Approved: 2-16-05
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on February 8, 2005 in Room 313-S of the Capitol.

All members were present except:
Michael Peterson- excused

Committee staff present:
Jerry Ann Donaldson, Kansas Legislative Research
Jill Wolters, Office of Revisor of Statutes
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:
Lew Ebert, The Kansas Chamber
Anne Kindling, Kansas Association of Defense Counsel
Jerry Slaughter, Kansas Medical Society
Kirk Scott, Kansas Medicial Mutual Insurance Company
Chip Wheelen, Kansas Association of Osteopathic Medicine
Bryan Smith, Kansas Trial Lawyers Association
Jim Clark, Kansas Bar Association
Sandy Barnett, Kansas Coalition Against Sexual & Domestic Violence
Representative Todd Novascone
Ron Hein, Kansas Restaurant & Hospitality Association & Kansas Beverage Association
Brent Haden, Kansas Livestock Association
Terry Holdren, Kansas Farm Bureau

The hearing on **HB 2150 - evidence of collateral source benefits allowed in any personal injury case where damages are requested**, was opened.

Lew Ebert, The Kansas Chamber, appeared before the committee as the sponsor of the bill. He informed the committee that 23 states allow collateral source to be admitted in jury trials. Collateral source benefits include insurance policies, gratuitous receipts of benefits such as wages or medical services and government benefits, such as workers' compensation and social security. The Chamber conducted a Business Owner's Poll in 2004 with 300 respondents, 60% of those believe that our current litigation system is a deterrent to business growth, while 83% believe that frivolous lawsuits increase the cost of doing business in the state. They also did a poll of 400 Registered Voters and found that they had the same belief, 65% believed that our current legal system should be reformed and 61% believed that lawsuit reform would contribute to economic growth. (Attachment 1)

Anne Kindling, Kansas Association of Defense Counsel, explained that current law does not allow juries to know about payments or benefits paid to or for the plaintiffs by healthcare providers or other sources. The bill would allow juries to hear the actual damages for which the plaintiff was and is responsible for. The proposed bill relates only to personal injury cases. (Attachment 2)

Representative Loyd questioned if there was some potential for inequity when the tort feasor actually did something wrong. Ms. Kindling responded that the greater inequity is when the plaintiff recovers cost, plus what the insurance companies have paid and end up with a windfall.

Representative Crow suggested that if juries are told about collateral source then they should also be told how much liability coverage doctors have. Ms. Kindling stated that the tort feasor doesn't argue he doesn't have any coverage so it shouldn't be allowed.

Representative Kinzer commented that the real purpose of the proposed bill is to reduce the number of cases where the tort feasor will have to pay large amounts. Ultimately the result is a reduction in the amount the defendant would have to pay. Ms. Kindling commented that the goal is to compensate the plaintiff for the actual cost that the plaintiff has and will have to pay. The legislation will still allow plaintiffs to recover, just not the costs that were already paid by someone else.

Ms. Kindling explained that the jury would determine who is at fault, the percentage of fault, the total costs and the net value of the case. Plaintiffs attorneys are suggesting to juries that the medical bills are X amount and that the plaintiff should be reimbursed for X amount and then they do not go on and inform juries that a percentage of X amount was paid for or written off by another source.

Representative Pauls was concerned that most individuals pay for all or at least part of their insurance and that they could possibly max out their lifetime allowance and then were would the plaintiff be financially.

Jerry Slaughter, Kansas Medical Society, appeared as a proponent of the bill. He stated that a collateral source bill was introduced and passed in 1988 but that the Kansas Supreme Court struck it down due to the threshold amount. It was passed to help with the rising cost of malpractice insurance rates. (Attachment 3) He explained that the proposed bill would not include services or benefits for which a valid lien or subrogation interest exists.

Representative Loyd asked in the states which have collateral source what has been the effect on health insurance premiums and how have the jury verdicts changed.

Kirk Scott, Kansas Medicial Mutual Insurance Company, responded that savings on insurance premiums range from 4% to 11% and there has been some increase in jury verdicts. (Attachment 4)

Representative Loyd wanted to what a health care provider would have to pay to provided malpractice insurance. Mr. Scott responded that an OBGYN would pay $53,000 per year. $200,000 coverage would come from KaMMCO and $800,000 coverage would come from the Healthcare Stabilization Fund.

Chip Wheelen, Kansas Association of Osteopathic Medicine, appeared in support of the bill. He reminded the committee to study all sections of law dealing with collateral source before making a decision. (Attachment 5)

Bryan Smith, Kansas Trial Lawyers Association, appeared before the committee in opposition to the bill because it's not a good bill for victims and would increase the costs of litigation. He was counsel for the plaintiff in *Thompson v. KFB Insurance Company* which is the case the Kansas Supreme Court took up and struck down the collateral source rule. He urged the committee to keep in mind that plaintiffs pay insurance premiums, co-pays, and deductibles and are entitled to care through their contractual and financial relationship with the insurance provider. They need to be compensated for all expenses in case they max out their lifetime benefits. (Attachment 6)

Representative Loyd pondered the issue that wouldn't good public policy be that if the plaintiff receives an award he then in turn pays the insurance company back for the expenses which they incurred. Mr. Smith commented that this would be placing the victim in a spot where they don't really receive any damages.

Chairman O'Neal stated that if juries are given the option to disregard the collateral source or look at payments and then decide how much the plaintiff would receive they would do it carefully. Juries continually ask in most trials "how much of the medical bills have been paid by insurance or written off?"

Jim Clark, Kansas Bar Association, provided the committee with an article from the Kansas Bar Journal in 1989 entitled Implementing the Kansas Collateral Source Rule. He stated that he could find only three cases last year where punitive damages were awarded. (Attachment 7)

Sandy Barnett, Kansas Coalition Against Sexual & Domestic Violence, appeared in opposition of the bill because it does not hold people accountable for their actions. (Attachment 8)

Written testimony in opposition to the bill was provided by:

David Moss (Attachment 9)
AFL-CIO (Attachment 10)
MADD (Attachment 11)

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on February 8, 2005 in Room 313-S of the Capitol.

The hearing on **HB 2150** was closed.

The hearing on **HB 2233 - creating an immunity from liability for claims relating to obesity or weight gain,** was opened.

Representative Todd Novascone appeared as the sponsor of the proposed bill which was requested on behalf of a constituent who owns a restaurant in Wichita who was concerned with the possible costs of court battles for people not taking responsibility for their own actions. The Senate introduced and had hearings on **SB 75** which deals with the same issue and it was suggested that the senate bill was drafted better and he would prefer that the committee consider it. (Attachment 12)

Ron Hein, Kansas Restaurant & Hospitality Association & Kansas Beverage Association, appeared in support of the proposed bill. His organizations prefer SB 75 because it is more narrowly drafted than the house bill. Fourteen states have passed similar legislation most are called the "commonsense consumption act". The legislation proposed today is similar to the National Restaurant Association model act which is stronger than both **HB 2233 & SB 75.** The reason for the bill is to stop frivolous claims. (Attachments 13 & 14)

Representative Jack was concerned with the "catch all" provision in **SB 75**. Mr. Hein said that it probably wasn't drafted correctly and they prefer lines 42 & 43 in **HB 2233.** Representative Jack also wanted to know what the "catch all" would "catch". Mr. Hein responded that he wasn't sure and would check the model act and get back to him.

Lew Ebert, The Kansas Chamber, conducted a Business Owner's Poll in 2004 with 300 respondents, 60% of those believe that our current litigation system is a deterrent to business growth, while 83% believe that frivolous lawsuits increase the cost of doing business in the state. They also did a poll of 400 Registered Voters and found that they had the same belief, 65% believed that our current legal system should be reformed and 61% believed that lawsuit reform would contribute to economic growth. (Attachment 15)

Brent Haden, Kansas Livestock Association, emphasized support for the legislation as well. These types of suits are not moving forward now but will be and will probably be very broad. (Attachment 16)

Terry Holdren, Kansas Farm Bureau, commented that a recent U.S. Surgeon General report sited that 61% of Americans are either overweight or obese. In recent years tort cases have begun to arise linking weight gain to food providers. A 2003 Gallup poll found that nine out of ten Americans believe that it is wrong to hold producers and providers liable for obesity related health problems. They prefer **SB 75** because it includes producers in the list of those provided protection. (Attachment 17)

Written testimony in support of the bill was provided by:

National Federation of Independent Business (Attachment 18)
Kansas Grain & Feed Association (Attachment 19)
Kansas Cooperative Council (Attachment 20)

Bryan Smith, Kansas Trial Lawyers Association, opposed both **HB 2233 & SB 75** because the immunity they offer would encompass more than just the amount of food one eats. When creating immunity all bills need to be narrowly defined. He was also opposed to making the bill apply to all cases that are pending. (Attachment 21)

The hearing on **HB 2233** was closed.

The committee meeting was adjourned at 5:45 p.m. The next meeting was scheduled for February 9, 2005 at 3:30 p.m. in room 313-S.

Legislative Testimony

HB 2150

Tuesday, February 8, 2005

Testimony before the Kansas House Judiciary Committee
By Lew Ebert, President and CEO

THE KANSAS CHAMBER

The Force for Business

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Chairman O'Neal and members of the Committee;

The Kansas Chamber and its over 10,000 members support passage of HB 2150. The Collateral Source Rule prohibits a defendant from introducing evidence that the plaintiff received any benefits from sources outside the dispute. The Rule allows a plaintiff to recover the full amount of damages *twice.* This measure would allow evidence of collateral sources of payments to be admitted into evidence. There would not be a set-off of the amount received, but only that the information is admissible. Twenty-three states allow collateral source benefit to be admitted into evidence. I have attached a chart to my testimony that shows which states have made changes to the common law collateral source rule.

In our December 2004 CEO and Business Owner's Poll, 60% of the 300 respondents believe that our current litigation system is a deterrent to business growth and 83% believe that frivolous lawsuits increase the cost of doing business in the state. Our November 2004 poll of Registered Voters found the same firmly held belief. Nearly 65% of those participating believe that our current legal system should be reformed and 61% believe that lawsuit reform will contribute to economic growth.

When the last collateral source rule reform bill was passed, a $150,000 limit was imposed. HB 2150 allows collateral sources of evidence to come in on all actions, regardless of the amount. Collateral source benefits include insurance policies, the gratuitous receipt of benefits such as wages or medical services, and governmental benefits such as workers' compensation and social security. The plaintiff receives compensation once from the insurance company, and then again at trial where no evidence of a prior recovery is permitted. Insurance does not compensate for an individual's injuries, but rather is a source of windfall profit.

We urge this committee to recommend favorably HB 2150. Thank you for your time and I will be happy to answer any questions.

Tort Reform Record

At-A-Glance

	Punitive Damages	Joint & Several Liability	Prejudgment Interest	Collateral Source Rule	Noneconomic Damages	Product Liability	Class Action Reform	Attorney Retention Sunshine	Appeal Bond Reform	Jury Service Reform
Alabama	X			X	◈		X			
Alaska	X	X	X	X	X					
Arizona	X	X		X						X
Arkansas	X	X							X	
California	X	X				X			X	
Colorado	X	X	X	X	X	X	X	X	X	X
Connecticut		X		X					+	
Delaware										
District of Columbia										
Florida	X	X		X	X	X			X	
Georgia	X	X	X	◈		X	X		X	
Hawaii		X		X	X				X	
Idaho	X	X		X	X				X	
Illinois	◈	X		X	◈	◈				
Indiana	X			X		X			X	
Iowa	X	X	X	X		X			X	
Kansas	X			◈	X		X	X	X	
Kentucky	◈	X		X					X	
Louisiana	X	X	X			X	X		X	X
Maine			X	X		X			+	
Maryland					X					
Massachusetts		X							+	
Michigan		X	X	X	X	X			X	
Minnesota	X	X	X	X	X					
Mississippi	X	X			X	X			X	X
Missouri	X	X	X	X			X		X	X
Montana	X	X		X	X	X				

◈ Denotes state where reform was struck down as unconstitutional and no additional reforms have been enacted.

\+ Denotes state where appeal bond is not required for a defendant to appeal a decision.

Tort Reform Record

At-A-Glance

	Punitive Damage	Joint & Several Liability	Prejudgment Interest	Collateral Source Rule	Noneconomic Damage	Product Liability	Class Action Reform	Attorney Retention Sunshine	Appeal Bond Reform	Jury Service Reform
Nebraska		X	X						X	
Nevada	X	X			X				X	
New Hampshire	X	X	X		◈	X			+	
New Jersey	X	X		X		X			X	
New Mexico		X								
New York	X	X		X						
North Carolina	X					X			X	
North Dakota	X	X		X	X	◈		X		
Ohio	X	X		X	X	X	X		X	
Oklahoma	X	X	X	X	X				X	X
Oregon	X	X		X	◈				X	
Pennsylvania		X							X	
Rhode Island			X							
South Carolina	X								X	
South Dakota	X	X							X	
Tennessee*									X	
Texas	X	X	X		X	X	X	X	X	
Utah	X	X								X
Vermont		X							+	
Virginia	X							X	X	
Washington		X			◈					
West Virginia		X			X				X	
Wisconsin	X	X			X				X	
Wyoming		X								

*Tennessee abolished joint and several liability by judicial decision

◈ Denotes state where reform was struck down as unconstitutional and no additional reforms have been enacted.

\+ Denotes state where appeal bond is not required for a defendant to appeal a decision.

ATRA's Tort Reform Record, December 31, 2004--edition

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February 8, 2005

House Judiciary Committee
Testimony on HB 2150

Chairman O'Neal and Members of the Committee:

My name is Anne Kindling. I am here on behalf of the Kansas Association of Defense Counsel to testify in support of HB 2150. The KADC is an organization of more than 200 practicing attorneys who devote a substantial portion of their professional practice to the defense of lawsuits. As such, the KADC maintains a strong interest in improving the adversary system and the administration of justice.

HB 2150 will limit an archaic and old-fashioned rule of common law which keeps certain information from the jury in a lawsuit seeking damages for personal injury. The common law collateral source rule prevents the jury from learning about payments that were made to or benefits conferred on the injured party from third-party sources, most notably health insurance benefits paid to the plaintiff's health care providers, even if the collateral source compensated all or a portion of the harm. The common law rule originated in the 19th Century when the availability of health insurance was much more limited than today.

Legislation of this nature has been enacted three times in the past three decades, each time struck down by the Kansas Supreme Court as unconstitutional but for reasons not implicated by HB 2150. At the risk of oversimplifying the prior legislation and Supreme Court decisions, the enactment in 1976 of K.S.A. 60-471 was struck down because it applied only to medical malpractice cases, distinguishing between plaintiffs injured by health care providers and plaintiffs injured by other classes of tortfeasors, and because it did not apply when the collateral benefit was purchased by the plaintiff or the plaintiff's employer. In 1985 even before the Supreme Court's decision on the prior statute, the legislature enacted K.S.A. 60-3403 which again applied only to medical malpractice cases. This bill took effect just 9 days after the Kansas Supreme Court's decision striking down K.S.A. 60-471. The Supreme Court again struck down K.S.A. 60-3403 as violative of equal protection. The Legislature responded in 1988 by enacting K.S.A. 60-3803 which remains on the statute books today.

