

MINUTES

HEALTH CARE STABILIZATION FUND OVERSIGHT COMMITTEE

October 24, 2019
Room 548-S—Statehouse

Members Present

Gary Hayzlett, Chairperson
Senator Barbara Bollier
Senator Gene Suellentrop
Representative Richard Proehl
Darrell Conrade
Dr. James Gleason
Dr. James Rider
Jerry Slaughter

Members Absent

Representative Henry Helgerson
Dr. Dennis Cooley
Dennis George

Staff Present

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

Conferees

Russel Sutter, Actuary, Willis Towers Watson
Rita Noll, Deputy Director and Chief Counsel, Health Care Stabilization Fund Board of Governors
Clark Shultz, Executive Director, Health Care Stabilization Fund Board of Governors
Rachelle Colombo, Director of Government Affairs, Kansas Medical Society; also presenting for Kurt Scott, CEO, Kansas Medical Mutual Insurance Company
Vicki Whitaker, Executive Director, Kansas Association of Osteopathic Medicine

Others Attending

See [Attached List](#).

MORNING SESSION

Welcome and Introductions

Chairperson Gary Hayzlett called the meeting to order at 8:32 a.m. The Chairperson welcomed members and asked them to introduce themselves. Following the introductions, Chairperson Hayzlett recognized Melissa Renick, Kansas Legislative Research Department (KLRD).

Staff Review of Committee Information and Recent Law and State Supreme Court Decision

Ms. Renick presented an overview of resource materials provided to the Committee. She stated the fiscal year (FY) 2020 Appropriations Report and the budget and subcommittee reports prepared by KLRD regarding the budget for the Health Care Stabilization Fund (HCSF) Board of Governors were included in the resource folder. She noted the resource folder also contained the Committee Report to the 2019 Legislature, which includes the recommendations and conclusions the Committee made last year, and a copy of the decision issued by the Kansas Supreme Court regarding *Hilburn v. Enerpipe Ltd.* (No. 112,765). She noted the Office of Revisor of Statutes would present a formal overview of the *Hilburn* opinion.

Ms. Renick referenced a memorandum outlining relevant 2019 legislation and law and interim study topics approved by the Legislative Coordinating Council (LCC) ([Attachment 1](#)). She commented on legislation related to the “corporate practice of medicine” discussed at the meeting last year and indicated the Legislature again considered the topic during the 2019 Session. She provided a summary of 2019 HB 2119, which, among other things, allows a business entity issued a certificate of authorization by the State Board of Healing Arts (BOHA) to employ or contract with one or more licensees of BOHA for the purpose of providing professional services for which such a licensee holds a valid license issued by BOHA. She noted provisions requiring the HCSF Board of Governors to conduct studies to determine the impact on the HCSF and report to the Legislature on or before January 1, 2020.

Ms. Renick next highlighted pending legislation, including HB 2348 and HB 2412. She stated HB 2348 would change the form of the basic professional liability coverage authorized to be written in Kansas or through the Health Care Provider Insurance Availability Act (HCPIAA). She stated HB 2412 would amend the Nurse Practice Act concerning advanced practice registered nurse (APRN) requirements for certification and medical malpractice coverage and also would amend the HCPIAA to include certain APRNs as defined healthcare providers and specify exemptions from this definition.

Ms. Renick next provided the 2019 Interim update and indicated among the actions the LCC approved at its July 2019 meeting was the approval of two study Committees whose authorized meeting topics included the Kansas Supreme Court’s decision in *Hilburn v. Enerpipe, Ltd.* (*Hilburn*): the Special Committee on Financial Institutions and Insurance (impact on healthcare costs in Kansas) and the Special Committee on Judiciary (recent Supreme Court decisions). She noted also included in the resources folder is KLRD’s analysis that was presented to the Special Committee on Financial Institutions and Insurance to address *Hilburn*.

Chairperson Hayzlett recognized Scott Abbott, Office of the Revisor of Statutes, to summarize *Hilburn* ([Attachment 2](#)). He indicated the Kansas Supreme Court issued an opinion holding that the cap on noneconomic damages found in Kansas law (KSA 60-19a02) is facially unconstitutional because it violates Section 5 of the *Kansas Constitution* Bill of Rights (the right of trial by jury). He provided a factual and procedural background for the case, indicating Enerpipe admitted its truck driver's negligence, conceded its vicarious liability, and went to trial on damages. The district court reduced the judgment for noneconomic damages to \$250,000 pursuant to the noneconomic damages limitation in effect at the time of the verdict, pursuant to KSA 60-1902(d).

