Approved: May 3, 2006
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 A.M. on February 7, 2006, in Room 123-S of the Capitol.

All members were present,
Dwayne Umbarger arrived, 9:40 a.m.
Les Donovan arrived, 9:43 a.m.
David Haley arrived, 9:50 a.m.

Committee staff present:
Mike Heim, Kansas Legislative Research Department
Helen Pedigo, Office of Revisor of Statutes
Karen Clowers, Committee Secretary

Conferees appearing before the committee:
Mark Rondeau, Counsel, Sunflower Electric Corporation
Charles Benjamin, Sierra Club
Clinton McLaughlin, P.E.
Charles L. Wheelen, Kansas Association of Osteopathic Medicine
Lew Ebert, President and CEO, The Kansas Chamber
Anne Kindling, Kansas Association of Defense Counsel
John Campbell, Kansas Insurance Department
Bryan Smith, Kansas Trial Lawyers Association
Terese Gretencord
Zackery E. Reynolds, Kansas Bar Association
Lillian Spencer, Executive Director, MADD
George Lippencott, AARP

Others attending:
See attached list.

The Chairman indicated that he divided the Committee into three Sub-committees and assigned five bills to each sub-committee. A list was provided to Committee members. He requested that the Sub-committees have their reports in to the Chairman by Thursday, February 16, 2006, so that the Committee may take action on the reports.

The hearing on **SB 361-Kansas air quality act, appeal agency action to court of appeals** was opened.

Mark Rondeau spoke in support stating its' purpose is only to expedite the appeal process for permits issued under the Clean Air Act (Attachment 1). It is his opinion that the appeal process at the district court level is an unnecessary step in the process.

Charles Benjamin spoke in opposition of the bill indicating concern over increased emissions from coal-fired electric plants on the environment, especially mercury (Attachment 2). He also voiced concern regarding elimination of judicial review at the district level which appears to prohibit appeals from Kansas Court of Appeals on air permit decisions from being heard by the Kansas Supreme Court.

Chilton McLaughlin appeared in opposition to **SB 361** stating concern that the bill will limit the access of citizens to one level of jurisdiction in the courts (Attachment 3). As an environmental engineer he is concerned about the amount of toxins emitted by power plants and the rights of Kansas to participate in the appeal process.

Written testimony in opposition of **SB 361** was submitted by:
Robert V. Eye, Attorney, Irogonegaray & Associates, (Attachment 4)

There being no further conferees, the hearing on **SB 361** was closed.

MINUTES OF THE Senate Judiciary Committee at 9:30 A.M. on February 7, 2006, in Room 123-S of the Capitol.

The hearing on **SB 335--Evidence of collateral source benefits allowed in personal injury cases where damages requested** was opened.

Charles Wheelen appeared in support of the bill and proposed two amendments (Attachment 5). The first amendment would remove the sunset date from Section 5. The second proposed amendment would correct a possible flaw in the bill regarding petitions filed after effective date, even if the injury occurred before the effective date.

Lew Ebert spoke in support of **SB 335** which would allow evidence of collateral sources of payments to be admitted into evidence (Attachment 6). It is his opinion that plaintiffs receive compensation twice, once from the insurance company and again at trial.

Anne Kindling spoke in support indicating it is the opinion of the Kansas Association of Defense Counsel that some plaintiffs are overcompensated for their losses (Attachment 7). Abolishing the collateral source rule will allow the jury to hear both sides of the equation, benefits received as well as the costs incurred in obtaining those benefits.

John Campbell appeared in support of the bill and requested removal of the sunset date in Section 5. He feels that removal would have a positive impact on insurance premiums in Kansas (Attachment 8).

Bryan Smith spoke in opposition because the Kansas Trial Lawyers believe it will eliminate protection for Kansans by shifting accountability from the offender to the victim (Attachment 9). He feels that elimination of the collateral source rule would penalize individuals who purchase insurance.

Teresa Gretencord appeared in opposition by stating her belief that people should be held accountable for their actions and that **SB 335** works against that concept (Attachment 10).

Zackery Reynolds opposed **SB 335** because he believes it will encourage irresponsible behavior and would cause fewer cases to settle (Attachment 11).

Lillian Spencer appeared in opposition stating the **SB 335** will allow drunk drivers and other offenders to use the injured victim's health insurance benefits to reduce the their responsibility to pay compensation (Attachment 12).

George Lippencott spoke in opposition (Attachment 13). The AARP believes defendants should not benefit by the victim's insurance.

Written testimony in support of **SB 335** was submitted by:
Jerry Slaughter, Executive Director, Kansas Medical Society (Attachment 14)
Chad Austin, Vice President Government Relations, Kansas Hospital Association (Attachment 15)

Written testimony in opposition of **SB 335** was submitted by:
Many Ann Khoury, DUI Victim Center of Kansas (Attachment 16)
Wil Leiker, Executive Vice President, Kansas AFL-CIO (Attachment 17)

There being no further conferees, the Chairman closed the hearing on **SB 335**.

Final action on **SB 408** continued. The Chairman distributed a balloon amendment that reflected the amendments adopted by the committee on February 6 (Attachment 18).

Senator Schmidt distributed a proposed amendment inserting a new Section 1 regarding reimbursement to counties by the Department of Corrections for offenders convicted of animal cruelty (Attachment 19).

Senator Schmidt moved, Senator Umbarger seconded, to adopt the proposed amendment. Motion carried.

The meeting adjourned 10:32 a.m. The next scheduled meeting is February 8, 2006.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2/7/2006

NAME	REPRESENTING
DAVE HOLTHAUS	KE&C
Patrick Hurley	Hein, KS.
Dan Morin	KMS
Lindsey Douglas	Hein Law Firm
Steve Miller	Sunflower Electric
MARK RONDEAU	SUNFLOWER ELECT
WAYNE PENROD	Sunflower Electric
Anne Kindling	KADC
Scott Heidner	KADC
CEW EBERT	KS Chamber
Jane Winchester	Ks. citizen
Chet McLaughlin	KS citizen
[illegible]	Sen. Bruce
Nanci Ann Raver	KAHP
Lillian M. Green	MADD
Teresa Luthrell	KS citizen
Mary Setter	Ks citizen
Russ Peterson	KS Citizen

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2/1/06

NAME	REPRESENTING
Shari Albrecht	KDHE
Lana Walsh	CJA
Brent Haden	KLA
JIM CLARK	KBA
[illegible]	KID
[illegible]	KID
FRED Lucky	KHA
Chad Austin	KHA
Chip Wheelen	Ass'n of Osteopathic Med.
George Lippencott	AARP
KEN DANIEL	KSSMALLBIZ.COM
E.R. "Woody" Moses	KAPA
[illegible]	Foulston Siefkin LLP
Michael White	KCDAA
DANIEL MAGGE	KHA
[illegible]	KTLA
Bryan Smith	KTLA
Zack Reynolds	KBA

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2-7-06

NAME	REPRESENTING
Claudia Weaver	Bus Vanguard

SUNFLOWER ELECTRIC POWER CORPORATION

A Touchstone Energy® Cooperative

TESTIMONY SUBMITTED TO THE SENATE JUDICIARY COMMITTEE IN SUPPORT of SB 361

Presented by Mark Rondeau, Partner, Watkins, Calcara, Chartered for Sunflower Electric Power Corporation

February 7, 2006

Thank you, Mr. Chairman and members of the Committee for providing this opportunity to speak today on Senate Bill 361. My name is Mark Rondeau. I come before you today representing our client, Sunflower Electric Power Corporation. Our firm has served as Sunflower's legal counsel since 1977.

The purpose for this bill is simply to expedite the appellate process for applicants (and opponents) for permits issued under the Clean Air Act.

One of the most important things that must be acquired in the development process of a powerplant is the PSD (Prevention of Significant Deterioration) Construction Air Permit (Permit). The Kansas Department of Health and Environment (KDHE) is charged with issuing this Permit, and they must issue it in full accordance with state and federal environmental laws.

One key aspect of the KDHE application review process is the Best Available Control Technology (BACT) assessment for the plant. The BACT assessment is a two-part technical analysis of the state-of-the-art pollution control technology and the establishment of plant emission limits. Because it is premised on the best available technology currently available, this analysis is generally considered valid for only about 18 months based on the recent permitting activities occurring around the nation.

Following the approval of the Permit by KDHE, if a judicial appeal is filed, history has shown it can often take more than 18 months to navigate through the district court and then through the Court of Appeals (and potentially, to the Supreme Court) to get a final decision. If this happens, and the BACT analysis must be redone, in order to proceed, the process starts all over again with a tremendous loss of time, money and opportunity.

Seventeen of the last twenty one PSD permits issued in the nation have been appealed to the courts. The minimum appeal time has been one year; the longest has been 4 years. Because of this record, we are confident that Sunflower's Permit issuance will be appealed.

Those who may be opposed to our Permit application would be delighted to pursue a continuous cycle of appeals and renewals effectively keeping the project from

Senate Judiciary
2-7-06
Attachment 1

ever being built without ever prevailing upon the merits. The catch 22 is that Sunflower could continually be granted a permit by KDHE, have that blessed by both the district court and Court of Appeals, but still never be able to build a plant because of the delay inherent in the process.

For these reasons, we bring a proposal to you today that grants the Court of Appeals exclusive jurisdiction for the initial judicial review of an appeal of a final agency action on a PSD Permit issued by the KDHE. Our objective with this bill is to take out the redundant district court "layer" and authorize the parties to the process to go straight to the appellate court.

Why do we think this change is justified?

- The proposal does not deprive any citizen of the opportunity to challenge a decision made by KDHE.

- It does not change the law governing the scope of review or the law governing the review of final administrative actions, the Kansas Judicial Review Act (KSA 77-601 *et seq).*

- The proposal is not at all unprecedented. For example: appeals directly to the Court of Appeals are authorized in utility rate decisions issued by the KCC involving utilities (KSA 66-118a); they are authorized in decisions rendered by the Kansas Racing Commission - in fact those appeals by-pass even the Court of Appeals and go directly to the Supreme Court (KSA 74-8813(v)); similarly, appeals from decisions of the Board of Tax Appeals (BOTA) in matters as to appraisals, assessments, income and other taxes go directly to the Court of Appeals(KSA 74-2426(c)(3); all situations where timely resolution of judicial cases is of the essence.

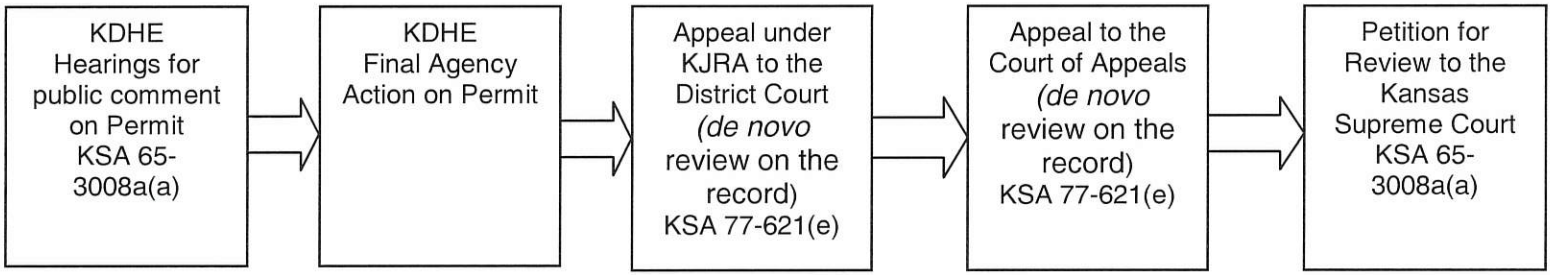
- Indeed, adoption of SB 361 would make the Kansas appellate procedure mirror the federal process relating to the Clean Air Act. If an appeal is brought against an EPA final action under the federal Clean Air Act, federal law provides for judicial review by the United States Court of appeals and by-passes review by the federal District Court.

I can't adequately convey to you this morning how important this change is to our development project. Even if we prevail throughout a lengthy appeal process, the viability of Sunflower's project is clearly at risk if we do not eliminate the unnecessary review at the district court level. We simply seek to shorten the process. It does not represent a burden upon the Court of Appeals. These cases will end up there in any event. It merely changes the timing.

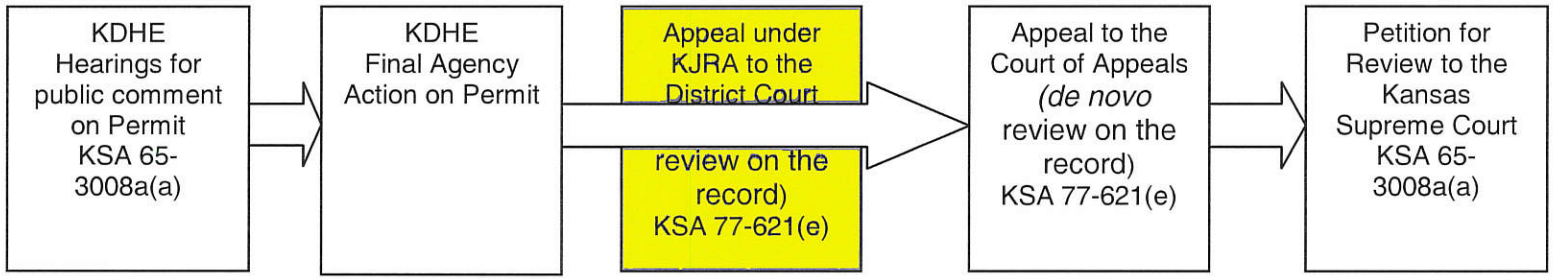
I've included a brief summary of the project I've referred to today, and I have also included a flowchart outlining the current legal process and another that reflects the change we've proposed.

I thank you for the opportunity to testify today. I would be happy to answer any questions you may have at the appropriate time.

EXISTING PROCEDURE FOR APPEALS OF KDHE PSD PERMITS



PROPOSED PROCEDURE FOR APPEALS OF KDHE PSD PERMITS



PROJECT DESCRIPTION

Sunflower has been actively working to expand the generating capacity of its facility at Holcomb, Kansas for several years. Its objective in developing the existing plant site is to maximize the value of those assets for the benefit of the six distribution cooperatives that own Sunflower.

Last August, Sunflower announced an agreement to build two new power plants in conjunction with a Colorado cooperative and they hope to announce a third plant in the near future which will serve loads in Kansas and the region.

The value of this project is approximately $3 billion and it will take six years to complete construction. The agreements for engineering, construction, and project management services are nearly complete and work is already underway on the transmission and landfill permitting processes.

A recently completed economic impact study projects the following impacts:

- Western Kansas will see the creation of 2,641 temporary and permanent jobs with earnings over the first 35 years of $1.11 billion.
- Statewide, 4,158 temporary and permanent jobs will be created with earnings of $1.54 billion.
- Permanent jobs created in western Kansas are 408; statewide, the total will be 487.

A more specific breakdown of these impacts is shown in the table below.

