MINUTES

HEALTH CARE STABILIZATION FUND OVERSIGHT COMMITTEE

October 21, 2015
Room 548-S—Statehouse

Members Present

Gary Hayzlett, Chairperson
Representative Richard Proehl
Darrell Conrade
Dennis George
Dr. Jimmie Gleason
Dr. Paul Kindling
Dr. James Rider

Members Absent

Senator Laura Kelly
Senator Vicki Schmidt
Representative Jerry Henry

Staff Present

Melissa Calderwood-Renick, Kansas Legislative Research Department
David Fye, Kansas Legislative Research Department
Renae Jefferies, Office of Revisor of Statutes
Norm Furse, Office of Revisor of Statutes
Scott Abbott, Office of Revisor of Statutes
Randi Walters, Committee Assistant

Conferees

Rita Noll, Deputy Director and Chief Attorney, Health Care Stabilization Fund Board of Directors
Russ Sutter, Actuary, Towers Watson
Charles “Chip” Wheelen, Executive Director, Health Care Stabilization Fund Board of Governors
Jerry Slaughter, Executive Director, Kansas Medical Society
Kurt Scott, President and CEO, Kansas Medical Mutual Insurance Company

Others Attending

See Attached List

Welcome and Introductions;
Staff Overview of Selected Materials for Committee Review

Chairperson Gary Hayzlett called the meeting to order at 9:02 a.m. The Chairperson welcomed members and asked them to introduce themselves. Following the introductions, Chairperson Hayzlett recognized Melissa Calderwood-Renick, Kansas Legislative Research Department (KLRD). Ms. Calderwood-Renick stated that Dr. Terry "Lee" Mills resigned his position with the Committee in February, taking a position in Oklahoma. Dr. Mills expressed gratitude for service on the Committee and was very pleased with the Health Care Stabilization Fund (HCSF) and the stability it provided for health care providers. She also indicated that Representative Proehl is the new Speaker designee on the Committee, replacing former Representative Crum. A replacement for Dr. Mills (an appointed health care provider) has not yet been named by the Legislative Coordinating Council.

Ms. Calderwood-Renick presented an overview of resource materials provided to the Committee. Ms. Calderwood-Renick stated among the items provided were the budget and subcommittee reports that document the HCSF Board of Governors' budgets for FY 2015, FY 2016, and FY 2017. Ms. Calderwood-Renick noted the Committee Report to the 2015 Legislature, including the recommendations and conclusions made. The Report was made available to members of the Senate Financial Institutions and Insurance Committee and the House Insurance Committee. She stated it was particularly helpful as the committees were considering two bills relevant to the Health Care Provider Insurance Availability Act (HCPIAA). Ms. Calderwood-Renick indicated the resources folder also included a copy of the syllabus issued by the Kansas Supreme Court regarding *Kansas Building Industry Workers Compensation Fund vs. State of Kansas*. She noted recent developments in the case would be reviewed in later testimony.

Ms. Calderwood-Renick stated another item that will be addressed is the Missouri Legislature's enactment of Senate Sub. for SB 239. Ms. Calderwood-Renick explained this Committee has discussed the *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 Missouri Supreme Court *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 Legislature responded was to state medical malpractice actions are now statutory causes of action, rather than common law causes of action. Ms. Calderwood-Renick stated Kansas also changed its caps 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.

2015 Session Update — HB 2064

Ms. Calderwood-Renick provided an update on the 2015 HCPIAA amendments. Included was a synopsis of introduced and enacted legislation, including committee action and hearings' detail (Attachment 1).

Health Care Stabilization Fund Board of Governors' Staff and Actuary Reports, 2014-2015

Chairperson Hayzlett next recognized Rita Noll, Deputy Director and Chief Counsel, HCSF Board of Governors, to address the FY 2015 medical professional liability experience (based on all claims resolved in FY 2015 including judgments and settlements) (Attachment 2). Ms. Noll 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.

Ms. Noll stated in the past few years, there have been fewer trials taking place. Ms. Noll believes, 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, Ms. Noll indicated there are a number of provisions in the legislation fraught and ripe for challenges. Ms. Noll believes, possibly before the year is up, there will be challenges to the new Missouri cap on non-economic damages.

