

Jumping in the Deep End? An Analysis of the North Carolina Health Insurance Risk Pool

INTRODUCTION

Dennis and Alice O'Connor lost their health insurance.¹ Their private insurance carrier ceased operating in North Carolina and, at the time, they were too young to qualify for Medicare.² As a result of prior medical conditions, the couple was unable to obtain affordable coverage from another private provider.³ Their story is similar to many other North Carolinians with prior health problems who struggle to find affordable health insurance that provides adequate coverage.

In North Carolina there are approximately 1.5 million individuals without health insurance.⁴ Like the O'Connors, some of these individuals are unable to obtain affordable coverage due to their prior medical history. Some individuals have pre-existing conditions that insurance companies refuse to cover or will only cover at much higher premiums. However, individuals with lower incomes as well as health problems cannot afford health insurance with premiums six and a half times the average rate for healthy individuals.⁵

It is estimated that 169,000 uninsured North Carolinians could be eligible under the North Carolina Health Insurance Risk Pool (the Pool).⁶ In other states, the equivalent of the Pool provides coverage to approximately 0.63% of the uninsured, although this varies from state to state.⁷ The Pool in North Carolina is projected to cover one percent (1%) of the uninsured population after ten years.⁸

1. Jean P. Fisher, *Gavel May Toll Risk-Pool Bill's End*, NEWS & OBSERVER, July 24, 2006, at B1, available at <http://www.newsobserver.com/674/story/463742.html>.

2. *Id.*

3. *Id.*

4. U.S. CENSUS BUREAU, HISTORICAL HEALTH INSURANCE TABLES (2008), <http://www.census.gov/hhes/www/hlthins/historic/index.html> (follow "HIA-4: Health Insurance Coverage Status and Type of Coverage by State—All Persons: 1999 to 2007" hyperlink) (indicating the number of people not covered by insurance in North Carolina in 2007).

5. CHRISTOPHER S. GIROD & SUSAN K. HART, NORTH CAROLINA HEALTH INSURANCE RISK POOL FEASIBILITY STUDY I (2007), available at http://www.ncdoi.com/lh/documents/nc_healthinsuranceriskpool_feasibilitystudy.pdf.

6. *Id.* at 3.

7. *Id.*

8. *Id.*

The Pool was designed to provide affordable coverage to high-risk individuals—those who have a medical condition or have suffered from past conditions—who cannot afford the high premiums of private coverage.⁹ In addition, the Pool was designed to “function as an acceptable alternative mechanism under the federal Health Insurance Portability and Availability Act of 1996” and to provide a form of “qualified coverage” to individuals under the Trade Adjustment Assistance Reform Act of 2002.¹⁰

There are inherent issues in attempting to provide insurance for individuals who are uninsurable, including financial repercussions and exposure to potential liability. However, North Carolina can attempt to avoid some of these dangers by looking at other state pools. Part I of this Comment explains the features of the Pool by looking at the Board of Directors of the Pool, reviewing the qualifications to apply, discussing the cost of coverage, and examining the financing of the Pool. Part II compares North Carolina’s Pool to established pools in other states. Part III concludes with an examination of potential issues that are likely to arise in the execution of the Pool.

I. EXPLANATION OF THE NORTH CAROLINA HEALTH INSURANCE RISK POOL

The Pool is established as a non-profit entity under the supervision of a board of directors.¹¹ The Pool opened on January 1, 2009,¹² with the purpose of providing coverage to high-risk individuals, qualified HIPAA (Health Insurance Portability and Accounting Act of 1996) individuals, and qualified individuals under the Federal Health Coverage Tax Credit.¹³ The Board of Directors manages the Pool with specific requirements regarding the Board’s authority,¹⁴ who is eligible for the Pool,¹⁵ what kind of coverage the Pool offers,¹⁶ and how the Pool is to be financed.¹⁷

9. N.C. HEALTH INS. RISK POOL, INCLUSIVE HEALTH, REPORT OF THE BOARD OF DIRECTORS TO THE N.C. GENERAL ASSEMBLY 1 (2008) [hereinafter INCLUSIVE HEALTH REPORT], available at <http://www.inclusivehealth.org/pages/39/filings/> (follow “Board Report to NC General Assembly” hyperlink).

10. *Id.*

11. N.C. GEN. STAT. § 58-50-180(a) (2007).

12. North Carolina Health Insurance Risk Pool Act, ch. 58, 2007 N.C. Sess. Laws 532 (codified at N.C. GEN. STAT. §§ 58-50-175 to -265).

13. INCLUSIVE HEALTH REPORT, *supra* note 9, at 1.

14. *See* N.C. GEN. STAT. § 58-50-180.

15. *See id.* § 58-50-195.

16. *See id.* § 58-50-205.

17. *See id.* § 58-50-225.

A. The Board of Directors

The first step in establishing the Pool was to create a board of directors consisting of members from various backgrounds to best accomplish the goals set out before it.¹⁸ These members are from the health community, small businesses, and insurance companies, and also include individuals representative of the typical candidate for the Pool.¹⁹ There are eleven board members of the Pool in addition to the Commissioner of Insurance of North Carolina (or an authorized designee²⁰), who serves “as an ex officio nonvoting member of the Board.”²¹ The board members are considered public servants²² and therefore are held to a high standard of ethical conduct.²³

The Board creates the Pool’s Plan of Operation for the Commissioner.²⁴ The Plan of Operation establishes procedures for operating the Pool;²⁵ selecting an Administrator for the Pool;²⁶ creating a fund for managerial expenses;²⁷ collecting, handling, and accounting for Pool claims;²⁸ announcing the existence of the Pool, including marketing and publication of information regarding the Pool;²⁹ filing grievances;³⁰ determining income of applicants;³¹ and providing for any other matters that might be necessary.³²

The Board is given discretion to act and has authorization to implement policies and procedures for the benefit of the Pool.³³ The Executive Director of the Pool is specifically required to operate the Pool so that the estimated cost does not exceed the income the Pool is designated to receive.³⁴ In order to do this, “[t]he Board may impose a cap on enrollment or may suspend enrollment for an indefinite period,” with exception for “federally defined eligible individuals.”³⁵

18. *See id.* § 58-50-180.

19. *Id.* § 58-50-180(b).

20. *Id.* § 58-50-175(4).

