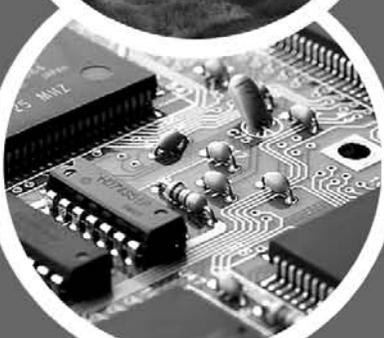


ISSUES CONFRONTING THE 2004 GENERAL ASSEMBLY



Informational Bulletin No. 212

**LEGISLATIVE RESEARCH COMMISSION
Frankfort, Kentucky**

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The Kentucky Legislative Research Commission is a 16-member committee comprised of the majority and minority leadership of the Kentucky Senate and House of Representatives. Under Chapter 7 of the Kentucky Revised Statutes, the Commission constitutes the administrative office for the Kentucky General Assembly. Its director serves as chief administrative officer of the legislature when it is not in session. The Commission and its staff, by law and by practice, perform numerous fact-finding and service functions for members of the General Assembly. The Commission provides professional, clerical, and other employees required by legislators when the General Assembly is in session and during the interim period between sessions. These employees, in turn, assist committees and individual members in preparing legislation. Other services include conducting studies and investigations, organizing and staffing committee meetings and public hearings, maintaining official legislative records and other reference materials, furnishing information about the legislature to the public, compiling and publishing administrative regulations, administering a legislative intern program, conducting a pre-session orientation conference for legislators, and publishing a daily index of legislative activity during sessions of the General Assembly.

The Commission also is responsible for statute revision; publication and distribution of the *Acts* and *Journals* following sessions of the General Assembly; and maintenance of furnishings, equipment, and supplies for the legislature.

The Commission functions as Kentucky's Commission on Interstate Cooperation in carrying out the program of the Council of State Governments as it relates to Kentucky.

Issues Confronting the 2004 General Assembly

Prepared by

**Members of the
Legislative Research Commission Staff**

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Foreword

As public servants, legislators confront many issues potentially affecting citizens across the Commonwealth. These issues are varied and far-reaching. The staff of the Legislative Research Commission each year attempt to compile and to explain those issues that may be addressed during the upcoming legislative session.

This publication is a compilation of major issues confronting the 2004 General Assembly. It is by no means an exhaustive list, as new issues will arise with the needs of Kentucky's citizens.

Effort has been made to present these issues objectively and concisely, given the complex nature of the subjects. The discussion of each issue is not necessarily exhaustive, but provides a balanced look at some of the possible alternatives.

The issues are grouped according to the jurisdictions of the interim joint committees of the Legislative Research Commission; no particular meaning should be placed on the order in which they appear.

LRC staff members who prepared these issue briefs were selected on the basis of their knowledge of the subject.

Robert Sherman
Director

Frankfort, Kentucky
December 2003

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Agriculture and Natural Resources

Should the General Assembly extend the tax exemptions, credits, and deductions currently available to livestock and crop farmers to horse farmers?

Prepared by DeVon Hankins

Background

Kentucky imposes a sales and use tax on raw materials used in the raising of horses. However, it does not impose taxes on comparable materials for most livestock or crop operations.

Horse farming continues to be the number one agricultural cash commodity for Kentucky, generating \$760 million in receipts in 2002.

Kentucky has consistently ranked among the top 10 states in equine production and sales.

Kentucky currently imposes sales and use tax on many of the raw materials used in horse farming operations: all feeds and feed additives, chemicals used to control pests and diseases, on-farm breeding and production facilities, fencing, equipment, and machinery. However, Kentucky does not impose sales and use tax on comparable materials for other livestock such as lamas, buffaloes, cattle, or poultry.

The state also imposes a sales tax on fees for breeding a stallion to a mare within the state, but does not tax the sale of semen from a bull. It also taxes the sale of horses used for racing or show, though a bull shown at a local or state fair is not taxed when sold.

The Kentucky equine industry has had and continues to have a substantial economic impact on the state as a whole. In 1996, the equine industry had a total \$3.4 billion economic impact on the Commonwealth, in addition to providing 52,900 jobs, according to the American Horse Council. Since 1999, horse farming has been Kentucky's leading agricultural commodity with regard to cash receipts, replacing even tobacco (Table 1). In 2002, according to the Kentucky Agricultural Statistics Service, the marketing of horses generated \$263 million more cash receipts than tobacco and \$299.6 million more than cattle and calves.

Kentucky has also maintained a leading position in a number of areas within the equine industry on a national level, consistently ranking in the top 10 states in equine production and sales.

Table 1
2002 Kentucky Cash Receipts by Commodity

Commodity	Cash Receipts (\$ Millions)	Percent of Total
Horses ^{1/}	\$706	24.4
Tobacco	\$443	14.2
Cattle & Calves	\$406.4	13.1
Poultry ^{2/}	\$421	13.5
Cash Grains ^{3/}	\$552.3	17.7

Source: Kentucky Agricultural Statistics Service.

---1/Includes mules and stud fees. 2/Broilers only. 3/Includes corn, soybean and wheat.

In 1998, the value of sales from equine was \$1.75 billion nationally. Kentucky ranked number one, accounting for 37 percent of this total, according to National Agricultural Statistics Service. In 2002, Kentucky ranked third nationally in the number of active stallions and led the U.S. in the number of mares bred, according to The Jockey Club (Table 2). It is also the annual leader in the list of states producing registered Thoroughbred foals, increasing its share of the total U.S. foal crop from 19 percent to 29 percent over the last decade, according to The Jockey Club (Table 3).

Table 2
2002¹ Top Five States
Active Stallions and Mares Bred

State	Stallions	State	Mares Bred
Texas	404	Kentucky	19,640
California	393	Florida	7,135
Kentucky	378	California	5,799
Florida	280	Texas	3,555
Oklahoma	215	Louisiana	2,257

Source: The Jockey Club, 2003 Factbook.

---1/Initial returns only (as of 09/30/03); states listed by ranking of active stallions.

Kentucky vies for market share with top competing states like Texas, New York, and California.

Many states are attempting to capture or recapture market share in the equine industry by using various types of incentives. These incentives range from increasing the value of their states' owner and breeder programs to enacting legislation that provides varying levels of tax relief.

Table 3
2001 Top Five States
Registered Foals

State	Registered Foals	Percent of U.S. Crop	% Change 1991- 2001
Kentucky	9,801	28.8	+34.9
Florida	4,311	12.7	+13.0
California	3,688	10.8	-25.5
Texas	1,950	5.7	-10.7
New York	1,728	5.1	+6.3

Source: The Jockey Club, 2003 Factbook.

Many states are offering tax relief on traditional and non-traditional production materials in an attempt to gain market share.

For example, in 2000 the state of New York added machinery and fuel to its already extensive list of materials that are eligible for tax relief for the industry. Within a year of New York's decision, California offered a partial tax exemption on farm equipment and machinery. Currently Georgia exempts the tax on materials such as woodshavings, sawdust, and peanut hulls for bedding; Texas allows tax exemptions on restoratives and therapeutic preparations; and Tennessee exempts costly materials that are speculative in nature such as semen and embryos.

Discussion

Proponents argue that all agribusinesses should be granted the same agricultural status, regardless of the commodity raised.

Proponents question why the state has chosen not to provide its horse farmers with the same type of tax benefits it provides to its other farmers. Most argue that it is an issue of equity. They assert that all agribusinesses should benefit from the same tax advantages as enjoyed by other commodity groups. It should be noted that Kentucky's equine industry includes recreational horses, pleasure horses, show horses, as well as race horses.

Proponents also contend that Kentucky's failure to provide tax relief to its horse farmers could result in a loss of equine-related revenues and industry participants moving to other states.

Proponents also argue that tax relief would provide additional income, enabling horse farmers to sustain and grow their operations. They contended that this is critical for Kentucky, particularly given the equine industry's sizable contribution to the Commonwealth's economy; not to mention the potential loss of income if the competitive advances of other equine producing states continues to go unchallenged. Proponents believe that offering tax relief to Kentucky's horse farmers is an economically sound public policy.

Opponents argue that tax benefits should be offered only to farmers who raise livestock for human consumption.

Opponents also argue that the equine industry is quite profitable and therefore is not in need of tax relief.

Opponents argue that comparing horses to livestock such as buffalo, cattle, and poultry is like comparing apples to oranges. The point being that these are commodities for consumption. They say tax relief is relevant when the state's goal is to aid its residents in attaining a basic need such as food at the lowest cost.

Opponents also contend that the equine industry, as profitable as it has been year after year, is not in need of any types of incentives. There is a long-standing perception that most horse farmers are at best merely 'gentlemen farmers' who oversee million-dollar "signature farms" and at worst, are non-resident venture capitalists seeking a tax shelter.

Opponents also argue that the relative value of the proposed tax credits is negligible compared with the average profits realized by horse farmers. For 2003, the estimated annual revenue from equine-related sales and use tax will be approximately \$21 million, or about 3 percent of the value of total 2002 cash receipts (Legislative Research Commission staff estimate.)

Works Cited:

American Horse Council, figures compiled 1996.

Kentucky Agricultural Statistics Service 2002-2003.

The Jockey Club. *2003 Factbook*.

National Agricultural Statistics Service. "U.S. Equine: Value of Sales." March 2, 1999 release.

Tennessee Statutes, Title 67, Chp. 6, Part 3.

California Codes, Section 6356.5.

Georgia Code, Chp. 48, Sec. 8-3.

New York Code, Article 28, Part 2, Sec. 1105; Part 3, sec. 1115.

Texas Tax Publication 94-101. *Tax Exemptions for Agriculture*.

Should the General Assembly amend the Voluntary Environmental Remediation Act to clarify definitions and standards?

Prepared by Hank Marks

Background

The Voluntary Environmental Remediation Act addresses certain contaminated industrial sites called brownfields

The purpose of a brownfields program is to clean up and redevelop commercial and industrial sites that are, or are believed to be, contaminated. These sites are generally abandoned and unused. They may pose health and environmental risks, do not contribute to the tax base of the communities in which they are located, and put development pressure on so-called greenfield sites in rural areas because the urban sites are unusable and nontransferable. The "Voluntary Environmental Remediation Act" (VERA), passed by the General Assembly in 2001, provides statutory authority for a program similar to those many other states have enacted.

A prominent feature of brownfields statutes is a provision for a "covenant not to sue." This is a written document that releases owners and subsequent purchasers of a remediated brownfield site from liability for the original contamination and thus enables properties to be bought and sold again, and used productively.

VERA (KRS 224.01-514 to 224.01-532) requires that administrative regulations creating cleanup standards and other program requirements be promulgated by the summer of 2002. These regulations were filed but have been withdrawn and the brownfields program has not yet been implemented.

The provisions of VERA are found in KRS 224.01-514 to 224.01-532 and became effective in July 2001. VERA requires that administrative regulations to put a Voluntary Environmental Remediation Program (VERP) into effect be promulgated by the Natural Resources and Environmental Protection Cabinet (NREPC) within one year of the effective date of the Act. The required administrative regulation, 401 KAR 100:100, was filed with the Legislative Research Commission in June 2002. This regulation was subsequently deferred by the Administrative Regulations Review subcommittee, and then finally withdrawn by the agency. Presently there are no administrative regulations that bring the Kentucky brownfields program into effect.

Discussion

Disagreements have arisen about what qualifies as a brownfield and the appropriate screening levels and remediation standards to be used.

Beyond the promulgating agency and environmental advocate organizations, the administrative regulation filed in June of 2002 had very little support. Although the concerns of governmental and industry organizations were numerous, the most fundamental issue centered on cleanup standards and screening levels. The two statutory provisions of the 2001 brownfields bill that bear most directly on this are contained in KRS 224.01-530(1):

- The numerical values contained in the document titled "Region 9 Preliminary Remediation Goals," ... are hereby established as screening levels and shall be used by the cabinet in conformance with the guidance set out in the Region 9 Preliminary Remediation Goals.
- It is not the intent of this section to establish these levels as the cleanup standards for individual contaminants that may be present at any site.

Generally speaking, those who support 401 KAR 100:100 as filed in June 2002 seek standards that are independent of and more restrictive than Region 9 screening levels. Those who are opposed want Region 9 levels and guidance to play a larger role in defining cleanup standards and responsibilities. In each case the interpretation of intent of the above provisions (and others) represents a kind of shorthand used to represent differing positions regarding the program's restrictiveness, the types of properties to be covered, interpretations of the program's purpose, and the corresponding requirements to be associated with it.

In part, fundamental disagreements regarding cleanup standards result from both implied or explicit definitions of a "brownfield," that is, by decisions relating to the kinds of sites that are eligible for participation in the VERP. As the definition of a brownfield broadens to include more sites and more types of ownership, the standards that are required for cleanup gain correspondingly broader implications for human health and environmental protection.

The Act's definition of a brownfield is broad and includes current owners of contaminated properties. This influences decisions and perceptions relating to the appropriate level of standards for cleanup of contaminants.

As noted earlier, brownfields are often defined narrowly as abandoned properties where an owner who is responsible for contamination and its remediation cannot be found or is insolvent. Kentucky's statute, on the other hand, broadens this general, limited understanding of brownfields and allows current owners who are responsible for contamination to be program participants. This would allow them to benefit from favorable brownfield-related standards, the covenant not to sue provisions, and any associated state and federal brownfield funding programs.

Strong differences of opinions have emerged regarding these definitions and standards. On one side are industry and local governments who seek a broad definition of a brownfield in combination with flexible, less restrictive standards. On the other side are environmentalists and the NREPC who seek a narrow definition of a brownfield site and more restrictive standards.

Again, positions taken on cleanup standards relate generally to the types of sites (and their intended use) that are eligible for participation in the VERP. Thus, it is reasonable to assume that there are those who could accept flexibility and less restrictiveness in exchange for a narrower definition of a brownfield, or the use of a range of standards to be applied to the unique requirements of a specific site.

The General Assembly may have to decide how to resolve the dispute relating to standards and whether to also open up the entire VERA to re-negotiation.

If the stalemate in the implementation of the program continues into the 2004 Regular Session, the legislature may be called upon to address the issues raised by 401 KAR 100:100 through statutory amendments to VERA. The 2001 passage of VERA was the culmination of a long and contentious effort over several years. The consensus that appeared at its enactment has disappeared in the regulatory process. Thus, the General Assembly may have to decide how to resolve the dispute relating to standards and whether to also open up the entire VERA to re-negotiation.

Should the General Assembly enact legislation that updates the electrical mine safety statutes?

Prepared by Tanya Monsanto

Background

Risks from electrical hazards are the second leading cause of coal mining fatalities.

Kentucky has accounted for one-half of the nation's fatalities from electrical hazards over the past three years.

High and medium voltage electrical equipment is becoming commonplace in coal mines as a way to increase production and reduce costs.

State and federal agencies have overlapping jurisdiction for mine safety.

Death or injury from electrocution is a significant risk to coal miners. In fact, injury from electrical hazards is the second leading cause of mining fatalities. Since 2001, the U.S. Department of Labor, Mine Safety and Health Administration (MSHA) reported an increase in the number of fatalities resulting from electrical hazards. Kentucky data show a similar trend. Between 1995 and 2002, Kentucky accounted for one-half of the national fatalities for electrical deaths reported by MSHA. There have been 40 electrical fatalities in coal mines since 1980.

The increased threat from electrical hazards occurs for two reasons. The first reason involves mine logistics. In a coal mine, the combination of water, high voltage electrical equipment, dark, cramped spaces, and ignitable dust creates a very hazardous environment for coal miners. It is difficult to see and it is difficult to maneuver. Inadvertent contact with electrical hazards can result.

The second reason is that use of electrical equipment is becoming increasingly common in mining. As a result of competition from states in the western United States, mine operators have tried to increase productivity through the use of automated mining equipment. Longwall shearers, continuous miners, various electrical pumps, and conveyor belts are used more frequently in mines. In 2002, MSHA approved a final rule allowing high voltage, longwall equipment in underground mines. Along with the gains in productivity comes an increased need for electrical power underground and a resulting increased risk of electrical accidents.

The protection of miners from electrical hazards is handled principally by two agencies: the Kentucky Department of Mines and Minerals (KMM) and by

MSHA. MSHA has its own inspectors and was granted authority under the Federal Mine Health and Safety Act of 1977 (the Mine Act) to investigate conditions, safety, and accidents in mines. MSHA can issue citations and orders and can levy penalties and fines for violations of federal law.

KMM only has the authority to investigate complaints and accidents related to violations of state law. It cannot enforce any of the provisions of the federal act. Under KRS 351.070, the Commissioner of Mines and Minerals “may prescribe reasonable safety standards governing the use of explosives, and electrical and mechanical equipment in the operation of open-pit or surface mines.” According to KMM, 68 percent of all electrical violations are written under KRS 352.230 (7) which states, “At all times when mining equipment is being used, it shall be maintained in safe working order.” KMM can levy fines and penalties for violations of provisions of the Kentucky law but cannot prescribe penalties for violations of federal law.

Pennsylvania, Virginia, and West Virginia have updated their electrical mine safety codes. KMM held a series of meetings in 2002 with coal operators in an attempt to strengthen Kentucky’s electrical safety procedures in mines. According to KMM, revising the procedures could be done through statute or through administrative regulations under the agency’s existing authority. In 2003, HB 555 was introduced as a statutory approach. Had it passed, HB 555 would have revised the mine safety statutes including those portions that pertain to electrical safety precautions in coal mines.

Discussion

Individual mine operators and the KMM disagree about the necessity for updating the mine safety statutes.

Operators argue that KMM already has the authority under statute to prescribe new safety procedures and requirements. Operators contend KMM could promulgate administrative regulations that would address many of the safety concerns about use of electrical equipment in mines.

Opponents contend that coal operators already face too much costly regulation and that updates to state electrical mine safety codes are unnecessary and duplicative.

KMM contends that if updates are made via administrative regulations, the regulations and the KRS authorizing statutes will be in conflict.

Kentucky law has the penalties to deter violation, but it doesn't have the statutory updates to the mine safety codes that will permit it to write violations.

Proponents contend that updates are needed because the mine safety codes in Kentucky are outdated and the state does not have authority to enforce federal laws.

Also, operators argue that electrical mine safety issues are already handled under the federal Mine Act and are enforced by MSHA. Coal mines are already regulated by the federal government and by the state. Operators are concerned that duplication will unnecessarily increase regulation of the coal mining industry, which is already suffering from decreasing production, revenues, and employment.

KMM agrees that it does have statutory authority to promulgate administrative regulations to update the electrical safety requirements. However, because the statute is very specific about how electrical equipment can be used in mines, KMM is concerned that portions of Kentucky law will contradict administrative regulations. According to KMM, this matter is best addressed statutorily to prevent confusion from conflicting provisions.

KMM disagrees, however, that current laws at either the state or federal level are strong enough to protect coal miners. Federal laws contain some of the necessary updates to the electrical safety codes but do not have serious penalties. Kentucky law has penalties to deter violation but does not have the statutory updates to the mine safety codes that would permit it to write violations. In fact, KMM's general counsel stated during the October 2003 Natural Resources Subcommittee meeting, "We need stronger state laws. Under the federal Mine Act, almost every violation under federal law is a misdemeanor offense."

KMM argues that because Kentucky laws are antiquated and federal laws do not have penalties that deter operator violations, KMM will only prosecute the most egregious injury and fatality cases. KMM asserts that this sends the wrong message to coal operators that KMM cannot or will not stop unsafe use of electrical equipment in mines.

Appropriations and Revenue

Should the General Assembly repeal the Motor Vehicle Property Tax?

Prepared by Terry Jones

Background

A Constitutional amendment adopted in 1998 permitted the General Assembly to exempt motor vehicles from property tax.

A Constitutional Amendment was adopted in 1998 that permits the General Assembly to exempt all or any portion of the property tax for any class of personal property. Many have argued that motor vehicles should be exempt from such taxes in the interest of fairness.

Motor vehicles are assessed on January 1 of each year at the average trade-in value of all vehicles of a specified model and year. The value is obtained from a manual prescribed by the Revenue Cabinet. The tax is collected by the county clerk upon the registration renewal of the vehicle.

- In 2002 there were approximately 2.8 million licensed drivers in Kentucky.
- In 2003 there were approximately 3.9 million vehicles on the tax rolls.
- The average assessed value for 2003 is approximately \$5,300.
- Each month nearly 325,000 renewal notices are mailed out.
- The county clerk retains 4 percent of the tax as a commission (approximately \$10.7 million).
- The state tax rate is \$0.45 per \$1,000 of assessed value and generates approximately \$94 million.

Discussion

Proponents of repealing the tax say it is unfair and voters overwhelmingly thought it had been repealed.

Although tax rates vary among taxing districts, the property tax on motor vehicles each year generates approximately

- \$104 million for school districts,
- \$28 million for counties,
- \$19 million for cities, and
- \$23 million for special districts.

Proponents of removing the state portion of the property tax on motor vehicles contend that using the average trade-in value for assessing the property tax, rather than the actual value of a specific vehicle,

results in the tax often being unfair. They also assert that individual voters thought they had repealed the tax when they had overwhelmingly approved the Constitutional amendment in 1998.

Opponents contend that repealing the state portion of the tax will provide very little tax relief and that there are serious budget considerations.

Opponents of removing only the state property tax on motor vehicles contend that individuals will not perceive that their taxes have been cut unless the local portion of the property tax on motor vehicles is removed as well. Moreover, since local taxes account for two thirds of the tax bill it is argued that local governments and school districts cannot absorb a revenue loss of this magnitude without some source of replacement funds. Opponents also contend that the state's budget cannot handle the loss of nearly \$100 million in revenues without replacing the revenues with some other source of funds.

Should the General Assembly repeal the remaining tax on intangible property?

Prepared by Pam Thomas

Background

In 1997, the Kentucky Supreme Court held that different tax treatment of in-state and out-of-state stock and bank deposits was unconstitutional

The remedy directed by the court resulted in a loss of \$45 million in General Fund revenues or approximately 68 percent of the total intangibles tax receipts at that time.

In 1998, a constitutional amendment was ratified to allow the General Assembly to exempt any class of personal property from the property tax.

In fiscal year 2002, the property tax on intangibles generated \$29.6 million.

The discussion about whether the tax on intangible property should be repealed began in earnest in 1997, after the Kentucky Supreme Court issued its opinion in *St. Ledger v. Commonwealth of Kentucky*, 942 S.W.2d 893 (1997). In *St. Ledger*, the court held that the Kentucky statutes that imposed a higher tax rate on out-of-state bank deposits than in-state bank deposits, and taxed the stock of out-of-state corporations while exempting the stock of in-state corporations violated the Commerce Clause of the United States Constitution. The court directed that all bank deposits be taxed at the lower in-state rate and that all corporate stock be exempted. Implementation of this court decision resulted in a loss of approximately \$45 million in General Fund revenues, which constituted approximately 68 percent of the total intangibles tax revenue at that time.

The ratification of Constitutional Amendment 2 by the voters in 1998, which amended the Constitution to allow the General Assembly to “provide by law an exemption for all or any portion of the property tax for any class of personal property” makes it constitutionally possible for the General Assembly to exempt intangible personal property through legislative enactment.

The property tax on intangibles generated \$29.6 million in General Fund revenues in FY 2002, which was 7 percent of the overall property tax receipts. Generally, intangible property is assessed at fair cash value as of January 1 of each year. With the exception of the tax on domestic life insurance capital, intangible property is not subject to tax by local governments or school districts.

The remaining intangible property subject to the tax and the rates imposed are set forth in Table 1 below.

**Table 1
Property Taxed and Rates Imposed**

Property Description	Rate
Annuities-right to receive income only; bank deposits; domestic life insurance reserves; profit sharing plans, and retirement plans.	\$0.001 per \$100 of assessed value
Accounts receivable between parent and subsidiary; receivables, patents, trademarks and royalties of out-of-state businesses; and tobacco base allotments.	\$0.015 per \$100 of assessed value
Bank for cooperatives capital stock, brokers accounts receivable, production credit associations, and savings and loan associations.	\$0.10 per \$100 of assessed value
Accounts receivable; credits, bonds, notes and mortgages of in-state businesses; annuities—single premium deferred; land contracts; installment accounts; domestic life insurance policy proceeds on deposit; margin accounts, and intangible property not otherwise classified.	\$0.25 per \$100 of assessed value
Domestic life insurance capital – Note – this tax is being phased downward and will be levied at a rate of \$0.14 per \$100 of value in 2003 and \$0.001 per \$100 of assessed value thereafter. Beginning in 2004 this tax will be essentially be replaced with a premium tax.	\$0.28 per \$100 of assessed value

Discussion

Kentucky’s property tax has been criticized as being overly complex.

One of the basic principles of good tax policy is that the taxes imposed be simple and efficient. The existing tax on intangible property has been criticized as being neither.

Good tax policy also requires that taxes be equitable. The existing tax on intangible property has been called inequitable.

Kentucky’s property tax has been criticized as being overly complex due to the myriad of separate classifications and rates. This is especially true for the intangibles tax, which includes 19 classes of property taxed at five different rates.

One of the basic principles of good tax policy is that the taxes imposed should be simple and efficient. The existing tax on intangible property has been criticized as being neither. The tax is complex, which makes it more difficult for taxpayers to understand and comply with. Complex taxes also generally require more cost and effort on the part of taxpayers to comply, and more public resources to collect and administer than simple taxes that are easily understood. These issues are magnified in the case of the intangibles tax because the rates imposed against several classes of property are so low that very little revenue is produced for the effort.

Good tax policy also requires that taxes be equitable. The existing tax on intangible property has been characterized as inequitable because it imposes

different tax burdens on similarly situated individuals based on the type of intangible property held.

The primary reason for not repealing the tax on intangible property is the revenues that will be lost.

The primary reason for not repealing the remaining tax on intangible property is the revenues that will be lost. If the General Assembly considers repealing the tax on intangible property, there are two specific issues that should be considered separately:

If the General Assembly considers repealing the intangibles tax, special consideration should be given to the tax imposed against savings and loan associations and the intangible portion of the tax imposed against public service companies.

- The intangible property tax imposed against savings and loan associations is not like the other intangible property taxes because it is imposed in lieu of all other taxes including the corporate income, license, and franchise taxes. This tax generated \$3.1 million in fiscal year 2002.
- The tax imposed against public service companies includes non-operating intangible property. The revenues generated by the intangible portion of this tax have not been included in the figures set forth in this paper because they are part of the larger overall base for public service companies. The intangible portion of the public service company tax generates approximately \$1.7 million

Should the General Assembly change the way limited liability companies are taxed?

Prepared by Pam Thomas

Background

A limited liability company (LLC) is a business structure that combines the business advantages of a corporation with the income tax treatment of a partnership.

Although there are many reasons why an entity might organize as an LLC, many business entities elect to organize as or convert to an LLC specifically for the tax advantages.

All 50 states and the District of Columbia allow the formation of limited liability companies (LLCs) as a method of doing business. Kentucky's Limited Liability Company Act was enacted in 1994 (KRS Chapter 275).

In general, the LLC is a business structure that combines the business advantages of a corporation with the income tax treatment of a partnership. The LLC is a separate legal entity, providing the same individual protection for its members as a corporation. The LLC may be treated as a partnership for tax purposes and, therefore, can provide its members with the flow-through tax benefits of partnerships and S Corporations, avoiding the "double taxation" of C corporations. Unlike S corporations¹, there are no limitations on the number of members an LLC may have, and it is permissible for a corporation to be a member of an LLC. Kentucky and most other states allow one-member LLCs to be formed.

Although there are many reasons a business entity might organize as an LLC other than achieving tax advantages, many organizations elect to organize as or convert to an LLC specifically for the tax advantages. The combination of the flexibility of the LLC as an operating entity and the differences among the taxing structures of the various states have created an environment in which corporate taxpayers can, in many cases, structure operations in a manner that avoids or substantially reduces total state taxes paid.

Discussion

Some people believe that small-business owners or individuals create all LLCs and that, because they are small, they deserve the tax breaks that exist in the current tax structure. Although it is true that many entities organized as LLCs are small businesses, the

¹ Subchapter S corporations are limited to 75 shareholders, and corporate shareholders are not permitted.

Some people believe that small-business owners create all LLCs. However, this is not true. Several large companies operating in Kentucky are organized as LLCs and do not pay the corporate franchise tax.

The popularity of the LLC as an organizational entity continues to grow. In 2000, the number of domestic LLCs organized surpassed the number of all types of corporations organized.

Dr. William Fox noted several issues regarding the taxation of LLCs in Kentucky in a report he prepared for the Subcommittee on Tax Policy Issues in 2002.

list of entities operating in Kentucky and organized as LLCs includes very large companies such as Marathon Ashland Petroleum, Speedway-Superamerica, Food Lion, Verizon Wireless Services, Cingular Wireless, GE Lighting, Cinergy Power Generation Services, and Louisville Forge. Under Kentucky's current corporate tax structure, none of these companies pays the corporate franchise tax, and those that are taxed as partnerships for federal tax purposes are not required to use the three-factor apportionment formula in determining where income should be taxed.

The popularity of the LLC as an organizational entity continues to grow. In January 2003, there were 33,246 active entities in Kentucky registered as LLCs. The Secretary of State's Office reported that by July 2003, the number of registered and active LLCs had increased to 39,312. In 2000, for the first time, the number of domestic LLCs organized surpassed the number of domestic corporations of all types (C corporations, Subchapter S, for profit and not-for-profit) organized in Kentucky. The Secretary of State's Office also reported that in 2002, there were 9,931 new LLCs organized, as compared to 6,926 corporations.

In a report prepared for the legislatively created Subcommittee on Tax Policy Issues in 2002, Dr. William Fox, Professor of Economics and Director of the Center for Business and Economic Research at the University of Tennessee, noted the following issues regarding the taxation of LLCs in Kentucky:

- LLCs are not required to pay corporate license taxes.
- The income of multi-state LLCs is apportioned using a single-factor sales formula (following the tax treatment of partnerships), rather than the three-factor formula used by corporations.² The single-factor formula allows Kentucky manufacturing firms to form an LLC in Kentucky with all activities in Kentucky except for a nexus-

² Corporations are required to apportion income between Kentucky and other states where they also are subject to tax based on a formula including payroll, property, and sales, with the sales factor given double weight.

creating activity such as a sales office with property or payroll that it locates in a state that does not have a single-factor sales formula. The location of sales for tax purposes in the other state will significantly reduce the Kentucky tax liability without increasing the tax liability in the other state.

- Profits earned by LLCs may be passed to the members and taxed at that level rather than at the LLC level, which means that the state may not receive tax revenues from out-of-state members receiving distributions from the LLC.

Fox recommended that the law be amended to require LLCs to pay the corporate license tax, and to require LLCs to apportion multi-state income in the same manner as other corporations.

Fox recommended that Kentucky tax LLCs like corporations by requiring them to pay the corporate license tax, and by requiring LLCs to apportion multi-state income in the same manner as other corporations. Fox also noted that Kentucky should consider imposing a withholding tax on all LLC income passed on to nonresident members to ensure the collection of tax due in Kentucky as a result of the activities of the LLC in the state.

Several other states have acted recently to address issues relating to the taxation of LLCs.

Several states have acted recently to address issues relating to the taxation of LLCs. Some states have required withholding on distributions to nonresident members.³ New Jersey recently added a withholding tax on the distribution of LLC earnings to out-of-state members and anticipates at least \$100 million in additional state revenue (Fox and Luna p. 6). California requires all nonresident or foreign corporate members of LLCs to consent to jurisdiction in the state and to pay the state taxes on their distributive share (Ely and Grissom p. 464). Because it is unclear whether mere ownership of a membership interest in an LLC is sufficient to allow that state to assert its taxing jurisdiction over a nonresident or foreign corporate member of an LLC, many states have opted instead to impose a tax on LLCs at the corporate level.⁴ Other states have increased annual fees on LLCs (Ely and Grissom).

³ As of November 2002, the following states had a withholding requirement: Indiana, Iowa, Kansas, North Carolina, Ohio, and Vermont (Ely and Grissom)

⁴ States that impose a tax at the corporate level (as of November 2002) include Alabama, California, District of Columbia, Florida, Illinois, Maine, Michigan, New Hampshire, New Jersey, Pennsylvania, Tennessee, Texas, Washington, and West Virginia (Ely).

The results of a recent study indicate that the increase in the number of LLCs has had a significant negative impact on state corporate tax revenues.

