Approved: Jan 31
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Emert at 10:14 a.m. on January 26, 2000 in Room 123-S of the Capitol.

All members were present.

Committee staff present:
Gordon Self, Revisor
Mike Heim, Research
Jerry Donaldson, Research
Mary Blair, Secretary

Conferees appearing before the committee:
Senator Janis Lee
Elwaine Pomeroy, Kansas. Credit Attorneys Association
Jerry Slaughter, Kansas Medical Society and Ks. Medical Mutual Insurance Co.
Susan Bechard, Kansas. County and District Attorneys Association
Christy Molzen, Attorney, KJC Code Advisory Committee
Judge Terry Bullock, KJC Civil Code Advisory Committee
Terry Humphrey, Kansas Trial Lawyers Association
Wayne Stratton, Kansas Association of Defense Counsel
Brad Smoot, Kansas Civil Law Forum

Others attending: see attached list

Bill Introductions:

Senator Lee requested a bill that regards the Crime Victims Restitution Fund (CVRF). She requested that in counties with populations under 10,000 where no tax dollars are used in CVRF, the bill would allow money to be given for restoration of businesses as well as individuals. (no attachment) Senator Bond moved to introduce the bill, Senator Goodwin seconded. Carried.

Conferee Pomeroy requested introduction of a bill to add an amendment to K.S.A. 61-2309 which he stated should have been dealt with but was inadvertently missed during the 1999 legislative session when K.S.A.61-2305 was amended.(attachment 1) Senator Vratil moved to introduce the bill, Senator Bond seconded. Carried.

Conferee Slaughter requested introduction of a bill to amend a current statute regarding licensure of physicians convicted of a felony or class A misdemeanor. (attachment 2) Senator Feleciano moved to introduce the bill, Senator Vratil seconded. Carried.

Conferee Bechard briefly discussed four bills she requested be introduced. The bills would: provide that no felon can own any firearm for ten years; allow preliminary breath tests into evidence; increase the level of penalty for arson crimes; and amend the juvenile code regarding affidavits to be used in revocations hearings. (attachment 3) Senator Goodwin moved to introduce the bills, Senator Vratil seconded. Carried.

Senator Emert discussed a request by Kansas Adjutant General Gardner for an amendment to the statute regarding allocation of forfeited property. The bill would allow the Kansas National Guard which, in 1997, was designated an LEA for the limited purpose of counter drug and drug interdiction operations, to use forfeited property. (attachment 4) Senator Feleciano moved to introduce the bill, Senator Vratil seconded. Carried.

SB 420–an act concerning civil procedure; relating to divorce or separate maintenance actions and interspousal tort actions

Conferee Molzen reviewed the current statute regarding divorce and interspousal tort actions and stated that the purpose of **SB 420** is to "set out the applicable civil procedure where spouses anticipate filing both a divorce action (or action for separate maintenance) and an interspousal tort action." She discussed whether

or not the two types of actions should be tried together or separately, and whether one type of action should preclude the other. (attachment 5)

SB 422–an act concerning contracts; relating to interest rates

Conferee Bullock testified in support of **SB 422** a bill which he stated would allow for recovery of prejudgment interest at the rate of 10% per year in certain limited cases. He stated that the bill is needed to provide equity for the victim of wrongdoing and it assures efficiency in payment of a judgment because it creates some incentive to settle disputes. (attachment 6) He provided a record of the rate of interest, date of accrual, and cases allowed in 35 states which allow for prejudgment interest in all civil actions or personal injury and contract cases. (attachment 7)

Conferee Humphreys testified in support of **SB 422.** Her testimony mirrored the previous conferee's testimony. (attachment 8).

Conferee Slaughter expressed concerns about **SB 422** questioning how the bill will work in actual practice, how appeals will be handled, it's use in the complexity of medical malpractice cases, etc. and offered an amendment.(attachment 9)

Conferee Stratton testified in opposition to **SB 422** because of it's unfairness to the defendant in the case. He noted that the interest penalty as described in the bill is unfair because it may be assessed back to a date before a lawsuit is even filed and before the defendant has had his trial. He discussed judgments where large sums of money are granted for past economic damages as well as future economic damages "permitting a double recovery because the plaintiff would be entitled to interest upon amounts not yet due." He also questioned why the bill assumes a 10% interest rate rather than the normal computed rate in judgments. (attachment 10). Discussion followed

Conferee Smoot testified in opposition to **SB 422** stating that the bill will not significantly increase settlements or clear dockets as previous conferees have stated because lawyers fees provide incentive to settle protracted litigation. He reiterated the previous conferee's claim regarding the bill's unfairness to defendants. He further discussed how the interest penalty in the bill relates to past, present, future and punitive damages and discussed the problems this generates. (attachment 11) Discussion followed.

The chair called for a motion on **SB 420**. Senator Oleen moved to pass the bill out favorably, Senator Bond seconded. Carried.

The meeting adjourned at 10:55 a.m. The next scheduled meeting is January 27th.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-26

NAME	REPRESENTING
Tim Wood	VCHS
Brad Smoot	KCLF
Edwina Pomeroy	KCHA - KCA
Wayne Stratton	KAPC
Jim Gleason	KMS
Jerry Slaughter	KMS
Chris Collins	KMS
Jeff Bottenberg	State Farm
Jean Barbee	KADC
Katy Porter	OJA
Christy Molzen	Judicial Council
Randy M. Hearrell	Judicial Council
Jerry Sloboda	Judicial Council
Kevin Davis	Am. Family Ins.
David Hanson	Ks Insur Assns
Lee WRIGHT	FARMERS INS.
Paul Davis	KBA
Bill Henry	Ks Governmental Consulting

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REQUEST FOR BILL INTRODUCTION

SENATE JUDICIARY COMMITTEE

JANUARY 26, 2000

Thank you for giving me the opportunity to appear before you to request the introduction of a bill on behalf of the Kansas Credit Attorneys Association, which is a state-wide organization of attorneys whose practice includes considerable collection work, and Kansas Collectors Association, Inc., which is an association of collection agencies in Kansas.

At the request of theses two organizations, the 1999 Legislature passed HB 2222, which amended K.S.A. 61-2305, to provide that in eviction actions, the original action can be simply for eviction, and a subsequent action can be brought for the amount Plaintiff claims to be due from the defendant as rent. That was passed to eliminate compliance problems with the Federal Fair Debt Collection Act.

At the time of passage of HB 2222, we overlooked the fact that an amendment also should have been made to K.S.A. 61-2309. The failure to also request an amendment to K.S.A. 61-2309 was pointed out to Bruce Ward, a member of the Kansas Credit Attorneys Association, by Professor Casad, at meetings of the Kansas Judicial Council Civil Code Advisory Committee. Mr. Ward agrees with the fact that if K.S.A. 61-2309 is to remain on the books, it should be amended to take into account the 1999 amendment.

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The Kansas Judicial Council has requested the introduction of a bill that would completely re-write Chapter 61. That bill was introduced on January 24, and is HB 2697. Our groups support the Judicial Council bill, HB 2697, and hope that it is passed this year.

