



STATE OF KANSAS

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February 20, 1978

ATTORNEY GENERAL OPINION NO. 78-81

Mr. Fletcher Bell
Commissioner of Insurance
Kansas Insurance Department
1st Floor - State Office Building
Topeka, Kansas 66612

Re: Motor Vehicles--Insurance--Rights of Action

Synopsis: Section 4(a) of 1977 House Bill No. 2490, found at K.S.A. 1977 Supp. 40-3113a, refers to an action in tort by an injured party against a tortfeasor for an injury for which personal injury protection benefits are payable under the Kansas Automobile Injury Reparations Act, and which injury is caused under circumstances "creating a legal liability against the tortfeasor pursuant to K.S.A. 1976 Supp. 40-3117" The reference to the latter statute incorporates by reference the whole of that statute, not only identifying the tortfeasor as "the owner, operator or occupant of a motor vehicle" but identifying and incorporating by reference the limitations on the liability of such tortfeasor imposed by the referenced statute. Section 4 is procedural in nature, amending previous remedies available to insurers to enforce their substantive protection against the payment of duplicative personal injury protection benefits, and as such, may be applied to claims arising prior to July 1, 1977, the effective date of said bill.

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Dear Commissioner Bell:

You inquire concerning section 4 of 1977 House Bill 2490, an amendment to the Kansas Automobile Injury Reparations Act, K.S.A. 1977

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Supp. 40-3101 et seq. The 1977 enactment made certain changes in the reimbursement and indemnity provisions of the act, by repealing K.S.A. 1976 Supp. 40-3113 and substituting therefor section 4 of the referenced bill.

K.S.A. 1976 Supp. 40-3113 declared the insurer's rights of reimbursement and indemnity so as to avoid collection by the injured party of damages from the tortfeasor or his insurer which were duplicative of personal injury protection benefits paid the injured party. Although no subtraction from personal injury protection benefits was permitted based upon the value of a claim in tort based on the injury, subtraction was permitted after recovery of damages, to the extent of the recovery, less reasonable attorney's fees and other reasonable expenses incurred in effecting the recovery, but only to the extent that the recovered damages were duplicative of payable personal injury protection benefits. If such payments had also been received, the claimant was required to repay to the insurer out of that recovery a sum equal to the benefits received, exclusive of reasonable attorneys' fees and other reasonable expenses of the recovery. The amount to be repaid could not exceed the amount of the recovery or the amount which was duplicative of personal injury protection benefits received. If an insurer was unable to collect the reimbursement to which it was entitled from the injured party, it could seek indemnity from the party who made such payment to the injured person with notice of the insurer's interest and did not make the injured person and the insurer joint payees, or otherwise protecting the interests of the insurer. In addition, if the injured person or his legal representative was entitled to but did not commence an action against the tortfeasor within eighteen months after the date of the accident, the insurer was authorized, upon thirty days' notice to the injured party, to commence its own action against the tortfeasor to recover the amount of personal injury protection benefits paid to or for the benefit of the injured person, although if prosecuted or settled without the consent of the injured party or his legal representative, the action was without prejudice to the injured party's own right to maintain an action against the tortfeasor. It included other provisions not necessarily pertinent to the questions raised herein.

Section 4 of 1977 House Bill 2790 omits references to reimbursement and indemnity, and instead relies upon subrogation of the insurer to forestall payment of duplicative personal injury protection benefits. Subparagraph (a) declares or confirms the right of the injured person to pursue his or her remedy against the tortfeasor

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"[w]hen the injury for which personal injury protection benefits are payable under this act are caused under circumstances creating a legal liability against a tortfeasor pursuant to K.S.A. 1976 Supp. 40-3117."

Under subparagraph (b), in the event of recovery from "such tortfeasor," the insurer is subrogated to the claim of the injured party to the extent of duplicative personal injury protection benefits paid to the date of recovery, and the amount of the recovery which is actually paid and recovered which is in excess of the personal injury protection benefits paid to that date is credited against future payments of personal injury protection benefits.

Subparagraph (c) provides, much as did subparagraph (c) of the repealed K.S.A. 1976 Supp. 40-3113, that if the injured person fails to commence an action against the tortfeasor within eighteen months from the accident causing the injury, that the insurer may initiate such an action "to recover the amount of the personal injury protection benefits paid pursuant to the provisions of this act" to or for the benefit of the injured person. The 1977 enactment provides specifically that the failure of the injured party to commence the action within that period operates as an "assignment" of the cause of action to the insurer, and omits language the injured party's right to consent to the prosecution or settlement of the action.

