

# Report of the Health Care Stabilization Fund Oversight Committee to the 2017 Kansas Legislature

**CHAIRPERSON:** Gary Hayzlett

**LEGISLATIVE MEMBERS:** Senators Laura Kelly and Vicki Schmidt; and Representatives Jerry Henry and Rich Proehl

**NON-LEGISLATIVE MEMBERS:** Darrell Conrade; Dennis George; Dr. Jimmie Gleason; Dr. Paul Kindling; Dr. James Rider; and vacant position (health care provider)

**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 considered two items central to its statutory charge: should the Committee continue its work and whether a second, independent analysis of the Health Care Stabilization Fund (HCSF) is necessary. 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 HCSF in providing stability in the professional liability marketplace, which allows for more affordable coverage to health care providers in Kansas. The Committee is satisfied with the actuarial analysis presented and did not request the independent review.

The Committee considered information presented by the Board of Governors’ representatives, the Board of Governors’ actuary, and health care provider and insurance company representatives. The Committee agreed to make the following recommendations and comments:

- **The Health Care Provider Insurance Availability Act (HCPIAA) and its milestone anniversary—stability for Kansas health care providers and the medical malpractice insurance marketplace in Kansas.** The Committee recognizes the 40th anniversary of enactment of this significant legislation occurred on July 1, 2016. The Committee continues to appreciate the intent of the original law and amendments over time that have facilitated a healthy, working public-private partnership among health care providers, insurers, the Legislature, and the Board of Governors and the benefits of a stable HCSF and more affordable coverage to not only those in the professional liability insurance marketplace but also as adequate remedy to injured persons seeking remedy under Kansas law. Over time, amendments to the law have expanded the defined “health care provider” and allowed additional providers and facilities to come into the HCSF and secure more affordable coverage. This partnership has helped to sustain the marketplace and support Kansas health care providers even in times of incredible market volatility. The Committee notes how the Kansas Supreme Court framed the purpose of and partnership created by the HCPIAA:
  - On October 5, 2012, the Kansas Supreme Court upheld the \$250,000 cap on noneconomic damage awards in *Miller v. Johnson*. The Committee notes the following from the Court’s findings about the *quid pro quo* relationship between the purposes of the HCPIAA and the requirement for certain health care providers to carry professional liability insurance and participate in the HCSF and the guaranteed source of recovery for persons seeking to recover pain and suffering damages (limited by the cap, as set by the Legislature);
  - “As noted in several of our prior cases, the Legislature’s expressed goals for the comprehensive legislation comprising the Health Care Provider Insurance Availability Act and the noneconomic damages cap have long been accepted by

this court to carry a valid public interest objective”); and

- [The statute was enacted] “in an attempt to reduce and stabilize liability insurance premiums by eliminating both the difficulty with rate setting due to the unpredictability of noneconomic damage awards and the possibility of large noneconomic damage awards”;
- **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 (KU) Faculty and Foundations and the University of Kansas Medical Center (KUMC) and the Wichita Center for Graduate Medical Education (WCGME) residents for state fiscal years (FYs) 2010, 2011, 2012, and 2013. The Committee notes normal reimbursements occurred starting July 1, 2013; and the Board of Governors had received 80 percent of the accrued receivables for the past four years as of July 2016. The HCSF received \$1,544,084.43 reimbursement in July 2013, \$1,544,084.45 in July 2014, \$1,544,084.45 in July 2015, and \$1,544,084.45 in July 2016. The remaining reimbursement receivables of \$1,544,084.45 are to be received in one remaining annual installment on July 1, 2017;
- **Proposed amendments.** The Committee notes two amendments presented for its consideration. First, an amendment to the HCPIAA was proposed by the Board of Governors to create an exception in HCSF coverage requirements for certain providers whose services are covered by Kansas and federal tort law. Additionally, a technical amendment to the Nurse Practice Act regarding the creation of an inactive license for certain providers was discussed. Such matters may be brought to the 2017 Legislature for its consideration;
- **Monitoring and oversight of positive and negative indicators to the health of the HCSF.** The Committee expects both the Board of Governors and its actuary, and the Committee acting in its statutory role, as monitors, to continue to evaluate the impact of changes to law made in 2014. In addition to its recommendation (below) regarding holding the HCSF in trust, the Committee notes indicators suggested by the actuary that could impact the assets and liabilities of the HCSF, including:
  - The change in Missouri law in response to the *Watts* decision; it is anticipated more claims will come forward with the new cap in place;
  - The negative indication seen with investment income changes; and
  - The change in the cap on noneconomic damages as required by 2014 SB 311: increased to \$300,000 in 2014 (from \$250,000), and increasing to \$325,000 in 2018; and
- **Fund to be held in trust.** The Committee recommends 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. 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 HCPIAA, the HCSF is required to be “. . . held in trust in the state treasury and accounted for separately from other state funds”; and