21. *Id.* § 58-50-180(b).

22. *Id.* § 58-50-180(i).

23. N.C. GEN. STAT. § 138A-2 (2007).

24. N.C. GEN. STAT. § 58-50-180(d).

25. *Id.* § 58-50-180(d)(1).

26. *Id.* § 58-50-180(d)(2).

27. *Id.* § 58-50-180(d)(3).

28. *Id.* § 58-50-180(d)(4).

29. *Id.* § 58-50-180(d)(5).

30. *Id.* § 58-50-180(d)(6).

31. *Id.* § 58-50-180(d)(7).

32. *Id.* § 58-50-180(d)(8).

33. *See id.* § 58-50-180(e).

34. *Id.* § 58-50-180(f).

35. *Id.*

The Board also must approve insurers to administer the Pool.³⁶ This selection is done through a competitive bidding process based on specific criteria determined by the Board.³⁷ These criteria include: the ability of the third party Administrator to handle individual's health insurance coverage,³⁸ the effectiveness of claim processing,³⁹ total cost for administering the Pool,⁴⁰ the ability to operate cost-efficiency mechanisms,⁴¹ the financial stability of the Administrator,⁴² and the authority to provide this service in North Carolina.⁴³ After reviewing the criteria and the bids, a contract is formed with the Pool, and the Administrator performs its necessary functions of providing coverage and paying claims.⁴⁴

In addition, the Executive Director, with oversight from the Board, is required to produce an annual report.⁴⁵ This report is given to the "Speaker of the House of Representatives, the President Pro Tempore of the Senate, the Commissioner [of Insurance], the Joint Legislative Health Care Oversight Committee, and the Committee on Employee Hospital and Medical Benefits."⁴⁶ The report must show the activities of the Pool.⁴⁷

B. Eligibility

An individual must meet specific requirements to be eligible for insurance coverage under the Pool. First, an individual must be a resident of North Carolina.⁴⁸ To be considered a resident under the statute, an individual must have "legal status in the United States" and have been "legally domiciled" in North Carolina for at least thirty days.⁴⁹

The individual must show that he or she qualifies through one of several conditions. A person is qualified for Pool coverage if an insurance company offering similar health care coverage rejects a person for

36. *Id.* § 58-50-185(a).

37. *Id.*

38. *Id.* § 58-50-185(a)(1).

39. *Id.* § 58-50-185(a)(2).

40. *Id.* § 58-50-185(a)(3).

41. *Id.* § 58-50-185(a)(4).

42. *Id.* § 58-50-185(a)(5).

43. *Id.* § 58-50-185(a)(6).

44. *Id.* § 58-50-185(b)-(c).

45. *Id.* § 58-50-180(g).

46. *Id.*

47. *Id.*

48. *Id.* § 58-50-195.

49. *Id.* § 58-50-175(18).

health concerns, which likely means that the person has a pre-existing condition that an insurer refuses to cover.⁵⁰ An individual is also eligible if he or she is accepted for insurance coverage “with a conditional rider that limits coverage for . . . high-risk medical condition[s]”⁵¹ or is refused coverage “except at a rate exceeding the Pool rate.”⁵² These are two conditions that limit an individual’s ability to obtain affordable health insurance. Eligibility can also be based upon diagnosis of a medical or health condition recognized by the Board of Directors.⁵³ A person can also qualify for Pool coverage if he or she is a federally-qualified, HIPAA-eligible individual, including those who currently have this coverage through an insurer.⁵⁴ An individual is considered a “federally defined eligible individual” if he or she has met certain conditions defined by HIPAA and has obtained creditable coverage for a period of eighteen months or more, lost access to group health insurance, and has exhausted means of continuation coverage.⁵⁵ Another basis for eligibility is entitlement to the federal health coverage tax credit.⁵⁶ Finally, an individual who can obtain similar coverage, but only at a rate above the Pool rate, is eligible for Pool coverage.⁵⁷

The Board of Directors, as authorized by section 58-50-195(b) of the North Carolina General Statutes, has adopted a list that includes a number of medical conditions allowing for eligibility for Pool coverage

50. *Id.* § 58-50-195(a)(1).

51. *Id.* § 58-50-195(a)(2).

52. *Id.* § 58-50-195(a)(3).

53. *Id.* § 58-50-195(a)(4) (providing that, if an individual is diagnosed with one of these medical or health conditions, the individual does not have to apply for other health insurance coverage to be eligible for Pool coverage).

54. *Id.* § 58-50-195(a)(5).

55. *See id.* § 58-68-60(b) (defining a person qualified to be an “eligible individual” under HIPAA as an individual who seeks coverage under this Act who had “creditable coverage” for 18 months or more, whose most recent coverage “was under an ERISA group health plan, governmental plan, or church plan,” who is “not eligible for coverage under (i) a group health plan, (ii) part A or part B of title XVIII of the Social Security Act, or (iii) a State plan under title XIX of the Act,” and whose coverage was not terminated on the basis of nonpayment or fraud); *see also* GIROD & HART, *supra* note 5, at 15 (stating that HIPAA guarantees qualified individuals “access to health insurance”).

56. N.C. GEN. STAT. § 58-50-195(a)(6). *See* I.R.C. § 35 (2008) (explaining who is eligible under the Trade Adjustment Assistance Reform Act to receive credit for health insurance).

57. N.C. GEN. STAT. § 58-50-195(a)(7).

under section 58-50-195(a)(4).⁵⁸ This list is not permanent and may be amended as the Board deems necessary.⁵⁹

Section 58-50-195(c) establishes specific instances where an individual is not eligible for Pool coverage.⁶⁰ First, if an individual can obtain comparable coverage or would be eligible for comparable coverage—except in the situations of either maintaining other coverage while under the waiting period for Pool coverage or maintaining Pool coverage while under a waiting period for another policy—that individual is not eligible for coverage under the Pool.⁶¹ Second, an individual is not eligible for Pool coverage if he or she can obtain Medicaid or Medicare coverage “unless the Pool offers Medicare supplemental insurance coverage.”⁶² If an individual has terminated coverage from the Pool, then he or she is not eligible for coverage unless a twelve-month period has lapsed.⁶³ Exceptions exist for a “federally defined eligible individual” or one who is eligible to receive benefits under the Trade Adjustment Assistance Program.⁶⁴ An individual also is not eligible for Pool coverage if he or she is an “inmate or resident of a public institution” unless he or she is a “federally defined eligible individual.”⁶⁵ An individual whose premiums are paid for by a government-sponsored program or provider is not eligible for the Pool unless the individual is a “full-time employee or dependent . . . of a government

