

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

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

7:30 a.m./~~p.m.~~ on March 29, 1990 in room 313-S of the Capitol.

All members were present except:

Representatives Buehler, Gomez, Peterson, Roy, Sebelius and Vancrum, 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:

Richard Mason, Kansas Trial Lawyers Association  
Ron Smith, Kansas Bar Association  
Jerry Slaughter, Kansas Medical Society  
Lori M. Callahan, Legislative Counsel, Kansas Medical Mutual Insurance Company  
Jeff Ellis, Kansas H.M.O. Association  
Keith Hawkins, Vice-President, The Pyramid Life Insurance Company  
Chip Wheelen, Kansas Psychiatric Society  
Gary Robbins, Executive Director, Kansas Optometric Association

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

Richard Mason, Kansas Trial Lawyers Association, testified in opposition to SB 396 regarding subrogation rights in health insurance contracts. He concurred with the existing Department of Insurance administrative regulation holding that Kansas law prohibits subrogation clauses in such contracts. He said health insurance policyholders pay premiums to cover costs when injured, including injuries caused by someone else. The policyholders pay for those benefits and they should receive them, see Attachment I.

Ron Smith, Kansas Bar Association, testified in opposition to SB 396. He stated while subrogation is allowed in other third party claims, the ultimate result of such a law is to increase the likelihood that more lawsuits would be brought. It is contrary to long-established common law traditions in that it allows insurance companies a double recovery, as well as allowing persons to contract to assign their rights in tort litigation. He also stated subrogation will adversely impact the settlement of claims, see Attachment II.

Jerry Slaughter, Kansas Medical Society, expressed concern about SB 396 because of its implications in the area of medical malpractice litigation. The use of subrogation clauses in accident and health insurance policies will negate the beneficial effect of the abolition of the collateral source rule in medical malpractice litigation. Mandating subrogation clauses will benefit health insurers only marginally but will significantly impact on the Health Care Stabilization Fund and the professional liability insurers in Kansas.

Mr. Slaughter proposed an amendment exempting medical malpractice actions from SB 396, see Attachment III.

Lori M. Callihan, Legislative Counsel, Kansas Medical Mutual Insurance Company, submitted testimony supporting the exemption from subrogation for medical malpractice actions, suggested by the Kansas Medical Society. This exemption will allow health care providers and the people of Kansas to obtain the most effective benefit from precluded double-dipping, which occurs from collateral source, as opposed to subrogation, see Attachment IV.

Mr. Keith Hawkins, Vice-President, Pyramid Life Insurance Company, submitted testimony in support of SB 396, in which he stated subrogation can effectively reduce overall claim costs. If claim costs are reduced, the savings can be used to offset medical care inflation and hopefully ebb the tide of increasing premiums, see Attachment V.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,  
room 313-S, Statehouse, at 7:30 a.m./~~p.m.~~ on March 29, 1990.

Jeff Ellis, Kansas H.M.O. Association, stated that subrogation reduces double recovery. The issue for the 1990s will be how to control rising health insurance costs. SB 396 is one small tool in controlling health insurance costs. He said it is unfair to place the recovery for a wrong committed by a third party on the back of the health care system. The responsibility lies with the tort-feasor. The health care system cannot support the tort system.

The hearing on SB 396 was closed.

**HEARING ON SB 736 Charitable health care providers employees of state for purposes of the Kansas Tort Claims Act**

Jerry Slaughter, Kansas Medical Society, explained SB 736 extends coverage of the Tort Claims Act to health care providers providing charitable primary care services to medically indigent persons, see Attachment VI.

Mr. Slaughter submitted amendments to SB 736. He recommended changing the words "primary care" to "professional care" wherever they appear in the bill; on page 2 in line 39, changing social and rehabilitation services to health and environment; delete (h) on page 2; and delete New Sec 5 on page 3, see Attachment VII.

Mr. Slaughter also recommended the provisions of HB 3042 be merged into SB 736. HB 3042 amends the definition of "employee" under the Tort Claims Act in a manner that specifically includes contract personnel who provide program services to persons in the custody of the Secretary of Corrections.

Richard Mason, Kansas Trial Lawyers Association, stated in response to a question from the Committee that the amendments proposed by the Kansas Medical Society would make the bill acceptable to the Kansas Trial Lawyers Association.

Chip Wheelen, Kansas Psychiatric Society, submitted an amendment to include psychiatry under "primary care services", see Attachment VIII

Gary Robbins, Executive Director, Kansas Optometric Association, submitted an amendment to include optometry under "primary care services", see Attachment IX.

The hearing on SB 736 was closed.

The Committee meeting adjourned at 8:30 a.m.





# KANSAS TRIAL LAWYERS ASSOCIATION

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

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## TESTIMONY of the KANSAS TRIAL LAWYERS ASSOCIATION before the HOUSE JUDICIARY COMMITTEE

SB 396

March 27, 1990

The Kansas Trial Lawyers Association wishes to go on record in opposition to SB 396 regarding subrogation rights in health insurance contracts. We concur with the existing Department of Insurance administrative regulation holding that Kansas law prohibits subrogation clauses in such contracts.

