

Approved February 1, 1989
Date

MINUTES OF THE House COMMITTEE ON Insurance

The meeting was called to order by Dale Sprague at
Chairperson

3:30 a.m. on January 25, 1989 in room 531-n of the Capitol.

All members were present except:

Committee staff present: Chris Courtwright, Legislative Research
Bill Edds, Revisor of Statutes
Patti Kruggel, Committee Secretary

Conferees appearing before the committee:

Richard Mason, Kansas Trial Lawyers Association
Mike Mullen, Medical Protective Insurance Company
Harold Riehm, Kansas Association of Osteopathic Medicine
Derenda Mitchell, Attorney

Others Present (See Attachment 1.)

The meeting was called to order at 3:30 p.m. Hearing for proponents on HB 2047 were resumed. Opponent testimony followed.

HB 2047 --

An Act abolishing the health care stabilization fund and eliminating the requirement that health care providers maintain professional liability insurance; establishing the medical malpractice liability liquidation fund for the purpose of liquidating liabilities of the health care stabilization fund; providing for the administration of such fund; providing for the adoption of a plan designed to amortize such liability; amending K.S.A. 40-3416, 40-3422, and 40-3423 and K.S. A. Supp. 40-3401 and repealing the existing sections.

Richard Mason, representing the Kansas Trial Lawyers Association, gave testimony in support of HB 2047. Mr. Mason stated that their position on the Health Care Stabilization Fund (HCSF) has been consistent and that they believe abolishing the Fund would remove some conflicts and duplication of effort that exists between the private carriers and the Fund.
(Attachment 2)

Next appearing was Mike Mullen, Medical Protective Insurance Company. Mr. Mullen gave opposition of HB 2047 stating that the legislature could better address the problem of finding coverage necessary for doctors to practice in this state, by tailoring the Fund and establishing a primary limit.

Harold Riehm, Kansas Association Osteopathic Medicine, appeared before the Committee in opposition to the specifics of HB 2047, though in support of the earliest termination of the Fund, as is practical. (Attachment 3)

Also opposing 2047 was Derenda Mitchell, Former attorney for the Health Care Stabilization Fund. (Attachment 4)

The Chairman thanked the conferees and reported that hearings on HB 2047 would continue at the next meeting, January 26, 1989.

The meeting was adjourned at 4:30 p.m.

GUEST LIST

Attachment 1

COMMITTEE: _____

DATE: 1/25/89

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Deronda T. Mitchell	Topeka	sdf
Chip Wheelen	Topeka	KMS
Jerry Slaughter	Topeka	KMS
BRAD SWOIT	Topeka	Ks Tort Reform
J-M RUSSELL	Topeka	UNION CARS
Jeff Rockett	Topeka	St. Francis-Wichita
Laurie Sprague	777 Phanson	—
Lid Thomas	Lawrence	—
Bill Mitche II	T Hutchinson	Alliance
Jim Olinic	Topeka	PIA
Tom Pitt	Topeka	Intern
Lori Callahan	Topeka	Am. Auto. Assoc.
Harold Riem	Topeka	KACM
Joe Fay	Topeka	KOE
Michael W. Am	"	KTRA
Ron Anth	"	Ks Bar Assoc.
R D Frey	TOPEKA	KTLA

Rep. Dale Sprague
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interest of the victims of medical malpractice that there be insurance to pay for the substantial damages that they may sustain.

KTLA does, however, feel that mandating all health care providers buy \$3.2 million of liability coverage is excessive. Some health care providers need and want this much insurance, but it is likely most don't. We support a significant reduction in the mandatory minimum levels of such coverage. Doing so will enable many, if not most, health care providers to realize an immediate reduction in their malpractice insurance bill.

In summary, we believe that eliminating the Health Care Stabilization Fund and lowering the mandatory insurance levels are the two most important steps the legislature can take to give doctors and other health professionals what they really want ... a lower insurance bill.

Thank you for the opportunity to comment on these extremely critical issues.

