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Health

L-1 Health Care Stabilization Fund and Kansas Medical Malpractice Law

The 1976 Health Care Providers Insurance Availability Act (HCPIAA) created the Health Care Stabilization Fund in an effort to stabilize the availability of medical professional liability coverage for health care providers. The law mandates a basic liability requirement for certain health care providers (identified below) and establishes an availability plan in order to provide required basic professional liability insurance coverage for those providers of health care in Kansas unable to obtain such coverage from the commercial market. The Fund receives its funding from professional liability coverage surcharge payments made by health care providers.

Health Care Providers

The Health Care Stabilization Fund was created, in part, to provide excess liability coverage for the following specified Health Care Providers in KSA 2012 Supp. 40-3401(f):

- Medical Doctors and Doctors of Osteopathy who are licensed or hold temporary permits with the State Board of Healing Arts;
- Chiropractors;
- Podiatrists;
- Persons engaged in a postgraduate training program approved by the State Board of Healing Arts;
- Registered Nurse Anesthetists;
- Dentists certified by the State Board of Healing Arts;
- Medical care facilities;
- Mental health clinics and centers;
- Psychiatric hospitals (certain facilities);
- Kansas professional corporations or partnerships of defined health care providers;
- Kansas limited liability companies organized for the purpose of rendering professional services by their health care providers;
- Kansas not-for-profit corporations organized for the purpose of rendering professional services by persons who are health care providers; and a nonprofit corporation organized to administer the graduate medical education programs affiliated with the University of Kansas School of Medicine.

Health care providers whose practice includes the rendering of professional services in Kansas are subject to the basic professional liability coverage and Fund surcharge requirements. In addition, the coverage and surcharge requirements also apply to health care providers who are Kansas residents and to non-resident health care

providers whose practice includes the rendering of professional services in Kansas.

Fund coverage, through basic professional liability coverage, is available from insurers authorized to write business in Kansas or through the Health Care Provider Insurance Availability Plan. The Fund coverage limits currently include three options: \$100,000/\$300,000; \$300,000/\$900,000; and \$800,000/\$2,400,000. (The first dollar amount indicates the amount of loss payment available for each claim, while the second indicates the total annual amount of loss payments for all claims made during a Fund coverage year.) For Kansas health care providers, the insurer is responsible for:

- Calculation of the amount of the surcharge based on the Fund coverage limit selected by the health care provider;
- Development of the rating classification code of the provider and the number of years the provider has been in compliance with the Fund; and
- Collection of the Fund surcharge payment along with the basic professional liability coverage and remitting the surcharge to the Fund without any reductions for commissions, collections, or processing expenses.

With a primary function of excess professional liability coverage, the Fund is “triggered” when the basic professional liability insurer’s projected loss exposure exceeds \$200,000.

According to the Fund’s staff, the Fund’s legal staff monitor all claims and suits filed against Kansas health care providers, including attending claim settlement conferences where the Fund’s coverage has not yet been triggered. In addition to claims protection, the law also requires all basic professional liability insurers to include prior acts coverage which eliminates the need

for Kansas health care providers to purchase tail coverage when changing insurers; requires all basic professional liability insurers to provide professional liability insurance for the overall or total professional services rendered by Kansas health care providers; funds “tail” coverage for qualified inactive health care providers in Kansas; and provides special self-insurance coverage for the full-time faculty, private practice foundations and corporations, and the residents of the University of Kansas School of Medicine (KUMC) and the Wichita Center for Graduate Medical Education (WCGME). (University of Kansas School of Medicine students are covered under the Kansas Tort Claims Act—KSA 75-6102(j).)

Fund Administration

The Board of Governors, as defined in KSA 2012 Supp. 40-3403, consists of ten members appointed by the Insurance Commissioner in the manner prescribed by statute. Three members are medical doctors in Kansas nominated by the Kansas Medical Society; three members serve as representatives of Kansas hospitals, nominated by the Kansas Hospital Association; two members are doctors of osteopathic medicine, nominated by the Kansas Association of Osteopathic Medicine; one member is a chiropractor in Kansas, nominated by the Kansas Chiropractic Association; and one member is a Registered Nurse Anesthetist, nominated by the Kansas Association of Nurse Anesthetists.

Prior to 1995, the Fund was administered by the Commissioner of Insurance. Beginning in 1995, the administration of the Fund became the responsibility of the Health Care Stabilization Fund Board of Governors, and the Board was recognized as an independent state agency. The following chart illustrates the agency expenditures for administration of the Fund and total paid claims, by fiscal year.

