



# Kansas Health Care Stabilization Fund

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Testimony on House Bill 2516  
Submitted by Charles L. Wheelen  
To The  
**Senate Committee on Financial Institutions and Insurance**  
February 19, 2014

We appreciate the opportunity to offer testimony on behalf of the Health Care Stabilization Fund Board of Governors. Our Board of Governors is responsible for administration of the Health Care Provider Insurance Availability Act (K.S.A. 40-3401 et. seq.). For those of you who are not already acquainted with the Availability Act, a brief summary is appended to this testimony.

As you know, in October 2012 the Kansas Supreme Court published an important decision that upheld the Legislature's enactment of a limit on noneconomic damages in personal injury lawsuits. The Court said that the Legislature can modify the common law in limited circumstances if the Legislature provides an adequate substitute remedy or *quid pro quo*, and in the Miller v. Johnson case, the Health Care Provider Insurance Availability Act was the identified *quid pro quo*.

One of the statutory duties delegated to our Board of Governors in K.S.A. 40-3403 is to "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." Following the Miller v. Johnson decision we decided to try and identify ways of improving the long term viability of the Health Care Stabilization Fund by updating the Health Care Provider Insurance Availability Act. Our guiding principle throughout this endeavor was to strengthen the *quid pro quo* by clarifying ambiguities, by replacing or deleting outdated language, and most important, by assuring that in the event a Kansas patient is injured as a result of an unintended medical outcome, the health care provider will always have statutory Health Care Stabilization Fund coverage. In most cases, the health care provider will have both professional liability insurance and HCSF coverage.

We did not recruit or otherwise encourage any groups of health care professionals or facilities to pursue Health Care Stabilization Fund coverage. **Our Board of Governors does not have a position on whether additional categories of health care professionals or facilities should be added** to the list of defined health care providers. We believe this is a public policy decision that should be made by the Legislature. We are, however, concerned that the transition may be awkward for some of the new facilities or professions that have asked to be defined as health care providers under K.S.A. 40-3401. It may be difficult for some of these new health care providers to obtain so-called tail coverage for patient care activities prior to January 1, 2015. For that reason we have drafted an amendment to K.S.A. 40-3414 to make tail coverage available via the Health Care Provider Insurance Availability Plan. It would provide an optional "safety net" for those few health care providers who may need it. A copy of the draft amendment is attached for your consideration.

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If the Legislature decides to add these seven new categories of health care providers, that means we will be auditing compliance and managing professional liability claims for approximately 4,340 additional health care providers. This would cause about a 35-40% increase in our workload compared to current levels of activity. Obviously it will be necessary to add additional compliance staff immediately and it may become necessary to hire additional legal staff at a later time. Because our budget for fiscal year 2015 has already been approved by the 2013 Legislature, this means we will need an expenditure limitation increase for FY2015. It is our understanding this will be included in the omnibus appropriation bill at the conclusion of the 2014 Session.

It has been two decades since the Availability Act was last updated in a comprehensive fashion. In view of the possibility this may be our last opportunity to request amendments for another twenty years, we have one final request. This amendment becomes necessary because some of our adversaries in civil litigation have learned to use the Kansas Open Records Act to obtain information that gives them an unfair advantage that would not exist if we were a private insurance company. In an effort to assure that Kansas health care providers are properly represented and not disadvantaged, we have drafted a narrow exemption from the Open Records Act for claims related information in our custody. A copy of the draft amendment is attached.

We enthusiastically support section one of the bill and subsection (m) of section 7. These amendments would accomplish two important objectives. The amendment to subsection (m) of section 7 would discontinue the current requirement that health care providers participate in capitalizing the Fund for at least five years before they become eligible for continued HCSF coverage. In the commercial insurance business this type of coverage is often referred to as an extended reporting endorsement, but is commonly called "tail coverage." This amendment would protect patients from the possibility that a health care provider might become inactive without making payment for tail coverage. It is, however, important to retain the current language in subsection (m) of K.S.A. 40-3403 because of the numerous health care providers who have already become inactive. That is why we simply added an expiration date at the conclusion of the subsection.

