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ATTORNEY GENERAL OPINION NO. 79-107

The Honorable Fletcher Bell
Commissioner of Insurance
First Floor, State Office Building
Topeka, Kansas

Re: State Departments; Public Officers, Employees--Surety Bonds and Insurance--Health Care Provider Insurance

Synopsis: The Committee on Surety Bonds and Insurance may purchase professional malpractice insurance pursuant to K.S.A. 75-4114, for and on behalf of, state agencies operating facilities soon to be subject to the provisions of K.S.A. 1978 Supp. 40-3401 et seq., by virtue of the terms of Substitute for Senate Bill No. 76 of the 1979 Legislative Session.

* * *

Dear Commissioner Bell:

As Chairman for the Committee on Surety Bonds and Insurance, you inquire whether the Committee may purchase medical malpractice insurance for state medical care facilities pursuant to the terms of K.S.A. 75-4114. You advise that the 1979 Kansas Legislature enacted Substitute for Senate Bill No. 76, which provides for a tort claims act and amends certain statutes relevant thereto. Among those sections amended by the new legislation is K.S.A. 1978 Supp. 40-3401 which, by virtue of its amendment, no longer excludes state health care facilities from the definition of "health care provider." Pursuant to the terms of the Health Care Provider Insurance Act, K.S.A. 1978 Supp. 40-3401 et seq., each such health care

provider must either qualify as a self-insurer under the act or purchase the required amounts of professional malpractice insurance. However, in its various appropriation acts, the 1979 Legislature did not include any line item appropriations to the affected agencies or the Committee for the purchase of the insurance now required. Since Substitute for Senate Bill No. 76 takes effect July 1, 1979, you ask specifically whether the Committee may authorize the purchase of such insurance and charge the costs therefor against the general operating accounts or fee accounts of such agencies.

The factual and legal situation you pose requires analysis of at least three separate, yet related, subjects of state law, namely the Health Care Provider Insurance Act, the laws establishing the state committee on surety bonds and insurance (K.S.A. 75-4101 et seq., as amended), and the recently-enacted Kansas Tort Claims Act.

In responding to your inquiry, we begin our discussion with a brief review of pertinent developments in the law of sovereign immunity in Kansas. Since the 19th century, Kansas courts have recognized governmental immunity and ruled on its scope and application. Generally speaking, the state of Kansas was considered immune from liability for tortious conduct in the performance of governmental and proprietary functions. Local units of government, such as municipalities, were not immune while performing similar proprietary activities. In the case of Carroll v. Kittle, 203 Kan. 841 (1969), the Kansas Supreme Court altered the judicial law regarding the state's blanket immunity by abolishing immunity from suit where the state was engaged in the performance of proprietary functions. In response to this decision, the 1970 Kansas Legislature enacted a statute reimposing statutory immunity from liability for the state government. K.S.A. 46-901 et seq. Subsequently, in 1975, the Supreme Court declared the state governmental immunity statute unconstitutional as violative of the equal protection and due process requirements of both the U. S. Constitution and the Kansas Constitution's Bill of Rights. But, on rehearing, the Court reversed its prior decision and upheld the constitutionality of K.S.A. 46-901 et seq. See Brown v. Wichita State University, 217 Kan. 279 (1975); rev'd, 219 Kan. 2 (1976).

Substitute for Senate Bill No. 76 is the latest episode in the Kansas experience with tort liability and immunity therefrom. Generally speaking, the new Kansas Tort Claims Act allows governmental entities, including the state, to be sued for tortious conduct. There are enumerated exceptions to this "open-ended" liability, as well as limits to the maximum amounts

recoverable. (See New Sections 4 and 5 of the Act.) Thus, the state of Kansas is no longer immune from suits sounding in tort and may be liable under those conditions specified in the Act. Within this context, we now examine the act as it relates to health care facilities operated by the state.

New Section 2 of the Act defines "State" as follows:

> "(a) 'State' means the state of Kansas or any office, department, agency, authority, bureau, commission, board, institution, hospital, college, university or other instrumentality thereof." (Emphasis added.)

