Approved: 4-26-07
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on March 1, 2007 in Room 313-S of the Capitol.

All members were present except:
Delia Garcia- excused

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

Conferees appearing before the committee:
Jane Hrabik, Clerk of District Court, Rice County
Alice Adams, Clerk of District Court, Geary County
Jerry Slaughter, Kansas Medical Society
Kirk Scott, Kansas Medical Mutual Insurance Company
Tom Bell, Kansas Hospital Association
Sarah Tidwell, Kansas Nurses Association
Ann Kindling, Kansas Association of Defense Counsel
Greg Dennis, Kansas Veterinary Medical Association
Mike Hodge, Attorney at Law
Chan Townsley, Attorney at Law
Russell Hazzlewood, Attorney at Law
Rick Guinn, Criminal Division, Office of Attorney General
Marian Bonura, Citizen of the State of Missouri
Shannon Shuler, Citizen of the State of Kansas
Minh Peng, Citizen of the State of Kansas

The hearing on **SB 54 - criminal procedure; signing arrest warrants**, was opened.

Jane Hrabik, Clerk of District Court, appeared before the committee in support of the proposed bill. She stated that the clerks do not want to be placed in the position of determining probable cause in order to sign a warrant for arrest. The bill would strike that requirement and place it decision as to probable cause on judges. (Attachment 1)

The hearing on **SB 54** was closed.

The hearing on **SB 52 - regulating traffic; speed limit violations**, open records, was opened.

Alice Adams, Clerk of District Court, appeared as a proponent to the bill. She explained that it would clarify that a violation for speeding not more than 10 miles per hour in excess of the maximum speed would not be report by the Division of Motor Vehicles. (Attachment 2)

The hearing on **SB 52** was closed.

The hearing on **HB 2530 - the Kansas Consumer Protection Act does not apply to professional services by health care providers**, was opened.

Jerry Slaughter, Kansas Medical Society, appeared before the committee as a proponent of the bill. He explained that it would exempt certain "professional services" provided by physicians and other health care providers from falling under the Kansas Consumer Protection Act (KCPA). "Professional services" would be defined as those related to the practice of medicine and surgery. It would not, however, exempt acts such as improper billing.

Mr. Slaughter explained that the bill was proposed in response to a recent Kansas Supreme Court decision

in *Williamson v. Amrani.* The case was originally filed as a medical malpractice case and a KCPA action. However, because the plaintiff was unable to obtain an expert who would testify that Dr. Amrani deviated from the standard of care, the malpractice action was dropped.

The KCPA case continued on the complaint that Dr. Amrani committed deceptive and unconscionable acts and practices by misleading the plaintiff about the benefits of the procedure and for willfully failing to disclose material facts about the success rate of the surgery. Unfortunately, the outcome of the surgery did not produce the desired results, and because no expert could be obtained, the patient pressed a claim under the KCPA.

The Court determined that a physician providing care and treatment to a patient is subject to the provisions of the KCPA, when it relates to deceptive acts and practices and to unconscionable acts and practices. The Court opined that the physician-patient relationship is subject to KCPA because the legislature did not specifically exempt them when the law was enacted in 1973. (Attachment 3)

Mr. Slaughter reminded the committee that physicians are licensed, regulated, and disciplined through the Kansas Board of Healing Arts Act (KBHAA). In conjunction with filing a medical malpractice claim, there are up to 60 grounds in the KBHAA that can trigger a lawsuit and action by the Board. The State also requires medical doctors to carry professional liability insurance. The Legislature also established the Health Care Stabilization Fund to assure that individuals injured by a physician or other health care provider's negligence would be compensated.

By allowing individuals to bring medical malpractice type suits under the KCPA creates an exemption to the tort reforms the Kansas legislature has crafted over the years to try and balance the rights of individuals with the public's need to have access to quality health services.

Mr. Slaughter commented that billing procedures would still be covered under the KCPA and that the KBHAA has the ability to pull ones license for repeated acts and/or unconscionable acts.

Kirk Scott, Kansas Medical Mutual Insurance, stated that KCPA cases would not be covered under the physician's medical malpractice insurance policy. He believes that a majority of claims for medical malpractice will be amended to include a KCPA claim. The result will be increased litigation, increased cost of defending these actions and increased insurance expenses and therefore, increase the cost of medical care in Kansas.

Tom Bell, Kansas Hospital Association testified in support of the proposed bill. They are concerned that the Court's decision undermines the medical malpractice tort system that has been in place in Kansas for many years. He reiterated that Kansas already has in place the Kansas Board of Healing Arts which regulates licenses, and disciplines physicians and therefore should continue to be treated differently from supplier-consumer transactions. (Attachment 4)

Sarah Tidwell, Kansas State Nurses Association, appeared as a proponent to the bill. She was concerned that the medical profession reinforces the mental and physical health of their patients but that not all respond to a treatment the same way. She noted that the proposed bill is narrowly drafted to exempt only "professional services" performed by a licensed physician or health care professional.

Ms. Tidwell also pointed out that registered nurses and ARNP's are regulated by the Kansas Board of Nursing, which has its own rules, regulations, and disciplinary process for those whose competency has been brought into question. (Attachment 5)

Ann Kindling, Kansas Association of Defense Counsel, informed the committee that the reason a case is brought under the KCPA is because it allows for attorneys to recover their attorney fees, which can't be recovered under a medical malpractice case.

The KCPA was enacted for the purpose of protecting consumers who had not been afforded protection under common law. Whereas, patients are already protected from unconscionable or deceptive acts by the

availability of medical malpractice remedy which encompasses claims not only for medical negligence by also for informed consent claims. (Attachment 6)

Greg Dennis, Kansas Veterinary Medical Association, requested that the committee include their profession under the bill. They are held accountable for standards of professional conduct and subject to disciplinary action for unprofessional conduct under a number of Kansas and federal statutes. (Attachment 7)

The Kansas Psychological Association, Kansas Academy of Physician Assistants, National Association of Social Workers, Kansas Optometric Association, Mental Health Credentialing Coalition, Specialty Physicians Alliance, Kansas Dental Association, Kansas Association of Osteopathic Medicine, Kansas Pharmacy Coalition, and Kansas Society of Radiologic Technologists, did not appear before the committee but requested their written testimony in support of the bill be included in the committee minutes. (Attachments 8- 17)

Michael Hodges, Attorney at Law, appeared as an opponent of the bill. While he believes that doctor's in Kansas are generally honest, there are some who are deceptive and that they should be allowed to be sued under the KCPA. The act simply applies to those who are "dishonest in attempting to sell a service."

Mr. Hodges stated that he didn't believe that doctors would not be covered under a insurance policy, that insurance cost would increase, nor that the cost of medical services would increase, simply because claims are now being filed under the KCPA. (Attachment 18)

Chan Townsley, Kansas Trial Lawyers Association appeared before the committee as an opponent of the bill. He suggested that passing it would weaken the KCPA by creating an exception for physicians and health care providers that most Kansas businesses must obey. He voiced his concern that the word "physician" was defined in Kansas statute several ways to confuse one as to who is actually covered. (Attachment 19)

Russell Hazzlewood, Attorney at Law, appeared as an opponent of the bill but agreed that medical malpractice suits should not be filed under the KCPA. He believes that all professionals should be covered under the KCPA, especially when it comes to billing practices. (Attachment 20)

Rick Guinn, Criminal Division, Office of Attorney General, appeared before the committee in opposition of the bill. He worried about which profession would be exempt next if physicians were exempted out. He commented that their office received 5-7 complaints each week about billing practices. (Attachment 21)

Mr Guinn stated in his written testimony that 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.*" However, under questioning from the committee he agreed that the KBHA did regulate and have authority over physicians such as they can assess fines, and can request that the Attorney General prosecute.

Marian Bonura, Missouri, relayed her story about her husband receiving a surgery that was different than the one the doctor stated he would perform. (Attachment 22)

Shannon Suhler, Derby, Kansas, relayed her story about billing practices by Wesley Medical Center. (Attachment 23)

Minh Peng, Wichita, Kansas relayed her story about helping individuals who do not speak English with understanding billing procedures and instances where billings are not accurate. (Attachment 24)

AARP, Dennis Essen, John & Brenda Kuhn, Teresa Culp, Theresa Allman, Lori Robles, William Kelly, Darrell Hicks, Stephen Dickerson, Carla Thomas, John Parker, Alice Souligny did not appear before the committee but requested their written testimony in opposition to the bill be included in the minutes. (Attachments 25 – 36)

The committee meeting adjourned at 5:20. The next meeting was scheduled for March 5, 2007.

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on March 1, 2007 in Room 313-S of the Capitol.

The hearing on **HB 2530** was closed.

The committee meeting was adjourned at 5:30 p.m. The next meeting was scheduled for March 5, 2007.

Jane rabik, President
Rice County
101 W Commercial
Courthouse, 3rd Floor
Lyons, Ks. 67554
620-257-2383

K.A.D.C.C.A.

Donna Oswald, Preside ect
Atchison County
423 N 5th
PO Box 408
Atchison, Ks. 66002
913-367-7400

Testimony
Issuance of Warrants
KSA 22-2303

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today to speak on behalf of the Kansas Association of District Court Clerks and Administrators regarding SB 54.

Currently KSA 22-2303(2)(1) states, "The warrant may be signed by the **clerk of the court**, but shall be in the same form, executed and returned in the same manner as other warrants." We are requesting that this statute be changed to read, "The warrant shall be signed by the **judge** and be in the same form, executed and returned in the same manner as other warrants."

The issuance of a warrant requires the determination of probable cause before it is signed. As clerks of court, we do not want to be placed in the position of determining probable cause and then placing our signature on a warrant for the arrest of an individual. Since other statutes require a judge to determine probable cause and to sign the warrant we would request that this statute be amended to reflect the same practice.

The Clerks of the District Court appreciate your assistance in helping maintain consistency with this procedure.

Thank you for your time and allowing us to appear before you today. If you have any questions, I would be happy to answer them.

House Judiciary
Date 3-1-07
Attachment # 1

Jan rabik, President
Rice County
101 W Commercial
Courthouse, 3rd Floor
Lyons, Ks. 67554
620-257-2383

K.A.D.C.C.A.

Donna Oswald, Preside lect
Atchison County
423 N 5th
PO Box 408
Atchison, Ks. 66002
913-367-7400

Senate Bill 52
PUBLIC RECORDS VS. CONFIDENTIAL RECORDS
K.S.A. 8-1560d

TESTIMONY
By: Alice Adams, Clerk of the District Court
Geary County District Court
8th Judicial District

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today on behalf of the Kansas Association of District Court Clerks and Administrators regarding Senate Bill 52.

K.S.A. 8-1560d currently requires, "Convictions for violating a maximum posted speed limit of 55 miles per hour or more but not exceeding 70 miles per hour, by not more than 10 miles per hour in excess of such maximum speed limit, shall not be a part of the public record and shall not be considered by any insurance company in determining the rate charged for any automobile liability insurance policy or whether to cancel any such policy under the provisions of subsection (4)(c)(7) of K.S.A 40-277, and amendments thereto."

Insurance companies are receiving driving records, excluding these confidential convictions, from the Department of Motor Vehicles (DMV). The portion of that statute that states the conviction shall not be a part of the public record creates a problem in the courts when the defendant is convicted of other charges that are not confidential. A single ticket may contain multiple charges. The court clerks don't have a way to keep one conviction closed and leave the other convictions part of the public record. There is no way to allow someone to view one part of a ticket.

We would like to have the words "shall not be a part of the public record and" removed from the statute. The Department of Motor Vehicles already excludes these confidential convictions from the records they accept from the courts, so deleting this language from the statute won't change the records made available to DMV. It will relieve the courts of attempting to keep one conviction out of two or more confidential.

Attach: copy of ticket

Phil Fielder, Secretary
Ellis County
PO Box 8, 1204 Fort Street
Hays, Ks. 67601
785-628-9415

Ann McNett, Treasurer
Barber County
118 E. Washington
Medicine Lodge, Ks. 67104
620-886-5639

Shae Watkins, Immed. Past Pres.
Elk C
PO B
Howa
620-3

House Judiciary
Date 3-1-07
Attachment # 2

2703273 UNIFORM NOTICE TO APPEAR AND COMPLAINT KANSAS HIGHWAY PATROL 2703274

Case No. 06TR2987 Station No:

State of Kansas County of GE ss. 1 and — of 1 Number Charges

In the District Court of GE County

The Undersigned, Being Duly Sworn, Upon Their Oath, Deposes and Says

on the 24TH day of Nov, 20 06 at 1340 (Time)

Name [redacted] (Last) [redacted] (First) [redacted] (Initial)

Street Address [redacted]

City [redacted]

Birth Date [redacted] Race W Sex M Ht 5'7 Wt 165

Driv. Lic. State KS No. [redacted]

Did Upon Public Highway No. I-70 At Milepost 155

(or other location) Co. of GE

Unlawfully Operate a Yr. 95 Make DODGE Type C

Year 07 State KS License No. [redacted]

And did then and there commit the following:

M.C. Id. No.

Speeding – Radar – VASCAR – LIDAR – Stopwatch – Pace – A/C

Alleged Speed 75 mph Legal Speed 65 mph ID#

☐ Fail to Yield ☐ Log Book ☐ Left of Center

☑ Seat Belt ☐ Driver's License ☐ Child Restraint

☐ Registration ☐ Equipment ☐ Liability Ins.

DUI ☐ Accident ☐ Commercial Vehicle ☐ Hazardous Material ☐ Const Zone

Other Violations: Speed 2 Seatbelt

1 Section No. 8-1558 ☑ Infraction ☐ Misdemeanor ☐ Felony

KAR No.

2 Section No. 8-2503 ☐ Infraction ☐ Misdemeanor ☐ Felony

KAR No.

Officer's Signature [redacted] No. 291 Co. 31

Appear before District Court At Manhattan (City) KS

on the 5TH day of DEC 20 06 at 0900AM (Time)

I promise to appear in said Court at said time and place above for arraignment.

Signature [redacted]

Bond Posted ☐ Cash ☐ D.L. ☐ Bond Card No.

Amount $ Location

Cases No.

I, the above officer, served a copy of the infraction citation upon the defendant.

Name [redacted] (Last) (First) (Initial)

2703273

2703274

Jan rabik, President
Rice County
101 W Commercial
Courthouse, 3rd Floor
Lyons, Ks. 67554
620-257-2383

K.A.D.C.C.A.

Donna Oswald, Presid lect
Atchison County
423 N 5th
PO Box 408
Atchison, Ks. 66002
913-367-7400

Senate Bill 52
PUBLIC RECORDS VS. CONFIDENTIAL RECORDS
K.S.A. 8-1560d

TESTIMONY
By: Alice Adams, Clerk of the District Court
Geary County District Court
8th Judicial District

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today on behalf of the Kansas Association of District Court Clerks and Administrators regarding Senate Bill 52.

