansans across the state, putting limits on damage awards was the least important, with only 9% of

the results. Creating new jobs was most important, with education concerns second.

In sum, Mr. Chairman, limiting awards is bad public policy and bad law. To the extent you feel this law must pass, HB 2692 as passed by the House is plenty.

The Kansas Bar Association is the largest voluntary association of lawyers in the state, representing nearly 5,000 of the state's 6,500 lawyers. Its members include corporate counsel, firms of all sizes, solo practitioners, law professors and the judiciary.

The 106-year-old Association provides continuing legal education for its members, and a number of other educational and professional services to its members through 11 different sections of the practice of law: Administrative Law, Aviation law, Corporation, Business and Banking, Family Law, Law Office Economics, Litigation Law, Military Law, Oil and Gas, Real Estate, Probate and Trust Law, Tax Law and the Young Lawyers Section. Association members operate a Client Security Fund, a variety of charitable programs through an IOLTA program overseen by the Kansas Bar Foundation, and Legal Aid and Referral Systems. Through its committee structure, KBA members provides legal services to the elderly, support of alternative dispute resolution programs in conjunction with local bar associations, and helps the Office of Disciplinary Administration investigate claims of attorney misconduct.

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• *SPORTS:* KU defeats K-State, 64-63 — page 17.

• *LEGISLATURE:* Senate approves DUI bill — page 7.

The Topeka Capital-Journal

FRIDAY, February 19, 1988 32 pages • Official County and City Newspaper single copy 25¢ Topeka, Kansas

Surveyed jurors call system fair

A Kansas Bar Association poll released Thursday shows that Kansans who have been on juries don't think the civil justice system in Kansas needs any "reform."

Christel Marquardt, president of the KBA, said 500 former jurors questioned in late January by the Topeka polling firm of Capital Research Services included 70 respondents who have household members who are in the medical business, either doctors, nurses or hospital employees.

"The current jury system we have for dealing with all cases, and especially with medical malpractice cases, is fair. Jurors who are actually involved in the cases think it is fair," Marquardt said.

"These people we surveyed have no vested interest in the cases."

She said that the results of the poll should show "that people don't want Kansas to give doctors protections (from liability) that no other group of people have."

Those protections from liability, or limits on ability for victims of medical malpractice to recover damages for their injuries, are keys to medical malpractice legislation.

Marquardt said the bar's survey should show lawmakers, and the Kansas public, that the medical malpractice issue is one that should be solved without making major changes in the state's legal system.

The survey nearly counters one conducted last month by the Kansas Medical Society, which was said to show that major changes were needed in law relating to medical malpractice lawsuits.

"A convincing 86 percent of the 506 jurors surveyed say the jury system fairly balances the rights of the plaintiff and the defendant in civil lawsuits. And two out of every three say the size of the awards in such cases is also fair. Fifteen percent said they were too low," the KBA said.

In a closely linked series of questions, the survey showed that 60 percent of former jury members believed that judges should have the authority to limit jury damage awards. They have that authority now.

But in a second question, 62 percent said "no" to the question: "Would you favor or would you oppose a law which would limit jury awards to $250,000 for pain and suffering for people who have been permanently disabled, paralyzed or badly disfigured by the negligence of another?"

Only 5 percent of the 500 jurors in civil liability cases heard medical malpractice cases. Thirty-seven percent heard auto accident, contract disputes or other civil cases.

The poll included a couple of questions dealing with the concept of a panel of doctors deciding medical malpractice cases.

Although 22 percent of respondents thought the doctor panel would render more fair awards, and 17 percent said the result would be about the same as a jury award, only 14 percent of respondents said they would be willing to have a doctor panel determine a malpractice case involving them or a member of their family.

Appendix "A"
$250,000 Noneconomic caps affects few 1987 cases

The cases are:

(a) Sedgwick County District Court, #83C641, involving an oil field explosion. Verdict exceeded one million dollars, but the dispute was over how to divide up a $300,000 insurance policy and what percentage of comparative negligence applied to the codefendant with that policy. The claimant died from the injuries, so the $100,000 limit on pain and suffering (60-1903) applied, but since there was only $300,000 available to pay the verdict, the statutory limit was of no consequence.

(b) Sedgwick County District Court, #84C593 - a general, rather than itemized verdict, was used. No indication as to the type of case, but the claimant was a child, who received $400,000. Parents were awarded $2,250, each.

(c) Sedgwick County district court, #85C2250 - two plaintiffs were both killed in a train crash with an automobile. One plaintiff recovered $1 million actual damages, $100,000 nonpecuniary. The other received $500,000 actual damages, $100,000 nonpecuniary. Wrongful deaths involved, so 60-1903 already applied.

(d) Wyandotte County #85C2295 - A trash truck backed over 21-year-old mother, killing her. Jury awarded $1 million actual damages to the husband, $1 million to the surviving child. $35,000 nonpecuniary loss was awarded to the husband, and $300,000 nonpecuniary loss to the child, which was reduced to $100,000 by 60-1903. Comparative negligence found to be 78.5% on the trash truck owner, 21.5% to the victim. The verdict was appealed, then settled on appeal, but no numbers are available. One can assume the settlement was less than what the verdict would have awarded.

(e) Wyandotte County #85C2456 - A personal injury and wrongful death action stemming from an electrocution. KPL and a sign company were codefendants. KPL was found 85% at fault, and the sign company 15%. Jury awarded the decedent $10,000. Heirs received $490,000 actual damages, nonpecuniary loss $500,000 which 60-1903 will reduce to $100,000. Punitive damages of $1 million were awarded. The entire verdict is on appeal.

(f) Johnson County #86C281 - a medical malpractice plaintiff's verdict for a failure to diagnose Hodgkins disease. A general verdict was used. The $1,775,000 verdict was appealed, and the case was settled on appeal. No pain and suffering separately identified.

(g) Johnson County, Appellate Court # 119604, stemming from negligence which cost a child the loss of the right eye. The defendant was found 58% at fault, and the parents were found to be 42% at

fault. The jury awarded a general (non-itemized) verdict of $300,000, but comparative negligence reduced the award to $174,000. A $250,000 cap would not have affected this case.

KANSAS BAR ASSOCIATION

March 15, 1988
HB 2731

Mr. Chairman. Members of the Senate Judiciary Committee. I am Ron Smith, Legislative Counsel for the Kansas Bar Association.

Let me restate that KBA opposes caps on punitive damage awards. However, you had that decision in 1987. Last year KBA did support a great deal of the legislation, such as bifurcation, mitigation factors, and a clear and convincing evidence standard.

KBA's major concerns with this legislation are (1) its redundancy, (2) its uselessness in doing anything positive concerning insurance premiums, and (3) the fact you are being premature. The U.S. Supreme Court is currently considering the role of punitive damages in American society -- guidance that will shortly be forthcoming. (See the discussion below.)

Practical Application

We also have concerns about the practical application of these laws. KBA did not and does not support House amendments removing the definition of Wanton conduct. We think the Senate should reinsert the language. The fact is that individuals, corporations and other tort-feasors can be highly reckless in their conduct, but not come up to a standard of "malice" or "despicable" conduct. Nor would their

conduct intend to hurt anyone. An act of silence when there is a duty to speak up might be reckless conduct, but it is not intentional. An intentional, willful act is a "designed purpose to do wrong." Corporations manufacturing a product do not always desire to do wrong or injure someone. But their corporate actions can be more than ordinary negligence.

There is conduct that is greater than ordinary negligence but not yet intentional conduct and when committed should cause liability for punitive damages. If you believe as public policy the definition of wanton conduct needs review, then review and change it. Find a better definition. But do not discard it.

Despicable Conduct

It is the opinion of litigators in KBA that your new definition of "malice" is an open invitation to extensive litigation. We have no idea what constitutes "despicable conduct." At a time when you like to tell us there are too many lawsuits, it is incredulous to us that you would put such language in the statutes of Kansas.

Let me offer some other points concerning HB 2731:

1. KBA offers a case study of punitive damages in Kansas appellate and federal courts since 1976. It is not a definitive study. Some of the results are not final. They are, however, summarized below. Generally speaking, most punitive damages sustained on appeal are for business transactions and contract interference, not personal inju-

ry. Clearly, regulating punitive damages has little impact on personal injury litigation involving individuals who are plaintiffs.

2. The House inserted Section 4, which requires waiting until after filing the action until you amend the pleadings to state a punitive damage count. The purpose is to get at the "perception problem," the "environment," where defendants get sued for punitive damages in order to put pressure on their insurance company to settle for actual damages. Proponents argue the defendant has to hire two attorneys -- one for actual damages and the other as his personal attorney. I would point out:

(a) Section 4 is not binding on pleadings in federal court. Section 4 is procedural in nature, and therefore the rules of the U.S. Supreme Court case of Erie v. Thompkins which are carried out in Hanna v. Plummer do not apply to cases filed in federal court. Other state limitations on pleadings, such as the $10,000 ad damnum limitations, are also not applicable in federal court.

(b) The 1987 changes -- bifurcation, clear and convincing evidence, etc. -- were designed to help with the "environment" problem. Section 4 is not needed. Rule 11 sanctions and KSA 60-211 can be read to imply that bringing a punitive damage claim without thorough research as to the facts and foundation for the claim is sanctioned by attorney fees and costs. What has not happened is that some defendants and some of their insurers have not opted to use the current tools to bring an action against those using punitive damage claims improperly.

(c) Section 4 presupposes all valid testimony giving rise to punitive damage claims occur prior to the pretrial hearing. What happens if during the trial special circumstances arise, such as uncovering at trial that a corporate executive lied in his deposition, revealing the corporation knew of dangers to consumers but were recklessly or intentionally negligent? Section 4 prohibits amending the pleadings and offering evidence to seek punitive damages. This denies due process.

