

Testimony before Senate Judiciary Committee
SB 16 – Attorney Fees in Certain Insurance Cases
Presented by Mike O’Neal, CEO

Wed., January 21, 2015

Mr. Chairman and members of the Committee:

On behalf of The Kansas Chamber of Commerce, I appreciate the opportunity to appear in support of SB 16, relating to awards of attorney fees in certain actions for damages covered by insurance.

SB 16 was introduced as a result of and at the express invitation of the Kansas Supreme Court in the recent case of *Bussman v. Safeco*, in which the plaintiff was injured while driving a vehicle owned by her employer. Bussman was hit by an underinsured motorist. She settled with the underinsured motorist’s insurance carrier for policy limits and then sued Safeco, her employer’s insurance carrier, for additional benefits under the underinsured motorist provisions of its policy. Safeco denied coverage, claiming it had not issued the policy and the claim went to trial wherein the district court ruled against Safeco. Bussman requested an award of attorney fees under both KSA 40-256 and KSA 40-908, which claim was denied. (See the attached exhibit which contains the language of both statutes.)

Both Bussman and Safeco appealed to the Ks. Ct. of Appeals, which found against Safeco on the coverage claim and against Bussman’s claim for attorney fees under KSA 40-256, but awarded her attorney fees under KSA 40-908, in spite of a strong dissent by Judge Atcheson, who found that KSA 40-908 was applicable only to claims for property damage and not personal injury. Safeco petitioned the Kansas Supreme Court for review, which was granted.

The Kansas Supreme Court, while agreeing that their ruling did not reflect what they knew to be the Legislature’s intent in enacting KSA 40-908, nevertheless found Bussman was entitled to recover her attorney fees under 40-908 because, although her claim was for personal injury and not a property damage loss caused by fire, tornado, lightning, or hail, her employer’s comprehensive insurance policy included coverage for those types of losses. The Court held that, contrary to federal case law in our 10th Circuit, the “type of policy” and not the “type of loss” should control.

The Court stated:

“The dissent’s [Judge Atcheson] appeal to logic is seductive. We agree with the dissent’s assertion that ‘it seems unlikely that the legislature intended K.S.A. 40-908 to apply to nonproperty claims arising under comprehensive



“...to continually strive to improve the economic climate for the benefit of every business and citizen and to safeguard our system of free, competitive enterprise”.

liability policies or umbrella policies covering both property losses and other casualties.”

The Court also conceded:

“...amicus, Kansas Association of Defense Counsel (KADC) does provide a compelling reason to believe that the legislature did not originally intend K.S.A. 40-908 to apply to package policies that provide both property and liability coverage. That reason is that such combination package policies did not exist until some 30 years after K.S.A. 40-908 was enacted in 1927.”

The Court went on to add:

“To conclude, we have to acknowledge that many of the arguments proffered by Safeco, Judge Atcheson, and the *amicus* KADC are seductively logical and just make sense. If we were writing on a clean slate, the result might be different.”

Finally, the Court held:

“...we affirm the Court of Appeals majority’s application of the statute in this case, **leaving it to the legislature to modify the statute if it did not intend an illogical and unreasonable result.**”

Accordingly, SB 16 is drafted to accomplish what the Court knew to be the Legislature’s original intent. K.S.A. 40-908, as amended, will allow recovery of attorney fees as a matter of right, in cases where the policy holder suffers property damage due to loss from fire, tornado, lightning or hail. In all other types of insurance claims, K.S.A. 40-256 applies to protect policy holders in cases where their carrier may fail without just cause or excuse to pay a claim.

As to the latter statute, KSA 40-256, I have considerable experience because, while in private practice, I defended claims brought by Plaintiff’s lawyers against insureds and insurance companies. One of my cases, which went to the Supreme Court, (*Allied Mutual Ins. Co. v. Gordon*, 248 Kan. 715, 1991) involved an uninsured motorist case, where the Supreme Court ruled that the Plaintiff was entitled to recover fees under KSA 40-256. Under KSA 40-256, the determination of whether an insurance company has refused to pay a claim “without just cause or excuse”, is a fact question. The Court in *Hofer v. Unum Life Insurance Co. of America* (338 F. Supp. 2d 1252, 2004), stated that “the circumstances confronting the insurer when payment of loss is denied determines the question, and the circumstances are to be judged as they appear to a reasonably prudent man having a duty to investigate in good faith and to determine the true facts of the controversy.” This is not a high hurdle. In *Sloan v. Employers Casualty Ins. Co.* (214 Kan. 443, 1974), the Court stated: “All the good faith and settlement offers in the world *after* suit is filed will not immunize a company from the consequences of an unjustified refusal to pay which made the suit necessary.”

SB 16 takes nothing away from anyone asserting a claim for damages under an insurance policy. Kansas has two statutes in place to protect insureds. SB 16 does nothing more than address the Court’s invitation to clarify and codify the Legislature’s original intent in protecting insureds in cases of claims for property damage due to fire, tornado, lightning or hail. The law was never intended to create an unintended windfall for attorneys filing claims.

Support for this legislation and acknowledgment that is a key plank in our 2015 legal reform agenda can be found in our Board-approved Kansas Chamber Legislative Agenda 2015.

Thank you and I would be happy to answer any questions.

40-256. Attorney fees in actions on insurance policies; exception. That in all actions hereafter commenced, in which judgment is rendered against any insurance company as defined in K.S.A. 40-201, and including in addition thereto any fraternal benefit society and any reciprocal or interinsurance exchange on any policy or certificate of any type or kind of insurance, if it appear from the evidence that such company, society or exchange has refused without just cause or excuse to pay the full amount of such loss, the court in rendering such judgment shall allow the plaintiff a reasonable sum as an attorney's fee for services in such action, including proceeding upon appeal, to be recovered and collected as a part of the costs: *Provided, however,* That when a tender is made by such insurance company, society or exchange before the commencement of the action in which judgment is rendered and the amount recovered is not in excess of such tender no such costs shall be allowed.

History: L. 1931, ch. 212, § 1; L. 1957, ch. 276, § 1; L. 1967, ch. 257, § 1; L. 1972, ch. 175, § 1; July 1.

40-908. Attorney fees in certain actions. That in all actions now pending, or hereafter commenced in which judgment is rendered against any insurance company on any policy given to insure any property in this state against loss by fire, tornado, lightning or hail, the court in rendering such judgment shall allow the plaintiff a reasonable sum as an attorney's fee for services in such action including proceeding upon appeal to be recovered and collected as a part of the costs: *Provided, however,* That when a tender is made by such insurance company before the commencement of the action in which judgment is rendered and the amount recovered is not in excess of such tender no such costs shall be allowed.

History: L. 1927, ch. 231, 40-908; L. 1929, ch. 199, § 1; L. 1967, ch. 257, §2; July 1.