Approved January 28, 1992
Date

MINUTES OF THE SENATE COMMITTEE ON FINANCIAL INSTITUTIONS AND INSURANCE.

The meeting was called to order by SENATOR RICHARD L. BOND, Chairperson, at 9:10 a.m./~~p.m.~~ on Wednesday, January 22, 1992 in room 529-S of the Capitol.

All members were present ~~except~~

Committee staff present:

Bill Wolff, Research Department
Fred Carman, Revisor's Office
June Kossover, Committee Secretary

Conferees appearing before the committee:

Dick Brock, Kansas Insurance Department
Bob Frey, Kansas Trial Lawyer's Association
Lori Callahan, KaMMCO
Bill Sneed, State Farm Insurance
Lee Wright, Farmers Insurance
Brad Smoot, American Insurance Association
David Hanson, Kansas Life Ins. Assn.

The meeting was called to order by Chairman Bond at 9:10 a.m.

Senator Strick made a motion, seconded by Senator Salisbury, that the minutes of the meeting of Tuesday, January 21, 1992, be approved as submitted. The motion carried.

HB 2082 - An act relating to insurance; concerning unfair claim settlement practices; amending K.S.A. 1990 Supp. 40-2404 and repealing the existing section.

Chairman Bond informed the committee that this bill started out as a proposal by the trial lawyers; however, some language requested by the trial lawyers was stricken by the House Insurance Committee and replaced by language favored by the Insurance Department so that the bill now appears to have become an Insurance Department Bill. The bill passed the House by a large majority.

Dick Brock, Kansas Insurance Department, appeared before the committee in support of HB 2082 as amended. Mr. Brock explained that this bill sets forth guidelines for unfair claim settlement practices. Mr. Brock stated that the changes would allow the Insurance Commissioner to do more in the area of unfair claim settlement practices for acts committed "flagrantly and in conscious disregard" of the law. (Attachment 1)

Bob Frey, Kansas Trial Lawyer's Association, appeared before the committee to express the KTLA's interest in this bill and to propose an amendment (Attachment 2) to allow an insured to bring suit against an insurance company for engaging in any practice, without just cause or excuse, described in subsection (a) (9) and to make it unnecessary to prove that the act was committed or performed with such frequency as to indicate a general business practice, and to entitle the individual to reasonable attorney fees, settlement of the claim and any other damages allowed by law. The prohibited unfair claim settlement practices acts found in subsection (a) (9) only empower the Insurance Commissioner to act; there is no right of a private individual to file suit under the act. The KTLA feels it is appropriate to empower individuals with the ability to pursue violations of unfair claim settlement practices, rather than to continue

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.

to burden the Insurance Commissioner with this task and urges the committee to reinstate the stricken language. (Attachment 3)

Ms. Lori Callahan, Kansas Medical Mutual Insurance Company, appeared before the committee the advise that the position of KaMMCO is that the amendment appears to assist consumers but, in fact, provides no additional benefit. Ms. Callahan urged the committee to consider the impact the amendment would have on insurance premiums and to oppose the amendment offered by KTLA. Attachment 4)

Mr. William Sneed, State Farm Insurance Companies, appeared before the committee to inform the committee that State Farm's position is that the proposed "private right to action" amendment should not be included in this bill and the legislation should only encompass NAIC model bill, and that the current law has been useful in settling claims. (Attachment 5)

Mr. Lee Wright, Farmers Insurance Group, appeared before the committee to explain that Farmers Insurance Group are not opposed to HB 2082 in the amended form that passed the House last year, but would oppose any amendment which would allow a private right of action for a single violation of the Unfair Trade Practices Act. Mr. Wright stated that combating fraudulent claims is a necessary and vital part of controlling insurance costs; however, the threat of a private cause of action involving costly litigation would significantly decrease the incentive and economic practicality of attempting to fend off fraudulent claims in the future. (Attachment 6)

Mr. Brad Smoot, American Insurance Association, appeared before the committee to voice opposition to any further attempts to amend HB 2082 to reinstate a private cause of action. (Attachment 7)

David Hanson, Kansas Life Insurance Association and Kansas Association of Property-Casualty Insurance, appeared before the committee to voice opposition to the proposed KTLA amendments, stating that consumers also file fraudulent claims.

