Approved April 7, 1990
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Michael O'Neal at
Chairperson

3:30 ~~XXXX~~ p.m. on March 27, 1990 in room 313-S of the Capitol.

All members were present except:

Representatives Douville, Peterson, Roy and Sebelius, who were excused

Committee staff present:

Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee:

Nancy Schmidt Roush, Trust Division, Kansas Bar Association
Marilyn Bradt, Kansans for Improvement of Nursing Homes, Inc. Lawrence
John Holmgren, Catholic Health Association of Kansas
Elwaine Pomeroy, member of the Kansas Delegation to the National Conference of Commissioners on Uniform State Laws
Senator Lana Oleen
Merrill Werts, Public Employee Relations Board
Don Doeskin, Staff Attorney, Public Employee Relations Board
Jeffrey Ellis, Kansas H.M.O. Association
Terry Leatherman, Kansas Chamber of Commerce and Industry
James P. Schwartz, Kansas Employer Coalition on Health, Inc.

HEARING ON HB 3060 — **Amendments to the durable power of attorney act and the durable power of attorney for health care decisions**

Nancy Schmidt Roush, Trust Division, Kansas Bar Association, testified in support of HB 3060. She submitted clean-up amendments. She explained one document could contain both traditional durable power of attorney provisions, such as dealing with property, as well as health care decisions. She recommended revising Section 5 to put the proper authority with the proper person, i.e. the conservator for property decisions and the guardian for health care decisions, see Attachment I.

Marilyn Bradt, Kansans for Improvement of Nursing Homes, Inc. testified that since the bill addresses both the durable power of attorney and the durable power of attorney for health care decisions some changes need to be made. She recommended that on page 2, line 6, following the word "incapacitated" insert "except that the fiduciary, unless a guardian charged with the responsibility for the principal's person, shall not have the power to revoke or amend the authority of the agent for health care decisions". She also questioned the advisability of having both the durable power of attorney and the durable power of attorney for health care decisions in a single document, see Attachment II.

John Holmgren, Catholic Health Association of Kansas, testified in opposition to HB 3060. He said Section 5 makes the health care agent responsible to the fiduciary, but also gives the fiduciary the power to revoke or amend the durable power of attorney. He said there could be a serious conflict of interest if the durable power of attorney for fiscal matters is combined or addressed along with the durable power of attorney for health affairs, see Attachment III.

Elwaine Pomeroy, member of the Kansas Delegation to the National Conference of Commissioners on Uniform State Laws, appeared in opposition to any attempt to do away with the uniformity of the Uniform Durable Power of Attorney.

Ms. Roush said she would furnish the Committee copies of the letter she wrote the Uniform Law Commissioners in regard to HB 3060, and their response. She said the Uniform Law Commissioners did not find that HB 3060 would affect the uniformity of the Durable Power of Attorney. She said she did not address Section 8 or Section 9 in her letter to the Uniform Law Commissioners and she said these Sections could be a separate act.

Keith Landis, Christian Science Committee on Publication for Kansas offered amendments to Section 5. On page 2, after line 3, "except that the agent designated in a durable power of attorney for health care decisions shall be accountable only to a guardian responsible for the principal's person", and on page 2, after line 6 "except that only the guardian with responsibility for the principal's person shall have the power to revoke or amend the durable power of attorney for health care decisions". Health care decisions should be made in accord with the principal's wishes and should not be controlled by interests whose main concern may be preservation of the principal's estate, see Attachment IV.

There being no other conferees, the hearing on HB 3060 was closed.

SUBCOMMITTEE REPORT ON HB 2835 Regional prison authority authorized

Representative Jenkins reported the subcommittee from the Local Government Committee and the subcommittee from the Judiciary Committee met twice. The joint subcommittee recommended an interim study of HB 2835. They also recommended the consideration and passage of SB 588 until guidelines are in place under HB 2835, see Attachment V. SB 588 would put a one year prohibition on the construction and operation of private prisons in Kansas. The subcommittee has requested that the Senate Federal and State Affairs Committee pass SB 588 out of the Committee to the Senate.

Representative Jenkins moved to adopt the subcommittee report on HB 2835. Representative Snowbarger seconded the motion. The motion passed.

HEARING ON SB 699 Procedure for public employee relations board

Senator Lana Oleen explained SB 699 was requested by the Public Employee Relations Board and deals with the amount of time the Public Employee Relations Board would have before issuing a final order.

Merrill Werts, Public Employee Relations Board, testified that since the Public Employee Relations Board normally meets only once a month, the requirement, "written notice of its intention to review the initial order within 15 days" creates a substantial logistical problem as several orders may be forthcoming in any given month. He stated the only effect of SB 699 is to allow the PERB a little more time to consider orders issued by its staff hearing officers. It was his understanding that the bill in its amended form is acceptable to the employee organizations and leaves the KAPA statutes workabale for the PERB, see Attachment VI.

Don Doesken, Staff Attorney, Public Employee Relations Board submitted testimony in support of SB 699, see Attachment VII.

HEARING ON SB 396 Subrogation rights under accident, health or sickness insurance

Jeffrey O. Ellis, Kansas HMO Association, testified currently an insurance company cannot issue contracts of insurance in Kansas containing a subrogation clause applicable to coverage providing for reimbursement of medical, surgical, hospital or funeral expenses. Subrogation is prohibited in health insurance contracts in Kansas by administrative regulation promulgated by the Kansas Insurance Department. SB 396, as amended, permits accident, health or sickness insurance policies and any health maintenance organization subscriber contracts to include a subrogation clause. SB 396 allows subrogation to the insurer for the insured's rights of recovery when the circumstances of the insured's injuries create a legal liability against a third party for not more than the amount of the benefits that the insurer might have previously paid or provided in relation to the insured's injury by that third party. Subrogation would be available only to the extent that the insured is not left with any uncovered, out-of-pocket expenses for medical and related health care services. The insurer would be allowed to enforce subrogation rights in its own name or the name of its insured, and any attorney fees or costs would have to be paid by the insurer from any recovery it obtained. He stated extending subrogation to health and accident insurers would benefit the insurers through reduced costs and the insured through reduced health care insurance premium costs, see Attachment VIII.

Terry Leatherman, Kansas Chamber of Commerce and Industry, supported granting health care insurers subrogation rights because it is one step in slowing down the runaway costs of health care insurance. Subrogation would further limit legal double-dipping, where the insured person collects from an insurer to pay for medical expenses and then collects again by filing a lawsuit against a responsible third party, see Attachment IX.

James P. Schwartz, Jr., Kansas Employer Coalition on Health, Inc. testified in support of SB 396. He stated it is unfair for claimants to collect twice for the same injury and it is unfair for an employer's health plan to get stuck holding the bag when double payments occur, see Attachment X.

The Chairman announced the hearing on SB 396 would be continued to a later date and conferees would be notified when the hearing is rescheduled.

The minutes of March 15 and March 19 were approved.

The Committee meeting was adjourned at 5:00 p.m.

