

**Report of the
Health Care Stabilization Fund Oversight
Committee
to the
2021 Kansas Legislature**

CHAIRPERSON: Gary Hayzlett

LEGISLATIVE MEMBERS: Senators Anthony Hensley and Gene Suellentrop; Representatives Henry Helgeson 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, reports, 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: whether the Committee should continue its work and whether a second, independent analysis of the Health Care Stabilization Fund (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.

The Committee considered information presented by the Board of Governors' representatives, including its required statutory report; the Board of Governors' 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; income and rate level indications.** The Committee notes the report provided by the Board of Governors' actuary characterized 2019 as a "surprisingly good year" for the HCSF with slightly higher than anticipated surcharge revenue and better than anticipated loss experience. While there was a significant drop in the reserves on open claims, it was noted payments were up only slightly. This Committee notes this analysis was submitted to the Board of Governors in late February 2020. The Committee also notes the Board's consideration of three options for the calendar year 2021 rates; the Board elected to make selective rate changes and to continue to compress the factors for years of compliance. These actions resulted in an overall increase in surcharge rates of 2.6 percent. The Committee recognizes the changing environment, given the present COVID-19 pandemic, and the impacts on the HCSF:
 - *Revenue and leveraging concerns.* The Committee notes the HCSF revenue comes primarily from two sources: health care provider surcharges and investment income. This equates to a leveraging effect; should one source (investment income) provide lower than anticipated revenue, the other source may be increased to offset this loss of revenue. Given the present status of U.S. Treasury rates and investment yield for the HCSF anticipated prior to the pandemic, the Committee notes its concerns regarding both short-term and longer-term impacts on the HCSF, the rate level indications, and health care providers participating in the Fund. [*Note: A 10 basis point decrease indicates a 1 percent increase in the surcharge. Based on the present U.S. Treasury rates, 2 percent for the surcharge now could become 12 percent if there is a decrease of 100 basis points.*]
- **COVID-19 impacts on claims and settlements.** The Committee recognizes the present public health emergency and the efforts to minimize public participation in the judicial

system. The Committee notes the delay in consideration of both filed claims and those claims to be filed. Once the courts are more broadly opened, testimony indicates medical malpractice actions will be placed behind the criminal trials that are pending, and it could be well into fiscal year 2021 before the courts are able to hear such claims. The Committee observes:

- A *Hilburn* medical malpractice action could not move forward if those cases are not being heard. The Committee recognizes the Board of Governors will continue to monitor the impact of the *Hilburn* decision;
 - The Board of Governors and Kansas Medical Mutual Insurance Company representatives indicated that there seems to be an impact on the number of cases that are also being filed overall; and
 - The Board of Governors reports, as of October 1, 2020, 25 lawsuits and claims have been made against 3 long-term care facilities. Absent discovery, which has been delayed, the Board cannot yet ascertain whether some of these allegations would fall outside the realm of professional liability and into corporate liability.
- **Marketplace conditions; approaching headwinds.** The Committee acknowledges the concerns presented by health care insurer and provider representatives and notes the considerable impact the pandemic has made to exacerbate the ability to provide adequate and affordable professional liability insurance to health care providers:
 - After a favorable period of market conditions, with availability, lower pricing, and open terms of coverage, compression is being observed in the marketplace;
 - The reinsurance marketplace, for long-term care facilities, is restricting access, with limitations on terms of coverage. The Committee is especially concerned about reports of reinsurance coverage exclusions for infectious diseases and other pandemic-related conditions and the resulting impact on the pricing for primary coverage for long-term care facilities, including hospitals providing long-term care; and
 - The governance of and future for telehealth, in terms of best practices and standard of care and licensure for either Kansas providers providing coverage outside of the state of Kansas or for providers outside of Kansas who would be providing service to Kansas citizens.
 - **Legislative proposals; amendments to the Health Care Provider Insurance Availability Act (HCPIAA).** The Committee recognizes the duration of the 2020 Legislative Session prevented more-formal consideration of legislation addressing some matters of concern to health care insurers, providers, and the Board of Governors. The Committee supports consideration on the proposals discussed and presented by the Board (corporate practice of medicine and business entity regulation and technical corrections to the HCPIAA) and the Kansas Medical Society/Kansas Hospital Association representative (changes to the required coverage limits and number of offerings).
 - **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 (excepting self-insurance programs reimbursement). 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 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 and to make recommendations to the Legislature regarding the HCSF.

The Committee met October 1, 2020.

COMMITTEE ACTIVITIES

Report of Willis Towers Watson

The Willis Towers Watson actuarial report serves as an addendum to the report provided to the HCSF Board of Governors dated July 14, 2020, which was based on the review of HCSF data as of December 31, 2019. The actuary addressed forecasts of the HCSF’s position at June 30, 2020, and June 30, 2021, based on the company’s annual review, along with the prior estimate for June 2020. In 2019, the estimate of

the HCSF-held assets as of June 30, 2020, was \$289.86 million, and the HCSF had liabilities of \$263.20 million, with \$26.66 million in reserve (2019 Study). As of June 30, 2020, the HCSF actually held assets of \$296.75 million and had liabilities of \$255.05 million, with \$41.70 million in reserve. The projection for June 30, 2021, is as follows: assets of \$302.68 million, liabilities of \$261.34 million, and \$41.34 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 2.3 percent for calendar year (CY) 2021 in order to maintain its unassigned reserves at the expected year-end CY 2020 level (estimated \$41.0 million).