However, in the event that the complete re-write of Chapter 61 contained in HB 2697 does not pass, we do request that a bill be introduced to make the appropriate amendment to K.S.A. 61-2309. Attached to my remarks is e-mail correspondence between Bruce C. Ward and Professor Robert Casad which sets out the proposed amendment to the statute.

Elwaine F Pomeroy
For Kansas Credit Attorneys Association
And Kansas Collectors Association, Inc.

Elwaine F Pomeroy

From: Bruce C. Ward [bruce@brucewardlaw.com]
Sent: Thursday, January 13, 2000 5:31 AM
To: Prof. Robert Casad
Cc: J Nick Badgerow; Christy Molzen
Subject: 61-2309

Prof. Casad:

Set forth below is the proposed amendment to K.S.A. 61-2309 I have drafted to be submitted to the legislature on behalf of the Kansas Credit Attorneys Association and Kansas Collectors Association.

This amendment was made necessary by the 1999 amendment to 61-2305.

Although the proposed amendment is not as artful as I might otherwise prefer, I think it will be sufficient to satisfy your concerns. As you may recall, the Chapter 61 bill approved by the Judicial Council contains a complete re-write of the article on forcible detainer. If the Chapter 61 bill passes and becomes law this session, the proposed amendment to 61-2309 will not be necessary as that section will be repealed by the Chapter 61 bill.

If the Chapter 61 bill does not pass this session, the proposed amendment to 61-2309 should be passed this session to remove the inconsistencies between existing 61-2309 and 61-2305 as amended in 1999, which were noted by you.

The proposed amendment to 61-2309 is shown below in all CAPS to make it easier to read in e-mail. If you have any questions or comments, please let me know ASAP. I will submit this amendment to our lobbyist on Monday morning (Jan. 17). Thanks.

61-2309. Trial; judgment; costs.

If the suit be not continued or place of trial changed or neither party demands a jury trial, the judge shall try the case at the time appointed for trial; and if, after hearing the evidence, said judge shall conclude that the facts alleged in the petition are not true, said judge shall enter judgment against the plaintiff for costs. If said judge finds the facts alleged in the petition are true, said judge shall render a general judgment against the defendant and in favor of the plaintiff for restitution of the premises and costs of the suit; if said judge finds the facts alleged in the petition are true in part, said judge shall enter a judgment for the restitution of such part only, and costs may be taxed as the judge may deem just and equitable. If the action is brought for the purpose of recovering possession from a tenant for nonpayment of rent, in addition to the judgment hereinbefore provided for, the judge shall enter judgment against the defendant for the amount of rent which said judge shall find to be due the plaintiff IF THE PLAINTIFF SOUGHT JUDGMENT FOR RENT DUE IN THE PETITION, and shall enter costs against the defendant as in civil suits for the recovery of money. The jurisdiction of the judge hearing such action shall not be limited by the amount of dollars involved in such judgment.

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Senate Judiciary Committee
Bill Request by the Kansas Medical Society
January 26, 2000

Subject: Felony Convictions

K.S.A. 65-2836

A licensee's license may be revoked, suspended or limited, or the licensee may be publicly or privately censured, or an application for a license or for reinstatement of a license may be denied upon a finding of the existence of any of the following grounds:

(a) The licensee has committed fraud or misrepresentation in applying for or securing an original, renewal or reinstated license.

(b) The licensee has committed an act of unprofessional or dishonorable conduct or professional incompetency.

(c) The licensee has been convicted of a felony or class A misdemeanor, whether or not related to the practice of the healing arts. ***In the case of a person with a felony conviction who applies for renewal, reinstatement or original licensure, a license may not be granted unless a 2/3 majority of the board members present and voting on such application determine by clear and convincing evidence that such person will not pose a threat to the public in such person's capacity as a licensee and that such person has been sufficiently rehabilitated to warrant the public trust.***

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Julie A. McKenna, President
David L. Miller, Vice-President
Jerome A. Gorman, Sec.-Treasurer
William E. Kennedy, III, Past President
Steven F. Kearney, Executive Director

DIRECTO

William B. Ellliott
John M. Settle
Christine K. Tonkovich
Gerald W. Woolwine

Kansas County & District Attorneys Association

1200 W. 10th Street • P.O. Box 2428
Topeka, KS 66601-2428
(785) 232-5822 • FAX (785) 232-5868

MEMORANDUM

DATE: January 25, 2000

TO: **Chairman Emert**
Members of the Senate Judiciary Committee

FROM: Susan Bechard, KCDAA

RE: Request for bills to be introduced

On behalf of Kansas County and District Attorneys Association, I request the following bills to be introduced:

1. Amend and simplify K.S.A. 21-4204 to provide that no felon can own any firearm for ten years.

2. Pass a statute that would allow Preliminary Breath Tests to be used as evidence in minor in possession or consumption of alcohol cases.

3. Amend the arson statute to make the crime a higher level felony, a person felony for arson of a dwelling, and to remove value as a determining factor for the level of the crime.

4. Amend the juvenile code to allow affidavits to be used in revocation hearings as in adult revocation hearings.

Thank you for your consideration of these matters.

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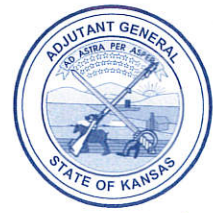
STATE OF KANSAS
THE ADJUTANT GENERAL
2800 S.W. TOPEKA BLVD.
TOPEKA, KANSAS 66611-1287



Bill Graves,
Governor

Major General Gregory B. Gardner
Adjutant General

20 Jan 00

The Honorable Tim Emert
Kansas Senate
Topeka KS 66612

Dear Mr. Emert

SUBJECT: Proposed Amendment to K.S.A. 60-4117, Allocation of Forfeited Property

1. This letter requests your assistance to amend K.S.A. 60-4117, titled *Allocation of Forfeited Property.* This will allow the Kansas National Guard counter drug operations to use forfeited property, further enhancing our support of state and federal law enforcement agencies (LEAs).

2. On January 29, 1997, the Kansas Attorney General opinion number 97-7 designated the Kansas National Guard as an LEA for the limited purpose of counter drug and drug interdiction operations. This allowed the agency to participate in the Comprehensive Drug Prevention and Control Act of 1997. That act authorizes the transfer of forfeited property to any state or local law enforcement agency based on their share of counter-drug operations. Therefore, we request your assistance in modifying K.S.A. 60-4117 to include our agency.