GUEST LIST

COMMITTEE: HOUSE JUDICIARY DATE: 3-27-90

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Marilyn Bradt	Lawrence	KLNH
Marie Brown	Lawrence	
Jim Schwartz	Topeka	KECH
John H Holmgren	Topeka	Catholic Health Assn
Don Dreskin	Lawrence	KDHR - Legal (SB699)
Monty Bertelli	Topeka	KDHR Labor Relations & Employ. Standards
Harold Matt	Horton	BNEK
Donna E Woods	Horton	BNEK
Marian E Yaussi	Hiawatha	
Lynn a Sonia Yaussi	R-of Northeast Ks.	
Leroy W. Stute	Horton	BNEK
Alma Knudsen	Horton	BNEK
~~Ralph Foster Esq.~~	KC, KS	KARPSLC CETE
Timothy J Forkell	Horton Ks	
ALAN COBB	Wichita	Anderson Conlee
Joyce Vancrum	Overland Park	
JAMES CLARK	TOPEKA	KCDAA
		KDOT
John W. Johnson	Wichita	KTLA

HOUSE BILL NO. 3060

Regarding Durable Powers of Attorney

Comments submitted by Nancy Schmidt Roush

I. References are used in the Bill several places to "agent-in-fact" and in other places to "agent." This should be changed so that the language is consistently "agent."

II. 58-612(a) in Section 5 of the Bill should be revised to read as follows:

> If, following execution of any durable power of attorney, a court of the principal's domicile appoints a guardian or a conservator for the principal, an agent who has been given power to make health care decisions shall be accountable to any such appointed guardian in connection with such decisions, and any agent who has been given powers over the principal's property shall be accountable to such appointed conservator in connection with decisions regarding that property, as well as to the principal. The following shall have the same power to revoke or amend any durable power of attorney that the principal would have had if the principal were not disabled or incapacitated: (i) a guardian in connection with any durable power of attorney to the extent it deals with health care decisions; (ii) a conservator in connection with any durable power of attorney to the extent it deals with matters other than health care decisions.

This puts the proper authority with the proper person, i.e. the conservator for property decisions and the guardian for health care decisions. This would also not be a substantive change to the existing durable power of attorney for health care decisions, Section 58-627, which provides that a guardian can revoke or amend the durable power of attorney for health care decisions. I think the power of the court appointed and court supervised guardian or conservatorship to override an agent under a power of attorney is an essential safeguard. As a practical matter, the agent can be nominated in the power of attorney as guardian/conservator so the same person would serve, absent a showing to the court that the person was unfit.

III. Section 58-612(b) in Section 5 of the Bill should read on line 8 and 9 on page 2 as follows: "A conservator or guardian

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H. Jud. Com.
Attachment I

for consideration by the court if protective pro-". Then there should be added, perhaps as subsection (c) the following:

> For purposes of this section, references to "guardian", shall apply to any court appointed fiduciary charged with responsibility for the principal's person, and reference to "conservator", shall apply to any court appointed fiduciary charged with responsibility for substantially all or all of the principal's property.

IV. Section 8 of the Bill, which amends 58-629 regarding the health care powers, should have the introduction revised as follows:

> (a) A durable power of attorney may convey to the agent the authority to do the following, hereinafter referred to as "health care powers:"
>
> Then consistent changes need to be made in the rest of Section 8 and Section 9 so that instead of referring to a durable power of attorney for health care decisions, the reference instead is to a durable power of attorney containing health care powers. This approach is much more consistent with the concept that one document could contain both traditional durable power of attorney provisions, such as dealing with property, as well as health care decisions.

V. Lines 32, 33, and the first part of 34 on page 3 in Section 8 of the Bill should be eliminated. This provides that the powers of the agent shall be limited to the extent set out in the durable power of attorney. This is an obvious statement of law. In addition, it is unnecessary now that the statutory form for a durable power of attorney for health care decisions is optional only.

VI. In Section 8 of the Bill on line 35 of page 3, there is a reference to "an existing declaration" to the effect that the power of attorney cannot include the power to revoke such declaration. I would like to eliminate the word "existing," to make it clear that whether the declaration is existing at the time the durable power of attorney is written and signed, or later executed by the principal, it still cannot be revoked.

VII. The addition of the Uniform Anatomical Gift Act, line 36 of page 3, has an extra "and" that should be deleted.

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H. Jud. Com.
Att I

VIII. There should be added at the end of Section (f) of the amended Section 58-629 (Section 8 of the Bill) the following: "if those powers are specifically given to the agent." Otherwise, the statement in (f) seems to imply that an agent can arrange for organ donation, autopsy, or disposition of the body regardless of whether the power of attorney grants those powers.

IX. In the form set out in Section 9 of the Bill, under Limitations of Authority, line 25 of page 5, we need to add the new limitation that the agent cannot revoke or invalidate a declaration under the Uniform Anatomical Gift Act.

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H. Jud. Com.
Att I

KINH Kansans for Improvement of Nursing Homes, Inc.
913 Tennessee, suite 2 Lawrence, Kansas 66044 (913) 842 3088

TESTIMONY PRESENTED TO
THE HOUSE COMMITTEE ON JUDICIARY
CONCERNING HB 3060
DURABLE POWER OF ATTORNEY FOR HEALTH CARE DECISIONS

March 27, 1990

Information received last year when the Durable Power of Attorney for Health Care Decisions was passed indicated that it could not be combined with the Uniform Durable Power of Attorney without destroying the uniformity of that Act. We would want to be convinced that the two acts can, in fact, be combined before we could support HB 3060, though we believe that certain of the proposed amendments in HB 3060 have some merit.

New Sec. 2 which provides for the principal to designate successor agents is a concept we have supported. We are pleased to see this addition. The new wording on page 4, lines 35-36, preceding the form clarifies the intent that the form serve as a guideline rather than a restriction. These changes we might be able to support.

We are, however, very uncomfortable with the wording in Sec. 5 (a) which not only makes the agent accountable to the fiduciary, but also gives the fiduciary the power to revoke or amend the durable power of attorney. A court-appointed fiduciary then has greater authority than the agent selected by the principal. In the case of the ordinary durable power of attorney handling the business affairs of the principal, this may be appropriate; in the case of the agent for health care decisions, it is not. The fiduciary, unless a guardian charged with the responsibility <u>for the principal's person</u>, has never had authority to make health care decisions for the principal. There is no reason to believe that the fiduciary's views on appropriate health care are compatible with those of the principal. It is quite possible that the principal would not wish to have the person who is acting as fiduciary make health care decisions in the principal's behalf, yet in effect the fiduciary has the power to do so by removing the agent for health care decisions.

We suspect that this was an unintended effect of combining the two acts, and suggest the following remedy: on page 2, line 6, following "incapacitated", <u>except that the fiduciary, unless a guardian charged with the responsibility for the principal's person, shall not have the power to revoke or amend the authority of the agent for health care decisions.</u>

In addition, we wonder whether it is generally advisable to have both the durable power of attorney and the durable power of attorney for health care decisions in a single document. The principal may not wish to have his/her business arrangements known to those persons such as the hospital, nursing home or personal physician who will have the document for health care

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H. Jud Com.
Attachment #1

decisions on file and, conversely, it may not be appropriate that instructions for the principal's personal health care should be known to the agent managing business affairs.

KINH is not entirely convinced that changes to the Durable Power of Attorney for Health Care Decisions statute are needed at all. We would certainly oppose HB 3060 unless changes to the bill similar to those outlined above were made.

