

Report of the Health Care Stabilization Fund Oversight Committee to the 2015 Kansas Legislature

CHAIRPERSON: Gary Hayzlett

LEGISLATIVE MEMBERS: Senators Laura Kelly and Vicki Schmidt; and Representatives David Crum and Jerry Henry

NON-LEGISLATIVE MEMBERS: Darrell Conrade; Dennis George; Dr. Jimmie Gleason; Dr. Paul Kindling; Dr. Terry "Lee" Mills; and Dr. James Rider

CHARGE

- The Committee annually receives a report on the status of the Health Care Stabilization Fund and makes recommendations regarding the financial status of the Fund.

Health Care Stabilization Fund Oversight Committee

ANNUAL REPORT

Conclusions and Recommendations

The Health Care Stabilization Fund Oversight Committee addressed the two statutory questions posed annually to the Committee. The Oversight Committee continues in its belief that the Committee serves a vital role as a link among the Health Care Stabilization Fund Board of Governors, the health care providers, and the Legislature and should be continued. Additionally, the Committee recognizes the important role and function of the Health Care Stabilization Fund (HCSF) in providing stability in the professional liability marketplace, which allows for more affordable professional liability coverage to health care providers in Kansas.

The Committee notes the enactment of 2014 legislation provides HCSF coverage requirements for five new categories of health care providers, impacts the short-term and long-term liabilities for the HCSF, including the provision of tail coverage and its availability to health care providers with less than five years of experience in the HCSF. Additionally, the current and future changes to the statutory cap on non-economic damages and the impact on claims filed and the associated dollar amount of the claims, will require continued monitoring. Committee oversight of impacts not only on the HCSF but also updates on new health care providers' experiences with the HCSF coverage will continue.

Actuarial Review. The Committee discussed its oversight of actuarial reporting provided by the HCSF Board of Governors and whether there was a need to contract for an independent actuarial review in 2015. The Committee recognized the additional analysis provided by the HCSF Board of Governors' actuary to account for the legislative changes enacted by the 2014 Legislature, including new health care providers subject to the HCSF coverage requirements, the change in tail coverage compliance from a five-year waiting period to immediate coverage, and changes to the non-economic damages cap specified in tort law. Following discussion on the actuarial analysis provided to the Committee and the Board of Governors and the routine audits the Board as a state agency is subject to, the Committee concluded there is no need to contract for an independent actuarial review in 2015.

Other recommendations. The Committee then considered information presented by the HCSF Board of Governors' representatives and health care provider and insurance company representatives. The Committee agreed to make the following recommendations:

- ***Reimbursement of the HCSF.*** The Committee notes the reimbursement schedule created by 2010 SB 414. This law allowed for the reimbursement of deferred payments to the HCSF for administrative services provided to the self-insurance programs at the University of Kansas Foundations and Faculty and the University of Kansas Medical Center (KUMC) and Wichita Center for Graduate Medical Education (WCGME) residents for state Fiscal Years 2010, 2011, 2012, and 2013. The Committee notes normal reimbursements occurred starting July 1, 2013; and, the HCSF Board of Governors have

received 20 percent of the accrued receivables for the last two years in July. The HCSF received \$1,544,084.43 reimbursement in July 2013, and \$1,544,084.43 in July 2014. The remaining reimbursement receivables are \$4,632,253.37.

- **Fund To Be Held in Trust.** The Committee recommends the continuation of the following language to the Legislative Coordinating Council (LCC), the Legislature, and the Governor regarding the HCSF:
 - The Health Care Stabilization Fund Oversight Committee continues to be concerned about and is opposed to any transfer of money from the HCSF to the State General Fund (SGF). The HCSF provides Kansas doctors, hospitals, and the defined health care providers with individual professional liability coverage. The HCSF is funded by payments made by or on the behalf of each individual health care provider. Those payments made to the HCSF by health providers are not a fee. The State shares no responsibility for the liabilities of the HCSF. Furthermore, as set forth in the Health Care Provider Insurance Availability Act (HCPIAA), the HCSF is required to be “... held in trust in the state treasury and accounted for separately from other state funds.”
 - Further, this Committee believes the following to be true: All surcharge payments, reimbursements, and other receipts made payable to the Health Care Stabilization Fund shall be credited to the HCSF. At the end of any fiscal year, all unexpended and unencumbered moneys in such Fund shall remain therein and not be credited to or transferred to the SGF or to any other fund.

Proposed Legislation: None.

BACKGROUND

The Committee was created by the 1989 Legislature and is described in KSA 40-3403b. The 11-member Committee consists of 4 legislators; 4 health care providers; 1 insurance industry representative; 1 person from the public at large, with no affiliation with health care providers or with the insurance industry; and the Chairperson of the Board of Governors of the Health Care Stabilization Fund or another member of the Board designated by the Chairperson. The law charges the Committee to report its activities to the Legislative Coordinating Council and to make recommendations to the Legislature regarding the Health Care Stabilization Fund. The reports of the Committee are on file in the Legislative Research Department.

The Committee met October 15, 2014.

