Approved February 11, 1988
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative Robert S. Wunsch (Chairperson) at

3:30 a.m./p.m. on February 2, 1988 in room 313-S of the Capitol.

All members were present except:

Representatives Vancrum and Whiteman, who were excused.

Committee staff present:

Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee:

Tom Sullivan, Attorney
Tom Theis, Attorney
Wayne Stratton, Attorney

The minutes of January 25, 26, 27 and 28, 1988, were approved.

The Chairman introduced Wayne Stratton, Tom Theis and Tom Sullivan. He said Wayne Stratton was involved in arguing the Farley decision before the Supreme Court and also the Bell decision before the Shawnee District Court. Tom Theis and Tom Sullivan were the arguing attorneys in the Bell decision.

Tom Sullivan, Tom Theis and Wayne Stratton discussed the two cases, their effect on previously enacted tort legislation and tort reform options.

Tom Sullivan distributed to the Committee a synopsis of Judge Theis's decision, (see Attachment I.

Wayne Stratton distributed a handout to the Committee, (see Attachment II showing what has been striken from the statutes.

The Committee meeting was adjourned at 5:15 p.m.

The next meeting will be Wednesday, February 3, 1988, at 3:30 p.m. in room 313-S.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

GUEST REGISTER

DATE Feb. 2, 1988

HOUSE JUDICIARY

NAME	ORGANIZATION	ADDRESS
Will Bolte	KAFP	Wichita
Matt Lynch	Judicial Council	Topeka
Harold Riehm	Ks Assn Osteopathic Med	Topeka
Ralph Skoog	Lawyer	Topeka
Chip Wheelen	Ks Medical Society	Topeka
Cliff Heckathorn	Ks. Head Injury Assn.	Topeka
Kevin Robertson	Ks Consulting Engrs.	Topeka
Carol Ronzulli	NA	Lawrence
Keith R Landis	Christian Science Committee on Publication for Kansas	Topeka
Clint Burnette		
Gary Robbins	Ks Opt Assn	Topeka
Bill Henry	Ks Engineering Society	Topeka

Statement of Thomas E. Sullivan
President, Kansas Trial Lawyers Association (KTLA)

Before the House of Representatives
Judiciary Committee
February 2, 1988

I. House Bill 2661 contains two types of changes

A. Substantive limitations on a plaintiff's right to a remedy (e.g., caps on damages, requirement that future damages be paid in the form of an annuity contract, elimination of vicarious liability)

B. Procedural changes concerning the determination of a plaintiff's right to a remedy (e.g., expert witness qualifications, admission of results of screening panels)

II. Kansas Malpractice Victims Coalition v. Bell, Case No. 86-CV-1700 (Shawnee County, Jan. 22, 1988) determines the constitutionality of the substantive limitations only

III. Substantive limitations on damages violate Sections 5 and 18 of the Bill of Rights of the Kansas Constitution

A. Judge Theis holds that the framers of the Constitution intended that the Legislature could not abrogate the common law right to a jury and to a tort remedy in effect at the time the Constitution was adopted.

B. As a result, caps on damages and the requirement that damages be in the form of an annuity contract are unconstitutional because they deny to plaintiffs rights that existed at common law.

C. Further, other substantive provisions of HB 2661 (including the elimination of vicarious liability) are unconstitutional because they can not be severed from the unconstitutional sections of 2661

IV. The unconstitutional aspects of HB 2661 can not be remedied by applying them to all tort plaintiffs or by presenting additional evidence for the necessity of such changes

A. Judge Theis held that the framers intended that Sections 5 and 18 of the Bill of Rights are absolute limitations on the legislature's power

B. As a result, they forbid substantive limitations on tort remedies regardless of whether the limitations apply to all torts or whether the legislature has additional evidence allegedly establishing the need for such limitations.

