Approved: March 10, 1995
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Michael R. O'Neal at 3:30 p.m. on February 1, 1995 in Room 313-S-of the Capitol.

All members were present except:
Representative David Adkins - Excused

Committee staff present: Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the committee:
Brad Smoot, Kansas Civil Law Forum
Jerry Slaughter, Kansas Medical Society
Lori Callahan, Kansas Medical Mutual Insurance
Wayne Stratton, Kansas Association of Defense Council
Ron Smith, Kansas Bar Association
Tom Buchanan, Kansas City Attorney
John Johnson, Kansas Trial Lawyers Association
Brenda Head, Kansas Trial Lawyers Association
Jan Guthrie, Kansas Collation Against Sexual/Domestic Violence
Cheryl Flannagan, Citizen
Ed Hund, appeared on behalf of Marcy Peterson
Carol Ridiger, Citizen
Gary Compton, Citizen
Tom Wilder, Kansas Insurance Department

Others attending: See attached list

Representative Jim Garner appeared before the committee on behalf of Representative Wempe with a bill request which would prohibit double and triple fines in plea bargaining traffic offenses. He made a motion to have this bill request introduced as a committee bill. Representative Pauls seconded the motion. The motion carried.

Representative Garner had a second bill request which would allow arrest records to be subject to expungement. He made a motion to have this bill request introduced as a committee bill. Representative Ott seconded the motion. The motion carried.

Representative Rutledge appeared before the committee with a bill request which dealt with worthless checks. He made a motion to have this bill request introduced as a committee bill. Representative Pauls seconded the motion. The motion carried.

Representative Ruff appeared before the committee with a bill request that dealt with divorce cases where parents who have custody of the children are abusing them. She made a motion to have this bill request introduced as a committee bill. Representative Graeber seconded the motion. The motion carried.

Chairman O'Neal had a bill request concerning the civil commitment of sexually violent predators, which dealt with the procedure to identify the offenders being done by the Department of Corrections and reviewed by the Attorney General's Office. Representative Pauls made a motion to have this bill request introduced as a committee bill. Representative Ott seconded the motion. The motion carried.

Hearings on **HB 2218** - collateral source benefits in certain actions for damages

Brad Smoot, Kansas Civil Law Forum, appeared before the committee as a proponent of the bill. He commented that they have supported the collateral source rule for many years. The collateral source statute which was enacted in 1988 was ruled unconstitutional in 1993, because of a dollar threshold provision. This bill does not limit the ability of the plaintiff to recover all economic damages in an unlimited amount, it only deals with medical expenses that have been paid by someone else, e.g., insurance companies. Currently, juries are not told that the expenses have been paid by someone else, and are led to believe that the plaintiff has incurred as reimbursed expenses. (Attachment 1)

Jerry Slaughter, Kansas Medical Society, appeared before the committee as a proponent of the bill. He told the committee that this bill was identical to the one passed last year and vetoed by Governor Finney. This bill would allow the evidence that a collateral source payment has been made and the jury may take the information into consideration in making any award. For physicians, this law played a substantial role in moderating the cost of professional liability insurance. High insurance costs are forcing physicians to retire early and some have even left the state to practice elsewhere. With the help of collateral source legislation, premiums have been dropping. Without this reform being enacted the premiums will begin to rise again. Under this proposed bill plaintiffs would not get less compensation than they lost, they just wouldn't get duplicate compensation. (Attachment 2)

Lori Callahan, Kansas Medical Mutual Insurance Company, appeared before the committee as a proponent of the bill. She explained that as an attorney one of the problems is that the jury is told "give them total, unlimited, no cap, past and future economic damages. Give them noneconomic damages, i.e., pain and suffering to the extent of $250,000. Unbeknownst to the jury there is this extra money that the plaintiff received. No wonder the public is upset with the legal system." This proposed bill would simply stop the plaintiff receiving more than full compensation. She encouraged the committee to remember that there are two different types of law: criminal is where the offender receives fines and incarceration & civil law is where damages are dealt with. Even with tort reforms in place, Kansas is still in the top 1/3 with the regards to medical malpractice premiums. This state is still not a good place to do business and practice medicine. (Attachment 3)

Wayne Stratton, Kansas Association of Defense Council, appeared before the committee as a proponent of the bill. He told the committee that he was involved in each of the Supreme Court decisions and have tried cases under the collateral source rule and it works rather easily. Research has shown that 29 states have some type of collateral source abrogation. The majority of states support the type of legislation that the committee is working with. The concept is that society as a whole would benefit by reducing the cost of litigation and insurance. It's not a negligent doctor or a guilty driver who will pay for these costs, it's society. He explained that Section 5 of the bill, which limits the effect in cases where there is comparative fault involved or an award of damages in excess of statutory limits, was adopted in 1987.

Bob Corkins, Kansas Chamber of Commerce and Industry & Ruben Krisztal, Shawnee Mission Attorney, did not appear before the committee but requested that their written testimony be included in the committee minutes. (Attachments 4 & 5)

Tom Buchanan, Kansas City Attorney, appeared before the committee as an opponent to the bill. He provided the committee with a list of differences between Kansas and Missouri Tort Laws. (Attachment 6)

Ron Smith, Kansas Bar Association, stated that Congress is looking at a collateral source rule and they will probably take care of the doctors on a national level. Experience teaches us courts and juries do not guarantee justice; they guarantee only an opportunity to achieve justice. (Attachment 7)

Representative Edmonds commented that it doesn't seem "fair" that if a doctor gets sued and wins the case they can't collect attorney fees and still have to pay the bill out of their own pocket, but yet, the opponents are saying that it's "not fair" for the jury to know that much of the medical bills have been paid by an insurance company and therefore the plaintiff can collect additional monies.

Chairman O'Neal commented that based on Mr. Smith's usual stance on having juries receive information, he asked whether there was anything that was unfair in telling the jury that an certain amount of medical bills had been paid by an insurance company. Mr. Smith responded that there are a lot of collateral sources involved in litigation. Attorneys currently don't tell the jury everything that is going on with the lawsuit, because most are not relevant to the trial. The only issue is "have I been damaged, and if so to what extent?" The Chairman asked if it wasn't relevant, and wouldn't the jury expect to be told, if any of the damages had already been paid from a source who does not expect any reimbursement. Mr. Smith responded that the courts have ruled that if a one party was going to have a windfall, then it should be the plaintiff.

John Johnson, Kansas Trial Lawyers Association, appeared before the committee as an opponent to the bill. He claimed that victims do not receive double recovery when insurance companies pay for the medical bills of the injured. Citizens are securing an investment when they purchase insurance and it should never benefit the negligent party. (Attachment 8)

Representative Edmonds commented that if all the facts are not presented to the jury, how can the court expect them to arrive at a true and honest decision? Mr. Johnson replied that if they were told about a collateral source it would confuse the jury. Representative Edmonds responded that the alternative is the "Mushroom Treatment; where you keep them in the dark and feed them fertilizer."

Chairman O'Neal stated that in a collateral source case the jury takes into consideration whether or not they believe that those collateral source benefits will be available to the plaintiff in the future. They can determine that the individual will have a lifetime of collateral sources benefits or that he will lose his job and have no collateral source benefits. Under subsection B, the collateral source benefits are "those that a jury believes will be available to the person in the future." The jury will decide if those benefits will indeed be available in the future.

Brenda Head, Kansas Trial Lawyers Association, appeared as an opponent to the bill. She commented that abrogation of the collateral source rule would mean a wrongdoer would not to be held fully accountable for all damages suffered by an innocent victim. She stated that if this bill was enacted, it would have effected Ryan Patton, who attended the committee meeting, and many similar cases. In Ryan's case he had almost $950,000 in medical expenses. The jury awarded him past and future medical damages, and over $750,000 in non-economic damages. The bottom line is who should be accountable for the damages. (Attachment 9)

Chairman O'Neal asked what the medical expenses werethat were paid for by a collateral source. Ms. Head responded that less than half, which were around $90,000 at trial. The Chairman asked if the collateral source benefits were around $100,000. Ms. Head replied yes, maybe less. Chairman O'Neal asked if she understood that if this collateral source rule was in effect at the time of trial, it would have had no affect on Ryan's case. Ms. Head commented that it would have shown the insurance he had at the time and the benefits he received. The Chairman explained that he was awarded $750,000 in non-economic damages, and got $250,000, which meant that there was $450,000 that he didn't get. Under this bill the $450,000 would off-set dollar for dollar any collateral source benefit found by the jury. In Ryan's case, since the $450,000 exceeds any collateral source benefit there wouldn't have been a reduction in what Ryan had recovered. Ms. Head stated that she understood that.

Jan Guthrie, Kansas Collation Against Sexual/Domestic Violence, appeared before the committee as an opponent to the bill. She explained that by passing the collateral source rule it would reduce the judgement against a perpetrator of domestic violence by the amount of the victim's collateral resources and allows the perpetrator once again to take advantage of the victim. (Attachment 10)

Chairman O'Neal asked Ms. Guthrie to give an example of a case that might end up in civil litigation. She responded that regardless of whether criminal charges have been filed the victim could still bring a case in civil court. The Chairman explained that when going through a criminal court the victim is entitled to damages, i.e. restitution.There is an exception in the bill that any amount included as part of a criminal sentencing order or pursuant to state programs of victims assistance incurred by virtue of the defendant also committing a criminal act. He questioned if the victims are seeking punitive damages for the intentional acts. She answered that very few cases ever get to civil court, because the victims do not recover enough. She said she understood, however, that in a civil court victims would be entitled to claim punitive damages.

Ed Hund, Kansas Trial Lawyer; Cheryl Flannagan, citizen; Carol Ridiger, citizen; Gary Compton, citizen, appeared before the committee as opponents to the bill. (Attachments 11, 12, 13 & 14)

Tom Wilder, Kansas Insurance Department, appeared before the committee as a neutral party. He provided the committee with a breakdown of rate filings submitted by several of the medical malpractice insurers over the past 13 years. (Attachment 15)

Hearings on **HB 2218** were closed.

The committee meeting adjourned at 6:30 p.m. The next meeting is scheduled for February 2, 1995.

