

ISSUES CONFRONTING THE 2002 GENERAL ASSEMBLY



Informational Bulletin No. 205

LEGISLATIVE RESEARCH COMMISSION

Frankfort, Kentucky

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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 orientation sessions for legislators, and publishing a daily index of legislative activity during sessions of the General Assembly.

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

ISSUES CONFRONTING THE 2002 GENERAL ASSEMBLY

Prepared by

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Legislative Research Commission Staff**

Edited by
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FOREWORD

This collection of issue briefs, prepared by members of the Legislative Research Commission staff, attempts to bring into sharper focus some of the major issues which have received considerable legislative attention in recent sessions and to date during the interim. The report by no means exhausts the list of important issues facing the 2002 Legislature. Nor are the alternatives in the discussion of each issue necessarily exhaustive.

Effort has been made to present these issues objectively and in as concise a form as the complexity of the subject matter allows. They are grouped for the convenience of the reader into the various committee jurisdictions and no particular meaning is placed upon the order in which they are presented. Because of continuing activity by the legislative committees, a supplement to this publication will be prepared in December.

Staff members who prepared the reports were selected on the basis of their knowledge of the subject matter and their work with the issues.

Robert Sherman
Director

Frankfort, Kentucky
September, 2001

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AGRICULTURE AND NATURAL RESOURCES

AGRICULTURAL CONTRACTING

Prepared by Biff Baker

Question

Should the General Assembly enact legislation regulating production and marketing contracts in agriculture?

Background

Over the past few decades, there has been a growing trend towards consolidation in agriculture. As mergers and acquisitions have taken place, fewer firms have gained control of more and more of the production and marketing of agricultural products. There is a concern that smaller producers are being put at a competitive disadvantage because of this consolidation.

There has been an increase in the use of production and marketing contracts in agriculture.

As the trend towards consolidation continues, there has also been a corresponding increase in the use of production and marketing contracts between agricultural firms and farmers. Production contracts are those in which a firm generally maintains ownership of the product, such as hogs or poultry, and dictates how the product is raised by a farmer, with some guaranteed price paid to the farmer for raising the product. A marketing contract is usually not as confining; the firm contracts with a farmer to raise a product, such as tobacco, and guarantees a price based on a predetermined quality standard. In a marketing contract, the farmer makes most of the management decisions regarding the raising of the product.

Reaching a consensus among the various agricultural groups involved in contracting has proven difficult.

The proliferation of agricultural contracting has created some concerns in the agricultural community. However, reaching a consensus among the various groups involved has proven difficult. There is disagreement between producers and industries as to what should be included in an agricultural contract, there is disagreement among the different industries themselves, and there is disagreement among the producers.

Several states' Attorneys General developed a model agricultural contracting bill in August 2000.

Recognizing that the use of agricultural contracting was rapidly increasing, and concerned that current antitrust laws might not provide farmers with the necessary protection to guarantee adequate competition in agriculture, some states' Attorneys General developed a model contracting bill in August 2000 called the "Producer Protection Act." This model bill addressed a variety of issues, including writing in plain language, good faith implications, disclosure, investment requirements, waivers, mediation, penalties,

3-day right of review, confidentiality prohibitions, liens for producers, restrictions on termination, and unfair practices.

Using the “Producer Protection Act” as a model, an agricultural contracting bill was drafted and debated in the 2001 General Assembly.

Discussion

Supporters of statutory regulation of agricultural contracting want more protection for producers.

Supporters of statutory regulation of agricultural contracting cite several concerns that they would like addressed, including the lack of competition in some farming sectors, particularly poultry, that has led to allegations of unfair contract terms because farmers lack market information and bargaining power; an unfair shifting of economic risks to farmers if they are required to make substantial capital investments on short-term contracts; and confidentiality clauses that can severely limit a farmer’s ability to compare a contract to others, thereby restricting the opportunity to negotiate a fair deal.

Proponents argue that these concerns and others addressed in the model bill could be resolved if agricultural contracts were regulated at the state level. They also argue that contracts can increase economic efficiency in agriculture by establishing specific parameters that farmers must meet in order to fulfill the terms of a contract. Contracts also guarantee certain income thresholds, making it easier for some farmers to obtain financing for their operations.

Opponents feel agricultural contracting is too diverse to develop a one-size-fits-all statute.

Opponents of state regulation of agricultural contracting argue that contracting is too diverse to develop a one-size-fits-all statute. Conditions that apply to production contracts might not apply to marketing contracts, and a statute that properly addresses the concerns of those with crop contracts may conflict with those that have livestock contracts.

Opponents also are concerned about the state interfering with private negotiations between willing participants and whether state legislation of agricultural contracting could violate existing contract law or interstate commerce laws.

HAZARDOUS WASTE ASSESSMENT

Prepared by Dan Risch

Question

Should the General Assembly extend collection of the hazardous waste assessment beyond June 30, 2000, or should the assessment be replaced with a different means of funding hazardous waste management programs?

Background

Since 1980, hazardous waste generators have paid an annual assessment to the state.

In 1980, the General Assembly established the hazardous waste assessment. The assessment is paid annually by generators of hazardous waste based on the amount of waste generated. Money collected pursuant to the assessment is paid into the hazardous waste management fund. The fund is administered by the Natural Resources and Environmental Protection Cabinet (NREPC). The present assessment is set out in KRS 224.46-580.

Hazardous waste is a byproduct of modern life.

The assessment was a vital part of the state's fledgling programs for managing the waste created from industrial processes. From chemical production and automobile assembly on the edge of town to dry cleaning and photo development within the neighborhood, many products and services in use every day result from processes that generate hazardous wastes. As the dangers of these wastes became known, industry and government acted to shield the public and the environment from the risk.

Industry and government have acted to protect the public from hazardous wastes.

The first mechanism to control the risks of hazardous waste is known as a "cradle to grave" regulatory program. The program requires waste generators to account for hazardous waste from the moment it is created until it is properly disposed or in some other way managed to remove risks to the public.

The second control is known as the state or "little" superfund. This program is patterned after the federal Superfund program. In both, the key element is the empowerment of government to compel businesses to clean up hazardous waste sites, and if a business has abandoned a site or is bankrupt, to stand in for the business and take actions necessary to protect the public.

The hazardous waste assessment is pivotal to the "little" superfund.

The hazardous waste assessment plays a pivotal role in the state superfund program.

The assessment raises approximately \$2,500,000 each year.

The hazardous waste assessment raises roughly \$2,500,000 each year, although a trend toward lower collections has been detected in the past few years. The money is used by the Natural Resources and Environmental Protection Cabinet to protect the public and the environment from the risks posed by improperly managed or disposed hazardous waste.

(Note: This discussion will focus primarily on the use of the assessment for the state superfund program and emergency clean ups. However, approximately \$500,000 per year is appropriated from assessment income to be used by the Kentucky Center for Pollution Prevention to assist small and medium sized businesses reduce their generation of solid and hazardous waste. Also, approximately 15% of assessment income is used for program administrative costs.)

Hazardous waste assessment funds match federal funds to clean up the most threatening sites.

An important use of hazardous waste assessment funds is to provide the state money needed to match federal funds to monitor and maintain Maxey Flats in Fleming County. Maxey Flats was a disposal site for low-level radioactive waste. Because Maxey Flats has posed a significant and immediate threat to the nearby environment and people, the facility has qualified for listing on the National Priority List (NPL) and to receive federal clean up funding.

However, Maxey Flats is just one of 20 National Priority List sites in Kentucky. In order to obtain the federal money necessary to clean up the other 19 sites, Kentucky must also provide 10% of the money needed at these sites. Kentucky's match comes from the funds raised by the hazardous waste assessment.

Hazardous waste funds help clean up other major sites and to respond to emergencies.

In addition, the Cabinet has identified approximately 675 other major sites that pose serious risks to public health and the environment. The hazardous waste assessment funds the clean up of these sites as well.

Hazardous waste site management and emergency responses are very costly.

Finally, the fund is used by the Cabinet to respond to emergencies involving hazardous wastes. Derailed railroad tank cars, traffic accidents involving tanker trucks, or the discharge of hazardous materials into a stream, all require immediate responses to prevent or limit harm to the environment and people.

Since 1993, \$6,258,654 has been spent to control the risks at Maxey Flats. Another \$17,700,00 has funded the capital costs to respond to other major hazardous waste sites. And, \$1,512,300 has been spent by the Cabinet to respond to emergency spills. For the future, the

cabinet estimates 50 emergencies will arise each year with an average cost of \$5,000 per incident. The Cabinet also estimates that \$81,000,000 will be needed for cleaning up the remaining major contaminated sites.

Hazardous waste sites are distributed around the state and are not limited to urban or industrial areas. Warren County hosts a site that is estimated to cost \$1,565,000 to clean up. Bullitt County contains a \$1,000,000 site, Boyd County a \$870,000 site, and Calloway County a \$500,000 site. And, emergency spills can occur anywhere in the state.

Discussion

Quick success was expected from the "little" superfund, so a June 30, 1984, sunset was planned.

In 1990, the legislature extended the assessment 10 years.

In 2000, the assessment was extended until June 30, 2002.

The 2002 General Assembly will be asked: Should industry continue to pay the assessment or should the public pay for the program via a general fund appropriation?

When the hazardous waste assessment was first enacted in 1980, little was known about the problems associated with the disposal of hazardous waste. The legislature passed the law in the belief that the money to be raised by the assessment would clean up a finite set of hazardous waste sites. Thereafter, the "cradle to grave" oversight of waste would make the fund unnecessary. Consequently, the initial version of the law contained a June 30, 1984, sunset provision.

However, beginning in 1984, and at every regular session thereafter until 1990, the General Assembly extended the life of the assessment for two additional years. In 1990, after a task force study, the assessment was substantially revised to broaden the assessment's base and to increase the assessment rate. In addition, the law was given a 10 year life. The new date to end the assessment became June 30, 2000. The ten year extension of the sunset provision was believed to be sufficient time to develop and consider implementation of a new source of funding.

But the 2000 General Assembly was convened and no alternatives to the assessment were brought forth. However, in testimony before the Senate Agriculture and Natural Resources Committee the Cabinet demonstrated an unabated need for funds to continue the process of cleaning up hazardous waste sites and to respond to emergency spills. Consequently, after a sharp debate, legislation was enacted to extend the assessment's sunset provision once again, this time until June 30, 2002.

Thus, the legislature in 2002 will again be asked to review the source of income for the hazardous waste management fund.

Hazardous waste generators believe the time has come for the cost to be shifted to the general public. One approach to accomplish this would be for the 2002 General Assembly to fund the hazardous waste management fund with a general fund appropriation.

In putting forth this alternative, industry stakes its position on a request for fairness. The early thinking behind the state superfund program posited that the industry as a whole should carry the burden of paying the costs of cleaning up abandoned sites or sites that the owner could not afford to clean up. There was also the expectation that the cost of the assessment would be included in the price of the products sold to the public so that ultimately the cost of proper hazardous waste management would be borne by the buyers of the products that gave rise to the waste. And finally, there was a tacit acknowledgement that it would be difficult to direct general tax revenues to the program in amounts sufficient to meet the projected needs.

After two decades, industry argues it has done its share to pay for other's mistakes.

Industry argues that after two decades of paying the hazardous waste assessment, responsible members of industry have done their share to clean up for the mistakes and bad acts of less responsible members of industry. Perhaps it is time, continues the argument, that the public now pay for whatever clean ups remain.

An opposite view is that the requested change would require a substantial revision of the legislature's strategy for hazardous waste management. KRS 224.46-580(1) sets out the strategy:

The General Assembly intended that the primary responsibility for hazardous waste be borne by industry.

"The intent of the General Assembly is to add to and coordinate, and not replace, existing efforts and responsibilities in the areas of hazardous waste management, toxic chemical manufacture, processing, or other use, and to leave the primary burden and responsibility for hazardous waste and toxic chemical reduction on private industry; and further to finance assistance and coordination by imposing assessments on the generation of hazardous waste. The assessments are intended to produce a reduction in waste generated; to promote the use of new techniques in recycling, treatment, and alternatives other than land disposal; and to place the burden of financing additional hazardous waste management activities necessarily undertaken by state agencies on the users of those products associated with the generation of hazardous waste." (Emphasis added.)

The assessment matches a trend toward user fees and allows the Cabinet to avoid competing for general fund dollars.

In addition, opponents of the industry position would hold that a shift toward the use of general fund money for a discrete government program would run counter to a strong trend toward

funding specific programs through user fees. As seen in the section of the law quoted above, the General Assembly conceived of the hazardous waste assessment as ultimately being paid by the end users of modern industrial products.

Finally, opponents of the industry position would assert that retention of the assessment could be expected to benefit the Cabinet's program planning. The assessment provides a known and dedicated income stream. Should the assessment be ended, the Cabinet would need to compete with all other state programs for a general fund appropriation of sufficient amount to accomplish the purposes of the hazardous waste management fund.

Replacing the hazardous waste generator fee with a general fund appropriation is not the only alternative available to the 2002 General Assembly. At this time however, an allocation of general funds for the hazardous waste management program is the only alternative that has been discussed. The legislature may choose to extend the assessment for another two years and to convene a formal study group to fully explore alternatives to the assessment.

DEAD ANIMAL DISPOSAL

Prepared by Brad Wellons

Question

Should the General Assembly pass legislation enacting a statewide program for dead animal pickup and disposal?

Background

Dead animal pickup and disposal is a statewide issue that affects all livestock farmers. The high costs involved in proper dead animal removal and disposal has an economic impact on farms that rely on livestock production for their livelihood. Farmers face higher production costs when they have to remove and properly dispose of large animals on an individual basis. Equipment needed for proper dead animal removal and disposal is costly for cities and counties as well as individual farmers.

Kentucky laws require the owner to properly dispose of any dead animals within 48 hours by any of six methods; however, enforcement is difficult.

Current Kentucky law requires that the body of an animal that has died be properly disposed of within 48 hours after knowledge of the death. The responsibility for disposal lies with the owner of the animal. Disposal methods acceptable under KRS 257.160 are complete incineration, boiling (for at least two hours), on-site burial, removal by a licensed rendering establishment, disposal in a licensed contained landfill, and composting. Improper disposal of dead animals can result in surface water or groundwater contamination. Therefore, proper dead animal disposal is also addressed in the required best management practices under KRS 224.71 to 224.140, the Agricultural Water Quality Act. However, with both statutes, enforcement is difficult.

Kentucky is a large livestock producer and has a large number of dead animals needing proper disposal.

The Kentucky Agricultural Statistics indicate that there are approximately 2.3 million cattle, 430 thousand swine, 20 thousand sheep, 155 thousand horses, and 261 million chickens (based on Kentucky Department of Agriculture estimates). Using the industry standard 2.5 percent mortality rate, that would mean that there would be approximately 57 thousand cattle, 11 thousand swine, 500 sheep, 3.9 thousand horses and 650 thousand chickens in Kentucky needing disposal every year.

Companion animals (pets) needing disposal are present in significant numbers, particularly in urban areas.

Another significant source of animals for disposal from urban areas is companion animals or pets. For companion animals, there is considerably less data, but a recent Kentucky Department of Agriculture presentation indicates that for the counties for which they have data, approximately 300 animals are removed per month,

representing fifty-five percent of the animals picked up per month. According to Department of Agriculture estimates, there are approximately 433 thousand companion animals every year in the state. In urban areas 75-80 percent of the animals needing disposal are companion animals. Also adding to the strain on the current dead animal removal and disposal system, Kentucky has two lab diagnostic centers in the state, many stockyards or other large animal handling facilities, and many animal shelters which all have substantial numbers of dead animals.

Assistance programs are available from state agencies to counties for a dead animal removal program.

The Kentucky Department of Agriculture has assistance available to counties for dead animal removal. This program provides funding to Kentucky counties to offset the cost of dead animal disposal. All Kentucky counties are eligible for up to \$5,000 per year. Funds may be used to continue current programs or develop new programs in counties where service is currently unavailable. Additionally, the Division of Conservation of the Department for Natural Resources, in support of the Agricultural Water Quality Act, has a similar program. In 2000, the Department of Agriculture provided \$132,694 in assistance to twenty-eight counties and the Division of Conservation provided \$60,000 in assistance to twelve counties.

Statewide, the most commonly used disposal option is disposal of dead animals at a state licensed and approved rendering facility. Other disposal methods are used but at much lower rates in county programs or on an individual basis largely because of availability and cost considerations. Contained landfills are the next most popular disposal option, but with only sixteen landfills accepting large animals, only five that have no restrictions on large animal disposal and the prices being high, it is not a widely used option.

Rendering companies, hit by the decline in the value of by-products, are increasing the costs of contracts with counties.

Currently there are only two rendering companies providing pickup and disposal services in the state, both of which are facing losses due to drastic declines in the value of by-products from the animals (most notably bone meal which has seen a fifty percent decline in value in a year's time) and rising fuel costs. These declines in revenue and increasing costs to the renders have resulted in the likelihood of discontinued or considerably more expensive pickup service from private rendering companies under current contracts with the counties, disposal programs, or other governmental or public service agencies. The average price increase in the pickup service contracts from FY 2000 to FY 2001 was roughly forty-seven percent for the counties and other public service agencies that contracted with the companies to provide the disposal service in the counties. One of the companies was threatened with closure if these

contracts were not renewed, but has decided to continue operation for the short term. Additionally, the rendering companies will provide pickups for individual farmers for a fee, but this fee discourages many producers from using this option, with pickup rates being extremely low, around fourteen percent.

Dead animal disposal may be a significant public health issue due to a risk of increased animal and human disease from improper dead animal disposal. However this public health risk has not been quantified.

The significance of improper dead animal disposal as a public policy issue is that dead animal removal and disposal is a public health issue. Large numbers of improperly disposed dead animals may increase the threat of environmental contamination of water resources and lead to public health problems from both human and animal disease outbreaks. However, it is unclear how significant this risk is to the public health of the state from increased levels of improperly disposed dead animals because no scientific studies have been conducted that effectively quantify this risk. If current dead animal pickup and removal services are discontinued, then future public health impacts are uncertain.

Current statutes were adopted before the advent of modern livestock production methods and the larger volume of animals needing disposal.

The original legislation for the management of dead animals, mainly as a means of controlling animal disease in Kentucky livestock, was developed in the 1940s and last substantially amended in 1980. However, as livestock operations have grown larger and more sophisticated means of animal production, transport, slaughtering, and processing have been developed, many feel that the dead animal disposal statute and system has become outdated. They propose that new legislation be developed that can fix the current dead animal disposal system in Kentucky with a statewide program. They argue that the current system has broken down and that the state is at a crisis situation where most animals are not properly disposed.

Discussion

Proponents of new legislation say that the old statutes need to be updated and the current system fixed, citing increased risks to the environment and public health, and increased rates of animal and human disease.

Proponents of a statewide program argue that improper animal disposal may increase the threat of environmental contamination of the water and a risk to public health from both human and animal disease outbreaks leading to human illnesses and large-scale animal deaths or create an inability to respond to other situations involving large numbers of animal deaths such as natural disasters. They point out that these types of situations have occurred recently in Europe with BSE (bovine spongiform encephalopathy or Mad Cow disease) and Foot and Mouth disease and in North Carolina after Hurricane Floyd. They argue that any of these situations would require a disease eradication and control program and a statewide animal disposal program for both human and animal health reasons. The Kentucky Department of Agriculture has developed an emergency plan for proper management of the large-scale death loss, but some say that without a statewide animal disposal

program, this emergency plan may not be effective in an emergency situation.

Opponents argue that the extent of the risks from higher levels of improper disposal has not been quantified and that any potential problems with dead animal disposal might be solved by increased enforcement.

Opponents point out that the extent and severity of this environmental, animal, and public health threat from improper dead animal disposal has not been effectively determined or quantified. Moreover they argue that in a situation of a natural disaster or other situation of large numbers of animal deaths, even if Kentucky had a program, the state program would be overwhelmed. Finally, they point to the recent crisis of dead foals from Mare Reproductive Loss Syndrome and say that it did not cause a breakdown of the animal disposal system. The opponents of a statewide program argue that the current law is satisfactory in that it makes the farmers responsible for their own livestock and that if there is a problem with improper disposal, then the problem is one of enforcement rather than a new statewide program.

A survey determined that 55 counties had a dead animal disposal program in 2000, but costs are expected to increase.

The Kentucky Department of Agriculture's Animal Removal Task Force surveyed county judges from the sixty-three counties that produce most of the state's livestock to determine what type of program was needed. They determined that the Department of Agriculture's and the Division of Conservation's financial assistance and individual county efforts, had lead to approximately 55 of 120 counties having some sort of animal disposal program in FY2000. The costs of these programs to the counties ranged from \$7500 to \$43,000 per year, with costs expected to increase. These cost increases have placed most county dead animal programs in jeopardy, in danger of not being able to be funded. Faced with this situation, the Kentucky Department of Agriculture and the Agricultural Development Board put together a short term, one year solution to provide relief of this emergency situation for the county animal disposal plans.

The Kentucky Agricultural Development Board approved a short term solution by creating a one-year voluntary cost-share program using county funds from the Phase I tobacco settlement to aid counties with all dead animal disposal methods.

The Kentucky Agricultural Development Board approved a proposal to create a one-year voluntary cost-share program using county funds of the Phase I tobacco settlement to aid counties with dead animal disposal. The Agricultural Development Board is to be assisted by the Department of Agriculture with program administration for consistency with the Dead Animal Removal Assistance Program currently administered through the department. Under the voluntary program, each County Agricultural Development Council will decide whether to apply for funding, and if they decide to submit an application, determine the type of disposal program to be used in compliance with state law. Each county may submit only one application. The maximum contribution from each county's share of Phase I tobacco settlement

monies will not exceed 50 percent of program costs or \$20,000, whichever is less.

The Kentucky Department of Agriculture's Animal Removal Task Force will offer proposals for the 2002 session.

The Kentucky Department of Agriculture's Animal Removal Task Force is considering these and other options and will offer a proposal for long term solutions to the General Assembly in the 2002 session. One uncertainty is the question of what the counties will do when the cost share money from the Agricultural Development Board is not available. The fear among some is that the counties will not adopt proper disposal plans, even in counties having a high number of animals. The Animal Removal Task Force will address this and other issues including rendering and other methods of disposal, which would have to be proven cost effective and non-objectionable to the public. Other issues to be addressed would include how animals would be moved from farms to a central site for pickup and how a proposed statewide program would be funded.

**APPROPRIATIONS
AND REVENUE**

INTANGIBLE PERSONAL PROPERTY TAX

Prepared by Terry Jones

Question

Should the remaining intangible property taxes be repealed?

Background

The Kentucky Supreme Court holds unconstitutional the different tax treatment of in-state and out-of-state stock and bank deposits.

The Kentucky Constitution is amended to permit the General Assembly to exempt all or any portion of the property tax on any class of personal property.

During the last several years, there has been a flurry of judicial activity regarding the intangible property tax. In a January 30, 1997, decision, the Kentucky Supreme Court held unconstitutional in St. Ledger v. Commonwealth of Kentucky the 25 cents per \$100 tax on out-of-state bank deposits and the statutes imposing the tax on corporate stock while exempting stock of in-state corporations. The Court held that the bank deposits tax statute violated the Commerce Clause of the U.S. Constitution by creating a lower tax rate on in-state deposits than out-of-state deposits. At the time, in-state deposits were subject to a 1/10 cent rate. In 1996, the General Assembly extended the 1/10 tax rate to all bank deposits. The Court held that the exemption for in-state stock violated the Commerce Clause of the U.S. Constitution. Due to these court decisions, the taxing scheme used by the state of Kentucky to tax bank deposits and stocks was invalidated. This resulted in an approximate loss of \$35 million in annual general fund revenues.

The 1998 Regular Session of the General Assembly proposed amending Section 170 of the Kentucky Constitution with House Bill 229. Voters approved the amendment, thereby permitting the General Assembly to exempt all or any portion of the property tax on any class of personal property.

Discussion

The tax on remaining intangible personal property generates approximately \$25 million.

Some businesses pay intangible tax in lieu of other taxes.

Generally, intangible personal property is assessed at fair cash value as of January 1 of each year and generates about \$25 million per year. Intangible personal property still subject to taxation includes annuities, capital stock of bank for cooperatives, brokers account receivable, domestic life insurance, production credit associations, profit sharing plans, retirement plans, savings and loan associations, bonds, patents, trademarks, receivables, royalties, and tobacco base allotments.

There are some tax levies classified as intangible taxes that are paid by businesses in lieu of other taxes. If the intangibles tax is

addressed as an entire class in proposed legislation, the taxes paid by certain businesses would be reduced:

Savings and loan associations' capital stock

The intangible tax paid by savings and loan associations generates approximately \$2million.

- Savings and loan associations currently pay \$0.10 on each \$100 of taxable value of their capital stock. The tax is paid by the bank or trust company on behalf of the shareholder and the shareholder is not required to list the shares for taxation. Savings and loan associations are also exempt from the corporate income and license tax. Revenues from this tax are approximately \$2 million a year.

Insurance companies' taxable capital

The intangible tax on domestic life insurance companies generates approximately \$0.2 million with the phase-out option.

- Domestic life insurance companies currently pay \$0.70 on each \$100 of taxable capital. Domestic life insurance companies are exempt from the insurance premiums tax, and the corporate income and license tax because they pay this tax in lieu of those taxes. However, with the enactment of House Bill 648 in the 1998 Regular Session of the General Assembly, domestic life insurance companies have the option in 2000 to begin phasing-out this tax and phasing-in the payment of the premium tax. The tax now generates only \$200,000 a year.

Public service companies' property tax assessments

The intangible tax on public service companies generates approximately \$1.7 million.

- Property taxes are assessed against the operating property, non-operating tangible property, and non-operating intangible property of public service companies. Public service companies include utility companies, such as electric, gas, water, telephone, and cable television, and transportation companies, such as railroads, air carriers, pipelines, and water transportation. Revenues from this tax are approximately \$1.7 million. Public service companies are exempt from the corporation license tax; however, they do pay a significant amount of corporate income tax.

MOTOR VEHICLE PROPERTY TAXES

Prepared by Terry Jones

Question

Should the motor vehicle property taxes be repealed.

Background

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

Section 170 of the Kentucky Constitution was proposed to be amended by the enactment of House Bill 229 in the 1998 Regular Session of the General Assembly and was subsequently adopted by the vote of the people to permit the General Assembly to exempt all or any portion of the property tax for any class of personal property.

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

- In 1999 there were approximately 2,700,000 licensed drivers in Kentucky.
- In 1999 there were approximately 3,500,000 vehicles on the tax rolls.
- The average assessed value for 1999 was approximately \$5,100.
- Each month nearly 300,000 renewal notices are mailed out.
- The county clerk retains 4% of the tax as a commission (approximately \$9 million).
- The state tax rate is \$0.45 per \$1000 of assessed value and generates approximately \$75 million.
- School district tax rates vary and the tax generates approximately \$76 million.
- County and special taxing districts tax rates vary and generate approximately \$45 million.
- Cities tax rates vary and the tax generates approximately \$23 million.

Discussion

Proponents for repealing the property tax on motor vehicles contend that the tax is unfair and voters overwhelmingly thought that they repealed the tax.

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

Proponents for removing the state portion of the property tax on motor vehicles contend that using the average trade-in value for assessing the property tax results in the tax being unfair and they assert that individuals thought they had voted to remove the tax when they had overwhelmingly approved the Constitutional amendment in 1998 to permit the General Assembly to exempt all or any portion of the property tax on any class of personal property.

Opponents of removing only the state property tax on motor vehicles contend that individuals will not perceive that their taxes have been cut without removing the local portion of the property tax on motor vehicles, which makes up two thirds, of the tax bill and that local governments and school districts cannot handle this revenue loss without some source of replacement funds. Opponents also contend that the state's budget cannot handle the loss of revenues without replacing the revenues with some other source of funds.

INDIVIDUAL INCOME TAX

Prepared by Susan E. Viers

Question

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

Background

Kentucky like other states uses a graduated rate system to impose a higher rate of tax on higher income taxpayers.

Kentucky employs several methods to exempt the first portion of income from taxation.

Kentucky first enacted an individual income tax in 1936 with a graduated tax rate of two percent on income under \$3,000 and five percent on all income over \$5,000. Rates remained unchanged until 1950, when a top rate of six percent applied to income over \$8,000. In 1956, a surtax was added that increased the actual rate above six percent. The current graduated rate system has been in place since tax year 1961. The basic tax structure, including rates, exemptions, and credits, has remained virtually unchanged since that time.

Kentucky provides several methods to attempt to remove the first portion of income for each taxpayer from taxation. These methods include the personal credit, the standard deduction, and the low income credit. Other methods target certain taxpayer groups. For example, the child care credit only allows tax relief for taxpayers with child care expenses.

The personal credit amount is \$20. A credit is allowed for the taxpayer and each dependent claimed on the return. Two additional credits are allowed to the taxpayer and spouse when their age is 65 or over or if they are blind. Special credits are also allowed for members of the Kentucky National Guard.

The standard deduction is used to exempt a certain amount of income completely from taxation. The standard deduction was set at \$650 for individuals from the early 1960s until the late 1990s. HB 547 passed in 1996 phased in an increase in the standard deduction: \$900 for 1997, \$1200 for 1998, \$1500 for 1999, and \$1700 for tax year 2000. For tax years 2001 and thereafter, the standard deduction increases annually based on the consumer price index.

The low income credit allows a reduction in tax for persons whose Kentucky adjusted gross income is less than \$25,000. It provides a

larger percentage of relief for lower income persons and effectively changes the rate of tax to less than the statutory rate until the low income threshold is exceeded.

Discussion

Kentucky is frequently criticized because of how the individual income tax impacts low income taxpayers. One advocacy group, the Washington-based Center on Budget and Policy Priorities, placed the income tax burden on a Kentucky family of four, with income at the federal poverty level of \$17,601, at a level higher than in any other state. This study evaluates only individual income tax and does not take into account Kentucky's lower rates in other taxes; it indicates Kentucky has a relatively high income tax rate on lower income persons.

The standard deduction and personal credit amount have not kept pace with inflation or increases in the federal income tax structure.

The standard deduction and the personal credits were implemented to relieve the tax burden on the first portion of income of Kentuckians. The tax rates currently in place were established to assess a higher level of tax on higher income persons. None of these methods of relieving the tax burden has kept pace with inflation or with increases in similar items in the federal income tax structure.

When the entire state tax burden on an individual is considered (income, sales, property, motor vehicle, miscellaneous), the ranking of Kentucky improves remarkably. When all taxes are considered, Kentucky ranks lower than most surrounding states on the tax burden for lower income persons.

Total tax burden is comparatively low.

Some Kentucky taxes are below the national average and below the amount assessed by surrounding states. For example, property taxes are significantly lower than similar taxes in surrounding states. Sales tax exemptions permit substantial amounts of tangible personal property to be purchased with no sales tax in Kentucky while similar purchases in other states would be subject to substantial levels of sales tax.

If the General Assembly does consider modifying rather than maintaining the status quo, possible alternatives to addressing the question of modification of Kentucky's income tax structure are to:

- Change the income tax structure to reduce or remove the tax from more low income taxpayers. This can be accomplished by

several means, utilizing any or all of the methods currently used to modify taxable income levels or tax rates.

- Change other taxes on individuals in addition to the income tax to shift some of the tax burden away from the relatively high income tax and onto one or more of the relatively low taxes.

BANKING AND INSURANCE

AUTOMOBILE INSURANCE

Prepared by Greg Freedman

Question

Should the General Assembly amend the automobile insurance statutes to address problems concerning no-fault threshold, compulsory insurance, high risk drivers, and rates?

Background

Premiums in Kentucky are higher than those in all but one of the surrounding states.

Kentucky's automobile insurance premiums rank 27th according to a survey of 1998 automobile insurance premiums by the National Conference of State Legislatures. Six of the seven states that border Kentucky rank lower than Kentucky: Illinois (28), Missouri (34), Tennessee (36), Indiana (38), Ohio (42), Virginia (43). The only border state that has higher average automobile insurance premiums than Kentucky is West Virginia (15).

Kentucky has enacted various laws in an effort to make automobile insurance available and affordable.

Kentucky, like other states, has adopted various measures aimed at making automobile insurance available and premiums affordable. No-fault motor vehicle insurance has been an option for Kentucky motorists since July 1975. Because Section 54 of the Constitution of Kentucky prohibits the General Assembly from limiting the amount to be recovered for death or injuries to person or property, the General Assembly cannot mandate no-fault coverage. A person under Kentucky's no-fault system cannot sue unless he or she meets the threshold of \$1000 in medical expenses or has a certain injury or disease. Kentucky has a compulsory liability insurance law that requires owners of motor vehicles to carry minimum liability coverage of \$25,000/\$50,000/\$10,000. Kentucky requires motor vehicle liability insurance policies to provide uninsured motorist coverage unless the named insured rejects the coverage in writing.

