Approved: 3-27-95
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairperson Tim Emert at 10:00 a.m. on February 23, 1995 in Room 514-S of the Capitol.

All members were present except: Senator Moran (excused)

Committee staff present: Michael Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Revisor of Statutes
Janice Brasher, Committee Secretary

Conferees appearing before the committee:
Jim Shetlar, United We Stand
Tom Wilder, Kansas Insurance Department
Meyer L. Goldman, Humana Health Care of Kansas
Lori Callahan, KAMMCO
Jerry Slaughter, Kansas Medical Society

Others attending: See attached list

Meeting called to order at 10:00 a.m.., the Chairman referred to Senator Harris for a subcommittee report..

Senator Harris reported on **SB 127**, stating that this bill allows the law enforcement officers to write a ticket on two offenses, one is operating a commercial vehicle under the influence, and the other is disorderly conduct.

SB 127--Citations may be written for violations of driving under the influence of alcohol or drugs by commercial motor vehicle driver and disorderly conduct.

The subcommittee unanimously recommended that bill be passed without amendment.

Motion to pass **SB 127** favorably and to place on Consent Calendar, made by Senator Parkinson, second by Senator Vancrum. Motion carried.

SB 298--Crimes and punishment, lesser included crimes.

Senator Harris stated that Paul Morrison, representing the district attorneys, testified in favor of this bill.

Motion by Senator Vancrum to pass out favorably **SB 298** and place on Consent Calendar, second by Senator Reynolds. Motion carried.

SB 299--Allowing county or district attorney to collect administrative handling cost from maker or drawer of bad checks.

Paul Morrison testified in favor of **SB 299**. Paul Shelby of the Judicial Administrator's Office stated that office had no objections. Subcommittee recommended passing this bill favorably without amendments.

Motion made by Senator Harris, second by Senator Vancrum to pass **SB 299** favorably. Motion carried.

Chairman Emert directed the Committee's attention to **SB 311**, and opened the hearing on that bill.

SB 311--Subrogation rights under health insurance policies.

Senator Parkinson presented an overview of **SB 311**, explaining that this bill has to do with tort claims and what happens when people recover in court claims. Senator Parkinson stated that under current law when a

person brings a personal injury accident and obtains a recovery sometimes they have to pay back their health insurance carrier and sometimes they do not. Under federal law, ERISA, self insurers and many large employers may subrogate. However, there are still a number of plans that are not ERISA plans, approximately 50%. Plaintiffs not in ERISA plans have the opportunity for double recovery under current Kansas Insurance regulations. Senator Parkinson stated that there are two ways double recovery can be eliminated. One way to handle the situation would be to abolish the collateral source rule, which is a rule that prevents juries from knowing that person's insurance has paid their medical expenses. Another way to solve the problem is what is proposed in **SB 311**, that would provide that the health insurance provider would get reimbursed whether they are in an ERISA plan or not. In Senator Parkinson's view the way to solve the problem through subrogation is superior to abolishing the collateral source rule. Rather than giving the benefit of insurance to the tortfeasor you give it to the insurance company. Senator Parkinson stated that this bill makes sense, and it could potentially reduce health insurance cost.

Tom Wilder, Kansas Insurance Department provided written testimony.(Attachment 1)

Meyer Goldman, Human Health Care of Kansas, stated that a recent survey among the affiliated health care association showed that no one opposed the idea of subrogation. Mr. Goldman referred to a subrogation fact sheet prepared by Kansas HMO Association. (Attachment 2). Mr. Goldman stated that Humana strongly supports the provisions of **SB 311**, and that this legislation would help to control health care cost and is an equitable means of recovering health care costs. (Attachment 3)

Jim Shetler, United We Stand, 3rd Congressional District spoke in support of **SB 311**. Mr. Shetler explained that United We Stand is a public interest group who believes very strongly in individual rights and accountability. Mr. Shetler advised that United We Stand has teamed up in support of the collateral source rule, and has objected to the modification of such rule. Mr. Shetler stated that if something needs to be done, subrogation seems the more reasonable approach. Mr. Shetler referred to a position paper on **SB 311**, and stated that a majority of the states have supported the subrogation approach. Subrogation seems a more reasonable approach than the abolition of collateral source. Mr. Shetler asked that **SB 311** be adopted as an alternative to collateral source.(Attachment 4)

Discussion followed concerning litigation cost under the abolishment of collateral source verses costs under subrogation legislation.