K.S.A. 8-1560d currently requires, "Convictions for violating a maximum posted speed limit of 55 miles per hour or more but not exceeding 70 miles per hour, by not more than 10 miles per hour in excess of such maximum speed limit, shall not be a part of the public record and shall not be considered by any insurance company in determining the rate charged for any automobile liability insurance policy or whether to cancel any such policy under the provisions of subsection (4)(c)(7) of K.S.A 40-277, and amendments thereto."

Insurance companies are receiving driving records, excluding these confidential convictions, from the Department of Motor Vehicles (DMV). The portion of that statute that states the conviction shall not be a part of the public record creates a problem in the courts when the defendant is convicted of other charges that are not confidential. A single ticket may contain multiple charges. The court clerks don't have a way to keep one conviction closed and leave the other convictions part of the public record. There is no way to allow someone to view one part of a ticket.

We would like to have the words "shall not be a part of the public record and" removed from the statute. The Department of Motor Vehicles already excludes these confidential convictions from the records they accept from the courts, so deleting this language from the statute won't change the records made available to DMV. It will relieve the courts of attempting to keep one conviction out of two or more confidential.

Attach: copy of ticket

2703273 UNIFORM NOTICE TO APPEAR AND COMPLAINT KANSAS HIGHWAY PATROL 2703274

Case No. 06TR2987 Station No:

State of Kansas, County of GE GE ss. 1 and 1 of 1 (Number / Charges)

In the District Court of GE County

The Undersigned, Being Duly Sworn, Upon Their Oath, Deposes and Says

on the 24TH day of Nov, 20 06 at 1340 (Time)

Name [redacted] (Last) [redacted] (First) [redacted] (Initial)

Street Address [redacted]

City [redacted]

Birth Date [redacted] Race W Sex M Ht 5 7 Wt 165

Driv. Lic. State KS No. [redacted]

Did Upon Public Highway No. I-70 At Milepost 155

(or other location) Co. of GE

Unlawfully Operate a Yr. 95 Make DODGE Type C

Year 07 State KS License No. [redacted]

And did then and there commit the following:

M.C. Id. No.

Speeding – Radar – VASCAR – LIDAR – Stopwatch – Pace – A/C

Alleged Speed 75 mph Legal Speed 65 mph ID#

☐ Fail to Yield ☐ Log Book ☐ Left of Center

☑ Seat Belt ☐ Driver's License ☐ Child Restraint

☐ Registration ☐ Equipment ☐ Liability Ins.

DUI | Accident | Commercial Vehicle | Hazardous Material | Const Zone

Other Violations: Speed 75 Seat Belt

1 Section No. 8-1566 ☒ Infraction ☐ Misdemeanor ☐ Felony

K.A.R. No.

2 Section No. 8-2503 ☐ Infraction ☐ Misdemeanor ☐ Felony

K.A.R. No.

Officer's Signature No. 291 Co. 31

Appear before District Court At Manhattan City (City)

on the 5TH day of DEC 20 06 at 0900AM (Time)

I promise to appear in said Court at said time and place above for arraignment.

Signature

Bond Posted ☐ Cash ☐ D.L. ☐ Bond Card No.

Amount $ Location

Oaths Adm.

I, the above officer, served a copy of the infraction citation upon the defendant.

Name (Last) [redacted] (First) (Initial)

2703273

2703274

2-4

SESSION OF 2007

SUPPLEMENTAL NOTE ON SENATE BILL NO. 52

As Amended by Senate Committee on Judiciary

Brief*

SB 52, as amended, would clarify that a violation for speeding not more than 10 miles per hour in excess of the maximum speed limit would not be reported by the Division of Motor Vehicles (DMV).

Background

The proponent of the bill was Alice Adams, Clerk of the Geary County District Court and representative of the Kansas Association of District Court Clerks and Administrators. She testified that current law makes speeding not more than 10 miles per hour in excess of the maximum speed limit a confidential violation which is not reportable to insurance companies. District court clerks were experiencing difficulty in deciding whether to release a record or not when a ticket had two violations, one which is confidential and one which is not. The bill is intended to alleviate this dilemma by clarifying that the violation would not be reported by the DMV.

There was no testimony in opposition to the bill.

Marcy Ralston, Chief of the Driver Control Bureau, provided neutral testimony on the bill.

The Committee amended the bill by inserting language that convictions of speeding not more than 10 miles per hour in excess of the maximum speed limit shall not be reported by DMV.

The fiscal note from the Division of Budget states, according to the DMV, that the passage of the bill would have a fiscal impact. However, the Chairperson of the Committee received notification from the DMV that the original fiscal note was based upon a misinterpretation of the bill and that the bill would have no affect on their administration. Therefore, the passage of the bill would have no fiscal impact.

———————————

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at http://www.kslegislature.org

KANSAS MEDICAL SOCIETY
KMS

623 SW 10th Avenue
Topeka, KS 66612-1627
785.235.2383
800.332.0156
fax 785.235.5114

www.KMSonline.org

To: House Judiciary Committee

From: Jerry Slaughter
Executive Director

Date: March 1, 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.

It is important to note that HB 2530 is narrowly drafted to only exempt "professional services" performed by licensed physicians or health care professionals. 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."* In other words, under this bill a physician would not be subject to a consumer protection act claim only when it relates 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 clarifying 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 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, a physician may be disciplined, including monetary fines, suspension or loss of license to practice medicine for the following violations of the Healing Arts Act (found at KSA 65-2836 and 2837):

- The licensee has committed an act of unprofessional or dishonorable conduct or professional incompetency;

- The licensee has used fraudulent or false advertisements.

- The licensee has willfully or repeatedly violated this act, the pharmacy act of the state of Kansas or the uniform controlled substances act, or any rules and regulations adopted pursuant thereto, or any rules and regulations of the secretary of health and environment which are relevant to the practice of the healing arts.

- The licensee has failed to report or reveal the knowledge required to be reported or revealed under K.S.A. 65-28,122 and amendments thereto.

- Sanctions or disciplinary actions have been taken against the licensee by a peer review committee, health care facility, a governmental agency or department or a professional association or society for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

- The licensee has failed to report to the board any adverse action taken against the licensee by another state or licensing jurisdiction, a peer review body, a health care facility, a professional association or society, a governmental agency, by a law enforcement agency or a court for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

- The licensee has failed to report to the board surrender of the licensee's license or authorization to practice the healing arts in another state or jurisdiction or surrender of the licensee's membership on any professional staff or in any professional association or society while under investigation for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

- The licensee has an adverse judgment, award or settlement against the licensee resulting from a medical liability claim related to acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

- The licensee has failed to report to the board any adverse judgment, settlement or award against the licensee resulting from a medical malpractice liability claim related to acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

- The licensee has failed to maintain a policy of professional liability insurance as required by K.S.A. 40-3402 or 40-3403a and amendments thereto.

- The licensee has knowingly submitted any misleading, deceptive, untrue or fraudulent representation on a claim form, bill or statement.

- One or more instances involving failure to adhere to the applicable standard of care to a degree which constitutes gross negligence, as determined by the board.

- Repeated instances involving failure to adhere to the applicable standard of care to a degree which constitutes ordinary negligence, as determined by the board.

- A pattern of practice or other behavior which demonstrates a manifest incapacity or incompetence to practice medicine.

- 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.

- Representing to a patient that a manifestly incurable disease, condition or injury can be permanently cured.

- Assisting in the care or treatment of a patient without the consent of the patient, the attending physician or the patient's legal representatives.

- Advertising professional superiority or the performance of professional services in a superior manner.

-Advertising to guarantee any professional service or to perform any operation painlessly.

-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 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.

- Obtaining any fee by fraud, deceit or misrepresentation.

- Directly or indirectly giving or receiving any fee, commission, rebate or other compensation for professional services not actually and personally rendered, other than through the legal functioning of lawful professional partnerships, corporations or associations.

- Performing unnecessary tests, examinations or services which have no legitimate medical purpose.

- Charging an excessive fee for services rendered.

-Prescribing, dispensing, administering or distributing a prescription drug or substance, including a controlled substance, in an improper or inappropriate manner, or for other than a valid medical purpose, or not in the course of the licensee's professional practice.

- Repeated 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.

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.

Interpreting the KCPA as applicable to physicians 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?

To summarize, we believe the approach in HB 2530 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 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;

- 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 physician's conduct or competence on matters related to the practice of medicine; 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, and drive up professional liability insurance costs. We urge your support of HB 2530. Thank you for the opportunity to offer these comments.

KANSAS HOSPITAL ASSOCIATION

Thomas L. Bell
President

TO: House Judiciary Committee

FROM: Tom Bell, President

DATE: March 1, 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.

Kansas Hospital Association
215 SE 8th Ave. • P.O. Box 2308 • Topeka, KS • 66601 • 785/233-7436 • Fax: 785/

KSNA
KANSAS STATE NURSES ASSOCIATION

1109 SW Topeka Blvd.
Topeka, Kansas 66612-1602

785.233.8638 • FAX 785.233.5222
www.nursingworld.org/snas/ks
ksna@ksna.net

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Decade of the Nurse in Kansas
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ELLEN CARSON, PH.D., A.R.N.P., B.C.
PRESIDENT

THE VOICE AND VISION OF NURSING IN KANSAS

TERRI ROBERTS, J.D., R.N.
EXECUTIVE DIRECTOR
For More Information Contact:
Terri Roberts J.D., R.N.
troberts@ksna.net

HB 2530; Concerning the Kansas Consumer Protection Act

March 1, 2007

Chairman O'Neil and members of the House Judiciary Committee, my name is Sarah Tidwell M.S.N., R.N. and I am here representing registered nurses on behalf of the KANSAS STATE NURSES ASSOCIATION.

The KANSAS STATE NURSES ASSOCIATION is supportive of the proposed statutory changes in H.B. 2530, amending the Kansas Consumer Protection Act (KCPA) to provide an exemption for professional services provided by "regulated health care providers", which would include RN's and ARNP's throughout the state.

This legislation was requested by the healthcare community 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. The medical malpractice action was dropped, however, the plaintiff proceeded, with the KCPA claim, alleging 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

The Supreme 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)

Registered Nurses in performing their daily tasks provide holistic care to the patients that they are charged with caring for. In many cases we encourage, teach and reinforce that the mental and emotional well-being of the patient contributes to their overall health and regaining or maintaining health. In delivering care we communicate our expectations with patients about what it is we are doing for them. These expectations are

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based on sound scientific principles and support the intervention we are carrying out. Do all patients respond alike, or within a similar spectrum? No. With some interventions there are patients that will not respond in the manner in which we would predict from past experience, evidence and research. It is these cases that we believe if the KCPA is not amended may be a cause of action that is successful. It might be successful,, not because there was any incompetency, or wrong-doing, but because the RN made explanatory and encouraging statements to reinforce the treatment modality and compliance by the patient towards a common goal of regaining or preserving health status. It does not appear from the court record that "intent" was a factor in the decision interpreting the KCPA.

Examples of hundreds of actions everyday by RN's in delivering care that under this ruling may be causes of action under the KCPA:

Pain Relief:

"I see you are wincing when you turn over in bed, would you like another pain pill for that discomfort? You need to keep moving so you don't get blood clots and will be walking down the hall this afternoon after you have had lunch. In order to keep moving the pain needs to be under control"

Patient develops a blood clot post-op. Did what the RN said in the course of giving pain medication and instruction about moving provide a "warranty" that if the patient complied this would not happen? What should he/she have said instead of what the expected outcome was?

Post-Op Deep Breathing Exercises:

"You are going to need to sit up and hold the pillow to your chest with pressure while you do your deep breathing and cough exercises. These exercise are to keep you from developing pneumonia since you had a general anesthestic during surgery."

Patient develops pneumonia despite compliance with the exercise regimen to prevent this recognized post-op complication. Did the explanation of why the exercises were done imply a guarantee that the complication of pneumonia would be avoided?

The court decision clearly indicates that the "legislature's intent" regarding the KCPA was fundamental to their ruling that it applies to physicians, and presumably other health care providers too. This is your opportunity to fix this, by passing H.B. 2530.

It is important to note that HB 2530 is narrowly drafted to only exempt "professional services" performed by licensed physicians or health care professionals are covered. Registered Nurses and ARNP's are regulated by the Kansas Board of Nursing and there is a disciplinary process for licensees whose competency has not been maintained or for intentional acts. The civil remedies for negligence are intact to address recourse by patients harmed in these circumstances. We support that the KCPA have an exception for physicians and other health care providers in light of the other legal remedies available for injury and harm to patients.

Thank You.

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

MEMORANDUM

TO: **House Judiciary Committee**

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

DATE: **1 March 2007**

RE: **HB 2530**

Chairman O'Neal and Members of the Committee:

My name is Anne Kindling and I submit this written testimony in support of HB 2530 on behalf of the Kansas Association of Defense Counsel, of which I serve as President-Elect. The KADC consists of more than 200 practicing attorneys who devote a substantial portion of their professional practice to the defense of lawsuits including those against all types of health care providers.

HB 2530 affords an opportunity for the legislature to clarify the Kansas Consumer Protection Act (KCPA) and correct a misperception by the Kansas Supreme Court that the KCPA was intended to apply to physicians in their treatment of patients. The reasoning of the Supreme Court is flawed and contrary to the intent of the KCPA. Sometimes, as here, the legislature must show the Supreme Court that its interpretation of the law was incorrect.

The relationship between a health care provider and a patient is a unique one and is not akin to the arms-length relationship that exists between the merchant or salesman and the consumer, as is contemplated by the KCPA. The KCPA attempts to eliminate the common-law doctrine of *caveat emptor* and to check the deceptive and unconscionable acts of suppliers in the marketplace. *Alexander v. Certified Master Builders Corporation*, 268 Kan. 812, 822, 1 P.3d 899 (2000). The enactment of the KCPA was for the purpose of protecting those consumers who had not yet been afforded protection under the common law. The doctrine of *caveat emptor* is simply non-existent in the realm of the practice by health care providers due to the unique relationship between patient and health care provider. Patients are already protected from unconscionable or deceptive acts by the availability of the medical malpractice remedy which encompasses claims not only for medical negligence but also for informed consent claims.

Additional safeguards are in place to protect patients from such practices in the form of the licensing statutes and regulations under state and federal law. There is a comprehensive

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scheme governing health care providers in all fields. This includes not only the availability of peer review and risk management to improve the quality of health care, but it also includes licensure actions for health care providers who engage in unprofessional, improper, or unauthorized practices. Since appropriate remedies to protect patients from the acts and practices of health care providers, the KCPA does not fulfill a need with respect to a remedy for health care services.

HB 2530 would make the KCPA inapplicable to all health care providers with respect to professional services for which the provider is licensed or regulated by Kansas. This would include not only physicians but also related professions including nurses, mid-level practitioners, pharmacists, and others who are already regulated or licensed by the state of Kansas. By excluding such regulated professionals, HB 2530 will have no adverse impact on the availability of checks and balances to insure that such professionals do not take advantage of patients, which is the purpose of the KCPA. There will remain the availability of malpractice actions as well as licensure actions by the regulating body. Thus, there is no need for an additional remedy under the KCPA.

