Kansas Health Care Stabilization Fund

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TO: Senate Financial Institutions and Insurance Committee

FROM: Health Care Stabilization Fund Board of Governors (by C. Wheelen)

DATE: March 21, 2017

SUBJECT: House Bill 2118, as Passed by the House

House Bill 2118 was requested by our Board of Governors to accomplish the following:

- Section 1 adds a new section in the Health Care Provider Insurance Availability Act that makes the HCSF not liable for claims against charitable health care providers or claims against health care providers whose claims are covered under the Federal Tort Claims Act.

- Section 2(s) amends the definition of full-time physician faculty at KU Medical Center. The change would allow a full-time KUMC faculty member to also work part-time for the U.S. Department of Veterans Affairs, for example, at a V.A. hospital.

- Section 2(z) would define "charitable health care provider" in the Availability Act to mean the same thing it means in the Kansas Tort Claims Act; a health care provider who enters into an agreement with the Secretary of Health and Environment which stipulates that the HCP will provide charity care to medically indigent patients. Under the Kansas Tort Claims Act a charitable health care provider is a state employee.

- Section 3(e) allows insurance companies to issue professional liability policies that exclude coverage for claims against charitable health care providers and also claims against health care providers who are covered under the Federal Tort Claims Act.

- Section 4(a) imposes a maximum HCSF liability of $3.0 million per fiscal year for tail coverage. This is the same limit applicable to active health care providers.

- Section 5(c) clarifies that APRNs with exempt licenses are not required to obtain professional liability insurance or participate in HCSF coverage.

- Section 5(d) creates a new inactive license category for APRNs and stipulates that those inactive licensees are not required to obtain professional liability insurance or participate in HCSF coverage.

In order to make sense of the amendments, it is important to review the principal features of K.S.A. 40-3402. The pertinent part of K.S.A. 40-3402 says (with emphasis added):

> (a) A policy of professional liability insurance approved by the commissioner and issued by an insurer duly authorized to transact business in this state in which the limit of the insurer's liability is not less than $200,000 per claim, subject to not less than a $600,000 annual aggregate **for all claims made during the policy period**, shall be maintained in effect by each resident health care provider as a condition of active licensure or other statutory authorization to render professional service as a health care provider in this state, unless such health care provider is a self-insurer.

To assure that we accurately interpreted this section, we corresponded with the Director of the Property and Casualty Division in the Kansas Insurance Department and inquired whether an insurer could limit coverage in a policy issued to a health care provider. In a letter dated June 30, 2016 the General Counsel for the Kansas Insurance Department opined as follows:

> K.S.A. 40-3402(a) requires each Kansas resident health care provider maintain in effect a MPLI policy approved by the Commissioner of Insurance. The policy must provide minimum coverage limits for all claims made during the policy period. This includes coverage for any claims that may be attributable to patient care rendered during the term of the policy or during the prior term of a similar policy. A policy that covers only occurrences during the policy term does not meet the requirements of K.S.A. 40-3402(a). Coverage cannot be limited to a particular scope of employment nor can it be limited to practice in a particular facility or location. During the term of the policy, it must cover the Kansas resident health care provider anytime and anywhere that he or she renders professional services.

Normally this “all claims made during the policy period” requirement is sound public policy that protects both the insured health care provider and the health care provider’s patients. But there are circumstances that may result in duplication of coverage under either the Kansas Tort Claims Act or the Federal Tort Claims Act.

Generally, the Kansas Tort Claims Act does not provide coverage for health care providers, but there are exceptions. One of those exceptions is a “charitable health care provider.” A charitable health care provider is a health care provider who has agreed to provide gratuitous health care services to medically indigent patients. The health care

provider must sign a formal agreement with the Secretary of Health and Environment and when that is done, the charitable health care provider is considered an employee of the State of Kansas when he or she provides charity care. This means that in the event of an unintended outcome and a malpractice claim against the charitable health care provider, he or she is defended by the Kansas Attorney General and any settlements or jury awards are paid by the State of Kansas.

If the charitable health care provider is retired, has an exempt license, and has no professional liability insurance, there is no doubt who is responsible for defending the health care provider or who is liable for payment of any claims. If, however, the health care provider has an active license, has professional liability insurance, and occasionally serves as a charitable health care provider, it can be argued that because his or her insurance policy must cover "all claims made during the policy period" the policy must also cover any claim that arises from his or her practice as a charitable health care provider. We believe this is inconsistent with legislative intent and deserves clarification.

A very different situation arises when a health care provider is an employee of an instrumentality of the federal government and he or she decides to work outside the scope of his or her federal employment (moonlight). If a health care provider is employed exclusively by a federal agency, he or she can obtain a federally active license and thereby become exempt from the statutory professional liability insurance requirements. His or her liability exposure is covered under the Federal Tort Claims Act. But oftentimes, employees of a federal agency or a federally qualified health center want to work outside the scope of their federal employment in order to earn additional income. When they moonlight, they are not covered under the Federal Tort Claims Act and therefore they must obtain an active license and comply with the Health Care Provider Insurance Availability Act. Because their insurance policy must cover "all claims made during the policy period," ostensibly the policy must cover any claims that arise as a result of their federal employment. Again, we believe this is not consistent with legislative intent and should be clarified.

Furthermore, some of the federally qualified health centers provide patient care services that are outside the scope of their grant contract with the federal government. For that reason, the FQHCs need to purchase so-called "gap" coverage for the professional liability exposure of their employees when they are not covered under the Federal Tort Claims Act. This is another reason for the amendment in section 3(e)(2).

The amendments in section 3(e) will allow insurance companies to adjust their premiums accordingly. This should make moonlighter policies and gap coverage more affordable.

For the above reasons, we respectfully request that you recommend passage of House Bill 2118. Thank you.