In a subsequent study specifically examining whether the advent of LLCs can explain declining corporate tax revenues, Fox and colleague LeAnn Luna noted the following about the impact of LLCs on state tax revenues: “The results [of the study] indicate that LLCs have had a significant, negative impact on state corporate tax revenues. The problem could be somewhat offset by states requiring combined reporting. The avoidance mechanisms allowed by LLCs and the failure to require combined reporting lower state tax revenues and increase the likelihood that state taxation is non-neutral and distorting” (Fox and Luna p. 20).

They further noted that the reduction in corporate tax revenues may be somewhat offset by increases in individual income tax revenues because of the pass-through of income to individual members of the LLC; however, the “ownership of LLCs by large corporations, which is probably the largest source of revenue loss, does not result in additional individual income tax receipts” (Fox and Luna p. 27).

The impact of the increasing use of LLCs in Kentucky on corporate tax receipts is not known. What is known, however is that the total corporate tax contribution to the General Fund has declined from 10 percent in 1990 to 5 percent in FY 2002. There are many other factors that have contributed to this decline including the increasing number of economic development tax incentive programs for corporations and the sluggish economy, but there is no doubt that the increase in the number of entities operating as LLCs has played a part.

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Should the General Assembly modify Kentucky's individual income tax structure to adjust for lower incomes?

Prepared by Susan Wobbe and Louis Pierce

Background

Kentucky uses a graduated income tax that imposes higher rates on higher incomes.

Tax deductions and credits remove a portion of income from taxation.

Some credits are available to all taxpayers, while some are targeted to specific groups.

Kentucky first enacted an individual income tax in 1936, with a graduated tax rate ranging from 2 percent on income less than \$3,000 to 5 percent on income more than \$5,000. In 1952, an additional top rate of 6 percent was applied to income more than \$8,000. The tax rate has remained unchanged since.

To lessen the tax burden on lower incomes, Kentucky law contains several provisions to remove a portion of income from taxation. Some of these provisions are available to all taxpayers, such as the personal credit and standard deduction, while others are targeted to specific groups, such as the low-income and child care credits.

The personal credit is \$20. It is allowed for each taxpayer and dependent claimed on a return. An additional \$20 credit is allowed if the taxpayer is over age 65, blind, or a member of the Kentucky National Guard. The standard deduction was set at \$1,700 in tax year 2000 and is adjusted each year thereafter based on the consumer price index. In 2003, it is \$1,830. It may be taken by any taxpayer in lieu of itemized deductions.

The low-income credit is available for taxpayers with an adjusted gross income of less than \$25,000. The credit is expressed as a percentage of the tax liability. The lower the income, the greater the credit. The child care credit is available to all taxpayers who qualify under federal law and is equal to 20 percent of the federal credit for child care expenses.

Discussion

Some people claim that Kentucky's individual income tax imposes a disproportionate and unfair burden on low-income families. They claim that since the highest

Some people claim that income tax rates have not kept up with inflation, and the burden falls disproportionately and unfairly on low-income taxpayers.

One advocacy group claims that income taxes are higher on low income people in Kentucky than in any other state.

Other people claim that Kentucky's income tax is fair and does not overburden low-income taxpayers.

Some statistics show that Kentucky's overall tax burden compares favorably with other states.

If the General Assembly chooses, it can make the income tax more progressive by either reducing the burden on lower incomes or increasing it on higher ones.

tax rate is imposed at \$8,000, the tax is not progressive enough and applies almost equally to all taxpayers regardless of income. Noting that the rate structure and personal credit have not been changed in 50 years, they claim the tax burden has not kept pace with inflation.

Proponents of this argument cite certain statistics to support their position. One advocacy group, for example, has concluded that the state income tax burden on a family of four at the federal poverty level is higher in Kentucky than any other state (Johnson). Another recent study concluded that Kentucky's overall tax system placed a higher burden on the lowest quintile of income earners than any other income group (Fox 24-25).

Other people argue that Kentucky's income tax does not need to be adjusted further for low-income taxpayers. They note that the standard deduction has already increased more than \$1,200 in the past seven years; that the overall tax burden on lower incomes in Kentucky, when all taxes are considered, is lower than the national average; and that any disproportionate burden on lower-income taxpayers that may exist is attributable to other taxes.

People holding this view also cite statistics to support their position. For example, a recent study showed that Kentucky's overall tax burden on low-income taxpayers is the 11th lowest in the country (Fox 23). The same study showed that, to the extent that there is a burden on low-income taxpayers, it is due to sales and property taxes, which make up almost 70 percent of their tax burden, rather than the income tax, which is only 4 percent of the tax burden (Fox 25).

In any event, if the General Assembly does consider amending the state income tax to adjust for low-income taxpayers, it could take either of two approaches. First, it could reduce the burden on lower incomes by expanding tax exemptions, deductions, or credits, or by increasing the income thresholds to which the current rates apply. Second, it could increase the burden on higher incomes by imposing a higher, additional rate on incomes over a certain

amount. Either option would make the tax more progressive, with the former decreasing state revenue and the latter increasing state revenue.

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Banking and Insurance

Should the General Assembly enact a statute to more strictly regulate automobile and homeowners insurance rates and underwriting guidelines?

Prepared by Greg Freedman

Background

Legislators should consider the issues of automobile and homeowners insurance regulation in the context of the current challenges to the authority of states to regulate the insurance industry.

Enactment of the 1999 federal Gramm-Leach-Bliley Act expanded the power of banks to sell insurance. The National Association of Insurance Commissioners is working to streamline the state regulatory system so insurers are not at a competitive disadvantage with banks.

Rates are rising in two major personal lines of property and casualty insurance—automobile and homeowners—and tighter underwriting guidelines are causing more households to lose homeowners insurance coverage. Consumers demand that rate increases be more closely regulated and express concerns about the fairness of underwriting guidelines that use credit and claims histories of applicants and customers. At the same time, Congress and state regulators are taking positions on whether insurance regulation should be left solely to the states and how much regulation is good for consumers. As they grapple with the state regulatory issues their constituents raise about automobile and homeowners insurance, legislators should consider these issues in the context of the challenges to the authority of states to regulate the insurance industry.

The battle over whether the states should continue to be the sole regulators of insurance intensified with the enactment in 1999 of the federal Gramm-Leach-Bliley Act (GLB Act, Pub. L. No. 106-102, 1999). The GLB Act removed barriers between banks and insurance companies established after the Depression greatly expanded the powers of banks to engage in insurance, securities, and other financial transactions. Insurers claimed to be at a competitive disadvantage with banks and securities firms because banks and mutual funds can get approval of new products from their federal regulators much faster than insurance companies can from state regulators. The National Association of Insurance Commissioners (NAIC) responded in 2000 by organizing working groups to modernize the state-based system of insurance regulation through design and implementation of

uniform standards for producer licensing, market conduct oversight, and rate and form regulation.

Property and casualty insurers prefer state regulation to federal regulation, but they want less state regulation. Consumers question the effectiveness of current state regulation of auto and homeowners insurance.

Although some insurers now support some federal regulation, most property and casualty insurers still prefer state regulation. However, property and casualty insurers want states to reform laws that require prior approval of rates and forms by state regulators before they can be marketed. Kentucky is one of the few states that allows property and casualty insurance rates to be used and then filed with the Insurance Commissioner. While property and casualty insurers seek less state regulation, some consumers question the extent of state oversight of personal auto and homeowners insurance rates and the fairness of tighter underwriting guidelines.

Automobile insurance rates are up an average of 13 percent since 2002, are expected to rise by 6 percent in 2004, and show no sign of leveling off.

The Insurance Information Institute estimates that auto insurance rates will rise by 6 percent in 2004. The increase is attributed to rising costs of medical care, vehicle repair, jury awards, automobile theft, and fraud (Insurance Information Institute "Auto"). According to J.D. Power and Associates, auto insurance premiums have increased an average of 13 percent since 2002 and show no sign of leveling off (Insurance Journal).

Homeowners insurance rates are expected to rise 8 percent in 2004 after rising 7 percent in 2003. Between 1990 and 2002 homeowners insurers paid out more in losses than they collected in premiums.

Homeowners insurance rates are expected to increase by 8 percent in 2004 after increasing by 7 percent in 2003. These increases follow increases of just over 2 percent in 2001 and 2002. Between 1990 and 2002, homeowners insurance companies paid out \$1.17 for each \$1 collected in premiums. The Insurance Information Institute reports that since 1990, more than \$100 billion has been paid out by insurers for catastrophic losses (Insurance Information Institute, "Rising"). The increase in premiums is due to rising construction costs and expensive natural disasters. Hailstorms in Kentucky during the past two years have required Kentucky's largest property insurer to pay out more than \$200 million (Interim Joint Committee on Banking and Insurance).

Discussion

Kentucky's auto insurance premiums were the 26th highest in the nation in 2001. Kentucky is one of only nine states with a use and file type of competitive rating system.

Kentucky has had a competitive rating system for property and casualty insurance for more than 20 years. Advocates of less state regulation endorse such a system. Kentucky is one of only nine states that allows rates to be used before they must be filed with a state regulator. The National Association of Insurance Commissioners ranked Kentucky's auto insurance premiums in 2001 as the 26th highest in the country. This is a higher ranking than all seven bordering states except for West Virginia, which Table 1 shows is ranked 16th.

Table 1

State	Auto Premium Rank 2001	Rating System
Kentucky	26	Use and File
Illinois	29	Use and File
Indiana	39	File and Use
Missouri	32	File and Use
Ohio	42	File and Use
Tennessee	37	Prior Approval
Virginia	40	File and Use
West Virginia	16	Prior Approval

Source: National Association of Insurance Commissioners.

Of the seven states that border Kentucky, Illinois also has a use and file system. However, of the remaining six border states all except for West Virginia have lower premiums than Kentucky and Illinois.

Advocates of reduced state regulation urge reform of laws that require prior approval of rates and support competitive rating systems that allow rates to be set by the competitive marketplace. They contend that prior approval systems increase costs, suppress competition, and divert insurance department resources from more important functions. Although Illinois and Kentucky have the system sought by those who advocate less state regulation, the rates in Illinois and Kentucky are higher than surrounding states without such a system, except for West Virginia. There are, of course, many factors that influence a state auto premium ranking, but as Table 1 indicates, less state regulation by itself has not resulted in lower premiums in this eight-state region.

Proponents of prior approval claim it produces lower rates.

Proponents of prior approval rating and contend that:

- Rates are lower in states that require prior approval;

- California rates decreased after Proposition 103 was approved requiring prior approval of insurance rates; and
- In competitive rating, insurers settle claims and pass costs on to buyers. This cost-plus pricing scheme provides no incentives to insurers to settle claims conscientiously.

Opponents of prior approval assert that competitive rating does not drain the resources of state regulators as does prior approval systems.

Opponents of prior approval rating systems contend that they:

- Drain department resources that could be used for solvency and market conduct;
- Produce slow review, approval, and acknowledgment of filings;
- Require review by an inadequate and inexperienced staff;
- Lower availability of coverage due to tightening underwriting criteria, canceling or nonrenewing policies, or departure from state;
- Should not be credited with reducing rates in California after approval of Proposition 103 because the rate reductions were due to stricter enforcement of seatbelt laws, stronger drunk driving penalties, and the U.S. Supreme Court's decision eliminating third-party bad faith lawsuits; and
- Do not allow insurers to react as quickly to changing circumstances by cutting prices and expanding underwriting as does a competitive rating system.

Insurers have typically lost money on homeowners coverage in the past but recouped losses through investments. Reduced investment returns and other factors have caused 2.5 million households in the last two years to lose their coverage.

Homeowner insurance policies have typically been losers for insurance companies, and the losses were made up in sales of auto and life insurance policies and investment of premiums. Reduced investment returns, higher medical costs, and increasing auto repair costs have prevented insurers from recovering losses as they have in the past. Nearly 2.5 million households lost their homeowners insurance coverage during the past 24 months (MSNBC News).

A giant database that may be electronically updated and accessed by insurers has enabled insurers in every state to use a person's claims history as an underwriting tool.

As was reported in *Issues Confronting the 2003 Kentucky General Assembly*, some companies are refusing to renew customers who file too many claims (Kentucky Legislative Research Commission). An insurer may drop customers if, for example, they file

two claims in three years and may reject a new customer if they have filed a claim with another insurer in the last three years. Another insurer looks closely at an insured who files two claims in five years and will likely drop an insured who files three claims in five years. It became easier in the 1990s for insurers to know the claims history of customers because insurers can search a giant database of home and auto claims known as the Comprehensive Loss Underwriting Exchange, or CLUE. Insurers contribute data to CLUE each month and they tap into CLUE each time a new customer applies.

Advocates of using claims history say there is a strong statistical correlation between claims history and the likelihood of filing claims.

Advocates of using claims history as an underwriting tool say there is a strong statistical correlation between a person's prior claims history and the likelihood that claims will be filed in the future.

Opponents question whether such a correlation exists and say it is not fair to use inquiries by customers. Advocates claim inquiries are valid because the fact that loss has occurred is relevant for underwriting purposes.

Opponents disagree that such a correlation exists and strongly oppose the use of claims inquiries by insurers. There are times when customers call their agents to see if they are covered. The customer may not file a claim because the cost of damage does not exceed the deductible, or the customer decides to pay for it out of pocket. Advocates contend it is fair to use a customer's inquiry even though the customer does not file a claim for the loss because the fact that a loss has occurred is relevant for underwriting and rating purposes.

Insurers now use elements of consumers' credit histories to develop insurance risk scores for purposes of underwriting.

In the mid-1990s, the industry also began using elements of an individual's credit history to establish an insurance risk score to predict whether the individual would file future claims and the severity of those claims. Kentucky has a statute that prohibits an auto insurer from refusing to issue, failing to renew, or canceling a policy solely because of a person's credit history (KRS 304.20-020). Kentucky has a statute that applies the same prohibition to all property and casualty insurance policies (KRS 304.20-042).

Advocates of insurance risk scores as an underwriting tool contend that persons with better credit file fewer claims.

Advocates of insurance risk scoring say there is a direct correlation between an individual's performance in handling financial obligations and whether the individual will file an insurance claim. According to

insurers, people who have a history of paying their bills on time tend to file fewer claims.

Opponents contend that insurers cannot explain why scoring works. They also claim that a person's score will be downgraded if there is unusual activity in the month before purchase of auto insurance.

Opponents claim that, while insurers can demonstrate a correlation between timely payment of bills and the likelihood of filing insurance claims, they cannot explain why scoring works. Opponents contend that, because insurance risk scores are based on credit activity, a person's score will be downgraded if there is unusual activity within the month before purchase of auto insurance. No state has imposed an outright ban on all uses of credit reports by insurers. Maryland has a law that prohibits home insurers from using credit scores in offering, canceling, renewing, or pricing home insurance. It allows auto insurers to use credit scores when the policy is first offered, but prohibits its use in canceling, nonrenewing, refusing to issue, raising premiums upon renewal, or requiring a specific payment plan. In August 2003, the Oregon legislature passed SB 260 that prohibits an insurer from canceling or nonrenewing a policy in effect for at least 60 days based in whole or in part on credit information. Insurance scoring models must be filed with the state regulator. An insurance score cannot consider the absence of credit, and certain credit factors cannot be used to calculate an insurance score. If an insurer makes an adverse underwriting decision based on credit information, the insurer must provide the consumer with a summary of the most significant credit reasons for the decision.

After restricting the use of credit histories in June, the Ohio Department of Insurance is now reviewing insurers' use of credit scoring.

On June 12, 2003, the Ohio Department of Insurance issued a regulation that prohibits insurers from using credit scores as the sole criterion for rating or underwriting personal auto and homeowners insurance policies. It also requires consumer disclosures, including an explanation of credit report findings. On August 1, 2003, the department said it intends to conduct a review of Ohio insurers' use of credit scoring (Ohio Department of Insurance).

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Should the General Assembly enact a statute to require medical malpractice insurers to file their rates with the Department Of Insurance?

Prepared by Greg Freedman

Background

The vast majority of states require medical malpractice insurers to file their rates with the state regulator. Instead, Kentucky leaves this decision to the discretion of the Commissioner of Insurance.

The vast majority of states require medical malpractice insurance rates to be filed with state regulators who have the authority to approve or disapprove the rates. That is one reason medical malpractice insurance reform efforts in most states have focused on limiting the amount of damages paid out on medical malpractice claims rather than amending state laws on rate regulation. Like most states, the Kentucky General Assembly continues to debate the merits of legislation to limit medical malpractice damages.

Unlike most states, however, Kentucky statutes do not mandate that medical malpractice insurance rates be filed with the Department of Insurance. Kentucky statutes leave it to the discretion of the Insurance Commissioner to determine whether medical malpractice insurers must file their rates. In January 2003, after months of expressions of concern by members of the Kentucky medical profession about the cost and availability of medical malpractice insurance, the Commissioner issued an order requiring medical malpractice insurance rates to be filed.

The question facing the General Assembly is whether Kentucky should remain a no file state with discretion to require filings residing with the Commissioner, or join the majority of other states and require by statute medical malpractice insurance rates to be filed with the Department of Insurance.

State rating systems are classified as prior approval or open competition.

Table 1 shows the seven types of state rating laws. Generally, the types of rating systems are classified as either "prior approval" systems or "open competition/competitive rating" systems. Competitive rating assumes a competitive market in which excessive pricing would result in loss of market share, and inadequate rates would jeopardize financial

health. A prior approval system assumes the state must intervene to make sure rates are fair to both insurers and consumers.

Table 1
Types of State Medical Malpractice Rating Laws

Types of Law	Description
Prior Approval	Rates must be filed with the state regulator and become effective either after a certain waiting period elapses or after approval by the state regulator. The state regulator may disapprove at any time.
Modified Prior Approval	If the rate revision is based solely on a change in loss experience, file and use may apply. If the rate revision is based on a change in expense relationships or rate classification, prior approval may apply.
Flex Rating	The insurer can increase or decrease a rate within a flex band or range without approval of the state regulator.
File and Use	Rates must be filed and become effective immediately or at a future date specified by the filer. The state regulator may disapprove the filing at any time.
Use and File	Rates become effective when used and must be filed within a certain period of time after use. The state regulator may disapprove the filing at any time.
State-Prescribed	The state regulator determines and promulgates the rates to which all insurers must adhere.
No File	The insurer is not required to file rates with the state regulator.

Source: Insurance Information Institute. "Rates and Regulation."

Kentucky has a two-tiered open competition system. For personal risks Kentucky is a use and file state. For commercial risks, including medical malpractice, Kentucky does not require filing of rates unless required by the Commissioner of Insurance.

Kentucky has a use and file form of competitive rating system (KRS 304.13-051). If the market is deemed to be competitive, insurers for personal risks may use the rates and then file them within 15 days after the date of first use. However, the statute provides an exception for commercial risks such as medical malpractice insurance. Insurers must file their rates only if the commercial line has been designated by the Insurance Commissioner. Thus, Kentucky has a two-tiered open competition system. For personal risks there is a use and file system. For commercial risks there is a no file system, which is the least restrictive filing system.

On January 7, 2003, the Commissioner of Insurance ordered medical malpractice insurers to file their rates. New rates that increase or decrease rates by 25 percent or less will be subject to the use and file system. New rates that increase or decrease rates by more than 25 percent will be subject to prior approval.

Since the Commissioner issued her order on rate filings, two medical malpractice insurers have filed for approval of rate increases exceeding 25 percent.

On July 12, 2002, the Department of Insurance held a hearing on medical malpractice insurance. On January 7, 2003, the Commissioner issued an order effective January 15, 2003, designating medical malpractice insurance as a commercial line of business that must file rates. The order directed all medical malpractice insurers to file their current rates within 60 days of the order. As to new rates, the order provided that rates must be filed no later than 15 days after first use of the new rates if the rate increase or decrease was 25 percent or less. If the new rates would increase or decrease rates more than 25 percent within a 12-month period, the rates must be filed and not used until approved by the Commissioner.

Since the Commissioner's order, two insurers have filed for approval of rate increases of more than 25 percent. One company asked for a 29 percent increase for physicians, which was approved. Previously, in January 2002, the company had increased rates 45 percent. The same company also requested a 157 percent increase for hospitals and other facilities. This was rejected and the company filed again for a smaller increase. A second company filed for an average increase of 40 percent, which was approved.

Discussion

The Commissioner's order has changed Kentucky from a no file state to one that requires filing as long as the order remains in effect.

The Commissioner's order has temporarily changed Kentucky from a no file state to one that requires filing. As long as the Commissioner's order remains in effect, Kentucky will be a use and file state for new rate filings that propose rate increases or decreases within a certain range, and a prior approval state for changes outside the range.

Proponents of the current system argue it allows for the market generally to set rates while, in times of crisis, the Commissioner can restrict excessive rate increases. Opponents contend that the lag time in gathering evidence and conducting hearings results in the exercise of discretion only after the crisis is well established, availability and affordability issues have had a negative impact on society and the economy, and inadequate reserves of some carriers have further tightened the market.

The 2003 General Assembly considered a bill to remove the Commissioner's discretion and require filing, but after passing the House the bill failed in the Senate.

By requiring rates to be filed, HB 379 would have kept Kentucky as a competitive rating system. Some argue that Kentucky should go further and require prior approval of medical malpractice insurance rates.

Proponents of open competition rating systems argue that prior approval is too high a burden on state regulators and has a negative impact on availability because insurers will not enter a market where there may be lengthy rate reviews.

Opponents of competitive rating systems point to the need to closely scrutinize loss reserves and the dependence on high investment returns to underprice coverage. They assert that prior approval regulation protects against excessive pricing.

During the 2003 Regular Session of the Kentucky General Assembly, the legislature acted to remove the discretion of the Commissioner when the House passed HB 379 requiring medical malpractice insurers to file rates with the Department of Insurance. The bill required an insurer to notify each policyholder of the proposed rate increase and to specify the effect on the policyholder's current premium. It authorized the Commissioner to hold a public hearing. After passing the House, the bill failed to be approved by the Senate.

If HB 379 had been enacted, Kentucky would have remained a competitive rating state, but medical malpractice insurers would have been treated the same as personal lines insurers are currently treated. Rates would have to be filed within 15 days after first use of and there would have to be prior approval of increases or decreases of more than 25 percent. There are some who say Kentucky should go further and require prior approval of all medical malpractice rate filings.

Advocates of competitive rating systems contend that the regulatory lags in rate approval in prior approval systems exacerbate the rate swings in the medical malpractice insurance market. They argue that rate review is too high a burden on state regulators when such review does not systematically change rates or loss ratios relative to competitive rates. Furthermore, they assert that prior approval systems have a negative impact on the availability of insurance because some insurers are reluctant to enter a market where there are lengthy rate reviews.

Opponents of competitive rating systems argue that prior approval is needed to protect consumers from excessive pricing as well as inadequate rates. They argue that prior approval will ensure that rates are adequate and not approved unless they provide for adequate reserves to meet future losses. Under-reserving can lead to insolvencies. Opponents believe that rate filings need to be reviewed to assure that carriers are not cutting prices to increase market share and relying too heavily on high investment returns to make up for inadequate rates.

The medical malpractice market tends to be cyclical. Legislators must keep the cyclical nature of rates in mind because the underwriting cycle affects rates regardless of the type of state regulation.

One of the reasons for the current high prices and tight market is the underwriting cycle. The medical malpractice insurance market, just as the property and casualty insurance market as a whole, tends to be cyclical. However, the cycles can be more extreme in the medical malpractice market than in other insurance markets due to the longer time period needed to resolve claims. Past insurance underwriting cycles consisted of a few years of low rates, relaxed underwriting, and underwriting losses followed by a few years of high rates, restrictive underwriting, and strong gains. Legislators should keep this cyclical nature of rates in mind because the underwriting cycle affects rates regardless of the type of state regulation. State regulators have tried but failed to end the rating swings of the underwriting cycle. Instead, they often try to restrict rate increases at the top of the cycle.

The GAO and Weiss Ratings Inc. both issued reports in June 2003 that describe reasons for the rate increases.

Weiss Ratings, Inc. and the U.S. General Accounting Office (GAO) issued reports in June 2003, which, as Table 2 shows, listed reasons for the spike in prices for medical malpractice insurance. The GAO report analyzed medical malpractice insurance in seven states.

Table 2
Cited Reasons for Premium Increases

General Accounting Office	Weiss Ratings, Inc
Since 1998 insurers' losses have increased rapidly.	Medical inflation rate increases.
From 1998 to 2001, insurers experienced decreases in investment income as interest rates declined on bonds that make up about 80% of their investments.	Supply and demand for coverage—the number of carriers increased through 1997 to 274 but had fallen to 247 in 2002.
During the 1990s, vigorous competition and strong investment returns caused insurers to offer premiums that did not completely cover losses.	The need to shore up reserves because medical malpractice insurers have been under-reserving since 1997.
Beginning in 2001, medical malpractice reinsurance rates increased more rapidly than in the past.	Financial safety—34.4% of medical malpractice insurers are financially vulnerable.
	Decline in investment income
	Insurance business cycle

Sources: Weiss and U.S. General Accounting Office

According to the Insurance Information Institute, there is no consensus on whether either system has lower loss ratios for a line of insurance, and there is little evidence of excessive pricing without a prior approval law.

Medical malpractice insurance is essential to the state's economy and its quality of health care. The rate review process could affect the price and availability of insurance.

Neither of the two reports above mentions whether the type of state regulation affects price increases. Many studies have examined the differences between prior approval regulation and competitive rating regulation. According to the Insurance Information Institute, the overall findings are as follows:

- There is no consensus on whether states with either system have lower loss ratios for a line of insurance.
- There is little evidence of excessive pricing without a prior approval law.
- Some evidence does support the existence of a regulatory lag in prior approval states.
- There is evidence that prior approval regulation tends to narrow the range of price dispersion, at least for personal lines ("State Insurance Regulation).

Medical malpractice insurance is essential to the Commonwealth's economy and the quality of health care in Kentucky. Excessive insurance premiums and lack of carriers might cause health care providers to retire, leave the state, or restrict their practices. The rate review process could affect the price and availability of medical malpractice insurance. Whether or not the General Assembly decides to mandate by statute the filing of rates, the effectiveness of rate regulation will be determined by how closely the Commissioner monitors the medical malpractice insurance market and the degree of scrutiny given to rate filings. The General Assembly and the Commissioner should consider the balance between the need for consumer protection and the possibility that regulation could reduce the number of products and competitors. Extreme rate regulation could result in fewer insurers offering products. Lax regulation could result in inadequate rates that threaten insurer solvency.

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Economic Development and Tourism

Should the General Assembly consider changes to the Enterprise Zone program?

Prepared by John Buckner, Ph.D.

Background

In 1982, the General Assembly passed legislation creating the Enterprise Zone program. Paralleling efforts in other states, the intent of the program was to improve the economic well-being of residents in designated areas that were characterized by high unemployment and deteriorating residential and commercial property. To do so, the program offered businesses certain sales and corporate income tax credits, and it offered zone residents sales tax exemptions to purchase building materials to upgrade residential property within zones. In Kentucky, the original legislation specified that each zone would have a life span of 20 years. With the initial zones set to expire, there has been debate over the effectiveness of the program in achieving its stated goals.

The legislative intent of the program is to revitalize economically depressed areas of the state.

To address the legislative intent of the program, current statutes may be subdivided into four components: (1) tax credits available to businesses and residents within zones; (2) the eligibility requirements placed upon businesses; (3) how cities may apply for an enterprise zone; and (4) the 20-year sunset provision.

Businesses are offered tax credits to stimulate economic activity.

A summary of the several tax credits available to businesses in an enterprise zone is below.

Sales and use tax exemptions

- Building materials used in rehabilitation or new construction within a zone
- New and used machinery and equipment purchased, leased, or rented and used by a qualified business

Motor vehicle usage tax exemptions

- Commercial vehicles purchased and used by a qualified business solely for business purposes

- Other vehicles purchased and used by a qualified business to the first \$20,000 of the retail price

Corporate income tax credits

- Credits equal to 10 percent of wages of qualified employees within the zone, up to \$1,500 per employee, with any unused credit able to be carried forward for up to five years

For existing businesses to be eligible for enterprise zone benefits, they must first be certified by the zone authority. For a newly created business to be certified, it must hire at least 25 percent of its workforce from persons who reside within the zone, who have been unemployed for at least 90 days, or who have received public assistance benefits for at least 90 days prior to employment with the business.

Local governments must apply for zone designation; however, the program is limited to 10 enterprise zones.

For an enterprise zone to be created, a local government must apply to the state enterprise zone authority and meet certain statutory requirements related to unemployment rates, median family income, population trends, and certification by the local government that the area is characterized by substandard housing and chronic abandonment of property.

Each enterprise zone is set to expire twenty years after receiving designation.

The original legislation called for seven areas to be eligible for enterprise zone designation, which was later amended to allow for three additional zones. The 10 areas that received enterprise zone designation were statutorily given 20 years of eligibility for program incentives. After the 20-year period, zones were set to expire. The existing zones and their expiration dates are listed in Table 1.

The enterprise zone authority may remove the designation of a zone if the area no longer meets the stated criteria; however, businesses eligible for tax credits prior to a zone being decertified retain eligibility for tax credits after a zone is decertified.

Table 1

Enterprise Zone Location	Expiration Date
Louisville	Dec. 31, 2003
Hickman	Dec. 31, 2003
Ashland	Dec. 31, 2004
Covington	Dec. 31, 2004
Owensboro	Dec. 31, 2005
Lexington	Dec. 31, 2005
Knox County	Dec. 31, 2006
Campbell County	Dec. 31, 2006
Paducah	Dec. 31, 2006
Hopkinsville	Dec. 31, 2007

Source: Kentucky Cabinet for Economic Development.

Discussion

Several possible problems have been raised regarding the constitutionality of the Enterprise Zone program and its efficacy in achieving the statutory intent of the legislation that created it.

A 1992 opinion by the Attorney General concluded that the program is unconstitutional.

In response to a legislator's questions concerning the legal basis of the program, in 1992, the Kentucky Attorney General issued an opinion (Kentucky OAG 92-86) that concluded that the program constituted "special legislation," which is prohibited by Sections 59 and 60 of the Kentucky Constitution, because it established an arbitrary limit on the number of areas eligible for benefits not made available to other similar areas. The opinion found no justification for this limit because:

- The benefits are provided to areas that have no reasonable distinguishing basis from other similar areas;
- The 10 areas designated as enterprise zones are not the most economically depressed areas in the state;
- The zone areas were designated on a "first come first serve" basis that discriminated against other areas that might qualify; and
- If the program is successful and an area is no longer economically depressed, businesses within a zone retain tax credit benefits for 20 years while similar businesses outside of zones do not qualify.

It must be noted, however, that the Attorney General's opinion does not carry the force of law and that the

questions raised in the opinion have not been adjudicated.

Most credits are taken for sales and use tax; less than 2 percent are granted for job creation.

In FY 2000, the Enterprise Zone program was the most costly of all incentive programs offered by the Kentucky Cabinet for Economic Development. Table 2 illustrates the tax credits given by other programs offered by the cabinet compared to those of the Enterprise Zone program. Of the credits taken under the program, more than 75 percent are for sales and use tax exemptions; approximately 20 percent for the motor vehicle usage tax exemption; and 2 percent for the corporate income tax credit, which is the credit given to firms for hiring members of the targeted workforce.

Table 2
Tax Credits Granted Offered
Kentucky Economic Development Programs
FY 2000

Program	Total Credits
Kentucky Rural Economic Development Act	\$135,376,238
Kentucky Industrial Development Act	\$45,687,045
Kentucky Jobs Development Act	\$58,623,847
Kentucky Industrial Revitalization Act	\$12,583,164
TOTAL for Other Programs	\$252,270,294
TOTAL for Enterprise Zones	\$284,270,294

Source: LRC staff analysis, *The Costs*.

Recent studies of the Enterprise Zone program have questioned its efficacy. A study conducted by the Office of the State Budget Director stated that the enterprise zones "... have lost their original focus on distressed communities. The zones now cover 221 square miles, including some of Kentucky's most productive manufacturing and distribution centers and a large portion of a rural county." The report found that some of the credits have been given for investments and hiring that would have occurred in the absence of incentives.

Some contend that the program may be successful at retaining existing jobs but not as successful at generating jobs.

Another recent study of the zone program in Louisville was commissioned by the Louisville Board of Alderman and found that, while the program has not been successful at generating new jobs, it can be argued

that it has been successful at encouraging businesses to maintain existing jobs (Lambert).

One study found that the program is important to existing businesses but needs to be modified.