- Further, this Committee believes the following to be true: All surcharge payments, reimbursements, and other receipts made payable to the HCSF 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.

Finally, in recognition of new members to the Legislature, the Committee requests its report be directed to the standing committees on health and insurance, as well as to the appropriate budget and subcommittees of the standing committees on appropriations.

***Proposed Legislation:*** None

## **BACKGROUND**

The Committee was created by the 1989 Legislature and is described in KSA 2016 Supp. 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 Health Care Stabilization Fund (HCSF) Board of Governors or another member of the Board designated by the Chairperson. The law charges the Committee to report its activities to the Legislative Coordinating Council (LCC) 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 November 30, 2016.

## **COMMITTEE ACTIVITIES**

### **Report of Willis Towers Watson**

The Willis Towers Watson actuarial report serves as an addendum to the April 19, 2016 report provided to the HCSF Board of Governors based on HCSF data as of December 31, 2015. The actuary addressed the HCSF's position at June 30, 2016, and forecast for June 30, 2017. The HCSF's position at June 30, 2016, was as follows:

the HCSF held assets of \$278.22 million and liabilities of \$230.02 million, with \$48.20 million in reserve. The projection for June 30, 2017, is as follows: assets of \$282.98 million and liabilities of \$234.40 million, with \$48.58 million in reserve. The actuary indicated the forecasts of unassigned reserves assume an estimate of surcharge revenue in FY 2017 of \$27.8 million, a 2.00 percent interest rate for estimating the tail liabilities on a present-value basis, a 3.25 percent yield on HCSF assets for estimating investment income, continued full reimbursement for University of Kansas (KU)/Wichita Center for Graduate Medical Education (WCGME) claims, and no change in current Kansas tort law or HCSF law. The actuary noted, based on the review, it was suggested by the actuarial firm that the Board of Governors consider a modest reduction in rates for calendar year (CY) 2017 and consider lessening the difference in rates by years of compliance (YOC) and making adjustments by specialty.

The actuary highlighted both the positive and negative developments in the HCSF's experience since the most recent review and indicated, due to growth in both the assets and the liabilities, the unassigned reserves are expected to be slightly higher at June 30, 2017. The actuary noted this increase in both categories is going to happen for some time due to the changes to the law made in 2014. (The 2014 Legislature added five new categories of health care providers under the

HCSF coverage provisions: nursing homes, assisted living, residential health care facilities, nurse midwives, and physician assistants.) He stated, with more providers in the system, it is a bigger pool than in 2013. He said until the new groups of providers have been in the program for a few years, it would be expected there would be a little more than an inflationary-type growth in both the assets and the liabilities of the HCSF. The actuary indicated, based on the analysis provided to the Board of Governors, the HCSF could reduce its CY 2017 surcharge rates by 3.2 percent and still maintain its unassigned reserves at approximately \$48 million.