The actuary explained the forecasts of unassigned reserves assume a 2.6 percent increase in surcharge rates for CY 2021, an estimated surcharge revenue in fiscal year (FY) 2021 of \$31.7 million, a 2.25 percent interest rate for estimating the tail liabilities on a present value basis [*Note:* The actuary commented this rate assumption was likely overestimated given current interest rates], a 2.85 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 a small increase in rates for CY 2021 with potentially some variation by class

and years of compliance. [Note: The Board chose to raise surcharge rates by an average of 2.6 percent effective January 1, 2021.]

The actuary reviewed the HCSF's liabilities as of June 30, 2020. The liabilities highlighted included claims made against active providers (losses) as \$77.5 million; associated defense costs (expenses) as \$15.5 million; claims against inactive providers, as known on June 30, 2020, as \$9.3 million; tail liability of inactive providers as \$144.1 million; future payments as \$13.1 million; claims handling as \$9.1 million; and other liabilities, described as mainly plaintiff verdicts on appeals, as \$100,000. Total gross liabilities were \$268.6 million; the HCSF is reimbursed \$13.6 million for the KU/WCGME programs, for a final net liability of \$255.1 million.

The actuary reviewed the HCSF's (surcharge) rate level indications for CY 2021, noting the indications assume a break-even target. The actuary highlighted payments, with settlements and defense costs of \$32.19 million; change in liabilities of \$6.04 million; administrative expenses of \$1.9 million; and transfers to the Health Care Provider Availability Plan (Availability Plan) and the Kansas Department of Health and Environment (KDHE) assumed to be \$500,000 (assuming a \$300,000 Availability Plan transfer and a \$200,000 KDHE transfer). In total, the cost for the HCSF to break even is \$40.62 million. The actuary stated the HCSF has two sources of revenue: its investment income (assumed to be \$8.42 million based on 2.85 percent yield) and surcharge payments from providers (\$32.2 million needed to break even). The actuary explained the rate-level indication and said rates need to be raised an estimated 2.3 percent in order to achieve break-even status.

The actuary also reported on trends in the HCSF's loss experience for active and inactive providers from CY 2015 through CY 2019. The actuary noted CY 2019 was better than anticipated, noting the concern at this time last year was the growth in year-end loss reserves, from \$40.68 million in 2017 to \$59.0 million in 2018 (active providers). During CY 2019, this trend changed significantly from the prior year, declining to \$40.83 million. The actuary indicated with a decrease in the year-end loss reserves without an appreciable increase in settlements, it

was a much better year than had been anticipated. The actuary reported similarly on the inactive providers with the year-end loss reserves at December 2019 down significantly from year-end 2018 without much of an increase on the settlements. The actuary highlighted trends in the HCSF loss experience for active and inactive providers by program year and noted there was not much inflation in the HCSF's overall experience for active providers over the past 13 to 14 years. The actuary indicated it was a better result this year than what was assumed last year. The actuary indicated there is some inflation for inactive providers, explaining this is due, in part, to the law change in 2014, which expanded the HCSF's coverage for inactive providers, particularly for those that had been in the HCSF for less than five years.

The actuary reported on the HCSF's investment yield over the past eight fiscal years, indicating FY 2020 showed a slight rebound with the yield increasing to 2.77 percent. The actuary noted the assumed yield in the 2019 study was 2.95 percent. The actuary stated it was decided to reduce it another 10 basis points in this year's study. The actuary commented this decision was made in February 2020, and since then, the 10-year U.S. Treasury yield rate has dropped significantly. The actuary explained in October 2019, the 10-year U.S. Treasury's yield was 1.8 percent; in October 2020, it was between 0.65 and 0.70 percent. The actuary indicated if the rate stays at this level, then it is anticipated the assumed yield will need to be reduced on the next analysis for the HCSF in January or February 2021. The actuary noted every change in 10 basis points in the interest rate is worth 1 percent in surcharge rate level. The actuary further noted if the assumed interest rate drops from 2.85 percent to 1.85 percent, then the HCSF's surcharge indication of 2 percent becomes 12 percent. The actuary explained the yield's leveraging impact on the HCSF's financials and the potential pressure on the HCSF Board of Governors to raise rates for 2022.

The actuary next provided an overview regarding indications by provider class. The report states the analysis of experience by HCSF class continues to show differences in relative loss experience among classes. The actuary explained this analysis is reviewed annually by the Board of

Governors to provide the Board with the opportunity to consider surcharge rate changes at the individual classification level. He provided a history of surcharge rate changes since 2009. The actuary noted a 6 percent change went into effect earlier this year (CY 2020).