Discussion

The monetary threshold in Kentucky is the lowest in the country.

Rising automobile insurance premiums, or average premiums that exceed those of surrounding states, make automobile insurance reform a recurring issue for state legislatures. Kentucky's General Assembly over the years has enacted various reforms. With premium costs lower in six of the seven states bordering Kentucky, it may be time to review the effectiveness of Kentucky's current laws.

No-Fault. None of the states that border Kentucky have a no-fault system. Kentucky's no-fault system has been in effect for twenty-six years. Proponents argue the system is more efficient and less costly than the traditional tort system. Critics claim it increases

costs as individuals inflate medical costs to meet the monetary threshold. In Kentucky that threshold is \$1000. The threshold in Massachusetts and Kansas is \$2000, in Colorado it is \$2500, in Utah it is \$3000, in Minnesota it is \$4000, and in Hawaii it is \$5000.

Florida has enacted legislation to reduce or eliminate PIP fraud.

Under Kentucky's no-fault system, a policyholder's Personal Injury Protection (PIP) pays the policyholder's medical expenses up to \$10,000. Florida has the same PIP coverage and discovered so much PIP fraud from inflated reimbursement costs that the legislature passed legislation in June 2001, to address the issue. PIP fraud was adding \$240 each year to Florida policyholders' premiums. Under the new law, clinics that treat accident victims must have a state license and adhere to a fee schedule that caps reimbursement rates. Because "runners" were obtaining accident reports and soliciting business for doctors and lawyers, the new law prohibits accident reports from becoming public for sixty days.

Ten percent of Kentucky motorists drive without insurance.

Compulsory Insurance. A study by the Insurance Research Council found that fourteen percent of motorists in the United States are uninsured. In Kentucky ten percent of motorists are uninsured. The study found that of the states bordering Kentucky, eighteen percent of the motorists in Tennessee are uninsured, thirteenth percent in Missouri, Illinois, and Ohio, twelve percent in Virginia and Indiana, and eight percent in West Virginia.

Kentucky is one of 44 states that mandate automobile liability insurance.

Kentucky is one of forty-four states with a compulsory insurance law. Owners of motor vehicles in Kentucky must maintain minimum liability insurance on their motor vehicles and keep an insurance card in the vehicle. Motor vehicle insurers must submit monthly to the Transportation Cabinet a list of insureds whose coverage terminated during the month. Failure to maintain insurance can result in a fine of \$500 to \$1000, up to ninety days in jail, and revocation of registration and plates for one year or until insurance is obtained. Penalties increase for second and subsequent violations.

Compulsory insurance enforcement laws vary in other states.

States such as North Carolina, Louisiana, and Florida allow plates to be removed from uninsured vehicles. New Mexico allows uninsured vehicles to be towed. Ohio allows the state to seize and destroy the vehicle of a three-time offender. Michigan, California, Louisiana, and New Jersey are "no pay, no play" states which prohibit uninsured motorists from seeking noneconomic damages, such as pain and suffering. Proponents of the legislation argue it gives uninsured motorists an incentive to buy coverage. A study in California found the law resulted in a five percent reduction in

premiums or about \$40 per driver and \$440 million across the state. Critics argue this is discrimination against persons who are unable to afford insurance. Virginia charges uninsured motorists at registration a \$500 fee and South Carolina charges a \$550 fee.

Kentucky is one of 42 states that have an automobile insurance plan. other states utilize joint underwriting associations, reinsurance facilities, or state funds.

High Risk Drivers. There are several different types of mechanisms to serve the residual market. There are forty-two states that use direct assignment, or automobile insurance plans, to provide automobile insurance coverage for high risk drivers who cannot obtain coverage in the voluntary market. All automobile insurers in the state must participate in the high risk pool. Drivers are randomly assigned to an insurer. Each insurer services the policyholders as it services its other customers and absorbs the profit or loss. Kentucky is one of the states that uses this mechanism. The Kentucky Automobile Insurance Plan has been in effect since August 20, 1948.

There are four states that use a Joint Underwriting Association that is composed of all auto insurers operating in the state. Under this mechanism a limited number of companies act as servicing companies. The JUA sets its own rates and writes its own policies. Underwriting losses are shared by all participants in proportion to the automobile insurance premiums written in the state.

Two states have reinsurance facilities. Under this mechanism, no automobile insurer can turn down any applicant, however, the insurer is allowed to cede a percentage of its policies to the reinsurance facility. Profits or losses on the ceded business is shared equitably among all automobile insurers in the state in proportion to their market share.

One state, Maryland, has established a state fund. Private insurers do not participate directly in the fund, but they must subsidize the losses and are allowed to recover those losses by surcharging their own policyholders.

Kentucky is a "use and file" state.

Rates. Kentucky is a "use and file" state if the market is deemed competitive. An auto insurer in Kentucky can use rates and then file them with the Department of Insurance within fifteen days after use. Some states require prior approval of rates by the state regulatory agency before they can be used. Others are "file and use" states which allow insurers to first file their rates and then use their rates before approval by the state regulatory agency. It is argued that states with more rate regulation have higher rates. The Louisiana legislature passed a bill that would have changed

Louisiana from a "prior approval" state to a "file and use" state, but the Governor vetoed it. Sixteen companies have left the state in the first half of 2001.

Fatalities of elderly drivers are nearly equal to fatalities of teen drivers.

The Insurance Services Office (ISO), a statistical-gathering group whose research is subscribed to by one-third of all auto insurers, has suggested eliminating the twenty percent insurance premium discount for motorists over the age of seventy-five due to their declining driving records. Fatalities of drivers age seventy and older have nearly equaled that of teens. The National Association of Independent Insurers wants laws that require elderly drivers to renew licenses every two years. Some auto insurers advocate tougher eye exams (Maine, North Carolina, and Utah require vision tests).

HEALTH INSURANCE

Prepared by Greg Freedman

Question

Should the General Assembly amend the health insurance statutes to address problems concerning small employer insurance, managed care, prompt payment of claims, HMO financial solvency, medical savings accounts, and prescription drugs?

Background

42 million Americans did not have health insurance in 1999; fifteen percent of Kentuckians do not have health insurance.

Despite the health insurance reforms enacted by the states and by Congress over the past decade, the number of uninsured have grown by ten million during that time period. A smaller share of Americans have health insurance through their jobs than ten years ago, and the figure would be higher if there had not been expansions in the Medicaid program. In 1999, forty-two million Americans, almost eighteen percent of the total nonelderly population, were uninsured. Many of the uninsured do not qualify for public health coverage. A report released on July 19, 2001 by Families USA states that eighty-one percent of low income, uninsured adults more than thirteen million people do not qualify for Medicaid or other public health coverage in their state. In more than half of all states, a parent in a three-person family who works full time at the minimum wage is considered to have too much money to qualify for Medicaid. In forty-three states, including Kentucky, non-parent adults are ineligible for Medicaid. According to the report, of the 116,076 persons in Kentucky with incomes below two-hundred percent of poverty, 65,609 are not eligible for Medicaid.

Although the poor and near-poor make up sixty-five percent of the uninsured population, the majority of the uninsured are in working families--seventy-one percent are employed full-time and twelve percent are employed part-time. According to a report by the Henry J. Kaiser Family Foundation, it is estimated that 566,060 persons are uninsured in Kentucky which is fifteen percent of the population. Twelve percent of Kentuckians are on Medicare, eleven percent are on Medicaid, four percent are insured in the individual market, and fifty-nine percent are insured through their employers.

The rising cost of health insurance has made it too expensive for many small employers and individuals. It has also made employers take cost cutting moves such as increasing deductibles and

HMO premiums are increasing, cost controls are decreasing, and 19 HMOs failed in 2000.

copayments that may erode profitability of HMOs. One example is California's public employee retirement system which has announced it will double employees' copayments next year. In 2000, nineteen HMOs failed, including Advantage Care in Kentucky. Several factors are influencing a rise in the cost of insurance and a decline in HMO profitability. Multiple attacks on HMOs, including class action lawsuits, are resulting in fewer cost controls. Incentive arrangements that give health care providers a bonus for keeping costs low are being curtailed. Capitation contracts with providers are being cut back. The number of procedures that require physicians to obtain precertification are being reduced. It is contended that fewer restrictions will mean costlier treatment which will drive up health care costs. HMO premiums are increasing by an average of 18.3 percent. Mergers and acquisitions by hospitals have increased their power in local markets. This has resulted in some hospitals winning higher payments from insurers, which is adding to the rise in medical costs. Medical costs increased ten to fifteen percent in the first quarter of 2001.

Three insurers have entered Kentucky's individual market since the first of the year when Kentucky Access began operations.

The latest health insurance reform enacted by the Kentucky General Assembly was the creation of Kentucky Access, a pool for high-cost Kentuckians, which has been in operation since January 1, 2001. Kentucky Access is funded in part by tobacco settlement funds. Proponents of the pool believe it will stabilize the individual market, attract more insurers to the Kentucky individual market, and provide a source of health insurance for Kentuckians with high cost medical conditions and Kentuckians unable to purchase coverage in the private market. Since the beginning of the year, three insurers have entered the individual market, which gives Kentuckians five companies from which to choose, plus the option of Kentucky Access.

Discussion

Health insurance continues to be a top state issue.

The number of persons without health insurance, increasing health insurance premiums, rising medical costs, and financial solvency of HMOs are some of the reasons why health insurance remains one of the top issues confronting the General Assembly. The comprehensive reforms enacted in 1994 have been modified or repealed in each subsequent session. Today, little remains of the 1994 legislation but health insurance remains a major issue today as it did in 1994.

Health insurance is a difficult issue for state legislatures for many reasons. Federal laws such as ERISA restrict the application of state laws in the area of health insurance. Large insurance companies

operate in many states, which requires small states such as Kentucky to always be aware that insurers can pull out of the state if legislation is perceived by insurers as creating an unfavorable environment. Within each state the legislature must continually confront which segments of the population are to be subsidized and to what extent, which benefits should be mandated, and to what extent should and can insurance premiums and medical costs be regulated. As medical costs continue to rise and the demand for medical care increases, the General Assembly will confront proposals to increase the availability of affordable health insurance to all Kentuckians.

2001 House Bill 83 would have created health purchasing outlets.

Group Health Purchasing Pools. It is an established underwriting group insurance principle that the group to be insured must have some common purpose other than obtaining insurance. A group organized solely for insurance will most likely include an excessive number of persons in poor health, engaged in hazardous occupations, or with other characteristics that make them high health risks. This will lead to adverse selection that increases cost and encourages healthier members to leave the group. 2001 HB 83, which failed to pass, would have created an exception to this principle of insurance. The bill permits the creation of health purchasing outlets (HPO) to enable persons to form a group to buy health insurance. HPO's are groups formed solely for the purpose of insurance. California has a similar law but it applies only to small employer groups. HB 83 is open to a wide range of individuals, including unemployed persons. It also allows small employers to provide employees with a voucher to purchase health insurance through the health purchasing outlet. The HPO must be registered with the Department of Insurance.

Several states have small employer group health purchasing pools.

There are small employer group health purchasing pools in some form in California, Colorado, Connecticut, Florida, Illinois, Minnesota, Montana, New York, North Carolina, Ohio, Oregon, Texas, Utah, and Washington. Most restrict the group size to two to fifty employees. The intent is to give the small employer the leverage enjoyed by large employers in the purchase of health insurance for employees. Because sixty-five percent of the uninsured population are in working families, it is clear that small employers need help in providing affordable health insurance to their employees. Utah requires a health insurance purchasing alliance to be licensed by the Insurance Commissioner or to submit articles of incorporation if the alliance is a nonprofit corporation. Minnesota requires purchasing pools to be registered with the Commissioner of Commerce and requires the experience of the pool to be pooled and rates blended across all groups. Texas allows

The 1998 Kentucky General Assembly enacted patient protection legislation.

two or more employers to form a cooperative which must be organized as a nonprofit corporation and must file a financial statement annually with the Commissioner of Insurance.

Managed Care. The 1998 Kentucky General Assembly enacted patient protections for persons enrolled in managed care plans (KRS 304.17A-500 to 590). The United States Senate has passed S.1052, known as the Bipartisan Patient Protection Act. A House proposal, HR 2563, was approved on August 2, 2001. Although it is not known if this Congress will enact a patient bill of rights, the General Assembly may want to compare its statutes to the proposals in Congress. Kentucky has many of the provisions in S. 1052 and HR 2563, but there are differences. Under S. 1052 a state may seek certification that its state provision is substantially compliant with the federal requirement. The Congressional Budget Office has stated that S. 1052 would add 4.2 percent to premium costs.

Several states allow health plans to be sued by plan enrollees.

One of the controversial provisions in the U.S. Senate proposal that is stronger than the House proposal is the amendment of ERISA to allow a cause of action against the managed care plan for failure to exercise ordinary care in making a decision, other than a medically reviewable decision, which causes personal injury to or death of the insured. An employer may also be held liable if the employer directly participated in the decision. The Congressional Budget Office has stated that this provision in S. 1052 would add 0.8 percent to premium costs. The House proposal limits noneconomic damages to \$500,000. Arizona, California, Georgia, Maine, Oklahoma, Oregon, Texas, Washington, and West Virginia have enacted legislation that authorizes lawsuits by enrollees of managed care health plans. There is some uncertainty with these state laws because courts have held that ERISA preempts many types of enrollee lawsuits against managed care plans. For that reason it will be important for states to watch whether Congress passes patient protections that amend ERISA in this area. None of the eight state laws allow lawsuits against employers or employer purchasing groups. All state laws except Arizona require enrollees to complete the state's external review process before filing a lawsuit. Georgia and Maine prohibit punitive damages. Maine limits noneconomic damages to \$400,000. (Section 54 of the Constitution of Kentucky prohibits the General Assembly from limiting the amount to be recovered for death or injuries to person or property.)

2000 Senate Bill 98 would have amended the prompt payment of claims act to address concerns of providers.

Prompt Payment of Claims. Under the prompt payment bill enacted in 2000, a health insurer who determines that payment was made to an individual who was not eligible for coverage or for

services not covered can give written notice to the health care provider and request a refund from the provider or make a recoupment of the overpayment against future provider payments. 2001 SB 98, which failed to pass, addressed what providers deem to be an inequity in this procedure. The bill provided that upon receipt of the notice of overpayment, the health care provider can refund the insurer, authorize the insurer to recoup the payment, or contest the claim of overpayment.

The bill also required an insurer to provide the provider at the time it enters into a contract with the provider a copy of the insurer's complete fee schedule. It also required thirty days notice of any changes in the fee schedule. Current law requires insurers to pay interest on late claim payments. Insurers when paying providers do not specify which claim it is paying the interest on. SB 98 required such a designation.

Three Kentucky HMOs have low Weiss ratings.

HMO Financial Solvency. As HMO profit margins decrease, medical costs rise, cost controls are cut back, and HMOs exposure to litigation increases, it becomes more important that state regulators carefully monitor the financial condition of HMOs. Maxicare Indiana was shut down by the Indiana Department of Insurance on May 4, 2001. The Indiana HMO insured 99,000 persons including 8,800 state employees. In 2000, nineteen HMOs failed, including Advantage Care in Kentucky. At the time of its failure on November 8, 2000, Advantage Care had a D- rating by Weiss Ratings. In Kentucky, three HMOs currently are rated below D by Weiss. One HMO has a Weiss rating of E+ and two others are rated E.

Although all states have a life and health guaranty fund that assesses insurers to pay claims of the insolvent insurer, the state funds, including Kentucky's, do not cover HMO insolvencies. Some states have HMO guaranty funds. There are opponents of state guaranty funds who claim they add to costs and encourage risk taking by insurers. The 2000 Kentucky General Assembly enacted legislation that requires HMOs to comply with risk-based capital requirements established by the Department of Insurance in administrative regulations and provided requirements for an HMO to meet in transferring risk to a provider.

Federal law provides a tax incentive for medical savings accounts

Medical Savings Account. Some advocates of more affordable health insurance claim Medical Savings Accounts (MSA) provide more affordable coverage with a tax incentive. Opponents claim MSAs "cherry-pick" health risks and eventually narrow health care choices. Once a person buys a high deductible comprehensive

health plan, the person can open an MSA. Federal law allows small employers (fifty or fewer employees) and self-employed persons to establish MSAs. Contributions to MSAs are exempt from a person's gross income for federal income tax purposes. Kentucky state law has adopted the federal deductions for purposes of state taxes. The General Assembly would need to enact legislation to extend a state tax deduction for MSAs to persons other than small employers and self-employed persons.

ECONOMIC DEVELOPMENT AND TOURISM

NEW ECONOMY INITIATIVES

Prepared by Mary C. Yaeger

Question

Should the General Assembly take additional action to encourage development of the new economy in Kentucky?

Background

Kentucky's per capita income is 88% of the US average.

Information Technology is the engine of growth for productivity and increased income for Kentucky's citizens.

Kentucky ranks 36th in the nation for R&D performance.

Kentucky and all the southern states have made progress in increasing incomes over the last fifty years. The Commonwealth has shown growth in export sales, hourly wages, employment, and sector diversity. However Kentucky's per capita income has not reached the national average. When adjusted for the cost of living and quality of life, Kentucky's per capita income in 1998 ranked 36th and is 88% of the national average.

Since the mid-1990's the southern region's performance has not improved, according to the chief economist for Economy.com. The economist explained at a recent Southern Policy Growth Board conference that increased income is dependent on productivity growth. And increasingly information technology (IT) is the engine of growth for productivity. IT industries require well educated employees, and the south, with its low-education attainment is at a disadvantage. Therefore, higher educational attainment and knowledge in the broad areas of IT are critical to attracting high-tech industries.

Besides a well-educated population, science and technology are thought to be a catalyst for economic growth. A representative of the Milken Institute recently reviewed those factors necessary for Kentucky to attract and sustain high-tech industries. He listed as factors the importance of proximity to excellent research institutions and the existence of a high-tech presence.

Kentucky's R&D funding has been historically lower than most states in part due to the lack of federally funded research and development centers. According to the National Science Foundation, the twenty highest ranking states in R&D expenditures account for 86% of the US total. Kentucky ranks 36th among the states and the District of Columbia in total R&D performance for 1998.

Other important factors necessary to a high-tech economy according to the Milken Institute include:

- Traditional cost-of-doing-business advantages (a competitive tax structure, low space costs, compensatory and capital costs, and business climate);
- Access to venture capital;
- A network of suppliers;
- Technology spillovers; and
- A positive climate and quality of life.

Entrepreneurship is "the unconstrained pursuit of new ideas resulting in an innovative creation."

Another less tangible indicator of a knowledge-based economy is having an entrepreneurial culture. The 1999 *Strategies* published by the Kentucky Science and Technology Corporation defined entrepreneurship as "the unconstrained pursuit of new ideas resulting in an innovative creation." This culture, according to the report, includes supportive networks of bankers, financial lenders, wealthy individuals, corporate lawyers, and government and community leaders.

The Kentucky Innovation Act signaled the state's commitment to "develop a strong, entrepreneurial economy, characterized by knowledge, innovation, and speed."

In the 2000 Regular Session, the General Assembly passed House Bill 572, the Kentucky Innovation Act, which signaled the state's commitment to "develop a strong, entrepreneurial economy, characterized by knowledge, innovation, and speed...." While significant, this important step was not the first or only effort to shift Kentucky's economy from low-technology based to high-technology based industries.

The General Assembly has been initiating efforts to support the knowledge-based economy for some time. These include the 1990 benchmark KERA legislation, the Kentucky Postsecondary Education Improvement Act of 1997, the Research Challenge Trust Fund and the regional university Excellence Trust Fund at the state's universities, the promotion of information technology, development of the information highway, and creation of digital government.

However, the General Assembly, in passing the Kentucky Innovation Act, took a comprehensive approach to entering the new economy by promoting innovation in multiple ways, including:

- Targeting seed funds and grants to entrepreneurs and scientists;
- Providing larger grants and loans for technology infrastructure;

- Studying Kentucky current position and planning strategies to eliminate barriers and set benchmarks for the new economy; and
- Promoting entrepreneurship, applied science, and R&D funding.

Individual entrepreneurs and scientists engaging in applied research are particularly targeted through three seed funds and related grant programs:

- The Research and Development Voucher program;
- The Commercialization program; and
- The Rural Innovation programs.

Grants and loans are available for larger capital construction and investments for technology infrastructure through two funds:

- The High-Tech Construction pool; and
- The High-Tech Investment pool.

The Office of the New Economy was created within the Cabinet for Economic Development to provide direction and accountability.

The Kentucky Innovation Commission was created to advise and report on the progress in reaching the goals of the new economy initiatives.

The Office of the New Economy was created within the Cabinet for Economic Development to provide direction and accountability to the knowledge-based economy initiatives. A Commissioner of this office was appointed to manage these pool funds.

A Kentucky Innovation Commission was created to advise and report on the status of Kentucky's knowledge-based businesses, increases in R&D projects, and educational levels of workers. The Commission also has the duty to understand Kentucky's current position and to study alternative policies.

The Council for Postsecondary Education, the Cabinet for Economic Development, and the Kentucky Science and Technology Corporation are key players in the administration of these programs and have been particularly involved in seeking innovative solutions.

Discussion

Based on existing statutory authority, the Commissioner of the New Economy has recommended some initiatives that have been approved by the Economic Development Partnership and the Kentucky Economic Development Finance Authority.

The goal of the Kentucky Innovation and Commercialization Centers is to increase commercial deal flow in high growth sectors.

The Kentucky Commonwealth Seed Capital, LLC is created to promote seed and early-stage, high-growth technology based companies

- The Kentucky Innovation and Commercialization Centers (ICC) Program; and
- The Kentucky Commonwealth Seed Capital, LLC.

The ICCs are located in geographic regions and include a headquarters, an Eastern, a Western, a Central, and a Northern center. The Northern region will consist of three centers: one in Northern Kentucky, one in Lexington, and one in Louisville. The primary function of the ICCs is to help build infrastructure in high growth sectors by increasing commercial deal flow. They will do this by providing support services and access to funding.

The Commonwealth Seed Capital, LLC, a Kentucky limited liability company under KRS Chapter 275, was created and funded by KEDFA at the level of \$10,100,000. The funds are to be managed by a venture capital management team and to be matched by other investment commitments. Five million dollars are designated for seed and early-stage high-growth potential technology based companies. Additionally, five million dollars are designated for use in four regions of the state: Eastern, Western, South Central, and North Central.

These initiatives may be before the 2002 General Assembly as amendments to the current Kentucky Innovation Act language or as budget items.

Other related issues which may be before the 2002 General Assembly include:

- Elimination of legal barriers to technology transfer as identified by the Entrepreneurial Policy Audit;
- Continued funding for new economy initiatives including the endowed chairs program, the R&D initiatives, and the ICC program;
- Further support for Kentucky identified niche industries or clusters as identified in the recent report *Kentucky Clusters Industrial Interdependence and Economic Competitiveness*;
- Modification of the Commonwealth Venture Fund under KRS 154.20-300 to 390; and
- Further exploration of the state's role in obtaining an equity position in companies it supports.

VENTURE CAPITAL

Prepared by John Buckner, Ph.D.

Question

Should the General Assembly amend the Kentucky Investment Fund program to make it more attractive to investors?

Background

Venture capital firms are created to provide funding to new businesses that are considered too risky by traditional lending institutions.

With the passage of 2000 House Bill 572 (the “Kentucky Innovation Act”) and other legislative initiatives in the past decade, the Kentucky General Assembly recognized the importance of fostering an entrepreneurial environment. The availability of capital is critical to growing new businesses, particularly in an age when the time between product development and marketing is decreasing. Yet the problem of how best to provide capital to start-up businesses is not easily answered. On one hand, traditional lenders are often reluctant to risk lending funds to businesses without a track record or to those seeking to sell products in an unproven market. On the other hand, it is these very types of businesses that offer the greatest return on investment when their products or services capture a market niche in which there are few competitors. To fill this potentially profitable investment opportunity, venture capital firms provide capital infusion to high-growth businesses that are inherently risky. To a venture capital firm, while the risk may be great, so too are the potential rewards.

Discussion

Legislation was enacted in 1988 and revised in 1998 to establish a state venture capital program.

One problem for states is how best to attract venture capital firms to invest in locally-owned and operated businesses. Kentucky has made two substantive efforts in this direction, the first being the passage of the Commonwealth Venture Fund program during the 1988 Regular Session of the General Assembly. This initial effort was designed to create a state-directed venture capital mechanism to help new businesses with high growth potential to secure needed capital infusion. During the 1990-91 Interim, the Interim Joint Committee on Economic Development received testimony from a variety of venture fund representatives who argued that the initial legislation made implementation of the fund all but impossible. The primary flaws found with the legislation were that the law permitted too much involvement by public officials, too little opportunity for follow-on investments of the fund, and too many restrictions regarding how the fund would be used (e.g. mandated expenditures for agricultural ventures). Various changes were recommended, including removal of Cabinet Secretaries from the panel

establishing the fund as well as selecting the management firm and otherwise limiting the panel's influence.

The second major legislative initiative in this area came with the Kentucky Investment Fund program (KRS 154.20-250 to 154.20-284), created by the 1998 Regular Session of the Kentucky General Assembly, which repealed the Commonwealth Venture Fund and replaced it with a substantively reworked program incorporating many of the recommendations of previous sessions.

Some of the key provisions of the current venture capital program in Kentucky are:

- allowance for the establishment of a number of private venture funds rather than a single state-developed venture fund;
- a tax credit equal to 40 percent of any approved investor's cash contribution, applicable to state personal income tax or corporate license tax, and deferrable for fifteen years;
- that no qualified investments be made in a small business that is owned either in whole or in part by the investment fund or fund manager. Additionally, no investor or officer in an investment fund shall occupy any management position in any small businesses in which the fund has made a qualified investment without approval from the Kentucky Economic Development Finance Authority; and
- that a qualified business have a net worth of less than three million dollars, be actively engaged in a qualified activity within the Commonwealth, have no more than one hundred employees, and have more than fifty percent of its assets, operations, and employees located in Kentucky.

Changes in the existing law related to capital venture funding are being proposed by investment fund managers.

While many investment fund managers find that the 1998 legislation is a decided improvement over its predecessor, still they identify constraints that arguably hinder the program from reaching its full potential. Specifically, some venture fund managers suggest that the program be changed to make it more attractive to investors. First, they suggest that the current prohibition against an investor's or fund manager's occupying a management position without the approval of the Finance Authority should be removed or modified. Many venture fund investors would like the option to become directly involved with companies in which they invest; put differently, to invest not only their money, but also their time, expertise, and management skills. However, others point out the

need to separate venture capital investment from management of venture capital firms in order to avoid potential conflicts in long-term goals.

Second, current law requires that a company have a net worth of less than three million dollars. Venture firm managers contend that this ceiling is too low because of the high value of many intangible assets. Based upon a report issued by the National Conference of State Legislatures, “seed and early-stage capital needs are in the \$500,000 to \$2 million range,” which places Kentucky’s maximum net worth of an eligible small business not far above the range for seed-stage capital. On the other hand, others argue that if the ceiling is raised, it will work to defeat the purpose of giving capital access to small firms.

Third, fund managers state that the current prohibition against a fund investment in a business in which the investor or fund manager has an existing financial interest, often described as a “follow-on investment,” unnecessarily restricts both parties. They argue that such investments are often needed by new businesses, and many companies that have existing investments in venture companies would be prevented from follow-on funding under existing statutory requirements. Again drawing from a report on venture capital issued by the National Conference of State Legislatures, “in 1997 only about six percent of the \$10 billion [venture capitalists] invested went to start-ups. The majority of investments went to follow-on funding for projects originally developed by individual investors, public research centers, and private corporations.” Yet others would counter that if unrestricted follow-on investments were allowed, then the public purpose of giving tax credits in exchange for benefiting as many businesses as possible would be severely diluted.

Finally, because the Kentucky Investment Fund is structured as a tax credit program, by definition tax-exempt entities (e.g. pension funds or university endowments) are not encouraged to invest in venture companies. One suggestion is to permit transferable tax credits so that tax-exempt entities can sell their credits to tax payers. By allowing transferable tax credits, tax-exempt entities such as universities and retirement systems would be encouraged to invest in venture companies. Others have called for allowing state pension funds to invest directly in venture capital firms — last year New York used \$250 million of the state’s \$120 billion pension fund to be used by venture capital firms in investments intended for small companies.

EDUCATION

INCENTIVES AND COMPENSATION FOR TEACHERS

Prepared by Audrey Carr

Question

What options are available to the General Assembly to expand incentives and compensation for teachers?

Background

Concerns are increasing about major teacher shortages.

During the past eleven years, Kentucky has made dramatic changes in its public schools beginning with the creation of a new system of schools by the 1990 General Assembly. The changes in academic expectations for students and the governance and management of schools were accompanied by an infusion of significant state funds and technology resources for all school districts, greater emphasis on school accountability, increased demands on teachers, and emphasis on teacher quality. Simultaneously, there have been growing concerns about how to attract talented persons to pursue teaching as a career, how to provide continuous professional development to enhance existing teachers' skills, and how to retain quality teachers and fill new teaching positions as Kentucky faces major teacher shortages in critical subject areas and in specific geographic areas.

The General Assembly has taken proactive steps to address teacher quality.

The General Assembly has been proactive in addressing many of the teacher quality issues:

- In 1998, the General Assembly enacted legislative changes to increase the Education Professional Standards Board's oversight of the qualifications of persons entering the teaching profession and to require the Board to make it possible for talented persons to enter the teaching profession through alternative routes. The General Assembly also revised the statutes dealing with professional development of certified staff and provided additional funds for the recruitment of minority teachers.
- In 1999, a legislative Task Force on Teacher Quality completed a study which identified that recruitment and retention of highly qualified individuals in the teaching profession were major concerns. The task force noted that there appeared to be a strong correlation between compensation, benefits, and the work environment and attracting and retaining persons in teaching. The task force noted that Kentucky was lagging behind many of the southern states and behind approximately thirty other states in average teacher salaries.

- In 2000, the General Assembly enacted several legislative changes proposed by the 1999 task force, including providing incentives for teachers to pursue professional development; providing financial benefits to teachers who earn certification by the National Board for Professional Teaching Standards; creating the Teachers' Professional Growth Fund and the Center for Middle School Academic Achievement; permitting a limited number of teachers to return to classroom teaching in shortage areas without penalty to their retirement annuities; reemphasizing the evaluation of certified personnel; and requiring the Kentucky Department of Education in collaboration with others to develop a statewide recruitment and retention program; and adopting SCR 88 which required the Interim Joint Committee on Education to conduct a study of teacher compensation and benefits and to develop recommendations so that by 2004 Kentucky's teachers' salaries and benefits shall mirror the national average.

Discussion

Stakeholders agree increased compensation is needed, but disagree on how best to achieve that.

There is considerable agreement among various education advocacy groups as well as the private sector that quality teachers deserve pay and benefits comparable to other professionals and that current pay levels are inadequate. However, the options for

increasing compensation do not garner the same level of agreement. The largest teachers' organization in Kentucky believes the traditional single salary schedule that awards compensation based on years of experience and levels of educational rank must be continued and across the board raises to the salary schedule are needed before other means should be considered. Other groups aren't in complete agreement. Differentiated pay that rewards demonstrated excellence in teaching and improved student achievement and meeting identified career levels are ideas suggested by the others.

Some education-based groups believe differentiating pay beyond the single salary schedule based on demonstrated knowledge and expertise, subject area specialty, and teaching in difficult school assignments may be in order. Likewise, most of the stakeholders believe permitting districts to grant signing bonuses in shortage areas is viable.

All stakeholders agree that lengthening the employment year is needed, but there is no consensus on how the days should be distributed.

All stakeholder groups agree that lengthening the employment year for teachers is needed although there is some disagreement as to

whether the increased length of the employment year should be for increasing professional development and planning days or increasing the instructional days or doing some of both. The General Assembly will be faced with the difficult task of considering a variety of actions, some of which may be in the form of enabling legislation as well as high cost options that may need to be phased-in over time. Some options that have been suggested for incentives and compensation include:

Various options have been proposed for addressing the issue of teacher compensation.

- Adopt enabling legislation to permit districts to provide alternative professional compensation plans at the district level rather than a single salary schedule or as modifications to the single salary schedule.
- Provide a matching fund and enabling legislation for those districts that wish to provide financial incentives for paraprofessionals to seek teacher certification and to give service within the district.
- Amend the current statutes relating to the school calendar to phase-in a lengthened school year to allow for more planning, curriculum development, professional development, and student instruction.
- Amend the current teacher scholarship program to remove the needs-based requirement in order to provide incentives to attract individuals to teaching.
- Increase the basic salary levels for beginning as well as veteran teachers with less compression in the salary schedule between 20 and 30 years of experience.
- Retain the single salary schedule as a base for compensating all teachers, but provide extra compensation for the following:
 - Demonstrated knowledge and performance in the classroom;
 - Mastery of established career levels;
 - Demonstrated leadership in teaching and school-based roles; and
 - Acceptance of assignments in teaching shortage areas including subject matter and geographic shortages.
- Expand funding for the Teachers' Professional Growth Fund and the National Board Certification Incentives.
- Clarify existing statutes to specify that districts may provide signing bonuses or other financial incentives to recruit teachers when geographic or content-specific shortage areas or a lack of diversity have been identified.