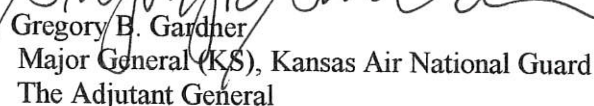
3. Specifically the recommendation is to amend K.S.A. 60-4117:

a. Paragraph (d)(1), line 9, to read, "Kansas department of corrections state forfeiture fund and the Kansas National Guard Counter Drug state forfeiture fund."

b. Paragraph (d)(1), line 27, to read, "the secretary of the Department of Corrections or by a person or persons designated by the Secretary. Expenditures from the Kansas National Guard Counter Drug state forfeiture fund should be made upon warrants of the Director of Accounts and Reports issued pursuant to a voucher approved by the Adjutant General of Kansas or by a person or persons designated by the Adjutant General of Kansas."

c. Paragraph (d) (3), line 5, to read, "moneys in the Kansas bureau of investigation state forfeiture fund, Kansas highway patrol state forfeiture fund, Kansas department of corrections state forfeiture fund, the special Law Enforcement Trust Fund", and the Kansas National Guard counter drug forfeiture fund shall not be considered a source of revenue to meet normal operating expenses."

4. There are NO negative fiscal impacts on the state or other law enforcement agencies due to this change. Presently, our forfeiture account has a balance over $20,000 that could be spent on a drug detection dog or additional equipment used to support Kansas LEAs. If there are any questions or concerns, please feel free to call me at 274-1001.



Gregory B. Gardner
Major General (KS), Kansas Air National Guard
The Adjutant General

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Point Paper
on
Federal Asset Sharing Program

- Federal Asset Sharing is a Department of Justice (D O J) Program
  - DOJ approved Kansas National Guard Counter Drug participation on 2 July 1998
- Kansas Attorney General opinion # 97-7 said Kansa s National Guard is law enforcement agency (LEA) for limited purpose of drug interdiction
- Federal asset sharing does not compete the Nationa l Guard with state or federal LEAs
  - Assets are shared based on percentage of agency participation (compares hours expended or significant contribution by each agency)
  - Kansas National Guard supports numerous federal agency cases that do not include participation by Kansas LEAs.
- Asset forfeiture funds are designed to enhance not r eplace LEA resources
- Any funds Kansas National Guard receives will ben efit all state LEAs and community based organizations – not just one agency or organization.
- Permitted use of funds include:
  - Purchase of equipment (e.g., radios, vehicles)
  - Drug education and awareness programs
  - Law enforcement agency training
  - Drug detection dog(s)
  - Facility support
  - Travel in support of law enforcement agency
- Status: Two cases filed with department of justice.
  - April 98: Drug Enforcement Agency (DEA) delivery to Maryland (potential for $70-80K)
  - November 1998: DEA Kansas City pipeline interdi ction (potential for $7K)
- National Guard Bureau Counter Drug funds primar ily go to pay and allowances for soldiers and airmen (81%). The balance is for day-to-day expenses.
- Department of Defense annual budget for National Guard program varies annually
  - Asset sharing can help stabilize our support to LEAs and community based programs
- **Recommendation**: Change K.S.A. 60-4117 *Alloca tion of Forfeited Property* to add Kansas National Guard to the agencies allowed to share in the allocation of forfeited property

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JUDICIAL COUNCIL TESTIMONY
BEFORE THE SENATE JUDICIARY COMMITTEE
ON 2000 S.B. 420

JANUARY 26, 2000

The issue addressed by this bill was first brought to the attention of the Judicial Council's Family Law Advisory Committee by Topper Johntz who is a long time member of the committee and has extensive experience in the area of divorce law in both Kansas and Missouri. Topper was aware of a recent Missouri decision which identified a problem that is becoming more and more common nationwide. That problem is how simultaneous divorce proceedings and interspousal tort actions should be handled.

Before the 1980's, Kansas had in place a judicial doctrine called interspousal tort immunity. That doctrine prevented spouses from suing each other for things like assault and battery, or negligence in causing a car accident. In 1982, the Kansas Supreme Court created an exception to that doctrine and allowed spouses to sue each other for intentional torts. *Stevens v. Stevens*, 231 Kan. 726, 647 P.2d 1346 (1982). Then, in 1987, the Kansas Supreme Court followed the national trend and abolished interspousal tort immunity completely in *Flagg v. Loy*, 241 Kan. 216, 734 P.2d 1183 (1987). Since that time, spouses in Kansas have been able to sue each other for both intentional and unintentional torts.

The purpose of this bill is to set out the applicable civil procedure where spouses anticipate filing both a divorce action (or action for separate maintenance) and an interspousal tort action. Some of the questions that arise in discussing interspousal torts and divorce proceedings are whether the two types of actions should be tried together or separately, and whether one type of action should preclude the other.

Subsection (a) of this bill addresses the first question-- whether there should be permissive or compulsory consolidation of an interspousal tort claim with a divorce action. The Committee decided that it would be best not to consolidate the two types of actions for the following reasons:

> (1) the factual situation in the divorce case is far more wide ranging than the specific factual situation of an interspousal tort case;
> (2) the divorce action sounds in equity and its factual issues must be determined by the court, whereas the tort action sounds in law and a jury trial may be demanded to determine the factual issues; and
> (3) attorneys may charge a contingency fee in a tort action, but not in a divorce action.

Accordingly, subsection (a) only allows consolidation where the parties agree and the court approves the arrangement.

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Subsections (b) and (c) deal with the issue of whether an action for divorce precludes the bringing of a separate interspousal tort action, and vice versa. A person may sue for divorce under one of three different grounds:

- incompatibility or "no-fault" under K.S.A. 60-1601(a)(1),
- failure to perform a marital duty or "fault" under K.S.A. 60-1601(a)(2), or
- mental illness or incapacity under K.S.A. 60-1601(a)(3).

By far the majority of divorce cases in Kansas are brought under the no-fault, or incompatibility provision of 60-1601(a)(1).

Subsection (b) of the bill states that if a party brings the action for divorce under K.S.A. 60-1601(a)(1) or (a)(3) (the no-fault grounds, or mental illness/incapacity, divorce provisions), then a separate action for interspousal tort is not precluded.

Subsection (c) of the bill states that if a party brings the action for divorce under K.S.A. 60-1601(a)(2) (the "fault" grounds divorce provision), then he or she would be precluded from bringing a separate interspousal tort action which is based upon the same factual allegations. This subsection addresses the rare circumstance where a person sues for divorce under the fault provision. Even under this subsection, the court will only consider fault in determining the financial aspects of the divorce in the "rare and unusual situation where misconduct is so gross and extreme that failure to penalize would itself be inequitable." *Marriage of Sommers*, 246 Kan. 652, 792 P.2d 1005 (1990). However, where the court does consider fault in making a division of the marital property or in awarding maintenance, it would be unfair to allow the plaintiff to then file a tort action based upon the same facts that constituted the fault element of the divorce, thereby obtaining a double recovery.

Logically, if a party elects to bring his or her divorce action on a fault ground (thereby attempting to obtain a more favorable division of property or maintenance) the party should be precluded from "double dipping" by bringing a separate tort action in front of a jury and asking for what amounts to additional financial compensation for the same injury. On the other hand, if a party brings a divorce action under a non-fault ground (or mental illness/incapacity), then a separate tort action would be appropriate.