Mr. Abbott noted the decision of the Court was split; Justice Beier authored the lead opinion and was joined by Justice Rosen and Justice Johnson. Justice Stegall wrote a concurring opinion and agreed KSA 60-19a02 is facially unconstitutional. Justice Luckert dissented and was joined by Justice Biles; Chief Justice Nuss did not participate. He indicated the Court had acknowledged the two-part due process-based *quid pro quo* test in *Miller v. Johnson* (2012), but the Court found the *Miller* holding should not be followed, leading the Court to "abandon the *quid pro quo* test for analyzing whether the noneconomic damages cap is unconstitutional under section 5. . ." He noted of interest in the concurring opinion, Justice Stegall agreed the statute was facially unconstitutional, but left open the possibility the Legislature could achieve that policy goal of limiting damages in these cases in a more specific and different manner, stating in the opinion: "The Legislature remains free—within the bounds of section 18—to limit or otherwise modify the common law cause of action for damages. But it must do so clearly and straightforwardly." (*Note*: Section 18, common law right to remedy.)

In response to a Committee member's question, Mr. Abbott indicated the statute that was struck down as unconstitutional is a noneconomic damages cap on all personal injury and wrongful death actions in the state. A Committee member inquired about a press release the Supreme Court issued concurrent with the releasing of the opinion, stating the Court was striking down the cap except in medical malpractice cases. Mr. Abbott clarified the statute does apply to all the cases and further indicated it is unclear, without further litigation and clarification by the Supreme Court in the specific arena of medical malpractice, how the Court might apply the new test they have laid out in that specific context. In response to a Committee member's question whether the Supreme Court has indicated they would further address these issues, Mr. Abbott indicated he was not aware of any such effort, but he would look into it.

Health Care Stabilization Fund Board of Governors' Staff and Actuary Reports, 2018-2019

Chairperson Hayzlett next recognized Russ Sutter, Actuary, Willis Towers Watson, to provide an actuarial report. The presentation was based on the review of HCSF data as of December 31, 2018, and is an addendum to the report to the Board of Governors dated May 13, 2019 ([Attachment 3](#)).

Mr. Sutter presented conclusions indicating 2018 was a "bad year" for the HCSF in many categories. He explained the agency needed to make transfers from the HCSF to the Availability Plan (\$552,000), the investment returns for the HCSF continued to decline, surcharge revenue in 2018 was down 4 percent from 2017 (expecting 2 percent decline), and the loss experience in 2018 was at a much higher level than seen in recent years and beyond what was anticipated. He stated the conclusion was the HCSF's financial position, while still fine, was not as strong as believed to be one year ago. Based on these conclusions, it was suggested the HCSF Board of Governors consider rate changes. He noted all of these conclusions were made prior to the June 2019 *Hilburn* decision.

Mr. Sutter addressed forecasts of the HCSF's position at June 30, 2019, and June 30, 2020, based on the company's annual review, along with the prior estimate for June 2019. Last year, the estimate of the HCSF held assets as of June 30, 2019, was \$296.93 million, liabilities of \$249.26 million, with \$47.67 million in reserve (2018 Study). As of June 30, 2019, the HCSF held assets of \$291.03 million, liabilities of \$260.10 million, with \$30.92 in reserve. The projection for June 30, 2020, is as follows: assets of \$289.86 million, liabilities of \$263.20 million, with \$26.66 million in reserve. He noted, based on the analysis provided to the Board of Governors, the HCSF needs to raise its surcharge rates by 15 percent for calendar year (CY) 2020 in order to maintain its unassigned reserves at the expected year-end CY 2019 level (estimated \$30 million). He discussed the comparable actuarial analysis for the New Mexico Patient Compensation Fund, indicating it is a smaller fund than the Kansas HCSF, with liabilities of about \$140 million, but more importantly assets of only \$90 million. The actuary also commented while the financial position of the HCSF is not as strong as thought a year ago, it still has a positive unassigned reserves.