COMPENSATION OF CLASSIFIED EMPLOYEES IN LOCAL SCHOOL DISTRICTS

Prepared by Ethel Alston

Question

Should the General Assembly adopt a statewide salary schedule to ensure that compensation of classified employees in local school districts is adequate and competitive?

Background

Classified employees play a vital role in education; many earn modest wages, trailing their private sector counterparts.

The adequacy of compensation and benefits provided for classified employees in local school districts has been of great concern in recent years. Classified employees have an important role in the overall quality of educational experiences of students by providing for the efficient operation of school services and facilities and for a safe school environment. Their salaries have been historically modest, trailing salaries of their private sector counterparts. With the escalating costs of health and life insurance and other benefits, net compensation has shrunk dramatically.

While minimum salaries for teachers are dictated by the single salary schedule imposed in the biennial budget, classified employees are subject to wages and benefits, fixed by local school districts.

The Interim Joint Committee on Education conducts a study of classified employees' compensation.

The Interim Joint Committee on Education was charged in 2000 House Concurrent Resolution 114 to conduct a study of the compensation of classified employees to determine its adequacy and make recommendations regarding the propriety of a statewide salary schedule and cost of living adjustments.

The payroll for 48,470 classified employees exceeded \$651 million in FY 2000-01.

The preliminary study conducted by the Subcommittee on Classified Employees Compensation reveals some interesting facts about the public service of classified employees. During the 2000-01 school year, 48,470 persons were employed across the state in the fields of communications, custodial and maintenance, fiscal, food services, enforcement, health care, instructional, library/media, management, personnel, purchasing, secretarial/clerical, student services, transportation and warehouse. The state payroll total exceeded \$651,858,000.

Female employees outnumber males almost 4 to 1.

In FY 2000-01, 38,368 females and 10,102 males served as classified employees. The largest job classifications-food service, health, instructional, and secretarial/clerical-are predominately

filled by female employees. Among the 269 job classifications, 53 were totally occupied by females. In some local school districts, these job classifications had pay ranges beginning at the state minimum wage, \$5.15 per hour. Males dominated forty-one job classifications in vehicle maintenance, grounds and facilities maintenance and HVAC technician. These positions had a minimum starting rate higher than the minimum wage.

2600 classified employees performed more than one job, most often serving as an instructional aide and a bus driver or monitor.

Based on a classified staff data report for FY 2000-01, 5,611 jobs were filled by 2,681 persons holding more than one job representing 11.6% of the jobs reported. The average annual salary for multiple job holders working 180 contract days was approximately \$18,352. About seventy percent of the full-time multiple job employees earned between \$12,000 and \$35,000.

Length of service and cost of living adjustments are dominant factors in wage and salary increases.

From information obtained in a survey of the local school districts, the dominant factors in wage or salary increases are longevity and experience in the job position and cost of living adjustments. In school year 2001, 164 school districts adjusted classified employees' salaries by 2.2% or more, the minimum amount stated in the state budget for adjusting teachers' salary schedules.

Classified employees are generally offered a full range of benefits.

The benefits offered to classified employees are comparable to those granted certified employees. These include dental insurance or reimbursement plans; emergency, personal and sick leave; expanded life or disability insurance coverage; uniform allowances for certain job classifications; and travel allowances while employees are on the school district's business.

Discussion

A hallmark of the Kentucky Education Reform Act was local governance and decision-making. This philosophy is incorporated in KRS 160.290 granting to each board of education the general control and management of the public schools, funds, property, and the power to appoint the superintendent and fix the compensation of employees.

Study on classified employees' compensation is due fall 2001.

The Interim Joint Committee on Education will complete its study on compensation of classified employees in fall 2001. The Subcommittee on Classified Employees' Compensation has heard testimony from stakeholders and reviewed financial data from the state and school districts. A report based on testimony and data will be presented by November 2001. The subcommittee will consider

national and regional reports on wages and salaries of comparable jobs in the public and private sectors to determine if classified employees' wages are adequate and competitive.

Other areas for consideration of legislative action include prescribing a minimum statewide salary schedule for classified employees and mandating cost of living increases that are comparable to the increases for certified personnel. Conversely, the committee may consider not taking any action, thereby maintaining the status quo and reaffirming local control and authority to establish the salaries and benefits of school district employees.

ENERGY

BIODIESEL

Prepared by D.Todd Littlefield

Question

Should the General Assembly pass legislation to encourage the development of biodiesel as an alternative fuel for trucks and cars?

Background

What is biodiesel?

Biodiesel is a cleaner-burning replacement for petroleum-based diesel fuel. Biodiesel can be manufactured from most vegetable oils, animal fats, and recycled greases. It may be blended with conventional diesel fuel or burned "neat." Most frequently, however, it is used as a fuel additive in 20% blends (B20) with petroleum diesel in compression ignition engines. The United States produced about five million gallons of biodiesel in 2000, but U.S. capacity is nearly fifty million gallons per year and growing. U.S. producers frequently use recycled cooking oils and soy oil in the production of this fuel. Biodiesel is currently used in some federal, state, and transit fleets as well as in marinas, tourist boats and other sites where environmental concerns are high. There is growing interest in using biodiesel where workers are exposed to diesel exhaust and in locomotives that operate in reduced-emission environments. Recent news reports indicate that efforts to blend biodiesel with jet fuel are being attempted in order to reduce emissions and reduce handling and storage concerns.

Biodiesel is non toxic, biodegradable, and has a higher flashpoint than conventional diesel, giving it considerable advantages in handling and transportation. It can be blended and burned in combination with other diesel fuels in conventional diesel engines, generally without modification. Minor modifications may be necessary if 100% biodiesel is used. Emissions produced from the combustion of biodiesel are improved in most areas as compared to petroleum diesel. In blends or neat, it offers significant reductions in unburned hydrocarbons, sulfur, carbon monoxide and particulates as compared to petro diesel. Biodiesel has completed EPA Tier I Health Effects testing under section 211(b) of the Clean Air Act. However, nitrogen oxide emissions can be as much as six percent above those from conventional diesel. Biodiesel is superior to petro diesel in lubricating properties. In January of this year, the EPA finalized a rule reducing sulfur levels in diesel fuel by ninety five percent. This will affect the lubricity of petro diesel. The

resulting loss of lubricity could be addressed by using biodiesel blends.

Discussion

Encouraging biodiesel manufacture and use in Kentucky has economic impact.

Supporters of biodiesel use suggest that it can help reduce dependency on foreign oil while simultaneously giving a boost to farmers who raise oilseed crops such as soybeans, hemp, and rapeseed. In a recent study, the U.S. Department of Agriculture and the Economic Research Service estimated that an annual demand for 100 million gallons of biodiesel would increase soybean oil prices by fourteen percent. An increase in soybean oil use of 200 million gallons per year would boost total crop cash receipts by \$5.2 billion over ten years, resulting in an average net farm income increase of \$300 million per year. The price for a bushel of soybeans would rise by an average of seventeen cents annually during the ten-year period. Others note that rising demand for soybeans and the probable increase in price caused by such a rise would negatively impact existing large purchasers of soybeans and soy products.

Biodiesel can be used to attain EPACT compliance.

In 1998, B20 was approved by Congress as a compliance strategy for fulfilling the requirements of the Energy Policy Act of 1992 (EPACT). EPACT fleets (states and other owners of large vehicle fleets) are required to purchase alternative fuel vehicles. Fleet operators can meet their alternative fuel vehicle purchase requirements by buying 450 gallons of biodiesel and burning it in new or existing diesel vehicles in at least a B20 blend. This has been found to be among the lowest-cost alternative fuel options for EPACT compliance.

Legislative proposals encourage biodiesel manufacture and use in other states.

Several states have considered and some have enacted legislation to promote biodiesel use. Kansas has implemented a program in which state vehicles and equipment which burn diesel will use a blend of two percent biodiesel (B2). A bill before the Minnesota legislature last session would require all diesel sold within the state to contain at least two percent biodiesel for a number of years, followed by an increase to five percent. Although the statewide biodiesel effort in Minnesota did not pass, the legislature there did pass a bill that requires the evaluation of developing energy sources from resources derived from agricultural production, including biodiesel. A less-stringent approach might require retail vendors to make a biodiesel blend available for sale. Biodiesel bills, or alternative fuel bills that could have a positive impact on biodiesel, passed in Washington, Hawaii, Nevada, Arizona, Montana, South Dakota, North Dakota, Iowa, Missouri, Arkansas, Indiana and Georgia. It

should be noted that any fuel which displaces petroleum demand could impact the petroleum industry.

Other states are providing tax incentives for those manufacturing and using biodiesel within the state. A bill passed in Montana establishes a revolving loan fund for alternative energy systems, which includes biodiesel use. Several states have passed various biodiesel tax exemptions, including Hawaii, where legislation establishes the tax rate for biodiesel at half the rate for diesel. As with any tax exemption, the reduction in revenue would have to be made up from other revenue sources. Successful bills in Missouri and Iowa established a biodiesel revolving fund, which pays the cost of biodiesel fuel used by state agencies through a self-sustaining fund generated by the sale of banked EPACT credits.

MERCHANT ELECTRICITY GENERATING PLANTS

Prepared by Tanya Monsanto

Question

Should the General Assembly enact legislation to provide for regulating the facility siting of merchant power plants?

Background

Merchant power plants are not utilities and the price and supply of the wholesale power they produce is not regulated by any state or local regulatory body.

Merchant power plants are not required to sell any of their power to Kentucky utilities.

In Kentucky, the number of applications to construct electric generating units rose from zero in 1996 to 12 in 2000.

Merchant power plants are electric power plants that sell power competitively on the wholesale market. Because they produce only wholesale power, the price and supply of the power is not regulated by state or local authorities. Therefore, merchant power plants are not utilities because they do not sell any of their power to retail electric customers. Since 1999, merchant power plants have been locating throughout Kentucky much to the consternation of some residents, local officials, utilities, and regulators. The rapid influx of these plants has caused policymakers to question the impact of these new entities on the Commonwealth.

Power plants, regardless of whether they are merchant or utility, have the potential to negatively impact air, soil, and water quality and to create a visual blight to scenic landscapes. Merchant power plants have no requirement to sell power to any utility serving customers in Kentucky, and this raises concerns for some policymakers who think the location of merchant power plants should be regulated. Most states regulate facility siting of power plants to some extent. Kentucky is the exception in that it doesn't regulate the siting of either merchant or utility power plants.

The number of merchant plants in the South Central region of the United States—Alabama, Kentucky, Mississippi, and Tennessee—has increased dramatically since the wholesale electric power market was deregulated in 1996. After 1996, power producers moved to sell their commodity in the newly competitive wholesale market to garner higher profit margins. According to the Energy Information Administration (EIA) electric generation by nonutilities in the South Central region between 1998 and 1999 rose from five percent to seven percent of total generation for the region. Of course, most of electric generation still comes from regulated utilities.

This trend toward increasing generation by nonutilities is more dramatic in Kentucky. According to EIA, in 1998 generation by nonutilities was approximately five percent. That percentage rose to twelve percent by 1999. Regional trends are magnified by the rapid growth of power plants in the Commonwealth. In 1996 and 1997,

the Kentucky Division of Air Quality had received no applications to construct electric generating units. The first application to construct was received in 1998, but the number of applications had risen to twelve by the year 2000. The dramatic interest in establishing facilities in Kentucky was the result of deepening competition in the wholesale electric markets and the opportunity to enter retail electric markets in surrounding states. Legislation or regulatory order permitting retail electric competition has been passed in Illinois, Ohio, W. Virginia, and Virginia.

Discussion

Facility siting for electric generation is under state jurisdiction and Kentucky has no state wide authority for regulating the site for a merchant power plant.

Unlike siting for transmission lines, the federal government has maintained that power plant siting is under state jurisdiction. To cope with the potential negative consequences of power generation, some states regulate where power plants may be located. A number of states already have laws regulating the siting of power plants by either an independent board or by the state utility commission. Florida and New York both have an independent board that evaluates the suitability of a proposed site for power plants. In Indiana and Minnesota, the state utility commission approves or denies all applications for power plants.

Kentucky is unusual in that there are no laws that regulate where power plants may be sited. Until recently, most new power generation was planned by utilities to serve the customers in the utility's service territory. In short, the demand for power locally coincided with the plan for new generation. New generating capacity was added incrementally and tended to be located on the existing utility's land.

The proliferation of power plants in Kentucky caused the Governor to place a moratorium on new applications and set up an Energy Advisory Board to review the siting process.

In light of the increase in requests for new power plants, Kentucky has taken some steps to evaluate the impact of new generating capacity on the environment and the transmission system. On May 16, 2001, the Governor created the Energy Advisory Board to examine the transmission system, power reliability and the impact of merchant plants on the Commonwealth. On June 19, 2001, a six-month moratorium was placed on new applications to construct an electric generating unit. During the moratorium, the Kentucky Division of Air Quality will be conducting an assessment of the cumulative impact of existing applications on the state's air quality. The Kentucky Public Service Commission (PSC) initiated Administrative Case 387 in response to the moratorium and the creation of the Energy Advisory Board. The commission will gather information on the adequacy of the transmission system and generating capacity in the state. Merchant plants are expected to be an important part of the review of transmission and generation related reliability in the Commonwealth.

Proponents of facility siting regulation raise a number of points. First, they indicate that local governments have neither the staff nor the resources to evaluate the suitability of a proposed location or the economic development advantages of attracting a power generator. The fact that many locales do not have planning and zoning laws raises concerns about a power generating facility locating in an urban or heavily residential area. Some proponents have advocated the establishment of state-wide setbacks from areas declared unsuitable for locating a power plant. Third, proponents point out that merchant plants do not have to serve Kentuckians, but they utilize the state's scarce resources. Proponents ask at what cost should the Commonwealth accept the locating of a merchant power plant in Kentucky.

Opponents make a number of arguments against siting regulation. First, merchants contend that most of the plants coming to Kentucky are gas-fired peaking units which are smaller, quieter and less polluting than traditional coal or oil-fired generating units. Only eight of the twenty-four applications pending at the Division of Air Quality as of June 19, 2001, will burn coal. Second, merchant power suppliers utilize relatively more environmentally clean and efficient generating technologies for burning coal. They say creating any barrier to siting a merchant plant is akin to creating a barrier to technological innovation, one that can increase Kentucky's market for coal and waste coal. Finally, merchants argue that the growth of a robust wholesale electric power market ultimately benefits Kentuckians. Regulation of siting will translate into a barrier to entry for new power suppliers, and any constraint on new suppliers may lead to higher power prices in the wholesale market.

**HEALTH AND
WELFARE**

PRESCRIPTION DRUG COVERAGE FOR THE ELDERLY

Prepared by Robert Jenkins

Question

Should the General Assembly implement a state prescription drug coverage program for the elderly in Kentucky?

Background

Drug therapies are allowing people to live longer and with a better quality of life.

As the United States Congress continues to debate differing proposals that would provide some form of prescription drug coverage for the elderly, Kentucky's senior citizens continue to examine their options for obtaining the medications necessary to maintain good health and to fight disease. The extent of the struggle is reflected in population projections from the University of Louisville's Kentucky Data Center, which reports that there are nearly 495,000 residents over age sixty-five, and that this number will increase by 2010 to over 551,000 and by 2020 to nearly 720,000. Drug therapies will continue to have a critical role in medicine as more life-sustaining and quality-of-life drugs are developed and used.

Most of the elderly who have drug coverage have private Medicare supplemental coverage, either through employer-sponsored plans or individually purchased policies. About one-fifth of this number has had coverage through a Medicare HMO, although many HMOs are terminating their relationship with Medicare. Of those persons with *no* drug coverage, most have private supplemental health insurance that covers health costs for things other than prescription drugs.

Many older people do not have insurance coverage (either Medicare or private) for drug therapies.

Based on research reported in *Health Affairs*, it is estimated that the *average* elderly person incurs prescription drug charges between \$700 and \$900 each year, with the higher number reflective of the charges incurred by Medicaid recipients. About one-third of noninstitutionalized senior citizens have no prescription drug coverage.

Several factors have been suggested for the lack of drug coverage. Drugs are not covered by Medicare, and because fewer people are purchasing coverage on their own, the risk is not being spread over as large a population. Many poor Medicare recipients cannot afford any type of supplemental coverage, and some of the coverages (Medicare HMOs) previously available in some areas were not available in others. Other persons have been denied drug coverage because of health problems, while others were unable to afford the

deductible and cost-sharing requirements. Yet another problem is the realization that in the future fewer retirees may have coverage under employer-sponsored plans because retiree health coverage is declining as a benefit.

Many states currently offer some form of prescription drug assistance to their older citizens.

Understanding the concerns of their citizens, states have grappled with prescription drug programs since the 1970s. Currently, sixteen states have operational pharmacy assistance programs, and an additional five states are awaiting implementation of programs authorized by legislative enactment in either 1999 or 2000. The amount of drug coverage, types of drugs covered, and requirements for coverage differ substantially among the states. It is this fact that makes a comparison of plans difficult and that, some think, underscores the need for a certain standard to be set by the federal government.

Some states have enacted laws that provide for discounts for the elderly based upon Medicaid rates. These laws would allow the elderly to take advantage of certain drug discounts and rebates available to the states. Other states have made broader use of federal health centers, which sell prescription drugs at discounts similar to the Medicaid rate. Some states use bulk purchasing to achieve greater price discounts, while others have price controls or maximum prices. Some state plans use a combination of these methods.

Legislation on this issue was considered by the 2000 General Assembly and the 2001 General Assembly.

The 2000 Kentucky General Assembly considered HB 364, which would have provided limited prescription coverage of \$700 per year for elderly persons meeting certain low-income requirements. The bill set aside \$10,000,000 in each year of the biennium to fund the program. There was discussion that the program could be funded out of proceeds from the Tobacco Settlement and that the program would sunset after two years. The bill was not reported out of the Appropriations and Revenue Committee.

The 2001 Kentucky General Assembly considered SB 103, which would have created a pharmaceutical assistance program administered by the Department of Insurance. The bill permitted lower-income Kentucky residents over age sixty-five to buy into the program, with premiums, deductibles, and copayments based upon a sliding scale. Funding, aside from premiums, would be secured from federal and private grants, rebates, and state appropriations.

Discussion

Almost every state has considered a prescription drug assistance program within the past year. Each proposal would have had a cost

of some form on the consumer, whether in the form of copayment, payment of premium, deductible, or other cost after a certain cap on coverage was met. Each proposal would have had a cost to the state, either in the form of a tax credit or through the cost of direct assistance to low-income seniors or other residents. Each proposal would have had a cost to the health care provider, either through lower receipts for drugs, less utilization, or increased oversight from a state or insuring entity.

Many people view prescription drug coverage as a federal issue and thus as a service that should be covered by Medicare.

Most plans had some method of directly subsidizing the cost of drugs for low-income elderly, although an increasingly common component has been a price limitation to the Medicaid reimbursement amount. California reported a savings of twenty-four percent for the state's 1.3 million Medicaid beneficiaries since its program went into effect in February 2000. The state of Washington estimates savings of up to forty-nine percent for its seniors. Most of these plans will require change if Congress includes prescription drug coverage among the covered services by Medicare.

Many options are available for inclusion in a pharmaceutical assistance program.

If the issue is to be considered during an upcoming session, certain decisions relating to coverage may be necessary. The General Assembly may want to consider:

- Whether Congress has mandated drug coverage in Medicare. If it has, then consideration may be given to whether Kentucky should subsidize an additional program. If not, consideration may be given to alternative proposals;
- Whether state assistance may take the form of tax credits or deductions;
- Whether the elderly, pharmacies, or pharmaceutical companies, or a combination of these groups, should bear the brunt of the cost of the program;
- Whether premiums, deductibles, and/or copayments will be required; and
- Whether a maximum benefit should be imposed on any state prescription drug program implemented.

CONTAINING THE COST OF MEDICAID PRESCRIPTION DRUGS

Prepared by Barbara Baker

Question

What strategies could the General Assembly consider to contain the costs of prescription drugs in the Medicaid program?

Background

Kentucky Medicaid Program anticipates a \$280 million shortfall for fiscal year 2001.

Prescription drugs are the fastest growing Medicaid expense.

New drugs and open formularies may have increased Medicaid costs.

The Kentucky Medicaid program is anticipating a shortfall in excess of \$280 million for the fiscal year that began in July 2001. Prescription drug costs are the fastest growing expenditure in the Kentucky Medicaid program. For fiscal year 2001, prescription drug expenditures grew to \$568 million, a thirty-one percent increase over the previous fiscal year.

Nationally, prescription drug costs account for the fastest growing expenditure in the Medicaid program, rising by fifty percent between 1992 and 1998. The national growth rate in prescription drug prices is about eighteen percent per year. The Centers for Medicare and Medicaid Services estimates that prescription drug spending will increase by 17.4 percent and 16 percent in federal fiscal years 2001 and 2002, respectively.

Many factors have affected the rising cost of prescription drugs. According to the National Institute of Health Care Management, sales from twenty-three new medications accounted for about half of the spending increase in 2000. The demand for these new drugs has been increased by direct-to-consumer advertising. The population of the United States also is greying. The aging population has increased risks of chronic medical conditions that require more drugs, and there are new drugs for the treatment of diseases that were previously not treatable and new drugs that improve the quality of life.

In Kentucky, legislation that passed in the 1998 Regular Session of the General Assembly requires all new drugs to be available for one year without any prior approval from the Department for Medicaid Services. Some individuals believed that this created an unfair playing field and limited access to drugs that had been on the market for longer than a year. Legislation followed in the 2000 Regular Session of the General Assembly that required any drug in the same category and having comparable clinical application, efficacy, safety, and comparable cost to a drug available without

prior authorization to also be available without any prior approval. Representatives from the Department for Medicaid Services have claimed that these two policies combined have prevented them from implementing cost containment strategies. However, the department has the right to require prior authorization of any product that the commissioner determines may pose any inappropriate financial burden upon the Medicaid program.

Effectiveness of new drugs may defer costs related to hospitalizations and emergency room use.

In making decisions about how to access new drugs, it is also important to consider the effect of new drugs on the total cost of care. While new drugs may be more costly, they may also be more effective. People are living longer because of the advances in drug therapy. Also, the cost of hospitalizations and emergency room visits may be decreased due to access to new drugs.

Discussion

States have tackled the cost of prescription drugs through price controls, bulk purchasing, and utilization control. A summary of selected cost management approaches that states are using are presented in the following paragraphs.

Pharmacy Prior Authorization

Prior authorization is a process that most states use to limit access to high cost prescription drugs. However, some states provide open access to new products. Medications that generally require prior authorization include the following types of drugs: antihistamines, anti-ulcer drugs, nonsteroidal anti-inflammatory agents, growth hormones, lipase inhibitors, and pain relievers. Prior authorization is commonly implemented through an independent organization.

Prior authorization can limit access to necessary drugs.

Prior authorization can create barriers to access to needed medications. Some physicians are reluctant to go through the prior authorization process because of the time for review and approval. It is important to have an infrastructure in place to expedite the process.

Two anti-ulcer drugs account for the top drug expenditures for the Kentucky Medicaid program. West Virginia saved \$6.8 million the first year by prior authorizing acute anti-ulcer therapy beyond 90 days.

The Lewin Group, a health policy consulting firm, estimated that about \$50 million per year can be saved by adopting prior authorization for a handful of overutilized drugs. Kentucky could consider prior authorization for drugs that account for the greatest cost to the Medicaid program. For fiscal year 2001, the two top drug expenditures in the Kentucky Medicaid program were for anti-ulcer medications, accounting for \$44 million. Selective Serotonin Reuptake Inhibitors (SSRI) type antidepressants (Prozac, Paxil,

Zoloft, and Celexa), Cox-2 inhibitors (nonsteroidal anti-inflammatory drug), and antihistamines were also identified as high cost drivers.

West Virginia implemented guidelines to control the cost of anti-ulcer medications, which were the most expensive class of drugs for their program. The recommendation by the manufacturer is that the acute dose only be administered for ninety days followed by a maintenance dose. Any acute dose beyond ninety days required prior approval; however, maintenance dosing did not require any approval. West Virginia saved \$6.8 million in 1997 as a result of this policy change.

Another approach to prior authorization is to target a small group of benefits based on cost, utilization, and best practices. This approach minimizes the resources needed to implement while maximizing the results. This approach would require that prior authorization services are consumer friendly and easily accessed 24 hours a day, seven days a week.

Prior authorization may interfere with physicians making medical decisions.

While there are many advocates of the use of prior authorization, others may see this strategy as governmental interference with private enterprise. In addition, some individuals may believe that prior authorization represents interference with the physician and patient relationship. Diminished access to necessary prescription drugs may result due to these policies.

Generic versus Name Brand Limits

Florida and West Virginia impose limits on the number of brand name drugs.

To capitalize on savings, several states including Florida, Arkansas, and Georgia promote the use of generics through various approaches. Some states impose a limit on the number of brand drugs that a beneficiary may receive per month. For example, Florida has a four brand limit, which does not apply to generics. Arkansas only prior authorizes drugs for which there is a generic equivalent.

Prior authorization may be required for brand name drugs.

One approach to control utilization is to require prior authorization for brand names for which generics are available. Generic drugs contain the same active ingredient as the name brand drug. However, some people believe that clinical outcomes may differ when using some generics instead of the branded product. In some cases, a brand name drug may be more effective in terms of the overall medical costs, patient compliance, and health outcomes.

Another measure is to provide a small quantity of a drug without prior authorization, followed by an evaluation that the treatment is working and is essential to care. Prescriptions for some drugs could also be limited to the dosage and duration of therapy recommended by the manufacturer, official United States Pharmacopoeia, or scientific medical literature for the disease for which it was prescribed.

Supplemental Rebates

Pharmacy companies provide supplementary rebates in Florida.

In 2001, the Florida legislature passed a law that authorized its Medicaid agency to negotiate supplementary rebates with pharmaceutical manufacturers. Providing rebates in addition to those required by federal law assures the manufacturer an opportunity to present evidence supporting the inclusion of their products on the preferred drug formulary. Instead of providing additional rebates, One drug company negotiated a deal with Florida designed to decrease prescription drug costs through case management. The company guaranteed that its program would save the state of Florida \$15 million in the first year and \$18 million in the second, and agreed to donate drugs to 30,000 to 50,000 Medicaid recipients at some community health centers.

While supplementary rebates may help contain the costs of the Medicaid program, it may be seen as coercion by threatening drug companies. A legal complaint has been filed because of the supplemental rebate requirements in Florida. This strategy also has the potential of limiting a patient's access to necessary drugs.

Bulk Purchasing and Price Controls

Numerous states are forming bulk purchasing cooperatives to cut prescription drug costs.

About twenty-nine states have some sort of legislation to lower the cost of drugs to additional segments of residents through discount programs, bulk purchasing programs, expanded rebates, or price controls. In 2000 legislation, Maine required pharmaceutical discounts from drug companies by consolidating purchasing for residents without pharmaceutical coverage. Pharmaceutical companies are required to make their prices "reasonably comparable" to those charged to the lowest-paying customer in the state and allowed for penalties for noncompliance. Texas, West Virginia, and Arkansas passed legislation during the 2001 Session that authorized bulk purchasing of drugs.

States are forming groups for the purpose of purchasing drugs at lower costs. Six New England states plus New York and Pennsylvania formed the Northeast Legislative Association on Prescription Drug Pricing. New Hampshire, Maine, and Vermont governors formed a Northern New England Tri-State Coalition. This action was authorized by legislation in Vermont and Maine. This later group announced on May 24, 2001, that the three states plan to pool Medicaid money for purchasing prescription drugs. They reported that they expect to save ten to fifteen percent a year on prescription drugs through their combined buying power. Numerous other states are considering similar actions.

Limit on Number of Prescriptions

Some states, such as West Virginia, impose a limit on the number of drugs that a Medicaid beneficiary can receive without prior approval. Some people believe that this is an arbitrary practice that could impose barriers to access to much-needed drugs. Limiting Medicaid drug benefits could lead to unintended consequences, such as increased hospitalizations and emergency room visits.

Drug effectiveness and quality of life are factors to consider in implementing cost-containment strategies.

Prescription drugs account for the largest growth in Medicaid spending. Numerous options can be considered to decrease the growth in prescription drug expenditures, including strategies to decrease inappropriate utilization, price control, and form bulk purchasing coalitions. As these issues are debated, factors to consider include the cost effectiveness of drugs in terms of patient outcomes, patient compliance, and overall costs.

MEDICAID COST CONTAINMENT

Prepared by Barbara Baker

Question

What strategies could the General Assembly consider to contain costs and improve the quality of care within the Medicaid program?

Background

The Kentucky Medicaid program anticipates a shortfall of \$280 million for fiscal year 2001.

Nationwide, Medicaid expenditures are expected to increase by 9.8 percent for federal fiscal year 2001.

Federal law requires Medicaid to include certain benefits.

Prescription drugs, KCHIP, and long-term care have affected the growth of Medicaid costs.

Kentucky expects a Medicaid budget shortfall in excess of \$280 million for the fiscal year beginning July 2001. Over two-thirds of the states estimate that Medicaid expenditures in the current fiscal year will exceed the budgeted amounts. For fiscal year 2000, Kentucky had a Medicaid growth rate of 6.8 percent, which is less than the national average.

Since its creation in 1965, costs in the Medicaid program have increased more rapidly than costs for health care services in general and have accounted for a larger share of the total health care dollars spent in the United States. Although the current growth rates in Medicaid are less than the double digits experienced in the early 1990s, Medicaid is projected to grow by 8.6 percent from 2001 through 2011, with an average increase of 9.8 percent estimated for federal fiscal year 2001.

There are many factors that have contributed to the rising cost of Medicaid expenditures. Medicaid offers a comprehensive package of benefits to its beneficiaries and is frequently criticized because the benefits are often more generous than those offered by private insurance. The federal government mandates the inclusion of many of these benefits, and Kentucky, like other states, has expanded Medicaid benefits in order to maximize their federal Medicaid funds. Also, Medicaid beneficiaries are generally living in poverty or have disabilities that make comprehensive services essential.

Prescription drug costs and the aggressive enrollment in the Kentucky Children's Health Insurance Program (KCHIP) are frequently identified as the cause of the rising growth in Medicaid expenditures. This is also the case in most states that are experiencing a Medicaid shortfall. Another factor affecting the cost of Medicaid is the cost of long-term care. For fiscal year 2000, long-term care Medicaid expenditures totaled \$824 million in Kentucky, seventy-seven percent being for institutional care and only twenty-three percent for home and community based care.

Discussion

Deficits in Medicaid could touch other programs and services.

The Governor has appointed an Executive Steering Committee on Medicaid.

The Medicaid Managed Care Oversight Advisory Committee is hearing testimony on how to improve the program.

Prescription drugs are the fastest growing cost for the Medicaid program.

Medicaid budgets make up a major portion of state budgets. The potential that these rising expenditures could touch many other services, such as education, has prompted states to consider various ways to overhaul their Medicaid programs. Policy changes have focused on decreasing utilization, prescription drug costs, and long-term care costs.

In Kentucky, the Governor's Executive Steering Committee on Medicaid recently recommended several policies to address the anticipated shortfall for state fiscal year 2002. These strategies include freezing provider reimbursement rates at the level paid at the end of the state fiscal year 2001, negotiating intragovernmental transfers, moving disabled recipients into the KenPAC program, and decreasing the dispensing fees for prescription drugs. These policies have been implemented by the Department for Medicaid Services.

The General Assembly's Medicaid Managed Care Oversight Advisory Committee (MMCOAC) has developed a workplan to build a consensus on how the Medicaid program could be restructured to assure that beneficiaries receive the necessary care, that providers are reimbursed fairly, and that care is provided in the most efficient and cost effective environment. The committee has heard testimony from officials of other state Medicaid programs and providers and is holding regional meetings to get input from local Medicaid providers and recipients.

Testimony before the MMCOAC included several strategies to contain costs and improve the quality of the Medicaid program. These strategies, as well as strategies used by other states, are summarized below.

Prescription Drug Costs

The cost of prescriptions drugs is the fastest growing expenditure in the Medicaid program, rising by fifty percent between 1993 and 1998. According to the National Institute of Health Care Management, sales from twenty-three new medications accounted for about half of the spending increase in 2000. Demand for new drugs has been affected by direct-to-consumer advertising. In Kentucky, Medicaid drug expenditures grew from \$433 million in fiscal year 2000 to \$568 million in fiscal year 2001, which is about a thirty-one percent increase.