3/27/90
H. Jud Com
Att II

Catholic Health Association of Kansas

John H. Holmgren • Executive Director
Jayhawk Tower, 700 Jackson, Suite 801 / Topeka, KS 66603 / (913) 232-6597

TESTIMONY PRESENTED TO
THE HOUSE COMMITTEE ON JUDICIARY
RE: HB 3060
DURABLE POWER OF ATTORNEY
FOR HEALTH CARE DECISIONS

March 27, 1990

My name is John H. Holmgren and I am the Executive Director of the Catholic Health Association. We are opposed to HB 3060 which, in effect, changes last year's HB 2009 which became a statute. It changes it in a way that is totally contrary to what we all worked so hard for in preserving the identity of the Durable Power of Attorney for Health Affairs, the agent, in other words, designated as the agent for health care decisions.

Last year, several of us presented testimony to separate the role of the fiduciary or guardian for financial affairs from the agent for health care decisions. Ron Smith, Attorney with the Kansas Bar Association, Marilyn Brandt, Executive Director of the Kansas Improvement for Nursing Homes and Sister Mary Francine, Director of Pastoral Care at St. Francis Hospital and Medical Center, here in Topeka, all collaborated to work out HB 2009 and it passed with support from both houses of the legislature, as well as the Judiciary Committee.

Now we are reviewing HB 3060 which has several problems, not the least of which is Section 5, which makes the health care agent responsible to the fiduciary, but also gives the fiduciary the power to revoke or amend the durable power of attorney. We think that this is wrong. The fiduciary has never been given health care decision authority.

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H. Jud. Com.

Attachment III

Also we do not believe it appropriate for the durable power of attorney for fiscal matters be combined or addressed along with the durable power of attorney for health affairs in the same document. There could be serious conflicts of interest in this regard.

Why do we need changes to the existing 1989 statute regarding Durable Power of Attorney for Health Care decisions? It is satisfactory. Sometimes having too many laws does not clearly define intent or promise.

Lastly, Durable Power of Attorney is a court appointed person in a management role, whereas Durable Power of Attorney for Health Care Decisions is a family, consumer oriented role. They should be clearly separated.

Thank you for your courtesy.

3/27/90
H. Jud Com.
Att III

Christian Science Committee on Publication For Kansas

820 Quincy Suite K
Topeka, Kansas 66612

Office Phone
913/233-7483

To: House Judiciary Committee

Re: House Bill No. 3060

It is requested that the following amendments be made to this bill:

On page 2, after line 3:

> except that the agent designated in a durable power of attorney for health care decisions shall be accountable only to a guardian responsible for the principal's person.

On page 2, after line 6:

> except that only the guardian with responsibility for the principal's person shall have the power to revoke or amend the durable power of attorney for health care decisions.

The committee also may wish to make a technical amendment deleting "and" from line 36 of page 3.

Designating an agent who may be called upon to make health care decisions for the principal is somewhat different from designating someone to look after property. It does not seem proper nor wise to allow any fiduciary to make health care decisions for the principal or to control the agent who makes those decisions. This was an area of considerable concern during the discussion of this subject last year. That concern does not diminish with the passage of time. Health care decisions should be made, so far as possible, in accord with the principal's wishes and should not be controlled by interests whose main concern may be preservation of the principal's estate.

The problem discussed above does not arise in the act passed last year but results from the attempt to combine that act with the uniform durable power of attorney act.

From discussions we have had concerning this bill, I expect to concur in the testimony by Marilyn Bradt of Kansans for Improvement of Nursing Homes.

Keith R. Landis
Committee on Publication
for Kansas

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H. Jud Com.

Attachment IV

STATE OF KANSAS

MARTHA JENKINS
REPRESENTATIVE, FORTY-SECOND DISTRICT
LEAVENWORTH COUNTY
ROUTE 1, BOX 47
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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE-CHAIRMAN: JUDICIARY
MEMBER: AGRICULTURE AND SMALL BUSINESS
FEDERAL AND STATE AFFAIRS
LEGISLATIVE, JUDICIAL AND
CONGRESSIONAL APPORTIONMENT
NATURAL AND SCIENTIFIC AREAS
ADVISORY BOARD

26 March 1990

Re: H.B. 2835 - Private Prisons

Mr. Chairman,

The Joint Subcommittee on H.B. 2835 has met twice and attempted to work this measure to the satisfaction of all involved. However, due to the number of concerns raised and the number of unanswered questions, it is the subcommittee's recommendation that the Chairman of Judiciary, representing the full committee, request an interim study of H.B. 2835.

Furthermore, we encourage the consideration and passage of S.B. 588 until such guidelines under H.B. 2835 are in place.

Respectfully,

Martha Jenkins

Martha Jenkins

Vince Snowbarger

Vince Snowbarger

Joan Adam

Joan Adam

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H. Jud Com.

Attachment V

To: House Committee on Judiciary
From: Merrill Werts, Member of the Public Employee Relations Board
Subject: Explanation of 1990 SB No. 699
Date: March 27, 1990

Senate Bill No. 699 proposes to amend K.S.A.77-526. Inasmuch as an explanation of the need for the bill requires an understanding also of the next following section, K.S.A.77-527, a copy of this is appended hereto.

The Public Employee Relations Board (PERB) became subject to the Kansas Administrative Procedures Act (KAPA) effective July 1, 1989. Prior to this date, standard operating procedure was that a staff hearing officer would preside over each case then prepare a proposed order for consideration by the full PERB at its next regular monthly meeting. The KAPA provides under K.S.A.77-526(b) that, "If the presiding officer is not the agency head, the presiding officer shall render an initial order," and under K.S.A.77-527(b) that, "if the agency head on its own motion decides to review an initial order, the agency head shall give written notice of its intention to review the initial order within 15 days of its service." In this instance, the agency head is PERB.

Since, as mentioned, the PERB normally meets no more often than monthly, the requirement, "written notice of its intention to review the initial order within 15 days"creates a substantial logistical problem as several orders may be forthcoming in any given month. This could involve many conference calls and possibly several meetings each month, to say nothing of the increased mileage expense and inconvenience for PERB members and other parties involved in matters before the PERB.

Some might question the need for the full PERB to pass upon <u>all</u> orders issued in its name. Inasmuch as the Kansas Supreme Court has, on occasion, recognized PERB orders as case law (albeit unpublished) and has cited them as precedent for its own decisions, current members of the PERB feel that if they are to be responsible, <u>all</u> orders issued in its name should have prior scrutiny by the full board.

Substantively, the only effect of SB 699 is to allow the PERB a little more time to consider orders issued by its staff hearing officers. In all other respects, it will continue to be fully subject to the KAPA.

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H. Jud Com

Attachment VI

Others may suggest, assuming the thrust of SB 699 has merit, that it would be better in this instance to amend the Public Employer-Employee Relations Act rather than clutter KAPA with another exception. I would remind members of the committee that one of the primary reasons for enacting KAPA in 1984 was to consolidate into one chapter all of the administrative procedure and due process laws rather than to leave them scattered throughout the several chapters of the statutes which govern the different state agencies. To do this now would tend to subvert the original intent of the KAPA.

The amendments on line 11 of page 1 and line 14 of page 2 are merely technical in nature and were made by the Senate Committee on Labor, Industry and Small Business at my request.