The 1988 legislation limiting the collateral source rule applied to all personal injury cases, not just medical malpractice cases, and so eliminated the basis for the prior statutes being held

unconstitutional. However, it imposed a damages threshold of $150,000 before the statute would apply. In a nutshell, the legislation allowed the jury to hear evidence of collateral source benefits received by the plaintiff and to determine the amount of such benefits received, and the judge would then reduce the amount of damages by the collateral benefit amount. The Kansas Supreme Court again struck down this statute, finding that the $150,000 threshold violated equal protection.

The current legislation eliminates this threshold and so eliminates the basis on which the Kansas Supreme Court found the statute to violate equal protection.

The rationale for limiting the common law collateral source rule can be best understood by considering the goal of an award of damages. The goal is to make the plaintiff whole and reimburse him or her for the amounts expended to remedy the injury caused by the defendant. The goal is not, however, to award a windfall to the plaintiff. Under the common law collateral source rule, the plaintiff in a personal injury case is able to recover costs of medical care even though these expenses were never paid by the plaintiff; in other words, the plaintiff receives a windfall by being paid for damages that were never actually incurred.

HB 2150 would eliminate this fiction and allow the jury to hear the truth about the damages actually incurred by the plaintiff. Under this legislation, courts will be able to implement the statutory scheme adopted in 1988 to place all relevant information in the jury's hands. The jury can learn of the collateral source benefits received and the cost to the plaintiff of purchasing those benefits. The jury can then decide the reasonable value of those benefits but the court then applies the reduction.

Thank you for the opportunity to testify in support of this bill and I would be happy to stand for questions.

Very truly yours,

Anne M. Kindling

KANSAS MEDICAL SOCIETY
KMS

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To: House Judiciary Committee

From: Jerry Slaughter
Executive Director

Subject: HB 2150; Concerning collateral source benefits

Date: February 8, 2005

The Kansas Medical Society appreciates the opportunity to appear in support of HB 2150, which would allow evidence of collateral sources of payment in personal injury lawsuits.

This legislation is actually modeled after legislation we have previously introduced, and the legislature has passed on three separate occasions – first in 1976, then again in 1985, and finally in 1988. As you know, the Kansas Supreme Court each time has struck down the legislature's various attempts to eliminate or alter the common law collateral source rule. The amendment included in this legislation should address the concerns of the Court, as articulated in *Thompson v. KFB Insurance Company*, 252 Kan.1010 (1993).

We believed this legislation was an integral part of the group of tort reform measures we advocated for in the past, and it would today provide added stability to our liability system without keeping individuals from receiving their true economic losses in such cases. If enacted, and subsequently upheld by the courts, this legislation would help lower insurance costs by preventing double recovery, wherein plaintiffs recover damages which are in excess of the actual damages incurred. We urge you to report HB 2150 favorably for passage. Thank you.

House Judiciary
2-8-05
Attachment 3

KaMMCO

KANSAS MEDICAL MUTUAL INSURANCE COMPANY

TO: House Judiciary Committee

FROM: Kurt Scott, Chief Operating Officer of KaMMCO

RE: House Bill 2150 – Collateral Source Benefits

DATE: February 8, 2005

The Kansas Medical Mutual Insurance Company (KaMMCO) appreciates the opportunity to submit written testimony in support of HB 2150. KaMMCO, a domestic, mutual insurance company, is the largest medical malpractice insurer of physicians and hospitals in the state of Kansas, and is affiliated with the Kansas Medical Society. HB 2150 addresses the admissibility of collateral source benefits in actions for personal injury or death. In actions for personal injury or death, HB 2150 would allow the parties to introduce into evidence collateral source benefits if they were, or are reasonably expected to be, received. Under K.S.A. 60-3801(b), collateral source benefits include benefits which were or are reasonably expected to be received by a claimant for expenses incurred as a result of the occurrence upon which the personal injury action is based, except life or disability insurance benefits or benefits gratuitously bestowed on the claimant. Collateral source benefits would not include services or benefits for which a valid lien or subrogation interest exists. See, K.S.A. 60-3801(b).

House Bill 2150 is patterned after K.S.A. 60-3802. Unfortunately, K.S.A. 60-3802 was declared unconstitutional in 1993 in *Thompson v. KFB Insurance Company*, 252 Kan. 1010 (1993). HB 2150 modifies K.S.A. 60-3802 to delete the language that the *Thompson* court found unconstitutional. K.S.A. 60-3802 was part of a package of legislative tort reform supported by the Kansas Medical Society in the late 1980s. KaMMCO continues to support tort reform laws, including a collateral source law such as HB 2150. KaMMCO believes HB 2150 will help reduce the cost of litigation in actions for personal injury or death.

Endorsed by the Kansas Medical Society

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Testimony To
House Judiciary Committee
In Support Of
House Bill 2150
February 8, 2005
By Charles L. Wheelen

The Kansas Association of Osteopathic Medicine supports the provisions of HB2150 because this bill would improve fairness in civil actions alleging personal injury because of negligence. House Bill 2150 would remove the threshold for admissibility of evidence of collateral source benefits in personal injury actions.

There may have been practical reasons why the 1988 Legislature decided to establish a minimum of $150,000 for admission of evidence of benefits received by a claimant for expenses incurred as a result of the incident giving rise to a personal injury action. But the fact there is a threshold at all is inherently unfair to both plaintiffs and defendants, and the existence of a threshold raises questions regarding equal protection guarantees.

House Bill 2150 amends K.S.A. 60-3802, but it is important to review the provisions of related sections of the Statutes. K.S.A. 60-3801 contains a number of definitions including "cost of the collateral source benefit." And a salient feature of the definition of "collateral source benefits" is the specific exclusion of services or benefits for which a valid lien or subrogation interest exists.

In addition, K.S.A. 60-3803 requires that when evidence of collateral source benefits are admitted as evidence, the cost of those benefits must be admitted as well. Further, K.S.A. 60-3804 instructs the court to determine the net value of collateral source benefits. Obviously this takes into account the cost of collateral source benefits compared to the benefits received. And finally, K.S.A. 60-3805 instructs the court to adjust the amount of the judgment based on the net collateral source benefits.

In other words, the sections of Kansas law governing admissibility of collateral source benefits in personal injury actions are, for the most part, designed to assure fairness to both plaintiffs and defendants. Passage of HB2150 would further promote this public policy objective. For this reason, we respectfully request that you recommend passage of HB2150.

Thank you for considering our position on this legislation.

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Chairman O'Neal and Members of the House Judiciary Committee

From: Bryan Smith on behalf of the Kansas Trial Lawyers Association

Date: February 8, 2005

Re: HB 2150

Chairman O'Neal and Members of the House Judiciary Committee, my name is Bryan Smith, and I am an attorney in Topeka. I am a member of the Kansas Trial Lawyers Association and I am here today to oppose HB 2150. The Kansas Trial Lawyers Association supports the current civil justice system wherein wrong-doers are held fully accountable for the harm and the damage that they cause.

The Legislature has previously attempted to override or limit the common law collateral source rule in 1976, 1986, and 1988. On all three prior occasions, the Kansas Supreme Court has declared these attempts to be unconstitutional. The last attempt to limit the collateral source rule by enactment of K.S.A. 60-3801 through 60-3806 was struck down in the case of *Thompson v. KFB Insurance Co.* of which I was one of the counsel for the Plaintiff, Ivan Thompson who, coincidentally, continues to live and work in this community.

The collateral source rule, which has been in place in our country for more than 200 years and in Kansas for more than 100 years provides that benefits received by the victim from a source wholly independent in collateral of the wrong-doer will not diminish the damages otherwise recoverable from the wrong-doer. The rule is based upon the premise that those causing harm to others must be fully accountable for the injuries they have caused. In addition, the collateral source rule prevents a wrong-doer from receiving a benefit due to the fact that the victim was fortunate enough to have health or disability insurance.

The attempted repeal of the common law collateral source rule by HB 2150 is advanced under the premise of tort reform. Tort reform implies that there is a crisis that provides the basis for limiting the rights of victims. Attached to my testimony is a graph that illustrates the facts as they relate to court cases in Kansas. Only 6% of the cases filed in the Kansas court are tort cases which would include medical malpractice, motor vehicle accidents, product liability, and other injury cases. In the year 2003, only 93 tort cases were decided by a jury in the entire State of Kansas. This is down from 112 cases in 2002, and 135 cases in 2003. Ninety-three jury trials involving personal injury in a state with a population that exceeds 2.5 million people seems an appropriate balance and not a crisis.

Terry Humphrey, Executive Director

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Many times legislation is introduced that restricts the rights of victims on the basis that it will reduce medical malpractice costs. However, under the current system which includes the common law collateral source rule, the cost of malpractice coverage is actually declining. In Kansas, physicians purchase primary coverage up to $200,000 from private insurance companies and then are required to purchase additional insurance from the Health Care Stabilization Fund over the $200,000 of primary insurance. Reduced claims history of the Health Care Stabilization Fund is reflected in its surcharge which was reduced from 35% to 30% for the highest level of coverage available under the Fund effective July 1, 2004. Malpractice insurance costs are also not a significant contributor to health costs in general: nationwide, medical malpractice insurance premiums account for only 1% of the total health care costs.

Eliminating the common law collateral source rule will likely not decrease litigation but will increase the cost and length of lawsuits. Additional discovery will be conducted to define the collateral sources that were available, the cost of the collateral sources, the likelihood of these sources being available in the future and their impact on the injured persons' claims. For example, if an employer furnishes group insurance as an employee benefit, the value of this benefit will have to be developed in the lawsuit so that the true picture of the benefit is available to the jury. This is but one example of how the elimination of the collateral source rule will actually increase the cost of litigation and not decrease it.

Another argument advanced by the supporters of this change is that injured victims allegedly receive double payments for their injuries by being compensated by the wrongdoer and receiving health insurance coverage (if the victim has insurance). However, this argument does not take into account that the victim has paid premiums, copays, and deductibles, and is entitled to care through their contractual and financial relationship with the insurance provider. In addition, health insurance policies typically have a lifetime maximum benefit. If, as a result of a negligent act that causes injury, the victim maxes out the lifetime benefit, the victim must seek an award that compensates him for future coverage of health care needs above and beyond the lifetime maximum. Therefore, not only are there no double payments under the current law, consideration of insurance coverage will actually result in a victim not being fully compensated for his or her loss.

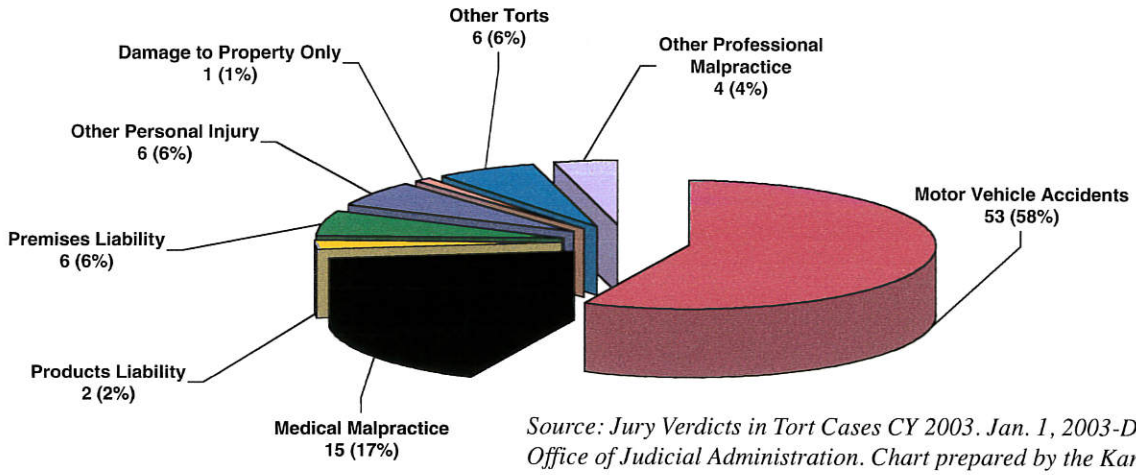
Restricting the injured person's rights to be fully compensated simply shifts the cost of care of the injured person to the State and away from the public sector. The cost of care for an individual who is confined to a wheelchair are the same whether they were fortunate to obtain a fair and just recovery for their injuries or whether they are immediately thrust into the public Medicaid and Medicare programs. When the recovery is inadequate, more people will be forced onto public programs and their costs will be paid by the state rather than the individual who caused the injury.

We believe that elimination of the collateral source rule will only help insurance companies and those that have caused harm. We respectfully request that you oppose HB 2150.

There is no "litigation crisis" in Kansas

KANSAS TORT CASES 2003

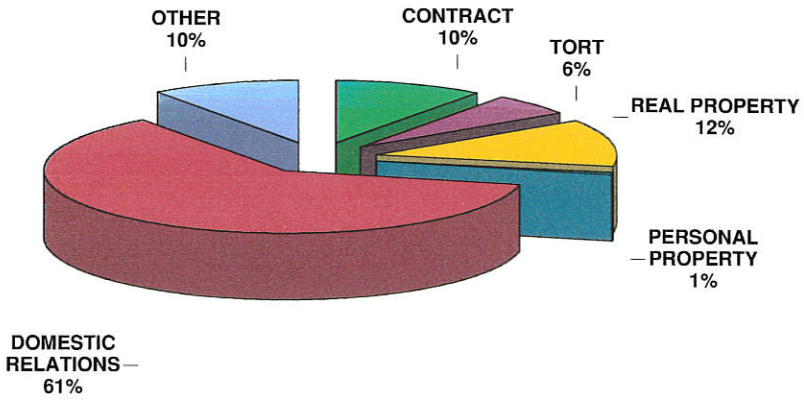
Breakdown of 93 tort cases
that resulted in a jury trial



Source: Jury Verdicts in Tort Cases CY 2003. Jan. 1, 2003-Dec. 31, 2003. Office of Judicial Administration. Chart prepared by the Kansas Trial Lawyers Association.

- √ Only 6% of cases filed in Kansas are torts, or personal injury cases.
- √ 93 tort cases were decided by juries in 2003, down from 112 cases in 2002 and 135 cases in 2003.
- √ More than half of all tort cases involve auto accidents.
- √ The median award in 2003 was $23,416.
- √ Punitive damages were awarded in only 3 cases in 2003. All 3 cases involved auto accidents.

Kansas Civil & Domestic Relations Cases for FY2003
Breakdown of 60,846 cases filed*



*Original cases filed
Source: Annual Report of the Courts of Kansas, July 1, 2002 – June 30, 2003.
Chart prepared by the Kansas Trial Lawyers Association

Check Your Facts Before You Change the Law

KANSAS BAR
ASSOCIATION

Testimony in Opposition to

HOUSE BILL NO. 2150

Presented to the House Judiciary Committee
By James W. Clark, KBA Legislative Counsel
February 8, 2005

The Kansas Bar Association appears in opposition to **HB 2150**, which would abolish the last vestige of the collateral source rule in Kansas, by eliminating the exception for cases alleging less than $150,000.

