Approved: 3-18-03
Date

MINUTES OF THE FINANCIAL INSTITUTIONS & INSURANCE COMMITTEE

The meeting was called to order by Chairperson Senator Ruth Teichman at 9:30 a.m. on 02-24-03 in Room 234-N of the Capitol.

All members were present except: Senator Barnett, excused; Senator Brungardt, excused; Senator Steineger, excused

Committee staff present: Ken Wilke, Office of the Revisor of Statutes
Dr. Bill Wolff, Kansas Legislative Research Department
Marlene Putnam, Committee Secretary

Conferees appearing before the committee: Jeff Southard, Farmers Ins. Group
Gary White, Kansas Trial Lawyers
Jarrod Forbes, Kansas Ins. Dept.
Sandy Praeger, Commissioner of Insurance

Others attending: See attached list

Senator Teichman introduced Jeff Southard, attorney for the Farmers Insurance Group of Companies. He is a proponent of **SB 160** which is the Kansas statute which deals with a type of automobile insurance coverage called Uninsured Motorist protection. The suggested amendment would clarify the Legislature's intent by making it clear that a person could not be a "disinterested witness" if he or she had at any time made any kind of claim under any portion of the policy for which the insured is making an Uninsured Motorist claim. (See attachment 1)

Gary D. White, Jr., of Kansas Trial Lawyers Association. KTLA opposes **SB 160.** The proposed amendment could result in the perverse and unjust result that one who has absolutely no pecuniary interest in an uninsured motorist claim would be classifies as a "disinterested witness" thereby barring an injured person's uninsured motorist claim. Further, the Kansas Supreme Court has defined "disinterested witness" to be one who is not related to the person making the claim and who does not have a pecuniary interest in the outcome. (See attachment 2)
SB 160 tabled.

Jarrod Forbes, Kansas Insurance Department summarized **SB 144 .** (See attachment 3)

Sandy Praeger, Kansas Commissioner of Insurance presented **SB 144,** with amendments to the committee. (See attachment 4)

Minutes approved.

Meeting adjourned.

SENATE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE
GUEST LIST
DATE: 2-24-03

NAME	REPRESENTING
Richard Bunten	KID
Comm. Praeger	KID
Jerry Wells	KID
Darren Foster	KID
Ron Gaches	CIA
Lee Wright	FARMERS
Jeff Southard	Farmers
Martha Jean Smith	KMHA
Barb Conard	KTLA
BILL YANEK	KS Assn of REALTORS
TOM KRATTLI	KS Assn of REALTORS
LARRY MAGILL	KS. ASSN OF INS AGENTS
Michael D. Lee	KFB
Kevin Davis	Am Family
Jamie Lehr	KIP

LAW OFFICES OF BREN ABBOTT

EMPLOYEES OF THE CLAIMS LITIGATION DEPARTMENT OF FARMERS INSURANCE GROUP OF COMPANIES®
NOT A PARTNERSHIP

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JEANNE M. ROBINSON

OFFICE ADMINISTRATOR
KATHY L. LOEHR

TESTIMONY ON SENATE BILL NO. 160
BEFORE THE FINANCIAL INSTITUTIONS & INSURANCE COMMITTEE
BY JEFF SOUTHARD
FEBRUARY 24, 2003

Madam Chair and Members of the Committee:

My name is Jeff Southard, and I am an attorney for the Farmers Insurance Group of Companies. Farmers issues liability insurance policies in Kansas under several different companies, including Farmers Insurance Company, Inc., Mid-Century Insurance Company, Truck Insurance Exchange, and others. Although Farmers currently does business in most states in this country, its involvement in Kansas dates back to the 1930s, and it is one of the largest providers of automobile liability insurance coverage in the state.

I appear before you today in support of Senate Bill No. 160, which would amend K.S.A. 40-284, which is the Kansas statute which deals with a type of automobile insurance coverage called Uninsured Motorist protection. This measure has been submitted at the request of Farmers, and is intended to clear up a situation created by the issuance of an opinion of the Kansas Supreme Court last summer, entitled Cannon v. Farmers Insurance Company, Inc. I was the attorney for Farmers on the case, in which Farmers lost an appeal from the District Court of Johnson County, Kansas. While the judgment has been paid in that case and it is now over, the effects of the Supreme Court's decision will continue to affect not only the policies issued by Farmers, but every issuer of automobile liability insurance in Kansas. Because Farmers believes the decision reached a result contrary to the

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attachment 1

intent of the legislature, we have suggested an amendment to clarify one definition contained in the statute, that pertaining to who may be a "disinterested witness" for purposes of an Uninsured Motorist claim.

Because this is a fairly complex area of the law (as the large number of appellate decisions on this one single statute show), I think it is appropriate to first give the Committee an idea of the factual background of the Cannon case before discussing the statute itself and the proposed amendment. The Cannon lawsuit involved an action for uninsured motorist coverage which was brought by Ms. Lindsey Cannon against her own insurance company, Farmers Insurance Company, Inc.. Ms. Cannon suffered serious injuries in a one-car motor vehicle accident on December 18, 1996, when a car she was driving left Mission Road near 63rd Street in Prairie Village, Kansas, and struck a tree without ever contacting another vehicle. Also injured was a passenger in her vehicle, Adam Hipp. Both Ms. Cannon and Mr. Hipp were students at Shawnee Mission East High School at the time.

Mr. Hipp made a third-party claim against the liability provisions of the automobile insurance policy Farmers had issued to Ms. Cannon, and recovered policy limits of $100,000 without filing a lawsuit. This was done within 2 years after the accident, as required by the Kansas statute of limitations law. After Mr. Hipp's claim was over and done with, Ms. Cannon made a first-party claim directly against Farmers under the Uninsured Motorist coverage portion of the policy. Language in the Uninsured Motorist portion of the policy provided that, if there is no physical contact between vehicles, the facts of the accident must be verified by someone **other** than the insured or another person having a claim from the same accident. In that Mr. Hipp was the only witness, Farmers denied Ms. Cannon's claim, insofar as he had made a claim arising out of the same accident. Only Mr. Hipp supported Ms. Cannon's claim that her car had been forced off the road by an unknown vehicle.

Under the Uninsured Motorist portion of the policy, the term "uninsured motor vehicle" is defined to include "a hit and run vehicle whose operator or owner has not been identified and which causes bodily injury with or without physical contact" to the insured's vehicle. The policy further provides that, "If there is no physical contact, the facts of the accident must be verified by someone other than [the insured] or another person having a claim from the same accident."

Both Farmers and Ms. Cannon sought summary judgment on the coverage issue, with it being stipulated that her damages were significant enough to receive the policy limits of $100,000 if coverage in fact existed. In its Motion for Summary Judgment, Farmers relied on the language of K.S.A. 40-284(e)(3), which is one of several permissible limitations on Uninsured Motorist coverage. Among others, paragraph (3) allows Uninsured Motorist coverage to be excluded when:

> "there is no evidence of physical contact with the uninsured motor vehicle and when there is no reliable competent evidence to prove the facts of the accident from a disinterested witness not making claim under the policy."

The district court found that Adam Hipp's testimony did provide a basis for Ms. Cannon's claim, insofar as his claim was not made under the Uninsured Motorist portion of the policy, but rather under the liability coverage portion. The court construed the language of K.S.A. 40-284(e)(3), which requires the testimony of a "disinterested witness not making claim under the policy," to mean only the Uninsured Motorist portion of the policy. On appeal, the Kansas Supreme Court upheld this interpretation, and further found that since Mr. Hipp's claim had already been settled, he could be a disinterested witness because he had no claim pending at the time that Ms. Cannon's claim was being considered.

Farmers believes that the courts' interpretation of K.S.A. 40-284 is contrary to the intent of the Kansas Legislature in enacting the exclusion to the statute, which was to combat the making of fraudulent claims. As initially enacted in 1968, K.S.A. 40-284 did not contain any authorization for exclusion or limitation of coverage for cases in which the uninsured vehicle was not identified. Such an exclusion was added in 1981 when K.S.A. 40-284(e)(3) was added, to wit:

> (e) "Any insurer may provide for the exclusion of limitation of coverage when:
>
> . . .
>
> (3) there is no evidence of physical contact with the uninsured motor vehicle."

In 1984, the statute was further amended to require either physical contact or corroborating evidence from disinterested witnesses, as follows:

> (e) "Any insurer may provide for the exclusion of limitation of coverage when:
>
> . . .
>
> (3) there is no evidence of physical contact with the uninsured motor vehicle and when there is no reliable competent evidence to prove the facts of the accident from a disinterested witness not making claim under the policy."
> (Emphasis added).

This is the language which was in effect at the time of the accident involving Ms. Cannon in December, 1996.

Prior to the Cannon decision, Kansas appellate courts had held that the above-quoted statutory language constitutes a recognition by the Legislature that Kansas insurance

companies have a valid concern in preventing fraudulent claims. One way to do so is by providing exclusions for accidents where no physical contact occurs. *Clements v. United States Fidelity and Guarantee Company, Inc.,* 243 Kan. 124, 753 P.2d 1274 (1988). *Clements* upheld the current statute against a constitutional challenge based on due process and equal protection grounds. Since the plaintiff in *Clements* lacked evidence from a disinterested witness not making claim under the policy, her Uninsured Motorist claim was dismissed. (There was no claim in Cannon that the statute was unconstitutional.)

