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ATTORNEY GENERAL OPINION NO. 91- 49

Mr. Ron Todd
Commissioner of Insurance
Department of Insurance
420 S.W. 9th
Topeka, Kansas

Dr. Stanley C. Grant, Secretary
Kansas Department of Health and Environment
900 S.W. Jackson, 9th Floor
Topeka, Kansas

Re: Public Health--Solid and Hazardous Waste--Kansas Storage Tank Act; Statement of Legislative Findings; Third Party Liability Insurance Plan, Contents; Duties of Commissioner of Insurance

Synopsis: The legislature intended that the term "noneconomic loss," found in K.S.A. 1990 Supp. 65-34,126 and not otherwise defined, have the meaning commonly accorded it and as defined by case law interpreting generally similar statutes. Cited herein: K.S.A. 1990 Supp. 65-34,100; 65-34,102; 65-34,126.

* * *

Dear Mr. Todd and Dr. Grant:

You request us to clarify K.S.A. 1990 Supp. 65-34,126(a)(8) by providing a definition of a term not otherwise defined in the act.

You indicate that the Kansas storage tank act, K.S.A. 1990 Supp. 65-34,100 et seq., generally provides a

comprehensive approach for the protection of the environment by preventing and remedying the pollution of the state's natural resources, and providing funding of the management, conservation and development of those resources. K.S.A. 1990 Supp. 65-34,100. You inquire about part of this legislative purpose, K.S.A. 1990 Supp. 65-34,126, which provides:

> "(a) The commissioner of insurance shall adopt and implement a plan for applicants for insurance who are in good faith entitled to insurance necessary to achieve compliance with the financial responsibility requirements for third party liability imposed by 40 CFR part 280, subpart H, and part 281 adopted by the federal environmental protection agency. Insurers undertaking to transact the kinds of insurance specified in subsection (b) or (c) of K.S.A. 40-1102 and amendments thereto and rating organizations which file rates for such insurance shall cooperate in the preparation and submission to the commissioner of insurance of a plan or plans for the insurance specified in this section. Such plan shall provide:
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> . . . . .
>
> "(8) exclusion from coverage of any damages for noneconomic loss and any damages resulting from intentional acts of the insured or agents of the insured."

Without defining the term, the statute excludes "noneconomic loss" from the third party liability coverage in underground storage tank liability policies issued by the insurance plan it authorizes [subsection (a)]. Subsection (a) of this statute also requires the insurance coverage to meet the financial responsibility requirements for third party liability imposed by 40 Code of Federal Regulations (CFR) part 280, subpart H, and part 281 adopted by the federal environmental protection agency (EPA). Your inquiry is prompted by the EPA's request that the term "noneconomic loss" be defined in order for the federal agency to give consideration to the proposed insurance plan's acceptability. Your request requires the application of rules of statutory construction in order to determine legislative intent.

It is a fundamental principle that unless there is some indication otherwise, statutory words are presumed to be used in their ordinary or usual sense and with the meaning commonly attributed to them. Atchison, Topeka and Santa Fe Ry. Co. v. U.S. 628 F.Supp. 1431 (D.Kan., 1986) modified on reconsideration 660 F.Supp. 29 (D.Kan., 1986). The term "noneconomic loss" does not appear to be a common term; it does not appear in common dictionaries such as the Merriam-Webster Dictionary, The American Heritage Dictionary or Roget's Thesaurus. It is however a common term in the statutes dealing generally with insurance coverage and more specifically with limitations on recovery for personal injuries. Identical words or terms used in different statutes on a specific subject are interpreted to have the same meaning in the absence of anything in the context to indicate that a different meaning was intended. Farmers Co-op v. Kansas Board of Tax Appeals, 236 Kan. 632, 640 (1985); T-Bone Fedders, Inc. v. Martin, 236 Kan. 641, 648 (1985); Callaway v. City of Overland Park, 211 Kan. 646, 652 (1973); see also 73 Am.Jur.2d Statutes § 206 (1974) (of importance is the meaning given to the term in question by the courts within that jurisdiction.); see generally 28A Words and Phrases (1955) (1990 Supplement).

The Kansas Supreme Court has defined "noneconomic loss," and in both cases the context has been that of liability. Both cases generally involve personal injury actions wherein legislation limited the recovery allowed for economic and noneconomic losses. In Kansas Malpractice Victims Coalition v. Bell, 243 Kan. 333 (1988) the court addressed the constitutionality of statutes that limited recovery in medical malpractice actions. Considering a provision that limited recovery for noneconomic loss, the court reasoned that the term not otherwise defined in the act must include those costs not covered by "economic loss" which was defined. The court stated:

> "Noneconomic loss would thus include claims for pain and suffering, mental anguish, injury and disfigurement not affecting earning capacity, or losses which cannot be easily expressed in dollars and cents." 243 Kan. at 337.

Adopting the definition from Malpractice Victims the court again, in Samsel v. Wheeler Transport Services, Inc., 246 Kan. 336 (1990), defined noneconomic loss and added to that definition:

> "Although we have determined that an injured party has a constitutional right to be made whole and a right to damages for economic and noneconomic losses suffered, it is clear that recovery for noneconomic loss suffered is not really compensation to make an injured party whole. Such damages are actually compensation to the injured party for loss of the quality of life, i.e., disability, pain, and suffering." (Emphasis added). 246 Kan. at 353.

Samsel involved the constitutionality of legislation limiting the liability of health care providers in medical malpractice actions by capping recovery for noneconomic losses and economic losses.

Both these cases interpret the term "noneconomic loss" in the context of liability for personal injury actions. At issue is the interpretation of K.S.A. 1990 Supp. 65-34,126 which contemplates liability in amounts specified in the federal act for bodily injury or property damage resulting from the release of a regulated substance or operation of an underground storage tank. See K.S.A. 1990 Supp. 65-34,102(f) and 40 C.F.R. part, 280, subpart H. In our opinion, the cases interpret statutes sufficiently related to ours that the term "noneconomic loss" can be interpreted to have the same meaning.

We can thus reasonably conclude that the legislature intended the term "noneconomic loss" found in K.S.A. 1990 Supp. 65-34,126 to have its ordinary meaning as defined by case law herein discussed.

Very truly yours,

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