

Report of the Health Care Stabilization Fund Oversight Committee to the 2016 Kansas Legislature

CHAIRPERSON: Gary Hayzlett

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

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

CHARGE

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

Health Care Stabilization Fund Oversight Committee

ANNUAL REPORT

Conclusions and Recommendations

The Health Care Stabilization Fund Oversight Committee considered two items central to its statutory charge: should the Committee continue its work and is a second, independent actuarial analysis of the Health Care Stabilization Fund (HCSF) necessary. The Oversight Committee continues in its belief that the Committee serves a vital role as a link among the HCSF Board of Governors, the health care providers, and the Legislature and should be continued. Additionally, the Committee recognizes the important role and function of the HCSF in providing stability in the professional liability marketplace, which allows for more affordable professional liability coverage to health care providers in Kansas. The Committee is satisfied with the actuarial analysis presented and concluded a second, independent review was not necessary.

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

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

Availability Act and the noneconomic damages cap have long been accepted by this court to carry a valid public interest objective.”

- [The statute was enacted] “in an attempt to reduce and stabilize liability insurance premiums by eliminating both the difficulty with rate setting due to the unpredictability of noneconomic damage awards and the possibility of large noneconomic damage awards.”
- **Reimbursement of the HCSF.** The Committee notes the reimbursement schedule created by 2010 SB 414. This law allowed for the reimbursement of deferred payments to the HCSF for administrative services provided to the self-insurance programs at the University of Kansas (KU) Foundations and Faculty and the University of Kansas Medical Center (KUMC) and Wichita Center for Graduate Medical Education (WCGME) residents for state Fiscal Years (FYs) 2010, 2011, 2012, and 2013. The Committee notes normal reimbursements occurred starting July 1, 2013; and, the HCSF Board of Governors have received 60 percent of the the accrued receivables for the last three years in July. The HCSF received \$1,544,084.43 reimbursement in July 2013, \$1,544,084.45 in July 2014, and \$1,544,084.45 in July 2015. The remaining reimbursement receivables are \$3,088,168.90 and is to be received in two remaining annual installments.
- ***Building Industry Workers Compensation Fund vs. State of Kansas update.*** The Committee notes the recent Kansas Supreme Court decision in this case that has questioned the constitutionality of transferring moneys from special revenue funds to the State General Fund (SGF). These funds were created for specific statutory purposes, much like the HCSF, and are funded by assessments paid by professional licensees or businesses. While there are several parts to this case and decision, the Committee notes the conclusion that it is unconstitutional to transfer moneys from special revenue funds to bolster the SGF balance.
- **Fund To Be Held in Trust.** The Committee recommends the continuation of the following language to the Legislative Coordinating Council (LCC), the Legislature, and the Governor regarding the Health Care Stabilization Fund.
 - The Health Care Stabilization Fund Oversight Committee continues to be concerned about and is opposed to any transfer of money from the Health Care Stabilization Fund to the State General Fund. The HCSF provides Kansas doctors, hospitals, and the defined health care providers with individual professional liability coverage. The HCSF is funded by payments made by or on the behalf of each individual health care provider. Those payments made to the HCSF by health providers are not a fee. The State shares no responsibility for the liabilities of the HCSF. Furthermore, as set forth in the HCPIAA, the HCSF is required to be “. . . held in trust in the state treasury and accounted for separately from other state funds.”
 - Further, this Committee believes the following to be true: All surcharge payments, reimbursements, and other receipts made payable to the Health Care Stabilization Fund shall be credited to the HCSF. At the end of any fiscal year, all unexpended and unencumbered moneys in such Fund shall remain therein and not be credited to or transferred to the SGF or to any other fund.

Proposed Legislation: None.

BACKGROUND

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

The Committee met October 21, 2015.

COMMITTEE ACTIVITIES

Report of Towers Watson

The Towers Watson actuarial report serves as an addendum to the report provided to the HCSF Board of Governors based on HCSF data as of April 30, 2015, with an addendum dated September 14, 2015. The actuary addressed forecasts of the HCSF's position at June 30, 2015, and June 30, 2016. The forecast of the HCSF's position at June 30, 2015, is as follows: the HCSF held assets of \$271.31 million and liabilities of \$223.03 million, with \$48.28 million in reserve. The projection for June 30, 2016, is as follows: assets of \$278.22 million and liabilities of \$230.02 million, with \$48.20 million in reserve. The actuary indicated the forecasts of unassigned reserves assume an estimate of surcharge revenue in FY 2016 of \$26.2 million; a 2 percent interest rate for estimating the tail liabilities on a present value basis; a 3.70 percent yield on HCSF assets for estimating investment income; continued full reimbursement for KU/WCGME claims; and no change in current Kansas tort law or the HCPIAA. The actuary stated, based on the review, it was suggested the Board of Governors consider a modest increase (2.5 percent to stay in a "break even" position) in surcharge rates for Calendar Year (CY) 2016.