Total Project Impacts, HE2, TS1 and TS2			
	Annual Jobs	**Annual Earnings**	**Annual Taxes**
Construction Period (2007-2013)			
Western Kansas	2,233	$63,007,706	$1,727,789
Eastern Kansas	1,439	$53,488,106	$675,164
Kansas	3,669	$116,495,812	$12,180,348
Out-of-State	17,641	$478,932,091	NA
Permanent (2011-2046)			
Western Kansas	408	$22,053,702	$438,782
Eastern Kansas	79	$2,027,756	$80,804
Kansas	489	$24,039,133	$1,017,615
Out-of-State	417	$11,005,065	NA
Total Project (2007-2046)			
Western Kansas	2,641	$1,149,925,806	$25,724,104
Eastern Kansas	1,518	$391,900,096	$6,879,124
Kansas	4,158	$1,541,825,902	$32,603,228
Out-of-State	18,058	$3,258,769,821	NA
	22,216	$4,800,595,723	$32,603,228

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Testimony in Opposition to SB 361
Amending the Kansas air quality act
On behalf of the Kansas Chapter of Sierra Club
Before the Kansas Senate Judiciary Committee
February 7, 2006

Mr. Chairman, members of the Committee, thank you for the opportunity to testify in opposition to SB 361 on behalf of the Sierra Club – the oldest and largest grass roots environmental organization in the world with over 750,000 members, including over 4,000 in Kansas.

Sierra Club concerns about toxic emissions from coal-fired electric plants
Sierra Club members in Kansas and elsewhere are very concerned about the impacts of air pollutants from coal-fired electric power plants. Burning coal produces Nitrogen Oxide (NOx) that reacts with volatile organic compounds (VOCs) to produce smog. Burning coal also produces fine particles that are strongly implicated in cardiopulmonary mortality and chronic lung diseases, like asthma.

One of the most dangerous toxins emitted from coal powered power plants is mercury. Mercury is a serious toxin that primarily affects fetal development. In unborn children it can influence the development of the brain and nervous system. When babies are exposed to toxic mercury by their breast feeding mothers, the result can be extremely dangerous and can cause delays in walking, talking and fine motor skills. The primary exposure pathway of mercury poisoning for most American is through consumption of fish with high levels of methyl mercury, the toxic form of mercury that accumulates in fish and in the animals that eat those fish, including humans. More than 70% of the fish advisories issued in 2002 were for mercury contamination.

Sunflower Electric's Plans to Expand Their Coal-Fired Electric Plants and its impacts
1. Sunflower Electric, through its Sand Sage subsidiary, has announced plans to construct three virtually identical 650 MW coal fired power plants, totaling 1950 MW, at their existing Holcomb 1 site just south of the Arkansas River near Holcomb, Kansas.

2. When completed the Holcomb 1,2,3 & 4 units will total about 2310 MW which makes it larger than Westar's 2213 MW Jeffrey coal burning complex, itself one of the largest coal power complexes in the country;

3. Two of the three plants are being constructed for Tri-State Generation and Transmission Assn. of Westminster, Colorado who will transmit and sell the power in Colorado. It is not yet clear where the power from the third plant will be sold.

Senate Judiciary
2-7-06
Attachment 2

4. Due to the prevailing winds from the southwest, most of the emissions from the plant will go to Kansas and points further north and east.

5. The plants will burn sub-bituminous coal from Wyoming. While mercury occurs in this coal in relatively small concentrations, about 10 parts per billion, the new Holcomb units will burn an enormous amount of coal each year, some 9 million tons.

6. The new Holcomb units will utilize dry scrubbers for sulfur dioxide control. So far, Sunflower has not included in their permit application any provisions for dedicated mercury controls. The EPA's new Mercury Rule emission limits, as applied to dry scrubbers, requires that only about 25% of the mercury contained in the flue gas be captured. Assuming an 85% capacity factor these new units can emit 1162 pounds of mercury. This will increase the total emission of mercury from Kansas coal plants by about 50%. In contrast KCP&L recently agreed to limit mercury emissions from its 1780 MW Iatan 1& 2 complex near Weston, Mo. to only 210 pounds/year.

7. The mercury emissions from the Holcomb complex will be deposited primarily in precipitation starting in eastern Kansas which not only has much higher rainfall than western Kansas but also high levels of ozone smog that oxidizes elemental mercury vapor to a form easily removed by both wet and dry deposition.

8. While Missouri has issued fish mercury advisories on all its streams and lakes, until recently mercury had not been considered to be a serious problem in Kansas. But according to the Lawrence Journal-world article dated Aug. 6, 2004 this is changing with higher levels now being found in Kansas lakes. The Journal-World reported on a study that listed Kansas as 18th in the nation for mercury pollution from power plants primarily because Jeffrey Energy Center is the fifth biggest mercury polluter among coal fired plants in the nation. EPA scientists have estimated that one child in six born in the US could be at risk for developmental disorders because of mercury exposure in the mother's womb (New York Times, Feb 2, 2004).

9. The proposed Holcomb 2-4 units employ water cooling towers which will use an enormous quantity of groundwater from this water short area. Loss will be by deliberate evaporation. Sunflower's operation will take water that supports local, agricultural industry for power that will go to Colorado.

10. Once the power plants are built they will be consuming water at the design rate for at least 50 Years. Sunflower will use huge quantities of water even in wet years when farmers wouldn't need to draw down the aquifer. Sunflower and its investors will be protecting a $3.5 billion investment. Thus they will have the means and incentive to use every drop.

11. In contrast, as the water table drops, farmers will be stuck with soaring energy costs and eventually have to stop growing food. The impacts to the area need to be thoroughly investigated.

The Clean Air Act (CAA)
Title V of the Clean Air Act § 502, 42 U.S.C. §7661a, prohibits major stationary sources of air pollution from operating either without a valid permit or in violation of the terms of a permit. The permit is crucial to the implementation of the CAA because it contains in a single comprehensive set of documents all the CAA requirements relevant to the particular polluting source.

Title V of the CAA contemplates that states will administer and enforce the permitting program. States are directed to submit for approval from the Environmental Protection Agency (EPA) their own programs for issuing CAA permits. EPA may not approve a proposed permit program unless it meets certain minimum criteria set out in the CAA. If a state fails to submit a permit program, or submits a permit program that EPA disapproves for failure to comply with CAA at §502(b), the state becomes subject to sanctions designed to encourage compliance under § 502(d) of the CAA.

The CAA at § 502(b)(6), 42 U.S.A. §7661a(b)(6), provides that a state permit program must contain: "Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including *an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.*" (emphasis in italics added)

A state permit program will be disapproved unless the state submits a legal opinion stating that the proposed Title V program allows state court review of permitting decision upon the request of "the [permit] applicant, any person who participated in the public participation process…and any other person who could obtain judicial review of such actions under State laws." 40 C.F.R. § 70.4(b)(3)(x). EPA interprets the statute and regulation to require, at a minimum, that states provide judicial review of permitting decisions to any person who would have standing under Article III of the U.S. Constitution. *Notice of Proposal Disapproval*, 59 Fed. Reg. 31183, 31184 (June 17, 1994) cited in *Virginia v. Browner*, 80 F.3d 869 (1996).

Senate Bill 361
S.B. 361, introduced by Sunflower Electric, would change current law that provides for judicial review in state district court of air permits issued by KDHE. Sunflower wants to have judicial review of air permits bypass state district court and be heard directly by the Kansas Court of Appeals. In fact, the bill calls provides that "the court of appeals shall have exclusive jurisdiction to review any such final agency action." This language would have judicial review of air permits bypass not only the state district court but would also appear to prohibit appeals from Kansas court of appeals decisions on air permits from being heard by the Kansas Supreme Court. Furthermore, granting "exclusive jurisdiction" to the Kansas court of appeals to review air permit decisions by KDHE would appear to raise some serious legal jurisdictional questions between the state and federal government. This provision would appear to prohibit the citizens of Kansas from requesting review of a KDHE issued air permit by the EPA whose decisions are in turn reviewable by the federal courts.

Why are air permits singled out for special treatment?
We urge the Judiciary Committee to look carefully at the motives of Sunflower Electric in asking the legislature to make a change in law that only applies to judicial review of KDHE permits under the Clean Air Act. Under current law any KDHE permits for water pollution control or landfills of various kinds or other state permits that KDHE administers under relevant federal law are reviewable in state district court. Why should the legislature single out air permits for exclusive review by the Kansas court of appeals? We urge this Committee to reject this request for special treatment by one industry in Kansas that seeks to deprive the citizens of Kansas of the right to seek judicial review of air permits in state district court.

Furthermore this bill appears to be aimed at smoothing the way for the expeditious approval of what will be one of the largest sources of air pollution in the nation. If Sunflower has made adequate provisions for the control of mercury and other toxic pollutants from their proposed new facility, why would they fear normal judicial review according to current law?

Chilton McLaughlin, P.E.
33975 Quivira
Paola, Kansas
913 244 0749

Testimony in Opposition to SB 361
Amending the Kansas air quality act

Before the Kansas Senate Judiciary Committee
February 7, 2006

Mr. Chairman, members of the Committee, thank you for the opportunity to testify in opposition to SB 361 on behalf of my extended family.

I am an environmental engineer who has been practicing for 35 years in the State of Kansas. I have a Masters in Sanitary Engineering from the University of Kansas and am a professional engineer, KS 6889. I currently work for the U.S. Environmental Protection Agency, Region 7 in Kansas City as a Pollution Prevention Expert. I have worked for the Kansas Department of Health and Environment and EPA for 36 years in solid waste, industrial waste reduction, climate change, and energy efficiency. But I come before you as a citizen of Kansas.

The purpose of the bill is to reduce the appeals available to Kansas citizens who are seeking relief from air quality permits. The reduction in appeals will limit the access of citizens to one level of jurisdiction in the courts. If we understand the bill correctly it will limit all future appeals of air quality permits issued by the Kansas Department of Health and Environment which is a serious erosion of citizen access to the courts for judicial review of actions to protect our air quality.

The most significant current issue is that of mercury emissions from the proposed Holcomb power plant expansion. An analysis of the proposal by Craig Volland of Spectrum Technologists shows that this expanded facility will emit as much as 1162 pounds of mercury per year. The Jefferies Energy Center at St. Mary's, Kansas, currently emits the 5th most mercury of any coal fired energy facility in the nation. The Holcomb emissions will likely be more than Jefferies, and make Kansas the mercury emission capital of the country.

Mercury is a toxic air pollutant that travels a considerable distance in the air before depositing on the ground. Prevailing winds will carry the mercury toward eastern Kansas. It deposits even faster in the presence of smog or nitrous oxide. Both are present in eastern Kansas along with additional rain which will encourage it to enter our lakes and contaminate our soil. As a person who has been affected by mercury poisoning when I was a student at the University of Kansas, I can testify to the hazards of mercury contamination and I do not want my family exposed to any additional toxic burden.

Kansas City Power and Light is building a facility similar in size to the Holcomb facility in Weston, Missouri and has pledged to reduce the mercury emission to 210 pounds per year with best available control technologies. Improvements in the controls for mercury are happening as we speak.

The ability of Kansas citizens to seek the best protection for our air quality, even if the KDHE does not require it, is a vital right which we need to preserve and protect. Thus we oppose SB 361 as a means to enable review of air quality (or any) permit.

IRIGONEGARAY & ASSOCIATES

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February 6, 2006

* PEDRO LUIS IRIGONEGARAY, J.D.
† ELIZABETH R. HERBERT, J.D.
ROBERT V. EYE, J.D.

* Also Admitted in Florida
† Also Admitted in Alabama
Fax No. (785) 267-9458

The Honorable Senator John Vratil
STATEHOUSE, 281 East
300 S.W. Tenth Street
Topeka, Kansas 66612

Dear Senator Vratil:

Re: SB 361 TESTIMONY

My name is Bob Eye. Thank you for the opportunity to testify about SB 361.

I am a lawyer and have been interested and involved in energy and environmental issues for more than twenty-five years. My experience includes representing clients in electric and natural gas rate cases and nuclear power plant/nuclear fuel cycle issues. As a matter of full disclosure, I am an antinuclear activist and an advocate for a transition to renewable fuel sources to generate electricity and meet other energy demands. I oppose the provisions in this bill that limit judicial review; I support the provision to expand the scope of what is considered the agency record for purposes of judicial review.

SB 361 is a subsidy for the vast coal industry consortium and, in particular, its coal-fired generating plant clients. It sends a signal that Kansas is a pushover when it comes to proposals to compromise public health and environmental quality.

This proposal is a subsidy because it will lower coal plant development costs by limiting judicial review otherwise required by current law. Under SB 361, review by district courts of administrative air pollution decisions is eliminated and fast-tracked directly to the appellate court.

The current process that requires district court review adds costs and extends the time required for judicial review of agency action on air pollution permits. That doesn't justify shortcutting full judicial review. The only motive to alter it now, in the context of air pollution policy, is to allow the coal industry consortium special treatment.

Senate Judiciary
2-7-06
Attachment 4

According to media coverage, this bill is being supported by the coal consortium that wants to build large coal-fired generating plants in Kansas. This misguided proposal, if carried through, would be very bad for our state.

First, the toxic releases from these plants range from mercury to fine particulates and end up in humans and the food chain. Perhaps, this unfortunate reality is something the coal consortium would like to limit judicial review of under SB 361. From its perspective, the less attention to this aspect of burning coal, the better.

Second, the proposed coal-fired plants would be significant sources of greenhouse gases and thereby contribute to global warming and climate change. The coal consortium wants as little attention as possible to this well-known consequence of burning coal.

Third, full judicial review might bring unwanted attention to the financial trends for coal costs. Though coal reserves appear relatively plentiful, there is no getting around the fact that it is a nonrenewable fuel. Accordingly, based on supply and demand models, costs will inevitably increase, particularly as demand increases. The U.S Department of Energy reports that for 2004 coal prices increased nationally over 11%. (U.S. D.O.E., Energy Information Administration, Annual Coal Report.) Further, given the increasing costs of diesel, costs to transport coal by rail will increase. Such long-term increased costs likely offset any short-term gains from plant construction related employment. And these costs do not account for increased health care costs and environmental degradation that come with burning coal.

The coal consortium would prefer to return to the good old days when government took a hands-off approach to air pollution. This nineteenth century attitude befits a nineteenth century technology--burning coal to boil water.

It is time to invest in renewable fuels and this should be done as soon as possible. For example, as this testimony is prepared, California is converting rooftops to solar panels with the goal of installing 3,000 megawatts of generating capacity in the next eleven years. This will be the approximate net energy production equivalent of three Wolf Creek sized nuclear plants. According to a February 1, 2006 A.P. article, California is offering rebates to home and businesses owners, farmers, schools and public buildings to install solar panels under a plan proposed by Governor Schwarzenegger and approved by the California Public Utility Commission.

This is sound policy and something similar to it should be adopted by Kansas. Otherwise, we will be captives of ever increasing fuel costs and pollution that will curtail economic activity and diminish our quality of life. Our state should adopt policies that create the conditions for the robust development of wind power and solar power to satisfy our energy needs. This transition should commence as soon as possible.

Kansas, like California, can get its energy house in order and enjoy the resulting environmental, public health and economic benefits. We can begin this task by saying "no" to the coal consortium on SB361.

One discreet part of SB 361 does need to be passed. The proposed amendments to K.S.A. 65-3008a(b) and K.S.A. 65-3013(e) that would require the agency record to include responses by applicants or permit holders to written comments or testimony related to air pollution permits is needed to make certain that all pertinent information is presented for judicial review. This is in the public's interest.

