Approved: April 27, 2007
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:35 A.M. on March 21, 2007, in Room 123-S of the Capitol.

All members were present except:
Dwayne Umbarger arrived, 9:45 A.M.

Committee staff present:
Athena Anadaya, Kansas Legislative Research Department
Bruce Kinzie, Office of Revisor of Statutes
Nobuko Folmsbee, Office of Revisor of Statutes
Karen Clowers, Committee Assistant

Conferees appearing before the committee:
Representative Mike O'Neal
Jerry Slaughter, Executive Director, Kansas Medical Society
Tom Bell, President, Kansas Hospital Association
Paul Morrison, Kansas Attorney General
Margaret Farley, Kansas Advocates for Better Care
Maren Turner, State Director, AARP
Leland Demspey, Kansas Trial Lawyers Association
Michael Hodges, Attorney
Russ Hazelwood, Attorney
Lori Robles
Terry Humphrey, Kansas Trial Lawyers Association
Mary Cockburn, Citizens Commission on Human Rights
Bill McKean

Others attending:
See attached list.

The Chairman opened the hearing on **HB 2530–The Kansas consumer protection act does not apply to professional services by health care providers**.

Representative Mike O'Neal testified as the sponsor of the bill which is a response to the Kansas Supreme Court opinion in the case of *Williamson v. Amrani, M.D.* handed down in February 2007. The Court ruled that the Kansas Consumer Protection Act (KCPA) can apply to an action for medical negligence or malpractice. House amendments make it clear that the KCPA should not and does not apply to professional services. This bill restores Kansas law to where it was prior to the *Williamson v. Amrani, M.D.* decision and consistent with prior court decisions and consistent with the public policy of the State (Attachment 1).

Jerry Slaughter spoke in support, indicating that without this legislation there would be a dramatic increase in allegations of KCPA violations for conduct which is already covered, and more appropriately litigated, under the traditional medical malpractice tort system. The KCPA offers nothing additional in the way of protection that is not already there and will affect the physician-patient relationship, be duplicative, stimulate more litigation, drive up medical malpractice insurance premiums, and increase health care for all Kansans (Attachment 2).

Thomas Bell appeared in favor, stating Kansas already has established regulations, statutes and remedies for malpractice claims that distinguish services provided by medical health professional from supplier-consumer transactions. Kansas law should avoid reclassifying what are essentially medical malpractice claims as some other form of action. **HB 2530** underscores the importance of preventing overlap between medical-malpractice claims and consumer-protection claims (Attachment 3).

Attorney General Paul Morrison testified in opposition, providing his opinion that all physicians and health care providers are subject to the KCPA because they fall within the definition of "supplier" found in K.S.A. 50-624(j). If **HB 2530** is passed, it would eliminate important protections currently in place for Kansans. General Morrison stated concern that the Board of Healing Arts cannot provide the legal protections that his

office provides to consumers. General Morrison also voiced concern that **HB 2530** does not specifically define who qualifies as a "health care provider" (Attachment 4).

Margaret Farley spoke as an opponent, indicating that the only way consumers can seek penalties against deceptive health care providers is through the KCPA. Ms. Farley stated concern that several facilities will no longer be accountable under KCPA including nursing homes, assisted living facilities, boarding care facilities, adult care facilities, and home health care agencies (Attachment 5).

Maren Turner spoke in opposition, stating that consumer protection laws allow an individual to bring suit in order to remedy violations of personal rights established by law. If the law does not provide a private right of action, the individual consumers must depend on federal or state officials and regulatory agencies for enforcement. In these cases the efforts and resources expended for enforcement may depend on the political climate, leaving the individual uncertain about obtaining remedies for violations of rights (Attachment 6).

Leland Dempsey appeared in opposition, relating that health care is a business in the United States. Therefore, health care providers should be held responsible for their misrepresentations to Kansas consumers. Mr. Dempsey voiced concern that **HB 2530** would provide special treatment to health care providers and absolve them from liability (Attachment 7).

Michael Hodges spoke as an opponent, stating that the KCPA is meant to provide a remedy to people who have been misled or mistreated by purveyors of services and merchandise in Kansas in the form of awarding fees and penalties. Mr. Hodges stressed that KCPA does not apply to ordinary malpractice cases. Mr. Hodges also stated concern that the term "health care provider" is not properly defined in the bill (Attachment 8).

Russ Hazelwood appeared in opposition, stating his belief that **HB 2530** is bad for Kansas consumers and bad public policy. The exemption of all "health care providers" is dangerous and unnecessary. The KCPA serves an important purpose protecting Kansas consumers against deceptive and unconscionable acts and practices and personal accountability is not a concept that should be reserved for those outside of the health care industry (Attachment 9).

Lori Robles spoke in opposition, relating her personal experience as a victim of deception by a physician and the resulting litigation (Attachment 10).

Terry Humphrey spoke in opposition, voicing concern that **HB 2530** will weaken the Kansas Consumer Protection Act and will set a precedent for other professionals or industries to request similar exemptions. There is no consumer benefit to distinguishing health care transactions from other consumer transactions. Ms. Humphrey indicated the term "health care provider" will encompass profit making entities that should be subject to the requirements of fair dealing found in the KCPA (Attachment 11).

Mary Cockburn, opponent, provided information on several cases of deception and misrepresentation by mental health providers. Ms. Cockburn stated every Kansan deserves to have every possible legal remedy available in the event they are victimized by psychiatric/mental health providers (Attachment 12).

Bill McKean appeared in opposition, stating the citizens of Kansas deserve consumer protection. Kansans need the ability to demand accountability and have recourse to the courts (Attachment 13).

Written testimony in support of **HB 2530** was submitted by:

- Gary Reser (Attachment 14)
- Ronald R. Hein, Mental Health Credentialing Coalition (Attachment 15)
- Ronald R. Hein, Kansas Society of Radiologic Technologists (Attachment 16)
- Ronald R. Hein, Kansas Pharmacy Coalition (Attachment 17)
- Charles L. Wheelan, Executive Director, Kansas Association of Osteopathic Medicine (Attachment 18)
- Gary Robbins, Kansas Optometric Association (Attachment 19)
- Kevin J. Robertson, Executive Director, Kansas Association of Osteopathic Medicine (Attachment 20)
- Mark Brady, Kansas Society of Anesthesiologist (Attachment 21)
- Robert Blanken, President, Kansas Academy of Physician Assistants (Attachment 22)

MINUTES OF THE Senate Judiciary Committee at 9:35 A.M. on March 21, 2007, in Room 123-S of the Capitol.

Written testimony in opposition to **HB 2530** was submitted by:

Steve Dickerson, Attorney (Attachment 23)
Marian Bonura (Attachment 24)
Dennis Essen (Attachment 25)
John Kuhn (Attachment 26)
Teresa Culp (Attachment 27)
Theresa Allamn (Attachment 28)
Carla Thomas (Attachment 29)
Brenda Kuhn (Attachment 30)
William Kelly (Attachment 31)
Shannon Jones, Statewide Independent Living of Kansas (Attachment 32)
Don Dew (Attachment 33)
Jennifer Schwartz, Kansas Association for Independent Living (Attachment 34)

There being no further conferees, the hearing on **HB 2530** was closed.

The Chairman called for final action on **SB 32–Health care; medical assistance repayment; discretionary trusts**. Chairman Vratil reviewed the bill and distributed a balloon amendment based on testimony heard March 13 (Attachment 35).

Senator Bruce moved, Senator Umbarger seconded to withdraw the committee recommendation passed February 9. Motion carried.

Senator Journey moved, Senator Bruce seconded, to adopt the proposed balloon amendment. Motion carried.

Senator Journey moved, Senator Bruce seconded, to recommend **SB 32**, as amended, favorably for passage. Motion carried.

The meeting adjourned at 10:29 A.M. The next scheduled meeting is March 22, 2007.

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.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3-21-07

NAME	REPRESENTING
JIM CLARK	KBA
Trudy Aron	Am Inst of Architects
Chad Giles	KTLA
Katie Sneeringer	Kearney
Lindsey Douglas	Hein Law Firm
E Robles	—
Gary Reser	Ks. Veterinary Med. Assn.
KEVIN ROBERTSON	KS DENTAL ASSN
Gary Robbins	Ks Optometric assn
BOB HAYES	HCSF
Rita Noll	HCSF
Gary Zook	HCSF
Mary Cockburn	CCHR
Bert Marvin	AG
D Gibb	KSAC
Bill McKean	opponent
Wendy Bergquist	SRS
Janice Knox	—

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3-21-07

NAME	REPRESENTING
Craig Johnson	
Cynthia Smith	SCL Health System
Doug Smith	Pinegar, Smith & Associates
Callie Denton Hartle	KTLA
Russ Hazlewood	opponent, Graybill & Hazlewood LLC
Kd Mudy	LGN
Mike Shields	KHI News
Dustin Hardison	Senate Minority
Terri Bergen	SRS
Kathy Wood	citizen
Rita Mora	citizen
JPSMALL	KOCH INDUSTRIES

STATE OF KANSAS
HOUSE OF REPRESENTATIVES

MICHAEL R. (MIKE) O'NEAL

104TH DISTRICT
HUTCHINSON/NORTHEAST RENO COUNTY

LEGISLATIVE HOTLINE
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KANSAS JUDICIAL COUNCIL
KANSAS COMMISSION ON JUDICIAL PERFORMANCE

Testimony on H.B. 2530
Medical Malpractice Exemption from KCPA
Rep. Mike O'Neal
March 21, 2007

Chairman Vratil and members of the Committee: H.B. 2530 was introduced in the House on Feb. 15, 2007, six days after the Kansas Supreme Court handed down its opinion in the case of _Williamson v. Amrani, M.D._. In *Williamson*, the Court ruled, for the first time in the nearly 34 year history of the Kansas Consumer Protection Act, that the act also applies to an action for medical negligence/malpractice. Failing to produce an expert on the claims of medical negligence, a requirement in a medical malpractice action in Kansas in virtually all circumstances, the Plaintiff's attorney sought to bring a KCPA claim for an alleged misrepresentation of material facts concerning the subject surgerical procedure. A District Court judge dismissed the KCPA claim and the case was appealed.

On the House side, the attorney who represented Williamson testified in opposition to the bill, which would return the law to the way it's been since the passage of the Health Care Provider law. The law established a mechanism for handling medical malpractice claims, including the requirement of mandatory professional liability insurance. Plaintiff's counsel admitted that the "KCPA does not apply to ordinary medical malpractice cases." He also agreed that in the 34 years the KCPA has been in existence the Act has been applied to the medical profession in only a handful of cases and "even the handful of cases involve the business aspect of practicing medicine which we understand to be not a part of the proposed bill."

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3-21-07
Attachment 1

House amendments to the bill make it clear that the KCPA should not and does not apply to professional services, i.e., claims arising out of the rendering or failure to render professional services. The KCPA would continue to apply to the purely business aspects of medicine, i.e., billing, media advertising or other business services.

Resist the suggestion that the bill should be amended to allow KCPA claims where there is a claimed willful misrepresentation. This "Trojan Horse" amendment is a less than subtle attempt to circumvent the intent of the bill. If added to the bill, all Plaintiffs' attorneys would need to do to circumvent the provisions of the bill would be to allege a willful misrepresentation. The mere allegation would trigger the cost of having to defend a KCPA claim that should never have been brought. There is no coverage under a health care provider's professional liability policy for KCPA claims and the mere allegation, together with the related costs of defending such a claim, will inevitably raise the cost of insurance and the costs of health care in the state, just as predicted by Justice Davis in his comprehensive dissenting opinion in *Williamson.*

On the House side, opponents offered several "scenarios" in an effort to sidetrack the bill. In every case the fact situation was either already covered under current medical practice law or would be covered as a business practice under the KCPA. H.B. 2530 **does not** protect health care providers from appropriate actions for medical negligence or business-related KCPA claims.

While the Office of Attorney General opposed the bill on the House side, Chief Counsel's written testimony contained some significant misinformation. The A.G.'s Chief counsel stated that: "Currently, the Kansas Board of Healing Arts regulates a subset of health care providers. The Board is only responsible for licensing functions. **The Board has no authority to investigate or prosecute deceptive or unconscionable acts."** Nothing could be further from the truth. See K.S.A. 65-2836 and K.S.A. 65-2837 of the Healing Arts Act for the medical equivalent of a consumer protection act for patients. See also, K.S.A. 65-2839a, which makes provision for the investigation and prosecution of complaints under the act. The investigative role is performed by disciplinary counsel for the Board and pursuant to K.S.A. 65-2866, upon request of the Board, the Attorney General shall prosecute claims. Similar regulatory duties are

imposed by law on the licensing agencies of other health care providers and health care facilities.

The Kansas Supreme Court had it right in its 1996 decision in Bonin v. Vannaman, 261 Kan. 199. There Plaintiff brought a claim of malpractice and fraud against a physician. In ruling that Plaintiff could pursue a claim for malpractice but not fraud, the Court, quoting from one of its earlier decisions, stated:

> *"As malpractice covers every way in which a patient is injured through the dereliction of a doctor in his professional capacity, the approach, depending on the facts, can be through any of several familiar forms of action.* ***But no matter what the approach, it remains an action for malpractice, not one for deceit, contract or anything else.*** *A well recognized ground for recovery is where a physician represents that he has the skill to perform a certain operation when in fact he does not. This form of action requires the same elements of proof that an action in fraud requires, yet it could not be successfully disputed that as between the two it is an action for malpractice."*
> (Emphasis added)

H.B. 2530 does nothing more than restore our Kansas law to where it was prior to Feb. 9 of this year and for the 34 years before that, consistent with prior court decisions and interpretations and consistent with the public policy of the State. It is significant that our current Court found the arguments in favor of the exemption from the KCPA persuasive and invited the Legislature to make the public policy clear. H.B. 2530 does that.

Thank you for your time. I will be happy to answer any questions.

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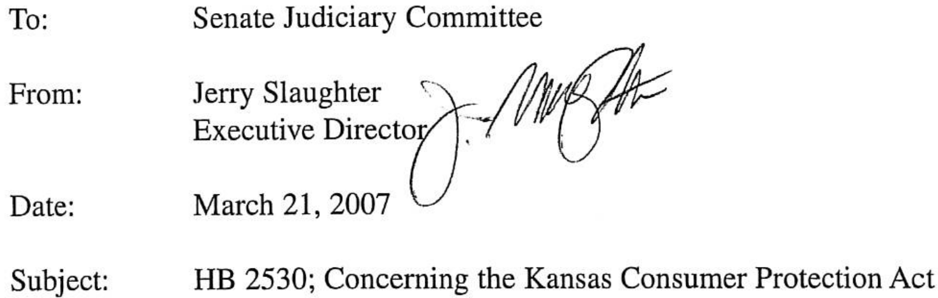
To: Senate Judiciary Committee

From: Jerry Slaughter
Executive Director



Date: March 21, 2007

Subject: HB 2530; Concerning the Kansas Consumer Protection Act

The Kansas Medical Society appreciates the opportunity to appear today in support of HB 2530, which amends the Kansas Consumer Protection Act (KCPA), to exempt certain professional services provided by physicians and other health care providers from the application of the KCPA. The bill was passed by the House of Representatives by a vote of 109-14 last week.

The opponents of the bill will tell you that if this passes, physicians and health care providers will not be held accountable for deceptive practices. Nothing could be further from the truth. There already exists a detailed body of tort law which governs a patient's ability to recover damages for acts of medical malpractice, which is the appropriate means to resolve disputes over a physician's legal duties owed the patient, their competence, or the care and treatment of patients. Claims over deceptive billing, advertising or business practices will continue to be handled under the consumer protection act, just as they are today.

Without this legislation, we would see a dramatic increase in allegations of KCPA violations for conduct which is already covered, and more appropriately litigated, under the traditional medical malpractice tort system. The result would be increased and duplicative litigation, increased defense costs, increased medical malpractice insurance premiums, and, ultimately, an increase in the cost of medical care.

It is important to note that HB 2530 is narrowly drafted to only exempt "professional services" performed by physicians or other licensed health care providers. It is truly a limited exception, in that it does not over-reach by covering all of the services or transactions with patients that physicians could provide. HB 2530 limits the exclusion to "*professional services ... for which such physician or health care provider is licensed or regulated by the State of Kansas*." "Professional services" is then defined to differentiate between the care and treatment of patients, and purely business-type services.

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Attachment 2

In other words, the exception contained in this bill for physicians would only apply to those professional services that constitute the practice of medicine – those services for which the physician must be licensed by the state of Kansas. It would not prohibit a KCPA claim for services related to fraudulent billing, for example, or other services which are not clearly related to the practice of medicine and surgery.

This legislation was requested in response to a recent decision (February 9, 2007) of the Kansas Supreme Court in *Williamson v. Amrani*. This was a case filed against an orthopedic surgeon relating to back surgery to relieve pain from a work-related injury that occurred almost fourteen years prior to the surgery. The case was originally filed as both a medical malpractice action and a KCPA action. Because the plaintiff failed to obtain an expert to testify that Dr. Amrani deviated from the standard of care, either as it related to the surgery itself, or as it related to the appropriateness of the informed consent document she signed prior to surgery, the medical malpractice action was dropped.