Additionally, it is noted that in the absence of legislation to remedy the Supreme Court's erroneous interpretation of the KCPA, costs of health care providers are sure to rise. Existing malpractice policies carried by health care providers likely include no coverage for KCPA claims, or at least the question is unanswered which will give rise to coverage litigation. Once policies are amended to include this coverage, the costs of coverage will increase to cover this new risk. In turn, those costs are going to need to be passed on to the consumer.

Finally, the KADC would direct the committee's attention to the arguments raised by Justice Davis in his dissent of the recent *Williamson v. Amrani* decision.

Thank you for the opportunity to testify in support of HB 2530.

KANSAS VETERINARY MEDICAL ASSOCIATION

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

March 1, 2007

Michael R. O'Neal, Chair
House Judiciary Committee
Kansas State Capitol
300 S.W. 10th Street
Topeka, Kansas 66612

Janice L. Pauls, Ranking Minority Member
House Judiciary Committee
Kansas State Capitol
300 S.W. 10th Street
Topeka, Kansas 66612

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

Mr. Chairman, Ranking Minority Member and members of the Committee, my name is Gregory M. Dennis. I am Legal Counsel for the Kansas Veterinary Medical Association.

The K.V.M.A. was formed more than a hundred years ago, in 1904 and was incorporated in 1926. It is a not-for profit corporation.

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

Kansas has a long history of acknowledging the importance of *veterinary* medicine to this state, as reflected by the College of Veterinary Medicine at Kansas State University, which can be traced back to at least 1905. K.S.U.- C.V.M., without doubt, is an institution of world-wide renown.

The K.V.M.A. is here this afternoon respectfully to request that you include veterinarians in the provisions of **H.B. 2530** and then vote "yes" for its 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

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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 bio-terrorism.

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 as outlined in the attachment to this testimony.

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 like statutory and regulatory provisions governing Kansas veterinarians. I have set these references out in detail in my extended written remarks below, which I am tendering to the Committee this afternoon.

For all of these reasons, the K.V.M.A. respectfully urges you to amend **H.B. 2530** to include veterinarians and then vote "yes" for its passage.

If the Committee has any questions, I would be glad to answer them.

Thank you

Gregory M. Dennis, Legal Counsel
Kansas Veterinary Medical Association

EXTENDED WRITTEN COMMENTS BY THE KANSAS VETERINARY MEDICAL ASSOCIATION ON H.B. 2530

1. The K.V.M.A. **supports** H.B. 2530 (2007), but requests it **be modified** to include veterinarians.

   a. The **reason** for this request is that many of the reasons that Justice Davis identified in his dissenting opinion in *Williamson v. Amrani* for human medicine, **applies equally for *veterinary* medicine**.

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

      i. (b) *The Kansas consumer protection act does not apply to rendering of or failure to render professional services by a physician or other health care provider with respect to professional services for which such physician or health care provider is licensed or regulated by the state of Kansas.*

      Should be modified to read:

      ii. (b) *The Kansas consumer protection act does not apply to rendering of or failure to render professional services by a physician other health care provider veterinarian with respect to professional services for which such physician health care provider is licensed or regulated by the state of Kansas. For purposes of this section "health care provider" shall mean: (1) a facility licensed by the Secretary of Health and Environment or the Secretary of Social or Rehabilitation Services, or (2) a person licensed by the Behavioral Sciences Regulatory Board, the Kansas Dental Board, the Board of Healing Arts, the Board of Nursing, the Board of Examiners in Optometry, the Board of Pharmacy, or the Board of Veterinary Examiners.*

2. ***Williamson v. Amrani***, _____ Kan. _____, 2007 Kan. *LEXIS* 26, 2007 WL 419698 (Kan. 95-154-S, February 9, 2007)

   a. The K.V.M.A. believes that Justice Davis (McFarland, C.J., concurring), in his dissent, correctly set forth that the health care provisions in Kansas are already highly regulated and that the Legislature has chosen those laws, rather than the *K.C.P.A.* to regulate health care.

   b. **Like human medicine, veterinary medicine is already highly regulated** by Kansas and federal laws.[1]

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[1] For instance, like physicians, veterinarians are subject to the *Kansas Uniform Controlled Substances Act.* E.g., **K.S.A. 65-4101(v)** "Practitioner" means a person licensed to practice medicine and surgery, dentist, podiatrist, ***veterinarian***, optometrist licensed under the optometry law as a therapeutic licensee or diagnostic and therapeutic

c. What Justice Davis said for the health care profession can be said, for the most part, for veterinary medicine.

i. **K.S.A. 65-4914**: *Public policy relating to provision of health care*. It is the declared public policy of the state of Kansas that the provision of health care is essential to the well-being of its citizens as is the achievement of an acceptable quality of health care. Such goals may be achieved by requiring a system which combines a reasonable means to monitor the quality of health care with the provision of a reasonable means to compensate patients for the risks related to receiving health care rendered by health care providers licensed by the state of Kansas.

ii. **K.S.A. 47-814**: *Purpose of* [*Kansas veterinary practice*] *act. In order to promote the* ***public*** *health, safety and welfare*, the legislature hereby declares that the practice of veterinary medicine is a privilege granted to persons possessed of the personal and professional qualifications specified in this act. See also, **K.S.A. 47-818(a)**–"In order to promote the public health, safety and welfare in relation t the practice of veterinary medicine, there is hereby established the state board of veterinary examiners, ..."

iii. **Justice Davis** noted that: "The *Kansas Healing Arts Act* (KHAA), K.S.A. 65-2801 *et seq*., which specifically covers physicians, see K.S.A. 65-2869, establishes an extensive regulatory scheme which outlines the education, licensing, and professional and ethical standards imposed on members of the healing arts."

iv. This statement is **equally applicable to *veterinary* medicine**.

The *Kansas Veterinary Practice Act* (KVPA), **K.S.A. 47-814 *et seq*.**, which specifically covers veterinarians, see **K.S.A. 47-816(f)** and **(j)**, establishes an extensive regulatory scheme which outlines the education, licensing, and professional and ethical standards imposed on members of the veterinary profession. See **K.S.A. 47-821**: *Powers of board* [*of veterinary examiners*[2]].

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licensee, or scientific investigator or other person authorized by law to use a controlled substance in teaching or chemical analysis or to conduct research with respect to a controlled substance."

[2] "(a) In general, but not by way of limitation, the board shall have power to:

(1) Examine and determine the qualifications and fitness of applicants for a license to practice veterinary medicine in this state in accordance with K.S.A. 47-824 and 47-826, and amendments thereto.

(2) Inspect and register any veterinary premises pursuant to K.S.A. 47-840, and amendments thereto, and take any disciplinary action against the holder of a registration of a premises issued pursuant to K.S.A. 47-840, and amendments thereto.

(3) Issue, renew, deny, limit, condition, fine, reprimand, restrict, suspend or revoke licenses to practice veterinary medicine in this state or otherwise discipline licensed veterinarians consistent with the provisions of this act and the rules and regulations adopted thereunder.

(4) Conduct an investigation upon an allegation by any person that any licensee or other veterinarian has violated any provision of the Kansas veterinary practice act or any rules and regulations adopted pursuant to such

v. **Justice Davis** further noted that "[t]he 'healing arts' are defined by K.S.A. 65-2802(a) as 'any system, treatment, operation, diagnosis, prescription, or practice for the ascertainment, cure, relief, palliation, adjustment, or correction of any human disease, ailment, deformity, or injury, and includes specifically but not by way of limitation the practice of medicine and surgery; the practice of osteopathic medicine and surgery; and the practice of chiropractic.'"

vi. The "*practice of **veterinary** medicine*" is defined by **K.S.A. 47-816(h)** as:

(1) To diagnose, treat, correct, change, relieve, or prevent animal disease, deformity, defect, injury or other physical or mental condition; including the prescription or administration of any drug, medicine, biologic,

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act. The board may appoint individuals and committees to assist in any investigation.

. . .

(9) Initiate the bringing of proceedings in the courts for the enforcement of this act.

(10) Adopt, amend or repeal rules and regulations for licensed veterinarians regarding the limits of activity for assistants and registered veterinary technicians who perform prescribed veterinary procedures under the direct or indirect supervision and responsibility of a licensed veterinarian.

(11) Adopt, amend or repeal such rules and regulations, not inconsistent with law, as may be necessary to carry out the purposes of this act and enforce the provisions thereof.

. . .

(13) Adopt, amend or repeal rules and regulations to fix minimum standards for continuing veterinary medical education, which standards shall be a condition precedent to the renewal of a license under this act.

(14) Register veterinary technicians.

(15) Establish any committee necessary to implement any provision of this act. . .;

(16) Refer complaints to a duly formed peer review committee of a duly appointed professional association.

(17) Establish, by rules and regulations, minimum standards for the practice of veterinary medicine.

(18) Contract with a person or entity to perform the inspections or reinspections as required by K.S.A. 47-840.

(19) For the purpose of investigations and proceedings conducted by the board, the board may issue subpoenas compelling the attendance and testimony of veterinarians or the production for examination or copying of documents or any other physical evidence if such evidence relates to veterinary competence, unprofessional conduct, the mental or physical ability of a licensee to safely practice veterinary medicine or the condition of a veterinary premises. Within five days after the service of the subpoena on any veterinarian requiring the production of any evidence in the veterinarian's possession or under the veterinarian's control, such veterinarian may petition the board to revoke, limit or modify the subpoena. The board shall revoke, limit or modify such subpoena if in its opinion the evidence required does not relate to practices which may be grounds for disciplinary action, is not relevant to the charge which is the subject matter of the proceeding or investigation, or does not describe with sufficient particularity the physical evidence which is required to be produced. The district court, upon application by the board or by the veterinarian subpoenaed, shall have jurisdiction to issue an order:

(A) Requiring such veterinarian to appear before the board or the board's duly authorized agent to produce evidence relating to the matter under investigation; or

(B) revoking, limiting or modifying the subpoena if in the court's opinion the evidence demanded does not relate to practices which may be grounds for disciplinary action, is not relevant to the charge which is the subject matter of the hearing or investigation or does not describe with sufficient particularity the evidence which is required to be produced.

(b) The powers of the board are granted to enable the board to effectively supervise the practice of veterinary medicine and are to be construed liberally in order to accomplish such objective."

apparatus, application, anesthesia or other therapeutic or diagnostic substance or technique on any animal including but not limited to acupuncture, surgical or dental operations, animal psychology, animal chiropractic, theriogenology, surgery, including cosmetic surgery, any manual, mechanical, biological or chemical procedure for testing for pregnancy or for correcting sterility or infertility or to render service or recommendations with regard to any of the above and all other branches of veterinary medicine.

(2) To represent, directly or indirectly, publicly or privately, an ability and willingness to do any act described in paragraph (1).

(3) To use any title, words, abbreviation or letters in a manner or under circumstances which induce the belief that the person using them is qualified to do any act described in paragraph (1). Such use shall be *prima facie* evidence of the intention to represent oneself as engaged in the practice of veterinary medicine.

(4) To collect blood or other samples for the purpose of diagnosing disease or conditions. This shall not apply to unlicensed personnel employed by the United States department of agriculture, the Kansas animal health department or the Kansas department of agriculture who are engaged in such personnel's official duties.

(5) To apply principles of environmental sanitation, food inspection, environmental pollution control, animal nutrition, zoonotic disease control and disaster medicine in the promotion and protection of public health in the performance of any veterinary service or procedure."

vii. **Justice Davis** also noted that the Legislature had established the State Board of Healing Arts for the "purpose of administering" the *K.H.H.A.*

viii. This statement is also **equally applying to *veterinary* medicine** as the Legislature has established the Board of Veterinary Examiners "[i]n order to promote the public health, safety and welfare in relation to the practice of veterinary medicine," **K.S.A. 47-818(a)**, and to administer the *Veterinary Practice Act.* See e.g., **K.S.A. 47-818** to **47-821**.

ix. **Justice Davis** additionally noted that the *Kansas Healing Arts Act* already defined "unprofessional conduct" as including fraudulent and false representations by a physician.

x. This statement is additionally apples with **equal force to *veterinary* medicine**.

A. **K.S.A. 47-830**: *Grounds for refusal to issue or revocation or suspension of license or other restrictions*. The board, . . .may *refuse* to issue a license, *revoke*, *suspend*, *limit*, *condition*, *reprimand* or

restrict[3] a license to practice veterinary medicine for any of the following reasons:

(a) The employment of *fraud, misrepresentation or deception* in obtaining a license;

. . .

(d) *false or misleading* advertising;

. . .

(h) *fraud or dishonest conduct* in applying, treating or reporting diagnostic biological tests of public health significance;

. . .

(j) failure to report as required by law, or making *false report* of any contagious or infectious disease

(k) *dishonesty* or negligence in the inspection of foodstuffs;

. . .

(o) unprofessional conduct as defined in rules and regulations adopted by the board [of veterinary examiners]. . .

---

[3] The Board may also assess a **fine**.

See **K.S.A. 47-842**: *Authority of board to assess fines; grounds; proceedings conducted in accordance with Kansas administrative procedure act.* "In addition to the board's authority to refuse licensure or impose discipline pursuant to K.S.A. 47-830, and amendments thereto, the board shall have the authority to assess a ***fine not in excess of $5,000*** against a licensee for any of the causes specified in K.S.A. 47-830, and amendments thereto. Such fine may be assessed in lieu of or in addition to such discipline. The proceedings under this act shall be conducted in accordance with the Kansas administrative procedure act, and the board shall have all the powers granted therein. All fines collected pursuant to this section shall be remitted to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the state general fund. Actual costs related to investigation, adjudication and enforcement shall be deducted and credited to the veterinary examiners fee fund."

See also **K.S.A. 47-843**: *Violation of act; civil citation; penalties.* "(a) If, upon completion of an investigation, the executive director has probable cause to believe that a veterinarian violated the provisions of the Kansas veterinary practice act, in lieu of proceedings pursuant to K.S.A. 47-830 and amendments thereto, the executive director may issue a citation to the veterinarian, as provided in this section. The investigation shall include attempts to contact the veterinarian to discuss and resolve the alleged violation. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Kansas veterinary practice act alleged to have been violated. In addition, each citation may contain an order of abatement fixing a reasonable time for abatement of the violation, and may contain an assessment of a *civil penalty not in excess of $2,000*. The citation shall be served upon the veterinarian by any type of mailing requiring a return receipt. Before any citation may be issued, the executive director shall submit the alleged violation for review and investigation to at least two designees of the board who are veterinarians licensed in or employed by the state. Upon conclusion of the board designee's review, the designees shall prepare a finding of fact and a recommendation. If the board's designees conclude that probable cause exists that the veterinarian has violated any provisions of the Kansas veterinary practice act, a civil citation shall be issued to the veterinarian, according to policies adopted by the board through rules and regulations.