Attachment I

Chart On Effects of Kansas Malpractice Victims Coalition v. Bell Case No. 86-CV-1700 (Shawnee County Jan. 22, 1988)

Key: X = unconstitutional under constitutional section cited
D = dismissed on ripeness grounds

Note: page citations to memorandum opinion

Section	Description	§1 KS	§14 US	§5 KS	§18 KS	Other
§13 87 Supp. 60-3407	caps on damages	X (34)	X (35)	X (30)	X (30)	violates separation of powers (31)
§13(c)(3) 87 Supp. 60-3407 (c)(3)	damages paid as annuity contract					stricken as nonseverable from unconstitutional sections of HB 2661 (36)
§15 87 Supp. 60-3409	future damages paid as an annuity	X (45)	X (45)	X (38)	X (38)	
§17 87 Supp. 60-3412	expert witness qualifications	D (9)	D (9)	D (9)	D (9)	
§27(d) 87 Supp. 40-3403(d)	fund may use installment payments					HB 2661 amendments stricken as nonseverable from unconstitutional sections of 2661 (54)
§27(e) 87 Supp. 40-3403(e)	cap on fund payments prior HB 2661					HB 2661 amendments stricken as nonseverable from unconstitutional sections of 2661 (54)

Key: X = unconstitutional under constitutional section cited
D = dismissed on ripeness grounds

Note: page citations to memorandum opinion

Section	Description	§1 KS	§14 US	§5 KS	§18 US	Other
§27(f) 87 Supp. 40-3403(f)	cap on fund payments after HB 2661					entire section stricken as nonseverable from unconstitutional sections of 2661 (55)
§27(h) 87 Supp. 40-3403(h)	elimination of vicarious liability					entire section stricken as nonseverable from unconstitutional sections of 2661 (55)
§28 87 Supp. 60-3411	pinhole to damage caps & further cap on damages	X (34)	X (35)	X (30)	X (30)	violates separation of powers (31)
§28(f) 87 Supp. 60-3411(f)	pinhole damages may be in form of annuity					stricken as non-severable from unconstitutional sections of HB 2661 (36)
§30 87 Supp. 40-3408	elimination of mandatory insurance for vicarious liability					HB 2661 amendments stricken as nonseverable from unconstitutional sections of 2661 (55)
49(c) 87 Supp. 65-4904(c)	results of screening panel admissible	D (9)	D (9)	D (9)	D (9)	

Key: X = unconstitutional under constitutional section cited
D = dismissed on ripeness grounds

Note: page citations to memorandum opinion

Section	Description	§1 KS	§14 US	§5 KS	§18 US	Other
87 Supp. 65-4901 et. seq.	screening panel procedures	D (9)	D (9)	D (9)	D (9)	

if the full amount to be paid to the state general fund is not so transferred in one payment, the director of accounts and reports shall continue to transfer amounts not more frequently than one time per month until the full amount has been transferred to the state general fund. The commissioner shall levy the maximum premium surcharge authorized by subsection (a) of K.S.A. 40-3404 in any fiscal year in which the fund is indebted to the state general fund.

The provisions of this section shall expire on July 1, 1981.

History: L. 1976, ch. 231, § 5; July 1.

Law Review and Bar Journal References:

"Countersuit: A Viable Alternative for the Wrongfully Sued Physician?," Stephen W. Cavanaugh, 19 W.L.J. 450, 461 (1980).

40-3406. Investment of health care stabilization fund moneys. The pooled money investment board may invest and reinvest moneys in the fund in obligations of the United States of America or obligations the principal and interest of which are guaranteed by the United States of America or in interest bearing time deposits in any commercial bank or trust company located in Kansas, or, if the board determines that it is impossible to deposit such moneys in such time deposits, in repurchase agreements of less than thirty (30) days' duration with a Kansas bank for direct obligations of, or obligations that are insured as to principal and interest by, the United States government or any agency thereof. Any income or interest earned by such investments shall be credited to the fund.

History: L. 1976, ch. 231, § 6; July 1.

40-3407. Payments from fund; claim payments. Except for investment purposes, all payments from the fund shall be upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the commissioner and, with respect to claim payments, accompanied by (1) a certified copy of a final judgment against a health care provider or inactive health care provider for which the fund is liable; or (2) a certified copy of a court approved settlement against a health care provider or inactive health care provider for which the fund is liable. For investment purposes amounts shall be paid from the fund upon vouchers approved by the chairperson of the pooled money investment board.

History: L. 1976, ch. 231, § 7; July 1.

