MINUTES

HEALTH CARE STABILIZATION FUND OVERSIGHT COMMITTEE

October 1, 2020
Room 112-N—Statehouse

Members Present

Gary Hayzlett, Chairperson
Senator Anthony Hensley
Senator Gene Suellentrop, *via* Zoom
Representative Henry Helgerson
Representative Richard Proehl
Darrell Conrade
Dennis George
Jimmie Gleason, MD
James Rider, DO
Jerry Slaughter

Members Absent

Dennis Cooley, MD

Staff Present

Melissa Renick, Kansas Legislative Research Department
Scott Abbott, Office of Revisor of Statutes
Randi Walters, Committee Assistant

Conferees

Russel Sutter, Actuary, Willis Towers Watson, *via* Zoom
Rita Noll, Deputy Director and Chief Counsel, Health Care Stabilization Fund Board of Governors, *via* Zoom
Clark Shultz, Executive Director, Health Care Stabilization Fund Board of Governors
Kurt Scott, President and Chief Executive Officer, Kansas Medical Mutual Insurance Company
Rachelle Colombo, Executive Director, Kansas Medical Society

Others Attending

See Attached List.

AFTERNOON SESSION

Welcome and Introductions

Chairperson Gary Hayzlett called the meeting to order at 1:32 p.m. The Chairperson welcomed members to the Committee. It was announced two conferees from the Board of Governors staff are participating *via* Zoom, as well as one Committee member. Chairperson Hayzlett next recognized Melissa Renick, Kansas Legislative Research Department (KLRD). Ms. Renick announced the meeting is being broadcast on the Legislature's audio stream,which is accessible on the Kansas Legislature's website, as well as on its YouTube channel.

Staff Review of Committee Information and Recent Legislation and Law

Ms. Renick presented an overview of resource materials provided to the Committee. She indicated among the items included in the resource folder are the House and Senate Budget Committee and Subcommittee Reports and the fiscal year (FY) 2021 Appropriations Report, both of which were prepared by KLRD staff regarding the budget for the Health Care Stabilization Fund (HCSF) Board of Governors. She noted the resource folder also contained the Committee Report to the 2020 Legislature and reviewed its conclusions and recommendations. Ms. Renick highlighted two contemporary issues contained in the report requiring continued oversight by the Committee and the HCSF Board of Governors: acknowledging the June 2019 *Hilburn v. Enerpipe Ltd.* (*Hilburn*) decision and the uncertainty of its impact on health care providers, medical malpractice cases and actions, and the medical malpractice insurance marketplace in Kansas; and the enactment of 2019 HB 2119 regarding the regulation of the corporate practice of medicine and business entities that would be providing this oversight, stating concerns regarding further changes to law may be necessary to clarify the criteria associated with an entity being described and defined as a business entity.

Ms. Renick next referenced a memorandum prepared by KLRD outlining relevant health care provider legislation considered this past session (Attachment 1). She explained the work of the 2020 Legislature was altered due to the COVID-19 pandemic, and work that would have been accomplished in the legislative calendar was ceased when the Legislature focused on an earlier-than-anticipated first adjournment, which occurred on March 19. Ms. Renick highlighted the amendments to the Health Care Provider Insurance Availability Act (HCPIAA) proposed in 2020 SB 493, which had been scheduled for hearing shortly before the Legislature's unexpected adjournment in March and did not advance during the 2020 Session. Its provisions were also not incorporated into Senate Sub. for HB 2054, which was a bill addressing emergency management, business and health care liability, and other COVID-19-related topics. She indicated SB 493 would have made substantial changes to how the health care provider community receives its professional liability coverage. She indicated the bill would have increased the minimum thresholds on the professional liability insurance coverage for the basic coverage from $200,000 per claim and $600,000 per year aggregate to $500,000 per claim and $1.5 million per year aggregate. Additionally, the number of options for those coverage limits would be changed from three to two. Ms. Renick noted other amendments would have affected the membership of the Board of Governors, as well as its powers, duties, and function under certain conditions. Additionally, the bill would have provided a response to *Hilburn* by specifically proposing dissolution of the HCSF should the Kansas Supreme Court declare the statutory noneconomic damages cap in KSA 60-19a02 unconstitutional.

In a response to a Committee member's question, Ms. Renick stated SB 493 officially died in committee at the end of the session and was not included in legislation during the special session; a similar bill would have to be introduced for the 2021 Session.

Chairperson Hayzlett recognized Scott Abbott, Office of Revisor of Statutes, to provide an overview of the enacted bill 2020 Special Session HB 2016 (Attachment 2). Mr. Abbott indicated the bill addressed a wide number of subjects related to the COVID-19 pandemic. He highlighted the provisions of the bill related to health care providers and liability for health care providers.

Mr. Abbott indicated the bill (Section 10) provided immunity for health care providers for any rendering of or failure to render health services, including services that were altered, delayed, or withheld as a direct response to the COVID-19 public health emergency with some exceptions for gross negligence or willful, wanton, or reckless misconduct or services that were not related to COVID-19 and that were not altered as a result of the COVID-19 pandemic. He stated these provisions apply retroactively to any cause of action accruing on or after March 12, 2020, which is when the state of disaster emergency was first declared in the state, and they continue to apply through the end of the state of disaster emergency.

