Approved Feb. 26, 1992
Date

MINUTES OF THE House COMMITTEE ON Insurance.

The meeting was called to order by Representative Turnquist Chairperson at

3:30 xx.m./p.m. on Thursday, Feb. 20, 1992 in room 531 N of the Capitol.

All members were present except:

Representative Sebelius - Excused

Committee staff present:
Mr. Fred Carman, Revisor
Mr. Chris Courtwright, Research
Mr. Mark Hunter, Intern
Mrs. Nikki Feuerborn, Secretary

Conferees appearing before the committee:

Discussion and Final Action on HB 2414 - An Act concerning group-funded workers compensation pools.

Mr. Chris Courtwright of ~~the~~ Legislative Research gave a staff review and history of the bill. This bill has been studied and recommendations made by a subcommittee composed of Representatives Weiland, Welshimer, and Sprague. (See Attachment 1).

Representative Sprague moved that the committee accept the balloon amendment version of **HB 2414** as presented by the subcommittee. Representative Welshimer seconded the motion. Motion carried.

Representative Sprague moved to add an additional member to the pool board which is to be designated and appointed by the Insurance Commissioner. This member is to be a representative of the affected group-funded. Representative Ensminger seconded the motion. Motion carried.

Representative Cornfield moved to table the bill. Representative Hayzlett seconded the motion. Representative Sprague entered a substitute motion to pass the bill out of committee favorably as amended. This motion was seconded by Representative Weiland. Motion carried by a vote of 7 in favor and 5 against. It was noted that this bill does not include or affect municipal pools.

Mr. Dave Hanson distributed additional information on **HB 2755** which will be discussed next week. (See Attachment 2).

Representative Wells moved that the minutes of the February 18, 1992, meeting be approved. Representative Gilbert seconded the motion. Motion carried.

The meeting adjourned at 4:30 p.m.

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.

GUEST LIST

COMMITTEE: House Insurance

DATE: Feb. 20, 1992

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Anne Smith		
Gary Robbins		
John Grace		
George Puckett		
Brad Smart		
Dave Hanson		

1991

HOUSE BILL No. 2414

By Committee on Insurance

2-20

8 AN ACT concerning group-funded workers compensation pools;
9 amending K.S.A. 44-582, 44-589 and 44-592 and repealing the
10 existing sections.

44-585,

11
12 *Be it enacted by the Legislature of the State of Kansas:*
13 Section 1. K.S.A. 44-582 is hereby amended to read as follows:
14 44-582. Application for a certificate of authority to operate a pool
15 shall be made to the commissioner of insurance not less than 60
16 days prior to the proposed inception date of the pool. The application
17 shall include the following:
18 (a) A copy of the bylaws of the proposed pool, a copy of the
19 articles of incorporation, if any, and a copy of all agreements and
20 rules of the proposed pool. If any of the bylaws, articles of incor-
21 poration, agreements or rules are changed, the pool shall notify the
22 commissioner within 30 days after such change.
23 (b) A copy of the trust agreement securing the payment of work-
24 ers' compensation benefits. If the trust agreement is changed, the
25 pool shall notify the commissioner within 30 days after such change.
26 (c) Designation of the initial board of trustees and administrator.
27 When there is a change in the membership of the board of trustees
28 or change of administrator, the pool shall notify the commissioner
29 within 30 days after such change.
30 (d) The address where the books and records of the pool will be
31 maintained at all times. If this address is changed, the pool shall
32 notify the commissioner within 30 days after such change.
33 (e) An individual application for each initial member of the pool.
34 Each individual application shall include a current certified financial
35 statement on a form approved by the commissioner.
36 (f) A current certified financial statement on a form approved by
37 the commissioner showing that the combined net worth of all mem-
38 bers applying for coverage on the inception date of the pool is in
39 an amount not less than $1,000,000.
40 (g) A current certified financial statement on a form approved by
41 the commissioner showing the financial ability of the pool to meet
42 its obligations under the workmen's compensation act.
43 (h) Evidence that the annual Kansas gross premium of the pool

