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April 20, 1984

ATTORNEY GENERAL OPINION NO. 84- 35

The Honorable Elwaine F. Pomeroy  
State Senator, Eighteenth District  
State Capitol, Room 143-N  
Topeka, Kansas 66612

Re: Insurance -- Administrative Rules and Regulations --  
Prohibition of Subrogation Clauses; Statutory Basis  
for Regulation

Synopsis: Pursuant to K.S.A. 40-103, the commissioner of insurance has authority to make all reasonable rules and regulations necessary to enforce the laws of this state relating to insurance. One such regulation, K.A.R. 40-1-20, prohibits the use of subrogation clauses in contracts of insurance which provide for reimbursement of medical, surgical, hospital or funeral expenses. While authorization for the promulgation of this rule and regulation is present in various statutes relating to insurance, the statutes cited in the regulation are not the statutes actually being implemented by the regulation. Accordingly, the rule and regulation is valid, but should be amended to correctly reflect the statutes being implemented. Cited herein: K.S.A. 40-103, 40-216, 40-287, 40-1110, 40-2201, 40-2203, 40-2204, 40-2208, 40-3113a, K.S.A. 1983 Supp. 44-504, 44-532, K.S.A. 60-217, K.S.A. 1983 Supp. 77-415, 77-416, K.A.R. 40-1-20.

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Dear Senator Pomeroy:

As Chairman of the Senate Judiciary Committee, you request our opinion on a question concerning the validity of an admini-

strative rule and regulation. Specifically, you direct us to K.A.R. 40-1-20, which was promulgated by the commissioner of insurance. You express the committee's concern that this regulation is not based on specific statutory authority, and is therefore void as being an attempt by the commissioner to legislate rather than administer insurance laws.

The regulation at issue has been in effect since 1966, and has only been amended once, in 1967. As amended, it reads:

"Insurance companies; subrogation clauses prohibited for certain coverages. All insurance companies are prohibited from issuing contracts of insurance in Kansas containing a 'subrogation' clause applicable to coverages provided for reimbursement of medical, surgical, hospital or funeral expenses. (Authorized by K.S.A. 40-103, 40-216, 40-1110, 40-2201, 40-2208, 60-217(a), effective January 1, 1966; amended January 1, 1967.)"

In a letter from the office of the commissioner of insurance, which you provide with your request, the presumed authority for the regulation is set forth. Briefly, it is as follows: (1) The regulation reflects what has always been the common law in Kansas and elsewhere, namely that accident or health insurance policies are not indemnity contracts and therefore are not subrogated as are property or casualty insurance; and (2) statutory authority exists in K.S.A. 60-217, which provides that actions shall be brought in the name of the real party in interest, and in various statutes in the insurance area (Chapter 40). Another memo from the Commissioner's office provides additional, albeit different, rationale, namely the existence of K.S.A. 40-2203 and 2204.

"Subrogation" is defined as the right of the insurer to be put in the position of the insured in order to pursue recovery from a third party who is responsible for the loss to the insured which the insurer has paid. As stated in Couch on Insurance 2d (rev. ed.) §61:18, p. 93 (1983):

"Subrogation has the dual objective of (1) preventing the insured from recovering twice for the one harm, as would be the case if he could recover from both the insurer and from a third person who caused the harm, and (2) reimbursing the surety for the payment which it has made. A sounder approach to the problem is that a wrongdoer who is legally responsible for the harm should not receive the windfall of being absolved from liability

because the insured had had the foresight to obtain, and had paid the expense of procuring, insurance for his protection; since the insured has already been paid for his harm, the liability of the third person should now inure for the benefit of the insurer. Stated simply, subrogation is a creature of equity having for its purpose the working out of an equitable adjustment between the parties by securing the ultimate discharge of a debt by a person who in equity and good conscience ought to pay it."

The commissioner notes in his letter that the Kansas courts have not addressed specifically the question of subrogation of accident and health insurance. The Kansas court has held that subrogation is a normal incident of indemnity insurance, in accord with common law practice. Ellis Canning Co., v. International Harvester Co., 174 Kan. 357 (1953). At this time, however, it is undetermined whether the Kansas courts would adopt the common law prohibition of subrogation in accident and health insurance policies, as has been done in other states. See, e.g., Harleysville Mutual Ins. Co. v. Lea, 2 Ariz.App. 538, 410 P.3d 495 (1966), Travelers Indemnity Co. v. Chumbley, 394 S.W.2d 418 (Mo. App. 1965). However, courts in some states have judicially determined not to follow the traditional rule [Liberty Mutual Ins. Co. v. Clark, 165 Ga.App. 31, 299 S.E.2d 76 (1983), Geertz v. State Farm Fire & Casualty, 451 P.2d 860 (Ore. 1969)], while in some states the common law has been replaced by statutory authority. Pate v. MFA Mutual Insurance Co., 649 P.2d 495 (Okla. 1982).