Mr. Abbott next highlighted liability protection provisions for adult care homes (Section 13). Mr. Abbott indicated the bill provided an affirmative defense to liability in any civil action for a COVID-19 claim against an adult care home if the facility was caused to reaccept a resident who was removed from the facility for treatment for COVID-19, treats separate COVID-19 patients from non-COVID-19 patients, or is acting in compliance with public health directives. He stated the bill also included provisions for requirements for the Kansas Department for Aging and Disability Services (KDADS) to provide certain services and supplies to adult care homes within 90 days of the effective date of the bill (Section 19).

Mr. Abbott next addressed the expanded practice of telemedicine (Section 20), stating these provisions are very similar to an executive order that the Governor issued earlier in the pandemic, Executive Order (EO) 20-08, which essentially authorized the expanded use of telemedicine by physicians in the state of Kansas, as well as the practice of telemedicine by out-of-state physicians with patients located in the state of Kansas if these providers advise the State Board of Healing Arts that they are engaging in that practice.

Mr. Abbott also described a section concerning hospital operations relating to COVID-19 in the bill (Section 21). He indicated it granted hospitals some greater degree of flexibility in their operations during the COVID-19 pandemic, and he explained this allows admitting patients in excess of the number of licensed beds or admitting patients inconsistent with the licensed classification of those beds for the duration of the pandemic, as well as greater flexibility in using off-campus, non-hospital space for certain COVID-19-related services. He stated the bill also relaxed some restrictions on critical access hospitals and their admission of patients for the duration of the state of disaster emergency.

Mr. Abbott stated the bill also included provisions related to temporary emergency licensure of health care professionals under the jurisdiction of the State Board of Healing Arts (codifiying EO 20-26). He explained 2020 Special Session HB 2016 essentially grants the State Board the authority to issue these licenses during the pandemic if the applicant for such a license has qualifications that the State Board deems are necessary to protect public safety and welfare. He also noted the bill amended the scope of practice and relaxed some supervision requirements for certain health care professionals and other individuals and facilities (Section 23, also provisions in EO 20-26). Mr. Abbott indicated the bill summary memorandum lists the

professionals and individuals who are affected by this. He explained the point of this section of the bill is essentially to relax some supervision requirements and allow certain categories of health care providers to provide services that they otherwise normally do not, or it would require specific supervision to provide such services for the duration of the pandemic. Mr. Abbott indicated the bill also has some provisions relating to lapsed or canceled licenses and allows for certain relaxed requirements for reinstatements of those licenses if they have been lapsed or canceled within the previous five years. He indicated the bill also has some provisions allowing professional certifications in life support, cardiac life support, and other services of that nature that may have been canceled or lapsed during the pandemic to remain valid during the pandemic. He stated the bill also has some provisions related to licensure of hospitals, adult care homes, and other types of facilities that for the same reasons may have some difficulty in meeting those requirements during the pandemic.

Mr. Abbott explained essentially all of the provisions in the bill expire at some point after the state of disaster emergency or on January 26, which is 15 days into the 2021 Session, so all of those provisions would have to be reexamined by the Legislature or would continue to exist through the state of disaster emergency.

Presentation of Health Care Stabilization Fund Board of Governors' Staff and Actuary Reports, 2019-2020

Chairperson Hayzlett next recognized Russel Sutter, Actuary, Willis Towers Watson, to provide an actuarial report. The presentation was based on the review of HCSF data as of December 31, 2019, and is an addendum to the report to the Board of Governors dated July 14, 2020 (Attachment 3).

Mr. Sutter presented conclusions, indicating 2019 was a "surprisingly good year" for the HCSF. He explained revenue came in a little higher than was anticipated, some of it due to growth in the number of providers, but, more importantly, the loss experience performed much better than anticipated and much better than in 2018. Mr. Sutter stated there was a significant drop in the reserves on open claims of $22 million at year-end 2019. He explained this drop in reserves would create concern if there were a significant upswing in payments, but there was not. He stated payments were up slightly, but not appreciably. Mr. Sutter indicated, as a result, the HCSF's financial position on June 30, 2020, was stronger than was anticipated in October 2019. Mr. Sutter commented on a "somewhat cautious" approach in the forecasts, given the recent favorable results and the potential impacts of the *Hilburn* decision.

Mr. Sutter addressed forecasts of the HCSF's position at June 30, 2020, and June 30, 2021, based on the company's annual review, along with the prior estimate for June 2020. Last year, the estimate of the HCSF-held assets as of June 30, 2020, was $289.86 million, with liabilities of $263.20 million, and with $26.66 million in reserve (2019 Study). As of June 30, 2020, the HCSF held assets of $296.75 million, liabilities of $255.05 million, and $41.70 million in reserve. He stated the projection for June 30, 2021, is as follows: The Fund will have assets of $302.68 million, liabilities of $261.34 million, and $41.34 million in reserve. Mr. Sutter indicated this analysis projects the unassigned reserves will be fairly flat from the June 2020 level to the June 2021 level. Mr. Sutter noted, based on the analysis provided to the Board of Governors, the HCSF needs to raise its surcharge rates by 2.3 percent for calendar year (CY) 2021 in order to maintain its unassigned reserves at the expected year-end CY 2020 level (estimated $41 million).