Example: Environmental Pollution case where corporate executives testify in their depositions their internal

documents showed toxic levels of contamination to be within governmental EPA tolerances. They present a document supporting that theory. After learning of the testimony of the executives, a whistle-blowing employee of the firm that did the toxicity study produces a report showing the company was warned the toxicity levels exceeded EPA guidelines. The witnesses have intentionally lied. Under Section 4, if this information comes to light after a pretrial conference, it would be impossible for the court to allow plaintiffs to amend their pleadings and sue for punitive damages -- unless the trial Court rules Section 4 unconstitutional as denying due process.

(d) Members of the Bar who are litigation attorneys indicate their clients prefer knowing early in the case if there is going to be a claim of punitive damages, since the client wants to know whether his insurance carrier is going to have a conflict of interests. To wait until the pretrial conference changes nothing. Plaintiffs can still seek to discover information leading to a punitive damage claim, such as financial condition of the defendant, or their conduct. Corporate documents can still be subpoenaed. Motions to quash discovery will still occur. Nothing changes. The same cloud hangs over the defendant's head. Yet after pretrial is the worst time for a new attorney to be brought into the case. Some KBA members think the corporation or defendant who even thinks they will later be charged with a punitive damage claim would want to hire an attorney anyway, so you haven't saved a dime. The litigation attorneys do not think you have helped the defendants much with this section. It may in fact harm them.

3. The 1987 law on punitive damages -- KSA 60-3701 -- may be ruled unconstitutional at some point, but not because whether you remove wanton conduct or change the definition of malice. The probable challenge will be whether the legislature can leave one decision with the jury (whether to award punitive damages) and give the other decision (how much) to a judge. Your ability to survive constitutional attack on removing wanton conduct would be better if you changed the decision maker on damages back to the jury.

4. Finally, the United States Supreme Court, in December, 1987, heard oral arguments in Bankers Life & Casualty Co. v. Crenshaw, #85-1765. The main question is whether a Arkansas jury's award of $1.6 million in punitive damages based on an award of actual damages of $20,000 violates the excessive fines clause of the Eighth Amendment. The entire issue of the propriety of punitive damages, including their growth from English Common law and their effectiveness as a deterrent, is being reviewed by the Supreme Court. The case will be the Court's first effort to discuss the "standards that apply to punitive damages outside the First Amendment area" and could have "major consequences" for the tort reform controversy, according to the National Law Journal. You may need to be back in 1989 reworking punitive damage legislation anyway; why not wait to see what guidelines the U.S. Supreme Court will give?

Thank you.

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practice areas, and disciplines within the Bar. The Legislative Committee reviews legislative proposals and makes recommendations to the Board of Governors. The Board of Governors, through its full panel or the Executive Committee, makes, revises or amends final association legislative policy.

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(3) the profitability of the defendant's misconduct;

(4) the duration of the misconduct and any intentional concealment of it;

(5) the attitude and conduct of the defendant upon discovery of the misconduct;

(6) the financial condition of the defendant; and

(7) the total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, compensatory, exemplary and punitive damage awards to persons in situations similar to those of the claimant and the severity of the criminal penalties to which the defendant has been or may be subjected.

At the conclusion of the proceeding, the court shall determine the amount of exemplary or punitive damages to be awarded and shall enter judgment for that amount.

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

(d) In no case shall exemplary or punitive damages be assessed pursuant to this section against:

(1) A principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer; or

(2) an association, partnership or corporation for the acts of a member, partner or shareholder unless such association, partnership or corporation authorized or ratified the questioned conduct.

(e) Except as provided by subsection (f), no award of exemplary or punitive damages pursuant to this section shall exceed the lesser of:

(1) The annual gross income earned by the defendant, as determined by the court based upon the defendant's highest gross annual income earned for any one of the five years immediately before the act for which such damages are awarded; or

← [reinsert the stricken language]

(2) $5 million.

(f) In lieu of the limitation provided by subsection (e), if the court finds that the profitability of the defendant's misconduct exceeds or is expected to exceed the limitation of subsection (e), the limitation on the amount of exemplary or punitive damages which the court may award shall be an amount equal to 1½ times the amount of profit which the defendant gained or is expected to gain as a result of the defendant's misconduct.

(g) As used in this section the terms defined in K.S.A. 60-3401 and amendments thereto shall have the meaning provided by that statute.

(h) The provisions of this section shall apply only to an action based upon a cause of action accruing on or after July 1, 1988.

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

Sec. 5. K.S.A. 60-209 is hereby amended to read as follows: 60-209. (a) *Capacity.* It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of any party to sue or be sued in a representative

capacity, the party raising the issue shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

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

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

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

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

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

(g) *Special damage.* When items of special damage are claimed, their nature shall be specifically stated. In actions where exemplary or punitive damages are recoverable, the *amended* petition shall not state a dollar amount for damages sought to be recovered but shall state whether the amount of damages sought to be recovered is in excess of or not in excess of ~~ten thousand dollars ($10,000)~~ *$10,000.*

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

(i) *Tender of money.* When a tender of money is made in any pleading, it shall not be necessary to deposit the money in court

[NOTE: The only substantive change in Section 5 is at line 259. This change of language is needed only if Section 4's provisions requiring a pre-trial conference deadline of amending the pleadings be adopted. If Section 4 is deleted, so, too, should section 5.]

when the pleading is filed, but it shall be sufficient if the money is deposited in the court at the trial, unless otherwise ordered by the court.

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

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

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

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

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

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

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

~~(f) "Wanton conduct" means an act performed with a real~~

[KBA Recommends deleting all of Section 6. This still retains KSA 60-3401 as the definitions section to K.S.A. 1987 Supp. 60-3701.]

9

~~ization of the imminence of danger and a reckless disregard or complete indifference to the probable consequences of the act.~~

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

Sec. ~~4.~~ 7. K.S.A. 60-209 and K.S.A. 1987 Supp. ~~60-3401,~~ 60-3402 and 60-3701 are hereby repealed.

Sec. ~~5.~~ 8. This act shall take effect and be in force from and after its publication in the statute book.

7 6

March 13, 1987

Mr. Chairman, members of the Senate Judiciary Committee. I am Ron Smith, KBA Legislative Counsel.

This handout addresses the Senate bills in a quick way. KBA prefers the Senate Committee address tort reform with the House bills. However, since this is the appropriate time for comment, we shall be brief:

SB 625 - changes current punitive damage law by conforming all punitive damage claims to the punitive damage bill enacted in 1985 for medical malpractice cases. It partially duplicates what HB 2731 tries to do. As Representative Wunsch said on the House floor, they had considered a similar type of bill in the House committee and chose HB 2731 primarily because they felt that the 1987 law limiting punitive damage law was better thought out than the 1985 law.

SB 625 also deletes the 7-point factors of mitigation that is beneficial to defendants, and makes a meaningless lowering of the caps on punitive damages. We say meaningless in that if the 1987 law, with a one-year gross income cap or $5 million is unconstitutional, it does not make it constitutional to change the law to 25% of one year's gross income or $3 million. Further, it sends 50% of the damages for punitive damages to the state's general fund without the state contributing to 50% of the cost of proving punitive damages. We urge that you deal with punitive damages in HB 2731.

SB 626 - deletes the special two-year discovery rule in medical malpractice actions, allowing such actions to fall back under the general 2 year statute of limitation. But notice that if subsection (c) is deleted (lines 47-56), the causes of action under subsection (a), which now includes medical malpractice, fall back into the general overall 10-year discovery rule. It appears you are lengthening the statute of limitation rather than shortening it. KBA does not believe you need to change the statute of limitations for medical malpractice injuries.

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SB 627 - the bill currently is identical to HB 2692 on limiting pain and suffering to $250,000 in all tort actions.

SB 628 - the bill requires funding of all future damages through an annuity contract, and juries shall not reduce damages to present value. The Senate passed SB 258 last year, 39-0. It implements the model Periodic Payment of Judgments Act. This year, the House Judiciary committee heard SB 258 and HB 2690, which is similar to this bill. The House committee decided that SB 258, which is in conference committee, was the more appropriate way of handling future awards.

The main problems with a bill similar to SB 628 is that it requires juries to hear unrealistically high numbers and give a gross dollar verdict which is not reduced to present value, then limits the only method of paying for the future award to the purchase of an annuity. This is fine for some defendants who can qualify for an annuity, such as the health care stabilization fund, but not all defendants can qualify for an annuity, or the cost of the annuity is unreasonably high. Yet SB 628 does not allow any other method of paying for future damages except using an annuity. (See Line 111-116)

The other problem with SB 628 is its inconsistency. Lines 108 through 110 allows the judge to determine "present value" and then order an annuity contract be purchased. Proponents of similar legislation on the House side argue, theoretically, if you have a gross dollar verdict, the cost of the annuity to fund those gross dollars into the future is the present value of the award. Section 3, however, makes two unconstitutional adjustments: the judge reduces the gross damages to present value and then orders an annuity be purchased to fund what: gross damages, or present damages? The bill is ambiguous, and therefore, vague and indefinite concerning due process issues.

Another problem is SB 628 requires annuities as the only mode of paying for future damages, but does not guarantee the annuity if the life insurance company goes sour. In 1986, you required such annuities to be guaranteed by the State Guaranty fund. We recommend you do that here, too.

The final problem is the bill's in ability to instruct the judge what to do if the defendant cannot buy an annuity. The defendant is facing a large, gross-dollar verdict which, presumably, would have to be paid in gross dollars. The bill says he is to have those gross dollars reduced to present value only if he thereafter buys an annuity. That is very unfair to some defendants but great for plaintiffs.

SB 628 is too hard to remedy. You've passed legislation last year, and it is in conference committee, handling this problem: SB 258. We recommend you stay with that bill.

SB 629 - requires physicians to carry only $25,000 of mandatory insurance for medical malpractice actions instead of the current

$200,000 minimum and through a complicated system the Health Care Stabilization Fund is abolished on July 1, 1991. The House Committee heard three bills that work to abolish the fund and remove the requirement of mandatory insurance. The Medical Society indicated that while they were in agreement with the thrust of the legislation, it would cause more problems than it solved. The House did not act on those bills. KBA has no position on whether physicians should be required to carry mandatory malpractice insurance.