40-3408. Liability of insurer or self-insurer for injury or death arising out of act or omission of health care provider, limitation; fund coverage excess over liability insurance coverage. The insurer of a health care provider covered by the fund or self-insurer shall be liable only for the first $200,000 of a claim for personal injury or death arising out of the rendering of or the failure to render professional services by such health care provider, subject to an annual aggregate of $600,000 for all such claims against the health care provider. However, if any liability insurance in excess of such amounts is applicable to any claim or would be applicable in the absence of this act, any payments from the fund shall be excess over such amounts paid, payable or that would have been payable in the absence of this act. The liability of an insurer for claims made prior to July 1, 1984, shall not exceed those limits of insurance provided by such policy prior to July 1, 1984.

If any inactive health care provider has liability insurance in effect which is applicable to any claim or would be applicable in the absence of this act, any payments from the fund shall be excess over such amounts paid, payable or that would have been payable in the absence of this act.

Notwithstanding anything herein to the contrary, an insurer that provides coverage to a health care provider may exclude from coverage any liability incurred by such provider from the rendering of or the failure to render professional services by any other health care provider who is required by K.S.A. 40-3402 and amendments thereto to maintain professional liability insurance in effect as a condition to rendering professional services as a health care provider in this state.

History: L. 1976, ch. 231, § 8; L. 1984, ch. 238, § 5; L. 1986, ch. 229, § 30; July 1.

CASE ANNOTATIONS

1. Where "occurrence" form policy construed as "claims made" policy to conform to statute, limits not changed to statutory minimum. Missouri Medical Ins. Co. v. Wong, 234 K. 811, 821, 676 P.2d 113 (1984).

40-3409. Service upon commissioner

Attachment II

e the act for which such
led; or (2) three million

or punitive damages are
to this section, 50% of
vered and collected shall
awarded them and 50%
e state treasurer for de-
easury and shall be cred-
care stabilization fund
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to.
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to this section against:
or employer for the acts
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on or after July 1, 1985.
35, ch. 197, § 2; July 1.

ournal References:
sonal Injury Law," Willard H.
408 (1987).

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aid to or for the benefit of
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the trier of fact shall
extent to which damages
awarded will duplicate reimbursement or indemnification specified in subsection (a); and (2) the extent to which such reimbursement or indemnification is offset by amounts or rights specified in subsection (b).

(d) The provisions of this section shall apply to any action pending or brought on or after July 1, 1985, regardless of when the cause of action accrued.

History: L. 1985, ch. 197, § 3; July 1.

Source or prior law:
60-471.

CASE ANNOTATIONS

1. Statute abandoning collateral source rule for medical malpractice liability does not violate equal protection clause; application to action pending on effective date of act. Crowe v. Wigglesworth, 623 F.Supp. 699, 700, 704, 705 (1985).
2. Statute rationally related to legitimate state purpose and does not violate state and federal constitutions. Ferguson v. Garmon, 643 F.Supp. 335, 336, 342 (1986).

60-3404. Expiration of act. (a) The provisions of K.S.A. 1985 Supp. 60-3401 through 60-3403 shall expire on July 1, 1989.

(b) This act shall be part of and supplemental to the code of civil procedure.

History: L. 1985, ch. 197, § 4; July 1.

60-3405. Findings and purpose. Substantial increases in costs of professional liability insurance for health care providers have created a crisis of availability and affordability. This situation poses a serious threat to the continued availability and quality of health care in Kansas. In the interest of the public health and welfare, new measures are required to assure that affordable professional liability insurance will be available to Kansas health care providers, to assure that injured parties receive adequate compensation for their injuries, and to maintain the quality of health care in Kansas.

History: L. 1986, ch. 229, § 1; July 1.

Revisor's Note:
60-3405 through 60-3413 were part of comprehensive medical malpractice legislation. For remainder of act, see table of sections, L. 1986, ch. 229, in Constitutions Volume.

60-3406. Definitions. As used in K.S.A. 1986 Supp. 60-3406 through 60-3410 and amendments thereto:

(a) The words and phrases defined by K.S.A. 1986 Supp. 60-3401 and amendments thereto shall have the meanings provided by that section.