1 will be not less than $250,000. The annual Kansas gross premium
2 shall be based upon the authorized rates as filed by the national
3 council of compensation insurance.
4 (i) An indemnity agreement jointly and severally binding the
5 group and each member thereof to comply with the provisions of
6 the workmen's compensation act. The indemnity agreement shall be
7 in a form acceptable to the commissioner.
8 (j) Proof of payment by each member of not less than 25% of
9 the estimated annual premium into a designated depository.
10 (k) A copy of the procedures adopted by the pool to provide
11 services with respect to underwriting matters and safety engineering.
12 (l) A copy of the procedures adopted by the pool to provide
13 claims adjusting and reporting of loss data.
14 (m) A confirmation ~~of~~ *that* specific and aggregate excess insurance
15 *provided by an insurance company holding a Kansas certificate of*
16 *authority is or will be in effect concurrent with the assumption of*
17 *risk by the pool.*
18 (n) Any other relevant factors the commissioner may deem
19 necessary.
20 Sec. ~~2~~. K.S.A. 44-589 is hereby amended to read as follows: 44- [3]
21 589. (a) Each licensed pool shall be assessed annually as provided
22 by K.S.A. 74-713, ~~K.S.A.~~ 44-566a, ~~and amendments thereto,~~ and
23 ~~K.S.A.~~ 44-588, *and amendments thereto*.
24 (b) Each *proposed and* licensed pool shall be subject to the pro-
25 visions of article 24 of chapter 40 of the Kansas Statutes Annotated.
26 *(c) Each pool shall be subject to assessments authorized by the*
27 *Kansas workers compensation plan established pursuant to K.S.A.*
28 *40-2109, and amendments thereto, based upon the pool's written*
29 *premium for workers compensation insurance in Kansas.*~~,~~
30 Sec. ~~3~~. K.S.A. 44-592 is hereby amended to read as follows: 44- [4]
31 592. Any person soliciting ~~the business of workers' compensation~~
32 ~~insurance~~ *coverage* for a *proposed or licensed* group-funded workers'
33 compensation pool must be licensed as provided in K.S.A. 40-240
34 to 40-243, and amendments thereto. [44-585,]
35 Sec. ~~4~~. K.S.A. 44-582, 44-589 and 44-592 are hereby repealed. [5]
36 Sec. ~~5~~. This act shall take effect and be in force from and after [6]
37 its publication in the statute book.

Sec. 2. K.S.A. 44-585 is hereby amended to read as follows: 44-585. (a) Premium contributions to the pool shall be based upon appropriate manual classification and rates, plus or minus applicable experience credits or debits, and minus any advance discount approved by the trustees, not to exceed 15% of manual premium. The pool must use rules, classifications and rates as promulgated by the national council on compensation insurance and must report premium and loss data to a rating organization.

(b) At least 70% of the annual premium shall be placed into a designated depository for the sole purpose of paying claims. This shall be called the claims fund account. The remaining annual premium shall be placed into a designated depository for the payment of taxes, fees and administrative costs. This shall be called the administrative fund account. The assessments required under subsection (c) of K.S.A. 44-589 and amendments thereto may be paid from the claims fund account.

(c) Any surplus moneys for a fund year in excess of the amount necessary to fulfill all obligations under the workmen's compensation act for that fund year may be declared to be refundable by the trustees not less than 12 months after the end of the fund year, upon the approval of the commissioner. Such approval can be obtained only upon satisfactory evidence that sufficient funds remain on deposit for the payment of all outstanding claims and expenses, including incurred but not reported claims. Any such refund shall be paid only to those employers who remained participants in the pool for an entire year. Payment of previously earned refunds shall not be contingent on continued membership in the pool.

