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 March 13, 1995 in Room 514-S of the Capitol.

All members were present except: Senator Vancrum (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 Haines, Executive Vice President, Western Resources, Inc.
Professor David Monical, Washburn University
Wilbur Geeding, Attorney, Representing Kansas Credit Attorneys Association
Kevin Davis, American Family Insurance
Janet Chubb, Representing the Office of Secretary of State, Ron Thornburgh

Others attending: See attached list

HB 2298--Registered limited liability partnerships, fees for applications or renewal application.

Janet Chubb spoke representing the Office of the Secretary of State in favor of **HB 2298.** Ms Chubb related to the Committee that under the registered limited liability partnership act passed in the 1994 session, the foreign partnership that do not have a partner with a principal office in Kansas was overlooked. This bill provides for a filing fee of $75 for foreign partnerships when there is not a principal office in Kansas. Ms Chubb asked that this bill be passed favorably.(Attachment 1)

Motion by Senator Parkinson, second by Senator Reynolds to pass out favorably and put on the consent calendar **HB 2298** as requested by the Secretary of State. Motion carried.

HB 2531--Municipal university police officers

David Monical of Washburn University spoke in favor of **HB 2531**. Mr. Monical explained that this bill would allow Washburn University to hire police officers under the same statutes that governs the Kansas Board of Regents institutions. The authority was given to the state regents schools ten years ago. The ability to hire these officers after that they have obtained the proper training through the law enforcement training center. Mr. Monical stated since that time, a need has developed for officers at Washburn. (Attachment 2)

Motion made by Senator Moran, second by Senator Martin to recommend **HB 2531** favorably and place on the consent calendar. Motion carried.

HB 2095--Penalties for intentional violations by public utilities and common carriers

Mr. Jim Haines appeared on behalf of Western Resources, Inc. and as a member of the Utility Industry Task Force which at the request of Representative Holmes undertook review of K.S.A. Chapter 66. **HB 2095,** as amended by the House Committee on Energy and Natural Resources, reflects an amendment recommended by that task force. **HB 2095** would award actual damages sustained by the party aggrieved, the costs of the suit, and reasonable attorney fees. Current law makes public utilities subject to a penalty of three times actual damages. Mr. Haines stated that the triple damages provision in K.S.A. 66-176 are redundant of K.S.A. 66-177 and urged passage of **HB 2095** as amended to remove the triple damages provision in K.S.A. 66-176.(Attachment 3)

Moved by Senator Bond, second by Senator Parkinson that **HB 2095** be recommended favorably for passage. Motion carried.

HB 2448--In property damage cases in auto accidents, attorney fees recovered only if previous demand for payment

Bill Sneed appeared on behalf of the Kansas Civil Law Forum supporting **HB 2448.** Mr. Sneed stated that this bill is an amendment to K.S.A. 60-2006. This statute allows that in an automobile accident in certain situations if a lawsuit is filed, and if there is recovery in an amount equal to or greater than what was offered at the time of the hearing, attorney's fees are awarded as costs. The purpose of the statute has been enumerated as the promotion of prompt payment of small but well-founded claims and the discouragement of unnecessary litigation of certain automobile negligence cases. The original statute allowed a threshold of $3,000 and increased to its current rate of $7,500. The criteria for damages must be less than the threshold, the party claiming the attorney's fees must prevail, and the adverse party did not make tender offer of damages before the commencement of the action in an amount equal to or greater than the amount recovered. What's occurring now, according to Mr. Sneed is an increase in litigation because there is no requirement that the plaintiff in the action has to provide any notification prior to the filing of the suit in order to come under this statute. **HB 2448** would amend K.S.A. 60-2006 by insertion of the word "property" on line 14. This change would eliminate cases in which bodily injury claims are also involved with a property claim. The bulk of the amendment in sub-section (b) requires the plaintiff prior to successfully claiming attorney's fees and prior to 30 days of commencement of action, to give written demand for the settlement containing all elements necessary for the opposing party to evaluate and quickly determine the validity of the claim. The House Committee amendments were aimed at clarifying property damage claim.(Attachment 4)

Mr. Sneed answered questions concerning the purpose of sub-section (b) . Mr. Sneed stated that lawsuits are being filed prior to notice in order to insure attorney fees are paid. Mr. Sneed responded to question regarding limiting this bill to property damages by stating those damages are easy to quantify and therefore, more objective than bodily injury claims.

