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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

July 20, 1999

Mr. George L. Schroeder
Director
Legislative Audit Council
400 Gervais St.
Columbia, SC 29201

Dear Mr. Schroeder:

You have requested the advice of this Office as to several questions regarding the Patient's Compensation Fund which your agency is currently reviewing. *See §38-79-410, et seq (1989).* Section 38-79-420 (Supp. 1998) provides, in part as follows:

[The Fund was created] ...for the purpose of paying that portion of a medical malpractice or general liability claim, settlement, or judgment which is in excess of one hundred thousand dollars for each incident or in excess of three hundred thousand dollars in the aggregate for one year. The fund is liable only for payment of claims against licensed health care providers (providers) in compliance with the provisions of this article and includes reasonable and necessary expenses incurred in payment of claims and the Fund's administrative expense.

Your questions are separately addressed below.

1. If the PCF were to become insolvent or for some other reason be unable to pay its claims, would the State be liable or under any obligation to pay the Fund's claims?

The State should not be liable because the "Fund is liable only" for payment of claims against licensed health care providers and related expenses in compliance with the statutory provisions for the Fund. *See §38-78-420 and §38-79-470.* Section 38-79-480 (3) limits payments under the Fund to \$100,000 per person, per occurrence unless the Fund's Board "in its discretion" decides to pay more. "If the Fund does not have enough money to pay all of the claims, claims received after the funds are exhausted are immediately payable the following year in the order in which they were received." §38-79-480 (4). Under these provisions, payments are limited to those

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made from the Fund under the above discussed terms. *See Ops Atty. Gen (May 28, 1982 - copy attached)*. Moreover, persons seeking to recover from the fund for a medical malpractice judgment are not limited to the Fund as a means of recovering the judgment. *Id.* In addition, defenses of sovereign immunity and under the Tort Claims Act would most probably bar recovery under these circumstances §§15-78-20 and 15-78-60 (Supp. 1998). Nevertheless, having a specific provisions spelling out that the State is immune from suit for recovery any money in excess of the Fund would further ensure that the State is immune from liability under the circumstances.

2. Can the PCF deny coverage for claims for a member who fails to pay fees and assessments or otherwise withdraws even though the claims were for occurrences in years in which the member had paid fees and assessments?

According to you, the PCF will not make payment under these circumstances. Certainly, this interpretation of the Board of Governors of the Fund is entitled to great weight as it is the agency charged with managing and operated the Fund. *Dunton v. South Carolina Board of Examiners in Optometry 291 S.C. 221, 353 S.E. 2d 132 (1987)*. The Board's construction of the law is consistent, too, with provisions of §38-79-450 which make membership contingent upon the Fund member's making timely payment of fees and deficit assessments (*See also Ops Atty. Gen (May 28, 1982)*); however, legislation may be desirable to address this question in express terms.

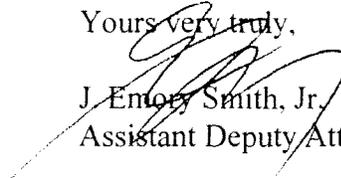
3. Is the provision allowing the PCF to spread claim payments out over several years constitutional?

As noted above, §38-79-480 (3) limits payments under the Fund to \$100,000 per person, per occurrence unless the Fund's Board "in its discretion" decides to pay more. You note that a Florida decision found a similar provision in that state to be unconstitutional; however, that decision was overruled and the pay-out provisions were found to be not unconstitutional. *Florida Patient's Compensation Fund v. Von Stetina, 474 So. 2d 783 (1985) (copy enclosed)*.

This letter is an informal opinion. It has been written by the designated Assistant Deputy Attorney General and represents the opinion of the undersigned attorney as to the specific questions asked. It has not, however, been personally reviewed by the Attorney General nor officially published in the manner of a formal opinion.

If you have further questions, please let me know.

Yours very truly,


J. Entory Smith, Jr.
Assistant Deputy Attorney General