Thus, all state agencies and instrumentalities are subject to the conditions and limitations of the tort claims act. This includes all hospitals, clinics, medical care facilities, mental health facilities and any other state-owned and operated health care facility. Although such agencies are subject to the Act, certain claims against such agencies regarding the rendering of professional services are not subject to the conditions and limitations of the Act. In this regard, New Section 15 provides in pertinent part:

> "The Kansas tort claims act shall not be applicable to claims arising from the rendering of or failure to render professional services by a health care provider or an employee thereof, when the health care provider is a governmental entity. Claims for damages against a health care provider that is a governmental entity, arising out of the rendering or failure to render professional services by such health care provider may be recovered in the same manner as claims for damages against a health care provider that is not a governmental entity. The terms 'health care provider,' as used in this section, shall have the meaning ascribed thereto in K.S.A. 1978 Supp. 40-3401, and amendments thereto." (Emphasis added.)

Thus, in reference to a health care provider that is a governmental entity, the application of the Kansas Tort Claims Act depends entirely on the nature of the tortious conduct alleged. For example, a guest injured in a "slip and fall" incident while visiting a state-operated hospital is subject to the Act including the exceptions to liability and dollar limitations contained therein. On the other hand, failure of a state hospital to provide the legally required care could result in claims by injured patients that would not be subject to the exceptions and limitations of the Act.

Therefore, for the purposes of professional malpractice liability, the new Kansas Tort Claims Act subjects state operated health care providers to the same potential liabilities as health care providers in the private sector.

Kansas has, since 1976, required health care providers in the private sector to obtain or maintain adequate liability coverage. The Health Care Provider Insurance Act, K.S.A. 1978 Supp. 40-3401 et seq., establishes, in some detail, the minimum professional malpractice insurance coverage required by licensed health care providers (K.S.A. 1978 Supp. 40-3402) and the prerequisites for obtaining the status of a "self-insurer for those institutions, hospitals, clinics and medical care facilities qualified under the Act (K.S.A. 1978 Supp. 40-3414). In addition, the Act requires the collection of a surcharge to be paid into a health care stabilization fund designed to pay claims and judgments beyond the capabilities of the self-insurer or the limits of a particular policy of insurance. Other provisions provide for the monitoring of health care provider compliance with the Act and enforcement of the Act by the attorney general. See K.S.A. 1978 Supp. 40-3416.

Prior to the effective date of the new Kansas Tort Claims Act, the Health Care Provider Insurance Act specifically excluded from its requirements "any medical care facility under the supervision and control of the state board of regents, within the department of social and rehabilitation services or within the department of human resources." K.S.A. 1978 Supp. 40-3401. Section 22 of Substitute for Senate Bill No. 76 amends K.S.A. 40-3401, by striking the above-quoted language. In our judgment, this evinces clear legislative intent that health care providers which are state governmental entities are not only to be treated as private health care providers for the purposes of professional malpractice liability, but also are now required to provide the necessary fiscal responsibility to respond to claims based on such liability, either through a program of self-insurance or the purchase of the required levels of insurance coverage.

After July 1 of this year, K.S.A. 1978 Supp. 40-3401(f), as amended by Section 22 of Substitute for Senate Bill No. 76, will define a health care provider as follows:

> "(f) 'Health care provider' means a person licensed to practice any branch of the healing arts by the state board of healing arts, a person who holds a temporary permit to practice any branch of the healing arts issued by the state board of healing arts, a person engaged in a postgraduate training program approved by the state board of healing arts, a medical care facility licensed by the department of health and environment, a health maintenance organization issued a certificate of authority by the commissioner of insurance, an optometrist licensed by the board of examiners in optometry, a podiatrist registered by the state board of healing arts, a pharmacist registered by the state board of pharmacy, a licensed professional nurse who is licensed by the board of nursing and certified as a nurse anesthetist by the American association of nurse anesthetists, a professional corporation organized pursuant to the professional corporation law of Kansas by persons who are authorized by such law to form such a corporation and who are health care providers as defined by this subsection, a dentist certified by the state board of healing arts to administer anesthetics under K.S.A. 1978 Supp. 65-2899, a physical therapist registered by the state board of healing arts, or a mental health center or mental health clinic licensed by the secretary of social and rehabilitation services;"

As Section 22 of Substitute for Senate Bill No. 76 eliminates the exempt status of medical care facilities under the supervision and control of the state, it is clear that those governmental entities which are encompassed within the definition prescribed by said Section 22 must comply with the terms of the Health Care Provider Insurance Act, as amended.