Kevin Davis, American Family Insurance Group spoke in support of **HB 2448.** Mr. Davis emphasized in regard to the time requirement of 30 days, that the National Association of Insurance Commissioners has prorogated a rule that has been set out in the unfair claims practices act which was codified by the insurance department and adopted by administrative rule 40-1-34 which indicates that an insurance company is in compliance with the unfair claims practices act after they have received notice of a claim that they have 30 days to investigate that claim and make a settlement if possible. Mr. Davis stated that it is his belief that this bill should apply to property damage only because in claims for personal injury the amount of claim would likely be in excess of $7,500. In addition, personal injury claims are more complex and difficult to settle. (Attachment 5)

Mr. Elwaine Pomeroy, Kansas Credit Attorneys Association briefly addressed the Committee in opposition to **HB 2448,** and introduced Wilbur D. Geeding, an attorney from Wichita, Kansas.

Mr. Geeding spoke representing the Kansas Credit Attorneys' Association. Mr. Geeding spoke in opposition to **HB 2448.** Mr. Geeding stated that this bill deprives the statute, K.S.A. 60-2006 of its original purpose. Mr. Geeding also addressed concerns regarding the demand part of the statute, stating the proposed amendment is too exacting. Mr. Geeding expressed concerns regarding the notice requirement stating that it places an unreasonable burden on the plaintiff to give actual notice. Mr. Geeding referenced remedial legislation in the consumer area, stated that the requirements for notice is by mail to the debtor's last known address. Mr. Geeding continued that if notice language is necessary, it should be to the last known address. Mr. Geeding observed that a notice requirement is not made of the defendant. Mr. Geeding spoke in opposition to eliminating the use of the statute for minor personal injury cases and expressed concern about attorney fees being paid in small personal injury cases. Mr. Geeding contented that the language was vague with respect to the demand and could result in increased litigation cost and delays in payment of valid claims. (Attachment 6)

Questions and discussion followed concerning specifying the elements.

Patrick Nichols, Trial Lawyers Association spoke in opposition to **HB 2448**, in particular to the exclusion of personal injury claims. Mr. Nichols contended that this bill segregates into two classes, property and personal injury claims. Mr. Nichols expressed concern for cases with personal injury not being handled. Mr. Nichols recommended leaving the statute as is. Mr. Nichols suggested allowing actual notice in place of the notice requirement. Mr. Nichols recommended leaving personal injury in the bill. (Attachment 7)

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY, Room 514-S Statehouse, at 10:00 a.m. on March 13, 1995.

Questions and discussion followed concerning the intention of K.S.A. 60-2006 in applying to personal injury claims.

Chairman Emert closed the hearings and stated that consideration would be given to these bills later in the week. The Chair then directed the Committee's attention to **SB 134** and **HB 2083,** heard previously in Committee.

Motion by Senator Harris, second by Senator Martin that **HB 2083** be reported favorably for passage. Motion defeated. Those voting in favor of the motion and requesting to be recorded were: Senator Harris, Senator Martin, Senator Brady, and Senator Moran.

The Chair asked the Committee's pleasure on **SB 134.** No motion was made.

SB 213 and SB 295 were briefly discussed. The Chair announced that a request for a post audit would be made.

Meeting adjourned at 11:00.

The next meeting is scheduled for March 14, 1995.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3-13-95

NAME	REPRESENTING
Ed Schaub	Western Resources
Jim Haines	Western Resources
Jim Ludwig	" "
L.M. CORNISH	Ks Assn of Prop+Casualty Cos
William Sneed	Ks Civil Law
Janet Chubb	SOS.
PATRICIA NICHOLS	KTCA
Kevin DAVIS	American Family Ins
Paul Shelley	OJA
Gene Johnson	Ks. Alcohol Safety Action Programs
Jeanene Gill	Myself - KFR
Jim Lowman	KS Governmental Consultancy
Wilbur Harding	KS Credit Attys Assn
Elwaine F Pomeroy	Kansas Credit Attorneys Association
Linda Peterson	KBCH Companies
Douglas Johnston	Planned Parenthood

#1

Ron Thornburgh
Secretary of State

2nd Floor, State Capitol
300 S.W. 10th Ave.
Topeka, KS 66612-1594
(913) 296-2236

STATE OF KANSAS

SENATE JUDICIARY COMMITTEE

Testimony of Secretary of State
HB 2298
March 13, 1995

Mr. Chairman and Members of the Committee:

HB 2298 provides for a $75 filing fee for any limited liability partnership that has no partner with a principal office in Kansas.

