

Approved: February 20, 1995
Date

MINUTES OF THE HOUSE COMMITTEE ON FINANCIAL INSTITUTIONS AND INSURANCE.

The meeting was called to order by Chairperson Bill Bryant at 3:30 p.m. on February 9, 1995 in Room 527S of the Capitol.

All members were present except: Representative Ruby Gilbert

Committee staff present: Bill Wolff, Legislative Research Department
Bruce Kinzie, Revisor of Statutes
Nikki Feuerborn, Committee Secretary

Conferees appearing before the committee: David Ross, KS Assn of Life Underwriters
Larry Magill, Kansas Association of Insurance Agents
William A. Larson, KS Association of Insurance Agents
Mike Taylor, National Council on Compensation Insurance
Brad Smoot, American Insurance Association
Bill Sneed, State Farm Insurance

Others attending: See attached list

David Ross, Kansas Association of Life Underwriters, requested introduction of a bill entitled the Kansas Partnership for Long-term Care Act (Attachment 1). This act will initiate a public/private partnership between the insurance industry and the State of Kansas to address the rising burden of expense being born by the state to finance long-term care. Successful pilot projects have been conducted in New York, Connecticut, California, Indiana, and Iowa.

Representative Cox moved for the introduction of the proposal as a committee bill. The motion was seconded by Representative Humerickhouse. Motion carried.

Hearing on HB 2249--Insurance rating organizations, costs

Larry Magill, Kansas Association of Insurance Agents, stated that the proposed legislation would do the following things (Attachment 2):

1. Rating organization and individual insurers must include cost of providing rate information in rates they charge or establish fees from members or subscriber companies;
2. Insured or his/her representative cannot be charged a fee for this services;
3. Information will be made available through INK;
4. Disclosure of workers compensation experience rating information available to insured or his/her representative.

An amendment was requested which would include the property rating statutes as well as the liability rating statutes in the bill.

Fees are largely unregulated in the rating organizations which are controlled by insurance companies. Cost shifting from insurance company members to agents and insureds is now occurring. In worker's compensation, a business and their agent must have copies of the business' last three year's experience modification worksheets to remarket the business's workers compensation insurance. NCCI charges from \$25 to \$50 per worksheet for this information. NCCI charges \$175 for an inspection to determine if the business' payrolls are properly classified. In addition, NCCI will charge \$35 for businesses to obtain a copy of its most recent inspection report explaining the most recent classification. In 1995, ISO will begin charging \$5 for each building rate, \$5 for each contents rate or \$8 for both. They have raised their micro-fiche service from \$300 to \$2,750 per year. Copies of building's fire rate surveys are \$32.50 to \$37.50 per copy, and reinspections are \$81-\$175. Double charging, high cost delivery and other industry problems were discussed.

Mr. Magill requested passage of the proposed legislation for the following reasons:

1. To prevent unchecked cost shifting by rating organizations.
2. To prevent the undermining of the rate regulatory system for insurance.
3. To protect consumers from unreasonable charges by monopolistic rating organizations.
4. To force rating organizations to use modern technology to deliver information at the lowest cost to consumers and to protect confidentiality.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON FINANCIAL INSTITUTIONS AND INSURANCE,
Room 527S-Statehouse, at 9:00 a.m. on February 9, 1995.

Will Larson, Counsel for the Kansas Association of Insurance Agents, explained that as a part of the premium charged to an insured, an insured should have the right to obtain all rating information (Attachment 3). The Department of Insurance was unaware of the charges being made as their interpretation of the existing statute has always been that the individual insured's rate information must be provided free of charge. A lawsuit resulted and NCCI won at the district court level in November of 1994. Their position is that the Insurance Department does not have the authority to deny charging for work sheets. This is being appealed and may be heard in March of 1995. It is possible that the court may find that NCCI should furnish one copy per year of the requested worksheets and allow for charging for extra sheets.

Michael Taylor, Director of the National Council on Compensation Insurance, said his organization believes that the cost of the products should be paid for by those who use them, not the system (Attachment 6). Current legislation states that NCCI cannot file rates that include any expense factors and the proposed bill would require that the costs for these products be included within the rates. No one has researched the cost or problems associated with making rating information available on the INK network as required by the bill. The NCCI InsNet system is being tested to deliver materials electronically to customers and mandating a particular state program will create a hinderance to that system. He asked for rejection of the bill.

Brad Smoot, Legislative Counsel for the American Insurance Association, stated that the bill was unnecessary because NCCI provides copies of experience modification work sheets to the employers and the insurance carrier (Attachment 4). Problems with the bill include lack of precedence in Kansas or any other state, definition and verification of "authorized agent," unfairness by asking 60% of employers who do not use the rating service to subsidize the service, and unconstitutionality.

Brian Moline of the Insurance Department said the broader issue was what residual authority does the Insurance Commissioner have to merge rates. The cost causer should be the cost payer.

Action on HB 2203--Confidentiality of NAIC reports

Representative Merritt offered a conceptual amendment of cleanup language on the bill. The motion was seconded by Representative Wilson. Motion carried.

Information on insurance companies in Kansas and other states is provided to the Insurance Commissioner's office by NAIC only if there is a confidentiality policy in place. Early warning allows the Insurance Commissioner's office access to data on companies doing business in the state. There are correction procedures in place if the internal information is erroneous. Mr. Wilder of the Insurance Department informed the Committee of their policy to contact the insurance company if suspect information is received.

Representative Dawson moved to pass the bill out favorably as amended. The motion was seconded by Representative Landwehr. Motion carried.

Action on HB 2081--Automobile liability insurance, exclusion or limitation of coverage

Bill Sneed of State Farm Insurance provided a compromise amendment to the bill which adds the words "provided for the insured's regular use" and refers to motor vehicles for which the insured has the legal responsibility to purchase insurance (Attachment 5). Committee members expressed concern over the use of term "motor vehicle" rather than "automobile." The revisor said this is an attempt to make the language in the statute the same.

Representative Smith moved to recommend HB 2081 not favorable for passage. The motion was seconded by Representative Correll. The motion did not carry.

Representative Landwehr moved to accept the amendment as referred to above. The motion was seconded by Representative Vickery. Motion carried.

Representative Landwehr moved for the favorable passage of the bill as amended. The motion was seconded by Representative Samuelson. Motion carried.

Representative Wilson moved for the approval of the minutes of February 1. Motion was seconded by Representative Welshimer. Motion carried.

The meeting adjourned at 4:50 p.m. The next meeting is scheduled for February 13, 1995.

HOUSE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE GUEST LIST

DATE: 2-9-95

NAME	REPRESENTING
Bill Sneed	State Farm
Kimberly Phillips	State Farm
Kevin Davis	Am. Family Ins Group
David Hanson	Ks Assoc P&C / NAIF
Derenda Mitchell	Alliance of American Insurers
Mike Taylor	State Farm Ins Co
MIKE TAYLOR	NCCI
Steve Thompson	
Stacey Simpson	Kevin Ebert: Weir
Burl Smart	AIA
DON LINDSEY	UTU
Bill Curtis	Ks Assoc of School Bds
Brian Malin	Kans Ins Dept
LARRY MAGILL	KAIA
Will Larsen	KAIA
Jim Leale	BHE
Jim Leale	SELF
Jim McHaff	AFL-CIO
Henry Helser	AFL-CIO

HOUSE FINANCIAL INSTITUTIONS AND INSURANCE
COMMITTEE GUEST LIST

DATE: 2/9/95

NAME	REPRESENTING
TAD KRAMAR	SBG
Mita Larson	SBG

Mr. Chairman and members of the Committee,

I am David Ross representing the Kansas Association of Life Underwriters. I appreciate the opportunity to appear before you today to request introduction of a bill entitled the Kansas Partnership for Long-term Care Act. This act will initiate a public/private partnership between the insurance industry and the State of Kansas to address the rising burden of expense being born by the state to finance long-term care.

At present, there are approximately 26,000 persons confined to long-term nursing care in this state. Half of these persons are utilizing medicaid to pay for the resulting expense at a cost to the state of \$1445 per month after deducting pension and social security income. The bureau of census estimates that between the year 2000 and 2050, the 65 and older population will increase virtually 100% in the United States from 34.8 million to 68.5 million. The state can expect a correlating rise in costs for long-term care if nothing is done to address the problem.

