Approved: February 22, 2005
Date

MINUTES OF THE HOUSE INSURANCE COMMITTEE

The meeting was called to order by Chairman Clark Shultz at 3:30 P.M. on February 15, 2005 in Room 527-S of the Capitol.

All members were present except:
Representative John Faber- excused

Committee staff present:
Melissa Calderwood, Kansas Legislative Research Department
Terri Weber, Kansas Legislative Research Department
Ken Wilke, Revisor of Statutes Office
Sue Fowler, Committee Secretary

Conferees appearing before the committee:
Jarrod Forbes, Topeka, KS
Brad Smoot, Blue Cross Blue Shield of Kansas City, Topeka, KS
Craig Shultz, Wichita, KS
Bill Sneed, Topeka, KS
Dave Hanson, Topeka, KS
Paul Olde, Olathe KS
Mick Murphy, Olathe, KS
Eric Blasdel, Wichita, KS
Jeff Chalk, Shawnee, KS
Representative Eric Carter, Overland, KS
Representative Candy Ruff, Leavenworth, KS
Russ Peterson, Overland Park, KS
Linda Berndt, Topeka, KS
Kevin Fowler, Topeka, KS
Rodney Whittington, Russell, KS
Larry Magill, Topeka, KS
Becca Vaughn, Topeka, KS
Pamela Johnson-Betts, Topeka, KS
Margaret Farley, Lawrence, KS
Ernie Kutzley, Topeka, KS
Kirk Lowry, Topeka, KS
Bill Sneed, Topeka, KS
Brad Smoot, Topeka, KS
Larrie Annn Lower, Topeka, KS

Others attending:
See attached list.

Hearing on:

HB 2203: Medical and hospital service corporations; termination of coverage for cause approved by commissioner of insurance.

Proponents:

Jarrod Forbes, Kansas State Insurance Department, (Attachment #1), appeared before the committee in support of **HB 2203**.

Brad Smoot, Blue Cross Blue Shield of Kansas City, (Attachment #2), presented testimony in support of **HB 2203.**

Hearing was closed on **HB 2203**.

MINUTES OF THE House Insurance Committee at 3:30 P.M. on February 15, 2005 in Room 527-S of the Capitol.

Hearing on:

Terri Weber, Kansas Legislative Research Department, gave a brief overview of **HB 2305**.

HB 2305: Allowing an uninsured motorist claim to the extent the coverage exceeds the limits of the amount of liability proceeds actually available to an injured insured.

Proponent:

Craig Shultz, Kansas Trial Lawyers Association, (Attachment #3), appeared before the committee in support of **HB 2305**.

Opponents:

Bill Sneed, State Farm, (Attachment #4), presented testimony in opposition to **HB 2305**.

Dave Hanson, Kansas Association of Property and Casualty Insurance Companies, (Attachment #5), presented testimony in opposition to **HB 2305**.

Rick Wilborn, Farmers Alliance, (Attachment #6), presented written testimony in opposition to **HB 2305**.

Hearing was closed on **HB 2305**.

Hearing on:

HB 2039: Workers compensation, exemption for certain supports officials working for nonprofit organizations.

Melissa Calderwood, Kansas Legislative Research Department, gave a brief overview of **HB 2039**.

Proponents:

Representative Eric Carter, 48th District, (Attachment #7), appeared before the committee in support of **HB 2039**.

Paul Olde, Olathe Youth Baseball, (Attachment #8), presented testimony in support of **HB 2039**.

Eric Blasdel, Westurban Baseball, (Attachment #9), appeared before the committee in support of **HB 2039**.

Jeff Chalk, The 3 & 2 Baseball Club of Johnson County, Inc., (Attachment #10), gave testimony in support of **HB 2039**.

Opponents:

Representative L. Candy Ruff, 40th District, (Attachment #11), presented testimony in opposition to **HB 2039**.

Russ Peterson, Kansas Trial Lawyers Association, (Attachment #12), presented testimony in opposition to **HB 2039**.

Hearing was closed on **HB 2039**.

Hearing on:

HB 2241: Adult care homes; risk assessment plans; prohibited use of inspection reports.

Melissa Calderwood, Kansas Legislative Research Department, gave a brief overview of **HB 2241.**

MINUTES OF THE House Insurance Committee at 3:30 P.M. on February 15, 2005 in Room 527-S of the Capitol.

Proponents:

Linda Berndt, Kansas Health Care Association, (Attachment #13), appeared before the committee in support of **HB 2241**.

Kevin Fowler, Kansas Health Care Association, (Attachment #14), gave testimony in support of **HB 2241**.

Rodney Whittingrton, Wheatland Nursing Facility, (Attachment #15), gave testimony in support of **HB 2241**.

Larry Magill, Kansas Association of Insurance Agents, (Attachment #16), gave testimony in support of **HB 2241**.

John Sheridan, eHealth Data Solutions, (Attachment #17), presented written testimony in support of **HB 2241**.

Opponents:

Becca Vaughn, The Topeka Independent Living Resource Center, (Attachment #18), presented testimony in opposition to **HB 2241**.

Pamela Johnson-Betts, State Department on Aging, (Attachment #19), appeared before the committee in opposition to **HB 2241**.

Margaret Farley, Kansas Trial Lawyers, (Attachment #20), appeared before the committee in opposition to **HB 2241**.

Ernie Kutzley, AARP, (Attachment #21), presented testimony in opposition to **HB 2241**.

Kirk Lowry, Disability Rights Center, (Attachment #22), presented testimony in opposition to **HB 2241**.

Deanne Bacco, Kansas Advocates for Better Care, (Attachment #23), presented written testimony to the committee in opposition to **HB 2241**.

Hearing was closed on **HB 2241**.

Hearing on:

HB 2357: Establish a self audit program for insurance.

Proponents:

Bill Sneed, State Farm, (Attachment #24), appeared before the committee in support of **HB 2357**.

Brad Smoot, American Insurance Association, (Attachment #25), presented testimony in support of **HB 2357**.

Larrie Ann Lower, Kansas Association of Health Plans, (Attachment #26), appeared before the committee in support of **HB 2357**.

Representative Eric Carter, 48th District, (Attachment #27), presented testimony in support of **HB 2357**.

Hearing was closed on **HB 2357**.

Next meeting will be Thursday, February 17, 2005.

Meeting adjourned at 6:10 p.m.

House Insurance Committee Guest Sign Sheet Tuesday, February 15, 2005	
Name	**Representing**
Larry Magill	KAIA
Linda Berndt	KHCA
Rodney Whittington	Wheatland Nursing Center
[illegible]	KMHA
[illegible]	KID
Alex Kotoyantz	PIA
Jan Sibes	AARP
Russell Peterson	KTLA
Kirk Lowry	DRC
Kerrie Bacon	KCDC (KS Commission on Disability Concerns)
Bill Sneed	State Farm
Boyd Sweat	AIA / BeSS KC
Nannie Ann Shaver	KS Assoc. of Health Plans
David Hanson	Ks Ins Assns / PCI
Natalie Haag	Security Benefit
Ron Seeber	Hein Law Firm

Kansas
Insurance
Department

Sandy Praeger COMMISSIONER OF INSURANCE

COMMENTS ON
HB 2203—CONCERNING NONPROFIT MEDICAL AND HOSPITAL
SERVICE CORPORTATIONS
HOUSE COMMITTEE ON INSURANCE
February 15, 2005

Mr. Chairman and members of the committee:

Thank you for the opportunity to visit with you on behalf of the Kansas Insurance Department. House Bill 2203 would allow a nonprofit medical and hospital service corporation to cancel a policy for "cause" such as fraud.

For years the HMO's have had the ability to cancel for reasons of "cause". Last year we intended to include all other organizations writing health policies in Kansas by amending the insurance law with language contained in HB 2597. However, the particular statute we amended does not include Blue Cross Blue Shield of Kansas City for the simple reason that they are not an insurance company, rather a medical and hospital service corporation.

House Bill 2203 would resolve the inconsistency that remains in our insurance laws and we would encourage your support of the legislation. With that Mr. Chairman I would be happy to respond to any questions the committee may have.

Jarrod Forbes
Assistant Director
Government Affairs

House Insurance
Date: 2-15-05
Attachment # 1

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ATTORNEY AT LAW

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(785) 234-3687 (fax)
bsmoot@nomb.com

10200 STATE LINE ROAD
SUITE 230
LEAWOOD, KANSAS 66206

Statement of Brad Smoot
Legislative Counsel
Blue Cross Blue Shield of Kansas City
House Insurance Committee
Regarding 2005 House Bill 2203
February 15, 2005

Mr. Chairman and Members:

Blue Cross Blue Shield of Kansas City is a nonprofit medical and hospital service corporation serving the greater Kansas City area, including Johnson and Wyandotte Counties in Kansas. We provide insurance coverage to approximately 300,000 of your fellow Kansans. We are pleased to support 2005 House Bill 2203.

Federal and state laws require insurers to offer continued coverage to persons who have lost coverage for a variety of reasons (lost job and group coverage; employer drops coverage; etc.). Federal law recognizes an exception to that requirement when a person is dropped from coverage for "cause," such as fraud. Kansas law has long allowed HMO's to refuse continuation benefits when fraud is involved. Last year, the Legislature extended the right to refuse continuation benefits to other types of health policies. Unfortunately, we failed to amend the special laws governing BCBSKC, the only non profit medical and hospital service corporation doing business in Kansas. Those sections of Kansas law are amended by HB 2003 in the same manner as last year's bill, HB 2597.

We view this amendment as purely technical, allowing BCBSKC to operate in the same fashion as all other health insurance plans with regard to continuation of coverage when fraud is involved. We urge your support of 2005 HB 2003. Thank you.

House Insurance
Date: 2-15-05
Attachment # 2

To: Chairman Shultz and Members of the House Committee on Insurance

From: Craig Shultz

Date: February 15, 2005

Re: **Testimony in Support of HB 2305**

Some people injured or suffering damages as a result of a vehicle accident would be better off if the driver at fault had no insurance. This is due to what I believe is a quirk in the existing language of K.S.A. 40-284b. It is this language that should and can be changed quite simply by HB 2305.

The intent of underinsured motorist coverage (UIM) is to allow people to buy insurance to protect them in the event a wrongdoer causes injury and has some insurance but not enough to cover their damages. Uninsured motorist insurance (UM) provides the same protection when the wrongdoer has no insurance at all. Generally, these protections work satisfactorily unless the accident causes injury to more than two people. It is then that the present language can have an unintended effect. The problem can best be shown by example.

Duane Halsey was a Farm Bureau Insurance agent and purchased UIM coverage in the amount of $500,000, believing this would protect him in the event of damage by a wrongdoer with insufficient coverage. In a horrific accident, Mr. Halsey's wife was killed in a surburban in Southeast Kansas while traveling to a funeral. Three people in the surburban were killed and five others were severely injured. The semi truck driver had an insurance policy with a single liability limit amount of $1,000,000. The insurance company knew it did not have sufficient coverage to respond to damages which ultimately proved to total nearly $5,000,000. Thus, the company simply paid the $1,000,000 into court (in what is known as an interpleader action), the purpose for which was to then allow all of the injured people to divide this money proportionately. Through an extensive process of evaluating the damages, the court ultimately approved an apportionment of approximately $103,000 to Mr. Halsey which was obviously less than his actual damage estimated to be in excess of $400,000.

