

## MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 8:00 A.M. on March 30, 2005, in Room 519-S of the Capitol.

All members were present except:

Barbara Allen- excused  
Derek Schmidt- excused

Committee staff present:

Mike Heim, Kansas Legislative Research Department  
Jill Wolters, Office of Revisor of Statutes  
Helen Pedigo, Office of Revisor of Statutes  
Nancy Lister, Committee Secretary  
Melissa Calderwood, Legislative Research Department  
Ken Wilke, Office of Revisor of Statutes  
Jerry Ann Donaldson, Legislative Research Department

Conferees appearing before the committee:

Frank Henderson, Jr., Executive Director, Crime Victims Compensation Board  
Representative Mike O'Neal  
David Rogers, Attorney, Foulston, Siefkin, L.L.P.  
Ann Kindling, Kansas Association of Defense Counsel  
Jerry Palmer, Kansas Trial Lawyers Association  
Jim Clark Kansas Bar Association  
Ernest Kutzley, AARP Kansas  
Sandy Barnett, Kansas Coalition Against Sexual and Domestic Violence  
Sandy Rains, President, Kansas MADD Association

Others attending:

See attached list.

Chairman Vratil opened the meeting. The Chairman stated that they had a confirmation hearing and an informational hearing scheduled for today. He introduced Mr. Frank Henderson, who was in attendance in conjunction with the confirmation hearing.

**Confirmation Hearing on reappointment of Paula S. Salazar to serve a four-year term on the Crime Victims Compensation Board**

Mr. Frank Henderson, Jr., Executive Director of the Crime Victims Compensation Board, Office of the Attorney General, stated that he was appearing before the Committee to answer any questions about the Board or Ms. Salazar. He stated Ms. Salazar had served on the Board since 1997 and has been a conscientious and faithful participant during her tenure on the Board, and he felt fortunate to have her serving as a member on the Board.

Chairman Vratil noted there were no questions from Committee members. He stated that he would like to postpone the confirmation vote until later in the meeting to give as many Committee members a chance to participate in the vote.

Chairman Vratil opened the informational hearing on **SB 102**.

**SB 102 Informational hearing on the policy in SB 102 (collateral source benefits)**

Proponents:

Representative Mike O'Neal testified in support of the bill and provided some background history on the issue and the bill history. Collateral source benefits have to do with medical malpractice and personal injury law suits, and what a jury is told regarding a plaintiff's losses incurred. The jury is not allowed to learn what losses have been recovered through health benefits or insurance. As a result, juries may award damages that are in excess of actual losses.

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Chairman Vratil stated that K.S.A. 60-258a is the statute that defines Kansas as a modified fault state, which means if a jury finds fault, for example, in an accident that the plaintiff is 10 percent at fault and the defendant 90 percent at fault, then the damage awards will reflect those percentages.

David Rogers, an Attorney in the law firm of Foulston, Siefkin, L.L.P., provided testimony in support of the bill. Since 1987, Mr. Rogers has primarily handled defense of personal injury cases, including liability, medical malpractice, premises liability and tort law. Mr. Rogers stated that as the law currently stands, the "collateral source rule" is an evidentiary matter. In court proceedings, the parties currently are restricted from presenting any evidence that the plaintiff has already received benefits of one kind or another for a given accident. The jury is told that the plaintiff has incurred the lost wages but is not told that the lost wages may have already been paid or will be paid by an insurance company or an ERISA plan. Mr. Rogers stated that **SB 102** will allow a jury to consider all of the pertinent evidence regarding special damages, leaving the determination of whether there is a net collateral source benefit to the discretion of the jury. ([Attachment 1](#))

Ann Kindling, Kansas Association of Defense Counsel (KADC), stated that the KADC believes that the interests of justice will be served with the enactment of the bill. The goal of damages in a lawsuit is to make a plaintiff whole by compensating for monetary and non-monetary damages suffered at the hands of the defendant. Because of the collateral source rule, often times a plaintiff receives compensation that is above actual losses, resulting in a "windfall".

**SB 102** will allow the jury to be told that certain monetary losses claimed by the plaintiff were actually paid by a third-party. Ms. Kindling stated that the latest amendment makes a reduction in the jury's award discretionary rather than mandatory, so the jury would be able to hear all the information and then decide whether to reduce the award at all, and if so, by how much.

Ms. Kindling stated that three aspects of this issue are often misunderstood: 1) collateral source benefits do not include amounts paid by a third-party who retains a lien or right of subrogation; 2) the law requires a defendant to take his victim as he finds him, which means that no two plaintiffs with identical injuries will receive the same damage award; 3) opponents often suggest that if a jury learns that a plaintiff was covered by insurance, then the jury should also be told whether the defendant had insurance. Again, the goal of damages is to compensate the plaintiff, not to punish the defendant. The plaintiff's damages should be the same regardless of whether they are paid by the defendant himself or by the defendant's liability insurer. ([Attachment 2](#))

Written testimony was submitted by Cary Silverman, Esq., on behalf of the American Tort Reform Association ([Attachment 3](#)); Lew Ebert, President and CEO of The Kansas Chamber ([Attachment 4](#)); Sandy Praeger, Commissioner, Kansas Insurance Department ([Attachment 5](#)); Jerry Slaughter, Executive Director of the Kansas Medical Society ([Attachment 6](#)); and Larry Magill, Kansas Association of Insurance Agents ([Attachment 7](#)).