Mr. Sutter drew attention to page 5 of his written testimony, noting the first bullet point is a misstatement, explaining this was a holdover from a presentation in which the assumption was no change in the HCSF surcharge rates. The actuary explained the forecasts of unassigned reserves assume an estimated surcharge revenue in FY 2020 of \$28.3 million, a 2.25 percent interest rate for estimating the tail liabilities on a present value basis, a 2.95 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 an increase in rates for CY 2020 ranging from 5 percent to 10 percent. The Board of Governors opted to raise rates 6 percent effective January 1, 2020. (*Note: The actuary clarified the assumption regarding changes in law would no longer be correct, given the status of Hilburn.*)

Mr. Sutter next reviewed the HCSF's liabilities as of June 30, 2019. The liabilities highlighted included claims made against active providers as \$85.7 million; associated defense costs as \$15.6 million; claims against inactive providers, as known on June 30, 2019, as \$10.1 million; tail liability of inactive providers as \$139.5 million; future payments as \$12.0 million; claims handling as \$9.0 million; and other, described as mainly plaintiff verdicts on appeals, as \$0.2 million. Total gross liabilities were \$272.1 million; the HCSF is reimbursed \$12.0 million for the KU/WCGME programs, for a final net liability of \$260.1 million.

Mr. Sutter reviewed the HCSF's (surcharge) rate level indications for CY 2020, noting the indications assume a break-even target. He highlighted payments, with settlements and defense costs of \$36,893,000; change in liabilities of \$2,442,000; administrative expenses \$1,810,000; and transfers to the Availability Plan and the Kansas Department of Health and Environment are assumed to be \$200,000 (the indication generally assumes no Availability Plan transfer); in total, the cost for the HCSF to "break-even" is \$41,346,000. He stated the HCSF has two sources of revenue: its investment income (assumption of \$8,428,000 based on 2.95 percent yield on those assets); and surcharge payments from providers (\$32,918,000 needed to break-even)). He explained the projected surcharge revenue of \$28,524,000 would not meet the break-even scenario. He explained the rate-level indication and indicated the need to raise its rates an estimated 15.4 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 2018. He pointed out CY 2018 active providers had both elevated payments on settlements and expenses with the year-end loss reserves up, as well as a higher number of open claims. He noted this was significant and estimates of total HCSF

costs had to be adjusted accordingly. He indicated that, beginning in 2017, there was a significant increase in the cost of settlements with more claims being resolved for seven- and eight-figures than three or four years ago. He stated this experience is not inconsistent with what is being seen across the country. He next discussed the inactive providers, indicating in CY 2018, the payment of expenses and the year-end loss reserves were up slightly. He highlighted trends in the HCSF loss experience for active and inactive providers by program year. He noted active providers from 2005 to 2015 was fairly stable with no obvious upward trends or inflation in the cost per provider. He pointed out starting with 2016, his company had to move the numbers up from last year with it continuing to escalate with 2017 and 2018. He indicated concern there is a little more inflation in the business than thought just a year ago.

A Committee member referred to the graph on Trends in HCSF Loss Experience—Active Providers regarding the 2018 program year study in comparison to the 2019 study. The member asked if that was an idea of what the ultimate losses were on existing claims; and then in 2019 after taking another look, the losses were greater than anticipated indicating the trend seems to be the gap is growing. Mr. Sutter indicated that was correct, in hindsight the numbers were too low with the 2018 study, and the numbers had to be raised to what they thought the future is going to be as a consequence. In response to an additional question regarding whether it is the number of claims or the size of claims driving that, Mr. Sutter responded they do not believe it is the sheer number of claims, but rather the frequency of severity. He explained it is the cost of these larger claims being far beyond what was reasonably anticipated back in 2016.

A Committee member inquired whether the actuary was looking at higher claims from a medical perspective and the kinds of claims. Mr. Sutter listed some of the conclusions were a more well-financed plaintiff's bar on some of the bigger cases, more significant life-care plans, issues with opioids, and punitive damages being much more frequent and higher. He indicated his theory that the environment is one that is more willing to 'punish', for lack of a better word, the providers than they were five or ten years ago.

In response to a question from a Committee member regarding tail coverage and why there is no surcharge for certain individuals (years of compliance), Mr. Sutter indicated that was a legislative decision made five years ago.

In response to questions regarding claims activity, Mr. Sutter indicated:

- It is not from one particular sector of providers, it has been all across the sectors seeing misdiagnosis, birth issues, and issues on what were thought as lower-risk providers;
- Based on his experience and what he hears from his colleagues, it is the same experience across the country; and
- One theory, in terms of what is contributing to this escalation that many of his colleagues hold, is the greater employment of physicians by health systems as opposed to being independent practitioners. He indicated he is not sure he believes this theory yet, but it has been a significant change over the last ten years in terms of how many physicians are independent versus employed by a large health system. Responding to a Committee member's inquiry, he agreed this is the "deep pocket" theory.