The new section one of the bill would improve the level of coverage when a health care provider retires or otherwise discontinues his or her Kansas practice. In most cases, the doctor or anesthetist would have \$1.0 million per claim coverage instead of \$800,000 per claim coverage. This would benefit both the inactive health care provider and his or her former patients.

I have prepared a list of the various amendments in HB2516 with a brief explanation of each. Most of the amendments are technical clarifications or updates. Some of the clarifications are in response to issues that have been raised during litigation. To assist your review, I have added bold emphasis to those sections that I believe are important decisions.

Thank you for considering the proposed improvements to the Health Care Provider Insurance Availability Act. We urge you to amend HB2516 as described in the two attached drafts, and of course we respectfully request your favorable action on the bill as amended.

HB 2516—Am. by HC

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1 ~~Such board shall consist of nine members to be appointed by the~~  
 2 ~~commissioner as follows: Three members shall be representatives of~~  
 3 ~~foreign insurers, two members shall be representatives of domestic~~  
 4 ~~insurers, two members shall be representatives of the general public, one~~  
 5 ~~member shall be a licensed insurance agent actively engaged in the~~  
 6 ~~solicitation of casualty insurance and one member shall be a health care~~  
 7 ~~provider. The members shall be appointed for a term of two years.~~

8 (f) An insurer participating in the plan approved by the commissioner  
 9 may pay a commission with respect to insurance written under the plan to  
 10 an insurance agent licensed for any other insurer participating in the plan  
 11 or to any insurer participating in the plan. Such commission shall be  
 12 reasonably equivalent to the usual customary commission paid on similar  
 13 types of policies issued in the voluntary market.

(g) Notwithstanding the provisions of K.S.A. 40-3402

and amendments thereto, the plan shall make available policies  
 of professional liability insurance covering prior acts. Such  
 professional liability insurance policies shall have limits of  
 coverage not exceeding \$1,000,000 per claim subject to not  
 more than \$3,000,000 annual aggregate liability for all claims  
 made as a result of personal injury or death arising out of the  
 rendering of or the failure to render professional services within  
 this state on or before December 31, 2014. Such professional  
 liability insurance policies shall be made available only to physician  
 assistants licensed by the state board of healing arts, licensed  
 professional nurses authorized by the state board of nursing to  
 practice as an advanced practice registered nurse, nursing facilities  
 licensed by the state of Kansas, assisted living facilities licensed by  
 the state of Kansas, and residential health care facilities licensed by  
 the state of Kansas that will be in compliance with K.S.A. 40-3402  
 on January 1, 2015. The premiums for such professional liability  
 insurance policies shall be based upon reasonably prudent  
 actuarial principles. The provisions of this subsection shall expire  
 January 1, 2016.

14 Sec. 16. K.S.A. 2013 Supp. 40-3414 is hereby amended to read as  
 15 follows: 40-3414. (a) Any health care provider, or any health care system  
 16 organized and existing under the laws of this state which owns and  
 17 operates two or more medical care facilities licensed by the ~~department of~~  
 18 ~~health and environment~~ *state of Kansas*, whose aggregate annual insurance  
 19 premium is or would be \$100,000 or more for basic coverage calculated in  
 20 accordance with rating procedures approved by the commissioner pursuant  
 21 to K.S.A. 40-3413, and amendments thereto, may qualify as a self-insurer  
 22 by obtaining a certificate of self-insurance from the board of governors.  
 23 Upon application of any such health care provider or health care system,  
 24 on a form prescribed by the board of governors, the board of governors  
 25 may issue a certificate of self-insurance if the board of governors is  
 26 satisfied that the applicant is possessed and will continue to be possessed  
 27 of ability to pay any judgment for which liability exists equal to the  
 28 amount of basic coverage required of a health care provider obtained  
 29 against such applicant arising from the applicant's rendering of  
 30 professional services as a health care provider. In making such  
 31 determination the board of governors shall consider (1) the financial  
 32 condition of the applicant, (2) the procedures adopted and followed by the  
 33 applicant to process and handle claims and potential claims, (3) the  
 34 amount and liquidity of assets reserved for the settlement of claims or  
 35 potential claims and (4) any other relevant factors. The certificate of self-  
 36 insurance may contain reasonable conditions prescribed by the board of  
 37 governors. Upon notice and a hearing in accordance with the provisions of  
 38 the Kansas administrative procedure act, the board of governors may  
 39 cancel a certificate of self-insurance upon reasonable grounds therefor.  
 40 Failure to pay any judgment for which the self-insurer is liable arising  
 41 from the self-insurer's rendering of professional services as a health care  
 42 provider, the failure to comply with any provision of this act or the failure  
 43 to comply with any conditions contained in the certificate of self-insurance