This legislation will encourage people to seek private insurance benefits to finance the expenses for long-term care. Persons having coverage for long-term care expenses will receive a matching amount of coverage from medicaid prior to their assets being exposed to attachment by the state.

*House FIF
Attachment 1
2-9-95*

AN ACT concerning long-term care for persons having certain insurance.

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

Section 1. The Commissioner of Insurance shall coordinate a program entitled the Kansas partnership for long-term care whereby insurance benefits pursuant to 40-401 and 40-2225 shall provide the primary coverage for long-term care expenses resulting from the need by individuals for permanent long-term care and medicaid shall provide excess coverage for an equal amount of long-term care expenses resulting from the need by individuals for permanent long-term care. The insurer providing primary coverage for long-term care expenses shall provide the Commissioner of Insurance the name, address, date of birth, and any other information the Commissioner deems relevant upon claim payment to any individual. The Commissioner of Insurance shall establish a reserve for payment of excess coverage to an individual by medicaid and shall notify the Secretary of Social and Rehabilitation Services when a reserve has been established. Receipt of a reserve advice from the Commissioner of Insurance shall be satisfactory evidence of eligibility for medicaid excess coverage. In the event an individual exhausts the medicaid excess coverage for long-term care expenses, the Secretary of Social and Rehabilitation Services may provide additional medicaid benefits pursuant to ??-???? except that no lien on the property belonging to any individual shall be exercised prior to the death of a surviving spouse when the property is the location of the spouses primary residence. No policy providing primary coverage for long-term care expenses pursuant to this act shall require prior hospitalization or a prior stay in a nursing home as a condition for providing benefits. The Commissioner of Insurance may adopt rules and regulations to implement the provisions of this act.

Sec. 2. The Secretary of Social and Rehabilitation Services shall seek appropriate amendments to medicaid rules and regulations and shall file an amended state plan with the Federal Health Care Financing Administration pursuant to Section 1. The Secretary of Social and Rehabilitation Services shall seek the foundation funds and federal approval necessary to carry out the purpose of this act and may adopt rules and regulations to implement the provisions.

Sec. 3. The Secretary of Aging shall establish an outreach program to educate consumers about: (a) The provisions of this act; (b) the need to prepare for long-term care expenses; (c) methods for financing long-term care expenses; (d) the availability of types of insurance providing benefits for long-term care expenses and (d) shall provide public information to assist individuals in selecting insurance coverage.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

Testimony on House Bill 2249 Before the House Financial
Institutions and Insurance Committee

by Larry W. Magill, Jr., Executive Vice President of
Kansas Association of Insurance Agents

February 9, 1995

Thank you, Mr. Chairman and members of the committee for the opportunity to appear today in support of HB-2249, a measure we requested that this committee introduce. The proposed legislation basically does four things:

1. It clarifies that rating organizations and individual insurers, to the extent that they develop their own rates, must include the cost of providing all pertinent information regarding an insured's own rate, either in the rates they charge or they may collect the cost, in the case of a rating organization, from the members or subscriber companies.

2. It clarifies that they will not charge the insured or the representative of the insured a fee for providing this information.

3. It provides that rating organizations will make the information available through the Information Network of Kansas, a state-controlled computer network.

4. It requires that workers compensation experience rating information (see sample attached as exhibit 1) is confidential and shall be disclosed only to the insured or the insured's representative.

We would like to ask the committee to consider an amendment to the proposal adding the same new language to KSA 40-933 (exhibit 2 attached), one of the property rating statutes. It was

House FD&D
Attachment 2

2-9-95

an oversight on our part, that we did not include the property rating statutes as well as the liability rating statutes in our original bill request. The concept applies equally to property and liability insurance rate information.

The primary rating organizations in Kansas are the National Council on Compensation Insurance (NCCI), the Insurance Services Office (ISO), the American Association of Insurance Services (AAIS) and the Surety Association of America (SAA). These rating organizations were formed and are controlled by insurance companies.

They are monopolies or near monopolies and their fees have been largely unregulated. The fact that they are monopolies, or near monopolies, has not been a problem because until recently, they recouped most of their cost from their insurance company members. But within the last two years, ISO and NCCI began an all-out campaign to shift as much of their costs as possible to agents and insureds, thus reducing the assessments on their insurance company members.

Insurance companies have always included the cost of rating organizations' services within their expenses of doing business and within the rates that they charge for insurance.

To give you a few examples, in workers compensation, a business and their agent must have copies of the business's last three years' (and in some cases last five years') experience modification worksheets to remarket the business's workers compensation insurance. This may be needed to move the business out of the assigned risk workers' compensation plan, or to find a

more competitive voluntary market. NCCI charges anywhere from \$25 to \$50 per worksheet for this information. The worksheets provide critical underwriting information on the size of business's payrolls and its losses by year. Use of experience modifications is required by the Kansas Insurance Department under the NCCI's approved rating plan and all carriers and group self-insurance funds must use them.

A second type of fee is where the business requests an inspection by NCCI to determine if its payrolls are properly classified. Payroll classification can make a tremendous difference in a business's cost of workers' compensation insurance if, for example, it can convince NCCI that its payrolls belong in a lower cost payroll classification. NCCI will charge that business \$175 for the inspection unless they agree that it is improperly classified. This charge has never been reviewed or approved by the Insurance Department and it was only recently instituted by NCCI. In addition, NCCI will charge \$35 for businesses to obtain a copy of its most recent inspection report explaining why it is classified the way it is.

ISO will begin charging in 1995 for property insurance rates at \$5 for each building rate, \$5 for each contents rate, or \$8 for both. Previously, these rates have been free. ISO did make all property rates available on micro-fiche for Kansas for \$300-- soon they will be charging \$2,750 per year for the service.

Currently, ISO inspects larger buildings to determine the proper fire insurance rates on the building and separately on its

contents. Based on the construction of the building, combustibility of contents, nature of operations and protection such as sprinklers, ISO sets the rate which every insurer that uses ISO uses as a base rate. ISO charges the insured \$32.50-\$57.75 for a copy of their building's fire rate survey which can tell the business owner what they need to change to reduce their fire rates. If a business makes improvements, such as adding fire walls, they must pay ISO \$81-\$157 for ISO to reinspect the building. None of their charges have ever been filed with or approved by the Kansas Insurance Department.

Department Regulation 40-3-50

With the support of the Kansas Association of Insurance Agents, the department promulgated regulation 40-3-50 in 1993 based on KSA 40-1117. A copy of the regulation is included in Will Larson's testimony.

Until we brought NCCI's charges to the attention of Dick Brock, the department was unaware that these charges were being made. It was the department's interpretation of KSA 40-1117 that the individual insured's rate information must be provided free-of-charge.

NCCI sued the department over the regulation and won at the district court level this past November. The decision is currently being appealed by the department and may be heard in March. Will Larson, our corporate counsel, will provide additional details on the case.

Double Charging and Cost Shifting

The cost of developing this rating information and providing it have always been included in the expense portion of the rates. By charging these fees, the industry is, in effect, charging twice for the same service. And this represents a significant cost shift by insurers to consumers.

Eventually it seems clear that insurance companies and their rating organizations will attempt to shift much of the cost of developing rates to separate unregulated fees charged to consumers and agents.

Until Kansas, along with a number of other states and our national association, the Independent Insurance Agents of America, became involved in this issue, NCCI was charging insureds \$7.50 for their experience modification information. Largely due to KAR 40-3-50, NCCI conceded the point on insureds' costs and filed a modification to their rules that has been approved in Kansas and requires NCCI to provide a free copy of the experience modification information once per year to any insured. We are still concerned that insureds will not appreciate the importance of the information and will misplace it. Nor will they be able to locate the previous three to five years' work sheets. Agents or insureds will then have to pay to obtain another copy or possibly separate \$25-\$50 charges for the last three to five years' worksheets.

charge agent \$20 \$25

Keep in mind that this regulation only addressed the charge for experience modification worksheets and not the cost of

inspecting a business or other charges NCCI or other rating organizations may make for their services.

Undermines Rate Regulation

If the department is not granted the authority to determine who rating organizations charge for their services, the department's ability to regulate rates will be seriously undermined. These fees, which up until now have always been included in the base rates, are not currently filed with the department or approved.

