

Approved: February 14, 1994
Date

MINUTES OF THE HOUSE COMMITTEE ON FINANCIAL INSTITUTIONS AND INSURANCE.

The meeting was called to order by Chairperson William Bryant at 3:30 p.m. on February 8, 1994 in Room 527-S of the Capitol.

All members were present except: Representative Susan Wagle
Representative Robert Watson
Representative Carol Dawson

Committee staff present: William Wolff, Legislative Research Department
Bruce Kinzie, Revisor of Statutes
Nikki Feuerborn, Committee Secretary

Conferees appearing before the committee: John Peterson, Professional Psychologists
Representative Blaise Plummer
Representative Jeff Ellis
Jim Schwartz, KECH
Richard Mason, Kansas Trial Lawyers
Thomas Buchanan, Kansas Defense Counselors
Jerry Slaughter, Kansas Medical Society
Lori Callahan, KaMMCO
Ron Smith, Kansas Bar Association

Others attending: See attached list

HEARING ON HB 2705: Automobile injury reparations act; psychologists

John Peterson, Kansas Association of Professional Psychologists, stated that this bill would amend the current no-fault auto insurance statute to clarify that a licensed psychologist could provide rehabilitation or health care that might be necessary for a policy holder (Attachment 1). The individual would be required to demonstrate to the satisfaction of their insurance company that the treatment they are receiving is directly related to the injury that they suffered in an automobile collision. The mandate is already in place for this provision in health and accident insurance but not for auto liability insurance.

HEARING ON HB 2717: Subrogation rights under accident, health or sickness insurance policies

Representative Blaise Plummer stated that the idea of an insurer recovering benefits paid on behalf of a member-subscriber injured by a negligent third party from any damages which the member-subscriber has collected from the third party is not a new one to the legislature (Attachment 2). Kansas does not statutorily allow subrogation for health insurance or health maintenance organizations. The intent of the bill is to allow subrogation of health care costs to the extent of benefits already provided and further provide the insured coverage for the out-of-pocket expenses for health care services as related to the injury. Three to seven percent of medical costs could be recouped through subrogation.

Jeff Ellis, representing the Kansas Managed Health Care Association, stated that the HMO's and PPO's he represents are often called upon to provide and pay for health care for their insured necessitated by the negligence of another (Attachment 3). Subrogation provides a method of preventing this inequity by recovering health care costs expended as a result of that person's negligence (up to a certain amount) thus enabling the health insurer or HMO to contain increasing insurance premiums. Thirty-eight states have subrogation rights.

James P. Schwartz, Jr., Kansas Employer Coalition on Health, Inc., stated that many government programs and self-funded plans have the right of subrogation but small groups in Kansas do not. Lack of subrogation rights by their insurers and HMO's contributes directly to exorbitant health premiums (Attachment 4).

Richard Mason, Kansas Trial Lawyers Association, appeared in opposition to the proposed legislation (Attachment 5). The effect of granting the right of subrogation to a medical insurance provider is to place a substantial penalty upon the injured victim by assuring that the proceeds from his or her insurance policy will be appropriated if he or she recovers any damages from a negligent third party. Health insurance

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON FINANCIAL INSTITUTIONS AND INSURANCE,
Room 527-S Statehouse, at 3:30 p.m. on February 8, 1994.

policyholders pay premiums to cover costs when injured, including injuries caused by someone else. If the right of subrogation is granted, the insurance company avoids exposure to any risk and is under no obligation to reduce premiums to its insureds.

Thomas Buchanan, Kansas Association of Defense Counsel, cited opposition for the following reasons (Attachment 6):

1. Increase in litigation.
2. Cause difficulty in settling cases because before injured plaintiff can obtain any funds, the health insurer must be repaid in full, thus more cases will go to trial rather than settlement.
3. Subrogation may not be relevant after health care reform which is scheduled for this Congressional session.
4. Health insurer is not required to share a pro rata portion of the costs and expenses incurred in pursuing recovery.
5. No provision which determines who may bring cause of action which may result in multiple cases being filed.