The actuary addressed the following recent law changes affecting the HCSF: the expansion of the number of providers and types of providers who are covered by the HCSF; increases in the caps on non-economic damages in Kansas; restoration of the caps on the non-economic damages in Missouri; elimination of the five-year compliance requirement for tail coverage eligibility; and increasing the HCSF coverage for inactive providers by the minimum basic coverage required (essentially increased for most providers from \$800,000 to \$1 million); and in addition, the HCSF surcharge rates are now being established on a CY basis instead of a FY basis. The actuary indicated the changes will take effect January 1, 2016.

The actuary next reviewed the HCSF's liabilities at June 30, 2015. The liabilities highlighted included claims made against active providers as \$81.8 million; associated defense costs as \$15.4 million; claims against inactive providers reported by the end of FY 2015 as \$8.3 million; tail liability of inactive providers as \$103.5 million; future payments as \$14.4 million; claims handling \$7.1 million; and other (primarily plaintiff verdicts on appeals) as \$2.1 million. Total of gross liabilities were \$232.7 million; the HCSF is reimbursed \$9.7 million for the KU and WCGME programs, for a final net liability of \$223.0 million. The actuary detailed what the tail obligation includes, stating any provider who is in the system as of June 30, based on the current HCSF law, does not have to pay the HCSF any more money to be covered for claims made after that provider becomes inactive. The actuary indicated it became a much bigger number because of the HCSF law changes last year that waived the requirement that providers be in the system for at least five years to get the tail coverage for no additional premium or surcharge.

The actuary reviewed the HCSF's rate level indications for CY 2016, noting the indications assume a break-even target. The actuary highlighted payments, with settlements and defense costs of \$29,977,000; change in liabilities, an increase of \$4,460,000; administrative expenses of \$1,720,000; and transfers to the Availability Plan and the Kansas Department of Health and Environment (KDHE) are assumed to be \$200,000 (assumes no Availability Plan transfer). In total, the cost for the HCSF to "break-even" for another

year is \$36,357,000. The actuary stated the HCSF has two sources of revenue: investment income based on the 3.7 percent yield assumption of \$9,974,000 and surcharge from providers of \$26,382,000. The actuary indicated, if the HCSF did not change its surcharge rates next year, the company believes the HCSF would have earned a little less than that, at \$25,734,000. Therefore, there would be a positive rate indication of about 2.5 points in order to have a break-even situation. The actuary discussed the current environment for interest rates, noting if interest rates do rise and that translates to more investment income for the HCSF, that brings down the rate level indication. The actuary provided two examples of varying earnings from investment income and noted the HCSF's financials, in terms of its rate indication, are very sensitive to what the HCSF can earn on its assets.

The actuary also provided an overview on the rating by years of compliance (YOC). Since enactment of 2014 HB 2516, the HCSF provides tail coverage at no additional cost to all providers upon becoming inactive. He reviewed the decision process for the HCSF Board of Governors as it considered how to accommodate providers, in terms of rates associated with YOC. The law change, the actuary noted, creates an equity issue among the providers. Those providers in the five-years-plus category, who make up the overwhelming majority of the providers in the state, are essentially subsidizing those in YOC one through four. The actuary stated that when the actuarial firm's representatives met with the Board of Governors in July, it was suggested the Board start shifting the rates so those in the YOC one through four have increases to get them up to the rates being charged to those who are in the state five or more years.

The actuary then 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 provided a history of surcharge rate changes since 2004 and then provided an overview of the options for CY 2016 surcharge rates that was provided to the Board of Governors. The actuary highlighted the Board of Governors' decision on the surcharge rate changes, indicating the estimated overall impact of

these changes was about a 1.6 percent increase in surcharge revenue.