But what must be avoided is the attenuated judicial review that is proposed in the balance of SB 361. This is no time to compromise the judicial review, public health and environmental quality.

Thank you.

Yours truly,

IRIGONEGARAY & ASSOCIATES

Robert V. Eye

RVE:MSW

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Phone (785) 234 5563
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Testimony to the Senate Judiciary Committee
In Support of Senate Bill 335
By Charles L. (Chip) Wheelen
February 7, 2006

Thank you for the opportunity to express our support for admissibility of collateral source benefits in personal injury actions. Those of you who served on the 2005 Special Committee on Judiciary will recall our testimony that outlined the history of this issue and our concern about carefully crafting a bill designed to withstand judicial scrutiny. A copy of that testimony and the series of statutes pertaining to the existing collateral source rule are attached.

While we support the principle and intent of SB335, we do not believe it is properly worded in its current form. New section four of the bill (p.2, line 3) states that, "The provisions of this act shall be considered substantive in nature." Yet the very next section establishes a sunset date that would send a message to the courts that this new law is just a temporary measure until such time the Legislature can think of a better way to handle rules of evidence in personal injury actions. The sunset date should be stricken from SB335.

Furthermore, we note that this bill would apply to petitions filed after the effective date, even if the injury that gave rise to the claim occurred prior to that date. We believe this would be viewed by the Courts as a major flaw. If you refer to the current provisions of K.S.A. 60-3807 (last page of attachment), you will note the language making the statutory collateral source rule applicable only to causes of action accruing on or after the effective date of the law. This should be replaced with a new date.

Attached to this testimony is a draft which outlines two amendments to page two of SB335 that we believe would remedy the two flaws described above. We urge you to adopt these amendments prior to recommending passage of SB335.

Thank you for considering our request.

Senate Judiciary
2-7-06
Attachment 5

(a)(4) then the court shall reduce the judgment by the full amount of the net collateral source benefits.

New Sec. 4. The provisions of this act shall be considered substantive in nature.

New Sec. 5. The provisions of this act shall ~~expire on July 1, 2009.~~ apply to causes of action accruing on or after July 1, 2006.

Sec. 6. K.S.A. 60-3802, 60-3804 ~~and 60-3805 are hereby repealed.~~ , 60-3805 and 60-3807 are hereby repealed.

Sec. 7. This act shall take effect and be in force from and after its publication in the statute book.

amendments requested by Chip Wheelen, Kansas Association of Osteopathic Medicine

3-2

Kansas Association of Osteopathic Medicine
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Testimony
Special Committee on Judiciary
By Charles L. (Chip) Wheelen
September 15, 2005

Thank you for this opportunity to make observations and offer suggestions for purposes of your study of collateral source benefits in personal injury actions. The discussion of collateral source benefits has been a topic of interest for at least thirty years now. For that reason, it may be helpful to review some of the major legislative activities that occurred in the past.

In the seventies, the State of Kansas was confronted with a situation referred to as a "malpractice crisis." But the real problem was limited access to medical care that arose because of the inability of physicians to purchase affordable medical malpractice insurance coverage. Because most physicians are unwilling to practice medicine without professional liability insurance, many of them retired early or left Kansas for another state where insurance was available and affordable. The result was limited access to medical care for Kansas patients, and unfortunately the problem was frequently described as a "malpractice crisis."

In 1975 a special interim committee made a series of recommendations intended to address the crisis. Many of those recommendations were then enacted by the 1976 Legislature. One of the most important and lasting measures enacted in 1976 was the Health Care Provider Insurance Availability Act which, among other things, created the Health Care Stabilization Fund. The Legislature established a requirement that all physicians obtain professional liability insurance as a condition of licensure, and participate in capitalizing the Health Care Stabilization Fund.

In addition to the Availability Act, the 1976 Legislature passed a limited number of tort reforms; measures which replaced common law rules with statutory procedures for medical malpractice actions. As you know, the common law collateral source doctrine precludes admissibility of evidence of collateral source benefits. The 1976 statutory collateral source rule was intended to abrogate the common law doctrine in order to allow collateral source benefits to be admitted as evidence in these lawsuits. This section of the Statutes was later ruled unconstitutional by the Kansas Supreme Court.

Almost a decade later, the situation in Kansas had not improved appreciably. Even though physicians and other health care professionals were assured access to professional liability insurance coverage, the cost of premiums was excessive and the number of physicians practicing in Kansas was declining. Kansans continued to experience limited access to medical care.

The 1985 and 1986 Legislatures responded by enacting a package of several tort reforms, including a statutory collateral source rule, but these new rules applied only in medical malpractice actions. It is important, however, to note that by this time other professions, businesses, and even local governments were experiencing the same kind of liability insurance problems that physicians experienced.

In 1987 the Special Committee on Tort Reform and Liability Insurance recommended a number of bills that were designed to extend tort reforms to all personal injury actions. These bills were carefully drafted to exclude medical malpractice actions because the tort reforms in medical malpractice cases had an earlier effective date, and the new bills were not precisely identical to the medical malpractice versions.

By the time the Legislature convened for the 1988 Session, it had become apparent that the courts would not accept rules of civil procedure that discriminated between medical malpractice lawsuits and other types of personal injury actions. For that reason, it was decided to enact a package of tort reform measures that applied generally to all civil actions in which a plaintiff seeks damages for personal injury or death.

One of those 1988 tort reform measures is now Article 38 of Chapter 60, *Kansas Statutes Annotated*. These seven sections of law do more than simply allow introduction of evidence. This statutory collateral source rule requires that the court reduce the amount of any judgment by the net amount of collateral source benefits received, but only in cases in which the plaintiff is seeking damages in excess of $150,000. A copy of these seven sections is attached for your reference.

As you probably surmise, the 1988 Legislature was concerned about the efficiency of a system in which modest claims would become burdensome for the courts and would delay the process because of the additional evidence pertaining to collateral sources of benefits. That's why a threshold was established. But apparently it was this threshold that became the basis for a 1993 Supreme Court decision declaring the act unconstitutional. And this is the issue addressed in 2005 HB 2150. Presumably, by deleting the arbitrary $150,000 threshold, the Legislature would address the Court's concern.

While HB 2150 appears rather innocuous, the deletion of three short words and a dollar amount may be somewhat controversial. We can only speculate whether such a law would be upheld by the Supreme Court. For these reasons, it may be advisable to examine the issue from a broader perspective.

We believe that when a medical malpractice case goes to a jury, a well-informed jury will make a better decision. This means the defendant should be able to introduce evidence of collateral source benefits, and the plaintiff should be able to introduce evidence regarding the cost of those benefits, whether those benefits are subrogated to another party, and the effect of those benefits on annual and lifetime limits of insurance policies. Whether there should be an automatic, post-judgment reduction based on net collateral source benefits is a secondary issue.

We urge you to recommend a statutory procedure that will allow juries to be properly and completely informed regarding collateral sources of benefits received by plaintiffs. We respectfully suggest that you review previous Supreme Court decisions on this subject in order to draft a bill that will likely withstand judicial scrutiny. We have learned from three decades of experience, this is not an easy task.

Thank you for the privilege of providing testimony. We hope this information assists you in your deliberations.

Chapter 60.--PROCEDURE, CIVIL
Article 38.--COLLATERAL SOURCE BENEFITS

60-3801. Definitions. As used in this act:

(a) "Claimant" means any person seeking damages in an action for personal injury or death, and includes the heirs at law, executor or administrator of a decedent's estate.

(b) "Collateral source benefits" means benefits which were or are reasonably expected to be received by a claimant, or by someone for the benefit of a claimant, for expenses incurred or reasonably certain to be 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. Such term shall not include: (1) Services or benefits for which a valid lien or subrogation interest exists; however, nothing in this act shall be construed to create or modify lien or subrogation interests not otherwise allowed by law; and

(2) amounts included as part of a criminal sentencing order or pursuant to state programs of victims assistance incurred by virtue of the defendant also committing a criminal act.

(c) "Cost of the collateral source benefit" means the amount paid or to be paid in the future to secure a collateral source benefit by the claimant or by anyone on behalf of the claimant. If the amount of any benefit paid or to be paid encompasses amounts paid over a period of time, thus making the benefit greater than it would be without such amounts paid, then evidence of such amounts paid shall be admissible in determining the "cost of the collateral source benefit."

(d) "Net collateral source benefits" means the sum of collateral source benefits after subtracting the cost of the collateral source benefit.

60-3802. Collateral source benefits; when admissible. In any action for personal injury or death, in which the claimant demands judgment for damages in excess of $150,000, evidence of collateral source benefits received or evidence of collateral source benefits which are reasonably expected to be received in the future shall be admissible.

60-3803. Same; evidence of the cost admissible. When evidence of collateral source benefits is admitted into evidence pursuant to K.S.A. 60-3802, evidence of the cost of the collateral source benefit shall be admissible.

60-3804. Same; determining damages. In determining damages in an action for personal injury or death, the trier of fact shall determine the net collateral source benefits received and the net collateral source benefits reasonably expected to be received in the future. If the action for personal injury or death is tried to a jury, the jury will be instructed to make such determination by itemization of the verdict.

60-3805. Same; reduction of the judgment. (a) The amount of the judgment shall be reduced by the court by the amount of net collateral source benefits received, or reasonably expected to be received in the future but only to the extent that such benefits exceed the aggregate amount by which:

(1) Such judgment was reduced pursuant to subsection (a) of K.S.A. 60-258a and amendments thereto;

(2) the claimant's ability to recover such judgment was limited by the application of subsections (c) and (d) of K.S.A. 60-258a and amendments thereto, other than by virtue of claimant's settlement with or decision not to assert a legally enforceable claim against a named or an unnamed party;

(3) the amount to which the claimant's ability to recover such judgment was limited by the insolvency or bankruptcy of a person; and

(4) the award of damages has been reduced because of a statutory limit upon the recovery of damages.

(b) If there is no amount falling within subsections (a)(1) through (a)(4) then the court shall reduce the judgment by the full amount of the net collateral source benefits.

60-3806. Severability. If any provision or clause of this act or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

60-3807. Application of 60-3801 through 60-3806. The provisions of this act shall apply to causes of action accruing on or after July 1, 1988.

Legislative Testimony

SB 335

Tuesday February 7, 2006

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

THE KANSAS CHAMBER

The Force for Business

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Chairman Vratil and members of the Committee;

The Kansas Chamber and its over 10,000 members support passage of SB 335. 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

In our December 2005 CEO and Business Owner's Poll, 85% of the 300 respondents 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. SB 335 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 SB 335. 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 chambe and trade organizations. The Chamber represents small, medium and large employers all across Kansa

Senate Judiciary
2-7-06
Attachment 6

KANSAS ASSOCIATION OF DEFENSE COUNSEL
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Telephone: 785-232-9091 • FAX: 785-233-2206 • www.kadc.org

TO: Senate Judiciary Committee

FROM: Anne Kindling, Kansas Association of Defense Counsel (KADC)

RE: Senate Bill 335

DATE: February 7, 2006

KADC supports the passage of SB 335, which is substantially similar to HB 2150, which we supported in the 2005 session. In support, KADC submits the testimony previously submitted to the Interim Judiciary Committee.

Senate Judiciary
2-7-06
Attachment 7

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MEMORANDUM

TO: **Members of the Committee**

FROM: **Anne M. Kindling for the Kansas Association of Defense Counsel**

DATE: **15 September 2005**

RE: **Collateral Source Legislation**

Chairman Vratil and Members of the Committee:

My name is Anne Kindling and I submit this written testimony regarding collateral source legislation on behalf of the Kansas Association of Defense Counsel.

The KADC consists of more than 200 practicing attorneys who devote a substantial portion of their professional practice to the defense of lawsuits. The KADC maintains a strong interest in improving the adversary system and the administration of justice. We believe that the interests of justice will be served by the enactment of legislation to allow juries to learn of collateral source benefits in personal injury actions.

Such legislation will limit the archaic and old-fashioned rule of common law known as the collateral source rule. The collateral source rule was developed in the 19th century and prevents the jury from learning about payments that were made to or on behalf of the injured party from third-party sources, most notably health insurance benefits paid to the plaintiff's health care providers or to the plaintiff himself. The present state of the law allows a plaintiff in a personal injury case to recover the cost of medical care. Even if the plaintiff's health insurance paid all or part of his or her medical expenses, the jury cannot be told of this. The result is that some plaintiffs are overcompensated for their losses.

The goal of damages in a lawsuit is to make the plaintiff whole by compensating him for the monetary and non-monetary damages suffered at the hands of the defendant. The monetary losses include the cost of medical care and other economic losses. However, when these medical costs have already been covered by health insurance, there is no actual monetary loss to the patient. Awarding the patient compensation for such sums, then, goes above and beyond the goal of damages and gives the plaintiff a windfall.

Abolishing the collateral source rule will allow the jury to be told that certain of the monetary losses claimed by the plaintiff were actually paid by a third party. The jury will hear both sides of the equation: the benefits received by the plaintiff, as well as the costs plaintiff incurred in obtaining those benefits. The jury then can decide the "net value" to the plaintiff of such benefits. Additionally, legislation proposed last session would make a reduction in the jury's award discretionary rather than mandatory. Thus, the jury would hear all the information and then decide whether to reduce the award at all and, if so, by how much.

There are three aspects of this issue that are often misunderstood. First, collateral source benefits do not include amounts paid by a third party who retains a lien or right of subrogation. K.S.A. 60-3801(d) specifically excepts from the definition of "collateral source benefits" "services or benefits for which a valid lien or subrogation interest exists." For example, amounts paid by Medicaid for which a lien exists would not be considered a collateral source, nor would amounts paid by an employer's self-funded health or worker's compensation plan be subject to this legislation where the employer's plan retains the right of subrogation or lien.

Second, opponents of this legislation frequently argue that two plaintiffs with identical injuries should receive the same damages award, but this legislation will result in the two defendants paying different amounts depending on whether or not the plaintiff had health insurance. However, this premise is faulty because a plaintiff with health insurance is not "identical" to a plaintiff without health insurance. The law requires a defendant to take his victim as he finds him. Compare, for example, a car accident requiring replacement of the front quarterpanel of the plaintiff's vehicle. If the defendant is so unlucky as to hit a Rolls Royce, that defendant is going to pay more in damages than a defendant who collides with an older model Honda Civic. It is no different when you look at personal injuries. The plaintiff with health insurance simply isn't identical to the plaintiff without insurance, even if both suffered a knee injury, and that is the reason the economic losses recovered will be different.

As a corollary to this argument, the inequity in net recovery by the two plaintiffs must be recognized due to operation of the collateral source rule. The plaintiff who lacks health insurance has already paid out of pocket his medical bills, while the plaintiff with health insurance has not. If the medical expenses total $100,000, for example, the plaintiff with health insurance will pocket recovery of $100,000, while the plaintiff with identical injuries but with no health insurance will pocket $0 since the $100,000 will have to be paid to his health care providers.