(b) The board shall adopt rules and regulations covering the assessment of civil penalties under this section which give due consideration to the appropriateness of the penalty with respect to the following factors:

(1) The gravity of the violation;

(2) the good faith of the person being charged; and

(3) the history of previous violations."

See also **K.S.A. 47-844**: *Civil citation; notice to contest; procedures; disciplinary actions and civil penalties.*

. . .

(q) *fraud, deception*, negligence or incompetence in the practice of veterinary medicine. . . .

B. **Kan. Admin. Reg. § 70-8-1**: *Acts of* ***unprofessional conduct***. The following acts by a Kansas licensed veterinarian shall be considered unprofessional conduct and shall constitute grounds for disciplinary action against the licensee:

(a) failing to meet the minimum standards for either veterinary premises or veterinary practice;

(b) engaging in conduct likely to deceive, *defraud* or harm the public or demonstrating *willful or careless disregard for the health, welfare or safety* of a patient;

. . .

(v) **guaranteeing a cure or specific results or creating an unjustified or inflated expectation of a cure or specific result**;

. . .

(z) making a *false, deceptive or misleading claim* or statement; . . . .

C. ***Principles of Veterinary Medical Ethics*** *of the American Veterinary Medical Association* (AVMA)[4]

II. Professional Behavior

B. . . . Veterinarians should be honest and fair in their relations with others, and they should not engage in fraud, misrepresentation, or deceit.[5]

xi. **No insurance coverage** for a violation of the *K.C.P.A.* On Monday, February 26, 2007, I spoke with the American Veterinary Medical Association Professional Liability Insurance Trust–the largest malpractice insurer in the United States for veterinarians--and was informed that its policies would not cover a judgement that a Kansas veterinarian had violated the *K.C.P.A.* At best, the A.V.M.A.-P.L.I.T. might issue a **reservation of rights** letter, but would not pay a judgment predicated upon a *K.C.P.A.* violation.

xii. **Common law fraud claims will still be available** to clients if H.B. 2530 is enacted.

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[4] While having not been formally adopted as a part of the Board of Veterinary Examiners' regulations, the *P.V.M.E.* has been used as a guide by the Board. E.g., ***In the Matter of Otto, D.V.M.*** (Kan. Bd. Vet. Examiners, 04047, February 20, 2006)--employing *P.V.M.E.*'s definition of "ethical veterinary products" to find that a veterinarian had engaged in a fraud and deception in the practice of veterinary medicine, in violation of **K.S.A. 47-830(r)** [now (q)].

[5] **Bold print** states the *Principles*, standard print explains or clarifies the *Principle* to which it applies.

CONCLUSION

Akin to Justice Davis' observation in ***Williamson v. Amrani***, leaving veterinarians subject to the *K.C.P.A.* will:

> . . . result in increased litigation, increased costs of defending *K.C.P.A.* actions by veterinarians, increased insurance expenses, and, ultimately, an increase in the costs of veterinary medical care. Ultimately, the majority decision in *Williamson v. Amrani* regarding the *K.C.P.A.* conflicts with Kansas' extensive statutory and regulatory scheme governing public health and the veterinary profession as well as the expressed public policy of this state to maintain quality veterinary care in Kansas.

The K.V.M.A. requests that H.B. 2530 modified to include veterinarians and then be recommended by this Committee to the House for passage.

Gregory M. Dennis
Legal Counsel
Kansas Veterinary Medical Association
Kent T. Perry & Co., L.C.
7300 West 110th Street, Suite 260
Overland Park, Kansas 66210-2387
Tel: (913) 498-1700
Fax: (913) 498-8488
E-mail: perry_reuter@yahoo.com

Kansas Veterinary Medical Association

Draft amendment to HB2530 23 Feb.07

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

Section 1. K.S.A. 50-635 is hereby amended to read as follows: 50-635. (a) The Kansas consumer protection act does not apply to 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.

(b) *The Kansas consumer protection act does not apply to the rendering of or failure to render professional services by a physician or other health care provider with respect to professional services for which such physician or health care provider is licensed or regulated by the state of Kansas. For purposes of this section, "health care provider" shall mean: (1) a facility licensed by the Secretary of Health and Environment or the Secretary of Social and Rehabilitation Services, or (2) a person licensed by the Behavioral Sciences Regulatory Board, the Kansas Dental Board, the Board of Healing Arts, the Board of Nursing, the Board of Examiners in Optometry, the Board of Pharmacy, or the Board of Veterinary Examiners.*

(c) A supplier alleged to have violated this act has the burden of showing the applicability of this section.

Sec. 2. K.S.A. 50-635 is hereby repealed.

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

K P A

KANSAS PSYCHOLOGICAL ASSOCIATION

STATEMENT OF SUPPORT

TO: **The Honorable Mike O'Neal, Chair**
And Members Of The House Judiciary Committee

FROM: **Gary Hawley, Psy.D.**
On Behalf Of The Kansas Psychological Association

RE: **HB 2530 – Concerning consumer protection; relating to health care providers**

DATE: **March 1, 2007**

The Kansas Psychological Association represents doctoral level psychologists in our state. We comprise the most advanced trained group of non-physician mental and behavioral health specialists in the state of Kansas. The Behavioral Sciences Regulatory Board currently licenses 685 psychologists in our state.

Licensed psychologists work in a variety of settings (e.g., medical centers, state hospitals, community mental health centers, and private practices) delivering a variety of services (e.g., consults from physicians, behavioral modification with children, neuropsychological testing, forensic and custody evaluations, and evidence based treatments for mental illnesses) to a variety of patients (e.g., children, adults, couples, veterans, and incarcerated individuals). Psychologists play a vital role in mental health care and are considered health care providers in the broad field of health care.

HB 2530 clarifies the consumer protection act by not extending consumer protection to the clients of licensed and regulated providers, such as psychologists. Consumers of services provided by psychologists are protected by the licensure and regulation that surrounds the practice of psychology. Rules and regulations that specify unprofessional conduct constrain the activity of licensed psychologists (KAR 102-1-10a). Unprofessional conduct includes but is not limited to:

- misrepresenting professional competency by offering to perform services that are inconsistent with education, training or experience;
- failing to obtain informed consent which includes a description of the possible effects of treatment or procedures when there are known risks to the patient;

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- failing to inform patients when a treatment is experimental; failing to end the therapeutic relationship if it becomes reasonably clear that the patient is not benefiting from or is being harmed by continued service;

- continuing to order tests, procedures, or treatment not warranted by the patient's condition;

- making claims of professional superiority that cannot be sustained;

- guaranteeing satisfaction of a cure will result from the professional service;

- claiming or using any method of treatment or diagnostic technique that the licensed psychologist refuses to divulge to the board.

All violations of conduct can and should be reported to the Behavioral Sciences Regulatory Board which is authorized to investigate and revoke the licenses of psychologists. Malpractice law suits remain another method of redress. These two options represent appropriate response to cases where patients feel that services have been inadequate or harmful.

For these reasons, KPA strongly supports HB 2530.

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 1, 2007

Chairman O'Neal and Members of the House 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 surgical services to patients at Tallgrass Surgical Specialists P.A. and at other local hospitals in the Topeka area.

The Kansas Academy of Physician Assistants (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 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 House Bill No. 2530 and efforts of the Kansas Medical Society.

Physician Assistants are granted license to practice the Healing Arts, under the direction and supervision of a physician, by the State of Kansas. The Kansas Board of Healing Arts is the administrative agency that regulates our profession.

House Bill No. 2530 is not trying to minimize anyone's right to complain about the services they receive. We do feel that the Board of Healing Arts is the appropriate regulatory agency to be tasked with protecting the public from incompetence and unprofessional conduct by persons who have been granted authority to practice in this State by the Board, not the Consumer Protection Act.

The Board of Healing Arts can determine the validity of an allegation through a review of prior claims, determine the quality of care in the physician-patient relationship and take disciplinary action as needed. Patients always have the ability to inquire of a provider's history through the licensing agency prior to receiving any medical services, and should use it.

Without this bill, we will see an increase in the number of claims filed because patients are not satisfied with the results even though there was no failure on the part of the provider. We all will end up paying for these additional legal actions through increased provider costs and insurance premiums. The legislature needs to make a clear statement that health care providers are not to be included in consumer protection actions for the professional medical services they provide.

Thank you for the opportunity to present testimony in favor of House Bill No. 2530 and request your favorable consideration of this legislation.

Robert Blanken, PA
President
Kansas Academy of Physician Assistants

Kansas Society of Anesthesiologist

Remarks Concerning House Bill No. 2530

House Judiciary Committee

March 1, 2007

Chairman O'Neal and Members of the House 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. 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 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 decrease 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

House Judiciary
March 1, 2007

Statement of Support

House Bill 2530
Concerning consumer protection; relating to health care providers
Sky Westerlund, LMSW
Executive Director, Kansas Chapter, National Association of Social Workers (KNASW)

KNASW is the professional association working on behalf of the profession and practice of social work in Kansas. Social workers have been licensed to practice at three levels of expertise since 1976. These are the baccalaureate (LBSW), the master (LMSW), and the clinical social worker (LSCSW). There are over 5500 social workers practicing and serving thousands of persons in Kansas every day. Social work is a broad and inclusive profession which allows social workers to provide services and care in a wide variety of settings, such as child welfare, juvenile justice, private practice (individual small businesses), military bases, hospitals, hospices, disaster events, domestic violence, aged care, substance abuse, community mental health centers, schools, public health organizations, community programs and more. Social workers play an important role addressing mental health care as part of the broadest arena of health care, so are considered to be health care providers.

HB 2530 clarifies that the consumer protection act is not designed to apply to licensed and regulated persons, such as social workers. *Rather, a client has recourse against a licensed and regulated health care provider through their specific licensure and regulatory body.*

The reason social workers are licensed and regulated in the state of Kansas, is so that the public is protected from unprofessional conduct of the licensees. There are explicit requirements that must be met before one can become a social worker. Through the tenure of the person's career as a social worker, there are rules and regulations outlining what constitutes Unprofessional Conduct (KAR 102-2-7). If an individual believes the social worker has violated the Unprofessional Conduct, then they have the right to submit a complaint to the Behavioral Sciences Regulatory Board for investigation and resolution. Professional licensure and regulation are deliberate forms of consumer protection that are designed specifically to the "product" which, for social work, is the professional social work services rendered to a client.

KNASW supports HB 2530.

Jayhawk Towers, 700 SW Jackson Street, Suite 801, Topeka, KS 66603-
(785) 354-4804 • FAX: (785) 354-1456 • sky@knasw.com • www.kn

KANSAS
OPTOMETRIC
ASSOCIATION

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

House Judiciary Committee
Testimony on House Bill 2530
March 1, 2007

The Kansas Optometric Association respectfully requests your support for House Bill 2530 which amends the Consumer Protection Act. Physicians and health care professionals are regulated by various agencies and licensing boards. Extensive regulations and penalties govern physicians and health providers under those various statutes ranging from monetary fines to loss of license.

In the case of the Optometry law administered by the State Board of Examiners in Optometry, there are extensive standards for competence and unprofessional conduct. The language mirrors other licensing statutes like the Healing Arts Act. Under the Optometry law in 65-1516 under unprofessional conduct, there are relevant sections covering consumer protection issues:

- Using fraudulent or false advertisement
- 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 or at the licensee's direction.
- The use of any false, fraudulent or deceptive statement in any document connected with the practice of optometry
- Obtaining any fee by fraud, deceit or misrepresentation.
- Performing unnecessary tests, examinations or services which have no legitimate optometric purpose.
- Charging an excessive fee for services rendered.
- Using experimental forms of therapy without proper informed consent, without confirming to generally accepted criteria or standard protocols, without detailed records.
- Failure to maintain minimum standards for ophthalmic goods and services.
- Willful betrayal of a patient's confidence.

The passage of House Bill 2530 will still provide the necessary consumer protections that patients deserve through the extensive regulatory system already in place covering physicians and other health professionals. Failure to address this issue could potentially have an adverse impact on health costs and ultimately the delivery of health care. We would ask the House Judiciary Committee to pass House Bill 2530.

Affiliated with
American Optometric Association

House Judiciary
Date 3-1-07
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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
House Judiciary Committee
Presented by Ronald R. Hein
on behalf of the
Mental Health Credentialing Coalition
March 1, 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.

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Carondelet Orthopaedic Surgeons, P.C.
Dickson-Diveley Midwest Orthopaedic Clinic, Inc.
Drisko, Fee & Parkins, P.C.
Johnson County Orthopedics, P.A.
Kansas City Bone & Joint Clinic, Inc.
Orthopaedic & Sports Medicine Consultants, Chtd.
Orthopaedic Professional Association
Rockhill Orthopaedics, P.C.

6420 Prospect, Ste T-207, Kansas City, Mo. 64132, (816) 444-9021 ext. 162, Fax 444-0643
E-Mail Gnorthcr@aol.com, Web Site www.spa-ortho.com

TO: CHAIRMAN O'NEAL AND MEMBERS OF HOUSE JUDICIARY COMMITTEE

FROM: SPECIALTY PHYSICIANS ALLIANCE, LLC.

SUBJECT: HOUSE BILL 2530

DATE: 3/1/2007

The Specialty Physicians Alliance, LLC. is comprised of a group of physician practices predominantly serving the greater Kansas City metro area. We wish to offer our support of House Bill 2530 that would make it clear that physicians are not subject to the Kansas Consumer Protection Act regarding the care and treatment of their patients.

Due to the Kansas Supreme Court decision in early February in *Williamson v. Amrani,* the Alliance felt compelled to offer support to House Bill 2530. With the Court in *Williamson* holding that since the Legislature did not specifically exclude physicians in the original Consumer Protection Act in 1973, that it applies in cases regarding a physicians' treatment and care of their patient, House Bill 2530 is crucial in making public policy clear on this matter.

The Consumer Protection Act when enacted was 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. The Committee is well aware that physicians and other health care providers licensed by the Kansas Board of Healing Arts are already subject to extensive regulation by the state of Kansas. The Board of Healing Arts enforces the Healing Arts Act that contains a comprehensive regulatory structure for the licensure and discipline of physicians.

A review of The Consumer Protection Act reveals consumer transactions regarding merchantable goods and services sold by telephone solicitation and other mass means. It is difficult to imagine that the 1973 Legislature intended that the physician/patient relationship be included in this Act along with the tampering to vehicle odometers, tampering with vehicle titles, thermal insulation and door to door sales.

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There already exists a well established statutory scheme and voluminous body of case law pertaining to medical malpractice should a patient be aggrieved by a physician. Couple that well established mechanism for relief with the intensive regulation under the Kansas Healing Arts Act and the Alliance suggests to the Committee that the appropriate public policy needed to address physician/patient relationships already exists.

We encourage you to act favorably on House Bill 2530 and make clear that the Kansas Consumer Protection Act does not apply to health care providers as the Court held in *Williamson.* Thank you for considering this very important matter.