SB 631 - limits the cost of large awards in the Health Care Stabilization Fund to no more than the cost of an annuity, and limits such cost to $700,000. It presumes that physicians can buy more insurance on the open market to cover contingencies above the million dollar limit.

Subsection (c)(2) beginning at line 280 is probably unconstitutional, according to some defense counsel that we've shown the bill to. It creates an irrebuttable presumption in the statute that the annuity purchased by a defendant that "to the greatest extent possible" tries to pay full damages is paying the damages in full. It is not, and there is nothing the plaintiff can do about it. He has no due process. The annuity contract is a conditional right to receive payments. His property right -- his verdict -- is possibly diminished in value by a statute after a jury has rendered a verdict. It is the same as saying that if a jury awards a verdict denominated in dollars, e.g. $100,000, that if a statute says I can pay that verdict with 100,000 yen, I have satisfied the verdict. A hundred thousand yen may, or may not, be equal to 100,000 dollars.

If as this section says, the Fund's limit of payout is $700,000, why should the state care whether it is in the form of an annuity or in cash? What parens patria duty is the state assuming here? More importantly, why should the state get involved in this manner? You are dealing with a rational way of treating future damages in SB 258. We urge that you deal with periodic payment of judgments in that bill.

This bill changes all the laws that are currently being challenged in the Kansas Supreme Court. Interestingly, if the appeal declares the 1986 laws constitutional, SB 631 will statutorily undo what the courts declared were constitutional.

Senator Kerr indicated Monday that he reads Farley to mean that since the legislature created the HCSF, it can control how things are paid from it. Because of that, he thinks the 15% attorney fee limitation is appropriate. We disagree.

KBA opposes attorney fee limits. It is arbitrary. In Stephan v. Smith, the Court has recently held the right to be paid for legal work done is a property right in which there must be due process before there is a taking. While we recognize that case deals with indigent criminal defendants, the issues are similar. If I want to hire Jerry Michaud to handle a medical malpractice case, and he

says he no longer handles them because the state only allows him a 15% fee, you haven't denied me my day in court, but you've denied me the ability to hire the best attorney I want to hire. You've interfered with my rights to contract with the best attorneys in the state. If, on the other hand, this bill were amended to say that only attorneys who were less than two years out of law school could handle the defense of multi-million dollar litigation, the insurance companies would be in her objecting to it. KBA feels the state should not get into the business of regulating either side's access to attorneys.

Finally, it raises a separation of powers question. The court has inherent power to regulate the practice of law, including reasonableness of fees. KSA 7-121b requires the court to approve fees in medical malpractice cases. This provision is unnecessary. It also assumes that a person catastrophically injured can hire an attorney for 15%. To the extent it has the desired effect of keeping people from filing catastrophic medical malpractice actions, it is denying equal protection of the law and due process -- probably under the federal constitution as well as the state constitution. KBA opposes this portion of SB 631.

Case Cite:	Case Title:	PLF TYPE (Key)	PLF EXP	DEF TYPE (Key)	DEF EXP	$PD SOU GHT	$PD AWAR DED	ACTUALS AWARDED $$$	DIS POS TYP	TRIALCT REDUCED V. BY $$	APP CT. REDUCED V. BY $	THEO ofPD KEY	N O T E S	TYP CON Key
230 KAN 443	Baca v. Walgreen Co.	1		5		7	1	3,943	5	0	1,200	1		5
227 KAN 747	Weigano v. Union National Bank of Wichita	1		5		2	2	0	5	0	10,000	2	R&R/TCterrdRecision	1
234 KAN 354	W.V. Enterprises Inc. v. FSLIC	5		4	federal a	7	4	1,045,944	8	0	0	2	Breach of contract	5
235 KAN 175	Iola State Bank v. Bolan	5		1		7	4	26,663	8	0	0	2	DefCntClm	5
241 KAN 042	Mohr v. State Bank of Stanley	3		4		4	3	224,452	5	0	76,000	2	conversion	4
562 F2D 19	Barbour v. U.S.	1		3		7	2	5,000	8	0	0	2		1
006 KAN APP 2D 346	USD #490 v. Celotex Corp.	4		5		5	5	100,000	5	0	43,000	4	600k PD	1
240 KAN 562	Smith v. United Technologies	1		4		0	2	30,000	8	0	0	5		2
705 F2D 286	Miller v. City of Mission, Kan. (1983)	1		7	City of M	7	2	20,000	8	0	7,500	5		2
233 KAN 656	Geiger v. Wallace	1		1		1	1	408	8	0	0	7	Ct.trial/afmdonApp	2
663 F. SUPP. 1360	Reazin, et al v. Blue Cross & Blue Sheild et al	6	Mix 1 & 4	4		7	5	10,007,882	8	0	0	7	FedAntitrust750kP.D.	5
006 KAN APP 2D 798	Speer v. City of Dodge City	1		7	Mix 1 & 4	1	1	17,196	5	0	1,500	8	Conv.Pers.Property	5
670 F2D 907	Barta v. Long (1982)	1		4		7	3	234,360	8	0	0	9		1
006 KAN APP 2D 735	M&W Development Inc. v. El Paso Water Co.	5		5		7	4	19,707	5	0	132,118	10	Promis. Notes	3
007 KAN APP 2D 110	Binyon v. Nesseth (C/Ap)	1		1		3	3	0	8	0	0	10	leased auto contract	1
008 KAN APP 2D 104	Slough v. J.I. Case Co.	7	Mix 1 & 5	5		4	4	55,500	5	0	150,000	10		1
012 KAN APP 2D 095	Topeka Datsun Motor Co. v. Stratton	5		1		2	1	0	5	0	3,083	10	deficiency jdgmt	0
220 KAN 350	Dold v. Sherow	1		1		2	2	22,000	8	0	0	10	25kPD	5
231 KAN 372	Sieben v. Sieben	1		7	Mix 1 & 5	2	2	19,350	5	0	20,000	10		5
231 KAN 381	Binyon v. Nesseth	1		1		7	3	9,326	8	0	0	10	Affirmed award	1
234 KAN 721	Goben v. Barry	7	Mix 1 & 5	7	Mix 1 & 5	7	3	0	8	0	0	10	breach of K; dissolu	1
237 KAN 495	Carmichael v. Halstead Nursing Center Ltd	1		5		7	3	50,000	8	0	0	10	unJustEnr/39kactuals	5
590 F2D 860	Scholz Homes, Inc. v. Wallace	5		1		3	2	20,000	8	0	0	10		1
542 F2D 532	Coleman V. Holeck (1976)	1		7	Mix 1 & 4	7	3	323,117	8	0	0	11		1
003 KAN APP 2D 536	Traylor v. Wachter (Emcasco Insurance Co.)	1		7	Mix 1 & 5	5	4	105,000	8	0	0	13		1
232 KAN 727	Ultimate Chemical Co. v. Surface Transp. Int'l Inc	5		5		7	4	102,000	8	0	0	15		4
718 F2D 604	Short v. Wise	1		1		1	1	25,204	8	0	0	15	$1 PD awarded	5
002 KAN APP 2D 313	Sanders v. Park Towne Ltd.	1		7	Mix 1 & 5	4	4	32,981	8	0	0	16	100kPD/Affmd/NoJury	1
007 KAN APP 2D 369	Lynn v. Taylor	1		1		7	3	13,246	8	0	0	16		1
009 KAN APP 2D 217	Capitol Federal Savings v. Hohman	5		1		2	2	35,000	8	0	0	16	Wilful Breach/Trust	5
225 KAN 678	Henderson v. Hassur	1		1		4	4	48,000	8	0	0	16	215kPD;	**
233 KAN 555	Eitus v. Orkin Exterminating Co.	1		7	Mix 1 & 4	7	3	33,195	8	0	0	16	READ	1
234 KAN 898	Price v. Grimes	1		1		7	3	85,000	8	0	0	16	breach of K	1
235 KAN 580	Plains Resources Inc. v. Empire Drilling Co.	5		7	Mix 1 & 5	7	5	282,569	8	0	0	16	DrillHoleSabotaged	5
235 KAN 815	Capitol Federal Savings & Loan v. Hohman	5		1		2	2	0	8	0	35,000	16	MtgInvalid READ	5
233 KAN 572	Sampson v. Hunt	1		7	Mix 1&5	5	4	10,000	8	0	0	17	300kPD/READ	1
229 KAN 210	Scarpelli v. Jones	1		1		3	3	4,000	5	0	44,000	21	Libel -- Judg 4 Def.	2
525 F. SUPP 46	Miller v. Lear Siegler, Inc. (1981)	1		4		7	3	35,000	8	0	0	21	libel/slander	2
001 KAN APP 2D 203	Hubin v. Shira	1		1		3	3	25,000	8	0	0	22	Assault/Battery30kPD	4
221 KAN 079	Webber v. Patton	1		1		1	1	63	8	0	0	22	Nominal Awd	4
224 KAN 506	Newton v. Hornblower Inc.	1		7	Mix 1 & 5	4	4	133,331	5	0	69,576	24	ShareholdrDirv/294kPD	5
236 KAN 335	Oberhelman v. Barnes Investment Corp.	1		5		8	8	0	8	0	0	24	Derivitive Action	1
230 KAN 032	Daniels v. Chaffee (1981)	1		1		1	1	2,450	8	5,050	0	28	2kPD/Affmd by S Ct	5

