Approved: 3-30-07
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on February 13, 2007 in Room 313-S of the Capitol.

All members were present.

Committee staff present:
Jerry Ann Donaldson, Kansas Legislative Research
Athena Andaya, Kansas Legislative Research
Jill Wolters, Office of Revisor of Statutes
Duston Slinkard, Office of Revisor of Statutes
Cindy O'Neal, Committee Assistant

Conferees appearing before the committee:
Nancy Strouse, Kansas Judicial Council
Anne Kindling, Kansas Association of Defense Counsel
Bill McKean, Individual
Bill Skepnek, Kansas Trial Lawyers Association
William Larson, State Farm Insurance Company
Tim Finnerty, Kansas Association of Defense Counsel
Senator Phil Journey
Jacob Graybill, Graybill & Hazlewood
Janice Meliza, Citizen
Jackson Hulsey, Citizen

The hearing on **HB 2363 - civil procedure; repealing statutes dealing with terms of court**, was opened.

Nancy Strouse, Kansas Judicial Council, explained that the proposed bill would delete references to "terms of the court" at the district level, because that term is no longer used and has been deleted from the Supreme Court Rules Relating to District Courts. The bill would also change the motion for summary judgement being served at least 10 days prior to a hearing to 21 days. (Attachment 1)

The hearing on **HB 2363** was closed.

The hearing on **HB 2188** - professional screening panels, was opened.

Chairman O'Neal provided the committee with a bill brief explaining each section of the proposed bill. (Attachment 2)

Anne Kindling, Kansas Association of Defense Counsel, appeared before the committee in support of the proposed bill. She commented that the changes proposed are consistent with the original intent of the process to provide an expedited and cost-effective opportunity to resolve professional and medical malpractice claims. The changes would also bring the operation of the screening panel process closer to how such cases actually progress. (Attachment 3)

Bill Skepnek, Kansas Trial Lawyers Association, agreed that there are problems with the screening panel process and that it needs to be fixed. (Attachment 4)

Bill McKean, Individual, provided an incident where a case took two years before it actually made it to the Board of Healing Arts because the screening panel took such a long time. He agreeded that the process needs to be streamlined.

The hearing on **HB 2188** was closed.

The hearing on **HB 2189** - attorney fees; civil actions concerning loss by fire, tornado, lighting, or hail

William Larson, State Farm Insurance Company, explained to the committee that K.S.A. 40-908 provides for mandatory assessment of attorney fees when actions are brought on insurance polices where the actual

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

loss occurred by fire, tornado, lightning or hail. K.S.A. 40-256 allows for attorney fees to be awarded if the insurer acted improperly, i.e., if the company has refused without just cause or excuse to pay the full amount of the loss.

The proposed bill would clarify that the mandatory assessment of attorney fees would apply only to actions brought under insurance policies where there was an actual loss that occurred by fire, tornado, lighting or hail. Without clarification, the insurance industry could unfairly be placed into a "loser pays" attorney fees situation in contravention of the well-established rule that generally each litigant bears its own attorney fees. (Attachment 5)

Tim Finnerty, Kansas Association of Defense Counsel, provided a history of K.S.A. 40-908 & 40-256. (Attachment 6)

Written testimony in support of the bill was provided by American Insurance Association, American Family Insurance Group, and State Farm Insurance (Attachments 7-9)

Senator Phil Journey, appeared as an opponent of the bill and suggested that the committee consider adopting **SB 377** from the 2006 Legislative Session. **SB 377** would enhance consumer protection and the consumer's position in dealing with insurance companies. (Attachment 10)

Jacob Graybill, Graybill & Hazlewood, commented that the reason he files insurance claim cases under 40-908 is because it's hard to get the court to order attorney fees under 40-256. One has to prove that the insurance company, without just cause, failed to pay the costs. (Attachment 11)

Janice Meliza and Jackson Hulsey, Citizens, informed the committee of their cases where they could not afford to hire an attorney to take their cases. Each talked to Mr. Graybill and he filed suit under 40-908 because he could recoup attorney fees and then they would not have to pay him directly. (Attachments 12 & 13)

Written testimony, in opposition to the bill, was provided by Kansas Trial Lawyers Association. (Attachment 14)

The hearing on **HB 2189** was closed.

The committee meeting adjourned at 5:45 p.m. The next committee meeting is scheduled for February 13, 2007.

The committee minutes from January 23, 24, 29, 30, & 31 were distributed by e-mail on February 12, 2007 with the notice that the minutes will stand approved if no changes are requested by February 19, 2007.

KANSAS JUDICIAL COUNCIL

JUSTICE ROBERT E. DAVIS, CHAIR, LEAVENWORTH
JUDGE JERRY G. ELLIOTT, WICHITA
JUDGE ROBERT J. FLEMING, PARSONS
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BRANDY M. WHEELER
ADMINISTRATIVE ASSISTANT

MEMORANDUM

TO: **House Judiciary Committee**

FROM: **Kansas Judicial Council**

DATE: **February 13, 2007**

RE: **2007 HB 2363**

In November, 2005, the Supreme Court requested that the Judicial Council review the Supreme Court Rules Relating to District Courts, Rules 101 through 186. The Judicial Council approved the request and formed the Judicial Council District Court Rules Advisory Committee, chaired by Hon. Robert J. Fleming. The Committee's recommendations were approved by the Judicial Council on June 2, 2006, and by the Supreme Court on August 30, 2006. The changes in the Rules became effective by Order of the Supreme Court on September 8, 2006.

Along with proposed amendments to the Supreme Court Rules, the District Court Rules Advisory Committee also submitted to the Judicial Council corresponding statutory amendments resulting from review of the Rules. HB 2363 contains the proposed statutory changes, which were approved by the Judicial Council in June, 2006.

1. The Judicial Council recommends the amendments contained in Sections 1 through 14, as well as the repeal of K.S.A. 20-325, 20-1036 and 20-3111, to delete references to "terms of court" at the district court level, a concept that is no longer used and that was deleted from the Supreme Court Rules Relating to District Courts in September, 2006. The Judicial Council consulted and received input and approval from the Office of Judicial Administration regarding these changes to ensure that they are consistent with current practice.

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2. The amendment contained in Section 15 relates to motions for summary judgment. K.S.A. 60-256(c) currently provides that a motion for summary judgment must be served at least 10 days prior to the hearing. Supreme Court Rule 141 allows the opposing party 21 days to respond to a motion for summary judgment (a copy of the Rule is attached). The 21-day response time in Rule 141 does not technically conflict with the statute's language of "at least 10 days," but it is confusing for the two governing provisions to seemingly provide differing time frames. The Council recommends that "10 days" in K.S.A. 60-256(c) be changed to "21 days" to eliminate the potential for confusion between the two provisions.

KANSAS JUDICIAL COUNCIL
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Rule 141
SUMMARY JUDGMENTS

No motion for summary judgment shall be heard or deemed finally submitted for decision until:

(a) The moving party has filed with the court and served on opposing counsel a memorandum or brief setting forth concisely in separately numbered paragraphs the uncontroverted contentions of fact relied upon by said movant (with precise references to pages, lines and/or paragraphs of transcripts, depositions, interrogatories, admissions, affidavits, exhibits, or other supporting documents contained in the court file and otherwise included in the record); and

(b) Any party opposing said motion has filed and served on the moving party within twenty-one (21) days thereafter, unless the time is extended by court order, a memorandum or brief setting forth in separately numbered paragraphs (corresponding to the numbered paragraphs of movant's memorandum or brief) a statement whether each factual contention of movant is controverted, and if controverted, a concise summary of conflicting testimony or evidence, and any additional genuine issues of material fact which preclude summary judgment (with precise references as required in paragraph [a], *supra*).

The motion may be deemed submitted by order of the court upon expiration of twenty-one (21) days, or expiration of the court ordered extended period, after filing and service on opposing counsel of the brief or memorandum of moving party notwithstanding the failure of the opposing party to comply with paragraph (b), supra. In such cases the opposing party shall be deemed to have admitted the uncontroverted contentions of fact set forth in the memorandum or brief of moving party. In determining a motion for summary judgment the judge shall state the controlling facts and the legal principles controlling the decision in accordance with Rule 165.

[History: Am. effective September 23, 1980.]

STATE OF KANSAS
HOUSE OF REPRESENTATIVES

MICHAEL R. (MIKE) O'NEAL

104TH DISTRICT
HUTCHINSON/NORTHEAST RENO COUNTY

LEGISLATIVE HOTLINE
1-800-432-3924

CHAIRMAN:
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KANSAS JUDICIAL COUNCIL
KANSAS COMMISSION ON JUDICIAL PERFORMANCE

H.B. 2188 Bill Brief
Rep. Mike O'Neal (2-13-07)

Sec. 1 Amends current professional malpractice screening panel law to make it clear that in a situation where there are two or more respondents, each is entitled to have a separate panel. Often, where there are multiple respondents, they will be of different specialties and will need to designate a panel member in their specialty.

Sec. 2. Amends the current screening panel timeline to provide a more realistic schedule for the parties. Under current law all members are to be appointed within 10 days. This never happens. Amendment provides for a 10 day period for the petitioner to appoint a member, then 10 days for the respondent to appoint and another 10 days after that for the parties to agree on a joint appointment.

Sec. 3. Extends the deadline for a screening panel decision from 90 to 120 days to be more realistic and to take into account additional days allowed to make the initial appointments. *May want to consider amending further to start the 120 days from date of appointment of 3rd member vs. from date of commencement.*

Sec. 4 Increases statutory compensation for panel chair and members. Still won't compensate for actual time spent but will encourage participation in the process.

Sec. 5. Clarifies that it is the commencement of the screening panel action and not merely the filing of a request that triggers the tolling of the statute of limitations. Avoids the situation where the statute is tolled without notice to the respondent.

Also, amends the current tolling provisions to provide a 180 day limit on the length of time the statute is tolled. Avoids the situation where the statute is tolled for up to 1-2 years waiting on a screening panel decision. *May want to further amend to start 180 day period from date of appointment of last member vs. date of commencement.*

Sec. 6-10 Makes same changes to medical malpractice screening panel provisions.

May want to consider a further amendment to clarify that where separate panels have been appointed, the tolling provisions in Sec. 5 and 10 are applied to the date of the last panel's decision.