Legislating against fraudulent claims has been an issue in many states, for Uninsured Motorist coverage is virtually universal in this country. As might be imagined, states have taken different approaches to the problem. Georgia, for example, simply requires corroboration by an eyewitness to the occurrence other than the claimant. This statute has been applied in such a way to permit a husband to testify in support of a wife's claim, and vice versa. At the other extreme is the approach taken by Tennessee, which requires either physical contact or clear and convincing evidence, which must be provided by persons who are not occupants of the insured's vehicle, regardless of whether they had a claim under the policy.

Statutory language which is closer to K.S.A. 40-284 is found in Oregon and Washington. In Oregon, the statute requires that evidence be provided by "other than the testimony of the insured or any other person who has a claim under the coverage." Washington's statute is similar, and requires "competent evidence by a person who does not have a claim against any similar insurance as a result of the accident." Cases from both states allow testimony of passengers who had released their claims against the driver, the

unknown driver and the insurer. This fact made their testimony acceptable, in that they did not have a claim against the insured's coverage.

Such was not the case here, for Mr. Hipp, far from providing Farmers with a Release, instead settled his claim for the policy limits maximum of $100,000. To do so, he had to point to Ms. Cannon's negligence as the cause of his injuries, for to blame the unknown driver would place him in the same spot as Ms. Cannon was in, namely needing the testimony of a "disinterested witness," namely one who was unbiased by personal interest or advantage. However, to support Ms. Cannon's claim, Mr. Hipp would then need to reverse course, and blame the unknown driver who allegedly forced them off of the road. At the very least, an appearance of impropriety is created, if not one of outright collusion.

If the narrow interpretation given to the statute by the Kansas Supreme Court is permitted to continue, the public policy against fraud will be weakened, for testimony will be allowed of witnesses like Mr. Hipp, who clearly did make a claim under the same policy that Ms. Cannon later sought to collect under. It is also important to note that because the Court's opinion construes the statute itself, and not just Farmers' policy, every company in Kansas who issues automobile insurance policies will be affected.

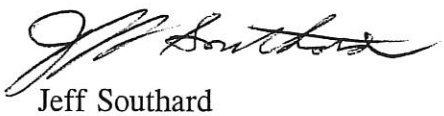
The Committee may also be interested to know that an issue of this type has come up before, involving both Farmers and K.S.A. 40-284. In 1979, the case of Simpson v. Farmers Insurance Company Inc. was decided by the Kansas Supreme Court. Farmers' policy at the time required that, before Uninsured Motorist coverage would apply, there had to be physical contact made with the insured's vehicle. Since K.S.A. 40-284 as it then read

contained no such requirement, the Court ruled against Farmers, holding that the statute mandated "broad, unqualified uninsured motorist coverage." By the amendment made in 1981, however, the Kansas Legislature saw fit to limit the scope of K.S.A. 40-284 through the addition of such a requirement. As noted earlier, another amendment was made in 1984 to require a disinterested witness. It is this requirement that the Cannon decision would now render largely toothless.

The suggested amendment would clarify the Legislature's intent by making it clear that a person could not be a "disinterested witness" if he or she had at any time made any kind of claim under any portion of the policy for which the insured is now making an Uninsured Motorist claim. This would eliminate any argument concerning the timing of the witness' claim, meaning that the fact the witness' claim was already settled would not now make them disinterested. It would also eliminate any argument that a witness making a claim under a different portion of the policy could be disinterested. As long as their claim arises out of the same accident for which the insured is making his/her claim, the witness could not be considered as a "disinterested" one.

I would be happy to respond to any questions the Committee may have. Thank you again for the opportunity to address you on this matter.

Respectfully submitted,



Jeff Southard

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Senate Financial Institutions and Insurance Committee

From: Gary D. White, Jr., Vice President of Legislation
Kansas Trial Lawyers Association

Re: SB 160

Date: February 24, 2003

Chairperson Teichman and members of the Senate Financial Institutions and Insurance Committee. Thank you for the opportunity to submit comments regarding SB 160. My name is Gary White and I currently serve as Vice President of Legislation for the Kansas Trial Lawyers Association.

KTLA opposes SB 160 and the proposed amendment to K.S.A. 40-284, which governs uninsured motorist coverage in Kansas. The amendment would improperly allow insurers to exclude coverage purchased by Kansas consumers who have been injured in automobile collisions on Kansas roadways.

When we purchase automobile insurance, we purchase at least four forms of coverage: (1) liability coverage that applies when someone is injured due to our own negligence, (2) uninsured motorist coverage when we are injured due to someone else's negligence, (3) personal injury protection (PIP) coverage to cover our medical expenses, wage loss, etc. regardless of fault, and (4) property damage coverage caused by our own negligence.

The proposed amendment would extend the "disinterested witness" definition to include situations where a third person makes a claim under the liability coverage, personal injury protection coverage or property damage coverage.

Under the amendment, a phantom vehicle could stop suddenly causing the two vehicles behind it to lose control and rollover injuring both drivers. If the driver of the third vehicle makes a comparative fault claim against the driver of the second vehicle for failing to keep a proper lookout, the driver of the second vehicle would be unable to make an uninsured motorist claim because the "disinterested witness" had made a claim under the liability provisions of the policy covering the second vehicle.

Another example would be where a phantom vehicle stops suddenly causing the second vehicle to lose control, strike a pedestrian and then rollover injuring the driver of the second vehicle. If the pedestrian makes a comparative fault claim against the driver of the second vehicle, the driver of the second vehicle would be unable to make an

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Terry Humphrey, Executive Director

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uninsured motorist claim because the "disinterested witness" had made a claim under the liability provisions of the policy covering the second vehicle.

Certainly, the driver of the third vehicle or the pedestrian does not have a financial interest in the second driver's uninsured motorist's claim and would be considered a "disinterested witness" under existing law allowing the driver of the second vehicle to make a claim under the uninsured motorist coverage he had purchased.

The proposed amendment to K.S.A. 40-284 is due to the Kansas Supreme Court's decision in *Cannon v. Farmers Insurance Company, Inc.*, ____ Kan. ____, 50 P.3d 48 (2002), which is the only case to interpret "disinterested witness" since the term was added in 1981. A copy of the decision is enclosed.

In *Cannon,* the Court reviewed the concept of a disinterested witness and concluded as follows:

> The concept of disinterestedness is commonly associated with a person's ability to be impartial. As applied to witnesses, a disinterested witness is one who has no right, claim, title or legal stake in the claim or matter at issue. Thus a disinterested witness does not stand to gain a benefit or suffer a detriment as a result of the outcome of the case and, therefore, has no motivation based on personal or pecuniary interest.

Id., Syl. 6. The Court also concluded that the phrase "under the policy" refers to a person making an uninsured motorist claim under the policy. 50 P.3d at 54. Applying these principles to the facts before it, the Court concluded that a passenger in Cannon's vehicle who made a liability claim against her was a disinterested witness on Cannon's claim for uninsured motorist benefits.

On her way to school on an early December morning, Cannon suffered severe injuries "when a dark sports utility vehicle stopped immediately in front of her vehicle, causing her to swerve, slip on ice, veer off the road, and crash into a utility pole." 50 P.3d at 50. Cannon and Hipp were the sole occupants of Cannon's vehicle and there was no impact with the sports utility vehicle. *Id.* Hipp verified that the sports utility caused the accident. *Id.* In evaluating Hipp's testimony, the Court noted:

> We also note that Hipp's initial response was that the dark sports utility vehicle stopped abruptly in front of Cannon's vehicle, causing her to lose control of her vehicle. Hipp's initial response and his stance throughout Cannon's action did not change. While not determinative, his initial response as well as his consistency throughout militates against a finding of fraud.

Id. at 56.

In evaluating the phrase "disinterested witness not making a claim under the policy," the Court recognized there are two distinct aspects involved and concluded "[t]he first pertains to the relationship of the parties and the second pertains to the lack of pecuniary interest in the outcome of the case." *Id.*

The Court initially noted that the relationship between Cannon and Hipp was one of driver-passenger that would not preclude Hipp from bing a disinterested witness. The Court also noted the distinction between the claims made by Cannon and those made by Hipp, as follows:

> Hipp's claim is commonly referred to as a third-party claim, that is, a claim against another person as opposed to a first-party claim, which is a claim directly against the insurance company. In this case, Hipp's claim is one sounding in tort against Cannon based on her own negligence in the operation of her vehicle. Hipp seeks to obtain judgment against Cannon for his injuries. She purchased a policy of insurance which indemnifies her in the event such a judgment is obtained against her by Hipp. In that event, Farmers pays the claim. In the present case, Farmers settled with Hipp, paying him the policy limits of $100,000. On the other hand, Cannon's claim is a first-party claim, that is, one directly against Farmers. In her action, Farmers becomes the defendant. Cannon's action is one sounding in contract seeking to enforce the contractual provisions in the policy between herself and Farmers.

