

**REPORT OF THE JUDICIAL COUNCIL
CIVIL CODE ADVISORY COMMITTEE ON
K.S.A. 40-256 AND K.S.A. 40-908**

February 15, 2006

BACKGROUND

In November, 2005, Senator John Vratil requested that the Judicial Council study and report on K.S.A. 40-256 and K.S.A. 40-908. At its December 2, 2005 meeting, the Judicial Council assigned the study to the Civil Code Advisory Committee. The Committee met on January 6, 2006 to consider the question presented.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Civil Code Advisory Committee are:

J. Nick Badgerow, Chairman, practicing attorney in Overland Park and member of the Kansas Judicial Council

Hon. Terry L. Bullock, District Court Judge in 3rd Judicial District, Topeka

Prof. Robert C. Casad, Professor Emeritus at The University of Kansas School of Law, Lawrence

Hon. Robert E. Davis, Kansas Supreme Court Justice, Topeka

Hon. Jerry G. Elliott, Kansas Court of Appeals Judge, Topeka

Hon. Bruce T. Gatterman, Chief Judge in 24th Judicial District, Larned

Barry R. Grissom, practicing attorney, Overland Park

Joseph W. Jeter, practicing attorney in Hays and member of the Kansas Judicial Council

David M. Rapp, practicing attorney, Wichita

Donald W. Vasos, practicing attorney, Fairway

Bruce Ward, practicing attorney, Wichita

INTRODUCTION

Kansas has two statutes that allow an award of attorney's fees to a prevailing plaintiff in an action on an insurance policy. K.S.A. 40-256 is a statute of general application that requires the court to allow a reasonable sum for plaintiff's attorney's fees when plaintiff prevails in an action on an insurance policy and the evidence shows that the insurance company refused to pay the full amount of plaintiff's loss without just cause or excuse.

K.S.A. 40-908 is a specific statute that only applies in actions on policies insuring property against loss by fire, tornado, lightning or hail. There is no requirement of a finding that the insurance company's failure to pay was without just cause or excuse. The statute provides as follows:

40-908. Attorney fees in certain actions. That in all actions now pending, or hereafter commenced in which judgment is rendered against any insurance company on any policy given to insure any property in this state against loss by fire, tornado, lightning or hail, the court in rendering such judgment shall allow the plaintiff a reasonable sum as an attorney's fee for services in such action including proceeding upon appeal to be recovered and collected as a part of the costs: Provided, however, That when a tender is made by such insurance company before the commencement of the action in which judgment is rendered and the amount recovered is not in excess of such tender no such costs shall be allowed.

On November 3, 2005, the interim Special Committee on the Judiciary held a hearing on the topic of attorney fee awards pursuant to the above statutes. The Special Committee heard testimony from insurance representatives that recent Kansas appellate court decisions have broadened the application of K.S.A. 40-908, and that an amendment is needed to ensure a more limited interpretation. The Kansas Supreme Court has held that the “fire, tornado, lightning or hail” language in the statute applies to the type of coverage in the policy involved in the lawsuit, and that a plaintiff suing under a policy with such coverage is entitled to the protection of the statute regardless of whether the actual loss results from fire, tornado, lightning or hail. *Hamilton v. State Farm Fire & Casualty Co.*, 263 Kan. 875, 953 P.2d 1027 (1998). The position of conferees representing insurance interests is that the statute should be repealed or should be amended so that it applies only in cases where the loss involved was caused by fire, tornado, lightning or hail. The Kansas Civil Law Forum testified that K.S.A. 40-256 and 40-908 appear to create two differing standards for awarding attorney’s fees and, thus, may result in unnecessary litigation and confusion. Other conferees, including the Kansas Insurance Department, the Kansas Trial Lawyer’s Association, an attorney who represents both insurers and insureds, a homeowner, and a business owner, testified that the current law works well and that no change is needed.

The Civil Code Advisory Committee reviewed the statutes, case law and the written testimony presented to the interim Special Committee on the Judiciary. The Committee concluded that K.S.A. 40-256 and 40-908 do not conflict. The Committee also concluded that the plain language of K.S.A. 40-908, as well as the statutory history and case law, support the interpretation that the statute was intended to apply to actions on insurance policies insuring property against loss caused by fire, tornado, lightning or hail. The plain language of the statute does not limit its application to actions where the actual loss involved arose from one of the four enumerated types of coverage. The Committee’s findings and conclusion are more fully set forth below.