58. *Id.* § 58-50-195(a)-(b). See N.C. HEALTH INS. RISK POOL, INCLUSIVE HEALTH, PRESUMPTIVE MEDICAL CONDITIONS LIST, <http://www.inclusivehealth.org/pages/33/Forms/> (follow “List of qualifying medical conditions” hyperlink) (last visited Mar. 3, 2009) (listing the following conditions: Acquired Immune Deficiency Syndrome/Human Immunodeficiency Virus, Alzheimer’s Disease, Amyotrophic Lateral Sclerosis (Lou Gehrig’s Disease), Aneurysm, Angina Pectoris, Angioplasty, Ankylosing Spondylitis, Cancer (except skin) treated or diagnosed in past 5 years, Cardiomyopathy, Cerebral Palsy, Chronic Obstructive Pulmonary Disease, Chronic Renal Failure, Cirrhosis of the Liver, Congestive Heart Failure, Coronary Insufficiency, Coronary Occlusion, Crohn’s Disease, Cystic Fibrosis, Emphysema, Hemochromatosis, Hemophilia, Hepatitis C, Hodgkin’s Disease, Huntington’s Chorea, Hydrocephalus, Leukemia, Lupus Erythematosus Disseminate, Major Organ Transplant, Multiple or Disseminated Sclerosis, Muscular Dystrophy, Myasthenia Gravis, Myocardial Infarction, Paget’s Disease, Paraplegia or Quadriplegia, Parkinson’s Disease, Polyarteritis (periarthritis nodosa), Psoriatic Arthritis, Raynaud’s Disease, Rheumatoid Arthritis, Schizophrenia, Stroke (CVA), Suicide Attempt, Tetralogy of Fallot, and Ulcerative Colitis).

59. N.C. GEN. STAT. § 58-50-195(b).

60. *Id.* § 58-50-195(c).

61. *Id.* § 58-50-195(c)(1)(a)-(b).

62. *Id.* § 58-50-195(c)(2).

63. *Id.* § 58-50-195(c)(3).

64. *Id.*

65. *Id.* § 58-50-195(c)(4).

agency.”⁶⁶ Lastly, an individual is not eligible for coverage if that individual has insurance in place when the Pool coverage takes effect.⁶⁷ The list of exclusions above clarifies more specifically the individuals who are qualified for coverage under the Pool.

Additionally, the Pool does not cover certain pre-existing conditions.⁶⁸ An individual will not be provided coverage during the first twelve months of enrollment for any conditions that were diagnosed or treated in the twelve-month period before enrollment in the Pool.⁶⁹ However, this limit does not apply to HIPAA eligible individuals.⁷⁰

An individual's coverage under the Pool may cease for several reasons. If an individual who was qualified for Pool coverage no longer meets the eligibility requirements, coverage must cease.⁷¹ This would occur when an individual who was unable to obtain insurance at a rate at or below the Pool rate is then able to obtain other insurance at a similar rate. Coverage would also cease when an individual is no longer a resident of North Carolina,⁷² when the individual requests coverage to cease,⁷³ or when the covered individual dies.⁷⁴ Additionally, when state law requires the Pool policy to be cancelled—potentially for lack of funding or similar situations—coverage would terminate.⁷⁵ Coverage may also be terminated when the person does not reply to requests regarding residence or eligibility⁷⁶ or when the individual has failed to make premium payments as required.⁷⁷ Pool coverage may also cease if an individual has performed an act or practice that constitutes fraud, such as making an intentional misrepresentation of material fact under the terms of the coverage.⁷⁸ It should also be noted that it is an unfair trade practice for an employer, insurer, or third-party administrator to refer an individual to the Pool with the intention of separating the individual from the group medical benefit plan that is provided by the individual's employment.⁷⁹

66. *Id.* § 58-50-195(c)(5).

67. *Id.* § 58-50-195(c)(6).

68. *Id.* § 58-50-210.

69. *Id.* § 58-50-210(a).

70. *See id.*

71. *Id.* § 58-50-195(e).

72. *Id.* § 58-50-195(d)(1).

73. *Id.* § 58-50-195(d)(2).

74. *Id.* § 58-50-195(d)(3).

75. *Id.* § 58-50-195(d)(4).

76. *Id.* § 58-50-195(d)(5).

77. *Id.* § 58-50-195(d)(6).

78. *Id.* § 58-50-195(d)(7). *See id.* § 58-68-45(b)(2).

79. *Id.* § 58-50-200.

These limitations restrict the Pool to a group of individuals who need to have this type of coverage. While there are many restrictions, it is estimated that 169,000 individuals in North Carolina would qualify as being both “high risk” and uninsured.⁸⁰ In addition, there are another estimated 9000 North Carolinians who should qualify, since they are currently paying more than the Pool rate under their existing coverage.⁸¹ Moreover, these numbers do not include the 22,283 North Carolinians eligible for “credit under the Trade Adjustment Assistance Reform Act.”⁸² This essentially means that an estimated 200,000 individuals would be eligible and meet the requirements to have coverage under the Pool.⁸³

C. Cost of Coverage for Qualified Individuals

There are varying levels of coverage offered to eligible individuals under the Pool. All that was required from the Board was to create two types of benefit plans that included “preferred provider organization” with varying levels of deductibles and cost-sharing plans with “at least one choice of health savings account.”⁸⁴ In addition, there was a specified lifetime limit that was to be at least \$1,000,000 and a deductible up to \$5000.⁸⁵ Upon recommendation of the Executive Director, the Board must adopt rules adjusting these limits at least once every five years in order to accurately reflect changes “in the medical component of the Consumer Price Index.”⁸⁶

The Board has created three plans that vary in offerings. Plan A offers an annual deductible of \$1000 and a lifetime maximum benefit of \$1,000,000.⁸⁷ Additionally, this plan offers co-insurance of eighty percent (80%) for services provided by a network provider and fifty percent (50%) for a non-network provider.⁸⁸ Plan A also provides an

80. GIROD & HART, *supra* note 5, at 3.

81. *Id.*

82. INCLUSIVE HEALTH REPORT, *supra* note 9, at 7. See I.R.C. § 35 (2008) (explaining who is eligible under the Trade Adjustment Assistance Reform Act to receive credit for health insurance).