The actuary concluded stating the firm's overall conclusions are that the HCSF remains in a very strong financial position and indicated last year's changes have caused upward pressure. The actuary and the Board of Governors also are going to continue to monitor the interest rate assumption because interest revenue is key to the HCSF's financials. The actuary stated the whole year compliance factor is an equity issue requiring further consideration, given the change to the tail coverage issues enacted last year. The actuary responded to Committee questions about tail liability of inactive providers (there was a large increase from the prior year's analysis to this year's analysis due to the law change; this amount, however will be a "one-time" hit); and, the effect of surcharge rates being established on a CY-basis instead of FY basis and when the change will be effective for a provider who is hired in August (the surcharges will start January 1, 2016. The actuary stated someone starting August 1, 2016, would have a full-year premium beginning on August 1; and then, when the provider renews August 1, 2017, that provider would get the rates that take effect January 1, 2017.)

Comments

In addition to the report from the HCSF Board of Governors' actuary, the Committee received information from Committee staff detailing resource materials provided for consideration including the bill summary and excerpted copy of enacted legislation, 2015 HB 2064, the FY 2015, FY 2016, and FY 2017 subcommittee and budget committee reports, and the Committee's prior conclusions and recommendations from its most recent annual report. The analyst noted the report was provided to the Senate Financial Institutions and House Insurance Committees; the Committees heard two bills that would have amended the HCPIAA during the 2015 Session.

2015 Legislation. SB 101 would have amended the HCPIAA to clarify exemptions from the defined term "health care provider" to designate certain health care providers who would not be subject to a requirement to purchase basic professional liability insurance coverage or pay

surcharges as required with such coverage. The bill would have specified this definition does not include persons holding an exempt license from the State Board of Nursing and would clarify language in the exclusion provision for Advanced Practice Registered Nurses and Physician Assistants who are employed in or on active duty in the federal government or who provide professional services as a charitable health care provider and would have extended this exclusion from the definition to nurse anesthetists. SB 117 would have amended the HCPIAA to allow health care systems that own or operate more than one medical care facility or more than one health care facility to aggregate insurance premiums for the purpose of obtaining a certificate of self-insurance from the HCSF Board of Governors. Both bills passed the Senate and were incorporated in the House committee report for SB 101. The provisions now contained in SB 101 were incorporated with other insurance related provisions into the Insurance conference committee report for HB 2064 [L. 2015, ch. 45].

The Committee analyst also reviewed the Missouri Legislature's enactment of Senate Sub. for SB 239. She explained this Committee has discussed the Missouri Supreme Court *Watts* decision over the past few years regarding the Missouri caps being declared unconstitutional. The Missouri Legislature has been working over the past few years to try to reinstate caps; under this new law, plaintiffs cannot recover more than \$400,000 in non-economic damages in medical malpractice actions. If, however, the case involves claims that are determined to be of "catastrophic personal injury" or wrongful death, the cap is increased to \$700,000. The two caps do not apply to economic damages or limit punitive damages and are to increase at a rate of 1.7 percent per year. The legislation also directly responded to the 2012 *Watts* decision in which the court indicated the limits established by the 2005 law violated the right to a jury trial that existed under common law when the Missouri Constitution was first adopted. The way the Missouri Legislature responded was to state medical malpractice actions are now statutory causes of action, rather than common law causes of action. The analyst noted the Kansas Legislature updated its cap in 2014 with \$250,000 for causes of action through July 1, 2014 (\$250,000 was the prior limit); the current period of \$300,000 for causes of action until July 1, 2018;

an increase to \$325,000 through July 1, 2022; and finally, a limit of \$350,000 for causes of action occurring on and after July 1, 2022.

Chief Attorney's Update. The Deputy Director and Chief Attorney for the Board of Governors addressed the FY 2015 medical professional liability experience (based on all claims resolved in FY 2015 including judgments and settlements). The conferee began her presentation by noting jury verdicts. Of the 17 cases involving 18 Kansas health care providers tried to juries during FY 2015, 16 were tried to juries in Kansas courts and 2 cases were tried to juries in Missouri. An additional case was tried to the judge in small claims court. The trials were held in the following jurisdictions: Sedgwick County (8); Johnson County (4); Johnson County, Missouri (2); Harvey County (1); Reno County (1); Shawnee County (1); and Wyandotte County (1). Of those 18 cases tried, 13 resulted in defense verdicts and 3 cases ended in mistrial. Juries returned verdicts for plaintiffs in 2 cases and resulted in expenditures from the HCSF, with both of these cases now on appeal.

