Approved March 26, 1990
Date

MINUTES OF THE House COMMITTEE ON Insurance.

The meeting was called to order by Dale Sprague at
Chairperson

3:30 xx a.m./p.m. on March 21, 90, 19__ in room 531-n of the Capitol.

All members were present except:

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

Conferees appearing before the committee:

see attached list

The Chairman called the meeting to order at 3:40 p.m.

Representative Littlejohn made a motion to approve the minutes of March 14 and March 15, 1990. Representative Flower seconded. The motion carried.

The Committee began hearings on SB 605.

SB 605 -- An Act concerning replacement and contestation of life insurance policies covering debtors of a creditor.

Senator James Francisco appeared in support of SB 605 and explained that the bill as amended concerns itself with credit life insurance with respect to real estate mortgage indebtedness and would create a new law regarding the substitution or replacement of a policy of credit life insurance. Sen. Franciso stated that the bill would specify that the insurance company issuing the replacement or substitute policy will not be entitled to contest payment of benefits to any greater extent than the replaced life insurance would have been contestable by the insurers had the policy not been replaced or substituted. He said that prohibition would not apply to amounts of insurance provided by the replacement policy which exceeded that amount of insurance provided by the replaced policy.right to contest payment of benefits under the policy.

Roberta Sue McKenna, Department of Social and Rehabilitation Services (SRS) appeared in support of SB 605. Ms. McKenna explained that the authorization for the Department to purchase the insurance required by the Federal Government with funds primarily provided by the Federal Government for individuals volunteering and serving as foster parents for children in the custody of the Secretary, is necessary to insure approximately $7 million in foster care funding. She also stated that the $7 million is matched by 45% state match.

There were no others wishing to testify and hearings on SB 605 were closed.

SB 587 -- An Act amending the Kansas municipal group-funded pool act; concerning purposes for which municipalities may pool their liabilities; amending K.S.A. 1989 Supp. 12-2617, 12-2618 and 12-2621 and repealing the existing sections.

Chris Courtwright, Legislative Research Department explained that the bill as amended, would amend several sections of the Kansas Municipal Group-Funded Pool Act and would add group sickness and accident and life insurance to the list of liabilities municipalities may enter into agreements to pool. Mr. Courtwright stated further that the bill would change existing law regarding reinsurance of the pool's risk to confine such reinsurance to an insurance company holding a certificate of authority to do business in this state and finally, would require that premiums charged by any pool for life insurance or group sickness and accident insurance be based upon sound actuarial principals.

Bill Curtis, Kansas Association of School Boards (KASB) provided testimony (Attachment 1) in support of SB 587. Mr. Curtis explained that the bill was requested by KASB and would permit municipalities to form group-funded pools for health insurance.

Chuck Stuart, United School Administrators of Kansas provided testimony (Attachment 2) supporting the bill and the ability to plan and implement regional health insurance pools in an opportunity to do something about the skyrocketing health care costs in school districts in Kansas.

Next appearing in support of SB 587 was John Torbert, Kansas Association of Counties. Mr. Torbert provided testimony (Attachment 3) stating that the bill would provide an alternative vehicle for the provision of health and accident risks and inject some much needed competition into the marketplace.

There were no other wishing to testify and hearings on SB 587 were closed.

SB 747 -- An Act concerning insurance; amending the health care provider insurance availability act; relating to coverage of liability for certain acts; amending K.S.A. 40-3408 and K.S.A. 1989 Supp. 40-3403 and repealing the existing sections.

Chris Courtwright, Legislative Research Department gave an overview of the bill which as amended, would amend two sections of the Health Care Provider Insurance Availability Act to allow the Health Care Stabilization Fund and insurers writing the basic cover under the Act to exclude from coverage any liability incurred by the health care provider based upon or relating to the provider's sexual acts or activities. Mr. Courtwright explained further that bill as amended would allow the Fund and private insurer to provide reasonable and necessary expenses for attorney fees incurred in defending against a claim based upon the sexual acts or activities of the health care provider.