Mr. Halsey made a claim against his UIM coverage and District Judge Eric Yost agreed he should get the difference, finding that the fair interpretation of the UIM statute, as presumably intended by the legislature, would allow the claim. The Supreme Court reversed, holding that Mr. Halsey could not make the UIM claim because the limits of his policy ($500,000) did not "exceed" the truck policy ($1,000,000) in spite of the fact that his limits did "exceed" the amount he was able to recover from the truck's policy ($103,699.04). If the truck had no insurance, Mr. Halsey would have been entitled to make a claim for his loss up to $500,000 on his UM policy. But, because the truck had some coverage, even though insufficient, he was not allowed to make any claim at all.

This quirk in the law is no less of a problem for smaller claims. Last year, Rosa Esparza of Emporia and her children were similar victims. In her wreck, the liability insurance was $25,000/$50,000 and one person was killed and five people injured, at least two quite seriously. The wrongful death claim

was limited to the $25,000 individual limit and the other five individuals had to split $25,000. Rosa received $10,000 for her claim that had a value well in excess of $25,000. She didn't even get enough from that claim to cover her medical bills. She desperately could have used the money. She had a low limit UIM coverage but again, because her $25,000 policy did not exceed the $25,000 liability policy, she was unable to make any claim. Had there been no liability insurance, she could have made a claim for $25,000.

Language similar to the existing statute has been interpreted in other states by their courts to avoid this effect. Our Supreme Court, however, declined to do so and indicated that any change from a strict "limits to limits" comparison should be done by the legislature. HB 2305 appropriately changes the language to avoid these harsh and unnecessary results.

The Federal Tenth Circuit Court of Appeals interpreted similar language in New Mexico to mean the "proceeds actually available to an injured insured" which is the language adopted by HB 2305. This will adequately leave intact the original intention of the legislature to avoid "stacking" of UIM/UM limits but will protect those unfortunate persons who now suffer twice--first from the horrendous injuries at the hands of the underinsured wrongdoer and the second time by not even being able to make a claim against insurance they bought with the belief that they would be protected in such incidents.

I would respectfully urge that HB 2305 be passed into law.

Craig Shultz
Law Office of Craig Shultz, P.A.
205 East Central
Wichita, Kansas 67202
Telephone: (316) 269-2284

Polsinelli | Shalton
Welte | Suelthaus PC

Memorandum

TO: THE HONORABLE CLARK SHULTZ, CHAIRMAN
HOUSE INSURANCE COMMITTEE

FROM: WILLIAM W. SNEED, LEGISLATIVE COUNSEL
THE STATE FARM INSURANCE COMPANIES, INC

RE: HOUSE BILL 2305

DATE: FEBRUARY 15, 2005

Mr. Chairman, Members of the committee: My name is William Sneed and I represent the State Farm Insurance Companies ("State Farm"). State Farm is the largest insurer of home and automobiles in Kansas. State Farm insures one out of every three cars and one out of every four homes in the United States. We appreciate the to present out thoughts regarding House Bill 2305. Please be advised that as written, we oppose HB 2305.

This bill changes Kansas uninsured motorist coverage from a difference in limits to a modified difference in limits.

An underinsured motorist claim arises when the tortfeasor's liability limits, although in compliance with the FRL, are insufficient satisfy the claimant/insured's claim. Currently, Kansas is a difference in the limits state for underinsured motorist claim. The claimant/insured can recover the unpaid portion of their claim only to the extent that their UM limits exceed the tortfeasor's liability limits. If the UM limits are equal to or less than the tortfeasor's liability limits than there is no underinsured motorist coverage.

The bill expands the amount of underinsurance coverage available by changing the difference in the limits to the amount by which the uninsured limits exceed the actual amount recovered. In essence, it lowers the threshold from the amount of the tortfeasor's liability limits to the amount of damages.

The opponents will argue that this is a wash as the amount of recovery will usually equal the tortfeasor's limits. Unfortunately, that is not the case. There are often times where multiple claimants will exhaust the per occurrence limit without exhausting the per person limit. In those instances this amendment would create additional coverage.

An example might help. Tortfeasor's liability limits 20/40/ Claimant/Insured UM limits 20/40. Under the current law no underinsured motorist coverage is available because the UM limits do

not exceed the liability limits. This is true regardless of whether the claimants exhaust the liability coverage or not. The comparison is between the limits, not damages.

Under the amendment, if there were five claimants and each recovered 8,000 from the tortfeasor they would be entitled to another 12,000 from the UM carrier. The threshold has changed from limits to damages.

This amendment will increase the cost of insurance as underinsured motorist coverage will be expanded. This is not an issue without a cure. If an insured wants to insure adequate protection they can purchase higher UM limits or higher no fault limits.

Based upon the above, we respectfully request that the committee not act favorably on House Bill 2305.

I am available for questions at your convenience.

Respectfully submitted,

William W. Sneed

WWS:pmk

019646 / 032884
WWSNE 1169089

GLENN, CORNISH, HANSON & KARNS, CHARTERED

800 SW Jackson - Suite 900
Topeka, Kansas 66612
785-232-0545

TESTIMONY ON HB 2305
February 9, 2005

TO: **House Insurance Committee**

RE: House Bill No. 2305

Mr. Chairman and Members of the Committee:

Thank you for this opportunity to appear before the Committee. I am David Hanson and am appearing on behalf of the Kansas Association of Property and Casualty Insurance Companies, whose members are domestic insurance companies in Kansas, and also on behalf of PCI, the Property Casualty Insurers Association of America, with over 1,000 member companies across the country writing about 38% of the property-casualty market last year.

We are concerned with the provisions of House Bill 2305 as the proposed language could cause a significant shift in how the current underinsured motorist coverage is applied, how claims are paid and consequently the cost of such coverage could substantially increase. Current law has been in place for over 15 years and we are not aware of problems that would warrant such a significant change. Instead, we believe the existing provisions have been working well and are supported by a number of court rulings.

We appreciate your consideration of our concerns and would ask that the bill not be passed in light of these concerns.

Respectfully,

David A. Hanson

DAVID A. HANSON

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House Insurance
Date: 2-15-05
Attachment # 5

FarmersAlliance

Insuring Rural America Since 1888

Underinsured Motorist Coverage

House Insurance Committee

H.B. 2305

Mr. Chairman and Members of the Committee, I appreciate this opportunity to share our views on H.B. 2305.

My name is Rick Wilborn. I am Vice President of Government Affairs for the Farmers Alliance Insurance Companies. Farmers Alliance is a domestic property and casualty company that has been operating in and committed to Kansas since 1888. We also write property and casualty insurance in eight other contiguous states.

Upon review of H.B. 2305, we have the following concerns. The way the proposed language reads it would, in effect, remove the bodily injury limit of liability offset in a tort claim. For example: If Party A (negligent party) has $50,000 limit of liability, and Party B (plaintiff party) has an $80,000 claim, Party B would claim the $50,000 limit of liability from Party A. The balance comes from the Party B's underinsured motorist coverage, if they had limits of more than $50,000. The claimant collects from his own underinsured motorist coverage after he has exhausted the tort-feasor's bodily injury limits. Some argue that the claimant is paying a premium for a certain amount but is unable to collect it. Rates are developed based upon past loss history. The rates reflect that the bodily injury limit of liability offset is in place by existing law.

In addition, there is case law that further supports the validity of existing language. We think one of the most compelling arguments is that we all have a choice to make by selecting the limits of liability for our bodily injury, uninsured motorist and underinsured motorist coverages. If one thinks it is important to have higher limits, then that choice is available by selecting the appropriate limit from their insurance carrier.

The wisdom of the Kansas Legislature over the years has yielded one of the lowest underinsured rates in the United States. We strongly oppose any change to K.S.A. 40-284.

I would be glad to answer any questions you might have.

Richard E. Wilborn, CPCU
Vice President, Government Affairs

House Insurance
Date: 2-15-05
Attachment # 6

1122 N. Main, P.O. Box 1401 • McPherson, KS 67460
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Alliance Administrators, Inc. • Alliance Indemnity Company • Alliance Insurance Company, Inc.

STATE OF KANSAS

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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
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MEMBER: REVENUE, JUDICIAL, TRANSPORTATION, AND RETIREMENT BUDGET
UTILITIES

LEGISLATIVE HOTLINE 1 800 432 3924
TTY 785 296 8430

Proponent: SB 177/HB2039

Services performed by an individual as a sports official for a private, nonprofit organization that sponsors an amateur sports event, should not be treated as an employment setting, subject to the Workers Compensation Act. A "sports official" includes umpires, referees, judges, score keepers or other neutral participants in amateur sports events.

The not-for-profit corporation's sole mission is to provide the youth of their community with a quality environment for the enjoyment of sports. Thousands of youth between the ages of four and eighteen enjoy organized sports each summer and fall. Many of the umpires, referees, judges and score keepers are older youth working a summer job. The not-for-profit organizations are being forced by insurance carriers to pay exorbitant premiums for workers compensation to cover officials. For example, the Three and Two Baseball Club of Johnson County's potential cost for coverage is approximately $70,000.00, per year. Other youth sports in the State of Kansas are facing similar exorbitant demands from their insurance providers.

The States of Missouri, Virginia, Alaska, Montana, California and Oregon have already enacted laws exempting sports officials from the coverage of their workers compensation acts. This bill has been written to apply only to nonprofit organizations sponsoring amateur sports events. This change in law will help ensure that youth in the state of Kansas can continue to have organized sports opportunities at an affordable cost.

Thank you.

Eric Carter

House Insurance
Date: 2-15-05
Attachment # 7

Testimony to House of Representatives on Insurance
Paul Odle, Commissioner
Mick Murphy, General Manager
Olathe Youth Baseball, Inc.

February 15, 2005

Chairman Clark Schultz and other Honorable Representatives:

I am appearing today on behalf of Olathe Youth Baseball, Inc., in support of House Bill 2039 which, if made law, will benefit Olathe Youth Baseball, Inc., and other non-profit, amateur, youth, sports organizations.

Our organization is a not-for-profit corporation that provides the youth of our area with an organized, structured baseball program through the spring, summer and fall seasons. There is expected to be about 2,600 youth of ages 6-18 on about 175 teams for the coming season. Umpires are employed as independent contractors and are paid for their service on a game by game basis, with no other benefits except that they receive the same secondary accident and liability protection as is afforded all players and adult volunteers. The umpires range in age from 13 to adulthood and accept umpire assignments as fits their need and schedule. Many are school age and wanting summer evening and week-end employment not otherwise available. Adults are working for some extra income and for maintaining an interest in a sport they once enjoyed playing.

Given the number of umpires and the games to be played, it is estimated that should the Bill 2039 not be passed, we will be looking at adding around $18,000 for the worker's compensation of umpires. Whatever the cost turns out to be, it will necessarily be passed on to our players and their parents, but not before next year as enrollment for the current season is already under way. We take great pride at trying to provide the most affordable program and thereby being as accessible to as many of our youth as is prudently possible.