Ron Smith, Kansas Bar Association, testified on **SB 311**, stating that the question is the relative equities of collateral source verses subrogation. Mr. Smith referred to written testimony addressing that question. Mr. Smith offered that subrogation is certainly an alternative. Mr. Smith pointed out that the assumption that the victim is made whole by the jury is not always true, because of expenses paid to the attorney. Mr. Smith contended that subrogation accommodates the problem of paying the attorney as found in Section 2(e). If the insurers do realize cost savings those savings can be passed along to a much broader group of people. The subrogation allows the injured party a practical credit against their major medical coverage. The collateral source rule would force me to use that against medical coverage. Subrogation is intended to keep the focus of the jury on the question of whether the defendant is negligent.(Attachment 5)

Discussion followed regarding the number of cases that would be subrogatable under this bill.

Jerry Slaughter, Kansas Medical Society, appeared as an opponent of **SB 311**. Mr. Slaughter offered supplement points regarding how the attorneys are going to be paid. Mr. Slaughter suggested that if the objective is to end double recovery, consideration should be given to adopting the English Rule, loser pays. Mr. Slaughter stated that it is a public policy determination, where to apply the benefit. Mr. Slaughter stated that the organization he is representing feels that the benefit should be applied to physicians who pay high liability costs and to the Health Care Stabilization Fund. Mr. Slaughter contended that under current law, payment of attorney fees and court cost are as high as the amount paid to indemnify the injured party. Mr. Slaughter stated that the monetary benefit of subrogation would have less impact because it would be spread over a greater number of individuals who pay health care premiums, so the benefit would be marginal. Whereas, those same dollars spread over a much smaller base of individuals, such as physicians, who pay liability insurance, would have a significant impact on liability premiums. Mr. Slaughter discussed the high cost of medical malpractice insurance, and its corrosive effect on the health care system. Mr. Slaughter suggested that if there is subrogation, then exclude attorneys' fees from the amount of subrogation.. Mr. Slaughter stated that the Medical Society believes that the collateral source rule would have a greater impact than subrogation. Mr. Slaughter concluded by requesting modification of the collateral source rule rather than using subrogation to end double recovery. (Attachment 6)

Discussion followed regarding the number of medical malpractice claims. Mr. Slaughter related an opinion as to the benefits of modification of collateral source to recovery of the injured party.

Lori Callahan, spoke in opposition to **SB 311** stating that if the benefits were spread over a large pool of all Kansans who have health insurance, the benefit is lost. Ms Callahan suggested that if you spread the benefit/return among a smaller group of Kansans who pay liability insurance premiums then the effect is more substantial. While acknowledging that double recovery is wrong, Ms Callahan suggested dealing with it in a way that makes sense financially or makes sense from an equitable standpoint. Ms Callahan further suggested that constituents would not feel the benefit significantly if **SB 311** were passed. Ms Callahan related that all the health care reforms considered last year, included collateral source, but not subrogation because the effects of collateral source on the constituents would be greater. Ms Callahan also contended that subrogation of health insurance would increase litigation. Ms Callahan addressed the fairness issue. Juries should know that they are awarding damages to someone who has already awarded damages for medical and other costs. Ms. Callahan contended that we were not talking about the tort feasor, but about the majority who have not done anything wrong, but in Kansas must carry liability insurance, bearing the blunt of making the plaintiff more than whole. Issue of a life-time cap was discussed. Ms Callahan stated objections to Section 2, subsection c that allows the insurer to commence action against a "tortfeasor" if the injured party does not. After you have applied comparative negligence, if the plaintiff happens to claim bankruptcy, you have lost the benefit for the health insurer. Under modification of the collateral source rule it is a very easy, efficient method of making that offset and preventing double recovery. (Attachment 7)

Questions and discussion followed regarding the differences in litigation expenses concerning a difficult drawn-out case verses a case that is not very aggrievous. Ms Callahan concluded by stating the English Rule is something that should be considered.