KANSAS DENTAL ASSOCIATION

Date: March 1, 2007

To: House Committee on Judiciary

From: Kevin J. Robertson, CAE
Executive Director

RE: Testimony in Support of HB 2530.

Chairperson O'Neal 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

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- 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 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
House Judiciary Committee
March 1, 2007
By Charles L. Wheelen

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

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 is 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).

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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 and 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 or a purveyor of snake-oil remedies. 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.

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
House Judiciary Committee
Presented by Ronald R. Hein
on behalf of
Kansas Pharmacy Coalition
March 1, 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.

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.

House Judiciary
Date 3-1-07
Attachment # 16

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
House Judiciary Committee
Presented by Ronald R. Hein
on behalf of
Kansas Society of Radiologic Technologists
March 1, 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.

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 provide written testimony.

House Judiciary
Date 3-1-07
Attachment # 17

LAW OFFICES
OF
MICHAEL L. HODGES
ATTORNEY AT LAW

13420 SANTA FE TRAIL DRIVE
LENEXA, KANSAS 66215

TELEPHONE (913) 888-7100
FAX (913) 888-7388

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

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

Date: March 1, 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 physicians and 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 physicians and 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. Only catastrophic losses justify a malpractice case in Kansas.

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 doctor or 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 for doctors 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 physicians 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 their doctors they are at their most vulnerable. They put their lives in the hands of doctors. 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 used car lots their guard is up. When people go to doctors 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 doctors 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 doctors.

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. 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 consumer fraud that have no other way to seek redress because of the economics of lawsuits. If the legislature decides that small deceptions are acceptable by medical providers and that minor fraud is fine 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.

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

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

From: Chan P. Townsley, Hutton & Hutton Law Firm, LLC
On Behalf of the Kansas Trial Lawyers Association

Date: March 1, 2007

RE: HB 2530 Kansas Consumer Protection Act

I appear today on behalf of the Kansas Trial Lawyers Association, a statewide nonprofit organization of attorneys who serve Kansans who are seeking justice. I am an attorney from Wichita. It is an honor for me to appear today to assist in the legislative process by providing testimony in opposition to HB 2530.

KTLA believes that HB 2530 takes a step in the wrong direction by weakening the Kansas Consumer Protection Act to the detriment of Kansas patients. HB 2530 will leave some consumers with no remedy for harm and injuries resulting from physician and health care provider deception and unconscionable acts. HB 2530 creates an unprecedented exception for physicians and health care providers from laws that most Kansans and Kansas businesses must obey. Given the enormous responsibility and the position of trust that physicians and health care providers occupy in their patients' lives, this exception from consumer protection laws is especially unwarranted.

The Kansas Consumer Protection Act does not apply to ordinary malpractice cases. Even though all physicians qualify as sellers under the KCPA, and their patients as consumers, liability can only be imposed under the act for conduct that essentially equates to misrepresentations, willful omissions, or unconscionable practices. This means that a 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.

There is no liability under the KCPA for honest, informed opinions or statements. However, 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 individuals and businesses must comply.

Terry Humphrey, Executive Director

Fire Station No. 2 • 719 SW Van Buren Street, Suite 100 • Topeka, KS 66603-3715 • 7

E-Mail: ktla@ktla.org

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Date 3-1-07
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If HB 2530 becomes law, Kansas will have perhaps the broadest immunity granted under the Consumer Protection Act in any state. For example, the bill exempts "Health care providers" from the requirements of the KCPA. The term "Health care provider" is a term which appears in the Kansas statutes over 200 times. The term is defined in more than a dozen different statutes, and the definitions vary. Unless a specific definition is used or incorporated, any or all of these definitions could apply.

Taken at the broadest, and combining those definitions, "Health Care provider" will arguably include any person licensed 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 [the statutes are inconsistent whether the entity must be providing any medical service], as well as any "officer, employee or agent thereof" acting in the course and scope of such person's employment or agency.[i]

These definitions clearly involve profit making entities which should not be exempt from the requirements of fair dealing found in the KCPA. Inclusion of all officers, employees, and agents is extremely broad, and could quickly result in unintended consequences to consumers in Kansas.

The term "physician" as used in the bill is problematic as well. "Physician" is defined in several different ways in the 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." It is easy to imagine a scenario in which a person presenting as a physician, but not really a physician, should be subject to the provisions of the KCPA.

The proposed language exempts the "professional services" which a physician or Health Care provider "is licensed or regulated" by the State of Kansas. Because "Health Care provider" could include corporations not necessarily limited to providing medical services, the provisions of HB 2530 may be construed to apply to entities and conduct far removed from the provision of medical services.

KTLA believes that HB 2530 as drafted is a complete exemption for physicians and health care providers from requirements of the KCPA. As worded, this exemption raises the question whether downstream activities from the Health Care provider are also exempt. If a physician providing professional services is exempt from the KCPA, is a collection agency which acts as an agent of the physician also exempt from the KCPA for any conduct to obtain payment? Typically, agents acting in the scope of and on behalf of those who are exempted from the requirements of a statute are also exempted.

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 not allow HB 2530 to advance.

Thank you for the opportunity to provide testimony.

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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 thereapist 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]]

TO: Members of the House Committee on Judiciary

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

DATE: March 1, 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, 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 KCPA prohibits deceptive and unconscionable trade practices by suppliers of consumer goods and services. 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.[1] (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.[2] 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[3] and hospital payments to physicians to reduce or limit services to Medicare or Medicaid

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[1] http://www.securitymanagement.com/library/000187.html

[2] http://www.gao.gov/new.items/d06813.pdf

[3] http://oig.hhs.gov/fraud/docs/alertsandbulletins/office%20space.htm

beneficiaries under the physician's direct care. [4]

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 have submitted written testimony for your review, and Mr. Shannon Suhler is here to tell you what happened to his family. My clients' testimony is intended to demonstrate to this body 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. Professionals occupy a position of public trust. There is no basis for doctors, lawyers, or other learned professionals 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:

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[4] http://oig.hhs.gov/fraud/docs/alertsandbulletins/gainsh.htm

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> [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).

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 he hasn't yet won the war. It would be prudent to allow the *Williams* 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.

There is no serious dispute that physicians fall comfortably within the KCPA's definition of "supplier," and Dr. Amrani never 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.

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 and by the proponents of H.B. 2530. Nor would this statute make any sense if read in the context of the proposed exemption in H.B. 2530.

In addition, if the statue 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. The proposed exemption is as follows:

> The Kansas consumer protection act does not apply to the rendering of or failure to render professional services by a physician or other health care provider with respect to professional services for which such physician or health care provider is licensed or regulated by the state of Kansas.

For example, if a hospital engages in unfair debt collection activity against the patient for a consumer transaction involving "professional services," would not the exemption at least arguably be implicated? This would be true even where the claim is asserted against someone other than a licensed health care provider. For example, third-party debt collectors are prosecuted under the Act for "enforcing" a "consumer transaction" after the fact. As I read the proposed language, the debt collector would have a good argument that, because the underlying transaction involved the rendering of professional services, there is no "consumer transaction," to which the Act applies.

In closing, I will leave you with one more example. Suppose a hospital routinely charges for services it never rendered, and even sues the patient to collect those charges. Even after the hospital is made aware that its charges are improper, and its own audit confirms the services were not performed, it refuses to back down or reduce its bill. (This example closely parallels a case I am currently working on). Would not the hospital be exempt under the language of H.B. 2530, because the patient's claim would involve the hospital's "failure to render services?" Based on my experience, I can assure you that the hospital would fervently argue it was.

The KCPA provides effective, necessary protection against deceptive and unconscionable practices by health care providers. There is no reason to begin hastily doling out exemptions. H.B. 2530 would be bad for Kansas consumers and, in turn, for the Kansas health care market. I respectfully ask that you take no action to exempt physicians, health care providers, or any other professionals, from the Act's coverage.

Respectfully submitted,

GRAYBILL & HAZLEWOOD L.L.C.

N. Russell Hazlewood

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STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL
CONSUMER PROTECTION AND ANTITRUST DIVISION

PAUL J. MORRISON
ATTORNEY GENERAL

120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-3751 • FAX (785) 291-3699
CONSUMER HOTLINE (800) 432-2310
WWW.KSAG.ORG

Testimony of
Rick Guinn, Chief Counsel
Office of Attorney General Paul Morrison
Before the House Judiciary Committee
HB 2530
March 1, 2007

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify on behalf of Attorney General Paul Morrison 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 the jurisdiction to investigate and prosecute claims against doctors, dentists, chiropractors, and all other health professionals in the state. The Consumer Protection Division of the AG's Office 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 consumers. Instead, consumers would be required to retain counsel and seek legal recourse through the courts. Such an option would place undue financial hardship on many consumers unable to afford private counsel.

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. Furthermore, the Board has no authority to redress the financial

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loss suffered by the consumer. As stated on the Board's website, "The Board does not represent individuals, nor obtain compensation on behalf of individuals. Each person is free to seek legal representation if they believe it is necessary."

Concerns also exist regarding the very broad definition of health care provider as proposed in HB 2530. The definition includes any hospital, clinic, out-patient center or rehabilitation center. These entities will arguably be allowed to violate the KCPA without consequence.

Finally, it is important to note that no other professional service is exempted from possible sanctions for violating the KCPA. Consumers in Kansas have a right to be protected from violations by those who provide professional services who choose to engage in deceptive and unconscionable acts.

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

To: House Judiciary Committee

From: Marian Bonura
Kansas City, Mo

Date: March 1, 2007

Re: **House Bill 2530**

My name is Marian Bonura. I am here today with my son Frank Bonura and several others that have also been injured by deceptive medical practices to ask you to vote no on HB 2530. 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. Robles 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. He remained in the hospital for 11 days fighting for his life. He lost that battle on January 26, 2001.

My husband, myself and my entire family has suffered due to the deceptive practices of this surgeon. This surgeon promised my husband the "duodenal switch", but performed a variation of an older procedure that 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.

House Judiciary
Date 3-1-07
Attachment # 22

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HEALTH TALK

HEALTH TALK IS PRODUCED BY THE ADVERTISING/SPECIAL PROJECTS DEPARTMENT OF THE KANSAS CITY STAR.

SURGERY FOR OBESITY

Q. I am a 33 year old woman. I weight 250 pounds, am five feet five inches tall, and have tried everything to lose weight. I have lost up to eighty pounds, but it just keeps coming back. Is there any way besides surgery that will really work? If not, what type of surgery will work and five the best quality of life?

A. Without surgery, your chance of losing the 120 pounds you need to lose and keeping that weight off for more than three years is virtually zero.

The second question is slightly more difficult to answer. There are two types of successful obesity surgeries. The most commonly performed in this area is the Roux-en-Y gastroplasty, which consists of a tiny 1 ounce stomach, and has permanent restriction of a low to no simple surgery, low-fat diet. This procedure surgically forces you to limit your volume intake of food, or you will vomit. It does, however, significantly reduce "hunger pangs". I have performed these type of surgeries for more that twenty years. If done correctly, they will work for about 12-15 years, but will most likely need revision due to gradual expansion of the stomach pouch and therefore nearly 50% weight regain.

The other type of surgeries are non-restrictive, malabsorption procedures. These include Biliopanreatic Diversion (BPD) and Duodenal Swith (DS). These have the advantage of a significantly better quality of life. They allow larger volumes of food intake with usually one to three soft stools per day. This type of surgery cures type II diabetes including insulin dependent type 100% of time, usually within one week. Also, they return cholesterol levels to normal within one month 100% of the time, and reduce triglyceride levels to normal 95% of the time. The re-operation rate for weight regain after twenty-two years is less than ten percent.

Patient compliance, successful wight loss, and satisfaction with quality of life compared to gastric restrictive procedures have amazed me. A patient support group of BPD patients, as well as a website, are available. For more information, go to www.sifersmd.medem.com or call 913-432-5575.

Dr. Timothy Sifers, M.D.
7315 Frontage Road, Suite 114
Shawnee Mission, KS 66204

for informat
816.234.4221

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Timothy M. Sifers, M.D., FACS
8800 W. 75th, Suite 310
Shawnee Mission, KS

Visit our website. www.sifersmd.medem.com

From pitch.com
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The Deepest Cut

Obese patients trusted Dr. Timothy Sifers for the best weight-loss surgery available. It was too good to be true.

By Allie Johnson

All over Kansas City one fall evening, dieters tuned in to KMBC Channel 9 for a Healthwatch report that promised information on a weight-loss miracle. Thanksgiving was approaching, and those extra holiday pounds couldn't be far behind. Channel 9 reporter Kelly Eckerman said just what overweight people wanted to hear:

Imagine that you could eat whatever you want and still lose 20 to 50 pounds a month. Believe it or not, it's happening to people who are not on diets or an exercise routine. Instead, they are trying a different approach.

That approach was an innovative operation so effective that some experts predicted it would replace all other types of weight-loss surgery, Eckerman said.

In that November 2000 broadcast, Eckerman told viewers that physician Timothy Sifers was the only surgeon in the metro area performing the duodenal switch, a procedure touted as the most advanced of the obesity surgeries that had evolved since the crude stomach-stapling operations of the 1980s. Over the years, doctors had discovered flaws in some procedures: The Roux-en-Y technique caused patients to vomit if they ate too quickly or didn't chew thoroughly enough; adjustable gastric banding sometimes failed to result in weight loss; and biliopancreatic diversion could be accompanied by ulcers, chronic diarrhea, gas and major nutrient deficiencies. After the duodenal switch, though, patients lost at least as much weight as with the other procedures but didn't suffer as many complications.

"These people tend to be able to eat pretty much all they want to, but they still lose the weight," Sifers told Channel 9. Eckerman interviewed one of Sifers' patients, a 400-pound woman who said she'd just had the duodenal switch and was excited about her projected weight loss. Eckerman emphasized that the new type of surgery had no "annoying" side effects.

Watching in his south Kansas City home, Marion Bonura thought he had found the answer to his lifelong struggle with fat. In his early fifties, Bonura was so big that he couldn't zip his fly or trim his own toenails. His profession didn't make it any easier -- a fourth-generation restaurateur, Bonura, with his wife, ran Luigi's Restaurant on Holmes Road in south Kansas City, and they had helped their youngest son, Luigi, open the elegant new Trattoria Luigi's in a renovated design studio on the Plaza. (That restaurant closed in the spring of 2001.)

Bonura wanted to escape the constant culinary temptation. After the segment ended, he went to his computer and started researching the

Brian Stauffer

Sabrina Staires

Marian Bonura says her husband would still be alive if he'd had the surgery he thought he was getting.

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duodenal switch operation. A few weeks later, he called Sifers' office in Mission and set up an appointment for a consultation.

"He wanted that surgery really, really bad. It was all he could talk about after he'd seen it on TV," recalls his wife, Marian Bonura.