While Kansas does not have a blanket statute authorizing subrogation, separate statutes have been enacted in a number of areas, such as workmen's compensation (K.S.A. 44-504, 44-532), uninsured motorist coverage (K.S.A. 40-287) and personal injury protection benefits under the Kansas Automobile Injury Reparations Act (K.S.A. 40-3113a). In a recent case involving the latter, K.A.R. 40-1-20 was held to have been pre-empted in part, although the court did not find the regulation invalid in toto. Hall v. State Farm Mutual Automobile Insurance Co., 8 Kan.App.2d 475 (1983).

Given this background, we may turn to the authority for the regulation itself. K.A.R. 40-1-20 was issued under of the authority of the commissioner to make all reasonable rules and regulations necessary to enforce the laws of Kansas relating to insurance and insurance companies. K.S.A. 40-103. However, the commissioner's authority in this area is not absolute, for he may act only within the limits prescribed for him by the legislature. As stated by the court in Fidelity Life Association v. Hobbs, 161 Kan. 163, 170 (1946), certain legal principles are applicable

to the insurance commissioner: "One is that the legislature makes the law and that its fiats must be observed by him. Another is that the statute is the source of his power and all of his acts must be within the limits of the authority it confers upon him." In the area of rules and regulations, his power is administrative in nature, not legislative, and to be valid, must be within the authority conferred. State ex rel. v. Columbia Pictures Corporation, 197 Kan. 448 (1966). In addition, the commissioner has no general or common law powers. Woods v. Midwest Conveyor Co., 231 Kan. 763 (1982), 1 Am.Jr.2d Administrative Law. §70.

The rule and regulation lists six statutes as authority for the regulation, namely K.S.A. 40-103, 40-216, 40-1110, 40-2201, 40-2208, and 60-217(a). As noted above, K.S.A. 40-103 simply authorizes the commissioner to make rules and regulations necessary to enforce the insurance laws of Kansas, and does not speak to any substantive areas of policy. K.S.A. 40-216 allows the commissioner to require companies to file their policies with his office, but likewise is without substantive provisions as to their content. K.S.A. 40-1110, 40-2201 and 40-2208 do deal with specific provisions which must be included in certain types of insurance contracts, but do not expressly address the subject of subrogation, either as a grant of authority or a prohibition. Lastly, K.S.A. 60-217(a), contained in the Code of Civil Procedure, provides that the plaintiff in an action shall be the person who by the substantive law possesses the right to be enforced. According to Vernon's Kansas Rules of Civil Procedure, Vol. 2, §60-217.1 (1963), this statute "effects a purely procedural change" leaving the "substantive law as to what claims are assignable" unaffected.

However, while none of the above statutes provides a sufficient basis for the rule and regulation in question, it is our opinion that other statutes pertaining to insurance in fact do so. Specifically, K.S.A. 40-2203(A) sets forth provisions which are required in every policy of accident and health insurance issued or delivered in this state. In addition to the twelve provisions set forth therein, subsection (B) lists eleven additional items which may be included in "the policy at the option of the insurer. In none of these provisions, either in the required or optional sections, is the right of subrogation in accident and health insurance policies permitted. To the contrary, in paragraphs (4) and (5) of subsection (B), which deal with the concept of "other valid coverage," third party liability coverage is not permitted. K.S.A. 40-2204 makes it clear that any other provision in a policy may not be less favorable to the insured than what is found in K.S.A. 40-2203. In that a subrogation clause would reduce the benefits which ultimately are received by a policy holder, it would be "less favorable," and so, not allowed.

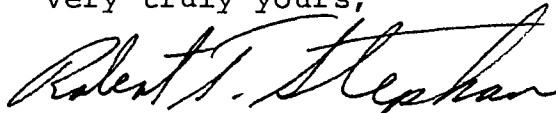
While the existence of the above two statutes is not disclosed in the regulation, as is required by K.S.A. 1983 Supp. 77-416(a),

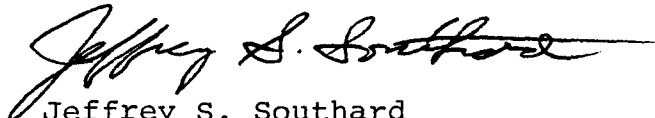
The Honorable Elwaine F. Pomeroy  
Page Five

it is further our opinion that this omission, being a technical one, does not affect the validity of the regulation. In that it is based on authority provided by the legislature, K.A.R. 40-1-20 is a valid interpretation or implementation of legislation which is enforced by the Commissioner. K.S.A. 1983 Supp. 77-415. While the omission in the supporting citations should be remedied, this is not sufficient reason to void the regulation. See, e.g., State ex rel. v. Columbia Pictures Corp., supra.

In conclusion, pursuant to K.S.A. 40-103, the commissioner of insurance has authority to make all reasonable rules and regulations necessary to enforce the laws of this state relating to insurance. One such regulation, K.A.R. 40-1-20, prohibits the use of subrogation clauses in contracts of insurance which provide for reimbursement of medical, surgical, hospital or funeral expenses. While authorization for the promulgation of this rule and regulation is present in various statutes relating to insurance, the statutes cited in the regulation are not the statutes actually being implemented by the regulation. Accordingly, the rule and regulation is valid, but should be amended to correctly reflect the statutes being implemented.

Very truly yours,

  
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