The plaintiff proceeded, however, with the KCPA claim, contending that Dr. Amrani violated the act at KSA 50-626 and 627, committing deceptive and unconscionable acts and practices, by misleading her about the benefits of the procedure, and also willfully failing to disclose material facts about the success rate of the proposed surgery. It is instructive to note that prior to surgery the plaintiff signed an informed consent document which contained the following language:

- *The nature of my ailment, the nature and purpose of the proposed procedure, possible alternative procedures, risks of unfortunate results, of possible complications, of unforeseen physical conditions within the body and the possibility of success have been explained to me.*

- *I am aware that the practice of medicine and surgery is not an exact science and I acknowledge that no guarantees have been made to me as to the results that may be obtained.*

This case is a good example of what we could expect to see in virtually all future medical malpractice cases involving informed consent if this legislation is not passed. This was an experienced spine physician who disclosed the known risks, discussed them with the patient, made no guarantees about outcomes, and obtained a signed consent form prior to surgery. Unfortunately, the outcome of the surgery did not produce the desired results, but there is no evidence the physician failed to meet the standard of care. In other words, the physician did what was expected of him in the care of this patient, and when the underlying medical malpractice case was dropped, the patient tried to press the claim under the consumer protection act. The truth of the matter is that - in this or any other case where the physician did not meet their informed consent disclosure obligations - if the physician failed to disclose material facts or misled the patient, it would be a classic informed consent case that would be tried as a medical malpractice action, and the patient wouldn't need the consumer protection act for a remedy.

Notwithstanding all that, the Court found that a physician providing care and treatment to a patient is subject to the provisions of the KCPA, specifically KSA 50-626, which relates to deceptive acts and practices; and KSA 50-627, which relates to unconscionable acts and practices. The essence of the Court's opinion turns on its finding that the physician-patient relationship is subject to the KCPA because the legislature *did not specifically exempt* them when the law was enacted in 1973. The Court observed the following:

"The plain language of the KCPA is broad enough to encompass the providing of medical care and treatment services within the physician-patient relationship"; and *"Nothing in the KCPA explicitly excludes physicians or other professionals from the scope of its coverage";* and finally, *"…the statute applies broadly to services provided by a supplier of services to a consumer. This language is plain and unambiguous. Hence, we must give effect to the intention of the legislature as expressed. We see merit to many if not most of the policy arguments discussed in the cases from other jurisdictions. However, it is not our role to determine public policies; that is the role of the legislature."* (emphasis added)

We have never believed that the physician-patient relationship, and the professional medical services of physicians, were either intended to be included, or were a comfortable fit, within the traditional "supplier – consumer" structure of our consumer protection act. Disputes over the provision of physicians' professional services have always been adjudicated as medical malpractice claims – actions in tort. In fact, this legislature, over a number of years, has enacted a carefully and thoughtfully constructed medical malpractice structure that balances certain tort reforms with heightened reporting, accountability, standards of conduct, peer review, and mandatory liability insurance. Our belief is that certain plaintiffs are attempting to recast medical malpractice claims as consumer protection claims in order to circumvent existing tort reforms, and increase recoveries. Be that as it may, the Court has clearly opined that the KCPA does apply to the practice of medicine and surgery, as the law is currently written.

HB 2530 would make it clear that those professional services for which physicians and other health care providers are licensed are exempt from the application of the KCPA. We believe such services should be exempt from the application of the KCPA for the following reasons:

An adequate remedy already exists in common law actions for negligence and other torts. Cases relating to the actual competence of a physician, including what a physician should tell a patient prior to treatment, are questions of competence in the area of informed consent, not a matter of trade or business. Such questions of competence should be addressed through traditional medical malpractice and tort actions, not the KCPA.

KSA 40-3401 *et seq.*, provides a comprehensive structure relating to the professional liability of physicians and other health care providers. Physicians who wish to practice medicine in our state are mandated to carry professional liability insurance. The legislature further established the Health Care Stabilization Fund to assure that individuals injured through a physician's or other health care provider's negligence will be compensated.

Extending the KCPA to matters involving the competence of physicians and the care and treatment rendered to patients, renders numerous legislative enactments and a well-developed body of law concerning medical malpractice (caps on noneconomic damages, vicarious liability, statutes of limitations, comparative negligence, etc.) obsolete. Allowing patients to assert a KCPA claim creates an exception to tort reforms the Kansas legislature has carefully enacted over the years to balance the rights of individuals with the public's need to have access to quality health care services.

In essence, allowing what amounts to a duplicate cause of action for medical negligence under the KCPA undermines these policy goals. There is no guarantee that actions brought under the KCPA will be covered by a physician's medical malpractice insurance policy. Absent exclusion of physicians' professional services from the KCPA, there will be an increase in lawsuits brought by patients against their physicians, particularly since the KCPA does not require that "intent to defraud" be proven in order to find liability. Therefore, patients will be allowed to bring a cause of action and recover against a physician despite the fact the physician had no intent to defraud the patient. Adding a KCPA claim to a medical malpractice claim creates a wedge between the physician and his/her insurer, because of the potential personal exposure to uninsurable damages. This will encourage physicians to press their insurers for settlements, which will drive insurance costs higher. We can expect that almost every claim for medical malpractice will be transformed into a KCPA claim, which will result in increased litigation, increased costs of defending KCPA actions by physicians and health care providers, increased insurance expenses, and, ultimately, an increase in the cost of medical care. What public purpose is served by this outcome?

An extensive regulatory system exists to protect patients of physicians and other health care providers. The clear public policy behind CPAs is that they were meant to protect consumers in circumstances where the safety of products, services or consumer transactions were not already closely monitored and regulated by the state or federal government. Physicians and other health care providers who must be licensed to provide professional services are already subject to extensive regulation by the state of Kansas. The Healing Arts Act (KSA 65-2801 *et seq.*) contains an extensive regulatory scheme for the licensure and discipline of physicians. In addition to establishing standards for education and competence, the Act also imposes significant rules of conduct for licensees, and contains far more in the way of protection of the public than the KCPA. For example, the following is but a few of the over 60 acts for which a physician may be disciplined, including monetary fines, suspension or loss of license to practice medicine for violating the Healing Arts Act (found at KSA 65-2836 and 2837):

- The licensee has committed an act of unprofessional or dishonorable conduct;
- the use of fraudulent or false advertisements;
- representing to a patient that a manifestly incurable disease, condition or injury can be permanently cured;
- advertising to guarantee any professional service or to perform any operation painlessly;
- engaging in conduct likely to deceive, defraud or harm the public;
- using any false, fraudulent or deceptive statement in any document connected with

the practice of the healing arts;

- making a false or misleading statement regarding the licensee's skill or the efficacy or value of the drug, treatment or remedy prescribed by the licensee or at the licensee's direction in the treatment of any disease or other condition of the body or mind;
- the use of any false, fraudulent or deceptive statement in any document connected with the practice of the healing arts including the intentional falsifying or fraudulent altering of a patient or medical care facility record;
- solicitation of professional patronage through the use of fraudulent or false advertisements, or profiting by the acts of those representing themselves to be agents of the licensee;
- knowingly submitting any misleading, deceptive, untrue or fraudulent representation on a claim form, bill or statement;
- obtaining any fee by fraud, deceit or misrepresentation;
- performing unnecessary tests, examinations or services which have no legitimate medical purpose; and
- failure to practice healing arts with that level of care, skill and treatment which is recognized by a reasonably prudent similar practitioner as being acceptable under similar conditions and circumstances.

It is clear that there exists in our state a comprehensive regulatory structure governing physicians that protects patients from fraudulent or deceptive conduct relating to the practice of medicine. Violations of the Healing Arts Act can result in substantial penalties, including loss of license to practice. The existence of detailed, professional regulation suggests that application of the KCPA to physicians' professional services is duplicative and unnecessary to protect patients.

The Consumer Protection Act is incompatible with the physician-patient relationship. To impose the liability provided by KCPA would have the effect of making a physician the absolute guarantor of both the treatment recommended and the anticipated results. Under the KCPA, each time a physician, *without fault,* performs an operation that doesn't restore 100% function, or recommends a treatment that doesn't achieve perfect results, he or she could face liability under the KCPA. Under the KCPA, a physician would be liable for an unconscionable act if the consumer (patient) "was unable to receive a material benefit from the subject of the transaction (KSA 50-627(b)(3))." In other words, even if the physician met the applicable standard of care, if the operation or treatment did not produce a "material benefit" to the patient, the physician could be liable. Thus, every time a complication occurs that outweighs the benefits of the treatment, there is a potential violation of the consumer protection act. Patient responses to treatments of any kind are widely variable, and very difficult to predict. Complications are often an unavoidable consequence of treatment, and an accepted risk for any medical intervention, however minor.

Additionally, in every case in which there is an allegation of lack of informed consent, there will also be a potential consumer protection act violation. Almost all medical malpractice claims that are filed already allege lack of informed consent. As a result of this ruling, we fully expect plaintiffs to amend their petitions in the vast majority of cases to include a claim under the KCPA.

Also, every case in which there is an allegation by the patient that the treatment recommended or provided by the physician was unnecessary, could be classified as a "deceptive act" in violation of KSA 50-626 (b)(9), which states "falsely stating, knowingly or with reason to know, that services, replacement or repairs are needed." There are many instances in which a physician recommends a particular treatment as a precaution when it is impossible to ascertain a diagnosis with 100% certainty. For example, a surgeon who is uncertain about the origin of abdominal pain, even after a thorough evaluation, may recommend surgery as a precaution to avoid a ruptured appendix and all the consequences of that. If it then turns out that the appendix was fine and not the cause of the pain, will the surgeon then have to defend a claim that the service was a "deceptive act" under the KCPA because it wasn't medically necessary after all?

These are but a few examples of why the physician-patient relationship is not a good fit within the KCPA. Application of the consumer protection act to physician-patient interactions will produce nonsensical outcomes. The nature of health care services and the expected, wide variability of patient responses to treatment, don't fit comfortably into the plain meaning of a "consumer transaction."

Subjecting the physician-patient relationship to the KCPA will fundamentally alter the interactions between physician and patient, to one of merely supplier and consumer. Instead of having an open line of candid communication between a trusted advisor and patient, which is essential to quality health care, concern over potential liability will make physicians less likely to express an opinion on treatment options. Patients want, and should expect to receive, the opinion of their physician when it comes to treatment decisions. It doesn't serve the patient interests well to not assist them in deciding whether or not to choose a certain course of treatment. That is why patients go to physicians: it is the sum of their training, knowledge, diagnostic and treatment skills, and equally importantly, their judgment and advice on treatment options.

To summarize, we believe the approach in HB 2530, as amended by the House Judiciary Committee, is responsible and balanced public policy. Without the clarification in this bill, we will see more and more attempts to re-cast medical malpractice claims as consumer protection act claims by enterprising plaintiffs' attorneys. Kansas courts have long recognized that plaintiffs may not use multiple avenues to pursue what is essentially a medical malpractice case. HB 2530 simply puts the statute into compliance with a long line of case law. That case law clearly states that if the claim involves the issue of whether the physician honored the legal duties owed to the patient, it's a medical malpractice, negligence case, and nothing else. This is true even if the conduct also amounts to fraud, breach of contract, etc. The courts will not allow a plaintiff to turn a breach of duty (medical malpractice case) into a contract or fraud case.

This legislation should be supported for the following reasons:

- there is a detailed and extensive body of law which govern a patient's ability to recover damages for alleged medical malpractice, which is the appropriate method to resolve disputes over a physician's conduct or competence on matters related to the care and treatment of patients within the practice of medicine;

- there already exists a comprehensive, long-standing regulatory structure that the legislature has put in place to protect patients from inappropriate conduct or improper professional practices by physicians;

- allowing KCPA claims for conduct which is already covered under the traditional medical malpractice system will result in increased and duplicative litigation, increased defense costs, increased medical malpractice insurance expenses, and, ultimately, an increase in the cost of medical care; and

- the consumer protection act will adversely impact the physician-patient relationship. Reducing the practice of medicine to mere commerce between "suppliers" and "consumers" will not protect patients or promote better patient care. It will drive a wedge between physicians and patients, and erode the bond of trust that is necessary for the delivery of quality patient care.

The KCPA offers nothing additional in the way of protection that is not already there, and in fact, will adversely affect the physician-patient relationship, be duplicative, stimulate more litigation, drive up medical malpractice insurance premiums, and increase health care costs for all Kansans. We urge your support of HB 2530. Thank you for the opportunity to offer these comments.

Thomas L. Bell
President

To: Senate Judiciary Committee

From: Thomas L. Bell, President

Date: March 21, 2007

RE: House Bill 2530

The Kansas Hospital Association (KHA) appreciates the opportunity to speak in favor of House Bill 2530 which clarifies that the Kansas Consumer Protection Act does not apply to services rendered or not rendered by physicians or other health care providers.

In the recent Kansas Supreme Court ruling in the case of *Amrani v. Williamson*, the Court concluded that medical services provided by Dr. Amrani may fall under the Kansas Consumer Protection Act (KCPA). The resulting Pandora's Box that has been opened by this decision creates serious ramifications for those who provide health care.

Kansas prides itself as having one of the most sophisticated and efficient tort reform systems in the nation. The use of medical screening panels to assess malpractice claims prior to filing suit, the establishment of caps on non-economic damages and the creation of the Health Care Stabilization Fund, with its affordable malpractice coverage, are the envy of other states and have brought many physicians to Kansas to practice. If medical services provided by health care professionals are now deemed to fall under the KCPA, it will unravel our current effective tort reform system and create a hostile environment for health care providers and other professionals as well.

Kansas already has established regulations, statutes and remedies for malpractice claims that distinguish services provided by medical health professionals from supplier-consumer transactions. Statutes should not compete with themselves. Kansas law should avoid reclassifying what are essentially medical malpractice claims as some other form of action. HB 2530 underscores the importance of preventing overlap between medical-malpractice claims and consumer-protection claims. Failure to pass this legislation runs the risk of transforming every claim for medical malpractice into a Consumer Protection Act claim.

Thank you for your consideration of our comments.

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Testimony of
Attorney General Paul Morrison
Senate Judiciary Committee
HB 2530
March 21, 2007

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify in opposition to House Bill 2530. HB 2530 seeks to exempt an entire industry from the scope of the Kansas Consumer Protection Act (KCPA). If enacted, this bill would eliminate the Attorney General's authority to investigate and prosecute deceptive and unconscionable acts committed by members of the health care industry in the state of Kansas.

Currently, all physicians and health care providers are subject to the KCPA because they fall within the definition of "supplier" found in K.S.A. 50-624(j). This distinction gives the Attorney General's Office the jurisdiction to investigate and prosecute claims against doctors, dentists, chiropractors, and all other health professionals in the state. While most health care professionals operate in a manner beyond reproach, as with every industry there are those who would take advantage of Kansas consumers. In fact, my office's Consumer Protection Division receives several complaints each week from consumers regarding these professional services.

Earlier this year, the Kansas Supreme Court, in Williamson vs. Amrani, explicitly held that deceptive or unconscionable acts committed by doctors do fall within the scope of the KCPA. In Amrani, the Kansas Supreme Court made it abundantly clear that the plain language of the KCPA provides a statutory remedy when a physician provides a service to a consumer.

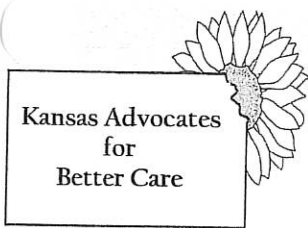
If HB 2530 is passed, health care providers will no longer be included in KCPA's definition of "supplier". Such a change would eliminate important protections currently in place for Kansans under the KCPA without delegating similar jurisdictional authority to any other entity. The Board of Healing Arts cannot replace the legal protections that my office provides to consumers.

Also of concern is the failure of HB 2530 to define, in any specific manner, what or who qualifies as a "health care provider." Any reasonable reading of HB 2530 will lead to the conclusion that any hospital, clinic, out-patient center or nursing home will be allowed to avoid KCPA challenges by simple definition.

Senate Judiciary
3-21-07
Attachment 4

Ultimately, I believe that KCPA authority is necessary for billing, advertising and business services as well as the willful use of falsehoods in the health care industry.

Thank you for your consideration. I look forward to answering any questions.



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Deanne Bacco, MCP, LACHA

House Bill 2530
exempting all health care providers from the Kansas Consumer Protection Act

Testimony to the Senate Judiciary Committee
From Kansas Advocates for Better Care
March 21, 2007

Chairman Vratil and Committee Members:

Kansas Advocates for Better Care (KABC) is opposed to HB 2530 because it exempts all health care providers from the Kansas Consumer Protection Act (KCPA). This bill is a grave injustice to every individual Kansan who may need to seek personal remedy for deceptive health care practices.

Do regulators compensate victims of deception by health care professionals? **No.**
Do victims have control over criminal prosecution for fraud or deception? **No.**
Is ordinary negligence really the same as a deceptive act? **No.**

The only way consumers can seek penalties against the few bad practitioners--deceptive health care providers--is through the consumer protection act.