Marian went to her husband's consultation with him in January. They did everything together. At their restaurant six days a week, she cooked pasta while he chatted up customers and handled the business. Construction workers were building their dream house, and before it was finished they'd sneak in, put on old records and dance on the marble floors. Even their first names, Marion and Marian, were almost indistinguishable.

As they sat together in Sifers' waiting room, Marian Bonura had misgivings. She thought the operation was too risky. A nurse led the couple into a consultation room, and soon Sifers walked in. Marian remembers that he looked as if he'd just arrived from a beach vacation. His hair was bleached blond, and he wore multicolored floral surgical scrubs. Sifers pulled out a marker and some paper, Marian recalls, and drew diagrams of different types of surgical procedures.

"There were three of them Sifers told us about. He said the third one was the best surgery of all: the duodenal switch. I'll never forget the name," she says.

Bonura was ready to sign the consent forms and write a check for $15,000 -- $9,000 for Sifers and $6,000 for Overland Park Regional Hospital -- because his insurance would not cover the surgery. But his wife expressed doubts. She says she told Sifers that her husband had a history of blood clots and was taking the blood thinner cumidin. Other health problems had been brought on by obesity: He had inflamed veins in one leg, he suffered from kidney stones and he couldn't walk up a flight of stairs without getting winded.

"Sifers said no problem, it would be a walk in the park," Marian Bonura recalls.

Sifers' receptionist scheduled Bonura for surgery almost immediately, and Bonura handed over the cash, Marian Bonura says. On the day her husband went into the hospital, he told her he was scared. "Then don't do it," she told him. "We can go home right now." But at that moment, nurses arrived and wheeled him off to the operating room.

While she waited, Marian Bonura says she wondered whether she should have stopped him.

He'd been in her life since the 1960s, when she was 25 and answered a help-wanted ad for a waitress at his family's restaurant. Back then, Luigi's Restaurant and Cocktail Lounge was downtown, across from Katz's drugstore at 10th Street and Main. Six days a week, she went to work there. One day the young waitress walked into the kitchen, and there was Bonura, stirring a pot of spaghetti sauce. He looked at her and professed his love. "He had big old tears rolling down his cheeks," she recalls.

When they married, Bonura was not yet twenty. He was a big man but not fat. Over the years, though, as his wife cooked his favorite foods -- fried chicken and apple pie -- he gained weight.

Marian and her husband, Marion, ran Luigi's Restaurant together.

Sabrina Staires

Mary Ann Bell cancelled her surgery with Sifers.

In February, Shawnee Mission Medical Center cancelled surgeries scheduled by Timothy Sifers.

Sabrina Staires

Lori Hollinger sued Sifers.

One summer in the late 1970s, Bonura announced he was going on a diet. It was the first of many. Bonura tried an early version of the low-carb diet; his wife weighed every portion of meat, vegetables and cottage cheese. He lost ninety pounds but later gained it all back and put on even more weight. Later, he tried a high-carbohydrate, low-fat diet. Then he saw Channel 9's report.

"This doctor was like God to Marion. It was like God coming down from heaven and saying, 'Marion, I'm going to give you a new life and another chance,'" Marian says.

The surgery seemed to go well. But afterward, when Bonura started having trouble breathing, staffers in the intensive-care unit put him on a respirator.

In his hospital bed, Bonura seemed restless. He moaned when he slept. He said the water he sipped felt like it was trickling around inside him, Marian says. His temperature began to rise. Then a black liquid started oozing out of the incision that ran the length of his belly. "It was a horrible black goo," Marian says. "It was like a black, black blood. And it was all over him and all over the bed."

Sifers called in an infection specialist, who prescribed antibiotics. But the dark fluid kept flowing, Marian says. One night more than a week after surgery, when the drainage seemed especially copious, Marian says she demanded that a nurse call Sifers at home. The nurse phoned but reported that Sifers had refused to come in. "The nurse told me that he had said there was no reason for him to come in, and he'd run tests on him in the morning," Marian recalls.

She slept restlessly in the chair in his room that night and left at 5:30 a.m. to go to their restaurant. Before she left, she says she squeezed her husband's hand and told him she'd be back as soon as she could get away. "I'll be here," he said.

Marian says she was in the kitchen standing over bubbling vats of pasta when the phone rang at 7:30 a.m. It was Sifers. All he said was, "We have a problem."

Bonura was dead.

"I truly feel deep down in my heart that he would still be here if he had not fallen for that doctor's lying to him about the surgery," Marian says.

During late 2000 and early 2001, Sifers claimed in television interviews (by then a segment had also aired on KSHB Channel 41) and told patients that he was performing the duodenal-switch operation. In fact, he was not, according to depositions taken from Sifers in a lawsuit one of his patients filed last summer.

Instead of the duodenal switch, Sifers was actually performing an older procedure, the biliopancreatic diversion. That technique is associated with more side effects and complications than the duodenal switch, according to the American Society for Bariatric Surgery, of which Sifers is a member. The lawsuit, filed in July 2002 by Lori Hollinger, accuses Sifers of deceptive sales practices, fraud, medical negligence and battery.

Sifers stopped telling patients he was performing the duodenal switch in early 2001, he said in depositions. He also said that Overland Park Regional Medical Center (which was then owned by Health Midwest) stopped allowing weight-loss surgeries there later that year. But he continued to do biliopancreatic diversions at Shawnee Mission Medical Center, owned by Adventist Health Systems, which is affiliated with the Seventh Day Adventist Church.

Sifers, through his wife, Celina, declined to talk to the *Pitch* for this story, citing the pending litigation against him. Sifers has testified that he performed weight-loss surgeries on 300 patients between the fall of 2000 and the fall of 2002. The *Pitch* has confirmed that at least three of Sifers' patients believed they were undergoing the duodenal switch but actually received different treatments.

The 55-year-old doctor has been practicing weight-loss surgery since its early days. He graduated from the University of Kansas Medical School and was first licensed in 1975. According to his résumé, Sifers

completed a fellowship with the American College of Surgeons, where he received specialized training in weight-loss surgery in 1981. His résumé also includes a yearlong position as chair of surgery at Shawnee Mission Medical Center in the early '90s. Now, he also trains KU Med surgical residents as a clinical assistant professor in the school's department of surgery.

Patients who have posted comments on obesity Web sites say Sifers has a confident, straightforward manner and describe him as a "straight shooter" who "doesn't sugarcoat anything." His own Web site reassures patients that "Dr. Sifers and his staff are committed to working together to provide the highest quality patient care. We offer personalized attention and patient education tailored to each individual's needs."

Although some patients say he comes off as gruff, many also say he answers their questions thoroughly and emphasizes the importance of "aftercare" -- strictly following the prescribed diet and coming in for regular checkups. "He is truly dedicated to making life for the heavy person longer and much better quality. He has saved and given me back my life and for that I will always be grateful," one patient writes on an online forum. Another woman adds, "Loved the scrubs (a mottled purple and teal, really cool.) Very professional, knows his stuff."

For Lori Hollinger, surgery with Sifers led to three years of misery and a lawsuit.

In the fall of 2000, when Hollinger heard that Channel 9 was going to report on weight-loss surgery, she left her telecommunications consulting job early the day of the broadcast to make it home to Belton in time to watch. She had spent years trying fad diets and calorie-counting programs -- Jenny Craig, NutriSystem, Weight Watchers, a cantaloupe diet -- but could never lose the weight she'd started putting on during two pregnancies when she was in her twenties.

At age 38, Hollinger weighed 250 pounds. Being heavy didn't stop her from being active -- she loved to go boating with her husband at the lake house they'd bought in the Ozarks, she lifted weights and she sometimes went four-wheeling. "But I just didn't feel comfortable with myself," Hollinger tells the *Pitch*. "I wanted to feel better about myself."

Hollinger had researched weight-loss surgery on the Internet. Most of the procedures had major drawbacks. But then she discovered the innovative duodenal switch.

She learned that an Ohio doctor, Douglas Hess, had developed the duodenal switch in 1988 to try to remedy some of the problematic side effects of other weight-loss surgeries. The duodenal switch involved reducing the size of the stomach to force a patient to eat less. (Within a year, though, the stomach stretched enough to hold a small but normal meal.) It also rerouted the small intestines to keep enzymes and bile (which break down fat) from mixing with food so that the patient's body would absorb fewer calories and nutrients.

The duodenal switch removed the part of the stomach that produces the most acid, cutting the risk of ulcers. This was important to Hollinger because she was prone to ulcers, having had them as a child. Also, she liked the fact that unlike other surgeries, the duodenal switch left a fully functioning stomach with a pyloric valve that controlled the release of food and gases from the stomach into the small intestine. Other operations removed the pyloric valve, allowing stomach contents to rush into the small intestine and sometimes cause an unpleasant effect known as "dumping syndrome" when the patient ate sweets or carbohydrates. As a result of dumping syndrome, some patients suffered shortness of breath and rapid heartbeats; some passed out.

That doesn't happen with the duodenal switch. "It's the best there is right now," says Robert Rabkin, a San Francisco surgeon who has been practicing since the 1970s. He began doing the duodenal switch in the '90s. Rabkin, a graduate of Stanford Medical School and a former Harvard University teaching fellow, developed a less-invasive laparoscopic technique for the duodenal switch. Now popular among patients who want that procedure, that operation has brought Rabkin so much success that he rarely performs any other type of weight-loss surgery.

Hollinger wanted the duodenal switch. The decision to have surgery was an especially serious one. Her mother, who'd always been hundreds of pounds overweight because of a thyroid problem, had died of a

bleeding ulcer after a primitive stomach-stapling operation in the early 1980s, she says. "My mom was basically a guinea pig," Hollinger says. "So this was not a decision I took lightly."

Because the duodenal switch was relatively new and complicated, Hollinger thought she'd have to travel to the East or West Coast or to Spain or Brazil -- both countries have respected surgeons who perform the duodenal switch (usually for less money than it costs in the United States).

When she saw Sifers on TV, she was ecstatic.

The morning after the news segment aired, Hollinger says, she called Sifers' office but kept getting a busy signal. When she finally got through, the receptionist told her that the phones had been ringing constantly, mostly with callers who had seen Sifers on TV. Hollinger says the receptionist asked two questions: "How did you hear about us?" and "How will you be paying?" Hollinger said she would pay in cash and scheduled a consultation, which would cost her $200. Then she'd pay $10,750 for the surgery.

In the meantime, Hollinger says, she talked on the phone with other area women she had met in an obesity support group on the Web. Two of the women had seen the news spot and made appointments, too.

"I had done a lot of research on the duodenal switch, and I didn't know there was a doctor in Kansas City who did it. I was surprised," says one of the women, Mary Ann Bell.

During their consultations, Sifers drew diagrams, talked about the advantages of the duodenal switch and handed them brochures about the duodenal switch, Bell says. Sifers explained that he would make a cut in the stomach, remove about three-fourths of it and leave the pyloric valve intact -- the distinctive characteristic of the duodenal switch.

"He said that one of the big advantages of the duodenal switch was leaving the pyloric valve intact, and that that really helped avoid acid reflux and a whole host of other side effects," Peggy Harness says. "I was gung-ho and game. He convinced me."

Hollinger says she was able to get a surgery date almost immediately -- December 15.

Hollinger says her surgery at Overland Park Regional Medical Center went well, lasting less than two hours. In a lot of pain but otherwise fine, she stayed in the hospital for three days. When she got home, however, she received a conference call from two friends who said they had been questioning Sifers about his operations. "You'd better sit down," one of her friends said. "We have some bad news for you."

Sifers was not doing the type of surgery he claimed he was doing, the women told her. Instead, he was doing an older operation called a biliopancreatic diversion, which leaves the patient with a "pouch" (instead of a functioning stomach with a pyloric valve) and a greater risk of side effects, including bleeding ulcers, diarrhea, bloating, flatulence and dumping syndrome, they told her.

Stunned, Hollinger hung up the phone. The next day, she says, she called Sifers' office and tried to get some answers from the receptionist. She says the receptionist insisted that Sifers had performed a duodenal switch on her. She says she called several more times over the next few days but never got to talk to Sifers. Finally, Hollinger says, a staff member admitted that Sifers had performed the older operation.

In the meantime, Hollinger's friends, who had both made down payments on their surgeries and scheduled them for early January, were demanding refunds. At first, Bell says, Sifers told her she could have a week to think about whether she wanted the surgery. But she says she told him she'd already made up her mind. "Instead of apologizing, he just got more and more arrogant with us," Bell says. "He said, 'Do you realize that procedure [the duodenal switch] would cost twice as much as what you're paying for?'"

When Hollinger went in for her first checkup a week after surgery, she says she was ready to face Sifers. "I was livid. I wanted to know what in the hell he had done to me," she recalls. Sifers told her he had done a "little bit of a different procedure," she says.

By Christmas Day, she says, she was having trouble keeping down liquids, Jell-O and soft eggs. Then she

started running a fever that climbed to 102 degrees. Pain stabbed through her abdomen to her back and shoulders. A few hours later, her husband, Rick, took her to the emergency room. After CT scans and tests, doctors found an infected abscess near her liver. They put her on antibiotics and started draining her wound. After five days in the hospital, she went home.

In mid-January, Hollinger says, she developed familiar symptoms and ended up back in the hospital for a week, diagnosed with another infection. Within days, yet another infection flared up, and she spent two more weeks in the hospital, this time at Shawnee Mission Medical Center.

Bell and another woman who had cancelled her surgery with Sifers decided to put themselves in another doctor's hands.

After getting their refunds from Sifers, the two women scheduled surgery in Alcoy, Spain, with Aniceto Baltasar, a respected surgeon who had performed the duodenal switch since the mid-'90s. At the end of January 2001, while Hollinger was battling infections, they flew there for the surgery, which they were able to get for just $10,500 (including plane ticket) partly because of a favorable exchange rate.

"He was wonderful," Bell says of Baltasar. "He was very caring, just the complete 100 percent opposite of Dr. Sifers." When Bell started bleeding excessively after surgery and required a transfusion, she says, Baltasar stayed nearby. Since the surgery, both women have lost weight without any complications, Bell says.

Hollinger, however, could barely eat anything without vomiting, and constant diarrhea forced her to bathe between trips to the bathroom. Finally, Hollinger decided she could not seek treatment from Sifers anymore. Desperate for a referral, she found another Kansas City weight loss surgeon, Thomas Helling, who agreed to see her at St. Luke's Hospital. (Helling no longer does weight-loss surgery, according to his office staff.)

Before she could make it to her first appointment with Helling, another infection flared up, and she met him at the St. Luke's emergency room. Helling cut through skin and nerves to remove a grapefruit-sized abscess, leaving a bloody hole in the middle of Hollinger's stomach -- a hole that took seven months to heal, according to her lawsuit. Over the following months, he cut out more infections and a bleeding ulcer and repaired two hernias, the lawsuit says.

Hollinger had expected to go back to work in March, but she says she never made it and eventually lost her $100-an-hour telecommunications consulting job. Reluctantly, she and Rick sold their vacation home in the Ozarks and their boat.