Chairman Bond announced that the hearings on HB 2082 were closed.

Fred Carman, with the Revisor's Office, recommended that the bill be amended to reflect the change in dates by inserting "1992." Senator Salisbury moved the adoption of the technical amendments recommended by Mr. Carman. Senator Kerr seconded the motion and the motion carried.

Senator Kerr made a motion, seconded by Senator Salisbury, to recommend HB 2082 favorably as amended.

A substitute motion was made by Senator Ward to amend the bill to include the language preferred by the Kansas Trial Lawyer's Association. The motion was seconded by Senator Francisco. The motion failed.

The original motion to recommend HB 2082 made by Senator Kerr and seconded by Senator Salisbury carried. Senator Bond will carry HB 2082.

The Senate Financial Institutions and Insurance Committee will not meet on Thursday, January 23, 1992.

The meeting adjourned at 9:55 a.m.

GUEST LIST

SENATE

COMMITTEE: FINANCIAL INSTITUTIONS AND INSURANCE   DATE: 1/22/92

NAME	ADDRESS	ORGANIZATION
Bill Sneed	Topeka	State Farm
Dick Wilson	Mayhew	Alliance Ins
Dave Hanson	Topeka	Ks Insur Assoc
Jerry Benaka	Manhattan	Ks Farm Bureau Life
Dick Brock	Topeka	Ks Ins Dept
R G Dreiling	"	KTLA
Chip Wheelen	Topeka	Ks Medical Soc.
Brad Smoot	"	AIA
Lori Callahan	Topeka	KaMMCO
Lee Wright	Overland Park	Farmers Ins. Group

Testimony by

Dick Brock, Kansas Insurance Department

Before the Senate Financial Institutions and Insurance Committee

January 22, 1992

As a review of the House Committee amendments will reveal, House Bill No. 2082 in its original form would have provided a private right of action against an insurance company that violates any provision of the unfair claim settlement practices established within the scope of the statutory provisions commonly referred to as the Kansas Unfair Trade Practices Act.

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 unfair claim settlement practices listed 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. This means it is difficult to institute formal proceedings -- it doesn't mean no action is taken and no assistance is available. An estimated 75% of consumer complaints are resolved in the consumer's favor but through mediation not formal administrative processes.

Therefore, the Insurance Department understands and supports the fundamental concept of House Bill No. 2082 to the extent of making the described practices more relevant to individual claims. What we could not support is the manner in which original House Bill No. 2082 proposed to do this.

FI&I 1-22-92

ATTACHMENT 1

The Department's biggest concern with House Bill No. 2082 was that the various unfair claims settlement practices described in the Kansas Unfair Trade Practices Act were not and are 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 simply as guidelines 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 and I have attached a copy of it as part of my testimony but, even with the regulation, these are still just guidelines.

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 but the N.A.I.C. (National Association of Insurance Commissioners) has now addressed the matter. The essence of the NAIC approach is embodied in the House Committee amendments which appear on lines 14 through 20 on page 4 of the bill.

With this amendment, the new language appearing on page 6 of the bill would not seem to be necessary because it preserves the original intent of establishing guidelines directed toward fair and consistent claims practices yet would provide the commissioner necessary authority to pursue single violations when the situation calls for it.

UNFAIR CLAIMS SETTLEMENT PRACTICES MODEL REGULATION

Table of Contents (As Amended July 10, 1989)

Section 1.	Authority
Section 2.	Scope
Section 3.	Definitions
Section 4.	File and Record Documentation
Section 5.	Misrepresentation of Policy Provisions
Section 6.	Failure to Acknowledge Pertinent Communications
Section 7.	Standards for Prompt Investigation of Claims
Section 8.	Standards for Prompt, Fair and Equitable Settlements Applicable to All Insurers
Section 9.	Standards for Prompt, Fair and Equitable Settlements Applicable to Automobile Insurance

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

(h) "Worker's Compensation" includes, but is not limited to, Longshoremen's and Harbor Worker'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.