Proponents of subrogation speak of the need to eliminate what they term "double recovery." Our experience in representing victims of negligence indicates there rarely are cases of overcompensation. Just the opposite, in fact, is true. This is especially evident when we consider the cost plaintiffs bear during the course of litigation for which they are not compensated, including legal expenses.

Subrogation generally will have a neutral effect on our members in their profession. Our testimony to you, then, is from the point of view of personal injury victims, who clearly stand to lose if subrogation is implemented.

Health insurance policyholders pay premiums to cover costs when injured, including injuries caused by someone else. They pay for those benefits, and they should receive them.

You have been told subrogation will reduce loss ratios for health insurers and thus lower the cost of health insurance itself. But how would SB 396 actually be reflected in the insurance bill of a typical policyholder? A savings of \$10 per month? \$5? No one seems to know.

The effect of granting the right of subrogation to a medical insurance provider is to place a substantial penalty upon the injured victim by assuring that the proceeds from his or her insurance policy will be appropriated if he or she recovers any damages from a negligent third party.

In return, the insurance company avoids exposure to any risk and is under no obligation to reduce premiums to its insureds.

*3/24/90  
H. J. Quinn*

*Attachment I*

RICHARD H. MASON  
EXECUTIVE DIRECTOR

Testimony of the Kansas Trial Lawyers Association  
SB 396  
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What possible good can be seen in a public policy that takes from the injured the very thing that the injured party had purchased for protection and then gives it to the insurance company which has not suffered an injury and which has been compensated in advance for the risk that it was insuring?

We know subrogation will take compensation away from victims, but it is unlikely Kansans will get anything in return. Subrogation is a one sided proposition and should once again be rejected by the Kansas legislature.

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Ronald Smith, Legislative Counsel  
Art Thompson, Legal Services — IOLTA Director

SB 396

~~January 23, 1990~~

3/29

Mr. Chairman, members of the Senate Financial Institutions and Insurance Committee. I am Ron Smith. I represent the Kansas Bar Association.

KBA opposes SB 396. While subrogation is allowed in other third party claims, we believe the ultimate result of such law is to increase likelihood that more lawsuits would be brought.

Further it is contrary to long-established common law traditions in that it allows insurance companies a double recovery, as well as allowing persons to contract to assign their rights in tort litigation.

KAR 40-1-20 prohibits subrogation clauses applicable to health insurance companies regulated by the Commissioner of Insurance. This is so even though thirty eight states now allow some form of subrogation of health insurance.

Even though we realize that subrogation exists for medical care in some instances, we oppose this legislation for the following reasons:

1. No other Kansas statute allows general medical benefits to be subrogated.
2. Subrogation constitutes assignment of proceeds from tort litigation to third parties, contrary to the common law.
3. Subrogation denies the insured the full benefit of the proceeds for which the insured pays a generally undiluted premium. This gives the insurance company a double recovery "windfall."
4. The bill fails to adequately consider the impact of comparative negligence, insolvency of codefendants, lack of joint liability and caps on awards to the "whole recovery" the plaintiff is being denied.
5. Settlement of claims will be adversely affected, creating a more litigious environment. The minimal cost savings possible under the bill does not offset this added problem.

1200 Harrison • P.O. Box 1037 • Topeka, Kansas 66601-1037 • FAX (913) 234-3813 • Telephone (913) 234-5696

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3/29/90  
H. J. Com

Attachment II

Let me address each problem individually.

The Common Law Condemns Assignment. Kansas common law provides that individuals cannot assign their cause of action in tort.<sup>1/</sup> Via SB 396 the companies are given statutory rights to receive assignment their cause of action from a litigant contrary to the common law. That, by itself, is not limiting. However, whether called subrogation or reimbursement, a company's statutory right to recover part of amounts paid from a third party recovery effectively amounts to an assignment and splitting of the proceeds from an insured's cause of action.<sup>2/</sup>

General Medical Never Subrogated. Kansas law has allowed health insurers to subrogate for personal injuries received by their insureds only in two limited areas: (1) personal injury protection benefits under automobile no fault laws,<sup>3/</sup> and (2) medical payments made in work-place accidents. Insurers paying general medical damages in tort cases have never had a right to subrogate under Kansas common law.<sup>4/</sup>

Insurance Company Windfalls. Subrogation denies the policyholder the benefits for which the insured pays premiums to the benefit of the company. This is especially true in health insurance premiums which are underwritten without any specific premium reduction in mind that in the future the insured may be the victim of a tort and recover damages. Insurers collect premiums over a long period of time. Under medical insurance policies, insureds are entitled to compensation whether or not the medical damages result from a tortious injury. While the HMOs and insurance companies can argue their insured may recover "twice" for injuries

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<sup>1/</sup>"Torts claims are personal in nature and third parties should not be permitted to buy claims for personal injuries and losses." Heinson v. Porter, 244 Kan. 667 at 675, 772 P.2d 778 (1989).

<sup>2/</sup>See Allstate Ins. Co. v. Reitler, 628 P.2d 667, at 670 (Mont. 1981). In Reitler the Montana Supreme Court held that medical payment subrogation clauses were invalid. The Court subsequently limited Reitler by permitting subrogation for uninsured motorist benefits. Farmers Ins. Exchange v. Christenson, 211 Mont. 250, 683 P.2d 1319 (1984). Specific medical payment benefits still are not subject to subrogation in Montana. 683 P.2d at 1322.