KANSAS DISTRICT COURT

Chambers of
TERRY L. BULLOCK
District Judge

Shawnee County Courthouse
Division No. Six
Topeka, Kansas 66603-3922
(785) 233-8200 Ext. 4375
Fax (785) 291-4917

Officers:
JOSEPH MARTINEZ
Official Court Reporter
(785) 233-8200 Ext. 4376
LYNN KEEZER
Administrative Assistant
(785) 233-8200 Ext. 4375

TESTIMONY OF
JUDGE TERRY L. BULLOCK
IN SUPPORT OF SB 422

(Adding pre-judgment interest in certain cases)

I appear today representing the Judicial Council's Civil Code Advisory Committee which drafted the amendment to K.S.A. 16-205, the subject of SB 422.

In the simplest of terms, this amendment would allow for the recovery of pre-judgment interest at the rate of 10% per annum in certain limited cases. The amendment is needed for two reasons:

1. EQUITY. Because judgments take time, interest is needed to make the victim of wrongdoing fully whole. In fact, I could make a convincing case for allowing the recovery of pre-judgment interest fully and in every case.

For example, if you are injured by another's fault and your income is interrupted, you will have to borrow to live until your case is decided, appeals exhausted and compensation paid. If all you receive is your wages (less your legal fees and expenses) you will still be short the interest you have had to pay on the borrowed money. As one of my friends says, "if that's winning, thank God I didn't lose!"

2. EFFICIENCY. To put it simply, there is no incentive to pay what you owe if waiting costs you nothing and if, in fact, you can invest that same money during the wait and earn a handsome profit for yourself. This means, of course, that there is no pressure on parties in litigation to either settle their case or move quickly to resolution, if the one who ultimately is required to pay can profit from delay.

In recent times, the national trend has been to allow pre-judgment interest. In fact,

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35 states now allow it in certain cases. A survey of the states is attached to this testimony for your information.

SB 422 is a compromise. It does not allow full pre-judgment interest in every case. In fact, it would allow interest in only limited situations. Those situations are:

1. If the claimant offers to settle and ultimately recovers that much, or more, then 10% interest will be added beginning 30 days following the date of the offer.

2. If the claimant offers to settle and the defendant makes a counteroffer, interest will be added to sums recovered above the counteroffer, provided the recovery is the same or greater than the original offer.

In other words, if you sue me and offer to settle for $100,000 and I make no counter offer, you can recover 10% interest beginning 30 days following your offer, if your judgment is $100,000 or more. If I make a counter offer of $50,000, you would receive interest on anything above $50,000, provided your judgment exceeds $100,000.

The plan is really simple: If you make me a reasonable offer (ie. at a level you can recover if the case is tried) and I ignore you, interest can be added. If I want to limit that exposure for interest I can make a counteroffer to cut off interest below that sum.

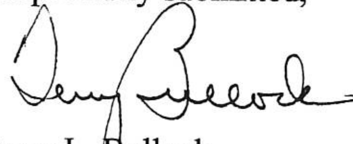
In other words:

1. SB422 goes a small way toward equity for victims; and

2. SB422 creates some incentive to settle or resolve disputes more quickly and efficiently.

These objectives, albeit limited, are worthwhile, in my judgment, and I seek your support of this Bill.

Respectfully submitted,



Terry L. Bullock
District Judge

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PREJUDGMENT INTEREST

Thirty-five (35) states allow for prejudgment interest in all civil actions or personal injury and contract cases.

Updated January 2000

STATE	RATE	DATE OF ACCRUAL	CASES ALLOWED
AK	three percentage points above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgment or decree is entered, except that a judgment or decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding the legal rate of interest for that type of contract, bears interest at the rate specified in the contract if the interest rate is set out in the judgment or decree.	From the day process is served on the defendant or the day the defendant received written notification that an injury has occurred and that a claim may be brought against the defendant for that injury, whichever is earlier.	Personal injury and contract. § 09.30.070
CA	10%.	Date of Plaintiff's original offer to settle.	Personal Injury: If Plaintiff makes offer and defendant refuses, Plaintiff is entitled to prejudgment interest if subsequent award exceeds original offer. Cal. Civil Code: § 3291
	10%.	Court may, in its discretion, fix day, but not earlier than date action is filed.	Contracts. Cal. Civil Code: §§ 3287, 3289
CO	9% note: The rate of interest is certified on each January 1 by the secretary of state to be two percentage points above the discount rate.	Date the action accrued.	Personal injury. § 13-21-101
	8%	From date funds are wrongfully withheld or from date due.	Contracts. §5-12-102
CT	12%	Date of filing complaint if Plaintiff offers to settle, defendant refuses, and Plaintiff obtains a judgment equal to or greater than the original offer, if the offer was filed within 18 months from filing the complaint. If offer filed after 18 mos.,	Any civil action. § 52-192a

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		compute interest from date offer of judgment filed.	
GA	12%	If defendant does not pay Plaintiff's demand for settlement within 30 days, Plaintiff is entitled to interest from date 30 days after initial demand if judgment is for amount not less than amount demanded. If plaintiff refuses defense's offer to pay demand for settlement within 30 days, plaintiff is not entitled to interest at judgment.	Personal injury. § 51-12-14
	12%	From date of breach.	Contract. § 13-6-13
HI	10%	Discretion of court; provided earliest date is the date when injury occurred. Towey v. Catling, 743 F. Supp 738 (D. Haw. 1990).	Personal injury. - 478.1 § 478.3
	10%	From date of breach within discretion of Court. Towey v. Catling, 743 F. Supp 738 (D. Haw. 1990).	Contract. - 478.1 § 478-2
IN	Court shall compute at simple rate of interest determined by court. The rate may not be less than six percent (6%) per year and not more than ten percent (10%) per year. § 34-51-4-9	Computed for a period preceding the date that the court returns a verdict or finding in the proceeding. § 34-6-2-113	Applies any civil action arising out of tortious conduct. §34-51-4-1
IA	Floating rate.	Date of commencement of action.	Liability arising out of tortious conduct. Does not apply to future damages. § 668.13
	By K	Date of breach.	Contract cases. § 668.13
LA	6%	Date of judicial demand until judgment is signed by the trial judge.	Personal injury and wrongful death actions. Suit against the state La. Review Stats. 13 § 5112C.
	Computed Annually	From date of breach.	Contract. Civil Code Art. 2000; LSA-R.S. 13:4202
ME	For actions in which the damages claimed or awarded do not exceed the jurisdictional limit, 8% per year, otherwise Floating rate.	Date sworn notice of claim served upon the defendant. Accrual is suspended during any continuances granted for periods exceeding 30 days. From date on which the complaint is filed - if no notice of claim is given to Defense.	Civil actions except those involving a contract. Excludes judgments less than $5,000 otherwise 8% per year. 14 M.R.S.A. § 1602
MD	10%	From date action is filed.	Only in cases where defendant or defendant's insurer causes unnecessary delay in having action ready or set for trial in automobile liability claims. C.J. § 11-301