IF HB-2249 is not passed, rating organizations will continue to shift more costs outside the rate regulatory system.

Highest Cost Delivery

In this age of the information super highway, both NCCI and ISO have chosen to provide their information in the highest cost manner possible. Both use labor-intensive personal handling of written requests or require telephone inquiries when much more lost cost access could be arranged through existing computer networks such as the Information Network of Kansas (INK). According to Jeff Fraser with INK's contract vendor, there would be only minimal software and hardware costs associated with granting INK access to their data, just as the Kansas Department of Revenue has done on Motor Vehicle Reports. In fact, according to Jeff Fraser state agencies have not incurred any costs in granting access to INK.

HB-2249 addresses this issue by requiring access to the Kansas Information Network. Rating organizations' costs, their

insurer's costs and ultimately consumer costs would be reduced to virtually nothing for access and the information would be available instantaneously and always current. The agents or other users would be paying the line cost to access the information and for the time needed to print it.

Confidentiality Critical

HB-2249 protects the confidentiality of the experience modification information which contains sensitive and proprietary information about an individual business such as their payrolls, claims history and claims reserves. We envision a similar procedure to the one now in use on MVR's where the agent has access to the individual's MVR in conjunction with an application for auto insurance only. Penalties for violating the restrictions are in the Open Records Act.

Loss Cost Rating

Loss cost rating will apply to workers' compensation insurance effective June 1, 1995, or whenever the rate change is effective this year. Loss cost rating already applies to many other types of insurance where ISO files rates. While NCCI may argue that they cannot include the expenses of providing an individual's rate information in the expense portion of rates since they will not be filing an expense portion under loss cost, HB-2249 contemplates that. It provides that NCCI can also recoup its costs by assessing its member companies which may then include those costs in the expense portion of their final rates. To argue that HB-2249 is a contradiction of the 1993 workers'

compensation reforms in SB-307 which required Kansas to move to loss cost rates is a moot point.

Summary

We urge the committee to favorably report HB-2249 ^① to prevent unchecked cost shifting by rating organizations, ^② to prevent the undermining of the rate regulatory system for insurance, ^③ to protect consumers from unreasonable charges by monopolistic rating organizations, ^④ to force rating organizations to use modern technology to deliver information at the lowest cost to consumers and to protect the confidential nature of the information.

We would be happy to provide additional information or respond to questions. Thank you for your support.

WORKERS COMPENSATION EXPERIENCE RATING

EXHIBIT 1

EFFECTIVE DATE 02/02/95

NAME OF RISK

15

RISK IDENT. NO 150215242

STATE KANSAS

1	2	3	4	5	6	7	8	9	10
CODE	ELR	RATI	PAYROLL	EXPECTED LOSSES	EXP PRIM LOSSES	CLAIM DATA	IJ F	ACT INC LOSSES	ACT PRIM LOSSES
CARRIER 11363			POLICY NO.	XW09250248445		EFF-DATE	02/02/91	EXP-DATE	02/02/92
4299	264	29	355129	9375	2719	NO. 2	*	312	312
7380	300	27	12251	368	99				
8017	122	31	102593	1252	388				
8742	039	28	46200	180	50				
8810	024	29	254623	611	177				
POLICY-TOTAL			770796	(SUBJECT PREMIUM = 13765)				312	
CARRIER 14486			POLICY NO.	C35197138		EFF-DATE	02/02/92	EXP-DATE	02/02/93
4299	264	29	328825	8681	2517	31578358	5 F	4363	4363
7380	300	27	11850	356	96	31566636	6 F	49	49
8017	122	31	106880	1304	404	31566467	6 F	60	60
8742	039	28	0	0	0	31567981	6 F	95	95
8810	024	29	301972	725	210	31567363	6 F	96	96
						31567042	6 F	101	101
						31567227	6 F	258	258
						31567227	6 F	327	327
POLICY-TOTAL			749527	(SUBJECT PREMIUM = 16763)				5349	
CARRIER 14486			POLICY NO.	C39587208		EFF-DATE	02/02/93	EXP-DATE	02/02/94
4299	264	29	417174	11013	3194	31569445	6 F	35	35
7380	300	27	46593	1398	377	31569319	6 F	38	38
8017	122	31	59194	722	224	31578769	6 F	50	50
8742	039	28	16788	65	18	31569838	6 F	255	255
8810	024	29	257525	618	179				
POLICY-TOTAL			797274	(SUBJECT PREMIUM = 25301)				378	
(A) POLICY C40712239				EFF DATE 02/02/94		EXP DATE	02/02/95	CARR 14486	

ASG.	RISK ADJ.	FACTOR (ARAP) IF APPL.:	(A)	(B)	(C) EXPECTED EXCESS (D-E)	(E)	(F) ACTUAL EXCESS (H-I)	(G)	(H)	(I)	
		1.00	009		26016	36668	10652	0	12950	6039	6039

* Total by Policy Year of all cases \$2,000 or less.
 # Limited loss.
 14486-049

PAGE NUMBER	1	(11) PRIMARY LOSSES	(12) STABILIZING VALUE	(13) RATABLE EXCESS	(14) TOTALS	(15) EXP MOD.
ACTUAL	6039	36625	0	42664		
EXPECTED	10652	36625	2341	49618	0.86	

2-9

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EXHIBIT 2

40-933

INSURANCE

addition to its filings, on behalf of its members and subscribers, in a manner consistent with such findings, within a reasonable time after the issuance of such order.

History: L. 1947, ch. 278, § 8; L. 1988, ch. 356, § 83; July 1, 1989.

40-933. Same; information to be furnished insureds; hearings and appeals for insureds. Every rating organization and every insurer which makes its own rates, shall, within a reasonable time after receiving written request therefor, furnish to any insured affected by a rate made by it, or to the authorized representative of such insured, all pertinent information as to such rate. Every rating organization and every insurer which makes its own rates shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard, in person or by authorized representative, on such person's written request to review the manner in which such rating system has been applied in connection with the insurance afforded such person. If the rating organization or insurer fails to grant or reject such request within 30 days after it is made, the applicant may proceed in the same manner as if such person's application had been rejected. Any party affected by the action of such rating organization or such insurer on such request may, within 30 days after written notice of such action, appeal to the commissioner, who, after a hearing conducted in accordance with the provisions of the Kansas administrative procedure act, may affirm or reverse such action.

History: L. 1947, ch. 278, § 9; L. 1988, ch. 356, § 84; July 1, 1989.

40-934. Same; advisory organizations; duties; hearing and order of commissioner; violation. (a) Every group, association or other organization of insurers, whether located within or outside this state, which assists insurers which make their own filings, or rating organizations in rate making, by the collection and furnishing of loss or expense statistics, or by the submission of recommendations, but which does not make filings under this act, shall be known as an advisory organization.

(b) Every advisory organization shall file with the commissioner: (1) A copy of its constitution, its articles of agreement or association or its certificates of incorporation and of its bylaws, rules and regulations governing its activities; (2) a list of its members; (3) the name

and address of a resident of this state upon whom notices or orders of the commissioner or process issued at the commissioner's direction may be served; and (4) an agreement that the commissioner may examine such advisory organization in accordance with the provisions of K.S.A. 40-936 and amendments thereto.

(c) If, after a hearing conducted in accordance with the provisions of the Kansas administrative procedure act, the commissioner finds that the furnishing of such information or assistance involves any act or practice which is unfair or unreasonable or otherwise inconsistent with the provisions of this act, the commissioner may issue a written order specifying in what respects such act or practice is unfair or unreasonable or otherwise inconsistent with the provisions of this act, and requiring the discontinuance of such act or practice.

(d) No insurer which makes its own filings nor any rating organization shall support its filings by statistics or adopt rate making recommendations, furnished to it by an advisory organization which has not complied with this section or with an order of the commissioner involving such statistics or recommendations issued under subsection (c) of this section. If the commissioner finds such insurer or rating organization to be in violation of this subsection the commissioner may issue an order requiring the discontinuance of such violation.

History: L. 1947, ch. 278, § 10; L. 1988, ch. 356, § 85; July 1, 1989.

Research and Practice Aids:
Insurance — 11.5.
C.J.S. Insurance § 60 et seq.