FINAL TOTALS			
TOTAL	13,206,887	5,050	592,977
AVG	307,136	117	13,790
COUNT	43	43	43

Case Cite:	Case Title:	PLF TYPE (Key)	PLF EXP	DEF TYPE (Key)	DEF EXP	$PD SOU GHT	$PD AWAR DED	ACTUALS AWARDED $$$	DIS POS TYP	TRIALCT REDUCED V. BY $$	APP CT. REDUCED V. BY $	THEO ofPD KEY	NOTES	TYP CON Key
P2D , 1987 K	Armstrong v. Goldblatt Tool Co.	0		0		0	0	0	0	0	0	0		0
P2D , 1987 K	State ex rel Stephan v Gaf Corporation, etal	0		0		0	0	0	0	0	0	0		0
P2D , 1988 K	Western Motor Co., Inc. v. Koehn etal	0		0		0	0	0	0	0	0	0		0
USDC 83-4040	Fisher v. Triplet Inc.	1		7	Mix 1 & 5	7	0	0	1	0	0	5		5
001 KAN APP 2D 180	McHugh v. City of Wichita	1		4		1	0	0	3	0	0	8	KTCA immunity	3
001 KAN APP 2D 203	Hubin v. Shira	1		1		3	3	25,000	8	0	0	22	Assault/Battery30kPD	4
001 KAN APP 2D 610	Jennings v. Speaker etal	1		1		0	0	13,043	0	0	0	10	TC affirmed;no P.D.	5
002 KAN APP 2D 313	Sanders v. Park Towne Ltd.	1		7	Mix 1 & 5	4	4	32,981	8	0	0	16	100kPD/Affmd/NoJury	1
002 KAN APP 2D 385	George v. Bolen-Williams Realtors	1		7	Mix 1 & 5	4	0	180,000	7	0	0	16	R&RemNewTrialonPD	5
002 KAN APP 2D 406	Thurman v. Cundiff	1		1		0	0	15,000	3	0	0	19	FalseArrest/NoPD/R&R	5
002 KAN APP 2D 683	Kiser v. Gilmore	1		7	Mix 1 & 5	2	2	3,888	7	0	0	20	K Law/15kPD/NewTrial	4
003 KAN APP 2D 077	Mansfield Painting Inc. v. Budlaw Services Inc.	5		5		1	1	6,308	1	0	0	10	BreachFidDty/affmd	1
003 KAN APP 2D 146	Gleichenhaus v. Carlyle	1		5		0	0	0	2	0	0	21	Libel/SumJud4Def.	2
003 KAN APP 2D 461	Belluomo v. KAKE-TV	1		5		7	0	0	8	0	0	15	Defense Verdict/Affd	5
003 KAN APP 2D 536	Traylor v. Wachter (Emcasco Insurance Co.)	1		7	Mix 1 & 5	5	4	105,000	8	0	0	13		1
003 KAN APP 2D 572	Coble v. Scherer	1		7	Mix 1 & 5	1	0	4,000	5	0	1,000	16		4
005 KAN APP 2D 353	Jones v. Smith	1		7	Mix 1 and	3	0	22,500	6	0	22,500	11	TCerrd AllwdDef.Jud	6
005 KAN APP 2D 552	Daniels v. Chaffee (1980)	1		1		2	0	0	6	0	15,000	7	Conversion	5
006 KAN APP 2D 272	Lawrence v. Phillips Petroleum Co.	1		5		0	0	0	1	0	0	18	WkrComp Exclusv Rem.	4
006 KAN APP 2D 342	Nohinek v. Logsdon	1		1		7	1	29,480	6	0	5,000	7		1
006 KAN APP 2D 346	USD #490 v. Celotex Corp.	4		5		5	5	100,000	5	0	43,000	4	600k PD	1
006 KAN APP 2D 735	M&W Development Inc. v. El Paso Water Co.	5		5		7	4	19,707	5	0	132,118	10	Promis. Notes	3
006 KAN APP 2D 798	Speer v. City of Dodge City	1		7	Mix 1 & 4	1	1	17,196	5	0	1,500	8	Conv.Pers.Property	5
006 KAN APP 2D 806	Cooper v. Hutchinson Police Department	1		4		0	0	0	7	0	0	5	InterlocApp/StatLim	3
007 KAN APP 2D 110	Binyon v. Nesseth (C/Ap)	1		1		3	3	0	8	0	0	10	leased auto contract	1
007 KAN APP 2D 369	Lynn v. Taylor	1		1		7	3	13,246	8	0	0	16		1
007 KAN APP 2D 416	Stanfield v. Osborne Industries Inc.	1		7	Mix 1 & 5	7	0	0	7	0	0	16	Royalty contract	2
007 KAN APP 2D 753	Hays House Inc. v. Powell	7	Mix 1 & 5	1		2	2	24,552	7	0	20,000	2	Rev/Rem for new tria	5
008 KAN APP 2D 104	Slough v. J.I. Case Co.	7	Mix 1 & 5	5		4	4	55,500	5	0	150,000	10		1
008 KAN APP 2D 737	Wade v. Ford Motor Credit Company	1		5		8	0	0	7	0	0	28	Repossession	5
008 KAN APP 2D 760	Mears v. Hartford Fire Ins. Co.	1		5		7	0	0	7	0	0	11		6
009 KAN APP 2D 080	Mills v. Smith	1		1		7	0	99	8	0	0	16	No P.D. awarded	4
009 KAN APP 2D 217	Capitol Federal Savings v. Hohman	5		1		2	2	35,000	8	0	0	16	Wilful Breach/Trust	5
009 KAN APP 2D 287	Caplinger v. Carter	1		1		0	0	0	2	0	0	5	Rev/Rem on some Issu	4
009 KAN APP 2D 338	Stevens v. Jayhawk Realty Co.	1		7	Mix 1 & 5	2	0	15,000	6	0	15,000	16	Rev/JNOVFraudnotProv	1
009 KAN APP 2D 338	Collins v. MBPXL Corporation	1		7	Mix 1 & 5	7	0	0	3	0	0	20	Labor Contract	1
009 KAN APP 2D 491	O'Donnell v. Fletcher	1		1		1	0	0	3	0	0	18	J/Def StatLim/Remand	5
010 KAN APP 2D 014	Scott v. Strickland	1		1		7	0	3,935	7	0	0	10	PDnotIssueonAppeal	5
010 KAN APP 2D 073	Ohme v. Ohme	1		1		0	0	0	3	0	0	23	DivorceIndpTort/R&Rm	5
010 KAN APP 2D 350	Hatfield Chevrolet v. Watson Motors	5		5		0	0	0	6	0	0	10	UCCBadFaithTCreversd	1
010 KAN APP 2D 659	Miller v. Clayco State Bank	1		5		7	0	0	1	0	0	2	Garnishment	5
012 KAN APP 2D 095	Topeka Datsun Motor Co. v. Stratton	5		1		2	1	0	5	0	3,083	10	deficiencyjdgmt	0
012 KAN APP 2D 123	State ex. rel. Stephan v. GAF Corporation	4		4		0	5	100,705	6	0	1,000,000	14	defectconstruc	3
12 KAN APP 2D 95	Topeka Datsun Motor Co. v. Stratton	0		0		0	0	0	0	0	0	0		0
219 KAN 140	Gowing v. McCandless	1		1		4	0	4,575	8	0	0	16	NoPDawardedByJury	3
220 KAN 244	Ford v. Guarantee Abstract & Title Co.	1		5		7	4	34,748	6	82,000	0	11	BrechFidDty/R&Rem	6
220 KAN 350	Dold v. Sherow	1		1		2	2	22,000	8	0	0	10	25kPD	5
221 KAN 079	Webber v. Patton	1		1		1	1	63	8	0	0	22	Nominal Awd	4
221 KAN 571	Bribiesca v. City of Wichita	1		4		2	0	0	3	0	0	8	TCtDsmd/KTCAImmunity	2

