Approved February 7, 1991
Date

MINUTES OF THE HOUSE COMMITTEE ON INSURANCE.

The meeting was called to order by REPRESENTATIVE TURNQUIST at
Chairperson

3:35 ~~a.m.~~p.m. on Wednesday, February 6, 1991 in room 531-N of the Capitol.

All members were present except:

Representative Cribbs - Excused

Committee staff present:

Mr. Bill Edds, Revisor
Mr. Chris Courtwright, Research
Mrs. Nikki Feuerborn, Committee Secretary
Miss Gena Lott, Intern

Conferees appearing before the committee:

Mr. Dave Calvert, Kansas Trial Lawyer's Association
Mr. Dick Brock, Insurance Commissioner's Staff
Mr. Bud Cornish, Kansas Property and Casualty Insurance
Mr. Lee Wright, Farmers Insurance Group
Ms. Lori Callahan, Kansas Medical Mutual Insurance
Ms. Glenda Cafer, American Insurance Association
Mr. William Sneed, State Farm Insurance

Hearing on HB 2061. Mr. Bill Sneed, representing State Farm Insurance, appeared as a proponent of the bill. This bill is identical to HB 3082 which was not passed in 1990 because of a concern regarding the fiscal effect of the proposed legislation. He stated that forty-nine states apply their respective retaliatory statutes in the manner which is proposed in this legislation. See Attachment 1.

Retaliatory tax statutes deal with the taxation of insurance companies that are not domiciled in the state that is imposing the retaliatory tax. The retaliatory tax statute calculates the amount of the retaliatory tax imposed upon a foreign insurer by substituting the general tax laws of the foreign insurer's state of domicile for the general tax laws of the retaliating state. This is done by applying the foreign insurer's home state tax laws to the business conducted by the foreign insurer in the retaliating state. If the foreign insurer's state of domicile has tax laws that are more burdensome than the retaliating state's tax laws, the foreign insurer pays a tax to the retaliating state equal to the tax which would be imposed by the foreign insurer's home state.

The issue the proposed legislation relates to is whether assessments made by the Illinois Insurance Guaranty Fund should be treated as an Illinois burden for purposes of computing the Kansas retaliatory tax. The Kansas Department is contending that assessments paid to the Illinois Insurance Guaranty Fund should be considered as a burden in Illinois for purposes of calculating the Kansas retaliatory tax. The Illinois Insurance Guaranty Fund is a private non-governmental non-profit organization which is designed to pay claims to policyholders of member insurance companies that become insolvent.

The amendment provides that guaranty fund assessments shall not be considered when determining the retaliatory tax to be paid to Kansas. This means that the regulatory mistakes of the Illinois Insurance Department will not be charged to State Farm policyholders in Kansas. In some years State Farm would pay higher retaliatory taxes to Kansas as a result of this bill and in some years the burden would be lower.

Mr. Dick Brock and Mr. Ron Nitcher of the Insurance Commissioner's office, testified regarding the lack of real fiscal impact on the passage of this bill. Had this bill been in effect in 1988, it would have resulted in a loss of $77,000. However, some years State Farm has paid as much as $300,000. The passage of this bill would not help the state collect more taxes, only less. Five other states handle retaliatory taxes in the same manner as Kansas.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

Hearing on HB 2082. Mr. Dave Calvert, representing Kansas Trial Lawyer's Association, appeared before the Committee as a proponent. This proposed legislation will provide a private cause of action against an insurance company when the person is damaged as a result of unfair claim settlement practices prohibited by K.S.A. 40-2402(A)(9). The bill also provides that it is not necessary for a consumer to prove that the unlawful acts were committed with such frequency as to indicate a general business practice of violating the law. The Kansas Consumer Protection Act protects Kansas consumers from deceptive acts and practices with only one exception, and that exception is the insurance industry because it is regulated by the Insurance Commissioner. The Unfair Claim Settlement Practices Act gives the Insurance Commissioner certain authority in cases of violations where the unlawful acts are committed with such frequency as to indicate a general practice. Currently an insured may sue his ow insurance company only for breach of contract. Mr. Calvert stated that the existing law encourages companies to balance the money they can save by grossly undervaluating claims, for example, against the risk of having to pay the claim plus attorney fees. Courts have problems in setting attorney's fees. The state is required only to go after actual damages at this time, nothing over and above such as punitive damages, pain and suffering, etc. See Attachment 2.

Mr. Dick Brock, Insurance Commissioner's Office, spoke as an opponent of HB 2082 as it is now presented. The new language appearing on lines 33 through 39 on Page 6 of the bills is unsatisfactory and unnecessary. He stated that Kansas has provided since 1931 for the provisions of recovery of attorney fees if an insurer has unreasonably refused to pay the full amount of any loss. Therefore if an insured or claimant has good reason to believe an insurer is not paying as much as it should as soon as it should, access to the court is encouraged by this provision. Furthermore, the mere existence of the provisions should discourage attempts by insurers to deny legitimate claims or procrastinate in paying those claims.

Mr. Brock stated that the biggest concern with HB 2082 is that the various unfair claims settlement practices described in the Kansas Unfair Trade Practices Act were not designed or intended to be precise, legal, descriptions to be used for purposes of determining whether a particular cause of action exists.

Mr. Brock stated the Insurance Commissioner's office could support the bill with the following changes: Amend on Page 4, lines 12-14 by striking the current language and inserting

> "It is an unfair claim settlement practice if any of the following or any regulations pertaining thereto are: (a) committed flagrantly and in conscious disregard of such provisions; and (b) committed with such frequency as to indicate a general business practice."

With this amendment, the new language appearing on Page 6 of the bill would not seem to be necessary. However, if such language is retained, it should at least be amended to include the words "without just cause or excuse" immediately following "(9)" on Page 6, line 34. Such language would then be compatible with the existing provisions of K.S.A. 40-256 relating to attorney fees and would, at least, lessen the possibility of unnecessary or frivolous litigation. See Attachment 3.

Mr. Bill Sneed, representing State Farm Insurance, appeared as an opponent of HB 2082. He testified that this bill will create a new cause of action against insurance companies for acts alleged to have been committed in violation of K.S.A. 40-2404 which now is only available as a regulatory tool for the Kansas Insurance Department.. Once this new cause of action is created, the plaintiff's bar wishes

to provide that one single infraction regardless of intent would be enough on which to base a lawsuit against an insurer. Thus, insurance rates would be raised to offset the additional costs incurred in lawsuits. See Attachment 4.

Mr. L. M. Cornish, representing Kansas Association of Property and Casualty Insurance Companies and The Kansas Life Insurance Association, testified as an opponent of HB 2082. Mr. Cornish supported the current law as it gives the Department of Insurance the tools to assure that insurance companies promptly and fairly meet their insurance claim obligations. Violations of the current law result in stringent penalties up to $50,000 being imposed upon the offending company by the Insurance Department. The current law empowers the Commissioner of Insurance to discipline any company which makes a general business practice of conducting claim settlement practices in a manner inconsistent with the law. Mr. Cornish stated that the passage of this proposed legislation will enormously increase litigation by granting a vaguely defined right of action to virtually any third party who may claim to have been a victim of an unfair claims practice. The proposed bill has no bearing on the policy holder's right to maintain a contractual cause of action against his or her own insurer in the event of a dispute; that right has always existed. See Attachment 5.

Mr. Lee Wright, representing Farmers Insurance Group, appeared as an opponent of HB 2082. He stated that combating fraudulent claims is a vital part of overall claims cost control and that he was concerned that HB 2082 will decrease the incentive and ability to effectively investigate and resist payment of these claims where strong fraud indicators are present because of the added looming threat of a direct cause of action. See Attachment 6.

Ms. Lori Callahan, representing KaMMCO, appeared as an opponent of HB 2082. The current act allows the Kansas Department of Insurance to investigate and take action against companies who have violated the act. This service is provided completely free of cost to those affected by the act. She stated that the position of KaMMCO was that HB 2082 under the guise of assisting consumers, in fact provides them no additional benefits and only adds costs to the system, which in the end must be paid for through increased insurance premiums. The private cause of action would apparently benefit only the attorney representing the consumer, rather than the consumer himself. See Attachment 7.