40-935. Same; joint underwriting or joint reinsurance; order for discontinuance of certain activities or practices; hearing. (a) Every group, association or other organization of insurers which engages in joint underwriting or joint reinsurance, shall be subject to regulation as herein provided. With respect to joint underwriting, to all other provisions of this act and, with respect to joint reinsurance, to K.S.A. 40-936 and K.S.A. 40-939 to 40-943, inclusive, and amendments thereto.

(b) If, after a hearing conducted in accordance with the provisions of the Kansas administrative procedure act, the commissioner finds that any activity or practice of any such group, association or other organization is unfair or unreasonable or otherwise inconsistent with the provisions of this act, the commissioner may issue a written order specifying in



National
Council on
Compensation
Insurance

EXHIBIT 3 Products & Services

NCCI ANNOUNCES REVISED FEE STRUCTURE FOR EXPERIENCE MODIFICATION PRODUCTS AND SERVICES

ATTENTION: WORKERS COMPENSATION CARRIERS AND AGENTS

NCCI produces more than 350,000 experience modifications each year for businesses across the country. During the past three years, we have placed special emphasis on improving the quality and timeliness of experience rating. We are proud to report that, on average, we release experience modifications to the insurer more than 90 days prior to the effective date of the experience modification.

INDIVIDUAL RISK REQUEST FEE SCHEDULE

Intrastate Telephone Modification Request

1 year	—	\$10.00
2 years	—	\$15.00
3 years	—	\$20.00
4 years	—	\$25.00
5 years	—	\$30.00

Intrastate Written Modification Request

1 year	—	\$15.00
2 years	—	\$20.00
3 years	—	\$25.00
4 years	—	\$30.00
5 years	—	\$35.00

Intrastate Modification Worksheet Request

1 year	—	\$25.00
2 years	—	\$35.00
3 years	—	\$45.00
4 years	—	\$55.00
5 years	—	\$65.00

Interstate Telephone Modification Request

1 year	—	\$20.00
2 years	—	\$25.00
3 years	—	\$30.00
4 years	—	\$35.00
5 years	—	\$40.00

Interstate Written Modification Request

1 year	—	\$25.00
2 years	—	\$30.00
3 years	—	\$35.00
4 years	—	\$40.00
5 years	—	\$45.00

Interstate Modification Worksheet Request

1 year	—	\$50.00
2 years	—	\$70.00
3 years	—	\$90.00
4 years	—	\$110.00
5 years	—	\$130.00

The procedure for obtaining experience modification products will remain the same. You can either call or write the NCCI office that administers services for a particular state. The pre-established billing account system will also continue. And at the request of many of our customers, we now accept your payment by Visa and Mastercard.

If you have any questions or comments, please contact our nearest Customer Service representative, who will be happy to assist you.

7.75 exchange

Post-it™ brand fax transmittal memo 7671	
To	From
Co.	NCCI
Dept.	Co.
Fax #	Phone #
	913-865-3314

CHL2:

2-11

**TESTIMONY OF WILLIAM A. LARSON
COUNSEL FOR THE KANSAS ASSOCIATION OF
INSURANCE AGENTS
IN SUPPORT OF HB 2249**

BACKGROUND

HB 2249 is designed to insure that every insured or its authorized agent has the right to obtain from its insurance carrier, and its insurance carrier's rating bureau all pertinent information on which its insurance carrier bases the premiums charged to the insured. The underlying premise of K.S.A. 40-1117, and the amendments proposed in HB 2249, is that as a part of the premium charged to an insured, an insured should have the right to obtain all rating information. This is a very simple and logical premise, but one which has been eroded by the National Council on Compensation Insurance (NCCI) which has been charging separate fees to insureds or their authorized representatives for rating information in the form of worker's compensation experience modification worksheets.

In an attempt to effectuate the statutory purpose of K.S.A. 40-1117, the Kansas Insurance Department enacted regulation K.A.R. 40-3-50. This regulation states:

No rating organization or insurer shall impose any conditions or fees upon any insured or any authorized representative of such insured for information requested pursuant to K.S.A. 40-1117 that is specifically relevant to any experience modification factor which is used or may be used to determine an individual insured's worker's compensation premium.

Attachment 3

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The legislative authority for enacting K.A.R. 40-3-50 is contained in the presently existing K.S.A. 40-1117 which in pertinent part states:

Every rating organization and every insurer which makes its own rates shall, within a reasonable time after receiving written request therefor, furnish to any insured affected by a rate made by it, or to any authorized representative of such insured, all pertinent information as to such rate.

K.A.R. 40-3-50 was adopted because for many years NCCI had charged insureds or their authorized representatives, generally insurance agents, a fee of \$5 for supplying worker's compensation experience modification worksheets. These worksheets are prepared for the insurance carrier members who own NCCI. They are prepared independent of any request of any insured or any insurance agent for use by insurance carriers. The carriers use the worker's compensation experience modification worksheets to determine any given insured's premium. When requested to provide a worksheet, all that is required of NCCI is to photocopy the presently existing worksheet and send it to either the insured or its authorized agent.

In approximately 1992 NCCI raised the fee for supplying its worksheet from \$5, to in most instances \$25, and in some instances as much as \$50. The fees charged by NCCI obviously bear no relationship to the actual cost of copying and delivering the worksheet. NCCI did not at the time nor has it ever attempted to justify the dramatic increase in the fees charged for supplying the worksheet.

The increase in the charge for supplying the worksheets was brought to the attention of the Kansas Insurance Department. Prior to being informed of the increase in the charge for supplying the worksheets, the Insurance Department was not aware that NCCI was charging any fee.

In order to rectify the situation and clarify what it believed to be the law, the Insurance Department proposed and eventually adopted K.A.R. 40-3-50 providing that no direct fee can be charged to an insured or its authorized representative for supplying a copy of the worksheet. The reason the Insurance Department enacted the regulation was twofold.

First, the Department believed that free access to rating information was part of the basic insurance services for which an insured pays a premium. The Department believed that the cost of providing the worksheets should be submitted to the Department as part of the rate filings and thus subject to regulation by the Department.

Second, the dramatic increase in the fee charged for supplying a worksheet was an obvious attempt by the insurance carrier members of NCCI to shift the cost of determining worker's compensation insurance rates. The fee of \$25 to \$50 bears no relationship to the actual cost of supplying the worksheet. It is, pure and simple, a cost shifting scheme.

COURT ACTION

After K.A.R. 40-3-50 was enacted suit was brought by NCCI in Shawnee County District Court claiming the regulation was invalid. NCCI attacked the validity of the regulation on three grounds. First NCCI argued that the enactment of the regulation

constituted a denial of due process because the regulation was not enacted in order to regulate the “health, safety or welfare” of the people of the State of Kansas. NCCI’s argument was that the regulation was enacted solely to protect insurance agents from having to pay for experience modification worksheets. Second, NCCI argued that K.S.A. 40-1117 did not give the Insurance Department the statutory authority to enact a regulation requiring NCCI to provide the worksheet to insureds or their authorized representatives without charge. Third, NCCI maintained the regulation allowed the taking of private property without just compensation in violation of the Fifth Amendment of the Constitution.

On the three grounds on which NCCI attacked K.A.R. 40-3-50, the Shawnee County District Court held:

1. The enactment of the regulation was not a violation of constitutional due process because it was enacted for the benefit of the health, safety and welfare of the public.
2. K.S.A. 40-1117 did not give the Insurance Department authority to enact a regulation requiring NCCI to provide the worksheets without charge.
3. The regulation constituted an unconstitutional taking of property of NCCI because it did not allow NCCI to charge for supplying the worksheet.

The Insurance Department has appealed the district court’s decision.

The effect of HB 2249 would be to eliminate the second reason for the district court finding K.A.R. 40-3-50 was invalid. In other words, it would clearly provide the

Insurance Department with regulatory authority under K.S.A. 40-1117 to enact K.A.R. 40-3-50. It admittedly would not resolve the constitutional issue.