Olathe Youth Baseball, Inc., and it predecessor organizations, spanning a period of over 50 years has never had a known case of an umpire submitting a worker's compensation claim. Not knowing for how long this current legislation has been in effect and why it is being brought forward by the insurance carrier at this time is a mystery to us. It may be the fact that Continental Western, administered by Berkley Risk Administrators is the only carrier approved by the State to provide this coverage and therefore there is no other competition for this business.

We urge your support of Bill 2039, which will then greatly benefit and support our program.

Your questions are welcome.

Paul R. Odle
Mick Murphy

House Insurance
Date: 2-15-05
Attachment # 8

Testimony to House Bill 2039
Kansas House of Representatives Insurance Committee
Eric D. Blasdel, General Manager for the
Westurban Baseball Complex and Youth League

February 15, 2005

Chairman Schultz and other Honorable Representatives:

I am here today representing the Westurban Baseball Complex and Youth League and to support House Bill 2039 and to testify why its passage would be a benefit to us.

Westurban Baseball is a non-profit organization whose sole purpose is to promote and provide the youth of south central Kansas with baseball. Approximately 2100 kids between the ages of 4-18 enjoyed organized baseball at Westurban Baseball last summer and fall. The complex is also home to Friends University and several Wichita area High School teams. Westurban will host some 1700 events this year, ranging from league games to youth tournaments to national tournaments.

Westurban Baseball hires umpires to officiate games played at the Westurban Baseball each year. The pool of umpires we use will also officiate games for other local youth leagues, area high schools, the Kansas Christian Athletic Conference, the Missouri Valley Conference, the Big XII and the National Baseball Congress World Series. Unfortunately, Westurban Baseball is forced by its insurance carrier to pay premiums for workers compensation for umpires even though they are universally regarded as independent contractors by such institutions as the Internal Revenue Service and the State of Kansas. The Umpires view themselves as independent contractors and each season sign an agreement confirming this fact.

There are 3 reasons why we support this Bill:

Cost- Westurban would save approximately $11,000 of our $14,000 worker compensations expense. We spend 80% for umpires who work for 3-4 months and 20% is for our employees and volunteers. Our cost works out to be $129.41 per umpire. There are organizations that provide coverage to umpires that includes medical, liability and game loss income coverage for less than $40 per umpire. One of our formers board members owns an automotive repair shop with 6 full service bays and his workers comp insurance is one third of what ours is. The reason Work Comp coverage is so expensive is that umpires for youth leagues are "rated" the same as professional athletes such as the Chiefs and Royals and that insurances cost are based on actual histories of injured employees. I do not think one could confuse the risk that a professional athlete takes during games with the risk that a youth umpire takes when he officiates his games. I know that in over 15 yrs that I have been involved with Westurban we have had only one injury claim.

Fairness-We are aware that not all leagues provide workman's' comp insurance for their umpires. I do not intend to name those leagues, I will just state that they are not just youth leagues. This creates an advantage for those who do not pay. They can charge less to play, they can put more money into their facilities and they can pay their umpires more, all are statements that we have heard used against us. Now other youth sports organizations in the State of Kansas are facing similar exorbitant demands from their insurance providers, however there are still several organizations that do not pay. It

House Insurance
Date: 2-15-05
Attachment # 9

appears to us that it is left up to the Insurance Carrier who is required to pay and not the State of Kansas.

Exposure- I know this sounds ridiculous but by providing coverage we are increasing are exposure and liability, however we are. As stated earlier umpires view themselves as independent contractors, they work when and where they want to. So in they course of a week the might work a little league game, a high school game and finish by working a college 3-game stand. Our increased exposure and liability occurs due to the fact we have insurance coverage while others do not. An umpire will get hurt working for another organization and then work a game for us and claim to have been hurt during our game because he knows we have coverage. This happened twice during the 2004 season.

Several states have enacted laws exempting sports officials from the coverage of their workers compensation acts. House Bill 2039 has been written in a very narrow fashion to apply only to nonprofit organizations sponsoring amateur sports events and the officials working those events. I would appreciate you providing your support to House Bill 2039. Passage of this Bill in the current legislative session is imperative to Westurban Baseball and many other youth sports organizations.

I would like to thank the Chairman and the committee for this opportunity to testify and I will be happy to answer any questions the committee might have.

Eric D Blasdel
General Manager
Westurban Baseball

Testimony to House of Representatives on Insurance
Jeff Chalk, Executive Director
The 3&2 Baseball Club of Johnson County

February 15, 2005

Chairman Clark Schultz and other Honorable Representatives:

I am appearing today on behalf of The 3&2 Baseball Club of Johnson County in support of Senate Bill 177 which, if made law, will benefit The 3&2 Baseball Club of Johnson County and many other non-profit, amateur, youth, sports organizations.

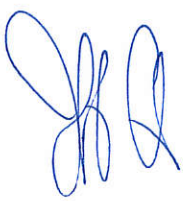
The purpose of this bill is to provide an exemption from the coverage of the workers compensation act for those who serve as an umpire, referee, judge, scorekeeper or timekeeper in sporting events sponsored by non-profit, youth, sports organizations.

3&2 Baseball is a not-for-profit corporation that's sole mission is to provide the youth of the community with a quality environment for the enjoyment of the baseball experience. Approximately 8500 kids between the ages of 4-18 enjoyed organized baseball at 3&2 last summer and fall. 3&2 employs umpires as independent contractors to officiate the many games played each year. The umpires control their own schedule and many officiate games for other organizations during the same season. The umpires are compensated for each game they umpire, receive no other benefits of any kind and pay for their own equipment. Many of the umpires are kids working summer jobs.

Unfortunately, for the first time in its fifty-plus years of operation, 3&2 is being forced by its insurance carrier (Continental Western, administered by Berkley Risk Administrators) to pay premiums for workers compensation insurance for umpires. The amount demanded for the 2003 season is $67,266 based on overall umpires' wages of $324,816 or $18.87 per $100 of wages. By way of comparison, the rate for grounds crew personnel is $6.32 per $100 of wages. The Baseball Club's insurance provider is demanding payment of this premium despite the fact that an umpire-related workers compensation claim has never been submitted against 3&2 and 3&2's liability for such a claim, if made, would be questionable at best. Should 3&2 have to pay that premium, it would be forced to raise fees to the point that many children would be sent to the sidelines because of the high player fees. Many other youth sports organizations in the State of Kansas are facing similar exorbitant demands from their insurance providers.

Currently, the States of Missouri, Virginia, Alaska, Montana, California and Oregon have enacted laws exempting sports officials from the coverage of their workers compensation acts. The bill before you is written in a more narrow fashion than the laws of the referenced states such that it only applies to sports events sponsored by nonprofit organizations. The bill creates a legitimate and narrow exemption and will help ensure that the youth of the State of Kansas can continue to enjoy organized sports at a reasonable cost.

I would be glad to answer any questions.



House Insurance
Date: 2-15-05
Attachment # 10

STATE OF KANSAS

L. CANDY RUFF
REPRESENTATIVE FORTIETH DISTRICT
LEAVENWORTH COUNTY
321 ARCH
LEAVENWORTH, KANSAS 66048
(913) 682-6390

STATE CAPITOL, ROOM 278-W
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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
RANKING MINORITY MEMBER: COMMERCE & LABOR
MEMBER: FEDERAL AND STATE AFFAIRS
WILDLIFE, PARKS & TOURISM

HB 2039 Testimony
By Rep. L. Candy Ruff

When the Kansas Legislature passed a workers compensation law several years ago protecting volunteer fire fighters, we made a strong statement. Those who serve the community in a quality of life service need workers compensation coverage. A volunteer or in the case of someone being paid a small stipend for their community service will not have the assurance of workers compensation coverage if HB 2039 becomes law.

Should the State decide this a good policy, will those sports officials be told up front that any injuries suffered from their participation be at their own risk? How will that disclosure be made?

And what about private non-profit organizations using a city or county owned sports facilities? Will the exemption be extended further? And what about those same sports officials playing at privately owned sports facilities? Will those private companies be exempted, too?

Workers compensation isn't easy to understand. Usually considered in the House Commerce and Labor Committee, these bills have many ramifications and unintended consequences.

On the surface HB 2039 seems simple and almost logical. But look further into the state policy we are creating. Participating in activities that enhance the quality of life is honorable and much needed. But to deny worker compensation coverage to sports officials dampens the enthusiasm for participation.

Like volunteer firefighters, these sports officials have other jobs. Should they be hurt in the course of their involvement, it could have a devastating effect on their lives. We have already stated that certain types community-enhancing activities must be covered by workers compensation.

I truly believe that sports officials fall into that category.

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Chairman Shultz and Members of the House Insurance Committee

From: F. Russell Peterson for the Kansas Trial Lawyers Association

Date: February 15, 2005

Re: **HB 2039**

Mr. Chairman and members of the Committee, my name is Russ Peterson and I am appearing today to testify on HB 2039. I'm a practicing attorney and member of the Kansas Trial Lawyers Association. The Kansas Trial Lawyers Association is a statewide, nonprofit organization of lawyers who represent consumers and advocate for the safety of families and the preservation of the civil justice system. We are pleased with the opportunity to provide you with written and oral testimony on HB 2039.

HB 2039 amends K.S.A. 44-505 to exempt from coverage under the workers compensation act "sports officials" working for a "private nonprofit organization which sponsors an amateur sports event" unless the sports official is "otherwise employed by the private nonprofit organization". "Sports official" is defined as an individual "who performs services as an umpire, referee, judge, scorekeeper or timekeeper," or is a "neutral participant" in the amateur sports event.

KTLA has several concerns with HB 2039. The proposed exclusion may violate the equal protection clause, since it applies only to sports officials working for private, nonprofit organizations, and would not bar compensation to sports officials doing exactly the same work for a public entity (such as a school district or city recreation department) or a for-profit organization. There is no rational basis for making a distinction between workers so similarly situated.

Second, sports officials who are hired as independent contractors, rather than employees, are already excluded from the Workers Compensation Act. However, simply calling a worker an independent contractor will not exclude him or her from coverage under the Act if the worker meets the legal criteria defining an employee for workers compensation purposes. An addition concern is that a worker who is under 18 cannot legally enter into a binding contract, and thus cannot be considered an independent contractor. To the extent that the intent of the bill is limit workers compensation coverage of minor "sports officials", we wonder at the policy impact of not protecting children whose parents may

House Insurance
Date: 2-15-05
Attachment # 12

Terry Humphrey, Executive Director

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not have health insurance to cover their child's injuries while serving as a "sports official".

Third, injuries to sports officials are rare, and few workers compensation claims by sports officials involve more than minor medical treatment. The wages paid to sports officials by nonprofit organizations are low, so any disability compensation will likewise be low. If high premiums demanded by an insurer for the nonprofit organization prompted this bill, the premiums cannot be justified by the claims history or the risk to be insured. We question whether the "sports officials" intended to be covered by the act are being rated appropriately by the insurer. If not, addressing the rating problems first would be more appropriate than creating a new exemption in the workers compensation act.