Somewhat different conclusions were reached by a 2002 study conducted by Deloitte & Touche LLP. Rather than using economic analysis, the authors of the study conducted interviews of representatives of companies within enterprise zones, as well as economic development officials, state legislators, and zone administrators. Based on these interviews, the authors concluded that, although the incentives offered through the program are not critical to location or expansion decisions, they make such decisions more feasible when combined with other incentive programs. The study found that poor overarching national economic conditions and increasing national and international competition make the tax credits offered through the Enterprise Zone program increasingly important to eligible businesses. However, to combat the perception that the program is subject to abuse, the study recommended that certain changes be made. These recommendations include:

- amending the definition of “eligible business” to target specific business sectors;
- amending the program’s hiring requirement to allow companies to receive credits for hiring low- and moderate-income individuals;
- limiting the expansion of enterprise zones;
- extending the sunset provision of the program in a manner that would gradually phase out the benefits;
- eliminating the exemptions for motor vehicles; and
- not certifying new businesses that relocate to an enterprise zone.

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Should the General Assembly reinstate funding for riverport authorities?

Prepared by Laura Marshall Taylor

Background

Riverport authorities were created to promote industry at state riverports.

In 1964, the General Assembly enacted legislation allowing a local government to form a riverport authority to develop and promote industry at local riverports. In the past two years, Kentucky’s number of riverport authorities has increased from seven to 11. Some contend this rise is a result of augmented barge transportation and the ensuing infrastructure needs at riverports to manage additional cargo. The concern is that the potential for economic development at public riverports may go untapped due to insufficient funding. Others argue, however, that current policy provides sufficient support for the river industry.

Table 1 lists Kentucky’s riverport authorities, as reported by Transportation Cabinet officials, and their dates of origin, according to each riverport authority.

Table 1
Kentucky Riverport Authorities

Location	Date of Origin
Hickman-Fulton County	1964
Paducah-McCracken County	1964
Louisville-Jefferson County	1965
Owensboro	1966
Henderson County	1970
Lyon County	1976
Maysville-Mason County	1978
Greenup and Boyd Counties	2001
Meade County	2001
Marshall County-Calvert City	2003
Wickliffe-Ballard County	2003

Source: Kentucky Transportation Cabinet and various riverport authorities.

The General Assembly discontinued state funding for riverport authorities in 1992.

For most of their history, riverport authorities were governed by the Kentucky Port and River Development Commission, attached to the Cabinet for Economic Development. During this period, the General Assembly regularly earmarked funds for the commission to use for grants and loans to riverport

authorities. Legislation in 1992 abolished the commission and discontinued state funding, and in 1998 program oversight was switched to the Transportation Cabinet.

Discussion

A 1999 study contracted by the Transportation Cabinet reported that approximately 5,100 jobs were directly or indirectly related to the use of barge transportation through Kentucky's public riverports.

The Transportation Cabinet study recommended consideration of a state-funded capital assistance program for riverport projects, as well as creation of a riverport function within the cabinet to address waterway transportation issues.

In 2000, riverport authorities were made eligible for KEDFA loans.

In 1998, Senate Bill 221 required the Transportation Cabinet to manage a study containing a long-range capital improvements plan for Kentucky's public riverports. The cabinet-contracted study, released in 1999, is reported to be the most recently published evaluation of the state riverport program. According to cabinet officials, it is possible that an updated and more thorough study of the Commonwealth's public riverports may be conducted in the next biennium. The 1999 study reported that approximately 5,100 jobs were directly or indirectly related to the use of barge transportation through Kentucky's public riverports. For the six public ports included in the study, the report estimated \$62 million would be needed for capital infrastructure improvements (Wilbur 4). The study recommended:

- Consideration of a state-funded capital assistance program to support river-oriented projects; and
- A riverport contact within the cabinet to address waterway transportation issues (Wilbur 6-7).

The 2000 General Assembly addressed funding for riverport development. KRS 154.20 was enacted to give the Kentucky Economic Development Finance Authority (KEDFA) specific powers to make loans to riverport authorities. The loans are to be used for maintenance, operation, expansion, and development of riverport facilities. According to officials at the Cabinet for Economic Development, one riverport authority has applied for and received a loan under this program.

When assigning priority to loan applications, KEDFA must consider the **indirect** employment created or maintained at the riverport facility, as opposed to the **direct** employment evaluated for most other loan applications. Direct employment includes only the employees who work directly for a firm applying for a loan. Indirect employment also includes the employees

of other firms whose operations are affected by the applicant firm, such as suppliers.

In 2003, the Transportation Cabinet's Division of Multimodal Programs created the position of Transportation Planner. The duties of that position include, in part, assessment of waterway transportation issues.

Opponents of state funding for riverport authorities contend the river industry currently receives ample state assistance, and that riverports should be funded at the local level.

Arguments that have been made against state funding for riverport authorities include the following:

- The availability of KEDFA loans and the flexibility granted in terms of employment impact is a currently sufficient but underused state funding source for riverport authorities;
- The newly created position of Transportation Planner should provide sufficient state assistance for the river industry;
- State subsidies for the river industry are not the most effective use of economic development dollars, especially during tight budget years; and
- Because the river industry is limited to those Kentucky communities that border navigable waterways, riverports are local interests that should be funded at the local level. KRS 65.580 allows local governments to levy taxes and appropriate funds for use by riverport authorities.

Supporters of state funding for riverport authorities argue that an adequately equipped port system would be an economic development boon for the entire state.

Arguments that have been made in support of state funding for riverport authorities include the following:

- According to industry officials, demand exceeds capacity at most of the state's public ports. An adequately equipped port system has the potential to capture more business, thereby creating jobs as well as tax revenue for the state;
- With more navigable waterways than any state except Alaska, the Commonwealth is failing to capitalize on its natural resources, unlike most of Kentucky's border states that do have state-funded riverport programs (West KY Corp); and
- The recommendations of the 1999 Transportation Cabinet study have not been fully implemented. Specifically:

- KEDFA loans are not an adequate funding source for capital improvements that have no guaranteed return on investment. Thus, a state-funded capital assistance program should be considered, as the study suggested.
- A more focused full-time contact is needed at the state level to serve as liaison for government and industry, as the study suggests.

Advocates have suggested using the watercraft tax revenue to establish a bond pool for riverport authorities, but opponents say this money—much of which is used to fund schools—should not be moved.

Proponents of state funding have suggested redirecting revenue generated from the watercraft tax set forth in KRS 136.181 to establish a bond pool for riverport authorities. Created in 1954 and amended in 1960, this property tax is assessed annually on nonresident vessels using Kentucky border rivers. The Revenue Cabinet estimates the watercraft tax annually generates \$1 million at the state level, and \$2.4 million at the local level. Advocates argue that this money should go back to the water transportation industry. Opponents contend that this money—much of which is used to fund schools—should not be redirected.

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Education

Should the General Assembly address the rising cost of public postsecondary education for Kentucky students?

Prepared by Audrey Carr

Background

To meet goals established by the General Assembly in the Postsecondary Education Improvement Act of 1997, it is necessary that more Kentucky students enroll in and complete a postsecondary education program.

Kentucky four-year public institution tuition rates increased between 3.6 and 16.4 percent in FY 2003-2004.

Increasing the college-going rate of Kentuckians is directly related to access and affordability, which are strongly correlated with funding. In FY 2002 and FY 2003, public postsecondary education institutions experienced budget cuts rather than increases. To offset those cuts, in FY 2004, four-year public institutions raised tuition rates between 3.6 and 16.4 percent. The Kentucky Community and Technical College System raised tuition by 23.4 percent, or \$360 annually per student (Taulbee).

Colleges and universities obtain resources from a variety of public sources.

Public universities and colleges obtain revenue from a variety of sources, including state appropriations, public funds derived from tuition and fees, federal funds, grants and contracts, and others. According to a Council on Postsecondary Education (CPE) policy, approximately one-third of state public funding in Kentucky's public institutions should be generated from tuition and fees (Taulbee).

In 1998, tuition and fees represented 31 percent of public funds, compared to 35 percent in 2002.

In 1998, tuition and fees represented 31 percent of the public funds, compared to 35 percent in 2002. However, funding for individual institutions varied, with some generating more than 35 percent of public funding from tuition and fees. This increasing reliance on revenue from tuition and fees has been raised as a concern by legislators, higher education leaders, parents, and students.

Tuition at Kentucky four-year institutions has increased more than 50 percent during the last five years.

According to the CPE, tuition at Kentucky's public four-year institutions has increased more than 50 percent during the last five years. Tuition represented 17 percent of total funds in 2002, compared to 15 percent in 1998 (McCormick).

Increases in tuition have made college less affordable for most Americans.

Kentucky parallels five national trends in higher education identified in the report "Losing Ground: A National Status Report on the Affordability of American Higher Education":

- Increases in tuition have made college less affordable for most Americans.
- Federal and state funding of student financial aid has not kept pace with increases in tuition.
- More families at all income levels are borrowing more than ever to pay for college.
- Increases in tuition have come at times of greatest economic hardship.
- State financial support for public higher education has not increased at a rate to keep up with increases in tuition (NCPPE).

Tuition in Kentucky has increased at a rate greater than inflation and the increase in the median income of Kentuckians.

The Executive Director of the Kentucky Higher Education Assistance Authority (KHEAA) reported that tuition in Kentucky has increased at a rate greater than inflation and at a rate greater than the increase in the median income of Kentuckians. As a result, college appears to be increasingly expensive and is likely to become even more so (McCormick).

Last year, half of the applicants who were eligible but did not receive College Access Program or Kentucky Tuition Grant awards did not attend college in Kentucky.

In spite of the increases in tuition and fees, student enrollments continue to increase across Kentucky. Ninety percent of Kentucky's full-time, first-time students seeking undergraduate degrees at public four-year universities received some form of student financial aid, as did 76 percent of students at two-year colleges (Marks). However, KHEAA reports that approximately half of the applicants who were eligible for the College Access Program (CAP) and the Kentucky Tuition Grant (KTG) program, but who did not receive awards because of limited funds, did not attend any college in Kentucky last year. KHEAA staff asserted that "students in the middle- and upper-income groups tend to simply borrow more to cover

increases in the cost of attendance, but students in the lower socio-economic groups tend to avoid borrowing, even if it means withdrawing from school" (McCormick).

Kentucky lags behind most of the Southern states in the percentage of adults who have bachelor's degrees or higher.

Kentucky lags behind most of its Southern Regional Education Board counterparts with only 17.1 percent of adults with bachelor's degrees or higher. The percentage in the Southern region as a whole is 22 percent; slightly lower than the U.S. average of 24 percent.

A state's economic position is strongly correlated with the educational attainment of its adults.

Research indicates that a state's economic growth is strongly correlated with the educational attainment of its adult residents (Waits). This would indicate that Kentucky should increase postsecondary education participation and graduation rates if it wants its economy to grow.

Adequate funding is needed if Kentucky is to achieve the national average in educational attainment by 2020.

Adequate funding for postsecondary education is needed if Kentucky is to achieve the 1997 Improvement Act's stated goals of matching the national average in educational attainment by 2020, enrolling 80,000 more students than were enrolled in 1998, improving student retention, and improving graduation rates.

The question is how to balance the rising costs of tuition and fees with the availability of student financial aid and basic government funding for the public institutions.

Discussion

Tuition and fee setting. Since 1998, the CPE has permitted institutional boards to set tuition rates with a requirement that nonresident rates be higher than resident rates. It is unknown how this policy has affected tuition increases or the percentage of total funding that comes from tuition and fees.

The General Assembly could consider requiring the CPE to set a maximum percentage by which a governing board may increase tuition and fees annually. However, if a maximum is set and overall state support for postsecondary education does not keep pace with increased costs, institutions would be expected to either limit enrollment (affecting access) or

implement cost cutting measures that might reduce educational quality such as increasing class sizes or reducing course offerings.

Increases in federal and state funding of student financial aid have been less than increases in tuition.

Student financial aid. Neither federal or state funding of student financial aid has kept pace with tuition increases. According to KHEAA, 2003 need-based student financial aid (based on the ability to pay for college) in Kentucky was estimated to be underfunded by \$70 million. Approximately 61,200 students applied and qualified for an award but did not receive one. Based on historical utilization rates of CAP and KTG awards, KHEAA estimates that more than 31,000 of those students would have been likely to attend college.

The average Kentucky graduate of a four-year institution owes about \$13,500 in college debt.

Loans are an important source of aid. More than \$334 million in federal student loans was disbursed to students attending Kentucky colleges, while state financial aid was \$116 million during the same period. The average graduate of a four-year public university in Kentucky owes about \$13,500 in student loans (McCormick).

The dread of student debt may prevent some students from low-income families from enrolling in college.

The "Losing Ground" authors suggested that some prospective students from low-income families—specifically those who would be the first in their families to attend college—may be inhibited from enrolling by fear of high debt. In most cases, they suggested, families of the lowest income students cannot help repay loans. They also suggested that the long-term consequences of high debt for students affects their ability to purchase a home and to save for retirement. Further, students' professional and career choices may be skewed by the prospect of heavy debt. An example would be that potential debt may contribute to the difficulty in recruiting students for needed but not necessarily high-paying fields such as teaching (NCPPE, 2002).

Lottery receipts are projected to be insufficient in the future to adequately fund merit-based and need-based student aid.

Currently, Kentucky student financial aid, including both merit-based (determined by student achievement) and need-based aid, is funded through lottery receipts. Some experts project that future lottery receipts will be insufficient to adequately fund the demand for financial aid. Increases in tuition costs and potential

decreases in the availability of student financial aid pose challenges for students and policymakers.

Questions to be considered:

- Should additional revenue be provided to support the basic funding levels for postsecondary education institutions in order to decrease the pressure for tuition and fee increases and how should these priorities be balanced with others in what is likely to be a severely constrained budget?
- Should additional revenue be provided to support need-based student financial aid to decrease the negative impact of increased tuition and fees on lower-income Kentuckians and what should be the source of any additional revenue used for this purpose?

Locking-In Tuition Rates. Pre-filed bill 2004 BR 222 proposes that the General Assembly require public institutions to lock-in tuition rates for four years for first-time students. Advocates of this bill argue that students would be able to anticipate and plan for college costs. Institutional leaders argue that the requirement would have the negative consequence of institutions raising tuition for each freshman class at a much higher level than might otherwise be necessary in order to ensure sufficient operating capital.

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Should the General Assembly make changes to the Kentucky Educational Excellence Scholarship program?

Prepared by Jonathan Lowe

Background

In 2002-2003, KEES provided 54,000 students with over \$57 million in scholarships to attend college in Kentucky.

Between 1997 and 2002, tuition and fees at Kentucky public postsecondary institutions increased at an average annual rate of 9.1 percent, while per capita personal income of Kentuckians rose at a 4 percent annual rate.

Graduates of Kentucky's public universities owe an average of \$13,500 in student loans.

The Kentucky Educational Excellence Scholarship (KEES) program provides grants to high school graduates to help pay for college at public and private postsecondary institutions in Kentucky. Eligibility and the amount of the merit-based KEES award is determined according to student achievement, as measured by a student's high school grade point average (GPA) and ACT score.

The 1998 legislation creating the KEES program mandated that proceeds from the Kentucky Lottery be used to fund it, along with the existing need-based financial aid programs, where eligibility is based on the ability of a student's family to pay for college. In fiscal year 2002-03, about \$57.3 million in KEES support was provided to more than 54,000 college students, with the average award being \$1,051 (KHEAA, "KEES Scholarships").

College Affordability and Enrollment - Between 1997 and 2002, tuition and fees at Kentucky public postsecondary institutions rose an average of \$188 annually from \$2,077 to \$3,019, representing an average annual increase of 9.1 percent. During the same period, per capita personal income in Kentucky rose at an average annual rate of 4 percent, from \$21,286 to \$25,579 (Layzell 5). In 1997, tuition and fees represented 22.8 percent of the median annual family income of families in the lowest fifth of incomes. This increased to 26.8 percent in 2002 (Marks 8).

The rising cost of college has led students and families to rely more heavily on loans to pay for college. Between 1992 and 2002, the amount of loans to Kentucky students increased by more than 150 percent, from about \$113 million to \$288 million

(McCormick, IJCE 28). Graduates of four-year public universities in Kentucky owe an average of \$13,500 in student loans (26).

Since 1998 undergraduate enrollment in Kentucky has increased by 23.3 percent, from 161,000 to more than 198,000.

At the same time, Kentucky educators have been working to expand the number of people attending and graduating from postsecondary institutions; they set a goal that between 1998 and 2020, the number of students attending college will increase by 80,000. The Council on Postsecondary Education reports that since 1998, undergraduate enrollment in Kentucky has increased by 23.3 percent, from 160,926 to 198,378.

Questions about the KEES program include:

- Will lottery-based funding keep pace with future costs?
- Does the current balance of merit-based and need-based aid need to be revisited?
- Are the standards for determining KEES awards fair and appropriate?

Given the rising cost of college and the greater number of students enrolling, several policy concerns have emerged regarding the KEES program and state-supported student financial aid overall:

- Will net lottery proceeds be sufficient to continue the program at current award amounts?
- Does the current combination of merit-based and need-based student financial aid effectively address the issues of college affordability and the promotion of access to postsecondary education?
- Are the standards for determining award amounts fair, and are they set at appropriate levels?

Discussion

In FY 2005-06, KEES expenditures are projected to exceed lottery allocations for KEES by \$3.3 million, even taking into account the KEES Program Reserve Account.

Lottery Revenue Projections - Over the next six years, the amount of lottery funds available to support KEES is projected to increase by 11 percent, from \$64.3 million to \$71.2 million. Need-based aid is projected to increase by 40 percent from \$62.4 million to \$87.1 million (Gleason 10). However, demand for student financial aid can be expected to increase more rapidly if enrollments continue to increase. Moreover, many students already eligible for need-based financial aid do not receive grants due to lack of funds (McCormick, SCOPE 34).

Lottery funds are expected to be insufficient to meet the demand for state-supported student grant aid in coming years. According to the Student Financial Aid Forecasting Workgroup, in FY 2005-06, total expenditures for KEES are projected to exceed total funds available by \$3.3 million, even taking into account funds from the KEES Program Reserve

Account created by the 2003 General Assembly. In FY 2002-03 the KEES reserve account received \$3.6 million from unclaimed lottery prize money. For fiscal year 2003-04, the projected reserve amount is \$9.5 million.

Growth in lottery sales is expected to be limited by the introduction of the Tennessee lottery, the expansion of gaming in neighboring states, a maturing product mix, and the fact that few people know proceeds from the Kentucky Lottery are used for scholarships.

The Kentucky Lottery Corporation projects relatively modest growth in total dividend transfers supporting student financial aid through 2010. According to the Kentucky Lottery Corporation, the rate of growth is expected to be limited due to the negative impact of the introduction of the Tennessee lottery, expansion of gaming in neighboring states, a maturing product mix, and the fact that few people know that proceeds from the Kentucky Lottery are used to fund scholarships for Kentucky students (Gleason 4).

Merit-based vs. Need-based Student Financial Aid -

Since the implementation of KEES, Kentucky has increased its commitment to need-based financial aid, unlike most states that implemented merit-based programs similar to KEES (McCormick, IJCE 24).

By 2005-2006, Kentucky will commit almost all net lottery proceeds to postsecondary student financial aid, with 55 percent going toward need-based aid, and 45 percent for the merit-based KEES program.

Support for both need- and merit-based aid in Kentucky has increased more than fourfold since 1999. The Kentucky Lottery Corporation projects that for 2003-2004, KEES and need-based programs will each receive \$62.5 million in net lottery proceeds (Gleason 10). By FY 2005-2006, almost all net lottery proceeds will go to student aid, with 45 percent of student aid dollars supporting KEES, and 55 percent supporting the need-based College Access Program (CAP) and Kentucky Tuition Grant (KTG) program.

Many eligible low-income students do not receive need-based aid due to insufficient state funds, limiting access to college.

Some researchers have argued that merit-based student aid has a negative impact on low-income and minority students, limiting access to higher education by diverting funds away from need-based programs, and providing a greater proportion of aid to students from families with higher incomes (Heller xii). In Kentucky, many students who are eligible for need-based aid receive none, due to lack of funds.

More than 31,000 individuals who were likely to attend college did not because there were not enough funds for their scholarship awards.

In 2002-03, for example, there were more than 61,000 students eligible for need-based grants through the CAP and KTG programs who did not receive them,

though not all of those students would have enrolled in college, even if the aid had been available. Based on historical utilization rates of CAP and KTG awards, KHEAA estimates that more than 31,000 of those students would have been likely to attend college, and were eligible for more than \$34 million in unfunded need-based aid (KHEAA, “Need-based”).

On average, wealthier students tend to get better grades and ACT scores than students from low-income families, and therefore receive larger KEES awards.

There is a correlation between socioeconomic status and student achievement as measured by grades and test scores (Heller 21). On average, students from wealthier families tend to receive better grades and higher ACT scores than students from lower-income families, leading to larger KEES awards. In 2001-2002, a student in a family earning between \$15,000 and \$19,999 received an average KEES award of \$780, while a student in a family earning between \$105,000 and \$109,999 received an average of \$1,216, or 56 percent more (KHEAA, “Average”). This effect is mitigated for many low-income students because Kentucky allows KEES and need-based grants to be used together without penalty (McCormick, PS 24).

KEES Standards - The amount of a KEES award is determined by a student’s high school GPA. For a GPA between 2.5 and 4.0 during each year in high school, a student can earn between \$125 and \$500 in KEES awards. A student can receive an additional award between \$36 and \$500 for a score of 15 to 36 on the ACT test. The maximum a student can earn is \$2,500 for each year of college.

Kentucky provides KEES merit awards for a wider range of student achievement than most programs in other states.

Some observers believe that the range of levels of achievement eligible to receive rewards is too wide and rewards students for mediocre work. Most other state programs require a 3.0 GPA, compared to the 2.5 GPA required in Kentucky, to receive a merit scholarship (McCormick, PS 18).

Others argue that providing incentives to students who are not high-achieving encourages them to consider college as a possibility and to increase their academic effort to attain that goal. Moreover, tightening eligibility requirements can be expected to mean that fewer low-income and minority students would receive

KEES assistance, thereby creating an additional financial barrier to college access.

Differences in grading scales in high schools across the state can lead to disparities in KEES award amounts.

Another concern is that KEES awards are based on GPA, yet the grading scales used by high schools across the state are set at the local level and differ among individual high schools. An analysis by LRC staff of the grading scales from 182 of the 293 public and certified nonpublic high schools in Kentucky shows that there are 61 different grading scales currently in use, potentially affecting the amount of KEES awards by hundreds of dollars. In previous sessions of the General Assembly, legislation has been introduced to require the determination of KEES awards be based on a uniform numerical scale of 0-100 to address this concern.

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Elections, Constitutional Amendments, and Intergovernmental Affairs

Should the General Assembly consider legislation to implement the federal Help America Vote Act?

Prepared by Laura H. Hendrix

Background

The Help America Vote Act creates federal requirements for elections.

The 2000 Presidential election highlighted issues related to outdated election laws and procedures throughout the country. In response, Congress passed the Help America Vote Act (HAVA) in 2002. This law significantly expands the federal role in the administration of elections, a responsibility that had traditionally been left to the states, and creates many new federal election law requirements that states must implement. The U.S. Justice Department is given the authority to enforce HAVA requirements. The states must write a “State Plan” that describes how officials will meet the federal requirements. This document is drafted by a State Planning group convened by the chief election officer of the state. Kentucky has issued its draft State Plan through the Secretary of State’s Office.

Kentucky has received \$5 million in federal funds to upgrade voting machines.

In order to assist states in meeting the new federal requirements, Congress established two sources of funds. The first pool of funds may be used by states to update old voting machines with newer technology. States that receive these funds must replace their punch card or lever machines by November 2004. According to the State Board of Elections, Kentucky has applied for and has received around \$5 million, which it is in the process of using to help counties replace old lever voting machines with machines that meet HAVA requirements.

Discussion

The federal requirements must be met, regardless of whether federal funding is accepted by a state.

The legislation also establishes an additional pool of federal funds for which states can apply if they provide a 5 percent match. According to the Congressional Research Service, it is estimated that Kentucky would be eligible to receive approximately \$42 million in additional federal funds. The General Assembly appropriated Kentucky’s required state match of

approximately \$2.2 million in the 2003 Regular Session. However, Congress has not fully appropriated the rest of the anticipated federal money for HAVA implementation. In late October, the Senate passed an appropriation bill with additional funds for HAVA implementation, which will most likely be the subject of a House and Senate conference committee. This means that states are still subject to all of the HAVA requirements, but may not receive enough federal money to meet many of the requirements of HAVA. This could represent a significant additional cost for state governments. For example, if there are no federal funds to assist Kentucky in replacing voting machines with ones that are fully accessible to the disabled, and if each precinct in Kentucky was provided one fully accessible machine (about \$6,000 each) the total state cost would be approximately \$20 million.

Additionally, although Kentucky is required to issue a draft State Plan in order to show how it will address the HAVA requirements, the federal government has not created the federal agency, the Election Assistance Commission (EAC), which is charged with distributing the remaining funds after the State Plan is received. In late October, the Senate Rules Committee held hearings on nominees to the EAC, and it is anticipated that the Senate may act on these appointments prior to Congress' recess for the year.

Some of these new federal requirements and their deadlines include:

- Provisional voting by 2004;
- New voting system standards, including disabled-accessible machines, by 2006;
- Statewide voter registration database by 2004, or 2006 if a waiver is applied for;
- Voter registration requirements by 2004, or 2006 if a waiver is applied for;
- Voter identification requirements by 2004; and
- Voter information requirements by 2004.

Provisional voting is where a voter who is not on a registration list or whose eligibility is challenged by a poll worker may vote a special ballot, which is then set

aside pending resolution of whether the person is actually registered to vote. Kentucky does not have a system for provisional voting. Currently, persons whose eligibility to vote is challenged at the polls may fill out an “oath of voter” and then vote, but there is no system for setting that vote aside to determine eligibility. HAVA requires provisional voting for federal races, unless the state has same-day voter registration at the polls.

The General Assembly may wish to consider legislation that would govern the eligibility for and use of provisional voting in federal or state elections.

Proposed legislation establishing provisional voting was considered in the 2003 Regular Session but was not passed. In order to meet the January 1, 2004, deadline for establishing provisional voting in Kentucky, the State Board of Elections is proposing to implement standards for provisional voting through administrative regulations. These proposed regulations would only permit provisional voting for federal elections, but not state or local elections. The General Assembly may wish to decide whether it wants provisional voting to apply only to federal races, or whether it wishes to extend provisional voting to state and local races as well.

Voting system standards and vote definitions may need to be updated in response to the federal act.

In the area of voting system standards, by 2006 all voting systems must:

- Provide voters the opportunity to privately check and correct ballot errors;
- Have voting systems with a permanent paper record that can be audited;
- Provide at least one voting machine per precinct that is accessible to the disabled;
- Provide alternative language accessibility under the Voting Rights Act;
- Have voting systems that do not exceed a specified error rate; and

Additionally, there must be a definition of what constitutes a legal vote for each type of voting machine in the state.

Currently, the voting systems in use in the Kentucky do not meet all of these requirements, and there is not a definition of what constitutes a legal vote for each type of voting machine in the state. The General

Assembly may wish to consider legislation that establishes standards for voting machines and that creates definitions of a vote, for each type of voting machine.

The voter information requirements of HAVA specify that state elections officials must post voting information at each polling place on election day, including a sample ballot, voting instructions, information on voting rights, and contact information in case of fraud. These requirements must be in place by January 1, 2004.

Death information used to update the statewide voter registration lists has been late in the past.

Each state must also implement a computerized statewide voter registration list, which is coordinated with other databases and is maintained at the state level. This list must be established by January 1, 2004, and Kentucky is one of the few states that already has such a list in place. However, an issue has arisen with respect to the accuracy and timeliness of the voter information that is used to maintain the list. In particular, testimony during the 2003 Interim indicated that the Cabinet for Health Services had been four to six months late in providing information to the State Board of Elections regarding death information (State of Kentucky, Kentucky). This information is used to take deceased voters off of the voting rolls. In many cases, voters' names were left on the rolls during the time of a primary or general election, raising the possibility of fraud or misuse of that person's registration information. The General Assembly may wish to consider whether to monitor or impose deadlines for the transmission of information.

Kentucky's voter identification requirements meet federal requirements.

Under HAVA, new voter registrations for federal elections may not be accepted unless a voter has included a driver's license number, the last four digits of the Social Security number, or assigned a unique identifier. Kentucky meets this requirement, as it uses the Social Security number. New voters who have registered by mail will be required to present identification when they vote. These requirements apply to new voters registering after January 1, 2003. Kentucky requires that election officers confirm the identity of voters by personal acquaintance or by

documentation such as a driver's license or Social Security card.

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Health and Welfare

Should the General Assembly mandate the reporting and analysis of medical errors?

Prepared by Barbara Baker

Background

It is hard to imagine how a teenage girl could receive a liver transplant from an incompatible donor in one of the best health care systems in the world. Yet, medical errors do occur. In a study conducted by the Henry J. Kaiser Family Foundation, over 40 percent of the public and more than one-third of physicians in the United States reported that they or their family had experienced a medical error (Kaiser 1).

The Institute of Medicine reported that as many as 98,000 hospital patients die each year from preventable medical errors.

The Institute of Medicine (IOM), established by the National Academy of Sciences, engages in scientific research and advises the federal government on issues related to medical care. In its publication, *To Err is Human: Building a Safer Health System*, the institute reported that between 44,000 and 98,000 individuals die each year in hospitals as a result of preventable medical errors. This is more than the number of individuals who die "from motor vehicle accidents (43,458), breast cancer (42,297) or AIDS (16,516)" (Kohn 1). These medical errors account for an estimated \$17 billion to \$29 billion of health care costs annually (Kohn 2).

Medication errors are one of the most common types of errors. The Agency for Healthcare Research and Quality reported that 770,000 medication errors occur yearly (U.S., "Reducing" 1). Approximately 7,000 individuals die annually from these errors (Kohn 27). Children are three times as likely to have adverse drug events than hospitalized adults (Kaushal et al. 2114).

Usually, preventable medical errors are caused by the health care delivery system and not by the negligence of any single practitioner. The Institute of Medicine called for the restructuring of the health care delivery system.

The IOM's report received widespread public attention. The medical errors identified generally occurred because of systematic problems in health care delivery, rather than from negligence or carelessness by a single health care provider (Kohn 3). For example, many medication errors occurred because providers hand write medication orders rather than entering them into

a computer with automated dosage alerts. The IOM advised state and federal governments, health care providers, and regulatory agencies to restructure the health care system to improve patient safety (Kohn 6).

Seventeen states now require reporting of medical errors and five states have voluntary reporting of these events. This data permits hospitals to compare themselves with their peers.

Subsequent to the IOM report, legislation was introduced in 26 states to address patient safety (Flowers 1). Seventeen states mandate the reporting of adverse medical events that occur in hospitals, and five have voluntary reporting of these events (MacEachern 4). New York mandates the reporting of adverse events in hospitals. This information provides the public with information on which to make health care decisions. It allows hospitals to evaluate their performance in comparison to other hospitals and to evaluate their trends (Meyer et al 3).

Patient safety centers in several states collect and analyze data regarding medical errors and provide information on best practices.

Several states, including California, Maine, and Massachusetts created patient safety centers. These centers collect data on medical errors, perform a root cause analysis, and distribute information on best practices to prevent errors (Flowers 11).

The federal government created a Patient Safety Task Force to improve patient safety and committed \$50 million in grants in 2001 to support research to reduce medical errors.

In April 2001, the secretary of the U.S. Department for Health and Human Services created a Patient Safety Task Force to coordinate the activities of government agencies to improve the collection and analysis of patient safety data (U.S., "Patient Safety" 1). The Agency for Healthcare Research and Quality committed \$50 million in grants in 2001 to support research to reduce medical errors (U.S., "New Research" 1).

Two bills were introduced in Congress to encourage voluntary reporting of medical errors.

Two patient safety and quality improvement bills were introduced in Congress in 2003. Both encourage health care providers to voluntarily report medical errors. The purpose of the bills is to provide a structure for blame-free reporting that promotes learning from mistakes. Information reported would be privileged and held confidential (AAMC 1).

Discussion

Nationally, there is growing support for mandatory reporting of medical errors by health care providers. The Institute of Medicine advocates a mandatory reporting system, particularly for serious errors (Kohn 9). The purpose of reporting these errors would be to identify systematic changes that could improve patient safety. Consumers also advocate for the reporting of medical errors. In a national survey, 73 percent of consumers indicated that government should require the reporting of serious medical errors and another 21 percent believed that reporting should be voluntary to protect providers and patients (Meyer et al 1).