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House Judiciary
Date 2-13-07
Attachment # 2

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MEMORANDUM

TO: **House Judiciary Committee**

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

DATE: **13 February 2007**

RE: **HB 2188**

Chairman O'Neal and Members of the Committee:

My name is Anne Kindling and I submit this written testimony regarding HB 2188 on behalf of the Kansas Association of Defense Counsel, of which I serve as President-Elect. The KADC consists of more than 200 practicing attorneys who devote a substantial portion of their professional practice to the defense of lawsuits and the defense of screening panel actions. The KADC maintains a strong interest in improving the adversary system and the efficient administration of justice. We believe that the interests of justice will be served by the enactment of HB 2188 to clarify or remedy certain difficulties with the operation of medical malpractice and professional malpractice screening panels.

HB 2188 makes a number of changes to the screening panel statutes, and those on which KADC is taking a position will be addressed in turn.

Sections 1 and 6 would modify K.S.A. 60-3502 and K.S.A. 65-4901, respectively, to entitle a defendant or respondent to request separate screening panels where there is more than one defendant or respondent named in the action. The KADC supports this provision. Since the statutes provide for only one panel member selected by the defendant(s) in the action, allowing the convening of separate screening panels will afford each defendant the opportunity to select a panel member of his or her choosing, instead of having to do so jointly with the co-defendant(s) whose interests may differ. Additionally, the purpose of the screening panel is best served when panel members in the same specialty as the defendant are called upon to evaluate the conduct at issue. This is clearly seen in medical malpractice screening panels, where several providers from very different specialties may be named as respondents in the same screening panel action. To meet the purpose and efficiency of the screening panel process, it is imperative that separate panels be convened in order that panel members can be designated from the same specialties as the various defendants.

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Section 6 also requires that health care providers selected as screening panel members must meet the expert witness qualifications of K.S.A. 60-3412. To give opinion testimony in court in a medical malpractice case, a health care provider must have devoted at least 50% of his professional time to the actual clinical practice of medicine in the two years preceding the act of alleged negligence. It is appropriate that if a screening panel member is going to give opinions on the standard of care, this same qualification must be satisfied. This also fits with the provisions of K.S.A. 65-4904 which allows panel members to testify as witnesses at trial.

Sections 2 and 7 modify K.S.A. 60-3503 and K.S.A. 65-4902, respectively, to allow a staggered timeline for designating panel members. The existing provisions require that all three panel members be designated within 10 days of the convening of the action. This time frame has proved unrealistic and unworkable in everyday practice. One reason for this is that the defendant does not always know the allegations of negligence that are being made by the claimant, and additional time is helpful to begin to develop an understanding so that an appropriate professional may be designated to serve as a panel member. In addition, this would more closely match the progression of a lawsuit where the plaintiff designated experts and then the defendant designates experts.

Sections 3 and 8 modify K.S.A. 60-3505 and K.S.A. 65-4904 to allow an additional 30 days for the panel to issue its written report, increasing the time period from 90 days to 120 days. Ninety days has proven to be insufficient to complete the screening panel's work. The KADC supports lengthening this time period, whether it is to 120 days or something even longer. However, it is also noted that while the statutes state that the report "shall" be filed within that time frame, in reality this does not occur. The time period has been construed by the Kansas appellate courts to be directory and not mandatory.

Sections 4 and 9 would increase the fees to be paid to panel members. Presently just $250 per panel member ($500 for the panel chairperson), this would increase the fees by $250. The fees have not been increased since the screening panel mechanism was adopted. While this increased amount will not adequately compensate the panel members for their time spent in service, it is a reasonable increase at this time.

Sections 5 and 10 modify K.S.A. 60-3509 and K.S.A. 65-4908, which provide for a tolling of the statute of limitations. The KADC takes no position at this time on the amendments which would commence the tolling provision when the panel is convened by the court, rather than when the plaintiff files the request to convene a screening panel. However, the KADC does support an outside limitation on how long the statute of limitations would remain tolled. In practice, many screening panels go on far beyond the expedited time frame contemplated by the statutes. This defeats the intent of the screening panel process to provide for resolution of claims without the expense and delay of litigation. The outside limitation could be 180 days or even a year, but it is appropriate to fix an ending point of the tolling provision.

One alternative to an outside limitation on the tolling provision would be to make clear that the tolling statutes do not operate to toll the applicable statutes of repose. Under Kansas law, the statute of repose for medical malpractice claims is 4 years. A reason behind this statute of repose is so that the information – and memories – are not completely stale before the case is

prosecuted. If there is an outside limitation on the length of tolling of either 180 days or a year, then the statute of repose will not come into play. If, however, the tolling of the statute of limitations is indefinite, as it presently is, then the tolling provision should not be construed to toll the statute of repose as well. The KADC believes, however, that the outside limitation on tolling the statute of limitations is a better way to proceed.

These are all changes to the screening panel process that are consistent with the original intent of the process to provide an expedited and cost-effective opportunity to resolve professional and medical malpractice claims. They will bring the operation of the screening panel process closer in line with how such cases actually progress.

Thank you for the opportunity to testify in support of HB 2188. I would be happy to stand for questions.

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Representative Mike O'Neal, Chairman
Members of the House Judiciary Committee

From: William J. Skepnek, Skepnek Law Firm, P.A.
On Behalf of the Kansas Trial Lawyers Association

Date: February 13, 2007

Re: HB 2188 Medical Malpractice Screening Panels

I appear today on behalf of the Kansas Trial Lawyers Association, a statewide nonprofit organization of attorneys who serve Kansans who are seeking justice. I appreciate the opportunity to provide testimony in opposition to HB 2188, relating to medical malpractice screening panels.

I am a 1978 graduate of the KU Law School, and have been admitted to the Kansas Bar since 1979. I practice in Lawrence. During that time I have represented both plaintiffs and defendants in medical malpractice suits. I have also been appointed by the District Court in Douglas County to serve as chairperson of a screening panel convened pursuant to KSA 60-3501 et seq.

In general the proposed amendments to the Screening Panel statutes undercut the purposes for which these statutes were enacted. The idea behind these statutes was to promote "non-litigation" alternatives to resolution of disputes between professionals and those they serve. KSA 60-3501 et seq. relates to non-healthcare providers, with proposed amendments contained in sections 1-5 of HB 2188. KSA 65-4901 et seq. relates to healthcare providers, with proposed amendments contained sections 6-10 of HB 2188.

I wish to comment upon several provisions of the proposed amendment. Sections 1 – 5, and 6 – 10, roughly parallel each other, dealing with the particulars of healthcare, and other professionals. I will treat the parallel provisions together, calling attention to differences when necessary.

Sections 1 & 6: These proposed changes would "entitle" each defendant "to request a separate screening panel." While the current statute does not speak to this precise issue, the practice in Douglas County (as well as Johnson and Wyandotte, and I imagine others) is for the judge to determine whether separate screening panels are necessary on a case-by-case basis. Our Court in Douglas County has granted separate panels when it seems appropriate and necessary. Vesting this discretionary power in the trial court makes good sense.

Terry Humphrey, Executive Director

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I can certainly foresee circumstances in which multiple panels would simply complicate the process and increase expenses. I can also foresee circumstances in which multiple panels would be helpful. It is not necessarily unreasonable to expect a single panel to evaluate the conduct of different health care providers, as we ask juries, who lack the professional experience of screening panel members, to do so all the time. In Kansas the "one trial rule" for comparative fault forces one trier of fact to resolve all claims in one trial. This promotes simplicity, and consistent panel recommendations.

A problem presented by this amendment is that the actual language of the proposed amendment is not clear on whether the defendant is entitled to a separate panel, or simply entitled to request one. It is also one sided. It seems to empower only the defendants to request separate panels. If a change is made, it should go both ways, allowing both the plaintiff and the defendant to request separate panels.

Section 6(b): This proposed amendment creates significant procedural problems in light of existing law. For healthcare providers the statute would adopt as a qualification for panel membership the 50% clinical practice rule which is required as an evidentiary standard in trials. This presents several problems in the context of screening panels.

First, how is the evidentiary question to be factually developed? In a trial, reports of experts are exchanged, and depositions of experts are taken. The trial judge then makes evidentiary rulings on objections. In the context of a panel, no reports are given, there is no power to take depositions, and there is no mechanism in place for a judge to make evidentiary rulings. This amendment simply mixes the metaphors, and causes unnecessary complication. The panel process is intended to be less formal than trial, and was never intended to require adversarial evidentiary procedures.

By way of example, retired head of obstetrics and gynecology at KU Med, Dr. Kermit Kantz, who is no longer actively engaged in practice, cannot serve as an expert witness at a trial, but is qualified to serve as a member of a screening panel. This is good, because Dr. Krantz is wholly qualified in the more relaxed and less formal process of a panel, and he is more easily available than a busy practicing physician.

Sections 2 & 7: Historically, it has been difficult in practice to find panelists and move the panel process along. The chairperson is in the position of a herder of cats, with little power to speed the process up. Additionally, though for healthcare providers there is a list of volunteers, it is often difficult to obtain the actual participation of panelists, who often have busy private practices. Thus, I would suggest longer periods, at least 20 days, or perhaps 30 days. As a practical matter the 10 day period is never complied with, and the chairperson of the panel has little power to do anything for non-compliance. These amendments ignore that the defendant can request a screening panel, and should provide that whoever asks for the panel should name his/her panelist first.

Sections 3 & 8: As a practical matter, it is unrealistic to expect the process to be completed in 90 or 120 days. In my experience it simply does not happen, and there is little a panel chairperson can do to move things along. It appears that these amendments

are intended to give the process a definite period, and conclusion. Perhaps a better mechanism, would be to provide the respondent to the process with the right to opt out of the screening panel procedure should it not resolve within the time period.

Sections 5 & 10: These provisions pose serious problems. These proposals would allow a statute of limitations period to run during (1) the time the court is acting to "convene" the panel following the making of a request for a panel, and (2) the time the panel is considering the matter, but has not issued its recommendation in a case. This would seem to defeat the very purpose of the statute. The purpose is to provide an alternate forum for resolution of medical malpractice claims which may head off litigation.

As a practical matter, the plaintiff cannot control the timing of the court's convening of the panel, or of the making by the panel of its recommendations. In my experience it typically takes more than 180 days to constitute the panel, obtain the materials to be considered, convene the panel and issue recommendations. The patient plaintiff, under this provision might be forced to file his law suit against a physician before the panel has been ordered, or has had the chance to reach any conclusions. This would pose a serious procedural trap for the unwary that would lead to disposal of claims without consideration of the merits, not a worthy objective of law.

Moreover, should the plaintiff file a suit to protect against the running of the statute of limitations, that filing will generate a reportable event for the physician to the national data bank, a result the statute was intended to avoid. A complicating issue is that the triggering event is not a clearly defined date. When is the panel convened? When the request is made, or the judge appoints a chairperson, or when all of the panel members are identified, or when the materials are submitted to the panel members, or when the meeting of the panel occurs? This is a provision which seems fraught with potential litigation fodder. I cannot imagine a good reason to cause the statute of limitations to run while panel is still considering the case. The net result will be that plaintiff will be deterred from using the statute, and defendants may lose an opportunity to resolve matters without full blown litigation.