When the registered limited liability partnership act was passed in the 1994 session, it stated a $75 fee for each partner with a principal office in Kansas. This fee provision covered domestic limited liability partnerships and some foreign partnerships but overlooked the foreign partnerships that do not have a partner with a principal office in Kansas. The omission was an oversight.

The Secretary respectfully requests that the committee favorably consider this technical amendment.

Corporations (913) 296-4564
FAX (913) 296-4570

Elections (913) 296-4561
Administration (913) 296-2236
FAX (913) 291-3051

UCC (913) 296-3650
FAX (913) 296-3659

Senate Judiciary
3-13-95
Attachment 1

WASHBURN UNIVERSITY
Topeka, Kansas 66621
Phone 913-231-1010

Testimony to Senate Judiciary Committee
House Bill 2531
March 13, 1995
by
David G. Monical
Executive Assistant to the President

Mr. Chairman, Members of the Senate Judiciary Committee:

Washburn University of Topeka, in requesting this measure, seeks to develop its security/public safety department to the level of those found at the campuses of the state educational institutions under the jurisdiction of the Kansas Board of Regents. Those departments are comprised of police officers and security officers, the former are sworn law enforcement officers while the latter are not.

The University did not come lightly to the conclusion that it should have armed law enforcement officers on its campus as we have had very good relations with a very fine police department, the Topeka Police Department. Nor is the decision to add armed police officers because of activities which have occurred or are occurring on the campus. Rather, the addition of armed law enforcement officers to the University's security force was one of several recommendations made following a comprehensive consultant's study of the University's security/public safety needs.

Crime prevention is one of the Legislature's top concerns and it is one of our top concerns as well. The addition of sworn law enforcement officers to complement our security officers will enhance our crime prevention efforts as well as providing a very quick response time to criminal acts reported on the campus.

We have identified four current statutes to be amended to extend authority to the University to employ law enforcement officers. First, we seek certified law enforcement personnel. We suggest K.S.A. 74-5602(e) be amended in the definition of "police officer" and "law enforcement officer" to include campus police at a municipal university. Similarly, we seek an amendment to K.S.A. 74-5605 to permit municipal university police officers to be admitted to the Law Enforcement Training Center. This would also mean that those municipal university police officers would be required to undergo annual training for continued certification just as law enforcement officers under the jurisdiction of a city, county or the state of Kansas. Next, we seek amendment to K.S.A. 1994 Supp. 22-2401a to grant municipal university police officers the same level of arrest authority as has been granted to university police officers at a state educational institution. That authority is limited to the environs of the campus and the area immediately adjacent to it. Lastly, we seek an amendment to one of the enabling statutes governing Washburn University, K.S.A. 13-13a12, to expressly include authority to employ police officers.

The amendments requested by Washburn University of Topeka will enhance our ability to adequately provide protection of life and property on campus. And, to the extent that employment of sworn law enforcement officers will reduce the dependency of the University on the Topeka Police Department, it will also complement the efforts of the local police to have a presence in this area. We ask your favorable action on this bill.

Senate Judiciary
3-13-95
Attachment 2

DGM/SENJUD031395:HB2531

X 3

HOUSE BILL No. 2095
As Amended by House Committee

Senate Judiciary Committee
3-13-95

Statement of James Haines

Good morning Mr. Chairman and members of the Committee. My name is Jim Haines. I am appearing on behalf of Western Resources, Inc. and as a member of the utility industry task force which, at the request of Representative Carl Holmes, undertook a review of K.S.A. Chapter 66.