Ms. Glenda L. Cafer, representing American Insurance Association, handed in testimony to the committee containing opposition to HB 2082. The testimony stated that a private case of action would increase litigation, increase administrative costs, and increase defense costs. Such costs would result without a corollary benefit in that currently the Kansas Department of Insurance has complete power and authority to enforce the act without any cost to the consumer. (Attachment 8)

Name	City	Co.
Nancy Zogleman	Topeka	BC/BS of Ks
[illegible]	Topeka	KaMMCO
Kurt Scott	Topeka	KaMMCO
[illegible] Schroeder	Topeka	State Farm
Richard E. Wilborn	[illegible]	Alliance Ins Co
Glenn Cogswell	Topeka	Alliance of Am. Insurers
Glenda L Cafer	Topeka	AIA
Bill Sneed	Topeka	State Farm
Lee WRIGHT	O.P. Ks	Farmers Ins Group
Mark Wetty	Tulsa	State Farm
Mike [illegible]	Tulsa	State Farm
Raymond Yakel	Lakin, Kans	Visitor
Helen [illegible]	Lakin	Legis. wife
D. Hanzlick	Topeka	KDA
[illegible]	Hutchinson	[illegible]
[illegible]	Wichita	Sedgwick
[illegible]	[illegible]	KBA
Ron [illegible]	Topeka	Insurance Dept

M E M O R A N D U M

TO : Larry Turnquist
House Insurance Committee

FROM : William W. Sneed
State Farm Insurance Companies

DATE : February 6, 1991

RE : House Bill 2061

A. Introduction

Mr. Chairman and Members of the House Insurance Committee, my name is Bill Sneed and I represent State Farm Insurance Companies. House Bill 2061 was introduced at our request in an effort to resolve an ongoing disagreement between my client and the Kansas Insurance Department relative to the Department's position on the Kansas retaliatory statute's (K.S.A. 40-253) application to the Illinois Insurance Guaranty Fund assessments. As I stated to the Committee on January 23rd when we made this bill request, an identical bill (H.B. 3082) to this proposal passed out of this Committee last year. Because of a concern about this bill's fiscal effect, H.B. 3082 was never debated on the House floor.

Currently there are 49 states that apply their respective retaliatory statutes in the manner which we are proposing, and based upon our review of the facts, we believe your favorable consideration of H.B. 2061 is warranted.

B. Retaliatory Taxes

1. General Discussion

State retaliatory tax statutes deal with the taxation of insurance companies that are not domiciled in the state that is

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imposing the retaliatory tax. For purposes of this discussion, the insurer subject to the retaliatory tax will be referred to as a foreign insurer and the state imposing the retaliatory tax will be referred to as the retaliating state. Typically, the retaliatory tax statute calculates the amount of the retaliatory tax imposed upon a foreign insurer by substituting the general tax laws of the foreign insurer's state of domicile for the general tax laws of the retaliating state. This is done by applying the foreign insurer's home state tax laws to the business conducted by the foreign insurer in the retaliating state. If the foreign insurer's state of domicile has tax laws that are more burdensome than the retaliating state's tax laws, the foreign insurer pays a tax to the retaliating state equal to the tax which would be imposed by the foreign insurer's home state.

A simple example can illustrate the application of the retaliatory tax laws. Assume Insurer A is domiciled in Illinois and received $100 of premiums for business done in Kansas. Kansas imposes a premium tax on foreign insurers at a rate of 2%, which would result in $2.00 of premium tax. Illinois, however, imposes a premium tax at a rate of 3%. Kansas' retaliatory tax statute would require Insurer A to pay the greater retaliatory tax of $3.00 to Kansas. The retaliatory tax is calculated by applying Illinois' tax rate of 3% to the $100 of premiums received by Insurer A for its business done in Kansas, the retaliating state.

2. Kansas

With the general background of retaliatory tax statutes in mind, this discussion will now focus upon K.S.A. 40-253, which is the Kansas retaliatory tax statute. As you will see from your review of K.S.A. 40-253, Kansas' retaliatory tax statute requires an insurer doing business in Kansas to pay a retaliatory tax to Kansas if the foreign insurer's home state burdens, which would be imposed on a similar Kansas insurance company doing business in the foreign insurer's home state equal to the amount of business conducted by the insurer in Kansas, exceed the Kansas burdens imposed upon the insurer. Thus, it is open to interpretation what types of burdens should be considered for purposes of calculating the Kansas retaliatory tax.

The issue that the proposed legislation relates to is whether assessments made by the Illinois Insurance Guaranty Fund should be treated as an Illinois burden for purposes of computing the Kansas retaliatory tax.

The Kansas retaliatory tax statute defines the burdens to be compared as follows:

> . . . any deposit of securities in such state or country for the protection of policyholders therein, or otherwise, or any payment for taxes, fines, penalties, certificates of authority, licenses, fees, compensation for examination, or otherwise . . .

The Kansas Department is contending that assessments paid to the Illinois Insurance Guaranty Fund should be considered as a burden in Illinois for purposes of calculating the Kansas retaliatory tax. The Illinois Insurance Guaranty Fund is a private non-governmental

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non-profit organization which is designed to pay claims to policyholders of member insurance companies that become insolvent. Although an insurance company must be a member of the Fund in order to do business in Illinois, the contributions to the Fund are not levied by or paid to the state or any other governmental unit. Furthermore, contributions to the Fund are refunded to the member insurers to the extent of any recoveries from the insolvent insurance companies.

The characteristics of the Illinois Insurance Guaranty Fund distinguish the assessments paid to it from general taxes. The purpose of the retaliatory tax statute is to equalize the state tax burdens imposed upon insurance companies. Because assessments paid to a fund which are used to pay claims of insolvent insurance companies in Illinois are not in the nature of taxes, the assessments paid to the Illinois Insurance Guaranty Fund should not generate a retaliatory tax liability in Kansas, or any other state. However, the Kansas Department's interpretation of the Kansas retaliatory tax statute has the effect of imposing a Kansas tax for assessments used to pay the claims of policyholders of insolvent Illinois insurance companies.

C. <u>Examples.</u>

Attached to this memorandum are several examples of the mechanics of the retaliatory tax and the premium tax offset. Example 1 would be the net result of retaliatory taxes under the

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Department's interpretation, whereas example 2 would be the net result under H.B. 2061.

This might initially lead one to the belief that the changes encompassed by H.B. 2061 would lead to a decrease in retaliatory taxes collected. However, if you change the amount of assessment by the respective states, as in examples 3 and 4, there would be an increase in retaliatory taxes collected. Further, this is not just a mere theoretical argument. In 1987, State Farm paid $155,912.40 in retaliatory taxes (related to guaranty fund assessments) and paid nothing in 1988 and 1989. While it is true that under the changes in H.B. 2061 we would have paid nothing in 1987 as it relates to guaranty fund assessments, we would have paid $154,630.15 in 1988 and $80,152.54 in 1989.

D. Effect of H.B. 2061.

Our amendment simply provides that guaranty fund assessments shall not be considered when determining the retaliatory tax to be paid to Kansas. This means that the regulatory mistakes of the Illinois Insurance Department will not be charged to our Kansas policyholders. In some years State Farm will pay higher retaliatory taxes to Kansas as a result of this bill and in some years the burden will be lower, but our Kansas policyholders will not be charged for the Illinois mistakes.

E. Conclusion.

Again, on behalf of my client, I wish to thank you for allowing us this opportunity to testify on House Bill 2061. We

submit that based upon the foregoing, favorable passage of H.B. 2061 will place Kansas in line with the vast majority of states regarding this issue, and over time, have no major fiscal impact on the state. Thus, we urge your favorable consideration of House Bill 2812.

Respectfully submitted,

William W. Sneed

APPENDIX A

RETALIATORY TAX EXAMPLES

FACT PATTERN: An Illinois insurer is operating in Kansas and receives $150,000,000 of premiums for risks insured in Kansas. Both Kansas and Illinois impose a flat premium tax rate of 2%. The fees charged by Kansas are $110.00 while similar fees in Illinois would be $200.00. Kansas imposes a tax on certain insurers for fire premiums that are not subject to the tax in Illinois. The fire tax in Kansas would be $150,000.00. The guaranty association assessment in Kansas is $100,000.00 and the guaranty association assessment in Illinois on the Kansas volume of business would be $265,000.00.

Because the Kansas premium tax is shown as the gross amount before application of the premium tax offset, the guaranty association assessment is not listed separately in example 1. This example shows the result based upon the Kansas Department's interpretation of the retaliatory tax statute that the assessments should be considered a burden for purposes of retaliation in Kansas.

EXAMPLE 1

	Kansas Basis	Illinois Basis
Fees	110.00	200.00
Premium Tax	3,000,000.00	3,000,000.00
Fire Tax	150,000.00	-0-
Guaranty Assoc.	-0-	265,000.00
Total	3,150,110.00	3,265,200.00

Retaliatory tax owed to Kansas $115,090.00

In the second example, the same facts outlined above apply except the guaranty association assessments are not considered as burdens for purposes of the Kansas retaliatory tax. As a result, the Kansas premium tax is shown net of the credit allowed for the assessments. It is assumed that the credit equals the annual assessment.