Id. at 54-55. The Court further stated:

> The second inquiry involves Hipp's pecuniary interest in the outcome of the case. Certainly, Hipp had a pecuniary interest in the outcome of his own claim, but his interest was not necessarily aligned with Cannon's. Hipp's third-party claim is against Cannon, with indemnification of Cannon by Farmers. ***In a comparative fault jurisdiction such as Kansas, see K.S.A. 60-258a, Hipp and Cannon have divergent interests based upon the claims asserted.*** Hipp's interest would be to establish that Cannon was solely responsible for the accident. To the extent Farmers' representation of Cannon could establish that the phantom vehicle was the cause of the accident, Hipp's recovery against Cannon would be diminished by the percentage of fault attributed to the driver of the phantom vehicle. Cannon's interest in her uninsured motorist claim against Farmers would be enhanced by the percentage of fault she was able to posit against the phantom vehicle, the uninsured vehicle defined as such under Farmers' policy. ***We conclude that Hipp's pecuniary interest is opposite of Cannon's***. Thus, Hipp's interest would not prevent him from providing facts of the accident under K.S.A. 40-284(e)(3). [Emphasis added].

Id. As a result, the Court found that Cannon and Hipp had divergent pecuniary interests and he could testify as a disinterested witness under K.S.A. 40-284.

As demonstrated above, the proposed amendment under SB 160 could result in the perverse and unjust result that one who has absolutely no pecuniary interest in an uninsured motorist claim would not be classified as a "disinterested witness" thereby barring an injured person's uninsured motorist claim. Further, the Kansas Supreme Court has defined "disinterested witness" to be one who is not related to the person making the claim and who does not have a pecuniary interest in the outcome. The amendment is therefore unwarranted and we respectfully request you strike the proposed amendment.

Thank you again for the opportunity to express our opposition about SB 160. We have attached a balloon with our proposed amendments, which we request you approve.

Session of 2003

SENATE BILL No. 160

By Committee on Financial Institutions and Insurance

2-6

AN ACT concerning insurance; relating to uninsured motorist coverage; amending K.S.A. 40-284 and repealing the existing section.

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

Section 1. K.S.A. 40-284 is hereby amended to read as follows: 40-284. (a) No automobile liability insurance policy covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state, unless the policy contains or has endorsed thereon, a provision with coverage limits equal to the limits of liability coverage for bodily injury or death in such automobile liability insurance policy sold to the named insured for payment of part or all sums which the insured or the insured's legal representative shall be legally entitled to recover as damages from the uninsured owner or operator of a motor vehicle because of bodily injury, sickness or disease, including death, resulting therefrom, sustained by the insured, caused by accident and arising out of ownership, maintenance or use of such motor vehicle, or providing for such payment irrespective of legal liability of the insured or any other person or organization. No insurer shall be required to offer, provide or make available coverage conforming to this section in connection with any excess policy, umbrella policy or any other policy which does not provide primary motor vehicle insurance for liabilities arising out of the ownership, maintenance, operation or use of a specifically insured motor vehicle.

(b) Any uninsured motorist coverage shall include an underinsured motorist provision which enables the insured or the insured's legal representative to recover from the insurer the amount of damages for bodily injury or death to which the insured is legally entitled from the owner or operator of another motor vehicle with coverage limits equal to the limits of liability provided by such uninsured motorist coverage to the extent such coverage exceeds the limits of the bodily injury coverage carried by the owner or operator of the other motor vehicle.

(c) The insured named in the policy shall have the right to reject, in writing, the uninsured motorist coverage required by subsections (a) and (b) which is in excess of the limits for bodily injury or death set forth in

K.S.A. 40-3107 and amendments thereto. A rejection by an insured named in the policy of the uninsured motorist coverage shall be a rejection on behalf of all parties insured by the policy. Unless the insured named in the policy requests such coverage in writing, such coverage need not be provided in any subsequent policy issued by the same insurer for motor vehicles owned by the named insured, including, but not limited to, supplemental, renewal, reinstated, transferred or substitute policies where the named insured had rejected the coverage in connection with a policy previously issued to the insured by the same insurer.

(d) Coverage under the policy shall be limited to the extent that the total limits available cannot exceed the highest limits of any single applicable policy, regardless of the number of policies involved, persons covered, claims made, vehicles or premiums shown on the policy or premiums paid or vehicles involved in an accident.

(e) Any insurer may provide for the exclusion or limitation of coverage:

(1) When the insured is occupying or struck by an uninsured automobile or trailer owned or provided for the insured's regular use;

(2) when the uninsured automobile is owned by a self-insurer or any governmental entity;

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

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

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

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

~~*For the purposes of this subsection, "disinterested witness" shall mean any person who has not at any time made any kind of claim under any portion of the policy for injuries or damages arising out of the accident for which the insured is making a claim.*~~

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

subrogated to the insured's right of recovery to the extent of such payment and any settlement under the underinsured motorist coverage. If the underinsured motorist coverage insurer fails to pay the insured the amount of the tentative tort settlement within 60 days, the underinsured motorist coverage insurer has no right of subrogation for any amount paid under the underinsured motorist coverage.

Sec. 2. K.S.A. 40-284 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

50 P.3d 48
(Cite as: 50 P.3d 48)

C

Supreme Court of Kansas.

Lindsay CANNON, Appellee,
v.
FARMERS INSURANCE COMPANY, INC., Appellant.

No. 87,080.

July 12, 2002.

After settling passenger's claim, driver brought action to recover uninsured motorist (UM) benefits for accident involving phantom vehicle without physical contact. The District Court, Johnson County, John P. Bennett, J., entered summary judgment in favor of driver. Insurer appealed. The Supreme Court, Davis, J., held, as a matter of first impression, that the passenger was a "disinterested witness" as to driver's claim, did not have a claim from the same accident or under the policy, and could verify the facts of the accident.

Affirmed.

West Headnotes

[1] Appeal and Error ⚿842(8)
30k842(8) Most Cited Cases

The interpretation of an insurance policy exclusion, as well as the interpretation of statutory law relating to the permissible exclusions of mandatory uninsured motorist (UM) coverage, are questions of law for which review is unlimited.

[2] Insurance ⚿2772
217k2772 Most Cited Cases

The purpose of uninsured motorist (UM) coverage is to fill the gap inherent in motor vehicle financial responsibility and compulsory insurance legislation mandated in state. K.S.A. 40-284.

[3] Insurance ⚿2772
217k2772 Most Cited Cases

The uninsured motorist (UM) statutes are remedial in nature and should be liberally construed to provide broad protection to the insured against all damages resulting from bodily injuries sustained by the insured that are caused by an automobile accident and arise out of the ownership, maintenance, or use of the insured motor vehicle, where those damages are caused by the acts of an uninsured or underinsured motorist. K.S.A. 40-284.

[4] Insurance ⚿2774
217k2774 Most Cited Cases

Any attempts not authorized by statute to condition, limit, or dilute the broad, unqualified mandated uninsured motorist (UM) coverage are void and unenforceable. K.S.A. 40-284.

[5] Insurance ⚿2780
217k2780 Most Cited Cases

Where insurance policy exclusions with regard to uninsured motorist (UM) coverage are overbroad and thus unenforceable, the statutory exclusions are applied in place of the unenforceable provisions. K.S.A. 40-284(e).

[6] Insurance ⚿1808
217k1808 Most Cited Cases

An insurance policy is ambiguous if there is genuine uncertainty as to which of two or more possible meanings is proper.

[7] Contracts ⚿143(2)
95k143(2) Most Cited Cases

To be ambiguous, a contract must contain provisions or language of doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language.

[8] Insurance ⚿1818
217k1818 Most Cited Cases

Where terms are ambiguous, the policy shall be construed to mean what a reasonable person in the position of the insured would have understood them to mean.

[9] Insurance ⚿1808
217k1808 Most Cited Cases

The test to determine whether an insurance contract is ambiguous is not what the insurer intends the language to mean, but what a reasonably prudent

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insured would understand the language to mean.

[10] Insurance ⚿2815(4)
217k2815(4) Most Cited Cases

Passenger who had settled claim against driver arising out of accident involving phantom vehicle was not a "person having a claim from the same accident" within the meaning of the driver's uninsured motorist (UM) coverage for injuries caused by accident without physical contact with the uninsured vehicle, if the facts were verified by someone other than the named insured or another person having a claim from the same accident; the word "having" was ambiguous as to whether a current claim was necessary, the word "claim" was ambiguous as whether it was limited to UM claims, and, thus, interpreting the policy in favor of the insured driver was warranted.

[11] Insurance ⚿2815(4)
217k2815(4) Most Cited Cases

Passenger who had settled claim against driver arising out of accident involving phantom vehicle did not have a claim "under the policy" issued to the driver within the meaning of uninsured motorist (UM) statute requiring reliable evidence from disinterested witness not making claim under the policy, if there is no evidence of physical contact with the uninsured motor vehicle, and, thus, the passenger could be a disinterested witness with respect to driver's UM claim; the passenger had made a third-party claim. K.S.A. 40- 284(e)(3).

[12] Insurance ⚿2815(4)
217k2815(4) Most Cited Cases

Passenger who had settled claim against driver arising out of accident involving phantom vehicle was a "disinterested witness" as to driver's claim for uninsured motorist (UM) benefits and, therefore, could be used to prove the facts of the accident under statute requiring reliable evidence from disinterested witness not making claim under the policy, if there is no evidence of physical contact with the uninsured motor vehicle; the passenger's pecuniary interest was the opposite of the driver's concerning the phantom driver's degree of fault. K.S.A. 40-284(e)(3).