A Committee member commented that obstetricians are not the most sued group any longer; some of the other groups, neurosurgeons especially, have had an increase in lawsuits.

Mr. Sutter next reported on the HCSF's investment yield over the last eight years, indicating it continues to have a gradual decline. He indicated his company lowered its assumed future yield rate from 3.05 percent in the 2018 study to 2.95 percent. He spoke to the leveraged effect of the lowered investment income assumption, noting if the Fund was earning 4.0 percent instead of 3.0 percent; this would be an equivalent of a 10-basis point change in the surcharge rate.

A Committee member asked whether other states are seeing the same diminishment. Mr. Sutter indicated he was not familiar with whether they have the same dedicated assets and cited the New Mexico example where they do have dedicated assets and are seeing a diminishing return and more importantly they do not have the assets to cover the liability as it is. The Committee member asked whether this is a reflection on the overall economy. Mr. Sutter noted he believes it is a reflection and discussed the U.S. Treasury 10-year note, indicating it has seen a similar pattern.

In response to a question from a Committee member regarding the effective yield for 2019 as 2.67 percent, and the rate level indication for CY 2020 of 2.95 percent return, Mr. Sutter explained the company thought it made sense throughout their analysis to take more of a longer-term perspective given that these claims are going to be paid out over a number of years. He further explained they had been bringing it down, but not as fast as the actual HCSF investment performance has come down.

Mr. Sutter provided an overview regarding indications by provider class. He explained every year his company evaluates the experience by class to minimize subsidization from one class to another. He indicated from an actuarial perspective, they would like each provider class to stand on its own so that no class is obviously subsidized by another class. The report states the analysis of experience by HCSF class continues to show differences in relative loss experience among classes. He explained this is something they present to the Board of Governors every year for its consideration. He indicated they were pleased to see the number of classes in the middle column (increase or decrease less than 13 percent) has been growing over time as the HCSF has taken rate action both positively and negatively on some of the classes that have been undercharged or overcharged. He also provided a history of surcharge rate changes since 2007.

Mr. Sutter next provided an overview of the three options for CY 2020 surcharge rates that were provided to the Board of Governors. He highlighted the Board of Governors' decision to implement Option 1 for its 2020 rates, which, beginning on January 1, 2020, almost every provider would pay an additional 6 percent. He commented that this was the first year, in some time, that there was not an option to "do nothing." He further explained there may be a compounding impact for those in Classes 15-24 if their underlying basic coverage premium is also being increased. (*Note:* These classes include Availability Plan insureds, medical care facilities, physician assistants, nurse midwives, and nursing facilities.)

In response to a Committee member's question, Mr. Sutter indicated the class definition rate structure is not dependent on volume of patients or services provided, it is determined by status as a full-time practicing physician.

A Committee member inquired if the surcharge revenue was short in February 2019 because of the timing issue mentioned in earlier testimony and if that impacted any of the

analysis that was made later. Mr. Sutter explained the revenue in the second half of the fiscal year did come in better than was expected likely due to a timing issue, and it did not impact any of the analysis. A Committee member inquired about the different surcharge rate percentage increases that have been referenced. Mr. Sutter indicated 15 percent is what is needed for the HCSF to maintain its unassigned reserves at the same level, but his company did not think there was a sense of urgency to do that; therefore, they gave the Board of Governors three options to consider ranging from 6 percent to 11 percent increases. The Committee member further inquired on what is going to improve in the next year or two that makes this enough compared to the 15 percent that was recommended. Mr. Sutter indicated there would likely be another rate increase needed, such as five percent, when this analysis is done in February 2020.

Chairperson Hayzlett next recognized Rita Noll, Deputy Director and Chief Counsel, HCSF Board of Governors, to address the FY 2019 medical professional liability experience (based on all claims resolved in FY 2019 including judgments and settlements) ([Attachment 4](#)).