	6%	Within discretion of court.	Contract. Maryland Const. Art. 3 § 57
MA	12%	Date of commencement of the action.	Personal injury. Ch. 231 § 6B
	12% or at K rate	Date of breach or demand.	Contract Ch. 231 § 6C
MI	Floating Rate	Date of filing action. If Plaintiff rejects a reasonable offer of settlement, filed with the court, the court shall disallow interest beyond the date of rejection of the written offer of settlement. § 600.6013(7) If a settlement offer is not rendered by the party against whom judgment is subsequently rendered, or is not filed, interest shall accrue from the filing of the complaint. § 600.6013(8)	Any civil action filed after 1/1/87. Mich. Compiled Laws Ann. § 600.6013(6)
	12%	Date of filing action.	Actions involving a written instrument. § 600.6013(5)
MN	Floating Rate	Commencement of action; demand for arbitration; or written notice of claim. Action must be commenced within 2 years of notice. If an offer to settle is entered, interest accrues from time of commencement of the action until the time of the verdict, only if the amount of the offer is closer to the judgment than the opposing party's offer. If the amount of the losing party's offer was closer to the judgment than the prevailing party's offer, the prevailing party shall receive interest only on the amount of the settlement offer or the judgment, whichever is less, from the date of commencement to the date the settlement offer was made. § 549.09	Applies in civil actions and arbitrations. Does not apply to workers' compensation cases, dissolutions, future damages, or punitive damages, attorney's fees.
MO	9%	If a claimant has made a demand for payment of a claim or an offer of settlement and the amount of judgment exceeds the demand for payment or offer, interest shall be calculated from a date 60 days after the demand or offer was made, or date the offer was rejected, whichever is earlier. § 408.040	Tort cases. § 408.040 N/A to contracts.
	9%	From date of breach. Not to include lost profits.	Contract actions.
MT	10%	30 days after claimant presents a written statement to the opposing party or his agent stating the claim and how the specific sum was calculated.	Personal Injury. § 27-1-210 Does not apply to pain and suffering, mental anguish or suffering; injury to credit, reputation or financial standing, exemplary or punitive damages, attorney fees.
	10%	Date of breach.	Contract. § 27-1-213
NE	12%	From date of Plaintiff's first offer of settlement which is exceeded by the judgment under the following conditions: (1) the offer is in writing; (2) the offer is not made within 10 days before trial; (3) a copy and proof of delivery is filed with the court; and (4) the offer is not accepted prior to trial or within 30 days of the date of the offer, whichever occurs first. § 45-103.02	Personal Injury and Contract. § 45-103.01

NV	Floating	For the period from the date of service of the offer to the date of entry of the judgment.	Personal Injury and Contract. § 17.115
NH	10% (business transactions), otherwise floating rate.	From date of commencing the action.	Personal injury, Wrongful Death, and Contract. § 524:1-b, § 336:1.
NJ	Floating rate except except that for all periods prior to January 1, 1988 interest shall be calculated at 12%.	From the date of the institution of the action or from a date 6 months after the date the cause of action arises, whichever is later, provided that in exceptional cases the court may suspend the running of such prejudgment interest.	NJ R. of Civ. Pract. 4:42-11
NM	8¾% unless judgment rendered on written doc. w/ diff. rate.	From entry of judgment and decree.	Personal Injury. § 56-8-4 If judgment is based on tortious conduct, bad faith, intent or or willful acts, interest 15%
	Up to 10% Discretion of he court.	From date complaint is served ONLY (1) if Plaintiff was not the cause of unreasonable delay in the adjudication of the Plaintiff's claims; and (2) if the defendant had previously made a reasonable and timely offer of settlement to the Plaintiff. Prejudgment interest now available in any other situation.	Personal Injury. § 56-8-4
NY			
	9% CPL&R § 5004	From the date the verdict was rendered or the report or decision was made to the date of entry of final judgment. § 5002	Contract and Property Damage § 5001 - Civil Pracitce Law & Rules. § 5002 - Interest or total awarded.
NC	8% § 24-1	Commencement of Action.	Actions other than contract.
	8%	Date of Breach.	Contract Actions. § 24-5
OH	10%	From the date the judgment, decree, or order is rendered to the date on which the money is paid.	Personal Injury. § 1343.03
	10%	From date of breach.	Contract Actions § 1343.03
OK	Floating rate	From date the action is commenced.	Personal Injury and Contract. 12 O.S. § 727
PA	Floating Rate	After 8/1/89: From a date one year after the date original process was first served in the action up to the date of the award, verdict or decision.	Only awarded if it is found that defendant(s) delayed the action. Applies to all civil actions, except eminent domain proceedings. Rule 238. Pa. R. Civ. Pro.
RI	12%	From the date the cause of action accrued.	Civil Actions.-Does not apply to K obligation if interest already provided.
	12%	From date of written notice of the claim to the insurer or health care provider, or the filing of the claim, whichever occurs first.	Medical Malpractice. § 9-21-10
SD	10% or at K rate	From date of loss. Not recoverable on future damages, punitive damages, loss of consortium, injury to credit, reputation or financial standing; loss of enjoyment of life or loss of society and companionship, pain & suffering, emotional distress.	Personal Injury and Contract. § 21-1-13.1

TX	Floating Rate § 304.103	Accrues on the amount of a judgment during the period beginning on the earlier of the 180th day after the date the defendant receives written notice of a claim or the date the suit is filed and ending on the day preceding the date judgment is rendered.	Personal Injury and Wrongful Death. § 304.104 § 304.103
UT	10% § 15-1-1	Only on special damages from the date of the occurrence of the act giving rise to the cause of action to the date judgment is entered.	Personal injury. § 78-27-44
VT	12%	Where a liquidated or readily ascertainable sum of money is involved, the party is entitled to interest from the date of commencing the action. Where a jury is not able to ascertain a specific sum (pain and suffering), a sum may be awarded by the jury in lieu of prejudgment interest.	Available in Torts & Wrongful Death. Not available on Punitive Damages. 9 V.S.A. § 41a(a)
	12%	From date of breach.	Contracts
VA	9% § 6.1-330.54	The jury may provide for interest on any award, fixing the period at which the interest shall commence.	Contract 8.01-382
WA	Floating		Foreign money claims 6.44.090
WV	10%	Only applies to special damages or liquidated damages from the date the cause of action accrued.	Contract and Personal Injury. § 56-6-31, 382 S.E.2d 536 (W.Va. 1989)
WI	12%	If there is an offer to settle which is not accepted and the party recovers a judgment greater than or equal to the offer, the party is entitled to prejudgment interest from the date of the offer of settlement.	Only Personal Injury. § 807.01(4)

PREJUDGMENT INTEREST

. rejudgment interest is one of the only measures which forces insurance companies to settle claims quickly and efficiently.

▪ WHAT IS PRE-JUDGMENT INTEREST?

Pre-judgment interest is imposed only after a party has been found responsible for causing injury to another. The main goal of prejudgment interest is to ensure that insurance companies are not profitably investing and using money that has already been designated to go to an injured party. Because the length of time from the date a claim is filed to the date it is decided or settled is often long, insurance companies set aside large amounts of reserves to pay such claims and invest this money, and realize huge profits, until the claim is paid.[1] Their delay can result in substantial profits at the expense of the injured party.