[13] Insurance ⚿2784
217k2784 Most Cited Cases

The purpose of the statutory restrictions on uninsured motorist (UM) coverage where there is no physical contact between the insured's vehicle and the phantom vehicle is the prevention of fraudulent claims. K.S.A. 40- 284(e)(3).

[14] Statutes ⚿188
361k188 Most Cited Cases

Courts should give to statutory words their accepted and usual meaning in the absence of an expressed contrary legislative intention.

[15] Insurance ⚿2815(4)
217k2815(4) Most Cited Cases

A "disinterested witness" within the meaning of uninsured motorist (UM) statute requiring reliable evidence from disinterested witness not making claim under the policy, if there is no evidence of physical contact with the uninsured motor vehicle, is one who has no right, claim, title, or legal share in the cause or matter in issue, does not stand to gain a benefit or suffer a detriment as a result of the outcome of the case, and, therefore, has no motivation based on personal or pecuniary interest. K.S.A. 40-284(e)(3).

[16] Insurance ⚿2815(4)
217k2815(4) Most Cited Cases

The phrase "disinterested witness not making a claim under the policy" within the meaning of uninsured motorist (UM) statute requiring reliable evidence from disinterested witness not making claim under the policy, if there is no evidence of physical contact with the uninsured motor vehicle, is most reasonably read as referring to a person who has no claim at the time that the witness offers testimony to corroborate the facts of the accident, rather than at the time of the accident. K.S.A. 40-284(e)(3).

***49** *Syllabus by the Court*

1. The interpretation of an insurance policy exclusion, as well as the interpretation of Kansas statutory law relating to the permissible exclusions of mandatory uninsured motorist coverage, are questions of law for which this court's review is unlimited.

2. The express purpose of uninsured motorist coverage is to fill the gap inherent in motor vehicle

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financial responsibility and compulsory insurance legislation mandated in the state. The uninsured motorist statutes are remedial in nature and should be liberally construed to provide broad protection to the insured against all damages resulting from bodily injuries sustained by the insured ***50** that are caused by an automobile accident and arise out of the ownership, maintenance, or use of the insured motor vehicle, where those damages are caused by the acts of an uninsured or underinsured motorist.

3. Any attempts not authorized by statute to condition, limit, or dilute the broad, unqualified mandated uninsured motorist coverage are void and unenforceable. Where insurance policy exclusions with regard to uninsured motorist coverage are overbroad and thus unenforceable, the statutory exclusions provided for by K.S.A. 40-284(e) are applied in place of the unenforceable provisions.

4. An insurance policy is ambiguous if there is genuine uncertainty as to which of two or more possible meanings is proper. To be ambiguous, a contract must contain provisions or language of doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language.

5. K.S.A. 40-284(e)(3) authorizes exclusion of uninsured motorist coverage where there is no reliable competent evidence to prove the facts of the accident from a disinterested witness.

6. The concept of disinterestedness is commonly associated with a person's ability to be impartial. As applied to witnesses, a disinterested witness is one who has no right, claim, title, or legal stake in the claim or matter at issue. Thus, a disinterested witness does not stand to gain a benefit or suffer a detriment as a result of the outcome of the case and, therefore, has no motivation based on personal or pecuniary interest.

7. The operative phrase in K.S.A. 40-284(e)(3), "a disinterested witness not making claim under the policy," is most reasonably read as referring to a person who has no claim at the time that the witness offers testimony to corroborate the facts of the accident, rather than at the time of the accident.

Jeffrey S. Southard, of Law Offices of Kenneth J. Berra, of Kansas City, Missouri, argued the cause and was on the brief for appellant.

David R. Smith, of Sanders, Simpson, Fletcher & Smith, L.C., of Kansas City, Missouri, argued the cause and was on the brief for appellee.

The opinion of the court was delivered by DAVIS, J:

Lindsay Cannon and her passenger Adam Hipp were injured in a one-car accident allegedly caused by the negligent driver of a phantom vehicle. Farmers Insurance Company, Inc. (Farmers) settled with Hipp on his liability claim against Cannon. However, Farmers denied Cannon's uninsured motorist claim based on a policy exclusion preventing Hipp, as one having a claim from the same accident, from verifying the facts of the accident. The trial court held that Hipp's liability claim did not disqualify him as a witness under statutory mandated uninsured motorist coverage. K.S.A. 40-284 *et seq.* We affirm.

Cannon sustained severe injuries early one December morning on her way to school when a dark sports utility vehicle stopped immediately in front of her vehicle, causing her to swerve, slip on ice, veer off the road, and crash into a utility pole. She and Hipp, who was also injured in the accident, were the sole occupants of Cannon's vehicle. There was no contact with the phantom vehicle. Hipp verified that the phantom vehicle caused the accident.

On behalf of Cannon, Farmers settled Hipp's claim for injuries against Cannon. Farmers refused to cover Cannon's uninsured motorist claim based upon a policy exclusion requiring verification of the facts of the accident from one not making a claim from the same accident. Cannon prevailed in the trial court, and Farmers appeals from summary judgment granted Cannon on her uninsured motorist claim.

The phantom vehicle is an uninsured vehicle under Farmers' policy which defines an uninsured motor vehicle in part as "[a] hit-and-run vehicle whose operator or owner has not been identified and which causes bodily injury with or without physical contact."

Farmers argued before the trial court that Hipp was not a witness who qualified to ***51** verify the facts

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of the accident under the policy exclusion because he had made a claim from the same accident against Cannon for his injuries. Farmers makes a similar argument on appeal under its policy and under K.S.A. 40-284(e)(3). Cannon claims that the trial court was correct that Hipp is qualified because his claim was not an uninsured motorist claim, but rather a liability claim against Cannon. Farmers and Cannon agreed that if coverage was found to exist, Cannon would be entitled to uninsured motorist policy limits in the amount of $100,000. We have jurisdiction by reason of our transfer of this case under K.S.A. 20-3018(c).

[1] The questions raised by this appeal involve the interpretation of the contractual exclusion provisions of Farmers' policy, as well as the interpretation of Kansas statutory law relating to the permissible exclusions of mandatory uninsured motorist coverage, specifically K.S.A. 40-284(e)(3). Both are questions of law for which this court's review is unlimited. *Hartford Cas. Ins. Co. v. Credit Union 1 of Kansas,* 268 Kan. 121, 124, 992 P.2d 800 (1999); *First Financial Ins. Co. v. Bugg,* 265 Kan. 690, 694, 962 P.2d 515 (1998).

Uninsured Motorist Coverage

Uninsured motorist coverage became mandatory when K.S.A. 40-284 was adopted in 1968. L.1968, ch. 273, § 1. Following a 1981 amendment, if the other motorist had liability insurance but the limits of liability were less than the insured's damages and less than the insured's uninsured motorist converge, the insured could recover the excess damages from his or her own insurer up to policy limits. L.1981, ch. 191, § 1; Jerry, *New Developments in Kansas Insurance Law,* 37 Kan. L.Rev. 841, 878 (1989); Jerry, *Recent Developments in Kansas Insurance Law: A Survey, Some Analysis, and Some Suggestions,* 32 Kan. L.Rev. 287, 343-44 (1984).

[2][3] The purpose of uninsured motorist coverage is to fill the gap inherent in motor vehicle financial responsibility and compulsory insurance legislation mandated by the State of Kansas. *Degollado v. Gallegos,* 260 Kan. 169, 172-73, 917 P.2d 823 (1996). Thus, the statutory mandate is remedial in nature and is to be liberally construed to provide broad coverage:

> "The uninsured and underinsured motorist statutes are remedial in nature. They should be liberally construed to provide a broad protection to the insured against all damages resulting from bodily injuries sustained by the insured that are caused by an automobile accident and arise out of the ownership, maintenance, or use of the insured motor vehicle, where those damages are caused by the acts of an uninsured or underinsured motorist." *Rich v. Farm Bur. Mut. Ins. Co.,* 250 Kan. 209, 215, 824 P.2d 955 (1992).

See *Clements v. United States Fidelity & Guaranty Co.,* 243 Kan. 124, 127, 753 P.2d 1274 (1988).

[4][5] Any attempts not authorized by statute to condition, limit, or dilute the broad, unqualified mandated uninsured motorist coverage are void and unenforceable. *Allied Mut. Ins. Co. v. Gordon,* 248 Kan. 715, 730, 811 P.2d 1112 (1991). Where an uninsured motorist coverage insurance policy is overbroad and thus unenforceable, the statutory exclusions provided for by K.S.A. 40-284(e) are applied in place of the unenforceable provisions. *Ball v. Midwestern Ins. Co.,* 250 Kan. 738, 741, 829 P.2d 897 (1992).