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EXAMPLE 2

	Kansas Basis	Illinois Basis
Fees	110.00	200.00
Premium Tax	2,900,000.00	3,000,000.00
Fire Tax	150,000.00	-0-
Total	3,050,110.00	3,000,200.00

Retaliatory tax owed to Kansas -0-

Examples 3 and 4 merely restate examples 1 and 2, respectively, with the exception that the guaranty association assessment in Kansas is $256,000 and the assessment in Illinois would be $100,00. As you will see in this example, the Department's position does not generate any retaliatory tax when the Kansas assessment is the larger amount. However, the retaliatory tax will be payable under the proposal when the Kansas assessment is the larger amount.

EXAMPLE 3

	Kansas Basis	Illinois Basis
Fees	110.00	200.00
Premium Tax	3,000,000.00	3,000,000.00
Fire Tax	150,000.00	-0-
Guaranty Assoc.	-0-	100,000.00
Total	3,150,110.00	3,100,200.00

Retaliatory tax owed to Kansas -0-

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EXAMPLE 4

	Kansas Basis	Illinois Basis
Fees	110.00	200.00
Premium Tax	2,735,000.00	3,000,000.00
Fire Tax	150,000.00	-0-
Total	2,885,110.00	3,000,200.00

Retaliatory tax owed to Kansas $115,090.00

KANSAS
TRIAL LAWYERS ASSOCIATION
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TESTIMONY
OF THE
KANSAS TRIAL LAWYERS ASSOCIATION
BEFORE THE
HOUSE JUDICIARY COMMITTEE
FEBRUARY 6, 1991

HB 2082 - Unfair Claim Settlement Practices

Thank you for the opportunity to speak with you on behalf of the Kansas Trial Lawyers association in support of HB 2082.

My name is David Calvert. My professional background may give you some idea of the perspective I bring with me today. From 1967 through 1972 I was Deputy County Attorney in Sedgwick County where I founded and was the first Director of the Consumer Protection Division. For the next eleven years I served as a District Judge, and have been in private practice since January 1, 1984, representing persons who have been injured as a result of someone else's wrongful acts. For 24 years I have been involved with people seeking a remedy where there is a wrong.

HB 2082 will provide a private cause of action against an insurance company when the person is damaged as a result of unfair claim settlement practices prohibited by K.S.A. 40-2404(a)(9). The bill also provides that it is not necessary for a consumer to prove that the unlawful acts were committed with such frequency as to indicate a general business practice of violating the law. We believe that consumers have the right to have their claims involving their own insurance companies settled fairly, consistent with the standards now provided by law, and that if they are not, those citizens should have some remedy for the company's failure or refusal to do so.

The Kansas legislature has a long history of providing for the protection of Kansas consumers, starting with the "Printer's Ink" law prohibiting false advertising in the early 1900's to the Buyer Protection Act of 1968 and continuing with the Kansas Consumer Protection Act.

The Kansas Consumer Protection Act, K.S.A. 50-623 et seq, protects Kansas consumers from deceptive acts and practices as enumerated generally in K.S.A. 50-626(a) and specifically in subsection (b). That Act protects consumers from deceptive acts committed by suppliers in consumer transactions of every conceivable type of business imaginable with only one exception, and that exception is the insurance industry. The Act gives the Attorney

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General and County and District Attorneys the power to enforce the act and, in K.S.A. 50-634, it gives private individuals the power to recover for violations of the act. The reasoning behind this "private attorney general" concept is solid: consumer fraud may affect only one individual and because it may affect him substantially, he should have the right to pursue his remedy whether or not the attorney general has the resources or even the inclination to pursue it for him. If it is right and fair for the attorney general to sue on the individual consumer's behalf, it is right and fair for the consumer to hire his own lawyer to file suit for consumer fraud.

However, as I mentioned, the Kansas Consumer Protection Act excludes deceptive or unfair acts committed by insurance companies because they are regulated by the Insurance Commissioner. That regulation is provided for in K.S.A. 40-2404.

Included among the fifteen specifically prohibited acts in subsection (a)(9) is a prohibition against refusing to pay claims without conducting a reasonable investigation based upon all available information, misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue, and not attempting in good faith to effectuate prompt, fair and equitable settlement of claims in which liability has become reasonably clear. We believe it is appropriate that where an insurance company intentionally misrepresents policy provisions to its insured, for example, that the insurance company should be made to answer for its fraud just as any other supplier of goods and services is made to answer.

The unfair Claim Settlement Practices Act gives the Insurance Commissioner certain authority in cases of violations where the unlawful acts are committed with such frequency as to indicate a general practice. Where, after a hearing, the Commissioner determines the act has been violated, he may levy fines and/or suspend or revoke licenses. On January 27, 1988, the then Assistant Insurance Commissioner testified that from 1980 through 1987 there had been 61,814 complaints filed by citizens of Kansas against insurance companies and not one of those complaints resulted in any hearings under this act. He further testified that in cases where the insurance company denied there had been unfair practices, consumers were told to contact their own attorney. However, the consumer's attorney has no power under the act.

The prohibited unfair claim settlement practices acts are found in subsection (a)(9), but only the insurance Commissioner is empowered to act; there is no right of a private individual who finds himself or herself a victim of an unfair practice to file suit under the act.

Currently, an insured may sue his own insurance company only for breach of contract. If it is found that the failure to pay was

without just cause or excuse, K.S.A. 40-256 provides for a reasonable attorney fee. There is no provision for recovery of additional damages which may have been sustained by the insured. Costs of litigation not covered by the statute (which is just about everything) and incidental damages may not be recovered. No private penalty exists for intentional violations of the law; there is no provision in the law which would provide a deterrent to future unfair practices. Only a private cause of action will accomplish this.

Under current law, the Court of Appeals has held that where an insurance company concealed the existence of insurance coverage from an illiterate consumer, the company was not liable because the consumer is presumed to have read her policy and understood it. (Beverage v. Shelter Ins., Unpublished) The Court explained that there was no cause of action for bad faith in Kansas. Another insurance company that filed a false affidavit concerning coverage was permitted to pay only attorney fees and the amount due under the policy. The costs of the depositions and other expenses were eventually paid by the consumer.

Based upon experience to date, an insurance company can reasonably expect that no formal action will be taken in the case of a consumer who files a complaint with the Insurance Department for unfair claim settlement practice. The existing law encourages companies to balance the money they can save by grossly undervaluing claims, for example, against the risk of having to pay the claim plus attorney fees. It is economically sound for those companies to violate the law. We believe it is time to put some teeth into the law by extending it to allow a private cause of action.

We urge you to act favorably on HB 2082.

Testimony By
Dick Brock, Kansas Insurance Department
Before the House Insurance Committee
on House Bill No. 2082
February 6, 1991

Needless to say -- and I believe the Kansas Insurance Department's recognition by a national consumer organization as one of the six states in the country that are doing the best and the most to assist insurance consumers evidences -- the Kansas Insurance Department's constant and continuing efforts to assure fair treatment of policyholders and claimants. This obviously includes the belief that no insurance consumer and no situation should arise where one of the practices described on page 4, lines 12 through 43 and page 5, lines 1 through 15 should cause a single policyholder or claimant to be treated unfairly.

In addition, we are of course aware of the obstacle the general business practice language presents in terms of holding an insurer and/or an insurer's representatives accountable for complete and total compliance with each of the described practices in every individual claim situation.

Therefore, in that sense, the Insurance Department understands and supports the concept of House Bill No. 2082 to the extent of making the described practices more relevant to individual claims. What we cannot support is the manner in which House Bill No. 2082 proposes to do this.

In the first place, we are not certain the new language appearing on lines 33 through 39 on page 6 of the bill are even necessary to accomplish the proponent's goals. K.S.A. 40-256 which according to the legislative history has in some form or fashion been Kansas law since 1931 already provides for the recovery of attorney fees if an insurer has unreasonably refused to pay the full amount of any loss. Therefore, if an insured or claimant has good reason to believe an insurer is not

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paying as much as it should as soon as it should, access to the court is encouraged by this provision. Furthermore, the mere existence of the provision should discourage attempts by insurers to deny legitimate claims or procrastinate in paying those claims. Some will also recall that, at the Department's request, the 1989 Kansas Legislature enacted Senate Bill No. 110 which provides for the payment of interest on claims that are not paid in a timely fashion. I mention these provisions simply as a reminder that Kansas law and the Kansas Legislature have not ignored the problems individual policyholders and claimants might have.