Jerry Slaughter, Kansas Medical Society, stated that mandating subrogation clauses in all accident and health insurance policies will negate the beneficial effect of the abolition of the common law collateral source rule in medical malpractice litigation and result in more litigation (Attachment 7). Subrogation actions would have a significant impact on the Health Care Stabilization Fund and medical professional liability insurers in our state because far fewer individuals pay premiums to secure professional liability insurance than pay health insurance premiums to support health and accident insurance companies and HMO's.

Lori Callahan, KaMMCO, spoke in opposition to the proposal as it is an inefficient method to prevent unjust enrichment of a plaintiff and because it could lead to an increase in litigation (Attachment 8). The collateral source rule allows for a much more efficient method of preventing double recovery by allowing the judge to offset the amount of medical expenses previously paid by a third party as well as the amount plaintiff paid for those benefits and then deducting plaintiff's previously received benefit from the award.

Ron Smith, Kansas Bar Association, stated in opposition to the legislation that extending subrogation rights to health insurance is contrary to national proposals to limit state laws which allow workers compensation health insurance rights of subrogation (Attachment 9). Amendments would be needed to conform to existing collateral source rules.

Representative Cornfield moved for the approval of the minutes of February 7 as corrected. Motion was seconded by Representative Minor. Motion carried.

The meeting adjourned at 4:40 p.m. The next meeting is scheduled for February 9, 1994.

GUEST LIST

COMMITTEE: James F. & F

DATE: 2-8-94

[illegible]

TESTIMONY

**JOHN C. PETERSON
KANSAS ASSOCIATION OF PROFESSIONAL PSYCHOLOGISTS**

**HOUSE COMMITTEE ON FINANCIAL INSTITUTIONS AND INSURANCE
HOUSE BILL 2705**

February 8, 1994

Mr. Chairman, members of the Committee, my name is John Peterson and I am appearing today on behalf of the Kansas Association of Professional Psychologists, an association of doctoral level psychologists who are engaged in private practice in the state of Kansas. Doctoral level psychologists are licensed in the state of Kansas as independent practitioners to diagnose and treat mental disorders.

House Bill 2705 would amend the current no-fault auto insurance statute to clarify that a licensed psychologist could provide rehabilitation or health care that might be necessary for a policyholder. We do not view this in any way as an expansion of the benefits allowed. Clearly an individual would have to demonstrate to the satisfaction of their insurance company that the treatment they are receiving is directly related to the injury that they suffered in an automobile collision.

We would urge your support for this classification and would be pleased to respond to any questions that the Committee might have.

*House File
Attachment 1
Feb. 8, 1994*

BLAISE PLUMMER
REPRESENTATIVE, TWENTIETH DISTRICT
JOHNSON COUNTY
10100 EL MONTE
OVERLAND PARK, KANSAS 66207



TOPEKA

HOUSE OF
REPRESENTATIVES

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JUDICIARY
JOINT COMMITTEE ON PENSIONS
INVESTMENTS & BENEFITS

HB 2717

February 8, 1994

BEFORE THE HOUSE COMMITTEE ON FINANCIAL
INSTITUTIONS AND INSURANCE

Testimony of Representative Blaise Plummer
in Support of HB 2717

Health insurance and health maintenance organizations have been attempting for a number of years to keep their costs down and to help control rising membership rates by seeking to recover benefits paid on behalf of a member-subscriber injured by a negligent third party from any damages which the member-subscriber has collected from the third party.

The State of Kansas already allows subrogation in many situations such as workers compensation, Kansas no-fault law and Medicare/Medicaid.

As of 1990, approximately 38 states permitted health care subrogation.

Blaise Plummer
Attachment 2
Feb. 8, 1994

Presently, Kansas has no statutorily credited right of subrogation for health insurance or health maintenance organizations. Kansas Administrative Regulation 40-1-20 prohibits all contracts of insurance from containing health care subrogation clauses.

The intent of HB 2717 is to allow subrogation of health care costs to the extent of benefits already provided and further provided that the insured is not left with out-of-pocket expenses for health care services necessitated by the injury.

Please support this needed health care reform.