Meeting adjourned.

The next meeting is scheduled for February 24, 1995.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2-23-95

NAME	REPRESENTING
Meyer L. Goldman	Humana Health Plans.
Jim Smethers	United We Stand
Kevin Davis	Am. Family Ins Group
Shannon Peterson	KBA
Sharol Couch	Ks Chiropractic Assn
Lori Callahan	Kammco
Mike Meacham	Thorn Americas
DAVID HANSON	NAII / Ks Life Assoc
Ronald Kasper	KDOT
Micah A. Ross	KPB
Tom Wilder	Kan Dept of Revenue
STEVE KEARNEY	CIGNA
Lee Wright	Farmers Ins Group
Chuck Stones	KBA
Paul Shelby	OJA
Ron Smith	Ks Bar
Bill Sneed	State Farm
John Federico	Pete McGill + Assoc

Kansas Insurance Department

Kathleen Sebelius, Commissioner

420 S.W. 9th

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

To: Senate Judiciary Committee

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

Re: S.B. 311 (Subrogation Rights of Health Insurers)

Date: February 23, 1995

The Kansas Department of Insurance supports Senate Bill 311 which allows health insurers to recover the amount of benefits paid to a policyholder from third parties responsible for the injuries suffered by the insured. If the insured does not file a legal action against the tortfeasor to recover damages, the insurance company may commence an action against the responsible party to obtain repayment of benefits. Currently subrogation rights are allowed in all indemnity insurance policies except health insurance. In addition, subrogation rights in health insurance policies are allowed under the Kansas "no-fault" law, government financed health insurance, self-insured health plans and for health insurance written outside the State of Kansas.

There are two amendments which should be made to S.B. 311. The Department suggests that the definition of "health care insurer" be broadened to include nonprofit hospital and medical service corporations, fraternal benefit societies, accident and health municipal group-funded pools and the Kansas Health Insurance Association. The definition of "health care services" should be deleted since HMO's are included in the definition of "health insurance."

This legislation would ultimately benefit the policyholders of this state. The recovery of health care insurance benefits from the guilty tortfeasor will have a direct impact on the "bottom

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line" costs of insurance companies doing business in Kansas. The Department of Insurance requests the Senate Judiciary Committee favorably consider S.B. 311.

SUBROGATION FACT SHEET
KANSAS HMO ASSOCIATION
February, 1990

Definition: Subrogation is the right of an insurer or HMO to be put in the position of its insured in order to pursue recovery from a third party responsible to the insured for a loss or benefit which the insurer or HMO has paid or provided. Example: a person with a health insurance policy is injured in his or her home as a result of a natural gas explosion. Such person sustains $20,000 in medical expenses, which are paid by his health insurer. He or she also recovers from the utility company who is at fault (or the company's liability insurer) $40,000, including $20,000 for medical expense. With a right of subrogation the health insurer would be permitted to recover the $20,000 it paid for the injuries caused by the negligence of the utility company.

* Current Kansas Insurance Department regulations prohibit subrogation for reimbursement of medical, surgical, hospital or funeral benefits paid for by insurers to insured injured by a third party. This prohibition on subrogation has also been applied to HMOs which provide health care services to enrollees injured by a third party (K.A.R. 40-1-20)

* Subrogation for insurers and HMOs would eliminate a costly duplicative recovery by the policyholders. Windfalls and excessive recoveries increase the cost of health insurance without a useful purpose.

* Federal law and Kansas law already permits subrogation for health care costs in certain instances:
  - Uninsured Motorist Coverage, K.S.A. 40-284.
  - Workers' Compensation, K.S.A. 44-504 and K.S.A. 44-532.
  - Kansas No-fault law, K.S.A. 40-3113a.
  - Governmentally financed health insurance, such as Medicare and Medicaid.
  - Employers who self-insure their health benefit program..
  - Employers whose contracts for health benefits coverage are written outside the State of Kansas.

* Objectives of Subrogation:
  - Prevent insured from recovering twice for one harm.
  - Wrongdoer should not be relieved of liability because insured had the foresight to obtain insurance and has paid for it.
  - Reimburse the insurer for the payment it has made thereby reducing cost and enabling the insurer to control premium rates.