Maine passed laws to require discounts.

States have tackled the problem of prescription drug costs through price controls and bulk purchasing strategies. Maine passed a law in 2000 that required pharmaceutical discounts from drug companies by consolidating purchasing for residents without pharmaceutical coverage. Pharmaceutical companies are required to make their prices "reasonably comparable" to those charged to the lowest-paying customer in the state and allows for penalties for noncompliance.

Pharmacy companies provide supplementary rebates in Florida.

Florida saved approximately \$243 million from changes in their pharmaceutical program. These changes include a four brand limit, thirty-day fill limit, and case management. In 2000, the Florida legislature authorized its Medicaid agency to negotiate supplementary rebates with pharmaceutical manufacturers. Manufacturers would be assured an opportunity to present evidence supporting inclusion of their products on the preferred drug formulary. Prior authorization for highly utilized or high cost drugs is also seen as a way to encourage use of less expensive drugs.

These strategies are viewed by some as government interference with private enterprise. Others may believe that these strategies represent interference with the physician and the patient relationship. Diminished access to necessary prescription drugs could also result in increased hospitalizations and emergency room visits.

Disease Management and Case Management

Disease management is a strategy used to contain the cost of specific high cost conditions such as asthma and diabetes. Many private insurance companies are tailoring cost-containment programs for subpopulations of their beneficiaries instead of plan-wide programs. Several type of models can be used to target these patients.

Florida officials expect savings from their disease management program.

Florida has the most comprehensive disease management Medicaid model in the nation. The program includes intensive case management, provider and patient education, provider and recipient profiling, and home visits. Disease management is outsourced to private contractors and is provided by registered nurses. Contractors guarantee savings to the state of Florida or otherwise pay negotiated penalties. Although the program is currently undergoing formal evaluation, Florida Medicaid officials reported significant savings related to changes in drug utilization and in the route of administration of specific drugs.

SKYCAP uses lay case managers and a patient tracking system to reduce the costs of health care.

In Kentucky, the Southeast Kentucky Community Access Program (SKYCAP) offers case management through layperson navigators. This approach is less costly than providing case management by professional providers, such as registered nurses. Representatives of SKYCAP report that their program has resulted in reduced emergency room visits, hospitalizations, and medication expenses. One of the features of this program is a patient tracking system.

The KenPAC case management model has not been successful in decreasing inappropriate use of the ER.

Some providers believe that case management is best done in the physician's office. The KenPAC, initially implemented as a trial in 1993, is a primary care case management model that was designed to provide care on a twenty-four hour basis seven days a week. Recently, through emergency regulation, the reimbursement for this management service was increased from three to four dollars per Medicaid member per month. This program has not been successful in curtailing inappropriate utilization of the emergency room. Instead of the current model, some physicians advocate the placement of a case manager in the physician's office. This individual would monitor the treatment of patients with high cost conditions based on established standards of care.

Information Systems Management and Information Sharing

Some health care providers view information sharing as key to cutting costs in the Medicaid program and improving quality of care.

Information sharing is viewed by some providers as a key to decreasing Medicaid expenditures and improving quality of care. Some patients "doctor shop" and receive multiple prescriptions or other Medicaid services.

Establishing a real time medical information system could provide a means of tracking services to patients. This could result in significant savings to the state through the prevention of duplication of services. Quality of care could be improved by diagnosing and prescribing treatment more quickly. Abuse of the system may also be decreased, yielding some savings.

Establishing a Medicaid information system could require substantial investment; however, using an internet-based system could cut down on the purchase of new equipment since many physician offices already have this equipment. The Medicaid program could offer incentives to physicians who use electronic medical records. A potential problem with these systems is the lack of universal standards for all electronic medical information systems.

HIPPA requirements must be considered in developing any medical information system.

Patient confidentiality and the patients' right to privacy are concerns that need to be considered in determining how to best share Medicaid information among providers. Some patients do not want all of their medical information to be provided to their physicians. However, some providers believe that this information is essential in providing quality medical care. The Health Insurance Portability and Accountability Act prohibits the release of patient information without consent of the patient.

Provider Profiling

Clinical profiling may be used as a tool to help physicians compare their practice patterns to those of other providers.

Clinical profiling of physicians has recently been increased among health benefit plans. Providing feedback to providers regarding their prescribing practices and how they compare to their peers could be a useful tool in changing physician behaviors and promoting best practices. Gathering information on physician prescribing patterns could also be beneficial in identifying outliers and focusing education to these providers. While many physicians may want this information, some physicians may be opposed to clinical profiling.

Strategies to Encourage Appropriate Use of the Emergency Room

Appropriate use of the emergency room may be encouraged by providing beneficiary education.

Decreasing inappropriate utilization of the emergency room is very challenging to states. Decreased utilization may result through educating the consumer about the appropriate use of the emergency room and community alternatives. It may also be helpful if information was provided to primary care providers regarding their patients' emergency room visits.

A 1-800 number may be useful in helping direct beneficiaries to the appropriate place to obtain health care.

Access to a physician or nurse by a "1-800" line prior to going to the emergency room could help direct patients to the appropriate place for treatment. Other possible considerations may include incentives for providers to extend office hours, outreach to bring new enrollees into the office for initial visits, and preventative services.

Cost-Sharing

Cost sharing decreases utilization of health services, but could lead to beneficiaries not receiving necessary care.

Co-payments are used by many states to decrease utilization of health services in their Medicaid program. For the states implementing cost-sharing strategies, many have limited this to

their Children's Health Insurance Program, prescription drug program, and Medicaid expansions to the uninsured or families.

Federal law limits cost sharing in the Medicaid program.

The ability of the Medicaid program to impose cost sharing is restricted, limiting the usefulness of this strategy as a way to change the behavior of beneficiaries. Federal law prohibits co-payments for services provided to pregnant women, children, institutionalized individuals, and health maintenance enrollees. In addition, some services including early and periodic screening diagnosis and treatment, and family planning are excluded from cost sharing. Also, providers cannot deny treatment based on inability of the patient to pay the co-payment and cannot engage in any collection procedures. Because of these restrictions, some physicians oppose co-payments because they believe they are not collectable. Instead, the co-payment results in decreased provider reimbursement. These restrictions could limit cost sharing in Kentucky to children enrolled in the Medicaid "look alike" component of the KCHIP and noninstitutionalized adults.

Another challenge in imposing cost sharing in the Medicaid program is the potential that patients will go without necessary medical care. Cost sharing could lead to Medicaid recipients' waiting to see their physician until their illness is far advanced and more costly to treat. It could also lead to increased emergency room utilization and increased hospitalization, both costly alternatives to early treatment in a physician's office.

LONG TERM CARE

Prepared by Robert Jenkins

Question

Should the General Assembly recommend changes in the long-term care service delivery system to facilitate the provision of care to more citizens?

Background

According to the Kentucky Data Center, there will be a significant growth in the 65 and older population in Kentucky in the next decade. People are living longer, and most of the state's current growth has been in the 44 to 65 age range. As more people live longer, there will be more relatives in their fifties and sixties caring for them and who will need to work longer to sustain the necessary income. Living arrangements of the elderly may be influenced by their disability status and need for assistance. Women are living longer and more are living alone.

The characteristics of elder Kentuckians are changing.

In the early 1900s, only one out of ten people lived beyond the age of sixty-five, while in 2000 the rate became eight out of ten. There will be fewer caregivers for the elderly in the future due to the aging of the workforce and the increasing numbers of the elderly. Between 2010 and 2030, the American population workforce is expected to decline by ten percent. Between 2010 and 2030, *all* growth in Kentucky will be in the sixty-five and older group. The average household of the future may have more older parents and fewer children to take care of them.

The long-term care industry is highly regulated, and there is much concern about the availability of competent health professionals who are trained to provide long-term care services. Nationwide, there is a shortage of frontline workers, and the shortage will worsen. These workers historically make low wages, lack benefits, lack training, and have little opportunity for career advancement. Thirty-six states have mandatory staff-to-patient ratios, and there are federal standards for R.N.s and L.P.N.s but not for nurses aides. Approximately 3.59 hours of care are spent per day per resident in Kentucky nursing homes, and Kentucky's staffing ratio is relatively high compared to other states in the southern United States.

Forty-two percent of older people who become frail and unable to care for themselves will be taken care of by families and the government. Citizens believe government support for medical care

and long-term care is important, particularly for basic medical care, prescription drug coverage, nursing home care, transportation, housekeeping, cooking, and with general assisted living. Despite the need for services, many people are not familiar with available in-home services, adult day care, Alzheimer's respite, long-term care ombudsman, personal care attendants, senior community service employment, or senior health insurance counseling.

Older Kentuckians expect government support of long-term care but question the government's ability to provide it.

A survey of Kentuckians by the Long Term Policy Research Center found that 1) Kentuckians are retiring earlier than planned, most often due to health problems; 2) financing medical care for older Kentuckians will be a significant challenge because many expect to rely heavily on Medicare; 3) most will find their standard of living about the same in retirement, but for those who rely on Social Security, retirement is likely to mark a change for the worse; 4) the future viability of Social Security and employer pension plans will have a significant effect on income security in Kentucky; 5) the health status of older Kentuckians is poorer than in most other states, so long-term care needs may be more acute; 6) most older citizens believe government support is important for a range of programs and services for older citizens, including long-term care; 7) most older citizens believe that these services should be linked to financial need; and 8) most older citizens believe that both government and family should assume responsibility for frail elders.

Discussion

The bulk of long-term care is rendered through family caregiving. One out of every four households is involved in family caregiving for an elderly and/or disabled relative. Many states have caregiver programs that provide information, referral services, and case management, and there has been an increase in respite care services. Some states provide tax credits or deductions for family caregivers and pay families to provide care for a family member.

Medicaid is the major funding source of long-term care services.

Medicaid is the major public payor of long-term care services. Seventy-seven and one-half percent (\$638 million) of Medicaid funds are used for institutional care, while home and community based services use 22.5 percent (\$186 million). Kentucky is the third highest state for home health expenditures. The national trend recognizes extreme growth for home and community-based services. In light of the Medicaid shortfall in the 2000-2001 biennium, it has been suggested that Kentucky re-visit Medicaid payment of long-term care services to determine if people can be served in a different manner and at less cost.

There are 285 nursing facility Medicaid providers in Kentucky that provide services to 21,951 recipients. Total expenditures for State Fiscal Year 2001 are \$506,565,346. There are ten ICF/MR Medicaid providers who serve 1,208 participants, with total expenditures for State Fiscal Year 2001 at \$83,378,852.

In Kentucky, Medicaid-covered services includes medical care provided in a licensed nursing facility. The nursing facility may be a freestanding institution, a hospital-based institution, or a nursing facility that offers specialized services for ventilator dependent patients, brain injury patients, or pediatric patients.

Medicaid also covers services for patients in an Intermediate Care Facility for the Mentally Retarded (ICF/MR). Covered services include room and board, nursing services, medical and surgical supplies, laundry services, and personal items routinely provided by the facility.

The following services are also included if ordered by a physician: prescription drugs, x-rays, physical therapy, speech therapy, occupational therapy, laboratory services, oxygen, and related oxygen supplies. Physician-ordered services are reimbursed separately from the nursing facility on a per diem rate.

Various Medicaid waiver programs provide services to citizens with widely varying expenditures per numbers of citizens served.

Kentucky has six waiver programs in its Medicaid program that impact long-term care services: Home and Community-Based Waiver, Community Living Waiver (Mental Retardation/Developmental Disabilities), Model II Waiver (ventilator dependent), Brain Injury Waiver, Personal Care Assistance Waiver, and Home Care Waiver. No people are being served in the Personal Care Assistance or Home Care Waiver programs. Home and community-based services also are provided through state funds in the Personal Care Assistance, Home Care, and Supported Living programs.

To qualify for Medicaid in the wavier programs, participants must meet nursing facility or ICF/MR level of care. The Model Waiver II program is designed for Medicaid eligible recipients who are ventilator dependent and may, without these services, be required to be admitted to a hospital-based nursing facility. These services are available to individuals of any age and include private duty nursing and respiratory therapy. There are nineteen Medicaid providers who serve one hundred recipients, and total expenditures for State Fiscal Year 2001 are \$4,545,069.

The Supports for Community Living (SCL) waiver program is designed for Medicaid eligible recipients as an alternative to institutional care for an individual diagnosed with mental retardation or a developmental disability. The SCL waiver provides an eligible individual the opportunity to remain in or return to a community in the least restrictive setting. Covered services offered in the SCL waiver include support coordination, community habilitation, supported employment, prevocational services, residential supports, community living supports, behavior supports, psychological services, occupational therapy, physical therapy, speech therapy, respite, and specialized medical equipment and supplies. There are seventy-two active Medicaid providers who can serve up to 1,937 individuals, which includes 250 new recipients being added to the SCL waiver in State Fiscal Year 2002. The total expenditures for the SCL waiver in State Fiscal Year 2001 are \$67,800,580.

The Home and Community-Based (HCB) waiver is designed for Medicaid eligible participants who are aged or disabled. Services under the HCB waiver include assessment/reassessment, care planning, case management, homemaker, personal care, attendant care, respite, adult day health care, and minor home adaptations. There are 102 HCB waiver providers who can serve up to 17,050 individuals. Total expenditures for in-home services under the HCB waiver for State Fiscal Year 2001 are \$46,211,534, and total expenditures for the Adult Day Health Care portion of the HCB waiver for State Fiscal Year 2001 are \$15,771,658. There are 114 Adult Day Health Care Medicaid providers.

The Acquired Brain Injury (ABI) waiver program is designed for Medicaid eligible recipients with an acquired brain injury who are receiving services in the community. Eligible recipients must be at least twenty-one years of age, but less than sixty-five years of age, with cognitive, behavioral, or physical impairments which necessitate supervised and supportive services. Excluding congenital injuries, there is no restriction with regard to the age of the individual at the time of the injury. Services included under the ABI waiver include case management, personal care services, respite, companion services, structured day program, prevocational services, supported employment, behavior programming, counseling and training, occupational therapy, speech, hearing and language services, specialized medical equipment and supplies, environmental services, and community residential services. There are fifty-four Medicaid providers who can serve up to 110 individuals, and total expenditures for State Fiscal Year 2001 are \$561,802.

Two Medicaid waiver programs have not been implemented.

The Homecare and Personal Care Assistant waiver programs are two new waivers administered by the Office of Aging Services. Eligibility criteria for these waivers was developed by the Office of Aging Services in collaboration with the Department for Medicaid Services. These waivers are funded from General Fund money allocated to the Office of Aging Services. These funds are being transferred to the Department for Medicaid Services for the purpose of matching state Medicaid requirements. These waivers do not require services to be provided by licensed health care providers.

The Homecare waiver program is limited to eligible recipients sixty years of age or older. Services covered include case management, homemaker, personal care, and environmental accessibility adaptations. There are thirty-seven providers who have received a Medicaid provider number who will be able to serve up to 990 individuals. There have not been any expenditures for State Fiscal Year 2001.

The Personal Care Assistant waiver program is designed for Medicaid eligible recipients eighteen years of age or older who have severe physical disabilities and permanent or temporary recurring functional loss of one or more limbs. Services covered under the Personal Care Assistant waiver include case management, personal care assistance (routine bodily functioning, dressing, housecleaning, laundry, preparation and consumption of food, moving in and out of bed, routine bathing, ambulating, and any other similar activity of daily living as performed by an attendant), and personal care coordination services. There are eleven Personal Care Assistant waiver Medicaid providers who can serve up to eighty-two recipients, and there have not been any expenditures for State Fiscal Year 2001.

In summary, approximately twenty-five percent of the Medicaid budget covers approximately 22,000 to 24,000 people who receive long-term care services.

Some people believe that in-home and community-based long-term care services may be provided at less cost than institutional care, while others believe that money diverted from long-term care will jeopardize the quality of care given in those facilities.

It has been suggested that Kentucky could provide more long-term care services to more people by providing those services in expanded home and community-based programs. Proponents would argue that by designating more funding to those programs, more expensive institutional care could be avoided. Opponents would argue that there are too few service providers of home and community-based services, and that there is insufficient data to indicate that the same level of care expected in an institution can be provided in a home or community setting.

The growth of long-term *institutional* care has largely ignored the availability of family support as an in-home alternative. It is argued that many people who have been placed in a long-term care institution could have remained at home if the family caregiver had received minimal assistance. For that reason, Kentucky may wish to look at the experience of other states that have more of a history with family caregiver and respite programs. Oregon and Arkansas have been recommended as potential resources of information.

Opponents of expanded family caregiver support argue that the state should not *pay* family members to care for their family, that there is an inherent responsibility to “take care of our family.” Respite care may lead to problems with federal regulations that require detailed patient assessment, which is both costly and arguably unnecessary for a temporary placement.

PUBLIC ASSISTANCE

Prepared by DeeAnn Mansfield

Question

Should the General Assembly provide alternative assistance or exemptions to families who have reached the 60 month lifetime limit under Temporary Assistance for Needy Families (TANF)?

Background

The enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193 (PRWORA), also known as welfare reform legislation, repealed the former Aid to Families with Dependent Children (AFDC) entitlement and replaced it with the Temporary Assistance for Needy Families (TANF) block grant to states. Under the law, states were guaranteed a fixed grant amount of funding from the federal government for six years, and in return were required to maintain state spending or face penalties. States were afforded flexibility to design TANF programs that met their individual goals and respected the diversity of each state and its citizenry. The Kentucky Transitional Assistance Program (K-TAP) and supportive services from the Kentucky Works Program are funded by the TANF block grant.

5,000 K-TAP recipients may reach the 60 month limit over the next year beginning November 1, 2001.

A major provision of the welfare reform legislation restricts states from using federal money to provide certain benefits to families for more than sixty months. The life-time limit started in Kentucky on 11/1/96. Since then, the number of families receiving K-TAP has declined from 68,260 to 33,334 families in June 2001, a 51% decline. The Cabinet for Families and Children estimates that 5,000 K-TAP recipients will reach the sixty month limit over the next year beginning November 1, 2001. Additional recipients will reach their time limit each month.

Kentucky may exempt over 6,000 families without receiving a federal penalty to its TANF block grant.

Federal regulations limit what counts against families' time limits. Families use up a month of their TANF clock only when they receive benefits such as cash assistance and housing subsidies. Kentucky provides a wide range of services to families not receiving cash assistance without affecting these time clocks. Federal regulations do not count services that are funded with the Social Service Block Grant or the Child Care Development Fund such as child care, transportation and work support for working families, payments to help recipients get cars fixed or enroll in training programs, education and literacy programs, and individual development accounts.

The federal welfare reform legislation allows a state to exempt twenty percent of its current caseload from the time limit for hardship reasons. A state may be penalized if the number of recipients exempted exceeds this amount. Assuming the caseload remains fairly stable, from June 2001 to November 2001, Kentucky should be able to exempt over 6,000 families without receiving a federal penalty to its TANF block grant. If the caseload continues to decline, the number of recipients that may be exempted without penalty will decline.

The General Assembly grants the Cabinet for Families and Children authority to establish and revise provisions of TANF funded programs and to file administrative regulations governing these programs under Chapters 194B and 205 of the Kentucky Revised Statutes. The Cabinet for Families and Children has indicated that it will exempt from the time limit an individual who is battered or subjected to extreme cruelty, has a physical or mental disability prohibiting work, is required to provide constant care of a parent, spouse, or child with a disability, is a grandparent or other close relative caring for an eligible child who would otherwise be placed in foster care, or is an adult with insufficient employment who has complied with all program requirements including participation in the Kentucky Works Program.

Discussion

Kentucky currently makes no statutory provision for exemption specifications.

States vary in the types of exemptions to the time limits that they will allow. Many states permit the implementing agencies to determine the specific criteria for exemptions or extensions. Some states, such as Arkansas, Georgia, Nebraska, New Jersey, South Carolina and Tennessee, specify general conditions for granting exemptions for hardship cases including victims of domestic violence, disabled caretakers, or pregnant women. Colorado allows counties to apply for hardship exemptions. Delaware limits exemptions to a two year extension. Florida sets exemption criteria for extraordinary barriers to employment and teen parents who need an exemption for twenty-four months after receiving their diploma. Other states, such as Alabama, Connecticut, and Kentucky, make no statutory provision for exemption specifications.

The General Assembly may want to consider statutory standards on the length, criteria, number, or the conditions for exemptions.

There are several alternative actions for the General Assembly to consider regarding the 2002 review of the sixty month time limit for receiving K-TAP. One option is to allow the Cabinet for Families and Children to implement all criteria for exemptions. An advantage to this option is that adjustments in exemption categories could be made more quickly by the cabinet in response to changing needs of the K-TAP population. A disadvantage is that input of the General Assembly would be minimal.

Another possibility is for the General Assembly to provide more guidance to the Cabinet for Families and Children on the length of extensions, the criteria for exemptions, the number of exemptions, or the conditions of granting exemptions. The General Assembly may also consider setting some general criteria for exemptions and allowing the Cabinet the flexibility to modify those criteria as needed.

Exemption policy and implementation will need to be monitored to respond to economic changes.

Whatever action the General Assembly takes in statute regarding the sixty month time limit, it will be important for the General Assembly to monitor the exemption policy and implementation. Changes in the state economy and federal legislation can have an immediate impact on the number of Kentuckians in need of assistance and on the funding available to states to provide that assistance.

MENTAL HEALTH AND SUBSTANCE ABUSE SERVICES

Prepared by Murray Wood

Question

Should the General Assembly increase funding for mental health and substance abuse services?

Background

Kentucky's public mental health services are provided by a network of fourteen private, non-profit organizations, the regional Mental Health/Mental Retardation Boards. The regional boards receive state and federal funds for services from the state Department of Mental Health/Mental Retardation of the Cabinet for Health Services. The regional boards provide in-patient and out-patient mental health services, crisis services, and substance abuse services for adults and children, regardless of the individual's ability to pay. The state Department directly operates five psychiatric hospitals, two nursing facilities, and three personal care homes. One private hospital is contracted by the Cabinet for Families and Children for inpatient psychiatric care of children who are indigent or in the custody of the Cabinet.

2000 HB 843 created a statewide commission to develop a 10-year plan for mental health and substance abuse services. The state commission was required to use regional planning reports as a base for the statewide recommendations.

The 2000 General Assembly passed HB 843 creating the Kentucky Commission on Services and Supports for Individuals with Mental Illness, Substance Abuse and Other Drug Disorders, and Dual Diagnoses to examine the system of mental health and substance abuse services. The law also required the establishment of "regional planning councils" in each mental health/mental retardation region of the state. Each regional council forwarded its recommendations to the "843 Commission," which then developed statewide recommendations and produced a report that serves as a ten year plan of improvement and that forms the basis of the Commission's legislative and budgetary initiatives for the 2002 Session. The Commission's report, *Template for Change*, also serves as a guide for the continuing work of the Commission and the regional planning councils.

The regional planning councils consist of local professionals, consumers, family members, community leaders and locally elected official, court and law enforcement personnel, educators, and others involved in mental health and substance abuse issues. Hundreds of Kentuckians were involved in the work of their regional councils. The statewide Commission is composed of six legislators and fourteen Executive Branch cabinet secretaries, commissioners, and

department heads representing the system and services that deal with mental illness and substance abuse. Workgroups were established by the Commission to examine the common issues and themes reported by the regional planning councils from the perspective of the service needs of children, adults, and the aging. These processes led to ninety-eight recommendations in twelve categories. The Commission then prioritized its recommendations for the 2002 Session in two categories—those requiring new or additional funding, and those that do not require additional funding.

The recommendations that would require new or additional funding include:

Priorities for funding include an increase in per capita spending, completion of the crisis stabilization network, a new regional flexible safety net fund, and increased services for substance abuse disorders and dual diagnoses.

- Increase funding over a 10-year period to move Kentucky from 44th to 25th in per capita spending that would:
 - Increase funding to provide access to adult and child crisis stabilization services in each region;
 - Establish a new flexible fund in each region to support safety net services (support for professional staff and cross training for community professionals, utilization of telehealth networks, access to medications, proactive case management, and public education and awareness campaigns);
 - Increase transportation services and options;
 - Establish suitable housing options and housing supports; and
 - Increase professional assessment and treatment services including additional professional staff, expanding drug courts, increasing medical and non-medical detoxification services, additional services for children and youth, increased access to medications, and sober housing options.
- Expand Medicaid coverage of primary and secondary substance abuse diagnoses to all ages of the Medicaid-eligible population (Medicaid currently covers services to pregnant women);
- Implement the Cabinet for Workforce Development's Supported Employment Funding Initiative and institute a Medicaid Buy-In Program with the Ticket to Work initiative for Medicaid consumers who are or may be employed;

Many of the recommendations support funding increases for other agencies such as Medicaid, Workforce Development, Justice, and the courts.

- Through collaboration among the Justice Cabinet, the Administrative Office of the Courts, the Criminal Justice Council, and the Department for Mental Health/Mental Retardation Services, establish cross-training of professionals, expand drug courts, pilot two mental health courts, fund specialized case managers and establish housing options for the targeted population, and, with the Kentucky Jailers Association and the Department of Corrections, develop regional behavioral health jails for specialized treatment for inmates.

The recommendations that have no new or additional funding include:

- Continue the planning process of the Commission and remove the sunset clause for the Commission and the regional planning councils and develop a goal-oriented two-year work plan for the Commission and regional planning councils;
- Add specified members to the Commission, including representatives of Kentucky Agency for Substance Abuse Policy (KY-ASAP) and the Criminal Justice Council, consumers, family members, and others;
- Conduct a thorough review of existing statutes and administrative regulations including laws regarding involuntary hospitalization and mentally ill defendants (KRS Chapters 202A and 504);
- Identify and reduce barriers preventing the elderly from accessing treatment services and promote housing options for older persons who are at risk of institutionalization;
- Assess the availability and adequacy of the professional workforce in each region and collaborate with the Council on Postsecondary Education to identify strategies to increase the availability of professional service providers;
- Require all providers who receive public funds to have formalized quality assurance and quality improvement processes, including grievance procedures;
- Increase access to community-based hospitalization; and
- Advocate with insurers for appropriate and comprehensive mental health and substance abuse benefits for all ages.

Discussion

Kentucky ranks 44th of the 50 states in per capita non-Medicaid spending for mental health services.

According to the most recent report (1997) of the National Association of State Mental Health Program Directors Research Institute, Kentucky spent \$35 per person and ranks 44th of the 50 states in per capita non-Medicaid spending for mental health services, excluding expenditures for substance abuse and mental retardation. Using the national prevalence rate, it is estimated that more than 800,000 Kentuckians have a mental or addictive disorder. The regional mental health/mental retardation boards received one three percent increase in their flexible Community Care and Support dollars in the past ten years. (Some programs have experienced funding increases from restricted funds, such as the Supports for Community Living Program.)

The National Association of Social Workers recommend a desired ratio of two professionals per 1,000 residents. Kentucky falls short of this ratio.

Kentucky has been a state characterized by numerous "health professional shortage areas" and this is particularly true for mental health and substance abuse treatment professionals. Based on a desired ratio of two mental health/substance abuse professionals per 1,000 residents, the Commission reports that over 3,000 professionals are needed across the state. The estimates range from a low of 82 professionals in the Comprehend region (Bracken, Fleming, Lewis, Mason, and Robertson counties), to a high of 447 in the Northkey region (Boone, Carroll, Campbell, Gallatin, Grant, Kenton, Owen, and Pendleton counties). Except for the urban regions surrounding Louisville and Lexington, all other regions reported a need for approximately 200 additional professionals.

Many Kentuckians with mental illness, a substance abuse disorder, or a co-occurring disorder (dual diagnosis) become involved in a "revolving door" of arrest, incarceration, release to the community, relapse, and re-arrest. It is estimated that of the over 15,000 persons currently incarcerated in Kentucky's prison system, approximately sixteen percent suffer from severe mental illness, and sixty percent suffer from a substance abuse disorder. Most of these inmates will eventually be released and return to live in communities across the state.

There is no "one size fits all" treatment for mental health conditions.

There is a lack of universally accepted treatment regimes and outcome standards in the field of behavioral health interventions. Treatment protocols, "best practices," and quality indicators for physical health conditions are more established and have more universal application. Treatment, including drug therapies, for major depression or bipolar disorder may vary greatly from individual to individual and from provider to provider. The variance in mental health and substance abuse treatment makes it difficult to establish and determine baseline outcomes. Tracking improvements in outcomes due to increased funding would be difficult. Although

there has been an increasing amount of valid research about effective treatment and standardized outcome measures, currently there is no consensus among providers and consumers.

Increasing access to mental health services would require new state funds, consideration of Medicaid coverage of substance abuse diagnoses, and more coordination among state and local agencies.

Providing more access to services, more professionals to provide services, and more assessment and treatment services and options would require new funds. The estimated cost of the 843 Commission recommendations for new or additional funding is at least \$27 million each year of the biennium budget. (Note: Several of the recommendations have not yet had fiscal impact determined).

"Opening-up" Medicaid reimbursement for substance abuse treatment would require additional state funds as a state match, and would create a new entitlement program, unless a specific waiver was developed and approved. Pharmacy costs have been cited as a significant factor in the Medicaid shortfall, and medications for mental illness tend to be expensive and are prescribed over long periods of time. The entire Medicaid program is currently under scrutiny and reconsideration from Executive Branch officials and legislators.

Increased funding alone may not meet the needs of Kentuckians. The lack of collaboration among and between the public and private mental health and substance abuse systems, the criminal justice system, the child welfare system, and related workforce issues often present significant barriers and conflicting demands on persons involved in treatment. Some believe these complexities indicate a need for systemic change, not just an influx of "new money."

CERTIFICATE OF NEED

Prepared by Eric Clark

Question

Should the General Assembly limit or repeal the “certificate of need” process?

Background

The certificate of need process provides the state with a mechanism to control Medicaid expenditures by limiting the availability of, and access to, medical services.

A certificate of need is an authorization from the Cabinet for Health Services to acquire, establish, offer, or substantially change a health service. The original purpose of the certificate of need was to improve the quality and increase access to health facilities, services, and providers, and to create a cost-efficient health care delivery system in the Commonwealth. By following the recommendations of the State Health Plan, the certificate of need process impacts the delivery of medical services by controlling awards of applications for the construction of health care facilities and the purchase of expensive medical equipment, the use of which would be reimbursed by Medicaid.

The Medicaid budget has continued to grow, increasing from over \$2 billion of actual benefit expenditures during the 1996 fiscal year to projected expenditures of \$3.3 billion for the 2002 fiscal year. Kentucky’s population over the age of 65 is estimated to grow to over 717,000, which is an increase of 45% as compared with only a 10% growth in Kentucky’s total population. This creates a major impact on nursing homes, hospitals, and other long-term care facilities, all of which are subject to the certificate of need requirements. Expenses for all of these facilities have continued to grow year after year, and as more facilities are constructed and more Medicaid recipients utilize them, the Medicaid budget will continue to grow.

The State Health Plan is the backbone of the certificate of need process.

The purpose of the State Health Plan is to set forth the review criteria that are used when reviewing applications for certificates of need. This plan is prepared triennially, updated annually, and approved by the Governor. The State Health Plan is only one step in the approval process of certificates of need; there are biennial budget authorizations and limitations as well.

With a Medicaid budget shortfall projected for this fiscal year, the General Assembly will be looking for ways to help fund Medicaid

Discussion

To control projected increases in Medicaid expenditures, an executive order has declared a limited moratorium on certificate of need applications.

Possible General Assembly action may include modifying or repealing the certificate of need process.

programs. On May 31, 2001, an executive order declared a limited moratorium through the end of the 2002 General Assembly on the review, consideration, and approval of all certificate of need applications for new construction, establishment, expansion of service area, or other initiatives to develop or expand certain health care services. There has been much debate on the effect of certificate of need on cost, consumer choice, geographic access, and quality health care, as well as the propriety of knowingly engaging in action that will make the delivery of health care services more difficult. Some people may view this access issue as an important policy consideration.

The federal mandate on the states to implement the certificate of need process was lifted on January 1, 1987, leading at least fourteen states to repeal or modify their certificate of need laws. These changes range from limiting the actions requiring a certificate of need to repealing the entire certificate of need process.

Due to current budget constraints, the General Assembly may wish to review the certificate of need process. If the certificate of need process is not saving money for the Medicaid program, or any other state program, then the General Assembly may wish to consider modifying or repealing the process. If the certificate of need process is saving money for the Medicaid program or any other state program, then the General Assembly may wish to study its effect on service delivery and access, as well as other potential health care cost factors.

BODY PIERCING

Prepared by Eric Clark

Question

Should the General Assembly require licensure and regulation of the body piercing industry?

Background

Body piercings have become increasingly popular among teenagers within the past three years. However, piercings are not regulated in Kentucky, and there is no requirement for parental consent.

Body piercing issues affect teenagers and adults.

