



KANSAS AUTOMOBILE DEALERS ASSOCIATION

TESTIMONY OF THE KANSAS AUTOMOBILE DEALERS ASSOCIATION
BEFORE THE
SENATE COMMITTEE ON JUDICIARY

WEDNESDAY, JANUARY 21 2015

ATTORNEY FEES IN CERTAIN ACTIONS (SB 16)

Good morning, Mr. Chairman and Members of the Committee, I am Pat Barnes, general counsel for the Kansas Automobile Dealers Association.

Our view of SB 16 is that it would change the law from that which has been in force since at least 1927 and would overrule at least two Kansas Supreme Court cases dealing with this issue, *Hamilton v. State Farm Fire & Cas. Co.*, 263 Kan. 875 (1998) and *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 281 Kan. 844 (2006). Both of these cases involve policy holders that paid their premiums and had coverage for their losses who were allowed their attorney fees in collecting what the insurance company owed them but refused to pay. The *Lee Builders* case also established that if your broader insurance is provided through a policy which also insures against loss by fire, tornado, lightening or hail, then you can recover your costs in the form of attorney fees for collecting what was owed to you in the first place.

The existing law motivates insurers to pay property damage claims promptly and fairly as required by their insurance contract, which they generally have written. This is a law which we do not believe is used very often, but when it is, it is one of the only ways Kansans have, whether they be individuals or businesses, to make sure that insurance companies do not delay or deny payment unfairly, a matter which could be devastating for any person. (Kansas doesn't allow "bad faith" tort actions against insurance companies.)

The breadth of SB 16 in overruling the cases I note could very well mean that very little is covered under the policy beyond the structure and items stored within. For automobile dealers, this means that the inventory damaged on their lot is not recovered, nor other attendant items and issues they insure against. Keep in mind the net effect of the law at this point is that if you have other covered calamities under this type of policy that are wrongfully denied, then the law that currently stands would allow you to collect those items and recover your costs for doing it. SB 16 would narrow that substantially and we believe render questionable the value of your insurance policy.

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The law as it stands really doesn't give either party the upper hand, though it does shift part of the risk of claim denial to the insurance companies. (They do take unreasonable positions from time to time.) It isn't unfair to hold them accountable. They have the policy holder at a disadvantage at a time when they either have no money, no way to earn it, or it's all tied up in their recovery. The insurance company has a way to spread their cost and recover their attorney fees through policy pricing and risk management. They have someone at their biggest disadvantage in these instances, often with loved ones killed or injured, if not entire communities disrupted with carnage.

If a company is fair in their assessment and management of a loss this won't be an issue. But the insurer has the power of the purse and the policy holder is at their mercy. They write the contract and they settle it the way they want and that is why laws like this are needed. Not only that, after they pay a loss they often cancel the policy or increase the premium on it.

If you prove at trial you are entitled to what they wouldn't give you in the first place, then without your attorney fees recovered you don't get what you paid to receive. This is because without this law your cost of taking your insurer to court is essentially netted out so you actually get less than what you were entitled to have if you had been paid fairly.

When I say this doesn't give either party the upper hand I also mean this law allows both parties an 'out' on the fee shifting under current law by the insurance company making a reasonable settlement offer before being sued. If they really think they are being above board in treating their customer then that should take care of it as in the end if they're right they pay no more than they would have anyway, or less; and the policy holder has to risk not getting as much, or anything in court.

The real issue about this is that under current law as interpreted by the courts, this fee shifting statute extends to other claims beyond fire, tornado, lightening or hail in one key way. If your policy covering such things covered other things, too, then even though you don't have a fire, etc. claim, but something else, if they wrongfully won't pay the other covered items, then they have to pay your fees on those, too. So that means under the common practice I buy all my coverage at once, such as under a garage man's policy. If my claim is for car theft or inventory damage on my lot and they don't want to pay or defend me from an insured peril, or want to low ball me, I may be able to get my fees for making them do what they were supposed to do in the first place. This may extend to disputes over policy language, a policy they wrote.

SB 16 as drawn would overrule the cases allowing what I said above about getting to other issues under a fire, etc., policy just because it was included in such a policy, or where there is a dispute over who should cover it, or where you are a secondary beneficiary. It restricts it to insured real estate and the loss of contents in direct instances.

This could ratchet down their paid responsibility more than intended, too. For example, many policies cover lodging while you're displaced, or similar coverages you need, like storage or alternate places to operate your business temporarily. If I pay you for the loss, but not the effect of the loss, even though I contracted for it, then this bill would not provide a stick to compel it. You can't wait around for court which would move far too slowly to cover yourself, particularly where you have sellers (such as in contracts to sell the business under performance) or lender's with clauses giving the option to agree to restoration or apply it to secured debt. They don't want to wait. This really doesn't address that net effect, but it does address recovering for it and the risk of expense that is implicit.

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