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1 insurer, the premium surcharge shall be collected in addition to the annual  
 2 premium for the basic coverage by the insurer and shall not be subject to  
 3 the provisions of K.S.A. 40-252, 40-955 and 40-2801 et seq., and  
 4 amendments thereto. The amount of the premium surcharge shall be  
 5 shown separately on the policy or an endorsement thereto and shall be  
 6 specifically identified as such. Such premium surcharge shall be due and  
 7 payable by the insurer to the board of governors within 30 days after the  
 8 annual premium for the basic coverage is received by the insurer, ~~but in~~  
 9 ~~the event basic coverage is in effect at the time this act becomes effective,~~  
 10 ~~such surcharge shall be based upon the unearned premium until policy~~  
 11 ~~expiration and annually thereafter.~~ Within 15 days immediately following  
 12 the effective date of this act, the board of governors shall send to each  
 13 insurer information necessary for their compliance with this subsection.  
 14 The certificate of authority of any insurer who fails to comply with the  
 15 provisions of this subsection shall be suspended pursuant to K.S.A. 40-  
 16 222, and amendments thereto, until such insurer shall pay the annual  
 17 premium surcharge due and payable to the board of governors. In the case  
 18 of a nonresident health care provider or a self-insurer, the premium  
 19 surcharge shall be ~~collected in the manner prescribed in~~ *paid upon*  
 20 *submitting documentation of compliance with K.S.A. 40-3402, and*  
 21 *amendments thereto.*

22 (c) In setting the amount of such surcharge, the board of governors  
 23 may require any health care provider who has paid a surcharge for less  
 24 than 24 months to pay a higher surcharge than other health care providers.

25 Sec. 11. K.S.A. 40-3407 is hereby amended to read as follows: 40-  
 26 3407. (a) Except for investment purposes, all payments from the fund shall  
 27 be upon warrants of the ~~director of accounts and reports state of Kansas~~  
 28 ~~issued pursuant to vouchers approved by the chairperson of the board of~~  
 29 ~~governors, or the chairperson's executive director or the executive~~  
 30 ~~director's~~ designee, and, with respect to claim payments, accompanied by:  
 31 (1) A ~~certified file stamped~~ copy of a final judgment against a health care  
 32 provider or inactive health care provider for which the fund is liable; or (2)  
 33 a ~~certified file stamped~~ copy of a court approved settlement against a  
 34 health care provider or inactive health care provider for which the fund is  
 35 liable.

36 (b) For investment purposes amounts shall be paid from the fund  
 37 upon vouchers approved by the chairperson of the pooled money  
 38 investment board.

39 Sec. 12. K.S.A. 40-3408 is hereby amended to read as follows: 40-  
 40 3408. (a) The insurer of a health care provider covered by the fund or self-  
 41 insurer shall be liable only for the first \$200,000 of a claim for personal  
 42 injury or death arising out of the rendering of or the failure to render  
 43 professional services by such health care provider, subject to an annual

(c) Payments from the fund for attorney fees, expert witness fees, and other costs related to claims, including invoices, statements and other documentation thereof, shall not be subject to K.S.A. 45-218 and amendments thereto.

## APPENDIX A

## Brief Overview of the Health Care Provider Insurance Availability Act

The Health Care Provider Insurance Availability Act is a successful public-private partnership. It promotes a stable professional liability insurance market for commercial medical liability insurance companies as well as for health care providers who are licensed to practice in Kansas. The Act provides for efficient administration of the Health Care Stabilization Fund and it assures timely payment when it is determined that a patient should be compensated.

The original Health Care Provider Insurance Availability Act was enacted in 1976 in response to a medical liability insurance crisis. There were three principal features of the original Act: (1) a requirement that all health care providers maintain professional liability insurance coverage as a condition of licensure, (2) the establishment of a joint underwriting authority for those health care providers who could not purchase liability insurance in the commercial market, and (3) the creation of the Health Care Stabilization Fund. There have been numerous amendments to the original Act during its thirty-seven year history, but the three fundamental components have always remained intact.