The Kansass Bar Association has a long-held position in opposition to any changes in the tort law system, including but not limited to:

Rules governing residency of expert witnesses;

Creation of dollar caps on non-pecuniary losses in personal injury actions;

Changes in the collateral source rule regarding insurance proceeds or other economic considerations not amounting to post-injury personal mitigation of damages;

Statutes of limitation; or

Overall limits on awards

unless proponents of such change can demonstrate a clear and convincing public need for such change and such change can demonstrate a clearly defined public benefit.

We have attached to our testimony an article from a 1989 issue of the *Journal of the Kansas Bar Association*, which gives a background on the issue of collateral source rule and the current statute,which is the subject of **HB 2150**.

Thank you.

House Judiciary
2-8-05
Attachment 7

More Goo for Our Tort Stew:

Implementing the Kansas Collateral Source Rule

By James Concannon* and Ron Smith**

Trial lawyers and consumer groups believe "tort reform" is an overcorrection to a fickle insurance boom and bust cycle, and higher liability premiums are a self-inflicted wound brought on by an imprudent insurance investment policy called cash flow underwriting.[1] Business owners and professionals feel the legal system is not as sensitive as it should be to what high premiums do to the quality of medicine or the economic chill on Main Street.[2] Between these polar extremes important changes in the collateral source rule were made as tort reform. This article examines these changes and some of the legal and evidentiary questions raised by the new law.

The Kansas Coalition for Tort Reform set the climate of the legislative debate, arguing legislative regulation of the common law collateral source rule merely "allows juries to know the facts and do what is fair."[3] As this article demonstrates, the legislation does considerably more.

Purpose and History

The collateral source rule received little scholarly attention until the mid-20th century, when commentators began focusing on the rule's underlying theories.[4] Fanning the fire of change were numerous no-fault automobile insurance systems and the movement toward social safety nets like Medicare and various state-sponsored mandatory insurance mechanisms.[5] The 1970s brought the first medical malpractice "crisis." The 1980s saw both product liability and medical malpractice insurance emergencies. In each instance, changing the collateral source rule became a focus of reform.[6]

The battle over the collateral source rule raged for years in the courts with innovative arguments.[7] The struggle shifted in the mid-1970s to state legislatures. There is little uniformity in the types and breadth of statutory regulation of collateral source rules.[8] We say regulation because nowhere does a statute completely abolish a state's common law rule.

Kansas Legislative Responses

As a reaction to the first medical malpractice crisis in 1976, K.S.A. 60-471 was enacted. That statute allowed juries in actions against health care providers to hear evidence of reimbursements or indemnifications paid to injured plaintiffs, except for insurance payments and HMO benefits where the plaintiff or plaintiff's employer paid for the premiums, in whole or in part. It excluded evidence of collateral benefits where subrogation or lien rights existed. The resulting law was declared invalid by one federal district court[9] and in 1985 the Kansas Supreme Court held it violated equal protection provisions of the U.S. and Kansas Constitutions.[10]

In 1985, rapidly increasing premiums prompted health

FOOTNOTES

*Concannon is a graduate of the University of Kansas School of Law and is dean of the Washburn University Law School. **Smith is a 1977 graduate of Washburn Law School and is Legislative Counsel for the Kansas Bar Association. Both have made presentations to the Kansas Legislature on the collateral source rule. The views in this article are those of the authors and not of any organization.

1. Report on Kansas Legislative Interim Studies to the 1987 Legislature, Proposal #29, Tort Reform and Liability Insurance, by the Special Committee on Tort Reform and Liability Insurance, p. 584, and p. 589. Hereafter this report is referred to as "Interim Reports."

2. 1986 Interim reports, p. 583.

3. From a May 1987 mailing by the Kansas Coalition for Tort Reform, the Kansas arm of the American Tort Reform Association.

4. Bell, Complete Elimination of the Collateral Source Rule — A Partial Answer to Criticism of the Present Injury Reparations System, 14 N.H.B.J. 20 (1972); Fleming, The Collateral Source Rule and Loss Allocation in Tort Law, 54 Calif. L. Rev. 1478 (1966); Peckinpaugh, An Analysis of the Collateral Source Rule, 32 Ins. Counsel J. 32 (1965); Schwartz, The Collateral Source Rule, 77 Harv. L. Rev. 741 (1964).

5. Prosser on Torts, 4th Ed., pp. 559-570.

6. Richardson, "The Collateral Source Rule," 42 Missouri B.A. 373, 378 (1986).

7. Richardson, supra, reports a 1921 case where a Kansas City, Missouri newsboy hitched a ride on the outside of a trolley car. The conductor angrily knocked the boy under the trolley, which severed the boy's leg at mid-thigh. On appeal, defense counsel argued the $3,350 verdict was excessive because, "Everyone knows, and the writer believes the court will take judicial notice of the fact that a crippled boy does make more money selling newspapers than a boy who is not crippled." Citing Samples v. Kansas City Railway Co., 232 S.W. 1049 (Mo. Ct. App. 1921).

8. See footnote 70, infra, listing various state collateral source rule statutes. See also Alabama, Code §6-5-523-525 effective 1987; Arizona, Rev. Stat. Ann. §12-565, Effective 1985; California, Civil Code §3333.1, effective 1975; Nebraska, Rev. Stat. §44-2819, effective 1976; Utah, Code Ann. §78-14-4.5, effective 1985; and Washington, Rev. Code, §7.70.080, effective 1975. In October 1987, the Ohio legislature enacted a comprehensive tort reform package that contained some collateral source changes.

9. Doran v. Priddy, 534 F. Supp. 30 (D. Kan. 1981). Judge Theis used a "heightened scrutiny" test.

10. Wentling v. Medical Anesthesia Services, 237 Kan. 503, 701 P.2d 939 (1985). A 5-2 majority agreed with Judge Theis' opinion in Doran, supra.

care providers to propose a broader statute. Contrary to the 1976 act, K.S.A. 1985 Supp. 60-3403 allowed submission to the jury of evidence of all defined collateral sources, regardless of whether subrogation interests existed. Evidence of subrogation interests was also allowed. During the 1987 session, other non-medical organizations introduced HB 2471, which attempted to broaden K.S.A. 1986 Supp. 60-3403 for use in all personal injury actions but the bill failed in the House of Representatives.[11]

K.S.A. 1987 Supp. 60-3403 was ruled unconstitutional in **Farley v. Engelken.**[12] Justice Lockett's concurring opinion in **Farley** suggested a statute might fare better constitutionally if it affected all litigants alike. The 1988 legislature accepted Justice Lockett's invitation for a broader approach to reform but learned construction of a statutory rule change was not a simple task.

Chapter 222 — An Overview

Chapter 222 of the 1988 Session Laws (K.S.A. 1988 Supp. 60-3801 *et seq.*) implemented the collateral source rule change. It is a unique piece of legislation. It not only changes the law of damages but also implements new economic and compensatory theory. Within its provisions are conflicts, the most obvious being that the legislature wants juries to hear evidence of present and future collateral source benefits but only when the entire claim exceeds $150,000.[13]

K.S.A. 1988 Supp. 60-3801(b) broadly defines collateral sources with three major exemptions: (1) life insurance, (2) disability insurance, and (3) any other service or insurance where subrogation or lien rights exist. The act itself does not create a lien or subrogation interest. Gratuitous services remain exempt, as at common law. Most important, **any** collateral source must be received "as the result of the occurrence upon which the personal injury action is based" or the statute is inapplicable.[14]

The statutory definition of collateral source is different from its common law root. The common law collateral source rule blocked admission only of evidence of payments made "independent of the tort-feasor."[15] If the tort-feasor paid part or all of the damages, for example a parent's hospitalization insurance for the child's injuries, such evidence was not shielded from the jury in states where children can sue parents for injuries in automobile accidents.[16]

"Collateral source benefits" is a term with a distinctive definition based only on the receipt of benefits by the plaintiff and the nature of those benefits, not the payor of the benefits. Parental benefits may be collateral sources because of the definition in K.S.A. 1988 Supp. 60-3801(b) even if the parent is a codefendant for comparative negligence purposes and even though at common law the collateral source rule would not apply to these benefits.

This "independent of the tort-feasor" point is important for two reasons. First, K.S.A. 1988 Supp. 60-3802 appears to prohibit any collateral source benefit as defined in the statute from being introduced unless the claim exceeds $150,000. Thus, in actions for less than $150,000, amounts which heretofore had not been collateral payments subject to the common law rule now may be excluded from evidence. The threshold and the definition may have changed the common law so that evidence the defendant previously could introduce is no longer admissible.

Second, even if evidence of payments by a tort-feasor is introduced, the K.S.A. 1988 Supp. 60-3805 credits and offsets temper much of the advantage of the tort-feasor.

K.S.A. 1988 Supp. 60-3802 limits presentation of collateral source evidence to a jury. Defendant appears to have the burden of proof to establish the extent to which collateral benefits have been or will be provided, and the plaintiff has the burden to establish the cost of the benefits.

The legislature included future collateral source benefits as admissible evidence.[17] The difficulties this will create at trial are discussed below.

The legislation is prospective in application and effective for claims "accruing" on or after July 1, 1988.[18]

11. HB 2471 was introduced as a committee bill, originally resembling K.S.A. 1987 Supp. 60-3403, except it applied in all personal injury cases. After floor amendments were added, the bill was killed on the House Floor, 50-72. (1987 House Journal, p. 421.)
12. 241 Kan. 663, 740 P.2d 1058 (1987).
13. K.S.A. 1988 Supp. 60-3802. There is no individual rationale for the $150,000 figure except that is the number to which four of the six conferees on the conference committee could agree.
14. K.S.A. 1988 Supp. 60-3801(b).
15. Restatement (Second) of Torts, §920A.
16. A parent may be a codefendant for comparative negligence purposes.
17. K.S.A. 1988 Supp. 60-3802.
18. K.S.A. 1988 Supp. 60-3807.

About the Authors

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Smith is Secretary for the Government Relations Section of the National Association of Bar Executives.

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Collateral Source Law as Economic Theory

Whatever problems the common law causes insurance companies or their insureds, the common law collateral source rule simplifies a trial. Whether a plaintiff is listed in the Fortune 1000, receives payments from insurance, gratuities from Mom, or exists on welfare is irrelevant to determining whether plaintiff was injured by defendant's negligence and the amount of damages sustained. The jury focuses on the culpability of the parties, not on the private resources of either party to pay damages. The legislation undoes this symmetry.

The legislature's new economic theory may be stated as follows. Each injury produces total damages, economic and noneconomic. If the injury is self-inflicted, first party insurance pays the damages up to limits in the policy. Where the injury is caused by another's negligence, the total cost is determined by a trier of fact. That determination is made without the jury knowing what ceilings state law imposes on awards or exactly what the court will do with the jury's comparative negligence determinations.

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The principle is that "net collateral source benefits" should be used to reduce the judgment against a defendant only when plaintiff would otherwise receive total compensation exceeding the total damages determined to be suffered by plaintiff. Before any reduction, plaintiff is entitled to apply collateral benefits first to any portion of total damages suffered which for one reason or another is self-insured or otherwise uncollectable.

When plaintiff has collateral sources, the legislation provides a rational way of allocating such collateral sources to account for the holes or the uncollectible damages now imposed by other Kansas law.[19] Connecticut has a similar allocation law,[20] and Montana allows a post-judgment reduction of an award only after the plaintiff is fully compensated.[21]

Procedural Due Process

When criticizing the rational basis of K.S.A. 1987 Supp. 60-3403, Justice Lockett in **Farley** worried about "inheration" of collateral source statutes.[22] One of the difficulties was permitting judicial discretion whether to admit evidence of payments by the claimant to purchase the benefits while removing judicial discretion whether to admit evidence of payments to the claimant.[23] Similar ambiguities have caused remedial tort reform such as K.S.A. 60-471 to be declared unconstitutional.[24] The Kansas Supreme Court has a lengthy history of constitutional concerns about legislation which alters or limits remedies.[25]

Practical Problems with the Statute

I. Property Collateral Sources

No legislation is gap-free. The collateral source law is no exception. For example, K.S.A. 1988 Supp. 60-3801(a) purports to limit the act to personal injury and death claims. In the real world personal injury claims often are mixed with property damage actions. The common law collateral source rule apparently still applies to the property damage claim brought within a personal injury or death action.

An illustration makes the point. Assume because of negligent maintenance of a railroad right of way a train derails, destroying a multimillion dollar bridge over a downtown traffic-way as well as injuring motorists driving underneath. Depending on the facts, the municipality might be a codefendant in a suit by the motorists but may also file a cross-claim against the railroad for property damage. The municipality may receive a federal grant to repair the damaged bridge or may have purchased property insurance for such calamities.[26]

Individuals with personal injuries suffered in the derailment may have their collateral sources of indemnification deducted from their awards yet the city's receipt of property collateral source payments is not used to reduce its award. The railroad is the common defendant in both claims and the root negligence is the same. The only difference is that one claimant's collateral source is health insurance and the other claimant's benefits come from a governmental grant or property insurance. The first mixed insurance case involving personal injury and property collateral sources will raise an interesting equal protection argument for the plaintiff.

II. Comparative Negligence

Kansas plaintiffs injured by defendants' negligence can be partially responsible for their own injuries. The absence of joint and several liability reduces the incidence of double payments under the common law collateral source rule.[27]

19. K.S.A. 60-258a. K.S.A. 1987 Supp. 60-19a01, Chapter 216 of the 1988 session laws of Kansas, and K.S.A. 60-1903. There is also a $500,000 overall limit on awards under the Kansas Tort Claims Act, K.S.A. 1987 Supp. 75-6105.

20. §52-225a-225d.

21. §27-1-307 and §27-1-308.

22. 241 Kan. at 681.

23. "As written, the statute could be interpreted to give a judge in a particular case the discretion to admit or exclude evidence of a plaintiff's payments. It is unlikely that the intent of the legislature in enacting this statute was to confer greater rights upon defendants than upon plaintiffs." 241 Kan. at 681; emphasis added.

24. Wentling v. Medical Anesthesia Services, supra, at 517, where a divided court outlines "inequitable treatment of two patients suffering similar injuries at the hands of the same health care provider" and other "invidious hypothetical" examples.

