

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on March 7, 2007 in Room 313-S of the Capitol.

All members were present.

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

**HB 2530 - the Kansas Consumer Protection Act does not apply to professional services by health care providers**

Representative Roth made the motion to report HB 2530 favorably for passage. Representative Watkins seconded the motion.

Representative Kinzer made a substitute motion to adopt the proposed balloon amendment provided by the Kansas Medical Society. (Attachment 1) The balloon is an effort to make clear that claims for professional services would not apply to the Consumer Protection Act. It specifically excludes billing, advertising and other business related services. Representative Owens seconded the motion.

A committee member expressed her concern that with the passage of the proposed bill, a Missouri pharmacist who altered drugs would not be covered under medical malpractice act or the consumer protection act because he had no personal relationship with the individuals he harmed and therefore the individuals who were affected by the act would not have a remedy.

Catherine Walberg, Kansas Medical Mutual Insurance Company, responded that the proposed bill would not prohibit a remedy through civil tort laws. The concept of lack of privity, a contract concept, would not prevent a direct cause of action under tort laws. Medical malpractice actions apply to anything that "springs" out of a health care providers rendering of care. The duties that are owed to patients are imposed by law. These duties can't be escaped through contracts.

Chairman O'Neal read that the Supreme Court referred to *Bonin v Vannaman* case in *Amrani* "As malpractice covers every way in which a patient is injured through the dereliction of a doctor in his professional capacity, the approach, depending on the facts, can be through any of several familiar forms of action. But no matter what the approach, it remains an action for malpractice, not one for deceit, contract or anything else. A well recognized ground for recovery is where a physician represents that he has the skill to perform a certain operation when in fact he does not. This form of action requires the same elements of proof that an action in fraud requires, yet it could not be successfully disputed that as between the two it is an action for malpractice." One can frame an action against a doctor in various ways, but it is still malpractice.

Rick Guinn, Attorney General's Office, commented that they would support the proposed amendment but would like an additional paragraph that would not exempt doctors for the intentional misrepresentation, deceptive, unconscionable, or willful acts. There would need to be a prima facie showing that there was a violation of the act.

Chairman O'Neal commented that the only thing plaintiff attorneys would have to do is to make the allegation that there was an willful act to be covered under the Consumer Protection Act. There is no insurance coverage, there is no duty to defend. When in fact, under current law, if one wants to claim willful acts, one can amend their petition to include punitive damages, The ability to recover moneys under the medical malpractice act far outnumbers the amount of moneys one would receive under the Consumer Protection Act.

A committee member relayed that he had recently spoken to the Board of Accountancy. The individual stated that by statute the attorney general has to handle cases where an accountant does something wrong, but it does not fall under the Consumer Protection Act, instead Kansas statute governs those who are certified under the

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Board of Accountancy. The only time the attorney general's office could prosecute under the Consumer Protection Act is once the individual is no longer a certified public accountant.

The motion to adopt the proposed balloon amendment carried.

Representative Ward proposed a balloon amendment, suggested by the Attorney General. (Attachment 2) Representative Garcia seconded the motion.

Representative Kinzer was concerned that (b)(1) does not give protection to hospitals, only to individual persons. Representative Ward agreed.

Representative Watkins suggested that if subsection (c) is included in the bill, it should be broadened to include other professional services for professionals which are already covered under other Acts in Kansas Statute. For example, there are Acts that deal with real estate sales people, attorneys, accountants, insurance agents. We are trying to avoid having Consumer Protection Act claims being brought when it's really not the public policy the state has had for many years.

Representative Ward, believes that the doctors are right, there is a body of law that deals with negligence, which requires an expert to testify to that standard of care. However, there are certain business practices that both doctors and attorneys engage in to obtain clients, such as advertising, and billings. Those business like related need to be covered under the Consumer Protection Act. The state mandated doctors carry medical malpractice insurance. Both doctors and lawyers are required to carry malpractice insurance, this is why they are listed in the amendment.