The AMA supports legislation to facilitate voluntary reporting that is confidential and nonpunitive.

The American Medical Association supported legislation that would facilitate voluntary physician reporting of medical errors. The AMA urged for reporting to be confidential, nonpunitive, and create a "culture of patient safety" (AMA 4).

Confidentiality of the reporter and documents are suggested means to increase the reporting of medical errors.

Proponents of legislation to require reporting of medical errors advocate for the confidentiality of reported information in order to improve adherence with reporting requirements and prevent an increase in medical malpractice claims. New Hampshire and Virginia protect quality assurance information, documents, analysis, and results of recommendations from subpoenas for evidence in any civil or administrative proceeding (Flowers 13). Also, to encourage reporting, it is suggested that facilities would need to focus on organizational change rather than on the failure of any individual (Findlay 3).

If Kentucky required health care providers to report medical errors, confidentiality and protection of documents would need to be considered.

Opponents of legislation to require reporting fear that reported information would not remain confidential. There is a realistic fear of being sued (Nordenberg 5). KRS 311.377 provides protection to individuals performing peer review, but does not provide for confidentiality of records produced through peer review. Therefore, if Kentucky required health care providers to report medical errors, confidentiality of the reporter and protection of documents would be issues for consideration.

Underreporting has been an issue in states with mandatory reporting.

Also, it can be argued that mandatory reporting might not work because of documented underreporting in states with mandatory reporting (Nordenberg 6). In

addition, there is no evidence regarding what components of the various models used for reporting are effective in reducing errors (Rosenthal et al 7).

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Should the General Assembly require school districts to offer healthier foods and snacks as a method of addressing the obesity epidemic?

Prepared by Audrey Carr and Robert A. Jenkins

Background

Kentucky has the fourth highest prevalence of obesity in the United States.

Obesity is associated with serious health conditions, including diabetes, heart disease, liver damage, and arthritis.

Obesity affects health and the economy.

Obesity is an epidemic in Kentucky, particularly among the young. The Commonwealth’s percentage of obese citizens increased from 13.3 percent in 1991 to 24.6 percent in 2001, ranking it as having the fourth highest prevalence of obesity in the U.S. and its territories (State of Kentucky 2). The percentage of children between the ages of 6 and 11 who were overweight had more than doubled between the late-1970s and 2000, rising from 6.5 percent to 15.3 percent. The percentage of overweight adolescents 12-19 tripled from 5 percent to 15.5 percent during the same period (National Center for Health Statistics).

Obesity is associated with higher rates of diabetes, elevated blood pressure and cholesterol, asthma, cardiovascular disease, liver damage, sleep apnea, and arthritis (Straw). Given its effects on health and its high costs of treatment, obesity impacts Kentucky’s bottom line as much as its waistline. Individuals who have lower incomes, are less educated, and have minority status are disproportionately represented in the prevalence of obesity (Table 1).

Table 1
Kentucky Obesity Rates by Selected Demographic Groups

Demographic Group	Percentage (%)
<i>Race</i>	
White	24.3
African American	32.7
<i>Education</i>	
Less than High School	28.6
High School or GED	26.8
Some Post High School	22.3
College Graduate	19.4
<i>Household Income</i>	
Less than 24,999	28.7
25,000 – 34,999	28.4
35,000 – 49,999	26.2
50,000 +	21.9

Source: Kentucky Epidemiologic Notes, Insert.

The costs for treating obesity-related illnesses are estimated at \$117 billion nationally.

The Surgeon General estimates the costs of obesity at \$117 billion nationally (United States). In Kentucky, costs attributed to obesity constituted 10 percent of the total health care costs in 1995 (Leach).

Hospitalization costs for obesity-related illnesses among children have tripled since 1983. Nearly 70 percent of cardiovascular disease cases are related to obesity, and obesity accounts for 19 percent of the total costs for all heart disease (Straw). Almost half of breast cancer cases are diagnosed among obese women, and 42 percent of colon cancer cases are diagnosed among obese men and women. Costs for treating these cancers approach 2.5 percent of all cancer costs (Leach).

The cost of diabetes treatment in Kentucky approximates \$1.9 billion each year.

Kentucky's diabetes rates have increased from 3.9 percent in 1994 to 6.4 percent in 2001, with growth in type II diabetes more than doubling during the period (Kentucky). It is estimated that the cost of diabetes treatment is \$1.9 billion of the \$13.5 billion total Kentucky health care expenditures each year (Leach).

Costs are indirect as well. Businesses may lose key staff to disability retirement; and resources needed for schools, roads, law enforcement, and other public activities will be reassigned to health care costs (Leach).

Discussion

Overall nutrition of children and adults has been affected by the changes in the eating habits, prompted by the availability of fast foods and ready access to products that contain large amounts of sugar and fats. It is estimated that only 2 percent of school-age children meet the recommended minimum number of servings for all five major food groups in the Food Guide Pyramid. In addition, children consume large amounts of sodas. By the time they are 14, it is estimated that 32 percent of young women and 53 percent of young men are consuming three or more servings of soda a day (Gleason 16).

Teaching children about proper nutrition and physical education may be more effective than targeting programs to adults.

The opportunities to intervene with adult behaviors that might affect the obesity epidemic are limited due to adults' time constraints and the difficulty of establishing meaningful education initiatives targeting their lifestyles. However, teaching children about

nutrition and the benefits of physical education might provide better results. Children are a captive audience when in school and are more likely to receive an intended message from a health initiative targeting their attention (Straw).

At least 15 states limit or prohibit the sale of foods with minimal nutritional value in schools.

At least 15 states statutorily limit or prohibit the sale of foods with minimal nutritional value in schools, and another 10 states have legislation pending (NCSL, "Health Promotion"). For example, Maryland and Georgia prohibit the sale of unhealthy foods until after the last lunch period, while Nebraska and Kentucky prohibit the sale of foods that would otherwise compete with school meals until after the last lunch period.

The General Assembly has considered legislation that would restrict the sale of unhealthy foods in schools.

In 2002 and 2003, and the Kentucky General Assembly considered legislation that would have restricted the sale of certain unhealthy foods, encouraged the sale of healthy food in schools, and mandated increased physical education (2002 HB 551; 2003 HB 77). Neither bill became law.

A May 2003 United States General Accounting Office report to Congress examined the School Lunch Program and found that efforts were needed to improve nutrition and encourage healthy eating among students. The study included on-site reviews of school lunch activities in 22 schools in California, Kentucky, Michigan, Rhode Island, and Texas. The report highlighted many of the efforts and barriers to providing nutritious food and encouraging healthy eating habits (GAO).

Proponents assert that the sale of healthy foods in schools could teach children about proper food choices, and children might share this information with their parents.

Proponents of encouraging the sale of healthy foods in schools argue several points. They say children would be more likely to learn about healthy foods and food choices and would enjoy better long-term health because of education received and practiced. Direct health benefits associated with those foods would result because choices would be limited to healthy foods. School district revenues from the sale of these foods would not decrease over the sale of unhealthy foods. Finally, they argue that children would take newly learned behaviors home to their parents, thus

enhancing the possibility of improving health habits generally (Dennis; Anderson).

Opponents of food sales restrictions argue that the General Assembly should not regulate food choices in local school districts and that such regulation will negatively affect the income of the districts.

Many school personnel think teaching time is too limited to include nutrition education.

Opponents argue that children will eat unhealthy foods regardless of whether they are offered in school (Finn). Not offering certain foods would result in children bringing unhealthy foods from home to school. School districts would lose revenues from any food and beverage contracts that they may have negotiated (Gillespie). They also argue that the decision to forego food contracts should be made at the local level. In the past, these contracts have provided school districts yearly amounts ranging from \$50,000 to \$100,000 and have been used to fund sports and physical education equipment, technology, computers, arts and theater programs, and foreign language classes (NCSL, "Junk Food"). The GAO report also stated that many teachers and school officials feel time is too limited to encourage healthy student eating habits, as curriculum emphasis must be given to meeting state academic standards (GAO 5).

While local boards of education can enact restrictive policies relating to sales of unhealthy foods and can adopt policies relating to nutrition education, many have been slow to do so. However, some states have enacted legislation to encourage increased physical activity, mandate nutrition education, expand training for food service workers, and limit the availability of unhealthy snacks in vending machines. For example California is in the process of phasing in several requirements relating to nutrition and food sales. Arkansas enacted legislation in 2003 to create a child health advisory committee and to coordinate statewide efforts to combat childhood obesity and related illnesses.

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Should the General Assembly mandate staffing standards for long-term care facilities that exceed the standards established by federal law?

Prepared by Eric Clark

Background

Congress enacted minimum staffing standards for long-term care facilities in 1987. Thirty-seven states have implemented staffing standards in excess of federal standards.

Long-term care facilities across the nation are experiencing nursing and direct care staff shortages. While these shortages can impact the level and quality of care that a patient receives while in a long-term care facility, they are not new within the health care industry. In 1987, Congress enacted the Omnibus Budget Reconciliation Act of 1987 (OBRA 87), which resulted in a federal regulation (42 CFR 483.30) establishing staffing standards in long-term care facilities. Since the federal regulation was enacted, 37 states have augmented the federal standards (Tanner). Most states imposed increased staff-to-patient ratios, but have generally struggled to fund the increases. Kentucky adopted most of the federal staffing standards in 902 KAR 20:026.

Currently, the federal staffing standards in long-term care facilities require:

- One registered nurse on duty for eight consecutive hours each day of the week;
- One licensed nurse on duty at all times each day of the week; and
- Sufficient staff to provide nursing services to maintain the highest levels of physical, mental, and psychosocial well-being of residents.

There is no minimum level of nonlicensed nursing staff required in the federal regulation, although it requires 75 hours of training for nursing assistants. Nursing assistants often play a major role in long-term care facility services by assisting with bathing, dressing, and eating (Harrington).

An attempt to mandate increased staffing standards in long-term care facilities failed during the 2003 Session of the General Assembly (2003 House Bill 149).

Bordering states have increased their standards, as shown in Table 1.

Table 1
Selected States Long-Term Care Staffing Standards

STATE	STAFFING REQUIREMENT
Illinois	2.5 hours of nursing care to each resident each day, with at least 20% by a licensed nurse.
Indiana	Hour-to-resident ratio of .5 licensed nurse hour each resident each day.
Ohio	One attendant on duty at all times for each 15 residents and one other person on duty at all times; one person must work 40 hours each week for each 4 residents; and more requirements based on facility size.
West Virginia	2 hours of nursing personnel time for each resident each day; more requirements based on facility size.
Tennessee	2 hours of direct care to each resident each day, including 0.4 hours of licensed nursing time.

Source: Tanner

Discussion

Advocates for nursing home residents, nursing home administrators, and public policymakers have debated whether Kentucky should further regulate nursing staff levels in long-term care facilities and, if so, how such changes would be funded.

Proponents of expanded staffing standards argue that inadequate staffing in long-term care facilities leads to poor health care.

Proponents of state-supplemented direct care staffing standards argue that poor care in long-term care facilities is a direct result of inadequate staffing. The federal Centers for Medicare and Medicaid Services “found evidence of a relationship between staffing ratios and the quality of nursing home care.” The Kaiser Commission on Medicaid and the Uninsured also found that most long-term care facilities do not have the adequate number of staff to ensure resident care and safety (Harrington).

Proponents contend that state-supplemented staffing standards would improve the quality of care in long-term care facilities by reducing residents’ risk of health conditions such as bedsores, dehydration, malnutrition, and pneumonia (Vonderheide). Proponents further argue that Kentucky could fund staffing mandates by designating that facilities receiving increased Medicaid reimbursement must dedicate the increase to hiring additional nursing staff.

Opponents of expanded staffing standards argue that staffing standards should be addressed by each individual long-term care facility and not by the state.

Opponents of state-supplemented staffing standards argue that standards should be addressed by each individual long-term care facility and not by a blanket mandate imposed by state government. The Joint Commission on Accreditation of Healthcare Organizations supports effective staffing standards but asserts that mandated staffing standards do not take into account “the differing skill sets of nurses or the acuity of patients.” Opponents believe that mandated staffing standards alone do not solve problems associated with workplace environments and employee morale.

Opponents also contend that state-supplemented staffing standards would not fix the problem of understaffing or poor care in a long-term care facility because each individual facility has unique needs that should be addressed by the facility’s director of nursing and not by the state (Miller). Opponents argue that supplemented staffing standards are not fair to the facility that already exceeds the federal staffing standards and provides quality health care to residents because the facility could use the additional money in other ways that meet its particular needs. They further argue that a price-based reimbursement system used for increased staffing would be too expensive for the state, resulting in higher health care costs for all residents in the facilities.

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Should the General Assembly mandate dental examinations for all children entering school?

Prepared by DeeAnn Mansfield

Background

Childhood dental caries is a common chronic bacterial disease in the United States that can lead to tooth loss.

The May 2000 “Oral Health in America: A Report of the Surgeon General” examined the status of children's dental health. According to the report, dental caries is the most common chronic disease of childhood. Dental caries, a bacterially caused disease, breaks down the enamel of the tooth surface, affects the core of the tooth and, if left untreated, can lead to tooth loss. The short-term consequences of untreated dental caries can include pain and emergency extractions. Long-term consequences can include negative effects on speech, nutrition, and self-image.

The Surgeon General's report indicated that preventative efforts implemented since the 1970s, such as community water fluoridation and the use of toothpaste and rinses that contain fluoride, have improved dental health. For example, the percentage of adults in the United States aged 55 to 64 years who are toothless declined from 33 to 20 percent over the past 20 years (Centers for Disease Control and Prevention, “Oral Health”). If more preventative efforts are implemented for children, there could be additional improvements in dental health. In the “Healthy People 2010” report, the federal Department for Health and Human Services cited a decline in the incidence of childhood dental caries as a top goal for the nation.

The federal “Healthy People 2010” report cites reducing childhood dental caries as a top goal.

The Center for Policy Alternatives reported in “State of the States: Overview of 2002 Oral Health State Legislation” that there have been a variety of legislative initiatives targeting the causes of dental diseases. These initiatives include increasing access to dental care, providing funds to increase training for dental providers, encouraging providers to volunteer dental services, lowering taxes on fees for dentists, strengthening dental quality oversight, and increasing Medicaid reimbursement for dental providers.

Only a few states mandate dental examinations for children entering school.

A few states, including Pennsylvania and Rhode Island, have mandated dental examinations for children entering school. Legislation has recently been introduced in Georgia, Hawaii, and New York that would impose the same mandate in those states. Other states such as Kentucky recommend, but do not currently mandate, dental examinations.

Discussion

A higher percentage of children 2 to 4 years of age in Kentucky have dental disease (47 percent) than in the United States (31 percent).

The General Assembly might consider mandating dental examinations for children entering school as a way to improve dental health. School entry could provide a near universal and effective point to emphasize the importance of early dental care. Data from the 2001 Kentucky Children's Oral Health Survey showed that almost 40 percent of preschool children in Kentucky had never been to a dentist (Hardison et al.). The data also showed that 47 percent of children 2 to 4 years of age exhibited dental caries compared to 31 percent in the United States as a whole.

State dental educators, dental associations, state officials, and other professionals appear to agree that improvement in the dental health of children is desirable. Kentucky has implemented several initiatives to increase awareness, education, and access to dental care for children. The Kentucky Department for Public Health appointed a full-time dental director in 2002 for the dental health program. The dental director oversees a statewide public information campaign, promotes dental screening, and manages the fluoride varnish program.

Kentucky has implemented several policy initiatives related to dental health.

The Kentucky General Assembly has also taken actions related to children's dental health. Medicaid dental reimbursement rates for all dental procedures were increased by 32.7 percent over two years beginning in July 2000. More recently, the 2003 General Assembly expanded the scope of legal practice for dental hygienists and approved \$250,000 to fund a pilot program to apply dental sealant to the permanent teeth of children with no private dental insurance. Legislation also was introduced in 2003 to require insurance coverage for children's dental surgery and to create a state children's dental fund using dollars from an increased state tobacco tax. However, this legislation did not pass.

One motivation for mandating dental examinations for children entering school is to raise the importance of dental health to the same level as general health. The American Academy of Pediatric Dentistry has suggested that dental health can be as important to school success as are adequate hearing, vision, and physical health. Most states, including Kentucky, have laws that require documentation of childhood immunizations and physical examinations. Several states recommend vision and dental screenings or examinations. The 2000 Kentucky General Assembly mandated a vision examination requirement for all children entering public school.

Kentucky may not have sufficient resources to fund dental examinations for all children entering school.

Some Kentucky health policymakers suggest that requiring dental examinations for all children entering school would not be the most effective approach to improving dental health in Kentucky. One difficulty often cited is that sufficient numbers of dental care providers may not be available, especially to serve low-income children. From 2000 to 2002, the percentage of dentists enrolled in Medicaid declined from 45 percent to 30 percent, while the number of dentists in Kentucky remained at about 2,200 (Centers for Disease Control and Prevention, "Synopsis"). Pennsylvania, one state that has mandated dental examinations for children, provides for a school dentist to be available in every school. Such an initiative would require additional funding for dental programs in Kentucky.

Expanding fluoride varnish programs and increasing educational activities may be effective means to address the dental health needs of Kentucky children.

Some other initiatives that could be effective in improving children's dental health include expanding the availability of fluoride varnish treatment and targeting prevention efforts to children most at risk of developing dental decay.

Kentucky is currently operating a pilot program to provide fluoride varnishes to the primary teeth of at-risk children. Fluoride varnishes have been found to reduce dental caries by 38 percent more than the second-best treatment (Cecil). The Surgeon General's report indicated that 80 percent of all dental caries in children are found in 25 percent of children. This data suggested that expanded efforts focussed on at-risk

children could be an effective means to improve dental health.

The Surgeon General's report also indicated that a common cause of dental caries in infants is bacteria transmitted from the mother. This suggests that educating new mothers on preventative dental health practices could be an effective means to reduce early childhood dental caries.

The General Assembly might want to consider a comprehensive state plan to improve children's dental health.

The General Assembly may want to study the relative effectiveness of other initiatives prior to mandating dental examinations for children entering school. Alternatively, the General Assembly may want to study mandated dental examinations in the context of a more comprehensive plan to improve the dental health of children in Kentucky.

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Judiciary

Should the General Assembly require that Transportation Cabinet vehicle enforcement officers enforce only commercial motor vehicle laws?

Prepared by Peter Cassidy

Background

KRS 281.765 commands all peace officers of the Commonwealth, including special officers employed by the Transportation Cabinet, to enforce its commercial motor carrier laws and all other laws relating to motor vehicles.

In 1980, the General Assembly transferred commissioned officers of the Transportation Cabinet to the Bureau of State Police and limited their duties to enforcement of commercial motor carrier laws.

In 1984, the General Assembly transferred the vehicle enforcement function from the Department of State Police back to the Transportation Cabinet

Through the years the General Assembly has created various classifications of peace officers with either powers to enforce specific statutory schemes or with powers to enforce all criminal laws in specific geographic areas. The Transportation Cabinet, Division of Vehicle Enforcement (MVE) employs peace officers pursuant to KRS 281.765 to enforce the provisions of KRS Chapter 281, relating to commercial motor carriers, as well as any other laws relating to “motor vehicles.” The term was initially defined as a vehicle carrying passengers for hire but that limitation was later removed.

In 1980, MVE’s predecessor was transferred to the Bureau of State Police.¹ As part of that reorganization, the General Assembly provided that the State Police could commission officers to enforce only violations of commercial motor carriers. KRS 281.765, relating to special officers of any state agency enforcing any other motor vehicle laws, was not amended.

In 1984, after opinions from both the Attorney General² and the Court of Appeals³ held that vehicle enforcement officers’ powers as peace officers were limited to enforcement of laws relating to commercial motor carriers, the General Assembly transferred these functions back to the Transportation Cabinet.⁴

Ten years later, the Kentucky Supreme Court overruled the Kentucky Court of Appeals and found that MVE peace officer powers included enforcement of all laws relating to motor vehicles, not just those pertaining to commercial motor carriers.⁵ The Transportation Cabinet expanded the practices of MVE peace officers to mirror the Supreme Court ruling.

While having general powers, Transportation Cabinet officers are not required to have the same general training required of other peace officers.

In 1998, the General Assembly enacted uniform peace officer basic training standards and mandated training for various law enforcement agencies, including some of the peace officers charged with limited statutory or geographic enforcement powers. MVE officers were not included in the class of officers mandated to be certified under the new standards. All Kentucky State Police troopers are required to complete standard basic training. They also issue citations and make arrests for all violations of state law.

Discussion

Legislation introduced in 2000 proposed to transfer vehicle enforcement back to State Police and to require basic training for MVE officers.

Legislation introduced during the 2000 Regular Session of the General Assembly sought to place these vehicle enforcement functions and officers back into the Department of State Police. It further sought to limit peace officer powers of those MVE officers who had not successfully completed basic training to only enforcing violations of commercial motor vehicle laws.⁶

The Division of Vehicle Enforcement has communicated to LRC staff that its officers usually complete the uniform basic training within one year of their hire date. In addition, those who have already completed that training also maintain their annual in-service training.⁷

The number of patrolling officers employed by MVE, the number of commercial and non-commercial citations issued, and the number of non-motor vehicle arrests made, for the years 2000, 2001, and 2002 are reported below in tables 1, 2, and 3, respectively.⁸

Table 1
Number of patrolling officers employed by MVE

Year	Number of officers
2000	123
2001	129
2002	111

Source: Division of Vehicle Enforcement

Table 2
Number of MVE motor vehicle citations issued

Almost half of MVE citations for this period are non-commercial motor vehicle citations.

Year	Commercial	Non-Commercial
2000	52,161	54,500
2001	36,980	33,607
2002	50,962	35,765

Source: Division of Vehicle Enforcement

Table 3
Number of MVE non-motor vehicle arrests

Year	Number of arrests
2000	729
2001	707
2002	812

Source: Division of Vehicle Enforcement

Data is not available for the number of MVE citations or arrests based on Uniform Offense Report codes. These codes are loosely keyed to the KRS section alleged to have been violated.

The information in the tables indicates that approximately 47 percent of the citations issued during the years 2000 through 2002 were for what MVE labels “non-commercial” citations.

Proponents of reorganization argue that a better use of resources and time spent for basic training would be for MVE officers to respond to all criminal violations. This could be accomplished by transferring some of MVE’s resources and personnel to the KSP or by establishing MVE as a separate department of the Justice Cabinet.

Another method could be for the General Assembly to mandate basic training for MVE officers and specify any expansion of peace officer powers. Those MVE officers who are currently employed but have not completed basic training could have their enforcement duties limited to laws relating to commercial motor vehicles.

Opponents of reorganization or mandated basic training argue that the current system is working well. They say that the Supreme Court opinion has clarified any confusion in the law granting peace officer powers to MVE officers and that the MVE is managing its roster of officers, the officers' workload, and their training efficiently without the need for any further action from the General Assembly.

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¹ Ky. Acts, ch. 25 sec. 9. See also ED. 8-8.

² OAG 2-20

³ *Wilson v. Bureau of State Police*, Ky.App., 65.1d 8)

⁴ See Ky. Acts, ch. 342 sec. 1, ch. 36 sec. 2) and ED. 2-6.

⁵ *Howard v. Transportation Cabinet*, Ky., 65.1d 4 0) rendered June 23, 0.

⁶ 2000 RS 5

⁷ Telephone Interview with Major Steve Moffett, Division of Vehicle Enforcement (Oct. 6 2003)

⁸ Letter from Debra Gabbard Executive Director, Office of Policy and Budget, Transportation Cabinet, to Tom Troth, Assistant Director, Legislative Research Commission (Oct. 5 2003) (on file with author)

Should the General Assembly enact legislation establishing criminal or civil responsibility for the loss of a fetus caused by improper conduct?

Prepared by Jonathan R. Grate

Background

During recent legislative sessions, the General Assembly has faced the issue of fetal protection. Within this subject area, an issue of concern involves responsibility for the loss of a fetus caused by improper conduct. Legislative proposals have focused on civil recovery for the loss of a fetus and on criminal sanctions for the conduct causing the loss.

Kentucky follows the born alive rule, requiring a fetus to take its first breath before it can be considered as a crime victim.

In terms of criminality, Kentucky currently follows a legal doctrine known as the “born alive rule” Hollis v. Commonwealth, 652 SW2d 61 (Ky 1983). This rule was developed in the common law courts of England and continued in American law. The rule requires that a child be born alive before he or she may be considered to be the victim of a crime. In applying this rule, a fetus *in utero* would not be the victim of a crime. However, if that same fetus had been wounded *in utero*, born alive, and then succumbed as a result of the wounds, the person who inflicted those wounds could be prosecuted.

Some states allow for penalty enhancements for crimes causing miscarriage.

Some states that follow the born alive rule have enacted statutes that act as penalty enhancers. These statutes enhance the penalty for criminal conduct that causes a woman to miscarry or suffer a still birth. In these states, the crime is dealt with as one committed against the woman, with the miscarriage or stillbirth being considered as an additional injury to her. Kentucky, while it follows the born alive rule, does not have a penalty enhancement provision.

Other states have enacted fetal homicide laws with the fetus as the victim of the crime.

Other states have abrogated the born alive rule and enacted laws that treat the fetus as the victim of the crime. As a result, in these states a single criminal act could have two victims, the woman and her fetus, and the perpetrator would be charged with two crimes.

Fetal homicide laws vary among the states.

While more than half of America's states have fetal homicide laws, either as penalty enhancers, separate crimes, or both, there is considerable variation in the structure and applicability of these laws among the states.

Fetal homicide coverage may start with conception, quickening, viability, or another stage of fetal development.

A common point of difference between state fetal homicide laws is the gestational age at which criminal coverage begins. Of states with fetal homicide laws, most begin their coverage at or very near the beginning of pregnancy. The terminology employed can refer to simply the beginning of pregnancy or use other terms including fertilization, fertilization and implantation, or conception. The next most common point is at what is called "quickening." Quickening refers to the point in a pregnancy when a woman can feel the fetus move within the womb. The latest gestational age used to define the temporal coverage of fetal homicide laws is viability. Viability refers to that point at which a fetus could survive outside the womb. A few states use other times between the beginning of pregnancy and quickening, such as 8 or 12 weeks, or when embryonic formation or fetal development occurs.

Some fetal homicide states expand the coverage of existing crimes by including "fetus" within the definition of "person."

Another point of difference for fetal homicide laws is the structure of the criminal provisions themselves. Some states use what might be called a definitional approach. In those states, where existing criminal statutes criminalize conduct committed against a person, the state will define the term "person" to include a fetus. As a result, the coverage of existing crimes, such as murder, is expanded to include fetuses as victims. In states using the definitional approach, the number of existing crimes for which the definitional expansion applies varies from state to state. Typically, the definition is expanded only for those crimes dealing with homicide. However, some states have included assaultive crimes; and at least one state, Missouri, has applied the expanded definition to all crimes.

Some fetal homicide states create new crimes that only apply to fetuses as victims.

An alternative to the definitional approach is to create crimes specific to fetuses. In these states, instead of using the existing homicide statutes, the conduct is criminalized in a separate statute that recognizes the fetus as victim. This approach would lead to a charge

of murder of a fetus instead of a charge of murder of a person. In creating new crimes, some of these states, such as neighboring Illinois, avail themselves of the opportunity to refer to the victim of the crime by using a term such as “unborn child” instead of the term “person.” Of the states with separate crimes specific to the unborn, the number of crimes may vary. Some states have a single statute that applies to all criminal conduct causing the loss of a fetus. Others create several crimes based on the offender’s conduct and culpability, leading to separate crimes for murder, manslaughter, or reckless homicide of a fetus.

States differ in how to refer to a fetus in the law, using terms such as fetus, unborn child, and others.

State fetal homicide laws also differ in how the fetus is referred to in the text of the law. Some states use the term “unborn child” or “child *in utero*” or “person,” while others use the terms “fetus” or “embryo.” Kentucky does not currently have a fetal homicide law. However, Kentucky’s statutes relating to abortion refer to the unborn child as a “fetus.”

The Kentucky Constitution guarantees a civil right of recovery for wrongful death.

Fetal homicide refers to a criminal action, where the state prosecutes an individual for breaching the criminal law of the state. That same conduct can also subject the perpetrator to civil liability, where a person injured by the wrongful conduct sues the perpetrator for damages. In cases where the victim dies, the suit brought is one for wrongful death.

A viable fetus is a “person” whose death may be the subject of a wrongful death action.

While there was no right to recover for wrongful death at common law, Section 241 of the Kentucky Constitution guarantees that right of recovery in the Commonwealth for the death of a “person,” with KRS 411.130 implementing this provision. As interpreted by Kentucky’s highest court in Mitchell v. Couch, 285 SW2d 901 (Ky. 1955), the term “person,” in Kentucky’s wrongful death law includes fetuses who have reached the point of viability. Thus, under current Kentucky law, a wrongful death action may be maintained for the negligent or intentional death of a viable fetus. However, the Court has not included a pre-viable fetus within the term “person” thereby precluding wrongful death damages in those circumstances.

Discussion

Legislative proposals have been offered in the past both for fetal homicide and for fetal wrongful death. None of the proposals has been enacted into law.

The typical Kentucky fetal homicide proposal is to define “person” to include “fetus.”

In the area of fetal homicide, past legislative proposals have generally taken a definitional approach so as to expand the definition of the word “person” in criminal homicide statutes to include “an unborn child from fertilization and implantation onward.” Under these proposals, the fetus would be the victim of the criminal conduct, and the perpetrator would be charged with the fetal death separate and apart from any crime committed against the pregnant woman.

Proponents believe a fetus to be a person, while opponents worry about subtle encroachment into reproductive freedom.

Proponents of this approach believe that the fetus has an identity separate and distinct from the pregnant woman and that the law should recognize this difference. Proponents also hold that human life begins at conception, and that life should be protected by the power of the state regardless of the stage of fetal development reached. Some opponents argue that recognizing the fetus as a “person” is a disguised attempt to encroach upon reproductive choice and that the criminal conduct can be punished by the state without declaring the fetus to be a person.

Penalty enhancement has been offered as an alternative to treating fetuses as persons.

A penalty enhancement approach is sometimes offered as an alternative to the definitional approach. The penalty enhancement proposal treats the loss of the fetus as an injury to the pregnant woman and uses her additional injury as the basis for increasing the penalty for the crime committed by one level. Thus, an Assault in the First Degree committed against a woman that causes her to miscarry would be enhanced from a Class B felony to a Class A felony. The penalty enhancement provision typically is drafted so as to apply at any gestational age.

Penalty enhancement proponents believe that miscarriage or stillbirth is an injury to the pregnant woman.

Proponents of the penalty enhancement approach believe that it delivers criminal sanction for conduct causing the loss of a fetus without having to engage in the question of whether the fetus is a person. Some opponents of this approach may believe that it devalues the fetus, and that the fetus should be recognized as an unborn child and separate entity.

Creating new crimes specific to fetuses has been offered as an alternative approach.

Recently, variations and alternatives to the traditional definitional approach and the penalty enhancement approach have been offered in Kentucky. For example, one variation has been to suggest changing the coverage of the definitional approach to a later point in fetal development such as viability. Alternatively, another proposal has been to create four new crimes based on the text of Kentucky's four current criminal homicide statutes, but with the victim being termed an "unborn child," so as to avoid the personhood debate that arises with usage of the existing statutes. This new crime approach has been offered with varied gestational starting points such as fertilization and implantation or viability.

Proposals to extend wrongful death coverage to pre-viable fetuses have been made.

In the area of wrongful death, past legislative proposals have sought to extend the coverage of a wrongful death action to include pre-viable fetuses. Historically, these proposals have sought to extend the coverage from the point of fertilization and implantation, or conception. However, future proposals could alternatively utilize the time frames discussed in relation to fetal homicide coverage, including 8 weeks, 12 weeks, or quickening.

Proponents believe pre-viable fetuses deserve coverage as tort victims.

Proponents of extending wrongful death coverage believe that viability is an arbitrary point in time, and with a fetus having its own distinct genetic identity, recovery should be allowed for its death as a separate entity. Proponents also argue that, with the advance of medical technology, parents begin viewing their children *in utero* as a part of their family earlier in gestation and have an increased expectation of live birth, given modern rates of infant mortality. Proponents also advance the argument that the threat of a recovery for the loss of a pre-viable fetus will encourage the public to engage in less risky behavior.

Opponents believe that pre-viable fetuses are not separate "persons" who should be treated as separate victims.