The Senate floor amendment on lines 17, 18 and 22 through 26 of page 2 was made as a result of suggestions made in Senate committee testimony by conferees from employee organizations. It is my understanding that this amendatory language is acceptable to those organizations and it would still leave the KAPA statutes workable for the PERB.

Favorable consideration of SB 699 by the committee would be appreciated.

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H. Jud Comm
Att VI 2

in connection with any issue in that proceeding, while the proceeding is pending, with any person serving as presiding officer unless notice and an opportunity are given all parties to participate in the communication.

(d) If, before serving as presiding officer in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subsection (e).

(e) A presiding officer who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications and a memorandum stating the substance of all oral communications received, all responses made and the identity of each person from whom the presiding officer received an ex parte communication and shall advise all parties that these matters have been placed on the record. Any party desiring to rebut the ex parte communication must be allowed to do so, upon requesting the opportunity for rebuttal within 10 days after notice of the communication.

(f) If necessary to eliminate the effect of an ex parte communication received in violation of this section, a presiding officer who receives the communication may be disqualified and the portions of the record pertaining to the communication may be sealed by protective order.

(g) The state agency shall, and any party may, report any willful violation of this section to appropriate authorities for any disciplinary proceedings provided by law. In addition, each state agency, by rule and regulation, may provide for appropriate sanctions, including default, for any violations of this section.

(h) This section shall not apply to adjudicative proceedings before:

(1) The state corporation commission. Such proceedings shall be subject to the provisions of K.S.A. 77-545;

(2) the commissioner of insurance concerning any rate, or any rule, regulation or practice pertaining to the rates over which the commissioner has jurisdiction or adjudicative proceedings held pursuant to the Kansas insurance holding companies act. Such proceedings shall be subject to the provisions of K.S.A. 77-546; and

(3) the director of taxation. Such proceedings shall be subject to the provisions of K.S.A. 77-548.

History: L. 1984, ch. 313, 25; L. 1986, ch. 362, 7; L. 1988, ch. 356, 12; July 1, 1989.

77-526. Orders, initial and final; exception for state corporation commission. (a) If the presiding officer is the agency head, the presiding officer shall render a final order.

(b) If the presiding officer is not the agency head, the presiding officer shall render an initial order, which becomes a final order unless reviewed in accordance with K.S.A. 1987 Supp. 77-527 and amendments thereto.

(c) A final order or initial order shall include, separately stated, findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, shall be accompanied by a concise and explicit statement of the underlying facts of record to support

the findings. The order shall also include a statement of the available procedures and time limits for seeking reconsideration, administrative review or other administrative relief. An initial order shall include a statement of any circumstances under which the initial order, without further notice, may become a final order.

(d) Findings of fact shall be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding.

(e) If a substitute presiding officer is appointed pursuant to K.S.A. 1987 Supp. 77-514 and amendments thereto, the substitute presiding officer shall use any existing record and may conduct any further proceedings appropriate in the interests of justice.

(f) The presiding officer may allow the parties a designated amount of time after conclusion of the hearing for the submission of proposed findings.

(g) A final order or initial order pursuant to this section shall be rendered in writing and served within 30 days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (f) unless this period is waived or extended with the written consent of all parties or for good cause shown.

(h) The presiding officer shall cause copies of the order to be served on each party and, if the order is an initial order, on the agency head in the manner prescribed by K.S.A. 1987 Supp. 77-531 and amendments thereto.

(i) Notwithstanding the other provisions of this section, if the presiding officer in a hearing before the state corporation commission is not the agency head, the presiding officer shall not render an initial order but shall make written findings and recommendations to the commission. The commission shall render and serve a final order within 60 days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (f) unless this period is waived or extended with the written consent of all parties or for good cause shown.

History: L. 1984, ch. 313, 26; L. 1988, ch. 356, 13; July 1, 1989.

77-527. Review of initial order; exceptions to reviewability. (a) The agency head, upon its own motion may, and upon petition by any party or when required by law shall, review an initial order, except to the extent that:

(1) A provision of law precludes or limits state agency review of the initial order; or

(2) the agency head (A) determines to review some but not all issues, or not to exercise any review, (B) delegates its authority to review the initial order to one or more persons, unless such delegation is expressly prohibited by law, or (C) authorizes one or more persons to review the initial order, subject to further review by the agency head.

(b) A petition for review of an initial order must be filed with the agency head, or with any person designated for this purpose by rule and regulation of the state agency, within 15 days after service of the initial order. If the agency head on its own motion decides to review an initial order, the agency head shall give written notice of its intention to review the initial order within 15 days after its service. If the agency head determines not to review an initial order in response to a petition for review, the agency head shall, within 20 days after filing of the petition for review, serve on each party an order stating th

review will not be exercised.

(c) The petition for review shall state its basis. If the agency head on its own motion gives notice of its intent to review an initial order, the agency head shall identify the issues that it intends to review.

(d) In reviewing an initial order, the agency head or designee shall exercise all the decision-making power that the agency head or designee would have had to render a final order had the agency head or designee presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the agency head or designee upon notice to all parties.

(e) The agency head or designee shall afford each party an opportunity to present briefs and may afford each party an opportunity to present oral argument.

(f) The agency head or designee shall render a final order disposing of the proceeding or remand the matter for further proceedings with instructions to the person who rendered the initial order. Upon remanding a matter, the agency head or designee may order such temporary relief as is authorized and appropriate.

(g) A final order or an order remanding the matter for further proceedings shall be rendered in writing and served within 30 days after receipt of briefs and oral argument unless that period is waived or extended with the written consent of all parties or for good cause shown.

(h) A final order or an order remanding the matter for further proceedings under this section shall identify any difference between this order and the initial order and shall include, or incorporate by express reference to the initial order, all the matters required by subsection (c) of K.S.A. 1987 Supp. 77-526 and amendments thereto.

(i) The agency head shall cause copies of the final order or order remanding the matter for further proceedings to be served on each party in the manner prescribed by K.S.A. 1987 Supp. 77-531 and amendments thereto.

History: L. 1984, ch. 313, 27; L. 1988, ch. 356, 14; July 1, 1989.

77-528. Stay. A party may submit to the presiding officer or agency head a petition for stay of effectiveness of an initial or final order until the time at which a petition for judicial review would no longer be timely, unless otherwise provided by statute or stated in the initial or final order. The presiding officer or agency head may take action on the petition for stay, either before or after the effective date of the initial or final order.

History: L. 1984, ch. 313, 28; July 1, 1985.

77-529. Reconsideration. (a) Any party, within 15 days after service of a final order, may file a petition for reconsideration with the agency head, stating the specific grounds upon which relief is requested. The filing of the petition is not a prerequisite for seeking administrative or judicial review except as provided in K.S.A. 44-1010 and 44-1115 and amendments thereto concerning orders of the commission on civil rights, K.S.A. 1987 Supp. 55-606 and 66-118b and amendments thereto concerning orders of the corporation commission and K.S.A. 1987 Supp. 74-2426 and amendments thereto concerning orders of the board of tax appeals.

(b) The agency head shall render a written order denying the petition, granting the petition and dissolving or modifying the final order, or granting the petition and setting the matter for

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further proceedings. The petition may be granted, in whole or in part, only if the agency head states, in the written order, findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, justify the order. The petition is deemed to have been denied if the agency head does not dispose of it within 20 days after the filing of the petition.

