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August 29, 1984

ATTORNEY GENERAL OPINION NO. 84- 88

The Honorable Fletcher Bell
Commissioner of Insurance
420 SW 9th Street
Topeka, Kansas 66612

Re: Insurance -- Health Care Provider Insurance -- Health
Care Stabilization Fund; Board of Governors

State Departments; Public Officers, Employees -- Kan-
sas Tort Claims Act -- Advisory Committees Covered

Synopsis: The 1984 Kansas Legislature amended the Health Care
Provider Insurance Availability Act, K.S.A. 40-3401
et seq., to create a Board of Governors to assist in
the administration of the Kansas Health Care Stabili-
zation Fund. K.S.A. 1983 Supp. 40-3403, as amended by
L. 1984, ch. 238, §3. Pursuant to subsection (b)(3) of
the statute, the board is made a part of the state in-
surance department. Accordingly, for purposes of the
Kansas Tort Claims Act, K.S.A. 1983 Supp. 75-6101 et
seq., the members of the board are "employees" of a
governmental entity, and so are covered by the provisions
thereof. While the board's performance of the duties
set forth by K.S.A. 40-3403(b), as amended, does not
fall under the exemptions from liability of K.S.A. 1983
Supp. 75-6104, the latter statute arguably does apply
to the performance of quasi-judicial duties under K.S.A.
1983 Supp. 40-3403(g). Cited herein: K.S.A. 40-102,
K.S.A. 1983 Supp. 40-3403, as amended by L. 1984, ch.
238, §3, K.S.A. 1983 Supp. 75-6102, 75-6103, 75-6104.

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Dear Commissioner Bell:

You have requested the opinion of this office on a question concerning the newly-created Board of Governors of the Kansas Health Care Stabilization Fund, which you chair. Created by action of the 1984 Kansas Legislature, the board provides assistance with the administration of the fund, which is under the control of your office. (K.S.A. 1983 Supp. 40-3403, as amended by Laws 1984, chapter 238, Section 3.) Concerns have been raised by board members as to the potential for tort liability on their part in the performance of their duties. Accordingly, you request our opinion on the application of the Kansas Tort Claims Act, K.S.A. 1983 Supp. 75-6101 et seq., to the Board of Governors.

As created by the 1984 amendments to the Health Care Provider Insurance Availability Act, the Board of Governors is composed of the Commissioner of Insurance and 12 members, 11 of which are appointed by health care providers covered by the act (e.g. doctors, osteopaths, hospital representatives, etc.) and one representing the general public. The board was created to provide technical assistance in the administration of the Health Care Stabilization Fund [which was created to help pay judgments awarded for the malpractice of health care providers (K.S.A. 1983 Supp 40-3403(c), as amended)] to contribute expertise with respect to evaluation of claims, offer advice regarding the qualifications of health care providers, and generally study and evaluate the operation of the fund, as well as making recommendations to the legislature to insure the viability of the fund. K.S.A. 1983 Supp. 40-3403(b), as amended. The board is also authorized, by a majority vote of its members, and after notice and an opportunity for hearing, to terminate the liability of the fund for all claims against any individual health care provider who presents a "material risk of significant future liability to the fund." K.S.A. 1983 Supp. 40-3403(g), as amended.

In the performance of these duties, the board is expressly made a part of the insurance department. As provided by K.S.A. 1983 Supp. 40-3403(b)(3), as amended:

"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."

While members of the board of governors do not receive compensation for their service, as a board they may make expenditures which are chargeable against the fund. K.S.A. 1983 Supp. 40-3403(c) (9), as amended.

The Kansas Tort Claims Act, K.S.A. 1983 Supp. 75-6101 et seq., was enacted to make governmental liability the rule for negligent acts or omissions, and immunity the exception. K.S.A. 1983 Supp. 75-6103 imposes liability on governmental entities for the negligent or wrongful acts or omissions of employees acting within the scope of their employment. For the purposes of the act, "governmental entity" is defined to include the state or any municipality, with the former term including "any department or branch of state government, or any agency, authority, institution or other instrumentality thereof." This would include the insurance department (K.S.A. 40-102). K.S.A. 1983 Supp. 75-6102(a), (c). K.S.A. 1983 Supp. 75-6102(d) defines "employee" thusly:

"Any officer, employee, servant or member of a board, commission, committee, division, department, branch or council of a governmental entity, including elected or appointed officials and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation. 'Employee' does not include an independent contractor under contract with a governmental entity. 'Employee' does include former employees for acts and omissions within the scope of their employment during their former employment with the governmental entity."