Section 8. Standards for Prompt, Fair and Equitable Settlements Applicable 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 may elect a cash settlement based upon the actual cost, less any deductible provided in the policy, to purchase a comparable automobile including all applicable taxes, license fees and other fees incident to transfer of evidence of 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.

1-6

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

KTLA proposes to amend HB 2082 in the following manner:

By inserting at page 7, at line 7, the following:

(15) An insured may bring suit against an insurance company for engaging in any practice, without just cause or excuse, described in subsection (a)(9). For the purposes of the individual action, it is not necessary to prove that the act was committed or performed with such frequency as to indicate a general business practice. If the individual prevails in the action, the individual may be entitled to reasonable attorney fees, settlement of the claim and any other damages allowed by law.

F I & I 1-22-92
ATTACHMENT 2

KANSAS TRIAL LAWYERS ASSOCIATION

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TESTIMONY
OF THE
KANSAS TRIAL LAWYERS ASSOCIATION
SENATE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE
JANUARY 22, 1992

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.

HB 2082 was originally introduced at our request to 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 provided 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 conceivbable type of business imaginable with only one exception, and that exception is the insurance industry. The Act gives the Attorney 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 that person substantially, he or she should have the right to pursue a remedy whether or not the attorney general has the resources or even the inclination to pursue it for that individual. If it is right and fair for the attorney general to sue on the individual consumer's behalf, why is it not right that the consumer should also have that same personal remedy?

F I & I 1-22-92
ATTACHMENT 3

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 reasonable clear. We believe it is appropriate that where an insurance company intentionally misrepresents policy provision 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 or her 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 an unfair claim settlement practice. The existing law encourages claims practice 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.

While the amended version of HB 2082 now before you may expand the criteria whereby the Insurance Commissioner may seek action, it still does not allow a private cause of action. We feel it is more appropriate to empower individuals with the ability to pursue violations of unfair claim settlement practices, rather than to continue to burden the Insurance Commissioner with this task. Thus, we urge you to reinstate the stricken language in (b) on pages 6 and 7.

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

TO: House Insurance Committee

FROM: Lori M. Callahan
General Counsel

SUBJECT: H.B. 2082

DATE: January 22, 1992

The Kansas Medical Mutual Insurance Company, KaMMCO, is a Kansas domestic, physician owned, professional liability insurance company formed by the Kansas Medical Society pursuant to legislation enacted by the Kansas Legislature. KaMMCO currently insures 830 Kansas physicians. KaMMCO opposes H.B. 2082 in its original form as proposed to the House, but has no position on H.B. 2082 as amended by the House.

H.B. 2082 as introduced in the House, created a private cause of action for unfair claims settlement practices by insurance companies. Currently, the Kansas Department of Insurance has the power and authority to assess fines and other remedies against insurance companies who violate K.S.A. 40-2402, which is the Unfair Claims Settlement Practices Act. These fines can be up to $2,500 per violation or $10,000 per violation if the violation was done in a knowing manner.

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Attachment 4

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To allow a private cause of action under this Act would result in substantial cost to the system without any resulting benefit 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 that currently the Kansas Department of Insurance has complete power and authority to enforce the Act without any costs to the consumer. The Kansas Department of Insurance has an excellent record of resolving allegations of violations of the Unfair Claims Settlement Practices Act all without the need for involvement of attorneys, which would be required for a pursuit of a private cause of action. The current system also results in resolution of the problem without payment of attorney fees.

It is the position of KaMMCO, therefore, that H.B. 2082 as proposed in the House while appearing to assist consumers, in fact provides them no additional benefit and only adds cost 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 state wide problems, especially in the area of availability of health care, it is the position of KaMMCO that H.B. 2082 is not only unnecessary but a detriment to the state.

Finally, as amended by the House Insurance Committee, H.B. 2082 adopts the model NAIC legislation for the Unfair Claims Settlement Practices and removes the provision for a private cause of action. KaMMCO takes no position on this amendment but concurs that the elimination of the provision allowing for a private cause of action eliminates its concerns with the bill.

Thank you. Let me know if I can answer any questions.

