

SESSION OF 2014

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2516

As Amended by Senate Committee of the Whole

Brief*

HB 2516 would amend provisions relating to the operation of mutual insurance companies organized to provide health care provider liability insurance and also would amend the Health Care Provider Insurance Availability Act (Act), which governs the operation of the Health Care Stabilization Fund (HCSF). Further, the bill would make continued HCSF coverage for inactive health care providers (commonly referred to as "tail coverage") immediate upon cancellation or inactivation of a Kansas license and professional liability insurance and increase the level of tail coverage available; make tail coverage available for new professionals and facilities for prior acts; limit disclosure of HCSF claims information to the public; and make technical amendments.

Specific changes proposed by the bill are described below.

Health Care Provider Liability Insurance Companies

The bill would make the following changes affecting mutual insurance companies organized to provide health care provider liability insurance:

- Require approval from the sponsoring organization of the mutual insurance company before the company could undergo a change of control, sale, or merger; and

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- Expand the types of insurance products that could be sold to include all insurance policies statutorily authorized for sale by mutual insurance companies other than life insurance.

Health Care Provider Insurance Availability Act

Definitions

The following changes and additions would be made to definitions in the Act:

- The “health care provider” definition would be amended to:
 - Include, as of January 1, 2015, physician assistants, nursing facilities, assisted living facilities, residential health care facilities, and certain advance practice registered nurses (certified in the role of nurse midwife);
 - Clarify what “health care provider” does not include; and
 - Add providers to the list of those excluded from the definition due to an inactive license or a federally active license that offers protection under the Federal Tort Claims Act;
- Definitions for “Board” and “Board of Directors” would be added to distinguish between two distinct boards, and the appropriate new term would replace existing references to boards; and
- “*Locum tenens* contract” and “professional services” would be defined.

Throughout the bill, references to named state agencies would be replaced with references to the state of Kansas. References to the Director of Accounts and Reports, a position no longer in existence due to agency reorganization,

would be replaced with references to the Secretary of Administration or the state of Kansas.

Disclosure of Information

The bill would amend existing HCSF payment requirements to specify that payments from the HCSF for attorney fees, expert witness fees, and other claims costs would not be subject to the public inspection requirements held in the Kansas Open Records Act (KSA 45-218). Further, the bill would provide that this confidentiality provision would expire on July 1, 2019, unless the Legislature reviews and reenacts it.

Liability Insurance Coverage

The bill would clarify that professional liability insurance and HCSF coverage are a condition of licensure to practice in the state for health care providers, as defined in the bill. Further, the bill would clarify that HCSF liability would be based on the level of HCSF coverage selected by a health care provider, and the HCSF would not be liable for any claim not normally covered by a medical professional liability insurance policy.

Inactive health care providers would be ensured of having HCSF tail coverage equal to the amount of their primary insurance coverage plus the amount of HCSF coverage selected and in effect at the time the event resulting in a claim of medical negligence occurred. Further, beginning July 1, 2014, the five-year compliance period requirement prior to being eligible for tail coverage would be removed and any health care provider would have tail coverage immediately upon canceling or inactivating a Kansas license and the provider's professional liability insurance policy. Any language unnecessary due to the improved tail coverage provisions would be removed.

The bill would clarify that any non-resident health care provider who maintains an active Kansas license would be required to maintain continuous professional liability coverage. Clarification would be made as to when a non-resident health care provider would be required to pay the premium surcharge. An exemption would be made for non-resident health care providers who provide services under a temporary agreement in the state to require occurrence coverage rather than claims made coverage.

The bill would provide that health care provider surcharge refunds would not be issued until notice of cancellation requirements were met.

The Board of Governors of the HCSF would be authorized to grant temporary exemptions from the professional liability insurance and HCSF coverage under exceptional circumstances.

New Health Care Providers—Tail Coverage, Transition Period

The bill also would require the Health Care Provider Insurance Availability Plan (Availability Plan) to make available professional liability insurance coverage for prior acts. Such policies would be required to have limits of coverage not to exceed \$1.0 million per claim (\$3.0 million annual aggregate liability for all claims) made as a result of personal injury or death arising out of the rendering of or the failure to render professional services within the state on or before December 31, 2014. The tail coverage would be available only to the new professionals and facilities made part of the definition of “health care provider” who are in compliance with the coverage requirements specified in KSA 40-3402 on January 1, 2015. The premiums for this coverage would be based upon reasonably prudent actuarial principles. The tail coverage provisions for new health care providers would expire on January 1, 2016. (The Availability Plan is a joint underwriting association created under the Act to provide

commercial insurance coverage for health care providers unable to purchase coverage.)

Insurer Responsibilities

The time allowed for insurers providing basic professional liability insurance coverage to notify the Board of Governors of such coverage for the purpose of hospital credentialing would be shortened.

Insurers failing to report any written or oral claim or action for damages for medical malpractice to the appropriate state health care provider regulatory agency and the Board of Governors would no longer face suspension, revocation, denial of renewal, or cancellation of the insurer's certificate of authority to do business in the state or certificate of self-insurance. Instead, if a civil fine was assessed by the Board of Governors for such violation, the reason for and the amount of the civil fine would be reported to the Insurance Commissioner.