Prejudgment interest reduces a party's incentive to delay judgment: Prejudgment interest encourages a party to deal with a claim with greater efficiency.

- Without prejudgment interest, there is an incentive to delay judgment by effectively providing a party with an interest free loan from the injured party until the judgment is rendered.
- Since prejudgment interest is calculated back to the date of the injury or the date of filing the claim, defendants have an incentive to reduce delay. This discourages insurance companies and other defendants from delaying settlement so that they can earn more money on the money they have reserved for the payment of the claim.

Ensures that the plaintiff receives full compensation: The payment of prejudgment interest ensures that the injured party is fully compensated and that the other party is not unjustly enriched. Common business practices require interest be charged when lending or borrowing money. Why should the defendant be allowed to delay an action to use the money free of charge. Prejudgment interest enables both parties to be placed in the same position that they would have been in if the judgment had been paid immediately.

Furthermore, an insurance company can avoid paying pre-judgment interest by making a reasonable offer. If the injured party does not get a verdict higher than the offer, pre-judgment interest is generally not assessed against the insurance company.

▪ PREJUDGMENT INTEREST IS ONLY ASSESSED AT THE END OF A FULL TRIAL

The only time pre-judgment interest is assessed is where a party is found responsible for causing injuries to another party at the end of a full trial and no settlement offer in that amount was ever made. If the court finds that nothing is owed to the alleged injured party, no pre-judgment interest will be assessed. Prejudgment interest is never assessed in settlements.

▪ PRE-JUDGMENT INTEREST WILL REDUCE COURT BACKLOG

Prejudgment interest encourage early settlements. Insurance companies tend to be opposed to such laws because it will prevent them from collecting interest on the money designated for the injured.

▪ INJURED PARTIES DO NOT HAVE AN INCENTIVE TO DELAY THEIR CASES TO GET MORE PRE-JUDGMENT INTEREST

Because pre-judgment interest rates are lower than market rates of investment return, injured parties would be better off settling early and investing the money themselves.

Prejudgment interest reduces a party's incentive to delay judgment, ensures that the plaintiff recovers their losses and promotes efficiency.

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[1] Michael S. Knoll, *A Primer On Prejudgment Interest*, 75 Tex. L. Rev. 293 (1996).

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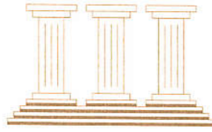

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

Jan. 26, 2000

TO: Members of the Senate Judiciary Committee

FROM: Terry Humphrey, Executive Director
Kansas Trial Lawyers Association

RE: SB 422

Mr. Chairman and members of the Senate Judiciary Committee, I am Terry Humphrey, executive director of the Kansas Trial Lawyers Association and I thank you for the opportunity to comment on SB 422.

The KTLA supports the efforts of the Kansas Judicial Council in recommending the implementation of pre-judgment interest. This legislation reflects the Council's thorough consideration of all sides of this issue and has been carefully and fairly drafted.

Pre-judgment interest, as provided for in this bill, is a resolution or settlement tool currently used in 35 states. It encourages parties to a legal dispute to exchange settlement perspectives and seriously explore early resolution. There are many benefits of early resolution, including saving time, money and conserving judicial resources.

KTLA commends the Kansas Judicial Council for its efforts to promote legislation that provides an incentive for settlement without putting additional demands on the judicial system.

In closing, I respectfully request your support of SB 422 and thank you for the opportunity to comment.

Terry Humphrey, Executive Director
Jayhawk Tower • 700 SW Jackson, Suite 706 • Topeka, Kansas 66603-3758 • 785.232.7756 • Fax 785.232.8825 or 785.232.2680
E-Mail: triallaw @ ink.org

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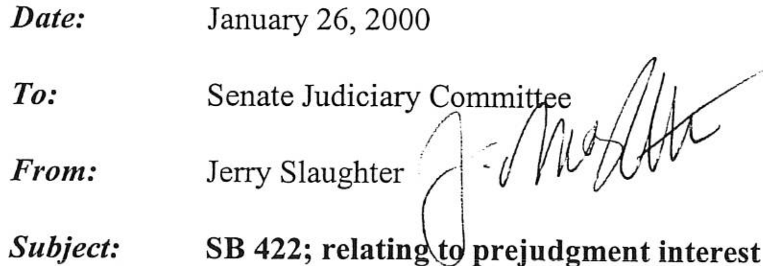
KaMMCO

KANSAS MEDICAL MUTUAL INSURANCE COMPANY



Date: January 26, 2000

To: Senate Judiciary Committee

From: Jerry Slaughter

Subject: **SB 422; relating to prejudgment interest**

KaMMCO is pleased to have the opportunity to appear today as the committee considers SB422, which would authorize prejudgment interest penalties in civil actions. We do have some concerns about the bill, and a suggested amendment.

By way of background, KaMMCO is the only domestic medical malpractice insurance company in the state. It was formed in 1989 by the Kansas Medical Society as a result of years of steeply rising premiums, instability and severe volatility in the market. These conditions adversely affected the availability of high risk services such as obstetrics, especially in rural areas of the state. Our mission is to provide physicians and other health care providers with a stable source of professional liability insurance, and to vigorously defend claims against our insureds when they have met the standard of care. It is a primary tenet of our mission that, except in very exceptional circumstances, we do not settle claims in which our insureds were not negligent. This philosophy arose out of widespread frustration in the medical community over the practice of insurers settling non-meritorious claims for "nuisance" value, usually without the insured's knowledge and approval.

Having said that, we generally agree with the philosophy behind the bill, that is, to encourage parties to resolve their differences expeditiously. In practice we make every effort to settle claims quickly when there has been a deviation from the standard of care that causes injury. However, if after careful review and investigation of the facts, we believe our insured met the standard of care, then we have an obligation to defend the claim through trial, if necessary. It is against our company philosophy, and our responsibility to our insureds, to settle claims that should be defended.

This is just not hard-headedness on our part. Every medical malpractice claim payment against a physician is reported to the National Practitioner Data Bank, where it becomes a permanent record that affects every future application for licensure, hospital privileges, and managed care network credentialing. While reports of claim payments made as a result of injuries caused due to negligence are appropriate, settlements even for "nuisance" value claims when there has been no negligence unfairly blemish a physician's permanent record.

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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As we mentioned above, we do have some questions about how the bill will work in actual practice. First, there is an assumption that all delays in litigation are the fault of the defendant. That is not always the case. Frequently the plaintiff will ask for more time, maybe due to the inability to get an expert witness on a timely basis. Also, the defendant has no control over the court docketing; a case could be delayed months because of crowded dockets.

What about appeals? The bill is silent about how the prejudgment interest will be figured in the case of appeals. Should the accrual of interest penalties be tolled in the case of appeals?