Mr. Sutter explained the forecasts of unassigned reserves assume a 2.6 percent increase in surcharge rates for CY 2021, an estimated surcharge revenue in FY 2021 of $31.7 million, a 2.25 percent interest rate for estimating the tail liabilities on a present value basis (*Note:* the actuary commented this rate assumption was likely overestimated given current interest rates), a 2.85 percent yield on HCSF assets for estimating investment income, full reimbursement for University of Kansas (KU)/Wichita Center for Graduate Medical Education (WCGME) claims, and no change in current Kansas tort law or HCSF law. Based on these conclusions, it was suggested the Board of Governors consider a small increase in rates for CY 2021 with potentially some variation by class and years of compliance. (*Note:* The Board opted to raise surcharge rates by an average of 2.6 percent effective January 1, 2021.)

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

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

Mr. Sutter reported on trends in the HCSF's loss experience for active and inactive providers from CY 2015 through CY 2019. He stated CY 2019 was better than anticipated, noting the concern at this time last year was the growth in year-end Loss Reserves, from $40.68 million in 2017 to $59.0 million in 2018 (active providers). He reported during CY 2019, this trend changed significantly, declining to $40.83 million. Mr. Sutter indicated with a decrease in the year-end loss reserves without an appreciable increase in settlements, it was a much better year than had been anticipated and materially better than in 2018. He reported similarly on the inactive providers with the year-end Loss Reserves at December 2019 down significantly from year-end 2018 without much of an increase on the settlements. The actuary highlighted trends in the HCSF loss experience for active and inactive providers by program year. He indicated there was not much inflation in the HCSF's overall experience for active providers over the past 13 to 14 years – there is no real trend in the HCSF's experience. He also indicated it was a better result this year than what was assumed last year. Mr. Sutter indicated there is some inflation for inactive providers. The actuary further explained some of that is to be expected due to the law change in 2014, which expanded the HCSF's coverage for inactive providers, particularly for those that had been in the HCSF for less than five years.

Mr. Sutter next reported on the HCSF's investment yield over the past eight fiscal years, indicating FY 2020 showed a little rebound with the yield increasing to 2.77 percent. He noted in the 2019 study, the assumed yield was 2.95 percent. The actuary stated it was decided to reduce it another ten basis points in this year's study. He reminded the Committee this decision

was made in February of this year, and since then, the ten-year Treasury rate has dropped significantly. Mr. Sutter explained in October 2019, the ten-year Treasury's yield was 1.8 percent; today it is between .65 and .70 percent. He indicated if the rate stays at this level, then it is anticipated the assumed yield will need to be reduced on the next analysis for the HCSF in January or February of next year. The actuary noted every change in ten basis points in the interest rate is worth one point in surcharge rate level. He further noted if the assumed interest rate drops from 2.85 percent to 1.85 percent, then the HCSF's surcharge indication of 2 percent becomes 12 percent. He explained the yield's leveraging impact on the HCSF's financials and the potential pressure on the HCSF to raise rates for 2022.

Mr. Sutter next provided an overview regarding indications by provider class. The report states the analysis of experience by HCSF class continues to show differences in relative loss experience among classes. The actuary explained this analysis is reviewed annually by the Board of Governors to provide the Board with the opportunity to consider surcharge rate changes at the individual classification level. He provided a history of surcharge rate changes since 2009. The actuary noted a 6 percent change went into effect earlier this year (CY 2020).

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

In response to a question from a Committee member regarding whether there would be a variation between loss and loss adjustment expenses for those in active practice and those that are inactive, Mr. Sutter indicated it is difficult to make that judgment because the right denominator for the inactive providers is not yet known. He noted the sheer volume of dollars flowing through the HCSF for inactive providers is much smaller than it is for active providers. In response to a request for information to be presented at future meetings, the actuary indicated the company would try to determine a way to display trends in HCSF loss experience for inactive and active providers together.

A Committee member asked, regarding the investment income discussion and the impact of a 10-basis-point change, if a 100-basis-point change will result in a 10 percent surcharge indication change. Mr. Sutter explained that assumption was correct, and if the HCSF investment yield is dropped to 1.85 percent, then the HCSF has a rate indication (surcharge) of another 10 points.

In response to questions from the Committee member, Mr. Sutter indicated if effective yields continue to be at a lower level, the HCSF's assets are laddered out fairly well, so it would take some time for the HCSF's effective yield in the future to start dropping significantly; but, it will put pressure on the rate level indications each year for a while if market rates stay at their present levels. The actuary further indicated he is not in a position to answer questions on the HCSF's investment strategy, but if the anticipated investment income decreases, any shortfall must be made up by the providers in the form of surcharge payments.

