

**Report of the
Health Care Stabilization Fund Oversight
Committee
to the
2020 Kansas Legislature**

CHAIRPERSON: Gary Hayzlett

LEGISLATIVE MEMBERS: Senators Barbara Bollier and Gene Suellentrop; Representatives Henry Helgerson and Richard Proehl

NON-LEGISLATIVE MEMBERS: Darrell Conrade; Dennis Cooley, MD; Dennis George; Jimmie Gleason, MD; James Rider, DO; Jerry Slaughter

CHARGE

This Committee annually reviews the operation of the Health Care Stabilization Fund and reports and makes recommendations regarding the financial status of the Fund.

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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: whether the Committee should continue its work and whether a second, independent analysis of the Health Care Stabilization Fund (HCSF or the Fund) is necessary. This oversight committee continues in its belief the Committee serves a vital role as a link among the HCSF Board of Governors (Board), 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 insurance 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, including its required statutory report; the Board's actuary; and health care provider and insurance company representatives. The Committee agreed on the following recommendations and comments:

- **Actuarial report and status of the HCSF; marketplace analysis and trends.** The Committee notes the report provided by the Board of Governors' actuary reviewed the financial performance of the Fund in 2018, indicating its financial position was not as strong as believed to be one year earlier. Among negative indications cited was the transfer from the HCSF to the Availability Plan, declining investment returns, a higher loss experience, and a larger-than-anticipated decline in surcharge revenue. The Committee further notes the rate level indications for the calendar year (CY) 2020 surcharge did not include a "do nothing" option; the Board responded to the actuary's conclusions and implemented an option that requires, beginning on January 1, 2020, almost every health care provider to pay an additional 6 percent. [*Note: The actuary noted all of these conclusions were made prior to the June 2019 Hilburn decision.*]
 - The Committee notes its discussion with the actuary, Board staff, and health care providers and insurers on broader trends and concerns, including the costs to resolve medical malpractice claims on health care providers increasing nationwide and the upward pressure on settlements. The Committee shares these concerns—and notes the marketplace shows signs of strain—for the increased pricing for medical professional liability insurance, the increased frequency of high-severity claims, and reinsurance capacity concerns.
- **Contemporary issues and continued oversight.** The Committee notes two issues requiring continued oversight by the Board and this committee. The Committee acknowledges the June 2019 *Hilburn* decision and the uncertainty of this decision's impact on the HCSF, health care providers, medical malpractice cases and actions, and the medical malpractice insurance marketplace in Kansas. Additionally, the Committee notes the enactment of 2019 HB 2119 and recognizes the concerns stated by representatives of the Board with the language in present law. The Committee encourages

clarification on the criteria associated with the term “business entity,” including a requirement for participation by not only the individual healthcare provider, but also by the corporate practice (corporation of providers) in the HCSF. The Committee further notes the study and report on the impact of requiring business entities to participate in the HCSF are to be submitted by the Board prior to the commencement of the 2020 Session.

- **Health Care Provider Insurance Availability Act (HCPIAA).** Although no formal amendments were brought before the Committee, the Committee notes the Board must report its findings to the Legislature (HB 2119, discussed above). Should the HCPIAA be open to amendment, the Committee notes technical amendments cited in the Executive Director’s testimony.
- **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 (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 behalf of each individual health care provider. Those payments made to the HCSF by health care 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, the 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.

The Committee requests its report be directed to the standing committees on health, insurance, and judiciary, 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 2018 Supp. 40-3403b. The 11-member Committee consists of 4 legislators; 4 health care providers; 1 insurance industry representative; 1 person from the general 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 or the Fund) 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 HCSF.

The Committee met October 24, 2019.

COMMITTEE ACTIVITIES

Report of Willis Towers Watson

The Willis Towers Watson actuarial report serves as an addendum to the report to the HCSF Board of Governors dated May 13, 2019, provided to the Board of Governors based on HCSF data as of December 31, 2018. The actuary addressed

forecasts of the HCSF's position at June 30, 2019, and June 30, 2020, based on the company's annual review, along with the prior estimate for June 2019. The HCSF's position at June 30, 2019, was as follows: the HCSF held assets of \$291.03 million and had liabilities of \$260.10 million, with \$30.92 million in reserve. The projection for June 30, 2020, is as follows: assets of \$289.86 million, liabilities of \$263.20 million, with \$26.66 million in reserve. The actuary noted, based on the analysis provided to the Board of Governors, the HCSF needs to raise its surcharge rates by 15 percent for calendar year (CY) 2020 in order to maintain its unassigned reserves at the expected year-end CY 2019 level (estimated at \$30 million).