H.B. 2095, as amended by the House Committee on Energy and Natural Resources, reflects an amendment recommended by that task force. H.B. 2095 would amend K.S.A. 66-176 to make public utilities which are found to have violated any of the provisions of law regulating them subject to the actual damages sustained by the party aggrieved, the costs of the suit, and reasonable attorney fees, to be fixed by the court. Current law makes them subject to a penalty of three times the actual damages, plus costs of the suit and reasonable attorney fees.

As a public policy, damages above actual are generally only imposed as a penalty to punish certain behavior and to deter others from the same behavior. For those purposes, however, the triple damages provision in K.S.A. 66-176 are redundant of K.S.A. 66-177 which, in relevant part, provides:

> Any public utility . . . willfully violating or evading any of the provisions of law for the regulation of such public utility . . . shall, for each offense . . . pay a penalty of not less than $100 nor more than $5,000.

Senate Judiciary
3-13-95
Attachment 3

On top of the general applicability of the penalty provision in K.S.A. 66-177, other statutes provide for penalties in specific situations. For example, K.S.A. 66-1,151 provides that any utility which violates any KCC rule or regulation adopted under the Gas Pipeline Safety Act (K.S.A. 66-1,150 et seq.) is subject to a penalty of up to $10,000 for each violation for each day the violation persists, not to exceed $500,000. K.S.A. 66-137, 66-138, 66-185, and 66-1315 also provide for penalties in specific situations.

In view of the penalty provisions of K.S.A. 66-177 and the other statutes mentioned, the task force concluded that there is not a compelling public policy reason to award any more than actual damages plus costs to any private litigants. To the extent that a utility's behavior is so egregious as to require further payment, the courts are free under K.S.A. 66-177, and in specific circumstances under the other statutes mentioned, to do so. Nor would this amendment preclude a civil litigant from bringing suit against a utility and claiming punitive damages for egregious behavior. Accordingly, the task force has unanimously recommended that K.S.A. 66-176 be amended to remove the triple damages provision.

For the task force, I urge you to vote in favor of H.B. 2095, as amended.

#4

MEMORANDUM

TO: The Honorable Tim Emert
Chairman, Senate Judiciary Committee

FROM: William W. Sneed
Gehrt & Roberts, Chartered

DATE: March 13, 1995

RE: H.B. 2448

Mr. Chairman, Members of the Committee: My name is Bill Sneed and my law firm is a member of the Kansas Civil Law Forum. I have been requested to provide testimony on H.B. 2448.

H.B. 2448 is an amendment to K.S.A. 60-2006. K.S.A. 60-2006 is a statute that was first enacted in 1969. This statute provides the ability to tax attorney's fees as costs in certain actions involving motor vehicle accidents. The purpose of this statute has been cited by several Kansas Supreme Court cases to be "the promotion of prompt payment of small but well-founded claims and the discouragement of unnecessary litigation of certain automobile negligence cases." *Arnold v. Hershberger*, 4 Kan.App.2d 24, 602 P.2d 120. The statute originally provided that attorney's fees could be taxed as costs if damages were less than $300.00. Since that time, the amount creating the threshold has been amended four additional times to its current level of $7,500.00.

The courts have stated that there are three requirements for the recovery of attorney's fees. They are: (1) damages must be less than the threshold; (2) the party claiming attorney's fees must prevail; and (3) the adverse party did not make a tender of damages before the commencement of the action in an amount equal to or greater than the amount recovered.

GEHRT & ROBERTS, CHARTERED
5601 S.W. Barrington Court South
P.O. Box 4306
Topeka, Kansas 66604-0306
(913) 273-7722
(913) 273-8560

Senate Judiciary
3-13-95
Attachment 4

Kansas case law has also stated that it is not a requirement that a demand for damages be a prerequisite for recovering attorney's fees under the statute. The courts have stated that since there is no specific prerequisite to that effect, they will not read something into the statute which is not there. In most of the cases cited regarding this statute on the issue that is the subject of the amendment found in H.B. 2448, the amount of damages under the claim were generally under $750.00. As noted earlier, that amount has increased over time, and as such, making a determination as to the validity of the claim has become more complex. Further, members of our coalition have seen an increase in cases filed shortly after the accident date notwithstanding the fact that much of the information needed in order to determine the appropriate amount of payment has yet to be provided to the appropriate party, usually the insurance carrier.