The actuary provided an overview of the three options for CY 2021 surcharge rates that were provided to the Board of Governors. The actuary highlighted the Board's decision to implement Option 3 for the CY 2021 rates. The actuary explained Option 3 was to make selective rate changes by class (e.g., not raise the rates on classes that were performing well and to take more than 2 percent on classes that were underperforming), and also to continue to compress the factors for years of compliance. The actuary indicated Option 3 has an overall increase in HCSF surcharge rates of 2.6 percent.

Discussion

The actuary characterized 2019 as a “surprisingly good year” for the HCSF and explained revenue came in a little higher than was anticipated with loss experience performing much better than anticipated and much better than in 2018. The actuary noted while there was a significant drop in the reserves on open claims, payments were up only slightly. As a result, the HCSF's financial position on June 30, 2020, was stronger than was anticipated in October 2019. The actuary noted a “somewhat cautious” approach in the forecasts, given these recent favorable results and the potential impacts of the *Hilburn v. Enerpipe Ltd.* (No. 112,765) decision.

On the topic of loss and loss adjustments expenses for active and inactive providers, the actuary confirmed variation between the groups, noting the denominator for the loss experience of inactive providers is not yet known. The actuary indicated the company would work to determine a way to display trends in HCSF loss experience for inactive and active providers together for future Committee meetings.

Committee members and the actuary discussed the declining investment yield and concerns regarding the leveraged relationship between the investment yield and income assumptions and the rate indication for health care providers

(surcharge). The actuary confirmed the impact of both a 10 basis point change (1 percent) and the 100 basis point change (10 percent). If the HCSF investment yield is dropped to 1.85 percent, for example, then the HCSF has a surcharge indication of another 10 points. The Committee and actuary also discussed future assumptions should effective yields continue to be at a lower level; the actuary indicated the HCSF's assets are laddered out fairly well, so it would take some time for the effective yield to start dropping significantly. The actuary cautioned this lowering of yield will put pressure on the rate level indications each year such market conditions stay at their present levels – if anticipated investment income decreases, any shortfall must be made up by the providers in the form of surcharge payments.

On the topic of the CY 2021 surcharge rates and the three options presented by the company to the Board of Governors, the actuary concurred each option was a “reasonable” option and further explained the Board's decision was made in spring 2020 based on information known in late February. At that time, the impact of the COVID-19 pandemic was fairly uncertain.

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 information from the Kansas Legislative Research Department's *FY 2021 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. The information also included a memorandum outlining relevant health care provider legislation considered in the 2020 Legislative Session. The analyst highlighted the amendments to the Health Care Provider Insurance Availability Act (HCPIAA) proposed in 2020 SB 493, which had been scheduled for hearing shortly before the Legislature's unexpected early adjournment in March and did not advance during the 2020 Session. Its provisions were also not incorporated into Senate Sub. for HB 2054, which was a bill addressing emergency management, business and

health care liability, and other COVID-19-related topics. She indicated SB 493 would have made substantial changes to how the health care provider community receives its professional liability coverage. She indicated the bill would have increased the minimum thresholds on the professional liability insurance coverage for the basic coverage from \$200,000 per claim and \$600,000 per year aggregate to \$500,000 per claim and \$1.5 million per year aggregate. Additionally, the number of options for those coverage limits would have been changed from three to two. The analyst noted other amendments would have affected the membership of the Board of Governors, as well as its powers, duties, and function under certain conditions. Additionally, the bill would have provided a response to *Hilburn* by specifically proposing dissolution of the HCSF should the Kansas Supreme Court declare the statutory noneconomic damages cap in KSA 60-19a02 unconstitutional.

A representative of the Office of Revisor of Statutes provided an overview of the 2020 Special Session HB 2016 (law), which addressed a wide number of subjects related to the COVID-19 pandemic. The revisor highlighted the provisions of the bill related to health care providers and liability for health care providers:

- Immunity for health care providers for any rendering of or failure to render health services, including services that were altered, delayed, or withheld as a direct response to the COVID-19 public health emergency, with some exceptions (*e.g.*, gross negligence or willful, wanton, or reckless misconduct or services not related to COVID-19). These provisions apply retroactively to any cause of action accruing on or after March 12, 2020, and continue to apply through the end of the state of disaster emergency [section 10];
- Liability protection provisions for adult care homes, which provide an affirmative defense to liability in any civil action for a COVID-19-related claim against an adult care home if the facility was caused to reaccept a resident who was removed from the facility for treatment for COVID-19, treats residents who test positive for

COVID-19 in compliance with a statute or rule and regulation, or is acting in compliance with public health directives [section 13];

- Expansion of telemedicine (provisions are very similar to Executive Order [EO] 20-08), which authorized the expanded use of telemedicine by physicians in the state of Kansas, as well as the practice of telemedicine by out-of-state physicians with patients located in the state of Kansas if these providers advise the State Board of Healing Arts (State Board) that they are engaging in that practice [section 20]; and
- Granting hospitals some greater degree of flexibility in their operations during the COVID-19 pandemic, by allowing the admission of patients in excess of the number of licensed beds or admitting patients inconsistent with the licensed classification of those beds for the duration of the pandemic, as well as greater flexibility in using off-campus, non-hospital space for certain COVID-19-related services. The bill also relaxed some restrictions on critical access hospitals and their admission of patients for the duration of the state of disaster emergency [section 21].