The actuary explained the forecasts of unassigned reserves assume an estimated surcharge revenue in fiscal year (FY) 2020 of \$28.3 million, a 2.25 percent interest rate for estimating the tail liabilities on a present value basis, a 2.95 percent yield on HCSF assets for estimating investment income, 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. Based on these conclusions, it was suggested the Board of Governors consider an increase in rates for CY 2020 ranging from 5 percent to 10 percent. The Board of Governors opted to raise rates 6 percent effective January 1, 2020. [Note: The actuary clarified the assumption regarding changes in law would no longer be correct, given the Kansas Supreme Court decision in *Hilburn v. Enerpipe Ltd.* (No. 112,765) (*Hilburn*).]

The actuary reviewed the HCSF's liabilities as of June 30, 2019. The liabilities highlighted included claims made against active providers as \$85.7 million; associated defense costs as \$15.6 million; claims against inactive providers as \$10.1 million; tail liability of inactive providers as \$139.5 million; future payments as \$12.0 million; claims handling as \$9.0 million; and other, described as mainly plaintiff verdicts on appeals, as \$0.2 million. Total gross liabilities were \$272.1 million. The HCSF is reimbursed \$12.0 million for the KU/WCGME programs, for a final net liability of \$260.1 million.

The actuary also reviewed the HCSF's (surcharge) rate level indications for CY 2020, noting the indications assume a break-even target.

The actuary highlighted payments, with settlements and defense costs of \$36.89 million; change in liabilities of \$2.44 million; administrative expenses of \$1.81 million; and transfers to the Health Care Provider Insurance Availability Plan (Availability Plan) and the Kansas Department of Health and Environment assumed to be \$0.2 million (the indication generally assumes no Availability Plan transfer); in total, the cost for the HCSF to break even is \$41.35 million. The actuary stated the HCSF has two sources of revenue: its investment income (assumption of \$8.43 million based on a 2.95 percent yield on those assets), and surcharge payments from providers (\$32.92 million needed to break even). The actuary explained the projected surcharge revenue of \$28.52 million would not meet the break-even scenario and explained the rate level indication; the Board of Governors would need to raise its rates an estimated 15.4 percent in order to achieve break-even status. [Note: Numbers above have been rounded; exact figures, when provided, are included in the Committee's October 24, 2019, minutes.]

The actuary reported on trends in the HCSF's loss experience for active and inactive providers from CY 2015 through CY 2018. The actuary pointed out CY 2018 active providers had both elevated payments on settlements and expenses with the year-end loss reserves up, as well as a higher number of open claims. The actuary noted this was significant and estimates of total HCSF costs had to be adjusted accordingly. The actuary indicated, beginning in 2017, there was a significant increase in the cost of settlements, with more claims being resolved for seven- and eight-figures than three or four years ago. The actuary also discussed the inactive providers, indicating in CY 2018, the payment of expenses and the year-end loss reserves were up slightly. The actuary highlighted trends in the HCSF loss experience for active and inactive providers by program year, noting active provider losses from 2005 to 2015 were fairly stable with no obvious upward trends or inflation in the cost per provider. The actuary pointed out, starting with 2016, Willis Towers Watson had to adjust loss experience to reflect the rate of inflation from those of the previous year with it continuing to escalate with 2017 and 2018, indicating concern there is a little more inflation in the business than thought in 2018.

The actuary reported the HCSF's investment yield over the past eight years continues to have a gradual decline. It was noted Willis Towers Watson lowered its assumed future yield rate from 3.05 percent in the 2018 study to 2.95 percent. The actuary spoke to the leveraged effect of the lowered investment income assumption, noting the Fund earning 4.0 percent instead of 3.0 percent would be equivalent to a 10-basis-point change in the surcharge rate.

