Report of the Health Care Stabilization Fund Oversight Committee to the 2012 Kansas Legislature

CHAIRPERSON: Mr. Dick Bond

LEGISLATIVE MEMBERS: Senators Laura Kelly and Vicki Schmidt; and Representatives Eber Phelps and David Crum

NON-LEGISLATIVE MEMBERS: Mr. Darrell Conrade, Dr. Jimmie Gleason, Dr. Paul Kindling, Dr. Terry "Lee" Mills, Jr., and Dr. James Rider.

CHARGE

- The Committee must review the operation of the Health Care Stabilization Fund and report and make recommendations to the Legislative Coordinating Council regarding the financial status of the Fund, including any recommendations for legislation necessary to implement recommendations of the Committee.

December 2011

Health Care Stabilization Fund Oversight Committee

Annual Report

Conclusions and Recommendations

The Committee addressed the two statutory questions posed annually to the Oversight Committee. The Health Care Stabilization Fund Oversight Committee continues in its belief that the Committee serves a vital role as a link between the Fund Board of Governors, the providers, and the Legislature, and should be continued.

Actuarial Review. The Committee reviewed the necessity for the need to contract for an independent actuarial review in 2012. While the Committee continues in its belief that the ability to contract an independent actuarial review is necessary for the safety and soundness of the Fund, the Committee does not see, at this time, a need for an independent review in 2012. As part of its review, the Committee discussed the necessity for an actuarial review should the *Miller v. Johnson* decision strike down the constitutionality of the cap on non-economic damages. In that instance, the Committee and its staff will consult with the Board of Governors to secure any actuarial reviews and revised projections reflecting the Court's decision.

Other Recommendations. The Committee then considered information presented by the Fund representatives and health care provider and insurance representatives, and recommendations were made to address the history of the Fund and the uncertainties facing the Fund and its providers today, as well as the expenditures of the Fund and its technology improvements.

- **The History of the Health Care Stabilization Fund.** The Oversight Committee acknowledges the history of this Fund, with attention to the events and circumstances that have shaped the Fund law and marketplace for professional liability insurance coverage for the future of the Fund and professional liability insurance marketplace in Kansas. The Committee recognizes the important function of the Fund as a stabilizer to market and economic conditions and premium rates, the declining claims volume and potential impacts of the *Miller v. Johnson* decision on tort law reforms in Kansas, and the current and projected physician and other health care provider shortages.

Historically, Kansas health care providers have faced spiraling professional liability insurance premiums; many physicians could not purchase any coverage and others only could purchase limited coverage that failed to insure against the provider's risk. Over time, efforts by past Legislatures and the involved parties to reduce the Fund's liability per claims, to establish annual aggregate limits, to reform civil litigation including a $250,000 limit on non-economic damages, and to require a minimum contribution of five years of contribution to the Fund for the purchase of tail coverage have provided for the stability of the Fund and availability of professional liability insurance coverage in Kansas.

- **Technology Improvements.** The Oversight Committee recognizes the agency's efforts to streamline its website and electronic forms for health care providers and insurers participating in the Fund. The Oversight Committee expresses its support for the Health Care Stabilization Fund's existing staff positions and continuing the agency's independent information technology improvements.

Finally, while the Committee makes no formal recommendations for changes in the statutes governing the work of the Board of Governors, it does recommend continuing the following language to the Legislative Coordinating Council, the Legislature, and the Governor regarding the Health Care Stabilization Fund (HCSF):

Fund To Be Held In Trust. The Committee recommends the continuing 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.

Proposed Legislation: None.

Background

The Health Care Stabilization Fund Oversight Committee was created by the 1989 Legislature and is described in KSA 40-3403b. The 11-member Committee consists of four legislators; four health care providers; one insurance industry representative; one person from the public at large, with no affiliation with health care providers or with the insurance industry; and the Chairperson of the Board of Governors of the Health Care Stabilization Fund (HCSF) or another member of the Board designated by the Chairperson. The law charges the Committee to report its activities to the Legislative Coordinating Council and to make recommendations to the Legislature regarding the Fund. The reports of the Committee are on file in the Legislative Research Department.