HOUSE JUDICIARY COMMITTEE GUEST LIST

DATE: February 1, 1995

NAME	REPRESENTING
Ron Smith	KS Bar Assoc
Terry Slaughter	KS Medical Society
Allison Peterson	Kansas Medical Society
Lori Callahan	Kammco
Kirk W. Lowry	Self
Casey Compton	Justice T.V.
[illegible]	KTLA
[illegible]	KTLA
Ed Head	KTLA
Brenda Head	KTLA
Jennifer Johnson	KTLA
Robin Lehman	KTLA
Glenn M. Israel	Catalyst Inc.
Trish Bledsoe	Kansas Coalition Against Sexual and Domestic Violence
Jan Guthrie	Kansas Coalition Against Sex. & Dom. Violence
C Flannagan	Self
Chip Wheelen	KS Medical Society
Paul Shelby	OJA
Carol Bidinger	Self

HOUSE JUDICIARY COMMITTEE GUEST LIST

DATE: FEBRUARY 1, 1995

NAME	REPRESENTING
Mitch Butler	State Farm Ins Co
Amy Howell	Intern
Mike Montaro	Steve Kearney
Greg Tugman	DOB
PAT NICHOLS	SELF
Callie Denton	KS Insurance Dept
Tom Wilder	Ks Insurance Dept
Stacey Empson	Heinz, Ebert & Weir
Jeffrey Chanay	Overland Park Chamber of Commerce
Gene Hatcher	KS Assn of Defense Counsel
William Henry	Ks Assn. of Defense Counsel
Joseph Booth	N/A
Thomas Buchanan	self

KANSAS CIVIL LAW FORUM

A Coalition of Professionals and Businesses Interested in the Kansas Court System

Brad Smoot, Coordinator
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800 SW Jackson, Suite 808
Topeka, Kansas 66612
(913) 233-0016 FAX (913) 234-3687

STATEMENT OF BRAD SMOOT, LEGISLATIVE COUNSEL FOR KANSAS CIVIL LAW FORUM

PRESENTED TO THE KANSAS HOUSE JUDICIARY COMMITTEE REGARDING 1995 HOUSE BILL 2018, FEBRUARY 1, 1995

Mr. Chairman and Members of the Committee:

I am Brad Smoot, coordinator for the Kansas Civil Law Forum, a coalition of numerous businesses, professionals and trade associations interested in Kansas civil law. A copy of our membership list is attached.

Thank you for this opportunity to speak in support of 1995 House Bill 2018, which would reinstate a statutory "collateral source" rule in Kansas civil law. We believe that the common law collateral source rule unfairly increased damage awards and permitted plaintiffs to recover twice for the same loss or expense. On more than one occasion, the Kansas legislature has acted wisely in changing the rule. Unfortunately, the latest version enacted in 1988 contained a dollar threshold which ultimately made the entire act unconstitutional. We support the reenactment of the statutorily-created collateral source rule without such a threshold.

This debate over the "collateral source" issue may seem more complicated than it really is. When a person is injured, he or she sometimes asserts that another person is legally responsible. A claim is made against that other party for the loss or damage suffered. The "loss or damage" may include claims for loss of wages, pain and suffering, loss of enjoyment of life, physical disfigurement, past and future medical expenses, and a host of other damages. When a lawsuit ensues, plaintiffs often hire attorneys to represent them on a contingency fee basis, meaning that the attorney will get a significant percentage of any recovery. Defendants, and in some cases their

insurance carriers, must defend the lawsuit and pay their attorneys fees whether they win or lose.

Frequently, some expenses which the plaintiff has or reasonably will incur as a result of his injury have already been paid by a health insurance carrier in the form of hospital and doctor bills. This is where the collateral source rule comes in.

Under English common law, the jury was not told of the payment of such expenses by the third party. Even though the plaintiff did not actually "lose" anything regarding such expenses, he was allowed to recover the amount of such bills. In other words, the courts would pretend that the plaintiff's bills had not been paid and then allow the jury to blindly award damages for charges or costs which the plaintiff neither paid nor owes.

I have heard plaintiff's attorneys argue that allowing the plaintiff to recover twice for medical expenses is fair since he or she must share their award or settlement with the attorney to pay his fee. I would remind you that defendants and their insurance carriers have to pay their attorneys fees even when they are found to be completely without fault. Consequently, this old fashioned method of putting a little extra in the plaintiffs judgment ("padding") so he can pay his attorney hardly seems fair when the defendant almost never recovers any of his litigation costs.

I have also heard plaintiffs' attorneys claim that we should not penalize a plaintiff for having purchased health insurance coverage by denying him the right to recover under both his health care policy and the defendant's liability coverage or personal assets. It is for this reason that the Kansas collateral source rule proposed in HB 2018, would permit the plaintiff to recover the amount of any premiums paid for their health care coverage even if the premiums were paid entirely by the plaintiff's employer. Likewise, the bill before you would allow the plaintiff to recover any out of pocket co-pays or deductibles actually expended as a result of the alleged injury.

We must also remember that this bill does not limit the ability of the plaintiff to recover for all economic damages in an unlimited amount, all uncompensated expenses in an unlimited amount, any pain and suffering up to $250,000 and punitive damages up to $5 million. Consequently, seriously injured plaintiffs may still recover

millions of dollars and their attorneys may still become millionaires overnight with their portion of the damage award or settlement.

The underlying issue is that American society spends too much money on litigation, both in terms of transaction costs (attorneys fees and court costs) and in terms of awards. No other country in the world spends as much. The double recovery of medical expenses adds an unnecessary expense to the system which should be removed. While we understand the attorneys' desire to be compensated for their work and to get as much as possible for their clients, the legal fiction of the collateral source rule is no longer justified.

Thank you for your consideration of our views and I would be pleased to respond to any questions.

KANSAS CIVIL LAW FORUM

A Coalition of Professionals and Businesses Interested in the Kansas Court System

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KCLF MEMBERSHIP LIST

The Association of Insurance Agents
Beech Aircraft Corporation
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The Coleman Company, Inc.
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Kansas Association of Defense Counsel
Kansas Association of Property & Casualty Insurers
Kansas Hospital Association
Kansas Medical Mutual Insurance Company
Kansas Medical Society
Kansas Railroad Association
Puritan Bennett Corporation
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Western Resources

KANSAS MEDICAL SOCIETY
623 SW 10th Ave. • Topeka, Kansas 66612 • (913) 235-2383
WATS 800-332-0156 FAX 913-235-5114

February 1, 1995

TO: House Judiciary Committee

FROM: Jerry Slaughter
Executive Director

SUBJECT: HB 2220 (and HB 2218); concerning the collateral source rule

The Kansas Medical Society appreciates the opportunity to appear today in support of HB 2220 which would reinstate legislation enacted in 1988 and invalidated in April 1993 by the Kansas Supreme Court. The provision which caused the Court to strike down the law has been eliminated. The bill is identical to the one passed by the Legislature last year and vetoed by Governor Finney.

Let me make it clear from the outset that, despite what our opponents may have told you, we do not support letting criminals off the hook for their criminal acts. Nor do we wish to keep deserving plaintiffs from receiving full and fair compensation for their actual losses. Kansas was one of the first states, in 1976, to require physicians to carry professional liability insurance to *assure* that persons injured through negligence would be able to recover their losses.

Simply put, this issue is about ending double recoveries in personal injury lawsuits. Currently, the collateral source rule prevents juries from being informed about payments a plaintiff has already received from another (collateral) source. The effect of the rule is that plaintiffs can recover twice for certain claimed damages, usually medical expenses. At the time of trial, for example, a plaintiff whose medical expenses have already been paid can keep that information from the jury, resulting in duplicate compensation for those losses. This bit of deception not only drives up professional liability costs for physicians, but also keeps the jury from being fully informed about the true extent of the plaintiff's losses.

This bill works by allowing the defendant in civil lawsuits to present evidence of collateral sources of payment so that the jury may take such information into consideration in making any award. Additionally, the plaintiff may introduce evidence to show what it cost to secure the collateral source benefit, such as through the payment of insurance premiums, or what it will cost in the future to assure coverage. After considering all the evidence, the jury awards damages.

This legislation was a key part of the package of legal reform bills enacted by the Legislature in the late 80's. For physicians, this law played a substantial role in moderating the

cost of professional liability insurance. It provided much needed relief to physicians who had seen their insurance costs increase over 600% from 1981 to 1988. High insurance costs were forcing physicians to retire early, discontinue providing high risk services, and even leave the state altogether. With the help of the collateral source rule which had been in effect from late 1988 to early 1993, premiums had been dropping. Malpractice costs for Kansas physicians were in the top ten in the nation prior to enactment of the legal reforms. They have since moderated, but the loss of the collateral source rule legislation will most certainly reverse that trend. Claim costs in our physician-owned insurance company, KaMMCO, have increased substantially since the Court's ruling almost two years ago.

It is significant to note that virtually all of the major health care reform proposals before Congress last year, including President Clinton's, called for eliminating the collateral source rule.

Reinstatement of this legislation is important to maintaining a stable medical malpractice environment in Kansas. With the rapid growth of managed care, there is intense pressure on physicians to lower their costs, making malpractice premiums a significant cost of doing business. The malpractice crisis of the 80's has subsided, thanks in large part to legal reforms passed by the Legislature, in particular the modification of the collateral source rule. We urge you to restore this reform and help keep malpractice costs lower. Thank you for giving our comments your consideration.

KaMMCO

KANSAS MEDICAL MUTUAL INSURANCE COMPANY

MEMO

TO: House Judiciary Committee

FROM: Lori Callahan, General Counsel

RE: H.B. 2218

DATE: February 1, 1995

The Kansas Medical Mutual Insurance Company (KaMMCO), is a Kansas domestic physician-owned professional liability insurance company formed by the Kansas Medical Society. KaMMCO is the largest insurer of physicians in Kansas, currently insuring over 1,000 Kansas physicians.

KaMMCO supports H.B. 2218. As a part of the tort reform package of the late 1980's, the Kansas Legislature enacted collateral source legislation designed to eliminate duplicate recoveries. This 1988 legislation was one of the premiere components of tort reform and had a substantial effect on stabilizing liability rates.

The concept of the collateral source reform is to prevent unjust enrichment by a plaintiff. Without these reforms, plaintiffs are allowed to accept, without any obligation of repayment, full medical benefits from their health insurer and then allege as losses those same medical costs in a liability suit. This allows the plaintiff to recover twice for the same damages.

In 1988, the Kansas Legislature enacted a modification of the collateral source rule which allowed a jury to consider that the plaintiff had already received payment for certain damages as well as the amount of premium the plaintiff had paid to receive those benefits. In April, 1993, the Kansas Supreme Court held the 1988 collateral source law unconstitutional based upon a technical aspect of the legislation. That constitutional infirmity was corrected in 1994 in S.B. 761. S.B. 761 passed both the House and the Senate, but was vetoed by Governor Finney. H.B. 2218 and H.B. 2220 are identical to S.B. 761 in 1994.