The actuary provided an overview regarding indications by provider class and explained every year, Willis Towers Watson evaluates the experience by class to minimize subsidization from one class to another. From an actuarial perspective, the objective is for each provider class to stand on its own so no class is obviously subsidized by another class. The report states the analysis of experience by HCSF class continues to show differences in relative loss experience among classes. The actuary indicated the company was pleased to see the number of classes whose increase or decrease is less than 13 percent has been growing over time as the HCSF has taken rate action both positively and negatively on some of the classes that have been undercharged or overcharged. The actuary also provided a history of surcharge rate changes since 2007.

The actuary provided an overview of the three options for CY 2020 surcharge rates that were provided to the Board of Governors. The actuary highlighted the Board of Governors' decision to implement Option 1 for its 2020 rates: beginning January 1, 2020, almost every provider would pay an additional 6 percent. The actuary commented this was the first year in some time there was not an option to "do nothing." The actuary further explained there may be a compounding impact for those in Classes 15-24 if their underlying basic coverage premium is also being increased. [Note: Classes 15-24 include Availability Plan insureds, medical care facilities, physician assistants, nurse midwives, and nursing facilities.]

Discussion

When presenting the report's conclusions, the actuary indicated 2018 was a "bad year" for the HCSF in many categories. The actuary explained the agency needed to make transfers from the HCSF to the Availability Plan (\$552,000), the

investment returns for the HCSF continued to decline, surcharge revenue in 2018 was down 4 percent from 2017 (a 2-percent decline had been expected), and the loss experience in 2018 was at a much higher level than seen in recent years and beyond what was anticipated. The actuary stated the conclusion was the HCSF's financial position, while still fine, was not as strong as it was believed to be one year earlier. Based on these conclusions, it was suggested the HCSF Board of Governors consider rate changes. The actuary noted all of these conclusions were made prior to the June 2019 *Hilburn* decision.

Committee members and the actuary discussed comparable actuarial analysis and Fund experience, including investment experience, for other states' funds similar to the HCSF, including the New Mexico Patient Compensation Fund (which has liabilities of about \$140 million, but assets of \$90 million). In response to questions regarding diminishing investment returns, the actuary indicated while he was not familiar with whether that fund has the same dedicated assets, noting the New Mexico fund has dedicated assets and is seeing a diminishing return and, more importantly, it does not have the assets to cover the present liability. Looking at the broader economy and investment returns, the actuary discussed the similarities with the U.S. Treasury ten-year note experience. In regard to the effective yield for 2019 as 2.67 percent and the rate level indication for CY 2020 of 2.95 percent return, the actuary explained Willis Towers Watson thought it made sense to take more of a longer-term perspective given that health care provider malpractice claims are going to be paid out over a number of years. The actuary further explained the company had been reducing its estimate of effective yield, but not as fast as the actual HCSF investment performance has come down.

Discussion topics also included the timing of surcharge revenue and the rate level indication options presented to the Board of Governors. The actuary explained the revenue in the second half of the fiscal year did come in better than was expected, likely due to a timing issue, and it did not impact any of the analysis. The actuary clarified the surcharge rate indications in the presentation, commenting 15 percent is what is needed for the HCSF to maintain its unassigned reserves at the same level, but the company did not

think there was a sense of urgency to do the full rate change; instead, the Board of Governors was given three options to consider ranging from 6 percent to 11 percent increases. The actuary indicated there would likely be another rate increase needed in the subsequent calendar year, such as 5 percent, when this analysis is done in February 2020.

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 its consideration. This included a memorandum from the Kansas Legislative Research Department (KLRD) outlining recent changes to law and legislation considered during the 2019 Session that was relevant to the HCSF Board of Governors or to health care providers in general (the KLRD analyst provided a summary of 2019 HB 2119, which, among other things, allows a business entity issued a certificate of authorization by the State Board of Healing Arts [BOHA] to employ or contract with one or more licensees of BOHA for the purpose of providing professional services for which such a licensee holds a valid license issued by BOHA, and she noted the report provisions outlined above); information from the KLRD *FY 2020 Appropriations Report* detailing the actual and approved Board of Governors' expenditures, including the related subcommittee reports; and the Committee's conclusions and recommendations contained in its most recent annual report. A copy of the decision issued by the Kansas Supreme Court in *Hilburn* and KLRD's associated analysis presented to the interim Special Committee on Financial Institutions and Insurance also was provided to supplement information presented by the Office of Revisor of Statutes.