Chip Wheelen, Kansas Psychiatric Society provided testimony (Attachment 4) supporting the basic concept in SB 747 which directly addresses the problem of sexual misconduct by a health care provider and denies the insurance coverage that otherwise would pay for any damages that can be awarded to a former patient or client who can prove that the person was a victim of sexual exploitation.

Lori Callahan, Kansas Medical Mutual Insurance Company (KaMMCO) appeared in support of SB 747 and provided testimony (Attachment 5) which would clarify the obligation the Fund may or may not have in the payment of claims based on alleged sexual misconduct, making it clear that both insurance companies and the Fund may exclude coverage for such acts. Ms. Callahan pointed out that the bill does nothing to absolve any health care provider of liability for any alleged acts of sexual misconduct, that would still be personally liable for any judgment against them.

In opposition to SB 747, Jerry Palmer, Kansas Trial Lawyers Association provided testimony (Attachment 6) as being detrimental to the welfare of patients and clients in this state. Mr. Palmer explained that the reason for the Fund or any mandatory insurance program, is to assure that the patient that has been wronged and thereby damaged will have adequate funds from which to seek compensation.

There were no others wishing to testify on SB 747 and the hearings were concluded.

The Committee began discussion and possible final action on SB 514.

SB 514 -- An Act relating to insurance; providing for licensure and regulation of managing general agents; prescribing authorities and duties of the commissioner of insurance; prescribing requirements for insurers utilizing the services of managing general agents; requiring a written contract for the placement of business with an insurer by a managing general agent and prescribing contents thereof; providing penalties for violations.

Staff reminded that Committee of the conceptual amendments offered by the Insurance Department in the minutes of March 20, 1990.

Representative Allen made a motion to amend the conceptual amendments of the Insurance Department in to SB 514. Representative Bryant seconded. The motion carried.

Representative Allen made a motion to recommend SB 514, as amended, favorable for passage. Representative Turnbaugh seconded. The motion carried.

The meeting was adjourned at 5:30 p.m.

GUEST LIST

COMMITTEE: Insurance DATE: 3/21

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Rick Brock	Topeka	Ins. Dept.
Richard E. Wilborn	McPher	Allianz Inc B
Bill Curtis	Topeka	KASB
Kathryn Degnan	Wichita	USD 259
ALAN CORK	Wichita	KS Restaurant Assn
CHUCK STUART	TOPEKA	UNITED SCHOLARS
Roberta Sue McKenna	Topeka	SRS Legal
LISA Getz	WICHITA	ST FRANCIS REGIONAL MEDICAL CENTER
Chip Wheelen	Topeka	KS Psychiatric Soc.
David Hanson	Topeka	KS Assoc Prop/Cas Ins.

KANSAS ASSOCIATION OF SCHOOL BOARDS

5401 S. W. 7th Avenue Topeka, Kansas 66606
913-273-3600

Testimony on SB 587
before the
House Insurance Committee
by

Bill Curtis, Assistant Executive Director
Kansas Association of School Boards

March 21, 1990

Mr. Chairman and members of the Committee, we appreciate the opportunity to testify today on behalf of the 302 members of the Kansas Association of School Boards. SB 587 was introduced at the request of KASB and would permit municipalities to form group-funded pools for health insurance. Current law restricts that authority.

During the 1987 session of the Kansas Legislature, KASB worked cooperatively with the House Insurance Committee to draft the language found in K.S.A. 12-2616 through 12-2629. That act is known as the Kansas Municipal Group-Funded Pool Act. As a compromise, health, life and accident insurance was excluded. Our members now find that the compromise was not a good idea. With the dramatic increase in health insurance premiums, school districts are looking for alternatives to the traditional market for health insurance. We know of at least one school district now paying in excess of $840 per month for a family plan.