MEMORANDUM

TO: The Honorable Dick Bond
Chairman, Senate Financial Institutions and Insurance Committee

FROM: William W. Sneed
State Farm Insurance Companies

DATE: January 22, 1992

RE: House Bill 2082

Mr. Chairman and members of the Committee: My name is Bill Sneed and I represent State Farm Insurance Companies. My client had previously testified on this bill in front of the House Insurance Committee on February 6, 1991. At that time, my client voiced its opposition to the bill as it was my client's position that H.B. 2082, in the original form, was unwarranted, costly and not in the best interest of the insuring public. After our testimony the bill was amended to encompass the National Association of Insurance Commissioners ("NAIC") Model Bill and eliminate the language which inserted a "private right of action" within the Unfair Claim Settlement Practices Act. However, my client would still contend that the current law is satisfactory in this area, and as such opposes H.B. 2082 as amended. Additionally, inasmuch as there may be a discussion relative to re-inserting the language that was taken out in the House, my client wishes to provide information in regard to my client's position on that particular provision.

The language inserted on page four, lines 16-20, would allow a single incident to trigger this law if committed flagrantly and in conscious disregard. My client

FI+I 1-22-92
Attachment 5

has testified before various committees of the National Association of Insurance Commissioners ("NAIC") on this point, and we have consistently argued against this new application. Inasmuch as the "general business practice" standard is clearly defined and well understood by the insurance industry, as well as by regulators, we believe this change is unnecessary and could cause confusion. Thus, my client again reiterates that this new standard should not be included.

In regard to the proposed inclusion of a "private right of action" within this law, please accept the following as a historical analysis and our arguments as to why this provision should not be included.

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 Bill, 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, which was not accepted by the House, was offered by the plaintiffs' attorneys 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. 40-2404 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 settlement 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 its 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 noted 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 *Spencer 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 former court's ruling due to its failure to provide answers to practical questions on the scope of 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 by 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 1987. 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

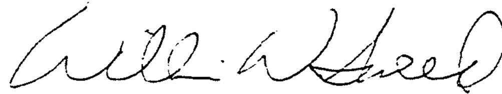
We are unaware of any rational basis on which to establish a new cause of action within our current tort system. If individual claimants are treated unfairly, current Kansas law provides ample protection and safeguards for them. In addition to various opportunities to collect attorney's fees, Kansas, under the appropriate circumstances, does provide for punitive damages, which have historically be 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 is there is a reasonable basis for such an action.

Therefore, it is my client's position that the proposed "private right of action" amendment should not be included in this bill, and absent a showing to the contrary, the Legislature should only encompass the NAIC Model Bill. Again, I would like to thank you for the opportunity to provide this information, and if you have any questions or comments, please feel free to contact me.