The actuary reviewed the HCSF's liabilities at June 30, 2016. The liabilities highlighted included claims made against active providers as \$79.4 million; associated defense costs as \$13.9 million; claims against inactive providers reported by the end of FY 2016 as \$9.1 million; tail liability of inactive providers as \$113.4 million; future payments as \$11.2 million; claims handling as \$7.5 million; and other, which is mainly plaintiff verdicts on appeals, as \$2.5 million. Total gross liabilities were \$237.0 million; the HCSF is reimbursed \$8.7 million for the KU and WCGME programs, for a final net liability of \$228.3 million. The actuary further discussed the tail liability of inactive providers, noting the 2014 change in the law removed the requirement for providers who have been in the HCSF for less than five years to pay the additional premium to have those claims made after that provider becomes inactive. He explained it is a very long tail liability, and that is why the number is so large and is discounted for present value.

The actuary also reviewed the HCSF's rate level indications for CY 2017, noting the indications assume a break-even target. The actuary highlighted payments, with settlements and defense costs of \$28,934,000; change in liabilities of \$5,717,000; administrative expenses of \$1,770,000; and transfers to the Availability Plan and the Kansas Department of Health and Environment are assumed to be \$200,000 (assumes no Availability Plan transfer); in total, the cost for the HCSF to "break even" for another year is \$36,621,000. The actuary indicated, if the HCSF did not change its surcharge rates next year, it is believed the HCSF balance would be about \$28,569,000. The actuary stated it was his firm's

opinion the HCSF could reduce its surcharge rates for CY 2017 and still maintain its unassigned reserves in the \$48 million area. (See information on indications by provider class for the surcharge rates approved by the Board of Governors.)

The actuary provided an overview on the rating by YOC. With the enactment of 2014 HB 2516, the HCSF provides tail coverage at no additional cost to all providers upon becoming inactive. The actuary indicated providers who have been in the program less than four years no longer had to pay the HCSF additional money to have their subsequent claims covered after they became inactive. The actuary noted without that requirement, the HCSF's traditional rating by YOC was no longer appropriate because everyone was adding the same exposure to the HCSF each year they were involved. He indicated the advice to the Board of Governors is to continue to migrate this group of providers who have been in the HCSF less than five years to the rates being charged to those providers who are in the five-years-plus group.

The actuary provided an overview regarding indications by provider class. He noted Classes 21 to 24 were added as a result of legislation reform; these classes were not part of the HCSF prior to 2015. The report states the analysis of experience by HCSF class continues to show differences in relative loss experience among classes. The actuary reviewed the recommendations to the Board of Governors regarding suggestions for improving the equity among classes and also provided a history of surcharge rate changes since 2004. The actuary next provided an overview of the three options for CY 2017 surcharge rates provided to the Board of Governors, and highlighted the Board of Governors' decision on the surcharge rate changes:

- Providers with five or more YOC (Classes 1-14) – decrease by 7.0 percent for classes 1-5, 8-10, and 12-14; no change for classes 6, 7, and 11;
- Providers with less than five YOC (Classes 1-14) – increase by 5.0 percent over CY 2016 rate;
- Providers with less than five YOC (Classes 16-24) for coverage limit of:

\$100,000/\$300,000 – decrease by 1.0 percent; \$300,000/\$900,000 – decrease by 2.0 percent; and \$800,000/\$2,400,000 – decrease by 2.0 percent; and

- Providers with five or more YOC (Class 15) for coverage limit of: \$100,000/\$300,000 – increase by 1.0 percent; \$300,000/\$900,000 – increase by 2.0 percent; and \$800,000/\$2,400,000 – increase by 2.0 percent.

The actuary indicated the estimated overall impact of these changes to be about a 2.7 percent decrease in surcharge revenue.

The actuary stated the firm’s overall conclusions are that the HCSF remains in a very strong financial position and indicated the changes being adopted for CY 2017 are improving the rating equity within the program. He noted it will be important to watch in the next year or two to see whether the new providers are paying too little or too much and to monitor the interest rate issue. The actuary also indicated interest income again exceeding \$10 million will keep the pressure off the rate increases for a bit longer.