COMMITTEE ACTIVITIES

Report of Towers Watson

The Towers Watson actuarial report serves as an addendum to the report provided to the HCSF Board of Governors dated March 20, 2014, and the subsequent analysis of legislative changes dated September 8, 2014. The actuary addressed forecasts of the HCSF's position at June 30, 2014, and June 30, 2015. The forecast of the HCSF's position at June 30, 2014, is as follows: the HCSF held assets of \$261.88 million and liabilities of \$190.26 million, with \$71.62 million in reserve. The projection for June 30, 2015, is as follows: assets of \$265.89 million and liabilities of \$194.04 million, with \$71.85 million in reserve. The report notes the forecasts were based on a review of the HCSF data as of December 31, 2013. The report states that in the 2013 study, the actuaries forecasted higher levels of assets (\$265.4 million) and liabilities (\$197.5 million) at June 2014, with a lower unassigned reserve (\$67.8 million).

Payment activity in calendar year 2013, however, was higher than anticipated. The actuary stated based on the annual study, the overall conclusion is the HCSF is in a very strong financial position with unassigned reserves at about \$72 million and not changing much as a result of FY15 activity. The actuary stated the forecasts assume there would be no change in surcharge rates for FY 2015; \$24.1 million in surcharge revenue in FY 2015; a 3.85 percent yield on the HCSF assets; continued full reimbursement for University of Kansas (KU)/WCGME claims, with continued payback of reimbursements from the state that were delayed until FY 2014; no change in current Kansas tort law; potential increase in claims due to Missouri's 2012 overturn of non-economic damage caps. The actuary noted the HCSF Board of Governors, at its March 2014 meeting, elected to make no change to the surcharge rates for FY 2015.

The actuary next reviewed the HCSF's liabilities at June 30, 2014. The liabilities highlighted included claims made against active providers as \$79 million; associated defense costs as \$15.9 million; claims against inactive providers reported by the end of FY 2014 as \$7.1 million; tail liability of inactive providers as \$75.2 million; future payments as \$14.9 million; claims handling \$5.5 million; and "other" which is mainly plaintiff verdicts on appeals as \$.9 million; for a total of gross liabilities of \$198.4 million of which some of the liabilities are for the KU and WCGME programs that the HCSF is reimbursed for \$8.2 million for a final net liability of \$190.3 million. The actuary further detailed why the tail liability of inactive providers is such a high number, stating that as of June 2014, anyone who has been in the HCSF for five years, does not have to pay the HCSF any more surcharge revenue to have the tail liabilities covered by the HCSF. He stated this is a very long-term liability; a very big liability; and a very challenging liability to quantify, but one the actuaries believe is appropriate for the HCSF to recognize. The actuary emphasized this is the single biggest item affected in the short run by the 2014 legislative changes. In response to a question, the actuary explained they look at the history of inactive provider claims based on when they occurred and when they are reported; they have information about how long providers were in the system before those providers left the system; and, with this provider data, they built a

model to figure out of the 10,000 or so providers in the system today and consider when they likely will retire and project when those retirees likely will sustain claims. The model has a lot of assumptions, but estimates are made for health care providers in the system: their future retirement dates; the potential for claims reported against them; the resolution of those claims; and the cost for resolution based on the year the potential claim(s) are resolved.

The actuary next reviewed the HCSF's Rate Level Indications for FY 2015 noting the indications assume a break-even target. The actuary highlighted payments, with settlements and defense costs of about \$28 million; change in liabilities, an increase of about \$3.8 million; administrative expenses of about \$1.6 million; and transfers to the Health Care Provider Insurance Availability Plan (Availability Plan) and the Kansas Department for Aging and Disability Services (KDADS) are assumed to be \$200,000 (assumes no Availability Plan transfer); totaling the cost for the HCSF to "break-even" for another year at \$33.8 million. The actuary stated that the HCSF has two sources of revenue: investment income based on the 3.85 percent yield assumption of \$9,898 million and surcharge from providers of \$23.905 million; therefore, the rate-level indication is a slight increase of about 1 percent. The actuary stated from their perspective, the HCSF's rates are pretty close to adequacy – "what is needed." The actuary then reviewed a 15-year history of what the HCSF's indicated costs per active provider have been for settlements and defense costs (less reimbursed amounts). He stated essentially there has been no inflation in the business over the last 15 years.

Impact of 2014 Legislation. The actuary also discussed the effect of the changes made by the 2014 Legislature in SB 311 and HB 2516. The actuary summarized the estimates of the HCSF's financial position at June 30, 2015. The actuary stated, prior to the legislative changes, the HCSF would have an unassigned reserve of \$71.85 million. However, with the changes, it is believed there will be an impact to the liabilities of \$27.8 million raising the liabilities from \$194.04 million to \$222.83 million. This would leave an unassigned reserve of \$44.06 million. The actuary indicated this projected \$44 million still makes the HCSF a financially stable environment. He stated

the impact on these liabilities is largely a one-time hit. The Committee and actuary discussed the level of reserves that would trigger a cause for concern for the actuaries. The actuary indicated less than \$20 million would start to be a concern. The actuary also provided estimates of the legislative changes in the HCSF liabilities by specific change, breaking out those changes by active providers versus inactive providers.

The actuary concluded his remarks with a few additional observations regarding the effect of the 2014 legislative changes.