House Judiciary
2-01-95
Attachment 3

Endorsed by the Kansas Medical Society

623 W. TENTH ST.-STE. 200 • TOPEKA, KANSAS 66612
913-232-2224 / 800-232-2259 / 913-232-4704 (FAX)

At KaMMCO, the effect of the loss of the collateral source modification in 1993 has been profound. A review of all claims in which an indemnity payment was made in the 9 month period following the Supreme Court case revealed that while there was great variability in the loss of the modification on individual claims, overall in those cases, involving a collateral source payment for medical expense, our total indemnity payout was 48% higher than it would have been prior to the court's ruling. Additionally, it should be noted that these cases do not include any amounts paid by the Health Care Stabilization Fund over and above what the primary insurer paid, nor does it include any other medical malpractice insurance companies in the state. Since we currently insure about 40% of the physicians in the state, however, I would anticipate that our experience would be similar to others in our state. These figures are consistent with the 1986 Rand Corporation study by Worten Business School health economist, Patricia Danson, which found that in states which limit double recoveries, medical malpractice awards were reduced by 18%, and the frequency of lawsuits fell 14%.

Even with the 1988 collateral source legislation, KaMMCO was in the top one third of all states in the highest medical malpractice insurance premiums in the nation. Without reenactment of this legislation, Kansas stands to lose considerable ground in its fight for tort reform returning us to the day when doctors were leaving our state for more tenable litigation environments.

Finally, by passage of this legislation, you would be adopting all prior legislative history pertaining to modification of the collateral source rule, including recognition that this legislation will only pertain to cases of personal injury, not property damage, since there has never been evidence presented to the Legislature on the lack of availability of property insurance due to the collateral source rule, while the evidence regarding lack of availability of insurance for personal injury has been overwhelming.

The reform embodied in H.B. 2218 and H.B. 2220 is critical to the preservation of the stable environment experienced in Kansas prior to the 1993 Kansas Supreme Court decision. We would ask the committee to vote this bill favorable for passage.

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

835 SW Topeka Blvd. Topeka, Kansas 66612-1671 (913) 357-6321 FAX (913) 357-4732

HB 2220

February 1, 1995

Testimony Before the
House Committee on Judiciary
by Bob Corkins, Director of Taxation
and Small Business Development

Honorable Chair and members of the Committee:

My name is Bob Corkins, director of taxation and small business development for the Kansas Chamber of Commerce and Industry. Thank you for the opportunity to express our members' support for the collateral source tort reform proposition contained in HB 2220.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

As with other litigation reforms in which KCCI has been active for many years, we view this proposal as an important means for reducing business costs and fostering a more positive, less litigious environment in which to advance economic development. KCCI has consistently supported the collateral source rule concept with that in mind. Our members were pleased with last year's success of the measure in SB 761, and

believe that a more favorable review of the legislation would be granted by Kansas' new Governor.

Thompson v. Kansas Farm Bureau Insurance acknowledged the denial of equal protection that was inherent in our previous dollar threshold for admitting collateral source benefit evidence. That defect would be corrected by the legislation before us today and KCCI considers this solution to be fairer in both a constitutional sense and from a pure policy standpoint. Moreover, HB 2220 would reestablish a reform which is one of simple equity: claimants should not be compensated more than once for the same injury.

Therefore we respectfully ask that you endorse today's proposal and recommend it favorably to the full House. Thank you again for your time and consideration.

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PLEASE REPLY TO POST OFFICE BOX

January 31, 1995

Mr. Mike O'Neal, Chairman
House Judiciary Committee
170 West Capitol Bldg.
Topeka, Kansas 66616
(913) 296-1154

Mr. James Garner
House Judiciary Committee
284 W Capitol Bldg.
Topeka, Kansas 66616
(913) 296-0251

Re: House Bill 2218- Collateral Source Rule
Edna Danner, by and through Michael Gibbens, Administrator and Ruby Buntin, daughter and heir-at-law v. Robert C. LaHue, D.O., Chartered, d/b/a Blue Valley Medical Group, et. al.
Case No. 93-C-0189

Gentlemen:

It has been brought to my attention that the House Judiciary Committee is contemplating arguments on the " Collateral Source Rule " and the abrogation of the same. The history behind such rule is one which I will not bore you with, nor will I take your time in describing the reasons why " Collateral Source " should not be admissible into evidence during the Trial of a case. I thought instead to provide you with a description of a case which I successfully tried in the District Court since the same is very relevant to your current undertaking.

The aforementioned "Medical Negligence" case involved issues of improper health care, possible Medicare Fraud and improper billing for services rendered by a Medical Assistant when not authorized by Statute. It involved the death of an innocent person who was hospitalized as a direct result of improper care and fraudulent practices of the health care providers and the group.

Mrs. Danner incurred nearly $30,000.00 in medical bills and if you were to eliminate the Collateral Rule the Defendants not only would have argued that the Plaintiff suffered no monetary medical losses but they would benefit from their fraudulent/unnecessary billing since that information may not be otherwise admissible.

In the event that you have any questions or members of your staff would like some additional information, please feel free to contact me and I will be more than glad to provide the same to you. However I request for you to pass a copy of this letter to all other members of your committee.

Synopsis

A Petition For Survivorship and Wrongful Death of Edna Danner was filed in the above matter in the Wyandotte County District Court, in the State of Kansas. Plaintiff was represented by Ruben J. Krisztal, a sole practitioner with offices at 7007 College Boulevard, Suite 405, Overland Park, Kansas 66211. Telephone number is (913) 451-4441. The defendants in this case were Robert LaHue, D.O. Chartered, d/b/a Blue Valley Medical Group, Christopher Murray, D.O. and Ronald LaHue, D.O.

Plaintiff brought a lawsuit alleging that the defendants were negligent in the care provided to Mrs. Danner and that led to her ultimate death. Plaintiff alleged that defendants Blue Valley Medical Group and Christopher Murray were negligent in allowing Gladstone Tucker, to provide medical treatment to Edna Danner. Gladstone Tucker is an individual from Sierra Leone, Africa, who received his M.D. degree from the Soviet Union and who came to this country in the early 1980's.

Gladstone Tucker took the ECFM&G in 1988 and failed same. At trial Mr. Tucker admitted that he had taken the test four times and had failed each time. He had recently taken the exam and is expected to fail again. The plaintiff further alleged that the defendants held Gladstone Tucker to the public as a physician and those representations were made expressly and impliedly. The defendants Robert LaHue, D.O. Chartered, d/b/a Blue Valley Medical Group, billed the services rendered by Gladstone Tucker under the name of Christopher Murray as if the services were rendered by Christopher Murray. Defendants were alleged to have fraudulently billed his services, they also failed to provide the proper care to the plaintiff leading to the aggravation of pre-existing conditions.

Plaintiff, Edna Danner, became a patient of Christopher Murray, D.O., on or about February 7, 1991, when she was admitted to Parkway Care Center, a nursing home owned and operated by Beverly Enterprises. At the time of her

admission, the plaintiff was 85 years of age, was able to ambulate with the assistance of a walker, and was able to carry on a normal conversation.

The evidence introduced at trial demonstrated that Mrs. Danner, when she was 83 years of age, underwent a double-bypass surgery. When she was 84 years of age, she underwent a cervical laminectomy so she would not have to live the rest of her days in a wheelchair. As far as the family was concerned, she was admitted to the nursing home for purposes of gaining strength so she could return home with her family. Mrs. Danner had a history of diabetes out of control and urinary tract infections. She had a life expectancy in excess of 3 1/2 years at the time of her death.

Mrs. Danner quickly deteriorated and became confused and disoriented. By September of 1991 she was admitted to a local hospital dehydrated, malnourished and with decubitus ulcers. She also had a diagnosis of diabetes out of control and a urinary tract infection.

Mrs. Danner remained at Providence St. Margaret's Medical Center for approximately two weeks. At the time she was discharged, she had a decubitus ulcer which was healing, and her diabetes was under control. Furthermore she was properly hydrated.

By December 17, 1991, Mrs. Danner was re-admitted to a local hospital with a M.R.S.A. Infection. At the time of her admission, she was described as being in a vegetative state, having a Stage III to Stage IV Decubitus Ulcer, which was very foul smelling, and had necrotic tissue, which was approximately 3 1/2 to 4 centimeters in diameter and 2 1/2 centimeters deep. She underwent surgical debridement of the sacral decubitus ulcer and a debridement of the ulcer of the heel. She remained at the hospital through December 30, 1991 at which time she was discharged to another nursing home. Mrs. Danner died on February 10, 1992.

The evidence produced at the trial demonstrated that Blue Valley Medical Group is a group of physicians that specialize in providing medical care to nursing home residents. They had in excess of 200 nursing homes in Kansas and Missouri. At the time that Dr. Murray was providing medical care to Edna Danner, he was providing services to approximately 34 nursing homes and allegedly cared for in excess of 1,100 patients per month.

It was alleged by the plaintiff that the defendants were negligent in that they had too many patients to care for and did not provide the proper care to Edna Danner. The defendant, Christopher Murray, D.O., testified that he worked 10 to 11 hours per day, and spent 10 to 20 minutes per patient. On the various days that defendant Christopher Murray D.O., allegedly cared for plaintiff Edna Danner, he saw a substantial number of other patients at various nursing homes.

Plaintiff also alleged that the defendants had engaged in a pattern of unnecessary lab testing. Evidence was introduced during the trial that Dr. Murray and Gladstone Tucker as employees of Robert LaHue, D.O., Chartered, ordered laboratory tests which were performed by Johnson County Medical Lab, a subsidiary of Blue Valley Medical Group. The president of both corporations is Robert LaHue, D.O. Testimony was introduced in the trial that certain tests were done contrary to acceptable standards, such as thyroid profile and glycosolated hemoglobin.

The experts testified as to the standard of care and how the defendants deviated from the same from a medical perspective and how such deviation contributed to the deterioration of plaintiff's condition, and led to her ultimate death. They further testified as to how the defendants violated federal law by billing third parties for services provided by Gladstone Tucker. The defendants presented a general denial, but they also argued that the plaintiff, who was 85 years old, had entered the "dying process stages of life", and that she had pre-existing conditions which caused the difficulties. Furthermore, they argued that they did not cause nor contribute to any of the plaintiff's injuries and they denied any violation of federal law.

The case was tried to a jury and the jury awarded the plaintiff the total sum of $635,000.00. The jury further stated that the defendants fraudulently represented to the plaintiff that Gladstone Tucker was a licensed physician and they recommended that punitive damages be awarded against Blue Valley Medical Group and Christopher Murray. The decision was a unanimous verdict.

Under Kansas law, punitive damages were assessed by the Trial Judge against both defendants at a separate trial.

I would appreciate if you would seriously consider the effect that the proposed legislation to eliminate " Collateral Source" would have on an innocent Plaintiff. It would indirectly benefit those who engage in fraudulent practices.

I believe that your proposed legislation will have an adverse effect in furthering the ultimate goal of protecting the rights of the elderly.