Committee Activities

Report of Towers Watson

The Towers Watson actuarial report serves as an addendum to the report provided to the Board of Governors dated March 25, 2011. The actuary first addressed the forecasts of the Fund's position at June 30, 2011: the Fund held assets of $239.85 million and liabilities (discounted) of $183.72 million, with $56.13 million in unassigned reserves. The projection for June 2012: assets of $246.09 million and liabilities (discounted) of $188.76 million, with $57.33 million in unassigned reserves. The report notes that the forecasts were based on Fund data of December 31, 2010. Assets at June 30, 2011, the actuary stated, were $4.5 million higher than anticipated; and the report continues, FY 2011 settlements were 19 percent below average of the prior 6 years.

The actuary next commented on the current "sound financial position of the Fund" and then offered some general conclusions: undiscounted liabilities at June 30, 2011, are approximately $7.0 million lower than anticipated in the actuary's 2010 study; the forecasts assume no change in surcharge rates for FY 2012; $27.4 million in surcharge revenue in FY 2012; a 2.0 percent rate for the undiscounted liabilities; continued full reimbursement for the Kansas University Medical Center (KUMC)/ Wichita Center for Graduate Medical Education (WCGME) claims, but with reimbursement from the state delayed until FY 2014; and no change in current Kansas tort law. Finally, the actuaries have suggested that the Board consider maintaining the FY 2011 rates for FY 2012, or implement an overall decrease involving modest changes by class to improve the rate adequacy in certain classes (the Board of Governors did not change surcharge rates for FY 2012).

The actuary then reviewed the Fund's liabilities at June 30, 2011, highlighting future claims against inactive providers—tail coverage and future payments. The actuary next discussed the changes from prior forecasts and then made some observations about the Fund loss experience: claim volume/activity in Calendar Year 2010 was generally lower than expected; the only unfavorable change was that the reserves on open claims increased by nearly $8 million. The changes in the estimates for provider losses included: active provider settlements were lower than expected (expected $24.1 million; actual were $19.5 million); settlements on inactive providers (expected $2.5 million; actual, $1.7 million); and open claims at year-end (expected 245, actual 222). In response to a Committee member's request for comment on the projections (estimates) versus the actuals on claims and loss experience, the actuary stated that generally, over the last 5 years, there were lower claims experience than was anticipated.

The actuary made further observations for the Committee's consideration:

From 1999 to 2009, the Fund's surcharge revenue ranged from 23 percent of basic coverage premium (2005) to 33 percent of premium (2001 and 2009). The FY 2010 ratio was 36.3 percent, and the fifth consecutive year with an increase;

Availability Plan insureds increased from 251 in FY 2001 to 674 in FY 2006, but have dropped since then. In FY 2010, there were 456 Plan insureds; and

The Fund's investment yield declined in FY 2011. However, given market rates over the last few years, the Fund's yield has been surprisingly good. (The FY 2011 average yield-to-maturity on Fund investments, the actuary noted, was still above 4.0 percent).

The actuary's presentation next addressed the findings by provider class; the actuary commented on the loss experience among the classes, noting that analysis continues to show differences in the relative loss experience among classes. Four classes were identified as

"undercharged" (relative rate change indicated – increase was greater than 12 percent): Class 11 [Surgery Specialty – Neurosurgery]; Class 4 [Family Practitioners, including minor surgery and OB]; Class 17 [Medical Care Facilities]; and Class 15: +77 percent [Availability Plan insureds]. The percentage for Class 15 denotes that insureds currently pay 40 percent of the basic coverage premium; recognizing actual claims experience, the insureds should be paying 77 percent. The actuary then continued with a historical review of surcharge rate changes (FY 2000-FY 2012). He noted that there was no change in the surcharge rate for FY 2003, FY 2011 and FY 2012 and that Class 1 (Physicians, No Surgery – dermatology, pathology, psychiatry) has experienced no increase (class surcharge rate) since 2006. Rates, the actuary continued, have been stable since 2010. Following the presentation, the actuary was asked to comment on the relativity of the risk, particularly for those classes with higher losses. The actuary indicated that the issue, from the actuary's perspective, is one of fair share.