We believe that the statute as written, coupled with the amount of damages available under this statute, has given rise to the exact opposite of the original intent. It is our contention that it has in essence encouraged lawsuits to be filed in an effort to force the payment of attorney's fees or to be used as a negotiating tool when attempting to settle claims, notwithstanding the fact that the individuals reviewing the claim have never had a good faith opportunity to settle the claim. To that end, we have requested two amendments.

The first amendment is found on line 14 by insertion of the word "property." This would eliminate those cases in which bodily injury claims are also involved with a property claim. In lieu of reducing the amount of damages sustained in the claim, it is our contention that by the elimination of bodily injury claims from the formula, the claim can be more quickly analyzed, thus reverting back to the original intent of the statute, i.e., prompt payment of small but well-founded claims.

The second amendment is new language found on lines 22-26. This new section would require the prevailing party, prior to being awarded attorney's fees, to provide written demand for the settlement of such claims containing all of the elements necessary for the opposing party to evaluate and quickly determine the validity of the claim. The amendment further requires that such material must be provided to the adverse party not less than thirty days before the commencement of the action.

We believe this section provides good public policy. Certainly there is a great desire to reduce the caseload in our court system. Further, it is important public policy that claims should be handled quickly and effectively. However, in order to meet this criteria the entity reviewing the claim should be provided the opportunity to receive all of the pertinent information on the claim so as to evaluate the propriety of the claim submitted. This will not eliminate the current safeguard in that after the proper submission and a tender offer made by the opposing party, if the prevailing party receives in excess of the tender offer, attorney's fees still are available for recovery by the prevailing party. Thus, the true intent of the statute is still retained and will halt what we believe to be the increasing race to the courthouse in an attempt to come under this statute.

Thus, on behalf of the Kansas Civil Law Forum, I respectfully request your favorable passage of H.B. 2448.

Respectfully submitted,

William W. Sneed

William W. Sneed

GEHRT & ROBERTS, CHARTERED
5601 S.W. Barrington Court South
P.O. Box 4306
Topeka, Kansas 66604-0306
(913) 273-7722
(913) 273-8560

#5

American Family Insurance Group
1300 S. W. Arrowhead Road
Topeka, Kansas 66604-4019
Phone (913) 273-5120

AMERICAN FAMILY INSURANCE

Kevin R. Davis
Government Affairs Representative

March 13, 1995

TO: Senate Judiciary Committee

FROM: Kevin R. Davis
American Family Insurance Group

Re: House Bill No. 2448

This bill is designed to address two issues. One to correct a long standing misinterpretation of the existing statute and two, to add a notice and submission/demand requirement as a prerequisite to the award to attorney fees.

In regard to the first issue, the word "property" has been added to modify damages and thereby eliminate other types of claims, such as personal injury, from applying to this statute. It is our understanding and belief that the statute was initially designed and passed to expedite property damage only claims of a relatively small amount ($7,500.00). I believe the statute was intended to facilitate the payment of property damage claims, However, we have found that creative plaintiff's attorneys are using the statute to also make personal injury and other claims which we believe was not the original intent of the statute. This bill would correct that problem.

The second issue addresses a notice requirement and submission of damages which must be met before attorney fees could be recovered. This would help facilitate settlement, discourage unnecessary litigation, and allow for a reasonable time period in order to investigate a claim and respond to a demand.

For example, under the current statute a lawsuit can be filed immediately after a cause of action has occurred without notice, and if there is liability and damage, attorney fees would be taxed as a part of the action. In an automobile accident an insurance carrier is required to indemnify their insured for the insured's legal liability as a result of an automobile accident. The insurance company is responsible to investigate these accidents and evaluate liability and damages. Obviously, before they can do that they must have notice of the claim, and some reasonable time to investigate the accident including the liability and damages aspects of the claim. This also involves contact with the

Senate Judiciary
3-13-95
Attachment 5

parties and at least some minimal cooperation in order to evaluate liability and damages.

The investigation of a claim begins with personal contact of the parties to obtain statements and learn about the nature of the accident, damages and witnesses. It also involves acquiring an accident report, estimate of damages, and many times various additional documentation, such as verification of vehicle ownership and liens. Without this investigation the insurance company can only guess as to whether their insured has liability, what the damages may be, and who to pay.