- The increase in caps on non-economic damages has only a modest initial impact on the HCSF's losses from active providers. That impact will grow over time. Ultimately, we estimate the higher caps will increase the HCSF's indicated rate level by 10 percent.
- The changes relative to inactive providers cause an immediate and material increase in the HCSF's liabilities. However, that impact is virtually a one-time hit.
- The changes cause additional uncertainty in estimates of the HCSF's liabilities until the effects can be quantified with subsequent experience.

The Executive Director then spoke to discussion during the 2013 interim regarding the *Miller v. Johnson* decision and potential legislation. He stated a number of groups, professions, and facilities not previously defined as health care providers had indicated renewed interest as a result of the decision. When they learned the Kansas Medical Society (KMS) was planning to request introduction of a bill that would amend that part of the HCPIAA, the HCSF Board of Governors felt there were a couple of really important improvements that also should be addressed. One of those was to improve the tail coverage. The Executive Director noted not only is it good for health care providers to be able to know their tail coverage will be provided immediately upon retiring from active practice or relocating out-of-state, a patient who is injured or experiences an unfortunate medical outcome will

have access to a reliable source of revenue in that event.

The Executive Director addressed SB 311 and its impact, stating once those step-by-step increases are analyzed, over an eight-year period of time, there is going to be a 40 percent increase in non-economic damages in the cap. He explained it does not necessarily mean there will be a 40 percent increase in every single professional liability claim, but it does mean there probably will be some increase. The Executive Director stated that is why upon passage of the two bills, the HCSF Board of Governors exercised the contingency clause in its contract with Towers Watson, in an effort to reanalyze liabilities.

Comments

In addition to the report from the HCSF Board of Governors' actuary, the Committee received information from Committee staff detailing resource materials provided for consideration including the bill summaries and copies of enacted legislation, 2014 HB 2516 and SB 311, the FY 2014 and FY 2015 subcommittee and budget committee reports, and the Committee's prior conclusions and recommendations from its most recent annual report. The Committee analyst stated HB 2516 is one of two bills that immediately impacts the HCSF, its governance, the membership of the HCSF Board of Governors, Kansas Medical Mutual Insurance Company (KaMMCO) and its ability to provide insurance products, and changes the definition of "health care provider" in the HCPIAA. The second bill, SB 311, is the other part of the *Miller v. Johnson* discussion before the Committee last year. She stated this was a measure advocated for by the KMS, Kansas Hospital Association, and a number of provider groups regarding a change in the non-economic damages limitations in statute. She also highlighted a recommendation in the subcommittee reports made by both the House Budget Committee and the Conference Committee regarding staffing at the HCSF Board of Governors, specifically related to the implementation of HB 2516.

A representative of the Revisor of Statutes' Office provided an overview of the 2014 legislation. The revisor first summarized SB 311,

noting the bill amended the Code of Civil Procedure relating to the limits on recoverable damages for non-economic damages in personal injury actions. For causes of actions accruing on or after July 1, 2014, to July 1, 2018, the new limit is \$300,000. For causes of action accruing on or after July 1, 2018, to July 1, 2022, the limit will be \$325,000; for causes of action accruing on or after July 1, 2022, the limit will be \$350,000. Prior to enactment of the bill, the limit had been \$250,000. Additionally, the bill amended the rule of evidence concerning opinion testimony to clarify a person not testifying as an expert witness may be admitted if the judge finds such opinions or inferences are: based on the perception of the witness; are helpful to a clear understanding of the testimony of the witness; and are not based on scientific, technical, or other specialized knowledge within the expertise of the expert. Finally, the bill repealed statutes that allowed for evidence of collateral source benefits to be admissible in actions for personal injury or death.

HB 2516 related to the operation of mutual insurance companies organized to provide health care provider liability insurance and amends the HCPIAA, which governs the operation of the HCSF. The bill made continued HCSF coverage for inactive health care providers (referred to as tail coverage) immediate upon cancellation or inactivation of a Kansas license and professional liability insurance and increases the level of tail coverage available. The bill made tail coverage available for new professionals and facilities for prior acts, limited disclosure of the HCSF claims information to the public, and made technical amendments to the statutes.

Among the provisions summarized, the revisor noted in Section 5 of the bill, the definition of "health care provider" is amended to include as of January 1, 2015, physician assistants, nursing facilities, assisted living facilities, resident health care facilities, and certain advanced practice registered nurses (who are certified in the role of nurse midwife). The bill also clarified what "health care provider" does not include and added providers to the list of those excluded from this definition due to an inactive license or a federally active license that offers protection under the Federal Tort Claims Act. Definitions for "board" and "board of directors" are added to distinguish between the two distinct boards, and the

appropriate new term replaces existing references to the two boards. The bill also provided a definition for "*locum tenens* contract," which means a temporary agreement not to exceed 182 days per calendar year that employs a health care provider to actively render professional services in Kansas. The bill defined "professional services" to mean patient care or other services authorized under the HCPIAA governing licensure of a health care provider.

Section 6 addressed professional liability insurance coverage, clarifying professional liability insurance and the HCSF coverage are a condition of licensure to practice in the state for health care providers. Further, the bill clarified the HCSF liability is based on the level of the HCSF coverage selected by a health care provider. The HCSF is not liable for any claim not normally covered by a medical professional liability insurance policy.