Attachment

40-1-20. Same; subrogation clause prohibited for certain coverages. An insurance company shall not issue contracts of insurance in Kansas containing a "subrogation" clause applicable to coverages providing for reimbursement of medical, surgical, hospital or funeral expenses. (Authorized by K.S.A. 40-103, 60-217(a); implementing K.S.A. 40-216, 40-1110, 40-2201, 40-2203, 40-2204; effective Jan. 1, 1966; amended Jan. 1, 1967; amended May 1, 1985; amended May 1, 1986; amended May 1, 1987.)

**Testimony Before
The House Committee on Financial Institutions and Insurance
House Bill No. 2717-Subrogation**

**By
Jeffrey O. Ellis
Kansas Managed Health Care Association
February 7, 1994**

My name is Jeffrey O. Ellis, and I am an attorney from Johnson County. My practice is focused mainly in the health care and insurance fields. I am appearing before you today representing the Kansas Managed Health Care Association. I appreciate the opportunity to appear before you to discuss legislation which would permit subrogation by health insurers.

The Kansas Managed Health Care Association is an affiliation of Preferred Provider Organizations (PPO's) and health maintenance organizations (HMO's) which emphasize quality, cost effective health care for their members and insureds. As the debate rages nationally concerning reform of health insurance and the health care delivery system in our country, managed health care is generally acknowledged as the primary means to reduce health care costs while continuing to provide quality health care services for our citizens.

PPO's and HMO's continuously battle rising health care costs which have become a major concern in this country and this State. For the last several years, health insurance premiums have risen nation wide at the rate of 15% to 20% per year and have become a major cost of doing business in both the public and private sector.

PPO's and HMO's are often called upon to provide and pay for health care for their insureds necessitated by the negligence of another. In such situations, the wrongdoer escapes responsibility if he is lucky enough to have injured an insured person. Moreover, if the injured person recovers health care benefits which were previously paid by his insurance company, the injured insured gets a windfall of double recovery. In either event, the HMO or PPO suffers increased expenditures which are truly the responsibility of the wrongdoer and which should not be extended to doubly enrich the insured.

Subrogation provides a method of preventing this inequity. As the public's demand for reasonable insurance rates increases in intensity, the Legislature will be called upon time and again to provide a source of relief. Subrogation is one of the tools available through the legal process to aid health care cost containment.

House Bill 2717 before you would allow health insurers and HMO's to subrogate against a wrongdoer and to recover health care costs expended as a result of that person's negligence thereby

*House F.D.D.
Attachment 3
Feb. 8, 1994*

enabling the health insurer or HMO to apply the recovery to contain rapidly rising insurance premiums.

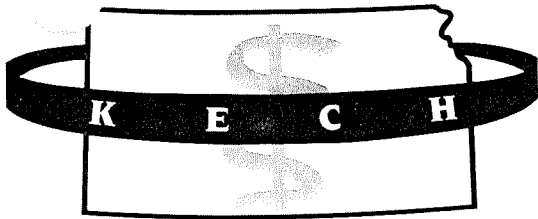
Currently, subrogation is prohibited in health insurance contracts in Kansas by Administrative Regulation promulgated by the Kansas Insurance Department. K.A.R. 40-1-20 states:

An insurance company shall not issue contracts of insurance in Kansas containing a "subrogation" clause applicable to coverages providing for reimbursement of medical, surgical, hospital or funeral expenses.

Interestingly, subrogation has been extended to personal injury contracts by this Legislature in the No-fault Act, the Uninsured Motorist Act, and the Workers' Compensation Act. Furthermore, federal and state government financed health insurance, such as Medicare and Medicaid, permits subrogation. Even self-insurers in Kansas and large employer's health plans, such as Boeing's, written by out-of-state companies, are free to include subrogation provisions in their health insurance contracts since self insurers and foreign health insurance companies avoid Kansas Insurance Department regulation. So even though this Legislature has allowed subrogation in several specific instances, it has not allowed subrogation in health insurance where, arguably, it is needed most to help curb rapidly escalating health insurance costs. The Kansas Managed Health Care Association firmly believes that subrogation for insurers and HMO's would eliminate a costly duplicative recovery by the policyholder. Windfalls and excessive recoveries increase the cost of health insurance without a useful purpose. Revenue income resulting from the use of subrogation varies from insurer to insurer, often as a function of the vigor with which recovery is pursued. National averages of additional revenue gained from subrogation range from 1% to 5% of total revenues. Because of the highly competitive nature of the health benefits' market, insurers and HMO's can be expected to use additional revenues to help hold down premium increases.