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* Revenue income resulting from the use of subrogation varies from insurer to insurer, often as a function of the vigor with which recovery is pursued. National averages of addition revenue gained from subrogation range from 1% to 5% total revenues, with 2% being the most commonly reported figure.

* A national health care claims processing entity has identified recovery potential for insurers and HMOs as being in the range of $9.84 to $14.40 per member per year. While percentages are small, aggregate numbers represent additional revenue for the insurer or HMO. For example, a 40,000 member plan could, permitted to subrogate, recover $400,000 per year (assuming an average recovery potential of $10.00 per member per year).

* Because of the highly competitive nat8ure of the health benefits market, insurers and HMOs can be expected to use additional revenues to help hold down premium costs.

* Usually the employer has paid all or part of the insured's health coverage premium. If the insurer receives that money and uses it to keep premium increases down, employers and employees benefit from moderated insurance premium increases.

* 38 states allow some form of health insurance subrogation. Of the 12 states which do not permit subrogation in health insurance contracts, Kansas is 1 of only 3 states prohibiting subrogation as a matter of law.

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TESTIMONY ON SENATE BILL 311

Meyer L. Goldman, Humana Health Care Plans, Kansas City, Mo.

before Senate Judiciary Committee

February 23, 1995

I am Meyer L. Goldman, of Kansas City. I am affiliated with Humana Health Care Plans, providing health care protection to more than 100,000 mid-Americans through HMOs and preferred provider organizations.

Humana strongly supports the provisions of Senate Bill 311 which would permit subrogation of claims in health care cases. We believe that the legislation is fair, and is consistent with a policy of controlling the increases in health care costs.

The present ban on subrogation permits an injured party to collect twice on medical costs: once through health care service or indemnity insurance, and again through the claims settlement process. The cost of the duplicate payment increases the cost of health care protection to employers and individuals who pay the premiums or fees.

Many states explicitly or implicitly permit subrogation of claims. The power to subrogate does not require the HMO to use the process, but reports indicate that a well-controlled and administered subrogation policy applied to major cases can recover as much as one to five percent of accident care expenditures.

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The present ban on subrogation in Kansas is not statutory, but is based on an administrative regulation promulgated by the Kansas Insurance Department. K.A.R. 40-1-20 states: An insurance company shall not issue contracts of insurance in Kansas containing a "subrogation" clause applicable to coverages providing for reimbursement of medical, surgical, hospital or funeral expenses."

However subrogation does exist in Kansas. It has been extended to personal injury contracts by the Kansas Legislature in the No-fault Act, the Uninsured Motorists Act and the Workers' Compensation Act.

Furthermore, federal and state government-financed health insurance, such as medicare and medicaid, permit subrogation. And self-insurers and many large employers in Kansas have subrogation rights because for them our law is preempted by the federal law, ERISA.

Enactment of subrogation legislation will not deprive any citizen of rights for full reimbursement in accordance with contracts, negotiation or court decisions. It would end costly duplication and windfall benefits paid at the cost of all Kansans. We urge you to approve Senate Bill 311.

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Members of the Senate Judiciary Committee

FROM: Jim Shetler
United We Stand 3rd Congressional District

RE: SB 311

DATE: Thursday, February 23, 1995

I am here today as a proponent of SB 311. Subrogation is a responsible and reasonable approach that the legislature can consider in debating ways in which to reduce health care costs to Kansas citizens. SB 311 benefits the Kansas consumer in four ways.

1.) The potential injured consumer may still hold a potentially negligent party 100% accountable in a court of law.

2.) If the consumer wins a judgment against a negligent party for medical damages he or she can have their benefits reinstated.

3.) Consumers' health care costs should decrease since insurance providers are guaranteed repayment.

4.) By holding the wrongdoer accountable the public at large benefits, as subrogation ensures that wrongdoers pay a price and the deterrent component of the current civil justice system is maintained.

Subrogation can end the so-called double recovery rhetoric by ensuring that the injured parties' health providers are reimbursed. The legislature is currently considering a type of legislation that is also supposedly designed to get at the issue of double recovery and that bill is HB 2218 -- the collateral source bill. United We Stand's third Congressional District has taken an official position to oppose any repeal of the collateral source rule. Our position against HB 2218 is primarily rooted in the fact the repeal of the collateral source rule will only benefit the negligent party, and responsible citizens will be

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penalized for securing sound investments for themselves and their families.