COMMITTEE FINDINGS

1. K.S.A. 40-256 and 40-908 do not conflict or cause confusion.

Both K.S.A. 40-256 and K.S.A. 40-908 allow insured plaintiffs who prevail in lawsuits against insurance companies to recover attorney's fees in certain circumstances. However, the two statutes operate quite differently and apply to different situations. K.S.A. 40-908 requires that courts award attorney's fees to a plaintiff who prevails in an action on an insurance policy that insures against loss by fire, tornado, lightning or hail. The history of this statute goes back to the Laws of 1893. That statute was different from today's version, but did provide for attorney's fees and applied to all fire insurance policies covering real property in Kansas. The statute was amended in 1897 so that it applied to all fire insurance policies, not just those covering real property. *Merriam Mortgage Co. v. St. Paul Fire & Marine Ins. Co.*, 97 Kan. 190, 155 P. 17 (1916). K.S.A. 40-908 was enacted in 1927, applying to fire, tornado and lightning policies. It was amended in 1929 to include hail policies.

K.S.A. 40-256 was enacted in 1931. This statute applies to any kind of policy, but there must be a finding that the insurance company refused to pay for the loss "without just cause or excuse." Although it applies to more kinds of policies, it is more difficult for plaintiffs to get attorney's fees under K.S.A. 40-256. It is not enough to prevail in the action - the bar for plaintiffs is quite high. "The language 'without just cause or excuse' has been interpreted to mean that the denial of the claim was frivolous, unfounded, and 'patently without any reasonable foundation.'" *Hartford Cas. Ins. Co. v. Credit Union 1 of Kansas*, 268 Kan. 121, 131, 992 P.2d 800 (1999) (quoting *Clark Equip. Co. v. Hartford Accident & Indemnity Co.*, 227 Kan. 489, 494, 608 P.2d 903 (1980)). The Supreme Court has held that "if there is bona fide and reasonable factual ground for contesting the insured's claim, there is no failure to pay." *Koch, Administratrix v. Prudential Ins. Co. of America*, 205 Kan. 561, 565, 470 P.2d 756 (1970). The presence of an issue raised in good faith by the insurer bars an award of attorney's fees under K.S.A. 40-256. *Whitaker v. State Farm Mut. Auto. Ins. Co.*, 13 Kan.App.2d 279, 284-85, 768 P.2d 320 (1989). The award of attorney's fees is not appropriate when an insurance controversy involves a case of first impression. *Garrison v. State Farm Mut. Auto. Ins. Co.*, 20 Kan.App.2d 918, 931, 894 P.2d 226, *aff'd* 258 Kan. 547, 907 P.2d 891 (1995).

In at least two reported cases, insurance companies have contended that K.S.A. 40-256 and 40-908 conflict and/or that the enactment of K.S.A. 40-256 repealed K.S.A. 40-908 by implication. The Supreme Court held as follows:

"It is to be noticed that section 40-908 has been the law of this state for many years, having been first enacted in somewhat different form in Ch. 102, Laws of 1893. We do not think that the enactment of section 40-256 can be presumed to have shown a desire on the part of the legislature to change the established policy of the state. Especially, is this true when both statutes may easily be construed to be operative side by side. If the policy is one insuring

property as provided in the old statute, the insurance company must pay attorney fees as provided therein. If the judgment is as to any other type of policy, then the insurance company may govern its liability under the newer statute.

“Counsel has directed our attention to the case of *Smart v. Hardware Dealers Mutual Fire Insurance Co.*, 181 F.Supp. 575, in which the learned judge of the United States District Court for the District of Kansas held that section 40-256 repealed by implication the provisions of section 40-908. It is to be noted the judge expressed doubt about his decision. In our view, the cases cited by the court found that not only was the same field covered by the two statutes, but the provisions of the newer act were *absolutely repugnant* to the provisions of the older act. Where that is true, the older act must be held to be repealed. But as explained above, the two acts involved in this case are not actually repugnant to each other but each may be effective. In view of the fact that repeals by implication are never favored, and further because of the rule that a specific statute will be favored over a general statute, *Dreyer v. Siler*, 180 Kan. 765, 308 P.2d 127; *Ehram v. Borgen*, 185 Kan. 776, 347 P.2d 260, we are constrained to disagree with the learned judge.”

State Farm Fire & Casualty Co. v. Liggett, 236 Kan. 120, 127-28, 689 P.2d 1187 (1984) (quoting *A. C. Ferrellgas Corporation v. Phoenix Ins. Co.*, 187 Kan. 530, 534-35, 358 P.2d 786 (1961)) (emphasis in original).