The Chief Attorney stated in the past few years, there have been fewer trials taking place. She also noted, since they have seen fewer claims being made over the past five or six years, fewer claims are going to result in fewer trials. Regarding the new Missouri legislation noted by Committee staff, the Chief Attorney indicated there are a number of provisions in the legislation fraught and ripe for challenges and, quite possibly before the year is up, there will be challenges to the new Missouri cap on non-economic damages.

The Chief Attorney highlighted the claims settled by the HCSF, noting in FY 2015, 60 claims in 53 cases were settled involving HCSF monies. Settlement amounts for the FY totaled \$24,322,582 (these figures do not include settlement contributions by primary or excess insurance carriers). She stated this FY data represents three fewer claims than the previous year, but the total aggregate amount of these claims incurred by the HCSF was \$316,668 more than the past year. The Chief Attorney noted for the past 16 years, FY 2000 through FY 2015, the average amount incurred by the HCSF for settlements was about \$20.8 million. Looking at the first five years of the century, the average

amount was \$17.6 million; however, over the past five fiscal years, from FY 2011 through FY 2015, the average was almost \$23 million per year. The Chief Attorney indicated the amount of settlements has been going up over the years. FY 2015 had 60 claims which was very similar to FY 2011 in which there were 61 claims; however, in FY 2015, 24 claims fell into the highest level of settlement compared to only 14 in FY 2011. This illustrates what has been said over the past few years, that settlements are higher than a decade ago, primarily because damages are higher. She stated often the largest component of a plaintiff's claim for damages is medical bills and future cost of care. So, as the cost of care rises, so do the potential for damages and the cost of settlements.

Of the 60 claims involving HCSF monies, the HCSF incurred \$24,322,582; the primary insurance carriers contributed \$11,200,000 to these claims. In addition, excess insurance carriers provided coverage for five of these claims for a total of \$14,400,000. So for these 60 claims involving the HCSF, the total settlement amount was \$49,922,582; it is a bit higher on the excess carrier for this past year due to one very large catastrophic case. The Chief Attorney stated, in years to come, it is likely there will be more claims involving coverage from excess insurance carriers. Further testimony also indicated, in addition to the settlements involving HCSF contributions, the HCSF was notified primary insurance carriers settled an additional 89 claims in 80 cases. The total amount of these reported settlements was \$7,268,626. The report included figures from FY 2000 to FY 2015 for comparison and also included a report of HCSF total settlements and verdicts, FY 1977 to FY 2015. The Chief Attorney stated that, during FY 2015, there were 60 settlements and 2 plaintiff verdicts for a total of 62 claims; the average was \$401,682.57 per claim.

The Chief Attorney reported there were 235 new cases during FY 2015. She noted there was a five-year decrease in the number of new claims from FY 2008 to FY 2013, with a modest increase in FY 2014, and another decrease in the number of new claims in FY 2015. The Chief Attorney stated what the HCSF has been experiencing in the numbers of claims, the primary insurance carriers and others around the country have also experienced. She noted the claims experience for

this past fiscal year is that the frequency of claims is down, but the severity of claims is up.

In response to Committee questions about the trend for FY 2016 claims, the Chief Attorney indicated for the first four months of FY 2016, the number of claims is stable. At this point, FY 2016 will look a lot like FY 2015 as far as the number of new claims and in regard to settlements. She noted the HCSF has not had any plaintiff verdicts since July 1. In answer to whether the severity of the claims are weighted in any one area of practice, the Chief Attorney indicated the HCSF was not seeing any one new area. She indicated, generally speaking, claims involving obstetrics or neurosurgery have the most catastrophic damage cases, so those claims settlements tend to be the larger settlements, but they are not seeing any more frequency of claims. The only notable item in the past year is robotic surgery claims. The Chief Attorney stated she has seen three or four this past year. She indicated 20 years ago when laparoscopic surgery was brand-new, they saw those kinds of new claims.

The Chief Attorney next addressed the self-insurance programs and reimbursement for the KU Foundations and Faculty and residents. She stated the FY 2015 KU Foundations and Faculty program incurred \$1,917,190.41 in attorney fees, expenses, and settlements and indicated this is down \$258,267.46 from the previous year, noting the settlement amounts are less. The Chief Attorney stated there were seven settlements involving KU full-time faculty members or foundations compared to nine settlements the previous year. The number of settlements was down, but the attorney fees and expenses were up. She indicated one of the reasons attorney fees and expenses were up was due to a large case that went to trial in Wyandotte County involving a KU faculty member. It was a defense verdict, but trials are very expensive and part of this additional expense was taking this case to trial.