83. INCLUSIVE HEALTH REPORT, *supra* note 9, at 7.

84. N.C. GEN. STAT. § 58-50-205(a).

85. *Id.* § 58-50-205(b).

86. *Id.*

87. N.C. HEALTH INS. RISK POOL, INCLUSIVE HEALTH, SCHEDULE: BENEFITS SUMMARY 1 (2008) [hereinafter INCLUSIVE HEALTH SCHEDULE], available at <http://www.inclusivehealth.org/intranet/downloadManagerControl.php?mode=GetFile&elementID=114&type=5&atomID=38>.

88. *Id.*

annual out-of-pocket maximum of \$2000 for network services and \$4000 for non-network services.⁸⁹

Plan B has a higher deductible at \$2500 and offers the same lifetime maximum of \$1,000,000.⁹⁰ Plan B offers the same co-insurance as Plan A: eighty percent (80%) for services provided by a network provider and fifty percent (50%) for a non-network provider.⁹¹ However, the plan limits annual out-of-pocket maximums to \$4000 for network services and \$5000 for non-network services.⁹²

The final plan, Plan C, offers the highest deductible of \$5,000 and the same lifetime maximum benefit of \$1,000,000.⁹³ This plan presents the possibility of a Health Savings Account⁹⁴ which allows an individual to set up a tax-exempt trust or custodial account in order to pay or reimburse certain medical expenses an individual incurs.⁹⁵ In addition, Plan C covers 100% of the cost of medical expenses once the deductible is met.⁹⁶

These individual plans offer diverse choices for different individuals. They also offer varying premiums so individuals can determine which one best fits within their budget.⁹⁷ In addition to the three plans, there is also the possibility that the Pool will offer a premium subsidy, which would provide financial support to certain individuals to assist in paying their premiums.⁹⁸ The Board must examine ways in which to subsidize premiums “for individuals with incomes up to three hundred percent (300%) of the federal poverty guidelines” in a sliding scale approach, providing more support for individuals with a greater need.⁹⁹

89. *Id.*

90. *Id.* at 3.

91. *Id.*

92. *Id.*

93. *Id.* at 6.

94. N.C. HEALTH INS. RISK POOL, INCLUSIVE HEALTH, APPLICATION FOR COVERAGE 5 (2008), available at <http://www.inclusivehealth.org/pages/33/Forms/> (follow “Enrollment application—print version” hyperlink).

95. See 26 U.S.C. § 223 (Supp. 2005).

96. INCLUSIVE HEALTH SCHEDULE, *supra* note 87, at 6.

97. See N.C. HEALTH INS. RISK POOL, INCLUSIVE HEALTH, PREMIUM RATES (2008), <http://www.inclusivehealth.org/pages/33/Forms/> (follow “Premium rates” hyperlink).

98. N.C. GEN. STAT. § 58-50-255(a)(5) (2007).

99. *Id.*

D. Financing

The Pool is financed through a number of sources for the start-up and ongoing costs of the Pool. The North Carolina Health Insurance Risk Pool Fund (the Fund) was developed to provide for the financing needs of the Pool and it accounts for the Pool's funds.¹⁰⁰ The revenue for the Fund consists of any fees or premiums paid in connection with the Pool, revenue from taxes applied to the gross premiums on taxable contracts by insurers,¹⁰¹ gifts or grants, and interest earned by the Fund.¹⁰² Financing of the Pool is divided into two specific areas: start-up costs and ongoing operating costs.

The North Carolina General Assembly established a start-up reserve that is appropriated to the General Fund.¹⁰³ This start-up period covered the span of August 31, 2007, to December 31, 2008,¹⁰⁴ and a one-time amount of \$250,000 was appropriated to help pay for start-up expenses.¹⁰⁵ These funds were allocated under the care of the Department of Insurance until July 1, 2009, and then transferred to the Special Fund.¹⁰⁶ The General Assembly also designated that any federal funds received in this start-up period should be included in this reserve.¹⁰⁷

Acting on the Pool's behalf, the Department of Insurance "applied for a federal high-risk pool 'seed' grant from the Centers for Medicare and Medicaid."¹⁰⁸ The grant of \$850,000 that was awarded is to be used in the grant period from September 20, 2007, until March 31, 2009.¹⁰⁹ At the end of this period, the unspent funds from this grant revert to the Centers for Medicare and Medicaid.¹¹⁰ As a result, the

100. North Carolina Health Insurance Risk Pool Act, ch. 58, 2008 N.C. Sess. Laws 118, pt. III, § 3.2(b) (codified as amended at N.C. GEN. STAT. § 58-50-225), <http://www.ncga.state.nc.us/EnactedLegislation/SessionLaws/PDF/2007-2008/SL2008-118.pdf> (last visited Mar. 21, 2009).

101. *Id.* § 3.2(d) (codified as amended at N.C. GEN. STAT. § 105-228.5B). See N.C. GEN. STAT. § 105-228.5(d)(2).

102. North Carolina Health Insurance Risk Pool Act, ch. 58, 2008 N.C. Sess. Laws 118, pt. III, § 3.2(b).

103. *Id.* § 3.2(f) (amending 2007 N.C. Sess. Laws 532, § 2.1).

104. INCLUSIVE HEALTH REPORT, *supra* note 9, at 2.

105. North Carolina Health Insurance Risk Pool Act, ch. 58, 2007 N.C. Sess. Laws 532, § 3.

106. *Id.*

107. North Carolina Health Insurance Risk Pool Act, ch. 58, 2008 N.C. Sess. Laws 118, pt. III, § 3.2(f) (amending 2007 N.C. Sess. Laws 532, § 2.1).