Opponents of extending wrongful death coverage argue that a wrongful death action is one designed to recover for the death of a person and that a fetus that cannot survive outside of the womb should not be included as a person. Opponents are divided on the question of whether some alternative means of compensation should be allowed, as by deeming the loss of the pre-viable fetus to be an injury to the person of the

pregnant woman. Opponents also believe that expansion of the right to recover for wrongful death brings the state closer to intruding into the question of reproductive choice.

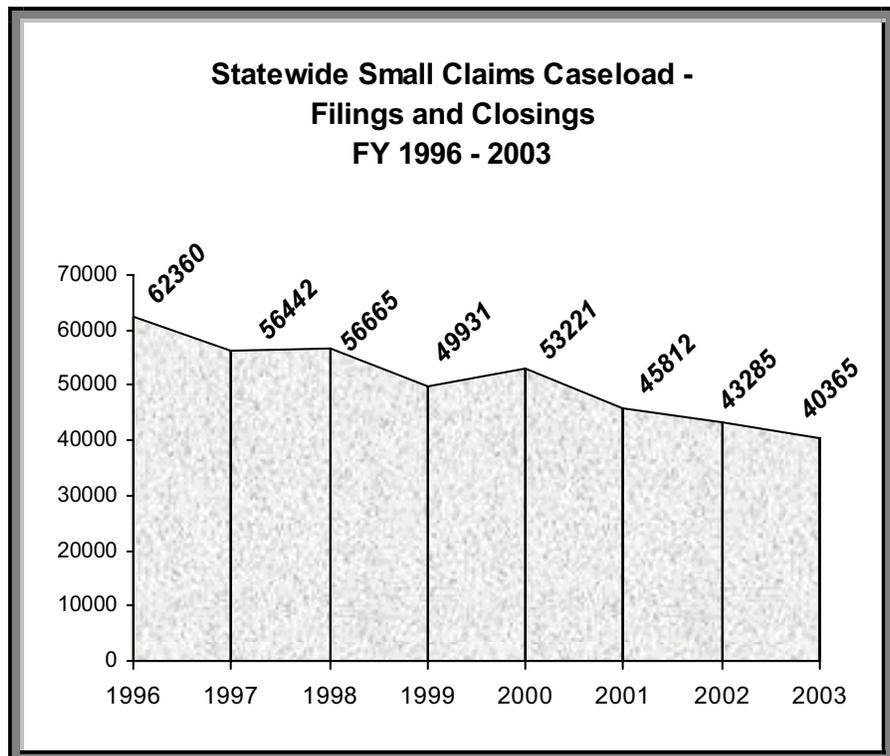
Should the General Assembly raise the current jurisdictional limits for small claims court?

Prepared by Jonathan R. Grate

Background

Small claims court provides a simplified legal forum for the redress of minor grievances.

Small claims court serves the function of providing judicial redress for claims of relatively low monetary value in a less formal forum than the regular civil division of the District Court. The process may be attempted without a lawyer, and many of the legal formalisms and procedures used in regular civil cases are not used. The resulting judgement is, however, real and enforceable. For these reasons, small claims court is used regularly across the Commonwealth in lieu of the ordinary civil docket. Its usage, however, appears to be slowly declining.



Data from Research and Statistics Branch, Ky. Administrative Office of the Courts, *District Court – Historical Caseload* (Sept. 9, 2003)
http://www.kycourts.net/AOC/ResearchStats/data_district/INS016.pdf.

Small claims court omits many of the practices and procedures used in regular civil court.

Small claims court is not a stand-alone court, but rather a division of the District Court. Its origin can be traced back to 1976 legislation implementing a constitutional amendment that completely restructured the Judicial Department. In creating the small claims division within the District Court in KRS Chapter 24A, the General Assembly sought to establish a simplified and more comprehensible judicial forum to allow non-attorneys to both bring and defend claims in a quicker and less expensive manner. The General Assembly eliminated many of the procedures found in ordinary civil cases, such as the ability to engage in evidentiary discovery, and limited the value and number of cases that may be brought before the small claims division.

Small claims cases may not exceed \$1,500 in value, nor may a single person bring more than 25 claims per year.

Two of the restrictions placed on small claims court are the focus of current discussion. Currently, the General Assembly restricts cases to those less than \$1,500 in value, and prohibits a single litigant from bringing more than 25 cases in one year. A merchant, however, is allowed to bring 25 cases per year for each business location. While the 25 case per year limit has remained constant, the current \$1,500 limit reflects an increase from the original \$500 limit set in 1976.

Year Limit Set	Claim Limit Set in Statute	Claim Limit Adjusted for Inflation
1976	\$500	\$1,581
1980	\$1,000	\$2,183
1988	\$1,500	\$2,281

Dollar conversion from historical statutory limit to 2002 dollars utilized the "Consumer Price Index for All Urban Consumers (CPI-U), U.S. City Average, All Items*," contained in: Letter from Barry Boardman, Ph.D., LRC Staff Economist, to Jonathan R. Grate (Oct. 6, 2003) (on file with author).

Discussion

One focus of the effort to expand small claims jurisdiction centers on the 25 claim per year limit. The objective of the limit was to prevent small claims court from becoming over-used by bill collectors or large-volume businesses seeking a cheap method of bill collecting. The thought was that if a business

generated more than 25 claims per year, that business could develop the expertise to use the ordinary civil docket and factor that increased expense into its cost of doing business.

Proponents believe businesses should be allowed to file additional claims per year to decrease their costs.

Proponents of increasing the limit on the number of claims believe that businesses should not be forced to pay higher costs simply because they have a large volume of claims. Also, as each defendant has the right to a hearing, and the hearing is the same regardless of whether the defendant is the 10th or 40th person sued by the plaintiff that year, every defendant receives due process. Moreover, proponents assert that allowing businesses increased access to small claims court will lower their costs, a benefit to business and to the public.

Opponents believe additional claims could lead to abuse.

Opponents believe that opening the gates to large-volume claimants opens the door to abuse. Sophisticated users of the system, such as a large firms, could have an unfair advantage over the ordinary litigant, who appears without an attorney and who has little understanding of the type of evidence a court will and will not consider. Opponents also believe that large-volume claimants should use more private collection methods instead of using scarce judicial time collecting large numbers of over-due bills.

Proponents want to increase the \$1,500 limit to keep pace with inflation and allow more cases to be settled through the small claims process.

The other point of current discussion centers on the value of a case that the small claims division may hear. Proponents believe that the monetary limit should be increased to keep up with inflation. If this is not done, the jurisdictional limit in small claims cases would shrink in real terms. Some proponents also argue for a further increase over inflation, arguing that, in cases where the law is clear and may be easily applied, it should not matter whether the claim is for \$1,500 or twice that amount—the lower costs and simplified procedures of small claims court should be available. Proponents also argue that increasing the monetary limit increases the likelihood that a defendant will appear and be heard instead of not filing a legal answer and allowing a default judgment to be entered, as might happen with a summons to the formal regular docket. If the case appears to be too

complicated for the small claims division, the judge could transfer the case to the ordinary civil docket.

Opponents argue the monetary limit is current with inflation, and that larger amounts need the protection afforded by regular courts.

Opponents argue that small claims jurisdiction has nearly kept pace with inflation, and a new statutory increase is unwarranted at this time. Moreover, they assert that, with increased amounts at stake, more difficult and challenging cases will be brought before the less formal proceedings of the small claims division, involving such topics as insurance law and subrogation. Opponents believe that more complicated cases need the more formal process of the ordinary civil docket. Also, litigants with more complicated cases may be in greater need of professional legal advice, but may not seek that advice if the case is in small claims court. Also, while a small claims judge may transfer a complicated case to the ordinary civil docket, that process may confuse a lay litigant.

Should the General Assembly require the entry of mutual protective orders in domestic violence cases?

Prepared by Stephanie Byers Martin

Background

Reported cases of domestic violence in Kentucky have increased.

Domestic violence is a growing problem in Kentucky. According to the Kentucky Domestic Violence Association (KDVA), the 17 spouse abuse centers in Kentucky received 41,600 domestic violence-related calls during fiscal year 2002.¹ This is nearly a 50 percent increase from fiscal year 2000, when the centers received 28,200 domestic violence-related calls.² Shelter statistics and the number of non-residential clients³ also continues to rise.

Table 1
Client Totals
Kentucky Domestic Violence Shelters

	FY 2000	FY 2002
Women sheltered	2,015	2,125
Men sheltered	11	12
Children sheltered	1,948	2,002
Total sheltered	3,974	4,139
Total non-residential clients	21,611	22,155

Sources: KY. DOMESTIC VIOLENCE ASS'N (KDVA), *Domestic Violence in Kentucky Fact Sheet*, <http://www.kdva.org/resources/DvinKentuckyFactSheet.pdf> (Oct. 9, 2003); KY. STATE POLICE (KSP), CRIME IN KENTUCKY 2000 CRIME REPORT 35, <http://www.kentuckystatepolice.org/pdf/Crime%20in%20KY%202000.pdf> (Oct. 8, 2003). The figures reflect first-time use of services during the fiscal year and are not duplicated.

Domestic violence court filings increased from 26,809 in fiscal year 1996 to 29,536 in fiscal year 2002.

Along with the increase in domestic violence statistics, the number of domestic violence filings in family and district courts has also increased. As shown in Table 2, domestic violence court filings increased from 26,809 in fiscal year 1996 to 29,536 in fiscal year 2002.

Domestic violence orders contain "no contact" provisions that prevent the restrained party from contacting the petitioner.

A domestic violence order, when issued, prevents the person found to have committed the domestic violence (the restrained party) from engaging in various acts with the victim (the petitioner) and usually includes "no contact" and other provisions.⁴ For the purpose of

this discussion, the term “domestic violence order” includes both the emergency protective order and the domestic violence order.⁵

Table 2
Domestic Violence Filings
(Fiscal Year 1996 – Fiscal Year 2003)

Fiscal Year	Family Court	District Court	TOTAL
1996	4,365	22,444	26,809
1997	4,508	23,303	27,811
1998	4,775	24,022	28,797
1999	5,060	22,464	27,524
2000	8,309	19,658	27,967
2001	9,630	19,535	29,165
2002	10,458	19,078	29,536
2003	11,468	16,629	28,097

Source: ADMIN. OFFICE OF THE COURTS, *Circuit Family Court Historical Caseload*, http://www.kycourts.net/AOC/ResearchStats/data_family/INS020.pdf (Oct. 10, 2003), and *District Court Historical Caseload*, http://www.kycourts.net/AOC/ResearchStats/data_district/INS016.pdf (Oct. 10, 2003).

Some judges have ruled that domestic violence orders apply to both petitioner and restrained party.

A domestic violence order applies only to the restrained party, and under KRS 403.735, “[a] court may issue mutual protective orders only if a separate petition is filed by the restrained party.” However, some judges, in cases where the restrained party did not file a separate petition, have ruled that domestic violence orders are mutually binding.⁶

Proposals have been made in recent years to have a domestic violence order apply to both parties, which would require both parties to obey the order to stay away from each other and would permit the court to punish either or both parties for violation of the order.

Discussion

Proponents believe the current system is often abused by petitioners and view mutual protective orders as a way of protecting victims from their abusers.

This issue may come before the General Assembly and there are several arguments in favor of and against changing the law to require mutual protective orders in domestic violence cases.

Those in favor of changing the law to require mutual protective orders in domestic violence cases say that the current system is often abused, allowing some petitioners to manipulate judges and use domestic violence orders to harass the restrained party.⁷ Proponents cite cases in which the petitioner, or

victim, voluntarily associates with the restrained person, often renewing the relationship. If the abuse reoccurs or the petitioner gets upset at the other party, he or she can turn the restrained person in for violating the domestic violence order without fear of being punished for complicity.

Proponents also view mutual protective orders in domestic violence cases as a way of protecting the victim from his or her abuser. Often “victims are drawn back to those who hurt them, and the threat of jail time can discourage such visits.”⁸

Opponents view mutual protective orders as another avenue by which abusers may continue to abuse their victims.

Opponents fear that mutual protective orders could have a chilling effect by discouraging victims from seeking help and could lead to dual arrests in some situations.

Kentucky may not be eligible for Grants to Encourage Arrest Policies and Enforcement of Protection Orders from the federal government if the state requires mutual protective orders.

Opponents of the proposed legislation feel that mutual protective orders would allow the abuser to further abuse the victim by claiming that contact was voluntary, thus escaping punishment, or by causing the victim to be punished for violating the order. Opponents also argue that such legislation would lead to a fear of punishment, thus discouraging victims from seeking protective orders⁹ or reporting violations. In addition, opponents assert that mutual protective orders could cause police officers, not knowing who initiated contact, to arrest both “abusers and victims in response to distress calls from homes in which orders are in place.”¹⁰

Finally, opponents are concerned that Kentucky will lose federal funding if it has mutual protective orders in place.¹¹ Under federal law, eligibility for one type of grant¹² requires the grantee to “certify that their laws, policies, or practices prohibit issuance of mutual restraining orders of protection except in cases where both spouses file a claim and the court makes detailed findings of fact indicating that both spouses acted primarily as aggressors and that neither spouse acted primarily in self-defense.”¹³ For example, New Mexico lost \$4 million in funding because the state permitted “arrest of both parties in domestic violence disputes without determining who the aggressor was,” and the state did not “prohibit the issuance of mutual restraining orders in domestic violence cases.”¹⁴

Grants to Encourage Arrest Policies and Enforcement of Protection Orders are discretionary grants,¹⁵ thus funding is not guaranteed. In addition, the amount of

available federal money may not be large enough to justify Kentucky's expense in complying with federal eligibility requirements, or large enough to outweigh the interest of Kentucky citizens and the General Assembly regarding a particular statute or program.¹⁶

A compromise proposal would give the court discretion in whether an order should be mutual or not.

Compromise proposals have been offered that would allow a court to issue a mutually binding protective order if the court finds it is in the interest of justice. Proponents of the initial proposal find the compromise proposal acceptable; however, the opponents do not generally find the compromise acceptable for the same reasons they oppose the initial proposal.

It is questionable whether mutual protective orders would be recognized by other states.

Another issue is whether a mutual protective order would be recognized by other states. Under federal law, a mutual protective order is not entitled to full faith and credit by other states unless the restrained party also filed a petition seeking a protection order.¹⁷ This is an issue the General Assembly may want to consider if it takes up this legislation.

Works Cited:

- 1 See Ky. Domestic Violence Ass'n (KDVA), Domestic Violence in Kentucky Fact Sheet, available at <http://www.kdva.org/resources/DvinKentuckyFactSheet.pdf> (Oct. 9, 2003).
- 2 See Ky. State Police (KSP), Crime in Kentucky 2000 Crime Report 35, available at <http://www.kentuckystatepolice.org/pdf/Crime%20in%20KY%202000.pdf> (Oct. 8, 2003).
- 3 Clients who "do not receive emergency shelter but they do receive services from the spouse abuse programs." KDVA, *supra* note 1.
- 4 See Ky. Rev. Stat. Ann. §§ 403.740 and 403.750 (Banks-Baldwin 1998).
- 5 An emergency protective order is issued for a short period of time (not to exceed 14 days) and does not require the presence of the restrained party. See Ky. Rev. Stat. Ann. § 403.740 (Banks-Baldwin 1998). A domestic violence order is issued for a longer period of time (not to exceed three years) and requires a hearing, which allows the restrained party a chance to defend himself or herself. See Ky. Rev. Stat. Ann. §§ 403.745 and 403.750 (Banks-Baldwin 1998).
- 6 See Francis X. Clines, Judge's Domestic Violence Ruling Creates an Outcry in Kentucky, N.Y. Times (Jan. 8, 2002), available at <http://www.lsc.gov/RPress/NYT0102.pdf> (Oct. 7, 2003); see also Woman jailed for violating her own protective order, Courier-J. (Apr. 21, 2002), available at <http://www.courier-journal.com/localnews/2002/04/21/ke042102s191546.htm> (Apr. 22, 2002); see also John Cheves, State bill applies EPOs to victims, Lexington Herald-Leader, Feb. 6, 2002, at A1 and A8.
- 7 See Cheves, *supra* note 6, at A1.
- 8 Woman jailed for violating her own protective order, *supra* note 6.
- 9 See Cheves, *supra* note 6, at A8.
- 10 *Id.*
- 11 See *id.*

12 See 42 U.S.C.A. Subchapter XII-I – Grants to Encourage Arrest Policies and Enforcement of Protection Orders (1994).

13 42 U.S.C.A. § 3796hh(c)(3) (1994).

14 Jacque Oldfield, State Legislators Consider Domestic Violence Bill, TVI Times (Feb. 5, 2002), available at <http://www.tvitimes.tvi.edu/restored-files/news/020205a.htm> (Oct. 8, 2003); see also Office of the Lt. Governor, Lt. Governor Walter Bradley Calls For Action on Domestic Violence Bill 242, (Jan. 23, 2002) (press release), available at <http://www.state.nm.us/clients/formergovernors/johnson/lrgov/nr27.html> (Oct. 9, 2003).

15 See 42 U.S.C.A. § 3796hh(b) (1994).

16 For example, “federal funding has not increased in recent years and money is being spread thinner around the country.” Deborah Yetter, Legal Aid to cut staff, shut offices, Courier-J. (Dec. 29, 2002), available at <http://www.courier-journal.com/localnews/2002/12/29/ke122902s339315.htm> (Oct. 14, 2003). And, “[t]he state has lost \$460,000 in funding from the federal Violence Against Women Act because of a change in the way the Bush administration allocates the money.” *Id.*

17 See 18 U.S.C.A. § 2265(c) (2000).

Should the General Assembly reduce the number of chemicals or amount of equipment necessary to constitute criminal ability to manufacture methamphetamine?

Prepared by Stephanie Byers Martin

Background

Illegal production of methamphetamine, a dangerous stimulant, has increased in Kentucky.

Methamphetamine is a central nervous system stimulant that is extremely addictive and can be injected, snorted, smoked, or orally ingested.¹ It is often easily produced in clandestine laboratories using store-bought materials, and is the most commonly manufactured synthetic drug in the United States.² Methamphetamine abuse and production is on the rise and is spreading across Kentucky.³

Table 1
Kentucky Methamphetamine Laboratory Seizures

Fiscal Year	Western District Kentucky	Eastern District Kentucky
1998	18	0
1999	76	1
2000	143	2
2001	185	77

Source: Nat'l Drug Intelligence Center (NDIC), *Methamphetamine – Kentucky Drug Threat Assessment* (July 2002) (citing DEA; Kentucky State Police; Kentucky Multijurisdictional Drug Task Forces), <http://www.usdoj.gov/ndic/pubs1/1540/meth.htm> (Sept. 23, 2003).

In Kentucky, the simple Birch reduction method is most commonly used to manufacture methamphetamine.

Several methods may be used to manufacture methamphetamines; however, the most common method used in Kentucky is the Birch reduction method, also called the Nazi method.⁴ The Birch reduction method does not require a trained chemist and is relatively simple because it “does not require extensive knowledge of chemistry or sophisticated laboratory equipment.”⁵ In addition, this method is fast and may produce a pound or less of methamphetamine with a 90 percent purity level in less than an hour.⁶ Finally, the Birch reduction method laboratory is very mobile, allowing the operator to easily pack the required chemicals and equipment

Methamphetamine production requires rather common chemicals and equipment.

in a box and construct the lab anywhere, including in the trunks of cars, in apartments or motels, on deserted roads, or at campgrounds.⁷

The chemicals and equipment used in manufacturing methamphetamines are fairly easy to acquire.⁸

Chemicals (Source)	Equipment
<ul style="list-style-type: none"> • Ephedrine or pseudoephedrine (cold and allergy medicine) • Acetone • Alcohol (rubbing or gasoline additive) • Anhydrous ammonia (farm fertilizer) • Campfire fuel • Ethyl ether (starting fluid) • Gasoline • Hydrochloric [Muriatic] acid • Iodine • Kerosene • Lithium (camera batteries) • Methanol (gasoline additive) • Methylsulfonylmethane [MSM] (animal feed supplement) • Paint thinner • Red phosphorus (road flares or matches) • Sodium hydroxide (Red Devil Lye) • Sulfuric acid (drain cleaner or battery acid) • Table/Rock salt • Toluene (brake cleaner) • Trichloroethane (gun scrubber) 	<ul style="list-style-type: none"> • Aluminum foil • Blender • Bottles • Clamps • Coffee filters • Funnels • Glass containers (cookware such as Pyrex) • Glass or plastic jugs • Hotplate or camp stove • Instructions (books or from Internet) • Measuring cups • Paper towels • Plastic or rubber tubing • Plastic tote box • Propane cylinder (20 lbs.) • Rubber gloves • Strainer • Tape • Turkey baster

Sources: *Methamphetamine Labs*, <http://www.streetdrugs.org/methlabs.htm> (Sept. 26, 2003); Guy Hargreaves, *Clandestine Drug Labs*, 69 FBI LAW ENFORCEMENT BULLETIN 4 (FBI) (Apr. 2000), <http://www.fbi.gov/publications/leb/2000/apr00leb.pdf> (Sept. 24, 2003).

KRS 218A.1432(1)(b) makes possession of the chemicals or equipment used to make methamphetamine a crime.

In addressing the problem of manufacturing methamphetamine, the Kentucky General Assembly enacted KRS 218A.1432, which states:

- (1) A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully:
 - (a) Manufactures methamphetamine; or
 - (b) Possesses the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine.
- (2) Manufacture of methamphetamine is a Class B felony for the first offense and a Class A felony for a second or subsequent offense.

Kotila v. Commonwealth interprets the statute as requiring possession of all chemicals or all equipment necessary to make methamphetamine.

Recently, the Supreme Court of Kentucky addressed this statute in *Kotila v. Commonwealth*.⁹ At issue in the case was whether the term "[p]ossesses the chemicals or equipment,"¹⁰ means any of the chemicals or equipment, or all of the chemicals or equipment necessary to manufacture methamphetamine.¹¹ The Supreme Court held that "the chemicals or equipment" means "all of the chemicals or all of the equipment necessary to manufacture methamphetamine."¹² Thus, to successfully prosecute a methamphetamine manufacturer under KRS 218A.1432(1)(b), the manufacturer must have either all of the chemicals or all of the equipment necessary to manufacture methamphetamine.

Discussion

Whether the General Assembly should amend KRS 218A.1432(1)(b) to require less than all of the chemicals or all of the equipment necessary to manufacture methamphetamine may be an issue during the 2004 Session.

Proponents of a "less than all" standard view the current statute as a difficult standard, which allows the maker to escape prosecution unless he or she is caught "red-handed."

Those in favor of amending the statute to a lower number are likely to argue that the statute requires too much and that a manufacturer will easily escape prosecution by always ensuring that he or she waits until the last possible moment before obtaining the last necessary chemical and piece of equipment. As the Chief Justice pointed out in his partial dissent in *Kotila*:

[T]he burden on the prosecution in methamphetamine manufacturing cases will be greatly enhanced, and an offender with the least amount of ingenuity will be able to prevent his conviction by merely omitting from his cache of tools and ingredients one or two of the more common, and bringing in the missing components only at the last moment. Thus, to achieve a conviction under the majority interpretation, it will be necessary to catch the offender "red-handed."¹³

Opponents argue that a less than all standard will lead to arbitrary and discriminatory law enforcement, double jeopardy, and that other statutes allow prosecution for less than all.

The Kentucky Supreme Court ruled that the current statute, as interpreted, was not unconstitutionally vague.

The void-for-vagueness doctrine requires criminal offenses to be sufficiently defined and in a way that does not encourage arbitrary and discriminatory enforcement.

If the statute requires less than all chemicals or equipment, double jeopardy problems could arise.

Opponents of amending the statute to allow for less than all chemicals or all equipment are likely to argue that a lesser standard will lead to arbitrary and discriminatory law enforcement, double jeopardy problems, and that a less than all standard is covered under other statutes.

In *Kotila*, the statute was also challenged for being unconstitutionally vague.¹⁴ The Kentucky Supreme Court ruled that the statute was not unconstitutionally vague because it interpreted the statute as requiring all chemicals or equipment.¹⁵ However, the court said that “[t]he argument might have more merit if we interpreted the statute as permitting a conviction for the possession of *any*, rather than *all*, of the chemicals or equipment necessary to manufacture methamphetamine.”¹⁶ The United States Supreme Court, in discussing the void-for-vagueness doctrine, said that the doctrine “requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”¹⁷

Further the U.S. Supreme Court pointed out “that the more important aspect of the vagueness doctrine ‘is ... the requirement that a legislature establish minimal guidelines to govern law enforcement.’”¹⁸ The U.S. Supreme Court also said, “Where the legislature fails to provide such minimal guidelines, a criminal statute may permit ‘a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.’”¹⁹ Therefore, if KRS 218A.1432(1)(b) is amended to allow prosecution for possession of less than all the chemicals or equipment necessary to manufacture methamphetamine, the statute may be unconstitutionally vague “because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute.”²⁰

In *Kotila*, the Kentucky Supreme Court also addressed the issue of double jeopardy that would exist if KRS 218A.1432(1)(b) allowed prosecution for less than all the chemicals or equipment necessary to manufacture

methamphetamine. In 2000, the General Assembly enacted KRS 250.489 and KRS 250.991(2). KRS 250.489(1) states “It shall be unlawful for any person to knowingly possess anhydrous ammonia in any container other than an approved container[,]” and KRS 250.991(2) states:

Any person who knowingly possesses anhydrous ammonia in a container other than an approved container in violation of KRS 250.489 is guilty of a Class D felony unless it is proven that the person violated KRS 250.489 with the intent to manufacture methamphetamine in violation of KRS 218A.1432, in which case it is a Class B felony for the first offense and a Class A felony for each subsequent offense.

If the statute requires less than all chemicals or equipment, it would be an “included offense” of KRS 250.489(1) (Class B felony version) and conviction under both statutes would be double jeopardy.

As the Supreme Court pointed out in *Kotila*, if KRS 218A.1432(1)(b) covers less than all the chemicals or equipment necessary to manufacture methamphetamine, then “[e]vidence of possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine would prove both offenses[,]” and “KRS 218A.1432(1)(b) would be an ‘included offense’ of the Class B felony version of KRS 250.489(1),” thus “convicting a defendant for possessing anhydrous ammonia under both statutes would constitute double jeopardy.”²¹

The General Assembly addressed a less than all standard when it enacted KRS 218A.1437 allowing conviction for possession of a precursor to methamphetamine.

In addition, the General Assembly enacted KRS 218A.1437 in 2002, which states:

- (1) A person is guilty of unlawful possession of a methamphetamine precursor when he or she knowingly and unlawfully possesses a drug product or combination of drug products containing ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use the drug product or combination of drug products as a precursor to methamphetamine or other controlled substance
- (2) ...
- (3) Unlawful possession of a methamphetamine precursor is a Class D felony for the first

offense and a Class C felony for each subsequent offense.

If KRS 218A.1432(1)(b) is amended to allow for less than all the chemicals or equipment necessary to manufacture methamphetamine, then an offense under KRS 218A.1437 would also be an offense under KRS 218A.132(1)(b). However, as the Supreme Court pointed out in *Kotila*, the General Assembly intended possession of a methamphetamine precursor with intent to manufacture methamphetamine to be a Class D felony, thus KRS 218A.1437(1) and (3) would be unnecessary if the General Assembly wanted such conduct to be a Class B felony under KRS 218A.1432(1)(b).²²

The statute currently allows conviction for possessing all of the equipment necessary to make methamphetamine; virtually every household in Kentucky could meet this standard.

An additional issue KRS 218A.1432(1)(b) raises is the possibility of prosecution for possessing all of the equipment necessary to manufacture methamphetamine. Virtually every household in Kentucky could have all the equipment necessary to manufacture methamphetamine. The statute also requires an intent to manufacture methamphetamine to be shown; nonetheless, such a statute could lead to arbitrary and discriminatory law enforcement.

Proposals for amending the statute include:

- Lowering the “all” requirement to two or more chemicals, or two or more items of equipment. This proposal fails to remedy any double jeopardy problems that may arise and could allow arbitrary and discriminatory law enforcement.
- Amending the statute to clarify that “all chemicals or all equipment” is required and create a new crime of “possession of chemicals or equipment for the unlawful manufacture of methamphetamine.” The proposal includes a first degree offense, in which the wrongdoer is in possession of five or more, but not all, chemicals, or five or more, but not all, items of equipment. Also, the proposal includes a second degree offense, in which the wrongdoer is in possession of at least two, but less than five, chemicals, or at least two, but less than five, items of equipment. This proposal fails to remedy any double jeopardy problems and also may

encourage arbitrary and discriminatory law enforcement.

Arbitrary and discriminatory enforcement could be remedied by an intent requirement; however, sometimes intent is presumed from possession, leading to arrest and requiring the defendant to prove that there was no intent.

Double jeopardy problems can be remedied by amending the statutes to exclude convictions under both statutes. Remedying encouragement of arbitrary and discriminatory enforcement cannot be done so easily because most, if not all, the chemicals or equipment are legal to possess, and anyone could possess two or more, or even five or more, of the chemicals or equipment. Including the intent to manufacture methamphetamine requirement may save such a statute; however, the requirement might fail to protect Kentucky citizens from arbitrary and discriminatory enforcement.

The Nevada Supreme Court recently ruled Nevada's statute unconstitutional.

The Nevada Supreme Court faced a similar issue in *Sheriff v. Burdick*,²³ where the Nevada Revised Statute 453.322(1)(b) criminalized possession of a majority of the ingredients required to manufacture a controlled substance. Acknowledging that the statute contained no intent element, the court said, "In addition to missing an intent element, the statute fails to provide a person of ordinary intelligence with fair notice of what conduct is prohibited. In particular, it fails to list the items that might be described as 'ingredients' required to manufacture ... a controlled substance."²⁴ In 2003, the Nevada Legislature amended the statute to include an intent requirement and a list of chemicals commonly used in manufacturing controlled substances and possession of which is unlawful.²⁵

Therefore, an alternative to the above-mentioned proposals is to include a list of chemicals that are unlawful to possess with an intent to manufacture methamphetamine.

Works Cited:

¹ See Office of Nat'l Drug Control Policy (ONDCP), *Methamphetamine – Drug Facts*, available at http://www.whitehousedrugpolicy.gov/drugfact/methamphetamine/meth_b.html (Sept. 26, 2003).

² See *id.*

³ See Nat'l Drug Intelligence Center (NDIC), *Methamphetamine – Kentucky Drug Threat Assessment* (July 2002), available at <http://www.usdoj.gov/ndic/pubs1/1540/meth.htm> (Sept. 23, 2003).

⁴ See *id.*

⁵ *Id.*; see also Guy Hargreaves, *Clandestine Drug Labs*, 69 FBI LAW ENFORCEMENT BULLETIN 4 (Apr. 2000), available at <http://www.fbi.gov/publications/leb/2000/apr00leb.pdf> (Sept. 24, 2003).

⁶ See NDIC, *supra* note 3.

⁷ See *id.*

⁸ See Michael S. Scott, *Clandestine Drug Labs*, PROBLEM-ORIENTED GUIDES FOR POLICE SERIES NO. 16 (Office of Community Oriented Policing Servs.) (Mar. 2002), available at <http://www.cops.usdoj.gov> (Sept. 26, 2003).

⁹ No. 2000-SC-0341-MR, 2003 Ky. LEXIS 127 (Ky. June 12, 2003).

¹⁰ KY. REV. STAT. ANN. § 218A.1432(1)(b) (Banks-Baldwin 1999).

¹¹ See *Kotila*, 2003 Ky. LEXIS 127, at *6.

¹² *Id.* at *7.

¹³ *Id.* at *18.

¹⁴ See *id.*, at *14.

¹⁵ See *id.*, at *14.

¹⁶ *Id.*

¹⁷ *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

¹⁸ *Id.* at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

¹⁹ *Id.* (quoting *Smith*, 415 U.S., at 575).

²⁰ *Id.* at 361.

²¹ *Kotila*, at *8.

²² See *id.* at *9.

²³ 59 P.3d 484 (Nev. 2002).

²⁴ *Id.* at 487.

²⁵ See NEV. REV. STAT. § 453.322 (S. Bill No. 394, effective May 28, 2003).

Should the General Assembly reorganize the Division of Forensic Services to improve the speed with which cases are handled?

Prepared by Stephanie Byers Martin

Background

The Kentucky State Police is a department under the Kentucky Justice Cabinet and is organized into four divisions: Division of Executive Services, Division of Police Services, Division of Forensic Services, and Division of Technical Services.¹ Recently, the Division of Forensic Services has come under fire because of a backlog in cases.

The Division of Forensic Services provides support at no cost for law enforcement agencies conducting investigations within the state.