William W. Sneed
Legislative Counsel
State Farm Insurance Companies

NO. 340A-20 DIETZGEN GRAPH PAPER
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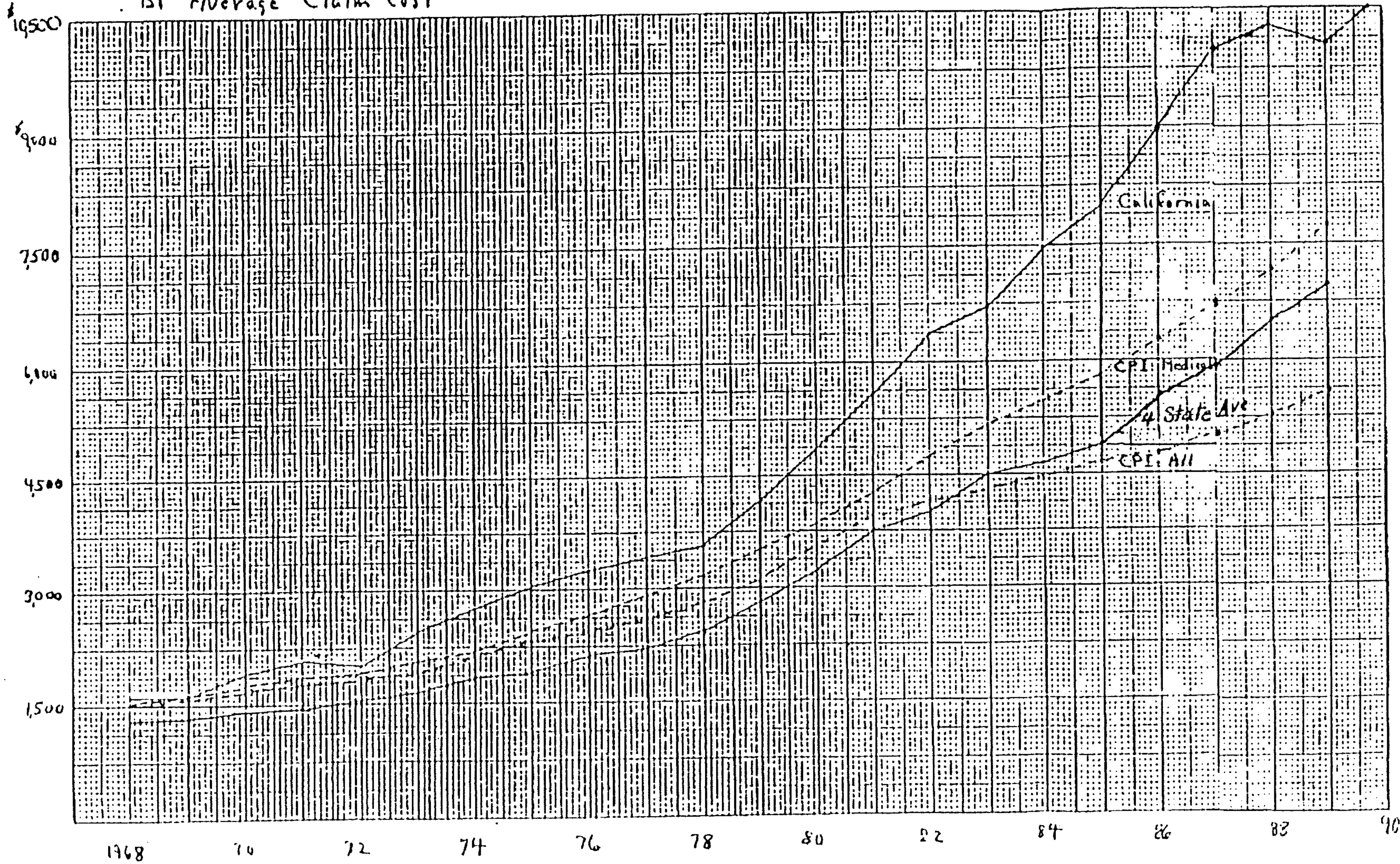
BI Average Claim Cost