The actuary explained Class 15 is made up of providers not insured voluntarily by the primary market as they have been turned down for coverage. He stated one could view them as being less desirable a risk to the primary insurance market; therefore, they cannot get the primary insurance coverage. The Health Care Provider Insurance Availability Act (HCPIAA) provides a coverage option for them at a slightly higher rate (the “Availability Plan”). The actuary stated that looking at it from the perspective of the HCSF and cost of the providers’ claims, Class 15 providers have been paying less than they should in terms of losses to the HCSF.

The actuary also addressed a question regarding the “credit” for future liability relative to the \$113 million tail liabilities. The actuary explained that some of these claims are not going to be resolved until 2050 so, in that regard, he considered it somewhat analogous to a pension plan liability where these payments are not going to be made for decades. Defined benefit pension plans, the actuary noted, use a valuation interest rate to discount those liabilities to current value

(this discounted amount reflects the present value of all benefits expected to be paid from the pension plan to its current members). Therefore, he believed it was appropriate to use a present value calculation for those tail liabilities as well, but less than what his firm and the Board are assuming the HCSF will earn. The actuary said it would be questionable to some extent to use a 6 or 7 percent interest rate to discount those liabilities, which would bring their value down considerably. The actuary also stated they did believe some discounting for present value was in order for that liability given how far into the future those claims will be occurring or being paid.

### **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 an updated memorandum on the HCSF and medical malpractice law in Kansas published on the Kansas Legislative Research Department’s website and the Committee’s conclusions and recommendations contained in its most recent annual report.

### **Chief Counsel’s Update**

The Deputy Director and Chief Counsel for the Board of Governors addressed the FY 2016 medical professional liability experience (based on all claims resolved in FY 2016 including judgments and settlements). Of the 14 cases involving 17 Kansas health care providers tried to juries during FY 2016, 13 were tried to juries in Kansas courts and 1 case involving a Kansas health care provider was tried in Arkansas. The trials were held in the following jurisdictions: Sedgwick County (4); Johnson County (4); U.S. District Court (1); Crawford County (1); Grant County (1); Labette County (1); Saline County (1); and Arkansas (1). Of those 14 cases tried, 12 resulted in defense verdicts, 1 resulted in a plaintiff verdict, and 1 case ended in mistrial.

The Chief Counsel noted that 14 trials is the fewest annual number of trials since the early inception of the HCSF. She indicated this may be due to the number of claims being down and the happenstance of the calendar of what cases were

ready for trial or settlement this past year, and stated 10 cases had gone to trial to date in FY 2017. The Chief Counsel noted one case went to trial in Arkansas with a defense verdict. She also noted, during FY 2016, no cases went to trial in Missouri for the first time in a long time. The Chief Counsel indicated, again, this may be due to happenstance of the calendar. To date in FY 2017, two cases had gone to trial in Jackson County, Missouri; both were defense verdicts. She pointed out that a few years ago, the Missouri Supreme Court declared the cap on noneconomic damages to be unconstitutional (the *Watts* decision; for a time after this decision, there was no cap on noneconomic damages). The Missouri Legislature enacted a new cap, effective after August 2015. The Chief Counsel indicated the Board of Governors anticipates cases in which there is a cap in place soon.

The Chief Counsel reported there were 248 new cases during FY 2016. She noted there was a 5-year decrease in the number of new claims from FY 2009 through FY 2013, with a modest increase in FY 2014 and a decrease in FY 2015. For FY 2016, there was an increase of 13 cases, which was not unexpected due to categories of providers being added. The HCSF has excess coverage for these health care providers for care provided on and after January 1, 2015. For FY 2016, there were 12 claims involving these new health care providers. The Chief Counsel stated if those claims were taken out of the mix, there was no increase in the number of new claims this past year—the increase was due to the new health care providers joining the HCSF. She also stated for FY 2017 to date, 8 claims have arisen from these new health care providers. The Chief Counsel stated out of the new groups of health care providers in the HCSF, nursing homes have seen the most claims. She indicated there had been about 16 or 17 claims so far: 2 for certified nurse midwives, 1 for a physician assistant, 2 for assisted living facilities, and the remainder for nursing homes.