By the following year, Hollinger had withered to 115 pounds. Helling finally agreed to try to reverse her initial surgery as much as possible, she says. Although the surgeon could not replace the missing pyloric valve, Hollinger's medical records show that he rerouted her intestines to their "normal anatomic position." Hollinger says Rick had to tell her 14-year-old daughter that there was a chance her mom could die.

Hollinger and several other patients who were considering Sifers as their surgeon say they checked his credentials. The Kansas State Board of Healing Arts lists Sifers as a licensed general surgeon with "no derogatory information on file." That means Sifers has never been disciplined by the board, which investigates complaints and can suspend or revoke licenses, says Mark Stafford, the board's general counsel.

But in the year following her weight-loss surgery, Hollinger returned to the hospital fifteen times, had seven surgeries and accumulated $450,000 in medical bills, according to her lawsuit. (Her insurance considered the hospitalizations the direct result of elective surgery, so they were not covered, she says.) She and Rick began arguing more. Hollinger's daughter, Pam, had a hard time dealing with seeing her mother so sick. After family counseling, Hollinger filed for divorce (a decision she now says she regrets), and Rick moved out.

After the reversal operation, her health began to improve slightly. Hollinger says she gained back some weight, and her fingernails and hair began to look healthier. But she still has problems with diarrhea -- she keeps spare underwear in the glove box of her truck and in a desk drawer at work. A hernia prevents her

from lifting weights and throbs when she tries to shovel snow or mow the lawn. And a bleeding ulcer forces her to pop Tums daily. She can't drink milk; she can't eat salad or any kind of roughage. She can't have a steak unless it's chopped into tiny pieces. She says she vomits four or five times a week.

"I know when my feet hit the floor in the morning what kind of day it's going to be. And if I get up green, it's going to be a long day," she says.

In February 2003, unable to pay the nearly half-million dollars in medical bills that she owed, Hollinger filed for bankruptcy in Jackson County Court.

Last summer, she filed her lawsuit against Sifers. The suit alleges that Sifers negligently failed to adequately inform Hollinger of the risks of the surgery he was performing. Sifers' biliopancreatic diversion caused permanent injury, Hollinger claims. She charges that he "knowingly, and with the intent to defraud," lied to her and other patients about the type of surgery he was performing, causing physical and emotional suffering and a loss of income.

In depositions, Sifers testified that he saw little difference between the biliopancreatic diversion and the duodenal switch. "I just used the terms interchangeably at that time," he said. He added that he sometimes called his surgery a duodenal switch because it was "easier to say." (Sikes was first deposed in November 2002; in another deposition a year later, he said that he had performed one duodenal switch in the previous year.)

That bothers Rabkin, the San Francisco surgeon. "I'd say that's a very big deal," Rabkin says of Sifers' use of terminology. "It's absolutely unacceptable. Loose and fast doesn't go along with surgery. Surgery is very exact, and it's very precise, and you have to be accurate and let people know exactly what you're doing."

On February 16 of this year, Channel 9 ran a much different story about Sifers. That night, the station reported that some patients scheduled for biliopancreatic diversion said the hospital had abruptly cancelled their surgeries without explanation. The hospital had issued a vaguely worded statement, and Channel 9 reported that Sifers told the station he was still waiting for an explanation.

Presumably, patients who were set to have biliopancreatic diversion would have been informed of its risks. Nonetheless, in its statement, the hospital noted its "full and ultimate responsibility to ensure the quality of care that is provided at Shawnee Mission Medical Center." The statement went on: "Sometimes we are forced to make difficult decisions based on all of the information available, but we always do so in what we believe to be the best interests of our patients. Further research is under way to determine if this procedure should be reinstated at Shawnee Mission Medical Center."

A hospital spokeswoman declined to clarify the statement for the *Pitch* or to specify who suspended the surgeries, when the decision was made or what prompted the change. She said the hospital would not release any further statements but would inform patients after deciding whether to reinstate the surgeries.

Channel 9's most recent report showed patients holding signs outside the hospital, angry that they'd been denied their surgeries.

Lori Hollinger wishes she'd never had hers.

TO: Members of the House Committee on Judiciary

FROM: Shannon Suhler

DATE: March 1, 2007

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

My name is Shannon Suhler. I live in Derby. I am employed in Wichita as salesman for a printing company. I have been a victim of deceptive and unconscionable practices by a health care provider. This is my testimony in opposition to House Bill 2530.

On October 4, 2002, my infant son, London, fell at the playground at a day care facility and was rendered unconscious. The day care facility called 911, and an ambulance took my son to the Emergency Room at Wesley Medical Center.

Fortunately, my son was not injured. Wesley personnel took some x-rays, examined him, and sent us home the same day.

Wesley required me to sign an Admission Agreement. As a part of that agreement, I assigned all applicable insurance benefits to the hospital. At the time, my family was insured by my Blue Cross Blue Shield (BCBS) health insurance policy, and Wesley was a contracting provider for BCBS. All of the services my son received at Wesley were covered by my insurance policy, and there were no applicable copayments or deductibles.

Four months later, Wesley sent me a bill, stating that I owed a balance of $349.92 for my son's emergency room visit. Upon receiving the bill, I contacted BCBS, which assured me it had satisfied, or would satisfy, Wesley's bill. BCBS told me I did not have any personal obligation to Wesley. I relied on that representation, and I took no further action at that time.

On February 24, 2003, BCBS paid Wesley's bill, in full.

Although it had been paid by my insurer, Wesley reported my account to the major credit reporting agencies as a "collection account".[1] That report created the false and embarrassing public impression that I was unwilling or unable to pay my just debts. At the time, I was unaware that Wesley had taken this action against me.

In October of 2003, while I was attempting to obtain a construction loan to build a new home for my family, I learned for the first time, from a prospective lender, that Wesley had published the negative information for inclusion in my credit report. Because of Wesley's report, the lender indicated it could not make me the loan. I was distraught. I contacted BCBS again, in an attempt to finally resolve the matter. BCBS assured me that it paid Wesley's bill, in full, and I did not owe Wesley anything for my son's emergency room visit.

On October 28, 2003, BCBS faxed correspondence to me with a copy to Wesley, stating:

Dear Mr. Shannon Suhler:

. . .

Payment of $1185.57 was issued to Wesley Medical Center on 2/24/2003. The patient's responsibility is $.00 for deductible, $.00 for coinsurance and $.00 for non-covered benefits. The total amount of the claim is $2216.00 with the patient's responsibility $.00. The provider write off for this service is $1030.43.

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[1] A collection account is an account allegedly in default that has been referred by the creditor to a consumer collection agency. When a collection account is reported in the consumer's credit report, it notifies current and potential lenders and others that the consumer is presently in default on a particular indebtedness.

A reported collection account is one of the more devastating negative items that can be reported in a consumer's credit report. In most instances, a consumer with a current collection account reported in his or her report will find it difficult or impossible to obtain a credit card or conventional loan. In those circumstances where a credit card or loan is available to that consumer, he or she will typically pay higher fees and higher rates of interest to obtain the loan. If loans are unavailable from conventional lenders because of a collection account reported in a consumer's credit report, the consumer may be forced to obtain loans from subprime lenders, in which the interest rates and fees will be dramatically higher than normal.

A reported collection account may also impact a consumer's life in other ways. For example, under a universal default clause, a credit card lender may increase a consumer's interest rate dramatically as a result of a reported collection account, even if the customer has made no late payment on that card. A collection account can also induce automobile insurance companies to charge the consumer higher premiums, and it may induce a potential employer not to employ the consumer. A collection account will generally remain on a consumer's credit report for seven years, even if the account is paid in full.

After Wesley received the fax, its debt collector informed me that the information was "not good enough," and the hospital continued to demand payment of the alleged debt from me. At my request, BCBS contacted Wesley directly in an attempt to resolve the matter. My construction loan was approved shortly thereafter. Accordingly, I believed that Wesley must have acknowledged that its bill had been fully satisfied and had withdrawn from further collection efforts against me.

As it turned out, I was wrong. In June of 2004, I began to receive dunning calls and letters from Wesley's debt collectors. Now, the hospital was asserting that I owed a balance of $680.51 for my son's emergency room visit. In response, I disputed the debt, in writing, and I again faxed Wesley a copy of the letter I had received from BCBS. At my request, BCBS also again contacted Wesley directly in an unsuccessful attempt to resolve the dispute.

Ultimately, Wesley refused to discontinue its aggressive effort to collect a debt from me which it knew, or should known, I did not owe. When the debt collectors began to contact me again in August, I felt I had no choice but to hire an attorney. In an attempt to convince the hospital to call off its dogs and clear up my credit report, I sought the advice of my attorney, Tom Gillman. Mr. Gillman indicated that he could not help me, but he referred me to attorneys Jacob Graybill and Russell Hazlewood.

Mr. Graybill and Mr. Hazlewood advised me Wesley's billing and debt collection practices directed against me were deceptive and unconscionable. They suggested that I file a lawsuit to obtain a declaration from the Court that I did not owe the alleged debt and a Restraining Order prohibiting the hospital from engaging in further debt collection activities against me. They told me litigation against a large, powerful hospital would be expensive, but the Kansas Consumer Protection Act would permit the Court to impose appropriate civil penalties and tax my attorneys fees and expenses against Wesley if I prevailed. Consequently, they were able take my case under an arrangement I could afford.

Graybill and Hazlewood filed a lawsuit for me in December of 2004. Within a few months, Wesley offered to settle with me. As a part of the settlement, the hospital agreed to stop harassing me and to take whatever action was necessary to remove the negative information it had reported from my credit files. The settlement also satisfied my attorneys fees and expenses.

It is my understanding that House Bill 2530, in its present form, would exempt health care providers, including hospitals, from application of the Kansas Consumer Protection Act. If the Act had been limited in the manner proposed by H.B. 2530, it would have been of no help to me. I urge the Committee to make no change that would have the effect of exempting health care providers from the Kansas Consumer Protection Act.

Respectfully,

Shannon Suhler

TO: Members of the House Committee on Judiciary

FROM: Minh Peng

DATE: March 1, 2007

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

My name is Minh Peng. I live in Wichita, Kansas. This is my testimony in opposition to H.B. 2530.

I am multi-lingual. I am frequently employed by the hospitals, Courts, private attorneys, and by individual members of the Vietnamese community to translate between English and Vietnamese. I am also frequently asked by Vietnamese people who do not speak English to assist them in chores of daily living that require them to interact with the local business community. A large portion of that assistance involves assisting them in matters relating to healthcare providers such as hospitals, clinics and pharmacies, as well as medical insurance providers, and governmental agencies that provide medical care. Virtually all of my clients are not fluent in English and a disproportionate number of them are elderly.

I spend a great deal of my time responding to situations in which my client is being billed for hospital services that are covered by, and should be billed to a private health insuror or Medicare. I have experienced repeated instances where a hospital has continued its demand payment from their former patient after the hospital has received full payment from a private insurance company or from Medicare, and continue to demand payment, turn the account to collection agencies and report the former patient to the national Credit Reporting Services after the hospital has been made aware the bill has been paid.

In those instances I refer the patient to Graybill and Hazlewood L.L.C. for possible assistance. In my experience, Graybill & Hazlewood are the only lawyers in the Wichita area that are familiar with billing issues of that type and are willing to assist former hospital patients caught in the catch 22 situation I have described. Its my understanding Graybill & Hazlewood are willing and able to provide their assistance because suppliers of medical services, including hospitals are covered by the Kansas Consumer Protection Act. I have been informed that the language of the proposed amendment could be interpreted to mean that the Kansas Consumer Protection Act does not apply to disputes that arise out of bills for the health care services hospitals provide. if that were to occur, it would have a devastating effect on Kansas consumers of hospitals and clinic services and I urge the legislature not to grant the exceptions being sought.

Respectfully,

Minh Peng

House Judiciary
Date 3-1-07
Attachment # 24

AARP Kansas

March 1, 2007
Representative O'Neal, Chair
House Judiciary Committee

Reference: HB 2530

Good afternoon Chairman O'Neal and Members of the House Judiciary Committee. My name is Ernest Kutzley and I am the Advocacy Director for AARP Kansas. AARP Kansas represents the views of our nearly 360,000 members in the state of Kansas.

AARP Kansas opposes HB 2530.

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.

Fraud and abuse can also be found in all segments of the health care system throughout the country. 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. On the other hand, billing errors may sometimes be mistakenly interpreted as intentional fraud.

AARP believes that adequate resources should be provided to support anti-fraud and anti-abuse efforts at all levels of government and health care. A balanced approach should be taken to ensure that anti-fraud and anti-abuse activities do not have unintended negative effects on patient health care. Strong protections against poor quality care will always be necessary.

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

Thank you.

AARP Public Policies, 2006

555 S. Kansas Avenue, Suite 201 | Topeka, KS 66603 | toll-free 866-448-3619 | 785-232-8259
Erik Olsen, President | William D. Novelli, Chief Executive Officer | www.aarp.org/ks

House Judiciary
Date 3-1-07
Attachment # 25

To: House Judiciary Committee

From: Dennis Essen
Moscow Mills, Mo

Date: March 1, 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.

After the procedure I began to suffer from severe ulcers and required additional hospitalizations and blood transfusions. It wasn't until much later I became aware 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. My injuries are permanent and I will be forced to deal with them for the rest of my life.

House Judiciary
Date 3-1-07
Attachment # 26

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: House Judiciary Committee

From: John Kuhn
Girard, Ks

Date: March 1, 2007

Re: **House Bill 2530**

My name is John Kuhn.

I have been a victim of medical deceptive practices by a Kansas Surgeon. As a result of this gross deception I have suffered permanent lifelong injury. 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. As a result of this surgeons' blatant deception, I continue to suffer from the complications and effects of this procedure. It appears these complications are permanent in nature.

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.

House Judiciary
Date 3-1-07
Attachment # 27

To: House Judiciary Committee

From: Teresa Culp
Oak Grove, Mo

Date: March 1, 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.

Since the surgery I have suffered from complications and required additional surgical procedures and medical treatment that I would not have otherwise undergone, but for the deception of this surgeon. He promised to perform the "duodenal switch" and I believed that is the procedure he was performing on me when I allowed him to anesthesize me.

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

House Judiciary
Date 3-1-07
Attachment # 28

To: House Judiciary Committee

From: Theresa Allman
Odessa, Mo

Date: March 1, 2007

Re: **House Bill 2530**

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. Immediately following the procedure I suffered from life-threatening complications. Due to the complications I was hospitalized for approximately 33 days.

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.

House Judiciary
Date 3-1-07
Attachment # 29

To: House Judiciary Committee

From: Lori Robles
Belton, Mo

Date: March 1, 2007

Re: **House Bill 2530**

My name is Lori Robles.