Thank you for the opportunity to provide you with our testimony. I respectfully request your opposition to HB 2188.

TESTIMONY OF CRAIG C. BLUMREICH AND WILLIAM A. LARSON, DEFENSE COUNSEL FOR STATE FARM INSURANCE COMPANIES, PERTAINING TO K.S.A. 40-908 AND HOUSE BILL NO. 2189

State Farm Insurance Companies support House Bill No. 2189 which clarifies that K.S.A. 40-908 relating to the mandatory assessment of attorney fees applies only to actions brought on insurance policies where the actual loss occurred by fire, tornado, lightning or hail. This comports with the original legislative intent when the statute was enacted.

Two statutes in Kansas provide for the potential recovery of attorney fees in an action brought by an insured against an insurance company. One of the statutes, K.S.A. 40-256, applies to any action brought by an insured against any insurance company, regardless of the type of insurance policy, if the company has "refused without just cause or excuse to pay the full amount of such loss."

K.S.A. 40-908 is significantly different. K.S.A. 40-908 provides:

> "That in all actions now pending, or hereafter commenced in which judgment is rendered against an insurance company *on any policy given to insure any property in this state against loss of fire, tornado, lightning or hail,* the court in rendering such judgment shall allow the plaintiff a reasonable sum as an attorney fee for services in such action including proceeding upon appeal to be recovered and collected as part of the costs: *Provided, however*, That when a tender is made by such insurance company before the commencement of the action in which judgment is rendered and the amount recovered is not in excess of such tender no such costs shall be allowed. (emphasis supplied)

Simply stated, K.S.A. 40-256 allows an award for attorney fees only if the insurer is found

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to have acted improperly while K.S.A. 40-908 makes an award for attorney fees automatic if the insured prevails in the case.

K.S.A. 40-908 was enacted in 1927 and K.S.A. 40-256 passed in 1931. From the time they were enacted until the late 1990's Kansas courts essentially applied the automatic attorney fee provisions of K.S.A. 40-908 to property damage cases when losses were caused by fire, tornado, lightning or hail while K.S.A. 40-256 was applied in all other non-property loss instances.

In its recent decision in *Lee Builders, Inc. v. Farm Bureau Mutual Insurance Company*, 281 Kan. 844, 137 P.3d 486 (2006), the Kansas Supreme Court significantly broadened the scope of insurance disputes potentially subject to K.S.A. 40-908. The controversy in *Lee Builders* involved a general contractor who sought to recover damages from its commercial general liability insurer related to a lawsuit brought by a homeowner against the contractor alleging construction defects. Specifically, the general contractor alleged its insurer breached its duty to defend and to indemnify the contractor from the contractor's liability coverage in connection with property damage claimed by the homeowner resulting from window leaks. Although the contractor's dispute with its insurer did not involve a first-party loss arising out of fire, lightning, tornado or hail the court applied the "plain language" of K.S.A. 40-908 and held that the automatic attorney fees provision of the statute applies where judgment is entered on any policy that insures against fire, tornado, lightning or hail losses *even if* the dispute between the insured and the

insurance company does not arise out of such a loss. Since Lee Builders was insured under a "package" commercial general liability insurance policy which included both first-party property damage coverage and third-party liability coverage the court found attorney fees awardable because the contractor prevailed. The court did not find that the insurer's denial of liability coverage under the circumstances was unreasonable and, therefore, justified an award of attorney fees under K.S.A. 40-256. Rather, the court found that K.S.A. 40-908 applied and, the award of attorney fees was automatic.

The decision in *Lee Builders* contradicts prior case law from the Kansas Supreme Court which specifically addressed the interplay between K.S.A. 40-256 and K.S.A. 40-908. In *State Farm Fire and Casualty Company v. Liggett*, 236 Kan. 120, 689 P.2d 1187 (1984), the insurer brought a declaratory judgment action to determine whether there was first-party coverage for a fire loss suffered by the insured and the insured counterclaimed for the amount of the fire loss. After a lengthy trial, the jury decided that the insurance company's arson defense was not supported by the evidence and that the insured was entitled to the amount of their fire loss. The court also awarded the insured attorney fees pursuant to K.S.A. 40-908 since the dispute arose out of a fire loss. On appeal, an issue was raised as to whether K.S.A. 40-908 had been repealed by implication by the legislature by the adoption of K.S.A. 40-256 meaning that attorney fees could be awarded *only* in cases in which the insurance company refused to pay without just cause or excuse. The court rejected this contention and held that both statutes continue to be effective. The court cited

with approval its prior pronouncement on this point in *Ferrellgas Corporation v. Phoenix Ins. Co.*, 187 Kan. 530, 358 P.2d 786 (1961):

> "If the policy is one insuring *property* as provided in the old statute, the insurance company must pay attorneys fees as provided therein. If it is *as to any other type of policy*, then the insurance company may govern its liability under the newer statute." (emphasis supplied) (236 Kan. at 128)

Neither of the statutes has been amended since *Liggett*. State Farm respectfully submits the court's previous analysis dealing specifically with this interplay between the two statutes is correct and should be given effect.

There are very practical reasons for the distinction between these statutes. Before the 1950's, individuals and businesses had to purchase separate policies for the risks they wished to insure against. A homeowner or business was required to purchase a fire policy to insure against that risk and, if the insured wanted to insure against other risks of loss to property, an "all perils" endorsement to cover wind storms or water losses could also be purchased. In addition, to cover the risk of potential liability to third parties, the insured purchased a separate personal liability policy.

Programs were then begun to consolidate a variety of personal and commercial property coverages in a single policy package. It was during this period that the first "homeowners" policy was issued which combined both property and personal liability coverages in a single policy. Thereafter, commercial property risks were also combined in a "commercial policy package policy" packaging previously separate property and liability

coverages. Today, both personal and commercial policies routinely combine property and liability coverages in a single policy package. Significantly, when K.S.A. 40-908 was adopted in 1927 there were no "package" policies so the only purpose of K.S.A. 40-908 in linking the specific perils of fire, tornado, lightning and hail to automatic attorney fees was for the statute to apply only in property damage cases.

It is likely the decision in *Lee Builders* will complicate the balance between K.S.A. 40-908 and K.S.A. 40-256 observed for many years in the insurance industry and courts and noted with approval by the Kansas Supreme Court in *Liggett*. It seems likely that K.S.A. 40-908 will now be asserted in place of K.S.A. 40-256 in any type of insurance litigation involving a package policy regardless of whether first-party property damage is involved. Without clarification of K.S.A. 40-908, *Lee Builders* could, for example, convert uninsured motorist, underinsured motorist and auto medical payments cases into heavily litigated cases lacking the potential for settlement because of the expectation of automatic attorney fees. These types of cases, with the difficult task of evaluating general damages such as pain and suffering, should not be subject to the imposition of automatic attorney fees when there has been no unreasonable refusal to pay. Without clarification, K.S.A. 40-908 could unfairly place the insurance industry into a "loser pays" attorney fee situation in contravention of the well-established rule that generally each litigant bears its own attorney fees.

KANSAS ASSOCIATION OF DEFENSE COUNSEL
825 S. Kansas Avenue, Suite 500 • Topeka, KS 66612
Telephone: 785-232-9091 • FAX: 785-233-2206 • www.kadc.org

TO: HOUSE JUDICIARY COMMITTEE

FROM: TIMOTHY J. FINNERTY
KANSAS ASSOCIATION OF DEFENSE COUNSEL

RE: HB 2189

DATE: FEBRUARY 13, 2007

Chairman O'Neal, members of the committee, thank you for the opportunity to appear today and comment on House Bill 2189.

My name is Tim Finnerty. I have practiced law in Wichita for 24 years. I am a past president of the Kansas Association of Defense Counsel (KADC) and appear today as a representative of that group. KADC is a statewide association of lawyers who defend civil damage suits.

This bill amends K.S.A. 40-908 to undo the effects of a recent Kansas Supreme Court decision, *Lee Builders, Inc. v. Farm Bureau Mutual Insurance Company*. KADC supports the amendment of K.S.A. 40-908 as this bill proposes.

Historical Background

In 1927 and in 1931, the Kansas legislature enacted the modern forms of K.S.A. 40-908 and K.S.A. 40-256, respectively. Each of these statutes was directed at what were perceived as insurance company abuses at the time. Each of the statutes permits the recovery of attorney's fees when someone successfully sues for recovery of damages. Each statute, however, deals with a different problem. K.S.A. 40-256 dealt with an insurer's unjustified refusal to deal fairly with someone who had a claim against its policyholder (third-party coverage). For example, an insurer's unjustified refusal to settle a motor vehicle accident injury case when its insured rear-ended the claimant's vehicle is an example in which the claimant might use K.S.A. 40-256 to recover

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attorney's fees. In this instance, the insurer may be required to pay the other side's attorney's fees if the insurer's failure to pay is "without just cause or excuse."

K.S.A. 40-908, on the other hand, concerns an insured's own claim against his or her insurance company (first-party coverage). For example, if a homeowner's roof is damaged by hail, the insurer's unjustified refusal to pay the homeowner the fair cost of repairing or replacing the roof can lead to the award of attorney's fees if the homeowner is forced to file suit. Under this statute, if the homeowner recovers even $1 more at the trial than was offered by the insurance company before suit was commenced, the homeowner recovers his or her attorney's fees automatically. In this situation, there is no need for the homeowner to show the court that the insurer's refusal to pay was "without just cause or excuse" in order to recover attorney's fees. It is enough that the insurer failed to offer presuit what its policyholder recovered after the suit.

At the time when these two statutes were enacted, insurance policies were offered for sale and purchased in a significantly different way than they are today. Until the 1950's, if you wanted to insure *your home* against loss by fire, wind, rain or other nature perils, you bought a fire insurance policy that also may have included coverage for these other perils. If you wanted to insure *yourself* against claims someone might make against you for injury he or she might sustain on your property or because of your activities, you would buy a separate *liability* policy that would give you this protection. The policies were separate and sold by companies that specialized in selling these separate types of coverages.

Similarly, a business that wanted to insure its buildings, manufacturing facilities, or tools and equipment from fire bought a fire policy. If the business wanted to insure against losses caused by wind and rain, the business could purchase "extended" coverages under its fire policy. If the business wanted to insure itself from liability to others caused by its operations, it bought a separate liability policy. As with the insurance purchased by the homeowner, the property and liability coverages could not be bought in a single package.