Third, opponents often suggest that if the jury learns the plaintiff was covered by insurance, then the jury should also be told the defendant had insurance. The goal of damages must again be considered. The goal of a damages award is to compensate the plaintiff for his loss, not to punish the defendant. The plaintiff's damages are the same regardless of whether they are paid by the defendant himself or by the defendant's liability insurer. The issue is the loss suffered by the plaintiff, not the source of payment for that loss. Thus, the two concepts are unrelated.

Thank you for the opportunity to testify in support of abolishing the collateral source rule. I would be happy to stand for questions.

Kansas
Insurance
Department

Sandy Praeger COMMISSIONER OF INSURANCE

Comments on

SB 335-- Concerning collateral source benefits
Senate Judiciary

February 7, 2006

Mr. Chairman and members of the committee:

Thank you for the opportunity to speak with you on behalf of the Kansas Insurance Department. The Kansas Insurance Department supports the objective of allowing evidence of collateral sources of payment in personal injury lawsuits.

Knowing that the desired result of this legislation is lower insurance premiums, we believe it is important to remove the sunset provision in Section 5. With the sunset of July 1, 2009 we are not confident that the intended result will be achieved. Quite simply, we don't believe the given timeline provides enough time to actuarially justify a lowering of rates.

With the sunset provision removed, we do believe this legislation could have a positive impact on insurance premiums in Kansas. Thank you again for the opportunity to appear before you today, and I would be happy to answer any questions you may have.

John Campbell
Chief Council

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KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Senator John Vratil, Chairman
Members of the Senate Judiciary Committee

From: Bryan W. Smith, Attorney at Law
Cavanaugh, Smith & Lemon, PA
Kansas Trial Lawyers Association

Date: February 7, 2006

Re: SB 335 Abrogation of the Collateral Source Rule

I appear before you today on behalf of the Kansas Trial Lawyers Association, a statewide nonprofit organization of attorneys who represent consumers and advocate for the safety of families and the preservation of Kansas' civil justice system. I appreciate the opportunity to provide you with testimony on SB 335, the admissibility of collateral source benefits in actions for personal injury or death. KTLA members are opposed to changing the collateral source rule because we believe it provides important protections for all Kansans that should not be eroded or eliminated.

I. Background.

Abrogation of and/or changes to Kansas' collateral source rule are not novel issues to the 2005-2006 biennium. 2005 HB 2150, which completely abolished the collateral source rule, was heard last year in the House Judiciary Committee but lacked sufficient committee support to advance it to floor debate. Late in the session, modified provisions of HB 2150 were added to SB 102, a totally unrelated bill, in a "gut and go" procedure by the House Insurance Committee. Subsequently, the conference report was rejected by the full House twice, the second time after a motion to reconsider previous action. As part of the conference report, sunset provisions were included to make the measure more palatable and similar provisions are also found in SB 335. We do not believe that the sunset makes SB 335 better but instead highlights the bill's weaknesses and speaks to the fact that changing the collateral source rule is questionable policy.

II. Public Policy Considerations.

The need for SB 335 is predicated on an assumption that there is a tort crisis in Kansas. However, review of Kansas court cases shows that the so-called "litigation crisis" is a myth. In

Terry Humphrey, Executive Director

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Senate Judiciary
2-7-06
Attachment 9

fact, only 2% of cases filed in Kansas are torts, and of that 2%, only 115 were decided by a jury. The median award in 2004 was $18,757, down from $23,416 in 2003. KTLA strongly discourages the Committee from shaping public policy based on the fiction that there is a crisis in Kansas.

In addition, Kansas does not need additional "tort reform" measures because Kansas already has in place strict laws that rigorously control tort cases. Kansas' comparative negligence law (K.S.A. 60-258a) requires that juries divide damages between the plaintiff and negligent defendants according to relative fault. For example, if the jury determines that a defendant is 70% at fault and a plaintiff is 30% at fault, the defendant would be accountable only for 70% of the damages. Kansas also has a cap on non-economic damages that limits recovery of so-called pain and suffering to $250,000 (K.S.A. 60-19a02). Given these laws, and the lack of a tort crisis, we strongly question the need for SB 335.

The collateral source rule has a long history in the world and in Kansas. Notions of requiring wrongdoers to make the parties they injure whole can be traced to the writings of Moses. In Kansas, the collateral source rule has been the law for over 100 years, and it stands for the Kansas value of accountability: those causing harm to others must be fully accountable for the injuries they have caused. In other words, if you break it, you must fix it.

SB 335 turns the ancient value of accountability on its head by eliminating the protections of the collateral source rule and allowing juries to hear evidence of an injured person's financial resources—"collateral source benefits". As a result, wrongdoers could use an injured person's own health insurance benefits to reduce the wrongdoer's responsibility to pay for the harm they caused. It is important to note that under current law, evidence of both the defendant's and plaintiff's resources and ability to pay cannot be presented to the jury, and neither can the jury be told of Kansas' cap on non-economic damages. However, SB 335 does not change the law to allow the jury to hear evidence of the defendant's assets and the damage cap—it unfairly changes only the rules affecting the injured party.

Supporters of changes to the collateral source rule have argued that injured victims allegedly receive double recovery for their injuries by simultaneously being compensated by the wrongdoer and receiving health insurance coverage. Their analysis is incorrect. Insurance coverage is not a "recovery" because it is a contractual entitlement purchased by the injured victim for his or her own benefit. As proponents describe it, injured persons should receive no compensation for health costs if the injured person has health insurance coverage. But people that responsibly purchase insurance coverage do so not to lessen the obligations of someone who might hurt them in the future but to assure that their own bills are paid. It is unfair to allow an injured person that has purchased health insurance to lose the value of that coverage because it goes to reduce the financial obligations of the person that caused their injury.

In addition, health insurance policies typically have a lifetime maximum on medical benefits that an injured person could potentially "max out" as a result of a wrongdoer's negligent act. The erosion of the victim's lifetime benefit, reduced medical benefits and future uninsurability may not be adequately compensated if the injured party's insurance coverage goes to reduce the damages that the wrongdoer should pay.

Proponents have alluded that costs would go down if the collateral source rule were changed or eliminated. But 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. 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. It also seems unlikely that private sector insurance costs will go down since SB 335 makes reduction by collateral source benefits discretionary with the jury.

Instead, passage of SB 335 could in fact increase the cost and length of lawsuits because 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.

Proponents have also argued that the collateral source rule should be eliminated in order to improve the economy in Kansas. However, there is no link between the economic health of the state and the collateral source rule, as confirmed by independent sources. A 2004 study for *Forbes* magazine ranked Kansas 1st in economic freedom, meaning businesses and individuals face fewer restrictions here than in other states (see attached.) And *Expansion Management* magazine ranked Kansas 1st in its Health Care Cost Quotient, meaning health care costs are more manageable for businesses here than in any other state. Kansas has also seen months of year-to-year job growth, and between 2004 and 2005 56 large- to medium-sized new businesses have moved to Kansas and 25 businesses have expanded or stayed in Kansas. Even the proponents of SB 335 acknowledge that changing the collateral source rule isn't an issue critical to the Kansas economy: the October 31-November 3, 2005 Kansas Chamber poll of 300 Business Owners/Executives in Kansas showed that business leaders believe that the most important issue facing Kansas is taxes. Clearly, Kansas is not in an economic freefall as the proponents suggest.

III. Constitutional Considerations.

A. The Proposed Statute Is Blatantly Unconstitutional As the Statute's Proponents Have "Fail[ed] to Fail to Provide Facts or Any Data" Showing that there Is a "Torts Crisis" or "Insurance Crisis" in Kansas -- More than 200 years ago, John Adams, in his famous defense of British soldiers on trial for their involvement of the Boston Massacre, cautioned that "[f]acts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence. John Adams, in J. Bartlett, BARTLETT'S FAMILIAR QUOTATIONS 462b (14th ed.1968).

More than ten years ago, in *Thompson v. KFB Ins. Co.*, 252 Kan. 1010, 1022, 850 P.2d 773, 782 (Kan.,1993) the Kansas Supreme Court struck a similar chord in invalidating the legislature's third attempt to abolish the centuries-old collateral source rule. The Court explained that

although the statute's proponents repeatedly had "project[ed]" that its enactment would yield significant savings for insurance companies and much lower premiums for insureds:

> The problem with the proponents' contention is that they *fail to provide facts or any data upon which to make such a projection* . . . . We are not presented with a set of facts upon which we can conclude the challenged [statute] is rationally related to a legitimate legislative purpose. Instead, we are presented with a wholly unsubstantiated assumption.[1]

The proponents of the new statute are now making similar "projections." But, as before, the proponents of the new statute "fail to provide facts or any data upon which to make such . . . projection[s]."[2]

The statute's proponents cannot be ignorant of the Supreme Court's standards. The reason they have not provided "facts or any data" is plain: there are no facts that demonstrate that Kansas needs to abolish the collateral source rule.

Thus, the statute's proponents have not provided any credible evidence showing that there is a "tort crisis" in Kansas, *e.g.,* no data showing that (1) the number of tort claims in our state is rising faster than the population or faster than the number of civil cases overall; (2) the size of tort damage awards are climbing higher than the rate of inflation, or climbing higher than awards in all civil cases in Kansas. Please see the attached chart ("No Litigation Crisis") showing that, in Kansas, median awards have decreased as well as the number of tort cases decided by juries.

The statute's supporters similarly have failed to furnish any reliable evidence that an insurance crisis exists in Kansas, *e.g.*, (1) no data how much money insurance company lost (or made) in Kansas in the last year, in the last five years, or in the last decade; (2) no data regarding loss/earnings ratios in various insurance "lines," and whether those crucial ratios have been rising or falling over the last decade; (3) no information regarding which insurance companies (if any) are have abandoned Kansas for friendlier markets, and whether other companies are taking their places (or need to). Even if some insurers' profits are down and even if some may have left Kansas, the statute's supporters have not supplied evidence that loss ratios are falling, that profits are down, and insurers are leaving because of the rising tort claims or awards, as opposed to other, unexamined factors that insurance industry critics say are the true causes of the recurrent crises, such as the insurance business cycle, executive mismanagement, corporate profiteering, natural disasters, or, in general, "cash-flow" underwriting practices (*i.e.*, charging low, introductory, below-cost premiums in order to gain more "market share," to obtain more premiums overall , and to invest the premiums in lucrative but speculative investment vehicles).

In fact, many independent researchers have concluded that the liability insurance crises that periodically sweep across the country are not caused by non-existent "liability crises" but instead are caused by the insurance industry's pricing policies and investment decisions; that because insurance rates are established on the basis of national trends, not local events, there is little that a lightly populated state like Kansas can do to induce insurers to lower rates; and that because

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1 252 Kan. at 1022, 850 P.2d at 782 (emphasis added).

2 *Id.*

the periodic insurance availability and affordability crises are *not caused by problems* in the tort system these insurance crises *cannot be remedied by fixes* to the tort system.[3]

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[3] *See, e.g.*, Prof. Daniel J. Capra, *An Accident and a Dream: Problems With the Latest Attack on The Civil Justice System*, 20 Pace L. Rev. 339, 377-78 (2000)(Athe evidence now indicates that the insurance crisis was caused not by lawsuits, but rather by a cyclical downturn combined with questionable underwriting practices and a drop in interest rates. . . . To put it simply, there is no liability-induced insurance crisis.@); Prof. Mark C. Rahdert, *Covering Accident Costs: Insurance, Liability and Tort Reform* 114 (1995); Robert B. McKay, *Rethinking the Tort Liability System: a Report from the ABA Action Commission*, 32 Vill. L. Rev. 1219, 1220 (1987)(insurers typically price tort premiums Aunrealistically low because of the hugely favorable investment climate.@); Prof. Mark M. Hager, *Civil Compensation and Its Discontents: A Response to Huber*, 42 Stan. L. Rev. 539, 568 (1990)(AInsurance industry propaganda has often portrayed the >insurance crisis= as a deep threat to insurance profitability posed by excessive tort liability. Evidence suggests, however, that no >insurance crisis= of this sort really exists. Instead, insurance interests have blamed tort liability for intervals of poor profit actually stemming from other causes. They have meanwhile used the excessive liability notion to justify price hikes, coverage cutbacks, and legislative >tort reform.=@); Prof. Lucinda Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 Emory L. J. 1263, 1274 (2005)("'[S]ince 1975, medical malpractice paid claims per doctor have tracked medical inflation very closely (slightly higher than inflation from 1975 to 1985 and flat since). In other words, payouts have risen almost precisely in sync with medical inflation, which should surprise the doctors who dutifully march off at the insurers' trumpet call to seek tort law changes. These data confirm that neither jury verdicts nor any other factor affecting total claims paid by insurance companies that write medical malpractice insurance have had much impact on the system's overall costs over time. [In addition], while payouts closely track medical inflation, medical malpractice premiums are quite another thing. They do not track costs or payouts in any direct way. Since 1975, the data shows that in constant dollars, per doctor written premiums--the amount of premiums that doctors have paid to insurers--have gyrated almost precisely with the insurer's economic cycle, which is driven by such factors as insurer mismanagement and changing interest rates, not by lawsuits, jury awards, the tort system or other causes. This is because: "[i]nsurers make most of their profits from investment income. During years of high interest rates and/or excellent insurer profits, insurance companies engage in fierce competition for premium dollars to invest for maximum return. Insurers severely underprice their policies and insure very poor risks just to get premium dollars to invest. This is known as the 'soft' insurance market. But when investment income decreases--because interest rates drop or the stock market plummets or the cumulative price cuts make profits become unbearably low--the industry responds by sharply increasing premiums and reducing coverage, creating a 'hard' insurance market usually degenerating into a 'liability insurance crisis.'" (cits. omitted)). *See generally id.* at 1267-78. *See* Prof. Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DePaul L. Rev. 393 (2005); Baker, THE MEDICAL MALPRACTICE MYTH (University of Chicago Press, forthcoming Nov. 2005); Melissa C. Gregory, *Capping Noneconomic Damages in Medical Malpractice Suits is Not the Panacea of the "Medical Liability Crisis"*, 31 Wm. Mitchell L.Rev. 1031, 1044 45 (2005); Center for Justice & Democracy, *Premium Deceit: The Failure of 'Tort Reform' to Cut Insurance Prices* (1999); Americans for Insurance Reform, *Medical Malpractice Insurance: Stable Losses/Unstable Rates, 2003* 23 (2003); National Association of Attorneys General ("NAAG") Committee, AN ANALYSIS OF THE CAUSE OF THE CURRENT CRISIS OF UNAVAILABILITY AND UNAFFORDABILITY OF LIABILITY INSURANCE (May 1986)(Attached hereto as Ex. G). *See also MICRA: The Impact on Health Care Costs of California's Experiment with Restrictions on Medical Malpractice Lawsuits, Report of the Proposition 103 Enforcement Project Study* (1995); The Foundation for Taxpayer and Consumer Rights *MICRA Did Not Lower Insurance Premiums in California*, (2002)

Finally, and most importantly, the statute's proponents have failed to show any evidence that the alleged tort crisis and the putative insurance crisis have undermined the Kansas economy. In fact, once again, the evidence shows that the Kansas' legal environment for business is the best and most "free" in the nation, coming in at "number one" in the country in the most recent ranking of states in the "U.S. Economic Freedom Index." That, index, which was compiled by the conservative, pro-business Pacific Research Institute for Public Policy and published by FORBES magazine, report that "*Kansas came up number one, thanks largely to its respect for property rights*: It engages in less income redistribution and *attracts less tort litigation than most states*."[4]

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http://www.consumerwatchdog.org/insurance/fs/fs002695.php3 (avail. Apr. 16, 2005); A.C. Hoffman, *Governmental Studies on Medical Malpractice*, 24 Med. & L. 297, 303-05 (2005); Franklin D. Cleckley & Govind Hariharan, *A Free Market Analysis of the Effects of Medical Malpractice Damage Cap Statutes: Can We Afford to Live with Inefficient Doctors?*, 94 W. Va. L. Rev. 11, 30 (1991), cited in William P. Gunnar, *Is There An Acceptable Answer To Rising Medical Malpractice Premiums?, 13 Annals Health L.* 465, 489 (2004).