You advise that of the numerous hospitals or medical care facilities operated by state agencies that come within the definition of a "health care provider," only the University of Kansas Medical Center in Kansas City, Kansas, would be likely to meet the statutory qualifications to be a self-insurer. You advise, however, that even the University of Kansas Medical Center desires to purchase insurance coverage for professional malpractice claims, rather than serve as a self-insurer.

With regard to the "State," including its subparts as defined in the Act, the Kansas Tort Claims Act specifically restricts the purchase of insurance pursuant to New Section 11. Said Section, in relevant part, provides as follows:

> "(a) A governmental entity may obtain insurance to provide for (1) its defense, (2) for its liability for claims pursuant to this act, including liability for civil rights actions as provided in section 16, (3) the defense of its employees, and (4) for medical payment insurance when purchased in conjunction with insurance authorized by (1), (2) or (3) above.
>
> "Any insurance purchased under the provisions of this section may be purchased from any insurance company or association. In the case of municipalities any such insurance may be obtained by competitive bids or by negotiation. In the case of the state, any such insurance shall be purchased in the manner and subject to the limitations prescribed by K.S.A. 75-4114, and amendments thereto."

Clearly, if state governmental entities are to purchase liability insurance to cover claims subject to the act, such entities, including health care providers, are governed by the terms of K.S.A. 75-4114. It appears, however, by the terms of New Section 11(a), that the Legislature contemplated such governmental health care providers purchasing insurance only for those claims which are subject to the Kansas Tort Claims Act, e.g., the typical "slip and fall" cases. Pursuant to Section 15, claims arising from the delivery or failure to deliver professional medical services are not subject to the terms of the Kansas Tort Claims Act. As a result, the authority to purchase liability insurance, expressly authorized by New Section 11, does not extend to insurance coverage for claims not arising under the Kansas Tort Claims Act, i.e., claims arising from the rendering or failure to render professional services by a health care provider.

Prior to the enactment of Substitute for Senate Bill No. 76, state agencies were authorized to purchase liability insurance pursuant to K.S.A. 74-4715, which reads in pertinent part:

> "(a) The procurement of insurance is hereby authorized for the purpose of insuring the state or any county or city, and their officers, employees and agents against any liability, in addition to liability covered by the Kansas workmen's compensation law, for injuries or damages resulting from any tortious conduct of such officers, employees and agents arising from the course of their employment." (Emphasis added.)

Pursuant to subsection (b) of K.S.A. 74-4715, state agencies presently are permitted to purchase liability insurance through the procedures of K.S.A. 75-4114, even though not required to do so. However, upon the effective date of Substitute for Senate Bill No. 76, such authorization is revoked by the repeal of K.S.A. 74-4715. (See section 33 of the Act.) Thus, whatever independent authority possessed by state agencies to purchase tort liability insurance will be removed by the repeal of K.S.A. 74-4715. Upon the effective date of Substitute for Senate Bill No. 76, state agencies will be dependent upon the State Committee on Surety Bonds and Insurance to purchase liability insurance for such agencies, including state-operated health care providers which are required to obtain professional medical malpractice insurance by the terms of K.S.A. 1978 Supp. 40-3402. The Committee derives such authority pursuant to the terms of K.S.A. 75-4114 which provides as follows:

> "The committee, in addition to the coverages specified in K.S.A. 75-4109, may, within the limitations of appropriations made by the legislature therefor, purchase such liability insurance as they deem necessary for the protection of the state and its officers, employees and agents against any liability for injuries or damages resulting from any tortious conduct of such officers, employees or agents arising from the course of their employment or from any liability for injuries or damages resulting from conduct or decisions of such officers, employees or agents in carrying out the official duties of their offices pursuant to existing law, rule or regulation or court order." (Emphasis added.)