<sup>3/</sup>Which includes PIP benefits and uninsured motorist benefits.

<sup>4/</sup>That is partly why the Insurance Commissioner promulgated K.A.R. 40-1-20.

sustained, "double recovery" does not in fact occur since the insured has been paying for the benefit all along.<sup>5</sup>

In fact, by allowing subrogation the insurer gets benefit of full premium payment then recovers all its payments, a classic double recovery by the insurer, not the insured.<sup>6/</sup> Conceivably, under SB 396 a policy holder over time can pay more in premiums than the benefits received and still have the insurance company seek reimbursement.

Insurance companies are not eleemosynary institutions.<sup>7/</sup> They are under no obligation to reduce premiums because of subrogated recoveries. No quid pro quo need be offered. The plaintiff in a given action need get no direct benefit for lowered premiums. The impact of subrogation on insurance rates in Kansas is unknown.<sup>8/</sup> Other courts have noted, however, that premium advantages are not guaranteed to the insured by permitting subrogation.<sup>9/</sup>

Less Than Whole. While SB 396's amendments speak to comparative negligence problems, they touch only limited situations where the plaintiff is partially at fault. The bill does not cover the situation where plaintiff is blameless but one or more multiple defendants are insolvent or take bankruptcy after the award is reduced.<sup>10/</sup> Further, if a limitation on

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<sup>5</sup>Maxwell v. Allstate Ins. Co., 728 P.2d 812, at 815 (Nev. 1986).

<sup>6</sup>The 1988 Collateral Source Rule, K.S.A. 1989 Supp. 60-3701 et seq. requires the "collateral source benefits received" by plaintiff be offset by the judge by the amount of premiums paid. The premiums paid is a question of fact for the jury. In that way the insurer does not double recover. SB 396 has none of this limiting language.

<sup>7</sup>See Judge Sheeny's dissent in Farmers Ins. Exchange v. Christenson, 683 P.2d 1319, at 1329 (Mont. 1984).

<sup>8</sup>Blue Cross has estimated that it would be negligible, one to three percent of health care expenditures. See 1989 Interim Committee Reports.

<sup>9</sup>"In terms of public policy, the only justification for allowing an insurance company to recoup the benefits it contracted to pay out in exchange for the receipt of premium payments which are presumably actuarially adequate would be the lowering of premium rates as a result of such recoupment. This is generally not the case ..." Allstate Ins. Co. v. Druke, 576 P.2d 489, at 492 (Ariz. 1978)

<sup>10</sup>Again, the Kansas Collateral Source Rule, K.S.A. 1989 Supp. 60-3705, does a much better job speaking to these possibilities.

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awards is effective reducing noneconomic loss awarded by a jury, the total damages to which a litigant is entitled may be further eroded by unbridled subrogation.<sup>11/</sup> SB 396 creates the policy that an insurer is entitled to reimbursement of its medical payment for which premiums were paid regardless of whether the negligent third party's insurance fully covered the victim's loss.<sup>12/</sup>

Claim Settlements We believe permitting subrogation will impact adversely the settlement of claims.<sup>13/</sup> When claims involving comparative negligence are settled before trial, no fact finder determines who is at fault and the degree of liability. Therefore, the limitation in SB 396 allowing the plaintiff's medical insurance company to reduce claims by the percentage of negligence attributed to the plaintiff can be rendered invalid. Yet the defendant's insurer, sensing this imbalance, may account for the injured victim's receipt of medical payments that are subject to subrogation and reduce its settlement offer proportionately.<sup>14/</sup> When liability is not a sure thing, a plaintiff given an opportunity to settle for something rather than risk nothing at trial are forced into unequal bargaining positions. The injured party may end up with a smaller total recovery out of which the party's own insurer would then demand nearly all of its outlay of benefits. Or at the very least the subrogating interest is another "party" to litigation which must agree to any settlement situation, which further complicates negotiations.

Thank you.

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<sup>11</sup>In essence, the 1988 Collateral source rule is new legislative theory that all resources of the plaintiff, including private collateral sources, may be used to pay the damages caused by a third party. Only when other laws, such as limits on awards, reduce the total recovery below the damages established that there is a "double recovery" against which the collateral source statute is imposed. See Smith & Concannon, "More Goo for the Tort Stew: Implementing the Kansas Collateral Source Rule," Journal of the Kansas Bar Association, February, 1989.

SB 396 presumes a double recovery exists before it is known whether plaintiff fully recovers proportional awards from all party litigants.

<sup>12</sup>"[T]he injured person may recover neither his actual damages nor the benefit of the premiums he has paid." Maxwell, supra, at 815.

<sup>13</sup>This was also the Insurance Commissioner's position last summer. Interim Reports, p. 479.

<sup>14</sup>Allstate Ins. Co. v. Reitler, supra, at 670.