Ms. Noll began her presentation by noting jury verdicts. There were 10 medical malpractice cases involving 14 Kansas health care providers tried to juries during FY 2019, 9 were tried in Kansas courts and 1 case involving Kansas health care providers was tried in a Missouri court. The trials were held in the following jurisdictions: Sedgwick County (4); Johnson County (2); Shawnee County (1), Ellis County (1); Ottawa County (1); and Jackson County, Missouri (1). Of the 10 cases tried, 9 resulted in complete defense verdicts and 1 case resulted in a mistrial. She noted FY 2019's 10 jury trials involving Kansas health care providers broke last year's record of the fewest number of cases that went to trial. She highlighted the possible reasons for the decrease in the number of cases that are going to trial. She further commented on trials, indicating smaller damages cases tend to be the ones that go to trial, but the expense of going to trial keeps increasing; the potential for larger jury verdicts increases as economic damages could exceed the HCSF's coverage; and there is growing pressure put on insurance carriers to settle a case for the cost of defense rather than go to trial.

Ms. Noll highlighted the claims settled by the HCSF, noting in FY 2019, 74 claims in 61 cases were settled involving HCSF moneys. Settlement amounts incurred by the HCSF totaled \$23,407,875 (these figures do not include settlement contributions by primary or excess insurance carriers). She noted the FY 2019 data represents one more settlement than the previous year, but incurred about \$800,000 less. She addressed severity of claims noting of the 74 claims, 11 cases fell into the top category of settlement of \$600,000 or more. She indicated FY 2019 was similar to FY 2018 with the same number of large number of settlements. Of the 74 claims involving HCSF moneys, the HCSF incurred \$23,407,875; the primary insurance carriers contributed \$11,797,022 to these claims. In addition, excess insurance carriers provided coverage for one claim for a total of \$550,000. For these 74 claims involving the HCSF, the total settlement amount was \$35,754,897. Further testimony also indicated, in addition to the settlements involving HCSF contributions, the HCSF was notified that primary insurance carriers settled an additional 120 claims in 107 cases. The total amount of these reported settlements was \$8,779,783. Her testimony also included a historical report of HCSF total settlements and verdicts, FY 1977 to FY 2019. She indicated for FY 2019, the HCSF incurred \$23,407,875 in 74 claim settlements with no verdict amounts this year.

Ms. Noll indicated there were 323 new cases during FY 2019. She noted since FY 2016, there has been an increase in the number of new claims. She indicated that was to be expected due to the 2014 law that added five categories of health care providers to the HCSF; physician assistants, nurse midwives, nursing facilities, assisted living facilities, and residential health care facilities. She reviewed the number of claims against the new health care providers, and

indicated this increase in the number of new cases is due to those new health care providers that have been added to the HCSF.

In answer to a question by the Committee, Ms. Noll indicated these are claims made, not occurrence-based coverages.

Ms. Noll next addressed the self-insurance programs and reimbursement for KU Foundations and Faculty and residents. She stated the FY 2019 KU Foundations and Faculty program incurred \$2,761,718.05 in attorney fees, expenses, and settlements; \$500,000 came from the Private Practice Reserve Fund and \$2,261,718.05 came from the State General Fund (SGF). She indicated this was a little over \$1.0 million more than FY 2018 due to the number of settlements, noting there were 12 settlements involving full-time faculty members as compared to 4 in FY 2018. She noted the number of pending claims against full-time faculty members has remained fairly constant through the last several years.

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 2019 was \$1,877,296.97 which was about \$250,000 more than the previous year. Ms. Noll pointed out there were five settlements in FY 2019 with 12 pending claims against residents. She noted attorney fees and expenses for the residents in training was \$1,052,296.97, indicating that is more than the attorney fees and expenses for the foundations and faculty. She explained recently there was a case in Wichita involving several defendants, including one resident. She reported that after almost six weeks in trial, the plaintiffs dismissed the resident. She indicated there was no judgment against the resident, but it is expensive to try these cases.

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 indicated the ten-year average for the faculty and foundations self-insurance programs is about \$1.8 million, making FY 2019 an above-average year. For the residency program, the ten-year average is about \$1.0 million a year, so FY 2019 saw another substantial increase. She provided information about moneys paid by the HCSF as an excess carrier. She reported FY 2019 had three claims involving residents where the claim was greater than \$200,000 involving HCSF coverage for \$622,500; and for the faculty members, there were six claims in FY 2019 that exceeded the \$200,000 primary coverage limit for \$2,110,000.

In response to a question from a Committee member, Ms. Noll indicated there are two foundations, University of Kansas Physicians, Inc. (UKP), and Wichita Medical Practice. She explained the three criteria to be eligible as a member of the self-insurance program: they have to be a member of the foundation; they have to be employed by the University of Kansas Medical Center (*i.e.* the State of Kansas); and they must have a full-time faculty appointment. She indicated when the University of Kansas took over St. Francis, there were six members of the staff at St. Francis Hospital in Topeka who were qualified to be in the foundation under the self-insurance program. She stated she was not aware of any physicians in the Great Bend or Hays' facilities that qualify under the criteria for self-insurance.