In order to provide for some reasonable requirement before awarding attorney fees we suggest that this bill is consistent with the requirements of the Kansas Insurance Department in Administrative Regulation 40-1-34, establishing the requirement for Unfair Claims Settlement Practices as promulgated by the National Association of Insurance Commissioners. This is a regulation which governs the manner in which insurance companies are required to handle claims. The following provisions are found in the Unfair Claims Practices Act.

1. Section 6(a). "Every insurer, upon receiving notification of a claim shall, within 10 working days, acknowledge the receipt of such notice unless payment is made within such period of time."

2. Section 7. "Every insurer shall complete investigation of a claim within 30 days after notification of claim, unless such investigation cannot reasonable be completed within such time." (emphasis added)

3. Section 8(e). "Insurers shall not continue negotiations for settlement of a claim directly with a claimant who is neither an attorney nor represented by an attorney until the claimant's rights may be affected by a statute of limitations or a policy or contract time limit, without giving the claimant written notice that the time limit may be expiring and may affect the claimant's rights. Such notice shall be given to first party claimants 30 days and to third party claimants 60 days before the date on which such time limit may expire."

As you can see, in regard to claims being made which involve insurance coverage, the Kansas Insurance Department has appropriate rules and regulations governing the processing of such claims. The National Association of Insurance Commissioners recognize that it does take some time to process and investigate a claim, once notice is given. They established a 30 day investigation period after notification, unless such investigation cannot reasonably be completed within such time. Obviously they are providing for the circumstance when the liability and/or damage investigation cannot be concluded within the 30 day time period. This bill would provide for that minimum time which we believe is reasonable. I would state that there are certainly times when we cannot complete this investigation within the 30 days and we will still be at jeopardy for attorney fees in such circumstances.

In conclusion, we believe that this bill is appropriate in limiting the claims to "property damages" only and allowing attorney fees only when written demand is made containing all of the elements of damage and the total monetary amount demanded on the adverse party not less than 30 days before the commencement of action. This appears to be totally consistent with the Kansas Insurance Department and the National Association of Insurance Commissioners in regard to claims handling and processing. I would note that section 8(e) of the Unfair Claims Practices Act demands that insurers notify third party claimants 60 days before the date on which any statute of limitations may run. We believe that 60 days is more than appropriate quid pro quo and justification for the notice and time requirements in this bill.

Kevin R. Davis

KRD/psc

PRESENTATION BY WILBUR D. GEEDING IN RE: HOUSE BILL NO. 2448

My name is Wilbur D. Geeding. I am an attorney from Wichita, Kansas who has been in private practice for over forty years. I am here as a member of and the representative for the Kansas Credit Attorneys' Association. In my practice, I have handled much litigation involving K.S.A. 60-2006 as I regularly represent persons involved in auto accidents who sustain personal injuries or property damages less than $7,500.00. I also presently represent insurance companies in subrogation type cases involving both property damage and personal injury. I am here to speak in opposition to the various amendments to K.S.A. 60-2006 at it appears that the proposed amendments will deprive the statute of its original purpose.

It is important to remember that the purpose of this legislation was originally intended to promote the prompt payment of small but well founded claims and to discourage unnecessary litigation of such small claims arising out of motor vehicle accidents. Prior to enactment of this legislation in 1969, the expenses and attorney fees which a claimant with a small meritorious claim would incur were prohibitive. Attorneys could simply not handle such cases on an economic basis. It was therefore commonplace that the injured claimant would forego his rights in court rather than incur the costs and expenses of litigation. Those who negligently caused the damages and some of their insurance carriers were refusing to pay just claims knowing that even if they were sued and lost, they would still only be required to pay the actual damages resulting from the accident. A party negligently causing damage or that person's insurance carrier could simply make it economically not feasible for the injured party to pursue a valid claim.