, except such assessment shall not be greater than the sum of any advance discount given during the policy year and the surplus moneys that are to be refunded under subsection (c) of K.S.A. 44-589 and amendments thereto. A pool shall be allowed to use the take out credit plan as filed by the national council on compensation insurance and approved by the commissioner.

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MEMORANDUM

RE: Proposed Revisions to House Bill 2755

The revisions on page 1 of HB 2755 simply change "automobile" to "motor vehicle" to correspond with the terminology used on K.S.A. 40-3104, which mandates "motor vehicle liability insurance coverage."

Likewise, on page 2 of the bill, lines 22 and 24, the references to "automobile" should be changed to "motor vehicle." The striking of "or trailer" on line 22 is not necessary and should be left in. In changing these references to motor vehicle on lines 22 and 24, we have also included references to underinsured motor vehicles to allow the insurer to exclude or limit coverage not only to uninsured motor vehicles, but also underinsured motor vehicles. Since the statute providing for uninsured motorist coverage was amended in 1981 to include underinsured motorist coverage, it was understood that the reference to uninsured motorist coverage included underinsured motorist coverage.

However, the recent decision in Farmers Insurance Co. v. Gilbert, 14 Kan. App.2d 395 (1990), holds that that assumption does not carry over into the permitted exclusions. In that case, the insured had separate insurance policies for his motorcycle, his van and his automobile. He only had $25,000.00 coverage for the motorcycle but $50,000.00 for each of the other two vehicles. After he had a wreck while riding the motorcycle, he was allowed to pursue his claim against a policiy on one of his other vehicles in order to get the higher limits, even though he had agreed to lower limits on the motorcycle and even though the policy on the other vehicle specifically excluded coverage while he was occupying another vehicle he owned or regularly used which was not insured under that policy. Although the motorcycle was underinsured when compared to the other vehicle policy, it was not uninsured as restricted in the statutory exclusions. Thus, the Court could not enforce the exclusion and allowed the insured to avoid the lower limits he had chosen for the motorcycle and instead pursue higher coverages under one of his other vehicle policies. The Court noted that if "coverage is to be limited because of the vehicle Gilbert is occupying, the limitation must come from an express limitation or exclusion authorized by the legislature . . ." and later admitted that this broad view of coverage for an insured, whether in the described vehicle or another vehicle could lead "to odd results in some situations" and then gave examples from several prior decisions. We have therefore added additional clarifying language on line 23 to prevent such "odd results." For the same reasons, we have added the reference to "underinsured" on lines 27 and 32.

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Attachment 2

We have deleted the word "duplicative" on line 30 in reference to workers compensation benefits since workers compensation involves a different cause of action and different remedies, which by law are exclusive remedies. Also, as noted in our testimony, the Kansas Supreme Court has acknowledged that the coverage mandated in K.S.A. 40-284 insures that motorists are protected against loss at the same extent they themselves provide protection for the rest of the world. Motor vehicle liability policies are not required to pay for injuries to employees or fellow employees or other workers compensation obligations. See K.S.A. 40-3107(i)(3,8 and 9). By limiting the exclusion of workers compensation benefits to only those that are duplicative, we would allow the insured to have protection that the same insured is not providing for the rest of the world.

The change on line 33 simply requires that the insurer be given an opportunity to intervene and be heard in an action where a judgment or agreed order might be entered affecting the UM/UIM benefits. Otherwise, plaintiffs and their attorneys are not prevented from structuring their damages to inflate judgments and to maximize nonpecuniary damages, such as pain and suffering, in order to obtain UM/UIM benefits.