[4] Dr. Lawrence J. McQuillan, *Where the Opportunities Are,* FORBES, May, 24, 2004 (available at http://www.forbes.com/static_html/bestplaces/2004/mapFLA.shtml).

Lawrence J. McQuillan, Ph.D., is Director of Business and Economic Studies at the Pacific Research Institute for Public Policy. According to the study, "[i]n coming up with our ratings we evaluated 143 variables for each state, using the most recent data. This snapshot includes tax rates, state spending, occupational licensing, environmental regulations, income redistribution, right-to-work and prevailing-wage laws, *tort laws* and the number of government agencies. These we grouped into five sectors--fiscal, regulatory, judicial, size of government and social welfare. For each of the 143 variables we ranked states from 1 (most free) to 50 (least free), calculated an average sector ranking and then weighted them to get an overall score. Welfare, fiscal and regulatory matters counted about equally; government size and judicial ratings counted for less." (Emphasis added).

In reply to a letter to the editor of the WICHITA EAGLE, which asserted the other surveys had reported that Kansas was not number one in business climate and therefore that the Pacific Research Institute study must not be reliable, the authors of that study explained that "*Our U.S. Economic Freedom Index* was never designed to 'measure the business climate,' as the writer claimed. It *measures the policy environment of each state as it relates to free enterprise and consumer choice* -- period. Many other factors besides government rules and regulations, what we call economic freedom, affect a state's business climate. We did not look at these factors, because they were beyond the scope of our study. Perhaps this explains why our results diverge from other indexes." Lawrence J. McQuillan, Robert E. McCormick, and Ying Huang, *Rebuttal to Letter to the Editor*, WICHITA EAGLE, Dec. 29, 2004 (available http://www.pacificresearch.org/press/opd/2004/opd_04-12-29lm.html; emphasis added).

Rankings by other groups, such as the U.S. Chamber of Commerce's Institute for Legal Reform "Overall Ranking of State Liability Systems," have Kansas fluctuating in rank from 16th (in 2005), to 9th (in 2004), 15th (in 2003), 4th (in 2002) (available at http://www.instituteforlegalreform.com/harris/pdf/OverallStateRanking.pdf). The fact that these fluctuations are both so dramatic and so contrary – combined with the fact that the Chamber's rankings of other states are equally and inexplicably fickle, e.g.., North Dakota's rank varied from 3rd to 16th to 6th to 25th during the same period, while Indiana's rank yo-yoed from 6th to 11th to 5th to 12th – says more about the reliability of Chamber's survey than it does about the business/liability climate of a single state in a

B. Even If There Is an Insurance "Crisis" in Kansas, the Statute's Proponents Similarly Have "Fail[ed] to Provide Facts or Any Data" Showing that the Statute Would Have Any Effect in Reducing Insurance Premiums and Solving the "Crisis" -- Although empirical research shows that caps on damages may reduce both tort plaintiffs' overall awards and insurance premiums, and although research also demonstrates that abrogation of the collateral source rule in other states has "a significant effect on [tort] plaintiffs' recovery" overall,[5] there is no evidence that insurance companies pass on their windfall savings from abrogation of the collateral source rule to their insureds in the form of lower premiums. In fact, not only have the proposed statute's sponsors and supporters failed to find any data supporting their claims that abrogation will improve insurers' profits and therefore reduce premiums, analysis of the effects of abrogation in other state states by neutral and highly respected scholars demonstrates that *abrogation has "no statistically significant effect" on either insurers' "loss ratios, i.e., profitability" or the premiums that insurers charge.*[6] "Even though the correlation between damages and introducing collateral source benefits appears strong, these studies discovered no statistical relationship between reducing collateral source benefits and premiums."[7]

Thus, *a recent review of "major recent" studies by the Congressional Budget Office (CBO), "did not identify any study which discovered a statistically significant relationship between repealing the collateral source rule and premiums.*"[8]

Further evidence that the abrogation of the collateral source has not affected insurance rates comes from the insurance companies themselves. In 1986, Florida enacted tort reform similar to the MICRA provisions in California. Shortly thereafter, in connection with its request for a rate increase, Aetna Insurance Company conducted a study showing that the Florida tort reform had no effect on its rates. "*Aetna stated that abrogating the collateral source rule would have a negligible effect*" on the premiums it charged "because 'current Aetna claim settlement practices recognize, in part, the existence of collateral sources as part of the negotiating process used in arriving at a mutually satisfactory damage value with the plaintiff.' Aetna's data suggested that the offset resulting from allowing collateral benefits to be introduced at trial is no more than four tenths of a percent."[9]

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single year. Suffice it to say that Kansas' average rank during the last years was 11th, better, that is, than 39 other states.

[5] Prof. Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 NYU L. Rev. 391, 458 (2005)

[6] *Id.*, NYU L. Rev. at 458 n.300 (citing Prof. Kenneth E. Thorpe, *The Medical Malpractice "Crisis": Recent Trends and the Impact of State Tort Reforms*, HEALTH AFFAIRS (Jan. 21, 2004) (available at http://content.healthaffairs.org/cgi/content/full/hlthaff.w4.20v1/DC1).

[7] Brandon Van Grack, *The Medical Malpractice Liability Limitation Bill,* 42 HARV. J. ON LEGIS. 299, 310 (2005).

[8] *Id.*, 42 HARV. J. ON LEGIS. at 310, n.77 (citing Congressional Budget Office, THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES 12-13 (2004) (available at http://www.cbo.gov/ftpdocs/55xx/doc5549/Report.pdf)).

[9] Jonathan J. Lewis, *Putting MICRA Under the Microscope: The Case for Repealing California Civil Code Section 3333.1(a)* [the collateral source provision], 29 WESTERN ST. U. L. REV.

Insurance defense lawyers and conservative "think tanks" agree. Thus, the DEFENSE COUNSEL JOURNAL reports that "David McIntosh, a fellow at the Competitiveness Center of Hudson Institute, has written that its studies concluded that reducing awards by the amount of collateral source benefits is relatively ineffective in cutting malpractice insurance costs."[10]

In sum, the overwhelming consensus among government researchers, university scholars, insurance company executives, defense lawyers, and conservative think tanks is that "collateral source reforms . . . will not lower insurance rates."[11]

C. Elimination Of the collateral source rule Would Penalize Individuals Who Paid Premiums to Insure Themselves – Abrogation of the collateral source rule would not only unnecessary and ineffective, it also would be perverse. As Thomas C. Galligan, the Dean of the University of Tennessee Law School has explained, abrogation would punish plaintiffs and allow defendants to "benefit[] from the plaintiff's foresight and investment in insurance."[12] As the Kentucky Supreme Court noted explained in invalidating that state's legislative repeal of the collateral source rule,

> There is no legal reason why the tortfeasor or his liability insurance company should receive a "windfall" for benefits to which the plaintiff may be entitled by reason of his own foresight in paying the premium or as part of what he has earned in his employment, and benefits received are usually subject to subrogation so there is no "double recovery" by any stretch of the imagination.[13]

D. Abrogation of the collateral source rule Would Lead To More Accidents, Injuries, And Costs Because Tortfeasors Would Have Reduced Incentive To Take Steps To Prevent Injuries – As Dean Galligan has observed, "the collateral source rule leads to more efficient deterrence than nonrecovery of the loss because it forces defendants to take account of these reimbursed losses or costs before acting," with the result that abrogation of that rule would lead to under-deterrence of negligent and even grossly negligent conduct.[14]

173, 185-86 (2001) (emphasis added). *See* Prof. Philip Shuchman, *It Isn't That the Tort Lawyers Are So Right, It's Just That the Tort Reformers Are So Wrong,* 49 RUTGERS L. REV. 485, 521 n.193 (1997).

[10] Douglas R. Dennis, *What Impact Will Health Care Reform Have on Vaccine and Drug Makers?,* 62 DEF. COUNS. L. J. 165, 171 (1995) (citing David McIntosh, *Without Malpractice Reform, Forget Health Care Reform*, WALL ST. J., Sept. 22, 1993, at A21).

[11] Van Grack, 42 HARV. J. ON LEGIS. at 310.

[12] Thomas C. Galligan, Jr., DISAGGREGATING MORE-THAN-WHOLE DAMAGES IN PERSONAL INJURY LAW: DETERRENCE AND PUNISHMENT, 71 Tenn. L. Rev. 117, 123 (2004) (citing 1 Dan B. Dobbs, DOBBS LAW OF REMEDIES § 380, at 1058-59 (2d ed. 1993). *See* Prof. Nora J. Pasman-Green, *Who Is Winning the Collateral Source Rule War?*, 31 U. Tol. L. Rev. 425, 445 (2000).

[13] *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 576 (Ky. 1995).

[14] Galligan, 71 Tenn. L. Rev. at 123. *Accord* Linda Ross Meyer, *Just the Facts?,* 106 YALE L. J. 1269, 1279 (1997); Lewis, 29 WESTERN ST. U. L. REV. at 190; Van Grack, 42 HARV. J. ON LEGIS. at 312.

E. Elimination Would Shift the Burden of Paying for the Costs of Injuries from Liable Tortfeasors to Government Agencies Like Medicaid and Medicare and, Ultimately, to the Taxpayers, Who Pay for Such Programs -- Abrogation of the collateral source rule would be perverse in a yet another way as it will compel the taxpaying public, which picks up the tab for Medicare and Medicaid, to pay for the accidents and injuries caused by negligent tortfeasors. Thus, "in most loss-based systems of private and social insurance [are forced to] bear primary responsibility for losses that would otherwise be compensable in tort."[15]

IV. Conclusion.

KTLA believes that changing the collateral source rule will only help insurance companies and those that have caused harm at the expense of working Kansas families and small businesses. We respectfully request that the Senate Judiciary Committee oppose SB 335.

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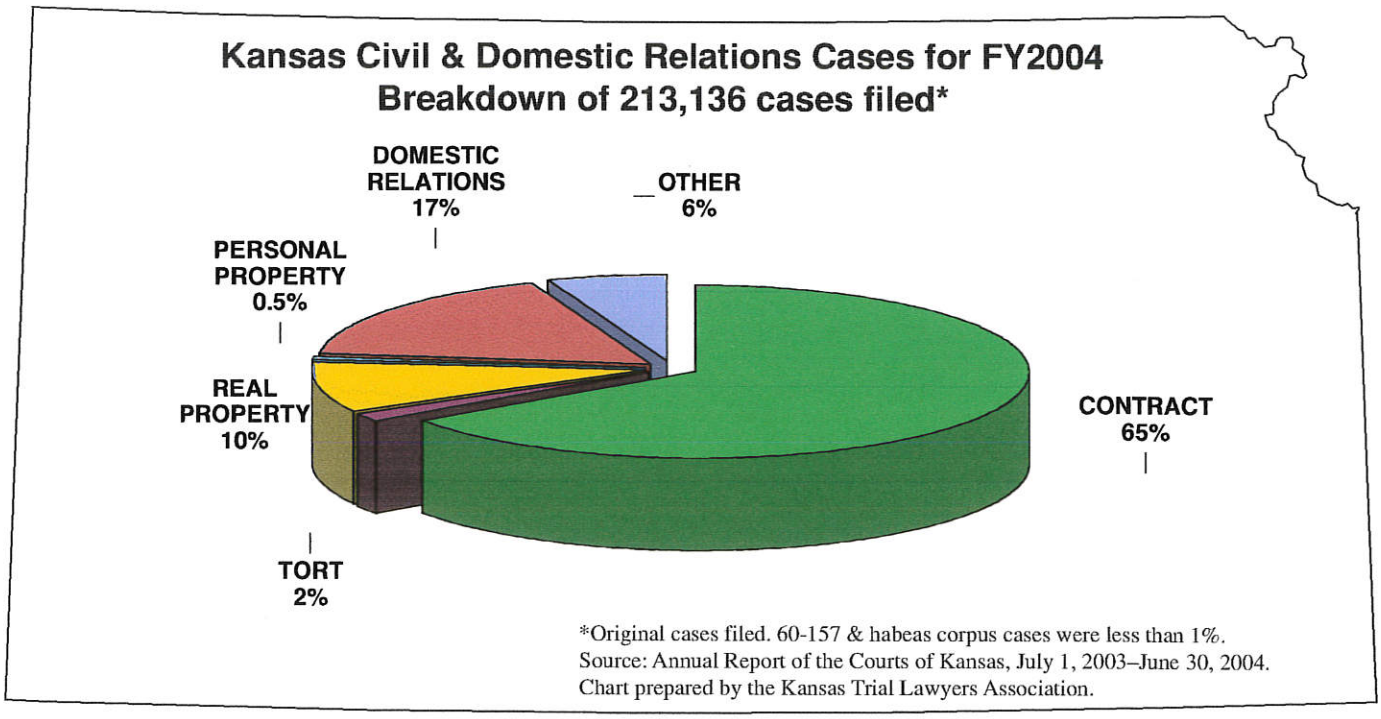
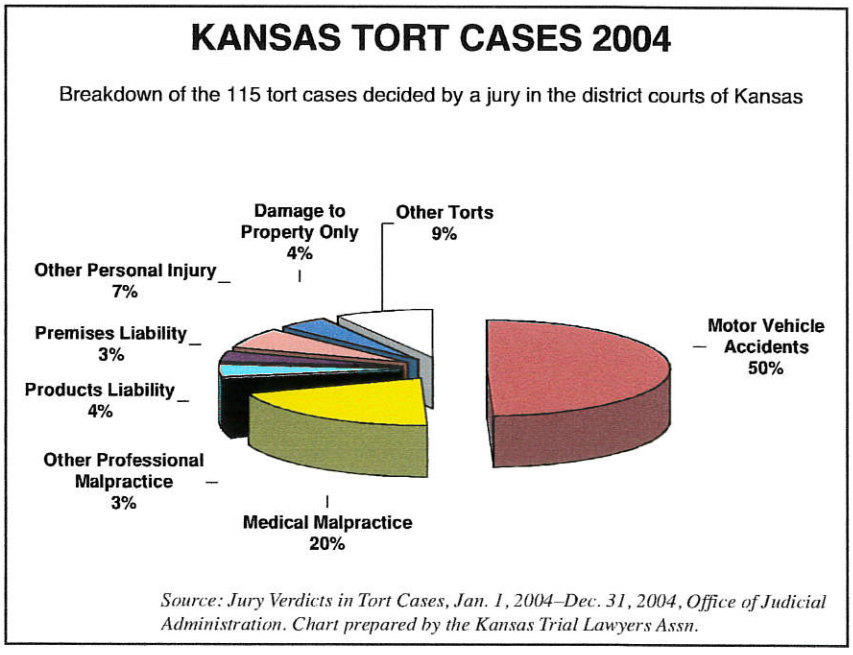
[15] Profs. Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 75 (1993).