Comments

In addition to the report from the Board of Governor's actuary, the Committee received an overview of recent law and relevant materials provided by Committee staff. The analyst briefly reviewed the findings from the Committee's report to the 2011 Legislature. Staff also provided a copy of KSA 40-3404, highlighting the language from 2010 SB 414, language that requires payment of State General Fund (SGF) reimbursements to the Health Care Stabilization Fund for its expenses in administering the self-insurance program. The 2011 report, the analyst noted, had recommended the legislative budget committees consider payments of this SGF obligation at an earlier time, should financial conditions improve and revenues be made available. Other items in the staff review included an updated article for the 2012 Legislator Briefing Book on the Fund and Kansas medical malpractice laws and the budget and subcommittee reports for FY 2011 and FY 2012.

The Deputy Director and Chief Attorney for the Health Care Stabilization Fund Board of Governors next addressed the FY 2011 medical professional liability experience, including judgments and settlements. Ms. Noll began her presentation by noting jury verdicts. Of the 19 medical malpractice cases involving 29 Kansas health care providers that were tried to juries during FY 2011, 16 cases were tried to juries in Kansas courts and three cases were tried to juries in Missouri. The largest number of cases (three) were tried in the following jurisdictions: Jackson County, Missouri; U.S. District Court, Kansas; and Wyandotte County. Of those 19 cases tried, 16 resulted in complete defense verdicts; plaintiffs won verdicts in two cases, and one case resulted in a "split" verdict. Ms. Noll noted that those cases with plaintiff verdicts are on appeal.

The Chief Attorney then highlighted the claims settled by the Fund, characterizing FY 2011 as similar to FY 2010, "only better." During FY 2011, Ms. Noll continued, 61 claims in 57 cases were settled involving HCSF monies. Settlement amounts for the fiscal year totaled $17,518,727.54, with the average settlement per claim of $287,192 (FY 2010 total was $19,745,200.00 to settle 61 claims in 54 cases). These figures presented do not include settlement contributions by primary or excess insurance carriers. Ms. Noll spoke to the trends for claims – more claims are falling to the high range, with the largest part of the increase seen in medical bills. Ms. Noll's testimony also indicated that the HCSF individual claim settlement contributions during FY 2011 ranged from a low of $17,500 to a high of $800,000. Ms. Noll continued her remarks, noting that in addition to the $17,518,727.54 incurred by the Fund, primary insurance carriers contributed $10,400,000 to the settlement of these claims (of the 61 claims involving Fund monies, primary insurance carriers tendered their policy limits to

the Fund in 52 cases). Additionally, four claims involved contribution from an insurer whose coverage was in excess of Fund coverage – these contributions totaled $4,350,000.

Ms. Noll's report also included FY 1995 to FY 2011 settlement contributions by primary carriers, the HCSF, and excess carriers; claims settled by primary carriers (FY 2000 to FY 2011); a report of HCSF total settlements and verdict amounts, as well as new cases opened for FY 1977 to FY 2011). The Fund was notified of 267 new cases during FY 2011; Ms. Noll commented that this is the third straight fiscal year where the number of new cases has declined and primary carriers also have had a similar experience. Ms. Noll then commented that in the first three months of FY 2012, there have been 68 new cases and the Fund is expecting an increase to the 2011 total. The Chief Attorney next addressed *Miller v. Johnson* and the potential implications if the cap on non-economic damages is declared unconstitutional. Ms. Noll indicated that claims for the next fiscal year depend on the outcome of this case and if there is an unfavorable ruling, it would not only effect the Fund but also primary insurance carriers. Ms. Noll's testimony further states that it would not be possible to estimate the impact of such a decision "until such time that our actuary knows whether the Court's decision would apply to all personal injury actions, or to claims made after the date of the decision, or only to causes of action accruing after the date of decision." A Committee member inquired about if the decision was expected by the end of the year. Ms. Noll indicated that it was not known.