Expecting to hear from you should you require additional information. I remain

Very truly yours,

Ruben J. Krisztal

RJK/slk

5-4

DIFFERENCE BETWEEN KANSAS AND MISSOURI TORT LAWS

KANSAS	MISSOURI

COMPARATIVE NEGLIGENCE

K.S.A. § 60-258a provides that a plaintiff cannot recover damages for a defendant's negligence unless the plaintiff's negligence was less than the negligence of the defendant.	Missouri is a true comparative fault state. Plaintiff is entitled to recover even if the plaintiff is found to be more at fault than the defendant. The plaintiff's recovery will, however, be reduced by the percentage of fault assessed to the plaintiff. See Cornwell v. Texaco, Inc., 712 S.W.2d 680; Shelton v. U.S., 804 F.Supp. 1147 (E.D.Mo. 1991).

DAMAGE CAPS

Non-economic damages in a medical malpractice action shall not exceed the sum of $250,000.00 from all defendants. K.S.A. §60-3407.	A medical malpractice plaintiff cannot recover more than $350,000.00 from any one defendant. R.S.Mo. §538.210. "Defendant" is defined for purposes of this statue.
Claims for pain and suffering shall not exceed $250,000,00. K.S.A. §60-19a01.	
In a death action, the damages, other than pecuniary loss sustained by an heir at law, cannot exceed in the aggregate sum of $100,000.00. K.S.A. §60-1903.	

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DIFFERENCE BETWEEN KANSAS AND MISSOURI TORT LAWS

KANSAS	MISSOURI

STATUTE OF LIMITATIONS

Negligence and Product Liability	Negligence and Product Liability
Tort actions enumerated in **K.S.A. § 60-513a** shall be brought within 2 years, But no more than 10 years.	**R.S.Mo §516.120** allows actions for the same torts to be brought within 5 years. No limit on age of product.

PRODUCT LIABILITY LAW

K.S.A. §60-3301 et seq. contains the Kansas Product Liability Act. A product seller shall not be subject to liability if it proves that the harm was caused after the product's "useful safe life" had expired (unless the seller has expressly warranted the product for a longer period). **K.S.A. §60-3303** establishes a 10 year period of repose wherein a presumption arises that harm caused more than 10 years after the time of delivery was caused after the useful safe life had expired. This presumption may only be rebutted by clear and convincing evidence.	**R.S.Mo. §537.762** allows a defendant, whose liability is only as a seller, to move for dismissal if another defendant is properly before the Court and from whom a total recovery may be had. Comparative fault applies. **R.S.Mo. 537.765.**

DIFFERENCE BETWEEN KANSAS AND MISSOURI TORT LAWS

KANSAS MISSOURI

PUNITIVE DAMAGES

KANSAS	MISSOURI
The plaintiff shall not plead a claim for punitive damages in the Petition unless the Court enters an Order allowing an amended pleading that includes a claim for punitive damages. **K.S.A. §60-3701.** The plaintiff must establish there is a probability that the plaintiff will prevail on the claim, by motion on or before the date of the Pretrial Conference. **K.S.A. §60-3703.** The Court will then determine whether punitive damages shall be allowed.	Punitive damages can be initially pled. The Judge decides if a submissible case is made and then submits it to the jury. The award of punitive damages must bear some relation to injury but need not bear any relation to the amount of actual damages. See e.g. DeLong v. Hilltop Lincoln-Mercury, 812 S.W.2d 834 (Mo.App. 1991).
If such damages are allowed and awarded, the plaintiffs must prove by clear and convincing evidence that the defendant acted toward plaintiff with willful conduct, wanton conduct, fraud or malice. **K.S.A. §60-3701(c).**	In tort actions, punitive damages may be awarded for conduct that is outrageous, because of defendant's evil motive of reckless indifference. Burnett v. Griffith, 769 S.W.2d 780 (Mo. 1989); **MAI 10.01.**
No award of punitive damages shall exceed the lesser of the annual gross income earned by the defendant (calculated from the defendant's highest gross annual income for any of the five years immediately proceeding the act) or $5,000,000.00 unless the Court finds that the profitability of the defendant's misconduct exceeds or is expected to exceed this limitation. Then the limitation on punitive damages which the Court may award shall be equal to 1 1/2 times the amount of profit which the defendant gained or is expected to gain as a result of the defendant's misconduct. **K.S.A. §60-3701(f).**	

DIFFERENCE BETWEEN KANSAS AND MISSOURI TORT LAWS

KANSAS MISSOURI

JOINT AND SEVERAL LIABILITY

KANSAS	MISSOURI
The concept of joint and several liability between joint tortfeasors no longer exists in Kansas in comparative negligence actions.	Missouri has adopted joint and several liability in tort actions. **R.S.Mo. §537.067.**
	The apportionment of fault between defendants has no effect on plaintiff's right to collect the full amount from one defendant.
	Where fault is apportioned and one defendant is judgment proof, any party can seek reapportionment of the noncollectible defendant's share.

CONTRIBUTION

KANSAS	MISSOURI
Since adoption of **K.S.A. 60-258(a)**, the right of contribution among judgment debtors no longer exists. Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978).	Tort defendants in Missouri are subject to contribution. Plaintiff's judgment may be reduced where plaintiff settled with some but not all joint tortfeasors. Settling tortfeasor is discharged from liability for contribution. **R.S.Mo. §537.060.**

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Kansas Bar Association
Legislative Testimony
By Ron Smith, General Counsel
February 1, 1995
House Judiciary Committee

re: Collateral Source Rule
HB 2218 and 2220

"The logic of the law is experience."

It was true in the turn of the century world of Oliver Wendell Holmes. It remains true today. If experience teaches us anything it is that legislatures are designed as political branches to set broad policy, and the judiciary is designed to provide individual justice. Experience teaches that in the legislative process, there are few rules and often testimony for legislation is anecdotal. In the courtroom, many rules attempt to insure decisions are not made on anecdotal evidence. Experience teaches us courts and juries do not guarantee justice; they guarantee an *opportunity to achieve justice.* If experience teaches anything, it is that legislatures are where powerful special interests often attempt to skewer the playing field to their benefit.

You are being asked by proponents to decide a question of future justice with majoritarian political means. That is an oxymoron. Majoritarian politics often is incompatible with justice. The real danger is politics may promote injustice.

Collateral source rules are rules of evidence which judges impose to keep irrelevant evidence from being discussed by the jury. Judges want juries focusing on the two fundamental issues: (1) was the defendant negligent and, (2) if so, what were the damages to the plaintiff.

Collateral source *rules* have been formalized in our civil litigation only in the last 150 years.[1] However, the Judeo-Christian laws of Moses have collateral source concepts in that law, although they did not have elaborate judicial mechanisms for resolving civil disputes.[2] In our development of Anglo- Saxon tort law, judges drew on biblical law for some of the development of the common law.

[1] Its first use was the year Kansas was made a territory, 1854, in Propeller Monticello v. Mollison, a Supreme Court admiralty case. 58 U.S. (17 How.) 152 (1854).
[2] In Exodus 21:18-19, "If men quarrel and one hits the other with a stone or his fist and he does not die, but is confined to bed, the one who struck the blow ... must pay the injured man for the loss of his time and see that he is completely healed." There is no exception for when the victim is privately wealthy or the victim has family funds to help with expenses.

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Collateral source rules come in all types. This bill only affects health insurance "collateral" sources. Why are collateral sources purchased by a human being less important than the collateral source of a business?[3] And if the answer to that question is because business collateral sources often are subject to subrogation, then we should be looking at the policy choices of putting human beings on the same footing as the businesses, put individuals at a disadvantage.

What we can agree upon is that the cost of paying for negligent injury is rising. A verdict that pays for a broken leg today will cost three times what the same verdict cost ten years ago. That is why we have this bill. Those who have paid for the plaintiff's cost of medical care have decided that they no longer want to pay for the injuries they cause. They get around it by making the victim pay the cost of medical care.

Yet we see the phenomenon if you look at ALL the current verdicts, the actual cost of total verdicts is going down -- without this bill. If you examine national trends, personal injury lawsuits make up only nine percent of civil cases filed, and the number of tort cases have been declining every year since 1990. Average personal injury verdicts fell to $62,000 in 1993 from $70,000 in 1989, an 11% drop. Between 1992 and 1993, awards in vehicular liability cases dropped 22% from $32,353 to $25,000. Further, *Lawyer's Weekly USA* indicates a more sophisticated defense bar is presenting tougher adversaries to the plaintiff's bar.[4]

US News and World Report, in an article critical of lawyers, reports in the January 30th issue:

> "Insurers and manufacturers have spent millions publicizing tales of run away litigation, of outrageous multi-million-dollar punitive-damage awards, of American competitiveness crippled by $100 billion a year in needless legal expenses. *Much of it is exaggerated."*

Where is the justification for this bill? Where is the "crisis?" How is this solution directly and rationally aimed at curbing the problems the proponents have attempted to identify?

Doctors are not facing major premium increases. I understand the Insurance Commission indicated to the House Business and Commerce Committee on January 24, 1995 that the Health Care Stabilization Fund has built up an estimated $40 to 65 million

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[3] For example, if a plaintiff business has fire insurance but the carelessness of the business next door causes a fire and damages both businesses, the first business can sue the second business for damages regardless whether the first insurance company pays off. The fact the defendant is insured against losses of this nature is also irrelevant and by collateral source rule reduced to a statute cannot be presented to the jury.

[4] LWUSA, 6/4/94

reserve (depending on which actuary you use). This may result in premium reductions. *There have been premium reductions each of the last three fiscal years in this fund.* Fund officials report that estimated losses three years ago have not panned out, and they've adjusted their loss allocations downward. This is exactly opposite what was happening in 1988.

The 1988 collateral source rule was declared unconstitutional in April, 1993. Yet FY 95 Fund losses were lowered by $10 million, a 36% decrease the first 12 months after the rule was declared unconstitutional. Further decreases are expected.

Changes in Case Law

Our case law has changed since 1988. To change common law damage rules you must have (1) a rational basis for your actions and (2) you must provide the plaintiff a *quid pro quo*.[5] If your justification is simply that insurance companies have asked for this legislation, you have no rational basis for this action, the action is arbitrary, and that makes the bill constitutionally suspect.

If your answer is that we are attempting to solve insurance problems of the defendant by penalizing the plaintiff for having purchased insurance, that is Orwellian logic at its convoluted best. The Ohio Supreme Court has already held that such rationale is unconstitutional.[6] The Ohio Legislature enacted a bill that all instances of payment of workers compensation, disability payments, social security, etc., can be deducted from tort awards. The Ohio Supreme Court held that whatever insurance problems existed did not justify infringing the rights of injured plaintiffs. A Mrs. Sorrell had won a $10,000 jury award but because she had received $14,000 in workers compensation benefits, the entire verdict was disallowed. Such a law, the Court held, violated the constitutional right to a jury trial, due process, and the right to a remedy at law for injury.