These are the kind of health care providers that will no longer be accountable (under KCPA) for practicing deceptive and unconscionable acts of professional service:

- **Nursing Homes**
- **Assisted Living Facilities**
- **Home Plus Facilities**
- **Boarding Care Homes**
- **Adult Day Care**
- **Home Health Care Agencies**

Some of the other health care providers excluded from the Consumer Protection Act will be:

- a person licensed to practice any branch of the healing arts, or with temporary permit to practice any branch; or postgraduate training;
- a licensed medical care facility,
- a health maintenance organization,
- a licensed dentist,
- a licensed dental hygienist;
- a licensed professional nurse
- a licensed practical nurse;
- an advanced registered nurse practitioner; a licensed professional nurse authorized to practice as registered nurse

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- anesthetist, including temporary authorization; respiratory therapist; a licensed optometrist
- a licensed podiatrist
- a licensed pharmacist
- a licensed mental health technician;
- a professional corporation organized [by] health care providers
- a Kansas limited liability company, partnership, not for profits, organized...[by] health care providers; a licensed physical therapist;
- a certified physical therapist; any person licensed to practice any branch of the healing arts; a licensed social worker, licensed physician assistant, or licensed psychologist; emergency medical ambulance and attendant services; a licensed occupational therapist or therapist assistant;
- any hospital licensed under 65-425; 40-12a01
- any private psychiatric hospital licensed under KS ST s 75-3307b; 40-12a01;
- a licensed medical care facility, or licensed health maintenance organization; licensed dental hygienist;
- an ambulatory center; radiology oncology center, or pathology center
- "any person licensed, by the proper licensing authority of this state, another state or the District of Columbia, to practice medicine and surgery, osteopathy, chiropractic, dentistry, optometry, podiatry, audiology or psychology."
- "a person licensed or registered to engage in an occupation which renders health care services" or "licensed to practice medicine and surgery";
- a professional corporation organized pursuant to the professional corporation law of Kansas by persons who are... health care providers
- a partnership of persons who are health care providers;
- Kansas limited liability company organized for the purpose of rendering professional services by . . . health care providers, authorized to render professional services for which the limited liability company is organized, and Kansas not-for-profit corporation "organized for the purpose of rendering professional services by persons who are health care providers" or an officer, employee or agent thereof acting in the course and scope of such person's employment or agency;
- 'Professional services' means those services which require licensure, registration or certification by agencies of the state for the performance thereof.
- licensed adult care homes
- "Physician" means a person licensed to practice medicine and surgery in this state; Or licensed to practice medicine and surgery under the healing arts act; Or a person who is employed by a state psychiatric hospital or by an agency of the United States and who is authorized by law to practice medicine and surgery within that hospital or agency; Or a person licensed or reasonably believed by the patient to be licensed to practice medicine or one of the healing arts as defined in K.S.A. 65-2802 and amendments thereto in the state or jurisdiction in which the consultation or examination takes place.

Thank you for the opportunity to provide testimony opposing HB 2530.

Deanne Bacco and Margaret Farley

Kansas State Office

March 21, 2007
Senator Vratil, Chair
House Judiciary Committee

Reference: HB 2530 as Amended

Good morning Chairman Vratil and members of the Senate Judiciary Committee. My name is Maren Turner and I am the Director for AARP Kansas. AARP Kansas represents the views of our nearly 360,000 members in the state of Kansas.

Recently, AARP unveiled *Divided We Fail (www.dividedwefail.org),* our new national and state effort designed to engage the American people, elected officials and the business community to find broad-based, bi-partisan solutions to the most compelling domestic issues facing the nation – health care and the long-term financial security of Americans. Concerns about health and financial security aren't just AARP issues; they affect all generations. HB 2530 as amended is about health care and financial security but not in the direction that AARP and the consumers of Kansas had envisioned. It removes the safety net of the Kansas Consumer Protection Act (KCPA).

Consumer fraud laws address the imbalance of information between consumers and businesses. We believe that "information asymmetry" is at its highest point in the doctor and health care provider/patient relationship. Doctors are responsible for ordering (if not providing) the most medical services. Therefore, AARP believes that they must be held accountable for their decisions and actions though the KCPA, as well as through malpractice litigation.

Consumer protection laws may provide individuals with a right of action. This allows an individual to bring suit in order to remedy violations of personal rights established by that law. If the law does not provide a private right of action, the individual consumer must depend on federal or state officials and regulatory schemes for enforcement. In these cases the efforts and resources expended for enforcement may depend on the political climate, leaving the individual uncertain about obtaining remedies for violations of rights.

In its Williamson v. Amrani decision, the Kansas Supreme Court held that doctors, like any other business in the state, are covered by consumer fraud laws. We would first note that health care constitutes an ever-growing share of the American economy and doctors are responsible for ordering, and often

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providing, the lion's share of those goods and services. Eliminating health care from KCPA would exempt about one-sixth of the business transactions in this state from the consumer fraud laws.

There is substantial evidence that serious quality problems exist throughout the American health care system. They can be characterized as underuse, in which individuals fail to receive services that save lives or prevent disability; misuse, in which individuals are injured when avoidable complications of health care are not prevented; and overuse, in which individuals are exposed to the risks of health services from which they cannot benefit. Quality problems are found in all types of delivery systems, including fee-for-service and managed care, and result in wasted resources as well as lost lives and reduced function.

The issue in the Williamson case was alleged overuse, specifically, unnecessary back surgery. Nothing was proven in that case and so my comments here address only the allegations. What we can say is that experts ranging from Dartmouth University researchers to the federal Agency for Health Care Policy and Research have suggested that many back surgeries essentially amount to consumer rip-offs; that is, patients who undergo the procedure have no better outcomes than similar patients who do not undergo the procedure. Sometimes overuse reaches the level of fraud and abuse.

Fraudulent and abusive practices include overcharging or double-billing health insurance companies or the government for services provided, charging for services not provided, and rendering inappropriate or unnecessary care. Fact of the matter is that sometimes doctors and health care providers do commit fraud. The most notorious case was a doctor in Redding California who performed numerous unnecessary surgeries, not only exposing his patients to invasive and possibly dangerous procedures but also defrauding the Medicare program.

The Kansas Supreme Court did not open the floodgates to medical litigation. The court held that lawyers must still bring in medical experts to prove a consumer fraud case. What the court might have opened the door to is encouraging evidence-based medicine—the idea that doctors' advice and care should be based on scientific evidence, not just custom. Most health care experts favor evidence-based medicine. We should let this ruling play out in Kansas for a few years to see if it brings about improved medical care and lower health care costs.

Kansas consumers trust their doctors and health care providers, and we believe that it is important to provide due recourse to the individual if that trust is violated.

AARP believes that:

- adequate resources should be provided to support antifraud and antiabuse efforts at all levels of government and health care.
- Strong protections against poor quality care and deceptive practices will always be necessary.

- States should endeavor to make their justice systems more accessible, less expensive and easier to use for people seeking enforcement of their rights.
- States should provide rigorous enforcement of civil rights and other statutes protecting the rights and safety of individuals.

We believe that Kansas would be the first state to pass such a law. This issue makes Kansas an interesting "laboratory of democracy". If passed this law would not only exclude doctors and all health care providers from the Consumer Protection Act but will open the gate for other professions to also ask for exclusion from the consumer protection act. This exclusion would allow Kansas to become a target state for those entities who would practice deceptive and unconscionable acts and allow our citizens to become the targets of those who choose to commit these acts.

Therefore, AARP Kansas opposes HB 2530. We respectfully request the Committee not support and advance HB 2530.

Thank you.

My name is Leland Dempsey and I am a plaintiff's attorney licensed in the state of Kansas. I believe that Senate Bill 2530 should not be passed because it would give health care providers in the state of Kansas unfair treatment above that of other Kansas professionals, effectively leaving Kansas Consumers without recourse when a healthcare provider deceives them through misrepresentations to his or her patients.

Health Care has become a business in America. Kansas Health Care Providers should be held responsible for their misrepresentations to Kansas consumers. Physicians or health care providers who represent that they will provide one product or service, but after the fact perform a different product or service to their patients should not be absolved from liability under the Kansas Consumer Protection Act.

I am here today with Lori Hollinger, who was a victim of a physician's deceptive and unconscionable acts when he represented that he would perform a new and improved weight loss surgery upon his patients, namely the "duodenal switch". Lori's physician represented in consultation that he was performing a new and improved weight reduction procedure in the Kansas City area that was only offered in limited areas of the country. Lori's physician also represented that this surgery would change her life and that she could eat whatever she want after the surgery, and that cheeseburgers would become herfavorite food. Dr. Sifers not only made this representation to Lori Hollinger, but also made the same representations in consultation to Marion Bonura, Teresa Allman, Dennis Essen, Carla Thomas, Teresa Culp, John Kuhn, and Brenda Kuhn. All of these patients also underwent the supposedly "new" weight reduction procedure, the duodenal switch.

This surgery did only one thing Dr. Sifers represented it would, it changed their lives. These patients are not able to eat whatever foods they want without serious consequences to their bodies. All of these patients now suffer from the same complications as a result of the surgery. These complications include but are not limited to: dumping syndrome, incisional hernias, hair loss, tooth decay, the breaking of their teeth, and severe skin problems. In fact, every single one of the patients of this physician who underwent the weight loss procedure are forced to carry an extra pair of underwear around with them at any time they leave their homes in case of a terribly embarrassing accident.

The reason all of these patients suffer from such serious and embarrassing complications after the surgery is due to the fact that this Kansas physician did not perform the new and improved weight reduction procedure, but had performed an older and more dangerous procedure on all of his patients. This type of deceptive and unconscionable conduct on the part of the physician should not be tolerated under the Consumer Protection Act.

These physicians who perform bait and switch procedures and lie to their patients would effectively be absolved from liability without the protection of the Kansas Consumer Protection Act. Any time such representations entice consumers in the state of Kansas to seek out specific health care services; these health care providers should be

held to their representations just as any other professional is held to in the state of Kansas.

While I do not believe that such fraudulent and deceptive advertising and promotion is a regular occurrence among Kansas health care providers, there is no reason to admonish health care providers from such promotional activities. There is no rational reason under the public policy of Kansas for these health care providers to receive special treatment and be effectively absolved from liability for their misrepresentations to Kansas consumers. I ask you to please vote no for this bill. Thank you.

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

From: Michael L. Hodges, The Law Offices of Michael Hodges, Lenexa

Date: March 21, 2007

Re: HB 2530 Relating to the Kansas Consumer Protection Act

I appear today to provide testimony in opposition to HB 2530 relating to the regulation of health care providers under the Kansas Consumer Protection Act ("KCPA" or "the Act").

Section 1 – Purpose and Scope of the Kansas Consumer Protection Act

The purpose of the KCPA is simple. It could just as easily have been called the "Honesty in Business Act". It is meant to provide a remedy to people who have been misled or mistreated by purveyors of services and merchandise in Kansas that does not exist in the common law. That remedy is the award of fees and a small penalty.

The Kansas Consumer Protection Act was enacted in 1973 replacing the 1968 Buyer Protection Act. In broad terms the Buyer Protection Act rendered unlawful any deception or misrepresentation in connection with the sale of merchandise. Under the Kansas Consumer Protection Act, the Legislature broadened and made the Act more specific and provided private remedies which were not available under the Buyer Protection Act. The Buyer Protection Act only covered merchandise. The Kansas Consumer Protection Act covered the sale of services as well. The KCPA has now been in existence for 34 years.

During the 34 years the KCPA has been applied by the Attorney General on several occasions to activities of physicians engaging in deceptive acts and practices. In that 34 years lawsuits have been brought based upon deceptive acts and practices against fraudulent practices by many types of professionals and nonprofessionals. The KCPA simply requires that a service provider be honest in dealing with customers.

The KCPA does not apply to ordinary malpractice cases. It does not apply to negligent acts. It does not apply to misdiagnosis or "slip of the knife" cases. The KCPA applies to people who are dishonest in attempting to sell services. If they make false statements to a customer to induce them to buy, they violate the Act. If they fail to reveal material information a customer would need to make an informed decision, they violate the Act.

Examples of violation of the KCPA in the medical community might include selling cancer drugs that have been diluted and the patient does not receive the benefit intended, patients that are on a heart transplant waiting list when no heart transplant program exists, and patients who stick their feet in water with magnets because they were told that it will remove the lead from their body.

Hocus pocus or medical fraud has a long history in the world. The proponents of an exemption for healthcare providers which would allow them to engage in deceptive acts or unconscionable acts and not be subject to the same rules that apply to the rest of Kansas citizens does not serve any legitimate purpose.

The purpose of the KCPA is to provide a remedy which was not available at common law. There are certain remedies available in the Act which allow those injured by deception to recover attorney fees and penalties: without these provisions, an action could not otherwise be brought. The average Kansas consumer is priced out of regular malpractice litigation. The cost of malpractice litigation is exorbitant due to the cost of depositions, the costs of medical records, the cost of discovery, and the cost of expert witnesses which are required. The average malpractice case costs more to prosecute than the average damages associated with small medical scams. Without the Kansas Consumer Protection Act, people scammed out of small to moderate amounts of money, would simply have no remedy whatsoever.

Section 2 – Is There a Problem that Needs Fixing?

In the last 34 years the Act has been applied to doctors in a handful of cases. Even the handful of cases involve the business aspect of practicing medicine which we understand to be not a part of the proposed Bill. The question then becomes what is the rush to try and fix a problem concerning a statute that has been on the books for 34 years which has never resulted in any payment by any healthcare provider. The fact that the plain reading of the Act covers all service providers and that it has taken thirty years to get a case to the Court of Appeals leads one to the conclusion that the vast majority of health care providers are honest with their patients and that the fix being requested will only benefit those that are not honest and in fact are engaged in dishonest or unconscionable behavior.

The argument that has been made is that the cost of insurance will go up. Where is the evidence of that? Did the cost of malpractice for engineers go up in 2002 when the Act was applied to professional engineers? Why did the engineers not come to the legislature seeking an exception to the honesty requirement? Is a deceptive or dishonest act even covered by insurance? Generally that has not been the case. In any event, having just been decided it is premature to speculate that the honesty requirement will really have much of an effect on rates of malpractice insurance.

Section 3- *Williamson v. Amrani*

In the case at hand, which apparently has prompted this requested change in the statute, the plaintiff has only been given the right to return to court and allow a jury to determine whether the activities involved were deceptive or unconscionable. She has not been awarded anything.

The facts which caused this case are not traditional malpractice claims. Although the surgery was not successful the claim is not based on cutting the wrong place or putting screws in wrong. The claim is based on the promises made by the surgeon to the patient that were not only

wrong, but directly contrary to his own knowledge of the likely out come and his own experience. Where a majority of people who had this surgery did not get a benefit from it, it is wrong to tell a patient to have the surgery and not tell them that most people did not benefit from it.

Kansas juries can and should be trusted to review the issues and make decisions based on the facts of each case. The bill under the committee's review would take the decision making authority away from juries by prohibiting consumer protection claims against health care providers from being filed at all.

Section 4-Effect of the Proposed Change

If any profession should be required to be honest with their customers is it the medical profession. When people go to a health care provider they are at their most vulnerable. They put their lives in the hands of health care providers. They are in pain or in fear of death. They are at that point in time most likely to be vulnerable to dishonesty. When people go to health care providers their guard is down. If the Legislature decides that the law requiring honesty is not a good law the fix should not be to exempt a group that should be most required to tell the truth.

To the extent that there are dishonest health care providers who are preying on their patients with false and misleading information to obtain dollars from them, certainly the medical community should join with the rest of society in wanting to insure that that behavior gets punished. The law has been here for many years with few examples of dishonest health care providers.

We can see no valid reason to exclude the group who should most be required to tell the truth from the requirement of honesty while subjecting the rest of society to the law. There has been no demonstration that this group is suffering financially from the requirement of honesty more than any other group. There has been no demonstration that this law places an undue burden on them. There has been no demonstration that by implementing the law according to its terms, malpractice rates will increase or lawsuits will increase.

If a learned profession exception should be made to the honesty requirements of the Act, why should it be limited to "health care providers"? Shouldn't veterinarians be included and engineers and architects and lawyers and teachers and all other professions? These professions are all governed by legislation and licensing and all are subject to discipline in their own areas, as well as to claims of professional malpractice. If the law is not a good law why not just abandon the requirement of honesty for all businesses and go back to the days of caveat emptor? At least we would all be treated the same.

HB 2530 would close the door to the courts for victims of deceptive and unconscionable practices that have no other way to seek redress because of the economics of lawsuits. If the legislature decides that deceptive trade practices are acceptable in the health care industry, then the thing to do is exempt those acts from the Kansas Consumer Protection Act, because no one will be able to afford to bring these suits without the remedies provided for in the Act.

Using the words "health care provider" in the exclusion will create confusion and litigation over what the words mean. They are not defined in the Act. Does this include the chelation therapist who claims to be able to get rid of cancer? Does this include the pharmacist who dilutes drugs? Does this include the faith healers, mental health professionals, social

workers, school counselors, nursing home workers, etc? Further, what does the language mean to address as to what acts are excluded. I believe they mean to exclude deceptive acts during the practice of medicine, but that is not clear. Does the practice of medicine include the selling of the service? Does it include the information given to a patient to inform the patient regarding the surgery? What if the information is false and given to get the patient to buy an unnecessary service or a service that has little chance of success? Is that the practice of medicine?

The legislature should not rush into this legislation that has worked fine for the last 30 years without being convinced that the citizens of Kansas are going to be better off by having the honesty requirement of the Act not apply to their health care providers.

CONCLUSION

In conclusion I would make three points. First, there has been no demonstration that the application of this law causes any harm to anyone other than the dishonest purveyor of services who preys on consumers. Second, if the Legislature determines that the honesty in sales practices requirement of the Consumer Protection Act is not a good law, it should be applied even handedly to all professions and services rather than separating out the medical profession. Third, the exemption as written fails to define healthcare providers in the Act which will simply end up with an extraordinary amount of litigation to determine who is and who is not a healthcare provider and what acts are and what acts are not covered. Since the only difference between this act and the common law is the remedy provision which allows access to the courts to the poor as well as the rich, is it really good policy to make exceptions for one special interest? We believe not.

I respectfully ask you to oppose HB 2530.

TO: Members of the Senate Committee on Judiciary

FROM: N. Russell Hazlewood, Graybill & Hazlewood L.L.C., Wichita

DATE: March 21, 2007

RE: H.B. 2530 and the Kansas Consumer Protection Act

Thank you for the opportunity to testify in opposition to H.B. 2530, today. My name is Russ Hazlewood. I am a lawyer from Wichita, Kansas. I graduated from the University of Kansas School of Law in 1997. At the present time, I represent businesses and individuals in litigation matters, as plaintiffs and as defendants. However, for the past six years or so, the majority of my practice has been devoted to the protection of Kansas consumers and insurance policyholders. My clients' claims are frequently grounded on the protections of the Kansas Consumer Protection Act (KCPA). In 2003, my partner, Jacob Graybill, and I were awarded the Consumer Advocate Award by the Kansas Trial Lawyers Association for our work in advancing the interests of health care consumers.