This legislation changed all of that. The statute originally was designed to place the burden on the negligent party and that person's insurance carriers to inquire, investigate, and if warranted, make an offer to settle the damages. If they did not make an offer and the other party successfully sued, the party negligently causing the damages and that party's insurance carrier would be required to pay attorney fees. This caused insurance companies to think twice before denying a valid claim. They could no longer take the calculated risk of denying a valid claim and hoping that the injured claimant would go away. The amendment to section (2)(b) unreasonably shifts this burden to the injured claimant. The

Senate Judiciary
3-13-95
Attachment 6

amendment requires that a written demand containing all of the claimed elements of property damage and the total monetary amount demanded in the action shall have been made on the adverse party. It therefore requires the injured party to inquire, investigate and make a demand on the adverse party. In my practice I have found that the damaged party is ill equipped to do this. They are unfamiliar with the procedures and must take time off from work to get estimates performed. Furthermore, they do not realize that an estimate is just that. Until the repairs are actually performed, the actual cost to repair the vehicle is not known and that amount could be much higher than the estimate. On the other hand, some insurance companies have established their own service centers for making repair estimates. The rest rely on professional estimators. Clearly the insurance companies have developed the expertise to investigate these claims and the burden should remain on their capable shoulders.

Furthermore there is no room for mistakes in the demand required by the proposed amendment. The amount contained in the demand must be explicitly itemized and must be exactly the same as that demanded in the lawsuit. Attorney fees will not be awarded if any hidden damages are later discovered after the suit is filed and the pleadings amended to include those additional damages.

The language of the amendment also requires that the plaintiff give actual notice to the adverse party. In many cases that I have handled the defendant is not located until after suit has been filed for the simple reason that the defendant moves and leaves no forwarding address with the Postal Service. Thus these defendants can only be found after suit has been filed and discovery tools utilized to locate them. In comparison all remedial legislation in the consumer area requires that the notice be sent by mail to the debtor's last known address and not actual notice. The current worthless check law requires that notice be sent by restricted delivery to the last known address of the maker of the check. This amendment places an unreasonable burden on the plaintiff to give actual notice. If a notice provision is deemed necessary, I believe that the language of the amendment should only state that demand be sent to the last known address of the adverse party.

It should be duly noted that no such notice burden is placed on the defendant. Under the amendment, if the defendant files a counterclaim and recovers he or she is under no burden of making a written demand before an allowance of attorney fees. The defendant will be able to recover attorney

fees without the necessity of making any kind of demand. This is clearly an unreasonable double standard.

Moreover, the language used by the House amendment in Section (2)(b) is vague and ambiguous. The language calls for a written demand containing all of the claimed elements of property damage. What exactly is meant by "claimed elements of property damage"? I frankly do not know and I have been practicing law in this area for forty years. It could be interpreted to mean that each and every damaged part of the motor vehicle from the largest bumper to the smallest bolt attaching that bumper must be contained in the notice for the demand to be sufficient. It might mean that only broad generic terms as loss of use and property damage need be itemized. However I am not certain that loss of use would even be a claimed element of property damage and by including loss of use a party might lose his entire claim to attorney fees under this amendment. Such unsettled language would force each District Judge to determine the sufficiency of the demand in each case. This in turn would cause an increase in the number of appeals filed in order to challenge the District Court's determination. This would again enable some negligent parties and their insurance companies to unreasonably prolong the litigation. This would in effect cause an extreme, inordinate delay in payment of the original damages which is just what the statute was designed to prevent but which is just what some insurance companies want. I would envision delays of as much as two to three years from the date of the accident.

The present amendments would only permit attorney fees when there is property damage involved. This amendment would effectively eliminate the recovery of subrogation claims against uninsured tortfeasors where there are personal injuries of less than $7,500.00. I personally handle many such claims against uninsured motorists causing minor personal injury. After the insurance company has paid the injured person based upon an uninsured motorist claim, it is entitled to subrogate against the uninsured motorist. Without the present statute applicable to personal injury losses, many if not all of these claims will go unrecovered as attorneys such as myself will simply not be able to handle such cases which fall under the $7,500.00 threshold on an economic basis. Liability insurance rates will go up for those of us who obey the law and maintain insurance and the uninsured, lawbreaking tortfeasor will be left to go on his or her merry way to have other accidents and not be held accountable for his or her

actions. The injured claimant and that person's insurance company will therefore be left without the ability to recover the losses.