### Opponents:

Jerry Palmer, with Palmer, Leatherman & White, L.L.P., appeared on behalf of the Kansas Trial Lawyers Association. Mr. Palmer stated that the way this bill came to be addressed was via a "gut'n go". Mr. Palmer stated that Kansas is deemed to be the most tort reformed state in the country, and the state that Forbes magazine called the most favorable state to do business in, from that standpoint. ([Attachment 8](#))

Mr. Palmer stated that collateral sources are for the most part things which have been acquired by the victim through their own resources, such as privately purchased health insurance or disability insurance. It may also be in the form of the contract between employers and employees that the employer pays for in whole or in part. Many of these plans have within them subrogation provisions, which means that the insurance company advances the monies to the injured person, but if the insured person is reimbursed by the wrong-doer, then the insurance company or the employer under its plan gets those monies back so that it reduces and defrays the expense of providing the benefit. Mr. Palmer cited examples, such as ERISA plans, personal injury protection benefits under auto insurance policies, benefits provided by the Veterans Administration. Kansas law requires that Medicaid be repaid from and to the extent of any third-party benefits, and similar requirements exist under federal Medicare law. Mr. Palmer stated subrogation is not dealt with in **SB 102** and that enactment of it would place the obligation of state agencies in opposition to the requirements of

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federal law.

Mr. Palmer stated that there was a collateral source act passed in 1988 by the Kansas Legislature that was struck down in 1993. At that time, it was determined that the average cost of producing the evidence on collateral source benefits, future collateral source benefits, and net collateral source benefits was so expensive that it should not be utilized in cases that didn't involve a potential claim of \$150,000 or more. By today's consumer price index, the equivalent case would have to be a \$243,000 case, as a result of inflation. The median tort jury verdict in fiscal year 2003 was less than 10 percent of this amount, \$23,416. (Attachment 9) Because the issues revolving around proving collateral source would be many, the bill has the potential of driving up insurance premiums because of the additional defense costs that would be charged back to insurance companies who hire defense lawyers. Mr. Palmer also provided a chart comparing the average medical malpractice premiums where collateral sources are admissible in states with states where collateral sources are not admissible. Kansas ranks among the lowest premiums in the country. (Attachment 10). In summary, Mr. Palmer stated that for good governance, common sense and fairness, the bill should be defeated, as it is unworkable.

Jim Clark, Kansas Bar Association (KBA), stated that the KBA objected to the bill because of the way the bill came into being and because there are no figures to support the need for the bill. Mr. Clark stated that attached to his written testimony is an article on the issue of implementing the Kansas Collateral Source Rule, which addresses the difficulty that juries will have in computing the comparative fault and determining the net effect of the collateral source, the determination of future benefits, and other such issues. (Attachment 11)

Mr. Ernest Kutzley, AARP Kansas, stated that on behalf of the 350,000 members, he hoped the Committee would not oppose the collateral source rule. Many Kansans purchase insurance to protect themselves and their families from unforeseen tragedies. AARP believes that SB 102 will punish Kansans for being prudent in insuring themselves against potential disasters. He asked the Committee not to support the bill. (Attachment 12)

Sandy Barnett, Kansas Coalition Against Sexual and Domestic Violence (KCADSV), stated that domestic violence and sexual assault impact every part of a person's life. Holding a perpetrator or wrongdoer accountable for the violence and damage done to a victim, whether the damage is emotional, physical or financial, or a combination, is important in helping victims recover. The current collateral source doctrine in Kansas supports the victim by placing the full responsibility for full compensation for injuries on the person doing the harm. Ms. Barnett cited two stories of actual victims, and how there were tremendous healthcare bills, as a result of injuries they received at the hands of others. Ms. Barnett asked the Committee to retain current law and oppose passage of **SB 102**. (Attachment 13)

Sandy Rains, President of Kansas MADD (Mothers Against Drunk Driving) Association, stated she was here to address the victim's side. Ms. Rains stated that the bill would allow juries to reduce the drunk driver's financial obligation on the amount that the injured victim receives in health insurance benefits. Ms. Rains summarized that victims have a right to be compensated fairly, that no one would willingly undergo the physical, psychological, and emotional trauma inflicted by a drunk driver. Ms. Rain stated MADD opposed any measure that would nullify the collateral source rule and asked the Committee to oppose **SB 102**.

A discussion ensued among the Committee. Several questions were raised by Committee members that were addressed by individuals who gave testimony on **SB 102**.

Written testimony was submitted by the Kansas AFL-CIO. (Attachment 14)

Chairman Vratil closed the hearing on **SB 102**.

Chairman Vratil asked the Committee to consider the confirmation of Paula S. Salazar.

### **Confirmation Hearing on reappointment of Paula S. Salazar to serve a four-year term on the Crime Victims Compensation Board**

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A motion was made to confirm the reappointment of Ms. Salazar to the Crime Victims Compensation Board for another four-year term. (Attachment 15) Senator Donovan moved, seconded by Senator Bruce, and the motion carried.

Chairman Vratil asked the Committee to consider action on **SB 102**.

**Final Action:**

**SB 102 Informational hearing on the policy in SB 102 (collateral source benefits)**

Chairman Vratil asked the committee to vote on whether to move the bill out of Committee and give the full Senate a chance to address and debate the issue. The vote was four favorable to moving the bill forward and four were opposed. Chairman Vratil stated that anytime there is a tie on a complex issue such as this, that he was in favor of allowing the full legislative body to address the issue and, therefore, he was voting in favor to move it forward (passed favorably) out of Committee.

Chairman Vratil adjourned the meeting at 9:30 A.M. There are no further Committee meetings scheduled.