In regard to the self-insurance programs for the KU and WCGME resident programs, the Chief Attorney indicated, in FY 2015, there was one settlement involving a Wichita resident with a settlement of \$40,000. She noted it was the first time in several years there had been any settlements involving the residents, but it was a small settlement. Overall, the attorney fees and

expenses for the residency programs, both Wichita and Kansas City, have gone down for at least two years in a row due to fewer claims made against the residents in training. However, since July 1, there has been an uptick in the numbers of claims being filed, especially involving the Wichita residents. The Chief Attorney indicated she is not optimistic there will be a decrease in the amounts next year. She also indicated that with increasing the presence in Missouri care, she has been concerned there would be more claims filed in Missouri, and Missouri laws are not as favorable as those in Kansas. The Chief Attorney noted, however, only one claim has been filed to date in Missouri.

The Chief Attorney's report listed the historical expenditures by fiscal year for the KU Foundations and Faculty and the KU and WCGME residents since inception. For FY 2015, the KU Foundations and Faculty was a little over the average. She noted the KU and WCGME residents programs have been below average for the past couple of years. The Chief Attorney then reviewed an allotment order issued in 2009, due to budget shortfalls, to stop reimbursement to the HCSF for these self-insurance programs and the legislative response in 2010 to amend the reimbursement statutes to provide that the HCSF would not be reimbursed for FYs 2010, 2011, 2012, and 2013. Beginning with FY 2014, two things were to take place: normal quarterly reimbursements were to begin and, for five fiscal years, FY 2014 through FY 2018, the HCSF was to be reimbursed 20 percent of the accrued receivable for those four years that the HCSF was not reimbursed. At the end of the four-year period, the time the HCSF was not reimbursed for the programs (June 30, 2013), the total amount of receivables was a little over \$7.7 million. The Chief Attorney stated that, for the past three years, the HCSF has been receiving normal quarterly reimbursements and, in July, the annual installment payments have been made. The HCSF received reimbursements of \$1,544,084.43 in July 2013, \$1,544,084.45 in July 2014, and \$1,544,084.45 in July 2015, which is 60 percent of the total amount. The HCSF is owed \$3,088,168.90 to be received in two remaining annual installments. The report also provided information about moneys paid by the HCSF as an excess carrier. The HCSF was involved in settling four claims greater than \$200,000 for \$1,013,000

on behalf of the KU Faculty and Foundations. (This amount is not reimbursed because it is the HCSF's excess coverage.)

The Chief Attorney also provided a synopsis of the syllabus issued by the Kansas Supreme Court regarding the Kansas Building Industry Workers Compensation Fund case. She stated this goes back to 2009 when there was a budget crisis and a gap of \$900 million between expenditures and revenues. To help make up the budget shortfall, the Governor recommended and the Legislature agreed to transfer monies from various state agencies' fee funds into the SGF (termed "cash sweeps"). In this case, the plaintiffs were persons who were required to pay fees to state agencies in order to practice their professions or to transact business in the State of Kansas. They sued the State of Kansas challenging the 2009 appropriations bill. The plaintiffs included insurers who provide workers' compensation insurance and pay assessments into the Workers' Compensation Fee Fund. They also include the Kansas Association of Realtors, which is made up of agents and brokers who pay license fees to the Real Estate Fee Fund, and the Kansas Bankers Association, whose members pay licensure fees and assessments to the Bank Commissioner Fee Fund. These plaintiffs argued that the Legislature's sweep of large sums of money from the fee-funded accounts into the SGF was an invalid exercise of the State's police powers and an unconstitutional exercise of its taxing authority. The case was filed in the Shawnee County District Court. The District Court did not get to the merits of the case; rather, this court dismissed the lawsuit finding the plaintiffs did not have standing to sue because the moneys were taken from the agencies and not from the individuals themselves. The plaintiffs appealed to the Kansas Court of Appeals, and the Court of Appeals reversed the trial court's order. An appeal was then taken to the Kansas Supreme Court. In August 2015, the Kansas Supreme Court upheld the Court of Appeals decision, which reversed the trial court's dismissal of the action, and remanded it back to Shawnee County District Court to take action on the merits of the case.