Additionally, inactive health care providers are ensured of having the HCSF tail coverage equal to the amount of such provider's primary insurance coverage plus the amount of the HCSF coverage selected and in effect at the time the event resulting in a claim of medical negligence occurred. Beginning July 1, 2014, the five-year compliance period requirement prior to being eligible for tail coverage is removed. Now, any health care provider has tail coverage immediately upon canceling or inactivating a Kansas license and the provider's professional liability insurance policy. In lieu of a claims made policy otherwise required under KSA 40-3402 (Section 6 of the bill), a nonresident health care provider employed pursuant to a *locum tenens* contract to provide services in Kansas as a health care provider may obtain basic coverage under an occurrence form policy if such policy provides professional liability insurance coverage and limits required by KSA 40-3402.

Section 7 provided the HCSF Board of Governors of is authorized to grant temporary exceptions from the professional liability insurance and the HCSF coverage under exceptional circumstances. The bill also provided "in the event of a claim against a health care provider for personal injury or death arising out of the rendering of or the failure to render professional services by such health care provider,

the liability of the HCSF shall be limited to the amount of coverage selected by the health care provider at the time of the incident giving rise to the claim.” The membership of the HCSF Board of Governors is increased from 10 to 11 members (The eleventh member is to be a representative of an adult care home.). All employees of the HCSF employed by the Board of Governors are unclassified employees.

Other changes in the bill required the Availability Plan to make available professional liability insurance coverage for prior acts. Such policies are required to have limits of coverage not to exceed \$1 million per claim or \$3 million annual aggregate liability for all claims made as a result of personal injury within the state on or before December 31, 2014. The tail coverage is available only to new professionals and facilities made part of the “health care provider” definition. Such providers must be in compliance with the coverage requirements on January 1, 2015. Time allowed for insurers providing basic professional liability insurance coverage to notify the HCSF Board of Governors of such coverage for the purpose of hospital credentialing has been shortened. Insurers failing to report a written or oral claim or action for damages for malpractice to the appropriate state health care provider regulatory agency and the Board of Governors no longer face suspension, revocation, denial or renewal, or cancellation of the insurer’s certificate of authority to do business in Kansas or certificate of self-insurance. Instead the Board of Governors will level a civil fine against the insurer for such violation.

Following the briefing, the Committee and the Executive Director, HCSF Board of Governors, discussed the removal of the five-year compliance period required prior to eligibility for tail coverage. The Executive Director explained, in 1988, the Legislature conducted an interim study and decided a good way to generate more surcharge revenue would be to impose a five-year requirement such that tail coverage would not be available to physicians or other health care providers unless they paid for it. He stated this has presented administrative challenges for years, and also has created an extraordinary hardship for young physicians. Another question raised by a Committee member was to verify the time period the insurer has to notify has been shortened by the

new law and also whether insurance companies can face suspension, revocation, denial or renewal, or cancellation. The Executive Director stated the notification period was slightly shortened. He then indicated he was not sure he could respond fully to the question because he is not affiliated with the Insurance Department, but he believes the Department has the authority to discipline an insurer that fails to comply.

Chief Attorney’s Update. The Deputy Director and Chief Attorney for the HCSF Board of Governors next addressed the FY 2014 medical professional liability experience (based on all claims resolved in FY 2014 including judgments and settlements). The conferee began her presentation by noting jury verdicts. Of the 27 cases involving 35 Kansas health care providers tried to juries during FY 2014, 25 were tried to juries in Kansas courts and two cases were tried to juries in Missouri. The largest number of trials were held in the following jurisdictions: Sedgwick County (8), Johnson County (6), Wyandotte County (3), Jackson County, Missouri (2), and Reno County (2). Of those 27 cases tried, 23 resulted in defense verdicts and 1 case resulted in a mistrial. Juries returned verdicts for the plaintiffs in 3 cases and resulted with expenditures from the HCSF, with 1 of those cases now on appeal.

The Chief Attorney then highlighted the claims settled by the HCSF, noting in FY 2014, 63 claims in 52 cases were settled involving HCSF monies. Settlement amounts for the fiscal year totaled \$24,005,914—these figures do not include settlement contributions by primary or excess insurance carriers. The conferee stated this FY data represents 16 fewer claims than the previous year, and about \$3.6 million less than the previous year. The conferee noted, in the last couple of years, the settlement amounts have been greater than the averages, reflecting a trend for higher settlements. Although there were 16 fewer settlements, more fell into the highest category of settlements. A big component to these amounts is due to past and future medical expenses. Of the 63 claims involving the HCSF monies, the HCSF provided primary coverage for inactive health care providers in nine claims. The HCSF also “dropped down” to provide first-dollar coverage for six claims in which aggregate primary policy limits were reached. Primary insurance carriers tendered their policy limits to the HCSF in 54 claims. In

addition to the \$24,005,914 incurred by the HCSF, primary insurers contributed \$10,135,000 to these settlements. Further, testimony indicated, four claims involved contributions from an insurer whose coverage was in excess of the HCSF coverage; the total amount of these contributions was \$3,875,000. The Chief Attorney's testimony also indicated, in addition to settlements involving the HCSF contributions, the HCSF was notified primary insurance carriers settled an additional 97 claims in 86 cases. The total amount of these reported settlements was \$8,909,740. The report included figures from FY 2000 to FY 2014 for comparison. The Chief Attorney's testimony also included a report of the HCSF total settlements and verdicts, FY 1977 to FY 2014. The Chief Attorney next provided a report of new cases indicating there were 268 new cases during FY 2014. She noted, for the previous five years in a row there was a decrease in the number of claims, so it was not unexpected there was a moderate increase for FY 2014. She also stated, since Missouri found its cap on non-economic damages unconstitutional a few years ago, she will be watching closely to see if the number of claims involved in the HCSF filed in Missouri increases.