On lines 34 and 35, we have again stricken the word "duplicative" to avoid the confusion that has resulted from recent court decisions, which now apply an arbitrary mathematical formula to determine whether or not benefits are duplicative. Even though all of the medical bills, lost wages and other actual damages may have been paid by PIP benefits and even though the insured plaintiff may receive that same amount or even several times that amount from the defendant's liability insurance, recent court decisions say that if the plaintiff's damages, including nonpecuniary damages such as emotional distress, pain and suffering, total an amount that exceeds the liability payments plus the PIP benefits, then the benefits were not duplicative as a matter of law, even though the actual expenses have been more than covered by the earlier payments. The insurer not only cannot subrogate against the liability payments to recover the PIP benefits, since the word "duplicative" is also used in K.S.A. 40-3113(a), if "duplicative" is now inserted in the authorized exclusions, the insurer would also not be given any credit for those PIP benefits against UM/UIM coverage. This change is not only unfair, in light of current case law, it can also hurt many insureds where the benefits are duplicative. Where the PIP benefits are duplicative, the proposed change would allow the insurer to reduce the UM/UIM benefits and also be entitled to subrogation and reimbursement under K.S.A. 40-3113(a). We believe that our language produces an appropriate offset so

that the insured does not get a double benefit, but neither does the insurer get a double credit.

The inclusion of the additional exclusion (7) after line 35 is to take care of the problem addressed in the recent case of Stewart v. Capps, 14 Kan. App.2d 356 (1990), where a passenger was trying to get $50,000.00 on a $25,000.00 motor vehicle liability insurance policy. The passenger received the driver's $25,000.00 liability limits and then claimed an additional $25,000.00 under the driver's UM/UIM coverage due to a phantom vehicle allegedly causing the wreck. The policy contained a provision reducing the UM/UIM coverage by the amount paid under the liability coverage to prevent stacking of the coverages. The Court recognized that this question had not been decided in Kansas and that the legislature is capable of responding to the question as has happened in other cases. Since the statutorily authorized exclusions currently do not provide such an offset or exclusion to prevent stacking of coverages, the Court ruled that the insurer's exclusionary language was unenforceable. The Court indicated that it was "persuaded that if the setoff provision in ASIC's policy is to be valid and enforceable, it must join the laundry list of exclusions set out in K.S.A. 40-284, along with the permitted 'limitations'" for workers compensation and PIP benefits and then concluded the decision saying, "We emphasize the uninsured motorist statute could, but does not, authorize the offset claimed by ASIC and contained in its policy."

The wording added in line 38 is to give the UM/UIM insurer notice of any proposed payment or surrender by the tortfeasor's insurance, not just when there is a tentative agreement to "settle." An insured plaintiff may refuse to "settle," especially now that the courts hold that a total settlement means PIP benefits are "duplicative" and therefore must be reimbursed to the plaintiff's insurer. If the plaintiff refuses to settle, the tortfeasor's liability insurer may, without settling, pay its policy limits into court or to the plaintiff to avoid further litigation expense. At that point, the defendant may be "judgment proof" and willing to stipulate to any amount of damages or simply allow judgment to be entered by default. Obviously, an inflated damage award can result without the plaintiff's UM/UIM insurer having an opportunity to intervene or be heard.

The proposed changes on page 3, line 3 carry forward this concept by allowing the UM/UIM insurer to substitute its payment for any such proposed payment or surrender by the tortfeasor's liability insurance, not just when there is a "tentative settlement."

The remaining changes on page 3 and in K.S.A. 40-287, which we attached to the proposed revisions, are to assure that the UM/UIM insurer is entitled to subrogation and reimbursement from any recovery or payment received, regardless of whether the courts try to classify it as "duplicative" or "non-duplicative." This is in accord with a comment made by the Kansas Supreme Court in State Farm vs. Kroeker, 234 Kan. 636 (1984), noting that "in K.S.A. 40-287, which provides for subrogation rights to an insurer providing uninsured motorist coverage, the word 'duplicative' is not used by the legislature. The insurance carrier is entitled to be subrogated, to the extent of uninsured motorists payments paid, to the proceeds of any settlement or judgment obtained by the insured without restriction." (emphasis added).

We believe our revisions will make the legislative intent clear and help avoid the admitted "odd results" reached in some earlier court cases.

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