The Chief Attorney spoke to the merits of the case, noting the Supreme Court first addressed the issue of the political question doctrine whether the issue presented is an issue the Court can address or whether budgeting is a political issue on which

Courts cannot second-guess the Legislature. The plaintiffs in this case said they do not dispute the Legislature's authority to appropriate public moneys, but they challenge the diversion of funds from the fee funds of the State into the SGF for appropriations and for expenditures for purposes not authorized or contemplated by enabling legislation that allowed the agencies to collect the fees. The State of Kansas argued that all moneys in the state treasury are public money; therefore, fee funds are public money subject to appropriation at the sole discretion of the Legislature. The Kansas Supreme Court ruled that just because money is in the State Treasury does not give the State of Kansas unfettered discretion or general appropriation powers over that money. The Court also concluded that this issue is a justifiable issue because it is not a political question, the Chief Attorney noted, but rather it is a question of the appropriate exercise of the State's police powers.

The Chief Attorney also noted another important issue the Court discussed was standing. The State of Kansas argued in this case that State agencies caused the plaintiff's injuries, because they chose to replenish their funds with additional assessments rather than constricting their operations to live within their post-sweep means. The Court rejected this argument, stating agencies are granted the authority to assess fees for their respective funds for a reason and the agencies that have fee funds have responsibilities and duties prescribed by law. Agencies are not granted the discretion to simply quit operating if they run out of money; rather, it is their responsibility to raise funds to carry out their duties. The Court gave the example that the Insurance Commissioner cannot refuse to pay covered workers' compensation benefits to a claim simply to reduce expenditures from the Workers' Compensation Fee Fund. The final question the Kansas Supreme Court addressed was whether associations have the right to sue. The Court went through discussions and determined that, if the three criteria are met, associations have the right to sue on behalf of their members. In this case, the Kansas Bankers Association and the Kansas Association of Realtors have standing to sue.

**Medical Malpractice Insurance
Marketplace; Update on the Availability Plan;
Comment from Health Care Provider**

Representatives. The Executive Director, Kansas Medical Society (KMS), was recognized and began his remarks addressing the necessity for the Oversight Committee, stating KMS believes this Committee provides an important bridge among the provider community, the insurance agent/broker community, others, and legislators. He indicated this law was enacted in 1976 and, during that time, there has been a lot of turnover in the Legislature and diminished institutional memory about the HCPIAA and professional liability insurance issues. It is important there be a continuing link between the Legislature that has full responsibility and those involved in the execution of this enterprise and therefore, KMS believes it is important to have the Oversight Committee still be active and engaged on the topic. The conferee addressed the necessity for an additional actuarial review, indicating KMS has a high level of confidence in the Towers Watson actuary and his colleague and stated there is no reason to expend the additional dollars for another review.

The KMS conferee also provided historical context to the HCSF, stating it has been operated in an actuarially sound manner. He believes it is important to include in the report each year to the Legislature the admonition that these funds are held in trust and should be expended only for those things in the statute. The KMS Executive Director concluded by expressing his appreciation to the Legislature and to the HCSF Board of Governors, stating both groups have acted responsibly over many years to see this process – the private-public partnership – works. Prior to the stability HCSF has been a part of, Kansas had a very volatile medical malpractice environment; it used to be in the top quartile in terms of cost of insurance for doctors, hospitals, and others. It has taken a long time, but Kansas has become a much better environment in which to insure doctors, hospitals, and others. Kansas is in a period of unparalleled tranquility now, not that there are not problems, but the KMS Executive Director believes many other states are a bit envious of the good liability environment here.

The President and CEO for the Kansas Medical Mutual Insurance Company (KaMMCO) commented, indicating that overall, from the stake-of-the-market standpoint, there is a very healthy and competitive medical malpractice

marketplace in Kansas. There are plenty of companies and rates are at all-time lows, which follows the fact that the Board of Governors representatives alluded to: the lower claim frequency levels. The conferee stated there is plenty of capacity to insure all of the new providers, even those that just came into the requirement of buying insurance this past year; he indicated it would remain true for the foreseeable future in terms of the overall insurance marketplace, not just Kansas, but nationwide.

The KaMMCO conferee also addressed a few changes that will ultimately affect the marketplace with the Affordable Care Act (ACA). He stated the ACA is changing the face of how health care is delivered, and with those changes comes challenges in terms of how providers are responding to health care delivery being mandated by the ACA. It puts pressure on hospitals and physicians; there is a lot of consolidation. It is difficult to estimate how health care delivery changes will impact the medical professional availability side of the equation. The conferee stated another challenge is that there is such a benign environment right now: low frequency of claims even though every once in a while there is a spike in the severity of claims, overall low inflationary trends, and low investment yields. He stated the challenge is the current environment for interest rates, as it is hard for rates to fall lower than they already are, it is hard for inflationary trends to be below where they already are, or claim frequency to decrease when the frequency is at an all-time low; there is nowhere for the trends to go but upward. With higher claim frequency, higher inflationary trends, and higher interest rates come volatility from the KaMMCO standpoint and increased costs and increased challenges to the industry.