Simpson v. Farmers Ins. Co., 225 Kan. 508, 592 P.2d 445 (1979), provides an early example of a policy provision excluding uninsured motorist coverage contrary to law. The policy in *Simpson* excluded coverage when there was no physical contact between the insured and the uninsured phantomvehicle. This court held that the "physical contact" requirement in the "hit and run" provisions of the automobile liability policy was in derogation of the uninsured motorist statute and was, therefore, void as against public policy. 225 Kan. at 515, 592 P.2d 445. In 1981, the legislature, primarily in response to *Simpson,* amended the law to permit, among other exclusions, the one we consider in this case regarding the phantom hit-and-run vehicle. See Scott, *Uninsured/Underinsured Motorist Insurance: A Sleeping Giant,* 63 J.K.B.A. 28, 31 (May 1994). The provision relating to the phantom vehicle is designed to ***52** protect against fraudulent claims in one-car accidents when there is no independent proof of the existence of the phantom driver. See Jerry, 32 Kan. L.Rev. at 343-44.

The 1981 amendment is set forth in K.S.A. 40-284(e)(3) and provides that uninsured motorist coverage may exclude coverage under the following circumstance:

> "(3) when there is no evidence of physical contact with the uninsured motor vehicle and when there

> is no reliable competent evidence to prove the facts of the accident from a disinterested witness not making claim under the policy."

Farmers' policy is somewhat similar to the statutory exclusion in providing coverage under the following circumstances:

> "If there is no physical contact, the facts of the accident must be verified by someone other than you or another person having a claim from the same accident."

Farmers denied coverage based upon the above exclusion. While the above statutory exclusion and Farmers' policy exclusion are similar in nature, Farmers' exclusion appears to exclude more than the statute allows. The trial court in its summary judgment reached this conclusion and replaced Farmers' exclusion with the language of the statutory exclusion.

Farmers Policy Exclusion

Farmers' exclusion is set forth in that part of the policy dealing exclusively with uninsured motorist coverage as follows:

> "PART II-UNINSURED MOTORIST
> Coverage C-Uninsured Motorist Coverage
> (Including Underinsured Motorists Protection)
> ....
> 3. Uninsured motor vehicle means a motor vehicle which is:
> ....
> b. A hit-and-run vehicle whose operator or owner has not been identified and which causes bodily injury with or without physical contact to:
> (1) You or any family member.
> ....
> If there is no physical contact, the facts of the accident must be verified by someone other than you or another person having a claim from the same accident."

Trial Court Decision

Based upon the undisputed facts, the trial court concluded that Farmers' exclusion was overbroad and applied the statutory exclusion in analyzing the question of coverage. Based on the statute, the trial court determined that Hipp was a witness who could provide corroborating evidence concerning the facts of the accident. It found that (1) Hipp settled his claim against the bodily injury provisions of the policy and that this claim was against Cannon, the driver of the vehicle; and (2) the statutory exclusion providing for a claim *under the policy* applies only where the witness actually makes a claim under the uninsured motorist coverage of the policy. The court concluded that its interpretation was consistent with the purpose of the exclusion to protect against fraud and that it gave broader effect to uninsured motorist coverage required by law.

Farmers argues in this appeal that the trial court did not find the policy or the statute ambiguous. However, our standard of review is unlimited. "Regardless of the construction given a written contract by the trial court, an appellate court may construe a written contract and determine its legal effect." *City of Topeka v. Watertower Place Dev. Group,* 265 Kan. 148, 152- 53, 959 P.2d 894 (1998) . We, therefore, examine Farmers' policy provision to determine whether there is ambiguity and whether Farmers' exclusion is overbroad compared to the authorized statutory exclusion set forth in K.S.A. 40-284(e)(3).

Policy Ambiguity

[6][7][8][9] Cannon claims that the policy language incorporating the exclusion is ambiguous in several respects. An insurance policy is ambiguous if there is genuine uncertainty as to which of two or more possible meanings is proper. *Steinle v. Knowles,* 265 Kan. 545, 549, 961 P.2d 1228 (1998); ***53** *Spivey v. Safeco Ins. Co.,* 254 Kan. 237, 240, 865 P.2d 182 (1993). "To be ambiguous, 'a contract must contain provisions or language of doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language.' " *Steinle,* 265 Kan. at 551, 961 P.2d 1228. " 'Where terms are ambiguous, the policy shall be construed to mean what a reasonable person in the position of the insured would have understood them to mean.' " 265 Kan. at 549, 961 P.2d 1228. "The test to determine whether an insurance contract is ambiguous is not what the insurer intends the language to mean, but what a reasonably prudent insured would understand the language to mean." *Union State Bank v. St. Paul Fire and Marine Ins. Co.,* 18 Kan.App.2d 466, 470-71, 856 P.2d 174 (1993).

[10] The insured argues that the exclusionary language in the policy is ambiguous because the word "having" makes no distinction between being able to make a claim, actually being in the process

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of making a claim, or previously having made a claim. Cannon suggests the most reasonable interpretation of the policy exclusion would require her to present a witness other than one who has a pending uninsured motorist claim. Because Hipp's liability claim was settled before Cannon filed her uninsured motorist action against Farmers, Cannon contends, he did not have a pending claim. In this sense, while Hipp "had a claim," he is not someone "having a claim." Cannon argues that the suffix "-ing" forms the present participle of the verb "have." Webster's Third New International Dictionary 1039 (1993). Hence, according to Cannon's argument, the present tense of the verb-form "have" was chosen by Farmers and necessarily excludes Hipp because he no longer had a pending claim.

Farmers takes the position that the policy language excludes a witness who ever had a claim arising out of the same accident. Farmers interprets its own policy as saying "having or ever had a claim." Thus, the fact that Hipp's claim was settled prior to Cannon's action does not make Hipp qualified to corroborate the facts of the accident.

Cannon further argues the word "claim" is ambiguous as that word is used in the policy. She argues that "claim" must mean an uninsured motorist claim. As noted above, the exclusion appears in Part II of the policy, which deals exclusively with uninsured motorist coverage. Farmers interprets the word "claim" to mean any claim arising from this same accident. Thus, Farmers asserts that Hipp's liability claim against Cannon is included in the definition of "claim."

We agree that ambiguity exists both in the use of the words "having a claim" and in the use of the word "claim." "Having" is susceptible to thefollowing interpretations: (1) A person with a pending claim is someone "having a claim"; (2) a person who is capable of making a claim, even if he or she chooses not to, may be someone "having a claim"; and (3) a person who at one time made a claim, but resolved the claim, may still be someone "having a claim." Moreover, by its use of the word "claim," the policy language is susceptible to varying interpretations. It could refer to uninsured claims only based upon its location in Part II of the policy. Further, the statutory language exclusively concerns uninsured motorist coverage, which strengthens Cannon's interpretation that "claim" refers only to uninsured motorist claims. However, as we discuss below, the policy excludes more than is permitted by statute.

If we limit our consideration to the policy exclusion, the exclusionary language used by Farmers is ambiguous. Under such circumstances, we interpret the policy exclusion against Farmers and in favor of the insured, Cannon. See *Shelter Mut. Ins. Co. v. Williams,* 248 Kan. 17, 23, 804 P.2d 1374 (1991). Since Hipp's claim was not an uninsured motorist claim under the policy but, rather, a claim against Cannon, he would be qualified as a witness to verify the facts regarding the phantom vehicle. In addition, the phrase "having a claim" would refer to someone presently having a claim, which would exclude Hipp because, although he had a claim, Hipp's claim against Cannon had been settled by Farmers. Thus, under the interpretations most favorable to the insured, summary judgment for Cannon was correctly entered by the district court.

Comparison of Policy and Statutory Exclusions

Cannon argues that the policy exclusion is broader than is permitted by the statutory ***54** exclusion and is, therefore, void. Citing familiar law, Cannon points out that when a contractual exclusion is broader in scope than its authorizing statute, the policy provisions are void and unenforceable. *Degollado v. Gallegos,* 260 Kan. at 171, 917 P.2d 823. Uninsured motorist coverage is mandated under Kansas law and any attempt to condition, limit, or dilute uninsured motorist coverage beyond the exclusions and limitations expressly allowed by statute are contrary to public policy and void. *Ball v. Midwestern Ins. Co.,* 250 Kan. at 740-41, 829 P.2d 897. The question remains whether Farmers' policy provisions are broader than those provided by K.S.A. 40-284(e)(3) and, if so, what is their effect in this case.

K.S.A. 40-284(e)(3) allows exclusion of uninsured motorist coverage when: (a) there is no evidence of physical contact with the uninsured motor vehicle and (b) there is no reliable competent evidence to prove the facts of the accident from a disinterested witness *not making claim under the policy.* Farmers' policy exclusion reaches beyond the statute by preventing any person *having a claim from the same accident* from verifying the facts of the accident.

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The district court based its decision upon K.S.A. 40-284(e)(3), thereby implicitly concluding that Farmers' policy exclusion was broader than allowed by the statute:

> "The facts admitted show that Mr. Hipp settled a claim against the bodily injury provisions of the policy, that is, a claim against the driver of the vehicle. The issue here is whether such a claim is 'under the policy' as that term appears in K.S.A. 40-284(e)(3). K.S.A. 40-284 is a statute dealing with uninsured motorist coverage and subparagraph (e) contains authorized exclusions from such required coverage.
>
> "The court reads the provisions ofK.S.A. 40-284(e)(3) to allow exclusion only where the witness actually makes a claim under the uninsured motorist coverage of the policy. The court finds that this interpretation is more consistent with the purpose of the exclusion to protect against fraud. This interpretation further gives broader effect to uninsured motorist coverage required by law. Therefore, defendant's motion for summary judgment should be denied."