OPERATING EXPENDITURES
Health Care Stabilization Fund
FY 2006-FY 2015

Fiscal Year	State Operations	% Change	Claims Paid	% Change	FTE
2006	\$ 6,255,737	33.4 %	\$ 23,245,032	(0.9) %	16.0
2007	6,389,120	2.1	25,104,792	8.0	16.0
2008	5,238,807	(18.0)	23,947,225	(4.6)	16.0
2009	5,853,999	11.7	22,467,114	(6.2)	17.0
2010	5,928,742	1.3	24,508,355	9.1	17.0
2011	6,655,856	12.3	25,236,640	3.0	17.0
2012 Actual	6,292,258	17.1	21,910,074	14.1	17.0
2013 Actual	6,250,365	(0.7)	28,405,415	29.6	18.0
2014 Approved	8,084,511	29.3	29,431,385	3.6	18.0
2015 Approved	9,065,309	12.1	34,110,975	15.9	18.0
Ten-Year Change					
Dollars/Percent	\$ 3,826,502	73.0 %	\$ 10,163,750	42.4 %	2.0

The Fund also receives interest on the state agency investments in addition to the surcharge paid by health care providers in Kansas. The investments for the Board of Governors are administered by the Pooled Money Investment Board (PMIB).

Budget Issue: Reimbursements from the State General Fund

2009 Session. In FY 2009 and FY 2010, transfers from the State General Fund to the Health Care Stabilization Fund for payments on behalf of the KU residents, faculty, and graduate medical education students were suspended. The moratorium on reimbursements from the State General Fund reduced the fund balance by a projected \$6.0 million over the two-year period. (The FY 2010 transfer payments were suspended by the Governor's agency allotment authority in July 2009.)

KSA 40-3403(j) pertained to the reimbursement for the costs and expenses associated with the administration of a self-insurance program for the full-time faculty, private practice foundations and corporations, and the residents of the University of Kansas School of Medicine and the Wichita Center for Graduate Medical Education. (When the costs, including claims and legal expenses, exceed the amount paid by the Faculty Foundations [Private Practice Foundation Reserve Fund], the SGF, upon certification of the amount of the payments

made by the HCSF, transfers the difference to the HCSF.) A 2009 Attorney General's opinion [2009-16] made, among other conclusions, the finding that, "nothing in the allotment system statute nor in the Health Care Provider Insurance Availability Act indicates that the statutory transfers of funds in KSA 40-3403 are exempt from the allotment system."

2010 Session. The Senate Financial Institutions and Insurance Committee introduced SB 414 at the request of the Kansas Medical Society as a bill to amend the Health Care Provider Insurance Availability Act and to exempt transfers from the State General Fund (SGF) to the Health Care Stabilization Fund (HCSF) as required by KSA 2009 Supp. 40-3403(j) from the allotment authority delegated by statute (KSA 75-3722) to the Secretary of Administration. The bill further amended the Act to provide that the funds required to be transferred to the Health Care Stabilization Fund for the payments specified in law (KSA 2009 Supp. 40-3403(j)) for state Fiscal Years 2010, 2011, 2012, and 2013 shall not be transferred prior to July 1, 2013. The Director of Accounts and Reports is required to maintain a record of the amounts certified by the Health Care Stabilization

Fund Board of Governors for the specified fiscal years. The bill also established a process for the repayment of the deferred State General Fund payments, as follows: beginning on July 1, 2013, and on an annual basis through July 1, 2017, 20.0 percent of the total amount of the SGF deferred transfers are to be transferred to the Health Care Stabilization Fund. No interest will be allowed to accrue on the deferred payments. SB 414 was signed into law on March 31, 2010.

Oversight

The Health Care Stabilization Fund Oversight Committee was created by the 1989 Legislature. The composition of the Committee is detailed in KSA 40-3403b. The eleven-member Committee consists of:

- Four legislators;
- Four health care providers;
- One representative of the insurance industry;
- One person from the general public with no affiliation to health care providers or with the insurance industry; and
- The chairperson of the Board of Governors of the Health Care Stabilization Fund or another Board member designated by the Board chairperson.

Current law requires the Committee to report its activities to the Legislative Coordinating Council and make recommendations to the Legislature regarding the Health Care Stabilization Fund. Committee annual reports are filed with the Legislative Research Department.