Subsection (d) provides that in the event of a recovery pursuant to K.S.A. 60-258a, the insurer's right of subrogation shall be reduced by the percentage of negligence attributable to the injured person. Lastly, subparagraph (e) provides that the court shall fix attorney's fees to be paid "proportionately" by the insurer and the injured person, "in the amounts determined by the court."

Your first inquiry concerns subparagraph (a) of section 4, which is set out here in full, although discussed above:

"When the injury for which personal injury protection benefits are payable under this act are caused under circumstances creating a legal liability against a tortfeasor pursuant to K.S.A. 1976 Supp. 40-3117, the injured person, his or her dependents or personal representatives shall have the right

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to pursue his, her or their remedy by proper action in a court of competent jurisdiction against such tortfeasor." [Emphasis supplied.]

The referenced statute, K.S.A. 1976 Supp. 40-3117, was not amended by the 1977 act. That section provides that in an action for tort against the owner, operator or occupant of a motor vehicle, or a person legally responsible for the acts or omissions of such person, that the plaintiff may recover damages for pain, suffering, mental anguish, inconvenience or other nonpecuniary loss only when the medical treatment for the injury reaches or exceeds the "threshold" value of \$500, or when the injury is one of those enumerated in that section. Thus, you inquire whether the "tortfeasor" against whom the injured party is authorized to sue by section 4(a) is one whose liability is limited by K.S.A. 1976 Supp. 40-3117, i.e., one who is not liable for nonpecuniary losses except when the threshold requirements are met, or whether the referenced tortfeasor is any tortfeasor, i.e., one whose liability is not limited by the referenced statute.

Section 4(a) refers to the right of the injured party to sue the tortfeasor for an injury causes under circumstances under which the tortfeasor would be liable under K.S.A. 1976 Supp. 40-3117. That statute does not create any liability, but merely limits a preexisting liability, i.e., it exempts the tortfeasor from liability for nonpecuniary losses except when the injury is one of those enumerated therein, or when the medical treatment reaches the threshold value. Section 4(a) speaks to the right of the injured party to maintain suit against the tortfeasor for an injury caused "under circumstances creating a legal liability against a tortfeasor pursuant to K.S.A. 1976 Supp. 40-3117." As stated, the referenced statute does not create, but limits, liability, and its use in this section to identify the liability which the injured party is authorized by this section to enforce has little meaning, in my judgment, if it does not in fact describe the liability of the tortfeasor which the injured party is authorized by this section to enforce. As an alternative construction, it is suggested that the reference to K.S.A. 1976 Supp. 40-3117 is used only to identify the tortfeasor as "the owner, operator or occupant of a motor vehicle or against any person legally responsible for the acts or omissions of such owner, operator or occupant . . .," language found in the referenced statute, without incorporating the further restrictions therein upon the tortfeasor's liability. Stated otherwise, it is suggested that the phrase "pursuant to K.S.A. 1976 Supp. 40-

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3117" modified only the term "tortfeasor," and not the "legal liability" of that tortfeasor. In my judgment, the reference to K.S.A. 1976 Supp. 40-3117 incorporates the whole of that statute, not merely the identification of the tortfeasor as the owner, operator, or occupant of a motor vehicle, but also the limitations upon the legal liability of that tortfeasor.

The further question is raised, then, whether an injured party may still bring an action for his pecuniary loss regardless of the amount. I.e., if section 4(a) purports to authorize the injured party to bring an action against a tortfeasor as that liability is defined by K.S.A. 1976 Supp. 40-3117, is the injured party precluded from bringing suit for his or her pecuniary loss regardless of amount. I find nothing in the amendment which, either expressly or by any necessary implication, precludes the injured party from doing so. K.S.A. 1976 Supp. 40-3117 does not prohibit the injured party from commencing a suit for his or her pecuniary loss regardless of the amount, and the reference in section 4(a) to that section does not introduce any new or additional limitation upon the injured party's right of action.