25. See Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041 (1904), and its offspring.

26. See Town of East Troy v. Soo Line R.R. Co., 476 F. Supp. 252 (E.D. Wis. 1979), aff'd 653 F. 2d 1123 (7th Cir. 1980), cert. denied 450 U.S. 922 (1981). There is, of course, an exception to the common law rule on government payments where the government is the defendant. A payment by one agency of the government to a plaintiff for medical expenses would not be excluded by the common law collateral source rule merely because another agency was the defendant. The common fund is the state general fund. In some jurisdictions, jurors are entitled to know that a fund common to the collateral source agency and the defendant has already paid part of the damages. Green v. U.S., 530 F. Supp. 633 (E.D. Wis. 1982) aff'd 709 F.2d 1158 (7th Cir. 1983). Further, the common law collateral source rule impermissibly allows a form of punitive damages against a municipality where punitive damages are not otherwise allowed by statutes. City of Salinas v. Souza and McCue Const. Co., 66 Cal. 2d 217, 57 Cal. Rptr. 337, 424 P.2d 921 (1967). In City, the court rejected use of the collateral source rule against a public entity since it would impose an unjust burden on the taxpayer while having no deterrent effect on a government since "government" is an abstract entity and government's employees were the true culprits.

27. Until the mid-1980s, when the latest wave of "tort reforms" began in state legislatures, Kansas was one of only four states which by statute had totally abolished joint and several liability for unintentional acts or omissions.

28. K.S.A. 60-258a. A claimant declared to be 25% negligent in his own injury sees the codefendants pay only 75% of all damages, including those for which the plaintiff has already been compensated, such as medical expenses paid by health insurance.

29. Because all such uses of the statute were appealed and Farley, supra, struck down the statute, the court was not called upon to solve this procedural conundrum.

30. K.S.A. 1988 Supp. 60-3802, 60-3803 and 60-3804.

31. K.S.A. 1988 Supp. 60-3805.

By definition there is no double recovery for the proportionate damages a plaintiff pays or absorbs from plaintiff's own resources.[28]

In K.S.A. 1987 Supp. 60-3403 the legislature did not indicate how judges were to mesh the change in the rule with the judicial duty to reduce the jury's gross verdict because of comparative negligence.[29] K.S.A. 1988 Supp. 60-3805 recognizes that problem. An elaborate system is created whereby the jury determines total damages, percentages of negligence attributed to the parties and collateral source benefits and costs,[30] but the judge apportions payment of the whole loss between plaintiff and defense resources.[31] This procedure is no more than a logical addition to post-trial judicial duties imposed by the comparative negligence act.[32]

By definition there is no double recovery for the proportionate damages a plaintiff pays or absorbs from plaintiff's own resources.

To avoid possible unfairness meshing comparative negligence with the collateral source statute, K.S.A. 1988 Supp. 60-3805 gives plaintiff credit for that portion of collateral source benefits which pay plaintiff's proportionate share of liability.[33]

Assume plaintiff has $200,000 in damages, and $50,000 in BC/BS payments already received, plaintiff was 20 percent negligent, and two codefendants D(1) and D(2) were equally at fault for the remaining negligence (40 percent each). If the common law collateral source rule remains in place, plaintiff recovers only $160,000 from defendants and keeps $50,000 paid by BC/BS.

Under the new law, $40,000, representing the plaintiff's proportionate negligence, is first credited against the $50,000 of the medical expenses already paid by plaintiff's health insurance resources. The remainder, $10,000, is reduced from the total remaining defense liability, and the $160,000 judgment becomes a $150,000 judgment split equally if both codefendants are solvent.

A. Limits on Recovery: Immune and Insolvent Codefendants

If a codefendant is either insolvent or immune or is a phantom or not otherwise subject to personal jurisdiction, another consideration applies.[34] If D(1) is immune, D(2) as the sole remaining solvent defendant does not get to claim the remaining $10,000 collateral source reduction because by law plaintiff must absorb D(1)'s share of liability.

Because of the self-insurance/economic theory behind the bill, plaintiff's collateral sources must also back fill for defendants who are insolvent, immune or uninsured.[35] In these circumstances, D(2) receives no deduction for plaintiff's collateral sources and owes his proportionate $80,000 in full, which is no more than the comparative negligence statute otherwise imposes.[36]

Plaintiff cannot receive collateral source credits under K.S.A. 1988 Supp. 60-3805 for the negligence of any party with whom plaintiff previously has settled or agreed not to assert a claim. Plaintiffs either make good or bad settlements and it was not felt appropriate to allow poor settlement negotiations to produce a credit. Presumably the reverse also is true. If plaintiff settled for an amount more than the jury awards against the settling defendant, the excess is not considered a collateral source. The law generally favors settlements and it seems inconsistent to penalize litigants who do so.

To trigger the exception, the plaintiff must make a "decision not to assert a legally enforceable claim against a named or unnamed party."[37] It is an open question what happens when plaintiff does not learn of the possible liability of a person until after a statute of limitations has expired, perhaps because of a defendant's refusal to supply pertinent information.

Can plaintiff argue there was no decision not to assert a claim against that person thus allowing any collateral source benefits to be offset under K.S.A. 1988 Supp. 60-3805? The word "decision" implies a conscious choice. Defendant may argue there is a "decision" when reasonable diligence would have uncovered the party. Plaintiff will counter that without a Rule 11 (K.S.A. 60-211) basis upon which to file the claim, there is no decision not to assert it.[38]

To trigger the exception, the plaintiff must make a "decision not to assert a legally enforceable claim against a named or unnamed party."

While bankruptcy seems cut and dried, insolvency may present factual issues. Does a defendant who seeks to have the judgment reduced have the burden of persuasion that plaintiff will be able to collect the judgment, or does the plaintiff who opposes reduction in the judgment have the burden to prove the plaintiff is unable to collect the judgment? Post-verdict discovery may be necessary in either event, probably in connection with a motion pursuant to K.S.A. 60-260(b)(1) or (2) when an insolvency becomes apparent after a K.S.A. 1988 Supp. 60-3805 reduction has been made. The reference to insolvency or bankruptcy of a "person" in this statute parallels the generic reference to "person" in the comparative negligence statute and thus should include corporate insolvencies and bankruptcies.[39]

32. Courts may need to instruct juries their only role is to determine disputed collateral source benefits received and costs thereof. They are not to reduce the gross verdict; such power is reserved to the court under K.S.A. 1988 supp. 60-3805.

33. Dean Concannon suggested this change to the 1987 House Judiciary Committee considering HB 2471. With a year to ponder, the 1988 legislature adopted the Concannon theory as the crux of K.S.A. 1988 Supp. 60-3805 post-trial adjustments.

34. K.S.A. 1988 Supp. 60-3805(a) (3) and (a) (4).

35. How K.S.A. 1988 Supp. 60-3805 affects proportionate judgments of underinsured codefendants is not specified in the act. The co-defendant may be partially insolvent under K.S.A. 1988 Supp. 60-3805, giving plaintiff partial credit for collateral source payments. Reductions in the judgment should be apportioned according to amounts actually paid by each defendant.

36. Plaintiff recovers $50,000 from his own resources and $80,000 from D(2), $130,000 total on a $200,000 injury. There is no double recovery in the classic sense.

37. K.S.A. 1988 Supp. 60-3805(a) (2).

38. Obviously, plaintiff's counsel should make sure the decision not to file a timely claim is the client's in order to avoid a later malpractice claim.

39. See a previous discussion of this question in Palmer and Snyder, "A Practitioner's Guide to Tort Refort of the 80's: What Happened and What's Left After Judicial Scrutiny?", 57 J.K.B.A. 25-26. November/December 1988 pp. 25-26.

40. K.S.A. 1988 Supp. 60-3805(a) (4).

B. Limits on Awards:

Statutory Caps

The act recognizes statutory barriers may prevent a full recovery. Plaintiff's collateral sources are not to be deducted when plaintiff does not receive full recovery. Any difference between limits imposed by law and the jury's itemized verdict becomes a K.S.A. 1988 Supp. 60-3805 credit for the plaintiff against net collateral source benefits.[40]

III. Subrogation Interests

A. Generally

The legislature's treatment of subrogation interests is a key element in use of the new law. At common law the existence of subrogation interests is kept from the jury unless the subrogee is a real party in interest and made a party to the litigation.[41] Under the collateral source statute, if the plaintiff already has been paid by insurance for part of or all the medical expenses but the insurer has a subrogation or lien interest, the evidence is inadmissible.[42]

The legislature faced a public policy dilemma. It has created statutory subrogation interests in third party negligence claims by a variety of interests, especially in mandatory no-fault insurance compensation systems.[43] Subrogation forces the liabilty insurance or private resources of the defendant to bear the risk of loss, not the claimant's first-party insurance.[44] K.S.A. 1988 Supp. 60-3801 *et seq.* leaves collateral source benefits with statutory and contractual subrogation rights unaffected. The theory behind this *status quo* arrangement is that no double recovery occurs.

Current Kansas regulations prohibit **domestic** health insurance companies from subrogating third party litigation claims.[45] Kansas hospitals are allowed statutory $5,000 liens against third-party recoveries by accident victims not covered by workers' compensation.[46] Consideration of subrogation interests — by alerting the jury to their presence — has been deemed inappropriate in a previous law journal article discussing Kansas legislative changes to the common law rule.[47] In any event, the 1988 legislature chose to abandon its 1985 theory and not put subrogation evidence in front of the jury, for some very practical reasons.[48]

B. Workplace negligence

Workers' compensation laws were not intended to eliminate or curtail all of the employee's common law rights to sue for negligence and resulting damages. Workers' compensation only prohibits tort actions against the employer. Actions against third party tort-feasors who cause workplace injuries are common.[49]

An injured Kansas employee must bring a third-party action within one year (the limit is 18 months if the injury causes death) or an automatic assignment of rights operates to preserve the *employer's* right of subrogation against the tort-feasor.[50] Public policy allows the employer to recover from the tort-feasor not on a strict subrogation basis, but on the theory the *employer* was harmed by the tort-feasor's negligence.[51]

Sometimes an employer is made a party to the lawsuit for comparative negligence purposes. Although the employer is immune from paying damages, workers' compensation law limits the employer's subrogation rights to a reciprocal of the percentage to which an employer is negligent. If the employer is found 25 percent negligent, the employer collects only 75 percent of its subrogation interest.[52] The employee keeps the other portion of his economic loss which he otherwise would owe through subrogation. This 1984 workers' compensation amendment intended (1) to penalize the employer who is partially negligent in the employee's injury and (2) benefit the employee.

Although the employer is immune from paying damages, workers' compensation law limits the employer's subrogation right to a reciprocal of the percentage to which an employer is negligent.

Yet the new statutes create a Hobson's Choice for the employee and procedural problems for the Court. The exclusion of collateral source ". . . services or benefits for which a valid lien or subrogation interest exists . . ." might be construed to preclude evidence of the employer's payment in all such cases. Potentially at least, all benefits paid are subrogated. However, the amount of the reduction of the employer's lien also might be held to be a collateral source under K.S.A. 1988 Supp. 60-3801(b). The benefits were paid as compensation for injury due to the accident.

How do the court and counsel present evidence to the jury when K.S.A. 1988 Supp. 60-3801(b) says if the benefits are subrogated such benefits are not collateral sources? Sometimes benefits are subrogated, sometimes not, depending on the jury's assignment of percentages of negligence. Further, if the reduction in the amount subject to subrogation becomes the employee's collateral source, the full amount of damages attributed to the employer's fault then must be considered uncollectible damages from an immune codefendant for purposes of K.S.A. 1988 Supp.

41. Klinzmann v. Beale, 9 Kan. App. 2d 20, 28-29, 670 P.2d 67 (1983).

42. K.S.A. 1988 Supp. 60-3801(b). An exception might be a case of malingering, where the defense wants to show the medical damages are high because of the direct action of the plaintiff. Such inquiry is complicated and requires that counsel lay a strong foundation. Acosta v. Southern California Rapid Transit Dist., 2 Cal.3d 19, 84 Cal. Rptr. 184, 465 P.2d 72 (1970).

43. K.S.A. 40-3113a and K.S.A. 44-504.

44. The theory is the subrogee is damaged by the actions of the third party causing injury to the insured and has a separate cause of action.

45. K.A.R. 40-1-20. Self-insured health insurance by employers or companies in other states doing business in Kansas is not regulated by the Kansas rule. A major sideshow in the 1988 session occurred over subrogation rights of health insurance. SB 630 allowed full health insurance subrogation. It passed the Senate, but stalled in the House without becoming law. Current Kansas law is in the minority, however: 38 other states allow subrogation of health insurance to third party claims.

46. K.S.A. 1987 Supp. 65-406. Even Veterans' Administration hospitals invoke this lien. An attempt in 1987 to increase the amount of the statutory lien to $50,000 did not pass.

47. "The state cannot effect the reforms called for by abolishing the collateral source rule if it leaves the right of subrogation in place." McDowell, "The Collateral Source Rule — The American Medical Association and Tort Reform," 24 Washburn L. J. 205, at 225 (1985).

48. See the interesting result that happens when state tort reforms do not take into account the supremacy of federal law and subrogation of federal workers' compensation statutes in U.S. v. Lorenzetti, 467 U.S. 167, 81 L.Ed.2d 134, 104 S.Ct. 2284 (1984). "More important, the fact that changing state tort laws may have led to unforeseen consequences does not mean that the federal statutory scheme may be judicially expanded to take those changes into account." (467 U.S. 169, emphasis added).

49. A 1980 book documents the growth of cases where employees injured in workplace accidents by defective manufacturing, products sue the manufacturer, but the author concludes this may be due in part to state workers' compensation benefits being "inadequate." Lieberman, The Litigious Society. In 1980, 4,239 of 13,554 product liability cases filed in federal district courts nationally (31% of all federal civil filings) were asbestosis cases, a form of third-party personal injury arising primarily in the workplace environment.

50. K.S.A. 44-504(b).

51. Keeton, Insurance Law — Basic Text, p. 151 (West 1971).

52. See Wilson v. Probst, 224 Kan. 459, 581 P.2d 380 (1971), and statutory changes that resulted in K.S.A. 44-504(b) and (d).

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60-3805(a)(2) credits.[53] The solution may be to have the jury determine the amount of workers' compensation payments as part of the verdict, then let the judge determine whether any amount is a collateral source. However, this solution is not currently allowed by the statute and further legislative amendment may be needed to clarify it.

The effect of the new law on third party negligence cases is an interesting, and perhaps unavoidable, paradox in public policy. K.S.A. 44-504(b)'s reduction in subrogation rights for employer negligence is clearly intended to reward the plaintiff employee, but the new law may transfer the intended benefit to the other negligent tort-feasor whose actions at least partly contribute to the employer having to expend workers' compensation benefits in the first place.

C. PIP Subrogation in Automobile Negligence Cases

Subrogation rights in Personal Injury Protection benefits (PIP) are controlled by K.S.A. 40-3113a.[54] Subsection (b) of that statute limits subrogation rights " . . . to the extent of **duplicative** personal injury protection benefits provided to date of such recovery . . . ." The Kansas Supreme Court has defined "duplicative" to mean those damages recovered by an injured insured which, if subrogation is thwarted, constitutes a double recovery.[55]

Once subrogated, the collateral source law does not apply. If the amounts paid are not duplicative, then they are collateral sources under the act, which defendant can seek to use post-trial to reduce the verdict.