The Chief Counsel addressed the self-insurance programs and reimbursement for the KU Foundations and Faculty and residents. She stated the FY 2016 KU Foundations and Faculty program incurred \$1,028,751.91 in attorney fees, expenses, and settlements; \$500,000 came from the Private Practice Reserve Fund and

\$528,751.91 came from the State General Fund (SGF). The conferee stated this was down \$888,438.50 from the previous fiscal year, noting there were both fewer settlements and the attorney fees and expenses also were down. The Chief Counsel also stated four settlements involved KU full-time faculty members in FY 2016, compared to seven settlements the previous year and nine settlements in FY 2014. The Chief Counsel indicated, so far in FY 2017, there have been five settlements involving KU full-time faculty for which the HCSF has been reimbursed \$850,000, as well as a case then at trial in Douglas County; therefore, attorneys' fees and expenses also will increase for next year.

In regard to the self-insurance programs for the KU/WCGME resident programs, the Chief Counsel indicated the total amount incurred for FY 2016 appears to be almost the same as for FY 2015. The Chief Counsel stated there were no FY 2016 settlements or judgments involving any of the residents. She noted the HCSF incurred \$664,698.71 for attorney fees and expenses for the WCGME residents, and only \$28,625.85 for attorney fees and expenses for the KU residents. In Kansas City, the Chief Counsel explained the attending physicians are full-time faculty and, most of the time, take full responsibility for the residents. In Wichita, most of the attending physicians are private practice physicians who have private insurance, so more residents are named individually as defendants. Therefore, there are fewer claims and cost with the residency program in Kansas City as compared to the Wichita program. The Chief Counsel stated there also was a case that went to trial in Wichita involving a resident this past year that resulted in a defense verdict, but was then appealed. The Court of Appeals overturned the defense verdict, so it is now being appealed to the Supreme Court and has become quite expensive, which contributed to more expenses this past year.

The Chief Counsel's report listed the historical expenditures by fiscal year for the KU Foundations and Faculty and the KU and WCGME residents since inception. The Chief Counsel indicated, for the past ten years, the faculty self-insurance program has incurred about \$1.6 million on the average and, for the residency program, that ten-year average is about \$863,000. She noted that FY 2016 was a below-average year

as far as the amount of moneys incurred for both the faculty and residency programs.

The conferee next addressed the reimbursement of expenses for administrative services provided by the Board of Governors noting in 2010, the Legislature reached a compromise that for four fiscal years (FY 2010, FY 2011, FY 2012, and FY 2013), the HCSF would not be reimbursed. Beginning with FY 2014, two things would occur: quarterly reimbursements were to begin and, for five fiscal years (FY 2014 through FY 2018), the HCSF was to be reimbursed 20 percent of the accrued receivable for those four years that the HCSF was not reimbursed. At the end of June 30, 2013, the amount of accrued receivables was \$7,720,422.23 for which the HCSF had not been reimbursed. The Chief Counsel stated this past July 1, for the fourth year in a row, the HCSF was reimbursed. The HCSF has received reimbursements of \$6,176,337.78, which is 80 percent of the total amount. One remaining installment payment of \$1,544,084.45 is due July 1, 2017. She also provided information about moneys paid by the HCSF as an excess carrier, stating for those claims involving the KU faculty members, the HCSF paid \$625,000 out of its excess coverage.