Board of Directors

Membership to the Board of Directors of each plan would be reapportioned to replace one of three members who are representatives of foreign (out-of-state) insurers with the chairperson of the Board of Governors or the chairperson's designee and to replace one of two members of the general public with an additional health care provider.

Board of Governors

The bill would increase membership to the Board of Governors (by new definition known as the "Board") of the HCSF from 10 to 11 members by adding a representative of adult care facilities. All employees of the HCSF who are employed by the Board would be made unclassified employees.

Background

The bill was introduced by the House Committee on Insurance at the request of a representative of the Kansas Medical Society (KMS), who testified before the House Committee on Insurance at a January 27, 2014, informational hearing on the bill. Also testifying in favor of the bill at the informational hearing were representatives of the Kansas Academy of Physician Assistants; Kansas Affiliate of the American College of Nurse-Midwives; the Kansas Association of Osteopathic Medicine; the Kansas Hospital Association; LeadingAge Kansas; the HCSF; and Medicalodges, Inc. Written testimony in favor of the bill was provided at the informational hearing by a representative of the Kansas Health Care Association and the Kansas Center for Assisted Living. Proponents indicated the inclusion of the additional health care provider groups would provide protection for these providers and ensure the availability of quality health care, including long term care.

At the informational hearing before the House Committee on Insurance, the KMS representative testified that the bill would make some changes to respond to an October 2012 Kansas Supreme Court decision (*Miller v. Johnson*) that upheld the constitutionality of the \$250,000 cap on non-economic damages (“pain and suffering”) enacted in 1988. He stated the Court’s opinion suggests that a healthcare provider must participate in the insurance structure involving the HCSF in order to be subject to the cap, which resulted in the request for inclusion by several health care providers groups not previously included in the HCSF. The representative noted the bill would allow the KMS-sponsored mutual insurance company (Kansas Medical Mutual Insurance Company, commonly known as KaMMCO) to offer a wider spectrum of insurance products to address emerging liability trends. Further, the KMS representative stated a companion bill had been introduced seeking an incremental increase in the non-economic damages cap to address concern expressed in the Kansas Supreme Court

decision that the cap had not been adjusted in more than 20 years.

The HCSF representative testified at the informational hearing before the House Committee that the bill would clarify ambiguities by replacing or deleting outdated language and would ensure a health care provider would always have HCSF coverage in the event a patient was injured as a result of an unintended medical outcome. The representative stated discontinuation of the current requirement that health care providers participate in capitalizing the HCSF for at least five years before becoming eligible for HCSF tail coverage would protect patients from the possibility that a health care provider might become inactive without making payment for tail coverage. Further, the representative indicated the level of coverage when a health care provider retires or otherwise discontinues practice in the state would improve.

A formal hearing on the bill subsequently was held before the House Committee on Insurance, and additional testimony in support of the bill was provided by representatives of the Kansas Alliance of Advanced Nurse Practitioners, the HCSF, and KMS. Additionally, the House Committee referred to the testimony provided at the informational hearing. The representative of the HCSF requested an amendment to the definition of a “health care provider” and a technical amendment. There was no opponent testimony.

The House Committee amended the bill to reinsert health care provider groups stricken from the definition of a “health care provider” in the original bill and to make a technical amendment.

The Senate Committee on Financial Institutions and Insurance amendments modify the definition of “health care provider” to include only certain advanced practice registered nurses (nurse midwives); exclude HCSF payments for attorney fees, expert witness fees, and other costs related to claims from a public records inspection provision in the

Kansas Open Records Act; and require the Availability Plan to make tail coverage available to the new professionals and facilities deemed "health care providers" by the bill. The tail coverage provision would expire on January 1, 2016. Testimony provided by the Chairperson of the Kansas APRN Task Force before the Senate Committee requested removal of advanced practice registered nurses (APRNs) from the bill and separate inclusion of certified nurse midwives and clinical nurse specialists in the definition of "health care provider." The Executive Director of the HCSF Board of Governors requested the other amendments adopted by the Committee.

The Senate Committee of the Whole amendment is technical in nature.

The fiscal note prepared by the Division of the Budget on the bill, as introduced, states the HCSF indicated most of the amendments to the Act would not have a fiscal effect, but adding an estimated 4,340 new health care providers would result in at least a 36.0 percent increase in workload. HCSF would require an additional 2.0 FTE positions, resulting in an annual all funds expenditure of \$146,000 for salaries and benefits, other operating expenses, and workstation construction and computers. The HCSF Board of Governors has statutory authority to assess premium surcharges on health care providers to fund all operating costs of the agency, as well as the cost of claims and expenditures required for the defense of claims. As a result, any increase in agency expenditures would be covered by surcharges collected. The HCSF indicated passage of the bill would require an increase in the agency's FY 2015 expenditure limitation for state operations.

In addition, the HCSF indicated the cost of future claims and related expenses for the newly covered health care providers cannot be estimated, as the HCSF does not have loss experience attributable to these new categories. The actuary for the HCSF also has indicated the additional tail coverage for inactive providers included in the bill would initially increase fund liabilities by approximately \$3.0 million

and reduce the unassigned reserves by an equal amount. This would require a small increase in surcharge rates in the future.

Any fiscal effect associated with the bill is not reflected in *The FY 2015 Governor's Budget Report*.