However, the Department's biggest concern with House Bill No. 2082 is that the various unfair claims settlement practices described in the Kansas Unfair Trade Practices Act were not designed or intended to be precise, legal, descriptions to be used for purposes of determining whether a particular cause of action exists. This is model law language developed by the National Association of Insurance Commissioners and you will note these provisions are replete with use of the term "reasonable"; contain some practices such as making certain things known to claimants or insureds that might have nothing to do with a particular claim; makes use of the word "promptly" to describe timeliness and so forth. Because these provisions were drafted in general terms to be used as guidelines, they have been supplemented by an administrative regulation for the purpose of obtaining more specificity. This regulation is also based on the N.A.I.C. model and I have attached a copy of it as part of my testimony.

I realize this background and reasoning does not address what I believe is the proponents real concern and that is the inability to apply the unfair claims settlement practice provisions to a single situation. As I indicated this has also troubled insurance regulators and as I earlier advised the Chair of this committee, the N.A.I.C. has now addressed the

matter. The relevant portion of the N.A.I.C.'s change is attached to the January 28 memo that is also a part of my testimony and you will note this new language provides a second means of determining that a violation of this part of the Unfair Trade Practices Act has occurred. Therefore, I would suggest that House Bill No. 2082 be amended on page 4, lines 12-14 to strike the current language appearing in these lines and in lieu thereof insert:

> "It is an unfair claim settlement practice if any of the following or any regulations pertaining thereto are: (A) committed flagrantly and in conscious disregard of such provisions; or (B) committed with such frequency as to indicate a general business practice."

With this amendment, the new language appearing on page 6 of the bill would not seem to be necessary. However, if such language is retained, it should at least be amended to include the words "without just cause or excuse" immediately following "(9)" on page 6, line 34. Such language would then be compatible with the existing provisions of K.S.A. 40-256 relating to attorney fees and would, at least, lessen the possibility of unnecessary or frivolous litigation.

UNFAIR CLAIMS SETTLEMENT PRACTICES MODEL REGULATION

(As Amended July 10, 1989)

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Section 1. Authority.

NOT ADOPTED

Section 4(9) of the Unfair Trade Practices Act prohibits insurers doing business in the state from engaging in unfair claims settlement practices and provides that if any insurer performs any of the acts or practices proscribed by that section with such frequency as to indicate a general business practice, then those acts shall constitute an unfair or deceptive act or practice in the business of insurance.

Section 2. Scope.

NOT ADOPTED

[This regulation defines certain minimum standards which, if violated with such frequency as to indicate a general business practice, will be deemed to constitute unfair claims settlement practices.] This regulation applies to all persons and to all insurance policies and insurance contracts except policies of Workers' Compensation insurance. This regulation is not exclusive, and other acts, not herein specified, may also be deemed to be a violation of Section 4(9) of the Act.

Section 3. Definitions.

The definitions of "person" and of "insurance policy or insurance contract" contained in section 2 of the Unfair Trade Practice Act shall apply to this regulation and, in addition, where used in this regulation:

(a) "Agent" means any individual, corporation, association, partnership or other legal entity authorized to represent an insurer with respect to a claim;

(b) "Claimant" means either a first party claimant, a third party claimant, or both and includes such claimant's designated legal representative and includes a member of the claimant's immediate family designated by the claimant;

(c) "First party claimant" means an individual, corporation, association, or partnership or other legal entity asserting a right to payment under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such policy or contract;

(d) "Insurer" means a person licensed to issue or who issues any insurance policy or insurance contract in this State.

(e) "Investigation" means all activities of an insurer directly or indirectly related to the determination of liabilities under coverages afforded by an insurance policy or insurance contract.

(f) "Notification of claim" means any notification, whether in writing or other means acceptable under the terms of an insurance policy or insurance contract, to an insurer or its agent, by a claimant, which reasonably apprises the insurer of the facts pertinent to a claim;

(g) "Third party claimant" means any individual, corporation, association, partnership or other legal entity asserting a claim against any individual, corporation, association, partnership or other legal entity insured under an insurance policy or insurance contract of an insurer; and

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(h) "[illegible]rker's Compens[illegible]n" includes, but is not limited to, [illegible]gshoremen's and Harbor [illegible]rker's Compensation.

Section 4. File and Record Documentation.

The insurer's claim files shall be subject to examination by the (Commissioner) or by his duly appointed designees. Such files shall contain all notes and work papers pertaining to the claim in such detail that pertinent events and the dates of such events can be reconstructed.

Section 5. Misrepresentation of Policy Provisions.

(a) No insurer shall fail to fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented.

(b) No agent shall conceal from first party claimants benefits, coverages or other provisions of any insurance policy or insurance contract when such benefits, coverages or other provisions are pertinent to a claim.

(c) No insurer shall deny a claim for failure to exhibit the property without proof of demand and unfounded refusal by a claimant to do so.

(d) No insurer shall, except where there is a time limit specified in the policy, make statements, written or otherwise, requiring a claimant to give written notice of loss or proof of loss within a specified time limit and which seek to relieve the company of its obligations if such a time limit is not complied with unless the failure to comply with such time limit prejudices the insurer's rights.

(e) No insurer shall request a first party claimant to sign a release that extends beyond the subject matter that gave rise to the claim payment.

(f) No insurer shall issue checks or drafts in partial settlement of a loss or claim under a specific coverage which contain language which release the insurer or its insured from its total liability.

Section 6. Failure to Acknowledge Pertinent Communications.

(a) Every insurer, upon receiving notification of a claim shall, within ten working days, acknowledge the receipt of such notice unless payment is made within such period of time. If an acknowledgement is made by means other than writing, an appropriate notation of such acknowledgement shall be made in the claim file of the insurer and dated. Notification given to an agent of an insurer shall be notification to the insurer.

(b) Every insurer, upon receipt of any inquiry from the insurance department respecting a claim shall, within fifteen working days of receipt of such inquiry, furnish the department with an adequate response to the inquiry.

(c) An appropriate reply shall be made within ten working days on all other pertinent communications from a claimant which reasonably suggest that a response is expected.

(d) Every insurer, upon receiving notification of claim, shall promptly provide necessary claim forms, instructions, and reasonable assistance so that first party claimants can comply with the policy conditions and the insurer's reasonable requirements. Compliance with this paragraph within ten working days of notification of a claim shall constitute compliance with subsection (a) of this section.

Section 7. Standards for Prompt Investigation of Claims.

Every insurer shall complete investigation of a claim within thirty days after notification of claim, unless such investigation cannot reasonably be completed within such time.

Sect[illegible]8. Standards for Prompt, Fair and Equitable Settlement[illegible]pplicable to All Insurers

(a) Within 15 working days after receipt by the insurer of properly executed proofs of loss, the first party claimant shall be advised of the acceptance or denial of the claim by the insurer. No insurer shall deny a claim on the grounds of a specific policy provision, condition, or exclusion unless reference to such provision, condition, or exclusion is included in the denial. The denial must be given to the claimant in writing and the claim file of the insurer shall contain a copy of the denial.

(b) If a claim is denied for reasons other than those described in paragraph (a) and is made by any other means than writing, an appropriate notation shall be made in the claim file of the insurer.

(c) If the insurer needs more time to determine whether a first party claim should be accepted or denied, it shall so notify the first party claimant within fifteen working days after receipt of the proofs of loss, giving the reasons more time is needed. If the investigation remains incomplete, the insurer shall, forty-five days from the date of the initial notification and every forty-five days thereafter, send to such claimant a letter setting forth the reasons additional time is needed for investigation.

(d) Insurers shall not fail to settle first party claims on the basis that responsibility for payment should be assumed by others except as may otherwise be provided by policy provisions.

(e) Insurers shall not continue negotiations for settlement of a claim directly with a claimant who is neither an attorney nor represented by an attorney until the claimant's rights may be affected by a statute of limitations or a policy or contract time limit, without giving the claimant written notice that the time limit may be expiring and may affect the claimant's rights. Such notice shall be given to first party claimants thirty days and to third party claimants sixty days before the date on which such time limit may expire.

(f) No insurer shall make statements which indicate that the rights of a third party claimant may be impaired if a form or release is not completed within a given period of time unless the statement is given for the purpose of notifying the third party claimant of the provision of a statute of limitations.

(g) An insurer shall not attempt to settle a loss with a first party claimant on the basis of a cash settlement which is less than the amount the insurer would pay if repairs were made, other than in total loss situations, unless such amount is agreed to by the insured.

Section 9. Standards for Prompt, Fair and Equitable Settlements Applicable to Automobile Insurance.

(a) When the insurance policy provides for the adjustment and settlement of first party automobile total losses on the basis of actual cash value or replacement with another of like kind and quality, one of the following methods must apply:

(1) The insurer may elect to offer a replacement automobile which is a specific comparable automobile available to the insured, with all applicable taxes, license fees and other fees incident to transfer of evidence of ownership of the automobile paid, at no cost other than any deductible provided in the policy. The offer and any rejection thereof must be documented in the claim file.