> "It is debatable whether the statute even addresses its stated goal of remedying the insurance crisis," *Lawyer's Weekly USA* reported, quoting the *Sorrell* decision, "since there is little evidence of such a crisis. But even if the crisis were real, the statute is an 'irrational' response to it since it has the effect of punishing plaintiffs for having insurance."

These same arguments will be raised if HB 2218 is enacted. The Bill of Rights of the 1859 Kansas Wyandotte Constitution was taken verbatim from the Ohio Constitution of 1850. The language the Ohio Court construed in reaching the *Sorrell* decision is nearly identical to what the Kansas Supreme Court will examine. Under rules of constitutional construction, another Court's interpretation of identical or nearly identical constitutional language carries persuasive effect.[7]

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[5] *Samsel v. Wheeling Transport Inc., supra.*

[6] *Sorrell v. Thevenir*, No. 92-2382, __ NE2d __ (June 1, 1994).

[7] When Kansas adopts a statutory or constitutional provision from another state, cases on the book of that state at the time of the Kansas adoption are considered as written into our provision. *Edgington v. City of Overland Park,* 15 Kan.App.2d 721, 815 P.2d

Internal Conflict

If you enact this law, you will have in Kansas law two conflicting statutes. First, KSA 60-454 states that just because the defendant has insurance resources, the plaintiff cannot introduce those insurance resources into evidence to show liability. The reason for 60-454 statute is good -- the fact a defendant is insured against loss does not mean he was negligent. Nor do we want juries finding a person to be negligent just in order to compensate the plaintiff. Ideally, the collateral source rule keeping insurance out of the trials gets juries to decide issues on the evidence, not their preferences if someone else (insurance companies) are paying the tab. We want juries to focus on whether the defendant truly was negligent, not whether the defendant can pay the judgment. Plaintiffs who can prove the defendant negligent have a right to a judgment regardless whether the defendant can pay the judgment.

These bills state the opposite. If the plaintiff has insurance for medical costs, the jury is told of that insurance *whether or not* the jury later decides the defendant was not negligent. Why should the legislature have two conflicting theories side by side in the civil procedure code?

Who is affected?

You have been told that this bill hurts trial lawyer incomes and helps doctors and businessmen. That is wrong on both counts.

Only those who buy health insurance or have it provided to them as a benefit of employment are affected by this bill. That means the poor and the very wealthy are unaffected by this bill. The poor do not buy health insurance and usually work in jobs that do not provide health insurance. The Government often provides Medicaid for them. Medicaid is not affected by this bill. The wealthy pay medical care out of their own resources, usually without health insurance.

1116, 1122 (K.Ct.Ap. 1991); When determining legislative intent, courts are not limited to mere consideration of language employed but may properly look into historical background of enactment, circumstances attending and subsequent to its passage, purposes to be accomplished, and effect statute may have under various constructions presented. *Joe Self Chevrolet, Inc. v. Board of County Com'rs of Sedgwick County,* 247 Kan 625, 802 P.2d 1231 (1990). *In re Petition of City of Moran,* 238 Kan 513, 713 P.2d 451 (1986) *Garber Enterprises Inc. v. City of Lawrence,* 14 Kan.App.2d 656, 798 P.2d 946 (1990); "It is a fundamental canon of construction that a *constitution should receive a liberal interpretation in favor of a citizen,* especially with respect to those provisions which were designed to safeguard the liberty and *security of the citizen in regard to both person and property. State ex rel Gladden v. Lonergan,* 201 Or. 163, 177, 269 P.2d. 491 (1954); cited with approval in *Lloyd Corp. v. Whiffen,* 849 P.2d 446 (Or. 1993). The right to a remedy at common law was designed to reimburse injured citizens for their losses. Thus Sec. 18 may be construed liberally to promote that end.

It is the Middle Class that buys health insurance or has it provided for them at work. *The people affected by this bill are the voters who sent you here.*

Fairness?

An excellent example of how the rule change would *negatively* impact certain cases is found in the facts of the case that prompted this legislation.

In *Thompson, v. KFB Insurance Company,*[8] Ivan Thompson was a passenger in his own automobile. He had purchased insurance from Farm Bureau Insurance. It was being driven on Interstate 70 by another person. Another automobile crossed the median and struck Thompson head-on . Thompson was spent two days in intensive care, then ten weeks recuperating. The person who caused the accident was marginally insured. The other driver's policy limits were paid to Thompson without a lawsuit. Thompson had purchased "underinsured motorist" coverage from his *own insurance company*. Since his injuries exceeded the other driver's insurance, Thompson applied to his *own insurance company* for Underinsured Motorist Coverage (UIM). They had to let a jury decide how much extra. Since Thompson alleged he was damaged more than $150,000, KFB sought to impose the 1988 collateral source rule *change against their own customer's interests.* The District Court determined before trial that the collateral source rule was unconstitutional. Thus it was not a factor for the jury to consider. The jury awarded $377,000 to Thompson. The district court made several reductions in the award and entered judgment for Thompson in the amount of $226,150. On appeal, the Supreme Court agreed with the district court that the collateral source rule as written was unconstitutional.

However, had this case happened after enactment of HB 2218 and if it is held constitutional, Mr. Thompson's own health insurance would have been used to reduce his verdict. Mr. Thompson is encouraged by insurance companies to buy automobile insurance and health insurance. Then the insurance industry comes here and seeks legislation to penalize Thompson for buying the insurance. Does that make sense?

Constitutionality

Proponents say HB 2218 is simply offered to fix the constitutional problem with the 1988 law. The arbitrary threshold is not the only problem with the 1988 law.

In 1987, the legislature enacted a $250,000 limit on pain and suffering. That law was held constitutional in the 1990 case of *Samsel v. Wheeling Transport Services Inc.* In that opinion the Kansas Supreme Court ruled that Kansans have a constitutional right to a remedy for injuries done to them. If the legislature is going to reduce the remedy available to citizens under the common law, then it must enact a *quid pro quo,* that is, the plaintiff must realize some benefit from the change.[9]

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[8] 252 Kan 1010, 850 P.2d 773 (1993)

[9] *Samsel v. Wheeler Transport Services Inc.,* 246 Kan. 336, 341 (1990)("In the past, we have recognized that the legislature, under its power to act for the general welfare, may

In *Samsel* the court essentially states that while the legislature provided a cap on pain and suffering, the *quid pro quo* was that a judge could not use inherent powers of remittitur to reduce the pain and suffering verdict below $250,000.

Where is the similar *quid pro quo* for the injured plaintiff in this bill?[10] Without a *quid pro quo,* the law is constitutionally suspect.

Some will advise you that legislators need not worry about the constitutionality of this bill. That is wrong. Legislators are closest to the people. You are the first protection line for citizens. Those wanting change to the common law must get your vote. You should not give that vote freely. You take the same oath to uphold the state constitution that judges take. Just as a judge is expected to act within constitutional limitations, so are you. You are not without a constitutional conscience. It should be after a rational basis is established for the change. The Court has said in *Samsel* the legislature must provide a *quid pro quo* for *plaintiffs*. Lowering liability insurance premiums for defendants -- which is not probably achieved by this bill anyway -- does not benefit plaintiffs.

You must decide whether the rights of the middle class are worth preserving. We think they are. We hope you will vote to report this bill adversely.

Thank you.

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alter or change the common law causes of action and constitutional rights if it provides an adequate quid pro quo.")

[10] By reducing the amount of recovery, it makes it harder in small-damage cases to get *any* recovery. Defendants can still avoid paying the verdict by taking bankruptcy. Nor will it make insurance more affordable. The *quid pro quo* under *Samsel* must be for the *plaintiff*. As the Ohio court states, it is odd public policy that to aid the defendant's liability insurance problems the legislature chooses to penalize the plaintiff for buying insurance.

TESTIMONY FOR HOUSE JUDICIARY COMMITTEE

FROM: John Johnson

REGARDING: H.B. 2218

DATE: February 1, 1995

My name is John Johnson. I am a member of the Kansas Trial Lawyers Association and am here today to oppose H.B. 2218. The Kansas Trial Lawyers Association supports the current civil justice system wherein wrongdoers are held fully accountable for the harm and damage they cause.

H.B. 2218 will abolish the collateral source rule as it applies to plaintiffs or victims in tort cases. The collateral source rule is a rule of evidence which prohibits telling the jury about certain types of insurance and other benefits that an injured person has or will receive in the future. These could include ones health insurance, a legislative or military pension, social security, KPERS benefits and others. A similar rule applies to the defendant which prohibits a jury from being told about any insurance that a defendant may have available to pay a judgment. However, insurance companies only want to abolish the rule that applies to victims, therefore tipping the scales of justice in favor of negligent parties, like the drunk driver.

The collateral source rule has been in place in our country for more than 200 years and in Kansas for more than 100 years. The rule is based upon the premise that those causing harm to others must pay for the resulting damages. This policy fosters two beneficial goals. First, it provides a means for the wrongdoer to compensate the victim. Second, it serves as a deterrent for similar negligent behavior by the defendant and others in the future.

The medical insurance industry's motive with this legislation is to limit their professional liability with the hope of economic gain. Publicly they argue that this legislation will stop double recovery and reduce health care costs. However, they offer no hard evidence to support their claims.

A common public perception that the medical insurance industry plays upon in order to advance their agenda is that a litigation crisis exists in Kansas. But according to the figures provided by the Kansas Supreme Courts Office of Judicial Administration, tort claims are few in number. I have attached a copy of our charts to my written testimony for your review. The figures show that 138,966 civil cases were filed in Kansas in fiscal year 1992 – a state with a population of over two and a half million people. The chart will illustrate a breakdown of those cases.

* The majority, or 53.9 percent, were contract cases (businesses suing businesses).

* Domestic relations cases accounted for 22.1 percent.

* **Only 3.1 percent of 138,966 civil cases filed were tort claims.**

Of the tort claims filed in fiscal year 1992, only 201 cases resulted in a jury trial. The overwhelming majority of those, 67.7 percent, were motor vehicle accidents. Only nine cases were medical malpractice claims; **none of the nine resulted in a plaintiff receiving an award.** After reviewing these charts it is difficult to see how the current collateral source rule significantly affects the proponents of this bill. The second chart attached to my written testimony illustrates that the majority of tort cases filed do NOT have an excessive or outrageous judgment rendered. The Supreme Court's statistics demonstrate that quite the opposite is true. The median dollar value of the 201 cases in 1992 were around 15,000 dollars. Hardly, a jackpot!

I acknowledge that there is a very real perception among legislators and the general public that tort activity is high in Kansas, but the statistics provided to you today prove that very little activity takes place within the civil justice system with regard to tort actions.