The revisor noted the bill also included provisions related to temporary emergency licensure of health care professionals under the jurisdiction of the State Board (codifying EO 20-26). He explained 2020 Special Session HB 2016 essentially grants the State Board the authority to issue these licenses during the pandemic if the applicant for such a license has qualifications that the State Board deems are necessary to protect public safety and welfare. He also noted the bill amended the scope of practice and relaxed some supervision requirements for certain health care professionals and other individuals and facilities [Section 23, also provisions in EO 20-26]. The revisor noted additional provisions relating to lapsed or canceled licenses, certain professional certifications, and licensure of hospitals, adult care homes, and other facilities (for entities that may have some difficulty meeting those requirements during the pandemic). The provisions of the bill

will expire, generally, at some point after the state of disaster emergency or on January 26, 2021.

Chief Counsel's Update

The Deputy Director and Chief Counsel for the Board of Governors addressed the FY 2020 medical professional liability experience (based on all claims resolved in FY 2020, including judgments and settlements). She stated 12 medical malpractice cases, involving a total of 18 Kansas health care providers, were tried to juries during FY 2020; 9 were tried in Kansas courts, and 3 were tried in Missouri courts. The trials were held in the following jurisdictions: Sedgwick County (4), Johnson County (2), Douglas County (1), Morris County (1), Wyandotte County (1), and Missouri courts (3). Of the 12 cases tried, 11 resulted in complete defense verdicts, and 1 case resulted in a verdict for the plaintiff for an amount within the primary coverage limits.

The Chief Counsel noted in the past several years, fewer cases have gone to trial, but in FY 2020, two more cases went to trial. She further noted due to the COVID-19 pandemic, no civil trials took place in March, April, May, or June 2020, meaning these 12 cases went to trial in 8 months. The Chief Counsel indicated for FY 2021, no jury trials are currently taking place; several are scheduled for the end of CY 2020, but realistically speaking, it will probably be well into CY 2021 before the courts are able to reopen the courthouses or create mechanisms to have jury trials. She stated when that happens, the first cases tried will likely be the criminal trials, and it is anticipated it will be well into next spring before any cases actually go to trial.

The Chief Counsel highlighted the claims settled by the HCSF, noting in FY 2020, 73 claims in 69 cases were settled involving HCSF moneys. Settlement amounts incurred by the HCSF totaled \$27,121,225 (does not include settlement contributions by the primary or excess insurance carriers). She noted in the past three fiscal years, about the same number of cases have settled, indicating the major difference between this year and last year is that \$3,713,350 more was incurred in settlements for this past fiscal year. The Chief Counsel also reported on the severity of the claims, noting there were two more cases that fell into the \$600,001-\$1,000,000 settlement range

than during the previous year. Of the 73 claims involving HCSF moneys, the HCSF incurred \$27,121,225; the primary insurance carriers contributed \$12,400,000 to these claims. The Chief Counsel noted nine of those claims involved inactive Kansas health care providers for which the HCSF provided primary coverage. In addition, excess insurance carriers provided coverage for five claims for a total of \$7,700,000. For the 73 claims involving the HCSF, the total settlement amount was \$47,221,225. She also indicated in addition to the settlements involving HCSF contributions, the HCSF was notified primary insurance carriers settled an additional 106 claims in 98 cases. The total amount of these reported settlements was \$9,868,875. The Chief Counsel's testimony also included a historical report of HCSF total settlements and verdicts from FY 1977 to FY 2020. The report indicated for FY 2020, the HCSF incurred \$27,121,225 in 73 claims settlements with no verdict amounts.

The Chief Counsel also reported 302 new medical malpractice cases during FY 2020, an amount lower than the prior year's total of 323. The Chief Counsel commented this was not likely due to the COVID-19 pandemic, noting that while the courthouses were closed to trials, in Kansas cases may be filed online. She stated it will be interesting to see in the next six months whether there is an uptick in the number of cases, and if so, it would likely be related to COVID-19. The Chief Counsel noted since FY 2015, the number of new medical malpractice cases reported to the HCSF has gradually increased; this was anticipated. She indicated this was due to the 2014 law that added five new categories of health care providers to the HCSF: nursing facilities, assisted living facilities, residential health care facilities, nurse midwives, and physician assistants.