There is no higher priority for this Legislature as it undertakes the health care reform debate. Subrogation does not provide the total answer of containing health care costs. However, it does provide an important weapon in the arsenal of health insurers, PPO's and HMO's in managing health care costs. Moreover, it is fundamentally fair.

The Kansas Managed Health Care Association urges your favorable consideration of House Bill 2717.



Kansas Employer Coalition on Health, Inc.

1271 S.W. Harrison • Topeka, Kansas 66612-2302 • (913) 233-0351

Testimony to House Financial Institutions and Insurance Committee

on HB 2717

(Providing subrogation rights)

by James P. Schwartz Jr.
Consulting Director
February 8, 1994

I am Jim Schwartz, consulting director for the Kansas Employer Coalition on Health. The Coalition is over 100 employers across Kansas who share concerns about the cost-effectiveness of health care we purchase for 300,000 Kansas employees and dependents.

Since 1987 we employers have supported attempts to secure subrogation rights for all health plans in Kansas. Many health plans, including government programs and self-funded plans, already enjoy those rights. Small groups, those who bear the highest costs of health insurance, do not. Lack of subrogation rights by their insurers and HMOs contributes directly to their exorbitant costs.

As we head toward comprehensive reform of the health system, it would be helpful to take those more modest steps that can stabilize costs in the present system until major reforms are enacted. Subrogation is a fair, practical and attainable step that we can and should take this year.

*House F&I
Attachment 4
Feb. 8, 1994*

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EXECUTIVE DIRECTOR



KANSAS TRIAL LAWYERS ASSOCIATION

Jayhawk Tower, 700 SW Jackson, Suite 706, Topeka, Kansas 66603-3731
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TESTIMONY of the KANSAS TRIAL LAWYERS ASSOCIATION before the HOUSE FINANCIAL INSTITUTIONS & INSURANCE COMMITTEE

HB 2717

February 8, 1994

The Kansas Trial Lawyers Association wishes to go on record in opposition to HB 2717 regarding subrogation rights in health insurance contracts. We concur with the existing Department of Insurance administrative regulation holding that Kansas law prohibits subrogation clauses in such contracts.

Proponents of subrogation speak of the need to eliminate what they term "double recovery." Our experience in representing victims of negligence indicates there rarely are cases of overcompensation. Just the opposite, in fact, is true. This is especially evident when we consider the cost plaintiffs bear during the course of litigation for which they are not compensated, including legal expenses.

Subrogation generally will have a neutral effect on our members in their profession. Our testimony to you, then, is from the point of view of personal injury victims, who clearly stand to lose if subrogation is implemented.

Health insurance policyholders pay premiums to cover costs when injured, including injuries caused by someone else. They pay for those benefits, and they should receive them.

It has been suggested subrogation will reduce loss ratios for health insurers and thus potentially lower the cost of health insurance itself. But how would HB 2717 actually be reflected in the insurance bill of a typical policyholder? A savings of \$10 per month? \$5? No one seems to know and it is not likely any insurer will put in writing any specific projected savings to consumers.

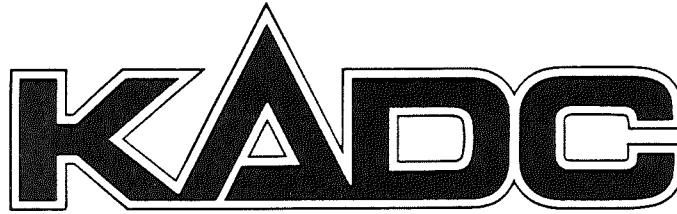
The effect of granting the right of subrogation to a medical insurance provider is to place a substantial penalty upon the injured victim by assuring that the proceeds from his or her insurance policy will be appropriated if he or she recovers any damages from a negligent third party.