A Committee member commented that the cost of the defense is expensive, but actually we need to defend more to deter others.

In response to a question from a Committee member regarding the impact of adding the new healthcare providers to the HCSF, Mr. Sutter indicated it is still early, but it is not obviously positive or negative. Ms. Noll noted there was one large policy limits claim against a nurse midwife several years ago, and she is surprised they have not seen more claims against the

physician assistants. Ms. Noll indicated from 2015 to 2019, there were 134 suits against these new health care providers; 39 of these cases were resolved and were settled within the primary limits; 6 settlements involving HCSF; 65 claims still pending; and 24 were dismissed. A Committee member commented regarding the physician assistants and the nurse practitioners, stating the physician assistants are more tethered to the physicians than the nurse practitioners and that may be why there are fewer cases.

Chairperson Hayzlett recognized Clark Shultz, Executive Director, HCSF Board of Governors ([Attachment 5](#)). Mr. Shultz began by thanking the Committee and acknowledging members of the Board of Governors present at the meeting. Mr. Shultz next introduced himself and two staff members: Lise Ullery, Chief Financial Officer, and Lorie Anderson, Director of Compliance.

Mr. Shultz provided a brief history of the HCSF law and its governance and explained when the law was passed in 1976, it had three main functions: 1) a requirement that all health care providers, as defined in KSA 40-3401, maintain professional liability insurance coverage; 2) creation of a joint underwriting association, the "Health Care Provider Insurance Availability Plan," to provide professional liability coverage for those health care providers who cannot purchase coverage in the commercial insurance market; and 3) creation of the HCSF to (a) provide excess coverage above the primary coverage purchased by health care providers, and (b) 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, 2019). The FY 2019 report indicated net premium surcharge revenue collections amount to \$28,896,286. The report indicated the lowest surcharge rate for a health care professional was \$100 (for a first-year provider selecting the lowest coverage option) and the highest surcharge rate was \$17,336 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 \$22,537 for this health care practitioner. The report detailed the medical professional liability cases. The average compensation per settlement (61 cases involving 74 claims were settled) was \$316,323. 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 2019 and total claims paid during the fiscal year amounted to \$28,918,065. The statutory report also provided the balance sheet, as of June 30, 2019, indicating total assets of \$294,148,935 and total liabilities amounting to \$254,631,909. He commented that information regarding the Availability Plan also was made available in his written testimony.

Mr. Shultz provided an update of 2019 HB 2119 and its provisions relating to what is commonly known as the "corporate practice of medicine." He explained the new law would allow certain business entities to apply for a certificate from the BOHA authorizing the business to employ physicians, chiropractors, and certain other health care providers for the purposes of providing professional services. He indicated during the legislative session, the Board of Governors expressed concerns regarding the impact the new law would have on the actuarial stability of the HCSF, on pricing and claims exposure. He stated the Legislature required in the bill that the HCSF report to the Legislature by January 1, 2020, on what that impact would be. He indicated there are two broad concerns the HCSF Board of Governors has regarding the bill: 1) the law, as passed, does not require the authorized business entities to participate in the HCSF. They are not, in present law, defined as a healthcare provider, so language would need to be passed into law for this participation to occur; and 2) the new law needs to clearly define

the three types of business entities to avoid any unintended consequences related to liability for services delivered out of the state by an entity with locations outside of Kansas. He indicated the revisors are working on some language, that he would present to the Board of Governors at its November 2019 meeting. The Board of Governors would review that language and would express its opinion and that would inform what goes into the report to the Legislature. He requested the Committee consider expressing that these two items are of concern and encourage the Legislature to take action at the appropriate time in its own report.

In response to questions from a Committee member regarding actuarial experience with the new business entities, Mr. Shultz indicated the Board is of the belief it would create an additional classification to be included into the HCSF. They would set an appropriate surcharge and then monitor it just as with any classification. He noted the bigger concern is the potential for unintended consequences, such as finding the HCSF involved in something that happens out of state by a corporation that has clinics somewhere else. He further indicated they would offer the same limits of coverage within the plan.