The Division of Forensic Services coordinates and manages the activities of the Electronic Crimes Branch and six forensic laboratory branches.² According to the Kentucky State Police 2002 Annual Report, the forensic labs provide support to all law enforcement agencies investigating cases within the state at no cost.³ Laboratory services include analysis in arson, blood alcohol, toxicology, firearms, solid dosage drugs, trace evidence, gunshot residue, and forensic biology serology/DNA.⁴ However, not all services are available at every branch.⁵

The increasing caseload of the division has led to a record backlog in cases.

The caseload of the division has steadily increased in the past several years (Table 1). In addition, the division is “struggling with a record backlog of 10,000 cases,”⁶ about 80 percent of which are drug cases “in which substances seized by police must be tested to show whether they truly are cocaine, meth[amphetamine], marijuana or whatever is suspected.”⁷ “Backlog” means the total number of uncompleted cases received in the division.⁸ This information is displayed in Table 2 and Figure A.

Case backlogs delay cases and investigations, upsetting judges, attorneys, and victims and their families.

Such a backlog causes serious delays in cases and investigations, which in turn upsets judges, prosecutors, public defenders, and crime victims and their families.⁹ “Across the state, judges are growing increasingly frustrated by having to put justice on hold

because of” the case backlog in the division.¹⁰ For example, one Circuit Court judge, frustrated by the delays in 47 cases, “warned the director of the Western Kentucky Crime Lab in Madisonville that he will hold the facility in contempt if it fails to provide test results within 90 days of receiving evidence in new criminal cases.”¹¹

Table 1
Division of Forensic Services Caseload

Year	Number of Cases Received	Annual Percent Change
1988	18,653	
1989	20,696	10.95
1990	21,413	3.46
1991	24,884	16.21
1992	27,172	9.19
1993	27,847	2.48
1994	29,517	5.99
1995	31,514	6.77
1996	31,607	0.29
1997	34,107	7.91
1998	37,216	9.12
1999	38,264	2.82
2000	39,230	2.52
2001	40,751	3.88
2002	38,523	-5.47

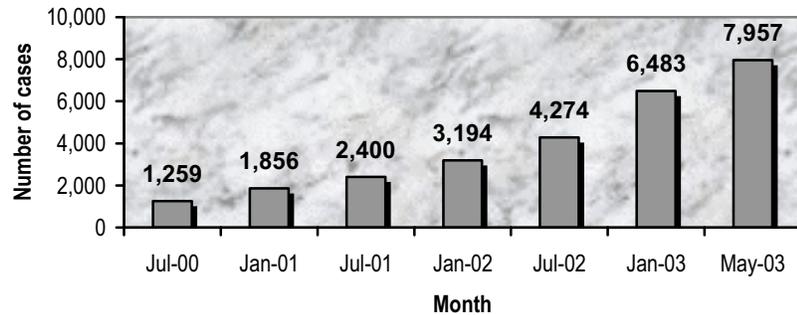
Source: Tom Loftus, *Caseload Crunch: Long delays common for drug, DNA tests*, COURIER-J. (July 28, 2003) (citing Kentucky State Police Forensic Laboratory), http://www.courier-journal.com/localnews/2003/07/28ky/wir-front-lab_caseload.html (Oct. 2, 2003).

Table 2
Case Backlog Comparison

Discipline	Backlog as of January 2003	Backlog as of August 2003
Arson	41	32
Blood Alcohol	825	631
Toxicology	562	761
Firearms	279	349
Solid Dosage Drug Analysis	6,430	8,667
Trace Analysis	94	50
Gunshot Residue	201	19
Forensic Biology Serology/DNA	401/268	448/274
Total	8,833	10,509

Source: KY. STATE POLICE FORENSIC SERVS. DIV. STAFF, RESPONSE TO INQUIRY FROM INTERIM JOINT JUDICIARY COMM. 21 (Sept. 16, 2003).

Figure A
Monthly Backlog of Drug Cases
(July 2000 - May 2003)



Source: Tom Loftus, *Caseload Crunch: Long delays common for drug, DNA tests*, COURIER-J. (July 28, 2003) (citing Kentucky State Police Forensic Laboratory), http://www.courier-journal.com/localnews/2003/07/28ky/wir-front-lab_caseload.html (Oct. 2, 2003).

Also, at a meeting of the Interim Joint Committee on Judiciary, a Circuit Court judge indicated that the case backlog problem “is resulting in court orders for the production of evidence, contempt citations for failing to produce evidence in a timely manner, and dismissal of cases.”¹² In addition, other judges and prosecutors attending the meeting indicated that some defendants commit new offenses on pretrial release while waiting for test results in prior cases.¹³

The Division says the major reasons for the backlog are insufficient personnel and a rapid increase in drug cases.

The Division of Forensic Services provided several reasons for the increasing backlog in cases:

- The division acknowledged that there is a need for more personnel.¹⁴ During an Interim Joint Committee on Judiciary meeting, division officials stated that the laboratories have lost 53 staff members since 1999 to higher paying jobs, less stressful jobs regardless of higher pay, and retirements.¹⁵ In addition, new staff members undergo a six-month training period and personnel laws do not allow a new staff member to be hired for the six-month training period prior to the retiring staff member’s departure.¹⁶
- Dramatic increases in drug submissions have contributed to the case backlog.¹⁷ “Lab officials ... say they are overwhelmed by requests for tests on drugs, DNA, blood and other evidence. They

attribute the soaring caseload mostly to drugs – methamphetamine (largely in Western Kentucky) and prescription drugs (Eastern Kentucky).¹⁸

- The division explained that court-ordered testing and prosecutor “demand lists” have also added to the case backlog.¹⁹ The laboratory system works on a first-come, first-served basis, thus court orders requiring completion dates for certain cases cause them to be taken out of order “and other cases that are even older than the newly prioritized ones must sit unexamined even longer.”²⁰ In addition, court orders and prosecutor lists inhibit the batching method of analysis often used for cases in which the same processes may be used for similar analysis at the same time.²¹
- The division cites the dramatic increase in clandestine laboratory cases in the last several years as another factor in the mounting backlog.²² “These cases are extremely time consuming and the evidence often difficult and dangerous to store. One clandestine laboratory case may take the same amount of time to work as fifteen (15) typical drug cases.”²³

The case backlog in the Division of Forensic Services is a major problem with serious consequences including dismissal of cases, possible constitutional rights violations as suspects wait in jail for results, and the pain victims and their families face resulting from the lack of closure.

Discussion

The Interim Joint Committee on Judiciary addressed this issue during committee meetings in which judges, prosecutors, and Justice Cabinet officials were able to discuss the growing problem and make suggestions.²⁴

The division may be retained under the Kentucky State Police.

Regardless of whether the General Assembly chooses to retain the Division of Forensic Services under the Kentucky State Police, several proposals have been suggested to alleviate the case backlog.

In order to tackle problems associated with hiring and keeping staff members, the following proposals have been suggested:

Options discussed to address the personnel problem include changing personnel laws, increasing salaries, stronger employment contracts, and encouraging universities to offer more and better training.

- Personnel laws could be changed to allow the hiring of new staff six months before the retiring member leaves, which would allow proper training without staff being pulled from case analyses to train new members.²⁵
- Salaries could be increased to be more competitive with the private sector, which may discourage current and newly trained staff from leaving.²⁶
- Employment contracts could include provisions requiring an employee to reimburse the division for the six-month training period in the event the employee leaves within a certain period of time after training,²⁷ thereby discouraging newly trained staff from leaving immediately after their training.
- Educational institutions could be encouraged to offer more and better training in forensic sciences.²⁸ Although this would not alleviate the present case backlog, it might lead to shorter training periods in the division. In addition, the division could offer incentives to graduates who work for the division, such as a student loan repayment program.²⁹

The option of contracting with private in-state labs, out-of-state labs, or educational institutions to reduce the backlog was criticized as unworkable.

Contracting with outside entities (for example private in-state labs, out-of-state labs, or educational institutions) to perform some services was considered in committee meetings, but the following problems were discussed:

- Few private in-state labs are “willing to analyze the forensic evidence in the volumes necessary.”³⁰ In addition, an in-state laboratory is likely to send cases out of state,³¹ which leads to the problems associated with contracting with out-of-state labs.
- In regard to contracting with out-of-state laboratories, the cost and burden of issuing subpoenas for testimony in state courts to persons who are out of state is a major concern. Out-of-state laboratories are likely to charge \$160 per hour plus costs for testifying in Kentucky.³² Although video conferencing may be an option for cases sent to out-of-state laboratories for examination, “defense attorneys would want the witness physically present in the courtroom.”³³
- Contracting with educational institutions, such as the University of Louisville or the University of Kentucky, is opposed by both defense attorneys

and prosecutors because of “[c]oncerns regarding evidential integrity, chain of custody and instrument[] integrity.”³⁴

Due to these concerns, the option of contracting with outside entities to reduce the backlog was criticized as being unworkable.

It was suggested that the division prioritize cases based on the seriousness of the offense.

It was suggested that the General Assembly might consider requiring the division to prioritize cases based on the seriousness of the offense,³⁵ instead of continuing its first-come, first-served method.

It was suggested that the division could be transferred to another branch under the Justice Cabinet, established as its own separate division under the cabinet, or could be transferred to another cabinet.

It was also suggested that the General Assembly consider transferring the division out of the Kentucky State Police. The division could be transferred to the Medical Examiner Branch (also under the Justice Cabinet) or could be established as its own separate division under the Justice Cabinet or another cabinet.³⁶ However, the Commissioner of the Kentucky State Police urged the committee to retain the division within the State Police.³⁷

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² See *id.*

³ See KENTUCKY STATE POLICE 2002 ANNUAL REPORT 5, available at http://www.kentuckystatepolice.org/pdf/KSP_ANREP_02.pdf (Oct. 3, 2003).

⁴ See *id.* at 6.

⁵ See KY. STATE POLICE FORENSIC SERVS. DIV. STAFF, RESPONSE TO INQUIRY FROM INTERIM JOINT JUDICIARY COMM. 22-24 (Sept. 16, 2003).

⁶ Tom Loftus, *Caseload Crunch: Long delays common for drug, DNA tests*, COURIER-J. (July 28, 2003), available at <http://www.courier-journal.com/localnews/2003/07/28ky/wir-front-lab0728-13177.html> (Oct. 2, 2003).

⁷ *Id.*

⁸ Telephone conversation with Commander, Central Forensic Laboratory, Frankfort, Ky. (Nov. 3, 2003).

⁹ See Loftus, *supra* note 6.

¹⁰ *Justice in Slow Motion*, KY. POST (Aug. 26, 2003), available at <http://www.kypost.com/2003/08/26/kedit082603.html> (Oct. 2, 2003).

¹¹ James Malone, *Crime lab could be held in contempt*, COURIER-J. (Aug. 14, 2003), available at <http://www.courier-journal.com/localnews/2003/08/14ky/met-4-judge08140-5310.html> (Oct. 2, 2003).

¹² 2003 INTERIM JOINT COMM. ON JUDICIARY, MINUTES OF THE 1ST MEETING OF THE 2003 INTERIM 3 (Aug. 20, 2003).

¹³ See *id.*

¹⁴ See KY. STATE POLICE FORENSIC SERVS. DIV. STAFF, *supra* note 5, at 26.

¹⁵ See 2003 INTERIM JOINT COMM. ON JUDICIARY, MINUTES OF THE 2D MEETING OF THE 2003 INTERIM 4 (Sept. 16, 2003).

¹⁶ See *id.*

¹⁷ See KY. STATE POLICE FORENSIC SERVS. DIV. STAFF, *supra* note 5, at 26.

¹⁸ Loftus, *supra* note 6.

¹⁹ See KY. STATE POLICE FORENSIC SERVS. DIV. STAFF, *supra* note 5, at 26.

²⁰ *Id.*

²¹ See *id.* at 27.

²² See *id.* at 26.

²³ *Id.* at 27.

²⁴ See MINUTES OF THE 1ST MEETING, *supra* note 12, and MINUTES OF THE 2D MEETING, *supra* note 15.

²⁵ See MINUTES OF THE 2D MEETING, *supra* note 15, at 4.

²⁶ See *id.*

²⁷ See *id.* at 5.

²⁸ See KY. STATE POLICE FORENSIC SERVS. DIV. STAFF, *supra* note 5, at 32 (indicating close relationship with Eastern Kentucky University and Western Kentucky University).

²⁹ See *id.* at 33 (indicating that the agency presently provides tuition assistance incentives).

³⁰ *Id.* at 32.

³¹ See *id.*; see also MINUTES OF THE 2D MEETING, *supra* note 15, at 4.

³² See MINUTES OF THE 2D MEETING, *supra* note 15, at 4-5.

³³ *Id.* at 4.

³⁴ KY. STATE POLICE FORENSIC SERVS. DIV. STAFF, *supra* note 5, at 32.

³⁵ See Malone, *supra* note 11.

³⁶ For example, it could be transferred to the Attorney General's Office, "as Ohio does, to hold a political face to the fire." *Justice in Slow Motion*, *supra* note 10.

³⁷ See MINUTES OF THE 2D MEETING, *supra* note 15, at 6.

Licensing and Occupations

Should the General Assembly appropriate resources to create awareness of and treat compulsive gambling?

Prepared by Jack M. Jones

Background

Kentucky currently allows commercial, legalized gambling in horse racing, lottery sales, and charitable gaming. Other gaming opportunities, including several riverboat casinos, are also located in close proximity to Kentucky. The recent expansion of casino-style gambling in surrounding states, and more opportunities to gamble in the United States in general, has been followed by an increased awareness that some gamblers develop problem gambling behaviors, the extreme form of which is referred to as compulsive gambling. Compulsive gambling can be viewed as very similar to alcohol or drug dependence.

There are a number of problems that may result for persons who exhibit problem gambling behaviors.

In 1980, compulsive gambling was identified by the American Psychiatric Association as a psychiatric disorder. Difficulties experienced by persons who exhibit problem gambling behaviors can include: financial troubles; criminal behavior; depression, and other psychiatric conditions; suicidal thoughts and attempts; family dysfunction; and domestic violence, including child abuse and child neglect. Research into compulsive gambling is a relatively new field with little consensus about the nature and cause of the disorder.

The Legislative Research Commission recently completed a study of compulsive gambling in Kentucky.

A Legislative Research Commission (LRC) study authorized by HCR 126 provided insight into gambling in Kentucky. The study included three major objectives:

1. to identify the number of current compulsive gamblers in the state,
2. to describe the costs associated with compulsive gamblers, and
3. to determine the resources available to treat persons who exhibit compulsive gambling behavior.

A statewide survey indicated that 55.1 percent of adult Kentuckians engaged in some form of gambling in the past year.

As part of the study, a statewide survey was developed to provide information about the types of gambling taking place and to what extent there is problem and compulsive gambling among the adult population. The survey indicated that 55.1 percent of adult Kentuckians (about 1.68 million) engaged in some form of gambling in the past year. The most frequent gambling activities reported were the lottery, followed by charitable gaming, horse racing, riverboat casinos, and others such as sports, cards, and dice. Of those who gambled, it is estimated that 12.3 percent may have had some problem with their gambling. Almost one percent of past year gamblers, and 0.5 percent of the total adult population in Kentucky, exhibited probable compulsive gambling behavior in the past year.

Compulsive gambling can have both personal and public negative consequences.

Compulsive gambling can result in negative consequences, both personal such as divorce and bankruptcy, and public such as crime. Generally, these negative consequences are referred to as the social costs of gambling. LRC staff used a survey of members of Gamblers Anonymous (GA) to help identify the social costs of gambling.

Gamblers Anonymous survey respondents indicated that gambling problems and financial obligations led many to commit theft, fraud, and embezzlement.

The 55 GA respondents most frequently cited casino-style gambling, including electronic gambling devices, as the type of gambling that caused more serious problems. Survey respondents indicated that there are often severe financial strains that serious gambling problems place on them and those close to them. Gambling problems, coupled with financial obligations, often led many of these respondents to commit illegal acts, including intentionally writing bad checks, theft, fraud, and embezzlement. For some, the need to support their gambling led to arrests, convictions, and incarcerations. Several survey respondents were also sued for unpaid debts, and over a third filed bankruptcy seeking relief from their gambling debts.

Many compulsive gamblers have a coexisting disorder and this was true for many GA respondents as well. In addition to saying that they thought of themselves as compulsive gamblers, just over one-half indicated having other disorders, most often citing alcohol and drugs.

Discussion

The Kentucky Lottery Corporation, the Department of Charitable Gaming, and horse racing tracks engage in efforts to raise awareness of compulsive gambling.

Kentucky state government does not currently provide direct state funding to support efforts to increase awareness of compulsive gambling. Several entities provide some support for creating awareness in the state. The nonprofit Kentucky Council on Compulsive Gambling develops and promotes a problem gambling helpline, produces publications, and provides education and training.

The availability of treatment for compulsive gambling is limited.

Also, the Kentucky Lottery Corporation (KLC), the Department of Charitable Gaming (DCG), and horse racing tracks in the state engage in efforts to increase awareness of compulsive gambling. The KLC and the DCG distribute posters and placards regarding responsible gambling. The KLC includes the “play responsibly” message on lottery games and advertisements. All race tracks display the helpline number on the premises with posters or placards. When space allows, the helpline number is also displayed at individual race tracks in the daily racing programs. The LRC staff report noted, however, that no efforts have been made to determine the effectiveness of any of these measures in increasing awareness.

Kentucky state government does not provide direct state funding to support specific efforts to treat compulsive gamblers. The availability of treatment by licensed professionals is limited in Kentucky. Gamblers Anonymous is involved in providing treatment, in addition to a few private providers. While Community Mental Health Centers do provide some treatment, none of the federal or state funding of these centers is directed to the treatment of compulsive gamblers.

The Association of Problem Gambling Service Administrators identified several states that provide state funding for compulsive gambling programs and services.

Very little information is available concerning the resources that other states provide for awareness and treatment of compulsive gambling. The Association of Problem Gambling Service Administrators has done analysis of states that offer state funding for compulsive gambling programs and services, which indicates:

- per capita funding ranges from \$0.003 to \$1.04;

- 14 states fund a statewide helpline;
- 13 states fund counselor training;
- 9 states have instituted prevention programs;
- 13 states fund outpatient treatment; and
- 4 states provide funds for inpatient treatment.

Legislation creating a compulsive gambling assistance fund has been proposed but not passed by the General Assembly.

Some consideration has been given in recent legislative sessions to creating a compulsive gambling assistance fund. Proposed legislation would have provided funding from the state lottery, pari-mutuel wagering, and charitable gaming to support this effort. Funds would have been used for conducting a prevalence study; promoting the awareness of compulsive gambling assistance programs; and providing assistance to groups that provide education, assistance, and counseling to persons and families experiencing difficulty as a result of compulsive gambling.

Proponents assert that current compulsive gambling awareness and treatment efforts are insufficient.

Proponents of state funding for awareness and treatment of compulsive gambling assert that state funding is needed to increase opportunities for persons to obtain the help they need and that existing awareness and treatment efforts are insufficient. While there has been no formal opposition voiced regarding the use of state funds for compulsive gambling awareness and treatment, legislation proposed in prior sessions of the Kentucky General Assembly has not been given much consideration. Funding considerations may be especially challenging in light of the current tight budget situation.

Another funding approach is to earmark a certain portion of annual gaming income that is generated from any expanded or new form of gambling for compulsive gambling awareness and treatment.

A different type of funding mechanism has been suggested to provide more awareness and treatment of compulsive gambling in the state. This approach involves earmarking, from any expanded or new form of gambling, a small percentage of the annual gaming income generated. This approach was discussed in past sessions of the General Assembly in bills to place electronic gaming devices at race tracks.

The Gamblers Assistance Program was proposed by the Kentucky Council on Compulsive Gambling.

The Kentucky Council on Compulsive Gambling proposed an initiative using this same sort of funding mechanism. This proposal, titled the Gamblers Assistance Program (GAP), would take a small

percentage of the annual gaming income generated from any expanded or new form of gambling approved either by the Kentucky General Assembly or by constitutional amendment to fund a new program. The council states that GAP “is a series of programs and services to help those who become addicted to gambling. It provides for prevalence studies, education, prevention and referral services; academic research; and in-patient and out-patient treatment services.” While this proposal was distributed during the 2003 General Assembly, it was not considered by the legislature because no expanded or new forms of gambling were approved.

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Local Government

Should the General Assembly allow all cities to levy restaurant taxes?

Prepared by Jamie Jo Franklin

Background

Cities, like other governments, are facing financial difficulties due to decreasing tax revenues and increasing costs.

The Kentucky Constitution limits the ways by which cities can generate revenues.

To assist small cities in meeting financial needs and to bolster tourism development, restaurant taxes were enacted for fifth class cities in 1980.

With the continuing nationwide economic slow down, Kentucky cities, like other governmental units across the country, face decreasing tax and licensing revenues along with increasing costs to provide many governmental services that have traditionally been provided in incorporated areas. In addition, constitutional limitations on the ability of cities to create new sources of revenues as well as additional budget cuts in state and federal funding programs further cloud the financial outlook for municipalities.

In 1980, during a similar economic downturn, representatives of the state's small cities approached members of the General Assembly to request authority to levy a restaurant tax. After the adoption of property tax limits in 1979, many local governments found themselves unable to generate adequate revenues for governmental services from real property tax revenues without raising taxes or fees. Many larger communities were able to rely on revenues from increases in property values or the adoption of insurance premium taxes or occupational license fees.

Smaller cities, especially those with limited growth and little manufacturing, began to experience serious revenue shortfalls. Some of these smaller cities were also extremely dependent on the revenues generated from tourism activities within their communities. As revenues shrank in other areas, many of these communities tried to increase revenues through tourism development. Beyond direct budget appropriation, the primary financial tool available to cities to fund development of tourism and recreational activities in their communities has been and continues to be receipts from the transient room tax (the hotel/motel tax) found in KRS 91A.390. Under the statute, this tax is capped at 3 percent.

Restaurant taxes are capped at 3 percent of the total receipts from restaurant sales and are to be in addition to the revenues received from transient room taxes.

Cities of the fourth class were authorized to levy restaurant taxes in 1986.

Seventeen cities have levied restaurant taxes with rates varying from 1 percent to 3 percent.

In response to the needs and requests of these smaller communities, the General Assembly authorized cities of the fifth class to levy, in addition to the transient room tax, a 3 percent restaurant tax (KRS 91A.400) to be used for the same purposes as the transient room taxes. By 1986, additional small cities were requesting authority to levy a restaurant tax. That year, legislation was enacted that extended this authority to cities of the fourth class.

Since the authorization of restaurant taxes, of the 218 cities of the fourth and fifth classes, approximately 15 are currently collecting such taxes with rates varying from 1 percent to 3 percent. Two other cities have recently enacted the tax and will begin collecting the revenues later this year. Revenues generated in 2002 from the restaurant tax were approximately \$4 million. Eleven of the 17 cities that levy the tax are located in Eastern Kentucky where receipts from tourism are often a major contributor to the local economy. Also, many of the communities that have the tax also have major folk festivals in their communities or historical sites that create tourism activity. For example, Paintsville has the Kentucky Apple Festival, Mount Sterling has Court Days; West Liberty has the Sorghum Festival, while Bardstown has My Old Kentucky Home, and Cave City has Mammoth Caves.

Discussion

According to representatives of city governments, current economic conditions are severely straining their budgets. Increasing personnel and retirement costs, increasing insurance premiums, implementation of Homeland Security requirements, technology needs, and the replacement of aging infrastructure are only a few of the items cited as driving up the cost of city government. Added to these increases is general public opposition to any increases in local property taxes or fees and the existing constitutional restrictions on revenue-generating capacity. The result is that Kentucky could be faced with the prospect of a reduction in the size and number of city governments as well as a reduction in the services they have traditionally provided to their citizens.

Table 1
Kentucky Cities With Restaurant Taxes

City	Year Enacted	Current Rate (%)
Barbourville	1993	2
Bardstown	1986	1
Cave City	1986	1
Fulton	1985	1
Harlan	1997	3
Jackson	1998	3
Lebanon	2003	3
Marion	2003	3
Morehead	1999	3
Mount Sterling	1990	2
Paintsville	1990	3
Pineville	1993	3
Prestonsburg	1987	3
Salyersville	1997	1
Shepherdsville	1997	2
West Liberty	1996	3
Williamsburg	1989	3

Source: Kentucky League of Cities and LRC Staff

City officials stress the need for individual cities to be able to determine their own financial structures.

Since the discontinuation of federal revenue sharing in the 1980s, representatives of city governments have continually urged the legislature to consider overall tax reform for local governments. They have argued the need for each city to be able to adequately address its unique situation with a varying assortment of revenue-generating methods. While general fund revenues come primarily from property taxes, insurance premium taxes, occupational license fees, and franchise fees, proponents have noted the ability of cities in other states to levy a wider variety of local-option taxes. For example, more than 32 states currently authorize the levy of a local-option sales tax. This is prohibited by the Kentucky Constitution. Given the current constitutional and statutory constraints that prevent cities from having a wider variety of revenue-generating methods, and in the absence of overall tax reform, cities argue that they should be allowed to maximize the revenue tools to which they have access. The restaurant tax is identified as one about which there is great interest.

Other classes of cities are requesting authority to levy restaurant taxes.

Many cities also would like to expand the allowable use of restaurant tax revenues beyond tourism expenditures.

Over the last few legislative sessions, cities have requested expansion of the authority to levy a restaurant tax to all classes of cities and urban-counties. They now also would like to see that authority expanded to include consolidated local governments. In addition to an expansion of the authority to levy the tax, city officials would like to be permitted to use resulting revenues for governmental purposes other than tourism development and recreational activities. They advocate for the ability of each city to exercise its constitutional right of "home rule" to determine for itself which taxes and fees best work for the community. They argue that those persons elected by the community are the most accountable to the public and are responsible for the overall planning and growth of the local community. As a counterpoint to opponents, proponents argue that the ability of a city to levy a restaurant tax can increase tourism activity in a community. They contend that the increase in revenues from the tax would allow an increase in promotional activities in order to increase the number of paying visitors to the community.

Opponents fear a decrease in restaurant and tourism promotion revenues, cumbersome paperwork for restaurant owners, and an unfair tax burden being placed upon only one industry in a community.

Opponents of the expansion of restaurant tax authority have raised several questions and concerns about the proposal. They say restaurant taxes could decrease overall restaurant revenues and could cause a decline in available tourism activities. They argue that organizations searching for locations for group meetings or conventions may be less likely to meet in a town with higher tourism-related taxes. Some restaurant owners fear that, in a struggling economy, another tax on consumers could cause some to stay at home rather than to eat out. They also argue that such a tax is especially cumbersome on small, individually owned restaurants and could cause some to close because of the additional financial and accounting burden.

Opponents also raise the question of the fairness of singling out one component of the tourism industry to tax. They ask why the burden of collecting funds for tourism development is only to be placed on restaurant owners when other types of businesses also benefit from tourism activity. Also, opponents say that

if the restaurants and motels are responsible for generating the tax revenues, then it would not be fair for cities to be allowed to spend the revenues on expenditures unrelated to tourism. Opponents fear that such a realignment could result in a decrease in the total funding of tourism activities as local governments shift these revenues to other government programs.

Another concern is the potential effect an increase in restaurant taxes could have on busy families that eat out several times a week due to busy schedules. Finally, opponents raise a concern about the expansion of taxing authority at the local level at the same time the state is facing its own revenue shortfall. Opponents fear the combined effect could represent too large an increase in the overall tax burden for the citizens of the Commonwealth.

Should the General Assembly establish stricter professional standards for planning commission members?

Prepared by Mark Mitchell

Background

Planning and zoning is directed by KRS Chapter 100. Planning commissioners are appointed, not elected.

The population of Kentucky has increased by 25 percent since planning statutes were first adopted, and planning commissioners must make decisions of increasing complexity.

Kentucky first established a system for planning and zoning at the local level in 1960. Now as then, it is optional for a local government to implement local planning controls. If a local government does opt to establish a local planning process, it must create a planning commission as outlined in KRS Chapter 100. Planning commission members are appointed to make recommendations to the local government about the management of growth in the community. A planning commission is composed of local citizens whose only qualification for appointment is that they must be residents of the planning unit.

Since 1960, the state's population has increased by approximately 25 percent, according to the U.S. Bureau of the Census ("Population"; "Census") Housing and related infrastructure (such as roads, and water and sewer facilities) have expanded to accommodate this growth. The increase in population along with changes in government management practices, technology, and environmental regulations have caused the management of local growth to become more complex. The increasing complexity of the planning process raises the question of whether the General Assembly should consider imposing minimum qualifications for planning commissioners and requirements for continuing education.

The General Assembly has addressed the professional standards issue for other categories of local government officials. Since at least 1942, property valuation administrators have been required to pass a written exam before being allowed on the ballot (KRS 132.380).

Local elected officials can receive a salary bonus for training completion.

In 1998, the General Assembly addressed professional standards for local elected officials through the adoption of KRS 64.5275, which created a salary schedule for local elected officials that included a bonus for continuing education.

KRS 147A.027 introduced mandatory training for planning commissioners and planning personnel.

In 2001, the General Assembly created KRS 147A.027, which required all planning commissioners and planning professionals in Kentucky to undergo orientation training and continuing education. This is the only known educational requirement for an appointed official. All of the other offices mentioned are elected positions.

Discussion

Initial qualifications and continuing education requirements are two elements of professional standards.

Two elements of professional standards for local planning commissioners are the initial qualifications for appointment and requirements for continuing education. Each is discussed below.

Initial Qualifications

Kentucky does not set minimum individual qualifications for planning commission members.

Qualifications for planning commissioners are different depending upon where the planning commission is located in Kentucky; however, the statutory rules only apply to the composition of the commission and do not address the qualifications of individual members. For example, a joint planning unit containing a county with more than 1,000 persons in an unincorporated area must have at least one member from that unincorporated area. Planning commissions in counties with populations over 300,000 must have members who do not live in the largest city in the county.

A survey of surrounding states reveals few initial qualifications required of planning commissioners.

A review of several surrounding states indicated that there are few initial qualifications required for local planning commission members. Table 1 lists the states reviewed and the initial qualification requirements imposed.

Residency is the most common qualification requirement. West Virginia and Virginia require some general knowledge and experience. These qualifications, while broader than those in other researched states, do not identify specific educational or experience prerequisites.

**Table 1
Initial Qualifications of Planning Commissioners**

State	Requirement
Illinois	➤ Residency
Missouri	District and county planning commissions: ➤ residency; and ➤ registered voter
Ohio	➤ Residency
Tennessee	➤ Proportionate racial composition
Virginia	➤ Residency; ➤ “qualified by knowledge and experience to make decisions on questions of community growth and development”; and ➤ 50% are to be owners of real property
West Virginia	➤ Residency; ➤ appointees must be freeholders; and ➤ “shall be qualified by knowledge and experience in matters pertaining to the development of the municipality”

Source: LRC staff analysis of individual state statutes.

Continuing Education

Kentucky and Tennessee have the only state mandatory training requirements for planning commissioners. However, Tennessee allows municipalities to opt out by ordinance.

Kentucky, Tennessee, and South Carolina have the only state mandatory training requirements in place for local planning officials, according to the American Planners Association. Kentucky was the first to require mandatory training through the passage of KRS 147A.027 in 2001. Tennessee followed with a training bill based on Kentucky’s law. South Carolina passed its version in 2003.

Kentucky law requires two phases of training: orientation training and continuing education.

KRS 147A.027 sets the training requirements for planning commissioners and planning professionals. It includes two phases of training: orientation training and continuing education. Each planning commission member and board of zoning adjustment member is required to have at least 4 hours of orientation training. After that, they are required to have at least 8 hours of continuing education within a two-year cycle.

The requirements for planning professionals, zoning administrators, administrative officials, and deputies and assistants of planning professionals are more rigorous. Each of these individuals must have 8 hours of orientation training plus 16 hours of continuing education over a two-year cycle.

Tennessee laws require planning commissioners to have the same amount of continuing education training as Kentucky, but uses a different schedule.

Tennessee laws requires planning commissioners to have 4 hours of continuing education each year, but specifies no orientation training. Each full-time or contract professional planner or an administrative official in charge of advising the planning commission must have at least 8 hours of training each year. Tennessee also allows its cities to opt out of the continuing education requirement through the passage of an ordinance. Kentucky does not.

South Carolina's training law is less stringent than those of Kentucky and Tennessee.

South Carolina requires its appointed officials and professional employees to attend 6 hours of orientation training from six months before to a year after starting the position. After that, each individual needs to attend at least 3 hours of continuing education each year.