The above definition clearly includes members of boards and persons acting on behalf of a governmental institution in an official capacity, with or without compensation. Therefore, even in the absence of the language of K.S.A. 1983 Supp. 40-3403(b) (3), which makes the board a part of the insurance department, the Tort Claims Act would apply. That wording simply clarifies which "governmental entity" the board members serve in their official capacity.

Having determined that the activities of the Board of Governors fall within the Tort Claims Act, it remains to examine the exceptions from liability which are set forth at K.S.A. 1983 Supp. 75-6104. In deciding whether a particular action by an agency is within these exceptions, one must look to the factors involved in performing the particular activity. Cook v. City of Topeka, 232 Kan. 334 (1982). For example, when a city adopts a zoning ordinance or a comprehensive plan, it is acting in a legislative function, and so would be exempt from liability

under subsection (a) of K.S.A. 1983 Supp. 75-6104. When a zoning question involving one tract is involved, however, and evidence is weighed and rules applied to specific facts, then the function is judicial or quasi-judicial in nature, and so exempt under subsection (b) of the statute. Accordingly, the same agency may exercise a number of different functions, some of which are exempted from liability by virtue of K.S.A. 1983 Supp. 75-6104, and some of which are not.

In looking at the specific functions performed by the board, it is immediately apparent that the duties exercised under subsection (g) of K.S.A. 1983 Supp. 40-3403, as amended, are quasi-judicial in nature. Therein, it is provided:

"Notwithstanding the provisions of K.S.A. 40-3402 and amendments thereto, if the board of governors determines 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 (g), 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." (Emphasis added.)

In determining that a particular health care provider poses "a material risk of significant future liability to the fund," the board is acting in a quasi-judicial function. As noted by Chief Justice Fatzner in Thompson v. Amis, 208 Kan. 658 (1972):

"Quasi-judicial is a term applied to administrative boards or officers empowered to investigate facts, weigh evidence, draw conclusions as a basis for official actions, and exercise discretion of judicial nature." 208 Kan. at 663.

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As a result, the board's actions pursuant to subsection (g) likely would be found by a court to fall within the judicial function exception from liability of K.S.A. 1983 Supp. 75-6104(b).

The remainder of the board's duties, which are found at subsection (b)(1) of K.S.A. 1983 Supp. 40-3403, as amended, involve providing:

"(A) Technical assistance with respect to administration of the fund;

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

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

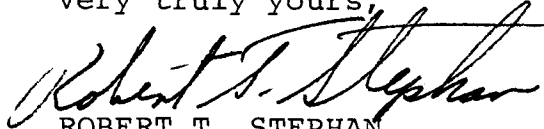
Subsection (b)(2) also provides that the board, in addition to its other duties, shall also "study and evaluate the operation of the fund and make such recommendations to the legislature as may be appropriate to ensure the viability of the fund." In our opinion, these latter functions are administrative in nature, rather than legislative or judicial, involving as they do the rendering of advice concerning the administration of the fund and the evaluation of claims and providers' qualifications. As such, they are not within the two exceptions to liability cited above, nor do we find that they clearly fall under any of the others set forth at K.S.A. 1983 Supp. 75-6104. Potential liability is therefore a possibility, subject to the other provisions of the Act.

In conclusion, the 1984 Kansas Legislature amended the Health Care Provider Insurance Availability Act, K.S.A. 40-3401 et seq., to create a Board of Governors to assist in the administration of the Kansas Health Care Stabilization Fund. K.S.A. 40-3403, as amended by L. 1984, ch. 238, §3. Pursuant to subsection (b)(3) of the statute, the board is made a part of the state insurance department. Accordingly, for purposes of the Kansas Tort Claims Act, K.S.A. 1983 Supp. 75-6101 et seq., the members of the board are "employees" of a governmental entity, and so are covered by the provisions thereof. While the board's performance of the duties set forth by K.S.A. 40-3403(b) does not fall under the exemptions from liability of K.S.A. 1983 Supp. 75-

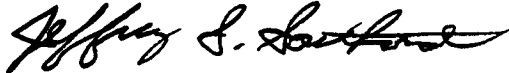
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6104, the latter statute does arguably apply to the performance of quasi-judicial duties under K.S.A. 1983 Supp. 40-3403(g).

Very truly yours,



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