Mr. Shultz next addressed the *Hilburn* decision and the press release that was handed down the same day as the decision. He indicated the press release used the words “struck down the statutory noneconomic damages cap in personal injury cases other than medical malpractice.” He indicated they do not know how it would impact medical malpractice cases or the HCSF, or how the Legislature may choose to react to the Supreme Court decision, so the Board is watching the issue very closely. He stated he believes the HCSF has been a very successful agency that plays a vital role in helping health care providers with the ability of providing health care in Kansas; and, it also is helpful when there are unintended medical outcomes that the citizens of Kansas have adequate recourse.

In answer to questions from a Committee member regarding the business entities in 2019 HB 2119, Mr. Shultz indicated if these entities had a professional liability policy already, that would likely be considered their base policy, but they would still need to be participating in the HCSF. He clarified the business entity itself, not just the health care professionals they employ, would need to participate in the HCSF. He then compared business entities to a partnership of physicians who opened a clinic, hospitals, and others entities who are required to participate in the HCSF, and indicated that business entities would be put into the same category as these other entities providing medical services.

In response to a question from a Committee member, Ms. Noll indicated if an individual became a defined health care provider, as the statutes are written, the individual would be required to have primary coverage and participate in the HCSF. She noted if those entities are made defined health care providers, they would have to have primary coverage. She explained the insurance they already have may or may not qualify, because if you are participating in the HCSF, you have to have insurance from an admitted insurance carrier in Kansas, it must be a claims-made policy not occurrence-based; and, the HCSF coverage by law would be excess of whatever applicable coverage that policy met.

A Committee member inquired about potential downsides to including these businesses, such as an increase in claims potentially due to the “deep pockets” theory. Mr. Shultz indicated he believes the statute is workable and the consensus from the HCSF is that these entities should be included and participate in the HCSF.

In response to a question from a Committee member, Mr. Shultz indicated the BOHA would have information regarding the number of physicians employed by the entities.

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 next recognized Rachele Colombo, Director of Government Affairs, Kansas Medical Society (KMS) ([Attachment 6](#)). Ms. Colombo began by speaking on behalf of Kurt Scott, CEO, Kansas Medical Mutual Insurance Company (KaMMCO) who could not attend ([Attachment 7](#)).

Ms. Colombo provided an overview of market conditions, stating Kansas continues to have a healthy competitive market for medical professional liability insurance for all types of health care providers. She indicated the industry is well capitalized, but annual operating results from the medical professional liability insurance line of business continue to deteriorate. She further described the medical professional liability insurance market conditions and also highlighted recent claims in Kansas. She discussed the *Hilburn* decision, indicating it is difficult to predict how quickly that impact will be felt and how high premiums will go up as a result. She noted that Mr. Scott attached to his testimony a copy of his testimony for the interim Special Committee on Judiciary, where he gave an analysis of the *Hilburn* decision and how it might impact medical malpractice. This testimony also included a copy of the Supreme Court press release.

Ms. Colombo discussed how the HCSF and the cap on noneconomic damages go hand-in-hand. She stated, previously in upholding the cap on noneconomic damages, it is the HCSF that was the basis for that decision as being the adequate *quid pro quo* that was established that ensures the constitutionality of the cap. She indicated KMS still believes that to be true, the HCSF serves an extremely important role in stabilizing the marketplace, and the continuation of the HCSF is extremely important. She concluded the testimony for Mr. Scott, indicating the market is changing, they do expect increases in premiums, and they do not know how much or how soon. She indicated it is going to take time and experience to see how all of these different factors including the change in the capitalization of the reinsurance market, the impacts of *Hilburn*, and the increase in the number of high severity claims compounded are going to create upward pressure on premiums and the affordability of coverage for health care providers.

Ms. Colombo next addressed the Committee on behalf of the KMS, indicating KMS believes the HCSF Oversight Committee should continue and do not believe that there is a need for another independent actuarial analysis. She urged the continuation of the HCSF Oversight Committee for another year. She stated her appreciation for the Committee discussion about the corporate practice of medicine bill, which would introduce a new body of providers into the HCSF. She indicated KMS believes it is important to protect the soundness of the HCSF, and as those new provider types are added in, it will be important they cover the cost of their own claims. She stated it is going to take some experience to know what that means and the “deep pockets” theory is a concern, but they believe it is appropriate for them to participate in the HCSF. She further indicated the entity itself should carry coverage the same way all medical individual providers do, so they are not just exposing the physicians that they employ to the cost of that coverage. She stated KMS would appreciate the Committee’s support of that in its report.