New Jersey does not require training, but allows local governments to set standards.

According to New Jersey legislative staff, while the state has no formal statutory training requirement, it does allow local governments to establish training requirements on their own. Rutgers University conducts a course through its Center for Government Services for planning officials that satisfies these requirements. A planning official also has the option to take coursework independently.

Proponents believe planning officials must be well qualified and well trained in order to protect the public.

Proponents for more training have indicated that, in certain cases, there seems to be a lack of knowledge and expertise among appointed planning officials and that this adversely affects their decision making. Given the complex issues of technology, planning law, and environmental matters, they believe planning officials must be well qualified and well trained in order to protect the public. They also believe that these appointed officials should be held to the same qualification and training standards as local elected officials.

Opponents argue that imposing additional requirements could reduce the number willing to serve and could increase costs for local governments.

Opponents argue that imposing initial qualifications could reduce the pool of citizens willing to take on what can be a time-consuming and controversial role in the community. They also assert that additional training requirements would impose costs on local governments money and increase the time planning commissioners would have to devote to what is typically a part-time appointment.

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Seniors, Veterans, Military Affairs, and Public Protection

Should the General Assembly permit a person to obtain a non-photo driver's license due to that person's religious beliefs?

Prepared by Michael D. Bennett and Todd Stephens

Background

Some individuals must choose between following religious beliefs that forbid personal photographs and obtaining a driver's license.

22 of 37 states surveyed allow a religious exception to driver's license photo requirements, but only 11 states have included the exception in statute.

Following the attacks of September 11, 2001, homeland security became a priority throughout the nation. Law enforcement personnel have increasingly emphasized the need to correctly identify all people with whom they have contact. Typically, anyone coming into contact with a law enforcement officer is required to present government-issued photo identification, often in the form of a driver's license.

Presentation of photo identification becomes a problem, however, when the person asked to present photo identification has a religious objection to being photographed. For example, Amish Mennonites consider photographs to be a symbol of self-admiration and pride. Photographs are graven images and are sinful (Biesk B1). Followers of the Islamic faith consider photographs to be immodest (Rabin A1). These individuals are forced to choose between adhering to religious precepts or violating those precepts to obtain a driver's license.

Kentucky requires that a driver's license bear a color photograph of the licensee (KRS 186.412). In the past, some Kentucky Circuit Court clerks have been lenient in enforcing the photograph requirement for individuals with religious objections. However, the Kentucky Transportation Cabinet has ordered clerks to suspend this unauthorized practice in the interest of state security (Biesk B1).

Some states do allow a person with a religious objection to being photographed the opportunity to have a non-photo driver's license. According to an American Association of Motor Vehicle Administrators survey, 22 of the 37 states responding indicated a religious exception to the driver's license photo

requirement. However, only 11 states—Arkansas, Idaho, Illinois, Kansas, Maryland, Minnesota, Missouri, New York, North Carolina, Oregon, and Pennsylvania—codify the exception into statute (“Comparative Data” 23). These states provide an exception to the photograph requirement by allowing a signed waiver or affidavit declaring a person’s religious objection.

Discussion

Proponents of a photograph requirement argue that the issue centers on public safety. A photo driver’s license allows for the accurate and immediate identification of the licensee when interacting with law enforcement. In a recent Florida decision, the Circuit Judge opined, “The state’s need to be able to immediately identify subjects of investigative traffic stops and criminal and intelligence investigations outweigh anyone’s need to pose for a driver’s license photo wearing any garb that cloaks all facial features except the eyes” (Rabin A1). Furthermore, proponents view driving as a privilege. A person must accept the conditions of licensure to gain the privilege to operate a motor vehicle. The Florida Attorney General commented, “While we are respectful of any person’s religious practices, this case was solely about safety and security. It was not about religious freedom or the right to pursue happiness, but instead the privilege to drive a car” (Rabin A1).

Proponents of the photo requirement say it enhances public safety. Opponents of the photo requirement say it violates the religious freedoms of some individuals.

Opponents of a photograph requirement argue that the issue centers on individual rights. Opponents view a driver’s license photograph requirement as a violation of some individuals’ religious freedoms. Both the United States and Kentucky Constitutions guarantee individuals the freedom of religious expression. The Kentucky Bill of Rights read “all men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned...The right of worshipping Almighty God according to the dictates of their consciences.” Opponents also contend that the goal of public security can be achieved in ways that are less restrictive to an individual’s religious freedom. The Kentucky Court of Appeals determined that for the Commonwealth to infringe upon an individual’s religious freedom the state must have a compelling

interest in so doing, and must do so in the least restrictive way (701 S.W.2d 137).

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Should the General Assembly enact legislation to generate dedicated revenue for the Department of Veterans' Affairs as a first step toward making the department independent of the Commonwealth's General Fund?

Prepared by Michael D. Bennett and Clint Newman

Background

As the Commonwealth continues to struggle with budget issues, the Department of Veterans' Affairs (KDVA) is once again seeking to become independent of the General Fund. The department supported revenue-producing legislation to facilitate independence from the General Fund in the 2002 Session and again in the 2003 Session. These legislative proposals might be introduced again in the 2004 Session.

Four Department of Veterans' Affairs (KDVA) revenue-producing bills were introduced in the 2003 Session but were not enacted.

Four bills (SB 124, HB 45, HB 46, and HB 47) to generate a revenue stream for the Department of Veterans' Affairs were introduced during the 2003 Session of the Kentucky General Assembly. All four bills failed to gain passage.

A 2003 bill would have created a veterans' lottery scratch off game with income dedicated to funding transportation of veterans and educating veterans about benefits available to them.

2003 SB 124 would have created a new Kentucky Lottery instant scratch-off game to benefit the veterans' assistance program. One-half of the expected revenue would have been used to fund transportation of veterans to VA hospitals or clinics. The other half would have been used to educate veterans about benefits and assist them with applying for benefits. Game tickets would have stated that ticket revenues would be used to fund veterans' programs.

KDVA proposed a veterans' lottery scratch-off game with the income dedicated to its programs.

2003 HB 45 would have created a new Kentucky Lottery instant scratch-off game designated as the Kentucky Veterans' Trust Fund Benefit Game. The Kentucky Lottery would have been required to design or theme the game to be competitive with other scratch-off games offered by the lottery. Tickets would have clearly stated that revenues would be directed to

Kentucky veterans' programs. Net revenues would have been used exclusively for programs administered by the Department of Veterans' Affairs.

The KDVA proposed a veterans' personal loan program.

2003 HB 46 would have created a veterans' personal loan program to lend up to \$10,000 to a veteran, a deceased veteran's unremarried spouse, or a deceased veteran's child under regulations promulgated by the Department of Veterans' Affairs. Loans would have been made for the purchase of a home, business, or business property; the education of a veteran, veteran's spouse, or veteran's child; the payment of medical or funeral expenses; and for consolidation of debt. Terms for repayment would not have exceeded 10 years. Loans could also have been made to a remarried spouse or mother of a deceased veteran's child for the education of the child. Funds received for the loan program not necessary for the operation of the program would have remained with the department for other uses.

The KDVA proposed designating a portion of receipts from veterans' organizations' charitable gaming to the veterans' program trust fund.

2003 HB 47 would have imposed a fee of one-tenth of 1 percent of the gross receipts from charitable gaming conducted by licensed veterans' charitable gaming organizations. Moneys would have been remitted to the Kentucky veterans' program trust fund established by KRS 40.460. This bill was withdrawn before it was considered by a House committee.

In addition to these revenue-producing pieces of legislation, the Department of Veterans' Affairs has expressed an interest in receiving proceeds from tobacco settlement money or from any increase in the tobacco tax.

Discussion

The Department of Veterans' Affairs would like to raise its own revenue and become less dependent on the General Fund.

The Department of Veterans' Affairs argues that it has difficulty offering services that it deems essential to its veteran constituents with the limited General Fund dollars it receives.

The department indicates that operating two veterans' nursing homes and building new veterans' cemeteries as well as funding other programs and services for veterans will require more revenue than can be expected from the General Fund. Consequently, the department proposes generating its own money. The

three bills introduced in 2003 would not have produced sufficient funds to make the department independent of the General Fund but were proposed by the department as a first step.

Forty-four percent of the department's FY 2003 expenditures of \$32 million was from the General Fund.

Total expenditures of the department increased from nearly \$27 million in FY 2002 to over \$32 million in FY 2003. In that year, 44 percent of the department's funding was from the General Fund. The large increase from FY 2001 included increased General Funds and Restricted Funds for the staffing and operations of new veterans' nursing homes in Eastern Kentucky and Western Kentucky. Also included were funds to expand the department's personnel cap by 30 positions.

Table 1
Kentucky Department of Veterans' Affairs
FY 2000 - FY 2003 Expenditures
(\$Million)

	FY 2000	FY 2001	FY 2002	FY 2003
General Fund	6.8	6.7	12.6	14.1
Restricted Funds	10.3	12.7	14.1	18.2
Total	17.1	19.4	26.7	32.3
Percent from General Fund	40%	35%	47%	44%

Source: LRC Budget Review staff.

The veterans' lottery games would raise about \$1 million per year and perhaps as much as \$2.5 million per year.

According to the Department of Veterans' Affairs, the proposed Kentucky scratch-off games to benefit veterans would generate approximately \$1 million per year and as much as \$2.5 million per year if the game was a specialty game with a veterans theme. The games would be a significant income source for the department.

Legislation to generate dedicated lottery revenue for the Department of Veterans' Affairs might reduce revenue available for other state uses.

A special lottery game to benefit veterans might further reduce lottery revenue contributed to the General Fund at a time when the lottery is already expecting reductions due to the enactment of a Tennessee lottery. The Kentucky Lottery has projected lost revenues due to the Tennessee lottery at \$16 million for FY 2004. The more lottery revenue that is dedicated to a specified use, such as the Department of Veterans' Affairs, the less flexibility the General Assembly has in appropriating funds according to overall priorities.

The proposed veterans' personal loan program originally required a \$5 million appropriation, but the Department of Veterans' Affairs later dropped the request for an appropriation.

The legislation proposing a veterans' personal loan program originally requested a \$5 million appropriation in 2002, but the department dropped the appropriation from the 2003 version, hoping to make the program more fiscally attractive. In light of the strain on the state budget, the department indicates that it may strongly urge legislators to enact the enabling legislation so that the program can begin promptly if the money becomes available.

Interest income from the loan program would be available for KDVA use.

If the program is funded, the department estimates it will need to operate for four or five years before an income stream will develop from the interest paid by borrowers. The department indicates that it intends to use the interest income to fund its other programs.

The proposed charitable gaming bill would raise \$95,000 a year.

According to the Department of Veterans' Affairs, the proposal to designate a small portion of charitable gaming receipts from gaming conducted by veterans' organizations in Kentucky would have generated approximately \$95,000 per year over the last two years.

Most state agencies rely on appropriations from the General Fund for their budgets. The enactment of the KDVA's three bills would increase the amount of its funding originating from other sources.

State agencies are dependent upon the General Assembly's appropriations to fund their programs. In the budgetary process, agencies compete for their share of total General Fund dollars every budget cycle. The General Assembly evaluates the budget requests and determines the priorities that will be given to each state agency. If the three bills discussed in this paper were enacted, the Department of Veterans' Affairs would have at least part of its funding originate outside of the intense competition for General Fund dollars. This is a position desired by many state agencies as they attempt to create dedicated funding streams for the programs they offer. However, dedicating sources of revenue to specific uses can serve to limit the flexibility of the General Assembly in setting overall funding priorities.

Should the General Assembly limit public disclosure of sensitive homeland security information?

Prepared by Todd Stephens

Background

In pursuit of increased security since the events of September 11, 2001, states face the issue of protecting sensitive homeland security information that, if widely distributed, might aid terrorists. Protecting this information creates a tension between the democratic idea of open government and the responsibility of a state to protect its citizens.

With passage of 2002 HB 258 (the Antiterrorism Act of 2002), the General Assembly established a means to oversee the ability of the Commonwealth to prepare for, and respond to, an act of terrorism. Any such preparedness program produces sensitive information.

Kentucky's Open Records Law permits the public disclosure of sensitive homeland security information created by public agencies.

Under Kentucky's Open Records Law at KRS 61.870 (2), records prepared, owned, used, in the possession of, or retained by a public agency are considered public records, publicly available upon request. KRS 61.878 provides 12 exemptions to the disclosure requirement for public records. However, sensitive homeland security information is not exempted.

In 2003, the General Assembly considered HCR 56. As introduced, the resolution directed the Legislative Research Commission to establish the Task Force on Homeland Security Records to study methods to enhance the protection of homeland security records. However, the resolution was not enacted.

Twenty-six states, including six of Kentucky's border states, have enacted legislation limiting the disclosure of sensitive homeland security information.

Twenty-six states and the District of Columbia have amended their public records access laws to limit the disclosure of security information to mitigate terrorist attacks and protect public safety. Six of Kentucky's border states—Illinois, Indiana, Ohio, Tennessee, Virginia, and West Virginia—have restricted the public

disclosure of sensitive homeland security information (Reporters Committee 62-70).

Thirty-four states limit the disclosure of information that could jeopardize the security of public utilities infrastructure.

In an effort to secure the nation's water supply, the federal Public Health Security and Bioterrorism Preparedness and Response Act of 2002 requires that all water utility providers conduct vulnerability assessments (Public Law 107-188). After completing the required assessments, 34 states and the District of Columbia responded by limiting the disclosure of information that could jeopardize the security of public utilities infrastructure (Atkins 1).

Discussion

The Kentucky Office for Security Coordination has established as its top legislative priority the amendment of Kentucky's Open Records Law to limit access to sensitive homeland security information (Franklin). Legislation may be introduced during the 2004 General Assembly.

Proponents suggest that public disclosure of a state's security information makes it easy for terrorists to plan attacks.

Proponents of limiting public disclosure of sensitive homeland security information suggest that making documents such as vulnerability assessments and response plans publicly available threatens a state's ability to protect its citizens. Proponents contend that the restriction on public access to security-related information is necessary for increased public safety. Testifying before the Interim Joint Committee on Seniors, Veterans, Military Affairs, and Public Protection, Kentucky's Adjutant General described public disclosure of sensitive documents as a "blueprint for attack" (Youngman). A report released by the Association of Metropolitan Water Agencies on the states' public records access laws asserted, "Open access to vulnerability and risk assessments, for example, provides nefarious elements with a road map for attacking the safe, secure, and reliable supply of services from utilities" (State FOIA Laws 1).

Opponents contend that disclosure of a state's security information promotes public scrutiny of government action.

Opponents of limiting public disclosure of sensitive homeland security information point to the fact that democratic government is strengthened by the ability of citizens to evaluate government action. In a recent report, the General Accounting Office, the nonpartisan auditing arm of Congress, noted that "the Freedom of Information Act is based on principles of openness and

accountability in government” (GAO 1). Kentucky’s Open Records Law is grounded in similar thought. The legislative intent of Kentucky’s Open Records Law declares that free and open access to public records is within the public interest and that exemptions should be narrowly construed (KRS 61.871). Opponents reason that limiting the public’s access to homeland security information hides government action from public scrutiny. “A Strong FOI [Freedom of Information] tradition suggests that the public is entitled to learn about the fallibility of its government—where weakness exists an informed public can clamor for change” (Reporters Committee 51).

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Should the General Assembly enhance the security of vital records?

Prepared by Scott Varland

Background

Vital records consist of birth, death, marriage, and divorce certificates. Kentucky has open vital records, but other states vary on how widely they allow access, as shown in Table 1 (Reporters Committee).

Kentucky has open vital records, but the other states vary widely on openness.

Table 1
States' Accessibility to Vital Records

Open Access	Moderate Access	Little Access
California	Alabama	Arkansas
Iowa	Alaska	Colorado
Kentucky	Arizona	Delaware
Massachusetts	Connecticut	Hawaii
Minnesota	Florida	Idaho
Nebraska	Georgia	Illinois
Nevada	Indiana	Maine
Ohio	Kansas	Mississippi
Washington	Louisiana	Missouri
	Maryland	North Dakota
	Michigan	Oklahoma
	Montana	Oregon
	New Hampshire	Pennsylvania
	New Jersey	Rhode Island
	New Mexico	Utah
	New York	
	North Carolina	
	South Carolina	
	South Dakota	
	Tennessee	
	Texas	
	Vermont	
	Virginia	
	West Virginia	
	Wisconsin	
	Wyoming	

Alabama, New Hampshire, and Tennessee provide examples of states with moderate access to vital records.

- Alabama—Marriage and divorce certificates are open; birth and death certificates closed (Al. Code 22-9A-21).
- New Hampshire—Vital records are closed, but there is an exception for a person with a “direct and tangible interest” in a vital record (RSA 126:14). Persons with direct and tangible interests include the person named in the vital record; family members; legal representatives such as attorneys, physicians, and funeral directors; and qualified members of the media when seeking “information...of a public nature” (RSA 126:14(I, II, and IV)). Furthermore, New Hampshire authorizes the “disclosure of certain information and statistical data...for legitimate genealogical purposes” (RSA 126:14(V)).
- Tennessee—Basic vital records information is disclosed, but certain confidential information is withheld (TCA 68-3-205(2)(A)).

The 2003 GA considered HB 308 to change Kentucky from an open access to a moderate access state.

In 2003, the Kentucky General Assembly considered HB 308. The bill passed the House and the Senate Committee on Veterans, Military Affairs, and Public Protection but was not enacted into law. If enacted, this legislation would have changed Kentucky’s access to vital records from open to moderate. In addition, 2003 HB 308 would have required that a certified copy of a vital record “have security features that deter the copy from being altered, counterfeited, duplicated, or simulated without ready detection” (Section 2(2) of the GA Copy).

Discussion

Proponents of restricting access to Kentucky vital records cite preventing crime in general and terrorism in particular.

Proponents of restricting access to Kentucky vital records argue that the restriction would prevent crime in general and terrorism in particular. The Inspector General of the federal Department of Health and Human Services has commented on criminals using birth certificates. “As we previously reported in 1988, 1991, and 1996, birth certificates continue to be used as ‘breeder documents’ from which other documents can be secured to alter identities and fraudulently obtain services and benefits”(Inspector General 7). The Director, Office of Special Investigations, General Accounting Office, testified before Congress on the dangers of terrorists possessing counterfeit birth certificates. He cited several examples, including the

ability of terrorists to enter the United States, buy firearms, and gain access to government buildings (Office of Special Investigations 1).

Opponents from the public, media, and genealogists argue for keeping Kentucky vital records open.

Opponents are found among the public, media, and genealogists. They note that the American people favor open government, which includes open records. Furthermore, nine states, including Kentucky, have open vital records.

Opponents argue that their concerns are not abstract. Some members of the public want to maintain Kentucky's current system of open vital records so that they can quickly obtain vital records to meet pressing personal and financial needs. In addition, these opponents argue the necessity for any vital records law to permit an individual to authorize a family member, employer, or some other entity to obtain a vital record naming that individual. The necessity becomes more acute when an authorizing individual resides in another state or country. Media representatives claim that without vital records they lack facts necessary for much of their research. Genealogists say that vital records are crucial to helping them trace family lines.

Proponents counter that a bill such as 2003 HB 308 addresses opponents' concerns.

Proponents counter that a bill such as 2003 HB 308 addresses the concerns of all three groups. If enacted, this bill would have established moderate access to vital records. The following individuals would have been able to obtain a copy of a particular vital record:

- A person named in that vital record;
- Family members of a person named in that vital record;
- Persons authorized by a person named in that vital record; and
- A guardian or a fiduciary for a person named in that vital record.

With regard to individuals prevented from obtaining a copy of a particular vital record, the bill would have permitted them to look at information contained in that vital record without receiving the actual vital record itself. According to proponents, 2003 HB 308 would have created a balance between preventing

crime and terrorism on the one hand and granting sufficient vital records access to the public, media, and genealogists on the other.

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State Government

Should the General Assembly enact antispyam legislation to protect Kentucky e-mail users?

Prepared by Joyce Neel Crofts

Background

All online computer users receive junk mail, both at home and work. The junk mail that the postal service delivers might be annoying, but junk e-mail, commonly known as “spam” or “unsolicited commercial e-mail,” delivered via the Internet has gone beyond annoying to being costly to the entity who receives it and to the Internet service providers (ISPs) that deliver it.

Spam, or junk e-mail, makes up 35 percent to 70 percent of total e-mail.

The volume of spam has been increasing rapidly in the last two years. Depending on the research source consulted, in 2003 spam accounts for 35 percent to 70 percent of all e-mail messages. Ferris Research, a market and technology research firm, predicts that in 2004, the average North American business user will receive approximately 19 spam e-mails per day and by 2008, will receive over 40 per day. Some, of course, receive many more than the average.

Spam is frequently used to promote offensive material or financial scams.

Not only is the sheer volume of spam a serious problem, so is the content. Much of spam is offensive, fraudulent, and illegal. Scams run rampant. A Federal Trade Commission Consumer Alert, “FTC Names Its Dirty Dozen,” names 12 common scams that include pyramid schemes; health and diet scams; get-rich-quick schemes; investment schemes; and guaranteed loans or credit that never come through. Graphic pornography advertisements are an increasing component of spam as well.

The major cost of spam is borne by government, business, and private individuals—not those who send it.

Why is spam such a problem? Can’t it just be deleted and forgotten? Unfortunately, the cost of spam is borne not by the spammer but by every person, business, government, and ISP who receives it.

With unsophisticated equipment, a spammer can send hundreds of thousands of advertisements per hour, and it costs the spammer almost nothing. On the other

hand, the massive amount of junk e-mail overloads ISP servers necessitating the purchase of additional servers to avoid slower Internet access for customers and causes problems with access, speed, reliability, and even system outages. ISPs may use software filters to identify and dispose of spam, but spammers are quick to adapt to these temporary but still costly fixes. In addition, filters can block legitimate messages in error.

The volume of spam forces ISPs, businesses, and governments to purchase additional and costly computer equipment.

For businesses, the costs in dollars and lost productivity of blocking large amounts of spam are rising rapidly. According to a study by Ferris Research, spam cost American corporations more than \$9 billion in 2002; and a study by the ePrivacy Group places at \$20.5 billion the amount that companies around the world will lose in 2003 for additional servers to process spam ("Spam by Numbers"). A new productivity study by Nucleus Research has placed a price on lost company productivity at \$874 per year per employee.

Until there is some effective method to prevent spammers from stealing resources belonging to others, the cost to businesses, governments, schools, and individuals of supporting spammers' advertisements will continue to increase.

Discussion

Spammers are unlikely to comply voluntarily with no-spam lists.

Unlike no-call lists to prohibit telemarketers from using the telephone to advertise products, a spam no-send list could be rendered useless. The abundance of spammers who disguise their identities, promote illegal or offensive content, collect and use personal information, try to avoid filters by continually changing and obscuring subject lines, steal others' resources to transmit their advertisements, and commit other deceptive and fraudulent practices, indicates it is unlikely that any of them would honor a no-send list. According to a 2003 Federal Trade Commission report, "False Claims in Spam," analyzing 1,000 random samples of spam, 66 percent of the spam analyzed contained false "From" lines, "Subject" lines, or message text. Spammers' voluntary compliance with a no-send list is unlikely, and because spammers use various deceptions to hide the source of a message, locating spammers for enforcement is nearly impossible. The same can be

said of the opt-in or opt-out solutions. In fact, spammers often use the opt-out choice to validate an e-mail address, resulting in more spam to that address.

Many experts believe that a technical solution or federal legislation will be necessary to reduce spam.

Many people believe that the only solution will be a technical one. Others see federal legislation as the answer. Still others, primarily professionals in the Internet field, believe that, while not 100 percent effective, the only reasonably effective response includes both ingredients—successful technology solutions and strong federal legislation that includes stiff penalties and court involvement.

In the absence of existing federal legislation, 36 states have enacted some type of anti-spam legislation.

Although several spam-related bills have been introduced in recent years, as of November 26, 2003, Congress had not enacted any federal legislation. In the absence of federal action several states have enacted their own legislation. As of October 2003, according to the National Conference of State Legislatures, 36 states have enacted antis spam legislation, of which 19 were enacted in 2003. These laws include such provisions as prohibiting transmissions that contain false information regarding the origin of the sender and the content of the message; requiring each e-mail advertisement's subject line to include "ADV" and each adult-oriented subject line to include "ADV:ADLT"; allowing recipients of such advertisements to opt out of future e-mail ads from the sender and simultaneously prohibiting the sender from selling or transferring the name; allowing recovery of damages by an electronic mail service provider or an individual whose name is used without permission; prohibiting a text message advertisement from being transmitted to a cellular phone or pager; authorizing an ISP to block spam; and establishing a no-spam list similar to the no-call list for telemarketers.

California's recent anti-spam law is the strictest.

California's recent antis spam law is the strictest and most far reaching. It prohibits a person or entity located in California from initiating or advertising in unsolicited commercial e-mail advertisements. It also prohibits a person or entity not located in California from initiating or advertising in unsolicited commercial e-mail advertisements sent to a California e-mail

address. The law allows Californians, officials, and ISPs to seek civil damages of up to \$1,000 per e-mail per customer and \$1 million per mass mailing.

States are concerned about weaker federal proposals that would pre-empt states' stricter provisions.

One of the major concerns of states that have enacted strong antispam legislation is that some of the proposals in Congress are weaker, yet would preempt the states' stricter provisions.

Since many states' actions are recent, it is too early to determine if they are having an impact.

Most of the states' legislation are recent enactments; therefore, there is not yet experience or data regarding whether any of these provisions have had a measurable impact on spam.

A new congressional initiative could preempt state spam legislation.

A major new development is that one federal antispam proposal, S. 877, appears to be moving closer to enactment. S. 877 passed the U.S. House 392-5, and, on November 25, passed the U.S. Senate unanimously. Slight differences between the two versions will have to be worked out. According to *The New York Times*, the President is expected to sign the bill. Expectations are that it will be passed and signed by its effective date of January 1, 2004.

S. 877 would allow the federal government, state attorneys general, and Internet service providers—but not individuals—to sue commercial bulk e-mailers who use deceptive practices such as false e-mail addresses and subject lines. The proposal also outlaws several techniques used by spammers to collect addresses. Deceptive spammers could face up to five years in jail and fines from \$250 per fraudulent e-mail up to a maximum of \$6 million. In addition, S. 877 requires the FTC to report on a plan to establish a national “Do-Not-E-Mail” registry and authorizes the FTC to implement the plan.

Of particular interest to the states is the provision in S. 877 that preempts state legislation that expressly regulates commercial e-mail “except to the extent that . . .(it) prohibits falsity or deception in any portion of a commercial e-mail message or information attached thereto” (S. 877, Section 8).

Some state legislators have been critical of Congress preempting state legislation, such as California's

recent law, that is stricter than S. 887. State officials also criticize the federal proposal for numerous loopholes and difficult enforcement.

Even so, most observers expect S. 877 to be enacted by January 1, 2004. If so, this will limit the ability of the General Assembly to develop its own legislation to address spam.

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Should the General Assembly require compatible wireless communication formats for public safety agencies?

Prepared by Clint Newman

Background

New York firefighters could not hear a police radio warning that the World Trade Center towers were about to collapse.

Police couldn't communicate with firefighters when the Oklahoma City federal building was bombed.

Interoperability allows different public service providers to communicate with each other electronically.

The September 11, 2001, terrorist attack on the World Trade Center dramatically illustrated the need for compatibility in wireless communications among public safety agencies.

As the fires raged through the World Trade Center weakening the twin towers, police officers and firefighters could not communicate with each other because their two-way radios utilized different frequencies. Police received a radio message warning that the twin towers were in danger of collapsing, but were unable to transmit the warning to firefighters. The result? A report from the University of New Hampshire-based ATLAS project stated, "...it would appear that non-interoperability was at least partially responsible for the loss of 343 firefighters at the World Trade Center" (National Task Force on Interoperability, "Why Can't We Talk?" 4).

The September 11 attack was the second terrorist attack to demonstrate the problem of incompatible radios. After the Oklahoma City federal building bombing, first responders had to use runners to communicate between command centers due to a lack of interoperability (National Task Force on Interoperability, "When They Can't Talk" 3).

What is interoperability? The National Task Force on Interoperability defines interoperability as the ability of public safety service and support providers—law enforcement, firefighters, EMS, emergency management, the public utilities, transportation, and others—to communicate with staff from other responding agencies, to exchange voice and/or data communications on demand and in real time (National Task Force, "Why" 9).

Interoperability of wireless radios is deemed a major public safety problem.

The federal Office of Homeland Security and the National Conference of State Legislatures' Task Force on Protecting Democracy have identified interoperable wireless communication as a top priority in their efforts to beef-up responses to major emergencies (43, 37). "No one has a blueprint for what states and localities should do to secure the homeland. But clearly, being on the same wavelength is the place to start" (Perlman 24).

Discussion

The 2003 General Assembly created the Kentucky Wireless Interoperability Executive Committee (KWIEC) with state and local officials as members.

Prior to September 11, public service agencies were very protective of their radio systems; reluctant to give up management and control of those systems, and reluctant to share management of radio systems (National Task Force, "When" 9). After September 11, that attitude began to change.

In an effort to include local stakeholders in planning and decisions relating to interoperability, KRS 11.5161 created the Kentucky Wireless Interoperability Executive Committee (KWIEC) that consists of 21 state and local officials. The local officials represent municipal and county governments, police and sheriff's departments, fire departments, emergency medical services, and 911 dispatchers. The committee exchanges ideas and viewpoints and makes recommendations to the chief information officer regarding initiatives to achieve public safety voice and data communications interoperability.

Currently, the chief information officer can recommend but not require radio frequency standards.

Under KRS 11.5163, the chief information officer must establish and implement a statewide interoperability plan and recommend architecture and standards that facilitate interoperability of public safety communications systems. However, the chief information officer lacks the authority to establish required interoperability standards.

The chief information officer seeks authority for the KWIEC to mandate radio frequency standards for all public service agencies.

On October 2, 2003, in testimony to the Interim Joint Committee on Seniors, Veterans, Military Affairs, and Public Protection, the chief information officer announced that she will seek legislation to give the KWIEC authority to establish required interoperability standards and to require public safety agencies to submit plans for new or upgrading communications systems to the KWIEC for review and recommendation.

Standardized frequencies would allow public safety agencies to communicate with each other, but might raise the cost of wireless radios.

If wireless communication frequencies are standardized, then interoperability will result, and public safety agencies will be able to communicate with each other in times of emergency. Staff of the Governor's Office of Technology (GOT) believe that standardized frequencies are necessary, but say that a possible disadvantage is that standardized frequencies may give an advantage to a particular vendor that has developed technology facilitating a particular frequency. This might drive up prices for wireless radios. On the other hand, GOT staff argue that if all public safety agencies were using the same radio frequency, a state price contract could possibly be written, which would tend to decrease the price of radios.

Funding and lack of radio spectrum remain a problem.

Other issues related to interoperability center around the funding that would be required to replace or upgrade the 10,000 to 15,000 radios used by Kentucky's public service agencies. The limited amount of radio spectrum available to public safety is another problem. Spectrum is the range of frequencies available for all radio communication. The Federal Communication Commission has allocated 10 bands of frequencies for public safety throughout the spectrum, adding to the fragmentation of public safety communications that exists today. (National Task Force, "When" 8-9).

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Should the General Assembly enact legislation to require local governments to pay more to cover the actual cost of health insurance for their retirees when their active employees are not included in the state group as well?

Prepared by Mark L. Roberts

Background

State employees and school personnel pay higher premiums because local governments include their retirees, but not their employees, in the state insurance group.

A fee was proposed for local government entities that do not participate in the state insurance group to eliminate the subsidy to their retirees.

When different groups of employees are included in the same benefit programs but receive different benefits or have different participation requirements, the benefits of some groups may be subsidized by other groups. Eliminating those subsidies may be difficult once they are established.

Employees participating in the County Employees Retirement System (CERS) who are not eligible for Medicare are included in the state medical insurance group after they retiree. Including retirees with state employees and teachers holds down premiums for retirees, but results in higher premiums for the active employees because younger individuals generally have fewer medical claims than older individuals.

Local government entities have not been required to enroll their active employees in the state group. Cities and county governments that insure their employees outside the state group enjoy lower medical insurance premiums than they would face if their retirees were included with their active employees.

In 2002, the Interim Joint Committee on State Government, with the assistance of an independent actuary, confirmed that these retirees, dubbed “unescorted retirees,” added approximately \$14 million to the cost of health insurance for all members of the state group in calendar year 2001. Insurance premiums would have been \$5 less per person per month without this added cost. One recommendation was to make cities and counties pay a fee to cover the cost of their unescorted retirees (Segal).

