

**REPORT OF THE JUDICIAL COUNCIL
CIVIL CODE ADVISORY COMMITTEE ON 2015 SB 16**

DECEMBER 4, 2015

In May 2015, Senator Jeff King requested that the Judicial Council review and make recommendations on 2015 Senate Bill 16. The bill would amend K.S.A. 40-908, a statute governing the award of attorney fees when a judgment is rendered against an insurance company on a policy written to insure property against loss by fire, tornado, lightning, or hail. At its June 5, 2015 meeting, the Judicial Council assigned the study to the Civil Code Advisory Committee. A copy of the bill is attached at page 10.

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

James M. Armstrong, practicing attorney, Wichita

Hon. Terry L. Bullock, Retired District Court Judge, Topeka

Prof. James M. Concannon, Distinguished Professor of Law at Washburn University School of Law, Topeka

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

Allen G. Glendenning, practicing attorney, Great Bend

John L. Hampton, practicing attorney, Lawrence

Hon. Kevin P. Moriarty, District Court Judge in the 10th Judicial District, Olathe

Donald W. Vasos, practicing attorney, Fairway

Angel Zimmerman, practicing attorney, Topeka

INTRODUCTION

SB 16 was introduced on January 13, 2015 at the request of William Sneed, Legislative Counsel for State Farm Insurance Companies. The bill would amend K.S.A. 40-908 to change the scope of the statute's applicability. Currently, K.S.A. 40-908 provides for the award of attorney fees when a judgment is rendered against an insurance company on any policy written to insure property against loss by fire, tornado, lightning, or hail, unless the judgment is less than any tender offered by the insurer before the case was filed. SB 16 would change the statute to provide for attorney fees when judgment is rendered on any "first-party policy claim for damage to real property or contents of real property caused by loss from fire, tornado, lightning or hail." Essentially, SB 16 would change the statute's applicability from being based on the type of coverage to the type of loss. The bill was referred to the Senate Judiciary Committee, where a hearing was held on January 20, 2015. The bill was later referred to the Judicial Council for study.

BACKGROUND

K.S.A. 40-908 requires that courts award attorney fees to a plaintiff who prevails in an action on an insurance policy that insures against loss by fire, tornado, lightning or hail. This statute has been the subject of considerable discussion over the last decade. On November 3, 2005, the interim Special Committee on the Judiciary held a hearing on the topic of attorney fee awards pursuant to K.S.A. 40-908. The Special Committee heard testimony from insurance representatives that recent Kansas appellate court decisions had broadened the application of K.S.A. 40-908, and that an amendment was needed to ensure a more limited interpretation. The Special Committee decided to send the matter to the Judicial Council for further study, and the study was assigned to the Civil Code Advisory Committee. The Judicial Council approved the Committee's report on February 15, 2006. The report contained statutory history and case law analysis that is not repeated herein, but a copy of the earlier report is attached at page 11.

The Committee's 2006 study included review of both K.S.A. 40-908 and K.S.A. 40-256, a statute of general application that requires the court to allow a reasonable sum for plaintiff's attorney 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. In its earlier study of K.S.A. 40-256 and K.S.A. 40-908, the Committee reached the following conclusions:

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

3. 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; and
4. Kansas appellate court decisions are consistent with the plain language of K.S.A. 40-908, and no amendment is necessary.

The 2006 report also noted that the Committee’s conclusions were based solely on a legal analysis of K.S.A. 40-256 and K.S.A. 40-908 and the case law interpreting them, but that public policy considerations must also be part of any decision regarding statutory amendments in this area in order to maintain a balance that affords adequate protection to consumers without unfairly burdening insurance companies. The Committee recommended that no amendments to these statutes, which 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 for its 2006 study. When Senator Jeff King requested that the Judicial Council study 2015 SB 16, he specifically requested that the study include a public policy analysis. Senator King requested that the study include “not only current law and SB 16, but a proposal in this area that the Council feels would best allocate attorney fees in these types of litigation.”

There have been additional developments in the law since the Committee’s 2006 study. Although none have passed, a number of bills have been introduced to amend K.S.A. 40-908, including 2006 SB 377, 2007 HB 2189, and 2014 HB 2678. The significant developments have come from case law, specifically two Kansas Supreme Court decisions issued in 2006 and 2014.

