



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

February 21, 1985

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 85- 21

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

Re: Insurance -- Health Care Provider Insurance --
Health Care Provider Insurance Availability Plan;
Governing Board

State Departments; Public Officers, Employees --
Kansas Tort Claims Act -- Advisory Committees

Synopsis: Pursuant to K.S.A. 1984 Supp. 40-3413, the Kansas Health Care Provider Insurance Availability Plan is created to insure the availability of professional liability insurance to those providers who are in good faith entitled to insurance but who are unable to procure it through ordinary methods. K.S.A. 1984 Supp. 40-3423(e) establishes a governing board which reviews and prescribes operating rules for the plan on at least an annual basis. The board is appointed by the commissioner of insurance, and acts on behalf of the insurance department in overseeing the plan. Accordingly, for purposes of the Kansas Tort Claims Act, K.S.A. 75-6101 et seq., the members of the board are employees of a governmental entity, and so are covered by the provisions of the act. Cited herein: K.S.A. 40-102, K.S.A. 1984 Supp. 40-3413, K.S.A. 75-6102, 75-6104, 75-6108, 75-6109.

*

*

*

Dear Commissioner Bell:

You have requested the opinion of this office on a question concerning the potential liability of the governing board of the Kansas Health Care Provider Insurance Availability Plan. Created pursuant to K.S.A. 1984 Supp. 40-3413, the board reviews and prescribes operating rules for the plan, which is designed to apportion among insurers those health care providers who in good faith are entitled to professional liability insurance, but who are unable to obtain such coverage through ordinary methods. In order to respond to concerns of board members as to the potential for tort liability in the performance of their duties, you request our opinion as to the application of the Kansas Tort Claims Act, K.S.A. 75-6101 et seq., to the governing board.

K.S.A. 1984 Supp. 41-3413 establishes both the plan and the governing board, and in pertinent part states as follows:

"(a) Every insurer and every rating organization shall cooperate in the preparation of a plan or plans for the equitable apportionment among such insurers of applicants for professional liability insurance and such other liability insurance as may be included in or added to the plan, who are in good faith entitled to such insurance but are unable to procure the same through ordinary methods. Such plan or plans shall be prepared and filed with the commissioner within a reasonable time but not exceeding 60 calendar days from the effective date of this act. Such plan or plans shall provide:

"(1) Reasonable rules governing the equitable distribution of risks by direct insurance, reinsurance or otherwise including the authority to make assessments against the insurers participating in the plan or plans;

"(2) rates and rate modifications applicable to such risks which shall be reasonable, adequate and not unfairly discriminatory;

"(3) a method whereby annually the plan shall compare the premiums earned to the losses and expenses sustained by the plan for the preceding fiscal year. If there is any surplus of premiums over losses and expenses received for that year such surplus shall be

transferred to the fund. If there is any excess of losses and expenses over premiums earned such losses shall be transferred from the fund;

"(4) the limits of liability which the plan shall be required to provide, but in no event shall such limits be less than those limits provided for in subsection (a) of K.S.A. 40-3402 and amendments thereto;

"(5) a method whereby applicants for insurance, insureds and insurers may have a hearing on grievances and the right of appeal to the commissioner.

"(b) The commissioner shall review the plan as soon as reasonably possible after filing in order to determine whether it meets the requirements set forth in subsection (a). As soon as reasonably possible after the plan has been filed the commissioner shall in writing approve or disapprove the plan. Any plan shall be deemed approved unless disapproved within 30 days. Subsequent to the waiting period the commissioner may disapprove any plan on the ground that it does not meet the requirements set forth in subsection (a), but only after a hearing held upon not less than 10 days' written notice to every insurer and rating organization affected specifying in what respect the commissioner finds that such plan fails to meet such requirements, and stating when within a reasonable period thereafter such plan shall be deemed no longer effective. Such order shall not affect any assignment made or policy issued or made prior to the expiration of the period set forth in the order. Amendments to such plan or plans shall be prepared, and filed and reviewed in the same manner as herein provided with respect to the original plan or plans.