*House FD-1
Attachment 5
Feb. 8, 1994*

In return, the insurance company avoids exposure to any risk and is under no obligation to reduce premiums to its insureds.

What possible good can be seen in a public policy that takes from the injured the very thing that the injured party had purchased for protection and then gives it to the insurance company which has not suffered an injury and which has been compensated in advance for the risk that it was insuring?

We know subrogation will take compensation away from victims, but it is unlikely Kansans will get anything in return. Subrogation is a one sided proposition and should once again be rejected by the Kansas legislature.



Testimony

House Financial Institution & Insurance Committee

February 8, 1994

Mr. Chairman, members of the Committee, I am Thomas Buchanan, Legislative Chairman of the Kansas Association of Defense Counsel. The Kansas Association of Defense Counsel is opposed to HB 2717.

Our opposition is based upon the following factors:

1. The legislation likely will result in an increase, rather than a decrease, in litigation.
2. The subrogation provision will result in difficulty in settling cases, because in order for the injured plaintiff to obtain any funds, the health insurer must first be repaid in full. Thus, one expected result from the proposal would be that more cases will actually go to trial, increasing the burden upon our courts.
3. Given that Congress intends to address health care reform during this session, it would be unwise to adopt a provision which may become unnecessary or even inappropriate.
4. The proposal contains no requirement that the health insurer share a pro rata portion of the costs and expenses incurred in pursuing a recovery. Thus, the health insurer would get a free ride.
5. The proposal contains no provision such as that found in K.S.A. 40-3113a which determines who may bring the cause of action, which will result in multiple cases being filed for each accident, one by the health insurer and one by the injured plaintiff.

For these reasons, we respectfully request that the Committee not approve this proposed legislation.

Thomas Buchanan

Thomas R. Buchanan
Legislative Chairman

*House F&I
Attachment 6
Feb. 8, 1994*




KANSAS MEDICAL SOCIETY

623 SW 10th Ave. • Topeka, Kansas 66612 • (913) 235-2383
WATS 800-332-0156 FAX 913-235-5114

February 8, 1994

TO: House Committee on Financial Institutions and Insurance

FROM: Jerry Slaughter
Executive Director 

SUBJECT: HB 2717; Subrogation in Health Insurance Policies

The Kansas Medical Society appreciates the opportunity to comment on HB 2717, which would mandate subrogation clauses in accident and health insurance policies. KMS opposes HB 2717, which incidentally, is almost identical to a bill which died in the House in the 1990 Session.

Simply put, mandating subrogation clauses in all accident and health insurance policies will negate the beneficial effect of the abolition of the common law collateral source rule in medical malpractice litigation, and will almost certainly result in more litigation. On three previous occasions, the Kansas Legislature has enacted collateral source rule legislation designed to eliminate duplicate recoveries in medical malpractice actions, thereby reducing claim costs paid by the Health Care Stabilization Fund and other medical liability insurers. Even though the Kansas Supreme Court last April struck down the collateral source rule legislation enacted by the 1988 Legislature, there is legislation pending in the Senate which would reinstate that law with one technical change designed to address the constitutional infirmity pointed out by the court.

While the issue of subrogation seems somewhat distant from medical malpractice costs, they are, in reality, closely linked. Legal arguments aside, the issue for your consideration is which insurer should benefit from legislation designed to eliminate duplicate payments in personal injury litigation. Mandating subrogation clauses will benefit health insurers only marginally: expected recoveries from subrogation actions have been variously estimated to be 2% or less of total income. However, subrogation actions would have a significant impact on the Health Care Stabilization Fund and medical professional liability insurers in our state, because far fewer individuals pay premiums to secure professional liability insurance, than pay health insurance premiums to support health and accident insurance companies and HMOs.

In our view, because of the enormous cost of medical malpractice insurance, and its effect on the health care system in general, any benefit which arises from avoiding duplicate payments in medical malpractice actions should go to the Health Care Stabilization Fund and the few insurers who provide professional liability insurance in this state. Additionally, the legislation before you would most likely result in additional litigation, as zealous health insurers pursue subrogation actions.