There is no "litigation crisis" in Kansas

Only 2% of cases filed in Kansas are torts.



- √ Only 2% of cases filed in FY2004 were torts, or personal injury cases.
- √ 115 tort cases were decided by Kansas juries in 2004, down from 135 cases in 2001.
- √ Half of all tort cases involved auto accidents.
- √ The median award in 2004 was $18,757, down from $23,416 in 2003.
- √ Punitive damages were awarded in only 5 cases in 2004.



Check Your Facts Before You Change the Law

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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He obtained his B.A. in history, political science and English from Kansas Wesleyan in 1973, and his J.D. from the Washburn University School of Law in 1976.

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

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.

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.

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. 870, 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.[29]

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 Reform 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).

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.

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.

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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 §768.78, 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. Satavatham, 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.

9-19

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.

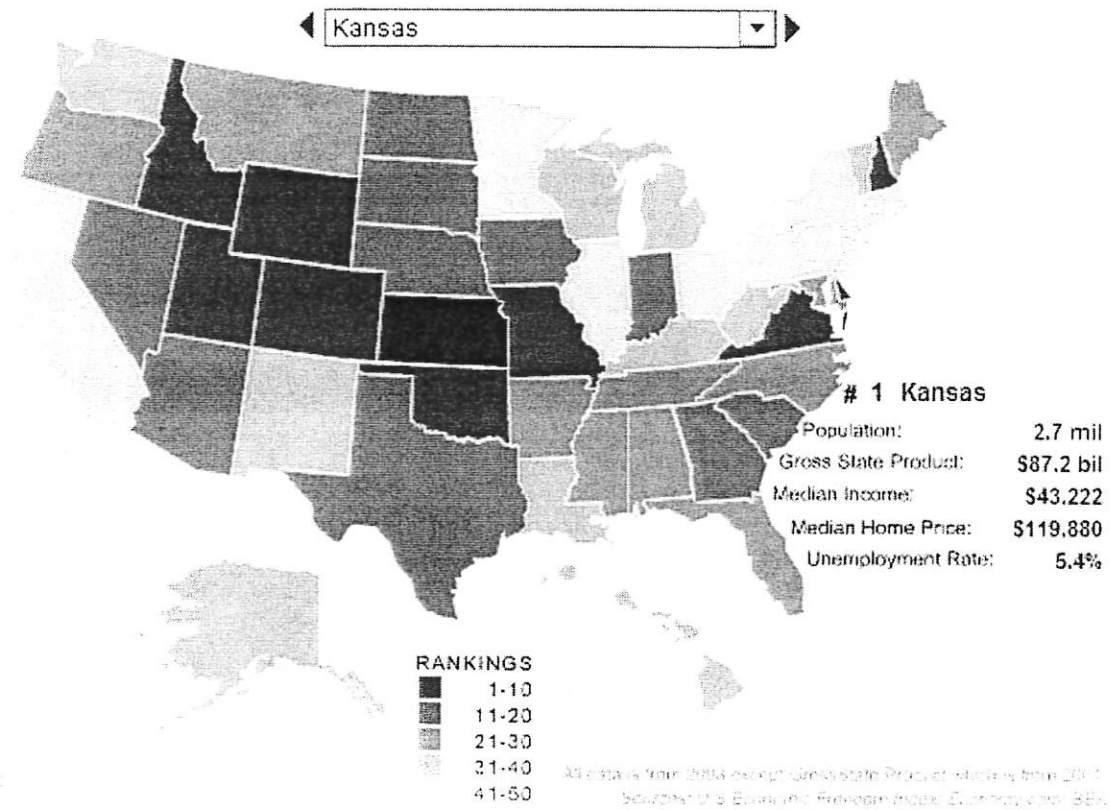
80. K.S.A. 60-236, or Federal Rule 36.

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.

Forbes Magazine
Where The Opportunities Are
Lawrence J. McQuillan, 05.24.04



Where should you locate new businesses and subsidiaries? In states with the fewest regulatory body blocks and fiscal obstacles. To give you a handle on those choices, the Pacific Research Institute for Public Policy in San Francisco has, with the help of economists Ying Huang and Robert E. McCormick of Clemson University, created a U.S. Economic Freedom Index.

In coming up with our ratings we evaluated 143 variables for each state, using the most recent data. This snapshot includes tax rates, state spending, occupational licensing, environmental regulations, income redistribution, right-to-work and prevailing-wage laws, tort laws and the number of government agencies. These we grouped into five sectors--fiscal, regulatory, judicial, size of government and social welfare. For each of the 143 variables we ranked states from 1 (most free) to 50 (least free), calculated an average sector ranking and then weighted them to get an overall score. Welfare, fiscal and regulatory matters counted about equally; government size and judicial ratings counted for less.

Kansas came up number one, thanks largely to its respect for property rights: It engages in less income redistribution and attracts less tort litigation than most states. The Kansas legislature is now considering innovative bills exempting custom software from sales taxes and eliminating the state franchise tax for most businesses--a serenade to entrepreneurial ears.

With the fewest regulatory barriers, Colorado places second. The state also ranks high in the fiscal sector, thanks to its constitutional tax limitation. Virginia, which shows restraint in income redistribution, is third. But it turns out that the South on the whole does not live up to its image as a business-friendly region. The most hospitable states tend to be in the Great Plains and Rockies. In contrast, Rhode Island, Connecticut, California and New York have the most punitive policy environments for economic opportunity.

Lawrence J. McQuillan, Ph.D., is Director of Business and Economic Studies at the Pacific Research Institute for Public Policy.

Testimony of Teresa Gretencord

11428 Reeder Street
Overland Park, KS 66210
913-825-9562

SB 335
February 7, 2006

Chairman Vratil and Judiciary Committee members, thank you for the opportunity today to speak in opposition to SB 335. My name is Teresa Gretencord. I am a registered nurse and work in an Overland Park hospital. I am here to speak to you about how SB 335 will affect real people in real world situations. I am here today with my mother, Mary Setter from Garnett, Kansas, and my daughter Michelle (Gretencord) Sommer from Greeley, Kansas.

I, like many of you, grew up and have spent my entire life in Kansas. I have held fast to the ideal that hard-working Kansans should act in a responsible manner. This ideal was instilled in me from a young age by my father and mother, and I hope that I have successfully instilled that value in my children. I believe that part of acting responsibly is making sure that you carry proper insurance, whether it is health, automobile, disability or life insurance. I also believe that each person should be responsible for their actions. Those who act in an irresponsible manner and injure others should be held to fully account for their deeds and not benefit from the hard work and responsible actions of the injured party.

SB 335 works against the personal responsibility concept, to the detriment of responsible Kansans and in favor of those who have, through their irresponsible actions, injured others. My family has been injured not once, but twice through the negligence of impaired persons.

In November 1999 my daughter, Michelle, then age 19, lived at home while attending nursing school. In addition to attending school, Michelle was employed part-time. Just before Thanksgiving in November 1999 Michelle was run over by drunk driver. Michelle was a pedestrian at the time she was run over. She sustained multiple massive and life-threatening injuries, including a crushed skull. She still has permanent signs of her injuries today, including permanent facial disfigurement. She also must use manufactured tear replacement for the remainder of her life because her tear ducts were damaged in the incident.

Michelle's medical bills totaled in excess of $150,000. Only $4,500 of Michelle's medical bills were paid by the drunk driver's Personal Injury Protection coverage. $8,000 of Michelle's medical bills were paid by the Personal Injury Protection coverage of our automobile insurance. This was insurance my husband and I paid for. Michelle's lost wages were also paid under this policy that my husband and I paid the premium for. The remaining $137,500 was paid by the health insurance policy that my husband and I

purchased through his work. The premiums for the coverage were deducted regularly through his paycheck. Again, this was coverage we paid for, not the drunk driver who struck Michelle. And we, not the drunk driver, had our lifetime medical benefits reduced as a result of the driver's irresponsible decision to drive drunk.

Had SB 335 been law at the time of Michelle's claim, the drunk driver would have been entitled to claim the benefit of over $145,500 for which he did not pay anything, not one cent.

Although Michelle nearly died as the result of a drunk driver, the incident did not kill her spirit. Two months after sustaining life-threatening injuries she was back in nursing school. She completed her degree and is now a registered nurse.

Unfortunately, Michelle's injury was not the only time an impaired person took a toll on our family. My father, Ralph Setter, who was Mary's husband and Michelle's grandfather, died in March 2002 as a result of medical malpractice. During the course of the malpractice case, it became known that the doctor who committed the malpractice on my father was on the Kansas list of impaired physicians.

My parents were married for 45 years. My father was retired from the Wolf Creek Power Plant at the time of his death. He had a life insurance policy through the plant, a policy that he paid for. He also had health insurance through his Wolf Creek retirement, which he paid for in many hours of work in addition to his premium dollars. He was also covered by Medicare.

Under SB 335, the impaired physician who took my father away from his wife and family may have been given the benefit of the life insurance, the health insurance and the Social Security benefits my father worked to pay for. The impaired physician did not pay one cent for any of those items. Why, then, should he be allowed to benefit?

I sincerely hope that no one has to face the challenges that have confronted my family. No one expects to be hurt or injured by another's negligence. But when it happens, you expect the negligent party to be held fully accountable. SB 335 rewards irresponsibility and reduces accountability and is a bad policy for Kansas. I respectfully request that you oppose SB 335 and vote no.

KANSAS BAR ASSOCIATION

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE IN OPPOSITION TO SB 335 FEBRUARY 7, 2006

My name is Zackery E. Reynolds and I am here on behalf of the Kansas Bar Association. I have practiced law for twenty-five years. My practice is somewhat unique in that I represent an equal number of Plaintiffs and Defendants. I have represented both injured parties and insurance companies and have had civil jury trials in twelve different Kansas Counties and Federal Court. I was President of the Kansas Bar Association in 1999 and was also President of the Fort Scott Area Chamber of Commerce in 1990. I represent injured people, businesses and insurance companies. I also mediate personal injury cases as part of my practice.

Generally speaking, the law and public policy should encourage responsible behavior, reward responsible behavior, and discourage irresponsible behavior. The law should also cause the responsibility for a loss to be placed upon the person or entity causing the loss. These are the underpinnings for the Collateral Source Rule, which has been imbedded in our case law for well over one hundred years.

The Collateral Source Rule encourages people to be insured. When a Kansan dips into his or her pocket and pays for health insurance, or goes to work every day so that the insurance can be provided as a benefit to them, the benefit of that insurance is personal to them. They paid for it and they received the benefit. They may pay premiums for years or even a lifetime without receiving anything in return.

Let's say I have an accident caused by a negligent driver and I have health insurance. Let's also say that I incurred medical bills.

The question everyone then asks is, who paid those medical bills?

The answer is: I did. I paid my money into an insurance company so the insurance company could hold my money and pay it out for my medical bills when they were incurred.

Therein lies the fallacy of the so called "double recovery". There in fact is no "double recovery". Those medical bills were paid with my money. Sometimes my money went to pay my fellow insured's medical bills, sometimes my fellow insured's money went to pay my medical bills. But in the end, since the health insurers are in fact making money, you could say that each of those insureds is essentially paying their medical bills, on average.

I have had many cases where responsible Kansans were injured by thoughtless, reckless drivers. In many cases, they incurred significant out-of-pocket medical costs, lost time and income from work, but most importantly either paid for their health insurance for many, many years or were hard working and industrious citizens who had the benefits supplied through their employer. I would hazard a guess that in over 90% of the cases, if the clients did recover the medical expenses that their insurance paid, the recovery never came remotely close to what the client paid in health insurance premiums last three to five years.

Senate Judiciary
2-7-06
Attachment 11

Yet, if the Collateral Source Rule is repealed, my clients would not recover their money that they paid into their health insurance fund so there would be money available to pay these bills. Instead, if the Collateral Source Rule is repealed, lucky Defendants, who were fortunate enough to have injured a responsible Kansan, won't be responsible for his or her medical bills. This is a rather stunning proposition: that the loss no longer falls on the person that caused it. Unlucky Defendants will be those who injure someone who had no health insurance. They, by a matter of mere fate, depending upon who they injured, will be liable for the entire medical bills.

It is hard to logically justify changing the Collateral Source Rule under these circumstances.

From the standpoint of the insurance company, I have tried many cases, settled many cases and mediated many cases. I cannot recall a single instance where an insurance company or Defendant evaluated their exposure or set their reserves based upon whether the claimant had health insurance. It is simply not a factor and I have not seen any credible evidence that repeal of the Collateral Source Rule would save Kansans insurance premiums.

The only benefit that I have seen to repeal of the Collateral Source Rule is the placement of a "check mark" on a report card for the Kansas business climate.

I would encourage the legislature to continue the public policy of this State to reward responsible behavior and discourage irresponsible behavior; and furthermore to let the responsibility for losses fall on the party causing the loss.

I would also discourage the legislature from attempting to reverse decades of good public policy in not allowing subrogation on health insurance policies issued in Kansas, a tradition passed down through insurance commissioners both Democrat and Republican. I can assure you that there is nobody out there that I have seen, who recovered medical bills in a personal injury claim, who made a windfall because they did not have to pay their health insurance company back. They already paid their health insurance company once. The health insurance company used their money to pay the bills in the first place. Returning this money to the person who paid it is certainly not what I would call a "windfall".

There is another factor I think is seldom considered and which I would like to highlight. When a case is being negotiated or mediated, naturally the victim/plaintiff looks to see what the net recovery will be to them. When the victim does not have to pay back the health insurance company the case is much, much easier to settle because more money is available from the settlement to compensate the victim. Also, I think I say without reservation:

> Cases involving victims with health insurance that does not require subrogation and health insurance that is not repaid the benefits settle for less money. This means the automobile insurer pays less to settle the claim. This means automobile premiums are lower.

When I am defending a case, I am quite pleased to have a responsible plaintiff on the other side, because the money paid to settle is usually less. The hard cases to settle are the no insurance cases. Repealing the Collateral Source Rule would totally reverse this benefit, cause fewer cases to settle and cause all of the concomitant expenses in defense costs and costs of the court system.

Respectfully submitted,

Zackery E. Reynolds

ZER/sc

MADD
Activism | Victim Services | Education®

Testimony of Lillian Spencer
Heartland Executive Director
Mothers Against Drunk Driving
Opposing SB 335
Senate Judiciary Committee
February 7, 2006

Thank you Mr. Chairman and members of the committee for holding this important hearing and for the opportunity to submit testimony to you today opposing SB 335 allowing drunk drivers and other wrong-doers to use the injured victim's health insurance benefits to reduce the drunk driver's responsibility to pay. I am Lillian Spencer, Executive Director of Mothers Against Drunk Driving in Kansas and Missouri.