#### **Medical Malpractice Insurance Marketplace; Update on the Availability Plan**

The President and CEO for the Kansas Medical Mutual Insurance Company (KaMMCO) addressed a question about health care providers who are moonlighting and are covered under the Kansas or Federal Tort Claims Act. The KaMMCO conferee indicated 43 residents in training in Kansas moonlight outside of the programs, primarily to provide emergency room coverage and often in rural areas.

The conferee presented information on the number of physicians and other providers insured by HCPIAA from 1990, when KaMMCO first took over the administration of the Availability Plan, through 2016. The conferee explained the cycles of the market, indicating the market currently is in a low-ebb area, where the medical malpractice insurance market is very robust with many companies competing for business, and there is usually a low-claims environment. He

stated that over the course of the past few years because of the low claims environment, the Availability Plan has returned money to the HCSF; this year, \$250,000 will be returned to the HCSF. The KaMMCO conferee described the current marketplace as a very healthy, competitive environment with plenty of capacity and very affordable coverage. The conferee highlighted factors on the horizon that might signal some future changes—changes to the Affordable Care Act and related changes in the health care delivery and financing mechanism or marketplace. He indicated KaMMCO will be watching to see what impact future changes may have on health care delivery in this state and what will need to be done to be able to insure those providers in the changing environment. The conferee stated KaMMCO has reviewed the proposed changes to the HCPIAA and is very supportive of those changes.

#### **Comments from Health Care Provider Representatives**

The Executive Director of the Kansas Medical Society (KMS) provided some historical information regarding the HCSF and the HCPIAA. He commented on the HCSF's anniversary, noting the HCSF and its governance is a public-private partnership that was purposefully constructed. The KMS conferee also noted Kansas was the first state to require health care providers to demonstrate financial responsibility to their patients and carry insurance as a condition of licensure to practice medicine. The conferee indicated the HCSF created a more stable, less volatile environment. He noted at the time the law was created and has since been debated, it was important to not transfer liabilities from one generation of physicians onto the next generation of physicians, and stated that is why it is important that the HCSF operate in an actuarially sound manner. The conferee indicated it is essential to have this unassigned reserve or surplus in the HCSF, so when this generation of physicians retires, enough money is set aside in the HCSF to pay those claims when they come due and to not push those liabilities onto the younger health care providers coming into the system. The KMS conferee also noted it could be tempting for the Legislature to look at the \$275 million in the HCSF, but this money has been paid by the health care provider community and set

aside in trust to make sure that patients are covered in the event there is a claim in the future. The conferee indicated the Legislature has honored that commitment to not touch those funds and is encouraged to continue to do so. The KMS conferee also noted the importance of the Committee in providing a connection to the Legislature, the health care provider community, and the insuring community to have a public forum to talk about changes. He noted KMS members believe the Committee serves a useful function and would encourage its continuation. The conferee concluded the KMS also supports the request that the Committee report to the Legislature these funds need to stay in trust to preserve the integrity of the HCSF.

### **Board of Governors' Statutory Report**

The Executive Director provided the Board of Governors' statutory annual report (as required by KSA 2015 Supp. 40-3403(b)(1)(C)).<sup>1</sup> Among the items detailed in the FY 2016 report:

- Net premium surcharge revenue collections amounted to \$28,114,941. The lowest surcharge rate for a health care professional was \$100 (for a first-year provider, opting for lowest coverage option) and the highest surcharge rate was \$16,510 for a neurosurgeon with five or more years of HCSF liability exposure (selecting the highest coverage option). Application of the Missouri modification factor for this Kansas resident neurosurgeon if licensed in Missouri would result in a total premium surcharge of \$21,463 for this health care practitioner;
- The average compensation per settlement (66 cases involving 76 claims were settled) was \$309,733. 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 2016 and total claims paid during the fiscal year amounted to \$27,278,643; and
- The balance sheet, as of June 30, 2016, indicated total assets of \$278,583,425 and

total liabilities of \$229,267,579. The Executive Director stated this amount is a comfortable margin (net assets).