It is the issue of double recovery that is at the heart of the proponents charge to make significant changes within our civil justice system. Under our current system victim's do not receive double payments for their injuries. Proponents of H.B. 2218 claim that victims receive their first recovery when a health insurance company pays for medical needs upon injury. The victim's insurance provider does not step in and pay medical costs out of the goodness of their heart -- those insurance providers pay for their clients claims, because their clients have paid significant amounts of money to secure a contract which provides them coverage. We are so used to having a deduction taken out of our pay checks for health insurance, I think we sometimes forget that the money we set aside for these benefits is just that, OUR MONEY. We are securing an investment when we purchase health insurance, and our foresight should never benefit the negligent party.

Although this bill allows for deductions pertaining to the costs incurred by the victim when securing the benefit, a mechanism or a the formula for computing that cost is absent. H.B. 2218 makes the terrible assumption that because one has health insurance today they will always have health insurance tomorrow. I doubt many of us would feel comfortable making such an irresponsible assumption, especially when we know that millions of Americans lose their health insurance every day.

Traditionally, a victim's financial status is irrelevant in a tort proceeding. If collateral source is repealed, then a victim's financial status becomes the central issue in a tort action instead of the issues of negligence, compensation and deterrence. If as proposed in H.B. 2218, judgments against a negligent party are automatically reduced by the amount of the plaintiff's collateral sources, then the negligent party benefits from the economic standing of the victim.

Another reason why the proponent's argue for this change is that the cost of medical liability insurance is pricing doctor's out of Kansas. I would like to submit to the committee a summary of a study which indicates that liability rates have declined over the past decade and that they are stabilized.

If there is no such thing as double recovery, and there is not a litigation crisis in Kansas, and if there is no professional liability insurance crisis, and if the sponsors of the this legislation are not promising lower rates, what public policy benefit is achieved by doing away with a century old rule of law? The only public policy benefit will go to the negligent parties in a tort action.

The Declining Costs of Malpractice:
An Analysis of Medical Malpractice Experience, 1985-1991

Summary

As health care reform has moved to center stage, debate over medical malpractice insurance has intensified. Doctors and insurance groups insist that medical malpractice premiums are hurting them financially. They also say that medical malpractice premium increases cause consumer health care price inflation. To evaluate these arguments, we examined medical malpractice as it has affected both doctors and insurers using the most recent data available.

We find that the costs of medical malpractice have declined considerably since the middle of the past decade.

*Malpractice Premiums Are Declining. Adjusted for inflation, premiums have declined steadily in recent years. In 1991, average premiums were 18.6% lower than in 1988. Malpractice premiums accounted for 8.85% of all professional expenses in 1991 as compared to 11.29% in 1988 and 10.22% in 1985.

*The Frequency of Malpractice Suits Is Declining. Between 1985 and 1991, the total number of lawsuits filed fell by 7.7%. Per doctor, lawsuits fell by 19.6%; per patient, suits declined by 23.3%

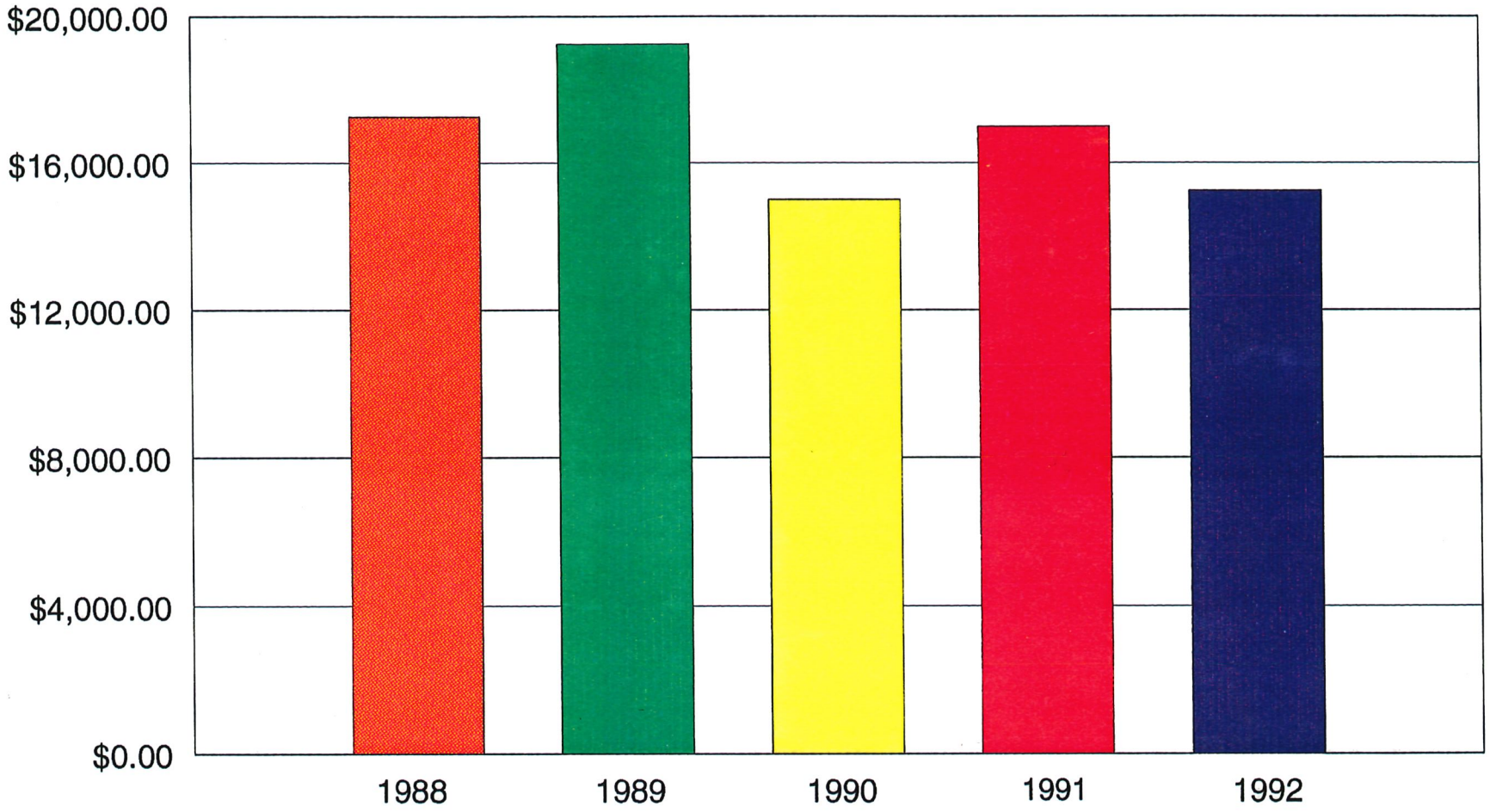
*Malpractice Insurance Profitability Has Soared. In 1985, insurers reported losing almost $200 million on medical malpractice policies. Every year since then has been profitable, and for the period 1985-1992, medical malpractice is the single most profitable line of property/casualty insurance. In 1992, medical malpractice insurance generated profits of $1.4 billion.

This report is written in two parts. Part One looks at doctors' experience, focusing on the cost of insurance and the frequency of malpractice suits. Part Two looks at insurers' expenses.

Tort Cases

Fiscal Years 1988-1992

Median Dollar Value for Damages

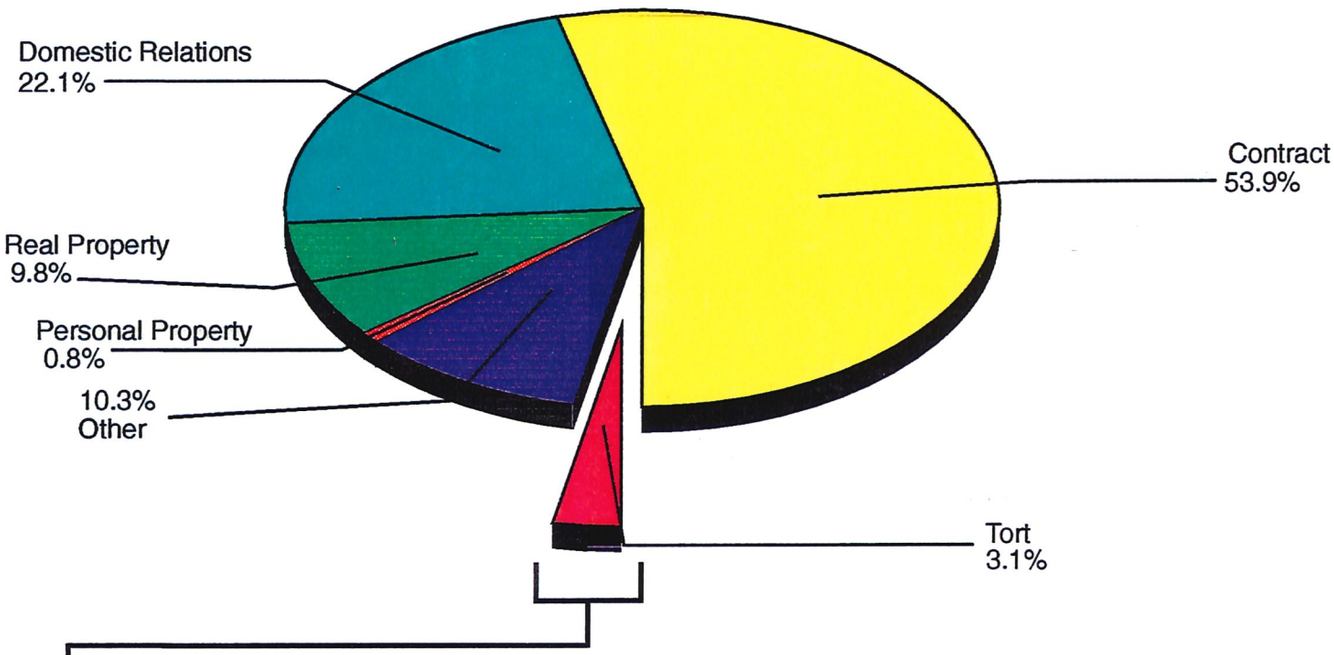


From the Office of Judicial Administration,
Annual Report of the Courts of Kansas, 1991-92 Fiscal Year)