Case Cite:	Case Title:	PLF TYPE (Key)	PLF EXP	DEF TYPE (Key)	DEF EXP	$PD SOU GHT	$PD AWAR DED	ACTUALS AWARDED $$$	DIS POS TYP	TRIALCT REDUCED V. BY $$	APP CT. REDUCED V. BY $	THEO ofPD KEY	N O T E S	TYP CON Key
221 KAN 596	Karms Enterprises Inc. v. Quan	5		1		3	0	24,160	4	5,600	0	5	TCt/noJury/NoPDAwded	3
222 KAN 225	Ayers v. Christianson	1		1		4	0	0	8	0	0	22	A&R/def.Verd.affirmd	5
222 KAN 644	Iseman v. Kansas Gas & Electric	1		5		2	0	9,000	4	3,500	0	16	TortInfCont/NoPDjury	5
223 KAN 477	Redi Bares v. First National Bank of Neodesha	1		7	Mix 1 & 5	0	0	0	7	0	0	10	TC SumJud4Def R&Rem	4
223 KAN 645	Gorrell v. City of Parsons	1		4		0	0	0	5	0	9,236	5	GovImm4PD/JNOV for D	3
224 KAN 406	Holder v. Kansas Steel Built Inc.	1		7	Mix 1 & 5	2	2	7,847	1	0	0	7	WageDisp/6KPDallowed	5
224 KAN 506	Newton v. Hornblower Inc.	1		7	Mix 1 & 5	4	4	133,331	5	0	69,576	24	ShareholdrDirv/294kPD	5
225 KAN 678	Henderson v. Hassur	1		1		4	4	48,000	8	0	0	16	215kPD;	**
226 KAN 070	Modern Air Cond. Inc. v. Cinderella Homes Inc.	5		5		2	0	10,939	6	6,277	0	16	APCtStruckPD	1
226 KAN 662	Citizens State Bank v. Gilmore	5		1		7	0	0	2	0	0	2		1
226 KAN 681	Cantrell v. R.D. Werner Company	1		7	Mix 1 & 5	7	2	18,500	2	0	0	4	Breach EXP warranty	5
227 KAN 045	Temmen v. Kent Brown Chevrolet	1		5		4	2	113	6	0	20,000	10	Warranty/JNOV to def	1
227 KAN 059	Nordstrom v. Miller	1		7	Mix 1 & 5	7	0	90,000	1	0	0	16		1
227 KAN 221	Traylor v. Wachter etal	1		1		4	0	55,000	4	150,000	0	13	TCstruckPD/Affirmed	5
227 KAN 308	Lindquist v. Ayerst Laboratories Inc.	1		5		7	0	0	1	0	0	12	Medical Malpractice	3
227 KAN 580	Citizens State Bank v. Martin	5		1		2	0	41,000	2	0	0	2		1
227 KAN 747	Weigano v. Union National Bank of Wichita	1		5		2	2	0	5	0	10,000	2	R&R/TCterrdRecision	1
227 KAN 914	Spencer v. Aetna Life & Casualty	1		5		0	0	0	3	0	0	11	Q:DoesKShaveBadFaith	6
228 KAN 052	Collier v. Operating Engineers Local #101	1		7		7	0	0	7	0	0	10		5
228 KAN 216	Yocum v. Phillips Petroleum Com.	1		5		5	0	2,258	1	0	0	18	WkrCmpn Affm on App	1
228 KAN 249	Hein v. Lacy	1		1		7	0	0	2	0	0	21	Libel	2
228 KAN 532	Guarantee Title Co. v. Interstate Fire & Cas.	5		5		4	0	17,375	7	0	0	11		6
228 KAN 641	Porter v. Stormont Vail Hospital	1		5		7	0	478	3	0	0	12	jud4Def.	5
229 KAN 210	Scarpelli v. Jones	1		1		3	3	4,000	5	0	44,000	21	Libel -- Judg 4 Def.	2
229 KAN 252	Marcotte Realty & Auction Inc. v. Schumaker	7	Mix 1 & 5	7	Mix 1 & 5	7	2	9,600	1	0	0	10	breach of contract	5
230 KAN 032	Daniels v. Chaffee (1981)	1		1		1	1	2,450	8	5,050	0	28	2kPD/Affmd by S Ct	5
230 KAN 115	Stephens v. Snyder Clinic Assn.	1		7	Mix 1 & 5	7	0	0	3	0	0	12	med mal/StatLimXprd	3
230 KAN 443	Baca v. Walgreen Co.	1		5		7	1	3,943	5	0	1,200	1		5
231 KAN 052	Broomfield v. Mann, Hamm, Vestring etal 79 C 38	1		7	Mix 1 and	7	3	100,613	4	100,613	0	10	VactdVrdReinstated	1
231 KAN 052	Broomfield v. Paul Mann 79 C 37	1		7	Mix 1 & 5	7	3	107,000	4	107,000	0	10	Affmd	1
231 KAN 052	Augusta Bank & Trust v. Broomfield 78 C 528	1	Def. Coun	5		3	3	60,000	4	60,000	0	2	ReinstatedbySCt.	1
231 KAN 372	Sieben v. Sieben	1		7	Mix 1 & 5	2	2	19,350	5	0	20,000	10		5
231 KAN 381	Binyon v. Nesseth	1		1		7	3	9,326	8	0	0	10	Affirmed award	1
232 KAN 001	Gobin v. Globe Publishing Company I	1		5		0	0	0	3	0	0	21	Libel/Rev/Remto TCt	4
232 KAN 001	Gobin v. Globe Publishing Company III	1		5		3	0	0	6	0	100,000	21	Libel/SCtRvsdTCtJNOV	3
232 KAN 076	Guarantee Title Co. v. Interstate Fire & Cas.	5		5		7	2	0	6	0	0	11		6
232 KAN 727	Ultimate Chemical Co. v. Surface Transp. Int'l Inc	5		5		7	4	102,000	8	0	0	15		4
233 KAN 492	Kearney v. Kansas Public Services Co.	7	Mix 1 & 5	5		7	3	97,000	0	0	0	0	FIND/REREAD	0
233 KAN 555	Eitus v. Orkin Exterminating Co.	1		7	Mix 1 & 4	7	3	33,195	8	0	0	16	READ	1
233 KAN 572	Sampson v. Hunt	1		7	Mix 185	5	4	10,000	8	0	0	17	300kPD/READ	1
233 KAN 656	Geiger v. Wallace	1		1		1	1	408	8	0	0	7	Ct.trial/afmdonApp	2
234 KAN 354	W.V. Enterprises Inc. v. FSLIC	5		4	federal a	7	4	1,045,944	8	0	0	2	Breach of contract	5
234 KAN 721	Goben v. Barry	7	Mix 1 & 5	7	Mix 1 & 5	7	3	0	8	0	0	10	breach of K; dissolu	1
234 KAN 811	Missouri Medical Co. v. Wong	5		1		7	0	0	1	0	0	11	Affmd no breach of K	6
234 KAN 898	Price v. Grimes	1		1		7	3	85,000	8	0	0	16	breach of K	1
235 KAN 045	Kelley v. Commercial National Bank	1		5		7	0	3,292	1	0	0	11	& 13, Promissry Note	6
235 KAN 175	Iola State Bank v. Bolan	5		1		7	4	26,663	8	0	0	2	DefCntClm	5
235 KAN 580	Plains Resources Inc. v. Empire Drilling Co.	5		7	Mix 1 & 5	7	5	282,569	8	0	0	16	DrillHoleSabotaged	5
235 KAN 815	Capitol Federal Savings & Loan v. Hohman	5		1		2	2	0	8	0	35,000	16	MtgInvalid READ	5

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235 KAN 870	Bowman v. Doherty	1		1		7	1	100	7	0	900	12	Leg/Mal	4
236 KAN 090	Stevens v. Jayhawk Realty Co. Inc.	1		5		7	2	15,000	6	0	15,000	16	JNOV for def.	1
236 KAN 108	Betts v. General Motors	1		5		0	0	0	4	0	0	4	TCtgranted JNOV	3
236 KAN 120	State Farm Fire & Casualty v. Liggett	5		1		8	0	119,998	5	0	119,998	11	119998wasAttFeeReman	5
236 KAN 335	Oberhelman v. Barnes Investment Corp.	1		5		8	8	0	8	0	0	24	Derivitive Action	1
236 KAN 417	City of Ottawa v. Heathman	4		1		0	0	70,000	8	27,767	0	16	TCaddi27k/affd/noPD	3
236 KAN 626	ANCO Construction Co. Ltd v. Freeman	5		1		8	0	0	3	0	0	21	Libel	4
236 KAN 664	Neufeldt v. L.R. Foy Construction Co.	1		5		8	4	50,000	6	0	100,000	25	Outrage/SCtJNOVP.D.	4
236 KAN 811	Farm Bureau Ins. Inc. v. Stephen Miller	5		1		7	0	0	1	0	0	11		6
237 KAN 184	Thurner v. Kaufman	7	Mix 1 & 5	1		7	0	6,750	4	6,750	0	16	Oil/gasLeaseRev	5
237 KAN 195	Ford Motor Company v. Suburban Ford	5		5		7	0	1,750,000	6	0	1,750,000	10	Contract Actuals61K	5
237 KAN 495	Carmichael v. Halstead Nursing Center Ltd	1		5		7	3	50,000	8	0	0	10	unJustEnr/39kactuals	5
237 KAN 629	Ling v. Jan's Liquor Stores	1		5		7	0	0	3	0	0	26	DramShop/TCDismissed	4
238 KAN 308	Decker Investments v. Bank of Whitewater	5		5		7	0	0	3	0	0	10	MTGforclosure	1
238 KAN 462	McDermott v. Kansas Public Service Co.	1		5		4	0	0	7	0	0	16	Fire Damage	4
238 KAN 663	Executive Financial Service Inc. v. Loyd	5		7	Mix 1 & 5	0	0	0	1	0	0	10	Breach of K	5
238 KAN 732	Andres v. Claassen	1		1		7	0	0	8	0	0	16	TCdeniedPDclaim/Affm	1
240 KAN 262	Davis v. Odell	1		1		0	0	1,910	4	500	0	27	landlord/tenant	3
240 KAN 562	Smith v. United Technologies	1		4		0	2	30,000	8	0	0	5		2
240 KAN 671	North Cent. Kansas Production Ass'n v. Hansen	0		0		0	0	0	0	0	0	0		0
241 KAN 013	Beck v. Kansas Adult Authority	0		0		0	0	0	0	0	0	0		0
241 KAN 042	Mohr v. State Bank of Stanley	3		4		4	3	224,452	5	0	76,000	2	conversion	4
241 KAN 257	Southwest Nat. Bank of Wichita v. ATG Const. Mngmt	0		0		0	0	0	0	0	0	0		0
241 KAN 281	Cooper v. Re-Max Wyandotte Cty Real Estate, Inc.	0		0		0	0	0	0	0	0	0		0
241 KAN 441	Tetuan v. A.H. Robins Co.	0		0		0	0	0	0	0	0	0		0
241 KAN 501	Morriss v. Coleman Co., Inc.	0		0		0	0	0	0	0	0	0		0
241 KAN 525	Slaymaker v. Westgate State Bank	0		0		0	0	0	0	0	0	0		0
241 KAN 647	Hunt v. Dresie	0		0		0	0	0	0	0	0	0		0
242 KAN 94	Boydston v. Board of Regents for State of Kan.	0		0		0	0	0	0	0	0	0		0
525 F. SUPP 46	Miller v. Lear Siegler, Inc. (1981)	1		4		7	3	35,000	8	0	0	21	libel/slander	2
542 F2D 532	Coleman V. Holeck (1976)	1		7	Mix 1 & 4	7	3	323,117	8	0	0	11		1
562 F2D 19	Barbour v. U.S.	1		3		7	2	5,000	8	0	0	2		1
590 F2D 860	Scholz Homes, Inc. v. Wallace	5		1		3	2	20,000	8	0	0	10		1
592 F. SUPP 976	Miller v. Cudahy Co.	1		4		7	6	3,117,739	7	0	0	15	pendingevaluation	3
619 F. SUPP 1465	Earth Scientists v. US Fidelity & Guarantee	4		4		7	0	0	1	0	0	11		1
626 F. SUPP 1246	Coffey v. US on Behalf of Commodity Credit Corp.	1		3		2	0	0	3	0	0	10	lackedjurisdiction	5
640 F. SUPP 953	Fogarty v. Campbell 66 Exp. Inc. etal	7	Estate of	7	Mix of 1	7	0	0	2	0	0	17	Mix of 13 and 17	4
641 F. SUPP 98	Kupka v. GNP Commodities Inc. etla	1		7	Mixed 1 &	7	0	0	1	0	0	17		1
654 F. SUPP 870	Urban v. Henley	0		0		0	0	0	0	0	0	0		0
656 F. SUPP 316	Miller v. Cudahy Co.	0		0		0	0	0	0	0	0	0		0
659 F. SUPP 1201	Ortega v. City of Kansas City, Kan.	0		0		0	0	0	0	0	0	0		0
663 F. SUPP. 1360	Reazin, et al v. Blue Cross & Blue Sheild et al	6	Mix 1 & 4	4		7	5	10,007,882	8	0	0	7	FedAntitrust750KP.D.	5
666 F. SUPP 1483	Graham by Graham v. Wyeth Laboratories, a Div. of	0		0		0	0	0	0	0	0	0		0
667 F. SUPP 1423	American Motorists Ins. Co. v. General Host Corp.	0		0		0	0	0	0	0	0	0		0
670 F. SUPP 310	Boyd Motors, Inc. v. Employers Ins. of Wausau	0		0		0	0	0	0	0	0	0		0
670 F2D 907	Barta v. Long (1982)	1		4		7	3	234,360	8	0	0	9		1
673 F. SUPP 1032	Endsley v. Naes	0		0		0	0	0	0	0	0	0		0
674 F. SUPP 1432	Diez v. E.R. Squibb & Sons, Inc.	0		0		0	0	0	0	0	0	0		0
705 F2D 286	Miller v. City of Mission, Kan. (1983)	1		7	City of M	7	2	20,000	8	0	7,500	5		2