Ms. Noll continued her remarks, next addressing the self-insurance programs and reimbursements for the University of Kansas Foundations and Faculty and residents. Ms. Noll first highlighted the FY 2011 KU Foundations and Faculty and KUMC and WCGME program costs, noting that in FY 2011, there were six claims. The FY 2012 experience, she continued, would look more like FY 2010 (increased from FY 2011). Ms. Noll further commented that there were no trials or settlements during FY 2011, while in FY 2010, there was a case (birth injury) that involved two residents and resulted in a defense verdict. She noted that a couple of trials had been scheduled (would account for the increase in FY 2010 self-insurance program costs). Ms. Noll then reviewed the reimbursement history for the programs and the schedule under the 2010 law for reimbursements to be made to the Fund. Those non-reimbursed amounts are as follows: KU Foundations and Faculty (FY 2011: $684,218.79; FY 2010: $945,658.21; and FY 2009: $2,190,724.52); KU and WCGME residents (FY 2011: $455,621.25; FY 2010: $1,201,718.01; and FY 2009: $728,875.79). Ms. Noll then commented that the FY 2011 resident self-insurance program reimbursement was the lowest amount since FY 1990. Further, excess coverage claims for the self-insurance programs only totaled $195,000 for FY 2011 ($970,000 in FY 2010). Ms. Noll's testimony also notes that as of June 30, 2011, the accrued State General Fund reimbursements receivables to the Health Care Stabilization Fund were $3,287,216.26.

A Committee member asked about the anticipated growth at the KU Medical Center (residency program) and the potential to face greater risks with future growth. Ms. Noll provided statistical information regarding growth in the self-insurance programs: Full-Time Faculty: FY 2011 (514); FY 2000 (310); Residents, Kansas City: FY 2011 (493); FY 2000 (375); and Residents, WCGME and more recently, Salina campus: FY 2011 (319); FY 2000 (270). The Committee then discussed liability coverage for medical students (Kansas Tort Claims Act) versus the residents. Ms. Noll responded that increasing the number of residents impacts the Fund. The Committee and HCSF staff also discussed the risk aversion programming and training for faculty and residents.

Statutory Report. The Executive Director, Health Care Stabilization Fund, then provided the Board's statutory report (as required by

KSA 40-3403(b)) for FY 2011. Among the highlights:

- Net surcharge revenue collections amounted to $25,795,776, with the lowest surcharge rate of $50 (chiropractor, first year of Kansas practice who selected the lowest coverage option) and the highest surcharge rate of $16,552 (neurosurgeon, five or more years of Fund liability exposure who selected the highest coverage option). Mr. Wheelen's report indicated that gross surcharge revenue collected in FY 2011 was very similar to FY 2010, but due to refunds, net surcharge revenue was about 2.3 percent less than the FY 2010 net surcharge revenue collected.

- There were 19 medical professional liability cases involving 29 Kansas health care providers decided as a result of a jury trial (only two claims resulted in Fund obligations amounting to $1,600,000). Fifty-seven cases involving 61 claims were settled resulting in HCSF obligations amounting to $17,518,727.54 (average compensation per claim was $287,192, an 11.28 percent decrease to FY 2010). These amounts are in addition to the compensation paid by primary insurers.

- Due to past and future periodic payment of compensation and other cash-flow characteristics, the reported amounts were not necessarily paid during FY 2011; instead, the report continued, the total claims paid during the fiscal year amounted to $19,207,586. This amount represents a 29.2 percent reduction compared to the prior fiscal year; there also was a corresponding reduction in expenditures for attorney fees and other costs attributable to claims activity.

- The financial report, as of June 30, 2011, indicated assets amounting to $244,401,935 and liabilities amounting to $216,171,036.