Under present case law where defendant tenders policy limits and the claimant accepts the limits in settlement of the total claim, the PIP carrier is subrogated as a matter of law because the settlement duplicates the benefits provided.[56] Once subrogated, the collateral source law does not apply. If the amounts paid are not duplicative, then they are collateral sources under the act, which defendant can seek to use post-trial to reduce the verdict.

Our no-fault law raises other considerations.

PIP subrogation interests are handled differently than other automobile subrogation statutes such as K.S.A. 40-287 which governs subrogation of uninsured and underinsured motorist coverage. Where both ordinary PIP subrogation and uninsured motorist subrogation are part of the trial, the judge will have a complex determination whether the extent of the subrogation interest precludes double recovery.

Whether a K.S.A. 40-3113a subrogation right can be exercised often cannot be determined until a trier of fact decides total actual damages.[57] This might mean that a claimant who seeks a judgment in excess of policy limits has preserved maximum subrogation and thus avoided application of the collateral source statutes. More likely, this situation sets up the need for a post-trial evidentiary hearing on the nature and existence of "duplicative" PIP coverage.

What are the rights, duties and responsibilities of an automobile insurance company that insures both the plaintiff and defendant? Can a company write in its contract that if two of its insureds collide and one sues the other, no subrogation right exists? While certainly this is a voluntary waiver under previous law, such a decision under K.S.A. 1988 Supp. 60-3801 *et seq.* means the company's insured defendant can introduce medical and other PIP payments to influence the jury's consideration of the overall award. The claims must exceed the dollar threshold for this possibility to occur.

D. Subrogation of Federal Entitlement Programs

About 10 percent of all Kansans are eligible for Medicare benefits, for which federal law allows subrogation.[58] The Veterans' Administration has subrogation interests for certain services it provides veterans.[59] Federal employees in Kansas are subject to FECA subrogation if injured on the job.[60] Even the Kansas Department of Social and Rehabilitation Services has a program subrogating third party claims where medical expenses were first paid by Medicaid.[61]

The type and extent of subrogation is important. If the benefit is not fully repaid under the subrogation clause, it is a double recovery and might be a collateral source subject to K.S.A. 1988 Supp. 60-3801 *et seq.*

IV. Future Collateral Source Benefits

K.S.A. 1988 Supp. 60-3802 states "evidence of . . . collateral source benefits which are reasonably expected to be received in the future shall be admissible." Several interesting problems are created by this clause. If damages to a child are severe and defendant's experts testify the child will not live very long, on equity grounds will defendant be precluded from introducing evidence of future medical benefits to be received for a period longer than life expectancy? Defendant may argue that evidence of benefits to be received for the life expectancy determined by plaintiff's experts is admissible, leaving it to the jury to determine the amount of future benefits based upon its resolution of the dispute over life expectancy.

K.S.A. 1988 Supp. 60-3802, the threshold and "when applicable" section, plainly states evidence of future collateral sources is admissible only when such evidence is "reasonably expected" to be received in the future. This implies a judicial determination whether to allow evidence of future collateral source benefits.

An earlier version of the act would have imposed a "reasonably certain" test before such evidence would be

53. Is this both a collateral source benefit and an amount of an award constituting a "payment" by an "immune" codefendant?

54. Easom v. Farmers Insurance Co., 221 Kan. 415, syl. 4, 560 P.2d 177 (1977). Easom established a three part test: (1) The PIP subrogation right is limited to those damages recovered by the injured insured which are duplicative of PIP benefits; (2) damages are duplicative when the failure to reimburse the PIP carrier results in a double recovery by the insured; and (3) PIP benefits are presumed to be included in any recovery effected by an injured insured, either by way of settlement or judgment in the absence of proof to the contrary, and the burden of supplying such proof is on the insured.

55. Interestingly, this statute allows health insurance benefits paid by a casualty insurance company to be subrogated, while K.A.R. 40-1-20 prohibits domestic health insurance companies — which may have made payments in the same automobile accident — from subrogating.

56. Russell v. Mackey, 225 Kan. 588, 592 P.2d 902 (1979).

57. Kansas Farm Bur. Ins. Co. v. Miller, 236 Kan. 811, 696 P.2d 961 (1985).

58. 42 U.S.C. §1395y(b); 42 CFR §405.322 *et seq.* For an excellent treatment of Medicare's subrogation interests in tort litigation, see Williams, "Medicare as Secondary Payor," 31 Res Gestae 188 (Indiana Bar Assn. Oct. 87).

59. 38 U.S.C. §629 *et seq.*

60. 5 U.S.C. §§8101 *et seq.*

61. K.S.A. 39-719a.

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admissible. New York has such a test.[62] The standard in most states is that such benefits "will be payable." None has the relatively unstructured "reasonably expected" test like Kansas.[63]

The legislature did not define what standard of proof is necessary for defendants to show that benefits are "reasonably expected" to be received in the future. That means initially the judiciary will legislate this standard. The phrase "reasonably expected" is used in P.I.K. Civil 9.01, Elements of Personal Injury Damage instructions. Since P.I.K. 9.01 is part of the standard instructions given to personal injury juries, this indicates the "more probably true than not true" standard of proof would be appropriate.[64] Until judicial standards of what constitutes "reasonably expected" benefits are formed, counsel will cross swords often.

The legislature did not define what standard of proof is necessary for defendants to show that benefits are "reasonably expected" to be received in the future.

V. Future Eligibility for Private Health Insurance

While evidence of health insurance covering future medical care can be introduced, the new statutes do not specifically allow claimants to show any difficulty they may have in maintaining eligibility for future health insurance. However, the definition of the cost of the collateral source benefits appears to allow such leeway. The operative words are "amounts paid . . . to secure" a collateral source benefit.[65] To read the new law as precluding evidence other than premiums would not make sense. Had the legislature meant to admit only premiums paid, it could have so stated. Further, if the jury is to determine accurately if future benefits are "reasonably expected" to be received, it must be made aware of the ease with which health insurance benefits are subject to cancellation or loss based on job choices.

The right to future private or public health insurance benefits is not guaranteed. Such benefits must be purchased. Health insurance for a catastrophically injured child's future medical care depends on the parents' maintaining continuous medical insurance coverage.[66]

Proving the cost of covered future medical care or the cost of remaining eligible for such care requires additional discovery as well as testimony. Clearly, if the statute allows introduction of future collateral source benefits, it must also allow evidence of how inflation may affect future costs of securing such benefits.

Rapidly rising health insurance costs may make current employer-paid health insurance unaffordable in the future.[67] Claimants who receive health insurance as part of their employment benefits may be disadvantaged if their union elects to change health insurance plans as part of its collective bargaining strategy. If such a change occurs after the jury assumed these benefits would be paid in the future, the claimant not only loses the health insurance but also has no way to reopen the verdict to have the negligent tortfeasor pay the future medical care resulting from his actions. A change of employers by a child's parents (or a change in private health insurance carriers for whatever reason) invokes new "waiting periods" and exclusions of known diseases or preexisting injuries. Once the jury's decision is made and post-trial motions are completed, claimants have limited remedies since **res judicata** applies.[68]

VI. State Medical Services or Institutional Care

In cases where the $150,000 threshold is not exceeded, the existence and availability of tax-funded institutional care for injured citizens is inadmissible. However, such benefits are an admissible collateral source under the new law if the threshold is exceeded and there is no government subrogation or lien interest in the benefits provided. Some states have seen new types of "experts" testify to the "availability" of state or federal programs to assist the injured person or the family.

The new statutes are silent as to whether defendant can argue the existence of future government benefits if the plaintiff fails to seek benefits from government programs to which plaintiff is entitled. Plaintiff may not need public assistance, but may have to admit the reason is private

62. Civil Practice L & R. §4545.

63. A key amendment to understanding legislative intent came during Senate floor debate. The Senate Judiciary Committee had taken the House version, which allowed the jury to consider future collateral source benefits, and modified the bill so that only present damages could be considered for reduction from the verdict and only by the trial judge in a post-verdict hearing. Senator Gaines amended the bill on the floor so that the judge could consider evidence of future collateral source benefits. He explained his reasoning by reading a portion of a letter from the primary proponents of the legislation, the Kansas Medical Society: "I've asked the Kansas Medical Society to tell us what are those outside sources we are going to consider. In their writing they said,

". . . the rationale for allowing the judge to consider benefits to be received in the future is that, especially in medical malpractice cases involving minors, there are frequently collateral source benefits paid which can have a substantial impact on award costs. For example, in addition to the traditional benefits of health insurance etc., there are many publicly funded programs for children such as rehabilitation and counseling services and the providing of equipment in services for special needs educational pruposes in physical or occupational therapy services programs."

Under questioning as to what programs he intended be included by the amendment, Gaines stated, "I tried to answer as best I could about what those would be. I envision those as applied by the trial judge to be things that are vested. Let me read again, for example, 'in addition to the traditional benefits of health insurance etc., there are many publicly funded programs for children such as rehabilitation and counseling services, the providing of equipment and services for special needs educational purposes in physical or occupational therapy services programs.' That's not difficult for a judge to determine. If those things are available, why do we want the HCSF to pay for that a second time? The logic to that is understandable. *** When they approached me and said, 'we want the judge to be able to consider the fact that there are many federal programs out there that substantially would result in a double payment. The government is going to provide those [benefits] despite any type of a judgment or award and we want credit to that extent.' Those are vested types of benefits that aren't going to run away from anyone; they aren't conjectural. It applies particularly to a brain injured child. ***" (Emphasis added)

The Conference Committee later changed the Senate version of the bill so that the jury instead of the judge decided the amount of future collateral source benefits. But it appears Senator Gaines intended that his amendment apply to future collateral source benefits which vest, presumably by time of trial. A complete transcript of the House and Senate floor debates on this legislation is available from the Kansas Bar Association. The minutes of judiciary committees are available from the Legislative Services Department in the Statehouse.

64. See P.I.K. Civil 2d 2.10. This definitional hiatus by the legislature raises the age old question of how much speculation and conjecture courts should tolerate concerning the future availability of collateral source benefits. Review the Kansas rule in Ratterree v. Bartlett, 238 Kan. 11, 707 P.2d 1063 (1985) where the Kansas Supreme Court restated its general rule that opinions by expert witnesses should not concern matters which are mere speculation or conjecture. Also see **Admissibility of Expert Medical Testimony as to Future Consequences of Injury as Affected by Expression In Terms of Probability or Possibility.** 75 A.L.R.3d 11 (1977). The lead case in this annotation is Nunez v. Wilson, 211 Kan. 443, 507 P.2d 329 (1973), later modified in Ratterree, supra.

65. K.S.A. 1988 Supp. 60-3801(c).

66. Blue Cross and Blue Shield typically covers medical care for a dependent child only until age 21 and only up to stated policy limits ($1 million for major medical). At age 21, with existing medical problems requiring long-term care, a disabled child probably will not qualify for his or her own Blue Cross plan for the preexisting injury. Even if a policy is available, the covered procedures within each policy vary from year to year.

67. The June 22, 1987 **Washington Post** reports health care expenditures account for nearly 11% of the current U.S. GNP, but are headed towards capturing 15% of GNP by the year 2000. Total U.S. Health costs will triple by 2000, from $458 billion to $1.5 trillion. Per capita costs will grow from $1,837 in 1986 to $5,551 in 2000. Price inflation rather than increased use, says columnist Michael Specter, accounted for 54% of the 1986 increase.

68. Try to argue that K.S.A. 60-260(b) (5) or (b) (6) allows reopening the judgment if the problem occurs. A simpler approach (substantively, not necessarily procedurally) to proving future collateral source benefits is a periodic payment of judgments statute, which was considered in 1987 SB 258. It did not pass.

resources or wealth. This presents a clash between the admissibility of "reasonably expected to be received" public resources and the "gratuitous services" exception.

To the extent evidence of publicly-funded benefits is presented to the jury, rebuttal should try to show (1) such programs are subject to future funding by the legislature or Congress, funding over which the claimant has no control, and (2) the benefits provided in such programs change frequently. However, the speculative nature of future welfare program funding goes only to the weight, not the admissibility, of the evidence, if the court otherwise rules the benefits are reasonably expected to be received. The new statutes allow evidence of non-subrogated public assistance even when it will benefit foreign individuals, corporations or insurers whose Kansas tax burden to help pay for this tax-funded alternative is slight or nonexistent.

VII. Life and Disability Insurance

All collateral sources are subject to the act except those expressly excluded, such as life and disability insurance. Life insurance is excepted because it often is purchased for investment motives in addition to its traditional purpose.[69] Life insurance often is exempted in other states' collateral source legislation.[70]

The portion contributed by the employee plus investment earnings should not be deemed a collateral source.

However, discrimination between similar types of collateral sources has been held unconstitutional by one Kansas court.[71] A wage continuation plan is an understanding with an employer that salary will be paid to an employee or executive of a company during any period of time that such person is disabled or injured. Such plans are collateral sources under K.S.A. 1988 Supp. 60-3801(b) unless there is a subrogation interest.[72] Yet another form of insurance, disability insurance, is an exempt collateral source even though its function is similar to a wage continuation plan.

Some employers have ERISA pension plans which allow the accumulated retirement fund to be given to the employee if the employee is disabled (or employee's estate if the employee dies). While the portion of the fund contributed by the employer certainly is a common law collateral source, it is uncertain whether ERISA proceeds are considered a collateral source under the new definitions.[73] The portion contributed by the employee plus investment earnings should not be deemed a collateral source.

VIII. Trial Concerns

Obviously the biggest change in the law is the conduct of the trial. The following is not an exhaustive list of concerns for trial counsel but gives an idea of some issues counsel must address.

A. Discovery Issues and Costs

Since the common law rule did not allow evidence of collateral source benefits or costs "paid to secure" the benefits, litigants heretofore spent little time developing such evidence. K.S.A. 1988 Supp. 60-3801 *et seq.* may require presentation of such evidence at trial. This means new costs of litigation in developing and presenting this evidence.[74]

Showing amounts paid to secure the right to the collateral source benefit requires new and perhaps extensive discovery, depending on the interpretation of the phrase costs "paid to secure" the benefit.[75] Experts from health insurance companies and personnel planning administration fields may be needed to testify. Indeed, the legislature may have spawned a whole new class of witnesses: public benefits experts.

What relevant time period is to be used to determine amounts paid "to secure the benefits"? As a practical matter few consumers keep their cancelled insurance premium checks for twenty or thirty years. Reconstructing insurance coverage and premium payments over a long time period is a significant financial burden.

B. Additional Discovery Impact on Employers

Absent pretrial stipulation by the parties, where an employee's health or disability insurance is provided by an employer and the employee (or dependent) is injured by negligent third parties, the employer must be prepared to testify on the cost of the benefit in **any** personal injury action in which an employee or employee's dependent is the claimant.