An order under this section shall be served on the parties in the manner prescribed by K.S.A. 1987 Supp. 77-531 and amendments thereto.

History: L. 1984, ch. 313, 29; L. 1988, ch. 356, 15; July 1, 1989.

77-530. Orders, when effective. (a) Unless a later date is stated in a final order or a stay is granted, a final order is effective upon service.

(b) Unless a later date is stated in an initial order or a stay is granted, an initial order shall become effective and shall become the final order: (1) When the initial order is served, if administrative review is unavailable; (2) when the agency head serves an order stating, after a petition for review has been filed, that review will not be exercised; or (3) 30 days after service if no party has filed a petition for review by the agency head, the agency head has not given written notice of its intention to exercise review and review by the agency head is not otherwise required by law.

(c) This section does not preclude a state agency from taking immediate action to protect the public interest in accordance with K.S.A. 1987 Supp. 77-536 and amendments thereto.

History: L. 1984, ch. 313, 30; L. 1988, ch. 356, 16; July 1, 1989.

77-531. Service of order. Service of an order or notice shall be made upon the party and the party's attorney of record, if any, by delivering a copy of the order or notice to the person to be served or by mailing a copy of the order or notice to the person at the person's last known address. Delivery of a copy of an order or notice means handing the order or notice to the person or leaving the order or notice at the person's principal place of business or residence with a person of suitable age and discretion who works or resides therein. Service shall be presumed if the presiding officer, or a person directed to make service by the presiding officer, makes a written certificate of service. Service by mail is complete upon mailing. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or order and the notice or order is served by mail, three days shall be added to the prescribed period.

History: L. 1984, ch. 313, 31; July 1, 1985.

77-532. Record. (a) A state agency shall maintain an official record of each formal hearing.

(b) The state agency record consists only of:

(1) Notices of all proceedings;

(2) any prehearing order;

(3) any motions, pleadings, briefs, petitions, requests, and intermediate rulings;

(4) evidence received or considered;

(5) a statement of matters officially noticed;

(6) proffers of proof and objections and rulings thereon;

(7) proposed findings, requested orders and exceptions;

Explanation of SB 699
by Don Doesken, staff attorney for PERB

SB 699 amends K.S.A. 77-526(i) to correct a timing problem that has cropped up because of the application of the Kansas Administrative Procedure Act K.S.A. 77-501 et seq. ("KAPA") to the activities of the Public Employee Relations Board.

The Public Employee Relations Board ("PERB") is responsible for the administration of the Public Employer-Employee Relations Act (K.S.A. 75-4321 et seq.), which allows state government employees to organize and bargain with their employing agency about the terms and conditions of their employment.

When disputes arise about the proper scope of an employee bargaining unit, or when prohibited practice complaints arise about particular bargaining activities, the PERB board may hold a formal hearing to decide the matter. The board normally appoints a staff person to preside over the hearing, and then reviews the presiding officer's decision at the next Board meeting.

PERB Board procedure before July 1, 1989:

Before July 1, 1989, the presiding officer appointed by the board was required to issue a "recommended order", which was then mailed to the parties for their comment and scheduled for review and possible adoption by the Board at its next regular meeting.

Parties who were not satisfied with the hearing officer's recommended order had ten days to file written exceptions with the Board, and they argued their exceptions before the Board at the Board's next regularly scheduled meeting. The Board then

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considered the hearing officer's recommendations and the arguments of the parties, and either adopted the hearing officer's order or wrote their own decision in the matter.

Changes in Board procedure as a result of KAPA:

On July 1, 1989, the Kansas Administrative Procedure Act ("KAPA") became applicable to PERB activities. Once KAPA became effective, the "presiding officer" who holds PERB hearings was required to issue an "initial order" rather than a recommendation.

Under KAPA, the presiding officer's initial order automatically becomes final unless a party appeals the decision to the Board within 15 days and the Board decides within 20 additional days to grant review, or unless the Board decides on its own motion within 15 days to conduct a review of the initial order. See K.S.A. 77-526, K.S.A. 77-527(b) and K.S.A. 77-530(b).

The Board feels these short time windows for Board review do not allow the Board adequate time to consider a presiding officer's initial order. Fifteen days is not enough time for an initial order to be mailed to board members, reviewed individually by them, and discussed at the Board's next meeting. If the presiding officer reached his decision without briefs from the parties or a transcript of the hearing, the deadline may mean the Board must decide whether to exercise review without knowing very much about the case.

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Attempts to conform to KAPA:

The Board has done two things to try to conform to the narrow window for review of initial orders in KAPA. One is to communicate between meetings by telephone to decide whether to review particular initial orders. Under the Board's present standing policy, any member may trigger a Board review of an initial order by requesting a review within 15 days after the initial order is mailed. If any Board member requests review, the Board's staff notifies the parties and the other board members that a review will be conducted by the Board.

The Board's other response to KAPA's narrow review window has been to instruct presiding officers to delay their initial orders for release until 15 days before the Board's next meeting. This practice allows the Board to timely discuss at their next meeting whether to grant review to any party who requests review within that time.

Both of these Board responses are stopgap solutions, however. Neither solves the timing problems that KAPA creates for the Board. The Board feels it may lose control over initial orders unless a change is made in the present law.

SB 699's solution to the problem:

SB 699 responds to the Board's timing problems under KAPA by returning hearing officer decisions to "recommended order" status. The bill amends K.S.A. 77-526(i) to require the Board's presiding

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officers to issue "written findings" and a "recommendation" rather than an "initial order".

As originally proposed, SB 699 required the PERB Board to review a presiding officer's "recommendation" and issue a final order within 60 days after the close of the presiding officer's record. This was the same procedure and the same time deadline that is now in force for activities of the Kansas Corporation Commission.

The 60 day deadline in the original bill was intended to allow the Board adequate time to mail out copies of a presiding officer's recommendation to all interested parties and to place the presiding officer's recommendation on the agenda of the Board's next monthly meeting for a full review and discussion.

However, SB 699 was amended on the Senate floor to require a final order from the Board within 45 days rather than 60 days after the close of the presiding officer's record. This amendment may not allow enough time for a full and fair review to occur except in the simplest cases.

Additional time may be needed in many of the Board's cases for the presiding officer to issue a well-drafted recommendation, for the parties to submit their briefs and arguments to the Board in response to the presiding officer's recommendation, and for the Board to consider the record and adopt a final order. However, the bill as amended does allow the Board to extend its time for review with the consent of the parties or for good cause shown.

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SB 699 will not cause a delay in the issuance of final orders by the Board:

This bill does not cause any delay in the issuance of final orders by the Board. Instead, the procedure in this bill for final Board orders can save 60 days or more compared to the present KAPA provisions in those cases where an initial order is controversial and the Board reviews it. The present provisions of KAPA contain several separate deadlines which can result in a delay of 120 days or more from the close of the presiding officer's record to the issuance of a final order by the Board.

The bill may cause a short delay in cases where the parties are satisfied with an initial order, as the bill provides that all presiding officer decisions will be reviewed by the Board. However, the delay in cases where the parties are satisfied with the presiding officer's decision would be only a short delay of a few days until the Board's next regular meeting.