In response to a question from a Committee member, Mr. Sutter concurred the three options offered to the Board of Governors for the CY 2021 surcharge rates were all reasonable options. He further explained the decision was made in spring 2020 based on information known in late February, so when the company met with the Board of Governors in March, the

impact of the COVID-19 pandemic was fairly uncertain in terms of its impact on providers and society in general. He indicated the Board must have time to get information to the insurance companies so they can program rate information.

Chairperson Hayzlett next recognized Rita Noll, Deputy Director and Chief Counsel, HCSF Board of Governors, to address the FY 2020 medical professional liability experience (based on all claims resolved in FY 2020, including judgments and settlements) (Attachment 4).

Ms. Noll began her presentation by noting jury verdicts. There were 12 medical malpractice cases involving 18 Kansas health care providers tried to juries during FY 2020; 9 were tried in Kansas courts and 3 cases involving Kansas health care providers were tried in Missouri courts. The trials were held in the following jurisdictions: Sedgwick County (4), Johnson County (2), Douglas County (1), Morris County (1), Wyandotte County (1), and Missouri courts (3). Of the 12 cases tried, 11 resulted in complete defense verdicts, and 1 case resulted in a verdict for the plaintiff for an amount within the primary coverage limits. Ms. Noll noted in the past several years, fewer cases have gone to trial, but in FY 2020, two more cases went to trial. Ms. Noll further noted due to the COVID-19 pandemic, no civil trials took place in March, April, May, or June 2020, and she stated these 12 cases went to trial in 8 months. Ms. Noll indicated for FY 2021, no jury trials are currently taking place; several are scheduled for the end of this year, but realistically speaking, it will probably be well into 2021 before the courts are able to reopen the courthouses or create mechanisms to have jury trials. Ms. Noll stated when that happens, the first cases that are going to be tried will be the criminal trials, and it is anticipated it will probably be well into next spring before any cases actually go to trial.

Ms. Noll highlighted the claims settled by the HCSF, noting in FY 2020, 73 claims in 69 cases were settled involving HCSF moneys. Settlement amounts incurred by the HCSF totaled $27,121,225 (these figures do not include settlement contributions by the primary or excess insurance carriers). She noted in the last three fiscal years, about the same number of cases have settled. Ms. Noll indicated the major difference between this year and last year is that $3,713,350 more was incurred in settlements for this past fiscal year. Ms. Noll reported on the severity of the claims, noting there were two more cases that fell into the $600,001-$1,000,000 settlement range than during the previous year. Of the 73 claims involving HCSF moneys, the HCSF incurred $27,121,225; the primary insurance carriers contributed $12,400,000 to these claims. Ms. Noll noted 9 of those claims involved inactive Kansas health care providers for which the HCSF provided primary coverage. In addition, excess insurance carriers provided coverage for 5 claims for a total of $7,700,000. For the 73 claims involving the HCSF, the total settlement amount was $47,221,225. She also indicated in addition to the settlements involving HCSF contributions, the HCSF was notified primary insurance carriers settled an additional 106 claims in 98 cases. The total amount of these reported settlements was $9,868,875. Her report also included a historical report of HCSF total settlements and verdicts from FY 1977 to FY 2020. The report indicated for FY 2020, the HCSF incurred $27,121,225 in 73 claims settlements with no verdict amounts this year.

Ms. Noll reported there were 302 new medical malpractice cases during FY 2020, which was lower than the previous year's total of 323. She commented this was not likely due to the COVID-19 pandemic, noting that while the courthouses were closed to trials, in Kansas cases are filed online, so even though the courthouse might be closed, attorneys are still able to file their cases online. She stated it will be interesting to see in the next six months whether there is an uptick in the number of cases and, if so, it would likely be due to a factor related to COVID-19. Ms. Noll noted since FY 2015, the number of new cases reported to the HCSF has gradually increased. She indicated it was due to the 2014 law that added five new categories of health care providers to the HCSF: nursing facilities, assisted living facilities, residential health care

facilities, nurse midwives, and physician assistants. Ms. Noll stated it was natural to expect an increase in the number of claims. Ms. Noll reported on the number of claims against adult care homes over the past several years; in 2019, of the 323 claims, 53 claims were suits and claims against adult care homes; and in 2020, of the 302 claims, 75 claims were suits and claims against adult care homes. Ms. Noll indicated she looked further because of the new phenomenon of COVID-19 claims being filed. She noted starting at the end of April and May 2020, the Board of Governors began seeing claims filed against adult care homes based on COVID-19-related issues. Ms. Noll reported for FY 2020, there have been 21 new suits and claims that were COVID-19-related. When the COVID-19 cases are subtracted, she continued, the experience for adult care homes for 2020 was the same as it was for 2019. Ms. Noll further reported in regard to the COVID-19 claims to date, as of October 1, 2020, 25 lawsuits and claims had been made against 3 facilities: a Wyandotte County facility with 19 suits and claims made against it, a Johnson County facility with 4 lawsuits and claims made against it, and a Sedgwick County facility with 2 suits that have been filed against it. Ms. Noll indicated it is anticipated that the numbers of these types of claims will increase during the next two fiscal years.