During its 2012 meeting, the Committee discussed its role in providing legislative oversight of the Fund, as outlined by statute. The Committee indicated that it continues to believe that the Oversight Committee serves a vital role as a link among the Fund Board of Governors, the providers and the Legislature, and therefore, should be continued. The Committee further stated in its annual report that it recognized the important role and function of the Fund in providing stability in the professional liability insurance marketplace. The Committee also reviewed the necessity for the need to contract

for an independent actuarial review in 2013. While the Committee continued its belief that the ability to contract for an independent actuarial review is necessary for the safety and soundness of the Fund, the Committee did not find, at that time, a need for an independent review in 2013.

The Committee considered the report from the Health Care Stabilization Fund Board of Governors, its actuary, and conferees at its November 2012 meeting, and made recommendations to the Legislature on the following: the obligation to reimburse the Fund for administrative services provided to the self-insurance programs (University of Kansas Foundations and Faculty and the KUMC and WCGME residents) pursuant to the time line created by 2010 SB 414; the *Miller v. Johnson* decision, the long-term impact the Fund and its stability has had on young physicians and health care providers into the health care work force; and the continuing conversation in the wake of this decision about the cap on noneconomic damages and the role of the HCPIAA; and a stated opposition to any transfer of moneys from the Health Care Stabilization Fund to the State General Fund.

The Committee received a report from the Fund actuary (this report assists the Fund Board of Governors in its decision to set the level of surcharges for the next year). The actuary offered some general conclusions as follows: the forecasts assume an average 5.0 percent decrease in rates for FY 2013; \$25.4 million in surcharge revenue in FY 2013; continued full reimbursement for KU/WCGME claims, but reimbursement from the State delayed until FY 2013; and no change in current Kansas tort law. The actuaries suggested the Board either maintain current rates or make a slight decrease (the Board opted to change FY 2013 surcharge rates at an average rate decrease of 5.0 percent). The actuary commented on the financial position of the Fund, stating that given the Fund's FY 2012 results and the recent Supreme Court decision, the firm believes the Fund is in the strongest financial position in its 36-year history.

Fund Status

The actuarial report provided to the Oversight Committee addressed the Fund's forecast position at June 30, 2012: the Fund held assets of \$253.37

million and liabilities (discounted) of \$189.75 million, with \$63.62 million in reserve. Projections for June 2013, established using Fund data as of December 30, 2011, include \$259.33 million and liabilities (discounted) of \$193.05 million, with \$66.28 million in reserve. *Miller v. Johnson* Decision (October 5, 2012 Ruling) – Legislative Authority to Establish a Cap on Noneconomic Damages

The Kansas Supreme Court upheld a \$250,000 cap on non-economic damages in a 5-2 decision. The decision cited, among other things, four constitutional issues to be resolved in this case. The majority of the Court upheld KSA 60-19a02 as it applied to *Miller* (personal injury Plaintiff, medical malpractice) – the statute provides for a \$250,000 cap on non-economic damages and applies to all personal injury actions, including medical

malpractice claims, accruing on or after July 1, 1988. The opinion also cited the Health Care Insurance Provider Availability Act by indicating “As noted in several of our prior cases, the legislature’s expressed goals for the comprehensive legislation comprising the Health Care Provider Availability Act and the noneconomic damages cap have long been accepted by this court to carry a valid public interest objective.” The opinion also noted the Legislature enacted KSA 60-19a02 “in an attempt to reduce and stabilize liability insurance premiums by eliminating both the difficulty with rate setting due to the unpredictability of noneconomic damages awards and the possibility of large noneconomic damage awards.”

Following is a brief summary of additional Kansas laws that address medical malpractice and the legal proceedings.

Kansas Medical Malpractice Tort Laws						
Statute of Limitations	Damage Awards’ Limits	Pre-trial Screening, Arbitration	Joint and Several Liability	Expert Witnesses	Attorney Fees	Health Care Stabilization Fund
KSA 60-513. Two years from act or reasonable discovery. Is permitted up to ten years after reasonable discovery.	KSA 60-19a02. \$250,000 limit on noneconomic damages recoverable by each party from all Defendants. KSA 60-3702. Punitive damages limited to the lesser of Defendant’s highest gross income for prior five years or \$5 million. If profitability of misconduct exceeds limit, court may award 1.5 times profit instead. Judge determines punitive damages.	KSA 65-4901; 60-3502. Voluntary submission to medical screening panel upon request of party; panelists must include medical professional of same specialty as Defendant.	No separation of joint and several liability.	KSA 60-3412. Fifty percent of the expert’s professional time over preceding two years must have been devoted to clinical practice in same field as Defendant.	KSA 7-121b. Attorney fees must be approved by the court.	KSA 40-3403. (discussed above).

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