SB 699 will not delay the processing of routine Board matters:

The amendment in SB 699 applies only to decisions of the Board that are the result of formal hearings. The bill does not require that all PERB matters come before the Board for final action.

Final action on routine, non-controversial matters can still be handled as a KAPA "summary proceeding" by PERB staff members under the general supervision of the Board. Parties not satisfied with a "summary" staff decision have 15 days to request a hearing

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before the board to challenge a staff disposition of their case. See K.S.A. 77-537 and 1990 HB 2996.

SB 699 does not change the Board's power to delegate routine matters to staff for final disposition, so long as no hearing is required by law or requested by a party. The bill will not cause delay in handling routine, noncontroversial matters.

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Analysis of PERB Decision Timelines under SB 699

Type of PERB action:	Existing KAPA law	SB 699
1. Decisions that do not require a hearing. (Agreed orders and other routine matters)	1. Handled as a summary proceeding under K.S.A. 77-537, with a right to request a hearing within 15 days. When practicable, staff must either dispose of the case within 90 days after receipt or set the matter for a hearing.	1. No change in summary proceedings.
2. Disputes that require a hearing. (Contested unit determinations and prohibited practice complaints)	2. Handled by a presiding officer appointed by the Board	2. a. and b. No change in conduct of hearing. Presiding officer handles the prehearing conference, if any, and conducts the hearing.
a. Prehearing conference (optional) b. Formal hearing or conference hearing. c. Decision by presiding officer	Presiding officer: a.conducts prehearing conference (optional) and b. presides over hearing c. Presiding officer must issue initial order within 30 days after close of hearing record and submission of proposed findings.	c. Presiding officer must prepare recommendations for consideration by the PERB board. No separate deadline for presiding officer recommendations. However, as a practical matter, presiding officer must issue recommendations rapidly so PERB board can consider them at the next Board meeting.
d. Appeal to agency head	d. Parties may appeal initial order to PERB Board within 15 days. Board must then decide within 20 additional days whether to review the initial order. Board may also decide on its own motion to review an initial order. Must decide within 15 days of initial order whether to review an order on its own motion.	d. Not necessary for parties to appeal from presiding officer's recommendations, as review by PERB of recommendations is mandatory. Only the Board can issue an order.
e. Review of hearing officer's order.	e. Review is optional. If Board grants review, it must allow proposed findings and may schedule oral argument.	e. Review of presiding officer recommendations is mandatory. Recommendations cannot become an enforceable

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	There are no time deadlines in KAPA for scheduling proposed findings or argument.	order unless adopted by the Board.
f. Final decision	f. Board must issue a final order within 30 days after it receives oral argument and proposed findings.	f. Board must issue final decision within ~~60~~ 45 days after presiding officer closes record.
TOTAL ELAPSED TIME:	It could take 120 days or more after close of presiding officer's record for presiding officer to issue order (30 days), for parties to request review (15 days), for the Board to grant a request for review (20 days), for the Board to set dates for oral argument and proposed findings (no KAPA time limits), and for the Board to issue a final order (30 days after proposed findings and oral argument).	~~60~~ 45 days. Board must issue final decision within ~~60~~ 45 days after the close of the presiding officer's record. This time limit could be difficult to meet if there are gaps in the Board's meeting schedule or if the presiding officer does not order briefs and a transcript before closing the record.
	Time limits can be extended with consent of the parties or for good cause shown.	Time limit can be extended with consent of the parties or for good cause shown.

<u>Historical Note:</u> Before KAPA became applicable to PERB activities July 1, 1989, there were no time limits in PEERA for issuing orders.

The only time limits were in the Board's regulation regarding hearings, which provided that:

- the presiding officer was to issue a recommended order "as expeditiously as possible";
- the parties were to submit written exceptions to the Board within 10 days if they disagreed with the presiding officer's recommended order; and
- the Board was required to "consider" the presiding officer's recommended decision at its next regularly scheduled meeting.

See K.A.R. 84-2-2.

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TESTIMONY BEFORE

THE HOUSE COMMITTEE ON THE JUDICIARY

SENATE BILL NO. 396 - SUBROGATION

By: Jeffrey O. Ellis

Kansas HMO Association

March 27, 1990

My name is Jeffrey O. Ellis, and I am from Johnson County. I am attorney and registered lobbyist for the Kansas HMO Association. I appreciate the opportunity to appear before you today to discuss legislation which would permit subrogation by health insurers.

The Kansas HMO Association in an affiliation of the fourteen health maintenance organizations serving more than 200,000 Kansans. Health maintenance organizations have been operating in Kansas since 1976 and were formed as an alternative to the traditional indemnity health insurance plans.

The HMO concept is to organize health care delivery into a local, efficient system that emphasizes the prevention and early treatment of disease and delivery of the full spectrum of health care services for a predetermined monthly charge rather than the more traditional reimbursement for expenditures used by indemnity carriers. There are no deductibles, although there are sometimes modest co-payments for individual services. As such, HMO's are not technically insurance companies, but since they provide health care services for a predetermined monthly charge, HMO's are similar to health insurance companies in their concern for control of rising health care costs, and they are, it fact, regulated by the Kansas Insurance Department. Those which are federally qualified or have Medicare contracts are monitored by the federal government as well.

Health insurers and HMO's are keenly aware that rising health care costs have become a major concern in this country and this state. Studies by the Group Health Association of America, Inc. (GHAA) released in April 1989 indicate HMO premiums nationwide will rise 16.9% this year while indemnity health insurance premiums will increase 20%-30%.

As health insurers and HMO's provide and pay for health care for their insured necessitated by the negligence of another, the wrongdoer escapes responsibility if he is lucky enough to have injured an insured person. Moreover, if the injured person recovers health care benefits which were previously paid by his insurance company, the injured insured gets a windfall of double recovery. In either event, the insurance company suffers increased expenditures which are truly the responsibility of the

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wrongdoer and which should not be extended to doubly enrich the insured. Subrogation provides a method of preventing this inequity. As the public's demand for reasonable insurance rates increases in intensity, the Legislature will be called upon time and again to provide a source of relief.

Subrogation is one of the tools available through the legal process to aid health care cost containment. Senate Bill No. 396 before you would allow health insurers and HMO's to subrogate against a wrongdoer to recover health care costs expended as a result of that person's negligence thereby enabling the health insurer or HMO to apply the recovery to contain rapidly rising insurance premiums.

Currently, subrogation is prohibited in health insurance contracts in Kansas by administrative regulation promulgated by the Kansas Insurance Department. K.A.R. 40-1-20 states:

> An insurance company shall not issue contracts of insurance in Kansas containing a "subrogation" clause applicable to coverages providing for reimbursement of medical, surgical, hospital or funeral expenses.

HMO's join health insurers in seeking legislation which would abrogate that administrative regulation. Senate Bill 396 which was first introduced in the 1989 session of the Kansas Legislature serves as a model for legislation accomplishing that purpose.

As background, I would like to review some of the legislative and legal history of subrogation and the ramifications of this legal theory as it applies to health insurance contracts.

As you know, in a general sense "subrogation" means substitution. Subrogation is the right of an insurer who has paid an obligation which a third party should have paid to be reimbursed by that third party. In other words, by "substituting" the insurer for the insured, the insurer is able to collect from the one responsible for the loss. Because the insurer recovers the amount paid out, subrogation allows insurers to contain costs, benefitting consumers who understandably object to rising premium rates. Along with the cost containment benefit, subrogation also prevents the insured from reaping a windfall by collecting from both the insurer and the party at fault.