(2) The insurer r[illegible]elect a cash settlement based upon the actual cost, less any deductible provide[illegible]he policy, to purchase a compa[illegible] automobile including applicable tax[illegible] license fees and other fees incide[illegible]o transfer of evidence ownership of a comparable automobile. Such cost may be determined by

(A) The cost of a comparable automobile in the local market area when a comparable automobile is available in the local market area.

(B) One of two or more quotations obtained by the insurer from two or more qualified dealers located within the local market area when a comparable automobile is not available in the local market area.

(3) When a first party automobile total loss is settled on a basis which deviates from the methods described in subsections (a)(1) and (a)(2) of this section, the deviation must be supported by documentation giving particulars of the automobile condition. Any deductions from such cost, including deduction for salvage, must be measurable, discernible, itemized and specified as to dollar amount and shall be appropriate in amount. The basis for such settlement shall be fully explained to the first party claimant.

(b) Where liability and damages are reasonably clear, insurers shall not recommend that third party claimants make claim under their own policies solely to avoid paying claims under such insurer's insurance policy or insurance contract.

(c) Insurers shall not require a claimant to travel unreasonably either to inspect a replacement automobile, to obtain a repair estimate or to have the automobile repaired at a specific repair shop.

(d) Insurers shall, upon the claimant's request, include the first party claimant's deductible, if any, in subrogation demands. Subrogation recoveries shall be shared on a proportionate basis with the first party claimant, unless the deductible amount has been otherwise recovered. No deduction for expenses can be made from the deductible recovery unless an outside attorney is retained to collect such recovery. The deduction may then be for only a pro rata share of the allocated loss adjustment expense.

(e) If an insurer prepares an estimate of the cost of automobile repairs, such estimate shall be in an amount for which it may be reasonably expected the damage can be satisfactorily repaired. The insurer shall give a copy of the estimate to the claimant and may furnish to the claimant the names of one or more conveniently located repair shops.

(f) When the amount claimed is reduced because of betterment or depreciation all information for such reduction shall be contained in the claim file. Such deductions shall be itemized and specified as to dollar amount and shall be appropriate for the amount of deductions.

(g) When the insurer elects to repair and designates a specific repair shop for automobile repairs, the insurer shall cause the damaged automobile to be restored to its condition prior to the loss at no additional cost to the claimant other than as stated in the policy and within a reasonable period of time.

(h) ~~The insurer shall not use as a basis for cash settlement with a first party claimant an amount which is less than the amount which the insurer would pay if repairs were made, other than in total loss situations, unless such amount is agreed to by the insured.~~ Insurers shall include consideration of applicable taxes, license fees, and other fees incident to transfer of evidence of ownership in third party automobile total losses and shall have sufficient documentation relative to how the settlement was obtained in the claim file. A measure of damages shall be applied which will compensate third party claimants for the reasonable loss sustained as the proximate result of the insured's negligence.

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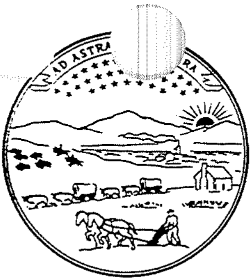
Legislative History (all references are to the Proceedings of the NAIC).



STATE OF KANSAS

KANSAS INSURANCE DEPARTMENT

420 S.W. 9th
Topeka 66612-1678 913-296-3071

1-800-432-2484
Consumer Assistance
Division calls only

RON TODD
Commissioner

MEMORANDUM

TO: The Honorable Larry Turnquist, Chair
House Committee on Insurance

FROM: Dick Brock, Administrative Assistant
Kansas Insurance Department

SUBJECT: Alternative to KTLA proposal to amend the Kansas Unfair Trade Practices Act, K.S.A. 1990 Supp. 40-2404

DATE: January 28, 1991

As we briefly discussed last Thursday, the National Association of Insurance Commissioners has adopted a revised approach to the regulation of unfair claims settlement practices provisions in the Unfair Practices Act. Specifically, the NAIC has now adopted separate model acts by removing the unfair claims settlement provisions from the general Unfair Trade Practices Act and putting them in an act by themselves.

We considered recommending a proposal of this nature this year but the result would have been little different from what we can do under our current law with one exception.

The exception addresses basically the same area as the KTLA's proposal but does so in an administrative way rather than through the process of litigation. Specifically, the new NAIC model adds another criteria which can be used to determine if an unfair trade practice has, under the law, been committed. In addition to the general business practice criteria, violating one or more of the described unfair claims settlement practices provisions would be considered a violation of the act if a single incident is committed flagrantly or with conscious disregard of the statutory or regulatory guidelines.

Since you expressed an interest in this approach, I have prepared and have attached a rough draft of a possible amendment for your consideration.

If you have any questions or wish to discuss this matter further, please do not hesitate to contact me.

cc: Bill Edds
Revisor of Statutes Office

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Amendment of K.S.A. 1990 Supp. 40-2404

(9) Unfair claim settlement practices. ~~Committing--or--performing with-such-frequency-as-to-indicate-a-general-business-practice-of-any-of the-following:~~ It is an unfair claim settlement practice if any of the following or any regulations pertaining thereto are: (A) committed flagrantly and in conscious disregard of such provisions; or (B) committed with such frequency as to indicate a general business practice.

(a) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

(b) failing to acknowledge and act reasonably prompt upon communications with respect to claims arising under insurance policies;

(c) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

(d) refusing to pay claims without conducting a reasonable investigation based upon all available information;

(e) failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

(f) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

(g) compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

(h) attempting to settle a claim for less than the amount to which a reasonable person would have believed that such person was entitled by reference to written or printed advertising material accompanying or made part of an application;

(i) attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;

(j) making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made;

(k) making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

(l) delaying the investigation or payment of claims by requiring an insured, claimant or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(m) failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance coverage;

(n) failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

KANSAS INSURANCE DEPARTMENT

REPORTING PERIOD 1/01/88 TO 12/31/88 COMPLAINT & INQUIRY FILES CLOSED BY DIVISION REPS

	NUMBER OF FILES CLOSED	NUMBER OF REOPENED FILES	RELIEF GRANTED	NO RELIEF GRANTED	ORIGINATED BY LETTER	ORIGINATED BY PHONE	ORIGINATED BY WALK-IN	CONS. DAY	QUEST/ INV/MC	AMOUNT RECOVERED	RESOLUTION TIME (DAYS)
CONSUMER ASSISTANCE											
	696	53	650	97	660	48	36			727,648.31	47
	43		43		43					.00	887
	791	22	632	181	709	3	100			403,501.21	68
	617	54	530	138	549	40	78			576,028.97	88
	345	21	327	38	207	6	151			696,327.32	74
	68		68		20	46	2			.00	2
	440	25	397	67	438	13	12			99,597.38	39
	687	16	518	185	616	10	74			320,595.60	50
		2	2		1		1			.00	
	1		1		1					7,386.51	104
	5		4	1	5					6,856.25	40
	641	36	583	93	625	22	29			144,908.88	35
	584	63	461	178	589	17	31			114,940.67	57
	2		1	1	2					.00	224
	13		8	5	12		1			6,362.73	577
	590	28	561	57	536	16	66			749,261.73	99
		1	1		1					.00	
	754	35	482	307	688	29	68			361,731.39	76
	806	61	612	249	695	44	117			548,439.43	40
	7083	417	5881	1597	6397	294	766			4,763,602.38	66
WICHITA											
	370	2	222	150	307		64			413,662.15	52
	10		6	4	10					.00	17
	287	3	190	100	248		37			203,355.59	58
	46		26	20	43		1			5,880.29	49
	713	5	444	274	608		102			622,898.03	54
	7796	422	6325	1871	7005	294	868			5,386,500.41	65

