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HEALTH CARE STABILIZATION FUND AND KANSAS MEDICAL MALPRACTICE LAW

The 1976 Health Care Providers Insurance Availability Act (HCPIAA) created the Health Care Stabilization Fund (Fund) in an effort to stabilize the availability of medical professional liability coverage for health care providers. The law created a basic liability requirement for certain health care providers (identified below) and established 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 revenue from professional liability coverage surcharge payments made by health care providers. A summary of recent changes to the HCPIAA is provided later in this memorandum.

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 2016 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;
- Physician Assistants*;
- Persons engaged in a postgraduate training program approved by the State Board of Healing Arts;
- Registered Nurse Anesthetists;
- Certain Advance Practice Registered Nurses (Nurse Midwives)*;
- Dentists certified by the State Board of Healing Arts;
- Medical care facilities;
- Mental health clinics and centers;
- Psychiatric hospitals (certain facilities);
- Licensed nursing facilities, assisted living facilities, and residential health care 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
- Not-for-profit corporations organized to administer the graduate medical education programs affiliated with the University of Kansas School of Medicine.

* Providers and facilities were eligible for coverage as of January 1, 2015.

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.

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). [*Note:* University of Kansas School of Medicine students are covered under the Kansas Tort Claims Act—KSA 2016 Supp. 75-6102(j).]

Fund Administration

The Board of Governors, as defined in KSA 2016 Supp. 40-3403 as the "Board," consists of eleven members appointed by the Commissioner of Insurance 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; one member is a Registered Nurse Anesthetist, nominated by the Kansas Association of Nurse Anesthetists; and one member

serves as a representative of adult care homes, selected by the Commissioner of Insurance from a list of nominees submitted by adult care homes' statewide associations.

Prior to 1995, the Commissioner of Insurance administered the Fund. 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 table illustrates the agency expenditures for administration of the Fund and total paid claims, by fiscal year.

OPERATING EXPENDITURES
(By Major Object of Expenditure)
Health Care Stabilization Fund
FY 2010–FY 2019

Fiscal Year	State Operations	% Change	Claims Paid	% Change	FTE
2010	$ 7,164,696	7.60 %	$ 28,314,866	12.2 %	17.0
2011	5,373,243	(25.00)	19,207,586	(32.2)	18.0
2012	6,292,258	17.10	21,910,074	14.1	18.0
2013	6,250,365	(0.70)	28,405,415	29.6	18.0
2014	7,722,355	23.60	25,029,266	(11.9)	19.5
2015	5,099,207	(34.00)	26,654,184	6.5	19.5
2016	5,824,554	14.20	27,248,643	2.3	20.0
2017 Actual	6,490,517	11.43	23,976,127	(12.0)	20.0
2018 Approved	7,723,786	19.00	31,999,700	33.5	20.0
2019 Approved	$ 8,181,979	5.93 %	$ 34,591,675	8.1 %	20.0
Ten-Year Change Dollars/Percent	$ 1,017,283	14.20 %	$ 6,276,809	22.17 %	3.0

Note: 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 (SGF) to the Health Care Stabilization Fund Board of Governors (HCSF) for payments on behalf of University of Kansas residents, faculty, and graduate medical education students were suspended. The moratorium on reimbursements from the SGF 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 full-time faculty, private practice foundations and corporations, and residents of KUMC and the WCGME. (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 HCPIAA and to exempt transfers from the SGF to the 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 HCPIAA 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 then-Director of Accounts and Reports is required to maintain a record of the amounts certified by the HCSF Board of Governors for the specified fiscal years. The bill also established a process for the repayment of the deferred SGF 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 were to be transferred to the HCSF. No interest was allowed to accrue on the deferred payments. SB 414 was signed into law on March 31, 2010. All repayment obligations were met and completed July 1, 2017.

Oversight

The Health Care Stabilization Fund Oversight Committee was created by the 1989 Legislature. The composition of the Committee is detailed in KSA 2016 Supp. 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.

The 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 and published by the Legislative Research Department.

Fund Status

The actuarial report provided to the Oversight Committee at its 2016 meeting addressed the Fund's forecast position at June 30, 2016: The Fund held assets of $278.22 million and liabilities (discounted) of $230.02 million, with $48.20 million in reserve. Projections for June

2017 include $282.98 million and liabilities (discounted) of $234.40 million, with $48.58 million in reserve.

Miller v. Johnson Decision—Legislative Authority to Establish a Cap on Noneconomic Damages

The Kansas Supreme Court upheld a $250,000 cap on noneconomic 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 noneconomic damages and applies to all personal injury actions, including medical malpractice claims, accruing on or after July 1, 1988. The opinion also cited the HCIPAA 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."

2014 Changes to the HCPIAA and Medical Malpractice Tort Law

In 2014, the Kansas Legislature responded to the *Miller v. Johnson* decision through the enactment of two bills—HB 2516 and SB 311. Among the amendments made to the HCPIAA in HB 2516 is amending the definition of "health care provider" to include certain professionals and facilities (described in the table on page 1); making continued coverage for inactive health care providers ("tail coverage") immediate upon cancellation or inactivation of a Kansas license and professional liability insurance and increasing the level of tail coverage available; making tail coverage available for new professionals and facilities for prior acts; limiting the disclosure of HCSF claims information to the public; and updating the membership of the Board of Directors and the Board of Governors. SB 311 amended the Code of Civil Procedure to increase the limits to be applied for noneconomic damages in personal injury actions as follows:

- $250,000 for causes of action accruing from July 1, 1988, to July 1, 2014;
- $300,000 for causes of action accruing on and after July 1, 2014, to July 1, 2018;
- $325,000 for causes of action accruing on and after July 1, 2018, to July 1, 2022; and
- $350,000 for causes of action accruing on and after July 1, 2022.

The bill also made amendments to the rule of evidence governing opinion testimony and repealed statutes allowing evidence of collateral source benefits to be admissible in actions for personal injury or death and provided a procedure for determination of net collateral source benefits and the reduction of a judgment by such amount. The Kansas Medical Society requested the introduction of both bills.

The 2015 Legislature made technical amendments to the HCPIAA (clarifying certain exemptions from the definitions of "health care provided") and modified this act to allow certain health care systems to aggregate premium for the purpose of obtaining a certificate of self-insurance. The 2017 Legislature made amendments and created law supplemental to the

HCPIAA and also amended provisions in the Nurse Practice Act to address requirements and exclusions from coverage pertaining to the liability of the HCSF and charitable health care providers and certain exempt licensees of the Board of Nursing.

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.** Limit on noneconomic damages recoverable by each party from all Defendants until July 1, 2014, and increases by $50,000 every four years to a maximum of $350,000 on and after July 1, 2022. **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.)