Thank you for the opportunity to provide you with comments on HB 2039. We respectfully request your opposition.

KHCA

Member of ahca

Kansas Health Care Association
(785) 267-6003 www.khca.org
Fax (785) 267-0833 Email: khca@khca.org

February 15, 2005

Testimony

Before the
House Insurance Committee
By
Linda Berndt, President/CEO
KANSAS HEALTH CARE ASSOCIATION

Committee Chairperson Shultz, Vice Chairperson Carter and Members of the Committee:

The Kansas Health Care Association, representing approximately 200 long-term-care facilities including professional nursing homes, assisted living facilities and long-term-care units of hospitals, appreciates the opportunity to speak in support of HB 2241.

Our profession is charged with caring for Kansas frail and elderly. Never in our history has this been more challenging than the past few years. We continue to be a profession-in-crisis. With Medicare cuts and Medicaid cost shortfalls, with exponential growth of liability insurance premiums, with food and utility costs skyrocketing, our facilities struggle to provide the high level of quality of care for which they are renowned.

While funding continues to be problematic with our current budget constraints, there are things we can do to reduce costs while assuring ongoing quality care improvements. Today you will hear from a variety of witnesses about HB 2241 explaining the technical aspects, the practical aspects and how the bill will encourage and improve upon best care practices in our profession.

You know from experiences in your Districts that your nursing facilities are implementing quality care initiatives. Both quality assurance and quality care processes are critical components of the risk management process. We know that things must change; that we must address this crisis. Nearly 30% of all Kansas nursing facilities faced with skyrocketing liability insurance premiums are going 'bare' or without insurance. That is not good public policy. That is not 'consumer friendly.'

Today you have the opportunity to turn this crisis around. You have the opportunity to improve the future for Kansas elders. We believe that passage of this bill will create the following positive outcomes:

House Insurance
Date: 2-15-05
Attachment # 13

- Improved quality of care outcomes. By encouraging facilities to gather documentation, to assess care outcomes and implement proven quality assessment processes, standards of care will improve. (Hospitals and doctors in Kansas currently have 'peer review' protections thus encouraging open assessment for improved care.)

- Retention of high quality, involved Medical Directors. Increasingly Medical Directors are resigning from nursing facilities in Kansas, stating that the regulatory environment and increased liability costs make this an unattractive relationship. Since having a Medical Director is federally mandated plus it is an important key to quality of care, we could do more on Quality Assurance side if protections were in place.

- Consumer protection continues for cases of abuse, neglect or any injuries of unknown origin. Residents of nursing facilities still maintain their individual rights to proper care. Individual residents' medical records and their plan of care are still discoverable and admissible in litigation. Survey reports remain public record and are available in every nursing facility in Kansas, most often posted by the front door.

- Better communication between Surveyors, Residents, Family Members and Care Providers: In today's environment, providers are concerned that there is a great deal of risk in conducting critical self-assessments of care. It's almost never a case of wrong doing, rather a case of 'could we have done better?'

- Reduced liability costs for both providers and the State as the Medicaid provider. Nursing facilities have seen between 100-1000% increases in liability insurance in the past 5 years. There are no admitted insurance carriers in Kansas writing for the nursing facility profession. In some cases, liability costs are greater than food costs per day.

Would you not want this continuing quality process to take place in any setting where health care services are being provided? Doctors and hospitals have this ability today. We believe it is time to give that same right to nursing facilities. It is all the more critical as those who enter a nursing facility are more ill, have higher acuity levels than ever before in our history.

We ask that you support HB 2241.

LAW OFFICES OF
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Testimony Before the House Committee on Insurance Supporting House Bill No. 2241

Kevin M. Fowler of Frieden, Haynes & Forbes on Behalf of the Kansas Health Care Association, Inc.

February 15, 2005

Chairperson Shultz, Vice-Chairperson Carter and members of the Committee, my name is Kevin Fowler. I am a partner in the Topeka law firm of Frieden, Haynes & Forbes and I have been licensed to practice law in Kansas for nearly 23 years. During the past twelve years, I have devoted a significant amount of my professional time and attention to legal matters affecting the interests of Kansas adult care homes and their residents. I am appearing before the Committee on behalf of the Kansas Health Care Association, Inc., and we are pleased to support House Bill No. 2241.

This bill amends the Kansas Adult Care Home Licensure Act (which is currently codified in Chapter 39, Article 9 of the Kansas Statutes Annotated) to require each adult care home licensed in Kansas to establish and maintain a "risk management program" in accordance with the requirements currently applicable to medical care facilities under the provisions of K.S.A. 65-4922(a). Under the bill, each adult care home must establish and maintain a written risk management plan or policy that must be approved by the Secretary of Aging as a condition of licensure and any reports and records reflecting the results of any internal or external assessments of performance in providing care and services by an adult care home are neither subject to discovery nor admissible in any civil action under Kansas law.

The Legislature has previously recognized that implementation of quality assurance programs for health care services, such as risk management plans and peer review, is sound policy that promotes the public's general health, safety and welfare. *See, e.g.,* K.S.A. 65-4929(a) (addressing the purpose of risk management programs). Although the Legislature has enacted a variety of quality assurance requirements and related protections for medical care facilities and health care providers, no Kansas statute includes any corresponding provisions applicable to adult care homes.

House Insurance
Date: 2-15-05
Attachment # 14

Under current provisions of Kansas law applicable to medical care facilities and health care providers, institutionalized assessments of performance in providing services promotes the interests of patients in quality health care while protecting medical facilities and professionals from the inappropriate or otherwise unwarranted use of reports, records and information generated during the assessment process. Simply stated, House Bill No. 2241 is designed to accomplish these objectives for the residents of adult care homes in Kansas and their providers of care and services.

Kansas adult care homes that participate in the Medicare and/or Medicaid Programs are currently required by federal law to establish and maintain a quality assurance program that is substantively identical to the risk management program contemplated in House Bill No. 2241. However, Kansas adult care homes that do not participate in either the Medicare or Medicaid Programs are not required by state law to establish or maintain any form of quality assurance or risk management program. This bill accordingly promotes conformity between federal and state law and ensures that all Kansas adult care homes are subject to the same requirements regarding the establishment and maintenance of quality assurance or risk management programs.

An essential component of this bill also ensures that records and reports involving internal and external assessments of quality in the delivery of care and services by Kansas adult care homes are neither subject to discovery nor admissible in any civil action under Kansas law. These restrictions do not remove any information from the public domain but provide Kansas adult care homes with a measure of the same protection currently afforded medical care facilities and health care providers under the state-mandated quality assurance programs known as risk management and peer review. As a matter of simple fairness, adult care homes should receive at least some of the protection currently enjoyed by medical facilities and health care providers from the unwarranted or otherwise inappropriate use of quality assessment information.

The Kansas Health Care Association also believes that the restrictions against discovery or admission of reports and records relating to any internal or external quality assurance or risk management process will also help Kansas adult care homes address the staggering and ongoing increases in liability insurance premiums that threaten their ability to provide quality care and to avoid insolvency or bankruptcy. For further information, Page 3 of this testimony provides a brief discussion of the alarming increases in liability insurance premiums that adversely affects all Kansas adult care homes and their residents.

The Kansas Health Care Association believes that House Bill No. 2241 provides a much needed amendment to the Kansas Adult Care Home Licensure Act and that this bill merits your favorable consideration.

KANSAS HEALTH CARE ASSOCIATION
Insurance Crisis in Long Term Care

The Kansas Health Care Association (KHCA) members continue to experience escalating costs for liability insurance when they can find liability coverage at all. Currently, Kansas nursing facilities are dealing with per bed premiums that have risen as much as 750% or more in recent years. In fact, the recent increases have been so substantial that as many as 30% of Kansas nursing facilities are "going bare" or operating without coverage. The insurance crisis is precipitated largely by two factors in Kansas:

- Claims and malpractice suits filed against long term care using inspection reports, including the Statement of Deficiencies document (CMS Form 2567), as evidence of inadequate care.

- Insurance companies basing rates on the number of deficiencies cited per survey and/or claims experience in other states.

Astronomical increases of this magnitude for the cost of liability insurance have a direct bearing on Medicaid rates and, therefore, should be of significant concern to state government. The cost of liability insurance premiums is included in the reimbursement rate that NFs receive to provide care and services to Medicaid residents. According to a recent study by Aon Risk Consultants, Inc., growing lawsuit costs have absorbed 21% of the increase in the U.S. average Medicaid rate from 1995-2002.

Kansas Department on Aging (KDOA) cost report data for calendar year 2001 shows that Kansas nursing facilities and nursing facilities for mental health participating in the Medicaid and MediKan Programs spent $8.6 million in liability insurance premiums. KDOA's cost report data for calendar year 2003 also reflects that such liability insurance costs nearly doubled, increasing to $14 million, over the next two years. Because approximately 55% of Kansas nursing facility reimbursement is from Medicaid, the Kansas State Medicaid Program paid at least $4.7 million for nursing facility liability insurance premiums in 2002 and at least $7.7 million for such premiums in 2003. These costs have increased dramatically in recent years and are certain to be significantly higher in the future. For example, KDOA data documents that total insurance costs for Kansas nursing facilities grew from $5.7 million in 1999 to $18.5 million in 2003, largely due to unprecedented increases in liability insurance premiums.

While an aggregate increase in insurance costs of 308% over five (5) years is alarming, these figures actually understate the severity of the liability insurance premium crisis. Some nursing facilities have seen their premiums increase 750% to 1,000% and others have been priced out of the market altogether. It is currently estimated that 30% of all Kansas nursing facilities operate without liability insurance and additional premium increases will predictably cause this percentage to grow in the future.

Wheatland
Nursing Center
skilled nursing by Americare

My name is Rodney Whittington. I am the administrator of Wheatland Nursing Center Russell, Kansas, a facility of Americare. We have 50 residents; we have 58 employees, our payroll is $1.2 Million a year and we pay nearly $300,000 in taxes annually. We are active in the community and have shown our commitment by investing thousands of dollars on improvements not just in the facility itself, but also on items that improve the care that we give.

This facility was a troubled facility, one that only a few years ago had a ban on admissions due to serious quality care issues. I am happy to report now that we have vastly improved our quality of care, that we have committed to the national Quality 1st Initiative and that we are sought out by families and their loved ones as a safe and loving place to reside. We have several repeat customers that we rehab to home following accidents and surgical procedures.

Having personally worked to improve this facility, a facility that is home to so many and is an important part of Russell, Kansas' economic viability; I have learned some lessons that I hope you will allow me to share with you.

Lesson #1: Quality of care is not just about survey results. It is more about customer outcomes and satisfaction. Quality is a way of doing business, a way of communicating with residents, family members, staff, surveyors and our community. It requires a great deal of open exchange, of sharing findings, cumulating data, and critically assessing that data.

Lesson #2: Short term outcomes don't always reflect the effort and care given to those outcomes. That's an important part of the quality assessment process. It takes time and everyone's input to improve. It is not enough to fix a problem, it is important to know why and how the problem occurred to prevent recurrences. We employ a QA nurse whose specific role is to head our QA processes. We have a process that is conducted annually called an ISA (internal services assessment). It allows us to identify areas for improvement and therefore create more satisfied customers. It is a week long process that mimics the survey process.

