

## MEMORANDUM

**TO: House Judiciary Committee**

**FROM: Anne M. Kindling for the Kansas Association of Defense Counsel**

**DATE: 1 March 2007**

**RE: HB 2530**

Chairman O'Neal and Members of the Committee:

My name is Anne Kindling and I submit this written testimony in support of HB 2530 on behalf of the Kansas Association of Defense Counsel, of which I serve as President-Elect. The KADC consists of more than 200 practicing attorneys who devote a substantial portion of their professional practice to the defense of lawsuits including those against all types of health care providers.

HB 2530 affords an opportunity for the legislature to clarify the Kansas Consumer Protection Act (KCPA) and correct a misperception by the Kansas Supreme Court that the KCPA was intended to apply to physicians in their treatment of patients. The reasoning of the Supreme Court is flawed and contrary to the intent of the KCPA. Sometimes, as here, the legislature must show the Supreme Court that its interpretation of the law was incorrect.

The relationship between a health care provider and a patient is a unique one and is not akin to the arms-length relationship that exists between the merchant or salesman and the consumer, as is contemplated by the KCPA. The KCPA attempts to eliminate the common-law doctrine of *caveat emptor* and to check the deceptive and unconscionable acts of suppliers in the marketplace. *Alexander v. Certified Master Builders Corporation*, 268 Kan. 812, 822, 1 P.3d 899 (2000). The enactment of the KCPA was for the purpose of protecting those consumers who had not yet been afforded protection under the common law. The doctrine of *caveat emptor* is simply non-existent in the realm of the practice by health care providers due to the unique relationship between patient and health care provider. Patients are already protected from unconscionable or deceptive acts by the availability of the medical malpractice remedy which encompasses claims not only for medical negligence but also for informed consent claims.

Additional safeguards are in place to protect patients from such practices in the form of the licensing statutes and regulations under state and federal law. There is a comprehensive scheme governing health care providers in all fields. This includes not only the availability of peer review and risk management to improve the quality of health care, but it also includes licensure actions for health care providers who engage in unprofessional, improper, or unauthorized practices. Since appropriate remedies to protect patients from the acts and practices of health care providers, the KCPA does not fulfill a need with respect to a remedy for health care services.

HB 2530 would make the KCPA inapplicable to all health care providers with respect to professional services for which the provider is licensed or regulated by Kansas. This would include not only physicians but also related professions including nurses, mid-level practitioners, pharmacists, and others who are already regulated or licensed by the state of Kansas. By excluding such regulated professionals, HB 2530 will have no adverse impact on the availability of checks and balances to insure that such professionals do not take advantage of patients, which is the purpose of the KCPA. There will remain the availability of malpractice actions as well as licensure actions by the regulating body. Thus, there is no need for an additional remedy under the KCPA.

Additionally, it is noted that in the absence of legislation to remedy the Supreme Court's erroneous interpretation of the KCPA, costs of health care providers are sure to rise. Existing malpractice policies carried by health care providers likely include no coverage for KCPA claims, or at least the question is unanswered which will give rise to coverage litigation. Once policies are amended to include this coverage, the costs of coverage will increase to cover this new risk. In turn, those costs are going to need to be passed on to the consumer.

Finally, the KADC would direct the committee's attention to the arguments raised by Justice Davis in his dissent of the recent *Williamson v. Amrani* decision.

Thank you for the opportunity to testify in support of HB 2530.