Adult Care Homes and Claims

The Chief Counsel reported on the number of claims against adult care homes over the past several years; in 2019, of the 323 claims, 53 claims were suits and claims against adult care homes; and in 2020, of the 302 claims, 75 claims were suits and claims against adult care homes. She noted starting at the end of April and May 2020, the Board of Governors began seeing claims filed against adult care homes based on COVID-19-related issues. The Chief Counsel reported for

FY 2020, 21 new suits and claims were COVID-19-related. Removing the COVID-19-related cases, the experience for adult care homes for 2020 was the same as it was for 2019. She further reported in regard to the COVID-19 claims to date, as of October 1, 2020, 25 lawsuits and claims had been made against 3 facilities: a Wyandotte County facility with 19 suits and claims made against it, a Johnson County facility with 4 lawsuits and claims made against it, and a Sedgwick County facility with 2 lawsuits filed against it. It is anticipated the numbers of these types of claims will increase during the next two fiscal years.

Self-insurance Programs

The Chief Counsel addressed the self-insurance programs and reimbursement for KU Foundations and Faculty and residents. She indicated FY 2020 was a good year, as these costs were \$1,196,273.25 less than costs in the previous year. She stated the FY 2020 KU Foundations and Faculty program incurred \$1,565,444.80 in attorney fees, expenses, and settlements; \$500,000.00 came from the Private Practice Reserve Fund, and \$1,065,444.80 came from the State General Fund (SGF). The Chief Counsel explained the programs incurred less moneys, as there were half the settlements and fewer lawsuits than during the previous year. She noted the number of lawsuits pending at the end of FY 2020 was 41, so it is anticipated during the next fiscal year, the self-insurance program amounts expended for attorney fees and expenses will increase as the number of lawsuits pending has increased.

In regard to the self-insurance programs for the KU/WCGME resident programs, including the Smoky Hill residents in Salina, the total amount for FY 2020 was \$933,533.33. The Chief Counsel reported the FY 2020 total was half of the FY 2019 total. She noted two reasons for the decrease: First, there was one settlement compared to five the prior year, and second, in the past two years, there have been about half of the number of lawsuits that were pending against residents in training than in FY 2018. This overall decrease, from 25 to 14 cases, is seen in the the amount of defense costs incurred.

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 ten-year average for the program cost for the faculty and foundations self-insurance programs is about \$1.8 million, meaning FY 2020's costs were slightly below average. The Chief Counsel indicated she anticipates defense costs will probably increase next year. For the residency program, the ten-year average is about \$985,000 a year, so FY 2020 was termed an average year. The Chief Counsel noted this year, for the first time, the number of full-time faculty numbers exceeded the number of residents in training. The Chief Counsel also provided information about moneys paid by the HCSF as an excess carrier. She reported there was a claim for FY 2020 against a resident in training with the settlement amount of \$500,000; \$200,000 was reimbursed by the state of Kansas, and \$300,000 fell within the HCSF's excess coverage. For the faculty and foundations for this past year, three claims fell into the HCSF's excess coverage for a total of \$535,000.

Discussion

During Committee discussion, the the Chief Counsel indicated the nature of the allegations against adult care homes appears to include claims that appropriate protective equipment was not used, the facility allowed employees who had symptoms of COVID-19 to go to work without being tested, or that appropriate techniques were not utilized to contain the spread of the virus. She further indicated some of the early suits were filed at the end of April and the beginning of May, and the facilities have been overwhelmed with trying to take care of their residents, so the discovery process has been slow, and the exact nature of the claims has not been fully discovered. At the time of the Committee's meeting, the Board of Governors could not yet ascertain whether some of these allegations would fall outside the realm of professional liability and into corporate liability. When asked about whether other health care providers (subject to the HCSF) could be included in these claims and suits, the Chief Counsel noted a records request is out to determine any negligence on the part of other kinds of health care providers, but she has not seen any formal claims made in that regard.

Medical Malpractice Insurance Marketplace; Availability Plan Update

The President and Chief Executive Officer, Kansas Medical Mutual Insurance Company (KAMMCO), reviewed overall market conditions and highlighted impacts associated with the COVID-19 pandemic. The KAMMCO conferee indicated the marketplace in Kansas and around the country has benefited from an extremely soft medical malpractice insurance marketplace, meaning there is availability, low pricing, and open terms of coverage. He noted signs of change emerging over the past few years and pointed to a significant turn late last fall. He reported reinsurance companies were beginning to withdraw from that marketplace and have announced a similar withdrawal from the hospital professional liability marketplace. He explained this occurrence as a “contraction” of the marketplace. The KAMMCO conferee further explained that with fewer companies (due to those companies having experienced losses or having uncertainties about the environment), pricing starts to increase, and policy terms get more constricted. He indicated the COVID-19 pandemic has accelerated and exacerbated that market trend. He reported KAMMCO would soon hold its reinsurance meetings to work on the January 1 renewal products and has already learned fewer companies will offer insurance coverage, pricing is getting more difficult, and some terms are being constricted.

The KAMMCO conferee addressed telehealth and the impact of the COVID-19 pandemic on the health care delivery system. He noted the acceleration of the application of telehealth across the country and Kansas, noting KAMMCO, like the Board of Governors, is studying these issues and gathering information from providers in more detail about their level of telehealth activities to better understand health care delivery and resulting liabilities for both those providers operating in-state and those Kansas providers providing health care services in other states.