As I stated in the beginning of my testimony, subrogation is a much more responsible way to address the issue of health care costs. This approach is currently allowed in many circumstance in Kansas.

1.) Kansas Law pertaining to no-fault.
2.) Kansas worker's compensation cases
3.) Uninsured motorist coverage
4.) Employers whose health insurance contract are from out-of-state.

In past testimony on similar subrogation legislation the HMO Association figured that subrogation could allow an average HMO plan the ability to recover $400,000 per year. (This assumes that the HMO plan had approximently 40,000 members.) Health insurance markets are highly competitive and it is our belief that consumers benefit from competition. Subrogation would allow the HMO's the ability to sell lower premium policies and compete more effectively for market share.

Finally, Kansas would not be a subrogation pioneer. Thirty-eight states currently allow some form of subrogation, and since many Kansans already have plans that allow subrogation SB 311 would be easy to implement.

I urge you to support such a reasonable and responsible piece of legislation. Thank you.

K·A·N·S·A·S HMO ASSOCIATION

Reply to:

February 1990

KANSAS HMO ASSOCIATION SUBROGATION FACT SHEET

- Definition: Subrogation is the right of an insurer or HMO to be put in the position of its insured in order to pursue recovery from a third party responsible to the insured for a loss or benefit which the insurer or HMO has paid or provided. Example: A person with a health insurance policy is injured in his or her home as the result of a natural gas line explosion. Such person sustains $20,000 in medical expenses, which are paid by his health insurer. He or she also recovers from the utility company who is at fault (or the company's liability insurer) $40,000, including $20,000 for medical expense. With a right of subrogation, the health insurer would be permitted to recover the $20,000 it paid for the injuries caused by the negligence of the utility company.

- Current Kansas Insurance Department regulations prohibit subrogation for reimbursement of medical, surgical, hospital or funeral benefits paid for by insurers to insured injured by a third party. This prohibition on subrogation has also been applied to HMOs which provide health care services to enrollees injured by a third party. (K.A.R. 40-1-20)

- Subrogation for insurers and HMOs would eliminate a costly duplicative recovery by the policyholder. Windfalls and excessive recoveries increase the cost of health insurance without a useful purpose.

- Federal law and Kansas law already permits subrogation for health care costs in certain instances:
  - Uninsured Motorist Coverage, K.S.A. 40-284.
  - Workers' Compensation, K.S.A. 44-504 and K.S.A. 44-532.
  - Kansas No-fault Law, K.S.A. 40-3113a.
  - Governmentally financed health insurance, such as Medicare and Medicaid.
  - Employers who self-insure their health benefit program.
  - Employers whose contracts for health benefits coverage are written outside the state of Kansas.

- Objectives of Subrogation
  - Prevent insured from recovering twice for one harm.
  - Wrongdoer should not be relieved of liability because insured had the foresight to obtain insurance and had paid for it.
  - Reimburse insurer for the payment it has made thereby reducing costs and enabling the insurer to control premium rates.

- Revenue income resulting from the use of subrogation varies from insurer insurer, often as a function of the vigor with which recovery is pursued. Natio: averages of additional revenue gained from subrogation range from 1% to 5% total revenues, with 2% being the most commonly reported figure.

- A national health care claims processing entity has identified recovery potentia for insurers and HMOs as being in the range of $9.84 to $14.40 per member p year. While percentages are small, aggregate numbers represent addition revenues for the insurer or HMO. For example, a 40,000 member plan could, permitted to subrogate, recover $400,000 per year (assuming an average recover potential of $10.00 per member per year).

- Because of the highly competitive nature of the health benefits market, insurer and HMOs can be expected to use additional revenues to help hold down premiun increases.

- Usually the employer has paid all or part of the insured's health coverage premium. If the insurer receives that money and uses it to keep premium increases down, employers and employees benefit from moderated insurance premium increases.