(b) "Current economic loss" means costs of medical care and related benefits, lost wages and other economic losses incurred prior to the verdict.

(c) "Future economic loss" means costs of medical care and related benefits, lost wages, loss of earning capacity or other economic losses to be incurred after the verdict.

(d) "Medical care and related benefits" means reasonable expenses of necessary medical care, hospitalization and treatment required due to the negligent rendering of or failure to render professional services by the liable health care provider.

History: L. 1986, ch. 229, § 12; L. 1987, ch. 224, § 3; July 1.

60-3407. Limitations on compensatory damages. (a) In any medical malpractice liability action:

(1) The total amount recoverable by each party from all defendants for all claims for noneconomic loss shall not exceed a sum total of $250,000; and

(2) subject to K.S.A. 1986 Supp. 60-3411, the total amount recoverable by each party from all defendants for all claims shall not exceed a sum total of $1,000,000.

(b) If a medical malpractice liability action is tried to a jury, the court shall not instruct the jury on the limitations imposed by this section or on the ability of the claimant to obtain supplemental benefits under K.S.A. 1986 Supp. 60-3411.

(c) In a medical malpractice liability action, subject to apportionment of fault pursuant to K.S.A. 60-258a and amendments thereto:

(1) If the verdict results in an award for noneconomic loss which exceeds $250,000, the court shall enter judgment for $250,000 for all the party's claims for noneconomic loss.

(2) If the verdict results in an award for current economic loss which exceeds the difference between $1,000,000 and the amount awarded by the court for damages for noneconomic loss, the court shall enter judgment for an amount equal to such difference for all the party's claims for current economic loss.

(3) If the sum of the amounts awarded by the court for noneconomic loss and for

current economic loss is $1,000,000 or more, no judgment shall be entered for future economic loss. If the sum of such amounts is less than $1,000,000 and the verdict results in an award for future economic loss which exceeds the difference between $1,000,000 and the sum of such amounts, the court shall enter judgment for the cost of an annuity contract which, to the greatest extent possible, will provide for the payment of benefits over the period of time specified in the verdict in the amount awarded by the verdict for future economic loss, the cost of such annuity not to exceed the difference between $1,000,000 and the sum of the amounts awarded by the court for noneconomic loss and current economic loss.

(d) The limitations on the amount of damages recoverable for noneconomic loss under this section shall be adjusted annually on July 1 by rule of the supreme court in proportion to the net change in the United States city average consumer price index for all urban consumers during the preceding 12 months.

(e) The provisions of this section shall not be construed to repeal or modify the limitation provided by K.S.A. 60-1903 and amendments thereto in wrongful death actions.

(f) The provisions of this section shall expire on July 1, 1993.

History: L. 1986, ch. 229, § 13; July 1.

Law Review and Bar Journal References:

"Perspectives on Personal Injury Law," Willard H. Pedrick, 26 W.L.J. 399, 408 (1987).

60-3408. Verdict; period for payment for future losses. In every medical malpractice liability action in which the verdict awards damages for future economic losses, the verdict shall specify the period of time over which payment for such losses will be needed.

History: L. 1986, ch. 229, § 14; L. 1987, ch. 224, § 4; July 1.

60-3409. Future economic loss; award of annuity contract; purchase of annuity; restrictions as to annuity and benefits. (a) In any medical malpractice liability action in which the verdict awards damages for future economic loss, the verdict shall not reduce such damages to their present value and the jury shall be instructed to that effect. The court shall reduce such damages to their present value and, except as provided by K.S.A. 1986 Supp. 60-3407, the court shall enter judgment, with respect to such damages, for an annuity contract which, to the greatest extent possible, will provide for the payment of benefits over the period of time specified in the verdict in the amount awarded by the verdict for future economic loss. The judgment shall incorporate the intervals of the annuity payments, which shall be fixed and determinable as to amounts and dates of payments.

(b) The health care stabilization fund or insurer shall purchase the annuity provided for in K.S.A. 1986 Supp. 60-3407 or this section upon approval of the court and, upon payment by the fund or insurer of the cost of such annuity, the judgment will be satisfied as to such annuity.