Farmers' policy requires verification by someone other than the insured or another person having a claim from the same accident. The statute authorizes exclusion "when there is no reliable competent evidence to prove the facts of the accident from a disinterested witness not making a claim under the policy." K.S.A. 40-284(c)(3). Notwithstanding the ambiguity of the phrase in the policy "having a claim from the same accident," it is apparent that this language is broader than "making claim under the policy." For example, Hipp may be automatically excluded under policy provisions from offering evidence of the accident based upon his claim against Cannon. His claim was against Cannon for injuries he sustained based upon her alleged negligence. This claim was a third-party claim not under or against the policy but rather against Cannon. Farmers paid Hipp its policy limits under the liability portion of the policy by way of indemnifying Cannon. However, Hipp would not necessarily be excluded as a witness under the statute because he was not, at the time Cannon filed suit, making a claim against Farmers; rather, his claim was against Cannon.

[11] In comparing the policy language to the statutory language, we question the meaning of the statutory phrase "under the policy." The policy language excludes persons having a claim from the same accident. The meaning of "under the policy" in the statute is important if that language is to be applied in place of the policy language. The trial court concluded "under the policy" refers to an uninsured motorist claim. We agree with the trial court.

Hipp's claim is commonly referred to as a third-party claim, that is, a claim against another person as opposed to a first-party claim, which is a claim directly against the insurance company. In this case, Hipp's claim is one sounding in tort against Cannon based on her own negligence in the operation of her vehicle. Hipp seeks to obtain judgment against Cannon for his injuries. She purchased a policy of insurance which indemnifies ***55** her in the event such a judgment is obtained against her by Hipp. In that event, Farmers pays the claim. In the present case, Farmers settled with Hipp, paying him the policy limits of $100,000. On the other hand, Cannon's claim is a first-party claim, that is, one directly against Farmers. In her action, Farmers becomes the defendant. Cannon's action is one sounding in contract seeking to enforce the contractual provisions in the policy between herself and Farmers.

The difference in the separate actions discussed above serve to enlighten us on the meaning of the statutory phrase "under the policy." Hipp's action is against Cannon. Cannon's action is against Farmers, based upon the policy. As such, Cannon's action is one "under the policy" while Hipp's action only relies on the policy for indemnification of Cannon's liability to him. Moreover, the exclusion we deal with appears in K.S.A. 40-284, which exclusively concerns uninsured motorist coverage. The same holds true in Farmers' policy. Part II as quoted above deals exclusively with uninsured motorist coverage. Thus, based upon the meaning of the phrase "under the policy" and the location of that phrase in the statute, and based on the location of the word "claim" in Part II of the policy, it is clear that the statute, as well as the policy, refers to first-party uninsured motorist claims and not third-party claims. Hipp is, therefore, not precluded from serving as a witness for Cannon under the exclusion because he made a third-party claim.

Disinterested

[12] K.S.A. 40-284(e)(3) authorizes exclusion of

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uninsured motorist coverage where there is no reliable competent evidence to prove the facts of the accident from a disinterested witness. The statute does not define "disinterested," and there are no Kansas cases defining the term as it is used in the statute. This case presents a question of first impression for this court.

[13] The purpose of the statutory exclusion where there is no physical contact between the insured's vehicle and the phantom vehicle is the prevention of fraudulent claims. *Clements v. United States Fidelity & Guaranty Co.,* 243 Kan. 124, 127, 753 P.2d 1274 (1988). In a one-vehicle accident with no witnesses, an insurance carrier has no way to refute the insured's statement that he or she swerved to avoid an on-coming vehicle. Thus, in 1981 the Kansas Legislature amended the mandatory uninsured motorist coverage provision and authorized insurance carriers to require, from the insured, a disinterested witness.

As we have stated, the mandated coverage is intended to provide recompense to innocent persons injured through the wrongful conduct of motorists who, because they are uninsured and not financially responsible, cannot compensate innocent persons for the damages. We recognize the remedial nature of this coverage and liberally construe the legislation to provide the intended protection. *Ball v. Midwestern Ins. Co.,* 250 Kan. at 738-41, 829 P.2d 897. We also recognize that fraud prevention is a legitimate and important consideration. *Clements,* 243 Kan. at 127, 753 P.2d 1274. Other states have attempted to limit or exclude recovery in cases involving phantom vehicles. While authority from other jurisdictions provides some help, the cases in different states vary widely based on individual states' statutory language.

[14] The issue is whether Hipp is a disinterested witness who may corroborate Cannon's version of the facts of this accident. As indicated above, the trial court found Hipp could provide evidence of the facts of the accident based upon its determination that Hipp was not making an uninsured motorist claim under the policy and was, therefore, qualified. There was no discussion of the meaning of the term "disinterested" in the trial court's decision. We are advised in the interpretation of a statute to give words their accepted and usual meaning in the absence of an expressed contrary legislative intention. *See Kilner v. State Farm Mut. Auto. Ins. Co.,* 252 Kan. 675, 686, 847 P.2d 1292 (1993) (holding subsections of K.S.A. 40-284[e] should be interpreted consistently and harmoniously).

[15] "Disinterested" is defined as "not influenced by regard to personal advantage," ***56** "free from selfish motive," and "not biased or prejudiced." Webster's Third New International Dictionary 650 (3d ed.1993). Black's Law Dictionary defines "disinterested" as "[f]ree from bias, prejudice, or partiality; not having a pecuniary interest." Black's Law Dictionary 481 (7th ed.1999). Black's defines the phrase "disinterested witness" as "[a] witness who is legally competent to testify and has no private interest in the matter at issue." Black's Law Dictionary 1596. The Iowa Supreme Court, in a different context, defined "disinterested witness" as "[o]ne who has no right, claim, title, or legal share in the cause or matter in issue." *Post-Newsweek Cable v. Bd. of Review,* 497 N.W.2d 810, 813 (Iowa 1993).

Other jurisdictions interpreting their own statutes regarding the exclusion we now consider have defined "disinterestedness" within the context of specific facts. See generally, Annot., *Uninsured Motorist Indorsement: Construction and Application of Requirement That There be " Physical Contact " with Unidentified or Hit-and-Run Vehicle; "Miss-and-Run Cases,"* 77 A.L.R.5th 319, § 5[c] and § 6[d]; Annot., *Uninsured Motorist Indorsement: General Issues Regarding Requirement That There Be "Physical Contact " with Unidentified or Hit-and-Run Vehicle,* 78 A.L.R.5th 341.

Consistent with the avowed purpose of preventing fraud, the definitions of disinterested, and case law, we perceive two distinct aspects involved in the determination of whether a witness is disinterested. The first pertains to the relationship of the parties and the second pertains to the lack of a pecuniary interest in the outcome of the case. As noted by most cases on this subject, the determination is fact intensive and in most instances will be made on a case-by-case basis. However, there are those cases where the answer is self evident, as it would be, for example, if Hipp were making, along with Cannon, an uninsured motorist claim against Farmers. However, since his claim is a liability claim against Cannon, the answer becomes more difficult and depends upon the relationship between Hipp and Cannon and upon Hipp's pecuniary interest in the

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outcome of Cannon's claim against Farmers.

The record in this case contains no evidence regarding the relationship between Hipp and Cannon. Farmers settled Hipp's liability claim against Cannon without any evidence of their relationship. We know that Hipp was a passenger and Cannon was driving early one December morning to school. Beyond this, we have no additional information about their relationship. Based upon the record, we conclude that the relationship is one of driver-passenger, a relationship that would not prevent Hipp from being disinterested and from providing evidence as to the facts of the accident.

We also note that Hipp's initial response was that the dark sports utility vehicle stopped abruptly in front of Cannon's vehicle, causing her to lose control of her vehicle. Hipp's initial response and his stance throughout Cannon's action did not change. While not determinative, his initial response as well as his consistency throughout militates against a finding of fraud.

The second inquiry involves Hipp's pecuniary interest in the outcome of the case. Certainly, Hipp had a pecuniary interest in the outcome of his own claim, but his interest was not necessarily aligned with Cannon's. Hipp's third-party claim is against Cannon, with indemnification of Cannon by Farmers. In a comparative fault jurisdiction such as Kansas, see K.S.A. 60-258a, Hipp and Cannon have divergent interests based upon the claims asserted. Hipp's interest would be to establish that Cannon was solely responsible for the accident. To the extent Farmers' representation of Cannon could establish that the phantom vehicle was the cause of the accident, Hipp's recovery against Cannon would be diminished by the percentage of fault attributed to the driver of the phantom vehicle. Cannon's interest in her uninsured motorist claim against Farmers would be enhanced by the percentage of fault she was able to posit against the phantom vehicle, the uninsured vehicle defined as such under Farmers' policy. We conclude that Hipp's pecuniary interest is opposite of Cannon's. Thus, Hipp's interest would not prevent him from providing facts of the accident under K.S.A. 40-284(e)(3).