Based on the foregoing, which has been established law in this state for more than forty years, the Committee concludes that the assertion that K.S.A. 40-256 and 40-908 are in conflict or cause confusion has no legal basis and provides no tenable support for the repeal of K.S.A. 40-908.

2. The plain language of K.S.A. 40-908 does not limit its application to actions arising from damage or loss caused by “fire, tornado, lightning or hail.” Looking at the four corners of the statute, the specified language applies to *type of coverage* and not *type of loss*.

Kansas appellate courts must follow established rules of law regarding statutory construction.

“It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained.” *City of Wichita v. 200 South Broadway*, 253 Kan. 434-36, 855 P.2d 956 (1993). “The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. When a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be.” *In re Marriage of Killman*, 264 Kan. 33, 42-3, 955 P.2d 1228 (1998).

Applying those rules to K.S.A. 40-908, the statute states in pertinent part: “That in **all actions** now pending, or hereafter commenced in which judgment is rendered against any insurance company on **any policy given to insure any property in this state against loss by fire, tornado, lightning or hail**, the court in rendering such judgment shall allow the plaintiff a reasonable sum as an attorney's fee for services in such action . . .” (Emphasis added). There is no language to indicate that the action must be on a loss arising from fire, tornado, lightning or hail. The plain language chosen by the legislature indicates that this statute will apply as long as the lawsuit is on a policy that provides coverage against loss from any of the four enumerated causes. No other result can be reached from a reading of the four corners of K.S.A. 40-908.

3. Statutory history and case law are consistent with interpretation that “fire, tornado, lightning or hail” language in K.S.A. 40-908 was intended to apply to the type of policy covering the loss, regardless of whether the loss occurred by one of the named causes or some other cause covered by the same policy.

For obvious reasons, it is difficult to research the precise motivations behind legislative action taken in 1893 or 1927. The records setting forth legislative intent simply don’t exist like they do for more contemporaneous statutes. Nonetheless, the *Hamilton* court did a thorough job of collecting and reviewing all pieces of available information pertaining to K.S.A. 40-908.

The court discussed *Millers’ Nat. Ins. Co., Chicago, Ill. v. Wichita Flour M. Co.*, 257 F.2d 93 (10th Cir.1958). In that case, the Tenth Circuit Court of Appeals interpreted G.S.1949, 40-908, which was the predecessor statute to K.S.A. 40-908, holding that the statute applied only to losses that actually occur as a result of fire, tornado, lightning or hail.

“In reaching this conclusion, the court noted that the statute had been amended before to include hail in response to [the Kansas Supreme Court’s] decision in *Ring v. Phoenix Assurance Co.*, 100 Kan. 341, 343-44, 164 P. 303 (1917), wherein [the Kansas Supreme Court] found that the statute did not apply to a hail insurance policy. *Millers’*, 257 F.2d at 102 n.22. The *Millers’* court seemed to reason that if the type of policy rather than the type of loss controlled, there would be no need to amend the statute to include hail.”

Hamilton, 263 Kan. at 879.

As the *Hamilton* court points out, this reasoning is flawed. The plaintiff in *Ring* was denied an award of attorney’s fees because his policy was one which covered only hail, and thus did not fall within the statute’s “fire, tornado or lightning” language. The legislature later added “or hail” to the statute. The *Hamilton* court noted that “the amendment in 1929 is less an indication that the legislature meant the statute to cover only specific losses such as fire, tornado, lightning or hail and more an indication that the legislature meant to bring hail insurance policies, such as the one in *Ring* that covered the insured’s crops, within the protective umbrella of the statute.” 263 Kan. at 881.

Also important to note in the history of this statute is that Kansas appellate courts chose not to follow the 10th Circuit Court of Appeals' interpretation. Just two years after the federal court's opinion in *Millers*, the Kansas Supreme Court decided *A. C. Ferrellgas Corporation v. Phoenix Ins. Co.*, 187 Kan. 530, 534-35, 358 P.2d 786 (1961). In that case, the insurance company argued only that the attorney's fees awarded to plaintiff were in error because the statute had been overruled by the enactment of section 40-256. Having found that the statute was indeed still in effect, the court said "[t]here can be no question about the authority of the court to allow attorney fees." *Ferrellgas*, 187 Kan. at 535. The plaintiff in *Ferrellgas* was suing over damage caused by wind, not fire, tornado, lightning or hail. The Kansas Supreme Court also affirmed the trial court's award of attorney's fees under K.S.A. 40-908 in *Thomas v. American Family Mut. Ins. Co.*, 233 Kan. 775, 780, 666 P.2d 676 (1983). The plaintiff's loss in that case was also caused by a windstorm, and not by fire, tornado, lightning or hail.