The purpose of plaintiff's evidence will be to persuade the jury that future collateral source benefits are not "reasonably expected to be received." Defendant, of course, will want to show the benefits will be provided. If the availability of future medical care through plaintiff's own health insurance is an issue, the employer might testify to the claimant's long-term job prospects and the corporate philosophy on maintaining health benefits as a long-term

69. See Dean Concannon's written testimony to the House Judiciary Committee, February 11, 1988.

70. State statutes that limit the common law collateral source rule but which exempt life insurance proceeds from the definition of a collateral source include: **Alaska**, Stat. §09.55.548, medical malpractice only, effective 1976, §09.17.070; **Colorado**, Rev. Stat. §13-21-111.6, excludes collateral sources directly purchased by the injured party, effective 1986; **Connecticut**, Gen. Stat. §52-225a-225d, medical malpractice only effective 1985, applied to all tort actions by amendment 1987; **Delaware**, Code Ann. tit. 18, §6861-6862, medical malpractice only; **Florida**, Stat. §768.50, effective 1976, but see §768.76, allowing deductions for life insurance if there is no subrogation right, effective 1986; **Georgia**, Code §51-12-1 (105-2005), effective 1987; **Illinois**, Rev. Stat. ch. 110, §2-1205, excluded only if there is subrogation right, effective 1985, §2-1205.1, effective 1986; **Indiana**, Code §34-4-36-1-3, effective 1986; **Iowa**, Code §147.136, does not include assets of a claimant or claimant's immediate family, amendment effective 1987; **Michigan**, Stat. Ann. §27A.6303, 27A.6304, effective 1986; **Minnesota**, Stat. §548.36, effective 1986; **Montana**, Code Ann. §27-1-307, §27-1-308, effective 1987; **New Hampshire**, Rev. Stat. Ann. §507-C:7, medical malpractice only, declared unconstitutional in **Carson v. Maurer**, 120 N.H. 925, 424 A.2d 825 (1980); **New York**, Civ. Prac. Law and R. §4545, effective 1986; **North Dakota**, Cent. Code §26-40.1-08, effective 1977 but repealed 1983; **Ohio**, Rev. Code Ann. §2317.45, effective 1988, see also §2305.27, effective 1976, held unconstitutional in **Simon v. St. Elizabeth Medical Center**, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (19760, and **Graley v. Satayatham**, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (1975), but see **Holaday v. Bethezda Hosp.**, 29 Ohio App. 3d 347, 505 N.E.2d 1003 (1986); **Oregon**, 1987 Or. Laws ch. 774; **Pennsylvania**, Stat. Ann. tit.40, §1301.602, medical malpractice only, public collateral sources only, effective 1975; **Rhode Island**, Gen. Laws §9-19-34, medical malpractice only, effective 1976; **South Dakota**, Codified Laws Ann. §21-3-12, medical malpractice only, exempts privately purchased insurance, effective 1977; **Tennessee**, Code Ann. §29-26-119, medical malpractice, exempts privately purchased insurance, effective 1975.

71. Discriminatory treatment between victims of negligence whose "collateral sources" are different ". . . does not have a reasonable and substantial relation to the purpose of keeping down rates." **Doran v. Priddy**, 534 F. Supp. 30, at 38 (D. Kan., 1981), cited with approval in **Farley**, supra.

72. Or unless wage continuation plans are considered "gratuitous services" under K.S.A. 1988 Supp. 60-3801(b) and thereby exempt.

73. One might argue that to include ERISA funds diminishes the intended benefit conveyed thereunder, contrary to federal supremacy considerations. Further, Key Man insurance is another form of insurance that is neither fish nor fowl, neither disability insurance or life insurance. Is it a collateral source benefit under K.S.A. 1988 supp. 60-3801 *et seq.*?

74. K.S.A. 1988 Supp. 60-3801(b) and (c).

75. K.S.A. 1988 Supp. 60-3801(c) and 60-3803.

benefit. If a corporation is considering scaling back the work force or reducing employee fringe benefits over the period a dependent child may need care, that is a material fact the jury must know before deciding which benefits are "reasonably expected" to be received in the future. Employer layoff histories necessarily will be explored.

Unfortunately if a child-claimant's parent is a discipline problem at work and may be fired in the future (thus impairing access to continuous employer-paid health insurance), this evidence may have to come out to dissuade a jury from including those amounts in the future benefits "reasonably expected" to be received. Yet such information may have other, unintended consequences.[76]

C. Thresholds

No reduction of a judgment occurs, nor should evidence be introduced, if the demand for judgment does not exceed $150,000. Defendants will need to invoke Supreme Court Rule 118 to obtain a statement of the amount of damages sought. The threshold is a "claim" threshold, not one based on the amount of duplicative damages contained in the pleadings.

No reduction of a judgment occurs, nor should evidence be introduced, if the demand for judgment does not exceed $150,000.

Presumably, damages that are sought other than "personal injury or death," such as property damages and consequential economic loss from damage to property, are disregarded in determining whether the threshold is met, but K.S.A. 1988 Supp. 60-3802 is unclear on this point. For tactical purposes, when collateral sources cover many of the damages, claims exceeding $150,000 might be scaled back to within the threshold limit to avoid this new burden.

An unanswered question is whether a claim by plaintiff exceeding the threshold means that collateral sources are admissible on a defense counterclaim for personal injury tried in the same lawsuit. Whether the defendant's collateral sources can be introduced then or whether a defendant must have a separate $150,000 counterclaim to trigger the statute remains to be addressed judicially or legislatively.

D. Relief from Judgment

An open question is whether relief from the judgment will be available pursuant to K.S.A. 60-260(b)(5) or (6) if a serious error is made. If a defendant thought to be solvent is shown — long after rendition of the judgment — to have been insolvent, or when a collateral source the jury assumed would be available in the future later proves not to be available, what can a court do? The current answer appears to be nothing.

E. Defense Strategy

The new law opens up additional defense strategies. If the evidence is admissible, defense counsel presumably may make references to the evidence beginning with voir dire examination to mitigate the nature and extent of the damages.

Because the object is to bring as many collateral sources into the equation as possible, defense counsel seeing the existence of a subrogation interest may consider a pretrial "buy out" of the subrogee's lien or subrogation interest. Plaintiff has no vested interest in a subrogee's contract rights regarding repayment of a subrogation or lien interest, and, subrogation interests usually being a creature of contract, assignment of such interests is common. The buy out becomes a form of financial "hedging" by defendants or, more probably, their insurers. Employers may jump at the chance to recoup a small percentage of every loss associated with third party negligence rather than wait for subrogation interests that might not materialize.

If defendant makes a pretrial purchase of the subrogee's interest and plaintiff prevails at trial, is defendant then able to subtract the subrogated interest from the award by treating it as a collateral source? Plaintiff might respond that defendant has no standing to introduce evidence of the subrogated amount unless the defendant formally waives enforcement of the subrogation lien. These waters are all uncharted, and the record is silent on legislative intent.

Some practical limitations on hedging exist. If the defense is lack of liability or causation, then hedging is a waste of defense resources. Hedging may be attractive only in medium size cases where damages are not limited by other statutes and the plaintiff is only slightly at fault. The $150,000 threshold precludes hedging smaller cases. The larger the subrogation interest purchased by defendant and the greater the possibility of a substantial pain and suffering verdict, the more plaintiff's K.S.A. 1988 Supp. 60-3805 protections come into play.

If the defense is lack of liability or causation, then hedging is a waste of defense resources.

Assuming statutory limits on recovery of noneconomic loss withstand analysis by the Kansas Supreme Court, where there are catastrophic injuries and the jury awards noneconomic damages in excess of statutory amounts, K.S.A. 1988 Supp. 60-3805(a) (4) would preclude larger hedged amounts from being offset. Hedging too big a piece of pie means the plaintiff may get to keep most of it anyway, yet with additional defense costs.[77]

76. Corporate counsel take heed! Employers swearing under oath as to the disciplinary status of an employee at the time of the deposition or trial may be impeached by such statements in later unrelated employment law proceedings.

77. The contrary is also true. If the Kansas Supreme Court extends the rationale of Kansas Malpractice Victims Coalition (KMVC) v. Bell, 243 Kan. 333, 757 P.2d 251, 257 (1988) to 1988 legislation limiting noneconomic losses in other lawsuits, it will increase the likelihood defense hedging could significantly reduce defendant's exposure. In medical malpractice actions where the plaintiff has little or no comparative negligence, buying out a $200,000 workers' compensation subrogation claim for ten cents on the dollar allows defendant to introduce $200,000 of collateral sources into evidence. If the jury returns a verdict for the defense, the defense costs are $20,000 higher. If it finds for the plaintiff but indicates $200,000 in collateral benefits were received, less costs, defendant's exposure is potentially reduced by $180,000 — the $200,000 in benefits not paid in the verdict minus the cost of hedging.

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F. Plaintiff's Strategies

A tactical reason behind allowing juries to learn of plaintiff's collateral source benefits is to reduce the sympathy factor.[78] That might facilitate a defense verdict, or perhaps affect noneconomic damages awarded. To the extent these are valid considerations, plaintiff's counsel wants to keep collateral source evidence away from the jury while maximizing recovery. Turning otherwise admissible benefits into benefits with a subrogation interest is one way to create inadmissible evidence.

One method is a voluntary bilateral subrogation contract between the claimant and the provider of the benefits.[79] All parties are represented by counsel, so overreaching or adhesion does not appear to be a problem. The contract might work better than a unilateral subrogation right, since counsel can negotiate contingencies that trigger subrogation reimbursement similar to those in K.S.A. 1988 Supp. 60-3805(a). Timing of the contract is important because pretrial discovery and negotiations with defendant may produce a settlement without need of the bilateral subrogation agreement.

Turning otherwise admissible benefits into benefits with a subrogation interest is one way to create inadmissible evidence.

There are pitfalls to these bilateral subrogation contracts. Such contracts are not advisable in cases where the jury may assess a significant portion of negligence to the plaintiff. It is not fiscally prudent to contract to give away additional portions of the damages if the plaintiff may have to absorb part of the liability because of comparative fault. Certainly in creating the bilateral subrogation contract, plaintiff can agree to make various levels of subrogation available to the subrogee depending on the jury's total award, the jury's assignment of negligence to the plaintiff, or a combination thereof.

If evidence of future collateral source benefits is allowed, defendant apparently has the burden of showing the present value of such benefits if the future economic loss is stated in terms of present value. This is an abnormal process especially when defendant has disclaimed liability and does not want to discuss damages except through cross examination of plaintiff's experts.

G. Request for Admission

Another way to avoid presenting collateral source evidence to the jury is to use a Request for Admission. If the claimant's benefits are fairly certain and claimant wants simply to offer five or ten years worth of paid premiums as the offsetting costs of the collateral source benefits, claimant can submit to defendant a Request for Admission.[80] If defendant agrees to the figures requested to be admitted, then claimant can argue that such evidence need not go to the jury because none of the facts are in dispute. To allow a jury to hear undisputed collateral source evidence makes no more sense than allowing juries to hear evidence of negligence when negligence is stipulated and the only trial issue is damages. If the request is denied without a good reason and the jury returns the same numbers plaintiff requested be admitted, plaintiff can seek additional attorney fees and costs for having to prove that which should have been stipulated.[81]

H. Instructions

The new law changes the law of damages in Kansas, even though the award itself is not directly affected by a jury decision. The parties may seek instructions on this new law.

Instructions should make clear that the jury must not reduce damages because of collateral source benefits and that the court will make any reduction that is appropriate. The instructions should also note the collateral benefits introduced as evidence are the only ones that may be used to reduce the judgment and the jury should not concern itself with other payments plaintiff might have received or may receive in the future.

In some cases, it might be appropriate to explain that other payments plaintiff received will not be used to reduce the judgment because plaintiff is legally obligated to repay the provider from the judgment. The substance of the instruction would be similar to the P.I.K. instruction allowing the jury to know the consequence of a 50 percent determination of comparative negligence.[82]

Conclusion

K.S.A. Supp. 60-3801 *et seq.* add a major new dimension to personal injury cases. It may prove to be highly litigious reform, requiring many supreme court decisions to define its parameters. While the legislation appears to meet constitutional concerns in **Farley** that the rule change apply to all tort cases,[83] other uncertainties as well as added litigation costs arise. In comparison to previous legislative enactments on the subject, the new law meshes the collateral source economic theory with existing statutory law in a better comprehensive scheme but, as this article shows, not without questions. The problems raised herein indicate why common law courts left collateral source evidence outside the province of the jury in the first place. ■

It may prove to be highly litigious reform, requiring many supreme court decisions to define its parameters.

78. Ten states limit evidence of collateral sources paid to post-verdict hearings to the trial judge. Juries do not consider the evidence. See the statutory citations in footnotes 8 and 70 above for the following state collateral source statutes: Alaska, Colorado, Connecticut, Illinois, Michigan, Minnesota, Montana, Nebraska, New York and Utah.

79. Presumably, insurance regulations do not prohibit domestic health insurers from entering into bilateral contracts with private persons represented by counsel on terms that may be just to all parties. See footnote 45.

80. K.S.A. 60-236, or Federal Rule 36.

81. K.S.A. 60-237(c) or Federal Rule 37(c).

82. See Nail v. Doctor's Bldg., 238 Kan. 65, 708 P.2d 186 (1985).

83. Curiously the statute is available for use to diminish damages by intentional, reckless or wanton tort-feasors when no other part of Kansas law benefits tort-feasors exhibiting more than ordinary negligence.

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KANSAS COALITION AGAINST SEXUAL AND DOMESTIC VIOLENCE

UNITED AGAINST VIOLENCE

220 SW 33rd Street, Suite 100 Topeka, Kansas 66611
785-232-9784 • FAX 785-266-1874 • coalition@kcsdv.org

To: House Judiciary Committee
DATE: February 8, 2005

RE: HB2150
Oppose

Dear Chairman O'Neal and Members of the House Judiciary Committee:

The Kansas Coalition Against Sexual and Domestic Violence (KCSDV) is a non-profit organization whose members are the programs serving victims of sexual and domestic violence across the state.

In working with victims of sexual and domestic violence, advocates often focus on the issues of safety for the victim and accountability of the perpetrator. Whether the violence is sexual or domestic in nature, in order to feel whole again, it is important that victims feel there is full accountability for the violence. Full accountability includes holding the perpetrator/wrongdoer responsible for the violence, whether the damages are emotional or financial in nature.

The current collateral source doctrine in Kansas supports the victim by placing the full responsibility for full compensation for injuries on the person doing the harm. Any rule to the contrary would serve to negate Kansas's strong public policy of holding the perpetrator responsible. While this public policy is often apparent when one looks at the criminal side of this issue, it is equally important not to forget the civil side of this public policy equation. Full responsibility and full accountability is about bringing an end to sexual and domestic violence.

KCSDV urges this committee to retain current law in this area. We support full responsibility for the wrongdoings of the perpetrator and oppose HB 2150 for these reasons.

Sandra Barnett, Executive Director
Kansas Coalition Against Sexual & Domestic Violence
782-232-9784

Testimony of David Moss

House Committee on Judiciary
Hearing on HB 2150
February 8, 2005

Mr. Chairman and members of the Committee, thank you for the opportunity to speak to you today on HB 2150 relating to the collateral source rule. I'm here today to tell you why this issue is important to me and to ask you to oppose HB 2150.