. . .

"(e) For every such plan or plans, there shall be a governing board which shall meet at least annually to review and prescribe operating rules. Such board shall consist of nine members to be appointed by the commissioner as follows: Three members shall be

representatives of foreign insurers, two members shall be representatives of domestic insurers, two members shall be representatives of the general public, one member shall be a licensed insurance agent actively engaged in the solicitation of casualty insurance and one member shall be a health care provider. The members shall be appointed for a term of two years." (Emphasis added.)

From the above, it may be observed that the role of the governing board is a limited one. The plan itself is put together by action of the insurers themselves (presumably with some input or direction from the insurance department), and is submitted to the insurance commissioner for approval or disapproval. Once in effect, the plan may be amended in the same manner as it was originally adopted. The board's role is restricted to reviewing the plan on at least an annual basis, and prescribing what are referred to as "operating rules." Appointed by the commissioner, the board is composed of nine members drawn from the groups specified in subsection (e) of K.S.A. 1984 Supp. 40-3413. Nothing appears in either the statute itself or elsewhere in the Health Care Provider Insurance Availability Act, K.S.A. 40-3401 et seq., which indicates that board members receive compensation for their services, or are even paid a per diem rate or receive mileage.

However, the lack of any financial compensation to board members is not dispositive of the question of liability, for the Kansas Tort Claims Act, K.S.A. 75-6101 et seq., is worded so as to hinge upon the duties of the individual, not whether compensation is paid. At K.S.A. 75-6102(d), the act defines "employee" to include:

"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 include former employees for acts and omissions within the scope of their employment during their former employment with the governmental entity."

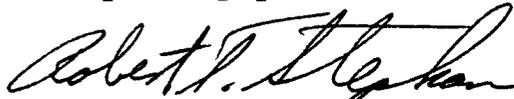
Given the language of K.S.A. 1984 Supp. 40-3413(e), we have no difficulty in concluding that the governing board acts "on behalf of or in service of a governmental entity," for the insurance department is clearly a governmental entity. See K.S.A. 40-102,

75-6102(a). Accordingly, the members of the governing board are covered by the provisions of the act, including complete immunity for the functions set out at K.S.A. 75-6104, and are entitled to a legal defense in the event they are sued for acts or omissions in the scope of their employ (K.S.A. 75-6108). In the further event that a judgment is rendered against them for such acts or omissions, they may look to the insurance department for indemnification. K.S.A. 75-6109.

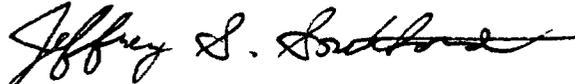
Finally, while any determination as to the applicability of the exceptions to liability found in K.S.A. 75-6104 would necessarily be dependent on the facts of a particular case, given the description of the board's duties in K.S.A. 1984 Supp. 40-3413(e), it would appear that they are administrative in nature, and therefore not specifically exempted from liability under any of the enumerated subsections to K.S.A. 75-6104. For a similar situation, see Attorney General Opinion No. 84-88, which discussed the duties of the board of governors of the Kansas Health Care Stabilization Fund.

In conclusion, pursuant to K.S.A. 1984 Supp. 40-3413, the Kansas Health Care Provider Insurance Availability Plan is created to insure the availability of professional liability insurance to those providers who are in good faith entitled to insurance but who are unable to procure it through ordinary methods. K.S.A. 1984 Supp. 40-3423(e) establishes a governing board which reviews and prescribes operating rules for the plan on at least an annual basis. The board is appointed by the commissioner of insurance, and acts on behalf of the insurance department in overseeing the plan. Accordingly, for purposes of the Kansas Tort Claims Act, K.S.A. 75-6101 et seq., the members of the board are employees of a governmental entity, and so are covered by the provisions of the act.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Deputy Attorney General