

Senator William Stouffer, Chairman
Senator Victor Callahan
Steve Reintjes, MD
John Stanley, MD
David Carpenter



Representative Robert Schaaf, MD
Representative Curt Dougherty
Lancer Gates, DO
Gloria Solis, RN, MSN, MBA

Health Care Stabilization Fund Feasibility Board

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January 9th, 2009

Meeting Minutes

Call to Order: The meeting was called to order at approximately 12:30pm.

Board Members in Attendance: Senator William Stouffer, Senator Victor Callahan, David Carpenter, Gloria Solis, RN, Dr. Lancer Gates, Dr. Stephen Reintjes, Dr. John Stanley,

Presenters in Attendance: Andrew Teigen on behalf of the Missouri Medical Malpractice Joint Underwriting Association; Don Carmody and Jennifer LeBlanc on behalf of Missouri Professionals Mutual.

Others in Attendance: Tamara Kopp, DIFP; Brent Kabler, DIFP; David Cox (by phone) DIFP

Approval of Minutes: Motion to approve the minutes was made by Sen. Callahan. Minutes were unanimously adopted subject to a minor change previously suggested by Dr. Rob Schaaf.

Presentation by Andrew Teigen regarding proposed legislative changes to the medical malpractice JUA.

Andrew discussed two limitations that he felt were hampering the ability of the JUA to operate effectively as a market of last resort. First, though the statutory language suffered from ambiguities, the JUA believed it was prohibited from writing claims made policies. Secondly, JUA coverage was only available subject to a first-year surcharge of 100 percent of premium, which he believed was onerous. He suggested that a 25 percent surcharge was more reasonable and more consistent with residual markets in other states. He said the JUA board had developed model legislative language to reflect these two changes.

Don Carmody said the medical malpractice market in Missouri could best be served by a competitive private market, and that insurers should not have to compete with the state. Don suggested that the current market was functioning very effectively, that there was no affordability or availability crisis, and that rates are headed downward. He also suggested that a proposal might be more acceptable if there were other features in place to ensure that the JUA did not compete against

private insurers, such as requiring five declinations from private carriers as a condition of eligibility of JUA coverage.

Andrew Teigen felt that there were already barriers in place to ensure the JUA was a true market of last resort, such as a surcharge and the requirement that rates be actuarially sound. The JUA currently only insured four physicians, all high risk specialties such as neurosurgeons. He noted that the New Hampshire JUA did not require a specific number of prior declinations as a condition of eligibility.

Lancer Gates asked about the restrictions on policy limits that could be offered by the JUA. Andrew Teigen felt that limits did not need to be increased in statute. Dr. Gates asked about the desirability of having a physician serve on the JUA board. Mr. Teigen said that the JUA board has not vetted that proposal, and it therefore was not included in the model legislation.

Sen. Stouffer said that the fact that the board was composed of representative from the P&C industry provides incentives to ensure that premium rates are adequate, since P&C carriers are subject to an assessment for any shortfall experienced by the JUA. Mr. Teigen said that the JUA board would look at physician representation at their next meeting in April.

Dr. Reintjes opined that the JUA was necessary. He discussed the experience of a neurosurgery group could not find malpractice coverage in Missouri and as a result had moved to Kansas. He said that at the time, only three companies offered coverage for neurosurgery, and that all three had declined to extend coverage. The JUA wasn't an option because of the 100 percent surcharge. He believed that reducing the JUA premium surcharge from 100 percent to 25 percent might help Missouri retain some high risk specialties that otherwise would relocated to Kansas.

Mr. Teigen said that requiring a potential insured to experience a minimum number of rejections would preclude JUA coverage in those instances in which coverage was offered but was over-priced. Dr. Reintjes agreed, saying that overpriced coverage was the same as no coverage.

Dr. Gates asked if current statute needed clarification with respect to the prior acts and tail coverage. Mr. Teigen did not feel the statute required such clarification. Dr. Gates asked if assessments made against insurers in the event of a JUA shortfall could be written off on a one-to-one basis from premium taxes. Mr. Teigen replied that at least a portion of such assessments could be written off, though he was unsure of the exact percentage.

Presentation of Don Carmody regarding a proposed regulation by the DIFP regarding the collection of medical malpractice data.