On November 25, 2004 my car was pulled over on the side of the road in Wichita and I was getting ready to have it towed. I was standing by my vehicle when a car hit me. The driver then hit my car and the tow truck driver. I was seriously injured with a left fractured ankle, damage to my left arm, and other physical injuries. The tow truck driver later died. I witnessed his injuries.

My case is still pending, but the police report indicates that the accident was caused by the driver driving under the influence (DUI) as well as inattentive driving.

If you pass HB 2150 it will have serious implications for Kansans like me. It will allow any award I receive to be reduced by the amounts paid by my insurance company. I have maintained insurance and I don't understand why the driver that hit me should be able to benefit from my insurance coverage. It isn't fair.

I respectfully request that you oppose HB 2150.

House Judiciary
2-8-05
Attachment 9

Kansas AFL-CIO

2131 S.W. 36th St. Topeka, KS 66611 785/267-0100 Fax 785/267-2775

WRITTEN OPPOSITION ON HB 2150
to the Judiciary Committee

By the Kansas AFL-CIO
February 8, 2005

For decades the Kansas AFL-CIO has protected the rights of the working men and women of Kansas. Whether the issue is access to health care; protection from toxic substances; or product liability, the AFL-CIO works hard to make the workplace safe and to improve the quality of life for Kansas workers.

The collateral source rule of law is a fundamental doctrine of civil rights which has been in place in our state for more than 100 years. It is an important rule of law in the protection of workers and consumers. The collateral source rule is now at risk of being abolished as it applies to product liability and other civil tort cases. This is special interest legislation. It is bad for workers and consumers. A small special interest group wants to strip away the rights of individual Kansans' to hold wrongdoers accountable. Without the collateral source rule, the burden of compensation for injuries is unfairly shifted to the injured worker or consumer themselves. The proposed change in law would benefit only the medical insurance industry and medical providers.

The civil rights of Kansas workers and other consumers must not be compromised. The proposed change in law would benefit all the wrong people and would send the wrong signal to those who inflict harm on Kansas workers and consumers. Wrongdoers must be held accountable for their wrongdoing.

The AFL-CIO of Kansas opposes any attempt to repeal the collateral source rule.

House Judiciary
2-8-05
Attachment 10

MADD
Activism | Victim Services | Education™

KANSAS STATE OFFICE
Victim Services Office
3601 SW 29th Suite 211
Topeka, KS 66614
Phone (785)271-6199
Phone (785)271-6324
Hotline 1-800-443-6233
Fax (785)271-0797
maddkansas@parod.com

February 7, 2005

Rep. Michael O'Neal, Chairman
House Judiciary Committee
State Capitol Rm 170-W
Topeka, Kansas 66612

Dear Representative O'Neal and Committee Members:

Position

MADD stands firmly for the rights of victims of alcohol and other drug impaired driving crimes, in particular, the right to be compensated fairly for harm suffered at the hands of impaired drivers.

Viewpoint

At the present time, a great deal of controversy is being focused on efforts to modify tort and liability laws on the state and federal level. While the complexity and variety of laws in this area make it difficult to adopt a single position which will address all issues surrounding tort reform, MADD recognizes that there is a need to promote and sustain the rights of victims of impaired driving crashes to be fully compensated for harm resulting from these crashes. Such compensation includes financial recovery through state administrated Victim Compensation Programs and civil tort actions in state or federal court. In light of this stand, a number of principles can be pronounced which bear on these issues.

Statements of Principle

MADD makes the following statements concerning specific tort reform issues which are paramount to the victim's right to recover.

1. MADD opposes any measures which will restrict or in any way limit the rights of victims of impaired driving crashes to seek and recover punitive damages in any cause of action arising out of impaired driving crashes.
2. MADD opposes any measures, such as joint and several liability revisions, which would prohibit the victim of an impaired driving crash from seeking full recovery of damages awarded from each defendant in cases where the evidence supports a finding that the conduct of each defendant, independent of the other defendant or defendants, was or could have been the proximate cause of the death or injury.
3. MADD opposes any measures that would limit the amount of damages that a victim of an impaired driving crash could recover in cases resulting in death or injury.

4. MADD opposes any measures to modify laws which could limit the rights of victims of impaired driving crashes to seek recovery in any dram shop or other third-party liability action which may be brought against the seller or provider of any alcoholic beverage.
5. MADD opposes any measure which would modify the "collateral source rule" so as to provide for a reduction in he amount of damages awarded to the victim of an impaired driving crash based on benefits which may be available to the victim through policies of insurance purchased by the victim or provided on his behalf by a third party.

These positions on tort reform measures are not intended to be all inclusive. MADD will continue to evaluate tort reform issues as they arise in light of the rights of victims of impaired driving crashes to be fairly and fully compensated for death or injury caused by impaired drivers. MADD opposes HB 2150 and asks that you oppose HB 2150.

Sincerely,

Sandi Raines

Sandi Raines
State Chairperson
Kansas MADD

State of Kansas
House of Representatives

Todd Novascone
99TH DISTRICT

COMMITTEE ASSIGNMENTS
VICE-CHAIRPERSON: COMMERCE AND LABOR
FEDERAL AND STATE AFFAIRS
ECONOMIC DEVELOPMENT

Chairman O'Neal and committee thank you for granting me the privilege to come and speak with you this afternoon regarding HB 2233.

The inspiration for this piece of legislation was two-fold. First, a constituent, who has the franchise for Applebees in the state of Kansas, approached me about introducing a law that would protect the restaurant industry from obesity related claims. He discussed with me his real fears concerning the future of his industry. He does not want the fast food/restaurant industry to have to travel down a path ravaged with costly and never ending court battles. He further expressed his belief that people will try to blame anyone for their obesity problems, and that the state needs to intervene to protect the innocent food service providers.

The next reason for me to bring this in front of your committee is a movie some of you may have seen called "Supersized" which depicts a healthy man who consciously chose to eat McDonalds for one month, yet he did not just eat dinner there, he ate every meal there. Within the first week, the subject was visibly tired, depressed, his heart rate and liver showed signs of damage, and he gained ten pounds. The movie showed me the role that individuals must play in their own health and well being. The scapegoat mentality of holding a restaurant liable for someone's obesity problem is exactly why I believe we need this bill.

All of you may think that this is a miniscule problem, but I am trying to prevent an onslaught of obesity related lawsuits similar to the rampant tobacco lawsuits of the early 1990s. Tort reform is a pressing issue for our country and eliminating frivolous claims is at least a step in the right direction. I am aware that obesity is a very real problem; in fact, 61 billion dollars are spent annually on obesity related medical costs. However, we need to actively fight the obesity problem with education, preventative measures, moderation and lifestyles structured around exercise. Suing restaurants only perpetuates the obesity problem, it does not lesson it.

When my dad was young the nutritionists were pushing steak and eggs, then it was potatoes and pasta. So who should we sue, the cattlemen or the Idaho potato farmer? Some lawyers would say sue them all; however I do not agree.

I urge your committee to pass out House Bill 2233 favorably. I will stand for questions.

Thank you,

Rep. Todd Novascone

BUTLER/SEDGWICK COUNTIES
1713 BUTTERNUT DRIVE
WICHITA, KS 67230

House Judiciary
2-8-05
Attachment 12

HEIN LAW FIRM, CHARTERED

5845 SW 29th Street, Topeka, KS 66614-2462
Phone: (785) 273-1441
Fax: (785) 273-9243

Ronald R. Hein
Attorney-at-Law
Email: rhein@heinlaw.com

Testimony Re: HB 2233
House Judiciary Committee
Presented by Ronald R. Hein
on behalf of
Kansas Restaurant and Hospitality Association
February 8, 2005

Mr. Chairman, Members of the Committee:

My name is Ron Hein, and I am legislative counsel for the Kansas Restaurant and Hospitality Association. The KRHA is the Kansas professional association for restaurant, hotel, lodging and hospitality businesses in Kansas.

The KRHA supports the passage of legislation similar to HB 2233, including SB 75, which is very similar to this bill. However, there are several changes which we believe need to be made to HB 2233 if it is to be worked. We could either propose specific amendments, or the more easier approach might be to substitute the provisions of SB 75.

This bill provides in section 1(b) that there shall be no civil liability by any grower, producer, retailer, or other person identified in the bill for a "claim arising out of weight gain, obesity, a health condition associated with weight gain or obesity, or other generally known condition allegedly caused by or allegedly likely to result from the long-term consumption of food." This bill might very well have been called the "Personal Responsibility Act". In fact, at the national level, the U.S. House of Representatives last year passed a similar bill called the "Personal Responsibility in Food Consumption Act." It was passed with overwhelming bi-partisan support, 276 to 139. Similar legislation, titled the "Commonsense Consumption Act," was introduced in the U.S. Senate.

HB 2233 is very narrowly written to block particular types of frivolous litigation. It applies only to claims of weight gain, obesity, or other conditions associated with the long-term consumption of food. It specifically does not apply to civil liability for what might be known colloquially as "food poisoning" type activities.

The bill also includes good faith exemptions, so that bad actors are still liable for their bad acts. For example, section 1(c) provides that the bill will NOT prohibit actions where there has been a "material violation of an adulteration or misbranding requirement" of state or federal law. The bill also allows civil liability under the provisions of section 1(c)(2), where the claim is based on "any other material violation of federal or state law

applicable to" the activities set out therein, including manufacturing and marketing. So, if a company misbrands a product, sells adulterated food or intentionally misrepresents a product, the company can still be liable.

The point of this bill is to stop frivolous claims. For example, where an individual makes his own choice of where to eat and how much to eat, as well as a slew of other lifestyle choices – such as exercise – and then files suit for gaining weight or developing a condition from overeating. This bill will provide sufficient protection for Kansas agricultural producers, Kansas restaurants, food dealers, and others in the food production chain who might be a victim of such a suit.

These types of lawsuits have been filed in other states, though I am not aware of any suits specifically filed in Kansas at this point. Thus far, judges have not been receptive to these suits. The KRHA believes we should not wait until litigation is filed in this state.

Section 1(e) provides for a stay of discovery during the time the motion to dismiss is being decided, unless the judge orders otherwise pursuant to that section. In this way, the costs of discovery will be avoided while the judge rules on the motion to dismiss. In this way, defendants will be forced to expend substantial funds to retain counsel and to fight these lawsuits in court.

This legislation is modeled after the National Restaurant Association model act, although it has been modified slightly. It is possible this legislation is based upon Missouri legislation.

As of January 2005, 14 states have enacted this or similar legislation, and numerous others have introduced them for consideration this year. We believe that this legislation is the most appropriate of the various versions that have been offered or enacted, and sets the most sound policy for handling cases of this nature.

A number of associations in Kansas support this type of legislation. Please see the attached list for those who have asked to be listed. Some or all of them may testify as well.

Thank you very much for permitting me to testify, and I will be happy to yield to questions.

Kansas Beverage Association

Kansas AgriBusiness Retailers Association

Kansas Farm Bureau

The Kansas Chamber

Kansas Cooperative Council

Kansas Food Dealers Association

Kansas Grain and Feed Association

Kansas Livestock Association

Kansas Pork Association

Kansas Restaurant and Hospitality Association

Kraft Foods North America, Inc.

National Federation of Independent Business

Petroleum Marketers and Convenience Store Association of Kansas

HEIN LAW FIRM, CHARTERED

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Ronald R. Hein
Attorney-at-Law
Email: rhein@heinlaw.com

Testimony Re: HB 2233
House Judiciary Committee
Presented by Ronald R. Hein
on behalf of
Kansas Beverage Association
February 8, 2005

Mister Chairman, Members of the Committee:

My name is Ron Hein, and I am legislative counsel for the Kansas Beverage Association (KBA), the state trade association for beverage bottling companies operating in Kansas. Previously we were the Kansas Soft Drink Association, but the KBA changed their name to more truly reflect the membership and the products made, which include carbonated diet and regular soft drinks, bottled waters, isotonic drinks, juice, juice drinks, sports drinks, dairy-based beverages, teas, and other beverages.

The KBA strongly supports the passage of legislation similar to HB 2233. This bill needs some amendments as is. Perhaps substitution of SB 75 would be the preferred way to amend it.

Fourteen states have passed this legislation, which we believe will help insure that Kansas does not have the types of lawsuits relating to obesity that have occurred in other states. In addition, the U.S. House of Representatives passed legislation along these lines last year and called it the "commonsense consumption act". It is possible that Congress will enact such legislation this year with regards to actions in federal court.

This bill provides for no civil liability for obesity claims arising from long term consumption of food. It provides exemptions to this general prohibition of liability if food producers, such as the bottlers who are members of the KBA, act in violation of state or federal law.

This legislation is similar to the National Restaurant Association model act. The American Beverage Association also has a model act which is arguably stronger than this bill or SB 75. The KBA understands that the Kansas Restaurant and Hospitality Association requested SB 75, and supports that legislation, or this bill if properly amended, even though there may be other options available.

Thank you very much for permitting me to submit this written testimony, and I will be happy to yield to questions.

Legislative Testimony

HB 2233

Tuesday, February 8, 2005

Testimony before the Kansas House Judiciary Committee
By Lew Ebert, President and CEO

THE KANSAS CHAMBER

The Force for Business

835 SW Topeka Blvd.
Topeka, KS 66612-1671
785-357-6321
Fax: 785-357-4732
E-mail: info@kansaschamber.org
www.kansaschamber.org

Chairman O'Neal and members of the Committee;

The Kansas Chamber and its over 10,000 members support passage of HB 2233. Passage of this measure will help curb frivolous lawsuits against food manufacturers and producers. This is a solid first step in ensuring that class actions lawsuits are not filed against the food industry and consumers take personal responsibility for the decisions that they make.

In our December 2004 CEO and Business Owner's Poll, 60% of the 300 respondents believe that our current litigation system is a deterrent to business growth and 83% believe that frivolous lawsuits increase the cost of doing business in the state. Our November 2004 poll of Registered Voters found the same firmly held belief. Nearly 65% of those participating believe that our current legal system should be reformed and 61% believe that lawsuit reform will contribute to economic growth.

Passage of HB 2233 would help protect many Kansas businesses and industries from frivolous lawsuits that are a reality in today's society. More than 10 state's have passed this type of legislation that safeguards companies against attorney's who see the food industry as their next cash cow.

We urge this committee to recommend favorably HB 2233. Thank you for your time and I will be happy to answer any questions.

The Kansas Chamber, with headquarters in Topeka, is the statewide business advocacy group moving Kansas towards becoming the best state in America to do business. The Kansas Chamber and its affiliate organization, The Kansas Chamber Federation, have more than 10,000 member businesses, including local and regional chambers of commerce and trade organizations. The Chamber represents small, medium and large employers all across Kansas.