The KaMMCO conferee concluded by stating, over the long term, issues related to the ACA and changes in health care delivery happening around the country and overall economic trends that could change will eventually have an impact on this business. Mr. Scott He indicated, for now, all is well in the industry and with the HCPIAA and the HCPIAA (Availability Plan) has actually subsidized the HCSF for the past couple of years due to the low claim environment. Providers and the state are very fortunate to have a well-run, well-funded HCSF.

Following the presentation, the Committee and the KaMMCO representative discussed potential liability issues relating to telemedicine. In answer to a question about potential risks telemedicine poses for the future, the conferee stated that is being wrestled with right now – both from a regulatory licensing standpoint for those providers, as well as from a professional liability standpoint. He indicated telemedicine could be reading of images or actually providing consults from different locations. The conferee further explained that for those providers not licensed in Kansas and not buying malpractice insurance in Kansas but providing care via some sort of long distance means, an issue can emerge. The Board of Healing Arts and the provider community are having discussions about how to address those issues.

Written testimony submitted by representatives of the New Birth Company, a Kansas birth center employing five certified nurse midwives. The testimony requested the Oversight Committee consider its recommendations to address concerns about the affordability for and availability of medical malpractice insurance for all health care providers subject to the HCSF coverage requirements. The testimony indicates efforts continue to seek full-practice authority (2015 HB 2280) for certified nurse midwives. Additionally, should the HCPIAA be amended in the future, the conferees requested consideration of adding licensed birth centers to the list of health care facilities subject to HCSF coverage requirements.

Board of Governors’ Statutory report, Fund history, and implementation of legislation. The Executive Director provided the Board of Governors’ annual statutory report (required by KSA 2015 Supp. 40-3403(b)(1)(C)). Among the items detailed in the FY 2015 report:

- The balance sheet, as of June 30, 2015, indicated assets of \$273,581,184 and liabilities amounting to \$231,467,025. The Executive Director indicated there basically is a margin for error of about 18 percent, and he believes this a very safe margin.

- Net premium surcharge revenue collections amounted to \$27,829,034. The report indicated the lowest surcharge rate for a health care professional was \$50 (chiropractor, first year of Kansas practice, opting for lowest coverage option) and highest surcharge rate was \$15,724 for a neurosurgeon with five or more years of HCSF liability exposure (selected highest coverage option). Application of the Missouri modification factor would result in a total premium surcharge of \$20,441 for this health care practitioner.
- The average compensation per settlement (53 cases involving 60 claims were settled) was \$405,376, a 6.4 percent increase compared to FY 2014. These amounts are in addition to compensation paid by primary insurers (typically \$200,000 per claim). The report states amounts reported for verdicts and settlements were not necessarily paid during FY 2015. Total claims paid during the fiscal year amounted to \$26,654,184.

The Executive Director also provided historical information about the creation and evolution of the HCPIAA, noting next July will be the Act's 40th anniversary. He indicated it is important to go back to October 2012 when the Kansas Supreme Court rendered its decision allowing the Legislature to impose caps on non-economic damages. The decision outlined a number of reasons for maintaining the cap, but one of the most important was the requirement for defined health care providers to have professional liability insurance as a condition of active licensure to render professional services in the State of Kansas. The decision generated a lot of renewed interest in the HCSF, and a number of organizations said they thought it would be in the best interest of their members to become defined health care providers. The Board of Governors did not take a position and left it to the Legislature to decide. During the 2014 Legislative Session, five new categories of health care providers were added. The Executive Director stressed that once the Legislature makes a profession or industry a defined health care provider, those providers must comply. The Board of Governors does not regulate the new providers, but it does keep track of those health care providers required to comply with the

HCPIAA. If there is a problem, the Board refers that problem to the appropriate licensing agency.

The Executive Director also explained that when the tail coverage improvements were enacted in 2014, the HCSF's liabilities immediately increased. Mr. Wheelen noted, while waiting for the *Miller vs. Johnson* decision, the Board of Governors was reluctant to increase or reduce surcharge rates. During that period of time, the HCSF's unassigned reserves gradually increased so, by 2014, there was enough of that margin to absorb the increase in liabilities. Mr. Wheelen stated, with a few exceptions described in his report, implementation of 2014 HB 2516 has been accomplished. He noted this has been accomplished largely because of the support the Board of Governors has had from the Board of Healing Arts, the Board of Nursing, and the Department for Aging and Disability Services.