A representative of the Office of Revisor of Statutes summarized *Hilburn*, indicating the Court issued an opinion holding that the cap on noneconomic damages found in Kansas law (KSA 60-19a02) is facially unconstitutional because it violates Section 5 of the *Kansas Constitution Bill of Rights* (the right of trial by jury). He provided factual and procedural background for the case. The district court reduced the judgment for noneconomic damages to \$250,000 pursuant to the noneconomic damages limitation in effect at the

time of the verdict, in KSA 60-1902(d). The revisor noted the decision of the Court was split; additionally, a concurring opinion agreed KSA 60-19a02 is facially unconstitutional. The revisor indicated the Court had acknowledged the two-part due process-based *quid pro quo* test in *Miller v. Johnson* (2012), but the Court found the *Miller* holding should not be followed, leading the Court to “abandon the *quid pro quo* test for analyzing whether the noneconomic damages cap is unconstitutional under section 5 . . .” He noted the concurring opinion agreed the statute was facially unconstitutional, but it left open the possibility the Legislature could achieve the policy goal of limiting damages in these cases in a more specific and different manner, stating in the opinion: “The Legislature remains free—within the bounds of section 18—to limit or otherwise modify the common law cause of action for damages. But it must do so clearly and straightforwardly.” [Note: Section 18 of the *Kansas Constitution Bill of Rights* is the right to remedy.]

During discussion, the revisor indicated the statute that was struck down as unconstitutional is a noneconomic damages cap as to all personal injury and wrongful death actions in the state; in response to an inquiry about the Court's press release issued concurrent with the opinion stating the Court was striking down the cap except in medical malpractice cases, the revisor clarified the statute does apply to all the cases and further indicated it is unclear, without further litigation and clarification by the Supreme Court in the specific arena of medical malpractice, how the Court might apply the new test the justices have laid out in that specific context.

Chief Counsel's Update

The Deputy Director and Chief Counsel for the Board of Governors addressed the FY 2019 medical professional liability experience (based on all claims resolved in FY 2019, including judgments and settlements). Of the 10 medical malpractice cases involving 14 Kansas health care providers tried to juries during FY 2019, 9 were tried in Kansas courts and 1 case was tried in a Missouri court. The trials were held in the following jurisdictions: Sedgwick County (4); Johnson County (2); Shawnee County (1); Ellis County (1); Ottawa County (1); and Jackson County, Missouri (1). Of the 10 cases tried, 9

resulted in complete defense verdicts and 1 case resulted in a mistrial.

The Chief Counsel noted FY 2019's 10 jury trials broke the prior year's record for the fewest cases that went to trial. She commented on trends for trials, indicating smaller damages cases tend to be the ones that go to trial, but the expense of going to trial keeps increasing; the potential for larger jury verdicts increases as economic damages could exceed the HCSF's coverage; and growing pressure is put on insurance carriers to settle a case for the cost of defense rather than go to trial.

The Chief Counsel highlighted the claims settled by the HCSF, noting in FY 2019, 74 claims in 61 cases were settled involving HCSF moneys. Settlement amounts incurred by the HCSF totaled \$23,407,875 (not including settlement contributions by primary or excess insurance carriers). She noted the FY 2019 data represent one more settlement than the previous year, but the Fund incurred about \$800,000 less in claims costs. The Chief Counsel addressed severity of claims, noting, of the 74 claims, 11 cases fell into the top category of settlement of \$600,000 or more and indicating FY 2019 was similar to FY 2018 with the same large number of settlements. Of the 74 claims involving HCSF moneys, the HCSF incurred \$23,407,875; the primary insurance carriers contributed \$11,797,022 to these claims. In addition, excess insurance carriers provided coverage for one claim for a total of \$550,000. For these 74 claims involving the HCSF, the total settlement amount was \$35,754,897. Further testimony also indicated, in addition to the settlements involving HCSF contributions, the HCSF was notified primary insurance carriers settled an additional 120 claims in 107 cases. The total amount of these reported settlements was \$8,779,783. The Chief Counsel's testimony also included a historical report of HCSF total settlements and verdicts, FY 1977 to FY 2019.

The Chief Counsel also reported 323 new cases during FY 2019, noting since FY 2016, there has been an increase in the number of new claims. The Chief Counsel indicated this was to be expected due to the 2014 law that added five categories of health care providers to the HCSF: physician assistants, nurse midwives, nursing

facilities, assisted living facilities, and residential health care facilities.