The KAMMCO conferee also noted COVID-19’s impact on adult care facilities, particularly its effects on the residents, staff, and finances. He indicated the insurance marketplace will soon face similar impacts and reported companies are beginning to either withdraw or raise pricing in

such a way that makes it difficult to continue in that marketplace, and reinsurers are adopting similar practices. The KAMMCO conferee explained companies like KAMMCO have seen signs that the reinsurance industry for long-term care is going to insist on an exclusion for infectious or communicable disease in reinsurance contracts, which would then follow through into underwriting. He noted this is in direct response to the pandemic, and it would be particularly devastating to the adult care community’s ability to secure the adequate insurance coverage it needs.

He indicated KAMMCO will work with the reinsurance industry to see if the issue can be mitigated; he reported one company in Kansas, the Berkshire Hathaway Company, however, has already filed such an exclusion with the Commissioner of Insurance (Commissioner). The KAMMCO conferee explained the Commissioner did approve the exclusion for excess or umbrella-type coverage, but declined the filed exclusion for the basic coverage that is mandated by the HCPIAA. He further explained the Commissioner said there was no statutory ability in the HCPIAA to be able to exclude that condition from the definition of health care services rendered or failed to be rendered, so the Commissioner disapproved that filing. In the short term, companies writing primary coverage will then be required to provide it, but the reinsurers will not choose to reinsure and certainly will not reinsure it for excess or umbrella-type coverage. He noted this is a major issue that insurers are going to face over the next few years. Insurers will deal with that issue in an environment where many of the claims filed against adult care homes will likely be COVID-19-related, *i.e.*, many of the claims will fit squarely inside an exclusion for infectious or communicable disease.

During Committee discussion, the KAMMCO conferee indicated he has visited with the Kansas Hospital Association (KHA) about reinsurance concerns for hospitals; he noted community hospitals that have swing beds and long-term care beds that are not separate facilities but are licensed underneath that hospital license are especially concerned. The KAMMCO conferee noted this insurance issue does not just affect providers and hospitals or long-term care facilities; it affects patients and their families in Kansas and nationwide. Responding to a question about

liability protections for long-term care facilities, the KAMMCO conferee discussed affirmative defense, indicating it does not rise to the same level as the immunity provided to all the other health care providers by 2020 Special Session HB 2016. He explained the adult care home's attorney must raise any affirmative defenses in the answer to a filed lawsuit. The KAMMCO conferee further explained when a medical malpractice claim is filed, different factors are considered, such as the timing of the claim, present law, and whether the statute of repose or the statute of limitations might exclude the claim from being successfully litigated. He indicated the next step in the claim process is discovery and then potentially a trial in order to determine whether that affirmative defense will stand. He further explained while the affirmative defense exists and provides the opportunity to argue for the actions of the adult care home under certain circumstances, a significant amount of discovery and work must go into actualizing those arguments and forming an effective defense.

The KAMMCO conferee also reported on the Availability Plan, commenting the number of insured providers compared to the previous year is not significantly different, with one notable surprise. He indicated at this time in 2019, roughly 8 adult care facilities were insured by the Availability Plan, meaning those facilities could not find insurance in the regular marketplace, and as of the date of the meeting, 20 facilities were insured by the Availability Plan. The KAMMCO conferee stated this is the beginning of what could develop into a crisis. He commented on the growing issues that could lead to this crisis: potential loss of the cap on noneconomic damages; the spread of COVID-19 and a resulting weakened health care delivery mechanism as a result of a two-month shutdown; and an already present hardening in the insurance marketplace that will be accelerated into a more acute problem.

The KAMMCO conferee noted its claims are down about 16 percent this year; the Kansas Supreme Court, as part of one of the emergency orders of the Governor, has tolled the statute of limitations. He explained law firms possibly do not feel any particular urgency to file those claims because they do not have to contend with any sort of statute of limitations. The KAMMCO conferee further explained this issue will present

compression in the future for those claims, which could be problematic for the insurance industry and the HCSF. In discussion with the Committee, the KAMMCO conferee noted information referenced by the Executive Director; Kansas is fifth lowest in terms of costs. The KAMMCO conferee indicated Kansas has enjoyed a stable and effective medical malpractice environment. He discussed noneconomic caps and the resulting uncertainty for tort reform, noting the delay in establishing a *Hilburn* test case for medical malpractice actions. He also contrasted the varied experience of the COVID-19 pandemic, highlighting the infection fatality rate difference between New York City and the state of Kansas. He spoke to this "mixed environment" that has both positive and negative indicators present.