The Executive Director noted the 40th anniversary of the HCPIAA (July 1, 2016). He indicated three essential components in the original HCPIAA have remained intact:

- Requiring all health care providers, as defined in the HCPIAA, to maintain professional liability insurance and participate in the HCSF coverage as a condition of active 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 provide supplemental coverage above the primary coverage purchased by health care providers and to serve as reinsurer of the Availability Plan.

The Executive Director highlighted the October 2012 *Miller v. Johnson* decision, indicating it was an extremely important decision and demonstrates the importance of keeping those three essential ingredients that were in the original HCPIAA back in 1976.

The Executive Director also provided an update on the medical professional liability insurance marketplace. His testimony stated the HCPIAA creates a favorable environment for responsible professional liability insurance companies. The Executive Director indicated it has been suggested because there has been a sustained "soft market" for professional liability insurance that the HCPIAA has outlived its usefulness. Members of the Board of Governors disagree with that assessment and think it is important to maintain the three essential features under the HCPIAA to assure long-term stability. His testimony also indicated the Legislature may wish to consider adjusting the coverage levels (e.g., insurers may want higher risks) and then

make corresponding adjustments in the level of HCSF coverage as well.

The Executive Director noted the HCPIAA is a successful public-private partnership that has accomplished legislative intent; it has provided the stability the Legislature originally intended, and actuarial integrity has been maintained. From a public policy perspective, it assures that in the event of an unfortunate medical outcome, the patient will always have a reliable remedy available. He indicated the Legislature has maintained the fiscal discipline to make this program work successfully. The Executive Director stated the Board appreciates this Committee has supported the fundamental principle that the HCSF should be used exclusively for its statutory purposes, and the Board of Governors respectfully requested the Committee include similar language in its report to the Legislature for 2017. The statutory report also stated, other than a few technical adjustments, the Board of Governors is unaware of any reason to substantially amend the HCPIAA. After four decades of success, the HCPIAA has achieved its legislative intent.

The Executive Director stated some residents moonlight, usually in their third or fourth year of residency training. He indicated those residents typically buy a special policy from the Availability Plan because most commercial insurance companies would prefer not to deal with that situation. The Executive Director noted this is a good example of a situation where the Availability Plan is needed, not because the residents are bad risks, but because they represent a unique group of health care providers for whom no insurance product is available in the regular marketplace. In answer to whether the proposed amendment would affect that moonlighting arrangement, the Executive Director stated it could affect residents in training if they were working in a federal facility or perhaps a clinic for medically indigent patients. But as far as moonlighting in a typical hospital, that would continue to be insured as it is now and will continue to be covered by the HCSF. The Executive Director stated a specific provision in the law says the academic part of the residency training is self-insured by the State of Kansas, but the extra-curricular activity, which means moonlighting, must be insured in the commercial insurance market, which in this case is the

Availability Plan. (See further comment from the KaMMCO conferee.)

**HCPIAA amendment and other legislative proposals.** The Executive Director addressed some preliminary draft legislation for the 2017 Session concerning a requirement that may result in duplication of coverage under either the Kansas Tort Claims Act or the Federal Tort Claims Act. He highlighted the circumstances of the duplication of coverage in these situations. The Executive Director indicated the Board of Governors has drafted a technical amendment that would amend the HCPIAA to allow exclusion of insurance and HCSF coverage when the health care provider is covered under the Kansas or Federal Tort Claims Act. He indicated it was the opinion of the Board of Governors that if a health care provider already has coverage under the tort claims act, there is no reason the HCSF should have any liability for that provider's coverage obligation, nor should the primary insurance company. The Executive Director noted the Board of Governors has solicited input from the Kansas Insurance Department as well as from organizations that represent health care providers, and stated if those organizations indicate support, the Board will request introduction of a bill when the Legislature convenes in January 2017.

The Executive Director reviewed another issue: the lack of an inactive license category for advanced practice nurse anesthetists and nurse midwives. The Executive Director noted when the law was amended to include nurse midwives in 2014, there was no inactive license category for advanced practice nurses. His testimony indicated draft amendments to the Nurse Practice Act have been sent to the Board of Nursing as well as to the associations that represent the professions.