In *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 281 Kan. 844, 137 P.3d 486 (2006), a general contractor prevailed in an action against its commercial general liability insurer for failing to defend or indemnify the contractor for property damage to a home it had built for a customer. The damage was caused by leaking windows that were defective and/or improperly installed by a subcontractor. The Kansas Supreme Court upheld the district court’s award of attorney fees under K.S.A. 40-908. Although the *Lee Builders* case was the first time the statute had been applied to a claim under a liability policy, the Court held:

“Based upon the plain language of K.S.A. 40-908, it applies where a judgment is rendered on *any* policy that insures against certain types of losses. *Hamilton*, 263 Kan. at 882, 953 P.2d 1027. In the instant case, Lee,

as plaintiff, recovered a judgment for indemnity against Farm Bureau. The judgment was based on an insurance policy that insured certain property against loss by fire, lightning, windstorm, and hail. Therefore, the district court did not err in awarding, and the Court of Appeals did not err in affirming, attorney fees pursuant to K.S.A. 40-908.” 281 Kan. at 862.

The second significant case since the Committee’s 2006 report was *Bussman v. Safeco Ins. Co. of America*, 298 Kan. 700, 317 P.3d 70 (2014). In that case, the Kansas Supreme Court affirmed the Court of Appeals’ decision that the trial court erred in denying plaintiff’s request for attorney fees under K.S.A. 40-908 in an action by an employee against her employer’s commercial automobile insurer. The plaintiff sought underinsured motorist benefits for personal injury incurred in an accident while driving a company vehicle within the scope of her employment. Although the Court acknowledged that arguments presented by Safeco, Judge Atcheson in his dissent to the Court of Appeals’ decision, and an *amicus* were “seductively logical,” the Court went on to hold:

“If we were writing on a clean slate, the result might be different. But we cannot ignore the fact that the legislature used very sweeping and inclusive language in K.S.A. 40-908 and, since the popularization of combination-coverage policies some 50 years ago, it has made no effort to modernize or change that language. Perhaps more importantly, in the 15 years since *Hamilton [v. State Farm Fire & Cas. Co.]*, 263 Kan. 875, 953 P.2d 1027 (1998)] the legislature has not attempted to correct this court’s interpretation of the plain language of K.S.A. 40-908. Notwithstanding any public policy considerations and regardless of what one might speculate that the legislature meant to do, the plain language of K.S.A. 40-908 says that the court *shall* allow the plaintiff reasonable attorney fees as part of the costs in *all* actions 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. Under that interpretation, *Bussman* is entitled to attorney fees as part of the costs of her action in which judgment was rendered against Safeco on a policy that insured property against loss by fire, tornado, lightning, or hail, *i.e.*, all of the elements of K.S.A. 40-908 were present.” 298 Kan. at 729.

METHOD OF STUDY

The Committee met three times during the fall of 2015, twice in person and once by telephone conference. The Committee reviewed a number of background materials including: SB 16 and the written testimony offered by proponents and opponents when the bill was heard in Senate Judiciary; the Committee’s 2006 report on K.S.A. 40-256 and K.S.A. 40-908; other states’ statutes

governing attorney fees in actions against an insurer; the Kansas Unfair Trade Practices Law, K.S.A. 40-2401 *et seq.*; and other states' unfair claims settlement statutes. In addition, the Committee heard from a number of interested parties, including those who provided testimony at the hearing on SB 16, who were invited to attend the Committee's second meeting to provide input on the concept of expanding insured's rights through a bad faith statute or a private cause of action under the unfair trade practices statutes.

DISCUSSION

The Committee began by discussing the *Lee Builders* and *Bussman* cases, which had been decided since the Committee last reported on K.S.A. 40-908 in 2006. It was agreed that the results in the two cases were consistent with the conclusions in the Committee's 2006 report. The Supreme Court's rulings are correct under a plain reading of the statute. The Committee also agreed with the Court that the result could not have been specifically intended when the legislature passed the statute, because combined property and casualty policies did not exist at that time.

The Committee discussed Kansas law in relation to the laws of others states on the issue of awarding attorney fees in actions against an insurer. A review of statutes from 32 states revealed that half of those states' statutes provide for attorney fees with no showing of bad faith. Some of these statutes are applicable only to certain types of insurance policies, but others are broader than K.S.A. 40-908. For example:

“Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or a beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.” Florida, § 627.428(1).

“Where an insurer has contested its liability under a policy and is ordered by the courts to pay benefits under the policy, the policyholder, the beneficiary under a policy, or the person who has acquired the rights of the policyholder or beneficiary under the policy shall be awarded attorney's fees and the costs of suit, in addition to the benefits under the policy.” Hawaii, § 431:10-242.