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## KANSAS MEDICAL SOCIETY

1300 Topeka Avenue • Topeka, Kansas 66612 • (913) 235-2383  
Kansas WATS 800-332-0156 FAX 913-235-5114

March 27, 1990

TO; House Judiciary Committee  
FROM: Jerry Slaughter  
Executive Director  
SUBJECT: Senate Bill 396 - Subrogation

The Kansas Medical Society appreciates the opportunity to provide some comments on the subject of subrogation clauses in accident and health insurance policies. We are concerned about this issue because of its implications in the area of medical malpractice litigation.

Simply put, the use of subrogation clauses in accident and health insurance policies will negate the beneficial effect of the abolition of the collateral source rule in medical malpractice litigation. On three previous occasions, the Kansas Legislature has enacted collateral source rule legislation designed to eliminate duplicate recoveries in medical malpractice actions, thereby reducing claim costs paid by the Health Care Stabilization Fund and other medical liability insurers. As recently as 1988, this Legislature enacted collateral source rule legislation specifically for that purpose.

This is the manner in which the issue of subrogation becomes intertwined with the issue of medical malpractice litigation. While mandating subrogation clauses will benefit health insurers only marginally (expected recoveries from subrogation actions are estimated to be 1/2-5% of total expenses), it has a significant impact on the Health Care Stabilization Fund and the professional liability insurers in our state. Legal arguments aside, the issue for your consideration is which insurer should benefit from legislation designed to eliminate duplicate payments in personal injury litigation?

In our view, because of the enormous cost of medical malpractice insurance, and its effect on the health care system in general, any benefit which arises from avoiding duplicate payments in medical malpractice actions should go to the Health Care Stabilization Fund or the few insurers who provide professional liability insurance in this state. This can be accomplished by exempting medical malpractice actions from this legislation which allows subrogation in accident and health insurance contracts. In 1988 when this issue first arose, we suggested such an amendment, and that has been our consistent position throughout consideration of this issue. As you can see from the attached draft, our amendment would merely exempt medical malpractice liability actions from the application of the subrogation provision.

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Attachment III

House Judiciary Committee  
SB 396 - Subrogation  
March 27, 1990  
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Additionally, if this Committee recommends the bill for passage we would ask that a statement of intent be placed in the Committee minutes which expresses the rationale to be that of reducing medical malpractice claim and premium costs, consistent with the collateral source rule legislation previously enacted by the Legislature.

We would not oppose subrogation legislation which included an exemption such as the one we have outlined. We appreciate the opportunity to provide these comments. Thank you.

JS:nb

Attachment

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SENATE BILL No. 396

By Committee on Ways and Means

4-6

AN ACT concerning insurance; ~~providing for~~ *permitting certain* subrogation rights under accident, health or sickness insurance policies.

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

Section 1. (a) As used in this act:

(1) "Insurer" means and includes all corporations, companies, associations, societies, fraternal benefit societies, mutual nonprofit hospital service and nonprofit medical service companies, partnerships and persons engaged as principals in the business of insurance of the kinds enumerated in articles 4, 5, 6, 7, 11, 13, 18, 19, 19a, 19b, 19c, 22, 32 and 38 of chapter 40 of the Kansas Statutes Annotated and any amendments thereto, insofar as the business of insurance of the kinds enumerated in such articles relate to accident, health or sickness; and

(2) "insured" means and includes persons who are the beneficiaries, assignees, payees of, owners of or certificate holders under such policies or contracts of insurance as described in subsection (1) including enrollees of a health maintenance organization as defined in K.S.A. 40-3202 and amendments thereto.

(b) Any policy or contract of accident, health or sickness insurance, and any health maintenance organization subscriber contract, issued in this state ~~shall~~ *may* include a subrogation clause providing for reimbursement of medical, surgical, hospital or funeral expenses. Such clause ~~shall~~ *may* subrogate the insurer to the insured's rights of recovery when the circumstances of the insured's injury create a legal liability against a third party for not more than the amount of benefits that the insurer shall have previously paid or provided in relation to the insured's injury by such third party *to the date of any judgment, settlement or recovery against or from such third party.* Subrogation shall 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 necessitated by the injury in question. ~~The insurer may enforce such rights of subrogation~~

(3) "medical malpractice liability action" means any action for damages for personal injury or death arising out of the rendering of or failure to render professional services by a health care provider as defined by K.S.A. 40-3401 and amendments thereto.

Any such subrogation clause shall specify that it is not applicable in any medical malpractice liability action.

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Handwritten notes: 3/29/90, 1 year, Neom.

# KaMMCO

## KANSAS MEDICAL MUTUAL INSURANCE COMPANY AND KANSAS MEDICAL INSURANCE SERVICES CORPORATION

March 27, 1990

TO: House Judiciary Committee  
FROM: Lori M. Callahan  
Legislative Counsel  
SUBJECT: Senate Bill 396 - Subrogation

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 submit written testimony today.

Throughout the discussion of legislation affecting professional liability insurance rates for doctors, consideration has been given to methods to prevent "double-dipping" by plaintiffs. As a result of those discussions, collateral source legislation was enacted. The purpose for enacting such collateral source legislation, as opposed to any other method to prevent double-dipping, was to insure physicians and others affected by high liability insurance premiums would realize the resulting savings.

By way of subrogation, health care insurers are now seeking relief for themselves, rather than physicians, from the double-dipping phenomena. Granting such subrogation rights to health insurers would abrogate the collateral source legislation, shifting the relief granted in 1988 away from Kansas physicians to health insurance companies.