The Committee concludes that the statutory history and case law are consistent with the interpretation that the "fire, tornado, lightning or hail" language in K.S.A. 40-908 was intended to apply to the type of policy covering the loss, regardless of whether the loss occurred by one of the named causes or some other cause covered by the same policy.

4. Kansas Appellate Court decisions are consistent with K.S.A. 40-908, and no amendment is necessary.

The interim Special Committee on the Judiciary heard testimony that recent appellate court decisions had interpreted K.S.A. 40-908 incorrectly. Specifically, the interim Special Committee was told that the *Hamilton* court had changed the application of the "fire, tornado, lightning or hail" language from the type of loss to the type of coverage after many years of holding the opposite way. The Civil Code Committee found no cases, other than the 1958 case decided in federal court, that were inconsistent with the *Hamilton* court's opinion. As discussed above, the Committee's position is that the *Hamilton* opinion is consistent with the plain language of the statute, the statutory history, and with prior case law. The contention that the appellate courts have improperly expanded the application of K.S.A. 40-908 is without legal merit and does not support amendment or repeal of the statute.

COMMITTEE RECOMMENDATION

Based on the foregoing, the Judicial Council Civil Code Advisory Committee unanimously recommends that no legislative action be taken to amend or repeal K.S.A. 40-256 or K.S.A. 40-908.

COMMITTEE COMMENTS REGARDING PUBLIC POLICY

This report was based solely on a legal analysis of the pertinent statutes and the case law interpreting them. It is clear, however, that significant policy considerations are also inherent in decisions regarding statutes that provide for the award of attorney's fees.

Shortly after the 1927 enactment of section 40-908, the Kansas Supreme Court stated that

the statute “is a public interest statute, prompted by the ‘pertinacious practices of insurance companies,’ that penalizes insurance companies for not making prompt payment of claims which are adjudged to have been meritorious.” *Light v. St. Paul Fire & Marine Ins. Co.*, 132 Kan. 486, 490, 296 P. 701 (1931). The legislative intent was also discussed in a later opinion where the Court stated “the purpose of K.S.A. 40-908 is not to penalize an insurance company for making what it deems to be a bona fide defense to an action to recover on an insurance policy, but to permit the allowance of a fair and reasonable compensation to the assured’s attorney in the event, after having been compelled to sue on the policy, he or she is successful in that effort.” *Lattner v. Federal Union Ins. Co.*, 160 Kan. 472, 480-81, 163 P.2d 389 (1945).

It cannot be denied that there is a very strong public interest in protecting consumers and encouraging insurance companies to pay claims promptly and fairly. The testimony from the Kansas Insurance Department that it had received 878 consumer complaints in 2004 alleging that insurance companies had failed to pay claims makes it clear that the concerns that prompted the initial legislation in 1893 have not disappeared. On the other hand, it is conceivable that the statutory scheme is in need of updating due to the drastically different nature of how insurance is bundled and sold in 2006. It is in the best interests of all concerned to maintain a balance that affords adequate protection to consumers without unfairly burdening insurance companies

The Committee recommends that no amendments to these statutes that are so crucial to the protection of Kansas consumers be considered without a more comprehensive review than the Committee was able to do in the time allotted. Ideally, this would include a survey of current opinions by scholars of insurance law, as well as a review of the statutory schemes in place in other states. The special Committee on the Judiciary received conflicting testimony in this regard . One conferee stated that it knew of no other state with a statute like K.S.A. 40-908 and that most states just have statutes like 40-256 wherein attorney’s fees are only awarded if the insurer has been unreasonable in refusing to pay. Another conferee noted that at least one state, Florida, has a statute similar to K.S.A. 40-908 that applies to all policies and is not restricted to those with coverage against loss by particular causes. Such a review of the laws of other states was beyond the scope of this report, but would be very important information for the legislature to have at hand before considering any amendments to K.S.A. 40-256 or 40-908. A comprehensive study of this issue would also need to include consideration of whether insureds in other states are able to bring causes of action against insurance companies based on bad faith, a tort which is not recognized in Kansas at this time.