Lesson #3: You cannot achieve the level of improvement in quality care we want to achieve if there is fear in documenting, in gathering data, in being critical of our processes and programs. Some problems may be systemic; some may be due to lack of procedures, regardless; we must be open and honest in our assessment. If these processes aren't protected there is no incentive to do them.

I hope that you will support HB 2241. It is tough to be a health care provider; it is even tougher when you have to be concerned that the very things you are doing to improve quality of care are the same things that could be used in litigation. Thank you for your time and consideration.

Rodney Whittington Jr.
Administrator, Wheatland Nursing Center

House Insurance
Date: 2-15-05
Attachment # 15

320 South Lincoln • Russell, Kansas 67665 • 785.483.5364 • fax 785.483.4981 • www.americareusa.net

Testimony Before the House Insurance Committee
On HB 2241
By Larry Magill
Kansas Association of Insurance Agents
February 15, 2005

Thank you mister chairman and members of the committee for the opportunity to appear today in support of House Bill 2241. My name is Larry Magill and I'm representing the Kansas Association of Insurance Agents. We have approximately 425 member agencies across the state and another 125 branch offices that employ a total of approximately 2,500 people. Our members write approximately 70% of the business property and liability insurance in Kansas.

We have been concerned for more than four years with the alarming increase in rates and lack of availability of nursing home liability insurance. Our members who specialize in providing this type of insurance have testified on numerous occasions that there is a crisis in the cost and availability of adult care home insurance.

Committees, task forces and interims have looked at the issues involved but so far no action has been taken to relieve some of the crushing cost of liability insurance that could, conceivably, cause some nursing homes to close their doors.

We urge you to support HB 2241 as a responsible way to encourage sound risk management principals in nursing homes and help them manage their liability costs while improving their standards of care.

Kansas Has Loss & Insurance Problems

What industry have you ever known, that was unhappy with its insurance availability and cost, that didn't think they were being penalized for losses occurring in other states? And while Kansas has not had the severe problems of some states like California, Texas or Florida, neither have our nursing homes paid the premiums that a Florida nursing home pays.

I can tell you that one of the carriers that used to write nursing homes in Kansas and had, at one time, 55 locations insured with over 3700 beds had a ten-year general liability loss ratio of 179.52% for 1989 to 1998 and a loss ratio in 1998 of 615%. They have since left the market. After rates had gone up significantly for several years, one of our members approached them to reconsider their exiting the market but with no success. They felt that they couldn't charge enough to cover the risk and that it was too difficult to predict and volatile. Most of that member's business is now in Lloyds of London, a non-admitted market of last resort.

Last year one of my members told me that one of their commercial accounts had asked a large chain of nursing homes for a certificate of insurance and was told that they were going bare on their liability. Many of the homes, possibly correctly, feel that if they just "turn over the keys" to the plaintiff's attorney, that the suits will go away. They doubt

that the plaintiffs want to run the facility. That's an admittedly desperate strategy but not without some merit.

Nursing homes have experienced a tremendous increase in their liability insurance costs in the last few years from rates of around $25 per bed four years ago to anywhere from $450 to $1,500 per bed today. They are being moved from an occurrence form to a claims made coverage form where rates increase over 3-4 years as they progress to fully developed claims made rates. And their coverage will often have anywhere from a $25,000 to $50,000 deductible on liability claims. In states like Florida, the rate can be as high as $6,000 per bed. This has put a tremendous strain on nursing homes' budgets and on state Medicaid budgets.

The people who do not like the solutions to the problem will deny that a crisis exists. But by any reasonable definition, this is an industry with an insurance crisis. Remember too that insurance companies are in the business of providing insurance. The hundreds of licensed insurers in Kansas would not ignore an industry if there were a reasonable chance to make a profit.

Risk Management Works

The insurance industry has long believed in risk management and loss control. Many insurance companies provide the services as part of the premium charge to all kinds of businesses they insure for all types of insurance. Similar requirements have worked quite well in the medical malpractice arena.

KAIA **supports HB 2241** requiring adult care homes to establish a risk management program for the following reasons:

- It is similar to requirements placed on medical providers in 1986 in Kansas that have worked quite well.
- The survey or inspection process for long-term care facilities is substantially analogous to the "peer review" process for other health care providers. "Peer review" documents involving doctors and hospitals are neither admissible as evidence in Kansas courts nor subject to discovery or disclosure in the civil litigation process.
- Risk management and loss control activities have long been recognized as an effective means to reducing losses and improving the safety of operations.
- The bill should encourage insurers to look favorably on returning to the Kansas insurance market for adult care homes. The market didn't disappear overnight and the rates didn't shy rocket to their current levels in one leap. The market will return when insurers are convinced that the losses are stable and predictable and an adequate rate can be charged to make it profitable.

We urge the committee to act favorably on HB 2241. It is one of the few ways the legislature can bring relief to spiraling nursing home costs and should help return admitted insurers to the Kansas insurance market for nursing home liability.

e-Health Data Solutions
https://www.ehealthdatasolutions.com
2634 Dartmoor Road
Cleveland Heights, Ohio 44118 Office: 216-371-2350 Cell: 216-387-5400

Testimony of John Sheridan on the proposed amendment of KSA 65-4922(a) and 65-4922(d).

My Name is John Sheridan, I one of the founders of eHealth Data Solutions, a company that serves Kansas' nursing homes use the information they produce from resident assessment and treatment to measure and improve quality. Among those we serve are the Meridian Nursing. We ask that you support HB2241 in order to improve care to Kansas' residents, lower costs and to encourage workforce development in the long-term care sector serving Kansas residents. We request that the following points receive your consideration.

1. Adult Care Homes licensed to participate in Titles XVIII (Medicare) and/or XIX (Medicaid) of the Social Security Act are medical care facilities by the benefits provided under the Act and are under contract to the State and Federal Authorities as participating providers.

2. It is standard and accepted practice for medical care facilities to have a process for Health Care Quality Improvement. Such a quality improvement process as defined by the Kansas Risk Management Committee law must examine incidents, occurrences, as well as unusual occurrences to evaluate if standards of care are followed and the actions and processes of clinical and other services were appropriate.

3. If the medical care location is a hospital then Kansas law protects such risk management discussion from discover and use in civil actions.

4. If such medical care location is an adult care home then Kansas' law does not protect the care provider and as such is not granting equal protection under Title XVIII and XIX to the Medicare/Medicaid Beneficiaries and their providers of Care.

Based on the enumerated points above and our support for the testimony of others present today, we encourage the Legislature to amend Kansas law to provide protections to adult care homes who are licensed under Title XVIII and XIX to provide care. Doing so will empower these organizations to implement continuous quality improvement. This approach will benefit the State by reducing its liability costs (70% of every judgment is paid for by the state).

With such protections, it is reasonable that the State expects a report and conduct evaluation of the protected activity. Such evaluation is now required of medical care facilities under the statue. Similar evaluation should apply to the adult care homes. To foster innovation and rapid improvement, we urge the Legislature to study such incidents and occurrences as reported by adult care homes in confidential sessions and to evaluate how to award financial recognition to those organizations who have improved quality and in doing so also reduced cost to the State of Kansas.

Topeka Independent Living Resource Center

785-233-4572 V/TTY • FAX 785-233-1561 • TOLL FREE 1-800-443-2207
501 SW Jackson Street • Suite 100 • Topeka, KS 66603-3300

Testimony
Presented to the Insurance Committee
February 15th, 2005
by Becca Vaughn

Dear Chairperson Shultz and Committee Members,

My name is Becca Vaughn. I am the Director of Advocacy Services at the Topeka Independent Living Resource Center (TILRC). The Topeka Independent Living Resource Center (TILRC) is a 501(c)(3) not-for-profit civil and human rights organization. Our mission is to advocate for equality, justice and essential services for a fully integrated and accessible society for all people with disabilities. Our center is owned, operated and governed by a majority of people with disabilities, representing people of all ages and cultural diversity. Thank you for the opportunity to address the committee on this important issue of civil liberty..

HB 2241 would do two things that affect the lives of valuable Kansans who reside in nursing facilities. The first thing which causes no harm and may in fact increase the accountability of these facilities by requiring that they establish and maintain a risk management program. The second thing would undermine the constitutional right to civil trial by jury for some of our most vulnerable and valuable citizens, elderly and disabled Kansans.

HB 2241 and other similar legislative initiatives (SB 430 & HB 2306) that have come before it are only unabashed attempts to overhaul the entire state judicial system on the backs of the poor, elderly and people with disabilities who live in nursing facilities who are victims of the crimes of abuse, neglect, exploitation, and death. First let me express the extreme distaste we hold for this legislative attempt to belittle true crimes against people with disabilities, of all ages, residing in nursing facilities. Instead of the nursing facility industry coming to you with proposals for assuring the highest quality of care for their residents, the nursing facilities have come to you with proposals to limit their exposure to liability when the people we have entrusted to their care are abused, neglected, mistreated, robbed and even die. A facility that is upholding the standards of accountability would not be afraid of information contained in any report/inspection and would have no reasons to fear its use in court. The only effect would be to eliminate one of the residents only "tools" to provide judicial relief if they are injured or harmed while living at the facility.

We oppose HB 2241 unless amended to delete lines 12-21 on page 2.

For equal rights and justice,

Becca Vaughn
Director of Advocacy Services

House Insurance
Date: 2-15-05
Attachment # 18

Advocacy and services provided by and for people with disabilities.

Topeka Independent Living Resource Center

785-233-4572 V/TTY • FAX 785-233-1561 • TOLL FREE 1-800-443-2207
501 SW Jackson Street • Suite 100 • Topeka, KS 66603-3300

HB 2241
Additional Resources RE: Reports/Inspections

One of our five, federally mandated core areas of service is "Deinstitutionalization," assisting people to move out of institutional settings and live free in a home of their choice.

Our 20 plus years of providing assistance to residents of care homes moving back into the community in a home of their own has provided us with opportunity to become familiar with many facilities. Central to this familiarity is accessing various sources of information and reports which discuss specific deficiencies that directly and most often adversely affect the resident we are assisting.

These facilities take our public dollars and in fact do owe the citizens of Kansas a great degree of accountability. We as a nation trusted them with our most precious members of society for their care and welfare for decades. It has been through various accountability standards and reporting vehicles that we now understand that separating valuable and precious residents (a older person) from the rest of our community is harmful and does not benefit anyone except the nursing home industry.

I would encourage you to use the federal Medicare website, http://www.medicare.gov/NHCompare/Include/DataSection/Questions/SearchCriteria.asp?version=default&browser=IE%7C6%7CWin2000&language=English&defaultstatus=0&pagelist=Home to review reports which outline many areas of defiencies of nursing facilities in our state. Often these conditions indicate level of care, or in this case, the lack of care, of a given facility. The effect of HB 2241 would be to insulate the most egregious violators, those being the facilities demonstrating a pattern and practice of neglect and abuse, from accountability. Insofar as nursing facility care is the presumptive long-term care alternative for elderly Kansans and Kansans with disabilities, the responsibility to maintain safe, healthy, supportive, and dignified care, is not a negotiable obligation.