Ms. Noll 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 fiscal year totaled $24,322,582 (these figures do not include settlement contributions by primary or excess insurance carriers). Ms. Noll stated this fiscal year 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. Ms. Noll 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 5 years of the century, the average amount was $17.6 million; however, over the past 5 fiscal years, from FY 2011 through FY 2015, the average was almost $23 million per year. Ms. Noll 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. Ms. Noll 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. Ms. Noll 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. Ms. Noll's report included figures from FY 2000 to FY 2015 for comparison. Ms. Noll's testimony also included a report of HCSF total settlements and verdicts, FY 1977 to FY 2015. Ms. Noll 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.

Ms. Noll 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. Ms. Noll stated what the HCSF has been experiencing in the numbers of claims, the primary insurance carriers and others around the country have also experienced. Ms. Noll stated perhaps the claims experience for this past fiscal year is that the frequency of claims is down, but the severity of claims is up. Ms. Noll then responded to questions from the Committee:

- In answer to whether the trend for FY 2016 is showing an increase or staying stable, Ms. Noll stated for the first four months of FY 2016, the number of claims is stable. Ms. Noll stated, 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. Ms. Noll stated 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, Ms. Noll indicated 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. Ms. Noll stated that probably the only notable item in the past year is robotic surgery claims. She stated she has seen three or four this past year. Ms. Noll indicated 20 years ago when laparoscopic surgery was brand-new, they saw those kinds of new claims. Ms. Noll stated they now are seeing claims for robotic surgery, but overall they are not seeing any frequency in certain areas.

Ms. Noll next addressed the self-insurance programs and reimbursement for the University of Kansas (KU) Foundations and Faculty and residents. Ms. Noll stated the FY 2015 KU Foundations and Faculty program incurred $1,917,190.41 in attorney fees, expenses, and settlements. Ms. Noll indicated this is down $258,267.46 from the previous year, noting the settlement amounts are less. Ms. Noll 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. Ms. Noll 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 Wichita Center for Graduate Medical Education (WCGME) resident programs, Ms. Noll indicated, in FY 2015, there was one settlement involving a Wichita resident with a settlement of $40,000. Ms. Noll noted it was the first time in several years there had been any settlements involving the residents, but it was a small settlement. Ms. Noll stated, 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. Ms. Noll indicated she is not optimistic there will be a decrease in the amounts next year. Last year, she had told the Committee she anticipated an increase in the number of claims against the Kansas City-based faculty, foundations, and residents that would be filed in Missouri because University of Kansas Hospital and University of Kansas Medical Center increased their presence in Missouri. Ms. Noll 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. Ms. Noll stated only been one claim has been filed to date in Missouri.

Ms. Noll stated the report lists the historical expenditures by fiscal year for the KU Foundations and Faculty and the KU and WCGME residents since inception. Ms. Noll indicated 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. Ms. Noll stated, in 2009, due to budget shortfalls, an allotment order was issued stopping reimbursement to the HCSF for these self-insurance programs. The 2010 Legislature also amended 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. Ms. Noll 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. Ms. Noll provided information about moneys paid by the HCSF as an excess carrier. The HCSF was involved in settling 4 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.

Ms. Noll next provided a synopsis of the syllabus issued by the Kansas Supreme Court regarding the *Kansas Building Industry Workers Compensation Fund* case. Ms. Noll 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 agree to transfer monies from various state agencies' fee funds into the State General Fund (SGF). These transfers became known as the "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 in Topeka. The District Court did not get to the merits of the case; rather, the District 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 of dismissal. 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. Ms. Noll stated the action is back in Shawnee County now to address the merits of the case. Ms. Noll indicated there is a lot in this case that is very important. For example, 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, to begin with. 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, Ms. Noll noted, but rather it is a question of the appropriate exercise of the State's police powers.

Ms. Noll stated that another important issue the Court discussed was standing, which is a person's right to make a legal claim or to seek judicial enforcement of an action. 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 Kansas Supreme Court completely 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.

Chairperson Hayzlett next recognized Russ Sutter, Towers Watson, to provide an actuarial report. The presentation was based on the review of HCSF data as of April 30, 2015, and is an addendum to the report dated September 14, 2015 (Attachment 2).

Mr. Sutter 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 fund;
- Increases in the caps on non-economic damages in Kansas;
- Restoring caps on the non-economic damages in Missouri;
- The elimination of the five-year compliance requirement for tail coverage eligibility;
- 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 calendar-year (CY) basis instead of a fiscal-year basis. Mr. Sutter indicated the changes will take effect January 1, 2016.