I do not practice in the area of medical malpractice, and I have never sued a physician. I have represented physicians and health care organizations in significant litigation matters on several occasions. My wife is a licensed health care provider. She is a respiratory therapist who works for a group of specialist physicians in Wichita.

I am testifying against H.B. 2530, because it is bad for Kansas consumers, and it is bad public policy.

The modern economy furnishes an unprecedented opportunity for economic advantage-taking, both at the commercial and consumer levels. Modern consumer protection laws, particularly statutes prohibiting deceptive acts and practices, are descendants of common law fraud. However, fraud is difficult and expensive to prove, and it falls short of providing a practical and effective method of redressing abusive sales practices in consumer transactions. State legislatures recognized that as commerce grew more complex, the consumer was increasingly at the mercy of the faceless bureaucracies many large suppliers had become. The response was enactment of a wave of consumer protection legislation beginning in the 1960's.

In 1968, the Kansas legislature passed the Buyer Protection Act, which broadly prohibited deception and misrepresentation in connection with the sale of merchandise. Enforcement of the Act rested exclusively with the Attorney General. Five years later, in 1973, Kansas adopted a version of the Uniform Consumer Sales Practices Act (UCSPA), now known as the Kansas Consumer Protection Act (KCPA), which repealed the first act, substituting a broadened definition of prohibited acts while at the same time defining more specifically the sorts of deceptive and unconscionable practices prohibited. Utah and Ohio also substantially adopted the USPCA. Texas adopted an act which has some similar provisions. See 7A (Pt. 1) U.L.A. (UCSPA), pp. 69-70 (2002). The stated purposes of the KCPA were to simplify, clarify, and modernize the law governing consumer transactions, and to protect consumers from suppliers who commit deceptive and unconscionable practices. K.S.A. § 50-623.

The KCPA recognized that the Attorney General can prosecute only a small percentage of violations. The legislature included within the Act a private right of action for damages and penalties for consumers who have been aggrieved as a result of a supplier's illegal conduct; and it included fee-shifting provisions in favor of a prevailing consumer (or a prevailing supplier subjected to a groundless claim). Violations of the KCPA were held to require the ordinary civil standard of proof, a preponderance of the evidence, rather than the "clear and convincing" standard applicable in fraud claims. In addition, the statute abolished privity requirements between plaintiff and defendant. These pro-consumer features of the KCPA were intended to plug the "holes" in the common law of fraud and misrepresentation, making consumer cases easier to prove and economical to prosecute. The idea was to encourage litigation that benefits society, fulfill a need for private enforcement, and vindicate important rights. In other words, the public interest would be advanced by consumers acting as private attorneys general. However, the KCPA has been criticized by some commentators for not going far enough. *See* Byers, Ellen, ADDRESSING THE CONSUMER'S WORST NIGHTMARE: TOWARD A MORE EXPANSIVE DEVELOPMENT OF THE LAW OF TORTIOUS FRAUD AND DECEPTIVE PRACTICES IN KANSAS, 38 WBNLJ 455, 460-461 (1999).

Since its enactment, the KCPA has been amended to give greater protection to elderly and disabled consumers, and the civil penalties have been increased. At the same time, the requirements for establishing a violation have been tightened.

The KCPA prohibits deceptive and unconscionable trade practices by suppliers of consumer goods and services. Its scope is generally defined by the interplay of the definitions of "consumer," "supplier," and "consumer transaction."

The KCPA protects not only an individual, but also any sole proprietor "who seeks or acquires property or services for personal, family, household, business or agricultural purposes." K.S.A. 50-624(b). For example, a farmer qualifies as a "consumer." *John Deer Leasing Co. v. Blubaugh*, 636 F.Supp. 1569, 1574 (1986); K.S.A. 50-624, cmt. A supplier is a person or organization that "... in the ordinary course of business, solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer." K.S.A. 50-624(i). However, "supplier" does not include "any bank, trust company or lending institution which is subject to state or federal regulation with regard to disposition of repossessed collateral by such bank, trust company or lending institution." The KCPA applies to "consumer transactions" between a consumer and supplier. The Act defines these instances as "a sale, lease, assignment or other disposition for value of property or services within this state (except insurance contracts regulated under state law) to a consumer; or a solicitation by a supplier with respect to any of these dispositions." K.S.A. 50-624(c).

In its present form, the only consumer transactions expressly exempted from the KCPA's coverage are "insurance contracts regulated by state law." The Kansas appellate courts have also held that the KCPA is inapplicable to arrangements that fall within the provisions of the KRLTA, which is specific legislation, complete in itself, which takes precedence over the broad KCPA and controls all transactions within its purview. Initially, "securities" were also excluded, but that exclusion was later removed.

Presently, no supplier enjoys a blanket exemption. The only suppliers who enjoy a limited exemption are:

i. any bank, trust company or lending institution which is subject to state or federal regulation with regard to disposition of repossessed collateral by such bank, trust company or lending institution; and

ii. a publisher, broadcaster, printer or other person engaged in the dissemination of information or the reproduction of printed or pictorial matter so far as the information or matter has been disseminated or reproduced on behalf of others without actual knowledge that it violated the Kansas consumer protection act. K.S.A. § 50-628.

H.B. 2530's proposed, broad exemption of physicians and all other health care providers from these proscriptions is dangerous and unnecessary.

In today's economy, health care is big business, and providers have captured a significant share of the total market for consumer goods and services.

By way of example, for-profit and not-for-profit hospital chains are buying up everything in sight to increase their market concentration. Their billboards are blazing all over Wichita. In 1997, the nation's largest hospital chain, HCA, which operates hospitals and other facilities in Kansas, was the seventh largest employer in the United States, and the twelfth largest employer in the world. In 2004, total U.S. health care spending amounted to 16 percent of the gross domestic product (GDP). Health care providers are among the very largest organizations in communities all around our State; and the estimate of Kansans' total annual expenditures on health care has been reported by the Governor's office at around $12 billion. I am sure the overwhelming majority of physicians and other health care providers act with honesty and good faith and would not try to deceive or overreach their patients. However, it would be disingenuous at best to suggest that any industry of that size and complexity supplies its consumers with goods and services in the absence of any meaningful deception or overreaching.

Notably, state and federal governments have found it necessary to devote tremendous resources to combat fraudulent billing of the Medicaid and Medicare programs by physicians and other health care providers. In a May 1996 report issued by the U.S. Government Accountability Office, it was stated:

Health care fraud burdens the nation with enormous financial costs, while threatening the quality of health care. Estimates of annual losses due to health care fraud range from 3 to 10 percent of all health care expenditures – between $30 billion and $100 billion based on estimated 1995 expenditures of over $1 trillion. In late 1993, the Attorney General designated health care fraud as the Department of Justice's number two enforcement priority, second only to violent crime initiatives. (Emphasis added).

In November of 2005, the Centers for Medicare & Medicaid Services (CMS) — the agency that administers the Medicare program — reported that Medicare made an estimated $12.1 billion in improper payments to health care providers due, in large part, to provider fraud. The Office of the Inspector General issues special fraud alerts for common health care provider schemes such as illegal physician referral kickbacks from suppliers of medical goods and services which are disguised as office rent payments and hospital payments to physicians to reduce or limit services to Medicare or Medicaid beneficiaries under the physician's direct care.

In my practice, I routinely encounter illegal, deceptive and unconscionable practices by health care providers, albeit on a smaller scale. I have handled several cases involving hospital admission, billing and collection practices, and

one case involving the billing and collection practices of a chiropractor. Some of my clients who could not be here today submitted in person and written testimony to the House Judiciary Committee in opposition to this bill. My clients' testimony demonstrates how necessary and effective the KCPA is in protecting Kansas health care consumers from abuse.

In weighing the merits of H.B. 2530, please consider the impact the proposed exemption would have on the victims of practices currently prohibited by the KCPA. Health care consumers, many of whom are elderly or disabled, would have no meaningful ability to resist being victimized by providers expressly exempted from the KCPA. In many instances, the consumers would have no effective legal remedy. Moreover, without the fee-shifting provisions of the Act, it would almost always be impossible or at least economically unfeasible for these consumers to hire attorneys to help them address deceptive and unconscionable practices. As it is, most lawyers are hesitant or unwilling to take on KCPA cases. My firm has no active competition for these cases. In fact, most of my clients were rejected by other lawyers before finding our door. Many had also made complaint to the (former) Attorney General's Office or the Consumer Fraud Division of the Sedgwick County District Attorney's Office, to no avail. These institutions of limited resources do not, and cannot, help each individual victim. Because H.B. 2530 would encourage deceptive and unconscionable practices by effectively rendering the victimized consumers helpless, it must be rejected.

H.B. 2530 is also unnecessary. There is no good reason that physicians or any other professionals (including lawyers) should be exempt from the KCPA's prohibition of deceptive and unconscionable acts and practices. Health care providers occupy a position of public trust. Consumers are likely to be less vigilant in dealing with health care providers than they would be in other transactions. There is no basis for health care providers (or any other professionals for that matter) to be held to a lower legal standard than telemarketers, spammers, "tote the note" used car dealers or payday lenders. As succinctly stated by the Supreme Court of Connecticut:

> **[I]t would be a dangerous form of elitism, indeed, to dole out exemptions to our consumer protection laws merely on the basis of the educational level needed to practice a given profession, or for that matter, the impact which the profession has on society's health and welfare.**

Haynes v. Yale-New Haven Hospital, 699 A.2d 964 (Conn. 1997) (emphasis added).

Despite what you might hear, *Williamson v. Amrani*, — P.3d ----, 2007 WL 419698 (2007) did not make new law in Kansas. Nor does it indicate that the sky is falling on physicians or other health care providers. The case does not justify an erosion of Kansas consumer protection law.

Applying the plain language of the KCPA, it is clear that physicians and their services are covered. There is no serious dispute that physicians fall comfortably within the KCPA's definition of "supplier," and **Dr. Amrani never even asserted he fell within a statutory exclusion.** In order for the Supreme Court to rule other than it did, it would have had to ignore well-established rules of statutory construction and engage in exactly the type of "judicial legislation" so often justly criticized these days. Moreover, when it enacted the KCPA, the legislature expressly mandated that courts take an expansive view of the application of the protections afforded by the Act. K.S.A. § 50-623.

The KCPA prohibits deceptive and unconscionable acts and practices by suppliers in connection with consumer transactions. Professional negligence is neither deceptive nor unconscionable in nature, and the KCPA is inapplicable to those claims. Any attempt to bootstrap a professional negligence claim into a KCPA violation, in the absence of any deceptive or unconscionable act or practice, will ultimately fail under the existing law. Notably, the plaintiff in *Williamson v. Amrani*, — P.3d ----, 2007 WL 419698 (2007) won the battle, but she hasn't yet won the war. It would be prudent to allow the *Williamson* case to run its course before impulsively gutting the statute less than a month after the case was decided.

While I offer no opinion as to whether the plaintiff, Ms. Williamson, was the victim of an act prohibited by the KCPA, the majority of the Supreme Court correctly applied the law. The case did not expand the law, nor should the result have been a surprise to anyone. Our statute is clear, unambiguous, and very different from the statutes of any other states except Ohio and Utah. Consequently, much of the law cited by Dr. Amrani was simply inapplicable. For example, many of Dr. Amrani's cases turn on the definition of "commerce," a word that does not appear in our statute.

I will also offer one point not mentioned in the Williams opinion. K.S.A. § 40-3209(b) makes "[a]ny action by [any physician, hospital or other person which is licensed or otherwise authorized in this state to furnish health care services ("provider")] to collect or attempt to collect from a subscriber or enrollee [consumer] any sum owed by [his or her] health maintenance organization" a per se violation of the KCPA. This section, which expressly contemplates that

physicians and other licensed health care providers are covered by the Act, cannot be reconciled with the implied exemption urged by Dr. Amrani.

In addition, if the statute is to be amended, the language proposed by the Kansas Medical Society goes farther than its professed purpose of clarifying the truism that pure medical malpractice claims (i.e., claims going to competence/negligence) are not actionable under the KCPA.

For example, if an unscrupulous audiologist sells a used hearing aid to an elderly patient while representing that it is new, a classic KCPA violation has been presented. Shouldn't the abused consumer have a practical way to seek financial recourse?

Similarly, if a pharmacist dispenses generic drugs to a consumer that have been mislabled as the more expensive, non-generic variety, should not our law provide the consumer with a method of recovering the provider's ill-gotten gains? Do we want our legislative actions to encourage or discourage that type of misbehavior?

As another example, if a chiropractor intentionally swindles a parapalegic by assuring her that a series of expensive spinal manipulations will make her walk again, shouldn't our law afford her with a practicable way of recovering her money (if not her dignity)?

In closing, I ask you not to take at face value the proponents' assurance that the Kansas Board of Healing Arts provides adequate protections for health care consumers such that the KCPA is unnecessary. Before you make that determination, I ask that you review the audit, released less than six months ago by the Legislative Post Audit Committee, wherein the Committee found:

> **Question 1: Does the Board of Healing Arts Conduct Timely and Thorough Investigations of Complaints It Receives, and Take Timely and Appropriate Actions To Correct Regulatory Violations It Finds?**
>
> . . . .
>
> **We identified significant weaknesses relating to intake and screening of complaints.** Within a regulatory environment, there's an expectation that complaints alleging violations of laws, regulations, investigated to determine what action needs to be taken. <u>However, the Board's policy is not to investigate allegations</u>

of poor patient care until there's a historical pattern, which is defined as three complaints in three years. Board staff said they didn't have enough resources to investigate all complaints, and their policy is consistent with State law that allows the Board to take disciplinary action only when there's an established pattern of conduct.

We had concerns with 4 of the 30 complaints we reviewed that were screened out without being investigated. These included one complaint alleging the patient underwent surgery for a double hernia, but the doctor only repaired one because she "forgot" about the other one. The second hernia was repaired the next day.

We also noted that only one staff member was assigned to review and screen complaints, and about one third of the complaints we reviewed weren't screened within the Board's two-week time frame. Those that took longer ranged from 15 days to 161 days.

Board staff have inadequate processes for tracking and monitoring the progress of complaint investigations, and of investigated complaints that are referred on to the Board's Review Committee. For the 30 closed cases we reviewed, Board staff appeared to have thoroughly investigated those cases, all but two of the investigations we reviewed met the Board's time lines, and disciplinary decisions appeared to be reasonable.

In all, the Board had 533 open cases at the time of the audit, 75 of which (14%) had been open longer than three years. We randomly selected 3 of those 75 cases for review, and identified significant problems with two of them. Both had been investigated and referred on to the Board's Review Committee, which reviews the information gathered during the investigation and makes a recommendation to the Board's Disciplinary Panel. In one of those cases, the Committee concluded that the doctor involved hadn't met the standard of care in treating eight patients. In both cases, Board staff failed to obtain expert opinions which had been recommended, and the cases have languished for years without any further action. Both doctors continued to be licensed to practice

> **Question 1 Conclusion.** As part of its efforts to protect the public from incompetent or unprofessional doctors, the Board of Healing Arts responds to about 2,500 complaints against licensees each year. While it appeared the complaint investigations we reviewed were thorough and the disciplinary actions we reviewed were reasonable, we have concerns about what isn't being done. In our minds, the staff policy of not investigating complaints of substandard patient care until a pattern of those complaints is amassed, the number of cases that have been open for two or more years, and the two open cases representing potentially very serious situations, raise questions about whether the public is being adequately protected.

Legislative Post Audit No. 06PA10 (October 2006) (bold emphasis in original, underline added) (copy attached for your ready review).

Of course, even assuming the Board does investigate a claim and discipline the provider, the consumer will receive no compensation for his or her loss. It will be little consolation to the victim of a deceptive scheme that the provider was, for example, admonished by the Board – three years after the fact.

In summary, the KCPA serves an important purpose in protecting Kansas consumers against deceptive and unconscionable acts and practices by suppliers – including health care providers. Personal accountability is not a concept that should be reserved for those outside of the health care industry. Please cast your vote in favor of health care consumers and against H.B. 2530.

Respectfully submitted,

GRAYBILL & HAZLEWOOD L.L.C.

N. Russell Hazlewood

To: Senate Judiciary Committee

From: Lori Hollinger Robles

Date: March 21, 2007

Re: HB 2530

Good morning ladies and gentlemen. I am here today to appeal to you to not pass HB 2530. First off, I must ask you all a question. Can anyone please tell me why they feel physicians should be exempt from the consumer protection act? Are they better people – they do not need to be included in the Kansas Consumer Protection Act? Why should they be exempt from being held accountable for their actions when they offering" professional services" to consumers?

The consumer protection act was in put place to protect consumers like you and me from deceptive and unconscionable practices, even for "professional services" they receive. Do you honestly believe that doctors need to be exempt from this law?

Most patients today are more informed about their health care than ever. They do their homework and research prior to making decisions – they are well informed. However, there are physicians out there that make fraudulent and deceptive claims to their patients. And more often than not – money is involved.

I personally am a victim of deception by a health care provider. I had a medical procedure performed several years ago by a physician in the KC area. He had been in practice for over 20 years. He had a good reputation as a general surgeon. I contacted his office, scheduled an appointment – the first thing I was asked – was how would I be paying for the surgery? When I said I was a cash paying patient – my medical insurance did not cover the surgery -- they had me in the office almost immediately.