A study of 766 tattooed and/or body-pierced college students in 18 universities across the United States and one in Australia was conducted to discover the demographic characteristics, motivational factors, and health concerns. According to this study, the traditional college years between 18 to 22 years of age was when most adults (69%) obtained their tattoo and/or body piercing. In Kentucky, it has been reported that piercing businesses have grown about 30 percent in the past three years. Some of these businesses already require parental consent and follow sanitary procedures as store policy. Other piercings are being performed at facilities that may not be equipped to handle unintended health consequences as a result of inappropriate or unsanitary equipment.

The greatest health risks associated with body piercing are Hepatitis B and bacterial infections.

The greatest health risks associated with body piercing and tattooing are the potential transmission of Hepatitis B, a virus that can survive on blood-contaminated surfaces for several months, and bacterial infections. There is also a risk of HIV transmission, but this risk is not as great because the virus dies at room temperature. It has been reported that navel piercings have a 45 percent infection rate because of poor hygiene and complications from clothing. Sterile instruments, a clean environment, and proper hygiene are critical in body piercing facilities.

Parental consent generally is required for nonemergency medical treatment of a minor. Many parents believe that piercing procedures are more invasive and involve more risk than other forms of "cosmetic" applications and should not be performed without their written authorization.

Currently, body piercing businesses in Kentucky are not required to register with their local health department or be regulated by the Cabinet for Health Services in the health and cleanliness of their

Discussion

Almost half of the states in America have regulated the body piercing industry.

place of business. There are no regulations on the sterilization of body piercing apparatus and there are no body piercing standards to prevent the spread of disease or infection associated with body piercing.

The Cabinet for Health Services already regulates tattooing establishments where most body piercings are performed. Tattoo parlors must follow strict sanitary procedures, but these regulations do not apply to body piercing techniques and apparatus. Legislation introduced during the 2001 General Assembly would have required parental consent and directed the Cabinet for Health Services to regulate body piercing establishments for cleanliness and sanitary procedures.

Approximately 20 states already require body piercing facilities to be licensed and regulated by either local health departments, state health departments, or both. By requiring body piercing businesses to be licensed by the state, there is a uniform standard created for all piercing facilities. Health departments manage local registered piercing businesses through regulations provided by the state. Such regulations include the sterilization of body piercing apparatus, using infection barriers such as gloves, and requiring representatives of the state or local health departments to visit body piercing facilities for regulation compliance.

States vary in their laws relating to the body piercing of minors.

At least 21 states have enacted laws regarding the body piercing of minors. These laws range from merely requiring a minor to have verbal parental consent to requiring written notarized parental consent for a piercing, including ear piercing. Several states have also regulated body piercing facilities for cleanliness. Kentucky does not put body piercing establishments under the same health regulations as tattoo establishments. The regulation and registration of body piercing businesses would have an expected fiscal impact on the Cabinet for Health Services and local health departments and there would likely be fees established for regulation and registration.

There is not an age requirement to receive body piercing services in Kentucky, and minors are able to have their body pierced without parental consent. Kentucky requires minors to have the consent of a parent or guardian before receiving a tattoo, and many body piercing facilities have policies, in the absence of state law, that already require parental permission. However, there are home-based piercings that occur where precautions and sanitary procedures are not followed, and this is where infection and the spread of disease occur most. Further, many home-based piercings

do not require parental consent to pierce a minor. It is this area of the body piercing industry that puts forward the biggest health concerns.

In the absence of a state regulatory requirement, some piercing facilities may be subject to local regulation. For example, a few localities, such as Paducah, have adopted ordinances requiring written parental consent for a minor to get a tattoo or body piercing. Not all localities have adopted ordinances relating to body piercing.

JUDICIARY

DRIVING UNDER THE INFLUENCE CASES

Prepared by Norman W. Lawson, Jr.

Question

Should legislation be passed making refusal to take an alcohol test a separate offense or should the current warning which is under attack in the courts be changed?

Background

Several district courts have ruled that a statutory warning by police that jail time would be doubled for persons refusing to take an alcohol concentration test is defective as it relates to first time offenders.

At the 2000 Regular Session of the General Assembly, refusal to take an alcohol concentration test offered by police in driving under the influence cases was made an "aggravating circumstance" which would result in twice the minimum amount of jail time on conviction of the person for driving under the influence. Another statute required a statutory warning to be given by law enforcement officers stating that jail time would be doubled if the person refused to take an alcohol concentration test. The problem is that for a first offense, refusal to take the test carries no jail time. Several District Courts have held that the warning is defective and have dismissed driving under the influence cases.

Discussion

The General Assembly could make refusal to take an alcohol concentration test a separate offense as opposed to an aggravating circumstance, which would provide a separate penalty and could be imposed independent of other penalties.

Merely correcting the existing warning would preserve the current law.

It has been proposed that refusal to take an alcohol concentration test offered by police in a driving under the influence case become a separate offense as opposed to an aggravating circumstance. Proponents feel that this change would, with an appropriate warning, not only clarify the current defects in the warning given by police, but would provide a separate penalty which could be equal to or more than that for driving under the influence. This would help solve the problem that if the alcohol concentration test is refused the defendant may not be convicted of driving under the influence because there is no evidence of alcohol concentration.

Others feel that merely correcting the existing warning is a better solution. Since the warning is required by statute, its correction lies in the hands of the General Assembly. This would preserve the current law which specifies that refusal of the alcohol concentration test is an aggravating circumstance and that if the General Assembly in 2000 provided that there be no jail time for a first offense that there is no need to change the offense to a separate one or to provide jail time for a first offense. All that is needed is to amend the warning to accurately reflect the state of the law.

SOVEREIGN IMMUNITY

Prepared by Norman W. Lawson, Jr.

Question

Should the General Assembly provide a limited right to sue government agencies to the extent to which those government agencies purchase insurance protection or should the General Assembly reform the Board of Claims process?

Background

Though some government agencies are required to purchase liability insurance, each maintains a degree of sovereign immunity.

State government, local government, and many state and local agencies purchase liability insurance and the purchase of such insurance is sometimes mandated by statute. Each of these agencies possesses some degree of sovereign immunity, particularly for official acts. When a person is injured or property damaged, and a claim is made against the insurance, the insurance company defends on the grounds of sovereign immunity and denies payment. In the fall of 2001, the Supreme Court of Kentucky issued an opinion holding a county hospital liable for negligence to the amount of its insurance, which has added a new dimension to the issue.

Discussion

One option involves waiving sovereign immunity to the extent of the insurance charges.

Two alternative proposals have been made to address this situation.

PROPOSAL #1: Waive sovereign immunity to the extent that a state or local government or government agency maintains liability insurance or self-insurance. Proponents feel that the doctrine of sovereign immunity is obsolete, particularly where the government has purchased insurance. According to proponents, governments and government employees do injure persons and their property and should be liable for the damage which they do. This is particularly true when government agencies purchase insurance which, when a claim is made, does not pay off due to the shield of sovereign immunity. Proponents feel that the purchase of insurance is not a legitimate government expense if the insurance company will never have to pay off. Proponents feel the same is true if the government puts aside its own funds in a self-insurance program.

Opponents feel that any waiver of sovereign immunity will result in a raid on the treasury which can cause unlimited liability for government and the taxpayers. Opponents cite the large number of frivolous lawsuits and the open invitation to sue the government over the slightest alleged wrong and the cost of defending those

lawsuits even if the government does not lose the case. If the government does lose the case then the cost of insurance, if insurance is maintained, will doubtless rise. Opponents feel that the purchase of insurance is not intended necessarily to pay off but to provide lawyers to defend the government from claims against the treasury at a known cost--the cost of the insurance. Opponents also cite many instances in which claims against government entities are paid by insurance, negating the necessity to waive sovereign immunity by statute.

Another option revolves around broadening the jurisdiction of the Board of Claims to increase the amount they can award and streamline the process.

PROPOSAL #2: Broaden the jurisdiction of the Board of Claims, increase the amount which the board may pay on a claim, and streamline the claims process. Some proposals would extend Board of Claims jurisdiction to local government and its agencies in a situation where the Board of Claims would handle claims against local governments as well as the current jurisdiction which applies only to state government and its agencies. Proponents feel that the Board of Claims procedure is unnecessarily complicated, that the Board of Claims Jurisdiction is too low, and that it takes too long for an injured person to get money from the board. Proponents cite the increased costs for damages such as medical expenses, and fixing or replacing damaged property. These costs can legitimately exceed one million dollars and many more times that if large numbers of persons are injured by the defendant's conduct. Proponents of the extension of the Board of Claims jurisdiction to local government think it would assist in having one location where all claims could be processed.

Opponents feel that increasing the jurisdiction of the Board of Claims, increasing the amount which the board can pay for a particular incident, or shortening the claims process would dramatically increase the costs to state government and that more and more claims would be invited. Opponents also point out that virtually all state activities are currently covered by the Board of Claims and that proposals which would extend the board's jurisdiction to local government activities are improper since the state should not be in the position of paying for local government's wrongs and that many local governments would not have the money to reimburse the state for funds expended by the state on behalf of the local government.

DEATH PENALTY

Prepared by Jonathan R. Grate

Question

Should the death penalty be abolished, stayed, modified, or expanded?

Background

The General Assembly has taken some action in recent years that affects application of the death penalty.

Every session of the General Assembly brings with it issues attendant to the death penalty. Proposals for change range from outright abolishment of the death penalty to the narrowing or broadening of its availability.

Current law allows the death penalty to be imposed where the defendant is convicted of murder or kidnapping and the jury finds the presence of an aggravating circumstance, such as where the defendant has a prior conviction of a capital offense or the defendant intentionally killed a police officer acting in the line of duty.

Since the enactment of Kentucky's present sentencing scheme, the General Assembly has increased the number of allowable aggravating factors, including instances such as assassinations of public officials and the killing of a person protected by a domestic violence order by the abuser. The General Assembly also took the lead among the states with the passage of the Racial Justice Act, which allows race to be used to challenge a death sentence.

Questions have been raised about the applicability of the death penalty to the seriously mentally retarded and juveniles.

Kentucky no longer executes the seriously mentally retarded if they were convicted after 1990. However, death penalty opponents argue that the practical and moral underpinnings of the policy against execution of the seriously mentally retarded apply equally to persons convicted prior to 1990. Currently, penalty opponents have identified one individual on death row who may benefit from a retroactive application of this prohibition.

Kentucky law currently allows the death penalty to be imposed where the defendant is 16 or 17 years of age. Death penalty opponents may continue their push to remove the death penalty as a sentencing option for these juveniles. Removing the threat of death would follow the general trend internationally, as penalty opponents see the execution of a child as reflecting negatively upon a society's values. Penalty proponents argue both that the defendant has proven himself an adult by his actions and that the jury and trial judge act

as appropriate safeguards in keeping the sentence from being imposed on an inappropriate juvenile.

Related issues include questions about forensic DNA testing for death row inmates and protecting the integrity of the trial process.

Increasingly, DNA testing has been used to connect people with crimes and increase confidence in convictions. It is also being used to exclude people from crimes, with some of the most visible examples being persons sentenced to death later being exonerated by DNA testing. The General Assembly may again face the question of facilitating the use of DNA testing for those on death row in Kentucky where the testing may exonerate the individual and the test was not available at the time of trial.

Another set of issues revolves around the integrity of the trial process. Retrials ordered on appeal due to errors in the initial proceeding not only cast doubt on the process in the eyes of the public, they re-open wounds in the family and friends of the victim, who must bear the emotional trauma of yet another trial. Proposals currently circulating include the assignment of death penalty cases only to experienced judges and utilization of the prosecutorial resources of the Attorney General's office where the local prosecutor may not have the experience in death penalty cases. As in other states, attention is likewise focused on the quality of legal counsel provided to a defendant so the defendant is not convicted because of the incompetence or inexperience of the defense attorney.

Other proposals address the issue of expanding the death penalty or placing a moratorium on its use.

As the General Assembly continues to try to control crime in the Commonwealth, legislation expanding the list of allowable aggravating factors which trigger death penalty consideration may again be offered, such as where the crime is particularly cruel or heinous, is planned and premeditated, or involves very young victims.

The idea of a moratorium on executions has gained momentum in some other states. The idea behind the moratoriums may stem from the increasing visibility of cases where death row inmates have their sentences commuted or are released outright because of new developments in their case, such as the production of exonerating evidence through the advent of modern DNA testing. Facing the possibility of executing an innocent person, moratorium proponents have urged that the sentences be stayed while a comprehensive study of the capital punishment system is undertaken.

Discussion

Both sides of the debate over the death penalty agree that the issues involved go to the very root of our values as a society. Building on

the traditional argument that the taking of a human life is simply wrong, opponents of the death penalty point to the uncertainty of trial verdicts and the irreversible nature of the death penalty as additional reasons for the abolishment of the death penalty. Moreover, in instances of mental retardation or youth, they believe additional ethical considerations come into play. If abolishment is not feasible at present, they suggest a moratorium so that a serious and contemplative study of the present system may be undertaken without the looming threat of ongoing executions overshadowing the discussion.

Proponents of the death penalty acknowledge the very serious nature of the sentence but argue that the nature of the underlying crime is likewise very serious and the murder of a human being deserves a comparable punishment. They also believe the severity of the punishment deters some from committing murder. Moreover, as the penalty is imposed by a jury of citizens and the trial judge who both hear evidence regarding the appropriateness of a death sentence in regard to the defendant, concerns relating to the defendant's age and mental ability are adequately addressed by the present system.

DNA TESTING

Prepared by Norman W. Lawson, Jr.

Question

Should the current statutorily mandated DNA testing program which applies to sex offenders be expanded to include persons convicted of violent offenses and burglary?

Background

Proposed legislation would expand Kentucky's DNA testing database beyond sex offenders to persons convicted of violent felony offenses and burglary.

With the advent of reliable DNA testing, many states have required that persons convicted of various crimes give samples of blood, saliva, or other body fluids for future testing and for comparison in the manner that convicted persons have been required to be fingerprinted in the past. Kentucky followed this trend and required sex offenders to give DNA samples for testing and comparison. Legislation in recent sessions has proposed expansion of the DNA testing database to persons convicted of violent felony offenses and burglary.

Discussion

Proponents point to the increasing role of DNA evidence in protecting innocent defendants, convicting guilty ones, and solving unsolved crimes.

Proponents of the expansion of the DNA database believe that expansion to include violent criminals and burglars is necessary because of the threat to society that such persons pose and because DNA evidence has become increasingly important in such cases both protecting innocent defendants and convicting guilty ones. Burglars are included because frequently a burglary results in the commission of a sex offense or violent offense if the burglar encounters a victim on the premises. Additionally, proponents advance the idea that increasing the data base will allow comparisons to be made which may well solve past and future crimes because DNA evidence collection is becoming more widespread. The proponents cite successes in other states where long unsolved crimes have been solved when the defendant commits a new crime, the DNA is tested and typed, and matches DNA evidence samples in an unsolved case.

In addition to the costs of collecting, storing and testing DNA samples, opponents cite liberty and privacy concerns with expanded uses of DNA databases.

Opponents of the expansion of the DNA database cite the costs involved in collecting, storing, and testing large numbers of DNA samples compared with relatively little success in Kentucky for the existing DNA database being successful in solving unsolved crimes. Other persons cite civil liberties concerns with expanded uses of the DNA database and are concerned that if the data were to

be publicly available that insurance companies might refuse to insure persons whose DNA revealed a propensity for certain diseases or that other non-official uses might be made of the information contained in the DNA data base. These groups feel that this is an invasion of the civil rights of convicted persons and their families.

COMPENSATION FOR WRONGLY INCARCERATED

Prepared by Norman W. Lawson, Jr.

Question

Should compensation be awarded to persons who were wrongly incarcerated by the state?

Background

Persons mistakenly imprisoned for crimes they did not commit have little, if any, recourse against the Commonwealth.

There have been incidents where innocent prisoners are sent to prison for crimes which they did not commit. In most cases this has not been the result of prosecutorial misconduct or government misconduct and thus a civil rights suit under 42 U.S.C. 1983 is precluded and such persons cannot sue the Commonwealth because of sovereign immunity. The only relief is that the General Assembly permit such claims to be filed either by suit or by filing an action in the Board of Claims. The matter moved from a theoretical one to actuality on the release of a man from prison after serving eight years for a rape which DNA evidence proved he did not commit.

Discussion

A proposal award of \$20,000 per year plus legal fees to persons wrongly incarcerated raises questions by some about its impact on sovereign immunity.

A proposal was made at the 2001 Regular Session of the General Assembly for a court to award compensation of \$20,000 per year served plus legal fees to persons later found innocent who served time in prison on felony charges. This would constitute a limited waiver of sovereign immunity for such purpose and authorize lawsuits in such cases. Proponents of the proposal feel that when the state errs in convicting and incarcerating a person who was innocent of the crime for which they were convicted, they have not only taken the person's liberty but also taken that person's ability to earn money during the period of incarceration. Proponents feel that the state, just like any other person committing a negligent act, should compensate that person, at least in part, for the wrong done to them by the state. Numerous states have such compensation schemes, some with overall limits, some with yearly limits, and some with combinations of limits.

Opponents of the proposal urge that the right to sue for compensation for wrongful incarceration or awarding compensation through the Board of Claims is a first step in the elimination of sovereign immunity and would open the treasury of the state to

many persons claiming to have been wrongly incarcerated. They indicate that even the defense of such cases would create a situation where there would be no limit on the funds that would have to be expended in the defense of such cases. Even with limits on any particular case either on a yearly basis or an overall limit or combination thereof the state treasury could be liable for unknown and unlimited sums. Opponents also cite the availability of a federal civil remedy under 42 U.S.C. 1983 if the state or officers of the state illegally violated the civil rights of such persons and that an honest effort on the part of the state to prosecute criminals which resulted in wrongful incarceration should not lead to liability on the part of the state.

OXYCONTIN

Prepared by Peter Cassidy

Question

Should the General Assembly place additional restrictions on OxyContin?

Background

OxyContin was first introduced in 1995. The tablet is intended for patients who suffer from moderate to severe chronic pain. OxyContin gained popularity with practitioners in part because of its controlled release mechanism – *i.e.* the ability for practitioners to administer, or for patients to self-administer, one dose of medication rather than four to six doses over the same period of time.

Is OxyContin dangerous if used as directed by a physician or only when physical properties are manipulated by abusers and traffickers?

There is debate over whether addiction occurs when using the tablets as prescribed by a doctor. But illicit users have discovered ways to abuse the drug by crushing the pills into a powder which can then be snorted or dissolved and injected, thus providing a powerful, dangerous, and addictive high. Combining alcohol or other drugs with the abuse of OxyContin may increase the risk of an overdose.

OxyContin has received an enormous amount of attention in the media this year in large part because of its illicit use in Kentucky and law enforcement's efforts to curb illegal trafficking of the tablets. Opponents of the medication have received widespread attention from the news media. Currently there are at least thirteen lawsuits filed against the manufacturer. The number of deaths in the Commonwealth related to OxyContin has been estimated from zero to over a hundred.

The Governor announced the formation of a Task Force on February 22, 2001, naming two Representatives and two Senators from the General Assembly as members.

This February, the Governor announced the formation of a Task Force to advise how to best combat the use and contain the spreading of abuse of OxyContin. Several members of the General Assembly were asked to join the task force. A final report from the Task Force is expected by the middle of September 2001.

Discussion

The habit-forming ingredient in OxyContin is oxycodone. The Cabinet for Health Services lists oxycodone as a Schedule II controlled substance in Section 4 of 902 KAR 55:020. As with the other substances in that section, oxycodone is an opioid that reacts

Existing law places OxyContin as a Schedule II controlled substance.

with the central nervous system as a depressant. Opioids are used therapeutically to control pain and illicitly to get high.

KRS 18A.060 describes Schedule II controlled substances as having a high potential for abuse which may lead to severe psychic or physical dependence, but also as having a currently acceptable medical use, with or without severe restrictions. Schedule I substances are those with a high potential for abuse that have no safe and medically acceptable use.

Trafficking in and possession of OxyContin both fall under first degree offenses, punishable for a first offense as a Class C and D felony, respectively, and for subsequent offenses as a Class B and Class C felony, respectively.

The manufacturer has submitted a patent application for an abuse resistant version of OxyContin.

The General Assembly could take no action about the abuse of OxyContin and let existing mechanisms adapt to the use and abuse of the prescription drug. Manufacturers have reformulated prescription drugs of this nature in the past in such a way to lessen the incentive for abuse while maintaining the medically useful properties. The manufacturer of OxyContin has applied for a patent on an abuse resistant version of the tablet that is designed to release an antagonist to counter the effects of oxycodone when the tablet is crushed and the time-release mechanism is destroyed.

02 RS BR 316 was pre-filed on June 28, 2001, and provides specific guidelines to practitioners for prescriptions of oxycodone tablets.

Another option would be the adoption of 02 RS BR 316, an act relating to controlled substances. This bill was pre-filed on June 28, 2001, and amends subsection (3) of KRS 218A.180 to require practitioners to include the patient diagnosis on the prescription form. The bill also clarifies that the diagnosis must be one approved by the Federal Food and Drug Administration (FDA) for the drug or included on the manufacturer's label in order for the prescription to be valid. Violation of this section is a Class A misdemeanor for a first offense and a Class D felony for subsequent offenses.

Stiffer measures range from a complete ban of oxycodone hydrochloride controlled-release tablets to changing strict liability presumptions for pharmaceutical manufacturers.

The General Assembly could single out specific offenses concerning illegal uses of OxyContin and provide stiffer penalties for violations than those that currently exist. Or, the General Assembly could ban licensed practitioners in the Commonwealth from prescribing or dispensing OxyContin to patients. Another measure could be to amend KRS 411.310 to change the presumptions for product liability actions against pharmaceutical manufacturers.

A broader solution would be to attack the problem of prescription drug abuse by improving the usefulness of the Kentucky All Schedule Prescription Electronic Reporting (KASPER) database.

Current law (KRS 218A.202(6)) allows prescribing physicians and law enforcement to request information on particular patients in the database. In this sense the database provides doctors with exact prescription histories in the Commonwealth and provides law enforcement with evidence for an investigation. Disclosure of this information to anyone else not specifically authorized by statute or by court order is a Class D felony.

A more comprehensive solution would use the existing framework of KASPER to monitor suspicious prescriptions of Schedule II controlled substances.

The General Assembly could require the Drug Enforcement Division of the Cabinet for Health Services to monitor suspicious patterns and trends of prescription drug purchases of Schedule II substances in the Commonwealth. While preserving the privacy rights of prescription drug patients, the Drug Enforcement Division could single out particular prescription patterns and alternatively alert pharmacists about such suspicious persons or be better equipped to provide instantaneous record checks to pharmacists who are wary of filling prescriptions for some holders.

Other legislative options are likely to emerge as the 2002 Session approaches. The approaches here are not an exhaustive list of policy choices but instead represent a range of options.

CHILD SUPPORT GUIDELINES

Prepared by Scott Varland, DeeAnn Wenk Mansfield, and Joseph Hood

Question

Should the General Assembly amend the child support guidelines?

Background

Child support guidelines serve as a rebuttable presumption for the establishment or modification of child support.

The awarding and modification of child support is provided for in KRS 403.211, 403.212, and 403.213. In awarding and modifying child support, the courts rely on the child support guidelines found in KRS 403.212. The guidelines "shall serve as a rebuttable presumption for the establishment or modification of the amount of child support" KRS 403.211(2). In a court's discretion, that court may deviate from the child support guidelines due to: 1) a child's extraordinary medical or dental needs; 2) a child's extraordinary educational, job training, or special needs; 3) either parent's own extraordinary needs, such as medical expenses; 4) the independent financial resources, if any, of the child or children; 5) combined parental gross income in excess of the Kentucky child support guidelines; 6) parental agreement with some exceptions; and 7) any similar factor of an extraordinary nature specifically identified by the court which would make the application of the guidelines inappropriate. KRS 403.211(3). "Any deviation shall be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation" KRS 403.211(2). Pursuant to KRS 403.213(4) and (5), the Child Support Guidelines Review Commission studies the economic data on which the child support guidelines are based, and the application of or deviation from these guidelines, at least once every four years as required by federal law and makes a recommendation to the General Assembly "to insure that the child support guidelines table results in a determination of appropriate child support amounts." Kentucky guidelines, first implemented in 1990, were reviewed in 1994 and 1998 and are due to be reviewed in 2002. The commission consists of representatives of the Cabinet for Families and Children, the Attorney General's Office, the Kentucky Bar Association, Circuit and District Judges, county attorneys, custodial parents, noncustodial parents, parents with split custody, and one child advocate.

The Program Review and Investigations Committee has studied child support in general and child support guidelines in particular.

Over the course of three meetings, the Program Review and Investigations Committee received testimony on child support in general and the child support guidelines in particular. The Committee adopted a Resolution on October 10, 2000, which

requested that the appropriate standing committees specifically consider certain child support issues:

The Program Review and Investigations Committee has adopted recommendations with regard to the Child Support Guidelines Review Commission.

At its May 10, 2001, meeting, the Program Review and Investigations Committee adopted recommendations with regard to the Child Support Guidelines Review Commission. They are as follows:

- If the Child Support Guidelines Review Commission is to fulfill its public policy advisory role in a manner that meets the needs of the General Assembly and the interested public without unduly burdening Commission members to the point that volunteers become unwilling to serve, the 2002 General Assembly may want to consider amending KRS 403.213 to achieve the following:
 - Clarifying the structure and procedures of the Commission;
 - Specifying exactly who is responsible for staffing the Commission and what the responsibilities are; and
 - Providing Commission members reimbursement for travel and other expenses related to attendance at Commission meetings.
- Prior to or in the absence of action by the 2002 General Assembly, the Program Review and Investigations Committee may want to recommend to the Governor and the Secretary of the Cabinet for Families and Children that the Cabinet assume responsibility for providing a greater level of operational support and guidance to the Commission.
- After the four new members mandated under 01 HB 123 are appointed, all Commission members should attend an introductory training work session on the responsibilities of volunteer members of state boards and commissions and the normal procedures of such bodies.
- The Commission should develop a regular meeting schedule, and that schedule should be made available to the public.
- The Cabinet for Families and Children, acting as support staff to the Commission, should devote whatever resources are necessary to meet statutory requirements in responding to open records requests for Commission materials.

- The Commission should draft and implement a set of regular operating procedures. Those procedures should include predictability and provide a regular forum for allowing involvement of members of the audience in Commission meetings. Additionally, the Commission should attempt to schedule its meetings in a location that is more accommodating of the public's interest in its activities.

There are various ways to promulgate and modify child support guidelines.

Although modifications have been made to some provisions of Kentucky's guidelines since initial adoption in 1990, the existing guidelines are still based on 1986 price levels and tax rates. A formal review of Kentucky's current guidelines was commissioned by the Division of Child Support, Department for Community Based Services, Cabinet for Families and Children. The report, submitted by Policy Studies Inc., "Economic Basis for Updated Child Support Schedule," September 1, 2000, recommends updated guidelines based on more recent economic data, federal and state income taxes, and FICA contributions. In addition, a group of concerned citizens has questioned the current procedures that are used to review the Kentucky child support guidelines. Some other states, including Virginia and West Virginia, have recently considered changes in their child support guidelines.

Since the child support guidelines establish child support presumptions, the guidelines are worthy of special attention.

The federal Family Support Act of 1988 [P.L. 100-485] requires that states adopt presumptive child support guidelines applicable to all court and administrative orders of child support. States vary in how they adopted and currently review child support guidelines. In twenty-six states, including Kentucky, the legislature adopts guidelines through statute. The court system adopts guidelines in eighteen states, and in six states, the state child support agency adopts guidelines through administrative rule.

States also vary in the review processes. Some states seek substantial public input early in the review process. In other states, child support agencies draft changes to the guidelines and wait for formal public hearings. Many states, including Kentucky, form a review committee to examine the guidelines and recommend policy changes.

Discussion

The Kentucky General Assembly has a significant role in the determination of Kentucky child support. The General Assembly

has established detailed child support guidelines as well as the circumstances under which a court may deviate from the guidelines. However, there are two other entities in the determination of Kentucky child support: the Child Support Guidelines Review Commission and the courts. In the future, should the Child Support Guidelines Review Commission have a greater, the same, or a lesser role than that established in KRS 403.213(4) and (5)? With regard to the judicial system, throughout most of Kentucky, Circuit Courts hear child support matters. However, Jefferson County has established its own Family Court, and the Kentucky General Assembly has established eight pilot project Family Courts.

The General Assembly may consider several child support guideline issues, including alternative guideline models and economic models.

There are several issues the General Assembly may consider regarding the existing child support guidelines. One fundamental consideration is the type of guideline model. Most states, including Kentucky and Colorado, use an income shares model in which child support obligation amounts are based on both parents' income. This model is based on the belief that obligation amounts should reflect the standard of living that the child would have experienced if the family had remained intact. This means that obligation amounts should reflect combined parental income and should not reflect income or obligations for prior or subsequent spouses or children. Kentucky's current guideline table requires a presumptive minimum child support obligation for all obligors. The lowest is \$60 for a combined monthly adjusted parental gross income of \$100 or less and an upper minimum obligation of \$1,225 for one child and a combined monthly adjusted parental gross income of \$15,000 or more. These minimums may be modified with proper written justification.

Some states, such as Delaware, Hawaii, and West Virginia, use a type of model that assumes the obligation amount should reflect a self-support amount at subsistence level for parents and a minimum subsistence level for children rather than the amount the child would have experienced if the family had remained intact. These models, such as the Melson model, make adjustments in the child support obligation for very low- and very high-income parents. The Melson model adds an extra standard of living amount to the child support obligation if either parent has income above parent and child subsistence levels.

In practice, there are many variations and modifications in these types of guideline models. For example, as an alternative to the income shares model, some states, such as Wisconsin, use a percentage of income model which considers only the income of the noncustodial parent. Most states, including Kentucky, make

provisions for health insurance coverage and child care expenses. Many states have recently debated making adjustments for prior or subsequent children. Other issues under debate by states include adjustments for parenting time, split custody arrangements, and secondary incomes.

Some states, including Kentucky, base the guideline table on gross income rather than net income. However, Kentucky uses estimates of parental income spent on children as a proportion of *net* income and then converts the net income table to an estimated gross income base. This procedure allows adjustments to gross income before the computation of the amount of the child support obligation.

A second consideration is the economic model used to estimate the expenses of raising children. Regardless of the type of model used for the guidelines, some estimate of the cost of raising a child must be used to determine the obligation amount. There is not a consensus among child support experts on which economic estimate is the most accurate. The major difficulty is that much household spending on children cannot be directly observed. Spending for food, housing, utilities, home furnishings, transportation, most recreation, and most health insurance are pooled with spending for adults. Most models attempt to estimate the marginal, or extra costs of child rearing relative to expenditures in the absence of any children. That is, how much more would a childless family have to spend to maintain their current well-being if they did have children. Another procedure is to estimate the expenses of raising a child at subsistence level.

Kentucky's current guideline table is based on economic estimates of child-rearing expenditures as a proportion of household consumption. These estimates were derived from national data on household expenditures from the 1972-73 Consumer Expenditure Survey conducted by the U.S. Bureau of Labor Statistics. These were the most current and reliable at the time. Kentucky has periodically adjusted its guideline table to reflect inflation. Several methods of estimating child-rearing expenditures that use more recent data from the national Consumer Expenditure Survey are now available.

There are several alternative actions for the General Assembly to consider regarding the 2002 review of the child support guidelines. One option is to keep the existing guideline table intact except for revisions for inflation. An advantage to this option is that major adjustments in the current child support determination process would not have to be made by all those involved, including the

courts, state agencies, county attorneys, and parents. A disadvantage is that an outdated basis for the guideline table may be perceived as unfair to all involved and may not accurately reflect recent social and economic changes.

Another option would be to adopt recommendations that may come from the Child Support Guidelines Review Commission, with or without modification. The Commission has received the report submitted by Policy Studies Inc. and has adopted the recommendations of this report. The Commission is expected to make its own recommendation to the General Assembly before the 2002 Legislative Session.

It is not clear how much actual child support obligation amounts would change if Kentucky adopted different methods or assumptions than those currently used. There are differences in the amount of the child support obligation owed by parents who have the same income levels between states that use different guidelines and procedures. In part, these differences may be a reflection of variation in the cost of living between states. None-the-less, changes in the child support statutes are likely to influence how much some individual obligors owe and how much support some individual children receive. Such changes could have a major impact on the perception of the fairness and the successful enforcement of the child support guidelines.

LABOR AND INDUSTRY

WORKERS' COMPENSATION

Prepared by Linda Bussell

Question

Should the General Assembly amend the black lung provisions in the workers' compensation law to improve access to benefits?

Background

Before December 1996, Kentucky's black lung provisions were considered the most liberal in the country. Now, they are considered by many to be the most restrictive.