Self-insurance Programs

The Chief Counsel addressed the self-insurance programs and reimbursement for KU Foundations and Faculty and for residents. She stated the FY 2019 KU Foundations and Faculty program incurred \$2,761,718 in attorney fees, expenses, and settlements: \$500,000 came from the Private Practice Reserve Fund and \$2,261,718 came from the SGF. The Chief Counsel indicated this was a little over \$1.0 million more than in FY 2018 due to the number of settlements: 12 settlements involving full-time faculty members as compared to 4 in FY 2018. She noted the number of pending claims against full-time faculty members has remained fairly constant through the past several years.

In regard to the self-insurance programs for the KU/WCGME resident programs including for the Smoky Hill Family Medicine Residency Program in Salina, the total amount for FY 2019 was \$1,877,297, which was about \$250,000 more than the previous year. The Chief Counsel pointed out there were five settlements in FY 2019 with 12 pending claims against residents. She noted attorney fees and expenses for the residents in training was \$1,052,297, indicating that is more than the attorney fees and expenses for the foundations and faculty. She noted a recent case in Wichita involving several defendants, including one resident, and after almost six weeks in trial, the plaintiffs dismissed the resident as a defendant. She indicated there was no judgment against the resident, but it is expensive to try these cases.

The Chief Counsel provided a list of the historical expenditures by fiscal year for the KU Foundations and Faculty and the residents in training and indicated the 10-year average for the faculty and foundations self-insurance programs is about \$1.8 million, making FY 2019 an above-average year. For the residency program, the 10-year average is about \$1.0 million a year, so FY 2019 saw another substantial increase. She provided information about moneys paid by the HCSF as an excess carrier, reporting three claims in FY 2019 involving residents for which the claim was greater than \$200,000, involving HCSF coverage for \$622,500, and six claims for faculty

members in FY 2019 exceeded the \$200,000 primary coverage limit, for \$2,110,000.

During Committee discussion, the Chief Counsel indicated there are two foundations—University of Kansas Physicians, Inc., and Wichita Medical Practice. She explained the three criteria to be eligible as a member of the self-insurance program: the healthcare professional must be a member of the foundation, employed by the University of Kansas Medical Center (*i.e.* the State of Kansas), and have a full-time faculty appointment. She indicated when the University of Kansas took over St. Francis Hospital in Topeka, six members of the staff were qualified to be in the foundation under the self-insurance program. She stated she was not aware of any physicians in the Great Bend or Hays facilities who qualify under the criteria for self-insurance. Regarding those providers who became defined health care providers due to 2014 law changes, the Chief Counsel indicated from 2015 to 2019, there were 134 suits against these new health care providers; 39 of these cases were resolved and were settled within the primary limits, 6 settlements involved the HCSF, 65 claims remained pending, and 24 were dismissed.

Medical Malpractice Insurance Marketplace; Availability Plan Update

A representative of the Kansas Medical Society (KMS) presented testimony on behalf of the President and CEO of the Kansas Medical Mutual Insurance Company (KAMMCO). The KAMMCO remarks included an overview of market conditions, with the representative stating Kansas continues to have a healthy competitive market for medical professional liability insurance for all types of health care providers. She indicated the industry is well-capitalized, but annual operating results from the medical professional liability insurance line of business continue to deteriorate. She further described the medical professional liability insurance market conditions and also highlighted recent claims in Kansas. She discussed the *Hilburn* decision, indicating it is difficult to predict how quickly that impact will be felt and how much premiums will increase as a result. She highlighted testimony to the interim Special Committee on Judiciary, noting KAMMCO submitted its analysis of *Hilburn* and how it might impact medical malpractice.

The KAMMCO comments outlined how the HCSF and the cap on noneconomic damages go hand in hand. The conferee stated, previously in upholding the cap on noneconomic damages, the HCSF was the basis for that decision as the adequate *quid pro quo* established that ensures the constitutionality of the cap. She indicated KMS still believes that to be true: the HCSF serves an extremely important role in stabilizing the marketplace, and the continuation of the HCSF is extremely important. She concluded the KAMMCO testimony, stating the market is changing, the company does expect increases in premiums, and it does not know how much or how soon. She indicated it will take time and experience to see how these different factors, including the change in the capitalization of the reinsurance market, the impacts of *Hilburn*, and the increase in the number of high severity claims, compounded, are going to create upward pressure on premiums and the affordability of coverage for health care providers.