The doctor and I discussed the procedure he would perform and we agreed upon a specific surgical procedure. Prior to admittance into the hospital, I signed a consent form with him and the hospital stating I was receiving that specific procedure from the physician. After returning home from the hospital, I learned that that the procedure I had was not what he told me he would perform. Deception! I received something totally different – much less, a procedure I absolutely did not want performed. I learned shortly after my surgery that the doctor had NEVER ever performed the service he told me he would perform. Can you all sit there and tell me this is not DECEPTION on the part of the doctor?

Doctors need to be held accountable for their actions – just like you and I are. They should be held to a higher standard to be honest. Their patients put their trust, lives and futures in their hands – believing that the doctor is going to do the best for them. When that happens, the betrayal is awful. Not too mention the violation they caused you. The hurt, pain, suffering, financial strains that this causes not only the patient – but their

families and loved ones as well. Doctors need to be held more accountable for their actions – not less.

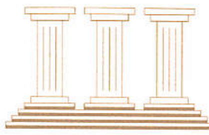
In my case, I nearly lost everything I had worked my whole life for. I lost my job, my health, my marriage, almost lost my home, plus my life was nearly taken from me. Not to mention – the torture my children went through. Wondering if their mom would come home from the hospital this time or not. I was hospitalized 19 times, endured 7 surgeries after that – to try and repair some of the damage caused by him, and over a half million dollars in unpaid medical bills. My insurance of course didn't cover any of my bills. I was forced to file bankruptcy on those medical bills at 40 years of age.

This experience was devastating to me and my family. And I certainly wasn't going to let this man get away with what he had done. I went public with my message. And I sued him.

The doctor who hurt me hurt many other people too, using the same deception. Now YOU all have the ability to force doctors to be responsible for their actions. By NOT passing this bill – consumers can and will feel that they have protections in place for them.

Remember how you got to where you are today – people voted you into office, thinking and hoping you were going to do the right things for the citizens of Kansas. They trusted and believed in you at election time. Please DO NOT let them down.

Thank you.



KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

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

From: Terry Humphrey, Executive Director

Date: March 21, 2007

RE: HB 2530 Kansas Consumer Protection Act

I am submitting testimony today on behalf of the Kansas Trial Lawyers Association, a statewide nonprofit organization of attorneys who serve Kansans who are seeking justice. We appreciate the opportunity to provide you with testimony opposing HB 2530.

KTLA believes that HB 2530 takes a step in the wrong direction by weakening the Kansas Consumer Protection Act (KCPA) to the detriment of Kansas patients. The KCPA is a remedy for consumers that are hurt by acts that are deceptive or unconscionable, protecting Kansans in a broad array of consumer transactions. There is not a sound public policy reason why physicians and others engaged in the business of medicine and health care should not be subject to the same requirements of honesty with which other professionals and businesses must comply.

HB 2530 is much more than a limited exception to the KCPA. If passed, it will be the beginning of the end of our consumer protection laws, because it sets the precedent for other professionals or industries to come to the Legislature and ask for a similar exemption. Professionals such as architects, engineers, and lawyers are not distinguishable from physicians; like doctors, other professionals are also subject to the KCPA and are also regulated through state licensure boards as well as the tort system through professional negligence claims. If the Legislature creates an exemption for physicians and health care providers it will be impossible to justify to other industries and professions why they should not be exempted also. Ultimately, the KCPA will have more exemptions than substance and will be inadequate for aggrieved consumers seeking a remedy to deceptive and unconscionable acts.

The KCPA has always regulated physicians and health care providers. In at least three cases, the attorney general has pursued physicians through civil litigation for violations of the KCPA. However, there is no remedy in the Kansas Consumer Protection Act for claims of alleged medical malpractice, and there is no liability under the KCPA for providing patients with honest, informed opinions or statements. This means that a

Terry Humphrey, Executive Director

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E-Mail: ktla@ktla.org

physician does not violate the KCPA by telling a patient, "I think you will get better", or by expressing an honest opinion about care. These types of statements are not misrepresentations, willful omissions, or unconscionable practices, which are prohibited under the KCPA.

If HB 2530 becomes law, Kansas will have perhaps the broadest immunity granted under a consumer protection act in any state. The term “health care provider”, exempted from the KCPA under HB 2530, clearly encompasses profit making entities that should be subject to the requirements of fair dealing found in the KCPA, and were not even the subject of the question before the Kansas Supreme Court in the Williamson v. Amrani decision. In fact, the court in the Amrani decision was very clear that the KCPA applies nearly without exception, so HB 2530 breaks new ground in creating an exemption to Kansas consumer protection laws.

To illustrate, the term “health care providers” is defined in more than a dozen different statutes, and the definitions vary. However, neither the KCPA, nor HB 2530, define or provide any limitation or clarification of how the term should be construed and what portion of the health care industry is exempted from the KCPA. Any individual or entity that could make a claim that they are a “health care provider” could potentially take advantage of the exemption, and therefore the term must be construed broadly in considering the implications of HB 2530.

The term “health care provider" arguably includes any person licensed or registered in any state to perform any type of medicine, including assistant/extenders, therapists, social workers, and psychologists, as well as private hospitals, laboratories and pathology clinics, and any corporation, LLC, partnership, and not-for-profit organized by health care providers, as well as any “officer, employee or agent thereof” acting in the course and scope of such person's employment or agency.[i]

The definition could also potentially include health maintenance organizations (HMOs), which are included in the definition of “health care provider” found at KSA 40-22a03. The courts would likely be forced to decide whether a “communication…related to….treatment” from an HMO was a “business practice” and subject to the KCPA or a “professional service” and exempt. In 2006, approximately 350,000-400,000 Kansans were enrolled in HMOs.

The term “physician” as used in the bill is problematic as well. “Physician” is defined in several different ways in Kansas statutes. Those definitions are basically consistent, although they vary to some degree in the scope of inclusiveness.[ii] One definition, however, of privileges, defines “physician” to include anyone “reasonably believed by the patient to be licensed to practice medicine.” A person representing themselves as a physician, but who is not really a physician, should be subject to the provisions of the KCPA, and the KCPA should be a remedy for consumers aggrieved by such deception.

HB 2530 was amended in the House to exempt only a physician or health care provider’s “professional services”—the care and treatment of patients. Billing, business practices,

and advertising are still subject to the KCPA. Given the breadth of the exemption created by HB 2530, it is nearly impossible to speculate as to the specific examples of deceptive conduct that would be protected if HB 2530 becomes law. However, we believe that the following examples illustrate the gray areas where consumers would have no recourse in the medical malpractice arena, and no remedy under HB 2530:

- Intentionally deceptive statements about a patient's care and treatment. Such statements could include misrepresentations about the doctor's credentials, training, or, knowledge of and experience with a condition or treatment. Also included would be intentionally deceptive statements about a patient's prognosis to induce further treatment, or to encourage a patient to terminate treatment, in order to result in financial gain to the provider. If such deceptive statements do not result in physical injury, then the there is no remedy in a medical malpractice case. Example: a patient sees Doctor X about treatment for an injured knee. The doctor misrepresents himself as having expertise in the treatment he is recommending and that he has special certification to perform the procedure, none of which is true. The patient decides to seek treatment with Doctor X, even though he is not in the provider network under her health insurance plan. As a result, she incurs significant additional out-of-pocket costs to secure his services. Even though the surgery is a success, she is dissatisfied because she could have gotten similar results from a physician that was covered by her health insurance, at much less expense, and would have done so except for Doctor X's deception.

- "Bait and switch" health care. The KCPA was specifically designed to deter cons such as the "bait and switch". These swindles include representations to the patient that a certain surgery will be performed when in actuality a different surgery is performed, or that devices such as hearing aids are superior when in fact the equipment provided is reconditioned, shoddy, or not what the patient selected. Example: a physician tells a patient he will perform a new, superior bariatric surgery for weight loss. In actuality, he performs a procedure with side effects that the new procedure does not have, and that is not as effective. His patients find out about the deception after they undergo the surgery. This example is based on the experiences of several patients who underwent surgery performed by Dr. Timothy Sifers in Kansas City.

Although the Board of Healing Arts and other health care provider regulators scrutinize licensees and can take action to terminate, limit, or suspend licenses and registrations, these regulatory bodies do not have the ability to make aggrieved patients "whole". In other words, they cannot compensate patients for losses that are the result of a licensee's deceptive acts. Likewise, restitution is not consistent or dependable as a remedy for the victims of physicians and health care providers that are guilty of criminal acts.

In summary, KTLA believes that the KCPA serves an important consumer protection function and its provisions should apply to physicians and health care providers in the same way that it applies to other Kansas businesses and professionals. There is no consumer benefit to distinguishing health care transactions from other consumer

transactions, or physicians and health care providers from others that provide services or supplies. We ask that the Committee oppose HB 2530.

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[i] 'Health care provider' means: (citing KSA 7-121b; other statutes cited as appropriate)

-a person licensed to practice any branch of the healing arts,
or with temporary permit to practice any branch;
or postgraduate training;
-a licensed medical care facility,
-a health maintenance organization,
-a licensed dentist,
-[a licensed dental hygienist; KS ST s 65-4921]
-a licensed professional nurse
-[a licensed practical nurse; KS ST s 65-4915]
-[an advanced registered nurse practitioner; KS ST s 40-2,111]
-[a licensed professional nurse authorized to practice as registered nurse anesthetist, including temporary authorization; KS ST s 40—3401]
-[respiratory therapist; KS ST s 50-1,100]
-a licensed optometrist
-a licensed podiatrist
-a licensed pharmacist
-[a licensed mental health technician; KS ST s 50-1,100]
-a professional corporation organized . . . [by] health care providers
-[a Kansas limited liability company , partnership, not for profits, organized . . . [by] health care providers; KS ST s 38-135]
-a licensed physical therapist;
-[a certified physical therapist; KS ST s 50-1,100]
-[any person licensed to practice any branch of the healing arts; KS ST s 40-2,111]

-[a licensed social worker, licensed physician assistant, or licensed psychologist KS ST s 40-2,111]
-[emergency medical ambulance and attendant services; KS ST s 50-1,100]
-[a licensed occupational therapist or therapist assistant; KS ST s 50-1,100]
-[any hospital licensed under 65-425; 40-12a01]
-[any private psychiatric hospital licensed under KS ST s 75-3307b; 40-12a01]
-[a licensed medical care facility,
or licensed health maintenance organization; KS ST s 40-22a03]
[licensed dental hygienist;
[an ambulatory center;
radiology oncology center, or
pathology center KS ST s 65-1,168]
-"any person licensed, by the proper licensing authority of this state, another state or the District of Columbia, to practice medicine and surgery, osteopathy, chiropractic, dentistry, optometry, podiatry, audiology or psychology.
KS ST s 44-508]
-["a person licensed or registered to engage in an occupation which renders health care services" KS ST s 40-22a03; or "licensed to practice medicine and surgery"; KS ST s 65-1,168]
-[a professional corporation organized pursuant to the professional corporation law of Kansas by persons who are . .. health care providers KS ST s 40-3401]
-[a partnership of persons who are health care providers; KS ST s 40-3401]
- Kansas limited liability company organized for the purpose of rendering professional services by . . . health care providers, authorized to render professional services for which the limited liability company is organized, and Kansas not-for-profit corporation "organized for the purpose of rendering professional services by persons who are health care providers"]
-or an officer, employee or agent thereof acting in the course and scope of such person's employment or agency;
-'professional services' means those services which require licensure, registration or certification by agencies of the state for the performance thereof.

[ii] KS ST s 65-425 (k): "Physician" means a person licensed to practice medicine and surgery in this state.

-Or licensed to practice medicine and surgery under the healing arts act. [KS ST s 40-3202]

-Or a person who is employed by a state psychiatric hospital or by an agency of the United States and who is authorized by law to practice medicine and surgery within that hospital or agency. KS ST s 59-2946

-Or a person licensed or reasonably believed by the patient to be licensed to practice medicine or one of the healing arts as defined in K.S.A. 65-2802 and amendments thereto in the state or jurisdiction in which the consultation or examination takes place. [KS ST s 60-427 [Phys patient privilege]]

Opposition to House Bill No. 2530
from

Citizens Commission on Human Rights
Mary Cockburn, Director
cockburn@swbell.net,
ph: 316-640-1633

Citizens Commission on Human Rights* (CCHR) has for 38 years investigated and exposed cases of *deception and misrepresentation* by mental health providers, which resulted in harm, abuse and violations of human rights.

Because of the nature of its diagnostic system (*The Diagnostic & Statistical Manual of Mental Disorders*), psychiatric diagnosis and treatment is more often than not a misrepresentation of what is actually ailing someone. This is because psychiatrists don't perform medical exams and they don't validate diagnosis with tests. They simply observe a behavior and give it a label. This can be harmful and even fatal.

Below are a few instances:

- CCHR was contacted by a Florida man who reported he had been treated for seven years by three psychiatrists for unbearable headaches and inexplicable temper tantrums. In 1996 he was diagnosed with depression and prescribed a psychiatric "mood stabilizer". In 2003, he suffered a seizure, dislocating his shoulder in his sleep. The doctor who treated him suspected a neurological disorder, ordered a MRI and discovered the man was suffering from a brain tumor that had been growing for 15 years. Once removed, he was no longer depressed.

- CCHR received a similar report for a woman in Indiana who was diagnosed with "bipolar disorder" and prescribed a revolving cocktail of psychiatric drugs. She too was found to have been suffering from a large tumor that had been growing for over 10 years.

- A Michigan woman reported to CCHR that she had been treated by four psychiatrists for stress, anxiety and sleep disturbances. They diagnosed her as "bipolar" and kept her on one or more psychiatric drugs for three years. She became so disabled by the drugs, she was unable to hold her job at the University of Michigan. After three years of this, she realized she was not getting better under psychiatry so she visited another doctor at a different hospital. She was diagnosed with numerous environmental and food allergies that, when addressed, restored her health...including her mental health. She was not "bipolar" to begin with.

These are only three of countless other stories.

DSM IV states that "mental disorders are not discrete entities with definable boundaries."

A 1994 study ("The Myth of Reliability of DSM," *Journal of mind and Behavior*, Winter and Spring 1994, Vol. 15, No. 1 and 2) found that "...there is still not a single multi-site study showing that DSM (any version) is routinely used with high reliability by regular mental health clinicians. Nor is there any credible evidence that any version...has greatly increased its reliability beyond the previous version.

Yet, for instance, more than 100 million people worldwide have been prescribed powerful mind-altering drugs based on these deceptive diagnoses. And nearly all such drugs carry

warnings from the FDA on/or other government drug regulatory bodies regarding increased risk of suicidality, death and other horrible side effects.
Recently on a BBC program "The Trap: What Happened to our Dream of Freedom", the chief author of the DSM, psychiatrist Robert Spitzer, admitted that the DSM diagnostic system is not medically sound.

SPITZER: "What happened is that we made estimates of the prevalence of mental disorders totally descriptively, without considering that many of these conditions might be normal reactions which are not really disorders. That's, the problem, because we were not looking at the context in which those conditions developed."

INTERVIEWER: "So you have effectively medicalised much of ordinary human sadness, fear, ordinary experiences, you've medicalised them?"

SPITZER: "Uh, I think we have to, to some extent. How serious a problem it is, is not known. I don't know if it's 20%, 30%, I don't know, but that's. that's a considerable amount if it is 20% or 30%."

In closing, DSM diagnosing – which is done by nearly all mental health providers – lead to the "treatment" of patients that includes the use of dangerous psychiatric drugs that carry strong FDA warnings, electroshock and psychotherapeutic counseling that in up to 25% of cases leads to the therapist sexually exploiting the patient. Statistics show that one in every 20 of these is a child between the ages of seven and 16.

In light of this information, the people of Kansas deserve to have every possible legal remedy available in the event they are victimized by psychiatric/mental health misrepresentation or deception.

*Citizens Commission on Human Rights is a non-profit mental health watchdog established in 1969 by the Church of Scientology. It investigates and exposes psychiatric violations of human rights. It works shoulder-to-shoulder with like-minded groups and individuals who share a common purpose to clean up the field of mental health.

TESTIMONY OF BILL MCKEAN IN OPPOSITON TO HOUSE BILL 2530

My name is Bill McKean and I am a constituent of Senator Les Donovan. Since the 2004 primaries, I have actively lobbied the reporters and editors at the Wichita Eagle and elected officials, politicians, judges, prominent attorneys and law professors through out the state to reduce the effects of nepotism and cronyism and in the Kansas judiciary by increasing accountability and transparency. I have testified before this committee twice and was prevented from testifying a 3rd time due to poor time management. I hope that I will not be rushed this morning because I believe that there is a direct correlation between the decline of ethics in the health care industry in Kansas and the decline of ethics in our legal profession.

We have become a society of influence peddlers, bullies and liars where medical professionals are valued by how many people they employ and legal professionals are valued by how easily they can peddle influence to avoid their clients from being embarrassed by public disclosure of their unethical conduct. The citizens of Kansas desperately need more consumer protection in health care. It is too difficult to file successful malpractice lawsuits against health care provides due to a code of silence that exists between an elite class of doctors, attorneys, judges, politicians and their children.

I want to offer 4 quick stories as examples:

I have a friend, Jerome who is a psychologist for Prairie View. He reported the terrible stories about the Kaufman's two years before they were shut down due to Medicaid fraud. Arlan Kaufman was a respected professor at the college in Newton. Judge Ted Ice is the powerful district court judge in Newton, His wife Sue Ice was a corporate development director for Prairie View and is on the board of healing arts . Their daughter, Laura Ice is the current president of the Wichtita Bar Association. Should any one be surprised that the citizens of Harvey County knew about the sexual abuse that was occurring for many years?