Representative Watkins responded that accountants carry malpractice insurance along with other professions that provide services to individuals. Representative Ward stated there is a lot of similarities between doctors and attorneys and that is why they were included in the balloon.

Chairman O'Neal commented that *Chelsie v Plaza Homes* makes a point to state that the Consumer Protection Act does not apply to landlords because there they fall under the Kansas Residential Landlord Tenant Act, which provides protection for the tenants and duties for landlords. It is a self-contained act. The same argument can be made for the Health Care Provider Act, is they same type of act. Attorneys are under the jurisdiction of the Supreme Court, not an Act. The *Armine* case is concerning because there is a licensing agency that polices them and now it's been expanded to the Consumer Protection Act.

Chairman O'Neal stated that by nature a deceptive or unconscionable would not come under medical malpractice act, but it would come under Consumer Protection Act and do not need a statute to specifically state it.

Representative Patton questioned the words "bodily injury or death". He believed that one could have a consumer protection act if there is no bodily injury. The proposed amendment would give immunity to physicians if their actions resulted in bodily injury or death but no immunity for those claims where there is no damages. This would provide no protection for professional services, where a patient could not prove any damage of any kind, but could still being a consumer protection claim.

Rick Guinn agreed that there could be an action under the consumer protection act where damages could not be provable but would still be penalty associated with it. An example was that it would be very had to show actual damages from advertising.

Chairman O'Neal reminded the committee that under the Board of Healing Arts Act there are around 40 specific deceptive acts and practices which could be use to file a complaint. It's more expansive than the list under the Consumer Protection Act.

Representative Yoder questioned how the proposed amendment would have applied to the *Amrani* case.

Representative Ward stated he understood that the plaintiff filed a medical malpractice case but could not find an expert to testify as to the deviation of the standard of care and had to amend his pleading to be filed under

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the Consumer Protection Act.

Chairman O'Neal announced that the question for the committee is a public policy issue. The motion to amend in the Attorney General's balloon failed.

Chairman O'Neal reminded the committee that the Kansas Veterinary Medical Association appeared before the committee at the hearing and requested that they be included in the bill. The adopted balloon amendment which included the definition of "professional services" does not include the word "human" and therefore would include veterinaries be covered by the proposed bill.

Representative Kinzer made the motion to report **HB 2530** favorably for passage, as amended. Representative Owens seconded the motion. The motion carried.

**SB 35 - DUI computation of time to request administrative hearings**

Staff provided the committee with a balloon which addressed concerns raised by the Kansas Department of Transportation at the hearing. It also amends in the provisions on **HB 2012**. (Attachment 3) Representative Kinzer made the motion to adopt the balloon. Representative Owens seconded the motion. The motion carried.

Representative Patton made the motion to amend in the provisions of **HB 2269**. Representative Roth seconded the motion. The motion carried.

Representative Kinzer made the motion to strike in **HB 2012** the drug impairment assessment provisions. Representative Whitham seconded the motion. The motion carried.

Representative Pauls voiced her concern against the provision that requires conferences be held by telephone unless a request is made for a face to face conference. Chairman O'Neal suggested that the certification form be redone to notify individuals about the conference availability and that they would need to do so in writing.

Representative Patton made the motion to amend Section 11(a) so that once the need is satisfied, the remaining funds would be used towards housing other inmates. Representative Kinzer seconded the motion. Chairman O'Neal explained that as a practical matter there would not be enough funds to meet the demand. With permission of the second, Representative Patton amended his motion to state that "preference shall be given to any one applying for a grant under K.S.A. 8-1567. The motion carried.

Representative Kinzer made the motion to strike "calendar" everywhere it appears in the bill. Representative Whitham seconded the motion. The motion carried.

Representative Kinzer made the motion to report **Substitute for SB 35** favorably for passage. Representative Whitham seconded the motion. The motion carried.

The committee meeting adjourned at 5:30 p.m. The next meeting was scheduled for March 8, 2007.