As far as we know, KASB is the only group-funded pool operating in Kansas under the authority granted in the above cited statute. The pool at present deals only with workers' compensation. That pool has

Attachment 1

111 school districts participating and the number of members continues to grow. KASB has worked cooperatively with the Kansas Department of Insurance to adhere to both the letter and the spirit of the statutes. Striking the exclusion is not a panacea to the problems of health insurance premiums. But it is an alternative and can certainly deal with the availability problem. It may not be the answer to affordability but the marketplace will answer that question. While we may be neophytes in the field of insurance, we believe we know the business of school districts as well as anyone. There are some steps that can be taken to at least slow down the dramatic increases in premiums that are within the expertise of KASB. We ask only for the opportunity to try.

We appreciate the time and attention of the Committee. We urge your favorable consideration of SB 587.

USA
UNITED SCHOOL ADMINISTRATORS OF KANSAS

SB 587

Testimony present before the House Committee on Insurance
by Charles L. "Chuck" Stuart, Legislative Liaison
United School Administrators of Kansas

March 21,1990

Mister Chairman and members of the committee, I am Chuck Stuart representing United Schools Administrators of Kansas. USA is very supportive of SB 587. The ability to plan and possibly implement regional health insurance pools provides one opportunity to do something about the skyrocketing health care costs in many school districts in Kansas.

In some school districts in our state the premium for a family health care insurance policy is approaching $600 per month. Something must be done quickly or a growing number of school employees will be unable to afford health care coverage.

SB 587 provides one possible solution which can be implemented now. USA urges the committee to recommend the bill favorably for passage.

SB587/gwh

Attachment 2

820 Quincy, Suite 200 Topeka, Kansas 66612 (913) 232-6566

KAC KANSAS ASSOCIATION OF COUNTIES

"Service to County Government"

212 S.W. 7th Street
Topeka, Kansas 66603
(913) 233-2271
FAX (913) 233-4830

March 21, 1990

TESTIMONY

To: House Insurance Committee

From: John T. Torbert
Executive Director

Subject: SB 587 (Insurance Pooling)

The Kansas Association of Counties is in support of SB 587. Our convention adopted platform statement is as follows:

"The current statutory prohibition on the pooling of health and accident risks should be repealed. Although a pool may not initially lower premiums in these areas, it would provide an alternative vehicle for the provision of these services and inject some much needed competition into the marketplace."

The one complaint that I hear most frequently from county commissioners is the escalating cost of health insurance. I have heard reports of counties where the family health premium is in excess of $600 per month. All of you on this committee are aware on what has happened to these costs. The worst part of it is that there does not appear to be any end in sight. There is truly a hopelessness that the cycle will ever change. Further, there are very few (if any) alternatives available to a county that wishes to find a different way of handling their health insurance risks.

We don't know if this legislation will provide the answer. It may well be that a health insurance pool would not be feasible in the current environment. But, we need to have the statutory ability to make that determination. Experience has shown that the mere discussion of insurance pooling can do miraculous things in the short term in the ability to reduce premium costs. In the long term, the ability to inject some competition into the marketplace with an alternative mechanism of transferring risk cannot hurt and probably will help.

We urge your favorable consideration of this legislation.

TSJHLHIN

Attachment 3

House Insurance
3/21/90

Kansas Psychiatric Society

1259 Pembroke Lane
Topeka, KS 66604
Telephone: (913) 232-5985
or (913) 235-3619

Officers 1988-1990

Donald R. Brada, M.D.
President
929 N. St. Francis
Wichita, KS 67214

Samuel L. Bradshaw, M.D.
President-elect
3910 Parlington Dr.
Topeka, KS 66610

Cathy Shaffia Laue, M.D.
Secretary
P.O. Box 1634
Lawrence, KS 66044

Donna Ann Vaughan, M. D.
Treasurer
R.R. 1, Box 197 A
Newton, KS 67114

Manuel P. Pardo, M.D.
Councillor, 1988-91
UKMC-Psychiatry
39th & Rainbow
Kansas City, KS 66103