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715 P2D 1045	Sec. of SRS v. Fomby	4		1		1	0	7,230	5	0	2,500	1	WelfareFr/NoPDallowe	1
716 P2D 524	White v. Adler etal	1		5		7	0	51,000	5	0	51,000	6	SCtRvrsdTCt/JNOV Def	1
716 P2D 544	Consolidated Reef Industries v. Schuyler	5		1		7	0	0	8	0	0	10	PD Recovered/AmtUnkn	1
718 P2D 604	Short v. Wise	1		1		1	1	25,204	8	0	0	15	$1 PD awarded	5
719 P2D 020	Winner v. Florey	1		1		2	0	0	3	0	0	5	FalseImpr/TCRev/Rem	5
722 P2D 0530	Newell v. Krause	1		1		7	4	171,833	2	0	0	16	150kPDonOneCoDef/Afm	1
722 P2D 1106	Turner v. Halliburton Co.	1		7	Mix 1 & 5	3	0	0	6	0	86,700	21	Defamation/Jreversed	5
722 P2D 1125	Grainland Farms Inc. v. ARKLA Gas Co. etal	5		5		2	0	500	1	0	0	15		2
722 P2D 660	Johnson v. Greer Real Estate Co.	1		5		1	2	8,600	1	0	0	16	SCtaffmdTC action	1
736 P2D 606	Kain v. Winslow MFG., Inc. (1984)	3		4		7	4	144,744	4	0	0	20	Tort/unfaircomp	1
814 F 2D 1489	Koch v. City of Hutchinson	0		0		0	0	0	0	0	0	0		0
815 F 2D 617	Carter v. City of Emporia, Kan.	0		0		0	0	0	0	0	0	0		0
821 F 2D 1438	O'Gilvie v. International Playtex, Inc.	0		0		0	0	0	0	0	0	0		0
								FINAL TOTALS						
								TOTAL	19,834,299		555,057	3,926,811		
								AVG	123,964		3,469	24,542		
								COUNT	160		160	160		

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Case Cite:	Case Title:	PLF TYPE (Key)	PLF EXP	DEF TYPE (Key)	DEF EXP	$PD SOU GHT	$PD AWAR DED	ACTUALS AWARDED $$$	DIS POS TYP	TRIALCT REDUCED V. BY $$	APP CT. REDUCED V. BY $	THEO ofPD KEY	N O T E S	TYP CON Key
F2D , 1987 K	State ex rel Stephan v Gaf Corporation, etal	0		0		0	0	0	0	0	0	0		0
F2D , 1987 K	Armstrong v. Goldblatt Tool Co.	0		0		0	0	0	0	0	0	0		0
F2D , 1988 K	Western Motor Co., Inc. v. Kuehn etal	0		0		0	0	0	0	0	0	0		0
12 KAN APP 2D 95	Topeka Datsun Motor Co. v. Stratton	0		0		0	0	0	0	0	0	0		0
233 KAN 492	Kearney v. Kansas Public Services Co.	7	Mix 1 & 5	5		7	3	97,000	0	0	0	0	FIND/REREAD	0
240 KAN 671	North Cent. Kansas Production Ass'n v. Hansen	0		0		0	0	0	0	0	0	0		0
241 KAN 013	Beck v. Kansas Adult Authority	0		0		0	0	0	0	0	0	0		0
241 KAN 257	Southwest Nat. Bank of Wichita v. ATG Const. Mngmt	0		0		0	0	0	0	0	0	0		0
241 KAN 281	Cooper v. Re-Max Wyandotte Cty Real Estate, Inc.	0		0		0	0	0	0	0	0	0		0
241 KAN 441	Tetuan v. A.H. Robins Co.	0		0		0	0	0	0	0	0	0		0
241 KAN 501	Morriss v. Coleman Co., Inc.	0		0		0	0	0	0	0	0	0		0
241 KAN 525	Slaymaker v. Westgate State Bank	0		0		0	0	0	0	0	0	0		0
241 KAN 647	Hunt v. Dresie	0		0		0	0	0	0	0	0	0		0
242 KAN 94	Boydston v. Board of Regents for State of Kan.	0		0		0	0	0	0	0	0	0		0
654 F. SUPP 870	Urban v. Henley	0		0		0	0	0	0	0	0	0		0
656 F. SUPP 316	Miller v. Cudahy Co.	0		0		0	0	0	0	0	0	0		0
659 F. SUPP 1201	Ortega v. City of Kansas City, Kan.	0		0		0	0	0	0	0	0	0		0
666 F. SUPP 1483	Graham by Graham v. Wyeth Laboratories, a Div. of	0		0		0	0	0	0	0	0	0		0
667 F. SUPP 1423	American Motorists Ins. Co. v. General Host Corp.	0		0		0	0	0	0	0	0	0		0
670 F. SUPP 310	Boyd Motors, Inc. v. Employers Ins. of Wausau	0		0		0	0	0	0	0	0	0		0
673 F. SUPP 1032	Endsley v. Naes	0		0		0	0	0	0	0	0	0		0
674 F. SUPP 1432	Drez v. E.R. Squibb & Sons, Inc.	0		0		0	0	0	0	0	0	0		0
814 F 2D 1489	Koch v. City of Hutchinson	0		0		0	0	0	0	0	0	0		0
815 F 2D 617	Carter v. City of Emporia, Kan.	0		0		0	0	0	0	0	0	0		0
821 F 2D 1438	O'Gilvie v. International Playtex, Inc.	0		0		0	0	0	0	0	0	0		0
230 KAN 443	Baca v. Walgreen Co.	1		5		7	1	3,943	5	0	1,200	1		5
715 F2D 1045	Sec. of SRS v. Fomby	4		1		1	0	7,230	5	0	2,500	1	WelfareFr/NoPDallowe	1
007 KAN APP 2D 753	Hays House Inc. v. Powell	7	Mix 1 & 5	1		2	2	24,552	7	0	20,000	2	Rev/Rem for new tria	5
010 KAN APP 2D 659	Miller v. Clayco State Bank	1		5		7	0	0	1	0	0	2	Garnishment	5
226 KAN 662	Citizens State Bank v. Gilmore	5		1		7	0	0	2	0	0	2		1
227 KAN 580	Citizens State Bank v. Martin	5		1		2	0	41,000	2	0	0	2		1
227 KAN 747	Weigano v. Union National Bank of Wichita	1		5		2	2	0	5	0	10,000	2	R&R/TCterrdRecision	1
231 KAN 052	Augusta Bank & Trust v. Broomfield 78 C 528	1	Def. Coun	5		3	3	60,000	4	60,000	0	2	ReinstatedbySCt.	1
234 KAN 354	W.V. Enterprises Inc. v. FSLIC	5		4	federal a	7	4	1,045,944	8	0	0	2	Breach of contract	5
235 KAN 175	Iola State Bank v. Bolan	5		1		7	4	26,663	8	0	0	2	DefCntClm	5
241 KAN 042	Mohr v. State Bank of Stanley	3		4		4	3	224,452	5	0	76,000	2	conversion	4
562 F2D 19	Barbour v. U.S.	1		3		7	2	5,000	8	0	0	2		1
006 KAN APP 2D 346	USD #490 v. Celotex Corp.	4		5		5	5	100,000	5	0	43,000	4	600k PD	1
226 KAN 681	Cantrell v. R.D. Werner Company	1		7	Mix 1 & 5	7	2	18,500	2	0	0	4	Breach EXP warranty	5
236 KAN 108	Betts v. General Motors	1		5		0	0	0	4	0	0	4	TCtgranted JNOV	3
USDC 83-4040	Fisher v. Triplet Inc.	1		7	Mix 1 & 5	7	0	0	1	0	0	5		5
006 KAN APP 2D 806	Cooper v. Hutchinson Police Department	1		4		0	0	0	7	0	0	5	InterlocApp/StatLim	3
009 KAN APP 2D 287	Caplinger v. Carter	1		1		0	0	0	2	0	0	5	Rev/Rem on some Issu	4
221 KAN 596	Karms Enterprises Inc. v. Quan	5		1		3	0	24,160	4	5,600	0	5	TCt/noJury/NoPDAwded	3
223 KAN 645	Gorrell v. City of Parsons	1		4		0	0	0	5	0	9,236	5	GovImm4PD/JNOV for D	3
240 KAN 562	Smith v. United Technologies	1		4		0	2	30,000	8	0	0	5		2
705 F2D 286	Miller v. City of Mission, Kan. (1983)	1		7	City of M	7	2	20,000	8	0	7,500	5		2
719 F2D 020	Winner v. Florey	1		1		2	0	0	3	0	0	5	FalseImpr/TCRev/Rem	5
716 F2D 524	White v. Adler etal	1		5		7	0	51,000	5	0	51,000	6	SCtRvrsdTCt/JNOV Def	1