Kansas Civil Cases

Fiscal Year 1991-92

Breakdown of 138,966 civil cases filed

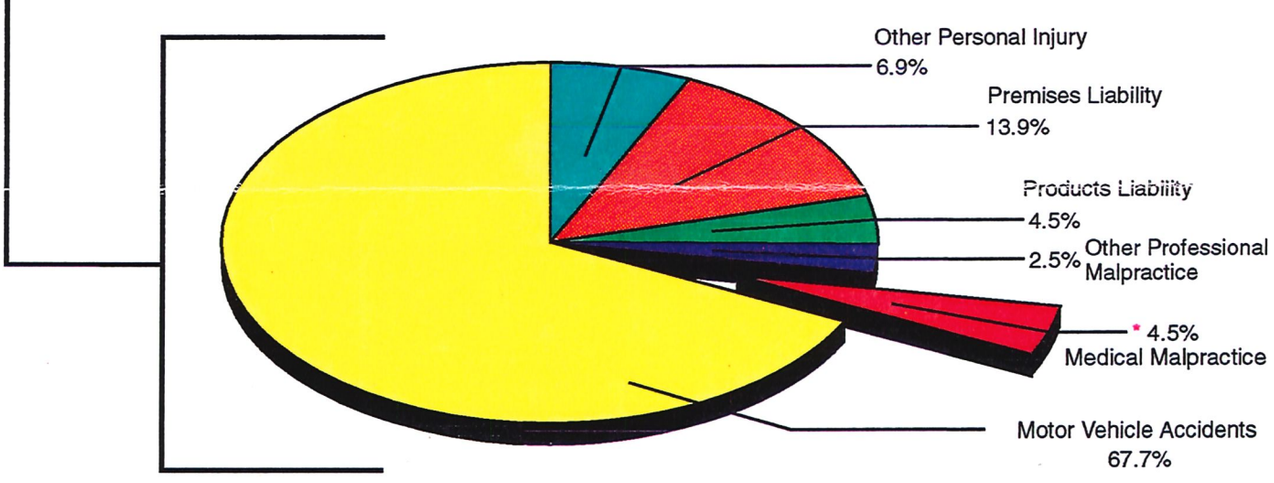


Kansas Tort Cases

Fiscal Year 1991-92

Breakdown of 201 tort cases that resulted in a jury trial

(4,137 tort cases were dismissed or settled out-of-court)



(From the Office of Judicial Administration,
Annual Report of the Courts of Kansas, 1991-92 Fiscal Year)

* In 1992, no medical malpractice plaintiffs received an award.

TESTIMONY IN OPPOSITION TO HOUSE BILL 2218
Presented by Brenda L. Head
On Behalf of the Kansas Trial Lawyers Association

On April 21, 1990, 16-year old Ryan Patton was working on his father's farm in Rural Hiawatha, Kansas, preparing to cultivate the farm ground. Ryan was assisting with the replacement of a hydraulic wing cylinder on the 90° field cultivator to prepare the cultivator for use in the field and the wing unexpectedly fell without warning to its extended position striking Ryan and rendering him a complete paraplegic for the rest of his life.

Ryan and his mother brought a claim against the manufacturer of the cultivator for several product liability claims regarding various design defects and the manufacturer's failure to warn and instruct unsuspecting consumers of the unreasonably dangerous propensities of the equipment. In May, 1994, more than 4 years after the date of the accident, a jury found the manufacturer liable and rendered a verdict in Ryan's favor.

More importantly, since the jury found the manufacturer responsible for Ryan's damages, the manufacturer has initiated a program to warn consumers of the unreasonably dangerous propensity of the equipment which may prevent future accidents and fatalities. Had this manufacturer not been held responsible and accountable for all the damages sustained by Ryan, the incentive to cure the defect and prevent future injuries would have been reduced. If a wrongful party can benefit from collateral sources of the responsible victim, the wrongful party is not deterred and is not fully responsible.

During the course of Ryan's trial, it was proven that this very manufacturer was aware of at least seven other similar accidents with this equipment before Ryan's accident, two of which were fatalities, and did absolutely nothing. In the face of knowing two farmers had been killed by their equipment and five others seriously injured, the manufacturer refused to be responsible and take action to prevent future accidents resulting in serious personal injury and potential death to the unsuspecting user of their product.

Abrogation of the collateral source rule will allow a wrongdoer to not be held fully accountable for all damages suffered by an innocent victim. Allowing collateral source benefits to reduce the liability of the wrongdoer would remove the incentive for the wrongdoer to correct the problem and reduce any deterrant effect because it would allow the wrongdoer to be discharged from full responsibility and accountability for their negligent acts. The wrongful party should not be the beneficiary of such legislation. If the manufacturer in Ryan's case would not have been held fully accountable for Ryan's damages, they may not have made any efforts to prevent future serious injuries or fatalities to Kansans using their product. Removing the incentive and allowing a negligent party not to be fully responsible and fully accountable is not sound public policy and is not what victims such as Ryan Patton, deserve.

KCSDV

Kansas Coalition Against Sexual and Domestic Violence

820 SE Quincy Suite 416B Topeka, KS 66612 (913) 232-9784 FAX (913) 232-9784*51

Kansas Coalition Against Sexual and Domestic Violence

Position

Collateral Source Doctrine

The Kansas Coalition Against Sexual and Domestic Violence (KCSDV) is a non-profit organization incorporated in the State of Kansas which unites the Kansas domestic violence and sexual assault programs in their efforts to combat violence against persons. An integral component of eradicating personal violence is full accountability for the perpetrator. Full accountability means that the victims, the family, law enforcement, the judicial community, and society in general hold the perpetrator fully and solely responsible for his or her violence. When the perpetrator can no longer find any support for violent behavior he or she will be forced to accept full responsibility which is the first step toward change.

The current collateral source doctrine in Kansas supports the victim in placing the responsibility for full compensation for injuries on the tortfeasor. Any contrary rule applied in domestic battery cases would be clearly against public policy. Reducing the judgment against a perpetrator of domestic violence by the amount of the victim's collateral resources in effect allows the perpetrator to take advantage of the victim's own provision or foresight to reduce the consequences of his or her own willful violence. KCSDV and its member programs cannot support such a doctrine.

KCSDV urges the Kansas legislature to retain the current collateral source doctrine which assigns full accountability on the perpetrator for his or her wrongdoings. KCSDV opposes any effort to abolish the current collateral source doctrine.

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Abrogating the Kansas Collateral Source Doctrine

Implications for Victims of Domestic Violence

The Kansas Coalition Against Sexual and Domestic Violence (KCSDV) is opposed to the repeal of the current Collateral Source Doctrine in the State of Kansas. The Coalition has considered the issue and passed the attached resolution.

Current legal practice in Kansas is to look only to the fault of perpetrator for the measure of the damages. Repeal of this doctrine would send a message to the victim of domestic and sexual violence, the perpetrator of this kind of violence, and the community that the judicial system holds the perpetrator only partially accountable for the damages he willfully inflicts--and that it is up to the victim herself or her community to provide for full recovery.

As a Coalition, KCSDV works with communities to develop a comprehensive response to the crimes of domestic and sexual violence. A well-designed community response is one in which law enforcement, prosecutors, and judges hold the perpetrator fully accountable, forcing consistent and rigorous consequences, while at the same time making provision for safety and redress for the victims. This kind of comprehensive response sends a message to the victim, that he or she has the right to be treated with dignity and respect. HB 2218 would weaken the judicial response to the perpetrator by reducing the amount of the judgment against him or her by the amount of collateral sources

available to the victim.

Real recovery from an abusive relationship is more than breaking free of the relationship. It is being made whole. It is only when the victim, the community, and the civil justice system work together to force this full accountability on the perpetrator that the individual harmed can begin to feel freed from the violence.

The principle of full accountability does not end in the criminal courts. The civil code of Kansas currently provides for make-whole relief for victims of intentional torts. When a victim of domestic violence goes to civil court for redress of her injuries she should not be told that because she has collateral sources her perpetrator's judgment will be reduced. With the passage of HB 2218, you are sending a strong signal to the victim, who has worked through personal, legal, and economic issues to come to court for full redress of her injuries, that the perpetrator gets the benefit of her own economic responsibility and foresight. In my experience, such a signal might well result in a step backward in the victim's recovery process.

In summary, repeal of the current collateral source rule would be an affront to the victims of sexual and domestic violence in Kansas who believe strongly in the principle of requiring full accountability of the perpetrators of domestic and sexual violence.

The Kansas Coalition Against Sexual and Domestic Violence cannot support this bill. We urge you to vote NO on House Bill 2218 and its twin bill HB 2220 when considered for action by the committee.

TESTIMONY
FEBRUARY 1, 1995
REGARDING H.B. 2218
FROM; CHERYL FLANNAGAN

My name is Cheryl Flannagan and I am here today to oppose H.B. 2218.

My daughter was killed by a drugged driver on June 25, 1988. This automobile crash involved two vehicles; one was my daughter Christine, and the other was Karen Merredith who was driving while on drugs. Merredith crossed the center line on a two-lane road in the area where there was a guard-rail. Christine had NO path to safety. She was good driver, and the police report shows that she tried to get out of the way. Prior to killing my daughter, Merredith killed a man in K.C. Missouri. In that accident she hit the victim, who was standing behind his car. Merredith was on drugs and crossed the center line when she killed the man in Missouri. I also know that Merredith was involved in a third fatal crash -- this one was in California.

I received an insurance settlement and an award for punitive damages after Christine's death. The insurance settlement came down first and went immediately into a trust fund. This trust fund is being used to benefit young people -- specifically to send kids to music camp and receive vocational training.

The civil suit I won cannot be collected upon, as the negligent party has no resources. My judgment against the drugged driver requires that she pay 15% of her wages, to an officer of the court and I have requested that this money go directly to MADD.

I am insulted by the proponents of this legislation who charge that victims like my daughter and myself are suing drugged drivers to somehow personally and financially benefit from our loss. What I have lost will never be replaced by any amount of money, and it is ridiculous to imply that victim's like myself are going through the civil system to profit. Clearly, I am not receiving ANY financial benefits.

My goal in filing suit was to prevent this drugged driver from killing anyone else. The suit I won, hopefully forces this negligent party to remember my daughter, and think about what kind of damages she has caused to me and to others.

Repealing collateral source will only benefit those who maim, and or kill. Please vote no on H.B. 2218.

TO: House Judiciary Committee
FROM: Marcy Peterson
RE: H.B. 2218
DATE: February 1, 1995

I am here today to speak to you about the dangerous piece of legislation currently in front of your committee. It is my understanding that the people who are interested in repealing the collateral source rule charge that under the current civil system victims are getting unjust enrichment and or double recovery in tort actions. I must tell you how insulted I am by those comments.

I have always had some type of collateral source, whether it be my health insurance, my house, my savings accounts or a number of investments I have made on my behalf or for my family. The simple fact is my life would have been much better had I not had to sue someone. I would like to tell the committee that I NEVER attempted to be unjustly enriched when filing a civil suit against the makers of Tampax tampons.

I am capable of providing for myself physically and medically today because I filed a suit against the makers of Tampax tampons. I was awarded damages that keep me off the public dole and allow me to live an independent life. I did not want to loose my legs or my hands, but did and NO amount of money could replace what I have lost.