During the 1950's, a revolution swept the part of the insurance industry that specialized in offering these coverages to businesses and individuals. Virtually inside that decade, it became possible for both individuals and businesses to buy both *property* and *liability* coverages inside a single package of coverages. The business or homeowner now paid a single premium for an array of coverages that protected the policyholder from the dangers of property loss and the potential liability that might be incurred if an accident led to accidental injury to another person. Offering insurance in packages simplified purchasing decisions for businesses and consumers. It also contributed to an enormous consolidation of companies offering property and liability

insurance. Today, virtually every kind of commercial insurance needed by a business enterprise is issued as a single "business package policy" containing all the required coverages. In a similar way, all of the coverages you need as a homeowner, insurance against loss of property due to fire, windstorm, or most other natural causes and insurance against your personal liability to others for your negligent acts, is contained within a single homeowner's policy.

Perhaps needless to say is that while these changes were going on in the insurance industry, there were no changes going on in the two statutes which controlled when and under what circumstances a litigant could recover attorney's fees in a lawsuit involving insurance. K.S.A. 40-908 and K.S.A. 40-256 were never amended to deal with the new combination of first- and third-party insurance policies inside a single package that came about in the middle 1950's and early 1960's. As a consequence, it theoretically became possible to apply the attorney's fee provisions in K.S.A. 40-908 and 40-256 to an array of situations that they were never thought to cover. Despite this theoretical possibility that each statute could be applied in situations where it had never been applied before, the courts managed to keep the purposes of the two statutes separate.

After K.S.A. 40-256 was enacted in 1931, there was some initial confusion about the proper application of the two statutes to specific situations. Decisions by Kansas appellate courts subsequently cleared the confusion. When the claim had to do with a loss covered by property insurance, K.S.A. 40-908 applied to permit a policyholder to recover attorney's fees when an insurer failed to offer its policyholder the fair cost to repair or replace the damaged property. When the controversy involved a dispute involving an insurer's policyholder's potential legal liability to another, the claimant could recover attorney's fees only when the claimant showed that the insurer failed to have a legitimate basis for failing to pay. The distinction between these two statutes held up until the Kansas Court of Appeals' and the Kansas Supreme Court's recent decision in *Lee Builders, Inc. v. Farm Bureau Mutual Insurance Company*. In this case, the two appellate courts blurred the historical distinction between the two separate purposes of these insurance attorney's fees statutes. The blurred distinction means that, for all practical purposes, K.S.A. 40-908 becomes the attorney's fees statute which most often applies, potentially shutting out the application of K.S.A. 40-256. The present amendment undoes the blurring and returns the law to the way it was before this decision.

Why the effect of Lee Builders should be undone.

There are several good reasons to undo the effect of these decisions. First, when these two statutes were enacted by this legislature, they were directed to two different

and distinct problems. The courts' recent decisions confuse the two different purposes and cause the application of the two statutes to overlap in their application. The overlap creates confusion about the nature and extent of an insurer's liability for attorney's fees when that confusion did not exist before. Confusion in this area is not a good thing because it can lead to unpredictable results or exposures to insurers that did not previously exist. When unpredictable results or new and unexpected litigation exposures arise, marketplace confusion can result. Confusion of this kind can lead to pricing problems.

Second and related to the first reason, the two statutes should continue to serve the original purposes for which this Legislature enacted them. The one statute, K.S.A. 40-908, applies a different standard for the award of attorney's fees than the other. K.S.A. 40-908 levels the playing field between insurer and insured when the coverage in question is one that the policyholder paid for him- or herself. In other words, when the dispute is between the insurer and the policyholder, the dispute will invariably be about whether and what amount is owed to the policyholder. One can fairly easily see that the statute provides an incentive to the insurer to deal fairly with its insured in a variety of circumstances. Whether property losses sustained by a homeowner, for example, are large or small, few homeowners have the financial wherewithal to take on an insurer if the two disagree about what ought to be paid for a fire loss, a windstorm loss, or a hail loss. If the insurer attempts to "low-ball" the policyholder, the policyholder can hold the insurer's feet to the fire with the assurance that, if the insured's view of the loss is correct, the insurer will pay the policyholder's attorney's fees.

This same consideration does not apply when a policyholder is sued by a stranger. In this circumstance, most often, the insurer and the insured are aligned in interest. When the policyholder is sued, it is generally in the interest of both that the suit against the policyholder be defeated or at least the liability or damages limited. Only very specific circumstances give rise, under the law prior to *Lee Builders*, to an insurer's liability for attorney's fees when a policyholder is sued. These circumstances include situations in which the insurer fails to initiate settlement discussions with the claiming party when the policyholder's liability is clear, when the insurer refuses to defend or indemnify the policyholder when required to do so by the policy, or when the insurer exposes the policyholder to personal liability for damages in excess of his or her policy's limits through the insurer's unreasonable actions. In each of these situations and others, the court may impose attorney's fees on the insurer when its failure to pay the claim was "without just cause or excuse."

By employing this standard, the standard of K.S.A. 40-256, courts can examine the circumstances presented by each situation to determine whether the insurer acted reasonably. If it did not, attorney's fees may be awarded.

The *Lee Builders* decision has fundamentally misconstrued the purpose of K.S.A. 40-908 and thereby made it potentially applicable to the situations previously thought to be covered only by K.S.A. 40-256. When that occurs, courts faced with a decision about whether to award attorney's fees will look, not to whether the insurer's actions were reasonable under the circumstances, but whether the insurer offered more money before the suit than the policyholder received after the suit. When situations like the ones mentioned above are the source of the controversy, the proper measure of the insurer's actions is not necessarily whether the policyholder recovers money but whether the insurer took the existing circumstances into proper account when it made its decision.

Third, the law, as altered by *Lee Builders*, runs the substantial risk of generating lawsuits for the profit of lawyers dedicated to their own economic interest as opposed to the speedy resolution of disputes. As you know, the American rule is that parties to lawsuits pay their own attorney's fees. This has been the rule since the country was founded. Since that time, the rule has been modified when specific circumstances suggest the public interest is served by assisting citizens with the expense of a lawsuit. Presently, awards of attorney's fees to a successful plaintiff occur in a fairly limited number of circumstances. Among these, at the federal level, are lawsuits seeking recompense for violation of a citizen' civil rights.

Until the *Lee Builders* case, in Kansas, the recovery of attorney's fees, when insurance was an issue, was limited to very narrow situations: an insurer's failure to pay personal injury protection benefits when due to a motor vehicle accident, an insurer's failure to pay a reasonable amount on a homeowner's fire, wind, or hail loss claim, or an insurer's failure to pay a reasonable amount when auto collision damage is less than $7,500. In these situations, a policyholder's properly filed lawsuit against an insurer for failure to handle a claim promptly and pay appropriately contains the potential for recovery of attorney's fees.

The substantial expansion of the availability of attorney's fees caused by the *Lee Builders* decision threatens to make virtually every insurance dispute between an insurer and a tort claimant the subject of a K.S.A. 40-908 attorney's fee claim. Prior to the *Lee Builders* decision, cases of this kind were almost always the subject of a contingent fee agreement between the person claiming injury and her lawyer. This decision marks a dramatic and unsettling shift away from that model. The contingent fee model, as it has existed for many years, has tended to keep litigation in check by

supporting the filing of lawsuits that had merit because of the lawyer's personal economic resources were on the line. The *Lee Builders* decision unhinges that balance by encouraging the filing of lawsuits that would not have been filed before the *Lee Builders* case. If the law stands as it is after this decision, the number of lawsuits filed, purely for the potential recovery of attorney's fees, will unquestionably multiply with little or no resulting benefit to the policyholder him- or herself.

For those of you who would like to read about the technical reasons why the *Lee Builders* decision was an incorrect decision based on the historical interpretation of K.S.A. 40-256 and 40-908, I have left a copy of my recent article on the subject in a statewide lawyer's publication with the committee secretary.

I urge you to pass this bill out of your committee.

BRAD SMOOT
ATTORNEY AT LAW

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SUITE 230
LEAWOOD, KANSAS 66206

Statement of Brad Smoot
American Insurance Association
House Judiciary Committee
Regarding House Bill 2189
Written Only

February 13, 2007

Mr. Chairman and Members of the Committee,

The American Insurance Association's (AIA) nearly 400 members are leading property and casualty insurers doing business around the world, across America and in Kansas. Because AIA and its members care about the continuing vitality of the property insurance market in Kansas, we support HB2189 and in the alternative the complete repeal of K.S.A. 40-908.

K.S.A. 40-908's mandate of attorney fees contradicts the American Rule that each party to litigation bares its own costs. Furthermore, the statute is completely one sided because ONLY the insurer pays the attorneys fees in any litigation. On this basis alone, the section is inherently unfair and should be repealed.

This statute is even more questionable given that most property insurance disputes are only about valuation and that reasonable parties can, of course, differ over value. In almost every litigation, at some point value is in dispute and yet only in the context of property insurance does this Kansas statute force the insurer to pay attorneys fees for those disagreements that wind up in litigation. Moreover, the wording of this statute supports ludicrous results, such as an award of attorney's fees because the insurer is ordered to pay one penny more than what it offered, even though the policyholder sought 100 times the offer.

Of course, the ultimate effect of K.S.A. 40-908 is that either Kansas insurance consumers will pay more as a result of greater lost costs or insurers may be reluctant to write coverage due to the increased costs of litigation. In the end, this statute is inherently unfair and detrimental to the Kansas insurance market and consumers. HB 2189 is a modest attempt to correct an overly broad interpretation of this section by Kansas courts. Hence, AIA supports HB 2189 or, in the alternative, the complete repeal of K.S.A. 40-908.

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AMERICAN FAMILY INSURANCE

AMERICAN FAMILY INSURANCE GROUP

PO BOX 1786 • JEFFERSON CITY MO 65102-1786 • PHONE: (573) 893-5600

February 13, 2007

Representative Michael R. O'Neal
Kansas State Capitol
Room 143-N
300 SW 10th Street
Topeka, KS 66612

Re: American Family Insurance's support for House Bill 2189

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

American Family Insurance provides automobile insurance coverage to approximately sixteen percent of the private passenger automobile insurance market in Kansas. We offer automobile insurance and other products through some 260 agents who reside throughout the state.

This letter serves to indicate American Family's support for House Bill 2189. The measure clarifies that KSA 40-908 applies only to losses that occur as a result of fire, tornado, lightning or hail.

At some point, lawmakers may want to develop a single statute for awarding attorneys fees. KSA 40-256 also provides for attorneys' fees on some claims. KSA 40-908 and KSA 40-256 establish different standards for awarding attorneys' fees that lead to ambiguities and additional litigation.