***57** [16] Finally, most jurisdictions dealing with this question conclude that the time for making a determination regarding a witness' qualifications under statutory exclusions, including his or her disinterested status, is at the time such witness' testimony is given. The Supreme Court of Oregon is representative of this conclusion:

> "In the absence of an express temporal qualification in the text of ORS 742.504(2)(g)(B) itself, we believe that the corroboration requirement set out in that subparagraph should be read consistently with the companion requirements set out in subparagraphs (A) and (C). Accordingly, we conclude that, based on text and context, the operative phrase in ORS 742.504(2)(g)(B)-- 'any person having an uninsured motorist claim resulting from the accident'--is most reasonably read as referring to a person who has such a claim at the time that the determination of uninsured motorist coverage is being made--*i.e.,* the time when the person's testimony is offered to corroborate the facts of the 'phantom vehicle' accident--rather than to a person who has such a claim at the time of the accident." *To v. State Farm Mutual Ins.,* 319 Or. 93, 101, 873 P.2d 1072 (1994).

Farmers settled with Hipp on his claim against Cannon. At the time of Cannon's action against Farmers, and under the provisions of K.S.A. 40-284(e)(3), Hipp is "not making a claim under the policy," for his claim had been settled by Farmers. Hipp, at that time, had absolutely no pecuniary interest in the outcome of the case. We conclude that the trial court properly entered summary judgment in favor of Cannon.

Affirmed.

ABBOTT, J., not participating.

DAVID S. KNUDSON, J., assigned. [FN1]

> FN1. **REPORTER'S NOTE:** Judge Knudson, of the Kansas Court of Appeals, was appointed to hear case No. 87080 vice Justice Abbott pursuant to the authority vested in the Supreme Court by K.S.A. 20-3002(c).

50 P.3d 48

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END OF DOCUMENT

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Kansas
Insurance
Department

Sandy Praeger COMMISSIONER OF INSURANCE

TO: Senate Financial Institutions and Insurance Committee
FROM: Jarrod Forbes, Legislative Liaison
DATE: February 21, 2003
RE: Senate Bill 144

I appreciate your consideration of Senate Bill 144. As you are aware, insurance scoring is an underwriting tool currently utilized by the insurance industry. In attempt to be the best regulators we can, the Kansas Insurance Department feels the need to regulate this process as well. Commissioner Praeger welcomes the responsibility to ensure insurance scoring does not unjustly discriminate and is applied in an appropriate manner. I have taken the liberty of providing a summary of our bill. I would be happy to answer any questions you may have.

- First and foremost, an individual's insurance score can never be the only reason an adverse action is taken against them.

- Customers with thin or no hit files must be treated as if they had neutral credit information. In other words, credit cannot hurt or benefit them.

- Insurers using insurance scoring must notify the consumer that credit information is being used and they must file their "black box" with the Kansas Insurance Department.

- Insurers cannot refuse to quote, deny, cancel or to non-renew any policy of personal insurance solely on the basis of credit information.

- A consumer can make an annual request to re-underwrite and re-rate their policy based on a new credit report and new insurance score, but the underwriting tier and rate can only change favorably. *The insurer can still run a consumer's insurance score every three years and change the underwriting tier and/or rate, up or down.*

    - This was done so a consumer does not have to wait three years to receive the benefit of a positive change in credit management. We made it upon consumer request, so the industry does not have the expense of doing everyone's. Only people who know their credit management has seen improvement will utilize this option.

2-24-03
SEN. FI+I
Attachment 3

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CONSUMER HOTLINE
1.800.432.2484

WEBSITE
www.ksinsurance.org

- An insurer shall provide an internal appeal process whereby a consumer can review an adverse action based on credit information.
    - The insurer must tell any new customer and every renewed customer that their rate is appealable.
    - The appeal process must be approved by the Kansas Insurance Department

- If an insurer underwrites and rates a consumer based on wrong credit information they must re-underwrite and re-rate the customer excluding that information. In addition, the insurer must refund the customer the difference paid in premium for that term.

- An insurer shall indemnify, defend, and hold harmless all agents acting in good faith with respect to credit scoring. *This requires the insurer to pick up all legal costs if the agent is sued for being the "messenger".*

- No consumer reporting agency shall provide or sell data they may possess, given to them for the purpose of creating a consumer report or insurance score to anyone other than the party who originally gave them the information. *This keeps consumer reporting agencies from selling the ending date of a customer's policy.*

- For the strict purposes of this act, we have included farm owners. This refers to the dwelling and automobile used for personal use by a farmer and not the crop or livestock traded by the farm owner.

3-2

SENATE BILL 144

AN ACT concerning insurance; relating to the use of credit scores in issuing certain policies.

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

Section 1. This act shall be known as the Kansas insurance score act.

Sec. 2. (a) This act shall apply only to personal insurance and not to commercial insurance. A personal insurance policy must be individually underwritten for personal, family or household use. No other type of insurance shall be included as personal insurance for the purpose of this act.
(b) This act shall apply to all personal insurance policies either written to be effective or renewed on or after ~~nine~~ six months from the effective date of this act.

Sec. 3. As used in this act:
(a) ''Adverse action'' means any of the following in connection with the underwriting of personal insurance:
(1) A denial or cancellation of coverage;
(2) ~~any change in the charge for~~ anything other than the best possible rate;
(3) a reduction or other adverse or unfavorable change in the terms of coverage of any insurance regardless of whether such insurance is in existence or has been applied for;
~~(4) a reduction or other adverse or unfavorable change in the terms of the amount of any insurance regardless of whether such insurance is in existence or has been applied for.~~
(b) ''Affiliate'' means any company that controls, is controlled by, or is under common control with another company.
(c) ''Agent'' shall have the meaning ascribed to it in subsection (k) of K.S.A. 2002 Supp. 40-4902, and amendments thereto unless the context requires otherwise.
(d) ''Applicant'' means an individual who has applied to an insurer to be covered by a personal insurance policy.
(e) ''Commissioner'' means the commissioner of insurance and any authorized designee of the commissioner.
(f) ''Consumer'' means an insured whose credit information is used or whose insurance score is calculated in the underwriting or rating of a personal insurance policy. ''Consumer'' also includes an applicant for a

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personal insurance policy.
(g) ''Consumer reporting agency'' means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages, in whole or in part, in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.
(h) ''Credit information'' means any credit-related information derived from a credit report, found on a credit report itself, or provided on an application for personal insurance. Credit information shall not include any information which is not credit-related, regardless of whether such information is contained in a credit report or in an application or is used to calculate an insurance score.
(i) ''Credit report'' means any written, oral, or other communication of information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing or credit capacity which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor to determine personal insurance premiums, eligibility for coverage, or tier placement.
(j) ''Department'' means the insurance department established by K.S.A. 40-102 and amendments thereto.
(k) ''Insurance score'' means a number or rating that is derived from an algorithm, computer application, model, or other process that is based, in whole or in part, on credit information for the purposes of predicting the future insurance loss exposure of an individual applicant or insured.
(l) ''Personal insurance'' means private passenger automobile, homeowners, motorcycle, mobile homeowners and non-commercial dwelling fire insurance policies and boat, personal water craft, snowmobile and recreational vehicle policies. **For the strict purposes of this act, personal insurance shall also include individually underwritten policies of farm owners.**

Sec. 4. No insurer authorized to do business in the state of Kansas which uses credit information to underwrite or rate risks, shall:
(a) Use an insurance score that is calculated using income, address, zip code, race, religion, color, sex, disability, national origin, ancestry or marital status of the consumer as a factor.
(b) Without consideration of any other applicable underwriting factor independent of credit information and not expressly prohibited by subsection (a), refuse to quote, deny, cancel or refuse to renew any policy of personal insurance solely on the basis of credit information.
(c) Without consideration of any other applicable factor independent of credit information, base an insured's renewal rates for personal insurance solely upon credit information.
(d) Without consideration of any other applicable factor independent

of credit information, take an adverse action against a consumer solely because such consumer does not have a credit card account. ~~or has an inadequate credit history.~~

~~(c)~~ Consider an absence of credit information or an inability to calculate an insurance score in underwriting or rating personal insurance, unless the insurer does one of the following:

(1) Treat the consumer as if the applicant or insured had neutral credit information, as defined by the insurer; or

(2) exclude the use of credit information as a factor and use only other underwriting criteria.

(f) Take an ~~allowed~~ adverse action against a consumer based on credit information, unless an insurer obtains and uses a credit report issued or an insurance score calculated within 90 days from the date the personal insurance policy is first written or ~~renewed.~~notice of renewal is issued.

(g) ~~Use credit information unless not later than every 36 months following the last time that the insurer obtained current credit information for the insured, the insurer recalculates the insurance score or obtains an updated credit report.~~

~~Regardless of the requirements of subsection (g):~~

~~(1) At annual renewal the insurer shall re-underwrite and re-rate the consumer's personal insurance policy based upon a current credit report or insurance score for such consumer if requested by the consumer and shall be used if the result of the re-underwrite and re-rate reduces the consumer's rate, but shall not be used to increase the consumer's rate. The insurer shall not be found in violation of rate filings by adjusting an insured's rate in such a manner. An insurer need not recalculate the insurance score or obtain the updated credit report of a consumer more frequently than once in a twelve-month period.~~

~~(2) The insurer shall have the discretion to obtain current credit information upon any renewal before the 36 months, if consistent with such insurer's underwriting guidelines.~~

~~(3) Notwithstanding the requirements of paragraph (1) of subsection (g), no insurer shall be required to obtain current credit information for an insured, if:~~

~~(i) The insured is in the most favorably-priced tier of the insurer, within a group of affiliated insurers. However, the insurer shall have the discretion to order such report, if consistent with such insurer's underwriting guidelines;~~

~~(ii) credit was not used for underwriting or rating such insured when the policy was initially written. However, the insurer shall have the discretion to use credit for underwriting or rating such insured upon renewal, if consistent with such insurer's underwriting guidelines; or~~

~~(iii) The insurer re-evaluates the insured beginning no later than 36 months after inception and thereafter based upon other underwriting or rating factors, excluding credit information.~~

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(g)(1) Except as provided in paragraphs (2) and (3), use credit information unless not later than every 36 months following the last time that the insurer obtained current credit information for the insured, the insurer recalculates the insurance score or obtains an updated credit report.