If you pass H.B. 2218, you will send a message to the general public that it is okay to harm others. My financial standing was not at issue when I sued Tambrand. If you repeal collateral source all of us will lose, because then what we have and what we save will be the central issue in a tort action, and those who have collateral sources will not be able to hold the wrong-doers accountable for their actions. People fought and died for our Democracy in order to live in a country where one's financial standing is irrelevant to the rights we have and hold. It doesn't matter if you are rich or poor you can own a gun, it doesn't matter if you are rich or poor you can go to school and become a doctor or lawyer, and it should NEVER matter if you are rich or poor whether or not you can hold a negligent party accountable for their bad behavior.

Today we have the right to hold wrong-doers accountable for their actions. If you pass H.B. 2218, wrong-doers will benefit from my foresight and my financial standing. Do not buy into the absurd and insulting claim that people like me file civil suits to hit the jackpot. The claim that you and I are somehow benefiting from negligent behavior is demeaning to me, demeaning to you and demeaning to our democratic system and it's institutions.

Say no to those who maim, kill and injure, and vote NO on H.B. 2218 .

Mr. Chairman and Committee Members, I thank you for the opportunity to come before you.

My name is Carol Ridinger and I am here to speak in opposition of House Bill No. 2218. To pass this bill would be a travesty of justice. There would be no justice in allowing a negligent third party to benefit because the person he injured was responsible and carried health insurance.

I am supposed to say who I represent and, in fact, I represent myself and you. All of us have the potential to be a claimant, as defined by this bill and we all have the potential to be injured in an accident caused by someone else's negligence.

I'm lucky, I have never been injured in this type of an accident, but I know many people that have. Thirty years ago, my brother-in-law lost his left arm at the elbow due to another's negligence. I can guarantee that his injury did not go away when his medical bills were paid. He has lived with the long term affects of his injury his entire adult life. He has been discriminated against in every aspect of his life, schooling, employment, credit (who wants to loan money to a one-armed man) and even in recreational activities.

Due to his injury, he was not able to continue at his employment and lost his medical insurance. Any medical insurance that he gets now considers this amputation as a pre-existing condition and will not pay any of the continuing expenses such as prosthesis repair or replacement or the trips from western Kansas to Denver for the repairs or special clothing that he needs to wear the prosthesis. He had trouble getting his health carrier to pay the medical bills that he incurred when the use of the

prosthesis caused adhesions on the muscles in his back and when he got infections in the stub due to the constant irritation of the prosthesis.

This bill would have harmed him as much as the initial injury. He certainly did not receive a double recovery. How could he have received a double recovery? All of the money in the world could not recover his arm. He continues to live without his arm and to face the related problems and expenses and will for the rest of his life.

This bill isn't written to benefit us, the potential injured claimants, so who does it benefit? The person whose negligence caused the accident and his insurance company, that's who.

I can talk to you about insurance because I worked in the insurance industry for twenty four years. For thirteen of those years, I was a claims adjuster. I am certified as an Associate in Claims by the Insurance Institute of America. This involved seven semesters of insurance education and the successful completion of a national essay exam for each semester.

If this bill is passed, it will effect the handling of every bodily injury claim submitted in Kansas. The standard Insuring Agreement in a liability insurance policy says "We(the company) will pay on behalf of the **insured** (the negligent party) all sums, within the limits of liability of these coverages, which the **insured** shall become legally obligated to pay as damages because of: (1) **Bodily injury** sustained by any person. The insured will no longer be legally obligated to pay any damages that the injured party has insurance or a collateral source to cover and the adjuster will have to deduct the amount of the collateral

source from the settlement. But wait, it's not that easy. First they will have to determine the cost of the collateral source. Does this mean the cost the month of the accident, or the months of the duration of the injury, or only the months that the injured claimant received medical treatment? How is this cost determined? How is it proved? And to take it a step further, if an employer provides health insurance, with no cost to the employee, is it a "benefit gratuitously bestowed on the claimant"?

This bill is unfair and it allows the wrong person to benefit. If a person negligently injures another, he must be held responsible for the entire cost of that injury.

One of the reasons that I think this bill is unfair is that a person who buys insurance with out any type of subrogation clause, theoretically would pay more for that coverage. This bill gives that person no more advantage than the one who is able to save on his health care premium by being in a plan that has a subrogation provision.

The most unfair thing about this bill is that the injured claimant is forced to reveal everything about his collateral sources. If he has insurance, with what company, how much coverage, and how much did it cost? The negligent party doesn't even have to tell the jury if he has liability insurance to cover the damages.

Thank you, I would be happy to answer any questions that you might have.

House Judiciary Committee
Rep. Mike O'Neal, Chairman

Testimony of Gary Compton
RE: House Bill 2218
February 1, 1995

Mr. Chairman. Committee members. Thank you for giving me this opportunty to testify today against House Bill 2218 regarding the collateral source rule of law.

My name is Gary Compton. I am the host and producer of the cable television show, "*Justice*" which airs in the Kansas City metropolitan area. It airs on Channel 29 and is seen in northern Johnson County and all of Wyandotte County. Even though I have experience with a broad range of legal issues in that capacity, I am here today as an individual citizen to express my personal views on the collateral source rule and House bill 2218.

I firmly believe that anytime government tampers with one side of an equation they have an obligation to the people to balance it out by tampering with the other side. If you are going to limit rights of plaintiffs, you must limit rights of defendants in an equivalent manner. If you're gonna tamper with rules of law and you don't tamper with both sides, you end up with an unfair result that is out of balance and does a disservice to the people of Kansas.

House Bill 2218 is unfair. It is clearly tampering with only one side of the equation --- the plaintiffs side. If you, as committee members, want this change, then to be fair you must also make the same change for the defendants. If you are going to open up the issue of a victims assets, then you're going to have to open up the defendants assets too. Let the medical professional open up their personal portfolios to the court as well as the victims.

Thank you for your time and for listening to me this afternoon. I urge you to vote against this lop-sided legislation and protect the existing collateral source rule of law in Kansas.

Kansas Insurance Department

Kathleen Sebelius, Commissioner

420 S.W. 9th

Topeka, Kansas 66612-1678 (913) 296-3071

To: House Judiciary Committee

From: Tom Wilder, Director of Governmental Relations
Kansas Department of Insurance

Re: House Bill Nos. 2218 and 2220

Date: February 1, 1995

The Kansas Department of Insurance does not endorse or oppose H.B. 2218 and H.B. 2220 that would impose a "collateral source" rule in all civil tort litigation. However, the Department is available to answer any questions that you might have regarding liability and property insurance coverage and premium rates in Kansas. In addition, the Insurance Department would like the Committee to keep in mind the effect the adoption of this legislation would have on insurance consumers in this state.

The "collateral source" proposals are not "plaintiffs vs. defendants" or "doctors vs. lawyers" bills. The costs or benefits of this legislation will be passed on to Kansas consumers. The Committee should view H.B. 2218 and H.B. 2220 in terms of how the change in the law will impact the insurance rates paid by your constituents.

I have attached a breakdown of the rate filings submitted by several of the medical malpractice insurers to the Kansas Department of Insurance over the past 13 years. You will note that the premium rates have generally declined since 1990. This information is somewhat misleading in that the rates paid by medical care providers may still be too

high even after the rate reductions. If medical malpractice insurers are permitted to reduce the amount they pay in judgments against doctors, hospitals or other health care professionals by the amount of insurance coverage which an injured patient may have, then it is expected that malpractice rates would continue to decline and the Insurance Department will take a close look at future rate filings of those companies. The effect of this legislation on health insurance premiums paid by individuals and group is harder to quantify since the health insurance coverage that is available to the insured will be paid whether or not they are permitted to recover additional moneys from a party in a civil lawsuit.

The Committee may wish to consider, as an alternative to imposing a "collateral source" rule in Kansas, a change in the law which would permit subrogation by insurers--this would allow an insurance company which pays a claim to have a lien against any money recovered by their insured as a result of civil litigation against the liable party. The 1994 legislature considered H.B. 2717 that would have allowed for subrogation rights under accident, health or sickness insurance policies. A copy of 1994 H.B. 2717 is attached. Another approach would be to refer this entire subject to an interim study that would consider the whole question of how the costs that are incurred for negligent or intentional torts should be allocated.

If you have any questions, please feel free to contact Bill Wempe, Supervisor of the Fire and Casualty Division, Kansas Department of Insurance at 296-7821 or myself at 296-7807.

Fiscal Year	Effective Date	St. Paul Fire and Marine Ins. Company	The Medical Protective Company	Medical Defense	Continental Insurance	KaMMCO
1980	------	None	None			
1981	7-1-81	+21%	None			
1982	------	None	None			
1983	7-1-83	+15%	+30%			
	8-29-83			27.4%		
1984	7-1-84	+30%	+30%	36.71%		
1985	7-1-85	+23%	+26%	25.0%		
1986	7-1-86	None	+21%	None		
	1-1-87			60%		
1987	7-1-87	+36% (Original Request 65.1%)	None			
1988	3-1-88		+48% (Original Request 84.6%)			
1989	7-1-88	+15.7% (Original Request 19.1%)				
	11-1-88		+33.5% (Original Request 52.0%)		Spring 1989 +35.7% Withdrawn	
1990	7-1-89	-7.4%				
1991	6-1-90		-21.4% (Original Request -12.0%)			-19.5%
	6-30-90	-20.9% (Original Request -15%)				
1992	8-1-92	0% Overall Class Relativity Revision (Anesthesiology -25.1%)				
1993	3-11-93				-10% (Original Request -6.8%)	

FCBH5810
TXTFMS
4-28-93

Session of 1994

HOUSE BILL No. 2717

By Representatives Plummer and Robinett

1-24

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

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

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

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

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

(b) Any policy or contract of accident, health or sickness insurance, and any health maintenance organization subscriber contract, issued in this state shall include a subrogation clause providing for reimbursement of medical, surgical, hospital or funeral expenses. Such clause shall subrogate the insurer to the insured's rights of recovery when the circumstances of the insured's injury create a legal liability against a third party for not more than the amount of benefits that the insurer shall have previously paid or provided in relation to the insured's injury by such third party. Subrogation shall be available only to the extent that the insured is not left with any uncovered, out-of-pocket expenses for medical and related health care services necessitated by the injury in question. The insurer may enforce such rights of subrogation in its own name or in the name of the person to or for whom payment has been made, as their interest may appear, by proper action in any court of competent jurisdiction. Attorney fees and costs shall be paid by the insurer from any recovery obtained by the insurer and the attorney shall

have a lien therefor against any such recovery and may intervene in any action to protect and enforce such lien.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

15-4