The nation has made significant progress in reducing alcohol-related fatalities in the past twenty years. However, we have a long way to go. In 2004, an alarming 17,694 people were killed in alcohol-related crashes, representing 39 percent of total killed in traffic crashes. More than 20,000 drivers are arrested annually in Kansas for DUI. Approximately 25%-30% of drivers arrested are estimated to be repeat offenders. Kansas lost 148 people to drunk driving in 2004, representing 32 percent of the 461 killed in all traffic crashes. While this is lower than the national average, this means there were 148 Kansas families who had to receive the visit from an officer telling them their loved one will not be returning home. We should not stop until this is zero.

But the suffering of some families goes on well beyond a devastating knock at the door. In 2004 there were 6, 545 person involved in alcohol-related crashes in Kansas. Over 2,000 people were

Senate Judiciary
2-7-06
Attachment 12

injured in these crashes. Families have to deal with the devastating injuries of their loved one who have been hurt in a drunk driving crash. I know this first-hand as a member of a family who continue to deal with the lasting injuries and medical costs of a sister who was injured by a drunk driver.

Based on wages lost, medical expenses, insurance administration costs and property damage, alcohol-related traffic deaths and injuries in 2004 cost the people of Kansas more than $676 million in direct costs. Nearly 30% of first year medical costs end up being paid for by tax dollars (National Highway Safety Transportation Safety Administration). We believe it should be the drunk driver who pays and pay fully.

MADD recognizes that there is a need to promote and sustain the rights of victims of impaired driving crashes and for them to be fully compensated for harm resulting from these crashes. Such compensation includes financial recovery through state administered Victim Compensation Programs and civil tort actions in state or federal court. In support of victims' right to recover, MADD makes the following statements:

- MADD opposes any measures which would modify the collateral source rule so as to provide for a reduction in the 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.
- We do not believe that changing the collateral source rule will result in any unjust enrichment of victims as there are no windfalls or double recoveries when a victim, has through their own means and earnings, paid for insurance. Even after medical insurance costs are paid, medical expenses beyond insurance coverage may continue to accrue. Therefore, victims should not be penalized by having whatever insurance they have admitted as evidence of collateral source benefits in a court of law.
- It is unjust and a miscarriage of justice to allow the victims' benefits to be used against them in any recovery and not admit the impaired driver's evidence of insurance. It adds insult to injury to allow this to happen.

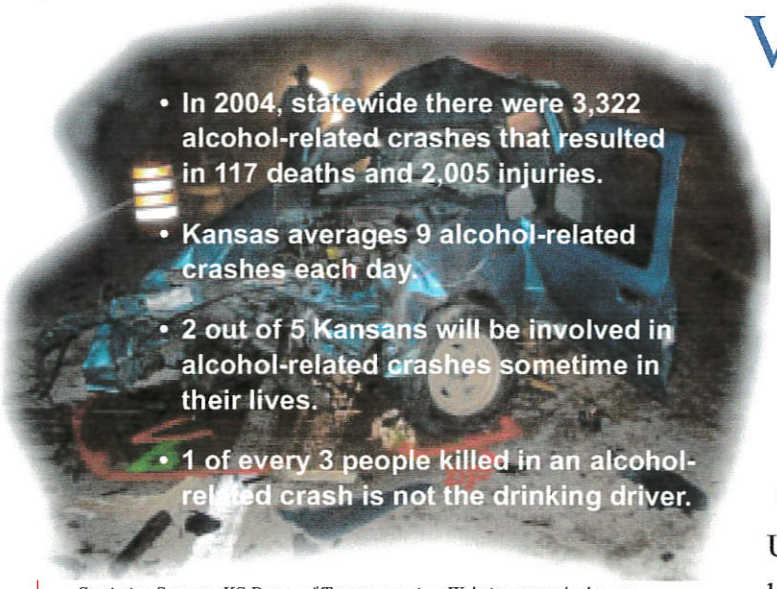
MADD will continue to monitor and evaluate measures that affect the rights of victims of alcohol-related crashes to be fairly and fully compensated for death or injury caused by impaired drivers. MADD opposes SB 335 and ask that you oppose SD 335.

Respectfully Submitted by:

Lillian M. Spencer
Regional Executive Director
MADD Heartland Region (Kansas and Missouri)

THE MISSION OF MOTHERS AGAINST DRUNK DRIVING IS TO STOP DRUNK DRIVING AND TO SUPPORT VICTIMS OF THIS VIOLENT CRIME AND PREVENT UNDERAGE DRINKING

REALITY CHECK



Statistics Source: KS Dept. of Transportation Website, www.ksdot.org

Vote NO on SB 335

the Drunk Driver Discount Bill

SB 335 allows drunk drivers and other wrongdoers to use the injured victim's health insurance benefits to reduce the drunk driver's responsibility to pay. In effect, SB 335 gives drunk drivers a discount instead of making them pick up the whole tab for the injuries they cause. Under SB 335, it's *not* the drunk driver but his victim who pays.

What is SB 335?

SB 335 is a proposal to change Kansas' collateral source rule, the rule of evidence that prohibits telling the jury about medical insurance or other benefits an injured person has or will receive. Under SB 335, the jury could be told about the injured person's "collateral source benefits"—their medical insurance coverage and other benefits—*but a drunk driver's insurance coverage would remain secret.* If SB 335 passes, the jury would get one-sided information, and drunk and dangerous drivers could walk away with a "discount" and not pay the total costs of the injuries they cause. The Kansas Chamber supports the Drunk Driver Discount bill.

What is the effect of SB 335?

SB 335 benefits drunk and dangerous drivers and other types of wrongdoers. SB 335 allows drunk drivers and other wrongdoers to use the injured victim's own health insurance benefits to reduce the drunk driver's responsibility to pay. This reduced compensation means that the victim's lifetime medical benefit is permanently decreased without adequate reimbursement. Essentially, under SB 335 the insurance planning the victim did to protect herself and her family will be used to protect the irresponsible and dangerous drunk driver who harmed her. Drunk drivers make out quite well under SB 335.

"Double Recovery" Double-Speak & Other Deceptions

- There are no "windfalls" or "double recoveries" when injured Kansans receive the insurance coverage they've paid for out of their own pocket or by the sweat of their brow. Often, a plaintiff who receives a judgment must first repay any medical costs paid by insurance plans with subrogation clauses, e.g., PIP, Medicare/Medicaid, workers compensation or ERISA plans. Even after repayment, their lifetime medical benefits remain reduced.
- SB 335 won't result in lower health insurance premiums—even the Kansas Chamber has admitted there will be no premium impact if SB 335 passes.
- SB 335 will not decrease litigation but will likely increase the cost and length of lawsuits.

THE FOLLOWING GROUPS OPPOSE CHANGING THE COLLATERAL SOURCE RULE:

AARP Kansas • DUI Victim Center of Kansas • Kansas Coalition Against Sexual & Domestic Violence • Mothers Against Drunk Driving (MADD), Kansas • Kansas Bar Assn. • Kansas Trial Lawyers Assn. • Kansas AFL-CIO • Kansas Advocates for Better Care

Vote NO on SB 335

12-4

AARP Kansas

February 7, 2006
Senator John Vratil, Chair
Senate Judiciary Committee

Good morning Chairman Vratil and Members of the Senate Judiciary Committee. My name is George Lippencott and I am a volunteer with AARP Kansas Topeka. AARP Kansas represents the views of our more than 350,000 members in the state of Kansas. Thank you for this opportunity to express our organization's opposition to SB 335(collateral source rule).

We oppose SB 335 because it erodes the collateral source rule and allows an injured party's award of damages to be reduced by any benefits that they have received from their insurer or others. The collateral source rule is intended to compensate victims and serve as a deterrent for negligent behavior.

Defendants should not benefit by virtue of the prudent plaintiff/victim who had the foresight to get insurance. Diminishing an award because of that prudence sends the wrong public policy message.

A drunk driver that hits a Kansan should not be able to benefit from the victim's insurance.

We respectfully request that you oppose SB 335.

Thank you.

Senate Judiciary
2-7-06
Attachment 13

555 S. Kansas Avenue, Suite 201 | Topeka, KS 66603 | toll-free 866-448-3619 | 785-232-8259 fax | toll-free 87
Marie F. Smith, President | William D. Novelli, Chief Executive Officer | www.aarp.org/ks

KANSAS MEDICAL SOCIETY
KMS

623 SW 10th Avenue
Topeka KS 66612-1627
785.235.2383
800.332.0156
fax 785.235.5114

www.KMSonline.org

To: Senate Judiciary Committee

From: Jerry Slaughter
Executive Director

Subject: SB 335; Concerning collateral source benefits

Date: February 7, 2006

The Kansas Medical Society appreciates the opportunity to appear in support of SB 335, which would allow evidence of collateral sources of payment in personal injury lawsuits. We do have some concerns, however, with portions of the bill.

Our concerns have to do with new sections 4 and 5 of the bill. These sections have the effect of substantially limiting the application of the change. Under the bill, only claims occurring after the effective date of the act – July 1, 2006 – would be affected, and then only for three years due to the sunset provision in new section 5. Due to this extremely narrow window of time, it would be virtually impossible for insurers to give any weight to the application of the bill's provisions, thereby compromising its effectiveness. Consequently, we urge you to delete new section 5 of the bill.

Except for this "sunset" provision, this bill is generally modeled after legislation we have previously introduced, and the legislature has passed, on three 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 amendments in section 1 of the bill should address the concerns of the Court, as articulated in the most recent opinion on the issue, *Thompson v. KFB Insurance Company*, 252 Kan.1010 (1993).

We believe this legislation is an integral part of the tort reform measures approved by the legislature in the past, and it would today provide added stability to our liability system without keeping individuals from receiving their true economic losses. If enacted, and subsequently upheld by the courts, this legislation would help lower insurance costs by preventing double recovery, and assuring that plaintiffs recover only those damages which they in fact incur. We urge you to report SB 335 favorably, with the amendment suggested above. Thank you.

Senate Judiciary
2-7-06
Attachment 14

Thomas L. Bell
President

To: **Senate Judiciary Committee**

From: **Chad Austin**
Vice President, Government Relations

Subject: **Senate Bill 335**

Date: **February 7, 2006**

The Kansas Hospital Association is grateful for the opportunity to provide testimony in support of Senate Bill 335. The proposed legislation would require that evidence of collateral sources of payment be admissible in personal injury cases. We would, however, like to suggest one amendment to Senate Bill 335. This amendment would be to eliminate the sunset clause in new section 5 and make the statute permanent.

The collateral source rule originated in the English common law system and has been used in this country for many years. Under the collateral source rule, a jury cannot be told about the payment of expenses by a third party to the plaintiff. The third party is not involved in the litigation but may well have paid to the plaintiff part or all of his/her expenses. In other words, the jury is not told that the plaintiff has already been compensated and as a result will award damages as though no prior compensation had taken place. For example, in a medical malpractice lawsuit, a defendant health care provider would not be able to introduce evidence that the plaintiff's medical expenses were paid by health insurance. As a result, the plaintiff may be compensated twice – once by insurance and once by the jury's award.

Three times, the Kansas Legislature has passed legislation to prevent double recovery. These proposals permitted collateral source evidence to be introduced, thereby allowing the jury to consider all the evidence in the case. In each of those instances where legislation was passed, the Kansas court system found the statutes unconstitutional.

If Senate Bill 335 is passed, the jury would be advised that the plaintiff has already been paid for medical costs, lost wages and other damages and those payments would probably not be duplicated by the jury in its verdict. This would result in lower awards, especially in medical cases. As such, a change in the law may help restrain health care costs.

The Kansas Hospital Association and its members urge you to pass an amended version of Senate Bill 335 that eliminates the July 1, 2009 sunset clause. Thank you for your consideration of our comments.

Kansas Hospital Association
215 SE 8th Ave. • P.O. Box 2308 • Topeka, KS • 66601 • 785/233-7436 • Fax: 785/233-6955 • www.kh

DUI VICTIM CENTER of KANSAS

355 N. Waco, Suite 220
Wichita, KS 67202
(316) 262-1673
(316) 262-3548 (Fax)
1-800-873-6957 Helpline
staff@duivictimcenter.com
www.duivictimcenter.com

February 6, 2006

Senator John Vratil, Chairman
Senate Judiciary Committee
300 SW 10th. Ave., Room 281-E
Topeka, KS 66612

RE: Senate Bill 335

Dear Chairman Vratil and Members of the Committee,

The DUI Victim Center of Kansas, Inc. *is a grassroots organization based in Wichita and has served victims of drunk and impaired drivers in Kansas since 1987. Our staff provides victim services throughout the state to more than 500 victims and their families annually. The statewide programs for prevention and education reach more than 3000 youth and DUI offenders every year.*

POSITION:
The DUI Victim Center of Kansas, Inc. *stands firm for the rights of victims of DUI and impaired driving crashes inclusive of the right to be compensated for personal injury and fatality expenses and needs due to the irresponsible actions of DUI/impaired drivers.*

According to Senate Bill 335, victims would be revictimized by the very system that should protect and assist them in their recovery needs. Any loss due to collateral source diminishes all that the victim would recover for harm as the victim of this crime. Seniors and others who receive Social Security income would be left without the regular income that they have planned on from decades of working. Worse, it would reduce the drunk drivers' obligation to pay. Insurance payments would be received as punishment rather than compensation. This would reduce the lifetime medical benefits of the victim whose health has already been damaged from the actions of the drunk driver and now steals the health benefits.

Senate Bill 335 has nothing in it for the victim. It is a bill supporting the irresponsible and criminal actions of the drunk/impaired driver. This bill is bad for our state and all who live here regardless of their careers, age, health, or family situation. It removes the responsibility of the criminal offender to be held accountable for actions that have resulted in personal injury or fatality. The ***DUI Victim Center of Kansas, Inc.*** *is very much aware of legislation to modify tort and liability laws at the state and federal level. Senate Bill 335 does not solve the problem but rather opens many other problems for the citizens of Kansas. This bill takes away what victims and their families have earned and paid for throughout their life and reduces the consequence of the offender.*

The ***DUI Victim Center of Kansas, Inc.*** *adamantly opposes this bill and any measure that would modify "collateral source rule" as to reduce the amount of damages in any way awarded to the victim of a drunk/impaired driver in our state. We ask that you oppose SB335.*

Respectfully Submitted,
DUI Victim Center of Kansas, Inc.

Mary Ann Khoury

Mary Ann Khoury, President/CEO

"Where Caring Brings Remembrance and Hope"

Senate Judiciary
2-7-06
Attachment 16

Kansas AFL-CIO

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

UNION YES

WRITTEN OPPOSITION ON SB 335
To the Senate Judiciary Committee

By the Kansas AFL-CIO
February 7, 2006

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 substance, 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 law 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 compromised 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 civil rights of Kansas workers and other consumers must not be compromised. The proposed change in law would benefit all the wrong people and 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 or amend the collateral source rule.

KANSAS AFL-CIO SOLIDARITY

Senate Judiciary
2-7-06
Attachment 17

Session of 2006

SENATE BILL No. 408

By Committee on Judiciary

1-19

AN ACT concerning crimes and punishment; relating to cruelty to animals and harming or killing certain dogs; amending K.S.A. 21-4317 and K.S.A. 2005 Supp. 21-4310, 21-4318 and 21-4704 and repealing the existing sections.