It is clear from the foregoing that the Committee has authority, independent of the terms of the Tort Claims Act, to purchase professional liability insurance for state agencies operating a facility subject to the Health Care Provider Insurance Act.

However, an additional problem exists in that the 1979 Kansas Legislature did not provide line item appropriations for liability insurance premiums to such health care providers, their parent agencies or to the Committee on Surety Bonds and Insurance. Thus, the issue arises as to whether the costs for such insurance premiums for professional malpractice insurance for state-operated health care providers may lawfully be charged against the fee accounts or general operating appropriations of such health care facilities. Resolution of this issue must be determined by reference to Article 2, Section 24 of the Kansas Constitution and the statutory language of K.S.A. 75-4114.

The Kansas Constitution provides:

> "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." Kan. Const. Art. 2, §24.

Thus, any charge against agency accounts must be found to be within the purposes of the "specific appropriation."

In State, ex rel., v. Fadely, 180 Kan. 652, 661 (1957), the Court said:

> "'The term 'specific appropriation made by law' may be defined as an authority of the legislature, given at the proper time and in legal form to the proper officials, to apply a distinctly specified sum from out of the state treasury, in a given period, for a specified objective or demand against the state. In general terms a 'specific appropriation made by law' is the act of setting money apart formally or officially for a special use or purpose by the legislature in clear and unequivocal terms in a duly enacted law."

In its holding, the Kansas Supreme Court declared that an appropriation to the State Finance Council for emergency purposes was a "specific appropriation" within the meaning of the Kansas Constitution. Therefore, we must conclude from the holding of the Fadely case that an appropriation for multiple purposes within the same general category is constitutionally permissible.

Of course, the legislature is free to further restrict the expenditure of public moneys and may require even greater specificity in its appropriations for the purpose of controlling the expenditure of moneys by state agencies. As a result, we are called upon to determine what degree of specificity is required by the use of the phrase "within the limitations of appropriations made by the legislature therefor," as these words are used in K.S.A. 75-4114.

The preceding language was inserted into the statute by the 1976 Kansas Legislature following an interim study report inspired by Attorney General Opinion No. 75-316, issued August 7, 1975. The Attorney General had ruled that a "specific appropriation" is not required in order for the Committee on Surety Bonds and Insurance to procure liability insurance on behalf of state agencies, thus allowing the costs of such insurance to be prorated to each agency and charged against the general operating fund of the agency. Obviously, the Attorney General did not use the words "specific appropriation" in their constitutional sense for such "specific appropriation" is mandatory. Kan. Const. Art. 2, §24. Rather, he apparently intended to say that K.S.A. 75-4114, as it read prior to 1976, did not require a line item appropriation. In any event, the interim report on the purchase of liability insurance recommended the passage of House Bill No. 2673 (1976), because the Legislative Budget Committee was "concerned that the present law, as interpreted by the Attorney General, permits the purchase of liability insurance without an appropriation expressly for that purpose." Report of Kansas Legislative Interim Studies to the 1976 Legislature, page 1111 (1975).

The foregoing constitutes rather persuasive evidence that the 1976 Legislative Budget Committee intended by the insertion of the phrase "within the limitations of appropriations made by the legislature therefor," to deny the Committee on Surety Bonds and Insurance the authority to purchase liability insurance and prorate the costs to the general operating funds of the various agencies. However, we have serious reservations as to whether such intent was accomplished by the amendatory language included in K.S.A. 75-4114, by the 1976 amendments thereto.