108. INCLUSIVE HEALTH REPORT, *supra* note 9, at 3.

109. *Id.*

110. *Id.*

Board has instructed that these federal funds be used prior to the state start-up funds.¹¹¹

To deal with ongoing costs the Pool will draw funds from several sources. First, individuals who enroll in the plan will pay premiums for coverage.¹¹² However, because the Pool is designed to provide lower cost medical coverage to high-risk individuals, the Pool is designed to run at a loss from these premiums.¹¹³

The difference from the claims and the premiums income will be covered by State funds through other sources.¹¹⁴ First, there is a transfer of \$5 million from the Health and Wellness Trust Fund in the 2008-2009 fiscal year.¹¹⁵ In addition, the Teachers' and State Employees' Comprehensive Major Medical Plan will make an annual payment equal to \$1.50 for each active enrollee and dependent under the Teacher's and State Employee's Plan.¹¹⁶ The General Assembly also specified that there will be an annual transfer from the General Fund to the Special Fund made "[w]ithin 75 days after the end of each fiscal year."¹¹⁷ The money from the General Fund is to be the growth in net revenue collected from gross premiums on taxable contracts "issued by insurers and to be applied to gross premiums and gross collections from membership dues, exclusive of receipts from cost plus plans, received by Article 65 corporations."¹¹⁸ Until June 30, 2010, 100% of this growth in net revenue will be transferred to the Special Fund.¹¹⁹ Beginning in 2010, the percentage drops to thirty percent (30%) of the growth in revenue over the 2006-2007 revenue that is to be transferred

111. *Id.*

112. *Id.* See N.C. GEN. STAT. § 58-50-190 (2007).

113. INCLUSIVE HEALTH REPORT, *supra* note 9, at 3.

114. *Id.*

115. *Id.*

116. *Id.*

117. North Carolina Health Insurance Risk Pool Act, ch. 58, 2008 N.C. Sess. Laws 118, pt. III, § 3.2(d) (codified as amended at N.C. GEN. STAT. § 105-228.5B), <http://www.ncga.state.nc.us/EnactedLegislation/SessionLaws/PDF/2007-2008/SL2008-118.pdf> (last visited Mar. 21, 2009).

118. N.C. GEN. STAT. § 105-228.5(d)(2) (2007).

119. North Carolina Health Insurance Risk Pool Act, ch. 58, 2008 N.C. Sess. Laws 118, pt. III, § 3.2(d) (effective until June 30, 2010, and indicating net revenue calculation by finding the difference between the amount of revenue calculated in the most recent fiscal year and the amount of revenue collected during the 2006-2007 fiscal year, which was \$475,545,413).

to the Special Fund.¹²⁰ In addition, because the Special Fund is interest bearing, the fund will earn interest income.¹²¹

II. COMPARISON TO OTHER POOLS

North Carolina is one of many states to offer a health insurance risk pool. Each state offers different premium rates, coverage plans, means of financing the pool, and methods of selecting eligible individuals for pool coverage.¹²² By comparing other pools, North Carolina can determine issues that will arise as well as find potential changes that should be made to the North Carolina Pool.

The Texas Health Insurance Risk Pool (the Texas Pool) is a well-established pool, originally enacted in 1989.¹²³ The Texas Pool was not fully functioning until 1998.¹²⁴ Therefore, the Texas Pool provides a helpful comparison to determine the future direction and potential problems that the North Carolina Health Risk Pool may face.

The purpose of the Texas Pool is to provide “quality health care at minimum cost to the public.”¹²⁵ In addition, the Texas Pool works to “relieve the insurable population of the disruptive cost of sharing cov-

120. *Id.* § 3.2(e) (codified as amended at N.C. GEN. STAT. § 105-228.5B) (effective June 30, 2010).

121. *Id.* § 3.2(b) (codified as amended at N.C. GEN. STAT. § 58-50-225(a)(4)).

122. *See, e.g.*, ALA. CODE §§ 27-52-1 to -6 (LexisNexis 2007); ALASKA STAT. §§ 21.55.010-.060 (2006); ARK. CODE ANN. §§ 23-79-501 to -513 (2004); CAL. INS. CODE §§ 12700-12739.4 (West 2005); COLO. REV. STAT. §§ 10-8-501 to -535 (2008); CONN. GEN. STAT. ANN. §§ 38a-469 to -477b (West 2007); FLA. STAT. ANN. §§ 408.90-.910 (West 2002); IDAHO CODE ANN. §§ 41-5501 to -5511 (2003); 215 ILL. COMP. STAT. ANN. 105/1 to /15 (West 2008); IND. CODE ANN. §§ 27-8-10-1 to -14 (LexisNexis 1999); IOWA CODE §§ 514E.1-.11 (2007); KAN. STAT. ANN. §§ 40-2117 to -2131 (1999); LA. REV. STAT. ANN. §§ 22:3101-:3112 (2004); MD. CODE ANN., INS. §§ 14-501 to -509 (LexisNexis 2006); MINN. STAT. §§ 62E.01-.19 (2005 & Supp. 2009); MISS. CODE ANN. §§ 83-9-201 to -222 (West 1999); MO. REV. STAT. §§ 376.960-.989 (2000); MONT. CODE ANN. §§ 33-22-1501 to -1524 (2007); NEB. REV. STAT. §§ 44-5301 to -5311 (2004); N.H. REV. STAT. ANN. §§ 404-G:1 to :2 (2006 & Supp. 2008); N.M. STAT. ANN. §§ 59A-54-1 to -21 (West 2003 & Supp. 2008); N.D. ADMIN. CODE 45-06-02.1-01 to -03 (Supp. 2009); OKLA. STAT. tit. 36 §§ 6531-6545 (2008); OR. REV. STAT. §§ 735.600-.650 (2007); S.C. CODE ANN. §§ 38-74-10 to -90 (2002); S.D. CODIFIED LAWS §§ 58-17-115 to -142 (2007); TENN. CODE ANN. §§ 71-5-101 to -199 (2004); TEX. INS. CODE ANN. §§ 1506.001-.050 (Vernon 2008); UTAH CODE ANN. §§ 31A-29-101 to -123 (2004 & Supp. 2008); WASH. REV. CODE ANN. §§ 48.41.010-.910 (West 2008); W. VA. CODE ANN. §§ 33-48-1 to -12 (LexisNexis 2006); WIS. STAT. ANN. §§ 149.105-.17 (West 2006); WYO. STAT. ANN. §§ 26-43-101 to -114 (2007).