“Any insurer issuing any policy, certificate or contract of insurance, surety, guaranty or indemnity of any kind or nature whatsoever that fails to pay a person entitled thereto within thirty (30) days after proof of loss has

been furnished as provided in such policy, certificate or contract, or to pay to the person entitled thereto within sixty (60) days if the proof of loss pertains to uninsured motorist or underinsured motorist coverage benefits, the amount that person is justly due under such policy, certificate or contract shall in any action thereafter commenced against the insurer in any court in this state, or in any arbitration for recovery under the terms of the policy, certificate or contract, pay such further amount as the court shall adjudge reasonable as attorney's fees in such action or arbitration." Idaho, § 41-1839(1).

"In all cases when the beneficiary or other person entitled thereto brings an action upon any type of insurance policy, except workers' compensation insurance, or upon any certificate issued by a fraternal benefit society, against any company, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his or her recovery, to be taxed as part of the costs. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings, except that if the plaintiff fails to obtain judgment for more than may have been offered by such company, person, or association in accordance with section 25-901, then the plaintiff shall not recover the attorney's fees provided by this section." Nebraska, §44-359.

Of the states that do not have a statute similar to K.S.A. 40-908, they generally have other avenues available to insureds seeking payment of a claim under a policy of insurance. Many states recognize the tort of bad faith, but Kansas does not. In Kansas, the only action available to the insured is a breach of contract action, in which the types of damages that can be recovered are limited. Many states also have bad faith statutes that provide another option for an insured. These bad faith statutes are often located in the states' unfair claims settlement practices act, which in Kansas is called unfair trade practice law and is located at K.S.A. 40-2401 *et seq.* Unlike many states, the Kansas act does not provide for a private cause of action. Instead, all enforcement is the province of the Kansas Insurance Commissioner. Other states allow insureds to bring an action under the consumer protection laws, but insurance is specifically excluded from consumer protection laws in Kansas. Whether under unfair claims settlement practices or consumer protection, insureds in many other states are provided with an opportunity to bring an action against an insurer and recover attorney fees without having to show bad faith. For example, there may be a provision that requires claims to be paid within 60 days after demand is made. If the insurer does not make timely payment, the insured can bring suit and recover attorney fees regardless of the reason for the delay in payment.

The Committee's initial review of laws from other states led to a tentative plan to suggest revisions to restrict K.S.A. 40-908 to its originally intended scope of application and to develop a new statutory scheme to provide insureds with another alternative, such as a private cause of action under the unfair trade practices law. However, the interested parties invited to attend the second committee meeting to provide input on that plan brought no proposals and expressed little interest in creating new law in this area, and the Committee did not further pursue that course of action.

The Committee carefully considered all available materials and testimony as it contemplated the question of opining on the appropriate public policy perspective and how that intersects with suggesting amendments to K.S.A. 40-908.

In its 2006 report, the Committee briefly discussed the original public policy underlying K.S.A. 40-908. As noted in that report, the public policy concerns addressed by the legislature in passing the statute in 1927 are hinted at in a Supreme Court opinion issued just a few years after the statute was enacted. The 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 Committee noted in its 2006 report that there is a strong public interest in protecting consumers and encouraging insurance companies to pay claims promptly and fairly. The Kansas Insurance Department continues to receive thousands of consumer complaints each year regarding the failure of an insurance company to promptly or fairly pay a claim, so the concerns that prompted the initial legislation in 1893 have not disappeared. Stating the public policy is relatively easy. It is much more difficult to determine whether stated policy objectives are currently being met and to evaluate proposed amendments in light of the objectives.

Proponents of legislation such as SB 16, which restricts the applicability of K.S.A. 40-908, argue that the case law has expanded the statute far beyond its original intent. Even if that is true, the argument doesn't carry much weight if the expanded application is still consistent with public policy. Proponents also argue that the original intent was to limit the applicability to property claims because property losses are fairly easy for an insurer to value and, therefore, to make prompt payment in the event of a claimed loss. They argue that personal injury claims are much more difficult, especially when they involve future medical expenses or nonpecuniary losses like pain and suffering.

The Committee was not swayed by these arguments. While it may have been true in 1927 that claims involving losses other than property damage were more difficult to assess, the insurance

industry has substantially evolved since that time. With the advent of technology came the ability to record each settlement or jury verdict and to create detailed databases of information. Insurers have a wealth of knowledge available with which to quickly arrive at a fairly accurate range of likely jury verdicts if the case were tried and are more than able to make a prompt and fair offer. The average consumer, on the other hand, may have virtually no knowledge of what his claim is worth and is disadvantaged by that lack of knowledge when negotiating the settlement of a claim. This is a situation in which the imbalance of power between insured and insurer manifests itself and, just as contractual ambiguities are construed against the insurer, it is fair to shift a bit more of the risk to the party who wields so much more power in order to balance the interests of both parties to the insurance contract. The Committee found no compelling arguments for treating claims differently based on the type of loss, noting that the public policy is the same in all cases.