George W. Getz, M.D.
Councilor, 1987-90
P.O. Box 89
Larned, KS 67550

Eberhard G. Burdzik, M.D.
Councillor, 1986-89
2700 West Sixth St.
Topeka, KS 66606

George Dyck, M.D.
Representative
Prairie View, Inc.
Newton, KS 67114

H. Ivor Jones, M.D.
Deputy Representative
8901 West 74th St.
Shawnee Mission, KS 66204

Jo Ann Klemmer
Executive Secretary
Telephone: (913) 232-5985

Chip Wheelen
Public Affairs Contact
Telephone: (913) 235-3619

March 21, 1990

TO: House Insurance Committee

FROM: Kansas Psychiatric Society Chip Wheelen

SUBJECT: Senate Bill 747; HCSF Coverage of Malpractice Arising as a Result of Sexual Misconduct

Thank you for this opportunity to express the support of the Kansas Psychiatric Society for the provisions of SB 747. Some of you may be aware that the Legislature has spent almost a year attempting to address the problem of sexual exploitation of patients and clients of providers of mental health services. This includes an interim study by a committee on mental health issues which recommended specific legislation that was then considered by the standing Senate Judiciary Committee. In addition, another measure was considered by the standing House Judiciary Committee, and a third measure was considered by the House Public Health and Welfare Committee.

Most of the proposals considered thus far dealt with discovery and punishment of therapists rather than deterrence of exploitation. None of the various bills considered by these committees of the Legislature have been perceived as an appropriate method of dealing with this problem. By contrast, SB 747 directly addresses the problem of sexual misconduct by a health care provider. It denies the insurance coverage that otherwise would pay for any damages (including mental anguish or pain and suffering) that can be awarded to a former patient or client who can prove that the person was the victim of sexual exploitation.

The Kansas Psychiatric Society endorses the basic concept of SB 747, but wishes to emphasize a very important consideration in this context. Because some patients may indeed be mentally ill, or may be suffering from emotional disturbances, there exists a greater likelihood for false accusations of sexual impropriety on the part of a physician or other health care provider. Such accusations could be the product of delusional thinking or simply an active imagination. This is particularly applicable to psychiatric physicians and other providers who are in the business of rendering mental health services. It is for this reason that it is extremely important that current policy be continued so that any health care provider accused of sexual misconduct will be defended by the Health Care Stabilization Fund.

It is reasonable to believe that a health care provider who becomes intimately involved with a patient or client will think twice before exposing his or her personal assets to the liability exposure that would occur if SB 747 is enacted. This, in conjunction with the very distinct possibility of suspension or revocation of one's license, should be an effective deterrent to sexual misconduct by these providers. This is by contrast to other approaches which have simply proposed to provide punishments subsequent to the occurrence of such acts.

It is for these reasons that we urge you to recommend passage of SB 747. Thank you for considering our concerns.

Attachment 4

KaMMCO

KANSAS MEDICAL MUTUAL INSURANCE COMPANY
AND
KANSAS MEDICAL INSURANCE SERVICES CORPORATION

March 21, 1990

TO: House Insurance Committee

FROM: Lori M. Callahan
Legislative Counsel

SUBJECT: S.B. 747

The Kansas Medical Mutual Insurance Company, KaMMCO, is a Kansas, physician-owned, non-profit professional liability insurance company formed by the Kansas Medical Society. KaMMCO currently insures 400 Kansas doctors and has capitalized and anticipates insuring in the next few months 400 more. KaMMCO feels it is in a unique position to provide insight to the Kansas legislature with regard to professional liability insurance for doctors and, therefore, appreciates the opportunity to testify today.

The Courts have long held that insurance contracts will not be construed to insure against activities which are repugnant to public policy. Thus, public policy has precluded liability insurance for punitive damages, criminal acts, as well as acts of clearly unprofessional conduct. This serves to punish those for participating in activities which are abhorant to the public welfare.