We appreciate the opportunity to offer testimony and urge you to support this legislation.

Sincerely,

David A Monaghan

David Monaghan

House Judiciary
Date 2-13-07
Attachment # 8

Polsinelli | Shalton
Welte | Suelthaus PC

Memorandum

TO: THE HONORABLE MIKE O'NEAL, CHAIRMAN
HOUSE JUDICIARY COMMITTEE

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

RE: H.B. 2189

DATE: FEBRUARY 12, 2007

Mr. Chairman, Members of the Committee: My name is Bill Sneed and I represent the State Farm Insurance Companies. State Farm is the largest insurer of homes and automobiles in Kansas. State Farm insures one out of every three cars and one out of every four homes in the United States. On behalf of my client, please accept this memorandum as our support and request for favorable passage of H.B. 2189.

As I am sure you will have been told in reviewing the bill, this proposal is designed to put back to the original intent K.S.A. 40-256 as it ties fees to listed perils. It is my client's contention that the judicial expansion of K.S.A. 40-908 was not intended by the legislature, and thus, we contend that this bill places the law closer to the true intention of the auto PIP claim statutes and attorney's fees that might be assessed.

My client has seen a dramatic increase in attorney fee demands utilizing this statute. The end result of this expansion has caused State Farm to be subject to the demands of attorneys who refuse to settle property damage files so that they can then incorporate other suits, and since the property portion is in the count, they are given awards for attorney's fees. It has also made it difficult to settle disputed property claim files since the attorneys have no incentive to settle.

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Based upon the foregoing, we would urge the Committee to support H.B. 2189 and act favorably when the bill is worked. We would be happy to answer any questions at the appropriate time.

Respectfully submitted,

William W. Sneed

WWS:kjb

9-2

STATE OF KANSAS

SENATOR PHILLIP B. JOURNEY
STATE SENATOR, 26TH DISTRICT
P.O. BOX 471
HAYSVILLE, KS 67060

STATE CAPITOL—221-E
300 S.W. 10TH AVENUE
TOPEKA, KANSAS 66612
(785) 296-7367
E-mail: journey@senate.state.ks.us

TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS

VICECHAIR: SPECIAL CLAIMS AGAINST THE STATE (JOINT), VICECHAIR
MEMBER: HEALTH CARE STRATEGIES
JUDICIARY
PUBLIC HEALTH AND WELFARE
TRANSPORTATION

CORRECTIONS AND JUVENILE JUSTICE OVERSIGHT (JOINT)

Testimony before the
Kansas House of Representatives Judiciary Committee
In Opposition to House Bill 2189

I want to thank the Committee and the Chairman for the opportunity to address the Committee regarding House Bill 2189.

In the 2006 Legislative Session, I filed two bills, Senate Bill 378 and Senate Bill 377. Senate Bill 378 and Senate Bill 377 were both intended to enhance consumer protection and the consumer's position in dealing with insurance companies. It had become apparent to me since 9/11 and other disasters that have befallen our country that insurance companies have become increasingly difficult to deal with as have their adjusters. The bureaucracy of an insurance company can be bewildering to the policy holder, who has paid their obligation dutifully for years, when they are confronted with a company that they believe unreasonably denies their claim. The vast majority of claims are for a small amount that should the award for attorney's fees be unavailable to these Kansas policy holders, they would be forced to settle for less than their claim was worth because of the net gain over the required payment of attorneys' fees. The limited protection available to consumers in Kansas has been the public policy in the State of Kansas for more than a century. House Bill 2189 significantly reduces that protection for consumers.

Senate Bill 377 filed in the 2006 Legislative Session amended the same statute contemplated in House Bill 2189, and while I intended to enhance consumer protection and the consumer's leverage in the David vs. Goliath relationship of insured vs. insurance company HB 2198 takes the exact opposite path.

Attached to my testimony are copies of letters I received from Gay Muenchrath of GM Clothes Horse, Colby Sandlian, and Glenda Shively all small business owners who without the protection of K.S.A. 40-908 would have in all likelihood failed to receive the insurance coverage that was owed them.

I urge the Committee to stand beside the consumers, the voters, and the constituents in their representative districts and either table HB 2189 or insert the language from last year's Senate Bill 377 and allow this bill to move forward as a positive statement in support of Kansas families and small businesses.

Respectfully submitted

Phillip B Journey

Senator Phillip B. Journey
State Senator 26th District

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Date 2-13-07
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Session of 2006

SENATE BILL No. 377

By Senator Journey

1-17

AN ACT concerning insurance; pertaining to the allowance of attorney fees in actions involving casualty insurance; amending K.S.A. 40-908 and repealing the existing section.

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

Section 1. K.S.A. 40-908 is hereby amended to read as follows: 40-908. ~~That~~ *(a)* In all actions now pending, or hereafter commenced in which judgment is rendered against any insurance company on any policy ~~given to insure~~ *providing property insurance coverage or casualty insurance coverage on* any property in this state ~~against loss by fire, tornado, lightning or hail~~, the court in rendering such judgment shall allow the plaintiff a reasonable sum as an attorney's fee for services in such action including proceeding upon appeal to be recovered and collected as a part of the costs~~: *Provided, however,* That~~ *except that* when a tender is made by such insurance company before the commencement of the action in which judgment is rendered and the amount recovered is not in excess of such tender, no such costs shall be allowed.

(b) As used in this section:

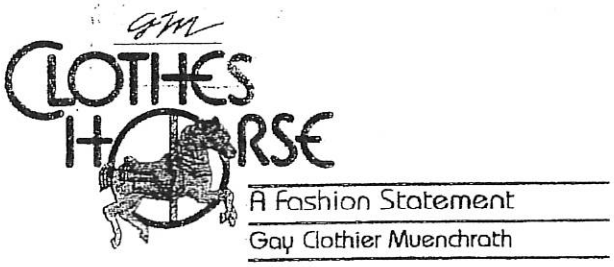
(1) "Casualty insurance coverage" means coverage against legal liability, including that for death, injury or disability or damage to real or personal property.

(2) "Property insurance coverage" means coverage for the direct or consequential loss or damage to property of every kind.

Sec. 2. K.S.A. 40-908 is hereby repealed.

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

10-2



November 11, 2005

The Honorable Phillip Journey
906 N Main, Suite 3
Wichita, KS 67203

RE: K.S.A. 40-908

Dear Senator Journey:

I am writing to express my observations and concerns relating to K.S.A. 40-908.

I am a businesswoman. For 20 years, I have owned and operated G.M. Clotheshorse, a woman's fashion clothing store that is located in the Waterfront in Wichita. My husband, Fred Muenchrath, is a retired banker. For many years, Fred was vice president of commercial lending at Bank IV and its successors.

Several years ago, my corporation, as well as me personally, were sued in the United States District Court. We reported the claim to State Farm, the company that had our business insurance: State Farm denied our claim and refused to provide a defense for us. We spent over $100,000 of our savings in a successful defense of that lawsuit.

After that lawsuit was dismissed by the Federal Court it was refiled in State Court. When that happened, we were advised to have State Farm's coverage denial reviewed by an attorney who specializes in insurance coverage disputes. After the matter was reviewed, we were informed State Farm owed us a defense in the new state proceeding, and it had wrongfully refused to defend the lawsuit in Federal Court.

The defense of the Federal Court proceeding had depleted our savings. However, our insurance lawyer, Jacob Graybill, explained that if we sued State Farm for coverage, and won, we could be and probably would be entitled to recover our litigation expenses as a part of our damages. He explained that our right to those damages arose out of a statute – what I now understand is K.S.A. 40-908.

Mr. Graybill sued State Farm for us. State Farm immediately agreed to provide a defense for us and it eventually settled the lawsuit. If K.S.A. 40-908 had not been in force, we would have been unable to pursue our claim.

While K.S.A. 40-908 worked for us, it is my understanding that it does not apply, across the board to all types of insurance. I have seen, first hand, the difference K.S.A. 40-908 makes to a policyholder that becomes embroiled in a dispute with her insurance company. It occurs to me all policyholders should be entitled to the protection K.S.A. 40-908 provides – not just those of us lucky enough to have our claims fall inside the present scope of K.S.A. 40-908.

I understand you are considering introducing an amendment to K.S.A. 40-908 that would broaden the scope of its operation to include all insurance. I strongly support such an amendment.

Mr. Graybill has also informed me the Kansas Consumer Protection Act contains an exemption for insurance companies. As I understand it, the Consumer Protection Act applies to every business that provides goods or service to consumers – except insurance agents and insurance companies. That seems unfair. There is no reason insurance companies should be permitted to operate under less strict standards in dealing with consumers than say, automobile dealers. To my way of thinking the average consumer is better able to look out for her interests when she purchases a car, than she is when she purchases insurance. I support removal of the exemption for insurance companies from the Consumer Protection Act.

Sincerely yours,

Gay Muenchrath

SANDLIAN REALTY

REAL ESTATE • INVESTMENT • DEVELOPMENT • CONSULTING

November 14, 2005

The Honorable Phillip Journey
906 N Main, Suite 3
Wichita, KS 67203

RE: K.S.A. 40-908

Dear Senator Journey:

It has come to my attention that you may be considering introducing bills during the next legislative session to broaden the scope of insurance that is covered by K.S.A. 40-908, and remove the present exemption for insurance companies and their agents and brokers from the Consumer Protection Act. I am writing to express my support for that effort.

I am owner of U-Stor Mini Storage Co. I own and operate U-Stor facilities and other commercial properties located throughout Kansas and the United States. Most of those entities are headquartered in Wichita, and consequently, many of the fire and casualty insurance policies covering those facilities are issued and delivered to us here.

In my experience, most insurance claims are dealt with appropriately. However, a few years ago, we experienced significant losses of money at a number of separate locations as the result of embezzlement by a dishonest employee. The insurance we had at the time provided coverage for employee dishonestly and each location was separately insured. We reported the loss to our agent who assured us we were covered. However, the insurance company took the position that the $25,000 policy limit applied across the board as a single limit for all of our locations combined and not to each insured location. Our agent assured us the company's interpretation was not correct. Nevertheless, we were compelled to file a lawsuit to obtain the coverage we had paid for. We were assured by our attorneys that our position was well-founded and correct, and that if we prevailed, under a statute (I now understand is K.S.A. 40-908) we would be entitled to recover our litigation expenses. After we filed suit, the insurance company agreed to a settlement that included reimbursement of our legal expenses.

I have seen firsthand how K.S.A. 40-908 provides a level playing field for policyholders faced with an insurance company's refusal to fully honor its contract of insurance.