I have a friend Lindy who I coached her son in soccer. Lindy currently is a social worker who works with troubled youth and the juvenile courts. Lindy was seduced by her family physician, Dick Egelof, who proceeded to put her on many powerful psychotropic drugs to place her in psychologically & sexually submissive. Lindy was unemployed for several years due to the emotional trauma and the ongoing harassment by Egelof. For some reason Egelof could not be sued for malpractice. Egelof was sued under another law and a settlement was reached out of the court. Egeloff was represented by former Wichita Bar President, Pam Clancy, who is married to a prominent heart surgeon. Clancy told me that she does not think that reforms are needed to discipline attorneys and doctors. Egelof is now being investigated by the Board Healing Arts. Egelof hired Tpeka attorney, Randy Forbes to represent him before the board of Healing Arts. Forbes is also the general counsel for the boards of dentistry, pharmacy and optometrists. Should the citizens of Kansas be surprised if Forbes negotiates a deal for Egeloff so tht there will not be any public censure?

After 4 years of investigations and procedures, an Oakley doctor finally lost his medical license. One the person making the complaints recanted due to psychological intimidation. The physician's attorney attacked the credibility of the witness in the press. The physician's attorney's was Mike O'Neal, Chairman of the House Judiciary Committee.

Can the citizens of Kansas trust the legal system or the professional boards to hold health care providers accountable when attorneys and judges are not investigated? We had two Kansas attorney generals, Mike Stephan, and Paul Morrison accused of sexual harassment. Morrison's accuser claims she was intimidated.

I have also attached a letter to judge Tony Powell concerning the corruption in the Wichita Courts. Fortunately there are citizens that are mobilizing politically to clean up the corruption. Fortunately there are courageous judges like Robb Rumsey fighting for political free speech. Fortunately we can elect our judges unlike the citizens in the chairman and ranking minority member's districts.

I urge the committee to defeat this bill. We need more accountability and recourse to the courts. Hopefully the legal and medical professions and the politicians will realize that the party is over.

I will respectively stand for any questions from the committee.

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I urge the committee to defeat this bill. We need more accountability and recourse to the courts. Hopefully the legal and medical professions and the politicians will realize that the party is over.

I will respectively stand for any questions from the committee.

I have driven up this morning from Wichita to provide you with anecdotal evidence of the lack of accountability that exists in the Sedgwick County District Court so that you do not kill Senate Bill 45 by sending to the Kansas Judicial Council for further study. More importantly I also want to encourage this committee early in the legislative session to enact many wide-sweeping judicial reforms on a bi-partisan basis. . I truly believe that

March 20, 2007

Judge Tony Powell –
Presiding Family Law Judge
18th Judicial District Court – Sedgwick County
525 Main Street – 4th Floor
Wichita, KS 67203

Re: Confirmation of Local Rules
Local Rules & Lack of Accountability
For Case Managers & Forensic Psychologists
Problems with Supervised Visitation at Wichita Children's Home

Dear Judge Powell:

I will be testifying tomorrow (for the 3td time before the Senate Judiciary Committee) in opposition to HB 2530 which exempt health care providers from any liability from the consumer protection act for any type of professional service including but not limited to treatment, prescription and diagnosis of any condition. I want to challenge not only to defeat HB 2530, but also to lobby for a post-legislative audit committee study of the corruption in the case management system in Sedgwick County which has resulted in children being unnecessarily medicated and with dishonest diagnosis by psychologist closely related to leadership in the Kansas legal community.

Currently dishonest mental health professionals like Kim Kadel & Jeanne Erickson with the Counseling & Mediation Center and Columbus Bryant have regulatory immunity psychologists from any disciplinary action by the Board of Healing Arts if they are acting under the order of the court. This conveniently allows them to act as goons and arbitrarily adjudicate disputes so that the 26 district court judges don't need to be bothered by trivial matters like determining what is in the best interest of a child. I truly appreciate the reluctance of many judges like you, Eric Yost and Ben Burgess to work in family law courts given your disappointments in not achieving your career goals of being attorney general, senator or federal judge. However hundreds of families are being destroyed due to the lack of accountability and oversight by any of the 26 judges. It's bad enough that greedy attorneys and case managers intentional try to poison the co-parenting relationship between divorcing spouses to churn fees. It's even worse when incompetent psychologists medicate young children with powerful psychotropic drugs because they are afraid to admit that they made an incorrect custody recommendation.

I appreciate you meeting with me in the past to discuss my concerns. However I must conclude that you are part of the problem by participating in the code of silence between judges and attorneys to cover up for each others misconduct and dishonesty. In my estimation, you and Judge David Kaufman have done NOTHING to reform the system since you entered the family law courts when you went into the family law court. I am

the individual citizen who pestered the Wichita Eagle to re-report the sexual harassment scandal involving Judge Wilbert & Judge Ballinger. I am the individual citizen who laid a guilt trip on the Wichita Eagle and the 26 district court judges to conduct a confidential survey of attorneys to evaluate the performance of the district court judges.

Regrettably due to the lack of courage and leadership by the chief administrative Judge Corrigan and you, I must pressure you to investigate the following allegations of corruption so that the concerned parents can protect the emotional and physical well being of their children with out harassment from dishonest, corrupt judges, attorneys and mental health professionals associated with the family law court:

ASSIGNMENT OF RETIRED JUDGES

Please advise if you or if Judge Corrigan is responsible for assigning Judge Beasley to serve on the family law court. In my opinion Beasley is the godfather of the influence peddling that occurs at the family law court. As you probably are aware, Beasely is widely reputed to have had a long-term sexual affair with SuperLawyer , Sheila Floodman. I have been told this by a senor trial attorney with a large law firm, a forensic psychologist and a case manager. I was in a court room last year when Beasely ruled in favor of Floodman's motion concerning the disposition of a jointly owned residence. Judges are to avoid any appearances of a conflict of interest. If necessary, I am willing to write the Commission of Judicial Qualifications to have Beasely removed form the list of eligible judges.

PROBLEMS WITH MAGISTRATE HOLLIS

Please who is responsible for hiring and firing Hollis. As I told you during our meeting two weeks ago, a few concerned citizens who represented themselves pro se have come to me complaining about influence peddling by Hollis and his abusive disposition. There is no accountability in the family law courts because the 26 judges rotate in and out and Hollis Liz Armstrong and the dishonesty case mangers – family law attorneys remain entrenched

PROBLEMS WITH THE WICHITA CHILDREN'S HOME

I called Liz Armstrong to set up a meeting to discuss my concerns. I am disappointed that you did not return my telephone call to explain to me why you did not want me to talk to visit with Liz about my concerns. Ii assume that you will not try to interfere or try to intimidate Liz or myself in the future. If there is a problem I would appreciate it if you would me courteous enough to contact me by phone call or my e-mail.

I have previously discussed with Sarah Robinson, Executive Director, and Becky Brewer, Child Access Director, my concerns about their lack of objectivity. I have repeatedly caught Becky minimizing my sons' problem sand having communications. I believe that the Wichita Children's Home can not be objective because the following board members

or advisory members are too closely aligned with the individuals who aced dishonestly in my case:

Jim Beasely is on the advisory board and my first attorney, Sheila Floodman refused to contact an independent witness, Alicia Lndsverk, to confirm that the court-appointed case manager, Kim Kadel manufactured lied and manufactured negative evidence against me.

Associate Wichita Police Chief Terri Moses is on the Board of Directors. I have accused attorney-case manager, John Foulston of obstructing justice, lying to me and misleading the court under oath. Foulston works for the law firm of David Moses, husband of Terri Moses.

PROBLEMS WITH LOCAL RULES

I am disappointed that you dismissed my concerns about a representative of the Wichita Family Bar and case manager, David Johnson, making a presentation at last year's Wichita Bar Association Family Law Seminar in which he told the audience that the family law judges (Fleetwood, Wilbert & Pilshaw) had instructed the family law bar not to advocate for their clients by attacking the basis or assumption of a court ordered custody evaluation. It was very disappointing but telling that later in the day not one of the 50 participants asked the 3 judges to confirm Johnson's instructions. In my opinion the incident only reinforces my belief that the 25 of the 26 district judges are too lazy and unqualified to serve on a family law court. This is why the district court judges have condoned the dishonesty of case managers like Bryant, Erickson, Foulston & Kadel, and why you joined some of these individuals to provide training to a new crop of family law case managers. In my opinion a separate state wide family law court system should be set up to hire empathetic judges who want to work in family law courts rather than judges who want to trade sexual favors for influence or want to sexually harass female employees of the family law court.

SPECIFICS REGARDING MY CASE

You and Judge Corrigan have told me that it would be inappropriate for me to discuss any aspects of my case is which currently on appeal. However I am concerned that it is more important for you both do not want to be presented with any evidence as it would require you to take initiate reforms.

I plan to write the attorneys, judges, case mangers and mental health professionals that have acted dishonestly to obstruct justice to encourage them to self-report their unethical behavior before my appeal rights are exhausted. However the unethical behavior of John Foulston, Bud Bryant, David Seifert and Marc Quillen (husband of Kansas Legal Services Executive Director – Marilyn Harp) are so egregious that I need to make you aware so that you do not assign these individuals to new cases. I will copy you and Judge Corrigan with my letter to these individuals.

I will also mail a copy of my complaint to every large firm in Wichita and to the pastors of the major churches to inform them that my second attorney, Charlie Harris, committed perjury when I forced him to testify under oath. Charlie is the chairman of the family law committee for the Kansas Judicial Council. Hopefully with a little publicity, the voting public will understand why we can not trust the Commission on Judicial Qualifications, the Office of Judicial Administration, the Board of Healing Arts and the Behavior Science Board to police ethics in our professions. The public needs to appreciate that we can not trust Julie Ariagno (wife of Superlawyers – Steve Ariagano & Tim Moore) or Mike Herd (son of Supreme Court Justice herd) to teach ethics to divorce attorneys at the family law seminars or trust retired Judge Terry Bullock or Disciplinary Administrator Stan Haslett to teach ethics at KU Law School or Linda Elrod to teach family law at Washburn Law School. The attorneys, judges and health care providers in Kansas are taught by the doctor-lawyer-judges parents and by their professors that think that they are an elite class of citizens that should not be held accountable for their unethical behavior.

I think I finally found out the real reason why the family law court system has retaliated against me for complaining that David Seifert had acted incompetently for putting my 6 year old son on Zoloft and then on Depacote and them suggesting that he be admitted to Menningers Hospital in Topeka for an evaluation when he actually agreed with my diagnosis that my son had an oppositional defiant disorder due to his lack of a relationship with me and due to physical bullying by an older teenaged half-brother. Seifert could not admit that he and his nurse practitioner made a mistake in 2003 because Wichita Psychiatric Consultants because they were earning $375,000 per year from Comcare providing nurse practitioners to evaluate incoming psychiatric patients at Wesley & Via Christi. Paul Murphy & Marc Quillen, the owners of Wichita Psychiatric Consultants, would rather destroy a family than admit that their nurse was incompetent or poorly supervised.

I hope that these issues will be openly discussed in the media before next years judicial elections so that the voters will understand that major reforms must be made to the divorce laws and that several gangsters need to removed from the bench.

Very truly yours,

Bill McKean
825 N. Bay Country Cir.
Wichita, KS 67235

KANSAS VETERINARY MEDICAL ASSOCIATION

816 S.W. Tyler, Suite 200
Topeka, Kansas 66612-1635
Tel: (785) 233-4141
Fax: (785) 233-2534

March 21, 2007

Senate Judiciary Committee

Re: **H.B. 2530**: *An Act concerning consumer protection, relating to health care providers, amending K.S.A. 50-635 and repealing existing section*

Mr. Chairman and members of the Senate Judiciary Committee, my name is Gary Reser. I am executive vice president of the Kansas Veterinary Medical Association.

The KVMA represents the Kansas veterinary profession through legislative, regulatory, education, information, and public awareness programs. The KVMA has more than 600 members in Kansas and almost 400 members in all other states.

The KVMA supports H.B. 2530 and respectfully requests that you vote "yes" for passage.

Veterinarians comprise the only profession trained in multi-species comparative medicine and provide an extraordinary link between animal diseases, human diseases, bio-terrorism agents, and food safety and security.

Veterinarians take an oath to **"use their scientific knowledge and skills to benefit society, promote public health, and advance medical knowledge."**

Public health veterinarians play a crucial role in the investigation, diagnosis, prevention, and control of infectious diseases in local, state, and federal agencies, and research institutions. Private practitioners, tending to individual patients or large herds, are a first line of defense against animal diseases or bioterrorism.

Veterinarians involved in food supply practice are involved in public health by protecting food production from conception to slaughter. These practitioners must be knowledgeable of food animal production methods, disease diagnoses, proper use of pharmaceuticals, proper slaughter procedures, food handling, and food safety.

Of course, it is also prudent to take time to consider the vital place of veterinarians in the vibrant Kansas agricultural economy. The profession certainly adds integrity and credibility to Kansas' food animal production.

In addition, Kansas veterinarians are already held accountable for standards of professional conduct and subject to disciplinary action for unprofessional conduct in a number of Kansas and federal statutes.

Most of the statutory or regulatory provisions relating to Kansas physicians mentioned by Justice Davis in his dissenting opinion in ***Williamson v. Amrani,*** about why physicians should not be subject to the ***Kansas Consumer Protection Act***, can be cross-referenced to many similar statutory and regulatory provisions governing Kansas veterinarians.

For all of these reasons, the KVMA respectfully urges you to vote "yes" on **H.B. 2530.**

Thank you.

HEIN LAW FIRM, CHARTERED

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

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

Testimony re: HB 2530
Senate Judiciary Committee
Presented by Ronald R. Hein
on behalf of the
Mental Health Credentialing Coalition
March 21, 2007

Mr. Chairman, Members of the Committee:

My name is Ron Hein, and I am legislative counsel for the Mental Health Credentialing Coalition. The Coalition is comprised of the members of the Kansas Association for Marriage and Family Therapy, the Kansas Association of Masters in Psychology, and the Kansas Counseling Association/Kansas Mental Health Counselors Association.

The MHCC supports HB 2530 which was introduced at the request of the Kansas Medical Society as the result of a recent Kansas Supreme Court ruling (Williamson v. Amrani, Kansas Supreme Court #95154). This bill clarifies that the Consumer Protection Act (CPA) does NOT apply to professional services provided by licensed healthcare providers.

The Supreme Court case was only applicable to physicians, but by implication, other healthcare providers, may be held liable for damages in future litigation for alleged medical or other professional malpractice under the Kansas Consumer Protection Act (CPA).

We would submit that this ruling is totally contrary to the original legislative intent of the CPA, and constitutes an unreasonable expansion of the CPA, while also presenting a significant risk to all healthcare providers.

Thank you very much for permitting me to submit this written testimony.

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

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

Testimony Re: HB 2530
Senate Judiciary Committee
Presented by Ronald R. Hein
on behalf of
Kansas Society of Radiologic Technologists
March 21, 2007

Mr. Chairman, Members of the Committee:

My name is Ron Hein, and I am legislative counsel for the Kansas Society of Radiologic Technologists. The KSRT is the professional association for radiologic technologists in Kansas.

The KSRT supports HB 2530 which was introduced at the request of the Kansas Medical Society as the result of a recent Kansas Supreme Court ruling (Williamson v. Amrani, Kansas Supreme Court #95154). This bill clarifies that the Consumer Protection Act (CPA) does NOT apply to professional services provided by licensed healthcare providers.

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Thank you very much for permitting me to provide written testimony.

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

Testimony re: HB 2530
Senate Judiciary Committee
Presented by Ronald R. Hein
on behalf of
Kansas Pharmacy Coalition
March 21, 2007

Mr. Chairman, Members of the Committee:

My name is Ron Hein, and I am legislative counsel for the Kansas Pharmacy Coalition (KPC). The Kansas Pharmacy Coalition is an ad hoc coalition comprised of the Kansas Pharmacists Association and the Kansas Association of Chain Drug Stores.

The KPC supports HB 2530 which was introduced at the request of the Kansas Medical Society as the result of a recent Kansas Supreme Court ruling (Williamson v. Amrani, Kansas Supreme Court #95154). This bill clarifies that the Consumer Protection Act (CPA) does NOT apply to professional services provided by licensed healthcare providers.

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Senate Judiciary
3-21-07
Attachment 17

Kansas Association of Osteopathic Medicine
1260 SW Topeka Boulevard
Topeka, Kansas 66612
Phone (785) 234 5563
Fax (785) 234 5564

Statement of Support
House Bill 2530
Senate Judiciary Committee
March 21, 2007
By Charles L. Wheelen

Thank you for the opportunity to express our support for the provisions of HB2530. We believe this legislation will restore original legislative intent under the Kansas Consumer Protection Act.

The Kansas Consumer Protection Act (KCPA) was never intended to apply to the relationship between a patient or client and his or her physician or other health care provider. The KCPA does not include the term patient or client, nor the phrase health care, anywhere in the definitions section. But the recent decision in *Williamson v. Amrani* concludes that because the Legislature failed to specifically exempt health care providers, the KCPA does apply to them. This is why HB2530 has become necessary.

Consumers of health care services already have adequate recourse in the event of an unsatisfactory outcome. If they believe there was negligence, they can file a civil action alleging malpractice by the facility or health care professional. If they believe the health care provider engaged in unprofessional conduct, such as deception or false advertisement, they can file a complaint at the state agency which regulates the facility or profession.