Until now, the Health Care Stabilization Fund law has been unclear on whether both the Fund, and private insurance companies, have an obligation to pay any claims based on alleged sexual misconduct. This bill makes it clear that both insurance companies and the Fund may exclude coverage for such acts. The Senate committee amendments merely clarified the point that both the Fund and private insurance companies may defend a policyholder against alleged sexual misconduct claims, but they need not provide indemnification or payment of a claim.

S.B. 747 does nothing to absolve any health care provider of liability for any alleged acts of sexual misconduct. They would still be personally liable for any judgment against them. It

Attachment 5

P.O. BOX 2307 • TOPEKA, KANSAS 66601-2307
913-232-2224 / 800-232-2259

does, however, make it clear that insurance companies and the Fund may exempt coverage in such instances. There is ample rationale for this change. Currently, for example, it is against public policy to provide insurance for acts which give rise to punitive damages, since such behavior is so inappropriate that we do not want to encourage that behavior by providing insurance for subsequent claims that arise because of it. The same thing applies here. Clearly acts of sexual misconduct or exploitation do not fall within accepted medical or professional treatment, and as such we should not encourage such acts by providing indemnification for them. Any health care provider convicted of sexual misconduct or exploitation would have to pay any claim out of their own assets, a far greater penalty than having them insulated from the claim by their insurance company.

Additionally, health care providers can lose their license to practice by engaging in sexual misconduct or exploitation of patients or clients, which is also a substantial penalty.

KaMMCO respectfully requests your consideration of this legislation which would serve to codify current practice in the state of Kansas which serves to protect the public policy interests of the state. If there are any questions regarding this, I would be happy to answer them.

KANSAS
TRIAL LAWYERS ASSOCIATION

Jayhawk Tower, 700 S.W. Jackson, Suite 706, Topeka, Kansas 66603
(913) 232-7756 FAX (913) 232-7730

TESTIMONY
of the
KANSAS TRIAL LAWYERS ASSOCIATION
before
HOUSE INSURANCE COMMITTEE

SB 747

March 21, 1990

The Kansas Trial Lawyers Association represents nearly one thousand lawyers and law students in the state of Kansas. Many of the members of the Association represent injured people, some of whom are those who are injured by the negligence of physicians or the employees of other health care providers which acts involve sexual acts or activities.

The Kansas Trial Lawyers Association opposes SB 747 in the strongest possible terms, as being detrimental to the welfare of patients/clients in this state.

The Act and its two provisions do two things. First, it says that the Health Care Stabilization Fund shall in no event be liable for claims against a health care provider due to "sexual acts or activities", and second, permits liability insurance companies to exclude from coverage for health care providers "sexual acts or activities".

The School of Hippocrates (late fifteenth century B.C.) provided the ethical guide of the medical profession more than two thousand years ago. Included within its injunctions are the following: "In every house where I come, I will enter only for the good of my patients, keeping myself far from all intentional ill-doing and all seduction, and especially from the pleasures of love with women or with men, be they free or slaves."

For more than two millennia physicians have recognized that the relationship involves the risk of inappropriate sexual behavior. Most frequently, sexual encounters between a health care provider and a patient will be found in the psychotherapeutic relationship. It must be remembered that psychotherapy in this state can be practiced by a variety of people, including psychiatrists, psychologists, social workers, ministerial counsellors, and others having some training in the field of psychology. The essence of the therapeutic relationship was recognized in the Kansas case of Seymour v. Lofgren, 209 Kan. 72 (1972), the Court related this phenomena:

> "What is perhaps regarded as the most significant concept in psychoanalytical therapy, in one of the most important discoveries of Freud, is the emotional reaction of the patient towards the analyst known as the transference ... Inappropriate emotions, both hostile and loving, directed toward the physician are recognized by the psychiatrist as constituting a special aspect of the patient's neurosis - the transference. The psychiatrist looks for manifestation of the transference, and is prepared to handle it as it develops ... transference may be positive, when the feeling and reactions are affection, friendly, or loving ... Understanding of transference forms a basic part of the psychoanalytic technique."