Mr. Wheelen then commented about the ratio of unassigned reserves the Fund would like to see, noting that currently HCSF assets exceed liabilities, but "only marginally." A healthy ratio translates into physical protection and quick compensation for an injured party. He also noted that while the Fund appears to be actuarially sound at the time, the ratio could change quickly, depending on economic factors and the *Miller v. Johnson* outcome.

The Executive Director continued his remarks, next addressing the commercial professional liability insurance market in Kansas which he generally described as "extremely cyclical." The Health Care Provider Insurance Availability Act, stabilizes the medical professional liability market in Kansas and further, the supplemental liability coverage provided by the HCSF combined with the existence of a joint underwriting association makes Kansas a stable market environment for insurers. Mr. Wheelen then discussed the Availability Plan (Plan) and the providers who would be likely to rely on the Plan for the purchase of their primary layer of professional liability insurance (unable to purchase from one of the commercial insurers) – some have unique circumstances or specialties, including residents who want to work outside of their training program (moonlighting) and *locum tenens*, health care providers who need to purchase short-term insurance coverage that applies only to their temporary Kansas practices. The existence of the Availability Plan, Mr. Wheelen noted, also allows commercial insurers to reject applicants who have a history of claims or are under investigation by a licensing agency. As of October 1, 2011, there were 386 Kansas health care providers insured by the Plan. Mr. Wheelen noted that under a unique occurrence last year, it was determined that the Plan should liquidate some of its reserves, resulting in a substantial transfer of $5,015,334 from the Plan to the HCSF (pursuant to requirements of KSA 40-3413). This year the Plan will transfer a surplus of $1,350,697.

Mr. Wheelen then briefly reviewed the criteria for health care providers to become an authorized self-insured (KSA 40-3414). The Executive Director also commented on 2010 SB 414 detailing the compromise to create the equivalent of a "line of credit" whereby the Fund continues to pay claims and expenses on behalf of the State, but will not be reimbursed until FY 2014. Mr. Wheelen's prepared remarks also indicated that at a recent board meeting, the Board of Governors adopted a formal motion directing its staff to "determine a better business model for insuring the professional liability of residents in training as well as full time physician faculty members and faculty foundations."

The Executive Director next addressed the Board of Governor's recent technology improvement plans and agency's FY 2013 budget request. Among recent activities, an information technology officer was hired; the Information Network of Kansas was contracted with to host a new website; and the new electronic compliance form (required an overhaul of the database and other substantive changes) is functional. Mr. Wheelen provided a review and demonstration of the website–created for use by the health care providers, insurers, and providers' attorneys. The next phase of the technology improvement plan has begun, with the HCSF collaborating with the principal insurer of Kansas health care providers to determine the feasibility of direct data exchange. This could allow the information contained in numerous compliance forms to be transmitted *via* the internet in batch mode. Mr. Wheelen's written remarks also addressed requests to centralize information technology facilities, equipment, and personnel, stating a concern about the potential impact on the HCSF's progress thus far; the HCSF's file servers and information technology staff must remain independent under the supervision of the Board of Governors in order to effectively serve Kansas health care providers and their insurers.

In response to a question about the agency's full-time equivalent (FTE) count, Mr. Wheelen indicated that the agency had to ask the Legislature to keep an existing FTE position throughout the 2011 Session. An effort to abolish vacant positions had mistakenly identified a vacant position within the agency, he continued. The position, however, was filled. Mr. Wheelen also noted the across-the-board cuts to technology improvements; the agency's budget was included in the cut. Mr. Wheelen described the agency's FY 2013 budget as a modest, maintenance only budget and requested the Committee consider a recommendation expressing support for the agency's FY 2013 budget request to maintain its existing 18 staff positions and continuing the agency's independent information technology improvements. A Committee member noted that the Fund staff is asking for support to spend "non-state" dollars. (Mr. Wheelen's testimony also included a history of the Fund, detailing significant events that led to the creation of the Fund and the availability of professional liability insurance coverage in Kansas).