An illustration of Availability Plan insureds, from 1990 to 2019, was submitted with KAMMCO's testimony. [*Note: Additional comment on the Availability Plan is provided in the summary of the Board of Governors' statutory report.*]

Comments from Health Care Provider Representatives

The KMS representative addressed the Committee's role, indicating KMS believes the HCSF Oversight Committee should continue and does not believe there is a need for another independent actuarial analysis. She urged the continuation of the Committee for another year. She stated her appreciation for the Committee discussion about the bill on corporate practice of medicine, which would introduce a new body of providers into the HCSF. She indicated KMS believes it is important to protect the soundness of the HCSF, and as those new provider types are added in, it will be important they cover the costs of their own claims. She stated it will require experience to better ascertain costs for coverage, but KMS believes it is appropriate for the business entities to participate in the HCSF. She further indicated the entity itself should carry coverage the same way all medical individual providers do, so the entities are not just exposing the physicians that they employ to the cost of that coverage. She

stated KMS would appreciate the Committee's support of that in its report.

The Executive Director of the Kansas Association of Osteopathic Medicine concurred with the KMS comments, and her testimony also noted the success of the HCSF's public-private partnership, stating it has done what it was envisioned to do: provide compensation to patients for unintended medical outcomes, give Kansas health care providers access to professional liability insurance coverage, and create a favorable environment for responsible professional liability insurance companies.

Written-only testimony submitted by the Kansas Hospital Association (KHA) provided additional comment on *Hilburn*, indicating KHA will continue to closely monitor any perceived impact the decision has on future insurance rates and jury awards.

Board of Governors' Statutory Report

The Executive Director of the Board of Governors (Executive Director) provided a brief history of the HCSF law and its governance and explained when the law was passed in 1976, it had three main functions: 1) to require all health care providers, as defined in KSA 40-3401, to maintain professional liability insurance coverage; 2) to create 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 3) to create the HCSF to provide excess coverage above the primary coverage purchased by health care providers, and to serve as reinsurer of the Availability Plan.

The Executive Director provided the Board of Governors' statutory annual report (as required by KSA 40-3403(b)(1)(C) and issued October 1, 2019).

The FY 2019 report indicated:

- Net premium surcharge revenue collections amount to \$28,896,286. The lowest surcharge rate for a health care professional was \$100 (for a first-year provider selecting the lowest coverage

option) and the highest surcharge rate was \$17,336 for a neurosurgeon with three 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 \$22,537 for this health care provider;

- The average compensation per settlement (61 cases involving 74 claims were settled) was \$316,323. These amounts are in addition to compensation paid by primary insurers, typically \$200,000 per claim. The report stated amounts reported for verdicts and settlements were not necessarily paid during FY 2019 and total claims paid during the fiscal year amounted to \$28,918,065; and
- The balance sheet, as of June 30, 2019, indicated total assets of \$294,148,935 and total liabilities of \$254,631,909.

Availability Plan

The Executive Director's report also included an update on the Availability Plan; the Availability Plan, a joint underwriting association, is a major component of the Health Care Provider Insurance Availability Act (HCPIAA) and assures health care providers always have access to a basic professional liability insurance policy. The Executive Director reported in 2004, there were more than 600 participants in the Availability Plan; as of October 1, 2019, there were 287 participants. In years when Availability Plan losses exceed income, the HCSF is required by law to transfer the net loss to the Availability Plan. At the conclusion of FY 2019, \$603,222 was transferred from the HCSF.

Contemporary Issues

The Executive Director provided an update on HB 2119 and its provisions relating to what is commonly known as the "corporate practice of medicine." He indicated during the 2019 Legislative Session, the Board of Governors expressed concerns regarding the impact the new law would have on the actuarial stability of the HCSF, as well as on pricing and claims exposure,

noting the reporting requirement to the Legislature. He indicated the Board of Governors has two broad concerns regarding HB 2119:

- The law, as enacted, does not require the authorized business entities to participate in the HCSF, plus they are not defined in law as healthcare providers, so language would need to be enacted for this participation to occur; and
- The new law needs to clearly define the three types of business entities to avoid any unintended consequences related to liability for services delivered out of the state by an entity with locations outside of Kansas.