KaMMCO believes such a shift should be considered in light of its financial and public policy implications. Health insurers can demonstrate little, if any, premium affect from subrogation. KaMMCO, however, believes, as demonstrated by the Rand study of collateral source, that collateral source has a very real premium impact for liability insureds as well as the Health Care Stabilization Fund.

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KaMMCO, therefore, supports the exemption from subrogation for medical malpractice actions as suggested by the Kansas Medical Society. We believe this exemption will allow health care providers and, therefore, the people of Kansas to obtain the most effective benefit from precluded double-dipping, which occurs from collateral source, as opposed to subrogation. With the inclusion of such an exemption as outlined by the Kansas Medical Society, KaMMCO would not oppose subrogation legislation. We appreciate the opportunity to testify and would be happy to answer any questions.

3/29/90  
H. Jud Corn

Attachment IV

M. KEITH HAWKINS  
Vice President  
Secretary and Counsel

RE: SENATE BILL NO. 396

Mr. Chairman and Committee Members:

My name is Keith Hawkins and I am Vice President, Secretary and Counsel of The Pyramid Life Insurance Company, a Kansas' domestic insurance company which specializes in the sale of individual health insurance to families and small businesses. I appreciate the opportunity to testify in favor of Senate Bill 396.

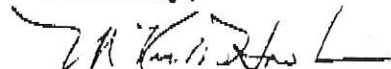
Like other health insurance companies, we are extremely concerned with affordability of health insurance coverage. If premiums become too high, policyholders are forced to give up their coverage and self insure. As you well know, health care costs have skyrocketed and as a direct result, health insurance premiums have increased substantially. We, like others, have tried various cost containment measures including higher deductibles, increased coinsurance, second opinions and pre-certification for non-emergency surgeries. These have helped, but we must continually look for other alternatives.

We have just begun marketing a new individual major medical policy in states other than Kansas that contains a subrogation provision. Twenty-three of the states Pyramid Life is licensed in permit subrogation. Although we have no Company experience, we firmly believe based on industry experience that subrogation can effectively reduce overall claim costs. If such is the case, any savings can be used to offset medical care inflation and hopefully ebb the tide of increasing premiums.

Availability means affordability. The insuring public are our customers and we cannot price ourselves out of the market. On the other hand, we cannot ignore the financial impact of medical inflation and remain solvent. Our only course is cost containment, so we ask that you vote in favor of Senate Bill 396 for the benefit of all Kansans' concerned with affordability of health insurance.

Thank you for your attention.

Sincerely,



M. Keith Hawkins  
Vice President

3/29/90  
H. Jud Com.

Attachment V



## KANSAS MEDICAL SOCIETY

1300 Topeka Avenue • Topeka, Kansas 66612 • (913) 235-2383  
Kansas WATS 800-332-0156 FAX 913-235-5114

March 28, 1990

TO: House Judiciary Committee

FROM: Jerry Slaughter  
Executive Director

SUBJECT: Senate Bill 736; Charitable Health Care Providers

Thank you for this opportunity to express our support for the provisions of SB 736. This bill is a product of much deliberation and work by the Kansas Medical Society and others who are interested in the provision of health care to medically indigent Kansans.

In May, 1989, the KMS House of Delegates adopted a resolution calling for "alternative liability coverage to physicians who provide free health care services." This resolution was adopted primarily because there are a growing number of recently retired physicians throughout Kansas who maintain what is called an exempt license in order to provide medical care in a very limited manner. Exempt under the Healing Arts Act means that the physician is not required to purchase medical malpractice insurance nor pay a surcharge into the Health Care Stabilization Fund. This licensure is contingent upon the condition that the physician may not accept compensation for medical services rendered. Exempt certainly does not mean that the physician is in any way immune from liability.

Originally, the exempt license was created by the Legislature to enable retired physicians to perform and provide basic health care services that would not expose those physicians to significant liability. In the meantime, because of an increasing demand for charity care to indigent patients, we have discovered that there are a number of physicians who would devote a certain amount of time to charity clinics or other situations providing medical care to indigent patients, were it not for the problem of liability exposure. Because of the very expensive premiums, neither the charity clinics nor the retired physicians can afford to purchase professional liability insurance to cover this exposure.

We believe that enactment of SB 736 will accomplish two major objectives. First, it will allow a significant number of retired physicians to provide charity care on a part-time or intermittent basis. Second, it will encourage actively practicing physicians to provide more charity care than they might otherwise. This second category of physician is one who does have professional liability insurance, but may choose not to donate professional services to indigent patients, because of the liability exposure. We frequently hear these physicians comment that they would render care to Medicaid and indigent patients if it were not for two things; the extensive paperwork and exposure to liability.

3/29/90

H. Jud Com.

Attachment VI



You will note that Senate Bill 736 allows the Secretary of Health and Environment to enter into agreements with health care providers which stipulate that the health care provider will not charge any fee when he or she renders care to a medically indigent patient. The bill also allows the Secretary to adopt eligibility guidelines for purposes of determining medical indigency status.