Before the 1996 Special Session on Workers' Compensation, Kentucky's black lung provisions were often described as the most liberal in the country. Following passage of HB 1 in December 1996, Kentucky's black lung provisions have been described as more restrictive than black lung provisions in other coal producing states, and more restrictive than the federal black lung law.

Major revisions were also made in Kentucky's black lung provisions in 1987. In an Extraordinary Session in October 1987, Kentucky's black lung provisions were significantly amended. That legislation established a tiered schedule of benefits for black lung and imposed eligibility requirements consisting of radiographic evidence of black lung and pulmonary impairment.

Despite the 1987 revisions, increasing black lung costs became a major cost driver in Kentucky's workers' compensation program and a major financial problem for the continually ailing coal industry. The concern and controversy culminated in an Extraordinary Session on Workers' Compensation in December 1996.

Discussion

In December 1996, HB 1 was enacted in an Extraordinary Session on Workers' Compensation. That legislation contained major revisions in benefits, administration and adjudication, as well as major revisions in black lung. In response to criticism that benefits for injuries were too low and that certain adjudicative procedures were ineffective and delayed the claims process, HB 992, enacted in the 2000 General Assembly, increased benefits for permanent partial disability and made some procedural changes.

Critics of the 1996 changes claim that they are having a more severe impact on coal miners than was intended, with the number of annual black lung claims more than half of what was anticipated.

Supporters of the current black lung provisions contend that they are based on sound medical science, and that miners' breathing problems often result from smoking rather than coal dust exposure.

Legislative hearings to again revisit the issue are scheduled before the 2002 General Assembly.

There is general agreement that the black lung changes in 1996 were severe and that those changes resulted in significant cost savings to the workers' compensation program and especially to coal employers. The debate over the extent and impact of those changes on coal miners began almost immediately following passage of the 1996 changes. Despite criticism and concern expressed by some that the 1996 black lung revisions went too far and are depriving sick and disabled coal miners of compensation they deserve, attempts in 2000 and 2001 to liberalize black lung benefits were unsuccessful.

Critics contend that the 1996 changes are having a much more severe effect on coal miners than was originally anticipated or intended. Reports indicate that the number of annual black lung claims is less than half the number predicted in 1996. Critics further argue that it is very difficult under the new standards to qualify for black lung benefits and that those standards are much more restrictive than those contained in the federal black lung law.

Supporters contend the 1996 changes were based on sound medical science and research which concludes that in most instances black lung is not disabling. There is a further contention that smoking causes breathing impairment in coal miners' much more frequently than inhalation of coal dust.

The debate about black lung seems to pivot on the medical evidence relating to the disabling aspects of the disease and on the cost to the coal industry of liberalizing the eligibility standards which would make more miners eligible for benefits.

Legislative efforts were made in 2000 and 2001 to expand black lung benefits for coal miners. During the 2000 General Assembly, actuaries disagreed on the cost effects of proposed changes. In 2001, actuaries predicted that the proposed changes on the coal industry could be enormous, and those costs combined with potential costs resulting from changes in the federal black lung program could devastate the coal industry. Since legislative hearings are scheduled once again to revisit black lung, the issue will probably be a major issue in the upcoming 2002 General Assembly.

LICENSING AND OCCUPATIONS

UNDERAGE DRINKING

Prepared by Vida Murray

Question

Should the General Assembly revise existing alcoholic beverage laws to create greater disincentives for underage drinking?

Background

Various provisions in state law restrict an underage person's access to alcoholic beverages. Minors are expressly prohibited from possessing or purchasing alcoholic beverages or entering any premises for that purpose; others are prohibited from facilitating a minor's purchase or possession of alcoholic beverages; and retailers are prohibited from selling alcoholic beverages to persons less than twenty-one years of age. Other provisions prohibit a minor from using false identification or misrepresenting his or her age to purchase or attempt to purchase alcoholic beverages and prohibit a person less than twenty years of age from engaging in the sale or service of alcoholic beverages.

In the past ten years, the General Assembly has passed several laws restricting the sale and possession of alcoholic beverages to and by those less than twenty-one years of age. In 1996, the Legislature banned the interstate retail shipment of alcoholic beverages. Wholesalers and distributors testifying to the Interim Joint Committee on Licensing and Occupations reported that teenagers were a captive audience for out-of-state retailers selling beer and wine through the internet and other media.

In the 1998 Session, the General Assembly passed the Malt Beverage Educational Fund--a program that sets aside up to one percent of the wholesale tax placed on malt beverage wholesalers and one percent of the excise tax collected from the sale and distribution of malt beverages to a fund for educational programs to deter or eliminate underage drinking. Moneys from the fund are awarded on a dollar per dollar basis with moneys from private contributors.

Another change enacted that Session, prohibited a licensee, its agents, servants, or employees from permitting any person under twenty-one years of age to remain on any premises where alcoholic beverages are sold by the drink, unless excepted. Excepted from the later prohibition are establishments where the usual and customary business is a hotel, motel, restaurant, convention center, convention

The Kentucky General Assembly has taken various actions to discourage underage drinking, including the banning of interstate direct sales and the establishment of educational programs.

hotel complex, racetrack, simulcast facility, golf course, private club, park, fair, church, school, athletic complex, athletic arena, theater, distillery, brewery, or wine tour, establishments where prebooked concerts are held, or any facility in which there is maintained in inventory for sale at retail no less than \$5,000 of food, groceries, and related products, valued at cost. Establishments not falling within the exceptions may allow minors to be present if all alcoholic beverage inventory is kept in a separate, locked department at all times when minors are on the premises or written approval has been given by the department allowing minors on the premises until 10:00 p.m. Permission is granted only when the sale of alcohol is incidental to a specific family or community event, such as a wedding, reunion, or festival.

The ABC department increased its enforcement efforts from 1997 to 2001.

The Department of Alcoholic Beverage Control has increased its enforcement and educational efforts, and reports that from 1997 to 2001, 2,114 retail establishments have been visited. In its Operation Zero program teenage decoys work with local police and state alcoholic beverage enforcement officers to determine if sales are made to minors. Through that program, the Department of Alcoholic Beverage Control has determined that someone sells alcohol beverages to a minor in one out of every four visits.

The ABC department educates retailers and their employees on identifying minors attempting alcoholic beverage purchases.

The Department has also formed an Education Branch and has directed its initial efforts toward educating and training retail licensees and their employees. One such program teaches those who sell and serve alcoholic beverages how to spot fake identification, about Kentucky statutes and regulations, and about their legal liabilities when serving alcoholic beverages.

Discussion

Some licensees circumvent prohibition against minors being on premises where alcoholic beverages are sold by the drink.

The Department of Alcoholic Beverage Control has identified limiting a minor's access to alcoholic beverages as a priority. The Department has observed that the general prohibition against a minor's presence on premises where alcoholic beverages are sold has been manipulated by some licensees to allow minors on premises that are in essence bars. Despite statutory language that the excepted establishment's "usual and customary business" must be a hotel, motel, restaurant, etc., some facilities have categorized themselves as a restaurant or a concert, by adding live music, pre-selling tickets, and adding the sale of some food and grocery items. The Department reports that such characterization has complicated its enforcement operations and has placed the burden on the Department to show that the facility is not a restaurant.

The Department proposes to amend its laws so that one cannot confuse a restaurant, concert, or other excepted facility from a bar. It proposes creating a brightline distinction as to what is a bar and what is not, thus making the enforcement of underage drinking easier. The Department will be able to discipline the licensee more readily and prosecute all who are underage in a bar without first obtaining actual evidence that the person is drinking.

Some propose that employees be liable for sales to minors and that penalties for minors purchasing be enhanced.

A related issue that the Legislature may face is whether to enhance the punishment for minors buying alcoholic beverages and impose penalties on retail employees selling to minors. Under existing law persons under the age of twenty-one are subject to fines of up to \$100 if they enter licensed premises to buy, or have served to them alcoholic beverages, possess, purchase, attempt to purchase or get someone else to purchase alcoholic beverages; or misrepresent their age for the purpose of purchasing or obtaining alcoholic beverages. Retail employees who sell to minors are not penalized; their actions are imputed to the retail licensee irrespective of whether the licensee had knowledge of the violation. Such a violation may result in the licensee being fined, his or her license being suspended or revoked, or the licensee making a payment in lieu of suspension.

Those advocating greater liability for both minors buying alcoholic beverages and employees selling alcoholic beverages to the minor say that it is unfair to make a retailer responsible for the actions of his or her employee when an employee may sell to a minor despite the retailer's instructions or knowledge. They propose that a program similar to the one used with tobacco product sales be implemented. Under that program a retailer will notify an employee that selling to a minor is prohibited and that an employee must obtain proof of age prior to selling tobacco products if the employee has reason to believe that the buyer is a minor. The retailer is fined if he or she fails to post signs and notify an employee, but the responsibility of selling to a minor is placed on the salesperson. Salespeople who sell to a minor will be fined and minors purchasing, accepting, or attempting to accept or purchase are fined and required to perform community service. Those advocating such a change say that placing responsibility on the employees will make them more apt to follow laws relating to selling alcohol to minors. Opponents assert that the licensee is the real stake holder and that the licensee, if faced with strong disciplinary sanctions, will take extra care in hiring persons who will comply. In addition, the opponents note that there is no legal relationship between the employee and the Department, while there is one between the Department and the licensee.

Other states have created or stiffened the penalties for supplying or giving alcoholic beverages to minors.

An additional issue that legislators may consider is whether to prohibit a friend or an acquaintance from giving alcohol to a minor. Several states have created or stiffened the penalties for persons supplying alcoholic beverages to minors. While the Kentucky court has found that third parties can be liable for the accidents caused by another who drives under the influence of alcoholic beverages, Kentucky law does not expressly prohibit a parent, friend, or acquaintance from giving alcoholic beverages to a minor.

In considering whether to enact laws to make it more difficult for those under twenty-one years of age to have access to alcoholic beverages, the General Assembly is likely to consider the following:

- The extent of alcohol use by the underage drinker in the Commonwealth and how that use compares with national statistics;
- Programs implemented by other states and the ease and costs of replicating them;
- The correlation between tighter restrictions on underage drinking and declining traffic accidents and fatalities; and
- The practicability of enforcing stronger provisions.

LICENSING OF ELECTRICIANS

Prepared by Vida Murray

Question

Should the General Assembly require electricians to be licensed?

Background

Current law provides for local licensing of electricians, but few localities have adopted licensing requirements.

In 1996, 1998, and 2000, bills were introduced requiring the licensing of electricians. The bills have taken various forms and have been modified over the years to address the concerns of proponents and opponents. At present, KRS Chapter 227 allows for local licensing and examination of electrical contractors and electricians. Any city or county may impose its own licensing requirements. This is totally within the discretion of the locality, and few localities impose the requirements. KRS Chapter 227 requires electrical inspectors to be certified and requires that a locality issue permits to those doing electrical work and makes the inspection of such work by a certified inspector a condition of getting the permit.

Discussion

Some believe that current laws adequately address concerns about improper electrical wiring. Some suggest that if licensing electricians is too restrictive, it has the effect of increasing the cost of and decreasing availability of electrical services.

The proper installation of electrical wiring is generally deemed necessary for public safety. The difference of opinion arising from the licensing of electricians largely rests on whether the existing system where a locality imposes its own licensing requirements is preferable to a system where statewide licensing requirements are imposed for all or most people engaged in electrical wiring.

Those adopting the first position state that existing statutes provide sufficient protection to the consumer. They indicate that there is already in place a program by which electrical inspections by state-licensed electrical inspectors are required as a condition of obtaining a permit. Others, in response, have indicated that permits are not obtained by all, and that despite electrical inspections electrical fires still occur. One of the arguments for statewide licensing is that persons meeting threshold requirements will be able to move from one area of the state to another and will not be subject to varying requirements.

Those opposing any licensing state that the licensing of electricians is more restrictive than need be. They point out that requiring the licensing or the registration of all or most of those performing electrical wiring has the effect of increasing the costs of and decreasing the availability of services and requires those in remote

or rural areas to compete with those in larger cities for professionally-trained labor.

They note that this problem was evident in an earlier bill that did not pass requiring the registration of apprentices with the Department of Labor. By establishing a Department of Labor apprenticeship program, the sponsoring organization must comply with state and federal standards regarding an apprentice/journeyman ratio, the wages paid, the hours of formal and on-the-job instruction, the qualifications of training personnel, and equal employment opportunity guidelines. Furthermore, they note that establishing apprentice programs are very costly, and that the programs are usually located in urban areas. Those opposing apprentice programs posit that a better option would be to require only those in supervisory positions, such as an electrical contractor or master electrician, to be licensed.

Some view apprentice programs as a means of upgrading professionalism in the state.

In response, those favoring apprentice programs indicate that many of the fires have occurred because the installations were performed by people who were not properly trained in the National Electrical Code. They indicate that the apprentice program with its dependence on professionally-trained workers promotes the economy by creating careers. They note that the increase in wages paid will spur spending and the state's tax base. Moreover, they indicate that if Kentucky adopts the higher standards, its licensees will have credentials that are comparable to those practicing in neighboring states, and will thus be qualified to seek jobs outside the state.

Other issues that the General Assembly may address when considering the state licensing of electricians are:

- How to accommodate jurisdictions with existing licensing requirements. A few cities already license electricians and electrical contractors. Those cities have departments and personnel in place that generate moneys for the localities. State-wide licensing may have the effect of eliminating the locality's department. Since 1998, the legislation proposing the licensing of electricians has allowed the city or county departments to become agents of the state and to retain fees generated;
- How to ensure that the requirements are not so stringent as to limit the number of practitioners and workers in rural areas;
- Whether there are sufficient safety concerns to warrant state licensing, i.e. are the risks to the public evident and are they not being met by requiring the licensing of electrical inspectors;

The General Assembly in considering whether or not to license electricians will look at local v. state licensing, its impact on the supply of electricians, and who should be exempt from licensing requirements.

- What businesses or persons should be exempt from the licensing requirements, i.e. Should a person be able to do his or her own electrical work at a house in which he resides or in a house that he or she rents to others; and
- Whether licensing requirements should vary depending on whether the property is residential or commercial.

CHALLENGES FACING THE EQUINE INDUSTRY

Prepared by Jack M. Jones

Question

Should the General Assembly enact legislation to address any of the challenges facing the equine industry in Kentucky, which include foal and fetus losses and increased competition from gaming opportunities in other states?

Background

The economic impact of the equine industry, through the racing and breeding of horses, represents a strong segment of the state's economy. An American Horse Council report published in 1996 estimated an overall economic impact of \$3.4 billion to the state, with 128,800 persons directly participating, 52,900 jobs generated, and 150,000 horses. American Horse Council figures further indicate that in CY 2000, Kentucky's sale of thoroughbreds at public auction totaled over \$795 million, and represented about 74.4 percent of the total sales—\$1.069 billion—in North America.

The first challenge facing the equine industry involves Kentucky's breeding industry, which has been adversely affected by a significant loss of foals and fetuses occurring on horse farms. Identified in the spring of this year, the industry has been working diligently to identify possible causes of this problem.

The second challenge facing the equine industry involves competition from increased gaming opportunities outside the state. The equine industry in Kentucky has expressed the concern that additional gaming opportunities outside the state are adversely affecting spending and revenue at Kentucky race tracks.

The horse racing industry no longer enjoys a monopoly on legal gaming in Kentucky.

For many years, the horse racing industry enjoyed a monopoly on legal gaming in Kentucky. However, in 1988, voters approved a Constitutional Amendment to establish a state lottery. In 1992, the Constitution was again amended to legalize charitable gaming. At about the same time, legalized casino gaming, which had been limited to Nevada and Atlantic City, New Jersey, began to increase significantly with the introduction of riverboat casinos, Indian Gaming, and video-lottery terminals (VLTs) at race tracks in several states. As a result, the horse racing industry is now facing competition from within as well as from new forms of gaming being legalized in other states.

Discussion

The breeding industry faces economic losses from mare reproductive loss syndrome.

An additional effort is underway to study the economic impact of mare reproductive loss syndrome.

Kentuckians continue to be lured by out-of-state gaming opportunities.

Mare Reproductive Loss Syndrome. In the spring of this year, mares were losing foals and fetuses at a rate almost ten times the normal rate in Kentucky. Termed “mare reproductive loss syndrome” by industry analysts, this problem involved late term foal losses and the spontaneous abortion of fetuses. The equine industry has been working diligently to identify possible causes of the problem and create a solution. University of Kentucky scientists have posited a theory that tent caterpillars ate the leaves of cherry trees, which contain a form of cyanide poison, which was then spread to horses.

A representative of the Kentucky Thoroughbred Association (KTA) estimates that the syndrome will directly cost the industry \$50 million this year due to late term foal losses, and \$350 million next year due to early fetal losses. A number of indirect industry costs have been identified as well, including fewer horse patients for veterinarians, grooming services rendered, feed and equipment sold, stallion fees, and boarding fees after worried owners began to ship their mares out of Kentucky. The KTA representative noted further that the horse racing industry plans to put together a state equine emergency management plan this year.

On June 1 of this year, the Governor’s Office announced that the state would commission an economic impact study of this syndrome to determine more accurately the impact on the industry as well as on the state’s economy. The College of Business and Public Administration at the University of Louisville has been commissioned to conduct the study. The study consists primarily of a confidential mail survey to horse farms in the state to collect data on this issue. A final report is expected by September 2001.

Out-of-State Gaming Opportunities Increase. As out-of-state gaming opportunities increase, Kentuckians appear to be spending more of their discretionary income on these activities. For example, a July 9, 2001, article in the *Louisville Courier-Journal* reported that Churchill Downs ended its spring meet with slight decreases in attendance and on-track pari-mutuel wagering. When compared to last year’s spring meet, average daily on-track attendance fell by about three percent, while average daily on-track pari-mutuel wagering decreased 5.7 percent. However, average daily off-track pari-mutuel wagering increased 7.7 percent from last year. A representative of Churchill Downs attributed the decline in attendance and on-track pari-mutuel wagering in part to competition from nearby riverboat casinos.

Several efforts to study the impact of gaming outside Kentucky and expanded gaming in the state have been performed.

The issue of the effects of gaming outside Kentucky on in-state gaming and expanded gaming in the state has been discussed since the early 1990s. Proponents argue that expanded gaming is a way to control the outflow of money to other states and bolster Kentucky's economy. Opponents argue that the social costs of expanded gaming, such as increases in crime and problem gambling, with their attendant consequences, outweigh the economic benefits that would be derived from expanded gaming in the state. Several studies have been performed to determine the effects of expanded gaming outside of Kentucky on in-state gaming and to examine aspects of expanded gaming within the state under specified scenarios.

The Kentucky Lottery Commission report estimated expanded gaming revenues using three different approaches.

In May 1999, the Kentucky Lottery Corporation (KLC) prepared a report that examined three different approaches: VLTs at pari-mutuel facilities, VLTs at retail outlets licensed by the Alcoholic Beverage Control Board, and keno games offered through the existing network of on-line terminals. Based on increased competition from the introduction of riverboat casinos along its borders, the report found it unlikely that the KLC would produce substantial incremental revenue without the addition of one or more of these gaming options. Using the pari-mutuel approach, the annual yield could be expected to be between \$400 to \$500 million in net machine income, with the state's share between \$144 and \$180 million. Using the VLTs at retail outlets approach, the net machine income could be expected to be between \$457 and \$498 million annually, with the state's share between \$165 and \$179 million. Using the keno approach, KLC projected that the state could expect incremental sales for keno ranging from \$89 to \$118 million, and, after expenses, a net yield to the state of between \$27 and \$35 million.

A Churchill Downs report addresses patron residence patterns for the Ohio river casinos.

Also in early 1999, Churchill Downs engaged the University of Louisville to research patronage by residence for the Ohio River casinos. At the time of the research, there were five riverboat casinos operating on the Ohio River along the Kentucky border: four licensed by Indiana and one licensed by Illinois. The license plate survey results indicated that:

- The percentage of riverboat patrons from Kentucky varies significantly based on the riverboat's proximity to metropolitan areas. The percentage of Kentucky patrons ranged from one-fifth of all patrons where the nearest Kentucky population centers are relatively small, to about one-fourth where the Kentucky section of a metropolitan area was close by but the riverboat was also next to the significantly larger bordering state

portion of the metropolitan area, to over one-half where the nearby Kentucky portion of a metropolitan area was a lot larger than the adjacent bordering state portion of the metropolitan area; and

- In four out of five riverboats, about two-thirds of a riverboat's patrons lived within one hour's drive of the riverboat.

The research consisted primarily of counting license plates under certain conditions to identify who was visiting the riverboat casinos. About 6,500 vehicles were surveyed in total at all five of the riverboats.

A University of Louisville report examined the demand for slot machine wagering at riverboats and "racinos."

In August 1999, the University of Louisville prepared a report which examined the demand for slot machine wagering at riverboats and "racinos," which is slot machine wagering restricted to pari-mutuel racetracks. While Indiana riverboats were not included in this analysis, the sample included 24 riverboats in Iowa, Illinois, and Missouri, and three racinos in Iowa. The demand for slot machine wagering is of special importance to the racing industry as proposals have been introduced in a number of state legislatures to legalize racino operations.

Like the previous study commissioned by Churchill Downs, this study indicates that casino wagering is very sensitive to patron access to the gaming facility. Also, increased proximity by patrons of a riverboat/racino to pari-mutuel wagering facilities is related to increased wagering at the pari-mutuel facility. Two other findings related to slot machine handle are worthy of note. Handle can be defined as the total amount wagered. First, slot machine handle is related directly to the number of slot machine gaming stations but is inversely related to the number of table games, which indicates that table games are substitutes for slot machines. Second, slot machine handle is directly related to population size and inversely related to per capita income in the market area of the riverboat/racino.

The Governor initiated a research effort in June 1999 to study the impact of expanded gaming in Kentucky.

In June 1999, the Governor initiated a research effort to assess the economic and social impacts of expanded gaming in the state and neighboring region. The analysis of the regional gaming market focused on Kentucky and the seven states bordering Kentucky: Illinois, Indiana, Missouri, Ohio, Tennessee, Virginia, and West Virginia. Gaming was analyzed by four major categories: casino gaming, lotteries, pari-mutuel wagering, and charitable gaming.

One major finding of the report was that out-of-state casinos are a significant attraction to Kentuckians who gamble and that gaming outside the state draws a substantial amount of income from

Kentucky residents. It was estimated that during 1998, Kentucky residents lost almost \$200 million at the six riverboats, accounting for twenty-eight percent of the total gaming revenues of these riverboats. Also, the report further estimated that total out-of-state gaming losses by Kentuckians totaled \$433 million during 1998. When spending by Kentuckians for other goods and services during their out-of-state gaming trips is included, this figure rises to about \$1 billion annually.

Land-based casinos or race track wagering parlors would significantly reduce out-of-state gaming losses.

The report also evaluated the economic impact of expanded gaming in Kentucky based upon three expansion scenarios: (1) land-based casinos at specific locations across the state, (2) wagering parlors equipped with either slot machines or VLTs at the eight race tracks, and (3) electronic keno machines/terminals at age-controlled facilities across the state. The report found that land-based casinos or race track wagering parlors would significantly reduce out-of-state gaming losses and also draw out-of-state residents into Kentucky to game. The largest to smallest economic impact to the state of the three expansion scenarios are (1) land-based casinos, (2) race track wagering parlors, and (3) electronic keno machines/terminals.

The operation of riverboat casinos has negatively impacted pari-mutuel handle at Kentucky race tracks.

Another aspect of the report relevant here involves the impact of continued expansion of gaming in Indiana and Illinois on the horse racing industry in Kentucky. The following four measures of activity at the race tracks were analyzed using data through part of CY 1999: live attendance, live handle, non-live attendance, non-live handle or wholecard simulcasting handle. Data analysis identified a significant negative impact of casino revenues on wholecard simulcasting handle at two race tracks. In both markets, the equations revealed that wholecard simulcasting handle decreased by about twenty percent—about \$40 million annualized in total—at the two race tracks due to the opening of riverboat casinos nearby. As a result, the riverboats may have reduced pari-mutuel handle and revenues by approximately six percent over this time frame, statewide.

A number of efforts are underway to increase gaming opportunities in other states.

Other states' efforts to increase gaming opportunities do not appear to be abating. In Tennessee, a statewide referendum on a lottery is planned for the November 2002 ballot. While a bill to allow race tracks in Ohio to add VLTs failed to pass out of a Senate committee this past session, there is some speculation that a statewide referendum on the issue will resurface. In Delaware and West Virginia, VLTs at race tracks continue to attract both patrons and horse owners. Racinos are offering large purse increases, funded by slot machine profits, that have lured some horse owners away from

Kentucky. For example, purses at Mountaineer race track grew 513 percent from CY 1995—when VLTs were first introduced—to CY 2000. Nevada recently enacted legislation that legalizes internet wagering and authorizes the Nevada Gaming Commission to adopt regulations governing the licensing and operation of internet wagering if the commission first makes certain determinations. As a result, it is likely that Kentucky will face additional threats from other out-of-state gaming opportunities.

The Kentucky Racing Commission held a series of three public hearings across the state.

The Kentucky Racing Commission held a series of three public hearings across the state in July and August of this year designed to act as a forum to air horse racing and breeding industry concerns. Concerns noted by participants at the hearings included mare reproductive loss syndrome, high taxes on pari-mutuel wagering, increased competition from other race tracks outside Kentucky and riverboat casinos nearby, and aging race track facilities. While no solutions to the equine industry's concerns were noted at these hearings, the industry reports that it is poised to offer alternative solutions for consideration by the 2002 General Assembly.

MATTERS FACING KENTUCKY CEMETERIES

Prepared by Ann Seppenfield

Question

Should the General Assembly enact legislation to ensure that Kentucky's cemeteries are adequately managed and maintained?

Background

Some problems in Kentucky's cemeteries span decades.

Kentucky law has provisions to preserve and protect the state's cemeteries, but in spite of these actions, complaints have been lodged that cemeteries are being mismanaged, neglected, vandalized, desecrated, and abandoned. In the late 1980s, reports of illegal practices covering several decades were published in state and national media. These practices include the following: burying more than one body in a single grave space. (Multiple layered graves have been discovered.); selling cemetery plots in excess of the numbers the area can accommodate; desecrating graves and corpses; failing to document financial, burial, and other cemetery records; mishandling and mislabeling of cremated remains; and failing to mow weeds and other vegetation that cover graves and impede cemetery access.

KRS 381.697 requires every cemetery in Kentucky, except private family cemeteries, to be maintained by its legal owner or owners. Though the exact number of cemeteries is not known, the Kentucky Historical Society has documented over 3,200 cemeteries and readily admits that many more exist that have not been documented.

Cemeteries are classified in state law as regulated and unregulated.

Legal ownership falls into two primary categories, regulated (nonexempt) and unregulated (exempt). Regulated or nonexempt cemeteries are ones that operate for profit and have salaried employees. Owners must be accountable for the following:

- Maintaining an irrevocable trust fund for the perpetual care and maintenance of the cemetery. Twenty percent of the gross sale price of every grave space is placed in trust by the cemetery owner for the sole purpose of care and maintenance over time.
- Registering with the Office of the Attorney General; filing annual financial and management reports; and being subject to audit, if warranted, by an independent appointee of the Attorney General's Office.

Unregulated or exempt cemeteries are ones that are owned or controlled by lot owners, operate as non profit entities, and have no salaried employees except for general maintenance staff. Owners are responsible for caring for only the plots they purchased. There is no umbrella association for cemeteries in this category, and therefore, no coordinating authority to oversee the entire area's appearance. According to the Attorney General's Office, seventy percent of Kentucky's cemeteries are unregulated and include small family or church cemeteries. There is no perpetual care trust fund requirement for these cemeteries.

A number of KRS Chapters address cemeteries, and some require state agency oversight.

More than twenty-five different Chapters of Kentucky's Revised Statutes address cemeteries. Some state agencies have authority to deal with cemeteries in certain circumstances, but there is no agency with authority to control, maintain, regulate, or preserve them collectively. For example, the Department of Veterans' Affairs provides for the interment of Kentucky veterans and next of kin. (KRS 40.315); the Department of Parks may maintain Civil War cemeteries and may take title in the name of the Commonwealth. Expenditures by the Department must not exceed \$1,200 annually. (KRS 148.161); the Kentucky Historical Society maintains the gravesites of past governors, pioneers, and other historical figures. This agency also has responsibility to collect, maintain, preserve, categorize, and publish necessary information concerning Kentucky family cemeteries (KRS 171.313); and, the Kentucky Department of Transportation is currently working with the Heritage Council to develop guidelines for addressing the historical significance of cemeteries obstructing rights of way where relocation may be required (KRS 381.755).

Well-meaning Kentuckians try to help cemeteries in need.

Media reports of abuses in Kentucky cemeteries are often followed by stories of support from concerned interest groups. For example, local historical societies may choose cemeteries as projects to preserve community identity; greenspace and wildlife advocates in urban areas may restore abandoned cemeteries as preserves; and, church groups, clubs, civic organizations, and concerned citizens may volunteer time and raise funds to help maintain cemeteries in their areas. Although grassroots efforts abound, the media reports indicate they are not addressing the full scope of existing problems. They are also not planning to meet future needs of cemeteries in the Commonwealth.

Efforts have been made to address problems statewide.

On May 21, 2001, an administrative order created the Attorney General's Task Force on Cemetery Preservation in response to public pressure to address long-standing problems of mismanagement and neglect. A need for action began in 1989 with

a series of lawsuits brought by families of individuals interred in three Louisville cemeteries, one dating back to 1848. Extensive archaeological investigations at one of the cemeteries revealed that as many as 82,000 bodies were buried on acreage large enough to accommodate no more than 30,000 bodies. Burying more than one body in a single grave was the result. A Jefferson County grand jury brought criminal charges against the cemetery company and its officials who cited insufficient resources as the reason for not providing the appropriate level of care. The case was dismissed under a criminal diversion agreement. A receiver was then appointed by the Jefferson Circuit Court to operate and maintain the three cemeteries. The receiver has publicly acknowledged that funds from the trust are inadequate, and local charities and civic groups have volunteered to help; however, the Attorney General's Office continues to receive notices of problems and complaints from families.

A related incident involves the cemetery company and its insurer. Individuals who paid to purchase cemetery plots that had already been used sought compensation from the insurance company. The company denied that its policy covered criminal conduct and refused to pay the individuals. In May 2001, the Kentucky Supreme Court issued an opinion which agreed with the insurance company.

In July 2001, media attention focused on problems of misidentified graves in Cove Haven Cemetery in Lexington. According to a report, the Attorney General's Office has received numerous complaints from consumers in pursuit of better financial and reporting procedures for this cemetery whose board has not met for five years. The cemetery is unregulated and managed by volunteers.

The Task Force on Cemetery Preservation has disseminated surveys to seek a broad range of information on every cemetery in the state. They are conducting cemetery site visits across Kentucky to focus attention on the issue and are also gathering information from other states. The group will submit findings to the 2002 General Assembly.

Discussion

Proponents of legislation to better manage and maintain Kentucky cemeteries contend that all cemeteries in the state should be preserved for their historical, archaeological, cultural, architectural, and genealogical significance. These proponents also contend that responsibility for mismanaged, neglected, and abandoned cemeteries cannot always be placed.

Lack of funds is given as the reason cemeteries are being mismanaged and neglected.

- Cemeteries dating back to the 1800s and most of the 1900s did not have perpetual care trusts and do not now generate enough revenue to be self-sustaining. In fact, cemeteries that are full or no longer accept burials have no way to set aside funds for perpetual care. Also, genealogical information in these cemeteries is at risk of loss due to the lack of records and deterioration of monuments.
- Families move away or become unable to care for the grave sites of their loved ones. Family and church cemeteries are not regulated, and under Kentucky law, there is no clear legally responsible party for maintaining these cemeteries; however, cities may have some responsibility under KRS 381.690.
- Desecration of graves by land developers and agricultural operations may occur by accident. Regardless of the circumstances, a violation is a Class A misdemeanor for the first offense and Class D felony for subsequent offenses. Prosecution for these offenses is handled at the local level, and the Task Force on Cemetery Preservation has received reports from complainants who are dissatisfied with the response of local law enforcement.
- Companies owning cemeteries become insolvent and declare bankruptcy because funds are insufficient to properly manage the grounds. Whether the lack of revenue is due to mismanagement by company officials, fraudulent conduct by managers, or inability to generate funds, the problem exists. The Office of the Attorney General's Consumer Protection Division regulates 290 cemetery companies as defined in KRS 367.932(12). This agency has the authority to file civil enforcement actions to enjoin violations and obtain civil penalties as well as to prosecute criminal offenses including violations of the perpetual care trust law. The agency does not, however, have the authority to compel proper cemetery maintenance.

Opponents agree support is needed but do not agree it should come from the state.