He requested the Committee consider expressing these two items are of concern and encouraging the Legislature to take action at the appropriate time in its own report.

The Executive Director next addressed the *Hilburn* decision and the Court's press release. He indicated the press release used the words "struck down the statutory noneconomic damages cap in personal injury cases other than medical malpractice." He indicated the Board does not know how it would impact medical malpractice cases or the HCSF, or how the Legislature may choose to react to the Supreme Court decision, so the Board is watching the issue very closely. He stated he believes the HCSF has been a very successful agency that plays a vital role in helping health care providers with the ability to provide health care in Kansas, and it also is helpful, when there are unintended medical outcomes, that the residents of Kansas have adequate recourse.

During discussion about the provisions of HB 2119, the Executive Director indicated the Board of Governors is of the belief it would create an additional classification to be included into the HCSF. He clarified the business entity itself, not just the health care professionals the entity employs, would need to participate in the HCSF. He then compared business entities to a partnership of physicians who open a clinic, hospitals, and other entities that are required to participate in the HCSF, and he indicated business entities would be put into the same category as these other entities providing medical services.

The Board would set an appropriate surcharge and monitor it just as with any classification. The Chief Counsel also noted, if those entities are made defined health care providers, they would be required to have primary coverage. She explained the insurance they already have may or may not qualify, as a person or entity participating in the HCSF must have insurance from an admitted insurance carrier in Kansas; that insurance must be a claims-made policy, not occurrence-based; and the HCSF coverage by law would be excess of whatever applicable coverage that policy met.

HCPIAA Amendments

No formal amendments were brought before the Committee. The Committee notes the Board of Governors is required to report to the Legislature. Should the HCPIAA be open to amendment, the Committee notes the technical amendments cited in the Executive Director's testimony (the words "healthcare" and "health care" are inconsistent in usage throughout this act).

CONCLUSIONS AND RECOMMENDATIONS

The Committee considered two items central to its statutory charge: whether the Committee should continue its work and whether a second, independent analysis of the HCSF is necessary. This oversight committee continues in its belief 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 insurance 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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provided by the Board of Governors' actuary reviewed the financial performance of the Fund in 2018, indicating its financial position was not as strong as believed to be one earlier. Among negative indications cited was the transfer from the HCSF to the Availability Plan, declining investment returns, a higher loss experience, and a larger-than-anticipated decline in surcharge revenue. The Committee further notes the rate level indications for the CY 2020 surcharge rates did not include a "do nothing" option; the Board of Governors responded to the actuary's conclusions and implemented an option that requires, beginning on January 1, 2020, almost every health care provider to pay an additional 6 percent. [Note: The actuary noted all of these conclusions were made prior to the June 2019 *Hilburn* decision.]

- The Committee notes its discussion with the actuary, Board of Governors staff, and health care providers and insurers on broader trends and concerns, including the costs to resolve medical malpractice claims on health care providers increasing nationwide and the upward pressure on settlements. The Committee shares these concerns—and notes the marketplace shows signs of strain—for the increased pricing for medical professional liability insurance, the increased frequency of high-severity claims, and reinsurance capacity concerns.
- **Contemporary issues and continued oversight.** The Committee notes two issues requiring continued oversight by the Board of Governors and this committee. The Committee acknowledges the June 2019 *Hilburn* decision, and the uncertainty of this decision's impact on the HCSF, health care providers, medical malpractice cases and actions, and the medical malpractice insurance marketplace in Kansas. Additionally, the Committee notes the enactment of 2019 HB 2119 and recognizes the concerns stated by representatives of the Board of

Governors with the language in present law. The Committee encourages clarification on the criteria associated with the term "business entity," including a requirement for participation by not only the individual healthcare provider, but also by the corporate practice (corporation of providers) in the HCSF. The Committee further notes the study and report on the impact of requiring these entities to participate in the HCSF are to be submitted by the Board prior to the commencement of the 2020 Session. Should the HCPIAA be open to amendment, the Committee notes technical amendments cited in the Executive Director's testimony.

- **Fund to be held in trust.** The Committee recommends 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 behalf of each individual health care provider. Those payments made to the HCSF by health care 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, the 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.

The Committee requests its report be directed to the standing committees on health, insurance, and judiciary, as well as to the appropriate budget

and subcommittees of the standing committees on appropriations.