No additional amendments were brought before the Committee.

## CONCLUSIONS AND RECOMMENDATIONS

The Oversight Committee considered two items central to its statutory charge: should the Committee continue its work, and whether a second, independent analysis of the HCSF necessary. The Oversight Committee continues in its belief that the Committee serves a vital role as

a link among the Board of Governors, health care providers, and the Legislature and should be continued. Additionally, the Committee recognizes the important role and function of the HCSF in providing stability in the professional liability marketplace, which allows for more affordable coverage to health care providers in Kansas. The Committee is satisfied with the actuarial analysis presented and did not request the independent review.

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  - On October 5, 2012, the Kansas Supreme Court upheld the \$250,000

cap on noneconomic damage awards in *Miller v. Johnson*. The Committee notes the following from the Court's findings about the *quid pro quo* relationship between the purposes of the HCPIAA and the requirement for certain health care providers to carry professional liability insurance and participate in the HCSF and the guaranteed source of recovery for persons seeking to recover pain and suffering damages (limited by the cap, as set by the Legislature);

- “As noted in several of our prior cases, the [L]egislature’s expressed goals for the comprehensive legislation comprising the Health Care Provider Insurance Availability Act and the noneconomic damages cap have long been accepted by this court to carry a valid public interest objective”; and
- [The statute was enacted] “in an attempt to reduce and stabilize liability insurance premiums by eliminating both the difficulty with rate setting due to the unpredictability of noneconomic damage awards and the possibility of large noneconomic damage awards”;
- **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 Faculty and Foundations and the KUMC and the WCGME residents for state FY 2010, FY 2011, FY 2012, and FY 2013. The Committee notes normal reimbursements occurred starting July 1, 2013; and the Board of Governors had received 80 percent of the accrued receivables for the past four years in July. The HCSF received \$1,544,084.43 reimbursement in July 2013, \$1,544,084.45 in July 2014, \$1,544,084.45 in July 2015, and

\$1,544,084.45 in July 2016. The remaining reimbursement receivables of \$1,544,084.45 are to be received in one remaining annual installment on July 1, 2017;

- **Proposed amendments.** The Committee notes two amendments presented for its consideration. First, an amendment to the HCPIAA was proposed by the Board of Governors to create an exception in HCSF coverage requirements for certain providers whose services are covered by Kansas and federal tort law. Additionally, a technical amendment to the Nurse Practice Act regarding the creation of an inactive license for certain providers was discussed. Such matters may be brought to the 2017 Legislature for its consideration;
- **Monitoring and oversight of positive and negative indicators of the health of the HCSF.** The Committee expects both the Board of Governors and its actuary, and the Committee acting in its statutory role, as monitors, to continue to evaluate the impact of changes made to laws in 2014. In addition to its recommendation (below) regarding holding the HCSF in trust, the Committee notes indicators suggested by the actuary that could impact the assets and liabilities of the HCSF, including:
  - The change in Missouri law in response to the *Watts* decision; it is anticipated more claims will come forward with the new cap in place;
  - The negative indication seen with investment income changes; and
  - The change in the cap on noneconomic damages as required by 2014 SB 311: increased to \$300,000

(from \$250,000) in 2014, and increasing to \$325,000 in 2018; and

- **Fund to be held in trust.** The Committee recommends the continuation of the following language to the 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 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 HCPIAA, the HCSF is required to be “. . . held in trust in the state treasury and accounted for separately from other state funds”; and
  - Further, this Committee believes the following to be true: All surcharge payments, reimbursements, and other receipts made payable to the HCSF 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.

Finally, in recognition of new members of the Legislature, the Committee requested its report be directed to the standing committees on health and insurance, as well as to the appropriate budget and subcommittees of the standing committees on appropriations.