Our research has disclosed that the phrases "within appropriations therefor," "within the limitations of appropriations available therefor," etc., as they are contained within various existing statutes, do not reflect legislative intent that an expenditure for a purpose expressly identified in the enabling statute be expressed with equal detail in a separate line item of an appropriation measure. The manner and form of appropriations are policy decisions made through the process of the evolution of the state budget by the governor and, in the final instance, by the legislature. In those instances where one of the foregoing phrases has been used in a substantive statute, the custom and practice has not been to appropriate by specific item, but to provide appropriations for state agencies by general items for operating expenditures. These general items are usually not categorized with any more detail than items of appropriation for "salaries and wages" and for "other operating expenditures." See Appendix A.

While the cited examples may not exhaust legislative references to appropriations in the statutes, it is evident that the legislature does not normally intend for the phrase "within the limitations of appropriations made by the legislature therefor," to require a line item appropriation before expenditures authorized by a given section may be made. In addition, when the legislature desires to prevent the use of general operating funds, it can, and does, so provide in the statute authorizing the expenditure that a specific "item" of appropriation be made prior to the agency making the expenditure. See Appendix B. In other words, the general practice has been to allow expenditures by agencies for authorized purposes within the general category without a line item appropriation naming the exact item or service to be acquired. Computer analysis reveals only two exceptions to these general rules. Appendix C contains those enabling statutes using language similar to statutes discussed in Appendix A but which have been funded through more exact appropriation language corresponding to the more detailed line items identified in Appendix B. Thus, even where expenditures are authorized only "within the limitations of appropriations," general operating funds are used to carry out identified purchases or activities, unless the legislature has expressly limited the authority to expend to a given item of appropriation or special fund.

We can only conclude that even though the legislature may have had some desire to require appropriations expressly identified for insurance costs as prerequisite to the purchase of liability insurance pursuant to K.S.A. 75-4114, the language chosen in 1976 simply does not accomplish such an objective. Such language, in custom and usage, is insufficient in itself to restrict the agency authority to expend general operating funds for the purchase of liability insurance. See 73 Am. Jur. 2d, §233 (1974).

Needless to say, were such general language sufficient to require a line item appropriation before expending funds for purposes authorized by a statute using such language, virtually all those functions mandated by the relevant sections cited in Appendix A would be impossible. The same would be true in the case of health care providers that are governmental agencies. Stripped of governmental immunity, subject to the mandates of the Health Care Provider Insurance Act, unable to qualify for self-insurance and, for purposes of professional malpractice liability, excluded from the Kansas Tort Claims Act, such state entities would be in the absurd and untenable position of closing their doors to Kansas residents pursuant to the mandates of the Health Care Provider Insurance Act. We certainly cannot conclude that this was an intended result of the legislature's enactment of Substitute for Senate Bill No. 76, and in spite of the apparent desire of a 1975 interim legislative committee, we cannot conceive of the Kansas Judiciary construing K.S.A. 75-4114 as prohibiting the purchase of required medical malpractice insurance for state-operated health care providers.

Therefore, the Committee on Surety Bonds and Insurance may purchase professional malpractice insurance pursuant to K.S.A. 75-4114, for and on behalf of, state agencies operating facilities soon to be subject to the provisions of K.S.A. 1978 Supp. 40-3401 et seq., by virtue of the terms of Substitute for Senate Bill No. 76 of the 1979 Legislative Session.

Very truly yours,

Robert T. Stephan

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Attorney General

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Deputy Attorney General

RTS:BJS:gk
Enclosures

APPENDIX A

The following sections have similar phrases ("within the limitations of appropriations therefor") and do not have state general fund appropriations delineated by particular items for specific purposes, or are financed by a combination of state general fund and special revenue fund moneys:

1. K.S.A. 40-110--Insurance Commissioner (HB 2346);

2. K.S.A. 1978 Supp. 49-404--KCC--mined-land (HB 2279) [special revenue fund for all operations];

3. K.S.A. 1978 Supp. 65-5a13 (see 65-5a08; operations)--H&E (HB 2346);

4. K.S.A. 1978 Supp. 66-1318--DOT--inspection stations (SB 157);

5. K.S.A. 1978 Supp. 71-209--DOC--juco instruction (a) institutions (never appropriated to DOC) (SB 183);

6. K.S.A. 1978 Supp. 74-3246--Regents--osteopathic students (HB 2692, Sec. 19) slots and loans;

7. K.S.A. 74-6203--GCCA--corporation of all agencies;

8. K.S.A. 1978 Supp. 74-6904--SRS--personnel (SB 158);

9. K.S.A. 1978 Supp. 74-7105--Health Care Cost Commission--services and personnel (expired L. 1978, ch. 13, sec. 6);

10. K.S.A. 1978 Supp. 74-7304--Crime Victims Reparations Board--office and personnel (HB 2308);

11. K.S.A. 1978 Supp. 75-1220--Department of Administration--Mobile Home Board (SB 173);

12. K.S.A. 1978 Supp. 75-3111--Attorney General--deputy and assistant A.G.'s (HB 2341a);

13. K.S.A. 75-3122--Supreme Court--clerks and secretaries (HB 2692, Sec. 14);

14. K.S.A. 75-3123--Supreme Court--reporter (same);

15. K.S.A. 75-3124--Supreme Court (same);

16. K.S.A. 75-3125--Supreme Court--clerk (same);

17. K.S.A. 75-3126--Supreme Court (same);

18. K.S.A. 75-3335--SRS--regional youth facilities (SB 158);

19. K.S.A. 75-3335a--SRS--Same, supplemental (SB 158);

20. K.S.A. 75-4807--Department of Administration--planning div. personnel (SB 173);

21. K.S.A. 75-5323--SRS--Div. Services Child. & Youth (SB 158);

22. K.S.A. 75-5350--SRS--Social Work Exam.--personnel (SB 158);

23. K.S.A. 1978 Supp. 76-370--KUMC--affiliated family practice (HB 2692, Sec. 21);

24. K.S.A. 76-719c--Regents--Grants to graduate students (HB 2692, Sec. 19);

25. K.S.A. 1978 Supp. 76-826--KUMC--liability insurance (HB 2692, Sec. 21).

APPENDIX B

Examples of statutes which appear to require a specific item or which refer to "item," and the state general fund appropriations therefor, include the following:

1. K.S.A. 2-1907c--State Conservation Commission
"State aid to soil conservation districts"
1979 House Bill No. 2345, Sec. 8(a);

2. K.S.A. 1978 Supp. 22-4512--Supreme Court--Aid to Indigent Defendants
"Aid to indigent defendants fund"
1979 House Bill No. 2309, Sec. 3(a);

3. K.S.A. 1978 Supp. 46-1214--Legislative Coordinating Council
"Legislative coordinating council--for other expenses"
"For the legislative research department"
"For the office of revisor of statutes"
1979 House Bill No. 2234, Sec. 3(a)
[See also K.S.A. 46-1216];

4. K.S.A. 1978 Supp. 65-4403 and 65-4407--SRS--DMHRS
"Aid for mental retardation programs in accordance with K.S.A. 1978 Supp. 65-4401 et seq."
"Aid for mental health center programs in accordance with K.S.A. 1978 Supp. 65-4401 et seq."
1979 Senate Bill No. 246, Sec. 10(a);

5. K.S.A. 1978 Supp. 65-4912--Health Care Provider Malpractice Study Commission [Act creating commission expired December 12, 1978]
"Legislative coordinating council--for other expenses--health care provider malpractice study commission";

6. K.S.A. 75-1033--Department of Administration
"To the state printing advisory committee for the acquisition of software and hardware and related expenses for printing by the state, including photo composition"
L. 1975, Ch. 25, Sections 2 and 10.

APPENDIX C

The following statutes have some form of the "within limitations of appropriations made therefor" phrase and have been funded by specific items of appropriation:

1. K.S.A. 74-3219--Regents--reciprocity agreements for higher education (HB 2692, Sec. 19);

2. K.S.A. 79-4504--Revenue--Homestead Relief (SB 158 and HB 2692, Sec. 58).