- 38 states allow some form of health insurance subrogation. Of the 12 states which do not permit subrogation in health insurance contracts, Kansas is 1 of only 5 states prohibiting subrogation as a matter of law.

#3

KANSAS BAR ASSOCIATION

1200 SW Harrison St.
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Telephone (913) 234-5696
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Legislative Testimony

TO: Sen. Tim Emert, Chair
Members, Senate Judiciary Committee

FROM: Ron Smith, KBA General Counsel

SUBJ: SB 311

DATE: February 23, 1995

The merits and demerits of collateral source legislation and subrogation have been before this committee previously. Subrogation of health insurance is an alternative to abrogation of the collateral source rule.

It is suggested that collateral sources should be deducted from plaintiff recoveries because plaintiff is otherwise fully compensated by the verdict. That, of course, is not fully accurate.. Juries do not always fully compensate. Plaintiffs pay their own attorney from any recovery. The House Collateral Source legislation ignores that fact. Subrogation accommodates this problem by apportionment of attorney fees between the plaintiff and the subrogating health insurance company. See section 2(e)

The chief advantages of subrogation over collateral source rule abrogation are:

- Most other states handle the issue through subrogation. At last count, nearly 40 states allow subrogation of health insurance. Subrogation is a common practice in the insurance industry. There is much case law on the topic, its purposes and limitations. Abrogation of the collateral source rule is uncommon. Few states use the collateral source rule offset.

- If health insurers realize a cost reduction through subrogation and pass those savings back to the health insurance consumer, a much larger group of Kansans benefit from the change.

- Subrogation allows the injured party a practical credit against major medical care limits of coverage. For example, if a person has a one million dollar lifetime health benefit in the policy and that person is catastrophically injured, they may use up significant amounts of that major medical "lifetime" cap. Subrogation allows a credit back, thus preserving the larger lifetime cap of the victim's insurance. With

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straight collateral source offsets, the victim sees the defendant get benefit of their health insurance plus lose a portion of their lifetime major medical benefit.

- Collateral source rule abrogation essentially tells plaintiffs that their foresight to protect their family from medical loss by purchasing health insurance is now going to be used against their interests if they litigate. The defendant does nothing to earn the benefit of that windfall. Subrogation allows any "benefit" of the victim's litigation to repay the health insurance company and be passed along to others buying health insurance. This keeps the focus on the wrongdoer's negligence, not the victim's insurance resources. However, subrogation has a tendency to cause a bit more litigation due to subsection 2(c), which similar to other subrogation provisions.

- Subrogation best preserves the original theory of the collateral source rule. In theory, if plaintiff gets health insurance benefits and then recovers from the defendant similar benefits, plaintiff gets a windfall. If the defendant gets benefit of the plaintiff's health insurance by abrogation of the collateral source rule, the defendant gets the windfall. The question is who should get the windfall? Since the early 1800s, the courts have ruled that the victim of negligence should get the windfall. Subrogation ends any "windfall" for either party.

Of these two options, both of which KBA has in the past opposed, subrogation appears to be a slightly better alternative. Thank you.

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

February 23, 1995

TO: Senate Judiciary Committee

FROM: Jerry Slaughter
Executive Director

SUBJECT: SB 311; concerning subrogation of health insurance benefits

The Kansas Medical Society appreciates the opportunity to appear today as you consider SB 311, which would allow subrogation provisions in health insurance contracts. KMS opposes SB 311, which is similar to other subrogation bills which have been considered but not enacted by the Legislature in previous years, most recently last year (HB 2717).

Simply put, encouraging subrogation in health insurance claims will negate the beneficial effect of modifying the collateral source rule in medical malpractice litigation. On four previous occasions, including last year, the Legislature has enacted collateral source bills designed to eliminate couble recoveries in medical malpractice and other personal injury claims. In 1993 the Kansas Supreme Court struck down the 1988 law on technical grounds. Last year's bill which would have reinstated the legislation was vetoed by Governor Finney. There is currently legislation pending in the House of Representatives which would re-enact the law. Our preference is that you enact a modification of the collateral source rule as the means of eliminating double recoveries, not create a right of subrogation.