Opponents of additional legislation agree that the maintenance and management needs of cemeteries should be addressed but contend that local communities and local governments should be responsible. They do not believe that state agencies and state funds should be involved with problems created by private sector instances of mismanagement and neglect.

The General Assembly may want to consider some options.

Some possible solutions espoused are (1) short-term funding for restoration and preservation of existing cemeteries that have been

mismanaged and neglected, and (2) long range strategies to adequately fund, maintain, and manage current and future burial sites so problems of the past do not recur. Others suggest that consolidating a number of KRS Chapters related to cemeteries could simplify access to information, and increasing the twenty percent perpetual care trust fund could provide additional funds for maintenance.

LOCAL GOVERNMENT

INSURANCE PREMIUM TAX

Prepared by Donna Gaines

Question

Should the General Assembly change the current method for collection and distribution of insurance premium taxes?

Background

The insurance premium tax is considered an important source of revenue for local governments, especially with current budget restraints and the constitutional and statutory limitations on other forms of local taxation. The tax, authorized by KRS 91A.080, allows local governments including cities, counties, and urban-county governments to impose license fees or taxes upon insurance companies for the privilege of doing business within the jurisdiction of the local government. The fees or taxes are based on the amount of premiums collected by insurance companies issuing policies within the taxing jurisdiction.

Local governments may levy an insurance premium tax on insurers based on the amount of premiums collected.

Local governments must levy this tax by ordinance. The local government is responsible for notifying the Department of Insurance of the enactment of the ordinance that levies the tax at least one hundred days prior to the effective date. The Department of Insurance must then notify the insurance industry no less than eighty-five days prior to the effective date. The Department of Insurance does not collect the tax; payment is made directly to the individual local governments by the insurers. Insurers pay the tax quarterly based on premiums actually collected within the quarter and payment must be made within thirty days after the end of the quarter. Insurers must file an annual report with the local governments and the Department of Insurance. The annual report shows all insurance premium taxes paid during the preceding calendar year. KRS 91A.080 allows insurers to retain a reasonable fee as compensation for collecting and distributing the tax to the local governments.

Discussion

There are criticisms of the current system.

There has been continuing controversy over the best way to collect and distribute this tax. Over the past few years, the Interim Joint Committee on Local Government has heard testimony regarding the collection and distribution of the tax from both local government and insurance company representatives. Local government representatives have complained that tax dollars are not always accurately distributed due to confusion over city and county boundary lines and zip code problems. Their problems occur after

the insurance premium tax is collected by insurance companies and remitted back to the local governments. In some cases, the tax is levied in multiple jurisdictions within the same zip code. When this occurs it is difficult to determine the proper amount which is to be credited to each of the taxing jurisdictions for the collection of the taxes. Meanwhile, the insurance companies argue that the current procedure for collecting and reporting the tax and making individual payments to the large number of local governments is too cumbersome.

A central clearinghouse for receipt of funds has been proposed in the past.

In response to these complaints, over the past few years the Department of Insurance and a group of participants including the Kentucky Association of Counties, the Kentucky League of Cities, the Department for Local Government, the Kentucky Revenue Cabinet, and representatives of the insurance industry, have worked on various plans to improve the accuracy and efficiency of the distribution and collection of the local government insurance premium tax. The General Assembly has also had on-going debate on this issue since 1990. In 1998, two bills relating to the distribution of the insurance premium tax failed to gain support. Another proposal, HB 995, was placed before the 2000 General Assembly. It passed out of the House Local Government Committee but was recommitted to the Appropriations and Revenue Cabinet where it remained for the session.

Proponents believe that a central clearinghouse could benefit both local governments and insurance companies.

This proposal consisted of the creation of a single clearinghouse for the receipt of funds from insurance companies and the distribution to the local taxing jurisdictions. According to testimony provided by Department of Insurance representatives in 1999 and 2000, this approach would allow for a more efficient and accurate distribution of funds to the local taxing jurisdictions and establish much easier and appropriate auditing records to assure that the local taxing jurisdictions are getting the proper allocation of funds.

The clearinghouse process also affected insurance companies. Briefly, it would have required only one detailed filing a year be sent to the clearing-house, with the quarterly payments based on that filing, rather than four filings per year sent to each local government taxing jurisdiction. This would result in a maximum of five checks per year as opposed to as many as 1,500 checks per year for companies that do business statewide. The clearinghouse would then prepare a summary of all the company reports for each taxing jurisdiction and would issue a single tax distribution check or direct deposit to each taxing jurisdiction. The clearinghouse would have authority to examine insurers to determine if they were properly remitting the tax.

Local officials express concerns.

The clearinghouse proposal is not without its detractors. City and county officials have expressed concern to the Department of Insurance that a new system of collection might result in a loss of control and flexibility at the local level or even an eventual attempt to place a cap on the local tax rate.

The clearinghouse collection agent must be chosen.

The designation of which agency or organization could best serve as the collection agency for the clearinghouse also remains to be determined.

CHAPTER 75 FIRE DISTRICT BOUNDARIES IN CONSIDERATION OF CITY ANNEXATION

Prepared by Mark E. Mitchell

Question

Should the General Assembly clarify who should provide fire protection services in newly annexed areas currently served by a fire protection district?

Background

Both cities and counties provide fire protection services to their residents. A city does so under the provisions of KRS Chapter 95. The boundary of the city is the boundary of the fire department's service area. A county does so either under the general provisions of KRS Chapter 67, or it may elect to form a special district under the provisions of KRS Chapter 75. Fire Protection Districts formed under KRS Chapter 75 have very specific boundary restrictions.

KRS Chapter 75 prohibits the provision of fire protection services by a fire protection district within the boundaries of a city

As development outside a city occurs, a Chapter 75 fire district reacts by providing fire protection to this new development. Chapter 75 fire districts levy ad valorem taxes on the citizens within their boundaries to raise the revenue necessary for funding the fire protection services and for debt service requirements. The fire district may invest large sums of money to build new fire houses or substations and to equip and staff them. A problem occurs when investment by the fire district has taken place and a nearby city decides to annex the developed property. The fire protection responsibility, and the tax base is then transferred from the Chapter 75 fire district to the city thereby leaving the fire district with debt and expanded facilities and less than adequate revenues to fund them.

Discussion

Cities and counties must vie for adequate revenue sources.

Growth is occurring. Cities and their suburban areas are getting larger. Citizens are demanding more services and the counties and cities are responding. Counties and cities both vie for the tax base to fund these increasing service demands. Fire protection is one of the most basic governmental services which is provided and expected in an urbanized area.

City annexation of unincorporated land can disrupt the fire protection district's plans.

Both the city and the county are obligated to provide adequate fire protection services. Some persons believe the statutory prohibition of the provision of fire protection service by a fire protection district within the city limits does not meet the test of efficiency or

economy. A city could annex an area without providing immediate services at the same level of service previously provided by the fire protection district. At the same time, after an annexation, the Chapter 75 fire district still remains responsible for the infrastructure, maintenance, and personnel costs it placed in the area when it had the responsibility for providing the fire protection. It is not inconceivable that a new station built in response to new development could be annexed into the city rendering it all but useless to the unannexed area.

An interlocal agreement is one system for addressing the situation.

Some solutions may exist: some through existing law, others through possible statutory changes. A city and a Chapter 75 fire district could enter into an interlocal agreement to have the fire district continue to provide fire protection. This is currently possible under KRS Chapter 65. The law could be changed to require the Chapter 75 fire district to be responsible for fire protection for a certain time after annexation or upon a different arrangement with the city. The district could also continue to receive the tax revenue for fire protection services during this period. Other solutions may present themselves. There would most likely be active dissension, though, to curtailing the cities' power to annex. As the populations increase in and around cities, this situation will only become more problematic.

**SENIORS, MILITARY AFFAIRS,
AND PUBLIC SAFETY**

KENTUCKY VIETNAM VETERANS' MEMORIAL

Prepared by Clint Newman

Question

Should the General Assembly require the Kentucky Vietnam Veterans' Memorial Foundation to fly the POW/MIA flag each day at the Kentucky Vietnam Veterans' Memorial?

Background

Senate Joint Resolution 76, introduced during the 2000 Regular Session of the General Assembly, would have required that the POW/MIA (Prisoner of War / Missing in Action) flag be flown each day at the Kentucky Vietnam Veterans' Memorial. The Resolution passed the Senate 35 - 0, went to the House of Representatives, and was referred to the Seniors, Military Affairs, and Public Safety Committee for consideration. The Resolution was discussed but was not called for a vote.

Discussion

Proponents see flying the POW/MIA flag as a way of keeping the prisoner of war issue before the public.

Proponents of flying the POW/MIA flag at the Kentucky Vietnam Veterans' Memorial argue that flying the flag is a fitting and proper way of honoring those soldiers who are unaccounted for following the Vietnam War. They further contend that flying the flag keeps the issue before the public and, more importantly, before the federal government. They believe that the federal government has made an insufficient effort to recover the bodies of Vietnam soldiers who are still missing or to locate those that they believe to be imprisoned in Vietnam.

Opponents believe that Kentucky's Vietnam Veterans' Memorial has a unique design that honors POW/MIAs.

Those opposed to flying the POW/MIA flag at the Memorial point out that the Kentucky Vietnam Veterans' Memorial is unique in its design, and that it recognizes Kentucky POW/MIAs by engraving their names on a tablet at the rear of the sundial marker (gnomon) where the shadow of the sun does not darken their names. As those veterans are accounted for, their names are erased and placed at the front of the sundial with other Kentucky veterans. They cite the fact that the POW/MIA flag is flown at the Memorial on the same six days that it is flown at the Vietnam Veterans' Memorial in Washington, D.C.. They also point out that the POW/MIA flag is not recognized by the National Office of Heraldry.

The KY Attorney General has opined that the General Assembly cannot mandate the flying of the POW/MIA flag because of the contractual agreement.

On March 14, 2000, The Kentucky Attorney General rendered an opinion that the Commonwealth, which leased the property to the Kentucky Vietnam Veterans' Memorial Foundation, cannot

legislate a mandate to fly the POW/MIA flag. The Attorney General said that "To require the Veterans to fly the flag each day of the year would be to modify the contract as written. A modification to the contract can be made only upon mutual consent of the parties."

ADJUTANT GENERAL OF THE KENTUCKY NATIONAL GUARD

Prepared by Alisha Miller

Question

Should the qualifications for adjutant general be revised to allow those without Kentucky National Guard experience to be considered?

Background

During the 1992 Regular Session of the General Assembly, several new requirements were added to those needed in order to be considered for the position of adjutant general. Among them were two which specified that the adjutant general must have had at least ten years commissioned service in the Kentucky National Guard and that the candidate must not have been separated from National Guard service for more than five years.

Proposed legislation introduced in 2000 would have removed the requirement that the adjutant general have Kentucky National Guard experience.

House Bill 731, introduced during the 2000 Regular Session of the General Assembly, would have changed the requirements needed in order to be considered for the position of adjutant general. The house bill would have removed the requirements for Kentucky National Guard experience and opened the position to experienced officers of any branch of service. House Bill 731 was referred to the Seniors, Military Affairs, and Public Safety Committee where it was discussed but not called for a vote.

Discussion

Arguments range from the value of a broadened field of candidates versus a working understanding of the unique mission of the Kentucky National Guard.

Those in support of changing the requirements for adjutant general cite that there are many citizens of Kentucky with extensive military experience other than with the Kentucky National Guard who should not be prevented from being considered. They argue that the current requirements may eliminate candidates who may be qualified to lead the Kentucky National Guard into the future. Supporters argue that increasing the pool of candidates to find the best based on experience would only benefit the Kentucky National Guard.

Those opposed to the change cite that the Kentucky National Guard is a unique entity that works and recruits citizens who not only work for the National Guard but who also have other jobs. They are concerned that a Kentucky candidate with no Kentucky National

Guard experience may be too focused on the military aspects of the position. They state that the National Guard has multiple tasks. Not only are they the state's military presence, but they are also trained to respond during disasters.

STATE GOVERNMENT

REDISTRICTING

Prepared by Joyce Honaker and Tom Troth

Question

What key legal requirements will face the General Assembly in redistricting Kentucky's state legislative, congressional, and Supreme Court districts?

Background

Among the legal requirements state legislative, congressional, and Supreme Court districts must meet are:

- Varying standards for equality population among districts;
- Prohibitions against discrimination on the basis of race;
- Prohibitions against creating districts based on race that run afoul of the Equal Protection Clause of the 14th Amendment to the United States Constitution; and
- Specific state constitutional mandates, in the case of state legislative and Supreme Court districts.

Districts must meet varying state and federal legal standards concerning equal population, voting rights, and county integrity.

This issue paper provides only a brief overview of several key laws affecting the redistricting process.

Equal Population

Before discussing the different population standards that are applied to the three types of districts, it is necessary to review how population equality is defined and measured in redistricting.

The method of determining the equality of districts' populations is based on the "ideal" district size.

The method for measuring the degree of equality of district populations begins with the concept of the "ideal" district size. The "ideal" size is simply the answer to the question, "What would be the population of each district if all of them were equal?" For example, with 100 representative districts in Kentucky, the "ideal" House district is the number obtained by dividing Kentucky's total population by 100.

Once the ideal population for a given type of redistricting plan is determined, each actual or proposed district is compared to the ideal. The difference, or "deviation," of a single district from the

ideal is most often expressed as an absolute number over or under the ideal and as a percentage over or under the ideal. If, for example, the "ideal" district has a population of 10,000, a district with a population of 10,500 would be 500 people over the ideal, or 5% over the ideal.

Statewide redistricting plans can be compared with one another on the issue of equal population by a single figure: the sum of the percentage deviations from ideal of the most populous and least populous districts. This single figure is called the "overall range of deviation."

To illustrate how plans are compared, assume that a state contains one million people who are to be divided among 100 districts. In this case the "ideal" size of any single district would be 1,000,000 divided by 100, or 10,000 people per district. If all districts in a plan contained 10,000 people, the plan would have an overall range of deviation of 0%. By contrast, another plan in which the largest district contains 10,500 people (5% more than the "ideal") and the smallest district contains 9,500 people (5% less than the "ideal") would have an overall range of deviation of 10%.

The Federal Voting Rights Act of 1965

Federal civil rights laws apply to congressional, state legislative, and judicial redistricting.

A second body of law applicable to all three types of redistricting processes are federal civil rights laws: the Fourteenth and Fifteenth Amendments to the United States Constitution and the federal Voting Rights Act of 1965, which was designed to protect and enforce the Fourteenth and Fifteenth Amendments (*NCSL*). Section 2 of the 1965 law prohibits a state from imposing "a voting qualification or prerequisite to voting or standard, practice or procedure...in a manner which results in the denial or abridgment of the right to vote on account of race or color" (42 U.S.C. section 1973(a)). A separate section of the law, Section 5, requires certain states and localities to receive preclearance for a change in election laws, practices, or procedures, including redistricting plans. Kentucky is not one of the states required to have Section 5 preclearance.

A key legal issue in drawing redistricting plans that comply with federal civil rights laws is to balance the effort to provide minority voters with an effective and equal opportunity to elect candidates of their choice with U.S. Supreme Court prohibition against "racial gerrymandering," which has been held to violate the Equal Protection Clause of the 14th Amendment of the United States

Constitution. The Federal Courts have formulated a rather complex test for determining what constitutes an improper racial gerrymander. The court will look at, among other things, the drawing of bizarrely-shaped districts to determine if race is the dominant motive for drawing the lines rather than basing the lines on traditional districting principles (*Watson*). Traditional districting principles include but may not be limited to compactness, contiguity, respect for political subdivisions, communities defined by actual shared interests, maintaining traditional boundaries, maintaining district cores, and protecting incumbents from contests with each other. The court will review whether there is evidence of an intent to unconstitutionally maximize the number of districts containing a majority of minority group members. In a recent case, the U.S. Supreme Court also suggested that when majority-minority districts are at issue, the Court may consider the extent to which there is a correlation between political party voting behavior and racial identification in determining whether there is a violation of the equal protection clause (*Hunt v Cromartie*).

Discussion

While federal civil rights laws apply to all three types of redistricting, different legal standards of population equality apply to the state legislative, congressional, and Supreme Court districts. In addition, Kentucky's Constitution contains specific requirements applicable to redrawing state legislative and Supreme Court districts.

State Legislative Redistricting

Under Kentucky Constitution Section 33, the Kentucky General Assembly has responsibility for dividing the Commonwealth into thirty-eight senatorial districts and one hundred representative districts, each represented by one legislator.

Beginning in the 1960's, the U.S. Supreme Court has ruled that the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment establishes population equality requirements for state legislative redistricting.

As a general rule, the federal equal population standard applicable to state legislative districts is "substantial" equality of population among the districts. Expressed in terms of the percentage deviation of districts and statewide plans from the "ideal," the federal courts

have established the following standards for state legislative redistricting (*Wattson*).

- A statewide plan with an overall range of deviation from "ideal" of less than 10% (that is, with the smallest and largest districts varying less than 5% from the "ideal") is presumed constitutional on equal population grounds. It is the responsibility of someone challenging the plan to prove otherwise.
- A statewide plan with an overall range of deviation of more than 10% *may* pass constitutional muster in federal court *if* the state can show that the deviation is necessary to implement a rational state policy which the state has consistently followed in the plan. Redistricting legal experts generally caution that 16.4% is the upper limit of overall deviation the U.S. Supreme Court is likely to find acceptable under the "rational state policy" exception to the "under 10%" rule.

Kentucky's Constitution also contains requirements for equal population of state legislative districts and additional requirements for forming districts from contiguous territory and limiting the splitting of counties in drawing a representative or senatorial redistricting plan.

Kentucky Constitution Section 33 states that:

The first General Assembly after the adoption of this Constitution shall divide the State into thirty-eight Senatorial Districts, and one hundred Representative Districts, as nearly equal in population as may be without dividing any county, except where a county may include more than one district, which districts shall constitute the Senatorial and Representative Districts for ten years. Not more than two counties shall be joined together to form a Representative District: Provided, In doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated. At the expiration of that time, the General Assembly shall then, and every ten years thereafter, redistrict the State according to this rule, and for the purposes expressed in this section. If, in making said districts, inequality of population should be unavoidable, any advantage resulting therefrom shall be given to districts having the largest territory. No part of a

The Kentucky Supreme Court has held that splitting counties should be minimized in state legislative redistricting.

county shall be added to another county to make a district, and the counties forming a district shall be contiguous.

In a series of decisions in 1994-97, the Kentucky Supreme Court held that Section 33 of the Kentucky Constitution requires the General Assembly to "make full use of the maximum constitutional population variation as set forth herein [plus-or-minus 5%] and divide the fewest possible number of counties." (*Fischer II* and *Jensen*)

Congressional Redistricting

No Kentucky statute expressly governs the redrawing of Congressional districts. The principal laws governing that process are Article I, Section 2 of the United States Constitution, sections of Title 2 of the United States Code, the 1965 federal Voting Rights Act, and court interpretations of those federal laws.

Under federal law, each state is automatically granted a minimum of one seat of the 435 seats in the United States Congress. The remaining seats are apportioned among the states based upon their respective populations, as determined by the most recent federal Census. The apportionment of congressional seats occurred in January 2001, when the Census Bureau reported the total population counts for the states. Kentucky retained six seats in the United States Congress.

The population standard applied to congressional districts by federal courts is that the districts must be as equal in population as "practicable," that is as equal as can be. Under this standard, redistricting bodies are to strive for 0% deviation of each congressional district from the "ideal," unless some variance is necessary to achieve a legitimate, consistently-applied state objective (*Wattson*).

Redrawing Supreme Court Districts

Section 110 of the Kentucky Constitution specifies that:

The Court of Appeals districts existing on the effective date of this amendment to the constitution [January 1, 1976] shall constitute the initial Supreme Court districts. The General Assembly

thereafter may redistrict the Commonwealth, by counties, into seven Supreme Court districts as nearly equal in population and as compact in form as possible.

The United States Supreme Court has ruled that the federal one person, one vote standard does not apply to judicial redistricting, although the Voting Rights Act of 1965 is applicable (*NCSL*).

Sources

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ONLINE PRIVACY

Prepared by Joyce Neel Crofts

Question

Should the General Assembly take any action to protect online privacy of individuals?

Background

Americans, knowingly and unknowingly, are leaving a trail of personal information on the internet that can provide others with a look into their private lives.

More than 100 million Americans are currently using the Internet to access information and do business, such as making purchases, receiving health services, banking, sending e-mail communications, taking advantage of educational opportunities, and even buying houses and cars. As Internet users do those things, they are providing various parts of personal information about birth dates, parents' and children's names, addresses, medical history, bank accounts, social security numbers, video rentals, credit card purchases, and favorite Web sites. Willingly, they part with small bits of private personal information in return for important conveniences; but in doing so, they have left a trail of data that can provide others with a look into their private lives. Many do not realize that there are further invasions of their privacy through web sites' online tracking and profiling of the Internet user's business transactions and viewing habits.

Personal information can be merged into a detailed profile of an individual and can be sold to others.

Consumers have an even greater concern over new technology that permits the merging of information from different sources—governmental and marketing? to create a single, detailed profile of an individual, including his/her vital statistics, how much he/she earns, what he/she buys, his/her state of health, his/her interests, what he/she reads, and more. Furthermore, all of that information can be, and often is, for sale—to direct marketers, current and potential employers, or anyone else willing to pay for it. Numerous recent surveys have revealed that privacy on the Internet is a primary concern for online consumers.

Discussion

The federal government has been slow in responding to privacy concerns, so many state legislatures have taken the initiative to address the concerns.

The federal government initially reacted by encouraging the industry to self-regulate; and Congress has taken a patchwork approach, enacting legislation relating to certain specific areas, such as the protection for the privacy of children online and protection for nonpublic personal information as it relates to financial institutions. However, according to many news reports, consumer groups, and surveys, the self-regulation and the patchwork legislation approaches have left many privacy areas uncovered.

Noting that the federal government is slow in responding to consumers' privacy concerns, many state legislatures have taken the initiative to enact legislation addressing various privacy issues. Legislative actions have addressed such issues as restrictions in public disclosure of certain personal information held by a state agency, sale of public information, development and posting of privacy policies on state agency web sites, publishing of names of or identifying information about students and minors on web sites, revisions in open records laws in light of technology, provision of information electronically, provisions for public records disclosure when private units perform services for public entities, and the confidentiality of Internet providers' subscriber information. Some states have formed privacy task forces studying such issues as the sale of public records and the availability of citizens' personal information. Other states have adopted regulations or issued executive orders relating to privacy policies of all state web sites and protecting confidential personal information while complying fully with state open records laws.

In the year 2000, according to NCSL, seven states (California, Connecticut, Illinois, Iowa, Nebraska, South Dakota, and Virginia) addressed publishing executive branch agency information, investigations, and orders via the Internet; seven states (California, Connecticut, Iowa, North Carolina, Tennessee, Virginia, and Washington) passed legislation regarding privacy and public records. Four states (California, Connecticut, Iowa, and Virginia) prohibited disclosing identifying information about a person on the Internet, even if it is contained in a public record. Tennessee determined that copyrighted computer materials are not public records, and Virginia created a task force to study privacy issues related to information policy.

Government's particular dilemma in managing personal data is how to provide the public with the necessary information to evaluate government activities while protecting an individual's private personal information.

Both federal and state governments have a particular dilemma regarding the privacy of personal information and the requirements of open records laws. Open records laws have been established to ensure public access to government records so that citizens may watch over government actions. The media relies on public records to tell people about government operations. However, many of these public records—such as birth and death records, divorces, marriages, adoptions, bankruptcies, drivers' records, genealogy records, criminal and civil records, professional and occupational licenses, real estate records, state and federal tax liens, unclaimed property, wills and probate—contain personal information about individuals. The electronic age now permits easier access to public records and, thus, creates new concerns for the privacy of personal

information. Governments are faced with the challenge of providing the necessary information for evaluating government performance while protecting an individual's right to privacy of personal information.

Any discussion of online privacy issues quickly reveals the complexity and diversity of the issues and the increasing consumer interest in protection of personal information.

UCITA
(Uniform Computer Information Transactions Act)
Prepared by Joyce Neel Crofts

Question

Should the General Assembly adopt the Uniform Computer Information Transactions Act?

Background

A proposed uniform commercial code for computer information transactions was approved by NCCUSL for consideration by state legislatures.

UCITA is the acronym for the Uniform Computer Information Transactions Act. It was approved in the summer of 1999 by the National Conference of Commissioners on Uniform State Laws (NCCUSL), a private organization composed of judges, lawyers, and law professors appointed by the states that drafts uniform state laws and then works toward their enactment in state legislatures. UCITA is a proposed uniform state law governing the interstate commerce of computer software, including the purchase of computer software as well as other information such as computer games, on-line databases, multimedia products, and the distribution of information on the Internet. It not only deals with the purchase of software, but also the software's authorized use. A complex law adopted amid much controversy, UCITA affects individual consumers, schools and universities, libraries, businesses, industry—generally anyone using software or any kind of digital information.

From 1995 until Spring of 1999, UCITA was known as proposed Article 2B of the Uniform Commercial Code (UCC). The UCC is co-sponsored by NCCUSL and the American Law Institute (ALI); but, in an action unprecedented in the fifty year history of UCC, the ALI withdrew from the project early in 1999 due to "significant reservations" about "key substantive provisions and its overall clarity and coherence." NCCUSL proceeded with the project as a stand-alone code and renamed it UCITA.

In 2000, the Kentucky General Assembly passed another NCCUSL-approved bill known as UETA, the Uniform Electronic Transactions Act. UCITA should not be confused with UETA. UETA gives electronic signatures or records the same validity and enforceability as manual signatures and paper-based transactions. Basically, it allows for the enforceability of electronic contracts to the same extent as paper-based contracts.

Discussion

Some states have adopted UCITA and others have adopted anti-UCITA legislation.

Debate over UCITA revolves around the conflicting needs of vendors and consumers.

Since its approval by NCCUSL in July 1999, UCITA has been adopted by two states, Virginia and Maryland, both with amendments. Virginia's legislation was enacted in 2000 but delayed the effective date until July 1, 2001, so that a commission could consider amendments. Some states are considering anti-UCITA legislation, called "bomb shelter" legislation, to protect their state's customers, consumers, and businesses from UCITA laws (or similar laws) in other states. Iowa and West Virginia have adopted anti-UCITA laws, and similar legislation is under discussion in several other states.

The ongoing debate surrounding UCITA generally pits companies that distribute software and want to increase their control over the use of their products against such diverse groups as small businesses, programmers, libraries, colleges and universities, insurance and banking industries, consumer protection groups, many states' attorneys general, the media and entertainment industries, and some parts of the software industry.

Proponents state that UCITA provides a set of default rules for computer information transactions, such as licensing contracts, thus updating commercial law to address the new technological world. They point out that existing contract law and uniform codes do not adequately address these largely intangible transactions. They argue that licensing arrangements detailed in UCITA are common methods of contracting computer information today and that UCITA helps to establish the legal framework for their enforceability. They say it is a necessary improvement in commercial contract law designed to bring uniformity to software licensing contracts and a common understanding of software licenses across the 50 states.

Critics state that UCITA is biased in favor of software vendors and does not contain sufficient consumer protections. In essence, they say that UCITA validates "shrink-wrap" or "click-on" agreements in electronic licensing (those entered into when a consumer clicks on a button marked "I Agree" or some similar term), superseding consumer protections, copyright law, and privacy protections. For example, they state that, under UCITA, the software purchased would no longer belong to the buyer; consumers would become licensees who are bound to the terms of the contract provided in "shrink-wrap" products or "click-on" agreements, with restrictions on use revealed to the user only after purchase. The restrictions may also be changed after purchase. Furthermore, UCITA allows software publishers to prohibit the transfer of software from one person or business to another, even in the course of a merger or

acquisition. Opponents are concerned also with the vendors' ability to limit their liability. Moreover, they say that UCITA is poorly drafted—long, confusing, and unnecessarily complex. Many opponents seem to agree that there is a need for legislation in the area of software licensing contracts but that it must recognize the needs of both vendors and consumers for fairness. They also say that UCITA is too flawed to even be a starting point.

ELECTION REFORMS

Prepared by Laura H. Hendrix and Melissa Bybee

Question

Should the General Assembly adopt election reform legislation?

Background

The 2000 election has produced a myriad of election reform proposals.

Most election law experts agree that the problems highlighted by the 2000 election have existed for many years, under the general public's radar screens. Many issues came to the forefront in the light of the extraordinarily close presidential election.

States and the federal government are now considering various proposals to address election reform. In the 2001 legislative sessions, the state legislatures have been extremely active in considering election reform. According to National Conference of State Legislatures' Task Force on Election Reform, 1378 bills were introduced in the 2001 legislative sessions of the fifty states, and these proposals have run the gamut from piecemeal approaches to specific problems to wholesale reform of the elections process. Around one hundred bills have passed thus far. The Florida legislature passed the most sweeping changes to its elections laws. However, election experts have stated that a "one size fits all" approach to election reform would not be beneficial.

Federal legislation is under consideration that could affect state election procedures by requiring standards and providing funding.

The federal government is also considering ways to assist states with their election responsibilities. However, many state officials are concerned that federal legislation may attempt to supplant traditional state authority in the area of elections. While some bills propose to mandate ballot standards for states and provide funds for states to upgrade voting equipment, several alternative federal bills would not mandate specific standards but would allow states to determine which reforms to implement and would provide federal funds to do so.

Kentucky has 111 counties with electronic voting machines, eight with lever machines, and one with optical scanning machines.

Unlike many other states, Kentucky had invested over the years in newer voting equipment. Therefore, Kentucky is in a much better position than many other states in this respect, as one hundred eleven counties in Kentucky use electronic machines for voting, eight counties use lever machines, and one county, Jefferson County, uses optical scan machines. However, parts and equipment for the lever machines still in use are not being produced. Additionally, over the years, many of Kentucky's election laws have been termed as "outdated" and in need of revision.

Discussion

Election reform issues are being discussed in the areas of absentee ballots, ballot standards, civic education, election costs and equipment, election officers, recounts and contests, reporting of election results, and voter registration.

Some of the areas listed below may be areas that the General Assembly wishes to address in the 2002 session. These were highlighted as a result of the 2000 elections, and many of these issues were also the subject of proposed legislation in the 2001 Regular Session.

Absentee Ballots: The Secretary of State's office has stated that absentee ballot fraud has been a problem in Kentucky, and that requests for absentee ballots should not be a matter of public record. Additionally, there are no standards for evaluating voter intent on paper absentee ballots, which may be problematic in case of a recount or contest action. Also, some categories of voters, such as students, are allowed only to cast a mail in absentee ballot, but not to vote in the clerk's office. A bill to address some concerns about absentee ballots, 2002 RS BR 264, has been prefiled.

Ballot Standards: In the 2000 election, ninety-three Kentucky counties used ballot faces aligned such that the voter was instructed to push the button beside the Vice-Presidential, rather than the Presidential, candidate. The Secretary of State's office has proposed that the State Board of Elections establish uniform statewide standards for ballot layouts in order to avoid voter confusion.

Civic Education: Many groups have linked decreasing voter turnout and increasing apathy to a lack of civic education. Additionally, the lack of general knowledge by the public as to how the election process works has been cited as a key factor in some of the problems with the 2000 elections, including basic knowledge of how to operate a voting machine. Some states have proposed the reintroduction of a basic required civics class, while other states, such as Kentucky, address parts of civics instruction throughout the curriculum but do not require a specific class. Many other voluntary programs seek to educate students and the general public about the basics of civics. In the 2001 session, HB 327 proposed to establish programs of civic education and establish an advisory board on civic education.

Election Costs: In Kentucky, the counties have a great deal of responsibilities for elections, and the state contributes towards these costs. However, county election officials have stated that the state share does not adequately reimburse counties for the costs of putting on elections. 2002 RS BR 265 would raise the state share of election payments from \$255 (\$300 for the 2000-2002 biennium) to \$700 per precinct.

Election Equipment: As stated above, only a few Kentucky counties still utilize old lever machines. However, the cost to upgrade these machines is significant. A proposal in the 2001 session would have provided state funds for counties to upgrade older machines by the 2002 primary election, and a similar prefiled bill, 2002 RS BR 265, would provide \$954,000 to upgrade lever voting machines and mandate these upgrades by the 2004 primary election. This bill would also eliminate references to punch card machines that still exist in the KRS, as well as references to lever machines. Additionally, the bill would provide a mechanism whereby any federal funds that may be appropriated would be used for these upgrades.

Election Officers: One of the issues highlighted in the 2000 election was the importance of qualified, well-trained election officers. The Kentucky County Clerks have stated that it is very difficult to recruit and retain qualified election officers due to the low pay and long hours on election day. One proposal, also contained in 2002 RS BR 264, would increase the minimum pay for election officers from \$60 to \$100 per election day served, and increase the pay for training from \$10 to \$25. Additionally, the recruitment of younger election workers has been difficult.