Senate Committee amendments appear to limit this program to certain physicians and dentists who would provide primary care services to indigent patients. However, the definition of "charitable health care provider" includes a long list of health care professionals which could be eligible for this program. We have attached to our testimony a list of these health care providers. We believe the list of eligible providers should be broad, to encourage participation by the greatest number. While we acknowledge the perceived need for limiting the scope of services, a number of our members have expressed concerns because primary care physicians oftentimes need to seek the services of surgical specialists in order to provide appropriate care to the patient. The limitation in the current version of SB 736 would likely inhibit the ability to recruit surgical services and thus could make it more difficult to properly care for the indigent patient.

We recognize that such legislation immediately raises two major questions. First, does application of the Tort Claims Act, in this instance, limit the ability of the patient to recover damages in the event of negligence on the part of a charitable health care provider? The answer is yes, the Kansas Tort Claims Act does include limitations on ability to recover. The important point to keep in mind in this context is that the patient might not have received medical care otherwise. The second major question pertains to the extent to which the State would be exposed to liability. This is a difficult question to answer with any degree of certainty. While there exists the potential for claims arising because of the care provided, it is unlikely, due to the nature of the population served by this program, that there will be significant claim frequency and severity.

We believe that passage of SB 736 will improve access to health care for the people of Kansas. If indeed the Executive Branch and the Legislature intend to restrain spending for programs delivering health care to medically indigent Kansans, then it is essential that other measures be taken in order to continue providing access to health care for needy individuals and families, particularly the children.

We also need to mention the likely possibility of a conflict between provisions of SB 736 and HB 3042. House Bill 3042 amends the definition of "employee" under the Tort Claims Act in a manner that specifically includes contract personnel who provide program services to persons in the custody of the Secretary of Corrections. It passed the House by a vote of 122-0. We have assured the Chairman of the Senate Judiciary Committee that KMS would bring this to your attention so that the provisions of HB 3042 can be merged into SB 736.

It is for these reasons that we urge you to recommend passage of SB 736. Thank you for your consideration.

JS:nb

3/29/90  
H. Jud Com  
Att VI 2

Health care providers covered in SB 736:

physicians  
hospitals  
optometrists  
dentists  
pharmacists  
chiropractors  
nurses  
physical therapists  
occupational therapists  
respiratory therapists  
mental health technicians  
podiatrists  
mental health centers

3/29/90  
H. Jud Com.

Att VI 3

[As Amended by Senate Committee of the Whole]

As Amended by Senate Committee

Session of 1990

SENATE BILL No. 736

By Committee on Public Health and Welfare

2-21

KMS  
KANSAS MEDICAL SOCIETY  
1300 Topeka Avenue • Topeka, Kansas 66612 • (913) 235-2383  
Kansas WATS 800-332-0156 FAX 913-235-5114

3/29/90  
H. Gud Corn  
Attachment VII

11 AN ACT amending and supplementing the Kansas tort claims act;  
12 providing that charitable health care providers are employees of  
13 the state for the purposes of such act; amending K.S.A. 75-6102,  
14 and 75-6115 and 75-6117 and repealing the existing sections.  
15

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

17 New Section 1. (a) The secretary of ~~social and rehabilitation~~  
18 ~~services health and environment~~ may enter into agreements with  
19 charitable health care providers in which such charitable health care  
20 provider stipulates to the secretary of ~~social and rehabilitation~~  
21 ~~services health and environment~~ that when such charitable health  
22 care provider renders ~~professional primary care~~ services to a med-  
23 ically indigent person such services will be provided gratuitously.  
24 The secretary of ~~social and rehabilitation services health and~~  
25 ~~environment~~ shall adopt rules and regulations which specify the con-  
26 ditions for termination of any such agreement, and such rules and  
27 regulations are hereby made a part of any such agreement. A char-  
28 itable health care provider for purposes of any claim for damages  
29 arising as a result of rendering ~~professional primary care~~ services  
30 to a medically indigent person, which ~~professional primary care~~  
31 services were rendered gratuitously at a time when an agreement  
32 entered into by the charitable health care provider with the secretary  
33 of ~~social and rehabilitation services health and environment~~ under  
34 this section was in effect, shall be considered an employee of the  
35 state under the Kansas tort claims act.

professional

professional  
professional

36 (b) The secretary of ~~social and rehabilitation services health~~  
37 ~~and environment~~ shall establish by rules and regulations eligibility  
38 criteria for determining whether a person qualifies as a medically  
39 indigent person.

40 (c) This section shall be part of and supplemental to the Kansas  
41 tort claims act.

42 Sec. 2. K.S.A. 75-6102 is hereby amended to read as follows:  
43 75-6102. As used in K.S.A. 75-6101 through 75-6118, and amend-  
44

3/29/90  
H. J. J. Comm.

Attachment VIII<sup>a</sup>

ments thereto, unless the context clearly requires otherwise:

(a) "State" means the state of Kansas and any department or branch of state government, or any agency, authority, institution or other instrumentality thereof.

(b) "Municipality" means any county, township, city, school district or other political or taxing subdivision of the state, or any agency, authority, institution or other instrumentality thereof.

(c) "Governmental entity" means state or municipality.