KANSAS INSURANCE DEPARTMENT

REPORTING PERIOD 1/01/89 TO 12/31/89 COMPLAINT & INQUIRY FILES CLOSED BY DIVISION REPS

	NUMBER OF FILES CLOSED	NUMBER OF REOPENED FILES	RELIEF GRANTED	NO RELIEF GRANTED	ORIGINATED BY LETTER	ORIGINATED BY PHONE	ORIGINATED BY WALK-IN	CONS. DAY	QUEST/ INV/MC	AMOUNT RECOVERED	RESOLUTION TIME (DAYS)
CONSUMER ASSISTANCE											
	714	62	690	80	593	144	28			375,7[illegible].65	37
	1	1		2	2					.00	165
	634	16	460	189	635	5	8			439,81[illegible].54	54
	812	23	639	196	651	115	67			578,753.25	52
	286	40	296	30	304	10	12			839,681.28	73
	562	25	490	97	486	75	24			292,925.71	36
	593	25	460	158	542	19	54			227,084.22	48
	626		626		124	498				.00	
	26	4	20	8	25	3				22,809.93	68
	681	35	641	74	600	98	17			263,737.18	33
	767	54	679	137	655	119	39			204,690.08	50
	2	2	4		4					.00	620
	494	23	458	59	444	25	46			801,903.66	84
	636	50	383	300	587	32	64			355,484.87	43
	651	42	493	196	558	42	81			318,802.08	33
	7485	402	6339	1526	6210	1185	440			4,721,43[illegible].65	44
WICHITA											
	43		30	13	37		5			36,787.06	60
	483	6	405	84	312	49	121			208,332.95	33
	611	16	414	213	408	58	159			109,110.37	26
	8		7	1	6		2			2,166.74	132
	53		40	13	53					9,189.92	57
	1198	22	896	324	816	107	287			365,587.04	32
	8683	424	7235	1850	7026	1292	727			5,087,021.69	42

KANSAS INSURANCE DEPARTMENT

REPORTING PERIOD 1/01/90 TO 12/31/90 COMPLAINT & INQUIRY FILES CLOSED BY DIVISION REPS

	NUMBER OF FILES CLOSED	NUMBER OF REOPENED FILES	RELIEF GRANTED	NO RELIEF GRANTED	ORIGINATED BY LETTER	ORIGINATED BY PHONE	ORIGINATED BY WALK-IN	CONS. DAY	QUEST/ INV/MC	AMOUNT RECOVERED	RESOLUTION TIME (DAYS)
CONSUMER ASSISTANCE											
	883	53	805	129	717	195	21			2,824,680.04	54
	639	19	445	213	640	8	9			657,042.68	70
	868	74	725	212	664	187	84			1,493,529.40	57
	264	38	270	30	277	14	9			276,659.22	64
	564	43	501	101	496	82	24			360,692.49	38
	724	25	596	153	691	18	40			288,511.78	52
	1555	1	1556		259	1296				.00	
	16	1	16	1	12	5				29.88	19
	1		1		1					.00	23
	846	45	831	58	651	192	45			244,378.48	33
	838	52	695	194	733	129	27			211,136.89	63
	552	29	532	49	509	32	40			662,658.56	86
	736	47	460	321	716	17	47			281,102.80	54
	779	65	617	224	716	32	91			230,315.52	40
	9265	492	8050	1685	7082	2207	437			7,530,737.74	45
WICHITA											
	295	4	248	51	153	50	93			125,478.60	31
	755	6	651	110	386	152	220			439,948.15	29
	435		354	81	156	119	158			280,171.00	21
	9		6	3	9					7,518.75	56
	1494	10	1259	245	704	321	471			853,116.50	27
	10759	502	9309	1930	7786	2528	908			8,383,838.24	42

MEMORANDUM

TO: Larry Turnquist
House Insurance Committee

FROM: William W. Sneed
State Farm Insurance Companies

DATE: February 6, 1991

RE: House Bill 2082

Mr. Chairman and members of the House Insurance Committee, my name is Bill Sneed and I represent State Farm Insurance Companies. I am here today to state my client's opposition to H.B. 2082. It is my client's position that H.B. 2082 is unwarranted, costly, and not in the best interest of the insuring public.

General Discussion

H.B. 2082 is an amendment to K.S.A. 40-2404, which is commonly referred to as the Unfair Claims Settlement Practices Act. This statute, taken from the National Association of Insurance Commissioners (NAIC) Model Bills, was and is designed to grant adequate authority to the regulatory body to regulate claims practices by insurers within a particular state. Under current law, the action by the insurance company must be committed or performed "with such frequency as to indicate a general business practice" in order to be in violation of K.S.A. 40-2404. The proposed amendment offered by the plaintiffs' attorneys is to change current Kansas law in two particular areas.

First, it is to create a new cause of action against insurance companies for acts alleged to have been committed in violation of K.S.A. 40-2404. Currently, K.S.A. 40-

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Feb. 6, 1991
Attachment 4

2404 cannot be used as a cause of action by an individual, and is only available as a regulatory tool for the Kansas Insurance Department.

Secondly, once this new cause of action is created, the plaintiffs' bar wishes to provide that one single infraction regardless of intent would be enough on which to base a lawsuit against an insurer.

My client supports K.S.A. 40-2404. The purpose of the statute is to regulate the overall business practices of insurers, rather than single isolated instances. Such violations are almost always inadvertent and can occur regardless of safeguards adopted by the insurer. Thus, we support the current law as a remedy against those few insurers which pursue a general business practice of unfair claims practices.

Case Law Review

After several early cases dealing with bad faith, the California Supreme Court in 1979 came out with Royal Globe v. Superior Court. In Royal Globe, the sole issue was whether an individual who is injured by alleged negligence of an insured may sue the negligent party's insurer for violation of the Unfair Practices Act. Subsections of that Act require insurers to "effectuate prompt, fair, and equitable settlements" and to refrain from "directly advising a claimant not to obtain the services of an attorney." The Court first reasoned that another section provided private litigants with a cause of action against insurers who violate the Unfair Practices Act. Then the Court concluded that since the Unfair Practices Act refers to claimants, and since the legislative history indicates that the

legislature failed to exercise their opportunity to change the language of the Act in order to clarify its application, third parties were to be protected by the Unfair Practices Act.

The next major decision was Moradi-Shalal v. Fireman's Fund Insurance Co. in 1988. In that case the Court began its discussion by noting that although similar unfair practices acts had been adopted by forty-eight states, "the Courts of other states have largely declined to follow our Royal Globe analysis." [Including the State of Kansas in the case of Spenser v. Aetna Life, 227 Kan. 914 (1980).] The Court viewed these out-of-state cases as strongly calling into question the validity of the Court's statutory analysis in Royal Globe. The Court also noted the criticism of scholarly journals which indicated the erroneous nature of the Royal Globe decision and the undesirable social and economic effects. The Court criticized the form court's ruling due to its failure to provide answers to practical questions on the scope of the action. For those reasons, the Court overruled Royal Globe.

Statistical Analysis

Although it is unclear whether Royal Globe had a significant impact on the frequency of bodily injury (BI) claims, and further, we cannot "actuarily" establish its impact, it is interesting to note certain trends before, during and after the Royal Globe case. Attached are two charts for your review.

The first chart shows the trend since 1968 in State Farm's average paid BI claim cost in California and in a "representative" tort state. The latter is based on the average of the claim costs in Alabama, Illinois, Ohio and Texas. Also shown for

comparison are the CPI-All Items and CPI-Medical Care trends over the same period. As you will notice, the Four state Average kept pace with the CPI-Medical Care Index while California's BI claim cost rose sharply during 1979 through 1988. The BI claim cost in California declined in 1989, but now has increased in the first nine months of 1990. Just as it took a long period of time for the adverse effects of Royal Globe to accumulate, it will take a period of time for the beneficial effects of Moradi-Shalal to materialize. [Note: Little, if any, of this spread can be attributed to our California policyholders carrying higher limits than elsewhere, since there is not a significant difference in the distribution of business by limits between California and the Four State Average.]

The other chart shows a comparison of the ratio of the BI liability incurred claim frequency to the PD liability incurred claim frequency over the same period. Everything else being equal, you would expect this ratio to remain constant. The Four State Average dropped a little, then climbed back to the 1968 level and in the last four years has continued to increase. The California ratio stayed flat for a few years and then increased, most dramatically from 1983 to 9187. These recent increasing trends are similar to those in the very recent study by the Insurance Research Council. As stated in their report Trends in Auto Bodily Injury Claims, there has been a growing trend by the American public to file more liability claims for bodily injuries in the past decade. The report concluded that this trend is due primarily to changes in claiming behavior rather than to increases in accident frequency or severity.

Kansas Status

We are unaware of any rational basis on which to establish a new cause of action within our current tort system. If individual claimants are treated unfairly, current Kansas law provides ample protection and safeguards for them. In addition to various opportunities to collect attorney's fees, Kansas, under the appropriate circumstances, does provide for punitive damages, which have historically been established to punish the wrongdoer above and beyond the plaintiff's actual damages. Further, we are unaware of any public outcry for such legislation.

The Kansas insurance market is one of the most reasonably priced markets within the country. Further, the Kansas Insurance Department is one of the most widely respected insurance departments within the country, and its Consumer Affairs Division, which monitors claims practices, has recently been denoted as one of the top consumer divisions in the United States. Since K.S.A. 40-2404 is a complex insurance law, it should remain in the hands of the experts, the Kansas Insurance Department.