There are sixteen categories of health care providers required by Statute to participate in the HCSF: (1) three types of medical care facilities [hospitals, ambulatory surgery centers, and recuperation centers] (2) all three licensees under the Healing Arts Act [D.C.s, D.O.s, and M.D.s] (3) podiatrists, (4) nurse anesthetists, (5) professional corporations incorporated by health care providers, (6) limited liability companies formed by health care providers, (7) partnerships consisting of health care providers, (8) not-for-profit corporations incorporated by health care providers, (9) graduate medical education programs affiliated with the University of Kansas, (10) dentists certified by the Board of Healing Arts to administer anesthesia, (11) psychiatric hospitals, and (12) community mental health centers. These health care providers are required to purchase professional liability insurance and participate in capitalizing the HCSF if they render professional services as a health care provider in Kansas.

Health care providers may purchase an insurance policy from a commercial company or from the joint underwriting authority (the Health Care Provider Insurance Availability Plan). The basic insurance policy must provide minimum coverage limits of \$200,000 per claim with an annual aggregate minimum limit not less than \$600,000 coverage. Health care providers are also required to select one of three options for supplemental coverage via the HCSF. Most health care providers choose the highest coverage option which, when combined with the primary level of insurance, results in a total of \$1.0 million per claim with an annual aggregate limit of \$3.0 million.

There has never been a State General Fund appropriation for the Health Care Provider Insurance Availability Act. The HCSF Board of Governors has the statutory duty to assess annual premium surcharges that are paid by health care providers to capitalize the Health Care Stabilization Fund. Those premium surcharges must be "reasonable, adequate and not unfairly discriminating." The Statute creating the Health Care Stabilization Fund stipulates that it "shall be held in trust in the state treasury."

Approximately 95% of the expenditures from the Stabilization Fund are for payment of claims or expenses that are directly related to claims. The cost of agency operations is normally less than five percent of total expenditures.

Appendix B  
Detailed Description of HB2516 as Amended by House Committee  
Prepared by C. Wheelen

<u>Page</u>	<u>Bill Section</u>	<u>K.S.A. Section</u>
1	New Section 1	New
	Line 10	
	<b>This section is an important new feature in the Health Care Provider Insurance Availability Act. It would give inactive health care providers HCSF tail coverage equal to the amount of their primary insurance coverage (currently \$200,000 per claim and \$600,000 annual aggregate) plus the amount of HCSF coverage selected and in effect at the time of the event resulting in a claim of medical negligence. For example, a doctor who purchased \$200,000 per claim commercial liability insurance and also continuously paid surcharges for \$800,000 HCSF coverage would immediately have \$1.0 million per claim HCSF tail coverage at no additional cost when he or she discontinues active practice and inactivates or cancels his or her license.</b>	
1	Sec. 2	40-12a02
	<i>Sections 2 – 4 amend sections of the Statutes pertaining to insurance companies organized by associations of health care providers for their members.</i>	
	Line 27	
	(b) and (c) Allow certain liability insurance companies to sell other insurance products in addition to liability insurance.	
	Line 35	
	(d) Adds new language stipulating that if the insurance company wishes to reorganize or be sold, the company must obtain approval from the professional association that formed the original insurance company.	
2	Sec. 3	40-12a06
	Line 5	
	(a) Deletes obsolete language.	
2	Sec. 4	40-12a09
	Line 39	
	(a) Deletes obsolete language.	
3	Sec. 5	40-3401
	<i>Sections 5 – 20 amend the Health Care Provider Insurance Availability Act.</i>	
	Line 11	
	(d) Technical clarification.	
	Line 15	
	(f) Various amendments as follows:	
	Line 16	
	The statewide organization representing physician assistants has requested that physician assistants be included in the definition of health care provider.	

<u>Page</u>	<u>Bill Section</u>	<u>K.S.A. Section</u>
3 (cont)	Sec. 5	40-3401

Line 21

Statutory authority to license and regulate is sometimes transferred via ERO or legislative amendment, for example, from the Secretary of Social and Rehabilitation Services to the Secretary for Aging and Disability Services. In addition, executive cabinet officer titles sometimes change, for example, from the Secretary of SRS to the Secretary of the Department for Children and Families. Regardless of which agency is responsible, licensure is a privilege granted by the State of Kansas.