The Kansas Association of Insurance Agents (KAIA), however, believes that the Court of appeals will find the district court erred in finding that K.A.R. 40-3-50 constituted an unconstitutional taking in violation of the Fifth Amendment of the Constitution. KAIA submits that Judge Jackson, the Shawnee County District Court judge who decided the case, failed to consider, at all, the position of the Insurance Department that K.A.R. 40-3-50 did not prevent NCCI from charging anyone other than insureds or their representatives for providing the worksheets. Specifically it was the position of the Insurance Department that NCCI was free to charge its insurance carrier members for the cost of supplying the worksheets to their insureds. In turn, the insurance carriers were free to include the cost in the expense addendums to the rate filings which would enable the insurance carrier members to recover the costs through the premiums they charged their insureds which are subject to regulation by the Insurance Department. It was never contemplated by the Insurance Department that NCCI would be required to provide the worksheets without compensation. It was always contemplated that a charge would be made to the insurance carrier who would in turn pass the charge on to insureds through premiums, which are subject to regulation.

It's clear that Judge Jackson in deciding this case was looking for the "simple solution". At oral argument the judge asked each side why the Insurance Department

couldn't simply pass a regulation telling NCCI what it could charge. In his mind this would solve the problem.

Judge Jackson says exactly this on page 10 of his decision where he states:

The essential defect of K.A.R. 40-3-50 lies in the fact that it simply attempts to regulate beyond the reasonable and justifiable bounds of K.S.A. 40-1117. However, this court's ruling should not be held to imply that the Insurance Department may not promulgate future regulations impacting on this question. For example, the Insurance Department could conceivably opt to promulgate a regulation which would establish a nominal fee structure to limit the amounts rating organizations or insurers could charge for providing copies of rating information to insureds and agents. (i.e., to cover clerical expenses, mailing, etc.) (Emphasis added).

The problem with Judge Jackson's decision is that he was substituting his judgment for that of the Insurance Department as to how to best regulate the NCCI charges. This is not the function of the judiciary.

It is the position of KAIA that since NCCI may recover the cost of supplying the worksheets from its insurance carrier members who may in turn recover it through premiums regulated by the Insurance Department, there is no taking without just compensation. The only issue is how the rate is regulated. This is an issue for the Insurance Department to determine.

Moreover, it makes a great deal of sense to regulate the fees charged by rating organizations such as NCCI by regulating premiums rather than attempting to directly regulate every fee that could conceivably be charged by a rating organization or an insurance

carrier. As Larry Magill of KAIA has pointed out, the practice of charging fees to insureds or their representatives for providing basic insurance services is expanding. It is a practice that is designed to circumvent the regulatory authority of the Insurance Department and to shift costs from insurance carriers to consumers.

BRAD SMOOT

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**STATEMENT OF BRAD SMOOT, LEGISLATIVE COUNSEL
FOR THE AMERICAN INSURANCE ASSOCIATION,

PRESENTED TO THE KANSAS HOUSE
FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE
REGARDING 1995 HOUSE BILL 2249, FEBRUARY 9, 1995**

Mr. Chairman and Members of the Committee:

I am Brad Smoot, Legislative Counsel for the American Insurance Association (AIA), a trade association representing more than 200 companies providing a variety of insurance products to Kansans and across the nation. We appreciate the opportunity to comment on H 2249. For a number of reasons, AIA and our member companies must oppose this bill.

To begin with, the bill is unnecessary. NCCI, the rating organization for workers compensation rates, already provides copies of experience modification work sheets to the employer and the insurance carrier. There is no charge for these copies although it should be noted that the carrier pays a subscription fee to NCCI for rating services and those costs are ultimately included in the premiums paid by employers.

Secondly, this bill is unusual. We know of no other state which has imposed a burden like this on rating organizations and insurers.

Third, the concept is unprecedented in Kansas law. I am unaware of other Kansas statutes which require one segment of the private sector to provide valuable property to another segment of the private sector free of charge.

Fourth, H 2249 is unclear. How are rating organizations to know just who is "the authorized agent?" (Remember this is confidential information unique to each employer.) Will a simple letter from the insurance agent do or must it be a letter from the employer? Does the letter need to be notarized or verified? What if

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the employer revokes the authorization? What form must the revocation take? How many "authorized agents" can an employer have in a given year? One or one hundred? Wouldn't it be a lot simpler for agents to just request a copy from their clients (the employers), or the insurance carriers with whom they work and from whom they receive commissions?

Fifth, this whole concept is unfair. It's unfair to sixty (60%) of the employers insured for workers compensation who are too small to be experienced rated and therefore do not use "experience mod" worksheets. Why should small employers subsidize the cost of materials useful only to large employers?

Finally, H 2249 is probably unconstitutional. When the previous insurance commissioner attempted to compel "free" worksheets for agents, the Shawnee County District Court ruled that the regulation, K.A.R. 40-3-50, was a "clear" violation of the Fifth Amendment to the U.S. Constitution. Not only did the regulation go beyond the statutory authority of the insurance department, but it also amounted to an unconstitutional taking of private property without just compensation. See *National Council on Compensation Insurance v. Todd*, Case No. 93-CV-1523 (Shawnee Co Dist Ct.). This case is now on appeal. Based on the wording of the Court's decision, I see no reason why a statute would be any more likely to stand constitutional muster than did a similar regulation.

For these reasons, we urge the Committee reject H 2249 or at least table the bill until the litigation has been concluded.

Thank you for this opportunity to comment on this legislation and I would be pleased to respond to questions from the Committee.

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION TWO

NATIONAL COUNCIL ON COMPENSATION)
INSURANCE, A Florida Not-For-Profit)
Corporation,)

Petitioner,)

vs.)

CASE NO. 93-CV-1523

RON TODD, Commissioner of Insurance)
of the State of Kansas,)

Respondent.)

MEMORANDUM DECISION AND ORDER

Petitioner National Council on Compensation Insurance (NCCI) seeks judicial review of the decision made by Respondent Ron Todd (Todd), Commissioner of Insurance of the State of Kansas, to promulgate K.A.R. 40-3-50. Pursuant to K.S.A. 77-622, the court issues this declaratory judgment finding that K.A.R. 40-3-50 imposes an unconstitutional taking of the private property of Petitioner without providing just compensation as required by the Fifth and Fourteenth Amendments to the United States Constitution.

FINDINGS OF FACT

Petitioner NCCI is a not-for-profit corporation in the business of developing workers compensation premium rates to be used by insurance companies. NCCI develops such premium rates for approximately 225 insurers in Kansas who write worker's compensation insurance. NCCI is a free-standing corporation, but is totally owned by its 700 member insurance carriers, and

provides information worksheets outlining and establishing premium rates for potential clients of those insurance companies.

Although the rates charged by insurance carriers are subject to regulation by the Kansas Insurance Department, the development of "experience modification worksheets" by NCCI to assist the insurance companies in setting insurance rates is not subject to Insurance Department regulations. K.S.A. 40-1117 however does require all organizations in the business of formulating experience modification rating information to provide copies of that information to insureds or their licensed agents upon request.

The administrative regulation at the center of the present dispute, K.A.R. 40-3-50, serves to prevent any organization which produces such experience modification information from imposing any condition or fee for the providing of copies of the insured's "experience modification worksheet(s)" to an insured or the insured's authorized agent. K.A.R. 40-3-50 reads:

40-3-50. Fire and casualty insurance; rating organizations; availability of rating information for individual insureds; charges, fees, conditions prohibited.

No rating organization or insurer shall impose any conditions or fees upon any insured or any authorized representative of such insured for information requested pursuant to K.S.A. 40-1117 that is specifically relevant to any experience modification factor which is used or may be used to determine an individual insured's workers compensation premium.

Prior to the creation of K.A.R. 40-3-50 Petitioner NCCI had charged fixed fees for providing copies of their experience modification worksheets to insureds or agents of insureds which

requested the information from NCCI.

Respondent Todd contends that the purpose for the promulgation of K.A.R. 40-3-50 was to clarify the intent of K.S.A. 40-1117 that insurance modification information must be provided free of charge to insureds or their agents by the company which develops the information. K.S.A. 40-1117 states:

40-1117. Every rating organization and every insurer which makes its own rates shall, within a reasonable time after receiving written request therefor, furnish to any insured affected by a rate made by it, or to the authorized representative of such insured, all pertinent information as to such rate. Every rating organization and every insurer which makes its own rates shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard, in person or by authorized representative, on written request to review the manner in which such rating system has been applied in connection with the insurance afforded such person. If the rating organization or insurer fails to grant or reject such request within 30 days after it is made, the applicant may proceed in the same manner as if such applicant's application had been rejected. Any party affected by the action of such rating organization or such insurer on such request may, within 30 days after written notice of such action, appeal to the commissioner, who after a hearing conducted in accordance with the provisions of the Kansas administrative procedure act, may affirm or reverse such action.