For example, under the Healing Arts Act, a physician or chiropractor can lose his or license for "fraudulent or false advertisements" or for any act of "unprofessional or dishonorable conduct" (KSA 65-2836). Among the many definitions of activities that constitute unprofessional conduct are: "Solicitation of professional patronage through the use of fraudulent or false advertisements," "Advertising professional superiority or the performance of professional services in a superior manner," "Conduct likely to deceive, defraud or harm the public," Making a false or misleading statement regarding the licensee's skill or the efficacy or value of the drug, treatment or remedy prescribed by the licensee," "The use of any false, fraudulent or deceptive statement in any document connected with the practice of the healing arts," and "Obtaining any fee by fraud, deceit or misrepresentation" (KSA 65-2837).

That same section of the Healing Arts Act defines false advertisement to mean, "any advertisement which is false, misleading or deceptive in a material respect. In determining whether any advertisement is misleading, there shall be taken into account not only representations made or suggested by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations made."

Historically, licensure laws have been enacted primarily for the purpose of protecting consumers from unscrupulous individuals or imposters who falsely portray themselves as knowledgeable professionals offering goods or services that ostensibly benefit the consumer. During Kansas territorial period and early statehood, health care consumers knew that membership in a county medical society meant the doctor was a legitimate graduate of a bona fide medical college rather than a charlatan. In 1901 the Legislature codified the county medical society credentialing process and added enforceable consumer protections. The early medical practice act was eventually replaced in 1957 by our Healing Arts Act. The principal focus of these laws was always consumer protection.

Over the years the Legislature has relied on the early medical practice act as the model for other licensure laws. Thus, the statutes prescribing licensure and regulation of other health care professions follow similar patterns. **Protecting consumers from false advertising and deceptive practices is a prominent theme among our laws that regulate health care providers.** This is why application of the KCPA to health care providers is entirely unnecessary, and was never intended.

For the above reasons, we urge you to recommend passage of HB2530. Thank you for considering our request.

KANSAS
OPTOMETRIC
ASSOCIATION

1266 SW Topeka Blvd. • Topeka, KS 66612
(785) 232-0225 • (785) 232-6151(FAX)
www.kansasoptometric.org

March 21, 2007

TO: SENATE JUDICIARY COMMITTEE

FROM: GARY L. ROBBINS, CAE, EXECUTIVE DIRECTOR

RE: HB 2530

The Kansas Optometric Association would respectfully ask for your support of House Bill 2530. This bill is in response to a February Kansas Supreme Court decision that ruled physicians could be sued under the Consumer Protection Act for cases involving the care and treatment of patients.

Without passage of HB 2530 this session, the potential exists for increased health care costs for Kansans. After many years of hard work by previous Legislatures, Kansas has crafted a reasonable medical malpractice system which protects patients and provides fair remedies for injured Kansans. Our concern is that the Supreme Court decision will allow for duplicate litigation under both the current medical malpractice system and the Consumer Protection Act which will increase defense costs, increase malpractice insurance rates and eventually lead to higher health care costs.

Critics of HB 2530 are concerned about health providers not being held accountable for deceptive practices. The House Judiciary Committee addressed this concern by passing an amendment offered by the Kansas Medical Society which we strongly endorse. It assures that deceptive business practices will continue to be brought under the Consumer Protection Act. Health care providers also face loss of licensure and other disciplinary actions under their individual licensure acts for deceptive practices as well.

We would respectfully ask for your support of HB 2530.

If you have questions, please don't hesitate to contact me at 232-0225 or by e-mail at gary@kansasoptometric.org.

KANSAS DENTAL ASSOCIATION

Date: March 21, 2007

To: Senate Committee on Judiciary

From: Kevin J. Robertson, CAE
Executive Director

RE: Testimony in Support of HB 2530.

Senator Vratil and members of the Committee I am Kevin Robertson, executive director of the Kansas Dental Association (KDA) representing 1,200, or some 80% of the state's licensed dentists. **The KDA supports HB 2530** which would make it clear that those professional services for which physicians and other health care providers are licensed are exempt from the application of the Kansas Consumer Protection Act.

Currently, disputes over the provision of a dentist's professional services are adjudicated as professional liability claims and there is a professional structure that balances certain tort reforms with heightened reporting, accountability, standards of conduct, peer review, and mandatory liability insurance. The KCPA would provide no additional patient protection that is not already in existence. In fact, the duplicative nature of KCPA claims will stimulate more litigation, and drive up professional liability insurance costs.

Like physicians and other healthcare providers, the dental practice act (KSA 65-1422 et seq.) contains extensive regulatory safeguards for the public through the disciplinary provisions for dentist. In addition to establishing standards for education and competence, the dental practice act also imposes significant rules of conduct for licensees, and contains a "laundry list" of twenty disciplinary standards in KSA 65-1436 with which the failure to comply by a dentist can ultimately result in the loss of licensure

As stated by Mr. Slaughter, HB 2530 should be supported for the following reasons:

- there already exists a comprehensive, long-standing regulatory structure that the legislature has put in place to protect patients from inappropriate conduct or improper professional practices by healthcare providers, including dentists;

- there is a detailed and specific set of laws which govern a patient's ability to recover damages for alleged medical malpractice, which is the appropriate method to resolve disputes over a healthcare provider's conduct or competence on matters related to the practice of dentistry; and

5200 SW Huntoon • Topeka, KS 66604 • 785.272.7360 • FAX 785.272.2301 • kevin@ks

- the consumer protection act will adversely impact the healthcare provider-patient relationship by reducing the practice of dentistry to mere commerce between "suppliers" and "consumers" which will not protect patients or promote better patient care.

Thanks for the opportunity to submit these written comments today. Again, the KDA asks the **Committee to support HB 2530 and recommend it favorably**.

5200 SW Huntoon • Topeka, KS 66604 • 785.272.7360 • FAX 785.272.2301 • kevin@ ksdental.org

Kansas Society of Anesthesiologist

Remarks Concerning House Bill No. 2530

Senate Judiciary Committee

March 21, 2007

Chairman Vratil and Members of the Senate Committee:

My name is Mark Brady and I am an Anesthesiologist licensed to practice the Healing Arts in Kansas. I graduated from Emporia State University and the Kansas University School of Medicine and have practiced anesthesiology in Kansas for 11 years. I am a partner with Midwest Anesthesia Associates, P.A. at Shawnee Mission Medical Center. Currently, I serve as President of the Kansas Society of Anesthesiologists.

The Kansas Society of Anesthesiologists was organized to raise and maintain the standards of the medical practice of anesthesiology and improve the care of the patient in Kansas. We are a component Society of the American Society of Anesthesiologists (ASA). The ASA serves as an important voice in American Medicine and the foremost advocate for all patients who require anesthesia or relief from pain.

I appear today, by this written testimony, on behalf of the Kansas Society of Anesthesiologists in strong support of House Bill No. 2530, as amended by the House Judiciary Committee. The bill will exempt professional medical treatments and services made available by health care providers, from the Kansas Consumer Protection Act (KCPA).

By way of background, an Anesthesiologist is a medical physician who specializes in the field of anesthesiology, the science (and art) of preventing or relieving pain. Under current medical education standards, Anesthesiologists must obtain a bachelor's degree after four years of undergraduate pre-med studies emphasizing the sciences, four years of graduate doctoral training (medical school), an Anesthesiologist must complete a one-year term internship and then three years of training in the medical specialty of anesthesiology and pain medicine (an anesthesia residency) - for a total of twelve years of medical training. After fulfilling specific requirements set by the American Board of Anesthesiology and passing two rigorous examinations, an anesthesiologist earns Board Certification in anesthesia. We are also required to have continuing medical education and periodically sit for re-examination of our medical/technical skills. Physicians operate under a professional license granted by the State of Kansas. Our profession is strictly controlled and regulated to protect the public against unprofessional conduct.

The role of an Anesthesiologist extends beyond the operating room and recovery room. Anesthesiologists work in intensive care units to help restore critically ill patients to stable condition. In childbirth, Anesthesiologists manage the care of two persons: they provide pain relief for the mother while managing the life functions of both the mother and the baby.

Anesthesiologists also specialize in pain management. We offer reasonable care and comfort to patients, and provide our professional judgment in the diagnosis and treatment of pain, both

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acute and chronic. Our goals in pain therapy are to decrease the frequency or severity of pain, increase the level of a patient's activity and to reduce or eliminate usage of medications to relieve pain. However, we can't measure the intensity of pain; it can be subjective and is highly individualized to each patient. Only the patient can convey the severity of the aches and pains. Sometimes we can meet the expectations of the patient and relieve the pain; other times we can only diminish the pain until another diagnosis is made.

In regard to KCPA and its application to health care providers, we are not talking about the care and maintenance of automobiles or appliances, but the complex physiologic machine of the human body and the body's systems, systems that take years of learning and training to understand. So many variables enter into each decision we make that oftentimes multiple approaches are considered before action is taken.

Licensed health care providers do not deal in sure cures and offer false hope. It conflicts with the education and training we have received, it goes against the professional and ethical standards we operate under, and is contrary to the medical license granted to us.

Consumer protection statutes are meant to protect consumers from unconscionable or deceptive business practices. These laws are to be so liberally interpreted that the intent to fraud need not be proven. I don't believe it was ever the intent of lawmakers to include professional medical services with consumer fraud scams. The Healings Arts are a medical discipline focused on the end goal determined by the patient and their provider, not a one-sided transaction between a bargain hunter and scheming seller.

Over the years, lawmakers have deliberated on and acted favorably toward the implementation of procedures and protections for both patients and health care providers, both in malpractice and liability statutes and programs. State licensing boards, in Kansas, can take disciplinary action against practitioners who appear to be unfit or who engage in inappropriate or unethical practices.

In addition, I believe that in the future access to affordable healthcare and provider recruitment could be negatively impacted without the proposed exemption.

I regret that because of my schedule I am unable to present these remarks in person but request that they be made a part of your Committee's record and that you consider them during your deliberations.

Should you require additional information please contact our Association's lobbyist in Topeka, Doug Smith. He may be reached at 785-235-6245.

Thank you for the opportunity to present this written testimony in favor of House Bill No. 2530 and request that you act favorably on this legislation.

Mark Brady, MD
President
Kansas Society of Anesthesiologists

Kansas Academy of Physician Assistants

Post Office Box 597 • Topeka • Kansas • 66601-0597 • 785-235-5065

Testimony on

House Bill No. 2530

House Judiciary Committee

March 21, 2007

Chairman Vratil and Members of the Senate Committee:

My name is Robert Blanken. I am a licensed Physician Assistant and serve as President of the Kansas Academy of Physician Assistants.

I am a 1990 graduate of the Wichita State University PA program and provide medical services to patients and assisting in surgery for the Tallgrass Surgical Specialists P.A. and other local hospitals in the Topeka area. Robert completed his undergraduate degree at Kansas State University, his physician assistant degree from Wichita State University and is presently completing his Masters Degree through the University of Nebraska.

The Kansas Academy of Physician Assistants (KAPA). KAPA serves as the official representative voice for the Physician Assistants (PA) in Kansas. Our purpose is to enhance the quality of medical care of the citizens of Kansas by providing medical education to physician assistants, other health professionals, the legislative, regulatory bodies and to the public. In Kansas, there are more than 700 Physician Assistants licensed by the State Board of Healing Arts.

I appear today, by this written testimony, on behalf of the Kansas Academy of Physician Assistants in support of the Kansas Medical Society and House Bill No. 2530.

Consumer Protection is designed to care for consumers and businesses victimized by fraud, deception, and unfair business practices.

Licensed Physician Assistants are granted license to practice the Healing Arts by the State of Kansas.

The Kansas Board of Healing Arts is the proper regulatory agency that should tasked with protecting the public from incompetence and unprofessional conduct by persons who have been granted authority to practice in this State, not the Consumer Protection Act.

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I regret that because of my schedule I am unable to present these remarks in person but request that they be made a part of your Committee's record and that you consider them during your deliberations.

Thank you for the opportunity to present this written testimony in favor of House Bill No. 2530 and request that you act favorably on this legislation.

Robert Blanken, PA
President
Kansas Academy of Physician Assistants

DATE: March 21, 2007

TO: Senate Judiciary Committee and Chairman John Vratil

FROM: Stephen G. Dickerson, The Dickerson Law Group
Olathe, KS

RE: HB 2530

My name is Steve Dickerson. I am a Kansas lawyer with law offices in Olathe. I am writing, on behalf of my clientele, to oppose HB 2530 which aims to exempt health care providers from accountability and responsibility under the Kansas Consumer Protection Act (KCPA).

There are many compelling reasons why HB 2530 disserves Kansas consumers. For example, since its enactment in 1973 the KCPA has broadly applied to all professionals and other suppliers of consumer services. The fact of the matter is that no profession is immune from having one of its members engage in acts or practices that are prohibited by the KCPA. When it happens, whatever the offending profession, the disaffected consumer should have the opportunity to pursue and obtain relief under the KCPA.

Although professionals, including health care providers, seldom cross the line and engage in acts or practices prohibited by the KCPA, the reality is that it does sometimes happen. I wanted to briefly share a Kansas, true-life account with you.

Dr. Herbert A. Daniels was an otolaryngologist (ear, nose and throat) specialist practicing in Kansas City, Kansas. By the mid-1990's his surgical practice was booming and had become incredibly profitable.

The profitability of Daniels' surgical practice aroused the concern of another local otolaryngologist that Daniels was performing excessive and unnecessary surgeries on his patients. Eventually, Daniels' surgical patterns and practices came under scrutiny by various federal law enforcement interests.

As it turned out, on November 17, 1999 Daniels was criminally indicted by a federal grand jury on 45 counts of health care or related mail fraud, or other unlawful activity, arising out of his medical and surgical practice. The central theme of the indictment was that Daniels unlawfully engaged in a scheme to perform excessive and unnecessary surgeries for monetary gain. Daniels was tried on this criminal indictment in Topeka federal court in the summer of 2000. This trial ended in a mistrial.

Daniels was criminally indicted a second time on January 17, 2001. The second indictment largely patterned the first indictment except that it added four perjury counts arising out of Daniels' testimony at the first trial. The second indictment included 47 counts and encompassed Daniels' care and treatment of <u>28</u> different patients.

Daniels' criminal case was transferred to Kansas City, and a second trial began in September, 2001. The jury returned a verdict on December 3, 2001 convicting Daniels (beyond a reasonable doubt) on 43 of the 47 counts charged, including three of the four perjury counts. Daniels was sentenced on May 30, 2002 under a Joint Sentencing Agreement by which Daniels made multiple concessions. The presiding federal judge ultimately sentenced him to serve 72 months in a federal prison facility. On December 20, 2001, shortly after his federal court criminal conviction, Daniels filed a Chapter 7 bankruptcy petition.

By anyone's measure, Daniels engaged in acts or practices against his innocent patients which constituted deceptive and unconscionable acts or practices under the KCPA. When such extraordinary misconduct occurs at the hands of a Kansas professional, the professional's patients (customers or clients) ought to have a full opportunity to pursue and obtain civil justice relief for the misconduct including all such relief available under the KCPA.

Although certain monetary restitution may be available to a victim through a criminal prosecution, criminal restitution is very limited and never a substitute for a civil claim against the offender. Unfortunately, when a professional's misconduct carries criminal implications, the victim's access to civil justice can be seriously compromised or eroded by claimed insurance coverage exclusions, an offender's bankruptcy and other considerations. When faced with such a nightmarish scenario, the KCPA can be an important, if not vital safeguard of justice for the victim.

We often think that a tragedy like the Daniels' saga could only happen somewhere else, not in Kansas. Wishing it were so does not make it so. Again, HB 2530 should not be enacted into law. Thank you for the opportunity to be heard on this patently anti-consumer bill.

To: Senate Judiciary Committee, Senator John Vratil, Chair

From: Marian Bonura
Kansas City, Mo

Date: March 21, 2007

Re: **House Bill 2530**

My name is Marian Bonura. On behalf of my husband, and my family, as well as the other victims of this practice to ask you to oppose HB 2530.

My husband, Marion Bonura was a victim of deceptive medical practices of a Kansas surgeon. He, like Ms. Hollinger and so many others saw a program on a local news channel featuring a surgeon boasting of a "new" bariatric procedure that only he was performing in our area. The surgeon referred to the procedure as the "duodenal switch". Marion was so excited to hear about this "new" procedure. Marion had been over weight most of his life. He was a big Italian man. We owned and operated an Italian restaurant together and Marion enjoyed a good meal.

After this program aired, Marion called the surgeon's office and requested an appointment. The surgeon was very confident about his ability. He promised Marion he would be able to eat whatever he wanted and still lose the weight. He indicated Marion would be a new man once he underwent the "duodenal switch". Marion was scheduled for surgery on January 15, 2001.

My husband suffered severe complications immediately following this procedure and remained in the hospital for 11 days fighting for his life. He lost that battle on January 26, 2001. Our family did not discover this surgeon's deception that he did not perform the procedure he had promised, but performed a more dangerous bariatric procedure on my husband until several years after his death.

My family discovered that this surgeon promised my husband the "duodenal switch", but performed a variation of an older procedure, which resulted in the death of my husband. My life, the lives of my children, and the lives of my grandchildren have been forever altered by this deception.

My story as well as the story of other victims of this surgeon has been the subject matter of newspaper and television accounts in the greater Kansas City area. I would like to introduce them and ask you to read the details of their stories, which they have submitted to the committee.

I beg you not to allow these physicians to get away with this behavior. Please do not pass House Bill 2530 as it would be a travesty of injustice to the public at large.

To: Senate Judiciary Committee, Senator John Vratil, Chair

From: Dennis Essen
Moscow Mills, Mo

Date: March 21, 2007

Re: **House Bill 2530**

My name is Dennis Essen. I am here to ask you to vote "no" on HB 2530.

