



To: Representative Scott Schwab, Chairman  
Members of the House Insurance Committee

From: LJ Leatherman, Topeka  
On Behalf of the Kansas Association for Justice

Date: February 19, 2014

Re: HB 2678 (Amending KSA 40-908 Relating to Insurance and Recovery of Attorney Fees)

The Kansas Association for Justice (KsAJ) is a nonprofit professional association of trial attorneys that supports the right to trial by jury and fair courts. KsAJ is opposed to HB 2678.

KSA 40-908 was enacted in 1927. It requires the court to allow the plaintiff, an insurance policyholder, to recover reasonable attorneys fees when:

- a judgment is rendered against the insurer;
- the dispute centers on any policy to insure any property against loss by fire, tornado, lightning, or hail; and
- if the insurer tendered an offer before the commencement of the action, the amount recovered by the policyholder exceeds the pre-suit tender.

HB 2678 limits the scope of KSA 40-908. If enacted, KSA 40-908 would apply only to claims of property *actually damaged* by fire, tornado, lightning, or hail. Reasonable attorney fees under KSA 40-908 would no longer be mandatory in damage claims related to burglary, wind damage, or any other type of property damage if the damage was not caused by fire, tornado, lightning, or hail.

Insurance companies have complained that the courts have applied KSA 40-908 more broadly than intended. In 2006, the Kansas Judicial Council Civil Code Advisory Committee reviewed KSA 40-908. The Committee unanimously concluded KSA 40-908 is clear and it is intended to apply to damage claims not caused directly by fire, tornado, lightning, or hail:

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"The Committee also concluded that the plain language of KSA 40-908, as well as the statutory history and case law, support the interpretation that the statute was intended to apply to actions on insurance policies insuring property against loss caused by fire, tornado, lightning or hail. The plain language of the statute **does not** (*emphasis added*) limit its application to actions where the actual loss involved arose from one of the four enumerated types of coverage." (p. 2)

K.S.A. 40-908 should not be amended. The current law motivates insurers to pay property damage claims promptly, fairly, and consistent with the contract of insurance. The current law is a necessary protection for insurance policyholders because Kansas does not have a first party bad faith cause of action (known as the tort of bad faith or first party bad faith).

KSA 40-908 is not used frequently. But when it is, it is one of the only ways Kansas consumers or Kansas businesses have to hold insurance companies accountable for delaying and denying claim payment, or consciously acting in a manner inconsistent with fair dealing.

KSA 40-908 has been sound public policy in Kansas since 1927—almost 100 years. In *Hamilton v. State Farm Fire & Casualty Company*, 263 Kan. 875, 953 P.2d 1027 (1998), the Kansas Supreme Court discussed K.S.A. 40-908:

'In *Light v. St. Paul Fire & Marine Ins. Co.*, 132 Kan. 486, 490, 296 Pac. 701 (1931), we stated that the statute at issue is a public interest statute, prompted by the "pertinacious practices of insurance companies," that penalizes insurance companies for not making prompt payment of claims which are adjudged to have been meritorious. Later, in *Lattner v. Federal Union Ins. Co.*, 160 Kan. 472, 480-81, 163 P.2d 389 (1945), we stated that the purpose of K.S.A. 40-908 is not to penalize an insurance company for making what it deems to be a bona fide defense to an action to recover on an insurance policy, but to permit the allowance of a fair and reasonable compensation to the assured's attorney in the event, after having been compelled to sue on the policy, he or she is successful in that effort.'

On behalf of the members of the Kansas Association for Justice, and their clients, I respectfully ask you to retain KSA 40-908, unamended, and oppose HB 2678.