Secondly, you inquire concerning the application of section 4 to claims arising prior to July 1, 1978, the effective date of the act. If, e.g., after July 1, 1978, an injured party recovers damages from a tortfeasor by judgment, settlement or otherwise, based upon a claim arising prior to July 1, 1978, the question applies whether application of the amendment operates to destroy any vested rights. In Jones v. Garrett, 192 Kan. 109, 386 P.2d 194 (1963), the court stated thus:

"It is the law of this state that a statute which merely changes a remedy is not invalid, as there are no vested rights in any particular remedy. While generally statutes will not be construed to give them retroactive application unless it appears that such was the legislative intent, nevertheless when a change of law merely affects the remedy or law of procedure, all rights of action will be enforced under the new procedure without regard to whether they accrued before or after such change of law and without regard to whether or not the suit has been instituted, unless there is a saving clause as to existing litigation." 192 Kan. at 115.

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Citing a legal encyclopedia, the court defined procedure as

"the mode or proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which, by means of the proceeding, the court is to administer--the machinery, as distinguished from the product; that which regulates the formal steps in an action or other judicial proceeding--a form, manner, and order of conducting suits or prosecutions." 192 Kan. at 114.

K.S.A. 1976 Supp. 40-3113 prescribed certain remedies available to the insurer to forestall or correct duplicative payments of personal injury protection benefits, including the subtraction of duplicative recoveries from benefits not yet paid at the time of recovery, reimbursement for personal injury protection benefits which had been paid prior to a recovery by the injured party to the extent that the recovery is duplicative of those benefits, and a right of indemnity from one who has paid the injured party with notice of the insurer's interest and without providing therefor. In lieu of those rights, section 4(b) substitutes a right of subrogation to the extent of duplicative personal injury protection benefits provided to the date of recovery, provides the insurer with a lien on such recovery for that purpose, authorizes intervention in any action to protect and enforce that lien, and authorizes the insurer to credit toward future payments of personal injury protection benefits the amount of any recovery which is in excess of such benefits paid to the date of recovery. Former K.S.A. 1976 Supp. 40-3113 was designed to protect the insurer against duplicative payments, and section 4(b) is designed for precisely that same purpose. The form of the remedy is described in terms of subrogation rather than subtraction and reimbursement. I see no basis upon which to regard the altered remedies provided by section 4(b) as just that, an amendment of remedies which in way affects the substantive rights of the insurer against duplicative payments or, for that matter, the substantive rights of the injured party.

Subparagraph (c) of section 4 of the 1977 act provides, as did former K.S.A. 1976 Supp. 40-3113, for commencement of an action by the insurer against the tortfeasor if the injured party fails to commence such an action within 18 months after the accident causing the injury. The 1977 provision includes additional language that failure of the injured party to commence such an action

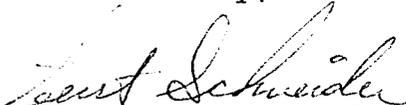
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within that period shall "operate as an assignment to the insurer . . . of any cause of action" in tort which the injured party may have "for the purpose and to the extent of recovery of damages which are duplicative of personal injury protection benefits. There appears to be no substantive change whatever in the respective rights of the insurer and the injured party by this amended subparagraph.

The last two paragraphs provide, respectively, that the insurer's right of subrogation shall be reduced, in the event of a recovery pursuant to K.S.A. 60-258a, by the percentage of negligence attributable to the injured person, and provides, lastly, that both the insurer and injured party shall bear the cost of attorney fees "proportionately . . . in the amounts determined by the court. In City of Wichita v. Chapman, 214 Kan. 575, 521 P.2d 589 (1974), the court held that a statute authorizing the allowance of attorney's fees was procedural, and could be applied to authorize such an allowance in a condemnation appeal commenced prior to the effective date of the statute. The amendment authorizes the cost of attorney fees to be allocated between the insurer and the injured party, a departure from former K.S.A. 1976 Supp. 40-3117. Under City of Wichita, supra, statutes providing for the allowance of attorney fees are procedural, and this subparagraph may thus be applied to actions in tort pending on July 1, 1977, based upon injuries occurring prior thereto. The insurer's right of subrogation is diminished to the extent of the percentage of negligence attributable to the injured party when the recovery is had under K.S.A. 60-258a. Once again, that provision does not alter the basic and substantive rights afforded the insurer under this section, i.e., its rights to protect itself against the payment of duplicative benefits, and it fixes only the measure of its subrogation in the enforcement of its right against such duplicative payments.

In summary, in my judgment, section 4 is fully applicable to claims occurring prior to July 1, 1977, the effective date of the bill, and is properly regarded as an amendment of procedural rights theretofore available to the insurer to enforce a substantive right provided for by the previous law, i.e., the right to avoid payment of or to enforce repayment of duplicative personal injury protection benefits.

Yours truly,


CURT T. SCHNEIDER
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