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

Section 1. K.S.A. 2005 Supp. 21-4310 is hereby amended to read as follows: 21-4310. (a) Cruelty to animals is:

(1) Intentionally [*or recklessly*] killing~~, injuring, maiming, torturing or mutilating~~ *or causing serious physical injury to* any animal;

(2) abandoning or leaving any animal in any place without making provisions for its proper care;

(3) having physical custody of any animal and failing to provide such food, potable water, protection from the elements, opportunity for exercise and other care as is needed for the health or well-being of such kind of animal; ~~or~~

(4) intentionally using a wire, pole, stick, rope or any other object to cause an equine to lose its balance or fall, for the purpose of sport or entertainment~~.~~; *or*

(5) causing any physical injury other than the acts described in subsection (a)(1).

(b) The provisions of this section shall not apply to:

(1) Normal or accepted veterinary practices;

(2) bona fide experiments carried on by commonly recognized research facilities;

(3) killing, attempting to kill, trapping, catching or taking of any animal in accordance with the provisions of chapter 32 or chapter 47 of the Kansas Statutes Annotated;

(4) rodeo practices accepted by the rodeo cowboys' association;

(5) the humane killing of an animal which is diseased or disabled beyond recovery for any useful purpose, or the humane killing of animals for population control, by the owner thereof or the agent of such owner residing outside of a city or the owner thereof within a city if no animal shelter, pound or licensed veterinarian is within the city, or by a licensed veterinarian at the request of the owner thereof, or by any officer or agent

Amendments adopted by Senate Judiciary Comm
February 6, 2006

of an incorporated humane society, the operator of an animal shelter or pound, a local or state health officer or a licensed veterinarian three business days following the receipt of any such animal at such society, shelter or pound;

(6) with respect to farm animals, normal or accepted practices of animal husbandry;

(7) the killing of any animal by any person at any time which may be found outside of the owned or rented property of the owner or custodian of such animal and which is found injuring or posing a threat to any person, farm animal or property;

(8) an animal control officer trained by a licensed veterinarian in the use of a tranquilizer gun, using such gun with the appropriate dosage for the size of the animal, when such animal is vicious or could not be captured after reasonable attempts using other methods; or

(9) laying an equine down for medical or identification purposes.

(c) As used in this section:

(1) "Equine" means a horse, pony, mule, jenny, donkey or hinny.

(2) "Serious physical injury" means an act to any animal which results in protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a limb or bodily organ, or in excessive or repeated infliction of unnecessary pain or suffering, or causing the same to be done.

(d) *Cruelty to animals as described in subsection (a)(1) is a nonperson felony. Upon conviction of this subsection, a person shall be sentenced to not less than 30 days or more than one year's imprisonment, be fined not less than $1,500, and* ~~*undergo psychological counseling or complete an anger management treatment program.*~~ have a psychological evaluation prepared Cruelty to animals *as described in subsection (a)(2), (a)(3), (a)(4) and (a)(5)* is a class A nonperson misdemeanor.

Sec. 2. K.S.A. 21-4317 is hereby amended to read as follows: 21-4317. (a) Illegal ownership or keeping of ~~a dog~~ *an animal* is owning or keeping on one's premises ~~a dog~~ *an animal* by a person convicted of unlawful conduct of dog fighting under K.S.A. 21-4315, and amendments thereto, *or cruelty to animals as defined in subsection (a)(1) of K.S.A. 21-4310, and amendments thereto,* within five years of the date of such conviction.

(b) Illegal ownership or keeping of ~~a dog~~ *an animal* is a class B nonperson misdemeanor.

Sec. 3. K.S.A. 2005 Supp. 21-4318 is hereby amended to read as follows: 21-4318. (a) Inflicting harm, disability or death to a police dog, arson dog, assistance dog, game warden dog or search and rescue dog is knowingly and intentionally, and without lawful cause or justification poisoning, inflicting great bodily harm, permanent disability or death, upon

18-2

18-3

a police dog, arson dog, assistance dog, game warden dog or search and rescue dog.

(b) As used in this section:

(1) "Arson dog" means any dog which is owned, or the service of which is employed, by the state fire marshal or a fire department for the principal purpose of aiding in the detection of liquid accelerants in the investigation of fires.

(2) "Assistance dog" has the meaning provided by K.S.A. 2005 Supp. 39-1113, and amendments thereto.

(3) "Fire department" means a public fire department under the control of the governing body of a city, township, county, fire district or benefit district or a private fire department operated by a nonprofit corporation providing fire protection services for a city, township, county, fire district or benefit district under contract with the governing body of the city, township, county or district.

(4) "Game warden dog" means any dog which is owned, or the service of which is employed, by the department of wildlife and parks for the purpose of aiding in detection of criminal activity, enforcement of laws, apprehension of offenders or location of persons or wildlife.

(5) "Police dog" means any dog which is owned, or the service of which is employed, by a law enforcement agency for the principal purpose of aiding in the detection of criminal activity, enforcement of laws or apprehension of offenders.

(6) "Search and rescue dog" means any dog which is owned or the service of which is employed, by a law enforcement or emergency response agency for the purpose of aiding in the location of persons missing in disasters or other times of need.

(c) Inflicting harm, disability or death to a police dog, arson dog, assistance dog, game warden dog or search and rescue dog is a ~~class A nonperson misdemeanor.~~ *nonperson felony. Upon conviction of this subsection, a person shall be sentenced to not less than 30 days or more than one year's imprisonment, be fined not less than $1,500, and* ~~undergo psychological counseling or complete an anger management treatment program~~ have a psychological evaluation prepared

(d) This section shall be part of and supplemental to the Kansas criminal code.

Sec. 4. K.S.A. 2005 Supp. 21-4704 is hereby amended to read as follows: 21-4704. (a) For purposes of sentencing, the following sentencing guidelines grid for nondrug crimes shall be applied in felony cases for crimes committed on or after July 1, 1993:

SENTENCING RANGE - NONDRUG OFFENSES

Category →	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanors	1 Misdemeanor No Record
I	653 620 592	618 586 554	285 272 258	267 253 240	246 234 221	226 214 203	203 195 184	186 176 166	165 155 147
II	493 467 442	460 438 416	216 205 194	200 190 181	184 174 165	168 160 152	154 146 138	138 131 123	123 117 109
III	247 233 221	228 216 206	107 102 96	100 94 89	92 88 82	83 79 74	77 72 68	71 66 61	61 59 55
IV	172 162 154	162 154 144	75 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 38
V	136 130 122	128 120 114	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	38 36 34	34 32 31
VI	46 43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25	26 24 22	24 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	28 24 22	24 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

LEGEND

Presumptive Probation

Border Box

Presumptive Imprisonment

(b) The provisions of this section shall be applicable to the sentencing guidelines grid for nondrug crimes. Sentences expressed in such grid represent months of imprisonment.

(c) The sentencing guidelines grid is a two-dimensional crime severity and criminal history classification tool. The grid's vertical axis is the crime severity scale which classifies current crimes of conviction. The grid's horizontal axis is the criminal history scale which classifies criminal histories.

(d) The sentencing guidelines grid for nondrug crimes as provided in this section defines presumptive punishments for felony convictions, subject to judicial discretion to deviate for substantial and compelling reasons and impose a different sentence in recognition of aggravating and mitigating factors as provided in this act. The appropriate punishment for a felony conviction should depend on the severity of the crime of conviction when compared to all other crimes and the offender's criminal history.

(e) (1) The sentencing court has discretion to sentence at any place within the sentencing range. The sentencing judge shall select the center of the range in the usual case and reserve the upper and lower limits for aggravating and mitigating factors insufficient to warrant a departure.

(2) In presumptive imprisonment cases, the sentencing court shall pronounce the complete sentence which shall include the prison sentence, the maximum potential reduction to such sentence as a result of good time and the period of postrelease supervision at the sentencing hearing. Failure to pronounce the period of postrelease supervision shall not negate the existence of such period of postrelease supervision.

(3) In presumptive nonprison cases, the sentencing court shall pronounce the prison sentence as well as the duration of the nonprison sanction at the sentencing hearing.

(f) Each grid block states the presumptive sentencing range for an offender whose crime of conviction and criminal history place such offender in that grid block. If an offense is classified in a grid block below the dispositional line, the presumptive disposition shall be nonimprisonment. If an offense is classified in a grid block above the dispositional line, the presumptive disposition shall be imprisonment. If an offense is classified in grid blocks 5-H, 5-I or 6-G, the court may impose an optional nonprison sentence upon making the following findings on the record:

(1) An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and

(2) the recommended treatment program is available and the offender can be admitted to such program within a reasonable period of time; or

(3) the nonprison sanction will serve community safety interests by

18-5

promoting offender reformation.

Any decision made by the court regarding the imposition of an optional nonprison sentence if the offense is classified in grid blocks 5-H, 5-I or 6-G shall not be considered a departure and shall not be subject to appeal.

(g) The sentence for the violation of K.S.A. 21-3411, and amendments thereto, aggravated assault against a law enforcement officer or K.S.A. 21-3415, and amendments thereto, aggravated battery against a law enforcement officer and amendments thereto which places the defendant's sentence in grid block 6-H or 6-I shall be presumed imprisonment. The court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the court regarding the imposition of the optional nonprison sentence, if the offense is classified in grid block 6-H or 6-I, shall not be considered departure and shall not be subject to appeal.

(h) When a firearm is used to commit any person felony, the offender's sentence shall be presumed imprisonment. The court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the court regarding the imposition of the optional nonprison sentence shall not be considered a departure and shall not be subject to appeal.

(i) The sentence for the violation of the felony provision of K.S.A. 8-1567 ~~and~~, subsection (b)(3) of K.S.A. 21-3412a, ~~and~~ subsections (b)(3) and (b)(4) of K.S.A. 21-3710, *subsection (a)(1) of K.S.A. 21-4310 and K.S.A. 21-4318*, and amendments thereto, shall be as provided by the specific mandatory sentencing requirements of that section and shall not be subject to the provisions of this section or K.S.A. 21-4707 and amendments thereto. If because of the offender's criminal history classification the offender is subject to presumptive imprisonment or if the judge departs from a presumptive probation sentence and the offender is subject to imprisonment, the provisions of this section and K.S.A. 21-4707, and amendments thereto, shall apply and the offender shall not be subject to the mandatory sentence as provided in K.S.A. 21-3710, and amendments thereto. Notwithstanding the provisions of any other section, the term of imprisonment imposed for the violation of the felony provision of K.S.A. 8-1567, subsection (b)(3) of K.S.A. 21-3412a ~~and~~, subsections (b)(3) and (b)(4) of K.S.A. 21-3710, *subsection (a)(1) of K.S.A. 21-4310 and K.S.A. 21-4318*, and amendments thereto, shall not be served in a state facility in the custody of the secretary of corrections.

(j) (1) The sentence for any persistent sex offender whose current convicted crime carries a presumptive term of imprisonment shall be double the maximum duration of the presumptive imprisonment term.

18-6

The sentence for any persistent sex offender whose current conviction carries a presumptive nonprison term shall be presumed imprisonment and shall be double the maximum duration of the presumptive imprisonment term.

(2) Except as otherwise provided in this subsection, as used in this subsection, "persistent sex offender" means a person who: (A) (i) Has been convicted in this state of a sexually violent crime, as defined in K.S.A. 22-3717 and amendments thereto; and (ii) at the time of the conviction under paragraph (A) (i) has at least one conviction for a sexually violent crime, as defined in K.S.A. 22-3717 and amendments thereto in this state or comparable felony under the laws of another state, the federal government or a foreign government; or (B) (i) has been convicted of rape, K.S.A. 21-3502, and amendments thereto; and (ii) at the time of the conviction under paragraph (B) (i) has at least one conviction for rape in this state or comparable felony under the laws of another state, the federal government or a foreign government.

(3) Except as provided in paragraph (2) (B), the provisions of this subsection shall not apply to any person whose current convicted crime is a severity level 1 or 2 felony.

(k) If it is shown at sentencing that the offender committed any felony violation for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members, the offender's sentence shall be presumed imprisonment. Any decision made by the court regarding the imposition of the optional nonprison sentence shall not be considered a departure and shall not be subject to appeal. As used in this subsection, "criminal street gang" means any organization, association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more person felonies or felony violations of the uniform controlled substances act, K.S.A. 65-4101 *et seq.*, and amendments thereto, which has a common name or common identifying sign or symbol, whose members, individually or collectively engage in or have engaged in the commission, attempted commission, conspiracy to commit or solicitation of two or more person felonies or felony violations of the uniform controlled substances act, K.S.A. 65-4101 *et seq.*, and amendments thereto, or any substantially similar offense from another jurisdiction.

(l) The sentence for a violation of subsection (a) of K.S.A. 21-3715 and amendments thereto when such person being sentenced has a prior conviction for a violation of subsection (a) or (b) of K.S.A. 21-3715 or 21-3716 and amendments thereto shall be presumed imprisonment.

Sec. 5. K.S.A. 21-4317 and K.S.A. 2005 Supp. 21-4310, 21-4318 and 21-4704 are hereby repealed.

18-7

Sec. 6. This act shall take effect and be in force from and after its publication in the statute book.

18-8

Session of 2006

SENATE BILL No. 408

By Committee on Judiciary

1-19

AN ACT concerning crimes and punishment; relating to cruelty to animals and harming or killing certain dogs; amending K.S.A. 21-4317 and K.S.A. 2005 Supp. 21-4310, 21-4318 and 21-4704 and repealing the existing sections.

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(1) Intentionally ~~or recklessly~~ killing~~, injuring, maiming, torturing or mutilating~~ *or causing serious physical injury to* any animal;

(2) abandoning or leaving any animal in any place without making provisions for its proper care;

(3) having physical custody of any animal and failing to provide such food, potable water, protection from the elements, opportunity for exercise and other care as is needed for the health or well-being of such kind of animal; ~~or~~

(4) intentionally using a wire, pole, stick, rope or any other object to cause an equine to lose its balance or fall, for the purpose of sport or entertainment~~.~~; *or*

(5) causing any physical injury other than the acts described in subsection (a)(1).

(b) The provisions of this section shall not apply to:

(1) Normal or accepted veterinary practices;

(2) bona fide experiments carried on by commonly recognized research facilities;

(3) killing, attempting to kill, trapping, catching or taking of any animal in accordance with the provisions of chapter 32 or chapter 47 of the Kansas Statutes Annotated;

(4) rodeo practices accepted by the rodeo cowboys' association;

(5) the humane killing of an animal which is diseased or disabled beyond recovery for any useful purpose, or the humane killing of animals for population control, by the owner thereof or the agent of such owner residing outside of a city or the owner thereof within a city if no animal shelter, pound or licensed veterinarian is within the city, or by a licensed veterinarian at the request of the owner thereof, or by any officer or agent

Proposed amendment, Senator D. Schmidt
February 7, 2006

New Section 1. Whenever an offender is convicted of cruelty to animals as described in subsection (a)(1) of K.S.A. 21-4310, and amendments thereto, and sentenced to imprisonment in the county jail, the department of corrections shall reimburse the county for the cost of maintenance of such offender. The reimbursement shall be paid from funds made available by the legislature for that purpose. Such cost of maintenance shall not exceed the per capita daily operating cost, not including inmate programs, for the department of corrections.

Renumber remaining sections accordingly.