123. H.B. 2602, 71st Leg., Reg. Sess. (Tex. 1989).

124. *See* H.B. 710, 75th Leg., Reg. Sess. (Tex. 1997); *see also* TEX. INS. CODE ANN. § 1506.001-.050.

125. TEX. INS. CODE ANN. § 1506.101(a)(1).

erage” and to “maximize reliance on strategies of managed care proven by the private sector.”¹²⁶ By codifying the purpose of the Texas Pool, the state has identified goals that the Texas Pool must meet. North Carolina, in contrast, failed to codify its purpose, which could lead to ambiguity in what its Pool is potentially trying to accomplish.

The Board of Directors for the Texas Pool consists of nine individuals: two to four individuals affiliated with insurance companies, two individuals eligible for Pool Coverage, and other individuals who may represent the health and medical community.¹²⁷ Similar to North Carolina’s Board, the Texas Board must produce an annual report in summation of the Pool’s activities.¹²⁸ Board members are not liable for acts or omissions that were made in good faith and no cause of action may be brought against them.¹²⁹ North Carolina extends similar liability protection to board members and employees of the Pool, but this protection only applies to positive actions and does not apply to omissions by the Board or the Pool’s employees.¹³⁰ However, like the North Carolina Pool, the Texas Pool itself may sue or be sued.¹³¹

To be eligible for the Texas Health Insurance Risk Pool, there are a number of requirements similar to those of North Carolina’s Pool. First, a resident individual who qualifies as a “federally defined eligible individual”¹³²—meaning the individual was covered for eighteen months with no gap in coverage greater than sixty-three days by a group health plan, governmental plan, or church plan—is eligible for Texas Pool coverage.¹³³ Additionally, a resident younger than sixty-five is eligible for Texas Pool coverage if he or she shows one of the following: a rejection or refusal of coverage for health related reasons;¹³⁴ certification from a representative of a health benefit plan showing the individual will be denied coverage because of a medical condition;¹³⁵ an offer for similar coverage but “only with conditional riders”;¹³⁶ a diagnosis of a medical condition established by the Board for automatic eligibility;¹³⁷ evidence that the individual has similar coverage

126. *Id.* § 1506.101(a)(2)-(3).

127. *Id.* § 1506.051.

128. *Id.* § 1506.057.

129. *Id.* § 1506.055.

130. N.C. GEN. STAT. § 58-50-180(h) (2007).

131. TEX. INS. CODE ANN. § 1506.108.

132. *Id.* § 1506.152(a)(1).

133. *Id.* § 1506.001(1-c) (describing a HIPAA-eligible individual).

134. *Id.* § 1506.152(a)(3)(A).

135. *Id.* § 1506.152(a)(3)(B).

136. *Id.* § 1506.152(a)(3)(C).

137. *Id.* § 1506.152(a)(3)(D).

but excludes condition(s) by rider;¹³⁸ or evidence that an individual is eligible for coverage under the Trade Adjustment Assistance Reform Act of 2002.¹³⁹ In addition, Texas notes that a dependent of an individual who is eligible for its Pool coverage is also qualified.¹⁴⁰ North Carolina recognizes dependent eligibility only in instances where individuals (and therefore their dependents) are eligible for credit for health insurance under the Trade Adjustment Assistance Reform Act.¹⁴¹ As the Pool in North Carolina is new, expanding coverage to include all dependents could prohibitively stretch funds, thereby inhibiting the Pool's capabilities. However, this issue could be considered at a later date, after the funding supply for the Pool is better understood.

Like North Carolina, Texas establishes a list of qualifications that prevent an individual from being eligible for Texas Pool coverage. For example, a person is ineligible if he or she has other health coverage in effect on the date Texas Pool coverage is to take effect.¹⁴² Other grounds for ineligibility include: if at the time the individual applies for coverage the individual is eligible for or covered by employer-sponsored health coverage, including a self-insured health benefit plan or continuation of coverage under state or federal law;¹⁴³ if an individual has terminated Texas Pool coverage within twelve months prior to application for Texas Pool coverage, unless there is a good faith reason for terminating the coverage;¹⁴⁴ if an individual is confined to county jail or is in prison;¹⁴⁵ if a person had Texas Pool coverage terminated for reason of fraud or nonpayment;¹⁴⁶ or if he or she will have premiums paid or reimbursed by or under a government sponsored program or government agency or by a health care provider.¹⁴⁷

The eligibility requirements and the composition of the Board are very similar in Texas and North Carolina. However, there are some notable differences in the coverage plans implemented by the Texas Board for eligible individuals for that state's Pool. The Texas Pool

138. *Id.* § 1506.152(a)(3)(E).

139. *Id.* § 1506.152(a)(4).

140. *Id.* § 1506.152(b). *See id.* § 1506.003 (stating that a dependent is "a resident spouse or unmarried child younger than 25 years of age" or a child who is considered a "full-time student younger than 25" or a child 18 years or older who is still entitled to child support, or a child who is "disabled and dependent").

141. N.C. GEN. STAT. § 58-50-195(a)(6) (2007).

142. TEX. INS. CODE ANN. § 1506.153(a)(1).

143. *Id.* § 1506.153(a)(2).

144. *Id.* § 1506.153(a)(3).

145. *Id.* § 1506.153(a)(4).

146. *Id.* § 1506.153(a)(6).

147. *Id.* § 1506.153(a)(5).

offers more coverage plans than North Carolina with varying levels of deductibles and co-insurance, and a lifetime maximum of \$2 million.¹⁴⁸ The Texas Pool offers a choice of four plans; the deductibles for Plans I, II, III, and IV are, respectively, \$1000, \$2500, \$5000, and \$7500.¹⁴⁹ Unlike North Carolina, which requires at least one plan to offer a health savings account, Texas does not offer a plan with a health savings account.¹⁵⁰ The lifetime maximum in Texas is higher, \$2 million.¹⁵¹ It is also noteworthy that the Texas Pool only provides twenty percent (20%) co-insurance for preferred providers and forty percent (40%) for co-insurance for non-preferred providers.¹⁵² However, the maximum out-of-pocket expense for preferred providers is \$3000 (except Plan IV, which is \$5000) and \$10,000 for non-preferred providers.¹⁵³

These differences between the various Texas plans obviously distinguish the costs of the programs and impact the total loss the Texas Pool incurs each year. Premiums collected, along with the amount paid to provide insurance for individuals, will vary in its effect on the funds of the Texas Pool, as well as the amount lost from year to year. North Carolina's Pool will be impacted in a similar manner. In 2007, the Texas Pool collected \$185,245,040 in premiums and paid claims that totaled \$242,129,097.¹⁵⁴ The Texas Pool ended that year with 27,733 members.¹⁵⁵ North Carolina is projected to have between approximately 1947 to 2839 enrollees in 2009.¹⁵⁶ The numbers are affected by the premium rates, the pre-existing condition limits, the plan choices, the marketing and public awareness of the Pool, and various other factors.¹⁵⁷ The comparison with the Texas Pool provides an example of possible future adjustments in North Carolina's Pool that have contributed to the longevity of the Texas Pool.