Another concern of ours has to do with the complexity of medical malpractice cases. They frequently involve multiple defendants, all of whom may have participated in the care of the plaintiff. Sorting out causation and fault in the preliminary analysis phase of preparing a defense of the claim can take months. Under the bill, a plaintiff has the advantage of unlimited time to prepare their claim and demand for damages, and then the defendant gets only 30 days to evaluate the claim and decide whether to make a counteroffer. That may be unintended, but it is unfair to the defendant.

An overarching concern of ours also has to do with whether a problem really exists in medical malpractice claims. Do defendants in medical malpractice cases unreasonably delay claim resolution in Kansas? We are not aware of any statistics that demonstrate that there is a problem that needs to be addressed legislatively. Do courts not already have the tools to compel parties to move their cases along more quickly? You may recall that in 1986, the legislature mandated settlement conferences in all medical malpractice cases (K.S.A. 60-3413; see attached). In our experience, the mandatory settlement conferences have done much to avoid the problems SB 422 is intended to address. Perhaps you should consider expanding the mandatory settlement conference requirement to all actions. At a minimum, we urge you to amend SB 422 to take into account the mandatory settlement conference provisions affecting medical malpractice claims (a suggested amendment is attached).

In summary, we question the need for this legislation in medical malpractice cases. There are several details that should be addressed, such as appeals and delays not caused by the defendant. Finally, if the committee believes the bill is needed, then it should be amended to take effect only after the mandatory settlement conferences in medical malpractice actions. Thank you for the opportunity to offer these comments.

as defined in K.S.A. 60-3401 and amendments thereto, in which the standard of care given by a practitioner of the healing arts is at issue, no person shall qualify as an expert witness on such issue unless at least 50% of such person's professional time within the two-year period preceding the incident giving rise to the action is devoted to actual clinical practice in the same profession in which the defendant is licensed.

History: L. 1986, ch. 229, § 17; July 1.

Research and Practice Aids:

Evidence ⇐ 538.

C.J.S. Evidence §§ 457, 546(79) et seq.

Law Review and Bar Journal References:

"K.S.A. 60-3412: The Good, the Bad and the Ugly of Kansas' Hired Gun Law," Jay Thomas, 11 J.K.T.L.A. No. 4, 18 (1988).

"Proof Of Causation: 3 Modes For Technical Issues," Jack Peggs, 58 J.K.B.A. No. 8, 21, 22 (1989).

"Establishing and Maintaining Positive Relationships With Expert Consultants In a Litigation Practice," John L. White, XIV J.K.T.L.A. No. 5, 20 (1991).

"Medical Malpractice in the 1990s: A Review of Changes in the Last Decade," Michael Sexton and Mark Sachse, J.K.T.L.A. Vol. XV, No. 4, 10 (1992).

CASE ANNOTATIONS

1. Cited; prohibition against use of "professional witnesses," qualification as expert witness examined. Wisker v. Hart, 244 K. 36, 766 P.2d 168 (1988).

2. Legislative limitation on recovery of noneconomic damages (60-19a01, 60-19a02) as not violating any constitutional rights determined. Samsel v. Wheeler Transport Services, Inc., 246 K. 336, 340, 789 P.2d 541 (1990).

3. Doctor of osteopathy serving only at osteopathic hospitals qualified to testify as to standards regarding "medical" hospitals. Denton by Jamison v. U.S., 731 F.Supp. 1034 (1990).

4. Trial court's refusal to allow expert testimony on deviation from standard of care in medical malpractice case examined. Smith v. Milfeld, 19 K.A.2d 252, 254, 869 P.2d 748 (1994).

60-3413. Settlement conference. (a) In any medical malpractice liability action, as defined by K.S.A. 60-3401 and amendments thereto, the court shall require a settlement conference to be held not less than 30 days before trial.

(b) The settlement conference shall be conducted by the trial judge or the trial judge's designee. The attorneys who will conduct the trial, all parties and all persons with authority to settle the claim shall attend the settlement conference unless excused by the court for good cause.

(c) Offers, admissions and statements made in conjunction with or during the settlement conference shall not be admissible at trial or in any subsequent action.

History: L. 1986, ch. 229, § 18; July 1.

Research and Practice Aids:

Physicians and Surgeons ⇐ 18.20.

C.J.S. Physicians, Surgeons, and Other Health-Care Providers §§ 97 to 109.

Law Review and Bar Journal References:

"Medical Malpractice in the 1990s: A Review of Changes in the Last Decade," Michael Sexton and Mark Sachse, J.K.T.L.A. Vol. XV, No. 4, 10, 11 (1992).

60-3414. Severability. If any provisions of this act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application and, to this end, the provisions of this act are severable.

History: L. 1986, ch. 229, § 51; July 1.

Revisor's Note:

For remainder of act, see Table of Sections, L. 1986, ch. 229, in Constitutions Volume.

CASE ANNOTATIONS

1. Cited; 60-3403 violates Kansas equal protection clause; classifications therein do not further legitimate legislative objective. Farley v. Engelken, 241 K. 663, 676, 678, 740 P.2d 1058 (1987).

Article 35.—PROFESSIONAL MALPRACTICE LIABILITY SCREENING PANELS

Law Review and Bar Journal References:

"A Practitioner's Guide to Tort Reform of the 80's: What Happened and What's Left after Judicial Scrutiny," Jerry R. Palmer and Martha M. Snyder, 57 J.K.B.A. No. 9, 21, 27 (1988).

60-3501. Definitions. As used in K.S.A. 60-3501 through 60-3509:

(a) "Professional licensee" means any person licensed to practice a profession which a professional corporation is authorized to practice but does not include any health care provider as defined by K.S.A. 40-3401 and amendments thereto.

(b) "Professional malpractice liability action" means any action for damages arising out of the rendering of or failure to render services by a professional licensee.

History: L. 1987, ch. 214, § 1; July 1.

Research and Practice Aids:

Physicians and Surgeons ⇐ 17.5.

C.J.S. Physicians, Surgeons, and Other Health-Care Providers §§ 97 to 119.

60-3502. Convening of screening panel; selection of members; list of professional licensees to be maintained by state agencies. If a professional malpractice liability