In response to questions from a Committee member, Ms. Noll indicated the nature of the main allegations against adult care homes appears to be that appropriate protective equipment was not used and further, some of the allegations are that the nursing facility allowed employees who had symptoms of COVID-19 to go to work without being tested, and there are allegations that appropriate techniques were not utilized to contain the spread of the virus. Ms. Noll further indicated some of the early suits were filed at the end of April and the beginning of May, and the facilities have been overwhelmed with trying to take care of their residents, so the discovery process has been slow, and the exact nature of the claims has not been fully discovered. Ms. Noll indicated the allegations she mentioned tend to be the allegations that are stated in the petition, and she does not believe at this point the Board of Governors has a strong grasp on whether some of these allegations will fall outside the realm of professional liability and into corporate liability.

Responding to a question from a Committee member, Ms. Noll indicated to date, the only claims or suits that have been presented to the Board of Governors have been against the adult care homes. She noted there is a records request out to also allege negligence on the part of other kinds of health care providers, but she has not seen any formal claims made in that regard. In response to a question, Ms. Noll restated the number of COVID-19-related claims and locations of the facilities involved (on a county level).

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

In regard to the self-insurance programs for the KU/WCGME resident programs, including the Smoky Hill residents in Salina, the total amount for FY 2020 was $933,533.33. Ms. Noll reported the FY 2020 total was half of the FY 2019 total. She noted two reasons for the decrease: First, there was one settlement compared to five the prior year, and second, in the

last two years, there have been about half of the number of lawsuits that were pending against residents in training than in FY 2018. This overall decrease, from 25 to 14 cases, is seen in the the amount of defense costs incurred.

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

Chairperson Hayzlett recognized Clark Shultz, Executive Director, Health Care Stabilization Fund Board of Governors (Attachment 5). Mr. Shultz noted 16,426 health care providers participate and are provided coverage in the HCSF. Mr. Shultz next provided a brief history of the HCPIAA, explaining when the law was passed in 1976, it had three main functions: a requirement that all health care providers, as defined in KSA 40-3401, maintain professional liability insurance coverage; creation of a joint underwriting association, the Health Care Provider Insurance Availability Plan (Availability Plan), to provide professional liability coverage for those health care providers who cannot purchase coverage in the commercial insurance market; and creation of the HCSF to provide excess coverage above the primary coverage purchased by health care providers and to serve as reinsurer of the Availability Plan.

Mr. Shultz provided the Board of Governors' statutory annual report (as required by KSA 40-3403(b)(1)(C) and issued October 1, 2020). The FY 2020 report indicated net premium surcharge revenue collections amount to $28,705,874. The report indicated the lowest surcharge rate for a health care professional was $100 (a first-year provider selecting the lowest coverage option) and the highest surcharge rate was $18,376 for a neurosurgeon with three or more years of HCSF liability exposure (selecting the highest coverage option). Application of the Missouri modification factor for this Kansas resident neurosurgeon (if licensed in Missouri) would result in a total premium surcharge of $23,889 for this health care practitioner. The report detailed the medical professional liability cases. The average compensation per settlement (69 cases involving 73 claims were settled) was $371,524. These amounts are in addition to compensation paid by primary insurers (typically $200,000 per claim). The report stated amounts reported for verdicts and settlements were not necessarily paid during FY 2020, and total claims paid during the fiscal year amounted to $27,651,536. The statutory report also provided the balance sheet, as of June 30, 2020, indicating total assets of $299,601,265 and total liabilities amounting to $271,785,592.

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

Mr. Shultz provided an update on 2020 SB 493, indicating the bill would have changed the three limit coverage levels of the HCSF of $100,000, $300,000, or $800,000 to two limit coverage levels, $500,000 or $1,500,000. Mr. Shultz stated a similar bill is expected to be introduced in the 2021 Legislative Session on behalf of the Kansas Medical Society. Mr. Shultz noted the Board of Governors is working alongside the Kansas Medical Society and other interested parties in drafting the specific language of the bill.

Mr. Shultz reported on 2019 HB 2119, which was signed into law and governs the "corporate practice of medicine." He explained the HCSF Board of Governors had been directed by the bill to have an actuarial study and review how the "corporate practice of medicine" would affect the HCSF. Mr. Shultz reported the agency did provide this report to the Legislature on January 1, 2020. He reported due to the shortened session, this issue was not addressed by the Legislature. Mr. Shultz stated the Board of Governors will be requesting legislation in the 2021 Legislative Session to address two broad concerns with the law and urge its consideration.

Mr. Shultz indicated the HCSF Board of Governors plans to request introduction of a bill addressing technical issues, including the use of the term "health care," and other items during the 2021 Legislative Session. Mr. Shultz reported the Board continues to monitor the resulting impacts of the *Hilburn* decision to see how that might further affect the HCSF.

Mr. Shultz addressed how the agency kept its staff members working safely and responded to the need during the COVID-19 pandemic to be continuously working as emergency orders came in, as temporary licensing was allowed, and how it responded to emerging issues, including telemedicine. He concluded his remarks, noting the HCSF Board of Governors and the HCSF not only serves the 16,426 health care providers, but this mechanism serves the State of Kansas and the citizens of Kansas to provide support in the case of unintended medical outcomes, and it provides coverage options for the health care providers, which keeps them in Kansas.