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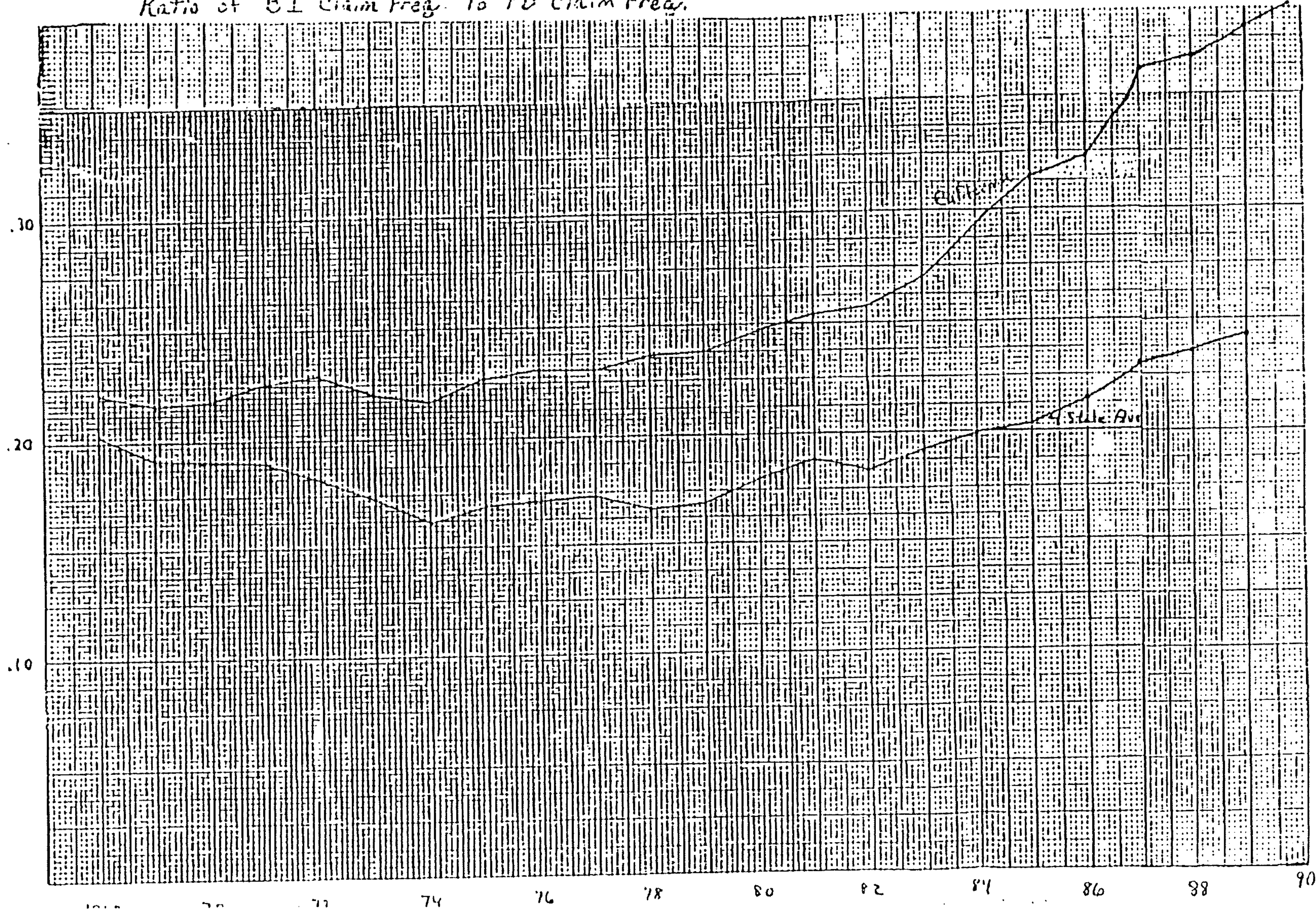

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HOUSE BILL #2082 - UNFAIR CLAIMS PRACTICES

Senate Financial Institutions and 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 on House Bill 2082.

We are not opposed to HB2082 in the amended form that passed the House last year.

We would be opposed to any amendment which would allow a private right of action for a single violation of the Unfair Trade Practices Act.

As we testified in the House Insurance Committee, we are particularly concerned with the impact such a provision could have on our ongoing efforts to resist fraudulent claims.

Combating fraudulent claims is a necessary and vital part of controlling insurance costs. However, the looming threat of a private cause of action involving costly litigation could significantly decrease the incentive and economic practicality of attempting to fend off fraudulent claims in the future.

Mr. Chairman that concludes my remarks. Thank you.

FI&I 1-22-92

ATTACHMENT 6

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Testimony to the Kansas Senate Financial Institutions and Insurance Committee by Brad Smoot, Kansas legislative counsel, American Insurance Association regarding 1991 House Bill 2082, as amended.

January 22, 1991

Mr. Chairman, Members of the Committee:

I appear today on behalf of the American Insurance Association, a trade organization of over 200 property and casualty insurance companies providing insurance in all lines of property and casualty insurance in Kansas and nationwide. AIA does not oppose H.B. 2082, as amended, but does oppose further amendment reinstating 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 Kansas laws (K.S.A. 40-2402) regarding unfair 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 in addition results in substantial costs to the system. A private cause of

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ATTACHMENT 7

action would increase litigation, increase administrative costs, and increase defense costs. Such costs would be incurred without a corresponding benefit since the Kansas Department of Insurance has power and authority to enforce the act without any cost to the consumer.

With the added power of H.B. 2082, as amended by the House Committee, the Department is well equipped to protect the consuming public. This is all done without the need for payment of attorney fees in order to enforce the act.

Accordingly, the American Insurance Association opposes any further amendment of H.B. 2082, which would reinstate a private cause of action. I would be pleased to respond to questions.