Further, subsection (c) of section 2 allows a health insurer to commence an action against a "tortfeasor" if the insured person does not bring their own suit. This will encourage health insurance companies to sue physicians for recovery of benefits paid to their insureds, even when there has been no showing that the injury was caused by any negligence. What happens when there is an unavoidable, bad result not caused by a departure from the standard of care? A zealous health insurer could use the subrogation statute to hammer a physician into a settlement, even though the physician was not negligent in the care provided.

Our interest in subrogation relates to two issues which are linked: double recoveries and medical malpractice insurance costs. We, in principle, do not support archaic legal rules that allow claimants to recover twice for certain damages, usually health insurance benefits. Currently, in most cases, subrogation is not allowed in health insurance contracts. As a consequence, if a medical malpractice claim is involved, the claimant does not tell the jury that their health insurance paid their bills, and the jury then awards damages for those costs which have already been paid. This just drives up the cost of liability insurance for physicians and the Health Care Stabilization Fund, while the claimant (and his or her lawyer) in essence, double dips.

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The issue before you with this bill is which insurer should benefit from legislation designed to eliminate double recoveries in personal injury litigation. Allowing a right of subrogation to health insurers will only benefit them marginally. It has been variously estimated that their recoveries will be in the range of .5% to 1.5% of revenue. Those same dollars, however, spread over a much smaller base of individuals, such as physicians, who pay liability claims, have a significant impact on liability premiums. Our professional liability company, for example, experienced a 48% increase in the cost of claims that involved a collateral source since 1993, when the Kansas Supreme Court struck down the modification of the collateral source rule enacted in 1988. While medical malpractice premiums have moderated somewhat because of the legal reforms enacted by the Legislature in 1988, premiums are still too high, and put us at a competitive disadvantage in attracting and retaining physicians, especially those in the shortage areas of primary care.

In our view, because of the high cost of medical malpractice insurance, and its corrosive effect on the health care system, any benefit which arises from avoiding duplicate payments should go towards reducing premiums charged by the relatively few professional liability insurers and the Health Care Stabilization Fund. On balance, the insignificant impact subrogation will have on health insurance premiums compared to higher medical malpractice premiums and increased litigation, does not justify passage of SB 311. We urge you report SB 311 unfavorably, and appreciate the opportunity to offer these comments. Thank you.

KaMMCO

KANSAS MEDICAL MUTUAL INSURANCE COMPANY

MEMO

TO: Senate Judiciary Committee

FROM: Lori Callahan, General Counsel

RE: S.B. 311

DATE: February 23, 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 currently insures over 1,000 Kansas physicians.

KaMMCO opposes S.B. 311. S.B. 311 allows health insurers in the state to include subrogation clauses in their contracts of insurance. KaMMCO opposes this proposal as it is an inefficient method to prevent unjust enrichment of a plaintiff and because it could lead to an increase in litigation.

The concepts of subrogation and modification of the collateral source rule both have as their goal the prevention of unjust enrichment by a plaintiff. Without one of these concepts, plaintiffs could receive full payment for medical expenses from their health insurer and then collect the same amount from a third party in a tort action. The question then is which method is the best to prevent this double recovery. Under subrogation, a health insurer must join with the plaintiff in litigation against the third party, thereby involving an additional party and possibly their attorney in every case. This results in complication of the underlying litigation.

Modification of the collateral source rule, which was passed by the Kansas Legislature in 1988, allows for a much more efficient method of preventing double recovery. This modified rule merely states that in an action by a plaintiff against a third party, the jury will be given information on the amount of medical expenses previously paid by a third party for the plaintiff's benefit, as well as the amount plaintiff paid for those benefits. The judge then offsets those amounts and deducts plaintiff's previously received benefit from the award, thereby preventing double recovery. This method is not only much more efficient than subrogation, but has been found to have a significant effect on controlling property and casualty losses, thereby stabilizing the tort crisis.

KaMMCO also opposes subrogation in that it may well lead to increased litigation. Health insurers could chose to pursue litigation to recover the benefits they paid even if the plaintiff did not want to bring suit. In Kansas, we have stabilized the tort crisis partially by methods intended to reduce litigation. Measures which increase the incentives to bring lawsuits escalate the crises rather than control it. For these reasons, we oppose S.B. 311.

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)

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