There are two types of subrogation, "conventional" and "legal". "Conventional subrogation" is the result of an agreement between two parties; i.e., a contract which stipulates the subrogation rights of one of the parties. "Legal subrogation" arises out of the concept of fairness. Where there is no explicit subrogation agreement, or conventional subrogation, between parties, courts may nonetheless find legal subrogation. When subrogation is allowed, it is because the courts or legislature find it unfair for a wrongdoer to escape

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financial liability for his actions or for the insured to collect twice for one incident. Here, we seek the right of conventional subrogation.

Although subrogation is prohibited by Kansas Administrative Regulation, it is regarded as a favorite of the law in other contexts; that is, legal subrogation has found favor as a concept of fairness with the Kansas courts. Definitions and purposes of the doctrine of subrogation can be found in early Kansas case law. In Tillotson vs. Goodman, 154 Kan. 31, 37, 114 P.2d 845 (1941) the Kansas Supreme Court described subrogation as:

> . . . founded on the principle that one cannot enrich himself at the expense of another by getting free of a debt by permitting the other, not so fundamentally or primarily bound, to pay the debt, but the matter is one of comparative equities, the root of the doctrine being in justice and equity and not in contract.

The idea that subrogation is based on justice and fairness is paramount throughout Kansas case law. In the more recent case of Western Surety Co. vs. Loy, 3 Kan. App. 2d 310,312, 594 P.2d 257 (1979), the court said:

> Subrogation is a creature of equity invented to prevent a failure of justice and is broad enough to include every instance in which one party is required to pay a debt for which another is primarily answerable. . . . Subrogation is termed a 'favorite of the law,' and the mere fact that it has not been invoked in a similar situation is no bar to its applicability.

The Legislature has followed the Court's lead and Kansas statutes permit subrogation in several specific situations in order to allow insurers to recover medical payments from the person responsible for the loss. The Kansas Automobile Injury Reparations Act (No-fault), K.S.A. 40-3113(a), allows an insurer to be subrogated when the injured party has recovered money from the tortfeasor. Subrogation is allowed in these cases in order to "prevent a double recovery by the claimant." Russell vs. Mackey, 225 Kan. 588, 592 P.2d 902 (1979).

In 1986, the Kansas Legislature amended the Uninsured Motorist Coverage Act, K.S.A. 40-284, by adding a provision allowing subrogation for insurers in cases involving an underinsured motorist. The Special Committee on Financial Institutions and Insurance determined that this amendment was necessary in order to remove the existing "impediment to claim settlement and encourage prompt claims adjustments". Interim Committee Reports, Proposal #13, October 7, 1985, p. 134. The minutes of the Senate Committee on Financial Institutions and Insurance meeting on March 8, 1986, indicate that subrogation was deemed necessary to remove the possibility of an impasse resulting from the injured person's ability to collect damages from both insurance companies.

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K.S.A. 44-504 allows both an employer and the Workers' Compensation Fund to be subrogated when a payment is made under the Workers' Compensation Act. In adopting subrogation in the Workers' Compensation Act, the Legislature acknowledged that the theory of allowing the employer to be subrogated is well established in Kansas case law. That theory was enunciated by the Kansas Supreme Court in Fenly vs. Revell, 170 Kan. 705, 707, 228 P.2d 905 (1951):

> . . . where an employer or master, not at fault, has become obligated to respond in and does pay damages to a third person for the negligence of his employee or servant, he will be subrogated to the rights of the injured party and may maintain an action to recover from the employee or servant, the one primarily liable, the amount so paid.

This basic theory was expanded by the Legislature in 1988 to also allow subrogation by the Workers' Compensation Fund. The rationale behind expanding the statute as reflected in the minutes of the House Committee on Labor and Industry meeting on March 2, 1988 was that "In many cases, judges [were] reading subrogation rights of the Workers' Compensation Fund into the statute . . . this 'cleans up' the statute."

The rather incongruous result, despite this clear preference for subrogation by both the courts and the Legislature in other arenas, is that Kasnsas law presently denies the extension of the doctrine of subrogation to health and accident insurers through Kansas Administrative Regulation. The common law doctrine behind this administrative restriction of subrogation from the health insurance environment was based on the common law principle that, in personal injury contracts, the exact loss could not be precisely determined. Subrogation under property and casualty principles was historically allowed because a fixed financial loss was identifiable, and through subrogation, the responsibility of the loss was put on the wrongdoer.

Distilled to its essence, this common law prohibition of subrogation in health insurance has been perpetuated through administrative fiat even though subrogation has been extended to personal injury contracts by the Legislature in the No Fault Act, the Uninsured Motorist Act, and the Workers' Compensation Act. Furthermore, federal and state government financed health insurance, such as Medicare and Medicaid, permit subrogation. Even self-insurers in Kansas and large employer's health plans, such as Boeing's, written by out-of-state companies are free to include subrogation provisions in their health insurance contracts since self-insurers and foreign health insurance companies avoid Kansas Insurance Department regulation.

The clear trend, not only in Kansas, but also throughout the United States is to allow subrogation. As best we have been able to determine, thirty-eight states permit subrogation in health insurance. Exact numbers are difficult to determine because the right of subrogation is sometimes determined through case law

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opinions rather than by clear legislative or regulatory pronouncements. It appears, however, Kansas is among twelve states which does not allow subrogation and one of only five states which specifically prohibits subrogation as a matter of law. We are certain Kansas is clearly in the minority position.

The Kansas HMO Association has long been an advocate of allowing subrogation as a health care cost containment measure. Health insurance costs rise as the costs of medical care increase, and, as we have been noting in the newspapers, and as we cited earlier, health insurance premiums have risen dramatically over the last several years and continue to rise. We hasten to caution that subrogation is not the panacea; it is only one of many tools which might be implemented by the Legislature to start coralling those rising costs. Our investigation reflects that revenue resulting from subrgation actions, and therefore costs saved, by health insurers and HMO's varies from insurer to insurer, often as a function of the vigor with which recovery is pursued. Our informal survey revealed national averages of additional revenue gained from subrogation ranged from one to five percent of total revenues with two percent being the most commonly reported figure.

Even though the Kansas HMO Association has long advocated subrogation, the issue unfortunately was raised initially during a time when the Legislature was faced with a crisis in rising medical malpractice insurance premiums. As the Legislature grappled with the difficult problems of tort reform, the idea of subrogation was bantered about as one of the methods through which the medical malpractice crisis could be solved.

Quite frankly, the HMO Association did not then and does not now feel that subrogation is appropriately a part of the tort reform debate. Rather, it is simply and straight forwardly a method of health insurance cost containment and a matter of putting all health insurers in Kansas on a level playing field whether they are regulated by the Kansas Insurance Department or are a function of the federal government.