Session of 2005

HOUSE BILL No. 2241

By Committee on Insurance

2-1

AN ACT concerning adult care homes; relating to risk assessment plans and inspection reports; amending K.S.A. 39-935 and repealing the existing section.

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

Section 1. K.S.A. 39-935 is hereby amended to read as follows: 39-935. *(a)* Inspections shall be made and reported in writing by the authorized agents and representatives of the licensing agency and state fire marshal, and of the county, city-county and multicounty health departments as often and in the manner and form prescribed by the rules and regulations promulgated under the provisions of this act. Access shall be given to the premises of any adult care home at any time upon presenting adequate identification to carry out the requirements of this section and the provisions and purposes of this act, and failure to provide such access shall constitute grounds for denial or revocation of license. A copy of any inspection reports required by this section shall be furnished to the applicant, except that a copy of the preliminary inspection report signed jointly by a representative of the adult care home and the inspector shall be left with the applicant when an inspection under this section is completed. This preliminary inspection report shall constitute the final record of deficiencies assessed against the adult care home during the inspection, all deficiencies shall be specifically listed and no additional deficiencies based upon the data developed at that time shall be assessed at a later time. An exit interview shall be conducted in conjunction with the joint signing of the preliminary inspection report.

(b) The authorized agents and representatives of the licensing agency shall conduct at least one unannounced inspection of each adult care home within 15 months of any previous inspection for the purpose of determining whether the adult care home is complying with applicable statutes and rules and regulations relating to the health and safety of the residents of the adult care home. The statewide average interval between inspections shall not exceed 12 months.

(c) Every adult care home shall post in a conspicuous place a notice indicating that the most recent inspection report and related documents may be examined in the office of the administrator of the adult care home.

Upon request, every adult care home shall provide to any person a copy of the most recent inspection report and related documents, provided the person requesting such report agrees to pay a reasonable charge to cover copying costs.

(d) Each adult care home shall establish and maintain a risk management program in accordance with the provisions of subsection (a) of K.S.A. 65-4922 and amendments thereto. No later than 60 days prior to the time for renewal of its license in 2006, each adult care home shall submit its plan for establishing and implementing such risk management program to the department on aging for action in accordance with the provisions of subsection (d) of K.S.A. 65-4922 and amendments thereto.

~~*Any reports and records reviewed, obtained or prepared by the department on aging in connection with any reportable incidents referred for investigation and analysis under such risk management program, including any reports and records reflecting the results of an inspection or survey under this chapter or in accordance with regulations, guidelines and procedures issued by the United States secretary of health and human services under titles XVIII and XIX of the ''social security act,'' 49 Stat. 620 (1935), 42 U.S.C. 301, as amended, shall not be subject to discovery nor shall they be admissible in any civil action under the laws of the state of Kansas.*~~

Sec. 2. K.S.A. 39-935 is hereby repealed.

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

2005 Kansas Legislative Session

Testimony Presented To
The House Committee on Insurance
by
The Kansas Department on Aging
Concerning House Bill 2241

Mr. Chairman and members of the Committee, thank you for the opportunity to present this testimony on House Bill 2241.

Background

House Bill 2241would require adult care homes to implement statutory risk management programs in accordance with K.S.A. 65-4922, sometimes referred to as the hospital risk management statute.

K.S.A. 65-4921, et seq. was enacted in 1986 as part of comprehensive medical malpractice reform legislation. At that time, it affected primarily hospitals and ambulatory surgical centers, otherwise defined as "medical care facilities."

Starting in 1987, all medical care facilities were required to submit risk management plans to the Kansas Department of Health and Environment. In talking with the person responsible for implementing the risk management program for KDHE in 1987, 166 plans were reviewed that year. Although few plans were approved upon initial submission, all but 17% were approved upon second submissions.

Starting in early 1988, KDHE initiated a risk management site review process to insure implementation of risk management programs. Staffing for 166 facilities consisted of three FTEs- one director and two master's level nurses.

Funding for KDHE's risk management oversight program came from the Health Care Stabilization Fund within the Office of the Insurance Commissioner. After five years of implementing risk management programs in hospitals, the oversight program was assumed by general KDHE surveyors.

Discussion

Current Law

Currently, adult care homes are not required to submit risk management plans to any state agency. However, they must provide residents with quality of care and quality of life as set forth at K.A.R. 28-39-152 and K.A.R. 28-39-153. Moreover, adult care homes must comply with state reporting requirements concerning allegations of resident abuse, neglect, and exploitation as set forth at K.S.A. 39-1401 et seq.

Proposed Law Under HB 2241

Approximately 600 adult care homes would be affected by passage of HB 2241, or 3.6 times the number of medical care facilities affected by passage of the original risk management law in 1986. It is estimated that an additional 7.0 FTE for staff members would be needed to review and approve plans in 2006.

The heart of Kansas risk management is good faith peer review. K.S.A. (2003 Supp.) 65-4921(f) defines a "reportable incident" in terms of the applicable standard of care. In other words, the risk management law requires a health care entity to determine whether its practitioners are meeting applicable standards of care with respect to identified clinical incidents. Under Kansas law, it is not enough to simply review a clinical incident. Kansas law requires a duly empowered peer review committee to determine whether each practitioner involved in an incident met the standard of care expected for their clinical discipline. Good faith peer review requires hard work and difficult decisions. That duty cannot be discharged lightly.

As the Secretary of Aging I can not support this bill as proposed. KDOA is however, supportive of any measures which are designed to improve the quality of resident care. The bill as written solicits several significant questions, some of which include:

1. What is the bill's purpose? Is it to require good faith peer review in adult care homes or to protect inspection reports and survey documents from discovery in civil litigation? If good faith peer review is intended, all of K.S.A. 65-4922 should be adopted and not just subsection (a). Ensuring good faith peer review cannot be done without an agency survey process as authorized for hospitals pursuant to K.S.A. 65-4922(c).

2. What providers will be subject to peer review in adult care homes? Neither adult care homes nor certified nurse aides are defined as "health care providers" at K.S.A. (2003 Session Laws) 65-4921(c). Most adult care homes do not have organized medical staffs and ancillary health care practitioners. Moreover, certified nurse aides are not subject to disciplinary action for standard of care deficiencies. Therefore, only licensed nurses would be subject to peer review requirements in adult care homes.

3. Does the Kansas State Board of Nursing need the assistance of nursing peer review committees in adult care homes? Concerns about nursing care already can be reported to the KSBN for possible disciplinary action.

4. If HB 2241 is enacted, should certified nurse aides be subject to disciplinary action by KDHE for standard of care deficiencies?

5. How will passage of HB 2241 affect abuse, neglect, and exploitation reporting requirements at K.S.A. (2003 Session Laws) 39-1401, et seq? Currently, adult care homes must report incidents of possible abuse, neglect, or exploitation to KDOA. Will the records of those investigations be subject to discovery and use in civil litigation?

Currently, agency complaint records can be compelled by a district court or administrative tribunal if the need for the records outweighs the need for confidentiality. K.S.A 39-1411(d). The new proposed risk management privilege might conflict with the more limited privilege under K.S.A. 39-1411(d) since many incident reports will involve allegations of abuse, neglect and/or exploitation.

Also, how will HB 2241 impact KDOA's ability to bring an administrative or judicial enforcement action against an adult care home?

6. Survey findings of adult care homes are public documents so residents, family members, and the public at large, may have important information concerning the care provided by a facility and its compliance with state and federal standards. What records under "titles XVIII and XIX of the social security act" will be protected from discovery and admissibility in civil actions? Do these records include Medicaid, Medicare and state licensure survey findings or only special risk management investigations under HB 2241? What if risk management findings demonstrate that state or federal laws have been violated? To exempt "any records, records reviewed, obtained or prepared" by KDOA "including results of inspections or survey" denies the public valuable information and is in direct conflict with other state and federal laws. KDOA could lose millions of dollars in federal funds for not complying with federal law requiring survey results be made public.

7. What would be the impact on smaller and/or rural facilities? Small and rural facilities generally do not have sufficient staff to form peer review committees or perform unbiased peer review.

8. Can the State afford the proposed Legislation? Does the cost of this bill as written afford the State a good return on its investment? The fiscal impact of requiring adult care home risk management programs would be substantial. Initially, three staff members would be needed to review and approve risk management plans submitted by approximately 600 adult care homes in 2006. Thereafter, reviewing program implementation would have to be done by risk management specialists in the field or added to the work of general surveyors. A fiscal impact statement has been prepared by KDOA.

Summary

Requiring adult care homes to comply with hospital risk management laws could improve the quality of resident care. However, improving resident care depends on how well peer review committees do their work. If paper plans are not implemented by adult care home staff, resident care will not improve. Moreover, accomplishing good faith peer review will require an immediate priority on the part of adult care home administrators, facility peer review committees, licensing agencies, and KDOA.

KDOA supports a risk management-peer review process which encourages internal critical self review that has the potential to improve policies and practices to prevent

repeated deficiencies and improve quality of care.

If adult care homes are required to conduct good faith peer review, then the resulting self-critical analysis should be protected from use in civil litigation. A facility cannot be expected to engage in self-criticism without protection. However, only peer review analysis should be protected. The facts about an incident, resident care records, licensing surveys, and certification surveys should not be protected.

Without this good faith peer review requirement, adult care homes should not be allowed to protect documents from review by the courts or the public. As written, KDOA opposes House Bill 2241 as it does not appear to support a good faith peer review component.

Testimony presented by:

Kansas Department on Aging
February 15, 2005

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Chairman Shultz and Members of the House Insurance Committee

From: Margaret Farley for the Kansas Trial Lawyers Association

Date: February 15, 2005

Re: **HB 2241**

Mr Chairman and members of the Committee, my name is Margaret Farley. I am an attorney and I represent persons who have been injured by negligent nursing home care. I also serve on the Board of Directors of Kansas Advocates for Better Care, which advocates for quality care in long term care facilities in Kansas. The Kansas Trial Lawyers' Association vigorously opposes HB2241 with respect to the prohibition from civil discovery and the prohibition of admissibility of inspection reports in civil actions. With regard to risk assessment plans concerning reportable incidents in adult care homes, the KTLA opposes such provisions as entirely superfluous.

HB 2241, Section 1(d), lines 12 -21, purports to permit the adult care home risk management programs (devised in the bill) to hide all reports and records reviewed, obtained or prepared by the Kansas Department on Aging if such risk management programs are referred reportable incidents which are connected to the content of the KDOA documents. Firstly, some of these documents, such as the statements of deficiencies and plans of correction, are already public documents, and thus subject to discovery.

Secondly, even if this bill were to pass, it would contravene established case law in the analysis of KSA 65-4922 as it relates to hospitals. In Adams v. St. Francis Regional Medical Center 264 Kan. 144, *144, 955 P.2d 1169, **1171 (Kan.,1998), the Kansas Supreme Court stated:

"Privileges in the law are not favored because they operate to deny the factfinder access to relevant information." Syllabus by the Court, para. 3.