In response to a question from a Committee member, Mr. Shultz commented on the issue of telemedicine, indicating the Board of Governors is always looking at how trends affect decisions relating to the HCSF and more broadly how the field of medicine and health care is developing. The Executive Director indicated when the Legislature is considering certain issues, the HCSF Board of Governors representatives are there to provide sound, factual information. Mr. Shultz noted when issues arise, they make sure the HCSF is available to serve people and contribute to building a better health care system in the state. He addressed the desire to keep Kansas health care providers in Kansas, and noted the staff and the Board believe keeping liability insurance rates at a level that is more acceptable is one of those components. Mr. Shultz further noted in 2018 *U.S. News and World Report* named Kansas in the top five for the lowest liability insurance rates, and the HCSF plays a significant part in that.

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

Chairperson Hayzlett recognized Kurt Scott, President and Chief Executive Officer, Kansas Medical Mutual Insurance Company (KAMMCO). Mr. Scott highlighted the history of KAMMCO and noted it insures a majority of the physicians in the state (estimated at 1,800 – 2,000), as well as a majority of the hospitals in the state (the conferee noted the number to be 83 community hospitals).

Mr. Scott first addressed how the COVID-19 pandemic has accelerated the application of telehealth across the country and Kansas. He noted KAMMCO, like the HCSF, is studying these issues and starting to gather information from providers in more detail about their level of telehealth activities to better understand what is actually being done, not only by out-of-state providers delivering care to Kansas patients, but also by Kansas providers delivering care to patients in other states.

Mr. Scott indicated the marketplace in Kansas and around the country has benefited from an extremely soft medical malpractice insurance marketplace, meaning there is lots of availability, low pricing, and fairly open terms of coverage. Mr. Scott noted signs of change over the past few years and pointed to a significant turn late last fall. He reported reinsurance companies were beginning to withdraw from that marketplace and are announcing they are withdrawing from the hospital professional liability marketplace. He explained this occurrence as a contraction of the marketplace. The KAMMCO conferee further explained what happens when there are fewer companies, due to those companies having experienced losses or have uncertainties about the environment; pricing starts to increase and terms get more constricted. Mr. Scott indicated COVID-19 has accelerated and exacerbated that process. He reported KAMMCO would soon hold its reinsurance meetings to work on the January 1 renewal products and has already learned fewer companies will offer insurance coverage, pricing is getting more difficult, and some terms are being constricted.

Mr. Scott next addressed adult care facilities, stating KAMMCO insures about a third of the adult care facilities in the state. He noted COVID-19 has hit the adult care facilities particularly hard in terms the effects on the residents, staff, and finances. He indicated the insurance marketplace will soon follow along. The KAMMCO conferee reported companies are beginning to either withdraw or raise pricing in such a way that makes it difficult to continue in that marketplace, and reinsurers are adopting similar practices. Mr. Scott explained companies like KAMMCO have seen signs that the reinsurance industry for long-term care is going to insist on an exclusion for infectious or communicable disease in reinsurance contracts, which would then follow through into underwriting. He noted this is in direct response to the pandemic, and it would be particularly devastating to the adult care community's ability to secure the adequate insurance coverage it needs. Mr. Scott indicated KAMMCO will work with the reinsurance industry to see if the issue can be mitigated. He reported one company in Kansas, the Berkshire Hathaway Company, has already filed such an exclusion with the Commissioner of Insurance. Mr. Scott explained the Commissioner did approve the exclusion for excess or umbrella-type coverage but declined the filed exclusion for the basic coverage that is mandated by the HCPIAA. The KAMMCO conferee further explained the Commissioner said there was no statutory ability in the HCPIAA to be able to exclude that condition from the definition of health care services rendered or failed to be rendered, so the Commissioner disapproved that filing. Mr. Scott explained, in the short term, companies writing primary coverage will be required to provide it, but the reinsurers are simply not going to reinsure it and certainly will not reinsure it for excess or umbrella-type coverage. He noted it is a major issue that insurers are going to face over the next few years. Insurers will deal with that issue in an environment where many of the claims filed against adult care homes will likely be COVID-19-related, *i.e.,* many of the claims will fit squarely inside an exclusion for infectious or communicable disease.

In response to a question from a Committee member, Mr. Scott indicated he has talked with the President of the Kansas Hospital Association (KHA) to discuss concerns hospitals have about the same reinsurance issues that adult care homes have; community hospitals that have swing beds and long-term care beds that are not separate facilities but are licensed underneath that hospital license are especially concerned. Mr. Scott noted this insurance issue does not just

affect providers and hospitals or long-term care facilities; it affects patients and their families. He stated it is not just a statewide issue; it is a nationwide issue.

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

Mr. Scott reported the Availability Plan's number of providers compared to the number last year is not significantly different, with one notable surprise. He indicated at this time in 2019, roughly 8 adult care facilities were insured by the Plan, meaning those facilities could not find insurance in the regular marketplace, and today 20 facilities are insured by the Plan. Mr. Scott stated this is the beginning of what could turn into a crisis. He commented on the growing issues that could lead to a crisis: potential loss of the cap on noneconomic damages; the spread of COVID-19 and a resulting weakened health care delivery mechanism as a result of a two-month shutdown; and an already present hardening in the insurance marketplace that will be accelerated into a more acute problem. Mr. Scott noted these issues will impact long-term care providers first, but hospitals and other entities will likely be impacted soon after.