Recounts and Contests: The U.S. Supreme Court has stated that if a state has recount and contest provisions for Presidential elections, then that state must also have uniform statewide standards by which to evaluate ballots, procedures for implementing those standards, and opportunity for judicial review. The use of standardless manual recounts was held to be violative of the 14th amendment to the U.S. Constitution's Equal Protection Clause. Depending on the courts' future use of this case, there may be constitutional implications for a failure to have uniform statewide standards for determining recounts and contests. Additionally, the timeline for certifying results in a Presidential election may overlap with the timeline for a contest of that election.

Reporting of Election Results: In the 2000 election, there was criticism of reporting election results before the polls had closed in all parts of the states. Additionally, the media were criticized for releasing "exit poll" data on elections that may not actually reflect the results of races. While the reporting of election information by the media is protected by the 1st Amendment to the U.S. Constitution, there have been proposals to restrict the official information released by election officials. Additionally, uniform poll closing times have been proposed in many states in order to counteract the effect of media reporting of exit poll results.

Voter Registration: Currently, all registered voters who do not register as members of the two most popular political parties, Democrat or Republican, are listed as "others." The County Clerks and the Secretary of State's office have proposed to require the specific listing of other political groups, and a prefiled bill, 2002 RS BR 261, would provide for voter registrations for persons of other political organizations, political groups, and independents by their specific party affiliation. Additionally, while the voter registration rolls are required to be periodically purged, the State Board of Elections has stated that it has not had the funds to perform purges on an annual basis, and there is a concern that the voter registration rolls are becoming increasingly inaccurate.

GUBERNATORIAL RUNOFF ELECTION

Prepared by Laura H. Hendrix

Question

Should the General Assembly consider elimination of the gubernatorial runoff primary election?

Background

Currently, if no gubernatorial slate receives more than 40% of the vote in a primary election, a runoff primary is held.

In 1992, the General Assembly adopted several provisions, including a constitutional amendment, that changed the way Kentucky elects the Governor and Lieutenant Governor. Some of these changes included constitutional provisions for succession of the Governor and Lieutenant Governor, and the requirement that Governor and Lieutenant Governor would be elected jointly by the people of Kentucky. Changes to the statutes required candidates for Governor and Lieutenant Governor to run for their offices as a slate and established a voluntary public financing program for those slates. As a part of these changes, a primary runoff election provision for gubernatorial slates was also passed. This provision, KRS 118.245 requires that a runoff election be held thirty-five days after the primary election if no slate received at least forty percent of the votes.

The procedures for a runoff election are subject to specific statutory provisions. The Secretary of State, upon receiving the certified results of the primary election, determines whether a runoff primary is required under KRS 118.245, and notifies affected slates of candidates, the county clerks, the county boards of elections, the State Board of Elections, the Registry of Election Finance, and the news media of the determination. The Secretary also notifies these parties of the date of the runoff primary, which is usually 35 days following the regular primary.

Public financing is available for runoff elections if candidates participate in the public financing program in the primary.

Kentucky has a public financing program for gubernatorial races, administered through the Registry of Election Finance, and candidates in a runoff primary may be eligible for public financing. Slates that do not accept public financing in the primary are not eligible to receive public financing in the runoff primary. Slates of candidates that participate in the public financing program receive \$300,000 in public funds and are then limited to expenditures of that \$300,000 in connection with a runoff primary, as increased or decreased by the consumer price index. Slates of candidates accepting public financing for a runoff primary are prohibited from accepting contributions during the fourteen days prior to the runoff

primary. There is no threshold qualifying amount that the slates of candidates participating in the runoff must raise in order to be eligible for public financing.

Runoff elections are a peculiarly Southern tradition, with only one state outside of the South having statewide runoff elections. However, some large municipalities, such as New York City and Los Angeles, use runoff elections. Currently, ten states have runoff elections for statewide offices: Alabama, Arkansas, Florida, Georgia, Mississippi, North Carolina, Oklahoma, South Carolina, South Dakota, and Texas. Eight states have Congressional runoff elections, and ten states have some local runoff elections.

Discussion

Among the issues surrounding runoff primaries, proponents cite runoffs as ensuring party support; opponents state that they are costly.

During the past several legislative sessions, legislation has been introduced which would eliminate the runoff primary. Between 1979 and 1991, primaries were won by candidates receiving less than forty percent of the vote. There has not been a runoff primary held in Kentucky since the 1992 law was passed. There was a runoff provision in place in 1935, which was repealed the next year. In Kentucky, the gubernatorial primary is the only race for which the runoff is used. Technically, a primary election is not an “election” in the pure sense of the word. Rather, it is the manner by which political parties choose their nominees for the general election. Therefore, a runoff primary is also a nominating procedure created by statute.

Proponents have stated that one of the chief reasons for the institution of the runoff primary in Kentucky is to ensure that the eventual nominee for the office has the party support necessary to help the nominee win the general election, and to ensure that the party’s nominee is truly the selection of that party. Opponents of the runoff primary have cited the costs of holding the runoff, which has been estimated at \$3 million. Additionally, opponents cite the short time frame and technical and logistical issues involved with having another election thirty-five days after the primary election, and cite the additional load on elections officials to prepare for, oversee, and execute the election. Also, opponents state that runoffs in other states have traditionally had low turnout.

Another criticism of the runoff has been the concern that minority and female candidates are negatively impacted by runoffs. Proponents of runoffs indicate that some studies of other states’ runoff provisions have found that they do not affect the chances for the election of minority or female candidates. Runoffs have been criticized as inherently unfair, requiring candidates who have essentially “won” the first election to prevail again in a second

election. Additionally, candidates would have to invest more time and money in the primary election instead of concentrating on the general election. Supporters contend this impact is lessened somewhat by public financing.

COLLECTIVE BARGAINING FOR PUBLIC EMPLOYEES

Prepared by Stewart Willis and Linda Bussell

Question

Should the General Assembly address the issue of collective bargaining for public employees?

Background

Collective bargaining for public employees has become a perennial issue that has confronted the General Assembly in almost every legislative session since the early seventies. Legislative proposals that would grant comprehensive collective bargaining authority to virtually all groups of public employees have been introduced and discussed but have failed to pass either the Senate or the House of Representatives.

Legislative proposals regarding public employee collective bargaining have not been successful during past legislative sessions.

Since 1996, the governor has actively pursued legislation that would extend collective bargaining rights to virtually all public employees. In 1998 and 2000, public hearings were held on comprehensive legislation that would have extended collective bargaining rights to most public employees, including teachers. The legislation was unsuccessful. In public testimony, the governor stated that public employees should have the same rights as private sector employees to collectively bargain with their employers, and that collective bargaining was the most efficient form of communication between employers and employees on matters such as wages and hours and other conditions of employment. Some form of public employee collective bargaining legislation exists in thirty-six states, and Congress authorized federal employees to bargain collectively in 1962.

Discussion

The Governor's Employee Advisory Council was established to allow employee groups to select organizations to discuss and make recommendations to the Governor on matters such as wages and other conditions of employment.

According to a 1975 opinion of the Attorney General, the governor is prohibited from extending collective bargaining rights to public employees by executive order. Legislation would be required.

Executive Order 2001-623 was issued pursuant to KRS Chapter 12 and specific provisions of Kentucky's constitution relating to the governor's authority to organize and administer functions of state government. The Order, which established the Governor's Employee Advisory Council, was issued May 18, 2001. Though it is not traditional collective bargaining, the Executive Order establishes a process to allow employee groups, after July 31, 2001, to voluntarily select an employee organization to represent them on

the Governor's Employee Advisory Council. The Council will consist of representatives of non-supervisory classified (*executive branch*) employees, excluding employees of Kentucky's constitutional officers and employees of the state's elementary, secondary, and post-secondary educational systems. The Council will convene periodically, at least twice annually, to provide advice and recommendations to the Governor concerning state employee/employer relations and shall discuss with the Governor matters pertaining to wages, hours and other terms and conditions of employment which are within the authority of the Governor to decide or recommend to the General Assembly.

Executive Order 2001-623 is the latest effort to strengthen bargaining rights of public employees in Kentucky. Statutory collective bargaining rights currently exist for firefighters in first class cities, and police officers in counties with a city of the first class—Louisville and Jefferson County. By virtue of Home Rule, collective bargaining agreements also exist between many public employees and their public employers on the local level. Nevertheless, there is no comprehensive collective bargaining law applicable to public employees in Kentucky.

The impact of Executive Order 2001-623 on the bargaining status of public employees might not be known when the General Assembly convenes in January 2002. Accordingly, it is uncertain whether public employee bargaining legislation will once again be a controversial issue during the 2002 General Assembly.

ALTERNATIVE CONSTRUCTION DELIVERY METHODS

Prepared by Mary Lynn Collins and Nancy Rose Osborne

Question

Should statutes that address state procurement be revised to more clearly define oversight and other issues relating to alternative construction delivery methods?

Background

Up to now, Kentucky state government has typically used the traditional construction delivery method referred to as design-bid-build, but is starting to use two alternative construction delivery methods: design-build and construction management-at-risk.

Traditionally, Kentucky state government has used a construction delivery method for building facilities referred to as design-bid-build. The first step under design-bid-build is to select an architect or engineer based on qualifications. The statutes, KRS 45A.800 *et. seg.*, set out a very detailed selection process for architects and engineers which include a selection committee made up of at least two Finance and Administration Cabinet employees randomly selected from a pool (one of which must be a merit employee), two merit employees from the user agency, a private-sector architect or engineer randomly selected from a pool, and a non-voting technical advisor. In addition, a non-voting representative of the State Auditor's Office serves on architect/engineer selection committees at the discretion of the State Auditor. Each voting member of a committee must file a statement indicating whether any violations of procurement laws were observed during the selection process. Once the architect/engineer is selected and all design work is completed, the construction work is procured through a sealed competitive bid, with the award typically going to the lowest bidder. There are two separate procurements and contracts: one for design and one for construction.

Recently, however, the Finance and Administration Cabinet, which administers most non-highway state construction, indicated that it is now using or plans to use two alternative construction delivery methods for some capital projects: design-build procurement and construction management-at-risk. (KRS 45A.045(11) permits either method in lieu of the traditional design-bid-build if the Secretary of the Finance and Administration Cabinet determines such method "offers the lowest real cost to the taxpayer.")

Design-build differs from the traditional design-bid-build in that both design and construction services are obtained under one procurement and one contract. The Finance and Administration Cabinet has awarded a design-build contract for a student housing project and is in the process of procuring design-build firms for

Under design-build, both architectural and construction services are obtained under one procurement and one contract.

construction of an office building and a medium security prison. Under this procurement, the Cabinet issues a request for proposals, and a committee narrows down the participants to three firms, based on qualifications. The three firms are then asked to prepare preliminary design, and oral interviews are conducted. Proposals are scored by the committee based on such factors as project approach and plans, minority contracting participation, and use of Kentucky contractors. Pricing information is not given to the selection committee. Points are assigned on pricing *after* the committee evaluates and otherwise scores the proposals. A total of one hundred points is possible; the maximum points that could be received for price for the student housing project and the office building was forty; for the prison, the maximum points that can be assigned for price will be sixty-five. It should be noted that under design-build, firms who do design work but do not get the design-build contract are sometimes given stipends for their work. In a pre-bid conference, participants in the design-build procurement for the prison project asked that stipends be considered for unsuccessful participants. A decision on stipends for that project has not yet been made.

A major advantage of the design-build method is that a single party is responsible for the project, which fosters a team building approach and reduces potential for conflict. Proponents also say the method saves time and reduces costs. A disadvantage of the method is a potential loss of owner control and quality since the initial price is based on preliminary requirements. In addition, some believe the method may discourage competition since fewer entities have the capacity to provide design-build services.

Under construction management-at-risk, construction expertise is brought in earlier than is the case for the traditional design-bid-build method, but it is procured separately from architectural services.

Construction management-at-risk, the other delivery system being considered by the Finance Cabinet, involves the use of a construction manager rather than a general contractor. As contemplated for use by the Finance Cabinet, the construction manager would be selected through a two-phase Request for Proposal process, parallel to or soon after the architect/engineer is selected. The selection is based on the candidates' qualifications, experience, references, and proposed fees for consulting services. The construction manager works with the architect during the design phase to review elements of project design for cost effectiveness, estimate cost, and develop a project schedule. The construction manager will provide a guaranteed maximum price at the conclusion of design development. The construction work will then be bid out in multiple bid packages (for example, structural steel, electrical, plumbing, heating, painting, and masonry). Once awards are made to subcontractors, the construction manager will act as a general contractor.

Major advantages cited by proponents of the construction management-at-risk method are the construction manager's expertise early in the process, less management demands on the owner's staff, ability to fast track some aspects of a project, and the ability of the owner to get the most competitive bids for all trade contractors since the construction is bid in multiple bid packages. Breaking construction into smaller bid packages may also increase competition among smaller, local companies. A disadvantage of the system is that the guaranteed maximum price (GMP) is negotiated some time after selection is made and the construction manager starts working on the project, which may put the owner in a weakened bargaining position. The GMP in such case is not based on a competitive bid.

Government has been slower to embrace alternative methods than has the private sector. However, states are starting to authorize and experiment with the alternative methods.

While these two alternative construction delivery methods have been widely embraced by the private sector, the government sector has been slower to utilize these methods since the traditional design-bid-build construction method, which was developed to eliminate favoritism from procurement decisions, is a more objective process—awards for construction go to the lowest sealed bid. However, proponents of the alternative delivery methods point out that the design-build teams and the construction managers contracted under these alternative methods have greater incentive to perform to a higher standard than they have under the traditional design-bid-build system where construction contracts are based on low bid and excellent past performance is not a factor in awards.

According to preliminary results of a survey by the Associated General Contractors, at least thirty-two states permit the use of design-build for state buildings and thirty-four states permit some form of construction management for state facilities. The authorization for some of the states is a general authorization to use any method if it is cost effective. In some states, however, the legislation specifically authorizes design-build and/or construction management-at-risk and in some cases, specifies when and how the methods are to be used. For example, several states permit alternative methods only for projects over an established threshold. Delaware only permits design-build when construction of a project must be completed in a substantially reduced period of time. New Hampshire requires approval of its General Assembly or its interim legislative fiscal committee prior to implementation of any design-build projects. West Virginia has established a design-build board made up of two licensed contractors, an architect or engineer, three public members, and a state official, to review and approve requests to use the design-build method.

Many of those states with authorization to use alternative methods are starting to experiment with design-build and/or construction management. The Director of Engineering in the Kentucky Department for Facilities Management surveyed his counterparts for their experience with both methods. Of the fifteen that responded, most reported that they were using one or both of the two delivery methods, and their experiences were mixed. A number reported that they were pleased with projects completed under the alternative methods; several reported no exceptional results, good or bad; several reported difficulties with the methods.

Discussion

Two legislative oversight committees are now reviewing contracts procured under the alternative construction delivery methods.

Policy questions that arise regarding alternative construction processes include the need for studies, prior review/approval by a legislative body, statutory guidelines for selection committees, restrictions on use of methods, and stipends for those unsuccessful bidders of design-build contracts.

In this state, the issue of legislative oversight related to contracts awarded under these methods was recently raised. Design-build contracts include architectural and engineering services as well as construction services. Pursuant to statute (KRS 45A.695), architectural and engineering services are reviewed by the Government Contract Review Committee. At the same time, procurement of both design-build and construction management are similar to built-to-suit procurement which is to be reviewed by the Capital Projects and Bond Oversight Committee pursuant to KRS 56.823(6). (Built-to-suit is essentially a design-build contract in which the contracting firm also provides financing through a long-term lease arrangement.) Because these alternative methods are so new and the issue of legislative oversight is not clear, the Chairs of both the Capital Projects and Bond Oversight Committee and the Government Contract Review Committee have asked the Finance Cabinet as well as the three universities that manage their own capital projects (University of Kentucky, University of Louisville, and Murray State University) to submit any alternative construction delivery contracts they award to both committees as information items.

Some of the policy questions that the 2002 General Assembly could address regarding alternative construction delivery methods include: Should a study of the projects using alternative construction delivery methods be requested? Should proposals to use alternative construction delivery methods be approved on a case-by-case basis by the General Assembly or reviewed by a legislative oversight committee? Should a selection committee process similar to the one for architects and engineers be established by statute for design-build firms and construction managers? Should there be any restrictions placed on the use of alternative construction delivery methods? (Through enactment of House Bill 347, the 2001 General Assembly prohibited local governments from using the same architectural firm for both design

and construction management services.) Should a stipend be given to firms who are asked to present design proposals but do not receive award of a design-build contract?

TRANSPORTATION

PENALTIES FOR SEAT BELT VIOLATIONS

Prepared by Kathy A. Kackley

Question

Should the General Assembly change the penalty for violating the state's mandatory seat belt law from a secondary offense to a primary offense?

Background

Kentucky's Seat Belt Law currently applies to all passengers in the vehicle.

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 ten 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 exempts persons who have in their possession a written statement from a physician or chiropractor that they are unable for medical or physical reasons to wear a seat belt. Letter carriers who work for the US Postal Service are also exempt from wearing a seat belt while engaged in the performance of their duties

Child restraints were added to the seat belt law in 1982.

In 1962, KRS 189.125 was enacted to prohibit the sale of any motor vehicle in Kentucky that was not equipped with seat belts in the front seat. In 1982, the statute was amended to require a parent or legal guardian to ensure that their children under forty inches in height were secured in a child restraint system at all times they were riding in a motor vehicle. The 1982 law prohibited police officers from either arresting or issuing a parent a ticket for violating the child restraint provisions. Police officers were permitted to issue courtesy warnings to parents who failed to have children under forty inches properly restrained. The statute further prohibited failure to have a child in a child restraint system from being considered contributory negligence and prohibited failure from being admissible as evidence in a civil trial.

Limited exemptions from child restraints were added in 1988.

In 1988, the General Assembly amended the provisions for failure to have a child properly restrained to provide that the child did not have to be in a restraint system if the child was riding in a pickup truck and all seat positions in the truck were occupied by a person other than a child forty inches or less in height. A penalty of \$50 was established for persons violating the child restraint provisions.

Violations of Kentucky's law are considered to be a Secondary Offense.

In 1994, KRS 189.125 was amended to require all passengers in both the front and rear seats to use seat belts unless the vehicle or

individual is exempt. The 1988 provision relating to children riding in trucks unrestrained was deleted and child restraint provisions were broadened to require any driver transporting a child under forty inches in height to ensure that the child is properly restrained. The statute expressly prohibits a police officer from stopping a person or issuing a person a citation for failing to wear a seat belt if the officer has no other reason to stop the vehicle. This prohibition makes Kentucky's statute 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 a seat belt. The penalty established for violating the adult seat belt provisions is \$25. The \$50 penalty for persons violating child restraint provisions was retained.

Discussion

National compliance percentages with seat belt laws indicate a 77% compliance rate in states with primary seat belt laws and 64% in states with secondary offense laws.

While the first seat belts were installed by automobile manufacturers in the 1950's, seat belt use remained low ranging from ten percent to fifteen percent nationwide until the early 1980's. According to the National Highway Traffic Safety Administration (NHTSA), by 1987 seat belt use had increased to forty-two percent as a result of the passage of mandatory laws in thirty-one states. By 1996, seat belt use nationwide was sixty-eight percent and ranged from a high of eighty-seven percent in California, to a low of forty-three percent in North Dakota. In the fall of 2000, use of seat belts by front seat passengers across the United States was estimated at seventy-one percent, according to results obtained from the National Occupant Protection Use Survey conducted by NHTSA. Estimates from the survey, conducted over six weeks during October and November 2000, also show that overall seat belt use in states with primary seat belt laws was seventy-seven percent compared with sixty-four percent in states with secondary seat belt laws.

Variations in seat belt laws make state comparisons difficult.

It is difficult to compare states with primary or secondary seat belt legislation because of the many variables between each state's provisions. For instance, out of fifty states, the District of Columbia, and Puerto Rico, there are nineteen states with "primary" laws, but seventeen states apply the law only to persons riding in the front seat while two states apply mandatory seat belt use to all passengers in the vehicle. Some states apply the law to persons up to a certain age and then it is permissive to wear the belt. Some states exempt taxis, commercial buses, school buses, farm vehicles, recreational vehicles, and vehicles greater than a certain weight.

Federal money is available for states which adopt legislation making violations of seat belt laws a primary offense.

Of the thirty-three states with "secondary" offense laws, twenty-one apply the law to passengers in the front seat only while twelve

states, including Kentucky, apply the law to all passengers in the vehicle. According to a 1997 *Presidential Initiative to Increase Seat Belt Use Nationwide*, survey data showed that fifty-two percent of persons over the age of sixteen support primary enforcement. The support for primary enforcement was highest, sixty-five percent, in states that currently have a primary seat belt law compared to only forty-six percent supporting primary enforcement in states that currently have a secondary seat belt law. Incentive monies are available in the form of federal grants to states as a reward for increasing seat belt usage across the state, regardless if the primary status applies to front seat passengers only or to all passengers in the vehicle.

Legislation to make Kentucky's seat belt violation a primary offense was introduced in the 2001 session but did not pass.

Legislation was introduced in the 2001 Regular Session to change Kentucky's seat belt law from a secondary offense to a primary offense. The legislation did not pass its house of origin. If a future General Assembly considers changing the status of Kentucky's mandatory seat belt law, policy makers will have to decide, among other things, if the current provisions covering all passengers in the vehicle will be maintained or if the law will only apply to persons riding in the front seat of the vehicle.

STRENGTHENING GRADUATED DRIVER LICENSING

Prepared by John Snyder

Question

Should the General Assembly impose restrictions on new operator's license holders under the age of eighteen?

Background

In 1996, Kentucky joined several other states in strengthening requirements for young drivers to receive their operator's licenses. Kentucky's reforms increased the minimum time period for holding an instruction permit from one month to six months, mandated that permit holders be accompanied by a licensed driver over the age of twenty-one (rather than of any age), placed a new midnight to 6 A.M. curfew restriction on permit holders, and established a new requirement that drivers under the age of eighteen attend a certified driver education course.

Kentucky strengthened restrictions on young drivers in 1996.

Kentucky, however, does not have a model graduated drivers licensing system. The model graduated driver's licensing system established by the National Committee on Uniform Traffic Laws and Ordinances has three levels: a supervised learning period, an intermediate license that permits unsupervised driving in lower risk circumstances, and finally, full driving privileges. The intermediate license will generally include some nighttime curfew and restrictions or limitations on the number of passengers, particularly teenage passengers. Kentucky's law allows young drivers to go directly from the learning phase to full driving privileges. Currently thirty-seven states impose some sort of intermediate licensing provision, with nineteen states imposing only a curfew, two states imposing only passenger restrictions and sixteen states imposing both.

Kentucky does not have a model graduated license system, which consists of learning, probation, and full privilege stages.

HB 332, which was introduced during the 2001 General Assembly, would have strengthened restrictions on young drivers. The bill had four major elements:

Legislation was introduced in the last session to strengthen Kentucky's law.

- a curfew from midnight to 6 A.M. on licensed drivers under the age of eighteen, unless accompanied by a licensed driver over the age of twenty-one;
- a passenger restriction limiting drivers who receive their license before their 18th birthday from carrying more than one passenger under eighteen for the first six months the driver

holds the license. This provision contained an exception for family members;

- a requirement that the certified driver education course be taken prior to taking the license test rather than the current provision of taking the course within a year of receiving the license; and
- a requirement that the parent or guardian of applicant for a license who is under eighteen attest that the applicant has received at least thirty hours of driving experience before the applicant can test for a license.

The bill was heard by the House Transportation Committee during the 2001 session, but no action was taken.

Discussion

Studies show a spike in accidents during the first month of holding a license.

Proponents cite that Kentucky's 1996 law has significantly reduced accident rates for drivers ages 16 to 16 ½, according to a Kentucky Transportation Center study.

Much of the reasoning behind stricter graduated licensing laws nationwide involves the relatively high accident rates for teenage drivers, particularly brand new drivers. Statistics have shown that while driver's with learner's permits are involved in very few crashes, a spike in accidents rates occurs in the first month and the first 500 miles of driving with a full-privilege license. A study conducted of 911 teenagers in four east coast states examined accidents and citations within the first year of full licensure and the first 3,500 miles driven. The crash rate was 5.9 per 100 drivers during the first month, 3.4 in the second month, and ranged from 1.3 to 3.0 during the next 10 months. For the first 250 miles of driving the crash rate is 3.2 per 10,000 miles driven, for the second 250 miles, 1.8, and for the third, 1.3.

Supporters of restrictions point to the effect Kentucky's 1996 reforms have had on accident rates. A study by the Kentucky Transportation Center comparing the four years after the 1996 law (1997-2000) with the three years prior (1993-1995) found an eighty-three percent decrease in accidents among drivers age 16 to 16½. For all sixteen year olds all types of crashes were reduced by approximately one third between the two time periods. However the study also found a three percent increase in accidents among drivers from 16½ to 17 over the same periods. Currently, the rate of crashes per miles driven is three times higher for sixteen year olds with a license as opposed to sixteen year olds with a permit. Supporters state that these findings underscore the argument that a transition period is needed to help further reduce accident rates.

Opponents contend that further restrictions on young drivers could be burdensome and could create enforcement problems.

Opponents of further restriction on young drivers point to problems of getting teenagers to and from school activities and jobs, particularly in rural areas. Further, they state these restrictions on passengers and hours of driving could cause tremendous enforcement problems for peace officers who would be forced to make snap determinations on age when deciding whether to stop a young driver for a violation of curfew and passenger restrictions.

REAR GUARD UNDERRIDE PROTECTION ON LARGE TRUCKS

Prepared by John Snyder

Question

Should the General Assembly increase penalties for non compliance with federal safety standards requiring rear guard underride protection devices on certain large trucks?

Background

Federal rules require the use of rear underride guards on many trucks.

Underride crashes are especially serious because passenger vehicles are essentially unprotected.

Legislation was introduced last session to crack down on violators of the underride guard regulations.

Federal regulations require that most trucks with a gross vehicle weight of more than 10,000 pounds be equipped with a rear underride guard if there is a distance of more than twenty-four inches between the truck bumper and the rear wheels and axle and if the bottom of the back bumper is more than twenty-two inches off the ground. This standard applies to trucks manufactured since 1952.

Underride guards are designed to protect passenger vehicles from sliding under the truck's rear bumper, resulting in a crash where the passenger compartment absorbs the full brunt of the truck bumper. Rear underride accidents are especially devastating because the passenger vehicle's normal defenses (front bumpers, front crumple zones) are rendered useless by the height of the truck bumper; this type of accident normally results in serious injury or death.

During the 2001 session of the General Assembly SB 154 was introduced to strengthen the \$20-\$100 fine for non-compliance with the rear underride guard requirement. The fine for violations was increased to \$250 under SB 154 with the stipulation that the fine would be dismissed if the person cited would present proof of meeting the standard within thirty days of the citation. Perhaps more importantly, the statute directed the Transportation Cabinet to include missing or defective rear underride guards in the "out-of-service" criteria used by truck safety inspectors and law enforcement personnel, meaning trucks not complying with the requirement would have to be parked until they were repaired. The bill was modified slightly, as different versions passed the Senate and House. The session came to a close before the differences could be agreed upon.

Discussion

The primary goal cited for SB 154 was to assure guards are placed on trucks.

Supporters of increased penalties for noncompliance stated that they were not concerned about citing and fining violators, the main goal of the legislation was to get the appropriate guards on the

trucks. This was the reason for the fine dismissal provisions in the bill. Further, they stated that placing underride guard violations on the list of out-of-service criteria sends a message to truckers that this is a serious violation.

Some voiced concerns over the severity of the out-of-service criteria and the cost of repairs.

During the debate on SB 154, some individuals voiced concern that to place these trucks out of service would be overly burdensome if the truck was in the middle of a delivery, especially if it were hauling a perishable cargo. Others were concerned at the cost of repairs to these rear underride guards. During the committee hearings on this bill during the 2001 session, estimates of \$200 to \$300 per truck were given as the cost of installing a rear underride protection device.

REGULATING CELL PHONE USE WHILE DRIVING

Prepared by John Snyder

Question

Should the General Assembly restrict the use of cell phones while driving?

Background

There are currently close to 100 million wireless telephone subscribers in the United States. The effect of this technology on the safety of the motoring public has become a major topic of discussion in recent years. As the discussion has become more intense, legislation has been filed in over 40 states to regulate the use of wireless phones in automobiles. Until this spring, no state had imposed major restrictions on driving while using a wireless phone. Several localities have banned wireless phone use while driving, as have England, Switzerland, Australia, and Singapore.

New York recently became the first state to ban cell phones while driving.

In June 2001, the New York State Assembly passed the first statewide ban on the use of hand held wireless phones while operating a motor vehicle. Senate Bill 5400 requires that any wireless phone used by the operator of a motor vehicle while driving be equipped with a "hands free" device which allows the caller to engage in a call without holding the phone. New York's law, however, only defines "engaging in a call" as talking and listening on a phone, and allows users to pick up the phone to activate and dial it. The law exempts emergency vehicles and personnel, and motorists who are reporting emergency situations. The law takes effect November 1, 2001, and delays fine enforcement for one month. Violators of the new law may be fined up to \$100.

In Kentucky, bills to outlaw cell phones while driving were introduced in the last two sessions.

During the 2000 and 2001 regular sessions of the Kentucky General Assembly, legislation was introduced which would have made operating a wireless phone while driving illegal. The bills made exceptions for emergency personnel, citizens reporting dangerous conditions, and users of "hands-free" phones.

Discussion

To date, most of the evidence regarding the safety of cell phone use while driving is anecdotal. In Kentucky, prior to the year 2000, there was no specific category on the uniform accident report to identify cell phone use as a contributing factor to an accident. The

Kentucky has just begun tracking cell phone use on accident reports. First year statistics show cell phones as a contributing factor in less than 1% of all highway accidents, injuries and deaths.

report form was changed beginning January 1, 2000, to include cell phones as a contributing factor. The following Table shows the total number of all accidents, injuries, and deaths on Kentucky's highways in 2000 and the number of accidents, injuries, and deaths where cell phone use was cited as a contributing factor:

**Comparison of Accidents, Injuries and Deaths
Total Accidents vs. Cell Phone Involved Accidents
Calendar Year 2000**

Number Of:	All Accidents:	Accidents Where Cell Phone Use is Cited as Contributing Factor:
Accidents	159,488	391
Injuries	55,354	179
Fatalities	835	2

Source: KSP Highway Accident data for the year 2000, July 2001

Most attempts at comprehensive studies of the issue suffer from a lack of quality data.

Because the reporting of cell phone use as a contributing factor on traffic accident reports only began very recently in most states, there is little good historical data on the subject. Studies that have been done were hindered greatly by a lack of complete data. A recent University of North Carolina study sponsored by the AAA Foundation for Highway Safety of accidents listed in the Nation Highway Safety Administration's Crashworthiness Data System (CDS) from 1995 to 1999 showed that in thirty of all cases the attentive status is missing or unknown. Further, of the drivers who listed as distracted, fully one-third were coded as "other" or "unknown" when asked to identify the source of the distraction. This study, which attempted to identify the major causes of driver distraction, identified cell phones as the source of distraction in 1.5 percent of accidents. However, the study authors cautioned that because of missing data and small numbers of some types of distractions, the database used underestimates driver inattention and distraction in crashes. Finally, the study authors cautioned that, "estimating the true percentage of crashes attributable to various distractions was not the goal" of the study.

Some studies have linked cell phones to accidents and slowed reaction times; Other studies have concluded that while there is a risk, it is relatively minor in comparison with other hazards.

A 1997 study in the *New England Journal of Medicine* examined 699 drivers who were involved in accidents and who were involved in accidents resulting in property damage. By analyzing the phone records of these drivers, it was determined that the risk of a collision while using a cell phone was four times greater than when not using a phone. The risk was similar for all levels of driving experience and age groups and interestingly, did not change significantly for hands-free devices over hand-held units. A 1991 study sponsored by the AAA Foundation For Highway Safety that tested the effects of various distractions on the reaction times of 151

subjects found that when using a cell phone, there was a twenty to thirty percent increase in the chance that a highway traffic situation would go unnoticed.

Other studies have found that cell phones pose a relatively minor risk. A Harvard School of Public Health study, funded by an industry provider, found that while cellular phones do pose some risk to drivers, other motorists, and pedestrians, the risks appear to be small in comparison with other daily risk. Further, the exact severity of such a risk is uncertain because of the limited research in the area. The authors calculated the risk of a driver's being killed using a cell phone at 6.4 in a million per year, 80% less than driving with a blood alcohol content of .10%. The study also cited several potential benefits of cell phone use, including decreased emergency response time and more effective apprehension of traffic violators and drunk drivers. The study urges that more and better quantitative information be gathered to judge the risks and benefits before governments regulate cell phone use in this manner.

