

Feb. 23, 2004

TO: House Health & Human Services Committee  
FROM: Frank Allison  
Kansas Trial Lawyers Association  
RE: HB 2867 Additional Information

Honorable Chairman Morrison and members of the Health & Human Services Committee, The Kansas Trial Lawyers Association strenuously opposes HB 2867. In addition to the information already submitted, I would like to outline other important reasons why this bill should be rejected.

**Current Malpractice Medical Review Panel Does Not Work:**

Currently, Kansas' malpractice review panel as contained in K.S.A. 60-3501, et seq. has many flaws which would continue to exist with passage of HB 2867. The malpractice review panel currently in place calls for an ad hoc panel of three physicians to render an opinion on the issue of malpractice. It is a voluntary system in which either party may request a panel to convene. However, it is mandatory if the defendant request it. Since inception of the law approximately ten years ago, it has been seldom used. The main reason the medical review panels do not work is that physicians are unwilling to submit their name to the panel list, and those that do, will give only a cursory review of a claim based on the fact that they are paid a nominal fee for reviewing the claim. In addition, when cases have been submitted to a panel the medical review that follows is not completed on a timely basis, and further delays access to the courts. As you can imagine if the system worked, defendants would be demanding that such reviews take place, however, as mentioned, few are asking for such reviews. It simply does not work, and neither would HB 2867.

Apart from the current system not working, the bill as proposed also violates certain constitutional guarantees.

**Violation of Constitutional Guarantees:**

✓ **Violation of Procedural & Substantive Due Process:**

This bill does not address any time requirements regarding when hearings should take place. To quickly illustrate this problem, in Florida, the clerk of the court was to set a time and place for a hearing before the medical review panel. The clerk was to set a hearing time within 10 months from the date of application, and if the matter was not heard within that time, the case could be filed directly to the proper court. In addressing the issue of establishing a proper time to have a hearing, i.e. a due process issue, the Florida Supreme Court ruled that the legislative scheme, i.e. a 10-month deadline, to be arbitrary, and in violation of a citizen's constitutional right to due process, and in addition, ruled that to allow a longer jurisdictional time period acted essentially as a denial of access to the courts.

✓ **Violation of Equal Protection:**

As to violations of equal protection, the current bill benefits a group of doctors at the expense of medical negligent plaintiffs. In Wyoming, the Supreme Court applied the “reasonable basis” standard to determine if the plaintiff’s claims that one group was being favored over another group were correct. The court found that there was not a reasonable basis, i.e. a sufficient link between medical panels and the issue of public health. The court stated that they could not condone the legislature’s use of a law to protect one class of people, i.e. doctors, from financial difficulties, while it diluted the rights under the constitution of another class of people, those citizens injured by negligent physicians. Moreover, the court determined that medical negligence actions served the public by enhancing the quality of care for its citizens.

✓ **Violation of a Right to a Jury:**

This bill seemingly says that it does not violate a citizen’s right to a jury. However, in another state, it was established that medical review panels do just that. In Pennsylvania, the Supreme Court held that provisions of a medical review panel bill did violate a citizen’s right to a jury. The court relied on a statistical study that examined how the medical panel review system worked for the previous two years. The study cited delays of one to four years between filings and completion of the arbitration period. The court concluded that the grant of “original jurisdiction” to the medical review panel violated the state’s constitutional guarantee of a right to a jury.

✓ **Violation of Access to the Courts:**

The bill again seemingly purports to say that juries, not the panel made the final decision, and that delays were not sufficiently long to deny access to the courts. This issue has not been uniformly decided by any courts to-date. In fact, in Missouri, the Supreme Court decided long ago that on its face, a medical review panel invalidated a constitutional right to have its citizens afforded the “right to seek immediate redress in the courts”.

**Other Important Considerations:**

✓ **Panel Composition & Evidence:**

The current bill consists of three voting physicians and one non-voting attorney. First, the panel is too vague. What is a geriatric-trained clinician – a nurse, a doctor, a physical therapist?

Also, the panel composition cannot adequately address issues regarding the nature of damages and the amount of damages. Simply put, the panel composition does not have the expertise to address the issue of damages, and is unfairly biased in favor of physicians. In other words, the bill calls for three voting physicians to make the call on damages, since the attorney on the panel is a non-voting member. Simply put, the issue of damages will not be in tune with the actual harm done.

In the current bill, it calls for the panel’s conclusions to be admissible at a subsequent trial, and that the panel shall sit as an expert advisory board. However, the bill proposes that no member on the panel shall be deposed for or testify at a subsequent trial of the same claim. This violates the constitutional guarantee of being able to confront witness for and against you at trial. What the bill wants a jury to do, is to accept the panel recommendations as simply just another piece of evidence. This places a substantial burden on a jury, i.e. to simply accept a panel’s conclusions

as just another piece of evidence, with no opportunity whatsoever to ask questions or better understand the panel's conclusions through the constitutional right of cross-examination.

✓ **Loser Pay Provision or the Substantial Improvement Provision:**

Currently the bill calls for a provision that states that if the claimant does not obtain a judgment at least 25% higher than the amount offered at settlement by defendant, the claimant shall be liable for the defendant's reasonable costs and attorney fees incurred in the court action. This 25% is not only arbitrary, but unreasonable. This violates the long-standing principle of American law, forcing litigants to risk paying the opposing party's attorney fees in order to access the judicial system for resolution of disputes. Most plaintiffs do not have the economic power to fight corporate insurance money. At 25%, this provision essentially denies plaintiffs their constitutional right to access the courts.

**Conclusions:**

The committee has heard testimony from the insurance industry time again that the State of Kansas is facing an insurance crisis. Yet time again when asked to produce relevant information supported by real documented evidence as to this crisis, they cannot or will not produce it. Instead, time and again, they offer up information that tells only part of the story. When asked to produce documentation about their own fiscal management or mismanagement, they balk and divert such requests, and instead make the argument that out-of-control lawsuits in Kansas are causing the problem. This is simply a misrepresentation of the facts.

Parties already have the opportunity to attempt resolution of claims through mediation prior to or subsequent to the filing of a lawsuit; thus private parties, not the government, pay these costs. This bill would essentially shift the private costs of dispute resolution to the government. And as has already been mentioned, a bill, like the one at hand, would not help the current system, but rather increase delays and increase costs. This bill does not serve the "best interests" of injured victims, nor the state of Kansas.

This bill offers a piecemeal approach to a problem that needs real study and real solutions. The citizens of Kansas deserve the real facts through a comprehensive study of the real causes of the problem.

HB 2867, as it currently stands, violates many constitutional guarantees. The constitutional rights of: Due Process, Equal Protection, Right to a Jury, Access to Courts, and the Right to Cross-Examination should not be easily diverted as this bill seeks to do.

Thank you for the opportunity to express our strong opposition to HB 2867. The protection of the interests and rights of consumers of nursing care should, and must, be first and foremost versus the protection of the self-interests of the nursing home industry. KTLA strongly urges you to reject HB 2867.