"In construing the peer review privilege granted to health care providers under K.S.A. 65-4915 *et seq.*, the court must balance the privilege against a plaintiff's right to due process and the judicial need for the fair administration of justice." Syl. para 4.

House Insurance
Date: 2-15-05
Attachment # 10

Terry Humphrey, Executive Director

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"Although the interest in creating the statutory peer review privilege is strong, it is outweighed by a plaintiff's right to have access to all the facts relevant to the issues raised in a malpractice action against a defendant health care provider." Syl. para 5.

Further, this bill is simply a similar attempt to last year's HB 2306 and SB 430, to bar all relevant inspection reports from being admitted into evidence in law suits against adult care homes in Kansas. Both bills failed to pass the legislature during the 2004 regular session and were studied and failed favorable recommendation by the 2004 Interim Joint Committee of the Judiciary. The nursing home and insurance industry representatives have admitted that keeping surveys out of the court room will have no effect on insurance rates in Kansas. Consequently there is no identifiable reason for bills prohibiting the discovery or admissibility of inspection reports other than to protect poor performing facilities from their bad inspection histories.

Finally, Kansas and federal statutes already require adult care homes to establish quality assurance committees for the purpose of identifying quality care issues and addressing identified deficiencies. In fact, current surveys must evaluate whether adult care homes already comply with such requirements. Therefore, there is no need to create a new statute to establish the risk management programs for reportable incidents envisioned in this bill. HB 2241 appears simply to be an alternative vehicle for the introduction of a bill to prohibit the discovery and admissibility of inspection reports in civil trials.

The KTLA strenuously urges this bill be unfavorably reported.

Respectfully submitted,

Margaret Farley

AARP Kansas

February 15, 2005
Representative Shultz, Chair
Insurance Committee
In opposition to HB 2241

Good afternoon Chairman Shultz and Members of the Insurance Committee. My name is Ernest Kutzley and I am the Advocacy Director for AARP Kansas. AARP Kansas represents the views of our more than 350,000 members in the state of Kansas. Thank you for this opportunity to express our comments and opposition to HB 2241.

AARP is working on nursing home issues in many states to maintain and strengthen nursing home quality protections. We know that there are many good nursing homes, however we also understand that there is a significant dilemma with the number of nursing home operators that have no insurance or assets, or nursing homes that are unable or unwilling to meet the minimum quality standards required by law.

We believe that the real reason for HB 2241 is to hide essential and relevant evidence from a jury. It will make it harder for older Kansans and their loved ones in nursing homes to seek redress when they've been injured, neglected or abused. Nursing home survey reports are key to showing the existence of a pattern of abuse or neglect which could be claimed by a nursing home resident.

These reports are essential to demonstrate that a nursing home had been notified of the problem being raised by the injured party. Any abuse or neglect case can look like an isolated incident, or simply an accident. AARP believes that information, documents or records otherwise available from original sources should be available for discovery or for use in any civil action even though they were presented or used in, for or by a risk management program.

HB 2241 is direct prohibition on the use of inspection reports in any civil litigation: ...any reportable incidents...including any reports or records reflecting the results of any inspection or survey...shall not be subject to discovery nor shall they be admissible in any civil action .

It has been said about HB 2241 that this the *Cat on a Hot Tin Roof* law. If a normal wrongdoer like you or me abuses or neglects old people, our past similar offenses could and most assuredly would be used to enhance our punishment for the new crime. California even has the three-strikes-and-you're-out (or, *in* for life, as it were).

House Insurance
Date: 2-15-05
Attachment # 21

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Marie F. Smith, President | William D. Novelli, Chief Executive Officer | www.aarp.org/ks

Unlike the rest of us though, because of laws like this, repeat offenders like nursing homes and assisted living facilities that repeatedly are caught abusing or neglecting their residents have no histories -- their slates always are clean

Once again quality resident and patient care are not the focus of legislation such as HB 2241.

It has been claimed, in many states, that increasing liability claims and runaway juries are to blame for the rising cost of liability insurance premiums. Yet, there's no evidence this is the case. Typically, nursing homes make this argument in an effort to enact "tort reform" – i.e., limits on residents' rights to sue for negligent or abusive care.

A study Nursing Home Liability Insurance: *An Overview* by Bernadette Wright, Ph.D. AARP Public Policy Institute, July 2003 reviews the nature and extent of problems with the cost and availability of nursing home insurance, the causes of the problems, and their proposed solutions. In summary, the report lists six factors that affect the cost and availability of nursing home insurance. Those factors include:

- the property/causality insurance cycle;
- severe premium cuts during the 1990s;
- lower returns on investment income;
- more claims and payouts and perceived variability and unpredictability of claims;
- losses from claims resulting from September 11, 2001 attacks;
- insurers' business decisions.

"If there is a liability crisis, AARP wants to help the good nursing homes with their insurance problems of availability and affordability. This can be accomplished by several means, such as use of a pool which allows nursing homes to enter the pool, such as a Joint Underwriting Association (JUA) to provide premium relief to nursing homes that provide high-quality care, or use of risk management to reward high-quality homes with lower premiums" (Wright, 2003).

Nursing home residents in every state deserve high-quality care in a safe and caring environment and must have meaningful legal protections to ensure they get it.

We respectfully ask that committee members oppose HB 2241. Passage of HB 2241 will not make liability insurance more affordable or more available for Kansas nursing homes.

Ernest Kutzley

DISABILITY RIGHTS CENTER of KANSAS
EQUALITY • LAW • JUSTICE

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Testimony Before the House Insurance Committee

February 15, 2005

Chairperson Shultz and members of the committee:

I am an attorney with the Disability Rights Center of Kansas (DRC; formerly Kansas Advocacy & Protective Services). DRC is the federally created and funded State designated protection and advocacy system for the State of Kansas. Federal law authorizes DRC to investigate abuse and neglect of people with disabilities. Federal law requires the State and independent service providers to provide access to DRC to people with disabilities, the facilities where they reside, their records, and their guardians. 42 U.S.C. § 14043, 42 U.S.C. § 10805, and 29 U.S.C. § 794e. Congress established the protection and advocacy system to establish statewide, permanent, private, nonprofit, independent agencies to be separate from the State and service providers in order to provide advocacy services to people with disabilities.

HB 2241 violates the constitutional and civil rights of people with disabilities.

HB 2241 violates people with disabilities' constitutional right to due process. All people have the constitutional right to access to all relevant facts in a court of law. *Adams v. St. Francis Regional Medical Center*, 264 Kan. 144, 173 (1998). That case held that the statutory privilege against disclosing peer review factual information violated the constitutional right to due process. The Court held that trials are to be a search for the truth. Privileges in the law to not disclose evidence or facts are disfavored. *Adams*, 264 Kan. at 172. "The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *Adams*, 264 Kan. at 172, quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974).

Moreover, HB 2241 is bad public policy. HB 2241 prohibits the discovery and admissibility of any survey conducted in accordance with law

by the Department on Aging. In exchange for millions of federal Medicaid dollars, Congress requires the states to survey, inspect and investigate allegations of abuse and neglect of people with disabilities who reside in adult care homes. 42 U.S.C. § 1396r(g). Adult care homes are defined by Kansas law as nursing facilities, nursing facilities for mental health, intermediate care facilities for the mentally retarded, assisted living facilities, residential health care facilities, home plus facilities, boarding care homes, and adult day care facilities. K.S.A. § 39-923(a)(1). Tens of thousands of people with disabilities reside in adult care homes in Kansas. They live with substantial physical, cognitive, and mental disabilities. Many are nonverbal. Clearly these are the most vulnerable of our citizens. As Attorney General Phill Kline recently said at a press conference introducing legislation to protect people with disabilities, one of the most fundamental functions of government is to protect those who cannot protect themselves. HB 2241 prohibits the discovery and admission into evidence of relevant evidence of abuse and neglect of people with disabilities. People with disabilities should be able to hold those who abuse and neglect them accountable using the discovery and admission of relevant evidence of abuse and neglect.

The state surveys and investigation reports required by federal and state law are most analogous to police reports of an auto accident. Most courts do not allow the opinion of a police officer, unless admitted as an expert, into evidence. No courts prohibit the discovery of a police report. Investigators at the Kansas Department on Aging are required to investigate allegations of abuse and neglect, similar to a police officer investigating a car wreck. They can review records of the resident, take photographs, and take statements of witnesses. That information is directly relevant to the issue of whether there was abuse and neglect of a person with a disability. That investigation, with its facts and opinions, is discoverable because it is relevant to the subject matter of whether there was abuse and neglect of a person with a disability. Moreover, in subsequent court case, the facts, without the opinions, should be admissible if they are relevant as tending to prove a fact in issue in the case.

DRC is currently investigating several cases of alleged rape in several adult care homes in Kansas. If a KDoA investigator takes statements of employees of the facility who witnessed the rape, should those statements be neither discoverable nor admissible? Moreover, DRC is investigating an

adult care home for abuse and neglect where the nonverbal resident's feeding tube was infected with maggots? Admissible? Discoverable?

HB 2241 is not in the best interest of the State or people with disabilities.

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for
Better Care

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HB 2241 concerning risk assessment plans and inspection reports
House Insurance Committee
February 15, 2005

Honorable Chairman Shultz and
Committee Members:

Kansas Advocates for Better Care opposes HB 2241.

- Section 1 (d), as proposed, is exactly contrary to the nature of inspection reports being public information when they are completed. When the regulatory department (KDOA) investigates a reportable incident, that means that the incident was severe enough to require regulatory oversight for accuracy and completeness. Any inspection of a reportable incident constitutes an inspection that is public information. Public information is available for public use and as such is reasonable as evidence in a civil action.
- Last summer a special committee for Judiciary held hearings about disallowing use of inspection reports in civil lawsuits. They left the topic without recommending to disallow inspection reports in lawsuits.

During the 2004 session, the Senate voted to leave the law as it stands, which allows for use of inspection reports in civil lawsuits.

-

KABC asks the Committee to NOT advance HB 2241.

Thank you for considering these comments.

Deanne Bacco, Executive Director

House Insurance
Date: 2-15-05
Attachment # 23

Polsinelli | Shalton
Welte | Suelthaus PC

Memorandum

TO: THE HONORABLE CLARK SHULTZ, CHAIR
HOUSE INSURANCE COMMITTEE

FROM: WILLIAM W. SNEED, LEGISLATIVE COUNSEL
THE STATE FARM INSURANCE COMPANIES

RE: HOUSE BILL 2357

DATE: FEBRUARY 15, 2005

Mr. Chairman, Members of the Committee: My name is Bill Sneed and I represent State Farm Insurance Companies ("State Farm"). State Farm is the largest insurer of homes and autos in the United States and Kansas. We appreciate the opportunity to testify on House Bill 2357. This bill creates a self evaluative privilege for insurers.

Our laws should protect those who play by the rules. Yet, in today's increasingly hostile legal environment, playing by the rules in not as simple as it should be. Insurance companies interested in using proactive self-evaluative audits are limited by the reality that these audits may be used against them by insurance regulators, or in court – even if problems identified in the audits have been corrected.