The Chief Attorney also addressed the self-insurance programs and reimbursements for the KU Foundations and Faculty and residents. She highlighted the FY 2014 KU Foundations and Faculty, and KUMC and WCGME program costs. The Chief Attorney stated the FY 2014 KU Foundations and Faculty program amount of \$2,749,707.77 increased considerably from FY 2013. The conferee stated there were 2 primary reasons for this increase. The first reason was there were more settlements for KU Foundations and Faculty at 9 settlements, compared to 5 the previous year. The second reason was a very large catastrophic damages case filed about 18 months ago; 16 full-time faculty members and residents were named as defendants. The Chief Attorney noted it is very expensive to defend 16 physicians in a high-dollar catastrophic damages case. She also noted two cases involving faculty members went to trial as defense verdicts, which also is expensive and increases attorney's fees and expenses. There were no FY 2014 settlements or judgments for the KU and WCGME resident programs. She noted there was a decrease in the amount of attorneys' fees and expenses incurred in defending the residents.

The Chief Attorney's report also listed the historical expenditures by fiscal year for the KU Foundations and Faculty and the KU and WCGME Residents since inception. She stated FY 2014 was an above-average year by about \$1 million. She noted the KU and WCGME Residents program was a little below average for FY 2014. The Chief Attorney stated, for the last several years, the HCSF stopped receiving reimbursements due to budgetary concerns. The 2010 Legislature addressed this issue with a compromise providing that for fiscal years 2010, 2011, 2012, and 2013, the HCSF would not be reimbursed for expenses and costs of these programs. Beginning FY 2014, two important things would happen; normal reimbursements would happen for the HCSF; and the HCSF would start being repaid for those amounts for their accrued receivables. The conferee reported both of those things have happened; normal reimbursements occurred starting July 1, 2013; and, they have received 20 percent of the accrued receivables for the last two years in July. The HCSF received \$1,544,084.43 reimbursement in July 2013, and \$1,544,084.43 in July 2014. The remaining reimbursement receivables are \$4,632,253.37. The conferee also provided information about monies paid by the HCSF for those claims that are greater than the \$200,000 primary coverage. She stated these are the claims that involve the HCSF as an excess carrier. There were no claims for the KU and WCGME residents, although six of the nine claims against the faculty members did involve the HCSF excess coverage of \$2.9 million. The Chief Attorney concluded her presentation stating the one thing she is monitoring, as Missouri no longer has a cap on its non-economic damages and KU has achieved National Cancer Center Designation, which means a greater presence in the state (*e.g.* clinics and rotations), is the possibility more lawsuits involving the KU Faculty Residents will be filed in Missouri.

In answer to whether electronic medical records are helping to keep settlements down due to better documentation, the Chief Attorney responded she believes as residents in training are trained on the systems and the systems are more compatible with other systems, there are going to be fewer and fewer claims that involve records kinds of issues.

Medical Malpractice Insurance Marketplace. The Committee then reviewed the current marketplace for medical malpractice insurance. The Chief Executive Officer (CEO), KaMMCO, stated, overall, the market in Kansas, much like the market across the country, is a very vibrant, competitive marketplace. He stated, in many cases, there are multiple options for providers and rates are as low as they have been in many years, so it is an extremely good marketplace for health care providers purchasing malpractice insurance. The conferee stated market conditions are often cyclical. Additionally, the numbers of claims have fallen for a few years, and are at all-time lows, which has really helped from a pricing standpoint, stability, and price competitiveness. The CEO stated it is his expectation the issues anticipated for the nurse midwives, the physician assistants, and adult care facilities are transitional issues regarding the way they used to buy it versus the way they now will need to buy it. The CEO indicated the insurance industry is in the process of responding to those issues. He stated KaMMCO does insure physician assistants who are affiliated with KaMMCO physicians or hospitals, and the company is committed to a market for long-term care facilities. The CEO stated any of those providers unable to acquire the required mandated insurance from an admitted carrier in Kansas, have the Availability Plan available to help them with that transition if it becomes an issue. He also noted the Insurance Department is working with a number of carriers to get these filings approved so everyone can find a home in the admitted market under the new requirement by January 1, 2015.

In a response to a question, the CEO indicated KaMMCO is very active in the area of risk management. He stated many carriers have some version of risk management loss prevention, and it is expanding and growing because the nature of the risks are changing. The conferee further stated there are different providers to consider as traditionally care management has been provided by a physician and now it is being provided by an APRN, a physician assistant, or some other physician extender, such as a hospitalist. He stated the transitions of care provide opportunities for things to fall through the cracks, with information not being transferred from place to place. The CEO stated, as electronic health records get better, it is a great example of issues where information will be able to be transferred easier and faster from

provider to provider as a patient goes from place to place. The CEO noted, over the course of the last five or six years, there has been a tremendous amount of changes in health care. The insurance industry is trying to do what it can to make sure the industry is responsive to the changes to provide the best opportunity to care for patients in a safe way and reduce adverse outcomes.