K.S.A. 40-1117 (1989).

NCCI argues that K.A.R. 40-3-50 creates an unconstitutional taking of private property by the State without just compensation because the regulation forces NCCI to not only provide free copies of its insurance modification worksheets, which NCCI has expended its own resources to develop, but NCCI must also bear the costs of locating, reproducing and delivering those worksheets to the insureds and their agents upon demand. NCCI

contends that because they are forced to take on these expenses without just compensation K.A.R. 40-3-50 must be found to create an unconstitutional taking of NCCI's private property without just compensation as required by the Fifth Amendment and made applicable to the States by the Fourteenth Amendment.

NCCI also contends that K.A.R. 40-3-50 should be overturned because it exceeds the scope of K.S.A. 40-1117. Further, NCCI claims that K.A.R. 40-3-50 should be held to be constitutionally invalid on the grounds that the regulation is in violation of the Fourteenth Amendment Due Process guarantee. Their contention is that the regulation is unconstitutional because it was not created to serve the "health, safety or welfare" of the people of the State of Kansas.

CONCLUSIONS OF LAW

Petitioner NCCI seeks review of an agency action pursuant to K.S.A. 77-601, The Act for Judicial Review and Civil Enforcement of Agency Actions. K.S.A. 77-621(c) states that "[t]he court shall grant relief only if it determines any one or more of the following:

- (1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
- (2) the agency has acted beyond the jurisdiction conferred by any provision of law;
- (3) the agency has not decided an issue requiring resolution;
- (4) the agency has erroneously interpreted or applied the law;
- (5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;
- (6) the persons making the agency action were

improperly constituted as a decision-making body or subject to disqualification;

(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or

(8) the agency action is otherwise unreasonable, arbitrary or capricious."

K.S.A. 77-621(c) (1989).

K.S.A. 77-621(c)(1) clearly acknowledges the authority of the court on judicial review to find an agency made rule or regulation unconstitutional. If the court finds an agency made regulation to be in violation of the Constitution, the court may issue a declaratory judgment to that effect. The authority of the court to issue a declaratory judgment while conducting a judicial review is found in K.S.A. 77-622:

(b) The court may grant other appropriate relief, whether mandatory, injunctive or declaratory; preliminary or final; temporary or permanent; equitable or legal. In granting relief, the court may order agency action required by law, order agency exercise of discretion required by law, set aside or modify agency action, enjoin or stay the effectiveness of agency action, remand the matter for further proceedings, render a declaratory judgment or take any other action that is authorized and appropriate.

K.S.A. 77-622(b) (1989).

The court finds the issuing of a declaratory judgment on the constitutionality of K.A.R. 40-3-50 to be the most appropriate form of relief in this case.

The court shall address Petitioner's arguments in the following order: (1) Does K.A.R. 40-3-50 violate the Fourteenth Amendment guarantee of Due Process by failing to serve the

"health safety or welfare" of the people of this State; (2) Does K.A.R. 40-3-50 exceed the scope of K.S.A. 40-1117; and, (3) Does K.A.R. 40-3-50 violate the "nor shall private property be taken for public use, without 'just compensation" clause of the Fifth Amendment?

1. Does K.A.R. 40-3-50 violate the Fourteenth Amendment guarantee of Due Process by failing to serve the "health safety or welfare" of the people of the State of Kansas?

The constitutional authority for States to regulate insurance rates is undeniable. [See *German Alliance Insurance Co. v. Ike Lewis*, 233 U.S. 389, 58 L.Ed. 1011, 34 S.Ct. 612 (1914)] Further, the States' power to regulate insurance is not limited solely to insurance rates charged, but extends to include regulation of matters which may impact on those rates. [See *O'Gorman and Young, Inc. v. Hartford Fire Insurance Co.*, 282 U.S. 251, 75 L.Ed. 324, 51 S.Ct. 130 (1931).]

NCCI contends that a State government's ability to regulate business and economic activity is limited to areas within its "police power" (i.e. the State's inherent power to promote the public health, safety, welfare or morals.) Petitioner then argues that the regulations imposed by K.A.R. 40-3-50 cannot reasonably be interpreted to rise from such "police powers" because "the regulation does not substantially advance a legitimate governmental interest through the governmental exercise of power." NCCI argues that the true purpose of the regulation is not to protect the welfare of Kansas insureds, but

instead the regulation was promulgated for the unlawful purpose of subsidizing Kansas insurance agencies at the expense of an out-of-state entity.

NCCI's argument that Due Process is violated by K.A.R. 40-3-50 fails to overcome the weight of the evidence showing that the regulation was promulgated in the interest of the welfare of Kansas insureds. K.S.A. 40-1111(a) clearly states that the purpose of the Kansas Insurance Act is:

[T]o promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate and unfairly discriminatory and to authorize and regulate cooperation among insurers in rate making and other matters under the scope of this act.

This section of the statute makes it clear that the Legislature intends for the regulation of insurance to serve the express purpose of promoting public welfare by guarding against excessive and unfair insurance rates. Regulations promulgated in furtherance of the goals of the insurance act should be presumed to serve to promote the public welfare.

In order to protect the "welfare" of individual Kansas insureds, factors which directly affect insurance rate making may be regulated. K.S.A. 40-1111. Thus, an Insurance Department regulatory action would not constitute a denial of Due Process so long as the regulation could be shown to have been properly promulgated in order to protect the "welfare" of Kansas insureds. In the case of K.A.R. 40-3-50, the regulation was intended to protect Kansas insureds from the possibility of being charged excessive fees for insurance rating information which they need

in order to determine which insurance company will be able to provide them insurance at the lowest rates. As promulgated, K.A.R. 40-3-50 does not constitute a violation of Due Process because the regulation only serves as an attempt to prevent the imposition of unfairly high fees on insureds which would fall outside of the regulated premium structure.

2. Does K.A.R. 40-3-50 exceed the scope of K.S.A. 40-1117 ?

Petitioner NCCI argues that the requirement imposed by K.A.R. 40-3-50 that no fee or condition may be imposed by a rating organization when an insured or his agent requests a copy of their experience modification worksheet exceeds the scope of the statute upon which the regulation was founded. NCCI contends that while K.S.A. 40-1117 does require NCCI to provide copies of their experience modification worksheets to insureds or their agents upon request, the statute does not require NCCI to provide the information without charging any fee to the party requesting the information.

Respondent Todd asserts that K.A.R. 40-3-50 is merely a clarification of the actual intent of K.S.A. 40-1117. Todd argues that the proper interpretation of K.S.A. 40-1117 is to require that insureds and their agents be given free access to copies of their "experience modification worksheets," and that the worksheets should be provided to the insureds and their agents at no cost.

The language of K.S.A. 40-1117 that the parties disagree as

to the proper interpretation of reads:

Every rating organization and every insurer which makes its own rates shall, within a reasonable time after receiving written request therefor, furnish to any insured affected by a rate made by it, or to the authorized representative of such insured, all pertinent information as to such rate.

The position of the Respondent is that K.A.R. 40-3-50 falls clearly within the scope of the authority of K.S.A. 40-1117 because the regulation is in fact no more than a clarification of the original intent of the statute.

Respondent Todd correctly argues that the interpretation of a statute by an administrative agency which has been charged with the authority to enforce the statute by the legislature is entitled to great judicial deference. *State ex rel Stephan v. Kansas Racing Commission*, 246 Kan. 708, 719, 792 P.2d 971 (1990). From this basis, Respondent argues that Petitioner NCCI must show how the Insurance Department's interpretation of K.S.A. 40-1117 is improper if the court is to find that K.A.R. 40-3-50 exceeds the scope of the statute.

Respondent further sites the rule that all administrative regulations are presumed to be valid, and the burden of showing invalidity falls to the party challenging the regulation. *Peck v. University Residence Committee of Kansas State University*, 248 Kan. 450, 807 P.2d 652 (1991).