Following Mr. Wheelen's presentation, the Committee further discussed the Availability Plan and its administration. Among the responses provided by the Executive Director and Committee members during the discussion were:

- The Plan Board's has been reorganized and improvements have been made to accounting services. The funds in the Plan surplus had been reserved for closed claims.

- The imbalance (underpayment of risk cited by the actuary) is caused by the risks of a few providers who have an extraordinary number of claims or settlement amounts. A Committee member commented that the Plan serves to help physicians who cannot find insurance and another member added that one or two outliers could be affecting the whole group.

- Residents who are moonlighting would be rated differently from those physicians who are "expensive" (claims, experience).

- The Availability Plan's ability to provide insurance in instances where a carrier leaves the state.

The Committee also discussed the role of the Board of Healing Arts and its oversight of certain practitioners (licensure includes compliance with insurance requirement).

The Committee then reviewed the current marketplace for medical malpractice insurance. The Executive Director of the Kansas Medical Society (KMS) provided comments from both KMS and the Kansas Medical Mutual Insurance Company (KaMMCO). Mr. Slaughter began his comments noting that the Fund, now 35 years old, has provided stability in the marketplace and is in good shape financially with adequate surplus. Mr. Slaughter described the current marketplace for professional liability insurance–premiums are stable and claims are declining. It is not known, he continued, how long this trend will last, as *Miller v. Johnson* and other factors could effect the market conditions. Mr. Slaughter noted there is in excess of 20 insurers, with the top six or seven insuring most of the health care providers. The Fund is the integral part and the marketplace continues to be very competitive. Mr. Slaughter then commented on the Plan, noting that KaMMCO serves as the servicing carrier. With mandatory professional liability insurance coverage, the Plan must be available to cover some providers and have the ability to adjust for market fluctuations. He further explained that there are 43 moonlighting residents and those providers are nominally priced by the Plan, unlike the fully-insured resident. Mr. Slaughter commented on the recent history of the Plan and number of insureds, ranging from 250 to as high as 600, noting that it would be difficult to construct a pricing scenario. Increasing the limit on basic professional liability coverage (from $200,000 to $300,000), Mr. Slaughter noted, is an option for a future discussion.

The Committee then reviewed testimony submitted by Barbara Atkinson, Executive Vice Chancellor, KU Medical Center and Executive Dean, KU School of Medicine. Dr. Atkinson's testimony acknowledged the role of the Health Care Stabilization Fund in its administration of the professional liability coverage for faculty and residents at the University of Kansas Medical Center, stating the Fund is "critically important to support the training of physicians in our state." The testimony highlighted the shortage of physicians in Kansas, below the national average in both the number of and especially in primary care, as well as the mal-distribution of physicians, with low physician ratios in five of six major geographic regions. Dr. Atkinson also addressed the KU School of Medicine campus expansions in Salina and Wichita. Total KU School of Medicine enrollment (all four years) is projected for 2016 and beyond at 844 students (four classes of 211 students); prior to 2011, the enrollment totaled 700 students (four classes of 175 students). Dr. Atkinson's testimony also addressed the need for additional residency slots and funding (Medicare funds most of these slots through the graduate medical education (GME) program); she noted that new slots were not expanded as part of federal health care reform and there is concern about a number of Congressional proposals that would cut GME. The testimony on residency slots and funding concludes that "[w]ithout more residency slots, we will continue to struggle with physician workforce shortages in our state, and will accept fewer foreign medical graduates in order to accommodate our own medical school graduates."

Following the formal presentations, the Chairman asked if anyone had any suggested changes to the Health Care Provider Insurance Availability Act. There were no plan amendments suggested by those present.

Conclusions and Recommendations

The Committee addressed the two statutory questions posed by annually to the Oversight Committee. The Health Care Stabilization Fund Oversight Committee continues in its belief that the Committee serves as a vital role as a link between the Fund Board of Governors, the providers, and the Legislature, and should be continued.

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- 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.