I have been a victim of the deceptive medical practices of a Kansas physician. While watching television one evening I became very interested in a particular segment regarding weight loss. A surgeon was promoting a "new" procedure he referred to as the "duodenal switch". The surgeon indicated this "new" procedure was better than other bariatric procedures, there were less complications and a patient could eat whatever they wanted and still lose weight. He also indicated he was the only surgeon in the area performing this procedure.

Like so many others, I struggled with weight loss for most of my life. Finally I found someone who was offering a solution to my problem. I was ecstatic to say the least. I called the surgeon's office and arranged an appointment with him. He seemed extremely knowledgeable about the "new" duodenal switch procedure. I felt at ease and decided to schedule surgery on December 20, 2000.

Several years later after the surgery this doctor performed, I discovered that the reason I was having these health problems was because the surgeon did not perform the duodenal switch as he promised. Instead he performed his version of a BPD, an older bariatric procedure. Ulcers were a known complication of the BPD. This surgeon completely deceived me and because of his deception I continue to suffer from health issues I would not have otherwise developed.

This deceptive practice cannot be allowed to continue. The average consumer is not aware that something such as this could happen to them and we need to be protected. Therefore, I respectfully request that House Bill 2530 not be passed.

To: Senate Judiciary Committee, Senator John Vratil, Chair

From: John Kuhn
Girard, Ks

Date: March 21, 2007

Re: **House Bill 2530**

My name is John Kuhn.

I have been a victim of medical deceptive practices by a Kansas surgeon. I first encountered this surgeon watching the local news broadcast. This surgeon was unbeknownst to me deceptively promoting a bariatric procedure he claimed was a "new" procedure called the "duodenal switch". He stated during the segment that he was the only surgeon performing this procedure in the area. He indicated after undergoing the procedure a patient could "eat whatever they want and still lose weight". He also indicated there were less side effects associated with the "duodenal switch" than with previous known bariatric procedures.

Most people who suffer from obesity try all the diets and diet aids available, but have little success. I was no exception. This surgeon was promoting a procedure that I believed through his promises would greatly change my life for the better. Therefore, I made an appointment. I was scheduled for surgery on April 5, 2001. Quite some time after the surgery I learned that this surgeon did not perform the "duodenal switch" as promised. In fact, he performed a variation of a BPD, a much older bariatric procedure with many known risks and side effects.

I feel that I have been deceived by a professional of the medical community. We should be able to trust our physicians and expect that they will act in our best interest. However, this physician clearly does not fall in that category.

Physicians such as the one I have encountered and described above should not be allowed to deceive or promote deception of the community. If they decide to act in this manner, they should know that they will be held accountable for their actions. Therefore, I believe it is in the best interest of the public for physicians not to become exempt from the type of deceptive practices described above per House Bill 2530.

To: Senate Judiciary Committee, Senator John Vratil, Chair

From: Teresa Culp
Oak Grove, Mo

Date: March 21, 2007

Re: **House Bill 2530**

My name is Teresa Culp. I am here to ask you to oppose HB 2530.

I have been a victim of deceptive medical practices of a Kansas physician. I originally became aware of this surgeon while watching a news story featuring this surgeon claiming to be performing a "new" weight loss procedure known as the "duodenal switch". He also claimed he was the only surgeon in the area performing this procedure. He indicated you could eat whatever you want and still lose weight and patients undergoing the "duodenal switch" did not suffer from the side effects other bariatric procedures were known to cause.

I too have struggled with my weight for some time. Therefore, I believed this was the procedure for me and I scheduled an appointment to see the surgeon. He scheduled my surgery to take place on August 28, 2001.

Recently, I learned this surgeon did not perform the surgery he indicated and I consented to undergo. In fact, he performed a variation of an older bariatric surgery that to my understanding is no longer considered a primary bariatric procedure and is no longer performed in the United States as such. This surgeon promised me he would perform the "duodenal switch" and I believed that is the procedure he was performing on me when I entered the operating room.

With the above in mind, I ask that you not exempt physicians from being held accountable for deceiving their patients and oppose HB 2530.

To: Senate Judiciary Committee, Senator John Vratil, Chair

From: Theresa Allman
Odessa, Mo

Date: March 21, 2007

Re: **<u>House Bill 2530</u>**

My name is Theresa Allman.

I have been a victim of the deceptive practices of a Kansas surgeon. This surgeon's deceptive practice resulted in my suffering from permanent lifelong injury. While listening to a radio broadcast of a local news program I heard this surgeon describing a bariatric procedure called the "duodenal switch". He promised this procedure was better than the other known bariatric procedures. He claimed a patient could eat whatever they wanted and still lose weight. He indicated he was the only surgeon performing the "duodenal switch" in the area.

Like so many others I have struggled with my weight for years. The claims and promises made by this surgeon were like a light at the end of the tunnel for me. I was sure that if I underwent this "new" procedure my life would dramatically change. That was an understatement.

I made an appointment and was scheduled for surgery on April 4, 2001. I have since discovered this surgeon did not perform the "duodenal switch", but instead performed a variation of the BPD, an older bariatric procedure that is associated with several undesirable side effects. This surgeon intentionally deceived me and others knowing full well when he appeared on the television station that it would be viewed by an extremely large audience. He generated a lucrative business by his deception.

This practice cannot be tolerated. I sincerely hope that you will not allow surgeons such as this one to act in such a manner that endangers the public and not be held accountable for those actions. Please oppose House Bill 2530.

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To: Senate Judiciary Committee, Senator John Vratil, Chair

From: Carla Thomas
Farmington, AR

Date: March 21, 2007

Re: **House Bill 2530**

My name is Carla Thomas

I have been a victim of the deceptive practices of a Kansas surgeon. I have suffered from obesity for most of my life. When I saw this surgeon on a local news station promoting a "new" weight loss procedure called the "duodenal switch" I thought my prayers had been answered. He indicated you could eat whatever you wanted and still lose weight. He claimed there was less side effects with the "duodenal switch" than with other bariatric procedures.

I made an appointment to see the surgeon. He scheduled my surgery to take place on March 19, 2001. At the time of my visit he claimed the procedure was reversible. As it turns out, he did not perform the "duodenal switch" as promised. In addition, I have learned the procedure is not reversible and I am basically forced to live with the effects of the procedure he performed.

I find it repulsive that this surgeon appeared on television and intentionally deceived possibly thousands of people not only in the state of Kansas, but in other states such as my state of Arkansas as well. I am shocked to learn of all the other victims of his deception and I am concerned about those who have yet to come forward.

Please vote "no" on House Bill 2530. Those physicians who choose to intentionally deceive their patients need to be held accountable for their actions.

To: Senate Judiciary Committee, Senator John Vratil, Chair.

From: Brenda Kuhn
Pittsburg, Ks

Date: March 21, 2006

Re: **<u>House Bill 2530</u>**

My name is Brenda Kuhn.

I have been a victim of the deceptive medical practices of a Kansas surgeon. This surgeon appeared on a local news channel promoting a "new" bariatric procedure known as the "duodenal switch". He indicated this procedure was better than the other bariatric procedures. He also indicated the "duodenal switch" did not produce the side effects that were associated with other bariatric procedures. He claimed you could eat whatever you wanted and still lose weight.

Of course I was excited to hear of this "new" procedure and I wanted to learn more. Therefore, I made an appointment to see the surgeon. He scheduled surgery for February 20, 2001. Since the surgery, I have discovered the procedure he promised and that I consented to undergo was not performed.

This surgeon lured me and many others in by appearing on television and intentionally promoting a "new" procedure that would change the lives of obese patients for the better. He was manipulating and deceiving as it turns out he has never actually performed the "duodenal switch" at all.

There are so many patients who relied on his knowledge as a physician. We believed his claims that our lives would be better if we underwent the "duodenal switch". He completely deceived so many of us. This cannot be tolerated.

Please vote "no" on House Bill 2530. Help protect the consumer.

To: Senate Judiciary Committee, March 21, 2007

From: William Kelly

Re: K.S.A. 50-625, House Bill No. 2530

My name is Bill Kelly. I live in Rose Hill, Kansas with my wife Glendina. We have two grown children. I am 52 years old and work at Boeing Aircraft in Wichita.

I am here today to ask you to vote NO on House Bill No. 2530. In my line of work I don't get to lie to our customers, neither does Glendina or my children or anyone else I know. I can't believe that our Kansas legislature would want to give special breaks to doctors so that they can lie to their patients without worrying about any consequences.

In 1999 I was supposed to have a hernia surgery done, so I went to Dr. Whitney Vin Zant in Wichita for the surgery. After the surgery was over, I noticed that my left testicle was missing. As you may have guessed, I was really scared and worried about what had happened in the surgery.

Glendina and I went to Dr. Vin Zant's office after the surgery and told him my testicle was gone. The words out of his mouth to Glendina and me were "All my surgeries are good, I don't do bad surgeries". Because of what he told us, we believed Dr. Vin Zant had a good track record as a surgeon and that he had not had bad results in his surgeries on other patients. So we trusted him and let him operate on me a second time. He cut me open again and when the surgery was over he told Glendina that he thought he had found the testicle in a mass of tissue and removed it.

I went in for a follow-up visit a week later and that is when Dr. Vin Zant finally told me the truth - that he hadn't found the testicle after all. He told me I had to have a third surgery so he could look around some more. During the third surgery he found my testicle sewn up in the

mesh patch that had been used in the hernia surgery. He cut out my testicle and they threw it away.

With the help of my attorney, I have filed suit against Dr. Vin Zant for violations of the Kansas Consumer Protection Act. We found out that Dr. Vin Zant had been sued for malpractice 15 times in 17 years before he told me that "All my surgeries are good, I don't do bad surgeries". I believe Dr. Vin Zant's statements to me and my wife were deceptive. Knowing what I know now about his track record, I think that Dr. Vin Zant was lying to me and my wife to avoid being held accountable in court.

Because of Dr. Vin Zant's deceptive statements I did not get a second opinion or the treatment I needed. I would never, ever have let Dr. Vin Zant cut on me a second and then a third time--I would have gone to another doctor.

House Bill No. 2530 gives special breaks to doctors so that they can lie to their patients without being held accountable. I think House Bill No. 2530 is bad public policy. Please do not pass House Bill No. 2530.

Signed,

William Kelly

Statewide Independent Living Council of Kansas

SILCK

700 S.W. Jackson, Suite 212, Topeka, KS 66603 ☎ (785) 234-6990 voice / TDD ☎ (785) 234-6651 fax

Testimony
Opposing HB 2530
Senate Judiciary Committee
March 21, 2007

Thank you for this opportunity to provide written comments opposing HB 2530. My name is Shannon Jones. I am the director of the Statewide Independent Living Council of Kansas (SILCK). As mandated by the federal Rehabilitation Act as amended, the SILCK is governor appointed, consumer controlled and comprised of statewide and cross-disability representation. Our Council continually seeks input from Kansans with disabilities of all ages on how the landscape of Kansas public policy can change so that people with disabilities are less dependent on the government system. This input is used as our roadmap to develop the State Plan for Independent Living. Our primary purpose is to facilitate and promote independent living philosophy, freedom of choice and equal access to all facets of community life for people with disabilities through systems change activities.

The SILCK has a long history of protecting the civil and human rights of seniors and people with disabilities. Many of the people we represent utilize and rely on their health care professionals for vital health care services and information. This bill puts citizens trust in their doctors and hospitals at great risk.

Additionally, we have grave concerns about one specific profession being shielded from liability for deceptive business practices. The question remains; "WHY" or "Who will be exempted next?"

Why would anyone want to take away the protections of the **Consumer Protection Act**?

The SILCK stands in strong opposition to HB 2530 and urges the committee to kill this bill before any harm to Kansas consumers; intended or not occur.

Testimony to
Judiciary Committee,
Senator John Vratil, Chairperson,
On HB 2530
By
Donald A. Dew
March 21, 2007

Thank you, Chairperson Vratil and Committee members for allowing me to provide written testimony in opposition to HB 2530. My Name is Donald Dew.

I am here today as a citizen of Kansas who is concerned that my rights as a consumer of medical establishments will be diminished due to the medical community and its lobbyist's efforts to pass HB 2530, thereby allowing them to exempt doctors and others in the medical field from being honest and ethical with consumers.

In our state where we have so many people without any health insurance at all, the rights of doctors already supercede patients' rights. Here is an example from my personal experience.

A patient who has a grievance against a hospital or other medical establishment does not have the right under statutes 65-4915 and 65-4925 to have an acknowledgement tat a peer review has been completed or the outcome of such review, even to the person who made the grievance. This is from the interpretation of these two statutes from former Attorney General Phill Kline after I made a complaint against the hospital and physician after I was denied my prescribed seizure medication and prescribed pain control. The hospital told me that they did not have to tell me anything due to these statutes and they stated that this is common practice throughout the state. That is one right that a medical consumer is denied.

I then went through the process of making a complaint to the state against the hospital and physician. By going through KDOA first for the hospital, I was told to call KDHE, who told me that all that they could do is a random investigation, but they could not act on a single complaint.

I filed a physician complaint with the Kansas Board of Healing Arts and after many months of waiting, I finally received a letter stating that in order for a physician to be reprimanded in any way by them, they had to have performed multiple negligent acts. I was appalled. Why give a physician more power to commit multiple acts of negligence before being reprimanded, and who decides what "multiple" is and how much damage is done to patients during those multiple times? There is another right gone for medical consumers.

This is the crux of my argument against HB 2530. Since doctors are already held in such high regard compared to their patients, who are their consumers, it is necessary to include them in the consumer protection act. They provide services that are paid for by consumers and there is nothing that exempts them from the requirement from being honest and ethical. If nothing else, they should be held to a higher standard of integrity since they are dealing with people's lives.

The court case which prompted this bill, Williamson v. Amrani, has brought about fears that allowing medical professionals to be included in the Kansas Consumer Protection Act would lead to a higher number of medical malpractice suits. This is unfounded. The KCPA does not have this in its scope. Medical professionals have been included in the KCPA since its inception at least 40 years ago, or there would not be this push from the medical professional community to change it now to exclude themselves from the KCPA. As I stated earlier, the KCPA might be the only recourse for a patient who has been treated unethically because in order for a doctor to be considered at fault by it's own governing board, they have to commit multiple acts of misconduct.

My fear is that if you start doing profession-by-profession exclusion in the KCPA according to special interest groups lobbying for change, consumers will have no rights or recourse whatsoever and therefore we will not have a consumer protection act in the state of Kansas at all.

I feel that HB 2530 is another nail in the coffin for patients' rights. If HB 2530 is passed, the only recourse left is for the Board of Healing Arts to fill the gap, which, as you know from my testimony is not a solution at all for someone who has been ethically violated from a medical professional, unless they can find several other people who have had the exact same situation and band together to file a complaint.

So I urge you to look past the special interest lobbyists and look at your constituents' best interests and at the fundamental rights of all Kansas lives when you are looking at HB 2530.

Don Dew
Gorham, KS. 67640

Jennifer Schwartz
Executive Director

Member Agencies:

Center for Independent Living for Southwest Kansas
Garden City, KS
620/276-1900 Voice

Coalition for Independence
Kansas City, KS
913/321-5140 Voice/TT

Independent Living Resource Center
Wichita, KS
316/942-6300 Voice/TT

Independence, Inc.
Lawrence, KS
785/841-0333 Voice
785/841-1046 TT

Independent Connection/ OCCK
Salina, KS
785/827-9383 Voice/TT

LINK, Inc.
Hays, KS
785/625-6942 Voice/TT

Prairie Independent Living Resource Center
Hutchinson, KS
620/663-3989 Voice

Resource Center for Independent Living, Inc.
Osage City, KS
785/528-3105 Voice

Southeast Kansas Independent Living, Inc.
Parsons, KS
620/421-5502 Voice
620/421-6551 TT

The Whole Person, Inc.
Kansas City, MO
816/561-0304 Voice
816/627-2201 TT

Three Rivers ILC
Wamego, KS
785/456-9915 Voice

Senate Judiciary Committee
Senator Vratil, Chair
Testimony in opposition of HB 2530
March 21, 2007

Chairperson Vratil and members of this Committee, thank you for the opportunity to provide written testimony to you regarding HB 2530, an act concerning consumer protection; relating to health care providers.

I am Jennifer Schwartz, the Executive Director of the Kansas Association of Centers for Independent Living (KACIL). KACIL represents Centers for Independent Living (CILs) across Kansas. KACIL is driven by the following mission statement: *To coordinate efforts within Kansas and the United States to the extent that these efforts will further independent living for all. KACIL will advocate for the civil rights of Kansans with disabilities.*

Centers for Independent Living provide services to people with any disability, of all ages. CILs provide information and assistance to businesses and other entities in the community to increase opportunities for people with disabilities to live, work, and play in all aspects of community life. In 2006 Kansas CILs served more than 16,000 individuals with disabilities or elderly that came through our doors requesting services. Centers for Independent Living are governed by a philosophy of consumer control.

KACIL is opposed to HB 2530. This bill would exempt the Health Care industry from the Kansas Consumer Protection Act. This Act is the individual, everyday consumer's voice in the health care services they receive. KACIL is opposed to eliminating these protections for Kansas constituents. Individuals with disabilities and elderly Kansans spend significant time doing advocacy with the health care industry. We must not do anything to weaken the voice of the average health care consumer.

KACIL rises in opposition of HB 2530. Please remember in your deliberations that it is important to protect the voice of the health care consumer in Kansas.

Thank you for your time. Please contact me with any additional questions.

Sincerely,

Jennifer Schwartz

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214 SW 6th Street, Suite A ◆ Topeka, KS 66603-3719 ◆ Voice/TT: 785/215-80