When asked about 2021 rates for adult care facilities given the reinsurance issues present in the marketplace, the KAMMCO conferee indicated actuarial work that the organization has conducted suggests the result could be a lower double-digit increase for adult care homes for 2021; he cautioned COVID-19 will not help those rate indicators. He also commented on the expectation that reinsurers will not cover anything pandemic-related starting January 1, 2021. The Committee and conferee discussed future implications and the consideration of creating protections and clarifying definitions that include infectious disease. The KAMMCO conferee indicated the HCSF is financially healthy, well-run, and has definitions in statute that require the delivery of health care services with very few exceptions. He indicated utilizing the HCSF will help insulate companies like KAMMCO from what other carriers will experience nationwide.

Comments from Health Care Provider Representatives

The Executive Director of the Kansas Medical Society (KMS) presented comments, stating she would also represent the KHA in her remarks concerning the drafting of and interest in proposed changes to the HCSF law. The conferee first addressed the purpose of the HCSF, indicating the HCSF is performing exactly as it was intended when it was put in place many years ago. She provided a brief history of the HCSF, indicating although providers could get access to insurance, there still needed to be some legal reforms to make

it more affordable in order to maintain that access for patients. She stated the cap on noneconomic damages has been a critical component in achieving affordability and access. The conferee indicated there is a question about whether the cap still stands for medical malpractice. The KMS remains a proponent of the HCSF because it is stabilizing the marketplace for medical malpractice insurance. The conferee also indicated KMS believes the Committee should continue its operation, and it is not necessary to have a secondary independent actuarial analysis.

The KMS conferee provided an overview of 2020 SB 493 and described the structural changes that would allow the HCSF to continue to perform in a way that provides adequate coverage. She indicated KMS and KHA plan to bring forward a similar bill for the 2021 Session; these associations have been working in conjunction with the HCSF Board of Governors and have thoroughly vetted this subject both with legislative leaders and more broadly with all defined types of health care providers. The KMS conferee explained the proposed draft removes the provision contained in 2020 SB 493 that would dissolve the HCSF in response to a ruling from the Kansas Supreme Court. The conferee also provided an explanation of the proposed changes: moving from three coverage options to two options, increasing the minimum coverage requirement to \$500,000, and allowing up to \$2.0 million in excess coverage to be offered as opposed to \$1.0 million through the HCSF. During discussion, the KMS conferee agreed with the comment that roughly 90 percent of those insured by the HCSF currently carry \$1.0 million of coverage. She added the HCSF cannot elect to offer higher limits without a statutory change, so this legislation would be necessary to allow for that increase in coverage.

Written testimony submitted by the Kansas Association of Osteopathic Medicine supported the continued operation of the HCSF, noting stabilizing support provided by the Fund and the affordability of malpractice insurance in Kansas. The testimony pointed to the present challenges: the *Hilburn* decision and upward pressure on the HCSF due to higher claims, the inclusion of the corporate practice of medicine (business entities participating in the Fund), and the uncertainty for health care providers due to the pandemic. The

testimony supported continued operation of the HCSF, its oversight by the Committee, and the continued treatment of the HCSF and its reserves as separate from the SGF.

Board of Governors' Statutory Report

The Executive Director of the HCSF Board of Governors (Executive Director) provided a brief history of the HCPIAA, explaining when the law was passed in 1976, it had three main functions: a requirement that all health care providers, as defined in KSA 40-3401, maintain professional liability insurance coverage; creation of a joint underwriting association, the 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 HCSF to provide excess coverage above the primary coverage purchased by health care providers and to serve as reinsurer of the Availability Plan. He noted 16,426 health care providers participate and are provided coverage in the HCSF.

The Executive Director provided the Board of Governors' statutory report (as required by KSA 40-3403(b)(1)(C) and issued October 1, 2020). The FY 2020 report indicated:

- Net premium surcharge revenue collections amount to \$28,705,874. The lowest surcharge rate for a health care professional was \$100 (a first-year provider selecting the lowest coverage option) and the highest surcharge rate was \$18,376 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 \$23,889 for this health care provider;
- The average compensation per settlement (69 cases involving 73 claims were settled) was \$371,524. 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 2020, and total claims paid during the fiscal year amounted to \$27,651,536; and

- The balance sheet, as of June 30, 2020, indicated total assets of \$299,601,265 and total liabilities of \$271,785,592.

Availability Plan

The Executive Director's report also included an update on the Availability Plan. The Executive Director reported as of October 1, 2019, there were 287 plan participants, including 176 physicians, 7 physician assistants, 13 nurse anesthetists, 2 chiropractors, and 2 nurse midwives, as well as 26 professional corporations and 27 facilities (the physician total includes those residents in training who are employed *via* "moonlighting"). He noted without the Availability Plan, these health care providers would be unlikely to be able to provide services within the state.