The Director of Government Affairs, KMS, was next recognized. She stated KMS introduced SB 311 and HB 2516 in response to the Kansas Supreme Court's ruling (*Miller v. Johnson*) in an effort to maintain the cap indefinitely. She stated KMS does believe the Committee should continue and legislative oversight is appropriate and necessary. The conferee concluded by stating KMS does not believe there needs to be an independent actuarial review.

The Executive Director, in response to a question from the Committee regarding inactive providers, clarified there are legal definitions of "inactive" that are extremely important. There are inactive licensees, which means providers who do not provide any patient care. Under the HCPIAA, not only does the inactive provider no longer provide patient care, but this provider no longer has liability insurance coverage. Regarding the tail coverage responsibility, this means the individual physician or other health care provider is no longer seeing patients. He stated the one exception is the exempt licensee who can continue to provide patient care in a very limited context; typically, it is at a clinic for medically indigent patients. The Executive Director also stated there is a source for recovery in the event one of those patients is injured, because, if the inactive exempt physician is a charitable health care provider, then the patient has access to recover under the Kansas tort law.

In response to a question from the Committee regarding vicarious liability, the Chief Attorney responded there is a statute that provides one defined health care provider is not vicariously liable for another health care provider. For example, a doctor and a hospital are named in the suit; since doctors and hospitals are both defined health care providers, the hospital is not responsible for the doctor's actions and *vice versa*. Nurse midwives and physician assistants are not defined health care providers. So, a hospital or a professional corporation or a physician could be

found vicariously liable for a physician assistant's or nurse midwife's actions. Starting in January 1, 2015, when these two groups become defined health care providers, the physician or the hospital is not going to be vicariously liable for these groups. The Chief Attorney stated she anticipates there will be increased numbers of claims being made against physician assistants and nurse midwives.

New Health Care Providers – Implementation Update. The Executive Director of the Kansas Academy of Physician Assistants (KAPA) was recognized to provide input regarding the new legislation's impact on KAPA's membership. He stated, generally, the response by their members has been very positive. The Executive Director stated there is one unintended consequence in regard to exempt licenses for physician assistants providing charitable care at facilities not specifically designated as "federally qualified" the KAPA will address by proposing legislation in the 2015 Legislative Session. The conferee concluded his remarks noting the requirements for physician assistants to have coverage in place do not take effect until July 1, 2015, so time remains to address the exempt licensure provisions.

The President and CEO of the Kansas Health Care Association and Kansas Center for Assisted Living, was recognized to provide input regarding long-term facilities that will come into the HCSF. She stated they are working through some issues, noting many of their providers are not based in Kansas and have many different business practices where their companies are based. The conferee's testimony stated both associations have been educating and working with providers to understand the new law. She stated there have been a lot of changes over the last couple of years, so it is believed this coverage will give an opportunity for providers to have some stability in one side of their practice. The conferee assured the Committee they are working with their providers on these risk management issues. She concluded by stating they may have some more comments and experience to address a year from now.

Two owners of the New Birth Center, Overland Park, were recognized to provide comments on the inclusion of nurse midwives into the HCSF. One of the conferees noted two out of three birth centers in Kansas have non-physician

owners. She stated they believe Kansas is ideal for the growth of midwife owned birth centers and their goal is to expand their business. She also stated their model is highly dependent on the malpractice insurance market that gives them competitive malpractice insurance options. The conferees encouraged the Committee to consider the following:

- The HCSF and its plan participants have the ability to create a market;
- Encourage the plans to report the markets and participation requirements in a transparent manner; and
- Consideration of the inclusion of licensed birth center facilities as a covered entity in future revisions of the HCSF statute.

One of the conferees concluded by stating the success of their business is highly dependent on the HCSF and the Kansas malpractice market operating in an open and competitive manner especially for self-employed nurse midwives. A Committee member asked for clarification regarding if it was New Birth Center's request to include licensed birth center facilities as a covered entity the next time the HCPIAA is opened. The conferees concurred.

The Executive Director of the Kansas Association of Osteopathic Medicine (KAOM) submitted written testimony. His testimony indicated KAOM supported 2014 HB 2516 and SB 311 and the association has not received any negative comments or concerns from osteopathic physicians regarding the legislation. One improvement highlighted was the tail coverage provision for retired physicians. The remarks indicate this provision has taken some of the worry about retirement from physicians who no longer intend to practice on a full-time basis, but would like to see patients on a part-time basis.

The President of the Kansas Affiliate of the American College of Nurse-Midwives (ACNM) submitted written remarks, highlighting the variety of practice settings for nurse midwives – hospitals, group practices, three freestanding birth centers, homes, military bases, health departments, and health centers – and concerns about the cost of

medical liability insurance coverage. Two provider issues included in the remarks were the case of a nurse-midwife, who is employed at a Federally Qualified Health Center, who works one day a month at a health department, has been informed the health department will not purchase coverage for the nurse-midwife. The other issue of concern is for nurse-midwives employed at birth centers or those who have a home birth business; only two insurance companies listed on the HCSF Board of Governors' website offer basic coverage to "all health care providers." While the Availability Plan is an option, the application for this plan was not yet available. This lack of companies offering basic policies to nurse-midwives, the remarks indicate, limits competition and may drive up the price of coverage. The president's testimony concludes with information regarding communications between ACNM, the Executive Director for the HCSF Board of Governors, and the Board of Nursing regarding nurse-midwives licensure status in instances where the nurse-midwife no longer renders professional services in Kansas (*There is not currently an "inactive" license option for Kansas APRNs.*).