148. TEX. HEALTH INS. RISK POOL, OUTLINE OF COVERAGE: INDIVIDUAL MAJOR MEDICAL COVERAGE 5 (2009) [hereinafter TEX. POOL COVERAGE], <http://www.txhealthpool.com/01012009%20Outline%20Web%2011-24-08.pdf>. See TEX. HEALTH INS. RISK POOL, 2007 ANNUAL REPORT (2008) [hereinafter TEX. POOL REPORT], available at <http://www.txhealthpool.com/BlackandWhite2007%20THIRP%20Gov%20Report%20Final%20Combined%20071408.pdf>; see also INCLUSIVE HEALTH SCHEDULE, *supra* note 87.

149. TEX. POOL COVERAGE, *supra* note 148, at 5.

150. N.C. GEN. STAT. § 58-50-205(a) (2007). See TEX. INS. CODE ANN. § 1506.001-.050.

151. TEX. POOL COVERAGE, *supra* note 148, at 5.

152. *Id.*

153. *Id.*

154. TEX. POOL REPORT, *supra* note 148, at 11.

155. *Id.* at 6.

156. GIROD & HART, *supra* note 5, at 24.

157. See *id.* at 24-25.

It is also significant to note information regarding the Texas Pool that might make a difference in North Carolina's Pool. Texas implemented additional drug coverage management rules that have helped in controlling Texas Pool costs.¹⁵⁸ The Texas Pool also implemented education programs regarding prescription drugs that have increased generic drug use.¹⁵⁹ This is significant because fifty-two percent (52%) of the Texas Pool's claims were for prescription drugs in 2007.¹⁶⁰ Texas also implemented health and wellness tools that allow members to find health solutions, discuss doctors, and receive discounts for programs that increase healthy activity such as gym membership and weight loss programs.¹⁶¹ This is noteworthy because North Carolina is required to study "methods for encouraging health behaviors" within a year of the Pool's implementation.¹⁶²

Texas also monitored Pool trends that could be helpful to North Carolina. Out of the above-mentioned coverage plans, the highest enrollment over a period of three years has been the \$2500 deductible plan.¹⁶³ Texas had a plan with a low \$500 deductible, but dropped it due to low enrollment.¹⁶⁴ The largest segment of enrollees in the Texas Pool was HIPAA-eligible individuals, comprising forty-two percent (42%) of the entire enrollment.¹⁶⁵ Individuals who were rejected because they had similar coverage represented eighteen percent (18%) of eligible individuals.¹⁶⁶ Of those individuals who withdrew from the Texas Pool, more than fifty percent (50%) withdrew because of non-payment of premiums or because they obtained other insurance.¹⁶⁷ This information could be indicative of trends for North Carolina's Pool since Texas has had its Pool in operation for a number of years. With similar requirements for "Pool eligible" individuals, North Carolina has the potential to show analogous trends, so the information from Texas can be useful to the North Carolina Board. Additionally, the plan information as well as the cause for withdrawal can prepare the Board for changes that should be made, and may be indicative of trends that could occur in North Carolina.

158. TEX. POOL REPORT, *supra* note 148, at 5.

159. *Id.*

160. *Id.*

161. *Id.*

162. North Carolina Health Insurance Risk Pool Act, ch. 58, 2007 N.C. Sess. Laws 532, § 1.3.

163. TEX. POOL REPORT, *supra* note 148, at 10.

164. *Id.*

165. *Id.* at 8.

166. *Id.*

167. *Id.* at 7.

Texas uses both Medco Health Solutions (Medco) and Blue Cross and Blue Shield of Texas (BCBSTX) as third-party administrators.¹⁶⁸ Medco manages the Texas Pool prescription drug claims and coverage while BCBSTX acts as another third-party administrator providing health care coverage.¹⁶⁹

Another Pool that North Carolina should examine is the Washington Health Insurance Risk Pool (the Washington Pool).¹⁷⁰ Because the Board for the North Carolina Health Insurance Risk Pool must look into methods for a premium subsidy for individuals with lower incomes, the Washington Pool provides a particularly relevant comparison since it offers such a subsidy.¹⁷¹ The Washington Pool offers a premium subsidy for individuals whose income falls within the range established by the Federal Poverty Guidelines.¹⁷² An individual with an income less than 251% of the federal poverty level has a thirty percent (30%) reduction of premium rates.¹⁷³ An individual with an income that is between 250% and 301% of the federal poverty level is given a fifteen percent (15%) reduction in premium rates.¹⁷⁴ Additionally, the Washington Pool offers a five percent (5%) reduction for those individuals that have been enrolled in the Washington Pool for longer than thirty-six months.¹⁷⁵ However, even with reductions, no rate may go below 110% of the standard risk rate.¹⁷⁶ The Washington Pool is a working example of how a sliding scale approach to a premium subsidy is implemented and North Carolina should consider it in determining methods for providing a premium subsidy.¹⁷⁷

III. POTENTIAL POOL PROBLEMS

The North Carolina Health Insurance Risk Pool seems to be starting out with significant funds and has the provisions in place to ensure successful operation. However, some potential problems should be noted. As stated previously, the Pool operates at a loss.¹⁷⁸ By design,

168. *Id.* at 3.

169. *Id.*

170. Health Insurance Coverage Access Act, WASH. REV. CODE ANN. §§ 48.41.010-910 (West 2008).

171. *See id.* § 48.41.200.

172. *Id.* § 48.41.200(3)(a).

173. *Id.* § 48.41.200(3)(a)(i).