Line 24

HMOs, optometrists, and pharmacists have not been covered by the HCSF for several years. [See 40-3402(a) and 40-3404(a)]. For that reason, they were stricken from the definitions in the original bill. The House Committee amended the bill in order to continue to include these categories in K.S.A. 40-3401 because this section of the Statutes is sometimes referenced in other sections of Kansas law, for example in the peer review Statutes.

4	Sec. 5	40-3401
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Line 5

Technical clarification – see 40-3403(k). After the departure of Menninger Hospital, there remains only one psychiatric hospital (Prairie View) that was grandfathered in 1988 for purposes of HCSF coverage.

Line 7

The Secretary of SRS no longer exists.

Line 8

**The definition of health care provider would be expanded to include three categories of adult care homes as well as physician assistants and advanced practice nurses. The phrase “advanced practice registered nurse” includes all four categories of advance practice authorized by the Board of Nursing: (1) nurse practitioner, (2) clinical nurse specialist, (3) nurse-midwife, and (4) nurse anesthetist. This would add three new categories of advanced nursing practice to the definition of “health care provider” because nurse anesthetists have always been defined as such. These new categories would be added on and after January 1, 2015 in order to allow a six-month transition period after the effective date of the amendments. This would give the insurance companies and the health care providers the time needed to modify or replace their existing insurance policies.**

Line 21

Under the Healing Arts Act, doctors who have an inactive license or a federally active license are specifically exempt from the insurance requirements under the Health Care Provider Insurance Availability Act. Unlike the Healing Arts Act, neither the Nurse Practice Act nor the Physician Assistant Licensure Act creates a unique license for licensees who are on active duty in the military or are employed by a federal agency such as the Veterans Administration and are therefore covered under the Federal Tort Claims Act. The language for exceptions numbered seven and eight is similar to the language in the Healing Arts Act regarding a federally active license.

<u>Page</u>	<u>Bill Section</u>	<u>K.S.A. Section</u>
5	Sec. 5	40-3401
	Line 27 (n) The Secretary of SRS no longer exists. Line 34 (o) The Secretary of SRS no longer exists.	
6	Sec. 5	40-3401
	Line 31 New definitions (u) and (v) provide clarification to eliminate ambiguity and to discriminate between the two completely different Boards. Line 35 The new definition (w) is important because of a new provision in 40-3402 that expedites the process of credentialing locum tenens for temporary hospital assignments. Line 38 The new definition (x) clarifies the type of professional liability coverage provided by the HCSF.	
7	Sec. 6	40-3402
	Line 3 (a) Clarifies that professional liability insurance and HCSF coverage are always a condition of licensure to practice in Kansas for the health care providers defined in 40-3401. Line 16 (a)(1) Expedites compliance and thereby improves the ability to verify coverage for purposes of hospital credentialing. Line 33 (a)(2) Technical clarification.	
8	Sec. 6	40-3402
	Line 6 (b) Clarifies that if a non-resident health care provider maintains an active Kansas license, he or she must maintain continuous professional liability coverage.	
9	Sec. 6	40-3402
	Line 11 (e) Allows non-resident health care providers who serve as locum tenens in Kansas to have occurrence rather than claims made coverage. This amendment is similar to the exception in subsection (d) for residents in training who moonlight while in residency training.	
10	Sec. 7	40-3403
	Line 4 (b)(1)(D) This amendment accomplishes two things: (1) it deletes unnecessary language that will no longer be needed as a result of improved tail coverage, and (2) it allows the Board of Governors to grant temporary exemptions from the professional liability insurance and HCSF coverage requirements when there are exceptional circumstances.	