Statutory report, Fund history, and implementation of legislation. The Executive Director, provided the Board of Governor's statutory report (as required by KSA 40-3403(b)) for FY 2013. Among the items detailed in the report:

- The balance sheet, as of June 30, 2014, indicated assets of \$265,988,612 and liabilities amounting to \$202,561,375. The Executive Director noted, however, with the July 1, 2014, implementation of 2014 legislation, the HCSF liabilities increased almost \$28 million the next day.
- Net premium surcharge revenue collections amounted to \$24,231,068. The report indicated the lowest surcharge rate for a health care professional was \$50 (chiropractor, first year of Kansas practice; opting for lowest coverage option) and highest surcharge rate was \$14,058 for a neurosurgeon with five or more years of HCSF liability exposure (selected highest coverage option). It was noted application of the Missouri modification factor would result in a total premium surcharge of

\$18,275 for this health care practitioner.

- The average compensation per settlement (52 cases involving 63 claims were settled) was \$381,046, a 9.0 percent increase compared to FY 2012. These amounts are in addition to compensation paid by primary insurers (typically \$200,000 per claim). The report states amounts reported for verdicts and settlements were not necessarily paid during FY 2014. Total claims paid during the fiscal year amounted to \$25,029,266.

The Executive Director also submitted historical information about the creation and evolution of the HCPIAA, highlighting three principle features of the HCPIAA that have remained intact since 1976, are interrelated and must be maintained:

- A requirement that all health care providers, as defined in KSA 40-3401, maintain professional liability insurance coverage as a condition of licensure;
- Creation of a Joint Underwriting Association, the "Health Care Provider Insurance Availability Plan," to provide professional liability coverage for those health care providers who cannot purchase coverage in the commercial insurance market; and
- Creation of the Health Care Stabilization Fund to, (a) provide supplemental coverage above the primary coverage purchased by health care providers; and (b) serve as reinsurer of the Availability Plan.

The Executive Director noted the discussion before the Committee regarding the *Miller v. Johnson* decision at its last meeting. He stated a number of groups, professions, and facilities not previously defined as health care providers had indicated renewed interest as a result of the decision. When they learned the KMS was planning to request introduction of a bill to amend that part of the HCPIAA, the HCSF Board of Governors felt there were a couple of really important improvements that also should be

addressed. One of those was to improve the tail coverage. He then addressed the Committee's discussion from last year regarding whether other states employ an independent actuary to offer second opinions and indicated the Board of Governors surveyed the other six states that currently have some type of patient compensation fund and have provided the results in this report (Indiana, Louisiana, Nebraska, New Mexico, South Carolina, and Wisconsin). The Executive Director stated, among the few states that do have a patient compensation fund, the states are all different in various ways. He pointed out most of the states employ an independent actuary. He stated Kansas has always maintained the kind of fiscal discipline necessary for a program like this to be successful.

The Executive Director next commented on the Medical Professional Liability Insurance (PLI) Market. He stated there has been a number of inquiries from insurance agents asking whether there is any way their clients (primarily adult care homes) can continue to purchase their basic coverage from non-admitted carriers. The Executive Director stated the HCPIAA states health care providers must be insured by admitted carriers. The Executive Director's report states, when the Legislature passed the original HCPIAA, the Legislature wanted to make certain health care providers were insured by companies subject to regulatory oversight by the Insurance Commissioner. In addition, admitted carriers are required to pay assessments into a guaranty fund such that if an insurance company becomes insolvent, any remaining claims for which the company would have been liable can be paid by the guaranty fund. He stated it is extremely important to have all the components in place so that if those health care providers cannot purchase their coverage in the independent market, they need that safety net to make certain they can comply with the requirements of the HCPIAA. The Executive Director stated there are at least seven insurance companies that have already obtained the authorization from the Insurance Commissioner and have indicated an interest in selling coverage to the adult care facilities.

Finally, the Executive Director addressed "a few unforeseen minor problems" in the implementation of HB 2516. He stated there are some physician assistants who continue to

maintain active licenses solely for the purpose of providing charity care at clinics for medically indigent patients. The Board of Healing Arts does not have authority to create an exempt license for those physicians assistants and will be requesting legislation to create an exempt license category for physician assistants. The legislation would allow these physician assistants to continue providing charity care in those limited settings, and they would be exempt from the professional liability insurance requirements under the HCPIAA. The Executive Director highlighted another issue: the Board of Nursing does not have the authority to grant inactive licenses to APRNs. He explained, fortunately the Legislature delegated authority to the HCSF Board of Governors to grant temporary exemptions to health care providers when there are exceptional circumstances. In these circumstances, an affidavit must be signed that swears the health care provider will not provide patient care in the State of Kansas during the period of exemption. The Board of Nursing and the Board of Governors has agreed to accept that in those limited circumstances.

