

**Testimony Before the House Health & Human Services Committee
On SB 430
By Larry W. Magill, Jr.
Kansas Association of Insurance Agents
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Thank you mister chairman and members of the committee for the opportunity to appear today in support amending the provisions of House Bill 2306 into Senate Bill 430 and then passing it out favorably. My name is Larry Magill and I'm representing the Kansas Association of Insurance Agents. We have approximately 425 member agencies across the state and another 125 branch offices that employ a total of approximately 2500 people. Our members write roughly 70% of the business property and liability insurance in Kansas.

We have been concerned with the alarming increase in rates and lack of availability of nursing home liability insurance for more than three years.

The Task Force on Long Term Care Services held a hearing on the issue of liability insurance for nursing homes on September 4, 2002 where Tom Murry with Insurance Center Inc in El Dorado testified for KAIA. The Task Force's 2003 report contained no recommendations other than to look at the state's survey process and use of HCFA 2567's to prove negligence in lawsuits by residents.

Kansas Has Loss & Insurance Problems

What industry have you ever known, that was unhappy with its insurance availability and cost, that didn't think they were being penalized for losses occurring in other states? And while Kansas has not had the severe problems of some states like California, Texas or Florida, neither have our nursing homes paid the premiums that a Florida nursing home pays.

I can tell you that one of the carriers that used to write nursing homes in Kansas and had, at one time, 55 locations insured with over 3700 beds had a ten-year general liability loss ratio of 179.52% for 1989 to 1998 and a loss ratio in 1998 of 615%.

Nursing homes have experienced a tremendous increase in their liability insurance costs in the last few years from rates of around \$35 per bed four years ago to as much as \$1,000 per bed today. They are being moved from an occurrence form to a claims made where rates will increase over the next 3-4 years as they progress to fully developed claims made rates. And their coverage will often have anywhere from a \$25,000 to \$50,000 liability deductible. In states like Florida, the rate can be as high as \$6,000 per bed. This has put a tremendous strain on nursing homes' budgets and on state Medicaid budgets.

Inspection Reports Are Misused

Nursing homes in Kansas are faced with state surveys that are extremely critical. The results must be posted in prominent display for the public to view and can be introduced as evidence in civil trials. This dramatically reduces, if not eliminates, an insurance company's defense in the event of a claim. Nursing homes should be held accountable if they do not provide proper care of our relatives and friends. But often these reports have little or nothing to do with what led to an injury.

Insurance companies are simply reacting to the increasing pressure of defending claims that may or may not be legitimate. These deficiency reports cause insurability problems for the nursing homes as well. Any level G violations can cause an underwriter to refuse to insure the home. The level G violation may be a simple fall where the home was not negligent at all.

Medicare is aggravating the situation by requiring, before they will process a claim, that the patient file a claim against the nursing home and present a denial to Medicare. This forces people to start thinking about holding the nursing home responsible regardless of whether there has been any negligence.

KAIA **supports SB 430** closing inspection records for the following reasons:

Similar to Ohio legislation passed several years ago

The reports make it too simple for plaintiff attorneys to use the records to prove negligence when the purpose is to inform the public and encourage sound operations

Insurance companies then must use them as an underwriting tool when they weren't intended for that purpose either. But knowing they will be used by plaintiff's attorneys against the home, they have no choice.

Minor infractions and "nit picking" by the state inspectors cause huge liability problems and insurance problems for the homes.

The survey or inspection process for long-term care facilities is substantially analogous to the "peer review" process for other health care providers. "Peer review" documents involving doctors and hospitals are neither admissible as evidence in Kansas courts nor subject to discovery or disclosure in the civil litigation process.

The survey report is a subjective, ambiguous report used by state agencies to identify alleged noncompliance with the Medicaid program. Form 2567 is not a reliable indicator of quality care and can create false or misleading impressions about a long term care facility.

There is seldom a direct correlation between the survey findings and the injury to the resident yet they are used to show negligence. Were an excerpt of a report refers and relates directly to a plaintiff, we support allowing the judge to decide on the record, and in the absence of the jury, if it is admissible.

In our view, passing SB 430 as it passed the Senate would be perpetrating a cruel hoax on our state's nursing homes. The bill simply codifies the current rule of evidence that is largely being ignored now. In our opinion, it would do little to improve the situation.

The reports would still be allowed into evidence and the insurance company underwriters would have to continue to price and select who they insure based on the criticisms in the report, regardless of a home's actual loss experience.

We urge the committee to amend the provisions of HB 2306 as it passed the floor of the House into SB 430 and act favorably on SB 430. It is one of the few ways the legislature can bring relief to spiraling nursing home costs, yet still leaves the tort system in place to protect residents from truly negligent homes.