(d) "Employee" means any officer, employee, servant or member of a board, commission, committee, division, department, branch or council of a governmental entity, including elected or appointed officials and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation, *and charitable health care provider*. "Employee" does not include an independent contractor under contract with a governmental entity. "Employee" does include former employees for acts and omissions within the scope of their employment during their former employment with the governmental entity.

(e) "Community service work" means public or community service performed by a person (1) as a result of a contract of diversion entered into by such person as authorized by law, (2) pursuant to the assignment of such person by a court to a community corrections program, (3) as a result of suspension of sentence or as a condition of probation pursuant to court order, (4) in lieu of a fine imposed by court order or (5) as a condition of placement ordered by a court pursuant to K.S.A. 38-1663 and amendments thereto.

(f) "Charitable health care provider" means a health care provider as the term "health care provider" is defined under K.S.A. 65-4921, and amendments thereto, who has entered into an agreement with the secretary of ~~social and rehabilitation services~~ health and environment under section 1, and amendments thereto, who, pursuant to such agreement, renders ~~professional~~ primary care services to medically indigent persons gratuitously and who is considered an employee of the state of Kansas under section 1, and amendments thereto.

(g) "Medically indigent person" means a person who lacks resources to pay for medically necessary health care services and who meets the eligibility criteria for qualification as a medically indigent person established by the secretary of ~~social and rehabilitation services~~ health and environment under section 1, and amendments thereto.

(h) ~~"Primary care services" means general pediatrics, general internal medicine, family practice and general dentistry.~~

professional

health and environment

} delete

Sec. 3. K.S.A. 75-8115 is hereby amended to read as follows:

3/29/90  
H. Jud Com.  
Att VII  
3

75-6115. (a) The Kansas tort claims act shall not be applicable to claims arising from the rendering of or failure to render professional services by a health care provider other than a charitable health care provider or a hospital owned by a municipality and the employees thereof. Claims for damages against a health care provider that is a governmental entity or an employee of a governmental entity other than a charitable health care provider or a hospital owned by a municipality and the employees thereof, arising out of the rendering of or failure to render professional services by such health care provider, may be recovered in the same manner as claims for damages against any other health care provider.

(b) As used in this section:

(1) "Charitable health care provider" shall have the meaning provided by K.S.A. 75-6102, and amendments thereto.

(2) "Health care provider" shall have the meaning provided by K.S.A. 40-3401, and amendments thereto.

(3) "Hospital" means a medical care facility as defined in K.S.A. 65-425, and amendments thereto, and includes within its meaning any clinic, school of nursing, long-term care facility, child-care facility and emergency medical or ambulance service operated in connection with the operation of the medical care facility.

Sec. 4. K.S.A. 75-6117 is hereby amended to read as follows: 75-6117. (a) There is hereby established in the state treasury the tort claims fund which shall be administered by the attorney general. All expenditures from such fund shall be made upon warrants of the director of accounts and reports pursuant to vouchers approved by the attorney general or by a designee of the attorney general.

(b) Moneys in the tort claims fund shall be used only for the purpose of paying (1) compromises, settlements and final judgments arising from claims against the state or an employee of the state under the Kansas tort claims act or under the civil rights laws of the United States or of the state of Kansas and (2) costs of defending the state or an employee of the state in any actions or proceedings on those claims. Except for claims against the state arising from rendering or failure to render professional [primary care] services by a charitable health care provider to a medically indigent person, to the extent that payment cannot be made from insurance coverage obtained therefor, payment of a compromise or settlement shall be made from the fund if the compromise or settlement has been approved by the state finance council as provided in K.S.A. 75-6106 and amendments thereto. Except for claims against the state arising from rendering or failure to render professional [primary care] services by a charitable health care provider to a medically indigent

professional

professional

1 person, to the extent that payment cannot be made from insurance  
2 coverage obtained therefor, payment of a final judgment shall be  
3 made from the fund if there has been a determination of any appeal  
4 taken from the judgment or, if no appeal is taken, if the time for  
5 appeal has expired.

6 (c) Upon certification by the attorney general to the director of  
7 accounts and reports that the unencumbered balance in the tort  
8 claims fund is insufficient to pay an amount for which the fund is  
9 liable, the director of accounts and reports shall transfer an amount  
10 equal to the insufficiency from the state general fund to the tort  
11 claims fund.

12 (d) This section shall be part of and supplemental to the Kansas  
13 tort claims act.

14 ~~[New Sec. 5. Subject to the provisions of K.S.A. 76-6111 and~~  
15 ~~amendments thereto, the liability for claims against charitable health~~  
16 ~~care providers, as defined by K.S.A. 76-6102 and amendments~~  
17 ~~thereto, shall not exceed \$250,000 for any number of claims brought~~  
18 ~~by one medically indigent person, as defined by K.S.A. 75-6102 and~~  
19 ~~amendments thereto.]~~

} ————— Delete

20 Sec. 4 ~~5~~-[6]. K.S.A. 75-6102 and, 75-6115 and 75-6117 are  
21 hereby repealed.

22 Sec. ~~5 6~~-[7]. This act shall take effect and be in force from and  
23 after its publication in the statute book.

3/29/90  
N. Jud. Com.  
Att. VII  
4

ments thereto, unless the context clearly requires otherwise:

(a) "State" means the state of Kansas and any department or branch of state government, or any agency, authority, institution or other instrumentality thereof.