Senate Bill No. 396 as it appears before you has been modified as a result of extensive discussions held this summer and fall before the Interim Committee on the Judiciary. The rationale for the changes is contained in the Committee's report. With those suggested modifications, we urge this Committee's favorable recommendation of legislation allowing subrogation clauses in any policy or contract of accident, health or sickness insurance issued in this state providing for reimbursement of medical, surgical, hospital or funeral expenses. The language of Senate Bill No. 396, as modified, allows subrogation to the insurer for the insured's rights of recovery when the circumstances of the insured's injuries create a legal liability against the third party for not more than the amount of the benefits that the insurer might have previously paid or provided in relation to the insured's injury by that third party. The bill also stipulates that subrogation should be available only to

the extent that the insured is not left with any uncovered, out-of-pocket expenses for medical and related health care services. The insurer would be allowed to enforce subrogation rights in its own name or the name of its insured, and any attorneys fees or costs would have to be paid by the insurer from any recovery it obtained.

In summary, let me state that the objectives of subrogation are to prevent the insured from recovering twice for one harm and to prevent the wrongdoer from being relieved of liability because the insured had the foresight to obtain insurance and had paid for it. Reimbursement to the insurer for payment it already made would enable the insurer to reduce costs and control premium rates. Extending subrogation to health and accident insurers would, therefore, benefit both the insurers and the insured through reduced health care insurance premium costs.

Other conferees today will tell you of the severe impact health care costs are having on small employers throughout this state and will describe for you the unfairness they confront in providing their employees with health insurance as compared with self-insurers and large employers providing out-of-state insurance, both of whom are allowed to subrogate in the current environment of the unlevel playing field.

I can also tell you as a current member of this Legislature's Commission on Access to Services to the Medically Indigent that the numbers of working citizens of this state who have no health insurance is rising dramatically because small employers are increasingly unable to provide health insurance as a benefit of employment because of rising health care costs.

We urge you to grant health insurers and HMO's the right of subrogation to be used as they deem appropriate, but under the supervision of the Kansas Insurance Department, as a health insurance cost containment tool. Bring Kansas into the camp of the majority of states allowing subrogation as a means of equity which has found overwhelming favor in the law.

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K·A·N·S·A·S HMO ASSOCIATION

Reply to:

February 1990

KANSAS HMO ASSOCIATION SUBROGATION FACT SHEET

- Definition: Subrogation is the right of an insurer or HMO to be put in the position of its insured in order to pursue recovery from a third party responsible to the insured for a loss or benefit which the insurer or HMO has paid or provided. Example: A person with a health insurance policy is injured in his or her home as the result of a natural gas line explosion. Such person sustains $20,000 in medical expenses, which are paid by his health insurer. He or she also recovers from the utility company who is at fault (or the company's liability insurer) $40,000, including $20,000 for medical expense. With a right of subrogation, the health insurer would be permitted to recover the $20,000 it paid for the injuries caused by the negligence of the utility company.

- Current Kansas Insurance Department regulations prohibit subrogation for reimbursement of medical, surgical, hospital or funeral benefits paid for by insurers to insured injured by a third party. This prohibition on subrogation has also been applied to HMOs which provide health care services to enrollees injured by a third party. (K.A.R. 40-1-20)

- Subrogation for insurers and HMOs would eliminate a costly duplicative recovery by the policyholder. Windfalls and excessive recoveries increase the cost of health insurance without a useful purpose.

- Federal law and Kansas law already permits subrogation for health care costs in certain instances:
  - Uninsured Motorist Coverage, K.S.A. 40-284.
  - Workers' Compensation, K.S.A. 44-504 and K.S.A. 44-532.
  - Kansas No-fault Law, K.S.A. 40-3113a.
  - Governmentally financed health insurance, such as Medicare and Medicaid.
  - Employers who self-insure their health benefit program.
  - Employers whose contracts for health benefits coverage are written outside the state of Kansas.

- Objectives of Subrogation
  - Prevent insured from recovering twice for one harm.
  - Wrongdoer should not be relieved of liability because insured had the foresight to obtain insurance and had paid for it.
  - Reimburse insurer for the payment it has made thereby reducing costs and enabling the insurer to control premium rates.

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- Revenue income resulting from the use of subrogation varies from insurer to insurer, often as a function of the vigor with which recovery is pursued. National averages of additional revenue gained from subrogation range from 1% to 5% of total revenues, with 2% being the most commonly reported figure.

- A national health care claims processing entity has identified recovery potentials for insurers and HMOs as being in the range of $9.84 to $14.40 per member per year. While percentages are small, aggregate numbers represent additional revenues for the insurer or HMO. For example, a 40,000 member plan could, if permitted to subrogate, recover $400,000 per year (assuming an average recovery potential of $10.00 per member per year).

- Because of the highly competitive nature of the health benefits market, insurers and HMOs can be expected to use additional revenues to help hold down premium increases.

- Usually the employer has paid all or part of the insured's health coverage premium. If the insurer receives that money and uses it to keep premium increases down, employers and employees benefit from moderated insurance premium increases.

- 38 states allow some form of health insurance subrogation. Of the 12 states which do not permit subrogation in health insurance contracts, Kansas is 1 of only 5 states prohibiting subrogation as a matter of law.

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LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

500 Bank IV Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321

A consolidation of the
Kansas State Chamber
of Commerce,
Associated Industries
of Kansas,
Kansas Retail Council

SB 396

March 27, 1990

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

House Committee on Judiciary

by

Terry Leatherman
Executive Director
Kansas Industrial Council

Mr. Chairman and members of the Committee:

I am Terry Leatherman, with the Kansas Chamber of Commerce and Industry. Thank you for the opportunity to express KCCI's views on SB 396.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

The cost of health insurance in Kansas is soaring. A recent survey by KCCI of its members indicates that 82% of respondents experienced a premium increase of over 10% last year, and over half (53%) experienced an insurance rate hike of over 20%. The never

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ending upward spiral of health insurance costs are causing employers to explore all avenues to decrease the cost of health insurance.

KCCI supports granting health care insurors subrogation rights because it is one step in slowing down the runaway costs of health care insurance. According to the Kansas H.M.O. Association, vigorous use of subrogation rights can retrieve between one to five percent of total insurance revenues. If applied to insurance premiums, those revenues can help make health care insurance more affordable.

While granting subrogation rights will help curb costs of health insurance, it will also bring fairness to the system. Subrogation would further limit legal double-dipping, where the injured person collects from an insuror to pay for medical expenses, and then collects again by filing a lawsuit against a responsible third party.

Thank you for the opportunity to express KCCI's support for SB 396.

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Kansas Employer Coalition on Health, Inc.
1271 S.W. Harrison • Topeka, Kansas 66612 • (913) 233-0351

Testimony to House Judiciary Committee on
Senate Bill 396
(granting subrogation rights to insurers)
by James P. Schwartz Jr.
Consulting Director
March 27, 1990

I am Jim Schwartz, consulting director for the Kansas Employer Coalition on Health. The Coalition is over 100 employers across Kansas who are concerned about the cost of health insurance for our 350,000 Kansas employees and dependents.

The soaring cost of health care stems not from any one gaping hole in the system, but from many small ones. Inability to subrogate claims in Kansas is one of the small ones.

We see subrogation as a fairness issue. It's unfair for claimants to collect twice for the same injury. It's unfair for an employer's health plan to get stuck holding the bag when these double payments occur.

We think it's proper for health insurance to step forward in times of emergency to procure necessary medical care, but if there's a claim for negligence, then the health plan should be made whole. It's only right.

We vigorously support SB396.

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Attachment X