174. *Id.* § 48.41.200(3)(a)(ii) (percentages overlap as per statute).

175. *Id.* § 48.41.200(3)(a)(iii).

176. *Id.* § 48.41.200(3)(b).

177. *See* N.C. GEN. STAT. § 58-50-255 (2007).

178. *See id.* § 58-50-180 (indicating the Pool is a non-profit entity); *id.* § 58-50-255 (outlining possible supplementary sources of funding).

the premiums do not cover the costs of operating the Pool.¹⁷⁹ This has two implications. First, the Pool must find additional funding from other sources. Second, the Pool must consider the ramifications of the Pool possibly running out of funds.

For now, the General Assembly has implemented sources of funding and the Board of Directors continues to investigate various other sources to provide income to the Pool.¹⁸⁰ There have been multiple appropriations to aid in costs.¹⁸¹ The initial funding covers the period before implementation of the Pool and other funding will cover ongoing operating costs—the difference between premium income and the cost of claims and management.¹⁸²

The Pool must also deal with the implications of running out of money to support the Pool's operation. While the General Assembly has set up promising funding from various sources, uncertainty remains as to the amount of money the Pool will receive.¹⁸³ As required by law, the Pool may cap enrollment if there is the possibility that cost will exceed funding.¹⁸⁴ However, the Board is also required to operate the Pool in a manner to prevent this from happening.¹⁸⁵ This ambiguity between what the Board is required to do and what it has discretion to do could cause legal conflicts between the Pool and individuals who are denied enrollment. Because the Board must monitor Pool funds to ensure the estimated costs do not exceed total income, there is an inherent requirement to keep the Pool operating.¹⁸⁶ However, if the Board determines there is a lack of funding, it is within its discretion to cap or suspend the Pool's enrollment.¹⁸⁷ If an individual is denied enrollment into the Pool, a lawsuit could be brought against the Pool or the Board of Directors due to this ambiguity within the statutes. While the Board's liability is limited by statute, it is at

179. GIROD & HART, *supra* note 5, at 26.

180. See N.C. GEN. STAT. § 58-50-255; North Carolina Health Insurance Risk Pool Act, ch. 58, 2007 N.C. Sess. Laws 532, §§ 2.1 to 6.

181. See North Carolina Health Insurance Risk Pool Act, ch. 58, 2007 N.C. Sess. Laws 532, §§ 3, 5.

182. See *id.* §§ 2.1 to 6.

183. INCLUSIVE HEALTH REPORT, *supra* note 9, at 4 (stating that funding is uncertain because of the variation in the number of state employees (from the N.C. Teachers' and State Employees' Comprehensive Major Medical Plan), the tax revenue transferred to the Special Fund, the interest income, and the expenses of the Pool).

184. N.C. GEN. STAT. § 58-50-180(f).

185. See *id.* § 58-50-255; see also *id.* § 58-50-180(f) (explaining that the Board shall run the pool so that funding is adequate).

186. *Id.* § 58-50-180(f).

187. *Id.*

least possible that if the Board fails to act, Board members could be exposed to liability.¹⁸⁸

In addition, the Pool is required to look into offering premium subsidies for individuals who are within “300% of the federal poverty guidelines.”¹⁸⁹ The premiums for Pool coverage are to be set between 150% to 200% of the standard risk rate.¹⁹⁰ By offering to subsidize these premiums, the result is likely to be an increase in the number of participants in the Pool.¹⁹¹ This can be both good and bad, in that by offering a subsidy, the Pool can increase the amount of money coming in from a larger number of premiums, but at the same time this will increase the uncertainty of the risk of individual participants and how much the Pool will have to pay for claims.¹⁹² This issue will be more clearly understood after the Pool has been operational for a period and actual numbers are established.

Several other states also have premium subsidies.¹⁹³ As previously discussed, Washington is an example that offers sliding scale coverage.¹⁹⁴ Subsidies in a majority of states are generally offered in relation to the Federal Poverty Guidelines on a sliding scale basis.¹⁹⁵ Funding varies from state to state, with some states receiving grants that are limited to one year, while other states “rely on renewable sources.”¹⁹⁶ North Carolina’s Pool would have to look into funding before it could start a similar program. In addition, the Pool must have some actual operational numbers in order to understand what enrollment will look like and what the financial needs of the Pool will be. Also, the Pool will need to determine the number of individuals who might qualify for a subsidy.

These financial issues could cause legal problems as well. Currently there is a complaint system in place to handle grievances by individuals who are currently enrolled in the Pool.¹⁹⁷ However, the legal committee should determine how best to handle these financial con-

188. *Compare id.* § 58-50-180(h) (explaining that the Board is not liable for actions but failing to discuss omission or failure to act by the Board and their liability in this context), with TEX INS. CODE ANN. § 1506.055 (Vernon 2008) (explaining that a board member is not liable “for an act or omission” made in good faith).

189. N.C. GEN. STAT. § 58-50-255(a)(5).

190. *Id.* § 58-50-190(b).

191. INCLUSIVE HEALTH REPORT, *supra* note 9, at 8.

192. *Id.*

193. *Id.* at 8-9.

194. See WASH. REV. CODE ANN. § 48.41.200 (West 2008).

195. INCLUSIVE HEALTH REPORT, *supra* note 9, at 9.

196. *Id.*

197. N.C. GEN. STAT. § 58-50-230 (2007).

cerns, since these could raise substantial issues regarding the Pool's operation. As a legal entity, the Pool has the ability to sue and be sued,¹⁹⁸ and the legal committee should determine potential lawsuits and how best to avoid them.

CONCLUSION

The North Carolina Health Insurance Risk Pool is a well-designed program that will provide health care to many individuals who are in need of assistance. While financial issues will arise, the Board will have a better understanding of how best to handle these after the Pool has been in operation. The inherent complexity in attempting to provide insurance for individuals who are "uninsurable" presents a number of problems that will arise in the North Carolina Pool. However, by examining the solutions offered by other comparable state pools, North Carolina will be better prepared to manage these issues. Because there are so many individuals without health insurance in North Carolina, the Pool will aid a number of individuals. Just as the O'Connors likely would be eligible for Pool coverage, many other individuals will be eligible for health care coverage that they could not have obtained on their own.

Megan G. West

198. *Id.* § 58-50-180(e)(2)-(3).