Mr. Sutter addressed forecasts of the HCSF's position at June 30, 2015, and June 30, 2016, based on the company's annual review. As of June 30, 2015, 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. Mr. Sutter stated, from the actuary perspective, the HCSF remains in a very strong financial position. Mr. Sutter indicated, based on the analysis, because of some of the increases in the caps and because of the higher limits available to inactive providers, the HCSF would need to increase its surcharge revenue by 2.5 percent to stay in a break-even position.

Mr. Sutter stated 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 HCSF law. Mr. Sutter stated, based on the company's full review, the actuary suggested the Board of Governors consider a modest increase in rates for CY 2016.

Mr. Sutter 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, which is mainly 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. Mr. Sutter further detailed what the tail obligation includes. He stated 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. Mr. Sutter 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.

Mr. Sutter next reviewed the HCSF's rate level indications for CY 2016, noting the indications assume a break-even target. Mr. Sutter 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 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. Mr. Sutter 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. Mr. Sutter 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. Mr. Sutter stated that the Federal Reserve has talked about raising interest rates, but so far no action has been taken. If interest rates do rise and that translates to more investment income for the HCSF, that brings down the rate level indication. Mr. Sutter provided two examples of varying earnings from investment income and stated that the HCSF's financials, in terms of its rate indication, are very sensitive to what the Fund can earn on its assets.

Mr. Sutter next 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, Mr. Sutter 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. Mr. Sutter stated that when company 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.

Mr. Sutter provided an overview regarding indications by provider class. Mr. Sutter stated this is something the Board of Governors looks at every year. The report states the analysis of experience by HCSF class continues to show differences in relative loss experience among classes. Mr. Sutter then provided a history of surcharge rate changes since 2004. Mr. Sutter also provided an overview of the options for CY 2016 surcharge rates that was provided to the Board of Governors. Mr. Sutter highlighted the Board of Governors' decision on the surcharge rate changes. Mr. Sutter indicated the estimated overall impact of these changes was about a 1.6 percent increase in surcharge revenue.

Mr. Sutter concluded stating the company'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. Mr. Sutter stated the whole year compliance factor is a real equity issue now given the change to the tail coverage issues enacted last year.

In answer to a question from the Committee regarding whether tail liability of inactive providers would increase significantly going forward or stay stable, Mr. Sutter stated it was a big increase from last year's analysis to this year's analysis because of the law change, but it will be a one-time hit. Mr. Sutter said he believes, going forward, there will be inflationary-type increases, and he would expect the number he presents next year to be somewhere in the range of $105 million to $106 million. A Committee member asked when the surcharge rates being established on a calendar-year basis instead of a fiscal-year basis would take effect, and how will it affect a physician out of residency who is hired in August. Mr. Sutter indicated the surcharges would start January 1, 2016. He 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.

Chairperson Hayzlett recognized Chip Wheelen, Executive Director, HCSF Board of Governors, to provide the Board's statutory annual report (as required by KSA 2015 Supp. 40-3403(b)(1)(C)) (Attachment 2). The Executive Director's report for FY 2015 indicated 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 5 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 report detailed the medical professional liability cases. 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 report also provided the balance sheet, as of June 30, 2015, indicating assets of $273,581,184 and liabilities amounting to $231,467,025. Mr. Wheelen indicated there basically is a margin for error of about 18 percent,

and he believes it is a very safe margin. Mr. Sutter stated the Board of Governors has said in the past it would like for the margin to be about 25 percent, if possible.

Mr. Wheelen provided some historical information about the creation and evolution of the HCPIAA, noting next July will be the Act's 40th anniversary. Mr. Wheelen 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 existence of the HCPIAA that requires health care providers as defined in the HCPIAA to have professional liability insurance as a condition of active licensure to render professional services in the State of Kansas. It 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. He has consistently stressed that this is not a voluntary participation. 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 for some kind of remedial action. Mr. Wheelen indicated the same bill that added the new categories of health care providers also contained a number of technical amendments that updated the HCPIAA.

Mr. Wheelen explained that when the tail coverage improvements were enacted, the HCSF's liabilities immediately increased. Mr. Wheelen stated, while waiting for the *Miller vs. Johnson* decision regarding caps on non-economic damages, the Board of Governors was reluctant to increase or reduce surcharge rates. Mr. Wheelen indicated, 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. Mr. Wheelen stated it 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. All three of those agencies stepped up and gave the Board of Governors a lot of support, communicating with their licensees to make sure everyone understood the rules, and providing any assistance those licensees may have needed.