House Bill 2357 addresses these concerns by creating a self-evaluative privilege to protect these audits. Currently five states, New Jersey, North Dakota, Oregon, Illinois, and Michigan as well as the District of Columbia, have a self evaluative audit privilege for insurers. These statutes share several key features with House Bill 2357. For the privilege to apply;

- There must be an insurance compliance audit. An audit is a voluntary internal evaluation not otherwise required by law that is designed to identify and prevent noncompliance and improve compliance with federal or state laws and regulations.
- Audits may not be used to hide illegal or improper activity.
- Insurance compliance audit material may to subject to disclosure to a regulator or law enforcement official.

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- The privilege does not apply to preexisting materials. Documents qualifying for the privilege are those prepared in connection with - - but not prior to - - - the audit. It does not protect documents created in the normal course of business, and access to insurance company records will remain the same as it is today.

- The privilege does not create immunity from lawsuits or from prosecution. It does not prevent the use of other evidence, beyond the insurance compliance audit, to establish liability. It is only designed to protect the voluntary audit from being used against the company.

Given the limited application of the privilege why is it desirable? One of the features of the privilege is that it encourages self correction. A regulatory environment that encourages voluntary self-correction is in the public's best interest. Unfortunately, it is unlikely without the privilege, as insurers can not afford the risk. The New Jersey Legislature noted if audits are ". . . available to third parties . . . and potentially can result in the insurance carrier's liability to such third parties, the insurance carrier may be discouraged from making those additional efforts . . ."

The self evaluative privilege also enhances regulatory enforcement. Because of limited resources regulators may be unable to address the breadth of conduct identified and corrected by these audits. Self correction allows insurers to inform a regulator of corrected conduct without fear of repercussion form the regulator, or in the courts, and is free to the taxpayer. Consequently, allowing regulators to use their limited resources more effectively.

Finally the privilege encourages a cost effective and efficient resolution of compliance issues. Everyone recognizes that litigation can be a deterrent to undesirable behavior, but it is a lengthy and expensive process, which only addresses the specific wrongs alleged by the plaintiff. Self correction can deliver more immediate and comprehensive results at a lower cost. In today's litigious environment, everyone is familiar with the image of an attorney telling a jury to send a message to punish the defendant. Absent the privilege, that company's self evaluative audit may serve as the basis for that charge – even when the company has corrected the problem before the lawsuit was filed. This is a deterrent to responsible corporate behavior.

State Farm supports House Bill 2357. At a time when business ethics and corporate compliance are under extensive scrutiny, this privilege encourages complete, candid analysis, the implementation of preventive measures and, if needed, remediation. State Farm Appreciates the opportunity to speak to the Committee on this issue, and we respectfully urge the Committee to pass the bill.

Respectfully submitted,

William W. Sneed

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STATEMENT OF BRAD SMOOT
LEGISLATIVE COUNSEL
AMERICAN INSURANCE ASSOCIATION
HOUSE INSURANCE COMMITTEE
REGARDING HB 2357
FEBRUARY 15, 2005

Mr. Chairman and Members:

On behalf of the American Insurance Association (AIA), I am pleased to appear in support of HB 2357, creating a statutory privilege for the conduct of internal self-evaluative audits by insurers. AIA is a trade association of 430 insurers providing business and personal insurance to customers in all fifty states. Our product lines include business, general liability, workers compensation, malpractice, auto and homeowners. We urge your favorable consideration of HB 2357.

The bill before you is based on a model bill prepared by the National Conference of Insurance Legislators (NCOIL). Although evidentiary rules in civil and criminal actions can be complicated, the concept here is not. It is good public policy – good for consumers, government and private businesses – for businesses, including insurance companies, to evaluate themselves from time to time to improve their manner of operating, uncover unlawful or improper conduct and make the changes necessary to correct the mistakes or wrongdoing that may be found. Our laws should encourage such behavior.

Numerous Kansas laws shield various types of information from being admitted in administrative, civil and criminal proceedings in order to protect the judicial process or promote quality in professional or business practices. For example, we all are aware of the attorney /client privilege (K.S.A. 60-426). Peer review proceedings are another good example (K.S.A. 60-4915). And, although there are countless other examples, the one which seems most similar is K.S.A. 60-3332, et seq., as amended. These provisions authorize a business to conduct a "voluntary, internal assessment, evaluation or review" of a facility to determine if the facility and its operations are in compliance with environmental laws. For an interesting article on this subject, see "Compliance Through Cooperation," Robert W. Parnoacott, 65 J.K.B.A. No. 5, 22 (1996).

While insurance departments, lawsuits and criminal investigations serve a valuable purpose in keeping insurers in line, they are not necessarily the only or best method for obtaining industry compliance with Kansas insurance laws. An internal audit can correct flaws in a process or practice that otherwise might go unnoticed for years and cause significant cost and inconvenience to customers, regulators and the insurer itself.

House Insurance
Date: 2-15-05
Attachment # 2.5

Although the bill covers a lot of detail, it is most important to note that the privilege does not exclude evidence (records or information) at hearing or trial that are uncovered during an internal audit. Rather, the privilege only protects the audit document itself and the person or persons doing the audit. And, even then, there are exceptions where, for example, the audit is being used to commit fraud or the insurer has not taken steps to remedy the problems disclosed by the audit. In such cases, the privilege would not apply.

An insurance self audit privilege would encourage insurers to "clean house" regularly without fear of reprisal for their trouble. Seems to us that our entire industry would be healthier, more compliant and consumer friendly if we were encouraged to routinely "take stock" in our operations. HB 2357 encourages such behavior. Thank you.

Kansas Association
of Health Plans

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Testimony before the
House Insurance Committee
HB 2357
February 15th, 2005

Mister Chairman and members of the Committee. Thank you for allowing me to appear before you today. I am Larrie Ann Lower, Executive Director of the Kansas Association of Health Plans (KAHP).

The KAHP is a nonprofit association dedicated to providing the public information on managed care health plans. Members of the KAHP are Kansas licensed health maintenance organizations, preferred provider organizations and other entities that are connected to managed care. KAHP members serve most all of the Kansans enrolled in a Kansas licensed HMO. KAHP members also serve the Kansans enrolled in HealthWave and medicaid managed care and also many of the Kansans enrolled in PPO's and self insured plans. We appreciate the opportunity to provide comment on HB 2357.

The KAHP appears today in support of HB 2357. We believe this bill encourages insurance companies to evaluate themselves and make corrections and changes that may be needed in order to potentially make the company a better corporate citizen.

Through various statutes the state has encouraged similar actions in other industries. Peer review proceedings for the medical community and internal assessments for the environmental industry are examples.

We encourage the committee to favorably consider this legislation. Thank you and I'll be happy to answer any questions you may have.

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TESTIMONY BY REP. ERIC CARTER IN SUPPORT OF *HB 2357*: A SELF-EVALUATIVE PRIVILEGE FOR INSURANCE COMPANIES

THE ISSUE: Whether documents generated voluntarily by insurers in connection with internal evaluations, reviews, assessments, audits or investigations to determine compliance with laws, regulations, orders, industry or professional standards should be considered privileged information.

WHY THIS BILL IS NEEDED: Insurers have become increasingly aware of the need to conduct self-evaluative or self-critical analysis audits to determine their compliance with laws, regulations or orders in states where they write business. This is particularly necessary where insurers are writing in multiple jurisdictions and regulatory issues become more complex. This practice has evolved, in part, as a reaction to state insurance regulators who, in recent years, have become more aggressive in pursuing market conduct examinations. There is also recognition within the insurance industry of the need to develop "best practices" as a way of creating greater value for customers in a highly competitive marketplace.

As a result, insurers are seeking assurances that if they conduct voluntary, self-evaluative audits, any reports produced in connection with the audits are treated as privileged information. If the reports are given to state insurance regulators, some insurers are concerned the reports might be used against them in administrative actions. A far greater fear is that the report will become "public" under state open records or freedom of information laws. Plaintiff's attorneys could then use them to pursue class action suits and other litigation, thus creating more financial exposure for insurers.

HISTORY: State insurance regulators have recognized this issue, and an NAIC Access to Information Working Group was created to develop a white paper on this subject. The Working Group finalized its white paper in December 1999, but chose not to recommend that the NAIC develop a self-evaluative privilege model at this time. In 2001, the NAIC Market Conduct & Consumer Affairs (D) Committee agreed to take up this issue again, and appointed a Self-Critical Analysis Working Group. The Working Group has concluded that there is not strong support among regulators for drafting model legislation at this time, so the Working Group, instead, has decided to develop a set of principles for regulators to reference when self-critical analysis legislation is introduced in their state. Nearly all states have adopted a similar privilege for medical peer reviews and more than half of the states have enacted protections for environmental self-audits.

WHAT THIS BILL DOES: This bill is based on the model act adopted by the National Conference of Insurance Legislators (NCOIL) in the fall of 1998. It asserts that an insurance compliance self-evaluative audit document is privileged information and is not discoverable or admissible as evidence in any legal action in any civil, criminal, or administrative proceeding. The only exceptions are situations where an insurer expressly waives its privilege, the privilege is asserted for a fraudulent purpose, or the material is not subject to the privilege.

If an insurer voluntarily submits a self-evaluative report to an insurance commissioner, the report must be treated as a confidential document. It can be viewed only in determining whether defects exist in an insurers' policies and procedures or whether any inappropriate treatment of customers has been remedied or is being remedied. Submitting the report voluntarily does not waive the insurer's self-evaluative privilege or any other statutory or common law privileges.

When a disclosure request is made, the insurer has 30 days to ask for an in-camera hearing, which must then be granted within 45 days. The party seeking the disclosure must prove either that the privilege is being asserted for a fraudulent purpose, or that the material is not subject to the privilege. If a judge rules in favor of disclosure, only those portions of the report relevant to the dispute can be disclosed. Any compelled disclosure is not considered a public document or a waiver of the privilege for any other civil, criminal or administrative proceeding.

So far, Illinois, New Jersey, North Dakota, and Oregon have already enacted an insurance compliance self-evaluative privilege similar to what is called for in this bill, but their laws differ in certain provisions. For example, the Illinois law adds another exemption to the privilege where a company fails to correct a problem discovered during a self-audit. The North Dakota law limits the insurance commissioner's ability to impose an administrative penalty against an insurer over a self-audit except where there is "clear and convincing evidence" that the insurer knew of a violation, yet took no corrective action.

PRACTICAL EFFECT: The interests of insurance consumers are enhanced by an insurance company's voluntary monitoring and reviewing of state insurance laws. The public ultimately benefits from incentives that identify and remedy insurance and other compliance problems. The limited expansion of a protection for self-evaluative reports will encourage voluntary compliance and will improve insurance market conduct quality. This legislation would create a "qualified immunity" for insurers who discover violations of laws and regulations during a self-audit. This means an insurer would not face an administrative penalty from the insurance department for bringing a violation to its attention through the self-audit process. It would require insurance regulators to honor the self-evaluative privilege if it is enacted in the state where an insurer is domiciled. This self-evaluative privilege, however, will not inhibit the authority of state insurance regulators who are entrusted with protecting insurance consumers.

Thank you for your attention and consideration of HB 2357.

Respectfully yours,

Eric Carter