On balance, the relatively small impact subrogation will have on health insurance company recoveries compared to higher medical malpractice insurance costs and additional litigation, does not justify passage of HB 2717. We appreciate the opportunity to provide these comments. Thank you.

House F&I
Attachment 7
Feb. 8, 1994

KaMMCO
KANSAS MEDICAL MUTUAL INSURANCE COMPANY
AND
KANSAS MEDICAL INSURANCE SERVICES CORPORATION

TO: House Financial Institutions and Insurance
FROM: Lori Callahan, General Counsel
RE: H.B. 2717
DATE: February 8, 1994

The Kansas Medical Mutual Insurance Company, KaMMCO, is a Kansas domestic, physician-owned, professional liability insurance company formed by the Kansas Medical Society. KaMMCO currently insures over 1,000 Kansas physicians.

KaMMCO opposes H.B. 2717. H.B. 2717 mandates all health insurers in the state to include subrogation clauses in their contracts of insurance. KaMMCO opposes this proposal as it is an inefficient method to prevent unjust enrichment of a plaintiff and because it could lead to an increase in litigation.

The concepts of subrogation and the collateral source rule both have as their goal the prevention of unjust enrichment by a plaintiff. Without one of these concepts plaintiffs could receive full payment for medical expenses from their health insurer and then collect the same amount from a third party in a tort action. The question then is which method is the best to prevent this double recovery? Under subrogation a health insurer must join with the plaintiff in the litigation against the third party, thereby, involving an additional party and possibly their attorney to every case. This results in complication of the underlying litigation.

The collateral source rule, which was passed by the Kansas Legislature in 1988, allows for a much more efficient method of preventing double recovery. This rule merely states that in an action by a plaintiff against a third party, the jury will be given information on the amount of medical expenses previously paid by a third party for the plaintiff's benefit as well as the amount plaintiff paid for those benefits. The judge then offsets those amounts and deducts plaintiff's previously received benefit from the award, thereby, preventing double recovery. This method is not only much more efficient than subrogation but has been found to have a significant effect on controlling property and casualty losses, thereby, stabilizing the tort crisis.

KaMMCO also opposes subrogation in that it may well lead to increased litigation. Health insurers could choose to pursue litigation to recover the benefits they paid even if the plaintiff did not want to bring suit. In Kansas, we have stabilized the tort crisis partially by methods intended to reduce litigation. Measures which increase the incentives to bring lawsuits escalate that crisis rather than control it.

For these reasons we oppose H.B. 2717.

Endorsed by the Kansas Medical Society

623 W. TENTH ST. - STE. 200 • TOPEKA, KANSAS 66612
913-232-2224 / 800-232-2259 / 913-232-4704 (FAX)

House FD & D
Attachment 8
Feb. 8, 1994



***Legislative Information
for the Kansas Legislature***

TO: *House FI & I Committee*
FROM: *Ron Smith, General Counsel, KBA*
SUBJ: *HB 2717, subrogation rights*

February 8, 1994

Summary:

The Kansas Bar Association opposes extending a statutory right of subrogation of third-party claims to health insurance companies.

Background:

K.A.R. 40-1-20 prohibits subrogation clauses applicable to health insurers regulated by the Commissioner of Insurance. Proponents of statutory subrogation rights desire to bring Kansas into conformity with 38 other states which allow such rights. Small amounts on savings on health care insurance costs could be achieved by such subrogation (from one to four percent).

Such savings if realized would come through a more litigious environment, how-

ever. Congressional reformers argue one proposal to curb product liability litigation is to limit state laws which allow workers compensation health insurance rights of subrogation. This proposal -- extending subrogation rights to other health insurance -- is contrary to nationally recognized problems.

Further, even if subrogation rights were accorded health insurance interests, in order to be fair to all litigants many amendments would be needed to conform such laws with existing collateral source rules, and our comparative negligence act. The minimal cost savings do not warrant such a change if the trade is for more litigation.

Thank you.

Ron Smith
Attachment 9
Feb. 8, 1994