Don Carmody stated that the proposed regulation was made pursuant to 383.105 and 383.106, passed a year after tort reform as the insurance piece of a more comprehensive reform. Mr. Carmody stated that he worked closely with Brian Yates to get the bill passed. With respect to 383.106, the DIFP was charged with monitoring the insurance market, and that the concern was insurance availability. Mr. Carmody said that the concern ought to be insurance solvency, and that insurers are already audited every three years. Mr. Carmody said that the statute required data for

limited purposes, and the data should not intrude on companies, as the statute was not intended to be a grant of authority to the DIFP to get all the information they wanted.

Mr. Carmody further discussed the potential disclosure of insurers' proprietary and trade secret information, and stated that this was a major concern on the part of insurers. He discussed prior litigation in which homeowners insurance data was exposed to disclosure, though the court did rule in that case that the data were protected from disclosure as a trade secret as such data had economic value to competitors.

Mr. Carmody next noted that the statute requires the data to be disclosed to the Health Care Stabilization Fund Feasibility Board, and noted his concern that the sensitive raw data would thus be exposed to competitors. In addition, he noted the very high cost to insurers of producing the data, and expected insurers to incur an annual expenditure of \$100,000.

David Carpenter noted that North Kansas City Hospital was subject to all sorts of data reporting requirements to state and federal entities. He stated that \$100,000 did not sound overly burdensome. Mr. Carmody indicated that such costs might be different for an insurer and a hospital, and that the two couldn't be compared.

Sen. Callahan stated that any proposed regulation has to flow from the language of the statute. He suggested that JCAR cannot easily determine legislative intent. Sen. Callahan noted that if JCAR approved a regulation that did not follow from statutory authority, it could be subsequently overturned in litigation.

Mr. Carmody then turned to the desirability of a stabilization fund in Missouri. He noted that such funds were devised largely in the 1970s, but have failed in every state in which they have been established, with the exception of Kansas. Sen. Stouffer said that the board was only interested in the Kansas fund. He indicated that Kansas is able to attract certain high risk medical specialties such as neurosurgeons. Mr. Carmody noted that the experience of Kansas is much more influenced by its tort environment than by the existence of the fund. He also noted that Kansas has erected barriers to the entrance of private malpractice insurers.

Sen. Stouffer noted the existence of cycles in insurance markets, as tend to exist in all markets. He said a fund could absorb some of the dislocations that occur in market downturns. Mr. Carmody stated that malpractice awards in Missouri are 2.6 times larger than those of Kansas, and that the tort environment is why the fund works in Kansas. He also noted that insurers did not want to compete against the state. Sen. Stouffer noted that any proposal for a fund would have to be modified relative to the structure of the Kansas fund. For example, he noted that the attachment point, or the amount of an award above which would be covered by the fund, might be raised from \$200,000 to \$400,000.

Dr. Gates asked Mr. Carmody how such a fund might cut into the profits of private insurers. Mr. Carmody responded that that consideration wasn't relevant, since his client was a non-profit entity. Mr. Carmody suggested that essentially the fund would be a state run reinsurer, and indicated that private reinsurers could function more efficiently.

Brent Kabler discussed the origin of the proposed DIFP regulation. He stated that the DIFP helped craft the language in statute, and that the approach was to delegate technical details to the DIFP. The statute merely specified the purposes that such data were intended to satisfy. He stated that this was a common approach, given the inflexibility of placing the actual “data call” in a statute. He also outlined how the proposed regulation was designed to ensure that any data released to the public would be aggregated in such a way that it would not be possible for any data user to infer confidential or trade-secret information about a single insurer.

Tamara Kopp outlined the time constraints on moving forward with the regulation. She indicated that the regulation would probably have to be withdrawn while the DIFP continued to work on compromise language with Mr. Carmody.

Next Steps

The board then discussed next steps. Sen. Stouffer suggested that the board might proceed on a dual track. He stated that the DIFP should continue to work out a compromise with carriers with respect to the proposed regulation, and that the data the board required could be a much scaled back version of such data. He stated that the data the board needed for its work did not need to be as detailed as contemplated in the proposed regulation. The board generally agreed with this suggestion.

Sen. Stouffer noted that the board met well ahead of its usual March meeting time, and that the next meeting would not be until June.

With no other matters before the board, the board adjourned.