In conclusion, it is the belief of the members of my association and myself that the proposed amendments to the statute will deprive it of its present effectiveness and will destroy the original purpose for which it was enacted. By shifting the burden of investigation away from the insurance companies and onto the injured person, the proposed amendment places the burden on the party least equipped to handle it. By eliminating the use of the statute for minor personal injury cases, the injured plaintiff and the insurance company subrogating on the injured person's behalf will essentially be deprived of legal representation as attorneys will not be able to economically afford to handle such cases. Finally by using such vague language with respect to the demand, the amount of litigation will increase and cause lengthy delays in payment of valid claims. This is exactly the opposite of the intended purpose of the original act.

#7

KTLA COMMENTS IN OPPOSITION TO HOUSE BILL 2448

March 13,1995
Presented by Patrick Nichols
Topeka, KS

The bill before the committee unnecessarily restricts the rights of litigants and will serve to thwart the laudable principles and goals of the statute. Moreover, it creates two classes of claims without a clear rational basis, thus risking court invalidation and increases, rather than reduced litigation,

The proposed amendment modifies provisions of K.S.A.60-2006 which allows attorneys fees to successful litigants in smaller claims auto accident litigation. The purpose of the original act was to discourage litigation of smaller claims and encourage settlements by forcing the litigant to assume the increased risk of paying the prevailing party's attorney fees. The amendment would allow such fees only in cases of property damage, not personal injury. Notice of requested damages would be required to be served 30 days before the filing of the case.

On behalf of consumers and accident victims we oppose the changes which exclude personal injury damages from the statute. The changes thwart the special and beneficial proposes of the original law. Constitutional law questions also are needlessly raised by the dichotomy of treatment.

The original legislation served two primary purposes, both of which compel the rejection of the proposed amendments. The first was to discourage the unnecessary litigation of smaller claims. It is common knowledge that the courts are in need of some assistance in reducing caseloads. The smaller cases are often as time consuming as the larger and it was originally thought that a policy to encourage presuit settlements would accomplish this purpose. The statute creates financial incentives for the defendant to make offers and for the plaintiff to carefully evaluate them. The rule effectively "raises the stakes" of the case and makes less likely the casual litigation of these smaller cases. This avoids clogging up the courts and at the same time allows early and successful resolution of the claims.

Senate Judiciary
3-13-95
Attachment 7

The second purpose served by the statute is the equalize the vast difference of power between consumers and insurance companies. Most consumers lack the resources to litigate a claim with assistance of a lawyer where smaller amounts are at issue. Thus they are easily overwhelmed by the power of the insurance companies who possess such resources in abundance and who, in any event pass those costs on as rate increases, the cost of doing business. If the consumer/accident victim is not made a fair offer (as later determined by a jury) they are able to recover not only their actual losses but the cost of litigation as well. Thus the consumer is truly made whole. Moreover, they are able to find counsel to assist them in the case since the fees wont be extracted from the small amount at issue (which would render the consumer's recovery greatly diminished) but from the recalcitrant party.

Both purposes, encouraging prompt and fair settlements and levelling the playing field for consumers will be discouraged by the proposed amendment to allow fees only in the cases of property damage. If the damages are small, early evaluation and settlement are worthy goals: therefore the exclusion of an important element is to exclude an important purpose of the law. Equalization of resources is just as important where the injury is to the person as to the property. Is the fender more important the human back or knee? Certainly the human frame is no less important than that of the automobile.

The law of unintended consequences must be considered here also. The exclusion of personal injury cases from the statute will encourage those previously covered by it to seek larger damages in court and thus encourage the evil sought to be prevented by the original statute, increasing not reducing litigation. These smaller cases cost as much in system resources and defense costs as the bulk of other related litigation. Thus these changes dictate more, not less litigation and greater not smaller costs to the system.

Constitutional issues are also raised by the creation of two classes of litigants who are then treated unequally. The principle of "equal protection" prohibits the disparate treatment of one class or another without a clear and rational basis. This bill proposes to create such a distinction. The law would value property over the person for purposes of equalizing resources and encouraging settlements. This distinction is dangerous and its inequality creates a fatal flaw.

On behalf of consumers and accident victims of the state I and the Kansas Trial Lawyers Association encourage rejection of H.B.2448 as amended.

Respectfully Submitted

PATRICK NICHOLS