When faced with paying a fee to fund the cost of their retirees in the state insurance group, local government representatives stated that they were willing to pay their fair share, but that there were other subsidies to consider. They pointed out that city and county governments pay higher contributions to CERS because classified school employees earn a full year's retirement credit when they work 180 days. Thus, school board employees receive 12 months of pension credit, which counts toward the medical insurance benefit at retirement, but only contribute on nine months of salary.

Local governments contend that they subsidize the insurance benefits of retired classified school board employees.

The benefit earned for the "summer months" becomes an unfunded liability. An analysis by a retirement system actuary indicated that cities and counties would pay substantially lower contributions—about \$12 million less annually—if the school boards funded the full cost of their employees separately (Actuarial).

Discussion

Representatives from cities and counties argue that if the General Assembly eliminates the subsidy created by their retirees in the state insurance group, the General Assembly should also eliminate the subsidy local governments pay to fund school employee retirement benefits.

Eliminating the subsidy of certain CERS retirees in the state group would shift costs from the state and its employees to local governments.

Assessing a fee on cities and counties to cover the cost of their retirees could reduce the size of future premium increases. This could reduce the amount the state pays in premiums for employees and the amount the employee pays in premiums for dependent coverage.

Separately funding the retirement and insurance benefits of classified school board employees would result in lower employer contribution rates for cities and counties and higher contribution rates for local school boards.

Eliminating the subsidy of classified school board employees would shift costs from cities and counties to the state.

The employer contributions to CERS for schools are funded through an appropriation in the state budget. Separately funding classified school employees' benefits would increase the state's financial obligation while saving cities and counties substantial funds.

Support for a compromise on sharing the costs of county retirees in the state groups still exists.

During the 2002 General Assembly, local government representatives, local school board officials, and state education officials proposed a compromise that would have spread the cost of local government retirees in the state group over all employers participating in CERS. The measure failed to pass.

Testimony before the Interim Joint Committee on State Government in June 2003 indicated that the groups involved remain supportive of compromise legislation to address the cost of retirees in the state group.

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Should the General Assembly make benefit changes or establish a self-insured plan to control costs in the state insurance group?

Prepared by Mark L. Roberts

Background

The state group health insurance program provides health insurance to employees of state government, local school districts, and the city and county governments that choose to participate. It also provides insurance to retirees of those groups as well as retirees of other local governments whose active employees are not included in the group. Retirees are only covered until they become eligible for Medicare.

The average premium for the state group rose 30 percent from 2000 to 2003. The number of carriers offering bids declined from five to three over the same period.

As with the rest of the nation, insurance premiums for the state group have been increasing each year. Average premiums rose 30 percent from 2000 to 2003. Five carriers offered coverage to the state group in 2000; however, only three offered coverage in 2003. The state group has also had difficulty obtaining bids in all 120 Kentucky counties and must pay higher premiums for coverage in some areas of the state. For instance, in 2004, the state will pay \$150 more per month for single coverage for its employees in Boyd, Carter, Elliott, Greenup, Henderson, Lawrence, and Union counties than it does for employees in Franklin County.

Providing health insurance to public employees will become increasing costly in the future.

Nationally, insurance premiums are expected to rise 15 percent in 2004 (Hay Group). Kentucky's aging public workforce and the growing number of retirees in the state group will only add to the expense.

Discussion

Many private and public employers are responding to rising health care costs by increasing the employee's share of costs.

Public and private sector employers throughout the nation are using a number of strategies to respond to rising health care costs. The most common of these strategies include:

- Increasing the employee's share of the premium, especially the amount the employee pays for family coverage.

- Increasing co-pays for procedures or prescriptions or switching to co-insurance where the employee pays a percentage of the cost.
- Increasing the maximum out-of-pocket expense.

Kentucky public employees currently pay nothing toward the cost of single coverage for a basic plan, but are responsible for the full cost of family coverage. According to the third annual report of the Kentucky Group Health Insurance Board, employees are opposed to any change in the state's policy of paying the full cost of single coverage for the basic plan.

Kentucky public employees pay more for family coverage than employees in other states, but have lower co-pays and deductibles.

In testimony before the Interim Joint Committee on State Government on September 23, 2003, the Secretary of Personnel noted that Kentucky benefit structure was different from the structure in many other states. State employees in Kentucky generally pay more for dependent coverage, but face lower co-pays and deductibles.

Thirty-two states self-fund health insurance for their employees.

Self-insuring the state group is frequently mentioned as a possible cost control measure. Thirty-two states self-fund at least one health insurance plan. Self-funding has both advantages and disadvantages. However, switching to a self-funded plan might not produce cost savings.

Self-funding might lower premiums and provide greater control over benefits and services.

Self-funding could result in lower administrative costs because of the elimination of the profit margin and would allow the state to benefit if claims are lower than expected. Self-funding could also give the state the ability to join prescription purchasing pools. Under a self-funded plan the state could consolidate the risk pool and offer the same premium for dependent coverage in all 120 Kentucky counties.

However, the state assumes greater risk under a self-funded arrangement.

However, under a self-funded arrangement, the state would assume the total risk. If claims exceed estimates, the state would have to pay the additional cost, either from a reserve fund or by appropriation. The purchase of stop-loss insurance could reduce the risk, but would also reduce potential savings.

Because of the size of the state group, self-funding could have a negative impact on the private insurance market.

A further consideration with self-funding is the impact on the private insurance market. The Commissioner of Insurance has testified that at least two insurers in the Commonwealth depend on the state group for a majority of their business. If a switch to self-funding impacted the viability of these insurers, it could impact the ability of private employers and individuals to obtain insurance.

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Should the General Assembly enact legislation to address the increasing cost of providing pension benefits to public employees?

Prepared by Mark L. Roberts

Background

Within the next 10 years, several factors are expected to cause the cost of maintaining the retirement systems for state and local government employees to increase. The increased employer contributions for pension benefits could force state and local governments to reduce expenditures for other employee benefits or government programs.

Historically, rate changes have been gradual. In 1956, when the Kentucky Employees Retirement System (KERS) was established, the employer rate was 4 percent of payroll. In the late 1990s, the rate had risen to more than 8 percent of payroll, only slightly more than double after 40 years and numerous benefit improvements.

A combination of factors will increase pension costs for state and local government over the next decade

However, costs are expected to rise more rapidly in the near future. The main factors driving the increase are recent market losses, retiree cost of living adjustments (COLAs), and retiree health insurance.

Market losses in FY 2001 and FY 2002 totaled \$5.5 billion.

Market losses for fiscal years 2001 and 2002 totaled \$5.5 billion for the three systems administered by Kentucky Retirement Systems. Carryover from these losses will depress the actuarial value of pension assets. The carryover for KERS is more than a half billion dollars. The lower asset value increases the unfunded liability, thus yielding pressure for additional employer contributions (Mercer).

Retiree cost-of-living raises increase costs long term.

Retirees' benefits are increased by the change in the Consumer Price Index each July. These COLAs are funded on a pay-as-you-go basis, meaning each COLA increases the employer contribution rate. A 3 percent COLA raises KERS costs by 0.27 percent of payroll for 30 years.

The main factor driving cost is health insurance for retirees. Funding increases would be required each year to retire this unfunded liability.

The main cost driver is the retiree health insurance benefit. As of June 30, 2002, the Kentucky Retirement Systems' insurance fund had unfunded liabilities of \$3.6 billion. The retirement board recommends increasing the employer contribution rate each year until 2016 to achieve a rate that will pay off remaining actuarial liabilities over 30 years from that date.

Employer rates for the majority of state and county employees are expected to more than double in 10 years.

Table 1 provides estimated future contribution rates. These rates were developed by the Kentucky Retirement Systems' actuary using the system's actuarial assumptions and insurance funding schedule.

Table 1
Projected Employer Contributions Rates Combining Investment Losses, Medical Insurance Funding, and Retiree COLAs

SYSTEM	EMPLOYER RATE (%) FY 2004	PROJECTED EMPLOYER RATE (%) FY 2014
Kentucky Employees Retirement System – nonhazardous	5.89	17.85
Kentucky Employees Retirement System – hazardous	18.84	21.17
State Police Retirement System	21.58	46.55
County Employees Retirement System – nonhazardous	7.34	18.36
County Employees Retirement System – hazardous	18.51	35.08

Source: Kentucky Retirement Systems

Discussion

Kentucky is unique in that it includes health insurance after retirement in the benefits promised to employees.

The pension benefits of current employees are protected by statute. The General Assembly cannot reduce pension or insurance benefits for current employees.

Kentucky is unique in that it not only pays the entire premium for employees who retire with 20 years of service, it also includes that benefit in the “inviolable contract” provision. The state further pays the premium for the spouse and dependents of hazardous duty employees who retire with 20 years of service.

Employee groups point to retiree health insurance benefit as one of the best benefits of public employment in Kentucky, but double-digit premium increases have made it an extremely costly benefit.

Pension costs are expected to grow by at least twice the rate of growth in the state's general fund.

The Kentucky Long-Term Policy Research Center estimates that pension costs could grow 98 to 152 percent over the next 10 years, while the state's General Fund is estimated to grow 27 to 46 percent. Thus, the cost of maintaining retirement benefits could reduce the share of revenues available for salaries or other programs (Childress).

The annual increase for retired members can be eliminated for current members, but retirees rely on these increases to keep up with inflation.

Retiree COLAs are not protected by the inviolable contract provision. The General Assembly could choose to suspend or repeal the COLA at any time. Unless continued for a number of years, suspension of the COLA would save a relatively small amount of money. Long-term suspension would effectively place retired public employees on a fixed income, which could create a hardship as inflation eroded the purchasing power of retirement income.

Benefits can be adjusted for new employees. Savings would not occur for several years.

Benefit changes can be made for employees not yet hired. However, if benefits are reduced for new employees, it would take a number of years before significant savings in pension costs result.

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Should the General Assembly restrict or prohibit certain state employment practices?

Prepared by Stewart Willis and Mark Roberts

Background

Burrowing and double dipping are two common employment practices that the General Assembly might want to consider.

In order to maintain the public's trust and confidence toward a government staffed by qualified, professional employees, the General Assembly might want to consider placing additional restrictions on some state employment hiring practices.

Two common employment practices that have drawn recent criticism relate to 1) hiring unclassified employees into the protected classified service (merit system), commonly referred to as burrowing; and 2) the practice of retired workers returning to employment with the same employer, commonly referred to as double dipping.

Discussion

The procedures for becoming an eligible for employment within the classified service are found in 101 KAR 2:046.

Burrowing

Recent mandatory reductions to the executive branch workforce, especially relating to positions appointed by the Governor, may reduce the immediate need for action. 2003 House Bill 269, the budget bill, required a reduction of 1,000 total executive branch state employees, with 250 of those to come specifically from employees in unclassified service (nonmerit employees). However, a point to note is that the restrictions placed in the budget bill expire at the end of FY 2004.

It is understandable that certain employees within the unclassified system would seek more stable employment opportunities within the protected merit system. The procedures regarding applications, qualifications, and examinations for the merit system are outlined in 101 KAR 2:046.

According to LRC staff analysis, from April 2, 2003, through November 3, 2003, a total of 106 employees from the unclassified service moved into the merit system.

Approximately 4.8 percent of full-time unclassified employees on April 3, 2003, burrowed into classified positions before November 3, 2003.

The total number of full-time unclassified employees on April 3, 2003, was 2,199. Therefore, approximately 4.8 percent of full-time unclassified employees burrowed into a position within the merit system between April until November.

The procedures for gaining employment in the merit system are specifically outlined through administrative regulations (101 KAR 2:046). Under these procedures, as long as an applicant meets the minimum requirements and ranks in the “high five” scores for the vacant position to be filled, they are considered “an eligible” for that position and placed on the appropriate register. After an individual is listed on the register, and a vacancy exists for that position, then the person may be chosen by the appointing authority from the list of eligibles to be interviewed and hired.

Few higher-level management merit positions require a standardized written examination. Many of these positions simply require a minimum amount of training and experience. Thus, there is some leeway in determining who is to be placed on a register for a management position.

A merit employee with 16 years of service can take a nonmerit position, but maintain “reversion” rights to re-enter the merit system.

An individual who is employed in the merit system and has 16 years of total merit and nonmerit service in state government is defined as a career employee. KRS 18A.130 and KRS 18A.135 provide that all career employees have the right to revert from a nonmerit position to a merit position similar to the position left to transfer to the unclassified service.

If a nonmerit employee has worked for at least 16 years in unclassified service, then that employee must be selected for a register like any other applicant. However, once that individual is on a register, he or she gains preference and must be chosen before any other person listed on the register. If there is more than one person with 16 years of service, then the employee with greater seniority must be listed first for that position.

Double Dipping

The 1998 General Assembly changed the law that governs the ability of most state and local retirees to return to work. Prior to that change, a retired employee could return to work in a position covered by the same retirement system and earn a limited amount of money. If the retired employee's earnings exceeded the limit, that person's pension was suspended. The 1998 change allowed an employee to retire, return to work within the same system, and receive a pension and the earned salary at the same time. There are no prohibitions against employees retiring and returning to positions covered by a different retirement system, such as state employees retiring and then working for local government.

The number of retired public workers returning to government service has increased.

Since the change, the number of retirees who have returned to work in a position covered by the same retirement system has increased. In 2000, there were approximately 143 state employees who had retired and returned to work full time. The number has been increasing at a steady rate: as of June 30, 2003, there were 618. This equals about 2 percent of all active state employees and about 3 percent of all state retirees (Kentucky Retirement Systems).

The public perception of public workers receiving a paycheck and a retirement check is generally negative.

The practice of retired workers returning to employment with the same employer is described as double dipping. The term applies only where it is perceived that the employee is receiving two checks at the taxpayers' expense while performing one job.

The current state application does not require an applicant to provide information about retirement status. Thus, the state has information only on those retirees who are working in positions covered by the same retirement system from which they are receiving a benefit, but no information on how many total workers are drawing a pension from another source.

Retirees can help fill positions where there is a shortage of skilled workers.

Retirees can be tapped as a resource in areas where there are worker shortages. The shortage of skilled workers has already been felt in the education field, and Kentucky has liberalized its laws allowing the rehiring of retired teachers. The National Conference of State Legislators reported that legislation to lessen

restrictions on retirees returning to work has been an important issue for the past three years, with 15 states making such changes in 2003.

The average retiree earns less on re-employment.

In testimony before the House State Government Committee during the 2003 General Assembly, employer groups opposed placing further restrictions on the rehiring of retirees. These groups noted that employers were able to hire retirees at lower salaries than other workers, thus acquiring significant experience at a savings. Statistics from the Kentucky Retirement Systems indicate that, on average, retirees returning to work earn about 78 to 82 percent of their final compensation (average salary used to determine their benefit at time of retirement).

Retiring employees may benefit from the arrangement by being able to change careers or take a less stressful lower-paid position. Retirees re-entering the state workforce are required to meet the same standards as other applicants and do not have salary reversion or seniority rights (101 KAR 2:034 and 101 KAR 2:102).

However, if employees retire at the earliest eligibility date with the intent to return to employment and use their pension as a salary enhancement, there may be financial consequences for both the retiree and the employer.

Workers who retire early and return to employment can create adverse financial consequences for both the retiree and the employer.

Retirement is meant to be income for the period after the working career has ended. When an employee retires, the employee's benefit is set for life based on the employee's earnings and service at that time. Combining a pension and salary may boost the individual's income temporarily, but if the individual does not work long enough to earn another pension or set sufficient savings aside, the individual will experience a significant drop in income upon termination.

If too many workers retire early with the intent of returning to employment, the actuarial cost for retirement benefits could be increased.

The cost of the retirement benefits is based on actuarial assumptions, including the age at which most employees will retire. These assumptions are adjusted periodically to reflect the actual trends of the group. If the ability to return to employment encourages significant numbers of employees to retire

early, the cost of providing benefits would increase to reflect the longer payment of benefits. According to the retirement systems, the employees who are retiring and returning to work are in their early 50s, if nonhazardous; and late 40s, if hazardous. These ages are below the normal retirement age of 65 for nonhazardous and 55 for hazardous.

Any restrictions on re-employment should take into consideration the demographics of the state employee group.

Placing restrictions on the employment of retired workers can discourage workers from retiring early, but could have other consequences. The number of workers aged 25-54 is not expected to increase significantly over the next decade, while the number of workers in the 55 and older category is expected to increase by nearly 47 percent (U.S. Department of Labor). As baby boomers begin to retire, there will be a limited number of younger workers to fill the vacancies. Further, for employees in the state retirement system, benefit enhancements sunset in 2009. As a result, there is a possibility that a significant number of eligible employees will retire by January 1, 2009, which could cause staffing shortages.

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Should the General Assembly impose additional limits on the ability of state agencies to issue sole source personal service contracts?

Prepared by Kathy Walton

Background

Kentucky's Model Procurement Code sets forth the law for state purchasing. Among the code's purposes is promotion of competition in an effort to reduce the cost of state contracts [KRS Chapter 45A.010]. As a general rule, state contracts are awarded by competitive sealed bidding unless there is written determination that competitive bidding is not practical [KRS Chapter 45A.080(1)].¹

Kentucky law does permit state contracting without competitive bidding.

Kentucky law does permit state contracting without competitive bidding. In making the determination as to whether a contract will be competitively bid, several factors may be considered. These include whether the contract should be awarded based on best value rather than lowest price, whether there is more than one qualified bidder, and whether pressing need for the service limits the time available for the bidding process [KRS Chapter 45A.080(1)(a)-(b)]. Some examples of contracts that do not require competitive bidding are set out in the procurement code:

- If there is only one known source that can fulfill the contract, there is no competitive negotiation process. Those contracts are referred to as "sole source"[KRS Chapter 45A.095(1)]. It is noted, however, that sole source is widely used in reference to contracts in general that do not require competitive bidding.
- If the purchasing officer finds that competition is not possible [KRS Chapter 45A.095(1)].
- If there is an emergency that must be addressed and it is not possible to engage in the normal competitive process [KRS Chapter 45A.095(1)].

¹ Competitive negotiation is not required if a contract is for a "small purchase": up to \$10,000 for construction; \$1,000 for state agency purchases; or \$40,000 for construction or purchases by the Finance and Administration Cabinet, higher education, and the legislative branch.

The law sets out several examples of services and purchases that may fall into one of the above categories and so may not require competitive bidding:

- If the purchase is for noncompetitive services such as public utilities [KRS Chapter 45A.095(1)(a)].
- If law or ordinance dictates the rate [KRS Chapter 45A.095(1)(b)].
- If the purchase is for library books, commercial items for resale, or interests in real property [KRS Chapter 45A.095(1)(c)-(e)].
- If the purchase is for visiting speakers, professors, expert witnesses, and performing artists [KRS Chapter 45A.095(1)(f)].
- If the contract is for a small purchase [KRS Chapter 45A.100].

The Legislative Research Commission's Program Review and Investigations Committee found the use of sole source contracts to be higher than average.

The Legislative Research Commission's (LRC) Program Review and Investigations Committee conducted an in-depth study of executive branch contracting practices. Part of its study included analyzing a random sample of 353 executive branch contracts issued from July 1999 through September 2000. The committee found that 17 percent of the sample were characterized as sole source contracts and noted the "higher-than-average use of sole source contracts" (67,68).

The LRC Government Contract Review Committee meets monthly to examine proposed personal service contracts.

Personal service contracts are often executed without competitive bidding. The LRC Government Contract Review Committee meets monthly to examine proposed personal service contracts. The committee examines the need for a service, whether the service could or should be performed by state employees, the term and value, and the appropriateness of any exchange of resources or responsibilities [KRS Chapter 45A.705(4)]. The committee provides written notification of any objection or disapproval to the Finance and Administration Cabinet. The cabinet secretary notifies the Contract Review Committee of any action taken in response to the objection.

The Secretary of the Finance and Administration Cabinet makes the final decision regarding personal service contracts.

Although the Government Contract Review Committee reviews proposed contracts and has input, the Secretary of the Finance and Administration Cabinet makes the final decision. The LRC study found that "many service contracts are issued without a thorough

analysis and documentation of the need for the contract. The Proof of Necessity forms required by the ... Committee tend to incorporate boilerplate language that does not adequately demonstrate the need for obtaining the services through a contract or present an adequate analysis of the costs and benefits of contracting” (63).

Discussion

“Justification for a sole source contract depends upon a needed item being available from only a single supplier under the prevailing circumstances” [Council of State Governments 74). Since sole source contracts do not have the built-in safeguards of competitively negotiated contracts, they should be closely monitored. Questions about “contract cost, accountability, and quality of work” are inherent in the sole source method of contracting [LRC 69).

There are instances where sole source contracts are more cost and time efficient than competitively awarded contracts.

Agency officials who support allowing state agencies to issue sole source contracts claim that there are instances where sole source contracts are more cost and time efficient than competitively awarded contracts. If, for example, the agency has had positive past experience with a vendor it would be more efficient to issue a sole source contract with that vendor than to spend agency time and resources pursuing the competitive sealed bidding process [LRC 67). Agency officials also assert that managers should be allowed the flexibility to manage their resources as they think best for the agency. The officials say this includes the ability to be able to respond quickly in certain situations.

Reduction in competition by widespread use of sole source contracts may compromise contract quality and increase contract price.

Opponents of widespread use of sole source contracts take the position that without competition, quality may be compromised while price may be increased. Opponents take the position that new qualified contractors may not be identified while sole source contracts are renewed year after year with little if any monitoring and accountability [LRC 68,69).

Concerns with sole source contracting include the inability to ensure best value, frequent renewals without close monitoring, and potential substandard work.

Concerns with sole source contracting include the inability to ensure best value, frequent renewals without close monitoring, and potential substandard work. As a matter of course, sole source contracts should not be renewed unless an analysis supports a finding that the contract still cannot be awarded competitively [Council of State Governments 74].

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Transportation

Should the General Assembly restrict the use of cell phones by drivers?

Prepared by John Snyder

Background

There are currently more than 150 million cell telephone subscribers in the United States, according to the Cellular Telecommunications and Internet Association. The effect of this technology on the safety of the motoring public has been a major topic of discussion in state legislatures over the past several years. As the discussion has become more intense, legislators in all 50 states have proposed legislation to restrict cell phone use by drivers (Sundeen 26).

New York is the only state that has placed a blanket ban on the use of hand-held cell phones by drivers.

To date, legislation passed by the various states regarding the use of cell phones in vehicles has taken several forms (Table 1). New York is the only state that has banned all use of hand-held cell phones by anyone operating a motor vehicle. New York's law is limited, however, in that it still allows a user to pick up a phone to activate and dial it. Other states have limited bans on bus drivers and permit holders and have placed some restrictions on hands-free listening devices.

Table 1
State Legislation on Cell Phone Usage

ACTION	STATES
Ban on hand-held cell phones while driving	NY
Ban school bus drivers from using cell phones while operating a school bus	AZ, AR, IL, MA, RI, TN
Ban on all mobile phone use by permit holders	ME, NJ
Require hands-free listening devices to cover only one ear, allowing hearing through one ear	FL, IL
Preempt local jurisdictions from regulating the use of cell phones while driving	FL, KY, LA, MI, NV, OK, OR

Sources: Sundeen 29; NHTSA Legislative Tracking Service.

Kentucky is one of several states to preempt enactment of local cell phone ordinances.

During the 2003 Session, the Kentucky General Assembly passed HB 154, a measure that barred local governments from adopting ordinances restricting the use of mobile telephones in a motor vehicle. Kentucky

is one of seven states that has established this local preemption.

Previous attempts in Kentucky to ban the use of hand-held cell phones while driving have met with no success.

Bans on using hand-held cell phones while driving have been introduced during the last four regular sessions of the Kentucky General Assembly. None of these bills has been voted out of committee. The bills introduced in Kentucky have made exceptions for emergency personnel and citizens reporting emergency situations.

Discussion

Accident report data from the last three years show cell phone use was listed as a contributing factor in less than 1 percent of accidents.

To date, most of the evidence regarding the safety of cell phone use while driving is anecdotal. Beginning January 1, 2000, Kentucky included a specific category on the uniform accident report to identify cell phone use as a contributing factor to an accident. Table 2 shows that, over the past three years, cell phone use is listed as a contributing factor in less than 1 percent of both total accidents and fatal accidents.

**Table 2
Incidence of Cell Phone Use as a
Contributing Factor to Traffic Accidents
2000-2002**

Accident Type	2000	2001	2002
Total All Accidents	135,079	130,190	130,347
Number of accidents where cell phone use was factor	362	429	475
Total Fatal Accidents	711	759	810
Number of fatal accidents where cell phone use was factor	2	3	2

Source: Kentucky Transportation Center and Kentucky State Police, *Traffic Collision Facts 2000, 2001, and 2002*.

Driver inattention is the most common contributing factor in nonfatal collisions in Kentucky.

The leading contributing factor for all accidents in Kentucky for the 2000-2002 period was driver inattention, cited in just over one-third of all accidents each year. For fatal accidents, the leading contributing factor was alcohol involvement (2000 and 2001) and inability to maintain proper control (2002) (Kentucky Transportation Center 27).

Other states have struggled with obtaining hard data on the incidence of cell phone usage as a contributing factor in accidents. Early data from six states (California, Florida, Minnesota, Oklahoma, Pennsylvania, and Tennessee) are similar to those of Kentucky, indicating that cell phones are a factor in less than 1 percent of motor vehicle crashes in each of these states (Sundeen 28).

Data obtained through accident reports may be suspect because it is from self-reports.

The accident report method of obtaining information on cell phone use does have drawbacks. Unlike factors such as alcohol involvement or seatbelt use, police officers must rely on witnesses and driver self-reporting to determine if a cell phone was in use at the time of an accident (Sundeen 28).

Proponents of a ban argue that cell phones distract drivers; research verifies this claim even for hands-free phone use.

Proponents of cell phone regulations cite the negative effect on driver attention. Academic studies of cell phone use on driver attention have confirmed this notion and have further cast doubt about the potential efficacy of hands-free only laws such as the one passed in New York. Strayer, Drews, and Johnston examined the effect of hands-free cell phone conversations on simulated driving. They concluded that:

- “Conversing on a cell phone appears to have altered the way drivers attended to stimuli in the driving environment” (30);
- Even when participants directed their gaze on objects they failed to “see” them because their attention is diverted;
- Cell phone conversations interfere with the brain’s ability to process what are known as “sudden onset stimuli,” that is, objects such as movement in front of a vehicle that generally trigger automatic attention in the brain; and
- Surprisingly, half of the participants in the study commented that they knew and had seen how cell phone use negatively affected the driving of others, but rarely, if ever thought that they were similarly affected (30-31).

NTSB recommends states ban drivers with a learner’s permit from using any wireless communication device while driving.

The National Transportation Safety Board has taken a modified approach to the question of a cell phone ban. The NTSB, in response to recent traffic accident

investigations it has performed, is recommending that states prohibit young drivers with an instruction permit or intermediate license from using any wireless communication device while operating a motor vehicle. The NTSB also recommends that states follow the lead of Kentucky and other states and include cell phone data on accident report forms (Blackistone 9-10).

Opponents cite the many potential distractions drivers face and suggest that cell phones are being singled out because of visibility.

Drivers face many distractions when operating a motor vehicle. Adjusting dashboard controls, eating, engaging in conversations with passengers, dealing with children, and using a cell phone all divert a driver's attention from the road. Opponents of regulation of cell phones argue that laws dealing with reckless driving already exist and they should be enforced. The feeling among some is that cell phones are a target for restriction because they are highly noticeable (Sundeen 30)

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Should the General Assembly change the enforcement of the mandatory seat belt law from a secondary offense to a primary offense?

Prepared by John Snyder

Background

Kentucky's mandatory seat belt law, enacted in 1994, provides for secondary enforcement.

Secondary enforcement prohibits police from stopping offenders solely for not wearing a seat belt; primary enforcement allows such stops.

States differ greatly in who is covered by seat belt laws and how they are enforced; only seven states apply the law to all passengers and have primary enforcement.

In 1994, Kentucky enacted the current mandatory seat belt law (KRS 189.125), which applies to all persons riding in a motor vehicle that is designed to carry 10 or fewer passengers. The seat belt law exempts persons operating a motorcycle, a motor-driven cycle, or a farm truck registered for agricultural use only and having a gross weight of one ton or more. The law also has certain exemptions for medical and occupational reasons. The penalty established for violating the adult seat belt provisions is \$25.

From an enforcement standpoint, Kentucky's seat belt law is a "secondary offense," meaning a police officer cannot stop a vehicle for the sole reason that the driver or other passengers in the vehicle are not wearing seat belts. "Primary enforcement" of the statute would give law enforcement the authority to stop a vehicle solely for a suspected violation of the seat belt requirement.

Nationwide, mandatory seat belt laws have been implemented in most states over the past 20 years (Insurance Institute for Highway Safety). Of the 50 states and the District of Columbia, only New Hampshire does not have a mandatory seat belt law. These state laws are differentiated by two key elements: 1) whether enforcement is primary or secondary, and 2) whether the law applies to only front seat passengers or to all passengers? Table 1 shows how states' seat belt laws fall into each of the four potential categories.

Table 1
Characteristics of State Mandatory Seat Belt Laws

Type of Enforcement	Law applies to adult passengers in:	
	Front Seat Only	All Seats
Primary	14	7
Secondary	17	12 (includes KY)

Note: New Hampshire does not have a mandatory seat belt law.
Source: Insurance Institute for Highway Safety

Legislation to change status of Kentucky's seat belt law to primary enforcement passed the House during the 2002 session and is prefiled for the upcoming session.

House Bill 68 was introduced in the 2002 Regular Session to change Kentucky's seat belt law from a secondary offense to a primary offense, while continuing to apply to all occupants of the vehicle. The law would have had a delayed effective date and delayed enforcement, prohibited police roadblocks for seat belt violations only, kept the fine at \$25, and eliminated court costs if the fine was prepaid. HB 68 passed the House of Representatives, but not the Senate. Legislation identical to the 2002 bill that passed the House was filed in the 2003 Regular Session of the General Assembly but received no action. The same legislation has been prefiled the 2004 Session.

Discussion

Seat belt use is considered the most effective means to prevent serious injuries and reduce fatalities.

The National Highway Traffic Safety Administration (NHTSA) considers seat belt use to be the single most effective way to prevent serious injuries and reduce fatalities in motor vehicle collisions (Occupant Protection Division Update 1).

Kentucky's current usage rate of 65.5 percent is the highest ever recorded.

The seat belt usage rate in Kentucky for 2003 was 65.5 percent, an increase over the 62 percent rate reported in 2002 and the highest rate ever recorded in Kentucky (Agent and Green ii). Kentucky's usage rates after passage of the mandatory seat belt law in 1994 have gone as low as 54 percent (Agent and Green 1).

The national usage rate in 2003 is 79 percent.

Kentucky's usage rate lags considerably behind the 2003 national rate of 79 percent. The national usage rate increased 4 percentage points over the 2002 rate of 75 percent and was the highest rate ever recorded by the National Occupant Protection Use Survey (Glassbrenner 2003, 13-14).

States with primary enforcement have consistently higher usage rates than states with secondary enforcement.

Researchers have found consistently higher usage rates in states with primary enforcement. In 2002, the usage rate was 11 points higher in primary enforcement states (80 percent versus 69 percent) (Glassbrenner, 2002, 1), and this disparity continued in 2003 (83 percent versus 75 percent) (Glassbrenner, 2003, 19).

Researchers found that usage rates during a recent education and enforcement campaign were significantly higher than normally seen, bolstering the argument for primary enforcement.

Researchers have cited evidence that the case for primary enforcement is bolstered by the increase in Kentucky's usage rate during the "Buckle Up Kentucky" education campaign in 2003. Usage rates reached 73 percent during that campaign. This finding, coupled with the very high usage rates for child safety seats (95 percent), which can be at least partially attributed to the primary enforcement of that law, suggests that primary enforcement would greatly increase seat belt usage rates (Agent and Green 13).

Opposition to primary enforcement centers on concerns over harassment of minorities and limitation of individual freedom.

Opposition to a primary seat belt law rests on three major arguments: anecdotal evidence of crashes where drivers were trapped in their vehicles; concerns over the potential harassment of minorities; and government infringement on individual rights (NHTSA, Traffic Tech 2). Concerns have also been raised about the use of roadblocks to enforce seat belt laws. Some of these concerns were raised during discussion on HB 68 during the 2002 Session, and as a result, the provision prohibiting police roadblocks to check solely for seat belt violations was added to the bill.

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