KANSAS LIVESTOCK ASSOCIATION

TESTIMONY

To: House Judiciary Committee
Representative Michael O'Neal, Chairman

From: Brent Haden, Assistant Counsel
Kansas Livestock Association

Date: February 8, 2005

Re: HB 2233, Obesity Lawsuit Immunity

The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing over 6,000 members on legislative and regulatory issues. KLA members are involved in many aspects of the livestock industry, including seed stock, cow-calf and stocker production, cattle feeding, grazing land management and diversified farming operations.

Good Morning. My name is Brent Haden, and I serve as Assistant Counsel for the Kansas Livestock Association. I am here today representing KLA and asking for your support and passage of HB 2233.

KLA is joining with the other food producers and sellers here today to ask this body to help prevent frivolous obesity lawsuits in Kansas. We believe it is important that the state of Kansas, as a net food exporter and America's bread basket, take affirmative steps now to shield its food producers, processors and sellers from economically destructive lawsuits in which plaintiffs will seek to shift the consequences of their own actions onto the backs of Kansas ranchers, workers and businesses.

The fundamental question addressed by this bill is one of personal responsibility, and of who should bear the burden for actions that cause obesity and the health problems that go with it. It is the belief of our members, and indeed the belief of 85% of Americans, that the burden of the costs and consequences of obesity should be borne by each individual, as each individual has the most control over whether they are obese or not. Every individual may choose to eat or not eat, to exercise or not exercise. No one is forced to do either, or to refrain from either, and therefore the responsibility for these choices should lie with the individual.

*6031 SW 37th Street * Topeka, KS 66614-5129 * (785) 273-5115 * Fax (785) 273-3399 * E-mail: kla@kla.org * www.kla.org*

Conversely, to allow obese individuals to sue farmers, ranchers, wholesalers or retailers for the costs associated with their own obesity unfairly places the burden of an individual's behavior upon people who have no control over whether an individual is overweight or not. Ranchers, farmers and the rest of the food production and preparation chain cannot police the consumption habits of individuals, even if they were inclined to. As such, the food producers and sellers of this state should not be forced to bear the responsibility for costs and consequences associated with these choices.

Of course, to most the above statement is mere common sense. In fact, some would say that the proposition that individuals, and not food producers and sellers, should be responsible for their own weight is so self-evident that HB 2233 is an unnecessary piece of legislation. However, we believe that in light of recent developments this legislation is warranted to protect the whole chain of food production and preparation from economically devastating lawsuits.

While to date no obesity suit has been successfully litigated, the last three years have seen a concerted national effort by trial lawyers and self-anointed food police groups to undermine consumer confidence in the safety practices and ethics of food producers and sellers. This is troubling because the current campaign against food producers and sellers parallels past campaigns waged against other types of products. In several of those campaigns, plaintiffs were able to win large verdicts after several years of defeat, during which they continued to lay the groundwork for victory by attacking the ethics of the industries in question and using mass media to create pockets of willing juries throughout the country.

If obesity suits were ever successful, Kansas, as a net food exporter, would disproportionately feel the effects because so much of Kansas' economy is tied to food production and preparation. Furthermore, Kansas food producers and sellers would be damaged economically if courts in Kansas would even entertain an *unsuccessful* lawsuit because the food producer or seller would be forced to hire attorneys to defend itself in court. Similarly, if obesity lawsuits were allowed to proceed in Kansas there is a possibility that food producers and sellers would settle these cases, regardless of their merit, to avoid the litigation costs involved in a successful defense. Such a development would prove a further drag on the state's economic health.

For the above reasons, our members believe that passage of HB 2233 is imperative for the protection of Kansas' economy. If obesity suits are allowed to go forward, successfully or unsuccessfully, the farmers, ranchers and food-service entities so crucial to Kansas' economic health would suffer. However, this body has before it an opportunity to protect the ranchers, farmers and food-service businesses of Kansas by nipping frivolous obesity lawsuits in the bud. HB 2233 would protect Kansas' critical food production and preparation businesses by preventing individuals from saddling food producers and sellers with the costs of their own actions, and would in turn protect Kansas' economy. We urge you to vote for this bill, and look forward to working with you. Thank you.

KANSAS FARM BUREAU
The Voice of Agriculture

2627 KFB Plaza, Manhattan, Kansas 66503-8508 • 785-587-6000 • Fax 785-587-6914 • www.kfb.org
800 SW Jackson St., Suite 1300, Topeka, Kansas 66612-1219 • 785-234-4535 • Fax 785-234-0278

PUBLIC POLICY STATEMENT

HOUSE COMMITTEE ON JUDICIARY

Re: HB 2233—Prohibiting claims based on weight gain or obesity.

February 8, 2005
Topeka, Kansas

Testimony by:
Terry D. Holdren
Local Policy Director—KFB Governmental Relations

Chairman O'Neal and members of the House Judiciary Committee, thank you for the opportunity to appear before you today. I am Terry Holdren and I serve as the Local Policy Director—Governmental Relations for Kansas Farm Bureau. As you know, KFB is the state's largest general farm organization representing more than 40,000 farm and ranch families through our 105 county Farm Bureau Associations.

As recently as 2002, our members, in conjunction with other farmers and ranchers across the state produced over 2 million bushels of grain and nearly 8 million head of cattle and hogs, adding nearly $9 billion to the economy of the state of Kansas. Those products—considered the safest and most affordable supply of food in the world—have increasingly become a target as more and more Americans eat too much without a proper perspective regarding nutrition and exercise.

The US Surgeon General reported recently that 61% of Americans are either overweight or obese. Those individuals are at risk to develop diabetes, heart disease and/or cancer among several other potentially negative health consequences caused by being overweight. Likewise, in recent years novel theories have begun to emerge that

seek to expand tort liability to include those health conditions related to weight gain or obesity. Specifically, the suits have alleged that providers of food have misled the public by promoting the idea that their products have greater nutritional value than they actually do, thereby encouraging patrons to overindulge. Secondly, they claim that providers should be held liable for offering "super-sized" meals that cause innocent customers to be duped into consuming more than nutritionally required.

A 2003 Gallup poll found that nine of ten Americans believe it is wrong to hold producers and providers of safe and properly prepared food liable for obesity related health problems. The members of Kansas Farm Bureau agree and have adopted policy supporting tort reform measures including prohibiting claims based on weight gain, obesity, or related conditions caused by consumption of food.

Eating habits, good and bad, are a matter of personal choice and responsibility. It is not the place of law to protect us from our own excesses. KFB asks that you consider the addition of the word "producer" to the list in section (b) to prevent plaintiffs from simply working their way up the chain of production in a lawsuit, and that you carefully consider HB 2233 and act favorably on this important protection for producers and providers of food.

Thank you.

Kansas Farm Bureau represents grass roots agriculture. Established in 1919, this non-profit advocacy organization supports farm families who earn their living in a changing industry.

NFIB
The Voice of Small Business®

KANSAS

Statement by
Hal Hudson, State Director
National Federation of Independent Business
On House Bill 2233
Before the Senate Judiciary Committee
February 8, 2005

Mr. Chairman and Members of the Committee:

My name is Hal Hudson, and I am representing the nearly 6,000 small business owners who are members o `NFIB, in support of HB 2233.

Fear of expensive or crushing lawsuits is a major concern for small business owners. In a survey of small business owners conducted by the NFIB Research Foundation the liability exposure to frivolous lawsuits and lawsuits for which they had no responsibility ranked high on the list of problems.

Recent lawsuits against food manufacturers have caused great concern for small-business owners who already pay a high price under our nation's troubled legal system. Trial lawyers have turned their sights on the food industry and have filed lawsuits blaming cookies and fast food for plaintiffs' weight and health problems.

Many of these lawsuits have been thrown out of court, but more are expected, and small-business owners are concerned that some of these suits will ultimately be successful. Trial lawyers, using the same tactics they used in asbestos and tobacco lawsuits, are charging that fast-food restaurants have acted negligently or deceptively in selling products high in cholesterol, fat, salt and sugar.

While small business owners ultimately may prevail in such frivolous lawsuits, they still may face expensive charges from lawyers to defend them.

We urge you to report HB 2233 favorably.

The NFIB Research Foundation conducts some of the most comprehensive research of small-business issues in the nation. The National Federation of Independent Business (NFIB) is the nation's largest small-business advocacy group. A nonprofit, nonpartisan organization founded in 1943, NFIB represents the consensus views of its 600,000 members in Washington and all 50 state capitals.

National Federation of Independent Business – KANSAS
3601 S.W. 29th Street, Suite 116B • Topeka, KS 66614-2015 • 785-271-9449 • Fax 785-273-9200 • www.NFIB.c

STATEMENT OF THE

KANSAS GRAIN & FEED ASSOCIATION

AND THE

KANSAS AGRIBUSINESS RETAILERS ASSOCIATION

SUBMITTED TO THE

HOUSE JUDICIARY COMMITTEE

IN SUPPORT OF HOUSE BILL 2233

REP. MIKE O'NEAL, CHAIRMAN

FEBRUARY 8, 2005

KGFA & KARA MEMBERS ADVOCATE PUBLIC POLICIES THAT ADVANCE A SOUND ECONOMIC CLIMATE FOR AGRIBUSINESS TO GROW AND PROSPER SO THEY MAY CONTINUE THEIR INTEGRAL ROLE IN PROVIDING KANSANS AND THE WORLD THE SAFEST, MOST ABUNDANT FOOD SUPPLY

816 SW Tyler, Topeka KS 66612 – 785-234-0461 - Fax: 785-234-2930

House Judiciary
2-8-05
Attachment 19

Chairman O'Neal and members of the House Judiciary Committee, I am Duane Simpson testifying on behalf of the Kansas Grain and Feed Association (KGFA) and the Kansas Agribusiness Retailers Association (KARA). The KGFA is a voluntary state association with a membership encompassing the entire spectrum of the grain receiving, storage, processing and shipping industry in the state of Kansas. KGFA's membership includes over 950 Kansas business locations and represents 99% of the commercially licensed grain storage in the state. KARA's membership includes over 700 agribusiness firms that are primarily retail facilities that supply fertilizers, crop protection chemicals, seed, petroleum products and agronomic expertise to Kansas farmers. KARA's membership base also includes ag-chemical and equipment manufacturing firms, distribution firms and various other businesses associated with the retail crop production industry. On behalf of these organizations, I am testifying in support of House Bill 2233.

HB 2233 is a common sense piece of legislation that prevents trial attorneys from filing frivolous lawsuits against our industry for damages due to obesity related health issues. It seems ridiculous that someone could regularly eat Big Macs, become obese and then file a lawsuit against McDonald's for damages. Unfortunately, those lawsuits have already been filed in other states. In addition, they could file a lawsuit against the livestock producers, the farmer who grew the corn fed to the cattle, and maybe even the agribusiness who sold fertilizer to that farmer. Grain elevators that buy and sell wheat in Kansas could face claims due to the high-carb content of bread.

Unfortunately, the threat for these lawsuits is all too real. Everyone involved in food production, from the farm to the fork, should be protected from these frivolous lawsuits. Individuals are responsible for what they eat. If they are incapable of self-control, they have no one but themselves to blame. We urge the members of the committee to support HB 2233. Thank you for your consideration.

KANSAS
Cooperative Council

816 SW Tyler St. Ste. 300
Topeka, Kansas 66612
Phone: 785-233-4085
Fax: 785-233-1038
www.kansasco-op.coop

House Judiciary Committee

February 8, 2005
Topeka, Kansas

HB 2233 – immunity from liability claims for weight gain.

Chairman O'Neal and members of the Committee, thank you for the opportunity to share comments on behalf of the Kansas Cooperative Council in support of HB 2233. I am Leslie Kaufman and I serve the Kansas Cooperative Council as Governmental Relations Director. The Council includes more than 223 cooperative business members. Together, they have a combined membership of nearly 200,000 Kansans.

Our members are concerned with the overall business climate in Kansas and the increased costs of doing business. The KCC has adopted policy language supporting changes in the regulatory systems and in our judicial system that eliminate unnecessary regulation, encourage business development and promote growth in the Kansas economy. Helping ensure food producers and processors are protected from frivolous lawsuits is another way the state can assist the state's food production sector.

Several members of our association can benefit from the protection proposed in HB 2233. Cooperative businesses and their owner-members are involved in food production at every point from the farm to the dinner table. Our grain handling and farm supply cooperatives are owned by the farmers and ranchers that grow our basic

commodities. They provide seed and inputs at the start of the process and storage and marketing once the crop is harvested. Cooperative members are also involved in processing, distribution and retail sales.

Food safety is an important component in cooperative food handling enterprises. Various types of protections and state and federal oversight are intermingled in the processes. Food products, their ingredients, or their processors that meet current health and safety standards should not be held liable for an individuals over-indulgence.

It is simply not reasonable to hold a food producer/processor responsible for an individual's lack of moderation. Even nature's most basic life sustaining fluid, water, is dangerous in excessive quantities. This truth was reemphasized recently by the tragic death of a young fraternity pledge that, as part of a hazing ritual, was forced to drink too much water in too short of a time period.

Too often, it seems human nature to overlook personal short-comings and try and shift blame where it really does not belong. This bill can help protect the food industry from becoming an unfair scapegoat for an individual's, or society's, weight problem.

As such, we respectfully encourage this committee to act favorably on HB 2233. Should you have any questions or comments regarding our position or this statement, please feel free to contact me. Thank you for your consideration.

Leslie Kaufman
Government Relations Director
Kansas Cooperative Council
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KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Chairman O'Neal and Members of the House Judiciary Committee

From: David Curotto on behalf of the Kansas Trial Lawyers Association

Date: February 8, 2005

Re: HB 2233

Chairman O'Neal and members of the committee, I appear before you today on behalf of the Kansas Trial Lawyers Association. I am a Kansas attorney and member of KTLA. KTLA 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 appreciate the opportunity to present written and oral testimony on HB 2233.

KTLA opposes all frivolous lawsuits. They are a poor use of the courts, waste citizens' time, and do not reflect well on our profession. We agree that "McLawsuits" based solely on the principal that someone who has overeaten and subsequently gained weight because of a personal choice should not have the right to waste the time of our courts here in Kansas.

Nevertheless, KTLA opposes HB 2233. Our concerns with HB 2233 are as follows:

1. It is overbroad and has far reaching potential for barring consumers from redress for negligence caused in the manufacturing, distribution, or sale of products to the retailer;
2. It does not address defective, mishandled, and dangerous products; and
3. It does not consider what might happen to consumers who ingest food products containing chemicals and additives, with unknown side effects, over time.

As written, HB 2233 attempts to limit the liability of a very broad number of services provided by the food industry without protection except in the most deceptive or malicious circumstances. Limitations without protecting a citizen's right to access the courts for redress under negligent circumstances not related to personal choices goes against the very nature of our constitutional right to use the courts under legitimate circumstances. Additionally, limitations to liability of any future negligent party should be taken with the greatest restraint. It is impossible to foresee long term consequences of many of the items we ingest; consequences that at times are because of another party's negligence, not our personal choice.

I respectfully urge your opposition to HB 2233.

Terry Humphrey, Executive Director

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