435 N. BROADWAY, SUITE 201 / WICHITA, KANSAS 67202 / 316-263-0118 / FAX NO. 316-265-6902

10-5

I have been informed that K.S.A. 40-908 only applies in circumstances where the policyholder prevails and it does not apply across the board to all types of insurance claims. We were fortunate that our dispute fell within the scope of the statute and we were able to obtain satisfaction. It occurs to me all policyholders should be entitled to receive the fundamental protection afforded by K.S.A 40-908, not just those of us lucky enough to discover, after-the-fact that our dispute is covered by the statue. I support your effort to make that happen.

I have no direct experience with the Consumer Protection Act. I have been informed that it was enacted in 1973; that it has not been controversial, and that it prohibits unconscionable and deceptive business practices in transactions involving goods or services supplied to consumers by suppliers. As I understand it, all suppliers of goods and services to consumers are covered by the act, expect insurance companies and their adjusters, agents, and brokers, who are exempted from the Act. "Suppliers", as it has been explained to me, include businesses such as banks, interior decorators, retailers, car dealers, plumbers, real estate agents and virtually everyone that supplies goods or services, except suppliers of insurance related services or products. Unless there is something I am not aware of, it does not appear to me that insurance companies and their agents, adjusters and brokers should be exempted from complying with a law that requires virtually every other business to conduct its business with consumers honestly and fairly.

Sincerely yours,

Colby B. Sandlian

Unique
Auto Upholstery

3333 S. Seneca
Wichita, Kansas 67217
(316) 522-2828

November 18, 2005

The Honorable Phillip Journey
906 N. Main, Suite 3
Wichita, KS. 67203

RE: K.S.A. 40-908

Dear Senator Journey,

My name is Glenda Shively. I am writing this letter to express support for broadening the scope of 40-908, and to remove the exemption for insurance companies from the Consumer Protection Act.

My husband Bill and I own and operate Unique Auto Trim Upholstery located at 3333 S. Seneca in Wichita.

In 2001, we owned two farmsteads in Harper County. There was a large pole barn on one of the properties where we customarily stored, among other material, 55-gallon drums of gasoline and kerosene. Our farm was insured by Farm Bureau. One night, the pole barn caught fire and was destroyed. We reported the loss to Farm Bureau. Farm Bureau investigated. Its investigators interviewed our neighbors, in the process started rumors in the community that we were guilty of arson and were perpetrating an insurance fraud. After collecting samples, and having them analyzed at a forensic laboratory,

Farm Bureau concluded to no one's surprise that a petroleum accelerant was present, and from that, Farm Bureau jumped to the conclusion we set our barn on fire. We were shocked and appalled. Aside from the financial loss we experienced, it was important to us to establish our innocence and repair the damage that had been done to our reputation.

In the course of our search for an attorney that would take our case, we were advised by Jacob Graybill that a statute on the books (what I now understand is K.S.A. 40-908) would allow us to recover our attorney's fee and litigation expenses if we proved Farm Bureau wrongfully denied our claim. Mr. Graybill agreed to take our case, and he and his partner, Jay Greeno, agreed to advance the necessary expenses necessary to take our case to trial.

After a lengthy jury trial, during which Farm Bureau presented a number of out-of-state expert witnesses, we were exonerated and Farm Bureau was ordered to pay our loss and our litigation expenses. If K.S.A. 40-908 had not been on the books, we would have been unable to find a lawyer to take our case. Based on the experience, we know firsthand how important K.S.A. 40-908 is to policyholders like us.

I understand K.S.A. 40-908 does not apply to all insurance policies. I have been informed you are considering introducing an amendment that would change that. My husband and I strongly support your effort.

I also understand the Consumer Protection Act applies to all businesses (like our own) that supply goods or services to consumers. For reasons that are not apparent to me, insurance companies are exempt from that Act. Based on our experience, we believe insurance companies should be regulated by the Consumer Protection Act and we support an amendment that would remove the present exemption insurance companies enjoy from the Act.

Sincerely Yours,

Glenda Shively

Bill & Glenda Shively

10-8

TO: Members of the House Committee on Judiciary

FROM: Jacob S. Graybill, 11 Via Verde, Wichita, KS 67230

DATE: February 13, 2007

RE: K.S.A. 40-908 and H.B. 2189

Thank you for the opportunity to testify today. My name is Jacob Graybill. I am a lawyer from Wichita, Kansas. I graduated from Washburn Law School in 1967, and since that time I have been continuously involved in insurance litigation, representing both insurance companies and policyholders in matters involving disputes over insurance coverage. At the present time, I represent both policyholders and insurance companies.

I appreciate this opportunity to comment in opposition to the proposal to enact legislation to limit the application of K.S.A. 40-908. A similar issue was considered in 2005 by a joint House and Senate Special Committee on Judiciary. As I recall, at that time the proposal was whether K.S.A. 40-908 should be amended to reflect the restrictions currently under consideration or repealed.

At Senator John Vratil's request, the Judicial Council assigned the task of studying the matter to the Civil Code Advisory Committee on K.S.A. 40-256 and 40-908, and requested a report. In its February 15, 2006, report, the Advisory Committee unanimously recommended "that no legislative action be taken to amend or repeal K.S.A. 40-256 or K.S.A. 40-908." The Advisory Committee also provided its ". . . Comments Regarding Public Policy," in which it was noted:

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It cannot be denied that there is a very strong public interest in protecting consumers and encouraging insurance companies to pay claims promptly and fairly. The testimony from the Kansas Insurance Department that it had received 878 consumer complaints in 2004 alleging that insurance companies had failed to pay claims makes it clear that the concerns that prompted the initial legislation in 1893 have not disappeared. On the other hand, it is conceivable that the statutory scheme is in need of updating due to the drastically different nature of how insurance is bundled and sold in 2006. It is in the best interests of all concerned to maintain a balance that affords adequate protection to consumers without unfairly burdening insurance companies.

The Committee recommends that no amendments to these statutes that are so crucial to the protection of Kansas consumers be considered without a more comprehensive review than the Committee was able to do in the time allotted. . . . . The special Committee on the Judiciary received conflicting testimony in this regard. One conferee stated that it knew of no other state with a statute like K.S.A. 40-908 and that most states just have statutes like 40-256 wherein attorney's fees are only awarded if the insurer has been unreasonable in refusing to pay. Another conferee noted that at least one state, Florida, has a statute similar to K.S.A. 40-908 that applies to all policies and is not restricted to those with coverage against loss by particular causes. Such a review of the laws of other states was beyond the scope of this report, but would be very important information for the legislature to have at hand before considering any amendments to K.S.A. 40-256 or 40-908. A comprehensive study of this issue would also need to include consideration of whether insureds in other states are able to bring causes of action against insurance companies based on bad faith, a tort which is not recognized in Kansas at this time.

A predecessor statute to K.S.A. 40-908 was enacted in 1893. K.S.A. 40-908 was enacted in 1927. As the Advisory Committee noted, the way insurance is packaged and marketed has changed since the statute was enacted . In 1893, insurance was not available for may of the risks and perils

that are commonly insured today. In 1927, the packaging of insurance for different types of risk - fire insurance and liability insurance for example - in a single insurance policy was uncommon. Today, it is commonplace for insurance that covers many different perils and risks to be packaged into a single insurance policy. A business owner's package policy typically provides insurance for loss of property caused by fire and the other perils specified in K.S.A. 40-908, as well as property loss caused by wind, vandalism, sink hole collapse, sprinkler leakage, volcanic action, theft, etc. A business package policy also typically provides liability insurance to the business, including, for example, commercial general liability insurance coverage for bodily injury, property damage, products completed operations risks, and advertizing injury risks.

The evolving changes in the nature of insurance products eventually caused the Supreme Court to address the scope of K.S.A. 40-908. In 1998, the Kansas Supreme Court decided Hamilton v. State Farm Fire & Casualty Co., 263 Kan. 875.

In Hamilton, the Court considered a policyholder's claim under a homeowners insurance policy for damage caused by the collapse of a basement wall. The policy provided coverage for loss caused by fire, tornado, lightning, and hail – and other perils, including, the Court determined, collapse of the basement wall. In reaching its decision that K.S.A. 40-908 applied, and the prevailing party was entitled to his attorneys' fee, notwithstanding the fact the cause of the loss was not one of the specified perils, the Supreme Court said:

> 1. STATUTES – *Construction – Legislative Intent.* . . . When interpreting a statute, the fundamental rule is that the intent of the legislature governs if that intent can be ascertained. When a statute is plain and unambiguous, the court must give effect to the intent of the legislature as expressed, rather than determining what the law should or should not be.
>
> ***
>
> 3. SAME – *Homeowner's Policy – Judgment against Insurance Company – Statutory Allowance of*

> *Attorney Fees – Policy Controls, Not Actual Type of Loss.* The plain language of K.S.A. 40-908 states that it applies to any case in which a judgment is rendered on *any policy* given to insure any property against loss by fire, tornado, lightning, or hail. The policy controls, not the actual type of loss. If the loss is covered by a policy which insures against fire, tornado, lightning, or hail, the statute applies regardless of whether the actual loss occurred by one of those named causes or some other cause covered by the same policy. (Emphasis supplied)

Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 281 Kan. 844 (2006), is the latest case in which the Supreme Court considered K.S.A. 40-908. In that case, the Supreme Court applied the rule set out in Hamilton to a builder's package insurance policy and held that Farm Bureau had wrongfully denied Lee Builders' liability coverage for a lawsuit brought against it by one of its customers. In that case, the Supreme Court affirmed the lower court's award of an attorneys fee to Lee Builders. The National Association of Home Builders was granted leave to file an amicus curiae (friend of the Court) brief' in support of Lee Builders.

While some have criticized the Court's decisions in Hamiltion and Lee Builders as examples of judicial usurpation of legislative prerogative, clearly that is not the case. The Court correctly held that where the language of a statute is not ambiguous, as is the case with K.S.A. 40-908, the Court may not second guess what the legislature intended. The statute is to be enforced according to the clear expression of legislative intent. It is the evolution of insurance marketing and the packaging of a variety of insurance coverages into single policies -- not an activist court -- that has effectively broadened the scope of the application of K.S.A. 40-908. (See also the thoughtful legal analysis set forth in the February 15, 2006, "Report of the Judicial Council Civil Code Advisory Committee on K.S.A. 40-256 and 40-908," a copy of which its attached).