Mr. Scott stated KAMMCO's claims are down about 16 percent this year. He noted the Kansas Supreme Court, as part of one of the emergency orders of the Governor, has tolled the statute of limitations. He explained law firms possibly do not feel any particular urgency to file those claims because they do not have to contend with any sort of statute of limitations. Mr. Scott further explained this issue will present compression in the future for those claims, which could be problematic for the insurance industry and the HCSF.

In response to a Committee member asking how Kansas compares to its peer states and the environments insurers are dealing with, Mr. Scott noted the Executive Director of the HCSF mentioned Kansas is fifth lowest in terms of costs. Mr. Scott indicated Kansas has enjoyed a stable and effective medical malpractice environment. He discussed noneconomic caps and the resulting uncertainty for tort reform, noting the delay in establishing a *Hilburn* test case for medical malpractice actions. Mr. Scott contrasted the varied experience of the COVID-19 pandemic, highlighting the infection fatality rate difference between New York City and the state of Kansas. Mr. Scott spoke to this mixed environment that has both positive and negative indicators present.

A Committee member compared bed rates for adult care homes in Kansas and other states and commented on primary carriers' notices regarding coverage exclusions and the remaining hope for the professional liability level. The member noted, however, underwriters are asking if Kansas has an immunity provision in law for health care providers. Mr. Scott agreed with the observations and commented on the attempt to place umbrella coverage for a hospital without the immunity provisions. Mr. Scott indicated the experience, from KAMMCO's perspective, was already starting to get a little worse for long-term care facilities' coverage. He

indicated KAMMCO is in the process of finishing its actuarial work, which will likely result in a lower double-digit increase for adult care homes for 2021; he commented COVID-19 will not help those rate indicators. Mr. Scott also commented on the expectation that reinsurers will not cover anything pandemic-related starting January 1, 2021.

A Committee member asked about future implications and the consideration of creating protections and clarifying definitions that include infectious disease. The member and conferee discussed how that might work in the future. Mr. Scott indicated the HCSF is financially healthy, well-run, and has definitions in statute that require the delivery of health care services with very few exceptions. He indicated utilizing the HCSF will help insulate companies like KAMMCO from what other carriers will experience nationwide.

Chairperson Hayzlett next recognized Rachelle Colombo, Executive Director, Kansas Medical Society (KMS) (Attachment 6). Ms. Colombo stated she will also represent the KHA in her remarks concerning the drafting of and interest in proposed changes to the HCSF law (Attachment 7).

Ms. Colombo addressed the purpose of the Committee. She indicated the HCSF is meeting its objective and is meeting its fiduciary duty in that oversight. Ms. Colombo noted the HCSF is performing exactly as it was intended when it was put in place many years ago. Ms. Colombo provided a brief history of the HCSF, indicating although providers could get access to insurance, there still needed to be some legal reforms to make it more affordable in order to maintain that access for patients. She stated the cap on noneconomic damages has been a critical component in achieving affordability and access. Ms. Colombo indicated there is a question about whether the cap still stands for medical malpractice, but until the Kansas Supreme Court clarifies that it does not, the KMS is a proponent of the HCSF, because it is stabilizing the marketplace for medical malpractice insurance.

Ms. Colombo next provided an overview of 2020 SB 493 and described the structural changes that would allow the HCSF to continue to perform in a way that provides adequate coverage. Ms. Colombo indicated KMS and KHA plan to bring forward a similar bill for the 2021 Legislative Session. She stated the associations have been working in conjunction with the HCSF Board of Governors and have thoroughly vetted this subject both with legislative leaders and more broadly with all defined types of health care providers. Ms. Colombo explained the proposed bill removes the provision contained in 2020 SB 493 that would dissolve the HCSF in response to a ruling from the Kansas Supreme Court. Ms. Colombo provided an explanation of the proposed changes: moving from three coverage options to two options, increasing the minimum coverage requirement to $500,000, and allowing up to $2.0 million in excess coverage to be offered as opposed to $1.0 million through the HCSF.

Ms. Colombo indicated KMS believes the Committee should continue operation and does not believe it is necessary to have a secondary independent actuarial analysis. She urged the Committee to consider providing support to these proposed changes and recommending in the Committee’s report to the committee of interest the proposal that will be brought before the Legislature.

In response to a question from a Committee member, Ms. Colombo agreed this proposal would increase the minimum coverage requirement, which is currently $300,000 a claim primary basic coverage plus Option 1 under the HCSF, and increase that to $1.0 million. Ms. Colombo also agreed with the comment regarding 90 percent of those insured by the HCSF currently carry $1.0 million of coverage. Ms. Colombo added the HCSF cannot elect to offer higher limits

without a statutory change, so this legislation would be necessary to allow for that increase in coverage.