<u>Page</u>	<u>Bill Section</u>	<u>K.S.A. Section</u>
15	Sec. 7	40-3403
	Line 32	
	(j) The Director of Accounts and Reports position was eliminated in a Department of Administration reorganization.	
19	Sec. 7	40-3403
	Line 25	
	<b>(m) This amendment is an important improvement. The amendment adds a sunset date to K.S.A. 40-3403(m) which means that beginning July 1, 2014 all health care providers would have “tail” coverage immediately upon cancelling or inactivating their Kansas license and their professional liability insurance policy. The original Act provided this kind of immediate tail coverage, but the 1989 Legislature decided to impose a five year compliance requirement in order to collect more surcharge revenue. Currently, some health care providers with fewer than five years compliance choose to make payment for HCSF tail coverage and some do not. Under current law there exists a potential situation wherein a patient who was injured as a result of an unexpected medical outcome might have to sue a health care provider who does not have professional liability insurance or HCSF tail coverage. This amendment would prevent that situation.</b>	
	Line 27	
	(n) Stricken language is obsolete. New language clarifies that HCSF liability is based on the level of HCSF coverage selected by the health care provider.	
	Line 40	
	(o) and (p) Stricken language is obsolete.	
20	Sec. 8	40-3403a
	Line 32	
	The first amendment is for consistency with the Healing Arts Act and the second amendment is a correction.	
21	Sec. 9	40-3403b
	Line 12	
	(a) Technical update.	
	Line 18	
	(b) The September 1 deadline has always been unrealistic, whereas January 1 allows time for staff to prepare the report after the Oversight Committee meets in October or November.	
23	Sec. 10	40-3404
	Line 8	
	1(b) Stricken language is obsolete, whereas the new language at line 19 clarifies how non-resident health care providers pay their premium surcharges.	
23	Sec. 11	40-3407
	Line 27	
	(a) Technical clarifications: The position of Director of Accounts and Reports was eliminated in a Department of Administration reorganization. Approval of vouchers has always been an administrative duty delegated to the executive director. File stamped is the proper legal certification.	

<u>Page</u>	<u>Bill Section</u>	<u>K.S.A. Section</u>
24	Sec. 12	40-3408
	Line 5 (a) Obsolete language. Line 28 (d) Clarifies that the HCSF is not liable for any claim that is not normally covered by a medical professional liability insurance policy.	
25	Sec. 13	40-3411
	Line 28 (d) This provision is never invoked by the parties. Assessment of costs is governed by K.S.A. 60-2002 which stipulates that “the costs shall be allowed to the party in whose favor judgment is rendered,” but gives the court discretion. In most medical professional liability actions, each party assumes responsibility for its own costs and plaintiff attorneys typically represent their clients on a contingency basis.	
25	Sec. 14	40-3412
	Line 41 (c) Technical clarifications.	
26	Sec. 15	40-3413
	Line 39 (b) Reorders this section in a logical sequence. The language is almost identical to subsection (e) except it adds a representative of the HCSF Board of Governors in lieu of a representative of foreign insurers (two foreign insurers instead of three).	
27	Sec. 15	40-3413
	Line 8 (c) Clarification consistent with new definitions (u) and (v) in 40-3401. Line 27 (d) Clarification consistent with new definitions (u) and (v) in 40-3401. Line 35 (e) Clarification consistent with new definitions (u) and (v) in 40-3401. Stricken language is already replaced by new language in subsection (b).	
28	Sec. 16	40-3414
	Line 17 (a) Statutory authority to license and regulate is sometimes transferred via ERO or legislative amendment, for example, from the Secretary of Social and Rehabilitation Services to the Secretary for Aging and Disability Services. In addition, executive cabinet officer titles sometimes change, for example, from the Secretary of SRS to the Secretary of the Department for Children and Families. Regardless of which agency is responsible, the privilege of licensure is granted by the State of Kansas.	

<u>Page</u>	<u>Bill Section</u>	<u>K.S.A. Section</u>
32	Sec. 17	40-3416
	Line 19	
	Technical clarification consistent with language in 40-3402.	
	Line 34	
	Technical update. K.S.A. 40-3419 is no longer the last section of the Act and a new section may be added upon passage of proposed legislation.	
33	Sec. 19	40-3421
	Line 30	
	(d) The current penalty is extreme. The amendment limits the penalty to a civil fine and a report to the Insurance Commissioner.	
34	Sec. 20	40-3422
	Line 13	
	Clarifies that in the event a medical professional liability jury award is stayed on appeal, the supersedeas bond filed by the HCSF Board of Governors shall be only for the amount the HCSF is liable.	