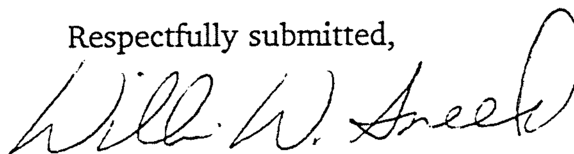
Additionally, as with prior discussions held by this legislature relative to punitive damages, in order to provide insurance at a reasonable price, it is important to allow recovery against companies for damages suffered by an individual, and that those damages should not be expanded upon simply by utilizing a threat of an additional cause of action. Clearly, our experience has indicated that once this type of cause of action is allowed for, all lawsuits thereafter, regardless of merit, will insert a claim for unfair claim settlement practice. As with punitive damages, the Kansas legislature has disallowed such

a practice of "shotgun pleading" on causes of action, and only provided for those causes of action if there is a reasonable basis for such an action.

Conclusion

Hearing no public outcry for such a proposal, coupled with the fact that Kansas enjoys reasonably priced insurance and has one of the most highly respected insurance departments in the country, we see no reason for the enactment of H.B. 2082. Thus, we respectfully request your disfavorable consideration.

Respectfully submitted,



William W. Sneed

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20 X 20 PER INCH
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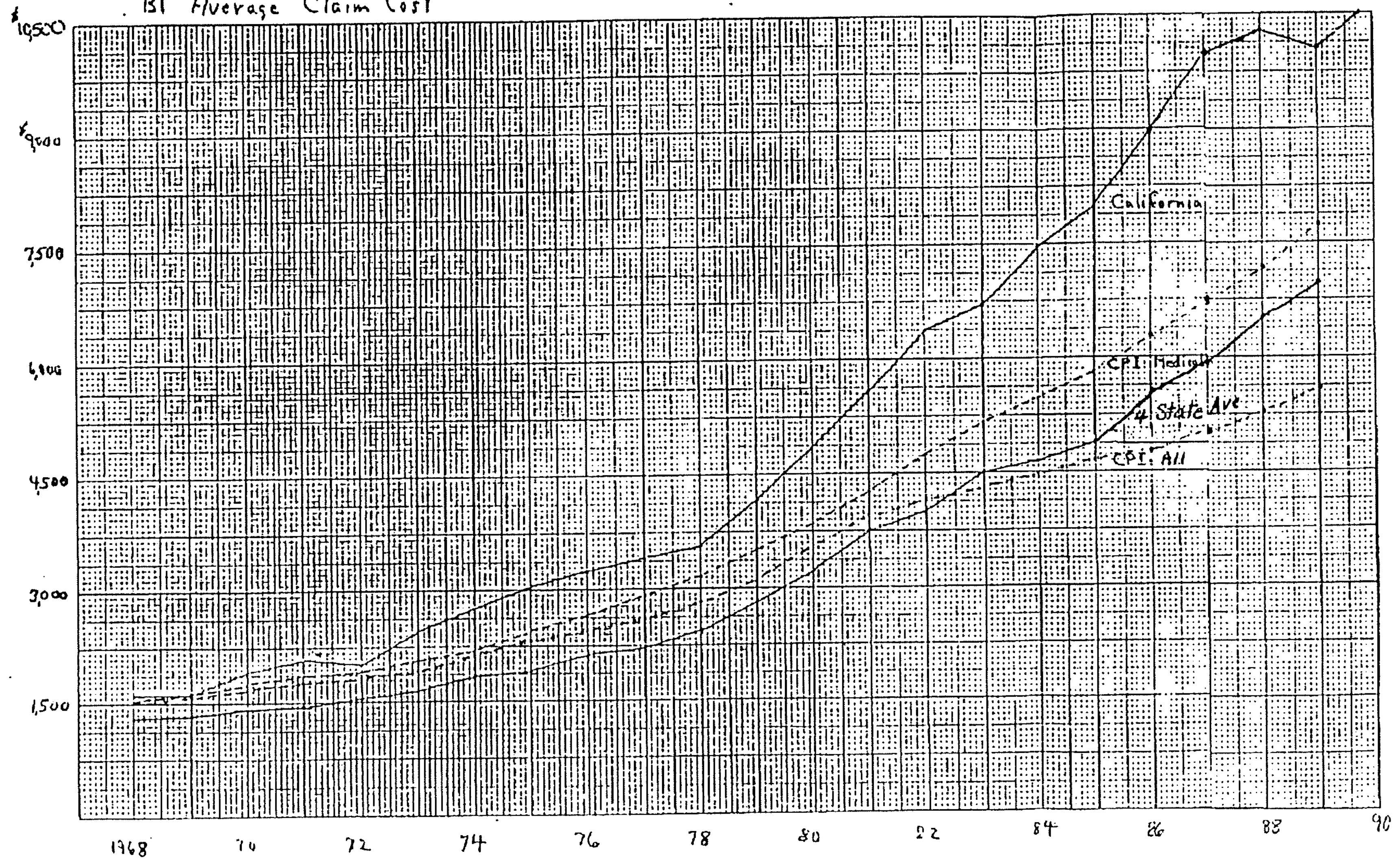
MADE IN U.S.A.



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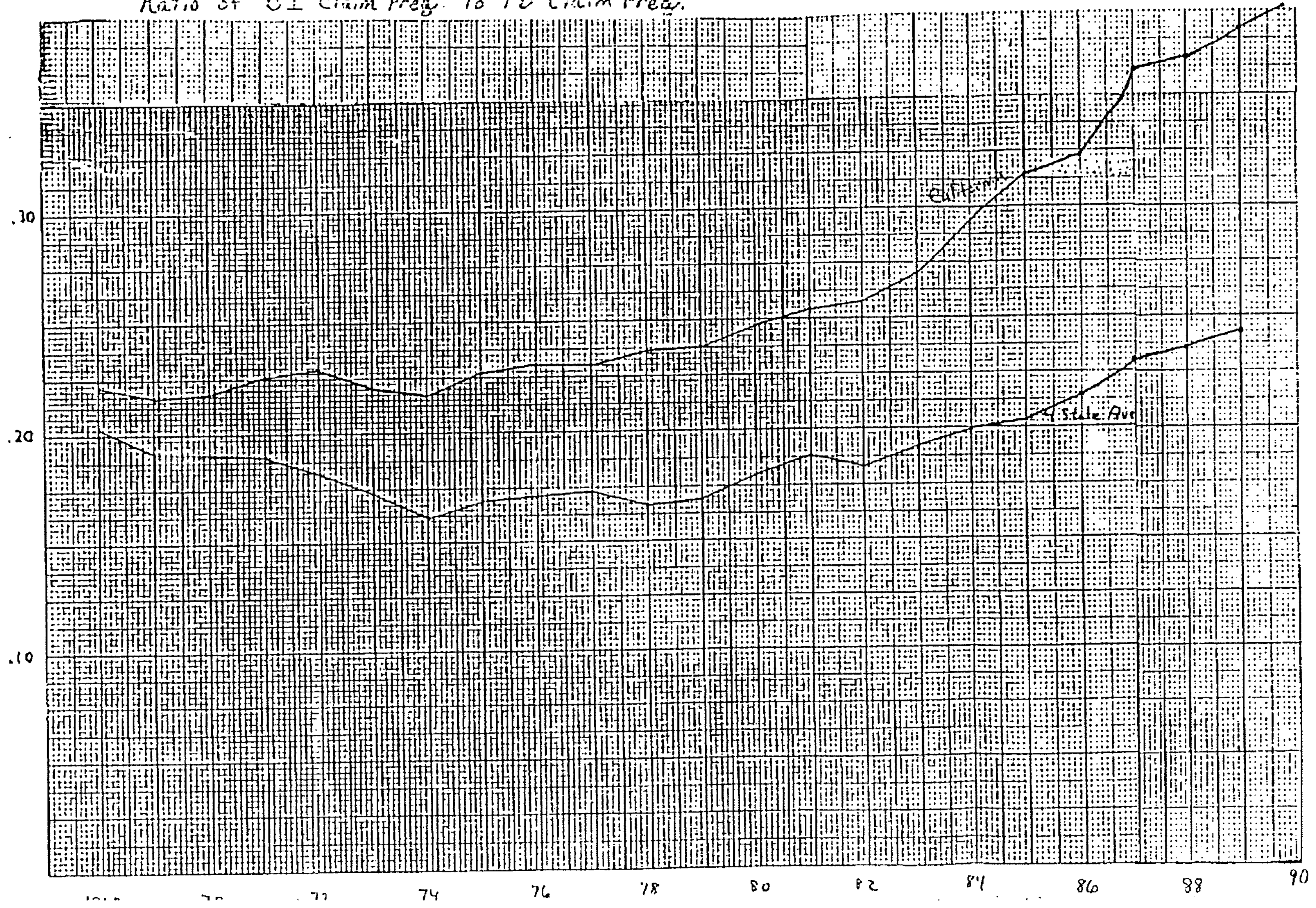

Ratio of BI Claim Freq. to PD Claim Freq.
.30
.20
.10
4 State Avg
74
76
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80
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88
90

MEMORANDUM IN OPPOSITION TO HB 2082

My name is L. M. Cornish and I represent the Kansas Association of Property and Casualty Insurance Companies and The Kansas Life Insurance Association. The Property/Casualty Association is composed of the 17 domestic Kansas companies; the Life Association is composed of the 11 domestic Kansas life and health insurance companies. We are the home owned - home growned section of the insurance industry.