(2) The insurer shall:

(A) Re-underwrite and re-rate the consumer's personal insurance policy, at the annual renewal of such policy, based upon a current credit report or insurance score for such consumer, if requested by the consumer. Such consumer's current credit report or insurance score shall be used if the result of the re-underwrite and re-rate reduces the consumer's rate. Such consumer's current credit report or insurance score shall not be used to increase the consumer's rate. The insurer shall not be found to be in violation of rate filings by adjusting an insured's rate in accordance with this subparagraph. Nothing in this subparagraph shall require an insurer to recalculate a consumer's insurance score or obtain the updated credit report of a consumer more frequently than once in a twelve-month period.

(B) have the discretion to obtain current credit information upon any renewal before the 36 months, if consistent with such insurer's underwriting guidelines.

(3) No insurer shall be required to obtain current credit information for an insured, if:

(A) The insured is in the most favorably-priced tier of the insurer, within a group of affiliated insurers. However, the insurer shall have the discretion to order such report, if consistent with such insurer's underwriting guidelines;

(B) credit was not used for underwriting or rating such insured when the policy was initially written. However, the insurer shall have the discretion to use credit for underwriting or rating such insured upon renewal, if consistent with such insurer's underwriting guidelines; or

(C) The insurer re-evaluates the insured beginning no later than 36 months after inception and thereafter based upon other underwriting or rating factors, excluding credit information.

(h) Use any of the following as a negative factor against a consumer in any insurance scoring methodology or in reviewing credit information for the purpose of underwriting or rating a policy of personal insurance:

(1) Any credit inquiry not initiated by the consumer or any inquiry requested by the consumer for such consumer's own credit information;

(2) any inquiry relating to insurance coverage, if so identified on a consumer's credit report;

(3) any collection account with a medical industry code, if so identified on the consumer's credit report;

(4) any additional lender inquiry beyond the first such inquiry related to the same loan purpose, if coded by the consumer reporting agency on the consumer's credit report as being from the given loan industry and

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made within 30 days of one another.
~~Regardless of the requirements of subsection (g):~~
~~(1) At annual renewal the insurer shall re-underwrite and re-rate the consumer's personal insurance policy based upon a current credit report or insurance score for such consumer if requested by the consumer and shall be used if the result of the re-underwrite and re-rate reduces the consumer's rate, but shall not be used to increase the consumer's rate. The insurer shall not be found in violation of rate filings by adjusting an insured's rate in such a manner. An insurer need not recalculate the insurance score or obtain the updated credit report of a consumer more frequently than once in a twelve-month period.~~
~~(2) The insurer shall have the discretion to obtain current credit information upon any renewal before the 36 months, if consistent with such insurer's underwriting guidelines.~~
~~(3) Notwithstanding the requirements of paragraph (1) of subsection (g), no insurer shall be required to obtain current credit information for an insured, if:~~
~~(i) The insured is in the most favorably priced tier of the insurer, within a group of affiliated insurers. However, the insurer shall have the discretion to order such report, if consistent with such insurer's underwriting guidelines;~~
~~(ii) credit was not used for underwriting or rating such insured when the policy was initially written. However, the insurer shall have the discretion to use credit for underwriting or rating such insured upon renewal, if consistent with such insurer's underwriting guidelines; or~~
~~(iii) The insurer re-evaluates the insured beginning no later than 36 months after inception and thereafter based upon other underwriting or rating factors, excluding credit information.~~

Sec. 5.(a) If it is determined through the dispute resolution process set forth in the federal fair credit reporting act, 15 USC 1681i(a)(5), ~~as in existence on the effective date of this act and amendments thereto,~~ that the credit information of a current insured was incorrect or incomplete and if the insurer receives notice of such determination from either the consumer reporting agency or from the insured, the insurer shall re-underwrite and rerate the consumer within 30 days of receiving the notice. After re-underwriting or rerating the insured, the insurer shall make any adjustments necessary, consistent with such insurer's underwriting and rating guidelines.
(b) If an insurer determines that the insured has overpaid premium, the insurer shall refund to the insured the amount of overpayment calculated back to the shorter of either the last 12 months of coverage or the actual policy period.

Sec. 6. If an insurer writing personal insurance uses credit information in underwriting or rating a consumer, the insurer or its agent shall

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disclose that it may obtain credit information in connection with such application. The insurer shall further notify such consumer that an internal appeal process exists as provided by **paragraph (b) of** section 7 ~~(b) herein~~. The disclosure shall be made either on the insurance application or at the time the insurance application is taken. Such disclosure shall be either written or provided to an applicant in the same medium as the application for insurance. The insurer need not provide the disclosure statement required under this section to any insured on a renewal policy if such consumer has previously been provided a disclosure statement.

Sec. 7. (a) If an insurer takes an adverse action based upon credit information, the insurer shall provide written notification to the consumer a notice that:
(1) An adverse action has been taken, in accordance with the requirements of the federal fair credit reporting act as set forth in, 15 USC 1681m(a) ~~as in existence on the effective date of this act~~ and amendments thereto; and
(2) explains the reason for the such adverse action.
(b) Each reason must be provided in sufficiently clear and specific language so that a person can identify the basis for the insurer's decision to take such adverse action. An insurer shall provide a procedure whereby a consumer may review an adverse action based on credit information. **Such procedure shall be consistent with the provisions of K.S.A. 40-2,112 and amendments thereto**. The insurer and the insurer's agent shall be immune from any action arising from information provided to the insured through such process. The insurer shall not be found in violation of rate filings by adjusting an insured's rate in such a manner.
(c) ~~In addition to K.S.A. 40-2,112, the~~ ~~The notification required by this section shall include a description of up to four factors that were the primary influences of the adverse action.~~ The use of generalized terms such as ''poor credit history,'' ''poor credit rating,'' or ''poor insurance score'' shall be deemed not to comply with requirements of this section.

Sec. 8. Each insurer that uses insurance scores to underwrite and rate risks shall file the procedure required by **paragraph (b) of section 7** ~~(b)~~ and such insurer's **insurance** scoring models or other **insurance** scoring processes with the insurance department. A third party may file **with the insurance department** such third party's scoring models or other scoring processes used on behalf of an insurer ~~with the insurance department~~. Any filing that includes insurance scoring may include loss experience justifying the use of credit information.
~~Any~~ Except for the procedure required by **paragraph (b) of section 7** ~~(b)~~ any filing relating to ~~credit information~~ **insurance scoring models or other insurance scoring processes** shall be considered to be a trade secret under the open record act.

Sec 9. The Commissioner of Insurance may conduct research, hold public hearings, make inquiries and publish studies relating to the purpose of this act.

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Sec. ~~9~~10. (a) An insurer shall indemnify, defend, and hold agents harmless from and against all liability, fees, and costs arising out of or relating to the actions, errors, or omissions of an agent who obtains or uses credit information or insurance scores, or both, for an insurer.
(b) The provisions of subsection (a) shall not be available whenever the agent fails to:
(1) Follow the instructions of or procedures established by the insurer; and
(2) comply with any applicable law or regulation.
(c) Nothing in this section shall be construed to provide a consumer or other insured with a cause of action that does not exist in the absence of this section.

Sec. ~~10~~11. (a) No consumer reporting agency shall provide or sell data or lists that include any information, in whole or in part, which was submitted in conjunction with an insurance inquiry about a consumer's credit information or a request for a credit report or insurance score. Such information includes, but is not limited to:
(1) The expiration date of an insurance policy or any other information that may identify any time period during which a consumer's insurance may expire; and
(2) the terms and conditions of the consumer's insurance coverage.
(b) The restrictions provided in subsection (a) of this section do not apply to:
(1) Any data or list the consumer reporting agency supplies to the insurance agent from whom information was received;
(2) the insurer for whom such agent acted; or
(3) such insurer's affiliates or holding companies.
(c) Nothing in this section shall be construed to prohibit or restrict any insurer from obtaining a claims history report or a motor vehicle report.

Sec 12. Whenever an insurer is found to be in violation of any provision of this act, the commissioner shall proceed under K.S.A. 40-2,125 and amendments thereto.

Sec. ~~11~~13. (a) If any provision of this act is declared invalid due to an interpretation of or a future change in the federal fair credit reporting act, the remaining portions of the act shall be deemed to be severable and shall remain in full force and effect.
(b) If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

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Sec. ~~12~~14. This act shall take effect and be in force from and after its publication in the ~~statute book~~Kansas Register.

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