Mr. Wheelen provided an update on the medical professional liability insurance marketplace. He stated, 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).

Mr. Wheelen's report states there are two principal reasons the Kansas HCSF is more successful than similar funds in other states:

- The HCSF 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.

Mr. Wheelen indicated HCSF moneys are supposed to be held in trust and he recognized the HCSF Oversight Committee for the reports made in the past that have stressed this importance. Holding a fund in trust in the State Treasury means it is going to be used exclusively for its statutory purposes. Mr. Wheelen noted the Legislature has always honored this doctrine.

Mr. Wheelen 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.

In answer to a Committee member's question regarding tail coverage, Mr. Wheelen stated he believes it is a great recruiting tool. If a hospital is trying to recruit a physician to the state, the physician is not going to have to buy a tail coverage policy when the person leaves active practice—it is built into the rates.

A Committee member asked, in regard to Ms. Noll's presentation that showed about $50 million was paid out in total malpractice claims for the past year with about $15 million paid out by excess carriers, whether there have been any discussions about either raising the expectation of the primary carrier with higher limits or the HCSF providing higher limits going forward. Mr. Wheelen stated that two years ago, prior to the 2014 Legislative Session, the Board of Governors' legislative committee seriously considered that possibility. Mr. Wheelen indicated, when they started to crunch the numbers and do the analysis, they found it was going to be very disruptive for the primary insurance carriers and would cause a great deal of shifting of liability from the commercial insurance industry to the HCSF. Mr. Wheelen also indicated an increase the amount of HCSF coverage is an increase in liability that might require the the Board to start increasing the surcharges it collects.

Update on the Current Status of the Medical Malpractice Insurance Market; Update on the Health Care Provider Insurance Availability Plan; Comment from Health Care Provider Representatives

Jerry Slaughter, Executive Director, Kansas Medical Society (KMS), was recognized and began his remarks stating the Society uses this opportunity every year to address a couple of points. One is there is still a role for the Oversight Committee; the other point is regarding the necessity for an independent actuarial review. Mr. Slaughter stated KMS believes this Committee provides an important bridge among the provider community, the insurance agent/broker community, others, and legislators. Mr. Slaughter 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. Mr. Slaughter indicated it is important there be a continuing link between the Legislature that has full responsibility and those involved in the execution of this enterprise; therefore, KMS believes it is important to have the Oversight Committee still be active and engaged on the topic. Mr. Slaughter next addressed the necessity for an additional actuarial review, indicating KMS has a high level of confidence in Mr. Sutter and his colleagues. Mr. Slaughter stated there is no reason to expend the additional dollars for another review.

Mr. Slaughter provided some historical information regarding 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. Mr. Slaughter 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. Mr. Slaughter indicated 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 he believes many other states are a bit envious of the good liability environment here. Mr. Slaughter indicated it is because of those responsible decisions made by the Legislature, the Board of Governors, and the affected individuals, principally from 1984 to the present day. No written testimony was provided.

Chairperson Hayzlett next recognized Kurt Scott, President and CEO, KaMMCO. Mr. Scott indicated 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 Ms. Noll and Mr. Wheelen both alluded to: the lower claim frequency levels. Mr. Scott 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. Mr. Scott indicated it would remain true for the foreseeable future in terms of the overall insurance marketplace, not just Kansas, but nationwide.

Mr. Scott also addressed a few changes that will ultimately affect the marketplace here, as well as across the country, 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 heath care delivery changes will impact the medical professional availability side of the equation.

Mr. Scott 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. Mr. Scott 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.

Mr. Scott 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 indicated, for now, all is well in the industry and with the HCPIAA. 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. No written testimony was provided.

In answer to a Committee member's question about potential risks telemedicine poses for the future, Mr. Scott 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. Mr. Scott indicated telemedicine could be reading of images or actually providing consults from

different locations. Mr. Scott 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. Mr. Scott stated this also goes back to the issue of how the ACA is changing health care delivery and systems, including reduced reimbursements and how physician practices and hospitals are managed. Mr. Scott indicated the economic conditions in health care right now are forcing change, and those changes are going to have a ripple effect. Telemedicine is certainly one of them.