(c) If an annuity is purchased pursuant to K.S.A. 1986 Supp. 60-3407 or this section, the annuitant shall not own, receive by assignment or otherwise have any interest in the ownership or purchase of the annuity and periodic payments made through such annuity shall not be accelerated, deferred, increased or decreased by the annuitant. If the fund or insurer assigns the annuity, the assignee shall not provide to the annuitant rights against the assignee which are greater than those of a general creditor and the assignee's obligation shall be no greater than the obligation of the assignor.

(d) Benefits paid under an annuity contract awarded pursuant to this section or K.S.A. 1986 Supp. 60-3407 shall not be assignable or subject to levy, execution, attachment, garnishment or any other remedy or procedure for the recovery or collection of a debt, and this exemption cannot be waived.

History: L. 1986, ch. 229, § 15; July 1.

Cross References to Related Sections:

Guaranty of annuity benefits, see 40-3001 et seq.
Fund-purchased annuities, see 40-3423.

60-3410. Application of 60-3406 through 60-3409. The provisions of K.S.A. 1986 Supp. 60-3406 through 60-3409 shall apply only to medical malpractice liability actions which are based on causes of action accruing on or after July 1, 1986.

History: L. 1986, ch. 229, § 16; July 1.

60-3411. Supplemental benefits, payment from fund. (a) As used in this section, "medical care and related benefits" and "medical malpractice liability action" have

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the meanings provided by K.S.A. 1986 Supp. 60-3406.

(b) If a claimant in a medical malpractice liability action has recovered, pursuant to a judgment or settlement agreement which has been itemized to show the amounts settled upon for noneconomic loss, current economic loss, future economic loss and future medical and related benefits, the maximum amount allowable under K.S.A. 1986 Supp. 60-3407 and the amount so recovered is insufficient to pay for necessary medical care and related benefits, the claimant may petition the court which heard the original action or, in the case of a settlement, the court which originally would have had venue, for supplemental benefits to pay for future medical care and related benefits. Any award for supplemental benefits shall be paid from the health care stabilization fund.

(c) Before awarding supplemental benefits, the court shall make a finding that all amounts recovered for medical care and related benefits pursuant to the settlement agreement or judgment have been actually used to pay for medical care and related benefits and that such amounts are insufficient to pay for future medical care and related benefits.

(d) In reaching its decision on whether to grant supplemental benefits, the judge shall consider: (1) The needs of the claimant; and (2) the availability of payments from collateral sources or governmental benefits to the claimant.

(e) In no event shall the supplementary grant, when added to the amount previously received by the claimant, exceed the least of: (1) The amount specified in the jury verdict for medical care and related benefits; (2) the amount actually necessary to pay for medical care and related benefits; or (3) $3,000,000.

(f) Any grant pursuant to this section may be in the form of an annuity contract.

History: L. 1986, ch. 229, § 28; July 1.

60-3412. **Expert witnesses, qualifications.** In any medical malpractice liability action, as defined in K.S.A. 1985 Supp. 60-3401 and amendments thereto, in which the standard of care given by a practitioner of the healing arts is at issue, no person shall qualify as an expert witness on such issue unless at least 50% of such person's professional time within the two-year period preceding the incident giving rise to the action is devoted to actual clinical practice in the same profession in which the defendant is licensed.

History: L. 1986, ch. 229, § 17; July 1.

60-3413. **Settlement conference.** (a) In any medical malpractice liability action, as defined by K.S.A. 1985 Supp. 60-3401 and amendments thereto, the court shall require a settlement conference to be held not less than 30 days before trial.

(b) The settlement conference shall be conducted by the trial judge or the trial judge's designee. The attorneys who will conduct the trial, all parties and all persons with authority to settle the claim shall attend the settlement conference unless excused by the court for good cause.

(c) Offers, admissions and statements made in conjunction with or during the settlement conference shall not be admissible at trial or in any subsequent action.

History: L. 1986, ch. 229, § 18; July 1.

60-3414. **Severability.** If any provisions of this act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application and, to this end, the provisions of this act are severable.

History: L. 1986, ch. 229, § 51; July 1.

Revisor's Note:

For remainder of act, see Table of Sections, L. 1986, ch. 229, in Constitutions Volume.