Case Cite:	Case Title:	PLF TYPE (Key)	PLF EXP	DEF TYPE (Key)	DEF EXP	$PD SOU GHT	$PD AWAR DED	ACTUALS AWARDED $$$	DIS POS TYP	TRIALCT REDUCED V. BY $$	APP CT. REDUCED V. BY $	THEO ofPD KEY	NOTES	TYP CON Key
005 KAN APP 2D 552	Daniels v. Chaffee (1980)	1		1		2	0	0	6	0	15,000	7	Conversion	5
006 KAN APP 2D 342	Nohinek v. Logsdon	1		1		7	1	29,480	6	0	5,000	7		1
224 KAN 406	Holder v. Kansas Steel Built Inc.	1		7	Mix 1 & 5	2	2	7,847	1	0	0	7	WageDisp/6KPDallowed	5
233 KAN 656	Geiger v. Wallace	1		1		1	1	408	8	0	0	7	Ct.trial/afmdonApp	2
663 F. SUPP. 1360	Reazin, et al v. Blue Cross & Blue Sheild et al	6	Mix 1 & 4	4		7	5	10,007,882	8	0	0	7	FedAntitrust750KP.D.	5
001 KAN APP 2D 180	McHugh v. City of Wichita	1		4		1	0	0	3	0	0	8	KTCA immunity	3
006 KAN APP 2D 798	Speer v. City of Dodge City	1		7	Mix 1 & 4	1	1	17,196	5	0	1,500	8	Conv.Pers.Property	5
221 KAN 571	Bribiesca v. City of Wichita	1		4		2	0	0	3	0	0	8	TCtDsmd/KTCAImmunity	2
670 F2D 907	Barta v. Long (1982)	1		4		7	3	234.360	8	0	0	9		1
001 KAN APP 2D 610	Jennings v. Speaker etal	1		1		0	0	13,043	0	0	0	10	TC affirmed;no P.D.	5
003 KAN APP 2D 077	Mansfield Painting Inc. v. Budlaw Services Inc.	5		5		1	1	6,308	1	0	0	10	BreachFidDty/affmd	1
006 KAN APP 2D 735	M&W Development Inc. v. El Paso Water Co.	5		5		7	4	19,707	5	0	132,118	10	Promis. Notes	3
007 KAN APP 2D 110	Binyon v. Nesseth (C/Ap)	1		1		3	3	0	8	0	0	10	leased auto contract	1
008 KAN APP 2D 104	Slough v. J.I. Case Co.	7	Mix 1 & 5	5		4	4	55,500	5	0	150,000	10		1
010 KAN APP 2D 014	Scott v. Strickland	1		1		7	0	3,935	7	0	0	10	PDnotIssueonAppeal	5
010 KAN APP 2D 350	Hatfield Chevrolet v. Watson Motors	5		5		0	0	0	6	0	0	10	UCCBadFaithTCreversd	1
012 KAN APP 2D 095	Topeka Datsun Motor Co. v. Stratton	5		1		2	1	0	5	0	3,083	10	deficiencyjdgmt	0
220 KAN 350	Dold v. Sherow	1		1		2	2	22,000	8	0	0	10	25kPD	5
223 KAN 477	Redi Bares v. First National Bank of Neodesha	1		7	Mix 1 & 5	0	0	0	7	0	0	10	TC SumJud4Def R&Rem	4
227 KAN 045	Temmen v. Kent Brown Chevrolet	1		5		4	2	113	6	0	20,000	10	Warranty/JNOV to def	1
228 KAN 052	Collier v. Operating Engineers Local #101	1		7		7	0	0	7	0	0	10		5
229 KAN 252	Marcotte Realty & Auction Inc. v. Schumaker	7	Mix 1 & 5	7	Mix 1 & 5	7	2	9,600	1	0	0	10	breach of contract	5
231 KAN 052	Broomfield v. Paul Mann 79 C 37	1		7	Mix 1 & 5	7	3	107,000	4	107,000	0	10	Affmd	1
231 KAN 052	Broomfield v. Mann, Hamm, Vestring etal 79 C 38	1		7	Mix 1 and	7	3	100,613	4	100,613	0	10	VactdVrdReinstated	1
231 KAN 372	Sieben v. Sieben	1		7	Mix 1 & 5	2	2	19,350	5	0	20,000	10		5
231 KAN 381	Binyon v. Nesseth	1		1		7	3	9,326	8	0	0	10	Affirmed award	1
234 KAN 721	Goben v. Barry	7	Mix 1 & 5	7	Mix 1 & 5	7	3	0	8	0	0	10	breach of K; dissolu	1
237 KAN 195	Ford Motor Company v. Suburban Ford	5		5		7	0	1,750,000	6	0	1,750,000	10	Contract Actuals61K	5
237 KAN 495	Carmichael v. Halstead Nursing Center Ltd	1		5		7	3	50,000	8	0	0	10	unJustEnr/39kactuals	5
238 KAN 308	Decker Investments v. Bank of Whitewater	5		5		7	0	0	3	0	0	10	MTGforclosure	1
238 KAN 663	Executive Financial Service Inc. v. Loyd	5		7	Mix 1 & 5	0	0	0	1	0	0	10	Breach of K	5
590 F2D 860	Scholz Homes, Inc. v. Wallace	5		1		3	2	20,000	8	0	0	10		1
626 F. SUPP 1246	Coffey v. US on Behalf of Commodity Credit Corp.	1		3		2	0	0	3	0	0	10	lackedjurisdiction	5
716 F2D 544	Consolidated Beef Industries v. Schuyler	5		1		7	0	0	8	0	0	10	PD Recovered/AmtUnkn	1
005 KAN APP 2D 353	Jones v. Smith	1		7	Mix 1 and	3	0	22,500	6	0	22,500	11	TCerrd AllwdDef.Jud	6
008 KAN APP 2D 760	Mears v. Hartford Fire Ins. Co.	1		5		7	0	0	7	0	0	11		6
220 KAN 244	Ford v. Guarantee Abstract & Title Co.	1		5		7	4	34,748	6	82,000	0	11	BrechFidDty/R&Rem	6
227 KAN 914	Spencer v. Aetna Life & Casualty	1		5		0	0	0	3	0	0	11	QtDoesKShaveBadFaith	6
228 KAN 532	Guarantee Title Co. v. Interstate Fire & Cas.	5		5		4	0	17,375	7	0	0	11		6
232 KAN 076	Guarantee Title Co. v. Interstate Fire & Cas.	5		5		7	2	0	6	0	0	11		6
234 KAN 811	Missouri Medical Co. v. Wong	5		1		7	0	0	1	0	0	11	Affmd no breach of K	6
235 KAN 045	Kelley v. Commercial National Bank	1		5		7	0	3,292	1	0	0	11	& 13; Promissry Note	6
236 KAN 120	State Farm Fire & Casualty v. Liggett	5		1		8	0	119,998	5	0	119,998	11	119998wasAttFeeReman	5
236 KAN 811	Farm Bureau Ins. Inc. v. Stephen Miller	5		1		7	0	0	1	0	0	11		6
542 F2D 532	Coleman V. Holeck (1976)	1		7	Mix 1 & 4	7	3	323,117	8	0	0	11		1
619 F. SUPP 1465	Earth Scientists v. US Fidelity & Guarantee	4		4		7	0	0	1	0	0	11		1
227 KAN 308	Lindquist v. Ayerst Laboratories Inc.	1		5		7	0	0	1	0	0	12	Medical Malpractice	3
228 KAN 641	Porter v. Stormont Vail Hospital	1		5		7	0	478	3	0	0	12	jud4Def.	5
230 KAN 115	Stephens v. Snyder Clinic Assn.	1		7	Mix 1 & 5	7	0	0	3	0	0	12	med mal/StatLimXprd	3