Finally, proponents of restricting the applicability of K.S.A. 40-908 often point to the existence of K.S.A. 40-256 as a tool for insureds in those situations in which the insurer does not act in good faith. The opponents were all in agreement that K.S.A. 40-256 is not an adequate substitute for K.S.A. 40-908 as it is currently applied. In order to get attorney fees under K.S.A. 40-256, an insured must show that the insurer refused to pay the full amount of the loss without just cause or excuse. Many insureds with meritorious cases would be unable to find an attorney to take the case if recovery of fees is only available when the insurance company has acted without just cause or excuse. The insurer may not be acting in bad faith – they may just be wrong. The insurer may have no ill intent but may still be misinterpreting a clause in the policy or relying on a word or phrase that a court later finds to be ambiguous. K.S.A. 40-256 is of no value to the insured unless the insurer's failure to pay is without just cause or excuse.

After considering the competing arguments regarding amendments to K.S.A. 40-908, the Committee also considered whether the statute is currently operating in a manner consistent with public policy. Many of the opponents of SB 16 stated that the statute's existence operates as a check on insurance companies and encourages them to make prompt and fair offers. That may be borne out by the fact that fair offers are made in the vast majority of claims. The Committee found no indication that K.S.A. 40-908 is a boon for plaintiffs' attorneys. To the contrary, the Committee heard of how difficult it is for an insured to find representation because so few attorneys in Kansas will take these kinds of cases. Also persuasive to the Committee was that proponents of SB 16 are advocating that the statute be restricted to cover fewer types of losses, while opponents of the bill would advocate for an expansion of the statute to cover all insurance cases. That may be a good

indication that K.S.A. 40-908, as interpreted by the courts, is currently striking an appropriate balance between the interests of insureds and insurers.

COMMITTEE'S CONCLUSIONS

Taking all of the foregoing into account, the Committee concluded that K.S.A. 49-908 is operating well and is consistent with public policy. While it is true that insurance policies have changed dramatically since 1927, improvements in technology have also changed how claims are handled and have made it easier to assess losses of all types. The old arguments about why the statute should apply only to property are not persuasive.

In comparison to other states, Kansas has fewer tools available to insureds who are harmed by an insurer that refuses to pay promptly or fairly. It is one of only a very few states that neither recognizes the tort of bad faith nor allows a private cause of action under its unfair claims settlement or consumer protection statutes. State laws vary widely, and on a continuum ranging from states whose statutes offer the most protections to insurance consumers to those offering the least protection, Kansas would occupy a space toward the bottom. To further restrict K.S.A. 40-908 would be a move in the wrong direction and would not be consistent with the public policy objective of protecting consumers and encouraging insurance companies to pay claims promptly and fairly.

COMMITTEE RECOMMENDATION

The Committee recommends against passage of SB 16 and against any amendments to K.S.A. 40-908 that would operate to restrict the applicability of the statute. However, the Committee does recommend one small amendment – “plaintiff” should be changed to “insured” to make clear that the statute is only applicable to first-party actions. The suggested amendment is shown below.

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 insured 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.

SENATE BILL No. 16

By Committee on Judiciary

1-13

1 AN ACT concerning insurance; relating to attorney fees in certain actions;
2 amending K.S.A. 40-908 and repealing the existing section.

3
4 *Be it enacted by the Legislature of the State of Kansas:*

5 Section 1. K.S.A. 40-908 is hereby amended to read as follows: 40-
6 908. ~~That~~ In all actions now pending, or hereafter commenced in which
7 judgment is rendered against any insurance company on any ~~policy given~~
8 ~~to insure any property in this state against loss by first-party policy claim~~
9 *for damage to real property or contents of real property caused by loss*
10 *from fire, tornado, lightning or hail, the court in rendering such judgment*
11 *shall allow the plaintiff a reasonable sum as an attorney's fee attorney fees*
12 *for services in such action, including proceeding upon appeal to be*
13 *recovered and collected as a part of the costs: Provided, however, except*
14 *that when a tender is made by such insurance company before the*
15 *commencement of the action in which judgment is rendered and the*
16 *amount recovered is not in excess of such tender, no such costs shall be*
17 *allowed.*

18 Sec. 2. K.S.A. 40-908 is hereby repealed.

19 Sec. 3. This act shall take effect and be in force from and after its
20 publication in the statute book.

**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.