A Committee member commented he sees other carriers within the market using a $2.0 million primary limit now. The member further commented, in the past, it was always practice to buy $1.0 million in coverage and also buy some kind of excess or umbrella coverage, so the member believes this change would be very helpful to align with the current practices occurring in the market.

Written-only testimony was provided by:

- Vicki Whitaker, Executive Director, Kansas Association of Osteopathic Medicine (Attachment 8).

Committee Discussion for the Purposes of Determining Conclusions and Recommendations to the 2021 Legislature, and 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 2021 Legislature. Ms. Renick was recognized to summarize issues presented to the Committee and topics that could be highlighted in the report, at the direction of the Committee.

Ms. Renick discussed the two functions unique to the Committee's statutory role: the continuation of the Committee and whether an independent actuarial analysis of the HCSF would be necessary.

The motion was made by Mr. Slaughter and seconded by Representative Helgerson to continue the language that has been previously stated in the Committee report regarding its function and continuance and indicate there is no request for independent review. With no further discussion, the motion carried.

Ms. Renick outlined the following topics for the Committee's consideration:

- Does the Committee wish to comment on the actuarial analysis that was presented and recognize the status of the HCSF? The report would note:
    - The timing of the analysis – provided to the Board of Governors in late February 2020;
    - Decisions made regarding health care provider surcharges in March 2020 and the Committee members' concerns regarding investment yield and the future impact on surcharge, since one is a leveraged on the other; if there is not sufficient investment income, then there is an increased impact on rate level indication for health care providers who submit surcharge funds. Such information could include the rate level indication provided by the actuary (*e.g.,* a 10 percent basis point increase translates to a 1 percent increase indication for surcharge. Based on the present U.S. Treasury rates, 2 percent for the surcharge now could become 12 percent if there is an increase of 100 basis points); and

    - The HCSF's more positive position than at the year-end in 2018 that included increased surcharge revenue and lower reserves on open cases. A comment would be noted on surcharge rate selected by the Board of Governors.
- Comment on the issues associated with the courts and jury trials and timely filing of claims created by the COVID-19 pandemic:
    - Testimony indicated medical malpractice actions will be placed behind the criminal trials that are pending, and it could be well into FY 2021 before the courts are able to hear these claims.
    - A *Hilburn* medical malpractice action could not move forward if those cases are not being heard. (*Note:* The HCSF Board of Governors will continue to monitor the impact of the *Hilburn* decision.)
    - The HCSF Board of Governors and KAMMCO indicated that there seems to be an impact on the number of cases that are also being filed overall.
    - Data on COVID-19 claims to date in adult care homes would also be included in this comment.
- Discussion of the approaching headwinds of a crisis in long-term care and the acceleration of those issues by the COVID-19 pandemic:
    - Already present contraction in the marketplace;
    - The reinsurance coverage exclusions for infectious diseases and other pandemic conditions and the resulting impact on the pricing for primary coverage for long-term care facilities, including hospitals providing long-term care; and
    - The governance of and future for telehealth, in terms of best practices and standard of care and licensure for either Kansas providers providing coverage outside of the state of Kansas or for providers outside of Kansas who would be providing service to Kansas citizens.
- Direction of the Committee's report to designated standing committees (*Note:* Health, insurance, judiciary, and the appropriate budget and subcommittees of the standing committees on appropriations were selected).
- Discussion of the legislative proposals presented by both the HCSF Board of Governors, as well as KMS and KHA:
    - The Board of Governors has discussed the corporate practice of medicine and further defining the criteria associated with business entities, as well as legislation to address technical issues in the HCPIAA; and
    - The changes in the amount of required coverage and the number of offerings in the proposal that is being jointly endorsed by KMS and the KHA.

There was consideration regarding continuing language in the Committee's report:

- Funds to be held in trust. The Committee recommends the continuation of the following language to the Legislative Coordinating Council, 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 SGF. The HCSF provides Kansas doctors, hospitals, and the defined health care providers with individual professional liability coverage. The HCSF is funded by payments made by or on behalf of each individual health care provider. Those payments made to the HCSF by health providers are not a fee. The State shares no responsibility for the liabilities of the HCSF (excepting self-insurance programs reimbursement). Furthermore, as set forth in the HCPIAA, the HCSF is required to be "held in trust in the state treasury and accounted for separately from other state funds"; and
    - Further, this Committee believes the following to be true: all surcharge payments, reimbursements, and other receipts made payable to the HCSF shall be credited to the HCSF. At the end of any fiscal year, all unexpended and unencumbered moneys in such HCSF shall remain therein and not be credited to or transferred to the SGF or to any other fund.

The motion was made by Mr. Slaughter and seconded by Representative Helgerson to incorporate language of the above-mentioned items in the report. With no further discussion, <u>the motion carried</u>.

Adjourn

Chairperson Hayzlett announced he has tendered his resignation from the Committee. He expressed his appreciation of the Committee's support and stated it has been a pleasure working with the Committee. Chairperson Hayzlett 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 4:00 p.m.

Prepared by Randi Walters

Edited by Melissa Renick

Approved by the Committee on:

December 23, 2020
(Date)