Contemporary Issues

Legislation and recent law. The Executive Director provided an update on 2020 SB 493, indicating the bill would have changed the three limit coverage levels of the HCSF of \$100,000, \$300,000, or \$800,000 to two limit coverage levels, \$500,000 or \$1,500,000. He stated a similar bill is expected to be introduced in the 2021 Legislative Session on behalf of KMS and noted the Board of Governors is working alongside the interested parties in drafting the bill language. The Executive Director also reported on HB 2119, explaining the Board was directed by the 2019 law to complete an actuarial study and review how the "corporate practice of medicine" (regulation of business entities) would affect the HCSF. The Executive Director reported the agency did provide this report to the Legislature on January 1, 2020; however, due to the shortened session, this issue was not addressed by the Legislature. He stated the Board of Governors will be requesting legislation in the 2021 Session to address two broad concerns with the law. The Executive Director indicated the Board plans to request introduction of a bill addressing technical issues, including the use of the term "health care," and other items. The Executive Director reported the Board continues to monitor the resulting impacts

of the *Hilburn* decision to see how that might further affect the HCSF.

COVID-19. The Executive Director addressed the agency's efforts to keep staff members working safely and the agency's response to the need during the COVID-19 pandemic to be continuously working as emergency orders came in, as temporary licensing was allowed, and how it responded to emerging issues, including telemedicine.

During discussion, the Executive Director commented on the issue of telemedicine, indicating the Board of Governors is always looking at how trends affect decisions relating to the HCSF and more broadly how the field of medicine and health care is changing. He addressed the desire to keep Kansas health care providers in Kansas, and noted the staff and the Board believe keeping liability insurance rates at a level that is more acceptable is one of those components.

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 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.

The Committee considered information presented by the Board of Governors' representatives, including its required statutory report; the Board of Governors' 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; income and rate level indications.** The Committee notes the report provided by the Board of Governors' actuary characterized 2019 as a "surprisingly good year" for the HCSF with slightly higher than anticipated surcharge revenue and better than anticipated loss experience. While there was a significant drop in the reserves on open claims, it was noted payments were up only slightly. This Committee notes this analysis was submitted to the Board of Governors in late February 2020. The Committee also notes the Board's consideration of three options for the CY 2021 rates; the Board elected to make selective rate changes and to continue to compress the factors for years of compliance. These actions resulted in an overall increase in surcharge rates of 2.6 percent. The Committee recognizes the changing environment, given the present COVID-19 pandemic, and the impacts on the HCSF:
 - *Revenue and leveraging concerns.* The Committee notes the HCSF revenue comes primarily from two sources, health care provider surcharges and investment income. This equates to a leveraging effect; should one source (investment income) provide lower than anticipated revenue, the other source may be increased to offset this loss of revenue. Given the present status of U.S. Treasury rates and investment yield for the HCSF anticipated prior to the pandemic, the Committee notes its concerns regarding both short-term and longer-term impacts on the HCSF, the rate level indications, and health care providers participating in the Fund. [Note: A 10 basis point decrease indicates a 1 percent increase in the surcharge. Based on the present U.S. Treasury rates, 2 percent for the surcharge now could become 12 percent if there is a decrease of 100 basis points.]
- **COVID-19 impacts on claims, settlements.** The Committee recognizes the present public health emergency and the efforts to minimize public participation in the judicial system. The Committee notes the delay in consideration of both filed claims and those claims to be filed. Once the courts are more broadly opened, testimony indicates medical malpractice actions will be placed behind the criminal trials that are pending, and it could be well into FY 2021 before the courts are able to hear such claims. The Committee observes:
 - A *Hilburn* medical malpractice action could not move forward if those cases are not being heard. The Committee recognizes the HCSF Board of Governors will continue to monitor the impact of the *Hilburn* decision;
 - The Board of Governors and KAMMCO representatives indicated there seems to be an impact on the number of cases that are also being filed overall; and
 - The Board of Governors reports, as of October 1, 2020, 25 lawsuits and claims have been made against 3 long-term care facilities. Absent discovery, which has been delayed, the Board cannot yet ascertain whether some of these allegations would fall outside the realm of professional liability and into corporate liability.
- **Marketplace conditions; approaching headwinds.** The Committee acknowledges the concerns presented by health care insurer and provider representatives and notes the considerable impact the pandemic has made to exacerbate the ability to provide adequate and affordable professional liability insurance to health care providers:
 - After a favorable period of market conditions, with availability, lower pricing, and open terms of coverage, compression is being observed in the marketplace;

- The reinsurance marketplace, for long-term care facilities, is restricting access, with limitations on terms of coverage. The Committee is especially concerned about reports of reinsurance coverage exclusions for infectious diseases and other pandemic conditions and the resulting impact on the pricing for primary coverage for long-term care facilities, including hospitals providing long-term care; and
- The governance of and future for telehealth, in terms of best practices and standard of care and licensure for either Kansas providers providing coverage outside of the state of Kansas or for providers outside of Kansas who would be providing service to Kansas citizens.
- **Legislative proposals; amendments to the HCPIAA.** The Committee recognizes the duration of the 2020 Legislative Session prevented more-formal consideration of legislation addressing some matters of concern to health care insurers, providers, and the Board of Governors. The Committee supports consideration on the proposals discussed and presented by the Board (corporate practice of medicine and business entity regulation; technical corrections to the HCPIAA) and the KMS/KHA representative (changes to the required coverage limits and number of offerings).
- **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 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 (excepting self-insurance programs reimbursement). 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.