Sincerely,

Richard H. Mason
Executive Director

sjs

Kansas Association of Osteopathic Medicine

Harold E. Riehm, Executive Director

1260 S.W. Topeka
Topeka, Kansas 66612
(913) 234-5563

TESTIMONY OF THE KANSAS ASSOCIATION OF OSTEOPATHIC MEDICINE

HOUSE BILL 2047

January 25, 1989

Mr. Chairman and Members of the House Insurance Committee:

My name is Harold Riehm and I represent the Kansas Association of Osteopathic Medicine (KAOM). I appear in opposition to the specifics of HB 2047 though in support of the earliest termination of The Health Care Stabilization Fund as is practical. We question the practicality of this Bill.

KAOM was a participant in the Insurance Department hearings of last summer and at that time endorsed the findings of the Committee. We continue to think those recommendations have merit. The keynote recommendations of that study were that the termination plan includes sufficient funding to cover all liabilities, that excess insurance over present base levels of \$200,000 be available, and that the Fund be phased out over a period of time. We supported optional levels of coverage for physicians in the phase out period and an end to statutory mandatory professional liability insurance coverage for health care providers. We also support an immediate reduction of the cap on fund payouts from \$3 million to no more than \$1 million, and optional levels of Fund coverage in the interim prior to termination.

We raise the following questions or observations regarding HB 2047.

- (1) If Fund coverage is terminated on July 1, 1989, on what basis will surcharges be assessed to retire existing deficits? Some physicians may opt to go bare, which would preclude assessing a surcharge based upon a percentage of the annual base coverage premium.
- (2) Tail coverage presents a problem. If there is no tail coverage for the period after July 1, 1989, then providers who had planned to retire in the few years after that date, would be faced with an unanticipated contingency. We think it likely that some, perhaps many providers would choose early retirement, exacerbating an already serious problem in Kansas of declining physician population. Eventually, tail coverage will end, of course, but we are talking about a termination date of five months out.
- (3) At this time, little thought has been given to a vehicle to replace the Joint Underwriting Authority. For those in the JUA because the market offered no other alternatives, availability may be a problem. For those there because of past case history, they may be forced to go bare because there exists no vehicle for insuring them. Again, these problems may be incumbent upon terminating the Fund at any time, but we think they need to be addressed in depth before abolishing the Fund.

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The figures presented to this Committee on Tuesday were frightening in their consequences for health care providers and the health consuming public. We think the Fund has outlived the usefulness it once had and needs to be terminated as soon as possible. We think, however, that we need to formulate answers to these and, no doubt, other contingencies before that occurs. KAOM is ready to pursue those objectives in this Session.

TESTIMONY OF DERENDA J. MITCHELL
BEFORE THE KANSAS HOUSE OF REPRESENTATIVES
COMMITTEE ON INSURANCE

January 25, 1989

OPPOSITION TO HOUSE BILL 2047

Chairman Sprague, members of the Committee, my name is Derenda J. Mitchell. I am an attorney in private practice here in Topeka. I am here on my own behalf because prior to being hired by my firm, I was the attorney for the Health Care Stabilization Fund for approximately three and one-half (3½) years. I proudly worked for the State of Kansas in the Insurance Department for a total of six and one-half (6½) years before leaving government service. My intent in addressing you today is to help provide a historical prospective and shed a little different light on the Fund than the proponents of House Bill 2047 have done.

First, I think it is important to emphasize as it was stated yesterday that the Health Care Stabilization Fund was created to provide insurance at a time when insurance was unavailable for health care providers. Granted, while the Fund under standards imposed upon other types of insurance pools, businesses, or operations might be characterized as insolvent, the Fund operates under the standards established by the Legislature and should not be subject to, nor viewed, under those other standards.

Professionals most often want to be financially accountable

for the mistakes which they make which may cause harm to others. People make mistakes. We are all human. This is not to say that all health care providers in Kansas are negligent. However, the very existence of the Fund is a tribute to the providers' attempt to be responsible. As I know you are all aware of, insurance not only benefits the insured, but worthy claimants. I can not help but believe that the Fund benefitted, as an example, those innocent, brain-damaged children on whose behalf we procured structured settlements. Without the Fund, or some mechanism in its place, those benefits may not be provided. In short, the Fund has accomplished its stated objective and purpose, to provide insurance. There is certainly nothing wrong with government intervening in the wake of a crisis. If government is to be responsive to the needs of its people, it has to be able to respond in time of emergency.