Article 35.—PROFESSIONAL MALPRACTICE LIABILITY SCREENING PANELS

60-3501. **Definitions.** As used in K.S.A. 1987 Supp. 60-3501 through 60-3509:

(a) "Professional licensee" means any person licensed to practice a profession which a professional corporation is authorized to practice but does not include any health care provider as defined by K.S.A. 40-3401 and amendments thereto.

(b) "Professional malpractice liability action" means any action for damages arising out of the rendering of or failure to render services by a professional licensee.

History: L. 1987, ch. 214, § 1; July 1.

60-3502. **Convening of screening panel; selection of members; list of profes-**

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ospital and training center,
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ıents thereto.
76, ch. 231, § 1; L. 1977,
79, ch. 186, § 22; L. 1980,
81, ch. 199, § 1; L. 1982,
84, ch. 177, § 1; L. 1985,
86, ch. 183, § 14; L. 1986,
986, ch. 231, § 4; L. 1986,
86, ch. 181, § 2; L. 1986,
86, ch. 181, § 4; L. 1987,
87, ch. 177, § 1; L. 1987,
87, ch. 178, § 1; L. 1987,

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vs Sifers," Richard Cordry,
.A. 21 (1984).
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indemnification of employee
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NOTATIONS
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155 (1987).
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dding requirements in home
nined. Curtis Ambulance v.
Com'rs, 811 F.2d 1371, 1381

40-3402.

Law Review and Bar Journal References:

"Practical and Constitutional Challenges to the 1985 Kansas Medical Malpractice Legislation," Edward J. Guiducci and Keith L. Mark, 25 W.L.J. 304, 306 (1986).

"Lessons of McGuire vs Sifers," Richard Cordry, Vol. VIII, No. 1, J.K.T.L.A. 21 (1984).

Attorney General's Opinions:

Self-insurance for residents by university of Kansas Medical Center. 85-73.

Maintenance of insurance as condition to rendering services in state. 85-92.

CASE ANNOTATIONS

4. Cited; ambulance services as professional services and exempt from bidding requirements in home rule statute (19-214) examined. Curtis Ambulance v. Shawnee Cty. Bd. of Cty. Com'rs, 811 F.2d 1371, 1381 (1987).

40-3403. Health care stabilization fund, establishment and administration; board of governors; liability of fund; payments from fund; qualification of health care provider for coverage under fund, termination; eligibility of psychiatric hospital for coverage. (a) For the purpose of paying damages for personal injury or death arising out of the rendering of or the failure to render professional services by a health care provider, self-insurer or inactive health care provider subsequent to the time that such health care provider or self-insurer has qualified for coverage under the provisions of this act, there is hereby established the health care stabilization fund. The fund shall be held in trust in a segregated fund in the state treasury. The commissioner shall administer the fund or contract for the administration of the fund with an insurance company authorized to do business in this state.

(b) (1) There is hereby created a board of governors. The board of governors shall:

(A) Provide technical assistance with respect to administration of the fund;

(B) provide such expertise as the commissioner may reasonably request with respect to evaluation of claims or potential claims;

(C) provide advice, information and testimony to the appropriate licensing or disciplinary authority regarding the qualifications of a health care provider; and

(D) prepare and publish, on or before October 1 of each year, a summary of the fund's activity during the preceding fiscal year, including but not limited to the amount collected from surcharges, the highest and lowest surcharges assessed, the amount paid from the fund, the number of judgments paid from the fund, the number of settlements paid from the fund and the amount in the fund at the end of the fiscal year.

(2) The board shall consist of 14 persons appointed by the commissioner of insurance, as follows: (A) The commissioner of insurance, or the designee of the commissioner, who shall act as chairperson; (B) two members appointed from the public at large who are not affiliated with any health care provider; (C) three members licensed to practice medicine and surgery in Kansas who are doctors of medicine; (D) three members who are representatives of Kansas hospitals; (E) two members licensed to practice medicine and surgery in Kansas who are doctors of osteopathic medicine; (F) one member licensed to practice chiropractic in Kansas; (G) one member who is a licensed professional nurse authorized to practice as a registered nurse anesthetist; and (H) one member of another category of health care providers. Meetings shall be called by the chairperson or by a written notice signed by three members of the board. The board, in addition to other duties imposed by this act, shall study and evaluate the operation of the fund and make such recommendations to the legislature as may be appropriate to ensure the viability of the fund.