As a result of the deceptive practices of a Kansas surgeon, I have suffered permanent lifelong injury. This surgeon appeared on a local television station to deceptively promote that he was now performing a "new" bariatric procedure called the "duodenal switch". He indicated he was the only surgeon performing this procedure in our area. He indicated after undergoing the procedure a patient could "eat whatever they want and still lose weight". This surgeon also sought out prospective patients through advertising in the Kansas City Star and via the internet.

I have struggled with my weight for years. This surgeon was offering a procedure that could change my life forever. Because of the doctor's promises, I made an appointment and was scheduled for surgery on December 15, 2000. After the surgery, I learned that this surgeon did not perform the duodenal switch as promised. In fact, he performed a variation of an out-of-date bariatric procedure no longer performed in the United States as a primary bariatric procedure – a procedure with many known risks and side effects. In fact, the variation he performed is a procedure unrecognized in any medical literature or by any bariatric association. As a result of this surgeons' "bait and switch", I experienced life threatening complications necessitating my hospitalization nineteen (19) times in the period of over one year.

I feel that surgeons such as the one above should be held accountable for their actions. Therefore, I implore you not to exempt surgeons practicing the type of deceptive practices described above per House Bill 2530.

House Judiciary
Date 3-1-07
Attachment # 30

To: House Judiciary Committee, March 1, 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

March 1, 2007

TO: The House Judiciary Committee

From: Darrell Hicks, Sr., Wichita

Re: House Bill No. 2530

My name is Darrell Hicks, Sr. I live in Wichita, Kansas. I have worked hard all of my life to raise my family right. I am here to tell you my story so that you will know why I am asking you to vote no on House Bill No. 2530.

In 2004, my 24 year old son, Darrell W. Hicks, passed away in his sleep. We found out that he died from mixed drug intoxication--a drug overdose. He had lethal levels of prescribed drugs in his system. We found out the doctor he had been seeing was prescribing strong pain medications and had been simply giving Darrell prescriptions for a long time, instead of reasonably treating the cause of Darrell's chronic back pain.

After my son's death, we learned the doctor he was seeing ran a busy, busy practice, substantially devoted to providing narcotics to people with chronic pain. I believe the doctor and his staff didn't give my son important information about the drugs they were prescribing because they had a financial interest in continuing to see him and prescribing him the drugs.

I am now a plaintiff in a lawsuit against that doctor. I represent my son and my son's children--my grandchildren. Our claim alleges that the doctor and his staff failed to disclose material facts about the drugs they were prescribing, in violation of the KCPA which prohibits misrepresentations, willful omissions, or unconscionable practices. I am glad we get the opportunity to have our day in court, although the life of my son and my grandchildren's father is something that cannot be replaced.

The amendment you are considering to exclude physicians from the same requirements that apply to everyone else in Kansas, including other professionals, is wrong. I do not understand why doctors need a special exception or special immunity. Doctors meet and deal with the public and should have the same responsibilities that other professionals have to be straightforward and honest with their patients. The lawyers tell me what you do today will not affect my current claim. But, by leaving the Consumer Protection Act the way it is, it will continue to apply to the rare doctor who puts his bank account ahead of his patients' best interests and is dishonest or deceptive. That is good for the people of Kansas.

The Consumer Protection Act says business people providing services and goods have to be honest and cannot make misrepresentations about the goods or about the services they offer. This is good public policy, and there is no reason that Kansas businessmen, including doctors, should have any exception from these requirements.

Please do not pass House Bill No. 2530.

Darrell Hicks, Sr.

House Judiciary
Date 3-1-07
Attachment # 32

DATE:March 1, 2007

TO: House Judiciary Committee and Chairman Mike O'Neal

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, or "upcoded" his medical and surgical services, 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 28 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: House Judiciary Committee

From: Carla Thomas
Farmington, Ar.

Date: March 1, 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 have required extensive medical treatment since this deception and it appears I will continue to require treatment for the rest of my life.

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.

House Judiciary
Date 3-1-07
Attachment # 34

TO: Members of the House Committee on Judiciary

FROM: John K. Parker IV

DATE: March 1, 2007

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

My name is John Parker. I live in Wichita, where I am employed as a pharmaceutical sales representative. I have been a victim of deceptive and unfair practices directed against me by a Kansas health care provider. This is my testimony in opposition to House Bill 2530.

In April of 1999, I was severely injured when I interrupted an armed robbery in progress at a Wichita grocery store. I went to the store around 10:00 p.m. to buy a steak and a pack of cigarettes. By the time I arrived, the robbers had control of the store for more than thirty minutes. They had captured the eighteen year-old security guard, and they were holding the guard and the teenagers who were running the store in the men's restroom, in various stages of undress. The robbers were masquerading as store employees.

I was lured to the back of the store by a robber pretending to be a store employee, and then I was brutally attacked. After I was beaten and kicked by four assailants and shot twice, I miraculously found the will to live and the strength to fight back. I was a running back for the National Football League in the late 1970's and early 1980's. When I was attacked, I instinctively reverted to my football training. I was determined to get out the front door. Although blinded by blood pouring from head, I carried several of my assailants out the front door on my back, and then I passed out. As it turns out, I foiled the robbery. Federal law enforcement officials later told me I saved the lives of the store employees and security guard. Some (but not all) of the robbers were later captured. They were tried convicted in federal court. Although I was terrified my own safety and for the safety of family (in part, because the robbers stole my wallet, and their accomplices would have had my home address), I testified for the prosecution.

After I passed out in the grocery store parking lot, I was transported via ambulance to the Emergency Room at Wesley Medical Center. In spite of my serious condition, Wesley required me to sign its form Admission Agreement before it would treat me. I had no ability to read or understand the agreement at that time. However, Wesley's admissions staff would have advised me that the hospital would file my insurance or assist me in doing so.

At the time of my hospitalization, my employer provided me health benefits through a self-funded plan. I paid additional premiums to increase my health benefits and further avoid the risk of unexpected expenses. By coincidence, Wesley was the preferred provider for my PPO network. Wesley's contract with my health insurer required it to submit claims within 120 days after providing covered services and to accept negotiated, discounted amounts as payment in full.

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Wesley obtained pre-certification approval from my insurer for all procedures performed; however it did not submit a claim to my insurer for those services. Instead, Wesley filed a hospital lien against me for the full amount of its undiscounted bill. Wesley filed its lien without first presenting me with an itemized bill sufficient for him me submit the claim myself.

After I was discharged from the hospital, I received frequent debt collection letters from Wesley's lawyers, who demanded that I disclose the status of any personal injury claims and threatened to pursue me, personally, if I did not cooperate. After I had received several of those letters, I contacted Wesley's lawyer directly, to explain that Wesley's charges should be covered by my health insurance. During the telephone conversation, Wesley's lawyer led me to believe that my call resolved the matter. Nevertheless, after that call Wesley continued to pursue its lien in lieu of filing a claim with my insurer.

I ultimately engaged attorneys to investigate and prosecute a negligent security claim against the grocer and its security contractor. In the course of that investigation, almost two years later, my attorneys discovered that Wesley had never submitted a claim for its charges to my health insurer. Assuming that the hospital's omission was inadvertent, my attorneys contacted Wesley's lawyer to request that the claim be submitted, to advise that claims not submitted within two years were forfeited under my insurance plan, and to point out that the deadline was fast approaching. My attorneys further expressed concern that I might not receive a recovery for my injuries, and they wanted to make sure that I would not be held personally responsible for the hospital's bill in that event. Wesley's lawyer responded that the hospital's failure to file insurance was not an oversight – the hospital had opted to "pursue the lien" instead. Wesley's lawyer further advised of Wesley's position that the hospital, not the patient, decides whether the patient can access health insurance benefits to satisfy the patient's hospital bill.

After that, my attorneys sought to assist me in submitting a claim myself. However, because Wesley had not provided me with an itemized bill, I was unable to provide the information required by my insurer for a proper claim. After seeking clarification from my insurance administrator, my attorney again called Wesley's lawyer to ask for the information necessary for me to submit the claim. Wesley's lawyer refused to provide the requested information to me, again asserting that health insurance claims were the hospital's exclusive prerogative. Wesley's lawyer also refused to agree that the hospital would not pursue me for payment of its bill in the event that my insurance was forfeited due to the hospital's failure to file within the limitations period and I didn't recover funds sufficient to satisfy the bill.

My health insurer also requested information necessary for it to pay the claim directly from Wesley, to no avail.

In an attempt to convince the hospital to do the right thing, my attorneys sent Wesley's lawyer a six-page letter explaining how I had been injured and imploring Wesley to file a claim with my insurance. They pointed out that my health insurer stood ready and willing to pay the claim. That letter went unanswered, and I was forced to file a lawsuit against the hospital under the Kansas

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Consumer Protection Act to avoid losing my health insurance benefits. In my lawsuit, I sought and obtained a Restraining Order requiring Wesley to immediately submit a claim to my insurer or provide me with information sufficient for me to submit the claim. I also sought an injunction prohibiting the hospital from preventing other tort-victim patients from accessing their health insurance.

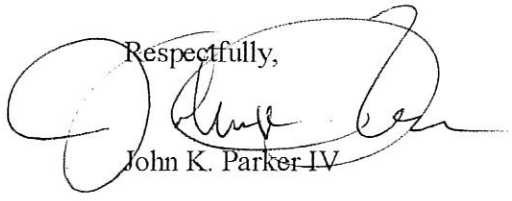
After it was served with the Court's Restraining Order, Wesley responded that it would not comply unless I first agreed to dismiss my lawsuit. However, when my attorneys served the hospital with a motion to show cause why it should not be held in contempt of court for violating the Restraining Order, Wesley acquiesced and finally filed a claim with my insurer. That claim was paid, in full, within a matter of days.

After I filed my lawsuit, Wesley filed a counterclaim against me, asserting that I (the consumer) had violated the Kansas Consumer Protection Act. I worried alot about being sued. However, my attorneys assured me that Wesley's claim against me was groundless, and the claim was ultimately dismissed on the hospital's own motion.

At trial, I presented evidence that Wesley had a practice of taking an assignment of tort-victim patients' insurance benefits, and then delaying or refusing the submission of claims to the patients' insurers and instead aggressively pursuing hospital liens against the patients' tort recoveries, without regard to the patients' wishes. As I understand it, by engaging in this scheme, the hospital could avoid the contracts it negotiated with health insurers and effectively collect more money from the patients. A Sedgwick County jury unanimously found that Wesley had engaged in two counts of deceptive acts and practices against me in violation of the Kansas Consumer Protection Act. The Court also found that Wesley had engaged in unconscionable acts and practices against me, in violation of the Act. The Court entered a two-year injunction prohibiting Wesley from interfering with its patients' attempts to access health insurance benefits. It also awarded me $15,000 in civil penalties under the Act, plus my costs, attorneys fees, and expenses for prosecuting the action. Wesley elected not to take an appeal, and it paid the judgment. I have been told that the hospital changed its collection practices as a result of my lawsuit.

It is my understanding that House Bill 2530, in its present form, would exempt health care providers, including hospitals, from application of the Kansas Consumer Protection Act. If the Act had been limited in the manner proposed by H.B. 2530, it would have been of no help to me. I urge the Committee to make no change that would have the effect of exempting health care providers from the Kansas Consumer Protection Act.

Respectfully,



John K. Parker IV

TO: Members of the House Committee on Judiciary

FROM: Alice L. Souligny

DATE: March 1, 2007

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

My name is Alice L. Souligny. I live in an apartment that I own in Wichita. I am seventy-five years old, and I am a retired business professional. I am a victim of deceptive and unconscionable practices by a health care provider. This is my testimony in opposition to House Bill 2530.

On May 19, 2004, I had gone to Health Strategies to exercise in the swimming pool. As I was returning home, I entered the lobby of the apartment house and summoned the elevator. When the elevator opened, I stepped in and fell, because it was not at floor level. I was injured in the fall.

I was taken by ambulance to the Emergency Room at Wesley Hospital. I was examined and released the same day. At the time, I was a Medicare beneficiary, and I was insured by a policy of Medicare supplemental health insurance I had purchased. All of the services I received at Wesley were covered.

Wesley did not submit a proper claim for its services to Medicare or my supplemental health insurer. Instead, it attempted to collect the full amount of its undiscounted charges ($1,260.64), from me. It further threatened to assign my account to a collection agency and report negative information about me to a credit reporting agency if I did not pay.

Originally, I assumed Wesley made a mistake. I called in and confirmed that it had my correct Medicare and insurance information. After that, Wesley followed through with its threat to turn my account over to a collection agency.

By December of 2004, I was still receiving dunning calls and letters from Wesley and its debt collectors. I had my lawyer, retired District Judge David Dewey, call Wesley and instruct it to submit the claim to Medicare and my supplemental insurer. At Wesley's request, he faxed copies of my Medicare card and insurance card to the hospital.

After that, the debt collection calls and letters continued. In February of 2005, I received a letter from Wesley indicating that my insurance had been billed, and a balance of $1,260.64 remained owing from me. The letter stated that I was "fully responsible for payment of the bill." Both of those statements were untrue.

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As of March of 2005, collectors were still calling me, at home, in the daytime and in the evening and telling me I owed a debt to Wesley and I needed to pay it. They also left messages on my answering machine. I told them that my lawyer had given my Medicare information to the hospital. I told them I had perfect credit, and I didn't appreciate having credit threatened. At the time, I was recovering from my injuries, and the calls were causing me significant annoyance and worry.

Wesley refused to discontinue its aggressive effort to collect a debt from me which it knew, or should known, I did not owe. The calls and letters to my home never stopped.

In March of 2005, I relented and paid Wesley $1,260.64 which I now understand I never owed. I have been told that Wesley collected approximately $900 more from me than it would have received from Medicare had it submitted a proper claim.

I told my attorney, Mark Kiefer, about the situation several months later. He suggested that I talk to attorneys Jacob Graybill and Russell Hazlewood, of Graybill & Hazlewood L.L.C.

Mr. Graybill and Mr. Hazlewood advised me Wesley's billing and debt collection practices directed against me were deceptive and unconscionable. They suggested that I file a lawsuit to get my money back. They told me litigation against a large, powerful hospital would be expensive, but the Kansas Consumer Protection Act would permit the Court to impose appropriate civil penalties and tax my attorneys fees and expenses against Wesley if I prevailed. Consequently, they were able take my case under an arrangement I could afford.

Graybill and Hazlewood filed a lawsuit for me in the spring of 2006. Wesley has acknowledged that my bill should have been paid by Medicare, but it has not refunded any of my money. The lawsuit is ongoing. Wesley's lawyers interrogated me in a deposition a few weeks ago.

It is my understanding that House Bill 2530, in its present form, would exempt health care providers, including hospitals, from application of the Kansas Consumer Protection Act. If the Act had been limited in the manner proposed by H.B. 2530, I would have had no remedy available to address Wesley's deceptive and unconscionable practices, and it would not have been economically feasible to hire a lawyer over $1,260.64 in any event. I urge the Committee to make no change that would have the effect of exempting health care providers from the Kansas Consumer Protection Act.

Respectfully,

Alice L. Souligny