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235 KAN 870	Bowman v. Doherty	1		1		7	1	100	7	0	900	12	Leg/Mal	4
003 KAN APP 2D 536	Traylor v. Wachter (Emcasco Insurance Co.)	1		7	Mix 1 & 5	5	4	105,000	8	0	0	13		1
227 KAN 221	Traylor v. Wachter etal	1		1		4	0	55,000	4	150,000	0	13	TCstruckPD/Affirmed	5
012 KAN APP 2D 123	State ex. rel. Stephan v. GAF Corporation	4		4		0	5	100,705	6	0	1,000,000	14	defectconstruc	3
003 KAN APP 2D 461	Belluomo v. KAKE-TV	1		5		7	0	0	8	0	0	15	Defense Verdict/Affd	5
232 KAN 727	Ultimate Chemical Co. v. Surface Transp. Int'l Inc	5		5		7	4	102,000	8	0	0	15		4
592 F. SUPP 976	Miller v. Cudahy Co.	1		4		7	6	3,117,739	7	0	0	15	pendingevaluation	3
718 P2D 604	Short v. Wise	1		1		1	1	25,204	8	0	0	15	$1 PD awarded	5
722 P2D 1125	Grainland Farms Inc. v. ARKLA Gas Co. etal	5		5		2	0	500	1	0	0	15		2
002 KAN APP 2D 313	Sanders v. Park Towne Ltd.	1		7	Mix 1 & 5	4	4	32,981	8	0	0	16	100kPD/Affmd/NoJury	1
002 KAN APP 2D 385	George v. Bolen-Williams Realtors	1		7	Mix 1 & 5	4	0	180,000	7	0	0	16	R&RemNewTrialonPD	5
003 KAN APP 2D 572	Coble v. Scherer	1		7	Mix 1 & 5	1	0	4,000	5	0	1,000	16		4
007 KAN APP 2D 369	Lynn v. Taylor	1		1		7	3	13,246	8	0	0	16		1
007 KAN APP 2D 416	Stanfield v. Osborne Industries Inc.	1		7	Mix 1 & 5	7	0	0	7	0	0	16	Royalty contract	2
009 KAN APP 2D 080	Mills v. Smith	1		1		7	0	99	8	0	0	16	No P.D. awarded	4
009 KAN APP 2D 217	Capitol Federal Savings v. Hohman	5		1		2	2	35,000	8	0	0	16	Wilful Breach/Trust	5
009 KAN APP 2D 338	Stevens v. Jayhawk Realty Co.	1		7	Mix 1 & 5	2	0	15,000	6	0	15,000	16	Rev/JNOVFraudnotProv	1
219 KAN 140	Gowing v. McCandless	1		1		4	0	4,575	8	0	0	16	NoPDawardedByJury	3
222 KAN 644	Iseman v. Kansas Gas & Electric	1		5		2	0	9,000	4	3,500	0	16	TortInfCont/NoPDjury	5
225 KAN 678	Henderson v. Hassur	1		1		4	4	48,000	8	0	0	16	215kPD;	**
226 KAN 070	Modern Air Cond. Inc. v. Cinderella Homes Inc.	5		5		2	0	10,939	6	6,277	0	16	APCtStruckPD	1
227 KAN 059	Nordstrom v. Miller	1		7	Mix 1 & 5	7	0	90,000	1	0	0	16		1
233 KAN 555	Eitus v. Orkin Exterminating Co.	1		7	Mix 1 & 4	7	3	33,195	8	0	0	16	READ	1
234 KAN 898	Price v. Grimes	1		1		7	3	85,000	8	0	0	16	breach of K	1
235 KAN 580	Plains Resources Inc. v. Empire Drilling Co.	5		7	Mix 1 & 5	7	5	282,569	8	0	0	16	DrillHoleSabotaged	5
235 KAN 815	Capitol Federal Savings & Loan v. Hohman	5		1		2	2	0	8	0	35,000	16	MtgInvalid READ	5
236 KAN 090	Stevens v. Jayhawk Realty Co. Inc.	1		5		7	2	15,000	6	0	15,000	16	JNOV for def.	1
236 KAN 417	City of Ottawa v. Heathman	4		1		0	0	70,000	8	27,767	0	16	TCaddi27k/affd/noPD	3
237 KAN 184	Thurner v. Kaufman	7	Mix 1 & 5	1		7	0	6,750	4	6,750	0	16	Oil/gasLeaseRev	5
238 KAN 462	McDermott v. Kansas Public Service Co.	1		5		4	0	0	7	0	0	16	Fire Damage	4
238 KAN 732	Andres v. Claassen	1		1		7	0	0	8	0	0	16	TCdeniedPDclaim/Affm	1
722 P2D 0530	Newell v. Krause	1		1		7	4	171,833	2	0	0	16	150kPDonOneCoDef/Afm	1
722 P2D 660	Johnson v. Greer Real Estate Co.	1		5		1	2	8,600	1	0	0	16	SCtaffmdTC action	1
233 KAN 572	Sampson v. Hunt	1		7	Mix 1&5	5	4	10,000	8	0	0	17	300kPD/READ	1
640 F. SUPP 953	Fogarty v. Campbell 66 Exp. Inc. etal	7	Estate of	7	Mix of 1	7	0	0	2	0	0	17	Mix of 13 and 17	4
641 F. SUPP 98	Kupka v. GNP Commodities Inc. etla	1		7	Mixed 1 &	7	0	0	1	0	0	17		1
006 KAN APP 2D 272	Lawrence v. Phillips Petroleum Co.	1		5		0	0	0	1	0	0	18	WkrComp Exclusv Rem.	4
009 KAN APP 2D 491	O'Donnell v. Fletcher	1		1		1	0	0	3	0	0	18	J/Def StatLim/Remand	5
228 KAN 216	Yocum v. Phillips Petroleum Com.	1		5		5	0	2,258	1	0	0	18	WkrCmpn Affm on App	1
002 KAN APP 2D 406	Thurman v. Cundiff	1		1		0	0	15,000	3	0	0	19	FalseArrest/NoPD/R&R	5
002 KAN APP 2D 683	Kiser v. Gilmore	1		7	Mix 1 & 5	2	2	3,888	7	0	0	20	K Law/15kPD/NewTrial	4
009 KAN APP 2D 338	Collins v. MBPXL Corporation	1		7	Mix 1 & 5	7	0	0	3	0	0	20	Labor Contract	1
736 F2D 606	Kain v. Winslow MFG., Inc. (1984)	3		4		7	4	144,744	4	0	0	20	Tort/unfaircomp	1
003 KAN APP 2D 146	Gleichenhaus v. Carlyle	1		5		0	0	0	2	0	0	21	Libel/SumJud4Def.	2
228 KAN 249	Hein v. Lacy	1		1		7	0	0	2	0	0	21	Libel	2
229 KAN 210	Scarpelli v. Jones	1		1		3	3	4,000	5	0	44,000	21	Libel -- Judg 4 Def.	2
232 KAN 001	Gobin v. Globe Publishing Company I	1		5		0	0	0	3	0	0	21	Libel/Rev/Remto TCt	4
232 KAN 001	Gobin v. Globe Publishing Company III	1		5		3	0	0	6	0	100,000	21	Libel/SCtRvsdTCtJNOV	3
236 KAN 624	ANCO Construction Co. Ltd v. Freeman	5		1		8	0	0	3	0	0	21	Libel	4

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525 F. SUPP 46	Miller v. Lear Siegler, Inc. (1981)	1		4		7	3	35,000	8	0	0	21	libel/slander	2
722 P2D 1106	Turner v. Halliburton Co.	1		7	Mix 1 & 5	3	0	0	6	0	86,700	21	Defamation/Jreversed	5
001 KAN APP 2D 203	Hubin v. Shira	1		1		3	3	25,000	8	0	0	22	Assault/Battery30kPD	4
221 KAN 079	Webber v. Patton	1		1		1	1	63	8	0	0	22	Nominal Awd	4
222 KAN 225	Ayers v. Christianson	1		1		4	0	0	8	0	0	22	A&B/def.Verd.affirmd	5
010 KAN APP 2D 073	Ohme v. Ohme	1		1		0	0	0	3	0	0	23	DivorceIndpTort/R&Rm	5
224 KAN 506	Newton v. Hornblower Inc.	1		7	Mix 1 & 5	4	4	133,331	5	0	69,576	24	ShareholdrDirv/294kPD	5
236 KAN 335	Oberhelman v. Barnes Investment Corp.	1		5		8	8	0	8	0	0	24	Derivitive Action	1
236 KAN 664	Neufeldt v. L.R. Foy Construction Co.	1		5		8	4	50,000	6	0	100,000	25	Outrage/SCtJNOVP.D.	4
237 KAN 629	Ling v. Jan's Liquor Stores	1		5		7	0	0	3	0	0	26	DramShop/TCDismissed	4
240 KAN 262	Davis v. Odell	1		1		0	0	1,910	4	500	0	27	landlord/tenant	3
008 KAN APP 2D 737	Wade v. Ford Motor Credit Company	1		5		8	0	0	7	0	0	28	Repossession	5
230 KAN 032	Daniels v. Chaffee (1981)	1		1		1	1	2,450	8	5,050	0	28	2kPD/Affmd by S Ct	5

FINAL TOTALS

	ACTUALS AWARDED $$$	TRIALCT REDUCED V. BY $$	APP CT. REDUCED V. BY $
TOTAL	19,834,299	555,057	3,926,811
AVG	123,964	3,469	24,542
COUNT	160	160	160

* * * * * E N D O F R E P O R T * * * * *

Kansas Natural Resource Council

Testimony presented to the Senate Judiciary Committee

Concerning:
- HB 2731: Limitations on punitive damages
- HB 2692: Caps on noneconomic damages
- HB 2693: Collateral sources
- SB 258: Periodic payment of awards
- HCR 5037: Constitutional Amendment

March 16, 1988

The proposed bills and constitutional amendment listed above deal with tort reform. The Kansas Natural Resource Council would like to raise three issues.

I. Tort reform is widely perceived as a medical malpractice issue. While we are sympathetic to the problems facing the medical community, we are also concerned about the broader implications of this tort reform for environmental areas. If medical insurance is the problem, then the legislative issues ought to be recast to deal specifically with insurance.

II. This tort reform legislation and amendment have ramifications for environmental issues. Consider how they might apply to the manufacture, storage, transport, disposal, and incineration of hazardous materials. Should a Kansas citizen be harmed by a chemical spill, this legislation would:

a) limit recovery and punitive damages and require proof that the responsible company/person intended to cause harm;

b) restrict unfairly the damages awarded to children and senior citizens, whose "lost wages" cannot be calculated;

c) deduct from recovered money the amount paid to an individual by insurance.

d) allow insurance companies to invest and earn interest on money owed to victims but not paid in a lump sum.

III. Environmental damages can be extremely costly to rectify. Limiting the liability of industries handling hazardous sustances removes an ecomonic incentive -- liability for damages -- which promotes safe handling of hazardous materials. We do not want Kansas sending an invitation to hazardous substance businesses to locate in or transport through our state because the liability risks are so minimal.

Respectfully submitted,

Charlene A. Stinard

Charlene A. Stinard
Kansas Natural Resource Council

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Att. VII