



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 88- 100

The Honorable Fletcher Bell, Commissioner
Kansas Insurance Department
420 SW 9th St.
Topeka, Kansas 66612

Re: Automobiles and Other Vehicles--Driving Under the
Influence of Alcohol or Drugs; Related
Provisions--Certain violations not public record;
not to be considered for liability insurance

Synopsis: The misnomer in L. 1988, ch. 47, §19 is not a
defect which renders the section void. The intent
of the legislature is sufficiently clear to allow
substitution of the correct language, so that
reference to K.S.A. 40-277(7)(c), which does not
exist, becomes K.S.A. 40-277(4)(a). Pursuant to
section 19, blood-alcohol tests refusals or
failures are not open records. Insurers may not
consider such refusals or failures in determining
automobile liability rates or in determining
whether to cancel a policy. However, if a driving
privilege is suspended by the department of
revenue, the suspension is part of an open record,
which may be obtained by insurers to process an
application, or renewal, or cancellation of, a
motor vehicle liability insurance policy. Cited
herein: K.S.A. 1987 Supp. 8-1341a; K.S.A. 40-277;
45-215; 74-2012; L. 1988, ch. 47, §19 (to be
codified at K.S.A. 8-1018).

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Dear Commissioner Bell:

As Commissioner of Insurance, you have requested our opinion regarding 1988 S.B. No. 111 (L. 1988, ch. 47, §19) to be codified at K.S.A. 8-1018. That section is part of a comprehensive bill concerning driving under the influence (DUI). Among other things, this law requires that driving privileges be suspended when a person refuses to submit to, or fails, a blood alcohol test. Section 19 prevents automobile liability insurers from considering such test refusal or test failure when determining the rate charged or whether to cancel the insurance policy. You have raised two questions. First, you ask whether a drafting error in section 19 renders that section inoperable. Secondly, you ask whether section 19 prohibits insurers from considering the administrative suspension which results from the test refusal or test failure when determining the rate charged or whether to cancel the policy.

Section 19 states:

"[a] test refusal or test failure shall not be a part of the public record and shall not be considered by an insurance company in determining the rate charged for any automobile liability insurance policy or whether to cancel any such policy under the provisions of subsection (7)(c) of K.S.A. 40-277 and amendments thereto." L. 1988, ch. 47, §19.

Regarding the first inquiry, K.S.A. 40-277 does not contain a subsection (7)(c). We do not believe, however, that the misnomer is fatal to section 19. From the context of the act, it is clear that the intent of section 19 is to pertain to suspensions of driver privileges. The applicable provision in K.S.A. 40-277 is subsection 4(a). That section of the insurance code prevents an insurance company from cancelling a policy unless,

"4. The named insured or any other operator, either resident in the same household, or who customarily operates an automobile insured under the policy, (a) has had such person's driver's license suspended or revoked during the policy period. . . ." K.S.A. 40-277(4)(a).

Our conclusion is consistent with established rules of statutory construction. In Coney v. City of Topeka, 96 Kan. 46 (1915), the Court stated:

"It is familiar law that legislative enactments are not any more than any other documents to be defeated on account of errors, mistakes or omissions. Where one word or figure has been erroneously used for another or a word omitted, and the context affords the means of correction, the proper word or figure will be deemed substituted or supplied. This is only making the naked letter of the statute yield to its obvious intent." 96 Kan. at 49.

See also Tatlow v. Bacon, 101 Kan. 26, 31 (1917).

Your second inquiry is whether administrative suspensions of driver privileges that automatically result from a test refusal or test failure may be considered by an insurer in determining the rate charged for the insurance policy or whether to cancel such policy. Section 19 states that a test refusal or failure shall not be part of a public record, and it shall not be considered by the insurer under the provisions of K.S.A. 40-277. The language of section 19 was adopted from and nearly identical to, the language of K.S.A. 1987 Supp. 8-1341a.

Section 19 must be read in conjunction with K.S.A. 74-2012 which governs records of the division of vehicles. That statute provides that certain records are confidential, and "[a]ll other records of the division of vehicles shall be subject to the provisions of the open records act except as otherwise provided by this section." K.S.A. 74-2012(a). Subsection (b)(1) and (2) permit the release of information by the division or by a law enforcement agency to insurers. See Kansas Attorney General Opinion No. 85-7 (authorizes release only of information in the public record, construing K.S.A. 1987 Supp. 8-1341a, statute from which section 19 was adopted). By its terms, section 19 refers to test refusals and test failures, stating that they are not part of the public record. Therefore, in addition to the confidentiality afforded by section 19, those records are not accessible under K.S.A. 74-2012.

The language of the act does not delete an administrative order for the suspension of driver privileges from the agency's records which are required to be open to the public. That record is subject to the open records act by the terms of K.S.A. 74-2012, and may be available to insurers pursuant to subsection (b)(1) of that statute. See K.S.A. 45-215 et seq. It would appear that, in order to uphold the validity of section 19 without revoking K.S.A. 74-2012 by implication, the new provision can be read only to prohibit an insurer from using a record of a test refusal or failure as the equivalent of a suspension. However, if a suspension actually results from a test refusal or failure, the information may be obtained and considered by insurers under the provisions of K.S.A. 74-2012. The following scenario illustrates the application of section 19: Assume that a driver is stopped by a law enforcement official and refuses to submit to a blood-alcohol test. The Department of Revenue subsequently suspends the driver's privileges. The test refusal is not a public record, but the suspension is. The insurer eventually cancels the driver's policy based on the suspension contained in public record. While the insurance company is not able to determine the cause of suspension, our construction of section 19 renders that information irrelevant. However, if we were to construe section 19 to preclude the insurer from cancelling an insurance policy based on the suspension, the insurer would find itself in a near factual impossibility. The suspension is an open record pursuant to K.S.A. 74-2012, but could not be used to cancel a policy. The insurer could not know whether the suspension was one which could be used to cancel a policy without a violation of even the strictest reading of section 19. The end result being that insurers would be in able to cancel any policy when the insured has had a license suspended. In summary, section 19 does not contain language sufficient to delete the suspension from the open records of the division, or to preclude an insurer from cancelling a policy once a suspension has occurred. We believe that whatever more restrictive construction the legislature may desire should be announced by the legislature.

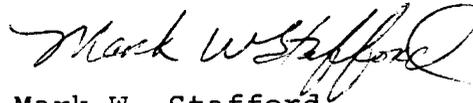
In conclusion, it is our opinion that a misnomer in L. 1988, ch. 47, §19 is not a defect which renders the section void. The intent of the legislature is sufficiently clear to allow substitution of the correct language, so that reference to K.S.A. 40-277(7)(c), which does not exist, becomes K.S.A. 40-277(4)(a). Pursuant to section 19, blood-alcohol test refusals or failures are not open records. Insurers may not consider such refusals or failures in determining automobile

liability rates or in determining whether to cancel a policy. However, if a driving privilege is suspended by the department of revenue, the suspension is part of an open record which may be obtained by insurers to process an application for, or renewal or cancellation of, a motor vehicle liability insurance policy.

Very truly yours,



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