(3) The board shall be attached to the insurance department and shall be within the insurance department as a part thereof. All budgeting, purchasing and related management functions of the board shall be administered under the direction and supervision of the commissioner of insurance. All vouchers for expenditures of the board shall be approved by the commissioner of insurance or a person designated by the commissioner.

(c) Subject to subsections (d), (e), (f), (i) and (k), the fund shall be liable to pay: (1) Any amount due from a judgment or settlement which is in excess of the basic coverage liability of all liable resident health care providers or resident self-insurers for any personal injury or death arising out of the rendering of or the failure to render professional services within or without this state; (2) any amount due from a judgment or settlement which is in excess of the basic

coverage liability of all liable nonresident health care providers or nonresident self-insurers for any such injury or death arising out of the rendering or the failure to render professional services within this state but in no event shall the fund be obligated for claims against nonresident health care providers or nonresident self-insurers who have not complied with this act or for claims against nonresident health care providers or nonresident self-insurers that arose outside of this state; (3) any amount due from a judgment or settlement against a resident inactive health care provider for any such injury or death arising out of the rendering of or failure to render professional services; (4) any amount due from a judgment or settlement against a nonresident inactive health care provider for any injury or death arising out of the rendering or failure to render professional services within this state, but in no event shall the fund be obligated for claims against: (A) Nonresident inactive health care providers who have not complied with this act; or (B) nonresident inactive health care providers for claims that arose outside of this state, unless such health care provider was a resident health care provider or resident self-insurer at the time such act occurred; (5) reasonable and necessary expenses for attorney fees incurred in defending the fund against claims; (6) any amounts expended for reinsurance obtained to protect the best interests of the fund purchased by the commissioner, which purchase shall be subject to the provisions of K.S.A. 75-3738 through 75-3744, and amendments thereto but shall not be subject to the provisions of K.S.A. 75-4101 and amendments thereto; (7) reasonable and necessary actuarial expenses incurred in administering the act, which expenditures shall not be subject to the provisions of K.S.A. 75-3738 through 75-3744, and amendments thereto; (8) annually to the plan or plans, any amount due pursuant to subsection (a)(3) of K.S.A. 40-3413 and amendments thereto; (9) reasonable and necessary expenses incurred by the insurance department and the board of governors in the administration of the fund; (10) return of any unearned surcharge; (11) reasonable and necessary expenses for attorney fees and other costs incurred in defending a person engaged in residency training from claims for personal injury or death arising out of the rendering of or the failı render professional services by such care provider; (12) any amount due f judgment or settlement for an inju death arising out of the rendering of (ure to render professional services person engaged in residency training amounts authorized by the court pursu K.S.A. 1986 Supp. 60-3411 and amend thereto; and (14) reasonable and nec expenses for the development and p tion of risk management education grams.

(d) All amounts for which the fu liable pursuant to subsection (c) sh paid promptly and in full except that, i case arising out of a cause of action ~~accrued before~~ ~~July 1, 1986,~~ if the ar for which the fund is liable is $300,0 more, it shall be paid, by installment ments of $300,000 or 10% of the amou the judgment including interest the whichever is greater, per fiscal yea first installment to be paid within 60 after the fund becomes liable and each sequent installment to be paid annual the same date of the year the first in ment was paid, until the claim has paid in full. Any attorney fees payable such installment shall be similarly pror

(e) In no event shall the fund be l to pay in excess of $3,000,000 pursua any one judgment or settlement agains one health care provider relating to injury or death arising out of the rend of or the failure to render professiona vices on and after July 1, 1984, ~~and b~~ ~~July 1, 1986~~, subject to an aggregate li tion for all judgments or settlements ar from all claims made in any one fiscal in the amount of $6,000,000 for each vider.