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1 *counterclaim, the claimant shall be entitled to have simple interest at the*
2 *rate of 10% per annum added to the amount of the compensatory portion*
3 *of the recovery or credit in accordance with the following conditions:*
4 *(1) No interest shall be added pursuant to this subsection if interest*
5 *on the claimant's recovery or credit is otherwise provided by law or*
6 *contract;*
7 *(2) interest pursuant to this subsection shall be allowed to the claim-*
8 *ant only if the claimant has served on the party adjudicated to be liable*
9 *a written offer of settlement of the claim, setoff or counterclaim, in an*
10 *amount no greater than the amount of the recovery or allowance as there-*
11 *after adjudicated. The offer shall be served either personally or by re-*
12 *stricted mail if made before suit is filed, or pursuant to K.S.A. 60-205,*
13 *and amendments thereto, if made after suit is filed. The offer shall not be*
14 *subject to revocation for a period of 30 days after service thereof on the*
15 *party claimed to be liable, but shall be automatically deemed to be with-*
16 *drawn unless accepted and payment made or credit given within such*
17 *period of 30 days;*
18 *(3) if the party claimed to be liable has served on the claimant a*
19 *counteroffer, any interest pursuant to this subsection shall be added only*
20 *to that portion of the recovery or allowance which exceeds the amount of*
21 *the counteroffer. The counteroffer shall be served either personally or by*
22 *restricted mail if made before suit is filed, or pursuant to K.S.A. 60-205,*
23 *and amendments thereto, if made after suit is filed. The counteroffer shall*
24 *not be subject to revocation for a period of 30 days after service thereof*
25 *on the claimant, but shall be automatically deemed to be withdrawn unless*
26 *accepted and payment made or credit given within such period of 30 days;*
27 *(4) interest to be added pursuant to this subsection shall be allowed*
28 *by the court from 30 days after the date the claimant served such offer to*
29 *the date of judgment, except that if the party claimed to be liable makes*
30 *a counteroffer, such interest shall be allowed from 30 days after the date*
31 *the counteroffer is served to the date of judgment; and*
32 *(5) an offer or counteroffer made hereunder but not accepted shall*
33 *not be filed in the case until relevant to the entry of judgment, and neither*
34 *the offer, the counteroffer, nor a failure to accept shall be an admission*
35 *against interest nor be evidence in the case until effect is to be given*
36 *thereto in the entry of judgment by the court.*

(6) in any medical malpractice action, as defined by K.S.A. 60-3401 and amendments thereto, for the purposes of computing interest pursuant to this subsection, any offer of settlement made prior to the settlement conference required by K.S.A. 60-3413 shall be considered to have been served at the conclusion of such settlement conference unless withdrawn by the claimant.

37 Sec. 2. K.S.A. 16-205 is hereby repealed.
38 Sec. 3. This act shall take effect and be in force from and after its
39 publication in the statute book.

S.J. 1-26

I am Wayne Stratton, a member of the Kansas Association of Defense Counsel. The KADC is an organization of attorneys who principally defend civil lawsuits. It is opposed to Senate Bill 422.

Historically, interest has been a sum assessed for the use of someone else's money. Senate Bill 422 presents a major change. The general rule is "that an unliquidated claim for damages does not draw interest until liquidated – usually by judgment." Lightcap v. Mobil Oil Corporation, 221 Kan. 448, 466, 562 P.2nd 1, cert denied 434, U.S. 876 (1977). The court has stated that "a claim becomes liquidated when both the amount due and the date on which it is due are fixed and certain or when the same becomes definitely ascertainable by mathematical computation." Plains Resources, Inc. vs. Gable, 235 Kan.580, Syllabus 1, 682 P.2d 653 (1984).

In the ordinary personal injury case, plaintiff's medical expenses have been paid by a third party. The claim for pain and suffering is certainly an unliquidated sum which may or may not be accepted by the jury. The majority of the large verdicts involve damages for future economic losses. There has been no use of the money by anyone under these circumstances.

I principally defend medical malpractice suits. My experience is that many times the plaintiff's attorney has spent months in preparation of a case. Frequently, the filing of the case is the first notice the defendant has that he is the target of a lawsuit.

Senate Bill 422 allows a plaintiff to serve a notice that he is willing to settle in an amount no greater than the amount of the recovery and can even be served before suit is filed. If a judgment is ultimately obtained, interest may be assessed back to a date before suit is even filed.

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Frequently, the defendants take the position that if they believe there is better than a 50% chance of winning a case, the suit is tried. This would only have the effect of imposing a penalty for the defendant/physician exercising his right to trial by jury. Even if a plaintiff recovers much less than the amount of the settlement offer, he still is entitled to pre-judgment interest under the terms of this bill. This bill amounts to an attempt to coerce settlements.

Assuming the scenario in which a doctor and a hospital are sued for millions of dollars because of a so-called birth defect. Much of the damages is based upon future economic loss. I have had cases in which an economist has testified that the loss in wages and the cost of medical care and support for a child is $30,000,000. When the case is tried, the jury is instructed to make an award for past economic damages as well as future economic damages and the economist then reduces the future damages to a present value utilizing a rate of inflation and return on investments. This bill would permit a double recovery because the plaintiff would be entitled to interest upon amounts not yet due.

One also wonders why this bill assumes a 10% interest rate which is the contract rate of interest. Judgments carry an interest rate based upon a rate equal to 4 percentage points above the discount rate which amount is computed annually by the Secretary of State. K.S.A. 16-204.

In summary, Senate Bill 422 represents a number of problems and is a major shift in our law with no public purpose being served.

KANSAS CIVIL LAW FORUM

A Coalition of Professionals and Businesses
Interested in the Kansas Court System
Brad Smoot, Coordinator
800 SW Jackson, Suite 808; Topeka, Kansas 66612
(785) 233-0016 FAX (785) 234-3687

STATEMENT OF BRAD SMOOT, COORDINATOR
KANSAS CIVIL LAW FORUM
TO THE SENATE JUDICIARY COMMITTEE
REGARDING 2000 SENATE BILL 422
JANUARY 26, 2000

Mr. Chairman and Members,

Thank you for this opportunity to comment on 2000 Senate Bill 422. I appear today on behalf of the Kansas Civil Law Forum, a coalition of businesses, associations and professionals interested in the Kansas civil court system. A copy of the KCLF membership list is attached to our statement. Although this bill, which would impose prejudgment interest in civil cases at a fixed rate of 10%, may be proposed with the best of intentions, we must respectfully express our opposition.

Proponents of such laws often argue that prejudgment interest will encourage settlement of cases. Our members are unconvinced that such will be the result. Plaintiffs and defendants already have substantial incentives to settle cases. Anyone who has paid lawyers fees knows the costs of protracted litigation. And anyone involved in a lawsuit today knows the powers district court judges already have to promote settlements. In our view, SB 422 will not significantly increase settlements or clear dockets.

More importantly, the "interest hammer" proposed in SB 422 truly effects only parties from whom damages are claimed. Any settlement "incentive" of prejudgment interest is born mostly by defendants. Since all delays are not caused by defendants and defendants, just like plaintiffs, ought to be entitled to "their day in court," prejudgment interest operates unfairly. Whatever balance exists in today's court system is disturbed by this proposal.

In addition, the interest penalty specified in this bill applies to all types of damage claims -- past, present, future and punitive damages. If the goal is to make the claimant whole, collecting interest on damages that have not yet occurred or punitive damages which do not "compensate" the plaintiff for an actual loss is excessive. We see nothing in SB 422 to delineate such differences by limiting interest to losses actually incurred by a plaintiff. Likewise, a fixed interest rate bears no relationship to the actual "loss" of any claimant. An interest rate indexed to a bond return or other standard measure (treasury bill) would be preferable.

SB 422 is unnecessary, somewhat arbitrary and punitive to only one party in civil litigation. We urge you to reject this proposal. I would be pleased to respond to questions.

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1-26-00
att 11

KANSAS CIVIL LAW FORUM

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