Insurance is a product that is purchased to shift risks to allow the purchaser to avoid calamity. A person buys automobile liability insurance to avoid bankruptcy, anticipating that if he or she causes a serious accident, the funds necessary to provide a defense or pay damages would not otherwise be available. A family buys life insurance to insure that, in the event of the breadwinner's premature death, funds will be available so that the surviving spouse and children can avoid poverty. Health insurance is purchased to avoid the prospect of bankruptcy should the purchaser be so unfortunate as to become seriously ill. The wrongful denial of insurance benefits is not limited to claims involving fires or tornados or lightning or hail. Wrongful denials of insurance benefits occur without regard to the nature of the casualty or loss. An unexpected, wrongful denial of the policyholder's claim is devastating regardless whether the claim is based on health insurance, auto insurance, life insurance, or whatever.

A common theme promoted by insurance advertising is that peace of mind can be purchased by purchasing insurance. Industry advertising conveys a notion that if a tragedy occurs insurance will provide an umbrella to shelter you from the rain of misfortune; good hands will prevent you from falling into hopelessness; like a good neighbor, your insurer will rush to your side at the first sign of calamity, checkbook in hand; and, the foresight to purchase insurance securely grounds your future well-being on a rock. When the insurer wrongfully denies a claim, the peace of mind and sense of security touted as the reason for purchasing insurance becomes illusory.

A wrongful coverage denial almost always comes at a time when the policyholder is already traumatized financially by the casualty that triggered his or her insurance claim. Whatever resources that are left after the casualty must be first directed to mitigating the casualty, *e.g.,* rebuilding the house, replacing the family automobile, paying the medical bills, etc. The typical policyholder rarely has resources left with which to contest a wrongful denial of insurance benefits. Too often, bankruptcy is the only viable alternative. Even when the policyholder has resources to successfully contest a wrongful benefit denial, the cost of that effort may exceed the value of the denied benefits. Without a law like K.S.A. 40-908 that makes it possible for a policyholder to hire an attorney to contest a wrongful benefit denial, the number of wrongful denials would rise exponentially.

To keep consideration of K.S.A. 40-908 in proper perspective, it is critical to keep in mind that the policyholder only recovers an attorney's fee when the denial of benefits is proven to have been wrongful. As a practical matter, in cases where K.S.A. 40-908 applies, attorneys customarily agree to accept as payment in full what ever the court awards. If the policy holder fails to prove that he or she was wrongfully denied benefits, the attorney receives nothing for his or her work and is not reimbursed the money he or she has advanced for litigation expenses. Those expenses may, and often do, exceed $10,000 in cases that go through a trial. Consequently, the attorneys who are willing to accept those cases are limited, as a practical matter, to a small number of lawyers who are experienced in handling those type claims, and who are able and willing to provide and risk their time and the expense money necessary to successfully prosecute the claim. For obvious reasons, the lawyers who take those cases are careful not to take cases that are frivolous or that have little chance of success. In my own experience, I accept approximately one tenth of the insurance benefit denial cases I am presented with. In most cases, I find upon the initial examination of the facts that the denial of benefits was appropriate and decline to become involved.

Contrary to conventional wisdom, K.S.A. 40-908 has not created a crisis that threatens the future availability of insurance products at a reasonable price. In most instances, when an insured casualty occurs, the insuror responds appropriately. Tens of thousands, perhaps hundreds of thousands, of Kansas insurance claims are presented and promptly and fairly paid in due course, without contest every year. K.S.A. 40-908, even if it were amended to include all types of insurance, would come into play in only a tiny percentage of the total claims processed. There is no objective evidence that the sky is falling.

The Advisory Committee pointed out that in many states policyholders faced with wrongful coverage denials can sue their insurors, in tort, for bad faith. In those states, a tort of bad faith lawsuit, in which the policyholder may also recover punitive damages, is a viable alternative to whatever statutory remedy similar to K.S.A. 40-908 may also be in place. In Kansas, there is no such alternative tort remedy. In Kansas, the only remedy available to the policyholder is the statutory remedy. There is no fallback or alternative remedy.

The Advisory Committee did not address the fact that in many states an insurance consumer, faced with a wrongful coverage denial, has alternative

remedies available by virtue of the state's consumer protection act. Examples of states applying consumer protection laws to insurance include Texas, Illinois, Massachusetts, Colorado, Connecticut, Kentucky, and Washington.

In Kansas, K.S.A. 50-624(e) expressly excludes insurance contracts from the definition of a "consumer transaction," and consequently from the regulation of the Kansas Consumer Protection Act. No other industry enjoys a similar blanket exclusion. It is not apparent why insurance is not subject to the KCPA when virtually every other business, profession, and trade is, including, merchants, retailers, hospitals, publishers, physicians, dentists, real estate agents and brokers, banks, automobile dealers, innkeepers, roofers, plumbers, electricians, financial advisors, architects, engineers, home builders, and credit unions. Any tinkering with the statutory scheme that is now in place to address insurance consumers' remedy for a wrongful denial of insurance benefits should start with the removal of the exemption of insurance from the KCPA.

In addition to the lack of alternative remedies available to Kansas insurance consumers, another shortcoming in the present system is that it does not cover all insurance products with equal vigor. Life insurance, for example, is never packaged with fire and casualty risks. K.S.A. 40-908 never applies to disputes arising out of health insurance coverages, cancer insurance or accidental death policies. Health insurance, cancer insurance and accidental death policies are fruitful sources of wrongful coverage denials. Because K.S.A. 40-908 does not apply to accidental death insurance, we were recently unable to accept a case in which the decedent, while intoxicated, fell in the restroom and, in the process lodged her head between the toilet bowl and the wall. The cause of her death was "positional asphyxia." The accidental death insuror refused to pay the claim, contending her death was not accidental. According to the accidental death insuror the cause of death was suicide caused by intentional alcohol consumption.

In the course of considering whether K.S.A. 40-908 should apply to all insurance, consider this hypothetical: A widow's husband died during a house fire while the widow was away. An imaginative accidental death adjuster, with no substantial supporting evidence, alleges that the decedent intentionally set fire to the house in the course of committing suicide, and refuses to pay the accidental death benefit. Feeding off the accidental death adjuster's fantasy, the fire insurance adjuster contends the deceased intentionally set fire to the

house, and the fire insurer also refuses to pay.[1] Is there any apparent reason why the widow, wrongfully denied the benefits of her husband's accidental death policy, should receive less legal protection in that dispute than in her dispute with the fire insurance company arising out of its wrongful refusal to pay the proceeds of the fire insurance policy?

Some states, Florida for example, have adopted modernized statutory regulation schemes similar to K.S.A. 40-908 that are less restrictive than K.S.A. 40-908 and apply across the board to all insurance products. The Florida statute states:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

Fla. Stat. Ann. 627.428.

If the legislature, in its wisdom, amends K.S.A. 40-908, it should amend it to reflect a regulatory scheme similar to Florida's that applies to all insurance policies across the board to give insurance consumers, including the consumers of life, cancer, accidental death and health insurance products, a workable, universal remedy. The legislature should also amend the KCPA to remove the blanket exclusion for insurance contracts.

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[1] For an example of a similar denial of accidental death benefits, see Evans v. Provident Life & Accident Ins. Co., 15 Kan. App. 2d 97, 803 P.2d 1033 (1990) aff'd in part, rev'd in part, 249 Kan. 248, 815 P.2d 550 (1991).

Respectfully submitted,

GRAYBILL & HAZLEWOOD L.L.C.

Jacob S. Graybill

Enclosure

JSG:ljc

TO: Members of the House Committee on Judiciary

FROM: Janice Meliza

DATE: February 13, 2007

RE: K.S.A. 40-908 and H.B. 2189

Dear Representatives:

My name is Janice Meliza. I live in Wichita, Kansas, where I am employed as an accountant. Please consider this my written testimony in opposition to H.B. 2189, in its present form.

On April 15, 2006 I purchased a new, 2006 Chevrolet Cobalt from Lubbers Chevrolet for approximately $18,000. On May 25, 2006 (when the car was only 40 days old), it was involved in a collision. My son had taken a date to the Warren theater, and someone drove into the side of my car in the parking lot. My son's date was pinned in the car, and she had to be extracted by the Wichita Fire Department. Fortunately, no one involved was seriously injured. However, my new car was severely damaged. The total damages were more than $11,000.

I had full coverage insurance on my car with Farm Bureau. Over my objection, it made an election to have my car repaired, and it instructed a body shop in Cheney, Kansas, to proceed with certain repairs. It did not share its estimate with me.

When I did speak with Farm Bureau's adjuster at the body shop, he was belligerent, and he even cursed at me. When he did that, the body shop owner became uncomfortable and walked away. I began to cry. During those discussions, Farm Bureau's adjuster told me that Farm Bureau would not pay to repair certain damage to the interior of my car (*e.g.*, scratches and gouges in the hard plastic and headliner), and I should look to the Wichita Fire Department for reimbursement for those repairs, because the firefighters caused the damage when they extracted the passenger.

When the body shop completed the repairs it was capable of making, my car had not been restored to its pre-collision condition. There remained additional, substantial damage that would need to be addressed by the franchise dealer or other facilities. For example, the automatic shift control in the floor console was leaning, and the dash did not fit. The body shop owner said he could not repair this type of damage.

Farm Bureau steadfastly refused to pay the body shop for the work performed on my car at its instruction unless and until I signed a broad policy holder's release that would, by its terms, release Farm Bureau from any further responsibility to complete the repairs or pay for the remaining damage to my car, even though Farm Bureau acknowledged the car needed additional work.

Farm Bureau's refusal to pay for the repairs it authorized caused the body shop owner to assert a mechanic's lien on my car, and he refused to deliver the car to me or to Farm Bureau until his repair bill was paid. Caught in a "catch 22," I sought legal advice and was directed to an experienced, prominent, Wichita trial attorney who assessed my situation and informed me that to unravel the

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difficult situation Farm Bureau created, I would have to file a lawsuit and hire expensive expert witnesses to testify on my behalf. He told me I would have to pay for his services at a rate of $220 per hour, and he required an initial $2,000.00 fee deposit. It was not possible for me to meet these requirements, so I sought help elsewhere.

Eventually, an attorney acquaintance of mine referred me to Jacob Graybill and Russell Hazlewood, of Graybill & Hazlewood L.L.C. Mr. Graybill and Mr. Hazlewood advised me that Farm Bureau had mistreated me and breached its insurance contract. They said Farm Bureau's handling of my claim involved unfair claim handling practices prohibited by Kansas regulations. They told me there was a statute, K.S.A. 40-908, that would allow me to recover my attorneys fees and expenses from Farm Bureau if I prevailed in a lawsuit. Consequently, they were able take my case under an arrangement I could afford.