(f) Except as provided by K.S.A. Supp. 60-3411 and amendments theret fund shall not be liable to pay in exce $1,000,000 pursuant to any one judgme settlement for any party against any health care provider relating to any inju death arising out of the rendering of o failure to render professional service and after July 1, 1986, subject to an a gate limitation for all judgments or se ments arising from all claims made in one fiscal year in the amount of $3,000 for each provider.

(g) A health care provider shal

deemed to have qualified for coverage under the fund: (1) On and after the effective date of this act if basic coverage is then in effect; (2) subsequent to the effective date of this act, at such time as basic coverage becomes effective; or (3) upon qualifying as a self-insurer pursuant to K.S.A. 40-3414 and amendments thereto.

(h) A health care provider who is qualified for coverage under the fund shall have no vicarious liability or responsibility for any injury or death arising out of the rendering of or the failure to render professional services inside or outside this state by any other health care provider who is also qualified for coverage under the fund. The provisions of this subsection shall apply to all claims filed on or after the effective date of this act.

(i) Notwithstanding the provisions of K.S.A. 40-3402 and amendments thereto, if the board of governors determines due to the number of claims filed against a health care provider or the outcome of those claims that an individual health care provider presents a material risk of significant future liability to the fund, the board of governors is authorized by a vote of a majority of the members thereof, after notice and an opportunity for hearing, to terminate the liability of the fund for all claims against the health care provider for damages for death or personal injury arising out of the rendering of or the failure to render professional services after the date of termination. The date of termination shall be 30 days after the date of the determination by the board of governors. The board of governors, upon termination of the liability of the fund under this subsection, shall notify the licensing or other disciplinary board having jurisdiction over the health care provider involved of the name of the health care provider and the reasons for the termination.

(j) (1) Upon the payment of moneys from the health care stabilization fund pursuant to subsection (c)(11), the commissioner shall certify to the director of accounts and reports the amount of such payment, and the director of accounts and reports shall transfer an amount equal to the amount certified from the state general fund to the health care stabilization fund.

(2) Upon the payment of moneys from the health care stabilization fund pursuant to subsection (c)(12), the commissioner shall certify to the director of accounts and reports the amount of such payment which is equal to the basic coverage liability of self-insurers, and the director of accounts and reports shall transfer an amount equal to the amount certified from the state general fund to the health care stabilization fund.

(k) Notwithstanding any other provision of the health care provider insurance availability act, no psychiatric hospital licensed under K.S.A. 75-3307b and amendments thereto shall be assessed a premium surcharge or be entitled to coverage under the fund if such hospital has not paid any premium surcharge pursuant to K.S.A. 40-3404 and amendments thereto prior to January 1, 1988.

History: L. 1976, ch. 231, § 3; L. 1980, ch. 143, § 1; L. 1983, ch. 160, § 1; L. 1984, ch. 238, § 3; L. 1984, ch. 178, § 1; L. 1986, ch. 229, § 27; L. 1986, ch. 179, § 2; L. 1986, ch. 184, § 3; L. 1986, ch. 181, § 5; L. 1986, ch. 181, § 6; L. 1987, ch. 176, § 2; L. 1987, ch. 177, § 2; L. 1987, ch. 178, § 3; July 1.

Law Review and Bar Journal References:

"Practical and Constitutional Challenges to the 1985 Kansas Medical Malpractice Legislation," Edward J. Guiducci and Keith L. Mark, 25 W.L.J. 304, 306, 307, 311 (1986).

Attorney General's Opinions:

Self-insurance for residents by university of Kansas medical center. 85-73.

40-3404. Annual premium surcharge; collection by insurer; penalty for failure of insurer to comply; basis of amount of premium surcharge. (a) Except for any health care provider whose participation in the fund has been terminated pursuant to subsection (i) of K.S.A. 40-3403 and amendments thereto, the commissioner shall levy an annual premium surcharge on each health care provider who has obtained basic coverage and upon each self-insurer for each fiscal year. Such premium surcharge shall be an amount equal to a percentage of the annual premium paid by the health care provider for the basic coverage required to be maintained as a condition to coverage by the fund by subsection (a) of K.S.A. 40-3402 and amendments thereto. The annual premium surcharge upon each self-insurer, except for the university of Kansas medical center for persons engaged in residency training, shall be an amount equal to a percentage of the amount such self-insurer