I also want to emphasize that the stated principle of insurance is to spread the risk. Merit rating, which the KBA claims as a reason to eliminate the Fund, is actually contradictory to the principal of insurance. For those of you who were here in 1986, you will recall that House Bill 2661, the legislation which in large measure was struck down by the Kansas Supreme Court, originally contained a merit surcharge provision. A year later, after additional study, the Legislature, almost unanimously, voted to repeal

the merit surcharge. Not only was the merit surcharge provision contrary to the stated principals of insurance, but it defeated the very purposes for which House Bill 2661 was enacted. The merit surcharge provision, true to the principles of merit rating, would have charged a higher surcharge to those health care providers having higher losses. The health care providers with the higher losses were the health care providers in the higher risk specialties, the ob-gyns, for example, who already had increased payments to make, and whose presence in the state the Legislature was trying to maintain, particularly in rural areas. Also, merit rating discourages settlements because health care providers would prefer to take their chances in court and have a jury tell them that they had to pay a certain amount rather than voluntarily agree to pay an amount in settlement and stab themselves in the back with an increased insurance payment.

The same legislation which eliminated the merit surcharge from the Fund also eliminated the provision which had been included in the original version of the House Bill 2661 providing for an additional payment to health care providers for tail coverage if they left the state before practicing three years. A provision to charge directly for tail coverage was not only an administrative tangle, but was repealed because the surcharge already indirectly

contemplates an amount for tail coverage. In fact, the system established in 1976 by the Legislature to pick up tail coverage has worked beautifully in terms of providing coverage in a market which might not otherwise be available to health care providers. Kansas has avoided the frustrations which states such as I recall Michigan dealt with in handling claims made against physicians who had died, retired, or who had left the state. I won't go into great detail about the merit rating system and the surcharge for the tail, except to say the the Legislature studied those issues in depth in 1986, and again in 1987 when the provisions were repealed.

I also noted yesterday that the KBA suggested as a reason for enacting House Bill 2047, that the \$3 million dollar cap limit on Fund coverage provides greater incentive to sue. It seems to me that if the amount of the cap on the Fund is a problem, amputating the leg is a might too radical when only the toenail needs trimming.

The Bar Association also states that the Fund discourages excess insurers from coming into the market and writing coverage. On this issue, who do you believe? The lawyers and a few judges state that there are excess markets available to fulfill the Fund's role. The doctors who have been diligently and desparately looking for excess markets since before 1976 and the Insurance Department which regulates the business of insurance on a day-to-day, hour-by-hour

basis say that there are no new markets available. I know where I would put my money on that bet.

The Bar Association also states that it is a reason to abolish the Fund because it is unfair to medical professionals to be interfered with by government. To that extent, I must agree with Rep. Patrick and the Bar Association. I understand and appreciate the purpose of having House Bill 2047 if it is to eliminate oppressive governmental interference. But I also think it is unfair to characterize the doctors as not knowing what the Fund costs and what they are purchasing. It is my impression that the new doctors educated at the University of Kansas Medical School were well-informed about the issues of insurance confronting them. Moreover, the doctors asked for the Fund, they pay for the Fund, and they are asking that the Fund not be abolished in the manner proposed by House Bill 2047.

Before closing I want to add that as the former attorney for the Fund, provisions of House Bill 2047 as a practical matter are unworkable. I do not want to belabor my opposition with a line by line technical analysis of the Bill, but as an example, I would refer the Committee to new Section 2(b) which states when and for whom the new liability liquidation fund is liable. House Bill 2047 under this provision would continue to provide tail coverage for the physicians, but the Bill repeals those provisions of the law which enable the Fund to know which health

care providers are entitled to tail coverage.

In conclusion, I oppose House Bill 2047 and ask the the Committee to respond to the health care providers' concerns and adopt those proposals that the health care providers sponsor. After all, it is the health care providers, and not the state taxpayers, who must pay for the Fund.