While a state agency's interpretation of a statute is entitled to considerable judicial deference, the courts have also repeatedly held that statutes are not to be construed in a manner that leads to uncertainty, injustice, unreasonable results or

confusion if it is possible to construe them otherwise. [See, *Tobin Construction Co. v. Kemp*, 239 Kan. 430, 436, 721 P.2d 728 (1986); *Martin v. Board of Johnson County Commissioners*, 18 Kan. App. 2d 149, 157, 848 P.2d 1000 (1993).] Applying this rule to K.S.A. 40-1117, it becomes clear that Respondent's interpretation of the statute cannot be accepted. While K.S.A. 40-1117 does require that insurance rating information be furnished by rating organizations to insureds and their agents within a reasonable time, the statute cannot reasonably be read to require that such information be supplied at no cost whatsoever to the parties requesting it. To require, as K.A.R. 40-3-50 does, that a rating organization must bear all the costs associated with producing, locating and delivering copies of their rating information to any insured or agent who makes a request clearly places an unjust burden on the rating organization. Therefore, under this interpretation of K.S.A. 40-1117, it must be found that K.A.R. 40-3-50 in its present form does exceed the scope of statutory authority and is invalid.

The essential defect of K.A.R. 40-3-50 lies in the fact that it simply attempts to regulate beyond the reasonable and justifiable bounds of K.S.A. 40-1117. However, this court's ruling should not be held to imply that the Insurance Department may not promulgate future regulations impacting on this question. For example, the Insurance Department could conceivably opt to promulgate a regulation which would establish a nominal fee structure to limit the amounts rating organizations or insurers

could charge for providing copies of rating information to insureds and agents (i.e. to cover clerical expenses, mailing, etc.) The Insurance Department might justify such a regulation as being comparable to the one found in *Lindstrom v. St. Francis Hospital*, 6 Kan. App. 2d 948, 636 P.2d 231 (1980), where the Court of Appeals upheld a regulation that "complement[ed] the statute by closing up some apparent loopholes," while still not creating an unjust situation where one party was being unfairly overburdened.

3. Does K.A.R. 40-3-50 violate the "nor shall private property be taken for public use, without just compensation" clause of the Fifth Amendment?

Petitioner NCCI contends that K.A.R. 40-3-50 imposes a constitutionally impermissible "taking" of NCCI's property without just compensation. On this issue both parties agree that the "experience modification worksheets" produced by NCCI do meet the definition of "private property" as it is used in the Fifth Amendment to the United States Constitution. NCCI argues that K.A.R. 40-3-50 is in violation of the Fifth Amendment first because NCCI's property is being taken under the regulation without any compensation being paid, and secondly because the property is being taken by the government for the sole benefit of Kansas insurance agents and not for a "public" purpose as required by the Fifth Amendment.

Respondent Todd contends that no "taking without just compensation" is created by K.A.R. 40-3-50 because NCCI has already been compensated for producing the "worksheets" by the

insurance companies who originally requested them, and that K.A.R. 40-3-50 does serve a "public" purpose by insuring that Kansas citizens will have access to copies of their insurance rating information without being forced to pay unfair fees to obtain those copies.

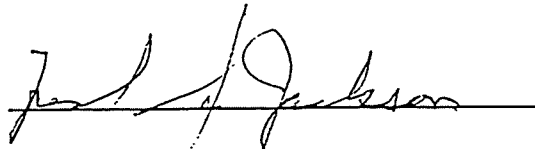
Respondent Todd has failed to acknowledge however that even if K.A.R. 40-3-50 is intended to serve a public purpose, the *Fifth Amendment requires the government to provide "just compensation" before taking any private property.* Respondent's argument that the Fifth Amendment "just compensation" requirement has already been met because NCCI has already been compensated by the insurance companies who originally requested the experience modification worksheets fails to hold water. K.A.R. 40-3-50 requires rating organizations and insurers who prepare their own rating information to furnish copies of that information to insureds or their agents at no cost to the insured or agent. The preparation of these "worksheets," as well as the clerical time and mailing of the worksheets to the individuals requesting them all require the expenditure of money by the rating organizations or insurers. Requiring NCCI, or any other rating organization or insurer, to give over their property and to incur costs, while providing for no method by which those individuals will be compensated for their losses by the government or anyone else, constitutes a clear violation of the Fifth Amendment's "just compensation" guarantee.

This court finds K.A.R. 40-3-50 to be in direct violation of

the United States Constitution's Fifth Amendment provision forbidding the taking of private property without just compensation, and therefore the regulation must be overturned.

The foregoing Memorandum Decision and Order shall serve as the order of the court, no further journal entry being required.

DATED THIS 9th day of November, 1994.


Fred S. Jackson
Judge of the District Court

Let it be of record that true and correct copies of the foregoing Memorandum Decision and Order have been deposited in the U.S. Mail on the 10th day of November, 1994, addressed to the following:

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MEMORANDUM

TO: The Honorable Bill Bryant, Chairman
House Financial Institutions and Insurance Committee

FROM: William W. Sneed, Legislative Counsel
The State Farm Insurance Companies

DATE: February 9, 1995

RE: H.B. 2081

As you are aware, several members of your Committee have raised concerns regarding our proposed amendment to K.S.A. 40-284, which is included in H.B. 2081. Those concerns are (1) the effect that this amendment would have on drivers of motor vehicles provided by an employer and when said employer has rejected UM/UTM coverage to the minimum levels; and (2) the effect this amendment would have on members of the United Transportation Union (UTU) who are transported daily to and from their place of employment in a vehicle owned by the motel where they stay.

Although my client does not believe that our proposal would have an adverse effect in either situation, and in the spirit of compromise, attached is a proposed amendment which we believe would clearly establish that the above two situations would not be affected by H.B. 2081.

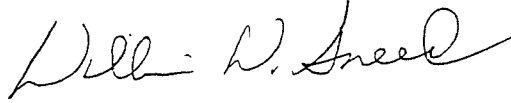
Further, on February 8, 1995 I provided copies of this language to the representatives of the KTLA and the UTU. As of the time I prepared this memo I had not heard from the KTLA. I have spoken with Mr. Lindsey of the UTU, and while he doesn't support the bill, he has acknowledged that my proposed amendment does take care of his concerns.

Hana F. D. S.
Attachment 5
2-9-95

Thank you for your time, and once again, I urge the Committee's support of H.B.

2081.

Respectfully submitted,



William W. Sneed

Attachments: 1

cc: Committee Members

1 (b) which is in excess of the limits for bodily injury or death set forth in
 2 K.S.A. 40-3107 and amendments thereto. A rejection by an insured
 3 named in the policy of the uninsured motorist coverage shall be a rejec-
 4 tion on behalf of all parties insured by the policy. Unless the insured
 5 named in the policy requests such coverage in writing, such coverage need
 6 not be provided in any subsequent policy issued by the same insurer for
 7 motor vehicles owned by the named insured, including, but not limited
 8 to, supplemental, renewal, reinstated, transferred or substitute policies
 9 where the named insured had rejected the coverage in connection with
 10 a policy previously issued to the insured by the same insurer.

11 (d) Coverage under the policy shall be limited to the extent that the
 12 total limits available cannot exceed the highest limits of any single appli-
 13 cable policy, regardless of the number of policies involved, persons cov-
 14 ered, claims made, vehicles or premiums shown on the policy or premi-
 15 ums paid or vehicles involved in an accident.

16 (e) Any insurer may provide for the exclusion or limitation of cover-
 17 age:

18 (1) When the insured is occupying or struck by an uninsured auto-
 19 ~~mobile or trailer~~ a motor vehicle owned by or provided for the insured's
 20 regular use if such motor vehicle is not described in the policy under which
 21 the claim is made or is not a newly acquired or replacement motor vehicle
 22 covered under the terms of the policy under which the claim is made;

23 (2) when the uninsured ~~automobile~~ motor vehicle is owned by a self-
 24 insurer or any governmental entity;

25 (3) when there is no evidence of physical contact with the uninsured
 26 motor vehicle and when there is no reliable competent evidence to prove
 27 the facts of the accident from a disinterested witness not making claim
 28 under the policy;

29 (4) to the extent that workers' compensation benefits apply;

30 (5) when suit is filed against the uninsured motorist without notice
 31 to the insurance carrier; and

32 (6) to the extent that personal injury protection benefits apply.