In 1985 the Menninger Foundation published a paper[1] recognizing some of the risks involved in transference and counter-transference, and said "The more troublesome form of counter-transference acting out is the romantic or sexual involvement of a staff member with a patient. This involvement violates all the ethics of the therapeutic contact ..."

There are many cases that specifically recognize sexual misconduct in this setting between psychotherapist and patient as malpractice. (Zipkin v. Freeman, 436 S.W. 2d 753 (Mo. 1968), Anclote Manner Foundation v. Wilkinson, 263 S. 2d 256 (Fla. 1972), Roy v. Hartog, 85 Misc. 2d 891, (NY app. div. 1976), Marston v. Minneapolis Clinic of Psychiatry and Neurology, 329 N.W. 2d, 306 (Min. 1982), Simmons v. U.S., 805 F.2d 363 (9th Cir. 1986) in which case the Court said "When the therapist mishandles transference and becomes sexually involved with a patient, medical authorities are nearly unanimous in considering such conduct to be malpractice." Another case, L.L. v. Medical Protective Company, 122 Wis. 2d 455 (1984) concluded "We believe the centrality of transference to therapy renders it impossible to separate an abuse of transference from the treatment itself. The District Court correctly found that the abuse of transference occurred within the scope of Mr. Kamer's employment." A review of these cases shows consistently that sex in therapeutic relationships is almost always to held to be within the terms of a malpractice insurance policy, and also within the scope of agency between an institution (health care provider) that employs a therapist and the mistreating therapist.

The reason for the Fund or any mandatory insurance program, is to assure that the patient that has been wronged and thereby damaged will have adequate funds from which to seek compensation. The rationale is the same as in the field of automobile insurance where we are securing the public against the risk of negligent injury by the use of an automobile. This law is instituted so that patients who have been malpracticed will have an adequate resource from which to collect damages.

These type of injuries are devastating. I have personally handled two specific cases which shed light on this issue. One involved a psychiatrist who had victimized no less than three people, and who conceived a child by my client, putting her in the situation of a quite painful extrication from the relationship. She had great difficulty re-establishing a therapeutic relationship with any other therapist. My other client committed suicide prior to the time that she was able to conclude her case against a non-physician therapist employed by one of the most respected institutions of mental health in the country. To attempt to remove the security for the remedy afforded by law would be a substantial injustice to patients who are not only negligently treated, but those who have been negligently treated to the point of actual abuse.

These are not cases of simple seduction where a physician/ therapist makes love to someone with whom he or she has a professional contact. They are more tantamount to rape. However, not in defense, but in explanation, the therapist is involved in a risky business, and one of the risks of the business is the personal involvement which will cause harm to the patient. It is just as much the inability of the therapist to pay attention to his role, as it is to the surgeon to pay attention to his scalpel, and when the therapist goes awry, the patient is damaged. No serious discussion by intelligent people indicates that the therapist does this simply for exploitation or other motives that might be involved in a simple seduction. All recognize that it is an inherent risk of the therapeutic process, but that persons doing this are supposed to be skilled enough and recognize the risk and keep themselves from being sexually involved with their patients. Only to the unsophisticated are these "intentional acts", such as would be excluded from most insurance policies for voluntary conduct.

Another separate reason this bill should not be passed is that it should not be the role of the Legislature to write insurance policies, either for the Fund, or for the health care practitioner, and start authorizing exclusions. If insurance companies want to exclude this kind of conduct, they can try to do so subject to the Court's interpretation of their policies.

The great injustice, though, is that severely injured victims will not be compensated as they were supposed to be in the great bargain which resulted in the creation of the Health Care Stabilization Fund, whereby patient traded longer statutes of limitations for the security of the judgment being paid. Enough inroads have been made into that basic covenant, that no further inroads should be made.

[1] Counter-transference in hospital treatment - Basic Concept & Paradigms, Ira Stamm, Phd. An occasional paper from the Menninger Foundation, No. 2 of a series.