Graybill and Hazlewood filed a lawsuit for me, and a they made a complaint with the Kansas Insurance Department, in September of 2006. A little more than a month later, Farm Bureau offered to confess a judgment to me. (By that time, I had been without a vehicle for more than five months). Farm Bureau agreed to total my car, which it ultimately purchased from me for its pre-collision value, and pay me interest from the date of the accident. It also agreed to pay my attorneys fees and expenses.

In many instances, and certainly in my case, a factor that motivates a consumer to purchase collision insurance is the realization that if his or her car is destroyed, the bank would still have to be paid, and it would be difficult or impossible to acquire replacement transportation. When a person purchases collision insurance, he or she expects that the insurance carrier will settle a claim promptly and get the insured into another vehicle as soon as is reasonably possible. That did not happen in my case.

If K.S.A. 40-908 were amended as proposed by H.B. 2189, it would have been of no help to me, and I would have been at Farm Bureau's mercy. Even with the statute, it was difficult for me to find attorneys who would help me on a contingency basis. I urge you to make no change that would limit the scope of K.S.A. 40-908. If the statute is amended, it should be expanded to encompass all insurance coverages.

Respectfully submitted,

Janice Meliza

Janice Meliza

TO: Members of the House Committee on Judiciary

FROM: Jackson L. Hulsey

DATE: February 13, 2007

RE: K.S.A. 40-908 and H.B. 2189

My name is Jackson L. Hulsey. I am an aeronautical engineer by profession. I retired from Raytheon Aircraft Company, in Wichita, in November of 2001, as the company's Vice President of Aircraft Development.

In December of 2004, I purchased myself a new Lexus GS 300 from Scholfield Lexus. In June of 2005 (on Father's day), my new Lexus had approximately 6,500 miles on the odometer. As I was driving home, I sat, stopped, waiting to turn in my neighborhood when a car coming from the opposite direction entered my lane of traffic and drove into the front of my vehicle and down its left side. The collision caused significant damage to my new car: the left front wheel and tire, left steering rod, hood, left front fender, left front door, left rear door, and left rear fender were destroyed, and the A-pillar, trunk, and rear bumper were significantly damaged. The total damage to my new car was in excess of $22,000.

I presented a claim for my loss to Chubb, the liability insurance carrier for the woman who hit me, and I was blown off. I found the adjuster very difficult to work with. I told him I wanted Chubb to total the car. He told me, "Mr. Hulsey, if you are not going to get the car fixed, we have nothing further to say to each other." Accordingly, I decided to present a claim to my own collision insurance carrier, State Farm.

State Farm had the car repaired, over my objection. When the repairs were completed, I was informed by the body shop that my car had sustained a significant loss of value as a result of the

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accident. To further confirm that, I took the car back to the Lexus dealer to determine the trade-in value on a similar vehicle that had not been wrecked. Even though the car had been repaired to the industry standard, the Lexus dealer informed me that my car had lost approximately $15,000 in value because of its damage history.

I asked State Farm to pay me my loss of value, because it had refused to total my car. State Farm told me that my policy did not cover loss of value, and loss of value is not recoverable in Kansas. It also told me that it would not pay for $50 of the repairs, because my car was "better" than it was before the wreck in that it had one "new" (mismatched) tire. (As stated above, the old tire had 6,500 miles on it).

I consulted with attorney Jacob S. Graybill to ask him whether what State Farm told me was true. Mr. Graybill advised me that loss of value is clearly recoverable under Kansas law, and I was entitled to loss of value under the collision coverage of my State Farm insurance policy. Mr. Graybill said State Farm knew that what it was telling me was wrong, and it knew it owed me my loss of value. He said the "betterment" deduction for my tire was hogwash. He told me there was a statute, K.S.A. 40-908, that would require State Farm to reimburse my legal expenses if I prevailed in a lawsuit against the insurance company.

I thanked Mr. Graybill for his advice, and I went back to State Farm on my own. I did not wish to file a lawsuit. Now armed with accurate information, I was convinced that I could resolve the matter myself if only I could talk to someone higher up in the company. I soon learned I was wrong. After several discussions with State Farm's regional claims manager, I concluded that State Farm would never pay me anything for my loss of value unless I filed a lawsuit.

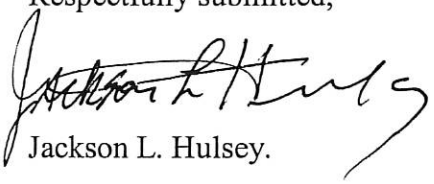
Mr. Graybill filed suit against State Farm for me in December of 2005. State Farm hired Craig West, of Foulston Siefkin, to defend the suit. Over the next several months, Mr. Graybill and Mr. West exchanged literally hundreds of pages of pleadings and briefs. I was astonished to see how much paperwork my claim had generated. I could not understand why State Farm was fighting so hard. It did not take long for Mr. Graybill's fees to eclipse my loss of value claim.

In April of 2006, Mr. West approached Mr. Graybill after a court hearing and indicated that State Farm was interested in settling the lawsuit. Eventually, State Farm agreed to buy my car for its retail value at the time of the accident, and it paid my legal expenses.

If K.S.A. 40-908 had not been in place, State Farm's obstinance would have been rewarded. Given the cost of litigation, it would not have been economically practical for me to prosecute my lawsuit, and I would have been forced to eat my $15,000 loss.

If K.S.A. 40-908 was limited in the manner proposed by H.B. 2189, it would have been of no help to me. I urge the Committee to make no change that would have the effect of limiting the scope of K.S.A. 40-908. If any change should be made, the statute should be expanded.

Respectfully submitted,



Jackson L. Hulsey.

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Representative Mike O'Neal, Chairman
Members of the House Judiciary Committee

From: Callie Denton Hartle
Kansas Trial Lawyers Association

Date: February 13, 2007

Re: HB 2189 Amending KSA 40-908

I appear today on behalf of the Kansas Trial Lawyers Association, a statewide nonprofit organization of attorneys who serve Kansans who are seeking justice. I appreciate the opportunity to provide testimony in opposition to HB 2189, relating to consumer protection and amending KSA 40-908, which permits the court to award attorneys' fees in certain circumstances.

Both K.S.A. 40-908 is a time-honored law which was passed by the Legislature in 1927. K.S.A. 40-908 permits the plaintiff to recover a reasonable sum for their attorney's fee when a judgment is rendered against any insurance company and the dispute centers on any policy to insure property against fire, tornado, lightening or hail. Attorney fees may not be awarded when a tender is made by the defendant insurance company before the commencement of the action in which judgment is rendered and the amount recovered is not in excess of such tender.

KTLA supports the preservation of both K.S.A. 40-908 is important because it has the effect of regulating insurance companies. Kansas insurance consumers—businesses and individuals--are not on equal footing with an insurance company, have little or no bargaining power in negotiating a contract of insurance, and have little recourse to pursue insurance companies for bad faith insurance practices.

In other states, insurance consumers have a cause of action (known as the tort of bad faith or first party bad faith) that allows them to pursue insurers that consciously act in a manner inconsistent with fair dealing or because of some dishonest motive. Because Kansas does not have such a first party bad faith cause of action, the threat of attorney fees in K.S.A. 40-908 is one of the only ways for ordinary working Kansans or small businesses to encourage insurers to honor their obligations.

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Terry Humphrey, Executive Director

Fire Station No. 2 • 719 SW Van Buren Street, Suite 100 • Topeka, Ks 66603-3715 •

E-Mail: triallaw @ ink.org

It is critical for the Legislature to foster a strong regulatory structure for insurance companies because insurance consumers have few avenues of recourse against their insurance companies. Mishandling of claims by insurance companies is currently the top complaint of Kansas insurance consumers. In the 2004 Consumer Complaint Ratio Report issued by the Kansas Insurance Department, 63% of the total written consumer complaints against a Kansas insurance company dealt with problems relating to claims handling. Such complaints include an unsatisfactory claim settlement or offer (46%); denial of claim (27%); and claim delays (21%).

K.S.A. 40-908 encourages insurers to fairly and properly pay claims. In *Hamilton v. State Farm Fire & Casualty Company,* 263 Kan. 875, 953 P.2d 1027 (1998), the Kansas Supreme Court discussed K.S.A. 40-908:

> 'In *Light v. St. Paul Fire & Marine Ins. Co.,* 132 Kan.486, 490, 296 Pac.701 (1931), we stated that the statute at issue is a public interest statute, prompted by the "pertinacious practices of insurance companies," that penalizes insurance companies for not making prompt payment of claims which are adjudged to have been meritorious. Later, in *Lattner v. Federal Union Ins. Co.,* 160 Kan. 472, 480-81, 163 P.2d 389 (1945), we stated that the purpose of K.S.A. 40-908 is not to penalize an insurance company for making what it deems to be a bona fide defense to an action to recover on an insurance policy, but to permit the allowance of a fair and reasonable compensation to the assured's attorney in the event, after having been compelled to sue on the policy, he or she is successful in that effort.'

The provisions of K.S.A. 40-908 that allow the plaintiff to recover attorney fees do not apply if the plaintiff recovers less than the tender made to them by their insurance company. If the attorney fees provisions in K.S.A. 40-908 were not in place, insurance companies could make ridiculously low offers to settle instead of paying the full amount due under the terms of the insurance policy. Working Kansans and businesses would be forced to take nothing or accept an unfair settlement offer. Under K.S.A. 40-908, Kansans have a tool to fight bad faith insurance practices and unfair offers to settle insurance claims.

K.S.A. 40-908 allows a plaintiff policyholder to recover attorney fees when they win their case. However, the question has been asked, "how do we level the playing field for defendant insurance companies?" As a practical matter, the insurance company already "holds all the cards"—they write the insurance contract, interpret it, and have the final say on whether they will pay claims based on their interpretation. Insurance companies have the financial ability to hold out during a lengthy dispute that a policy holder, having suffered an unanticipated loss, does not have.

Insurance consumers need the protection of K.S.A. 40-908 because the playing field is already tilted in favor of insurance companies. We distinguish the acts of a policy holder that are fraudulent and criminal because the Kansas Insurance Department Anti-Fraud

division already has the power to investigate and prosecute such acts. But dismantling the regulatory mechanism in K.S.A. 40-908 would serve to favor the entities that already have more resources and more control.

KTLA members believe that the attorney fees provisions in K.S.A. 40-908 serve an important regulatory and consumer protection function. K.S.A. 40-908 does not affect insurers that act in good faith. Rather, it addresses only those insurance companies that fail to honor the terms of their policies. It also furthers the public policy goal of leveling the playing field between ordinary Kansans and the multi-billion dollar insurance industry and ensuring that the system works fairly for everyone.

On behalf of the members of the Kansas Trial Lawyers Association and their clients, I respectfully request that the Committee oppose HB 2189.