33 (f) An underinsured motorist coverage insurer shall have subrogation
 34 rights under the provisions of K.S.A. 40-287 and amendments thereto. If
 35 a tentative agreement to settle for liability limits has been reached with
 36 an underinsured tortfeasor, written notice must be given by certified mail
 37 to the underinsured motorist coverage insurer by its insured. Such written
 38 notice shall include written documentation of pecuniary losses incurred,
 39 including copies of all medical bills and written authorization or a court
 40 order to obtain reports from all employers and medical providers. Within
 41 60 days of receipt of this written notice, the underinsured motorist cov-
 42 erage insurer may substitute its payment to the insured for the tentative
 43 settlement amount. The underinsured motorist coverage insurer is then

. As used in this section, "provided for the
 insured's regular use" refers to motor vehicles for
 which the insured has the legal responsibility to
 purchase insurance;



February 9, 1995

**TESTIMONY OF MICHAEL TAYLOR BEFORE THE HOUSE FINANCIAL
INSTITUTIONS AND INSURANCE COMMITTEE ON HOUSE BILL 2249**

Mr. Chairman and Members of the Committee:

I am Michael Taylor, Director of Government, Consumer and Industry Affairs for the National Council on Compensation Insurance, Inc. for the midwest region. Thank you for giving me the opportunity to appear before you to express our concerns on this piece of proposed legislation.

The purpose of this Bill is to amend Kansas Law to require that the rating organization the insurers or the system pay for the costs of rating information for agents and employers. NCCI believes that the cost of the products should be paid for by those who use them, not the system. For example, the system does not pay for a credit report or a drivers record. The cost of obtaining one of these is charged to the individual who orders or uses it.

This Bill would require that the costs for these products be included within the rates. As part of SB 307, passed in 1993, NCCI cannot file rates that include any expense factors. The Bill would override that, which would appear to be in violation of that law.

NCCI is not opposed to the employer or the agent receiving any rating information. We have filed, and the Kansas Insurance Department has approved, a program wherein NCCI will furnish to the employer, annually and at no cost, a copy of their experience rating. In addition, copies of the rating are provided to the employer's insurance carrier. This provides two options for agents to acquire the rating information. We feel very strongly that a carrier should share this information with the agent and, in 1993, Bill Hager, President and CEO of NCCI sent a letter to all insurers requesting they do this. A copy of that letter is attached.

Nearly 60% of Kansas employers are not experience rated, therefore, anything that is put into place to require the system cover the costs will create a subsidy of large employers, and their agents by small employers.

No one has researched the cost or problems associated with making rating information available on the INK network, as required by this Bill. No other state has enacted or proposed something similar. It may be very possible that the costs associated with such a program will greatly outweigh any benefits, and could be more than current costs. NCCI continues to research methods to make information available electronically and to lower unit costs. Currently in testing is *NCCI InsNet*, a program to deliver materials electronically to customers. Mandating a particular state program will create a hinderance to that system.

Inspection costs are also a concern of NCCI, and we believe that the cost of performing an inspection should be borne by those who use it. We also understand that there are occasions when the carrier and agent/employer disagree on the classifications. NCCI will not charge the employer or the agent for an inspection that confirms that the codes assigned by the carriers were incorrect.

Finally, a similar regulation was instituted by the Kansas Insurance Department in 1993. NCCI appealed that and the District Court of Shawnee County upheld the NCCI position. The Kansas Insurance Department has appealed that decision. Without commenting on the case itself, it would just seem appropriate to delay any action whatsoever until this issue has been decided by the courts.

NCCI firmly believes that the users of any product or service should be the ones responsible for the cost. Having the system, or all employers pay for the costs for agents use, creates an unfair subsidy by those who do not need or use the information.

NCCI respectfully requests that the Committee reject House Bill 2249.



National
Council on
Compensation
Insurance

William D. Hager
President and
Chief Executive Officer

DATE: June 29, 1993
TO: NCCI CEO's
FROM: W. Hager
RE: Experience Rating Services to the Producer Community

At the direction of our member companies, NCCI is moving rapidly and wherever possible to a fee-for-service revenue basis. As might be expected with any major change, this move has not been without adverse reaction, especially from the producer community. The issue, as raised by the producers, concerns the right of the employer or the employer's representative to obtain rating data free of any charges. Some producers have indicated an intention to challenge NCCI fee practices for experience ratings and will raise these issues with regulators and state legislators. We do not regard the regulatory or legislative arenas as appropriate forums to resolve these issues and have made extensive efforts with the national and state producers associations to discourage such activity.

To meet the anticipated challenge, we have conducted the necessary research and are fully prepared to defend NCCI's right to charge reasonable fees for products and services including experience rating data. However, to minimize unnecessary conflict, I am soliciting your assistance.

Given their close relationship to the policyholder, producers can serve as strong advocates for the employer's attention to loss control and claims management. The experience rating data is a necessary part of the information needed by employers, producers and carriers to make critical and necessary business decisions.

Under current procedure, NCCI provides two copies of the experience modification worksheet to the carrier of record for each eligible employer. This information is distributed to your company, immediately upon promulgation, in accordance with your company's specific mailing instructions.

It is my request that you instruct your staff to distribute one of these copies promptly either to the agent-of-record or directly to the

policyholder. You may wish to consider including your own promotional piece explaining the effect of the modification on premiums and offering your company's services as a means of controlling frequency, severity and ultimately costs to your policyholders. This distribution would be of great assistance in reducing producer concerns over access to the experience rating data.

WH157/p

November 21, 1994

Page 1 of 1

Contact: Sally B. Narey, Senior Vice President & General Counsel 407-997-4700

NCCI v. RON TODD, COMMISSIONER OF INSURANCE OF THE STATE OF KANSAS

On November 9, 1994 the District Court of Shawnee County, Kansas, issued a declaratory judgment finding a Kansas statute requiring rating organizations and insurers that prepared rating information to furnish copies to insureds, or their agents, at no cost imposed an unconstitutional taking of private property without providing just compensation as required by the Fifth and Fourteenth Amendments to the U.S. Constitution. The Petitioner, National Council on Compensation Insurance (NCCI), filed the action seeking judicial review of a decision by the Commissioner of Insurance for the State of Kansas.

The statute in dispute, K.A.R. 40-3-50, enacted after NCCI began charging fees for their experience modification work sheets, states:

Fire and casualty insurance; rating organizations; availability of rating information for individual insureds; charges, fees, conditions prohibited. No rating organization or insurer shall impose any conditions or fees upon any insured or any authorized representative of such insured for information requested pursuant to K.S.A. 40-117 that is specifically relevant to any experience modification factor which is used to determine an individual insured's workers compensation premium.

It was argued by the Petitioner that the statute resulted in an unconstitutional taking without just compensation by forcing NCCI to provide free copies of its experience modification work sheets and pay the costs of locating, reproducing and delivering the work sheets on demand in violation of the Fifth Amendment made applicable to states by the Fourteenth Amendment. NCCI further argued that the statute exceeded the scope of K.S.A. 40-117, which provides, in part, that insurance rating information be furnished by rating organizations to insureds and their agents within a reasonable time. The respondent asserted that K.A.R. 40-3-50 clarified the actual intent of K.S.A. 40-117 and argued that the interpretation of a statute by an administrative agency charged with its enforcement should be given great judicial deference. Both parties agreed that the experience modification work sheets met the definition of "private property."

The court rejected the Commissioner's argument pertaining to statute interpretation, and stated that statutes should not be "construed in a manner that leads to uncertainty, injustice, unreasonable results or confusion if it is possible to construe them otherwise." Although K.S.A. 40-117 required rating information be provided within a reasonable time, the court explained:

. . . the statute cannot reasonably be read to require that such information be supplied at no cost whatsoever to the parties requesting it. To require, as K.A.R. 40-3-50 does, that a rating organization must bear all the costs associated with producing, locating and delivering copies of their rating information to any insured or agent who makes a request clearly places an unjust burden on the rating organization.

The court concluded that K.A.R. 40-3-50 was unreasonable and unjustifiable as it related to K.S.A. 40-117. The court further related that the ruling should not be construed to prohibit the Insurance Department from promulgating future regulations of this issue and stated that the Commissioner could establish "a nominal fee structure" to limit the amounts charged.