In answer to whether KU is using telemedicine in western Kansas, Mr. Scott indicated KU is attempting to reach out to the state with an initiative, the Kansas Heart and Stroke Collaborative. Some of it is happening in-state and some of it is happening out-of-state. Mr. Scott indicated some of the providers here are providing those kinds of services to other places around the country and, in some cases, outside of this country. Mr. Scott noted the uncertainty, for example, as to how a patient would seek remedy, *e.g.,* sue a provider in Australia for inadequate care provided.

Written only testimony regarding HCSF coverage and insurance carrier options available to nurse midwives was provided by Catherine Gordon, MS, APRN, CNM, and Kendra Wyatt, BSIE, New Birth Company (Attachment 3).

Proposed Amendments to the Health Care Provider Insurance Availability Act, if any

The Chairperson asked for any proposed amendments to the HCPIAA. No such amendments were brought before the Committee.

Committee Discussion for the Purposes of Reaching Conclusions and Making Recommendations to the 2016 Legislature; Direction to Staff for the Committee Report to the Legislative Coordinating Council

Chairperson Hayzlett invited Committee discussion for the purpose of reaching conclusions and making recommendations to the 2016 Legislature.

A Committee member commented regarding the current medical malpractice marketplace. The member stated there is a glut of carriers in the marketplace right now, and premiums have never been as affordable. The member stated he does not know if there are enough providers for a large pool of premiums to keep all carriers satisfied, and the member believes some of them may become discouraged and leave. The member stated, right now the providers can buy this coverage at a very attractive price.

Chairperson Hayzlett recognized Ms. Calderwood-Renick to summarize issues presented to the Committee. Ms. Calderwood-Renick brought to the attention of the Committee the two statutory questions were not formally included on the agenda this year in response to Committee discussion at last year's meeting. A Committee member had asked the Committee to consider that it is called by statute to meet and, unless there is objection, the Committee should continue its work. In regard to the second statutory question about independent actuarial analysis, the Committee would request such analysis only if it was not satisfied with the findings and report provided by the Board of Governors' actuary. (No objections were made.) Ms. Calderwood-Renick indicated, if the Committee is satisfied on both of those points, language

could be continued in the report regarding the nature of the Committee including some of the points made by the KMS representative and Mr. Wheelen about the relationship between this public and private partnership of which the Committee is a part, in the conclusion. Ms. Calderwood-Renick stated language also could be included stating the actuarial analysis was sufficient and a separate report would not be requested by this Committee.

Items requested by the Committee for inclusion in the Committee report will continue as follows:

- **Funds 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 HCSF to the State General Fund. The HCSF provides Kansas doctors, hospitals, and the defined health care providers with individual professional liability coverage. The HCSF is funded by payments made by or on the behalf of each individual health care provider. Those payments made to the HCSF by health providers are not a fee. The State shares no responsibility for the liabilities of the HCSF. Furthermore, as set forth in the Health Care Provider Insurance Availability Act, 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 Health Care Stabilization Fund. At the end of any fiscal year, all unexpended and unencumbered moneys in such Health Care Stabilization Fund shall remain therein and not be credited to or transferred to the State General Fund or to any other fund.

Ms. Calderwood-Renick discussed other issues that could be highlighted in the report, with approval from the Committee (approval was provided by consensus of the members present):

- Include reference that was made in Mr. Wheelen's testimony to the *Building Industry Workers Compensation Fund vs. State of Kansas* in the finding that it would be unconstitutional to transfer certain dollars to the SGF for the purpose of maintaining the balance in the SGF;

- The reimbursement schedule pursuant to 2010 SB 414, that the first 60 percent is now in, and two installment payments remain on those deferred payments, and stating the amount still owed to the HCSF Board of Governors;

- Recognize the approaching 40th anniversary of the HCPIAA; and

- Recognize several points regarding that the HCPIAA is actuarially sound; the liabilities are funded; the public-private partnership remains active; a source of remedy remains adequate for the injured patient; additional types of providers

have come into the HCSF; and the HCPIAA has been changed many times to accommodate and to allow those persons to come into the HCSF and coverage; and stability has been provided in the marketplace even in times of incredible volatility.

Adjourn

The Chairperson thanked the Committee members, staff, and attendees for their participation in this annual review.

There being no further business to come before the Committee, the meeting was adjourned at 11:05 a.m.

Prepared by Randi Walters
Edited by Melissa Calderwood-Renick

Approved by the Committee on:

January 13, 2016
(Date)