The Executive Director also stated it has been suggested the Secretary for Aging and Disability Services does not have sufficient authority to enforce compliance with the HCPIAA. He stated they respectfully disagree with that suggestion, but to be certain, they have corresponded with the General Counsel at the KDADS, requesting his opinion on this matter. Depending on the KDADS' response, a request for legislation delegating necessary enforcement authority to the Secretary may be required. A Committee member later posed a question about whether legislation should be introduced regarding delegating necessary enforcement authority to enforce compliance with the HCPIAA to the Secretary without awaiting a response from the KDADS general counsel. The Executive Director indicated their position will depend on the general counsel's response since KDADS regulates these types of facilities. The Executive Director stated he believes the statute is clear and if clarification is needed, he will communicate with the Legislature.

The Executive Director responded to questions following his presentation and first addressed the new facilities that are becoming part of the HCSF, stating the actuary will be continuously monitoring the loss experience of each category of health care

provider, so there is an entirely separate category exclusively for skilled nursing facilities and another separate category exclusively for the assisted living and residential health care facilities. If it is determined the loss experience is attributable to those categories of health care providers, and the claims are extraordinary and for some reason differ from other categories like hospitals and physicians, then the surcharge rates collected from those categories will be increased. In answer to whether the adult care homes can continue to purchase insurance from a non-admitted carrier, the Executive Director stated those facilities must purchase their primary insurance coverage from an admitted carrier (*i.e.* \$100,000 from the HCSF) and then any additional amount of coverage from an Excess and Surplus carrier; although he believes they will not get a better premium rate than what they can get by paying their surcharge to the HCSF. The Executive Director responded to the issue of whether there should be a request for a statute to provide an exemption for APRNs not currently covered under the HCPIAA, stating they have an informal agreement with the Board of Nursing the next time the Board needs to amend the Nurse Practice Act, that will be one of the requested amendments.

CONCLUSIONS AND RECOMMENDATIONS

The Health Care Stabilization Fund Oversight Committee addressed the two statutory questions posed annually to the Committee. The Oversight Committee continues in its belief that the Committee serves a vital role as a link among the HCSF Board of Governors, the health care providers, and the Legislature and should be continued. Additionally, the Committee recognizes the important role and function of the Health Care Stabilization Fund in providing stability in the professional liability marketplace, which allows for more affordable professional liability coverage to health care providers in Kansas.

The Committee notes the enactment of 2014 legislation provides HCSF coverage requirements for five new categories of health care providers, impacts the short-term and long-term liabilities for the HCSF, including the provision of tail coverage and its availability to health care providers with less than five years of experience in the HCSF. Additionally, the current and future changes to the

statutory cap on non-economic damages and the impact on claims filed and the associated dollar amount of the claims, will require continued monitoring. Committee oversight of impacts not only on the HCSF but also updates on new health care providers' experiences with the HCSF coverage will continue.

Actuarial review. The Committee discussed its oversight of actuarial reporting provided by the HCSF Board of Governors and whether there was a need to contract for an independent actuarial review in 2015. The Committee recognized the additional analysis provided by the HCSF Board of Governors' actuary to account for the legislative changes enacted by the 2014 Legislature, including new health care providers subject to HCSF coverage requirements, the change in tail coverage compliance from a five-year waiting period to immediate coverage, and changes to the non-economic damages cap specified in tort law. Following discussion on the actuarial analysis provided to the Committee and the HCSF Board of Governors and the routine audits the Board as a state agency is subject to, the Committee concluded there is no need to contract for an independent actuarial review in 2015.

Other recommendations. The Committee then considered information presented by the Board of Governors' representatives and health care provider and insurance company representatives. The Committee agreed to make the following recommendations:

- **Reimbursement of the HCSF.** The Committee notes the reimbursement schedule created by 2010 SB 414. This law allowed for the reimbursement of deferred payments to the HCSF for administrative services provided to the self-insurance programs at the KU Foundations and Faculty and the KUMC and WCGME residents for state Fiscal Years 2010, 2011, 2012, and 2013. The Committee notes normal reimbursements occurred starting July 1, 2013; and, the HCSF Board of Governors have received 20 percent of the accrued receivables for the last two years in July. The HCSF received \$1,544,084.43 reimbursement in July 2013, and \$1,544,084.43 in July

2014. The remaining reimbursement receivables are \$4,632,253.37.

- **Fund to be held in trust.** The Committee recommends the continuation of the following language to the Legislative Coordinating Council, the Legislature, and the Governor regarding the HCSF:
 - The Health Care Stabilization Fund Oversight Committee continues to be concerned about and is opposed to any transfer of money from the HCSF to the State General Fund (SGF). The HCSF provides Kansas doctors, hospitals, and the defined health care providers with individual professional liability coverage. The HCSF is funded by payments made by or on the behalf of each individual health care provider. Those payments made to the HCSF by health providers are not a fee. The State shares no responsibility for the liabilities of the HCSF. Furthermore, as set forth in the Health Care Provider Insurance Availability Act (HCPIAA), the HCSF is required to be “... held in trust in the state treasury and accounted for separately from other state funds.”
 - Further, this Committee believes the following to be true: All surcharge payments, reimbursements, and other receipts made payable to the Health Care Stabilization Fund shall be credited to the HCSF. At the end of any fiscal year, all unexpended and unencumbered moneys in such Fund shall remain therein and not be credited to or transferred to the SGF or to any other fund.