(b) "Municipality" means any county, township, city, school district or other political or taxing subdivision of the state, or any agency, authority, institution or other instrumentality thereof.

(c) "Governmental entity" means state or municipality.

(d) "Employee" means any officer, employee, servant or member of a board, commission, committee, division, department, branch or council of a governmental entity, including elected or appointed officials and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation, and charitable health care provider. "Employee" does not include an independent contractor under contract with a governmental entity. "Employee" does include former employees for acts and omissions within the scope of their employment during their former employment with the governmental entity.

(e) "Community service work" means public or community service performed by a person (1) as a result of a contract of diversion entered into by such person as authorized by law, (2) pursuant to the assignment of such person by a court to a community corrections program, (3) as a result of suspension of sentence or as a condition of probation pursuant to court order, (4) in lieu of a fine imposed by court order or (5) as a condition of placement ordered by a court pursuant to K.S.A. 38-1663 and amendments thereto.

(f) "Charitable health care provider" means a health care provider as the term "health care provider" is defined under K.S.A. 65-4921, and amendments thereto, who has entered into an agreement with the secretary of ~~social and rehabilitation services~~ health and environment under section 1, and amendments thereto, who, pursuant to such agreement, renders ~~professional~~ primary care services to medically indigent persons gratuitously and who is considered an employee of the state of Kansas under section 1, and amendments thereto.

(g) "Medically indigent person" means a person who lacks resources to pay for medically necessary health care services and who meets the eligibility criteria for qualification as a medically indigent person established by the secretary of social and rehabilitation services under section 1, and amendments thereto.

(h) "Primary care services" means general pediatrics, general internal medicine, family practice and general dentistry.

Requested amendment submitted to the House Judiciary Committee by Chip Wheelen on behalf of the Kansas Psychiatric Society

3/29/90  
A. Grad Com.

Attachment VIII

, psychiatry

Sec. 3. K.S.A. 75-6115 is hereby amended to read as follows:

# Kansas Optometric Association

1266 SW Topeka Blvd., Topeka, KS 66612  
913-232-0225

TESTIMONY ON  
SENATE BILL 736  
BEFORE THE HOUSE JUDICIARY COMMITTEE  
MARCH 28, 1990

I am Gary Robbins, Executive Director of the Kansas Optometric Association. I appreciate the opportunity to appear in support of Senate Bill 736. Optometrists have been actively involved in providing primary eye care to the medically indigent for many years. We participated in the development of several vision programs for the working poor over the past ten years. During the last six years, our Vision USA program has served Kansans who have been without health insurance and who have not qualified for Medicaid. Through this program we have provided vision care to more than 3,500 deserving individuals during the last five years. The Salvation Army has done an excellent job in screening those individuals who have requested these services. This is only one example of a program in which optometrists are participating.

We are requesting an amendment to Senate Bill 736 which would insert on page 2, line 42 the word ", optometry" into the definition of primary care services. We were originally in the bill until deleted by the Senate Committee amendments. A balloon is attached reflecting our proposed change.

Thank you for considering our views on this important legislation.

3/29/90

H. Jud Com.



Affiliated with  
American Optometric Association

Attachment IX



ments thereto, unless the context clearly requires otherwise:

(a) "State" means the state of Kansas and any department or branch of state government, or any agency, authority, institution or other instrumentality thereof.

(b) "Municipality" means any county, township, city, school district or other political or taxing subdivision of the state, or any agency, authority, institution or other instrumentality thereof.

(c) "Governmental entity" means state or municipality.

(d) "Employee" means any officer, employee, servant or member of a board, commission, committee, division, department, branch or council of a governmental entity, including elected or appointed officials and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation, and charitable health care provider. "Employee" does not include an independent contractor under contract with a governmental entity. "Employee" does include former employees for acts and omissions within the scope of their employment during their former employment with the governmental entity.

(e) "Community service work" means public or community service performed by a person (1) as a result of a contract of diversion entered into by such person as authorized by law, (2) pursuant to the assignment of such person by a court to a community corrections program, (3) as a result of suspension of sentence or as a condition of probation pursuant to court order, (4) in lieu of a fine imposed by court order or (5) as a condition of placement ordered by a court pursuant to K.S.A. 38-1663 and amendments thereto.

(f) "Charitable health care provider" means a health care provider as the term "health care provider" is defined under K.S.A. 65-4921, and amendments thereto, who has entered into an agreement with the secretary of ~~social and rehabilitation services~~ health and environment under section 1, and amendments thereto, who, pursuant to such agreement, renders ~~professional~~ primary care services to medically indigent persons gratuitously and who is considered an employee of the state of Kansas under section 1, and amendments thereto.

(g) "Medically indigent person" means a person who lacks resources to pay for medically necessary health care services and who meets the eligibility criteria for qualification as a medically indigent person established by the secretary of social and rehabilitation services under section 1, and amendments thereto.

(h) "Primary care services" means general pediatrics, general internal medicine, family practice and general dentistry. , optometry

Sec. 3. K.S.A. 75-6115 is hereby amended to read as follows:

OH IX  
H grad com.  
3/29/90  
2