HB 2082 will confer a 3rd party right of action or a private right of action against an insurer for any single practice described in K.S.A. 40-2404(b)(9) beginning at line 12, page 4, and authorizes recovery of attorney fees and other alleged damages.

This concept arose from a California Court Decision some years ago. Significantly, that California Court Decision has since been reversed.

The significant language is found on lines 33-39 on page 6 of the bill which provides that any person may bring an action against an insurance company if it has a single violation of subsection (9).

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Attachment 5

It is important to recognize that the current statute, which is termed the Kansas Unfair Claims Settlement Practices Act, was enacted by the legislature to create a framework for regulation of the claims settlement practices of insurers by the Kansas Insurance Department and creates a regulatory offense if there are violations with such frequency as to indicate a "general business practice." The objective of the present law is to give the Department the tools to assure that insurance companies promptly and fairly meet their insurance claim obligations. Violations of the current law result in stringent penalties being imposed upon the offending company by the Insurance Department which penalties may be as high as $50,000.

Clearly, the current law was never intended to be the basis for a private right of action, especially by claimants not parties to the insurance contract. This law was enacted to allow the Insurance Department sufficient flexibility to regulate claim settlement practices and is, therefore, written in very broad terms which leave much to the discretion of the regulator. The intent of the current law is to set forth the responsibility of the Insurance Department with respect to the regulation of unfair claims practices; it is not intended to turn over regulation of the insurance industry to plaintiff lawyers and irate individuals who may have concerns which have nothing to do with proper regulation.

The current law empowers the Commissioner of Insurance to discipline any company which makes a general business practice of conducting claim settlement practices in a manner inconsistent with the law. The intent of the law is to prevent companies from adopting certain specifically designated unfair business practices to the detriment of the public and to give the Insurance Department the ability to discipline any company which adopts such practices. Isolated instances of failure to meet the imposed standards are not subject to sanctions in recognition of the fact that occasional unintentional lapses are bound to occur. The present law was not designed to establish a laundry list of "per se" violations nor does it create any new private causes of action.

The creation of this new cause of action will transform <u>any violation</u> of KSA 40-2402(a)(9) into a separate actionable tort. This will enormously increase litigation by granting a vaguely defined right of action to virtually any third party who may claim to have been a victim of an unfair claims practice. Such actions will be exceedingly expensive for insurers to defend and insurers might well be forced to defend actions by persons with whom they have no contractual relationship. Plaintiff attorneys are well aware of the

additional bargaining power which enactment of this legislation will give them. The great expense factor of defending and settling these "nuisance" suits will ultimately be borne by the general public through inevitable increases in insurance premiums.

The proposed bill has no bearing on the policy holder's right to maintain a <u>contractual</u> cause of action against his or her own insurer in the event of a dispute; that right has always existed. This bill will, however, grant the right to both insureds and third party claimants to bring an additional tort action against an insurer.

In the real world, this additional legal exposure is intended to create new leverage to be applied by a plaintiff attorney against an insurer. The insurer will face a dilemma: the company will have to either settle liability claims for an amount higher than the claim will justify, or face a second lawsuit demanding additional damages. Predicting the outcome of cases based on the new cause of action is extremely difficult, but it must be borne in mind that the legal expense of defending such suits alone would be great enough to cause auto insurance rates to rise.

House Bill #2082 - Unfair Claims Practices

House Insurance Committee

Testimony by Lee Wright

Legislative Representative for Farmers Insurance Group

Mr. Chairman and members of the Committee. My name is Lee Wright and I am representing Farmers Insurance Group. We appreciate this opportunity to appear here today in opposition to House Bill 2082.

There are a number of reasons why we are opposed to this legislation, but in the interest of the Committee's time, I will devote my testimony to one particular concern.

One of the most significant and direct factors adversely affecting the cost of insurance to the public are fraudulent claims. It has been estimated the size of insurance fraud amounts to 10% of total claim dollars paid. Nationwide claim losses from fraud were estimated at seventeen billion dollars for 1989.

Farmer's considers fraud a prevalent and real problem. Our Regional Office in Overland Park employs a full-time in house special investigator whose primary functions are to coordinate fraudulent claims investigations in Kansas and educate our claims personnel in recognizing and handling suspected fraudulent claims.

Combating fraudulent claims is a vital part of overall claims cost control. As such, we are concerned HB2082 will decrease the incentive and ability to effectively investigate and resist

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payment of those claims where strong fraud indicators are present because of the added looming threat of a direct cause of action against us imposed by this bill. That increased threat of costly litigation could have an adverse impact on our claims handling strategy and the practicality of fending off fraudulent claims in the future.

Mr. Chairman, that concludes my remarks. Thank you.

KaMMCO

KANSAS MEDICAL MUTUAL INSURANCE COMPANY
AND
KANSAS MEDICAL INSURANCE SERVICES CORPORATION

TO: House Insurance Committee

FROM: Lori M. Callahan
Legislative Counsel

SUBJECT: H.B. 2082

DATE: February 9, 1991

The Kansas Medical Mutual Insurance Company, KaMMCO, is a Kansas, physician owned, non-profit professional liability insurance company formed by the Kansas Medical Society pursuant to legislation enacted by the Kansas Legislature. KaMMCO currently insures 750 Kansas physicians. KaMMCO opposes H.B. 2082.

H.B. 2082 creates a private cause of action for violation of the current law which prohibits unfair methods of competition or unfair and deceptive acts or practices by the insurance industry. This act allows the Kansas Department of Insurance currently to investigate and take action against companies who have violated the act. This service is provided completely free of cost to those affected by the act. Allowing a private cause of action for violations of the act would therefore result in no additional benefit to those affected by a violation, and yet would result in the consumer being required to pay for such a benefit. Considering that attorney fees in Kansas commonly are 40% of amounts collected, and can rise to 50%, a

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private cause of action would apparently benefit only the attorney representing the consumer, rather than the consumer itself.

The Kansas Department of Insurance can show a very fine record of aggressive prosecution in collection of fines against the few who have violated the act. If an attorney feels that his client has been harmed by a violation of the act, the attorney must merely report and refer the case to the Kansas Department of Insurance so that the Department may perform its job.

It is the position of KaMMCO, therefore, that H.B. 2082 under the guise of assisting consumers in fact provides them no additional benefits and only adds costs to the system, which in the end must be paid for through increased insurance premiums. In a time when increased insurance costs to all Kansans is creating statewide problems, especially in the area of the availability of health care, it is the position of KaMMCO that H.B. 2082 is not only unnecessary, but a detriment to the state.

Thank you. Please let me know if I can answer any questions.

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TO: House Insurance Committee

FROM: Glenda L. Cafer
American Insurance Association

SUBJECT: H.B. 2082

DATE: February 9, 1991

The American Insurance Association is a trade organization of over 200 property and casualty insurance companies providing insurance in all lines of property and casualty insurance nationwide. AIA opposes H.B. 2082.

H.B. 2082 would provide a private cause of action for unfair claim settlement practices by insurance companies. Currently, the Kansas Department of Insurance has substantial power and authority to assess fines and other remedies against insurance companies who violate K.S.A. 40-2402, which pertains to unfair methods of competition and unfair practices in the insurance industry. These fines can be up to $2,500.00 per violation or $10,000.00 per violation if the violation was done in a knowing manner. To allow a private cause of action under this act results in substantial costs to the system without any resulting benefits to the consumer. A private cause of action would increase litigation, increase administrative costs, and increase defense costs. Such costs result without a corollary benefit in

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that currently the Kansas Department of Insurance has complete power and authority to enforce the act without <u>any</u> cost to the consumer. The Kansas Department of Insurance has shown its effectiveness in collecting monetary penalties against companies who have violated the act. This is all done without the need for payment of attorney fees in order to enforce the act.

Accordingly, the American Insurance Association opposes H.B. 2082 as an unnecessary expense to the system without a corollary benefit.