Vicki Whitaker, Executive Director, Kansas Association of Osteopathic Medicine (KAOM), indicated KAOM agrees with everything that KaMMCO and KMS stated in their testimony ([Attachment 8](#)). She stated KAOM supports the HCSF Oversight Committee, the

HCSF and its recommendations, and for those business entities also having to participate in the HCSF.

Written-only testimony was provided by:

- Chad Austin, Senior Vice President, Government Relations, Kansas Hospital Association ([Attachment 9](#)).

Discussion of Proposed Amendments to the Health Care Provider Insurance Availability Act

The Chairperson asked for any proposed amendments to the HCPIAA. A Committee member noted Mr. Shultz reported that prior to the start of the 2020 Legislative Session, the Board of Governors is making a report to the Legislature on the amendments that are going to be required to follow 2019 HB 2119. The Committee member indicated no other amendments need to be made to the HCSF law, although since the HCSF law may be opened up, this might be an opportunity to make a technical change of whether “health care” is one word or two to make it consistent.

Further discussion included questions from the Committee:

- Regarding surcharge rates for different sizes of professional corporations in Class 16, Mr. Sutter stated they are on a percentage of the underlying premium basis, so in theory the larger practices would be paying a higher basic coverage premium and would translate to a higher surcharge paid to the HCSF. The Committee member asked a follow-up question whether the corporations that are employing physicians would also pay in a similar manner. Mr. Sutter indicated that initially his recommendation to the Board of Governors would be that they pay as a percentage of their basic coverage premium; and
- Regarding if hospitals pay different rates based on types of cases they handle, Mr. Sutter indicated these facilities also pay as a percentage of their basic coverage premium. He further explained to the extent that a hospital is a small critical access only facility, they would be paying a small basic coverage premium and therefore a small surcharge as opposed to a large tertiary care metropolitan area hospital.

Committee Discussion and Recommendations for the Committee Report to the 2020 Legislature

Chairperson Hayzlett invited the Committee discussion for the purpose of reaching conclusions and making recommendations to the 2020 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 HCSF Oversight Committee, and whether an independent actuarial analysis of the HCSF would be necessary.

The motion was made by Mr. Slaughter and seconded by Representative Proehl to continue the language that has been previously stated in its report regarding its function and continuance and that 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:

- Reflecting the comments that were made both by the Executive Director of the Board of Governors and by the KaMMCO representative:
 - Continuation of language stated in the prior year report regarding the vital role and the relationship between the Board, the health care providers, the HCSF itself, and the Legislature, as well as the comment regarding the HCSF being a stabilizing force in the marketplace;
- If the Committee wishes to comment on the actuarial analysis that was presented and recognize the state of the HCSF's health:
 - Reflecting some of the comments from the actuary regarding the 2018 experience and some of those factors that led to the recommendation for increased surcharge rates. Comment could include some of the analysis that was presented from 2015 to 2018 regarding the increasing reserves and open claims that has also lead to some more inflation in the path for those active health care providers also the frequency of severity; and
 - The nationwide costs to resolve medical malpractice claims on health care providers has been increasing and there is a great deal of pressure. Also the lowering of the investment income while increased assets, there is still that lowering so that affects the leverage of the surcharge;
- An item cited by KaMMCO, which are the signs of strain, the increased pricing for medical professional liability insurance, highlighting the frequency of high-severity claims and reinsurance capacity issues;
- *Hilburn* and its uncertainty and the impact on the HCSF and on medical malpractice, as well as whether cases will come forward regarding medical malpractice and not personal injury;
- The issue addressed by the Board of Governors' representatives and its 2019 HB 2119 study and concerns and recommendations that they are discussing among the Board for a participation requirement in the HCSF and clarity on the definitions for the three types of business entities to avoid unintended consequences as well as consideration of the technical cleanup of the term healthcare; and
- Direct the Committee's report to certain standing committees (*Note: Health, insurance, judiciary, and the appropriate budget and subcommittees of the standing committees on appropriations were selected*).

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

- **Funds to be held in trust.** The Committee recommends the continuation of the following language to the LCC, 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. 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 Jerry Slaughter and seconded by Dr. Rider to incorporate language of the above-mentioned items in the report. With no further discussions, the motion carried.

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 10:44 a.m.

Prepared by Randi Walters

Edited by Melissa Renick and Matthew Moore

Approved by the Committee on:

December 27, 2019

(Date)