The Executive Director provided an update on the medical professional liability insurance marketplace. At the conclusion of FY 2014, 26 approved companies actively were marketing professional liability insurance to health care providers. By the end of FY 2015, there were 37 companies; the 40 percent increase was primarily companies that wanted to sell coverage to adult care homes (these facilities became defined health care providers as a result of 2014 law).

The report also highlighted the two principal reasons the Kansas HCSF is more successful than similar funds in other states:

- The Board of Governors has made an extraordinary effort to maintain the actuarial integrity of the HCSF; and
- The Legislature has maintained fiscal discipline by avoiding the temptation to divert HCSF revenues.

The Executive Director addressed the importance of the HCSF being "held in trust" and past Oversight Committee recommendations. Holding a fund in trust in the State Treasury means it is going to be used exclusively for its statutory purposes. He noted the Legislature has always honored this doctrine. The Executive Director concluded by stating members of the Board

believe the HCPIAA has accomplished legislative intent; it has provided the stability the Legislature originally intended; actuarial integrity has been maintained; and the HCPIAA has become a successful public-private partnership. From a public policy perspective, it assures that, in the event of an unfortunate medical outcome, the patient will always have a reliable remedy available. The report stated, as a result of technical amendments enacted by the Legislature this year, the Board of Governors is unaware of any need to amend the HCPIAA in the 2016 Session.

Following the presentation, the Committee and the Executive Director discussed the inclusion of tail coverage for health care providers (there is no longer a five-year waiting period) as a recruitment tool. Additionally, the discussion included a potential increase to the primary coverage requirements to address the amounts currently paid by excess carriers and implications for the Fund and insurance carriers. The Executive Director indicated this topic has been explored and analysis suggested it was going to be very disruptive for primary insurance carriers and could cause a great deal of shifting of liability from the commercial insurance industry to the HCSF.

CONCLUSIONS AND RECOMMENDATIONS

The Oversight Committee considered two items central to its statutory charge: should the Committee continue its work and is a second, independent actuarial analysis of the HCSF necessary. The Oversight Committee continues in its belief that the Committee serves a vital role as a link among the HCSF Board of Governors, the health care providers, and the Legislature and should be continued. Additionally, the Committee recognizes the important role and function of the HCSF in providing stability in the professional liability marketplace, which allows for more affordable professional liability coverage to health care providers in Kansas. The Committee is satisfied with the actuarial analysis presented and concluded a second, independent review was not necessary.

The Committee considered information presented by the HCSF Board of Governors' representatives and health care provider and insurance company representatives. The

Committee agreed to make the following recommendations:

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

cases, the legislature's expressed goals for the comprehensive legislation comprising the Health Care Provider Insurance Availability Act and the noneconomic damages cap have long been accepted by this court to carry a valid public interest objective."

- [The statute was enacted] "in an attempt to reduce and stabilize liability insurance premiums by eliminating both the difficulty with rate setting due to the unpredictability of noneconomic damage awards and the possibility of large noneconomic damage awards."
- **Reimbursement of the HCSF.** The Committee notes the reimbursement schedule created by 2010 SB 414. This law allowed for the reimbursement of deferred payments to the HCSF for administrative services provided to the self-insurance programs at the KU Foundations and Faculty and the KUMC and WCGME residents for state Fiscal Years 2010, 2011, 2012, and 2013. The Committee notes normal reimbursements occurred starting July 1, 2013; and, the HCSF Board of Governors have received 60 percent of the the accrued receivables for the last three years in July. The HCSF received \$1,544,084.43 reimbursement in July 2013, \$1,544,084.45 in July 2014, and \$1,544,084.45 in July 2015. The remaining reimbursement receivables are \$3,088,168.90 and is to be received in two remaining annual installments.
- ***Building Industry Workers Compensation Fund vs. State of Kansas update.*** The Committee notes the recent Kansas Supreme Court decision in this case that has questioned the constitutionality of transferring moneys from special revenue funds to the SGF. These funds were created for specific statutory purposes, much like the HCSF,

and are funded by assessments paid by professional licensees or businesses. While there are several parts to this case and decision, the Committee notes the conclusion that it is unconstitutional to transfer moneys from special revenue funds to bolster the SGF balance.

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