MINUTES

HEALTH CARE STABILIZATION FUND OVERSIGHT COMMITTEE

November 16, 2021
Room 112-N—Statehouse

Members Present

Marvin Kleeb, Chairperson
Senator Cindy Holscher
Senator Gene Suellentrop
Representative Henry Helgerson
Representative Richard Proehl
Darrell Conrade
Douglas Gleason, MD
Jerry Slaughter
Kevin McFarland

Members Absent

Dennis George
James Rider, DO

Staff Present

Melissa Renick, Kansas Legislative Research Department
Martin de Boer, Kansas Legislative Research Department
Scott Abbott, Office of Revisor of Statutes
Eileen Ma, Office of Revisor of Statutes
Jenna Moyer, Office of Revisor of Statutes
Randi Walters, Committee Assistant

Conferees

Russel L. 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
Kurt Scott, President and Chief Executive Officer, Kansas Medical Mutual Insurance Company
Rachelle Colombo, Executive Director, Kansas Medical Society
Kendra Wyatt, CEO, New Birth Company
Cathy Gordon, Consultant
Rebecca Williams, Account Executive, HUB International Mid-America

Others Attending

See Attached List

MORNING SESSION

Welcome and Introductions

Chairperson Kleeb called the meeting to order at 8:32 a.m. The Chairperson welcomed members of the Health Care Stabilization Fund Oversight Committee (Committee). It was announced that one conferee as well as two Committee members, Senators Holscher and Suellentrop, would participate virtually. Chairperson Kleeb next recognized Melissa Renick, Kansas Legislative Research Department (KLRD). Ms. Renick announced the meeting is being broadcast on the Legislature's audio and video streams and its YouTube channel. Ms. Renick stated the agenda and meeting testimony are available on the Committee's webpage on the Legislature's website.

Staff Review of Committee Information and Recent 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 KLRD FY 2022 Appropriations Report and the Committee Report to the 2021 Legislature. Ms. Renick noted the Committee Report includes the conclusions and recommendations the Committee submitted in its annual report.

Ms. Renick next referenced a memorandum with information regarding 2021 House Sub. for SB 78. (Attachment 1) Ms. Renick explained the bill included amendments to the Health Care Provider Insurance Availability Act (HCPIAA) contained in a larger insurance subject-related bill passed by the 2021 Legislature. Ms. Renick indicated those changes address the professional liability insurance coverage options for defined healthcare providers, the liability of the Health Care Stabilization Fund (HCSF) as both an agency and a fund, and membership of the HCSF Board of Governors. Ms. Renick highlighted similar legislation, 2020 SB 493, that the Committee had considered and reviewed last year. Ms. Renick noted the Governor approved House Sub. for SB 78, and the bill became law effective July 1, 2021. Ms. Renick next summarized the provisions pertaining to HCPIAA amendments in the bill.

Chairperson Kleeb recognized Jenna Moyer, Office of Revisor of Statutes, to provide an overview of the 2021 Legislative Session changes to the practice of telemedicine. (Attachment 2) Ms. Moyer first discussed SB 283, which amended KSA 48-963 to allow an out-of-state physician to treat Kansas patients via telemedicine if that physician holds a temporary emergency license that is granted by the State Board of Healing Arts pursuant to the authorization in KSA 48-965. Ms. Moyer highlighted the provisions of SB 283 relating to the practice of telemedicine by out-of-state practitioners. Ms. Moyer stated the changes made to KSA 48-963 and KSA 48-965 were signed into law on April 1, 2021, and are set to expire on March 31, 2022. Ms. Moyer next discussed Senate Sub. for HB 2208, stating Section 10 of the bill allows an out-of-state physician to treat Kansas patients via telemedicine upon receipt of a telemedicine waiver issued by the State Board of Healing Arts. Ms. Moyer noted one key distinguishing factor between Senate Sub. for HB 2208 and SB 283 is the provisions in HB 2208 are not tied to the COVID-19 pandemic and are not set to expire.

Presentation of Actuary Reports and Health Care Stabilization Fund Board of Governors' Staff Reports, 2020-2021

Actuary Report

Chairperson Kleeb next recognized Russel Sutter, Actuary, Willis Towers Watson, appearing via Webex, to provide an actuarial report. The presentation was based on the review of HCSF data as of December 31, 2020. (Attachment 3)

Mr. Sutter first addressed overall conclusions, indicating the HCSF's results in calendar year (CY) 2020 were "mixed." He explained that surcharge revenue came in a little higher than anticipated but, on the negative side, reserves on the open claims at year-end 2020 were much higher than at year-end 2019. Mr. Sutter noted some of this impact on reserves is related to much lower payments in 2020 compared to the 2019 experience, which may be due to the shutdown in the claims settlement process due to the COVID-19 pandemic. Mr. Sutter explained that, if claims are not being paid out, the reserves will naturally be higher at year-end because new claims are coming in without other claims getting resolved and paid. Mr. Sutter stated the investment yield seems to have flattened out in the mid to high 2 percent range. Mr. Sutter indicated as a result of all of these factors, the HCSF's financial position at June 30, 2021, was a little worse than the company had forecasted and presented to the Committee one year ago.

Mr. Sutter addressed forecasts of the HCSF's position at June 30, 2021, based on the company's annual review, along with the prior estimate for June 2021. Last year, the estimate of the HCSF-held assets as of June 30, 2021, was $302.68 million, with liabilities of $261.34 million, and with $41.34 million in reserve (2020 Study). As of June 30, 2021, the HCSF held assets of $303.34 million, liabilities of $264.71 million, and $38.62 million in reserve. Mr. Sutter noted, based on the analysis provided to the Health Care Stabilization Fund Board of Governors (Board of Governors), the HCSF needs to raise its surcharge rates by 3.3 percent for CY 2022 in order to maintain its unassigned reserves at the expected year-end CY 2021 level (estimated $39 million). Mr. Sutter explained it was a slightly worse financial position than what was thought when making this presentation in 2020.

Mr. Sutter reviewed the HCSF's liabilities as of June 30, 2021. The liabilities highlighted included claims made against active providers (losses) as $90.7 million; associated defense costs (expenses) as $14.3 million; claims against inactive providers, as known on June 30, 2021, as $8.5 million; tail liability of inactive providers as $145.7 million; future payments as $9.2 million; claims handling as $9.3 million; and other liabilities, described as mainly plaintiff verdicts on appeals, as $100,000. Total gross liabilities were $277.7 million; the HCSF is reimbursed $13.0 million for University of Kansas Wichita Center for Graduate Medical Education (KU/WCGME) programs, for a final net liability of $264.7 million.

Mr. Sutter reviewed the HCSF's (surcharge) rate level indications under existing law for CY 2022, noting the indications assume a break-even target. He highlighted payments, with settlements and defense costs of $37.091 million; change in liabilities of $2.207 million; administrative expenses of $2.050 million; and transfers to the Kansas Department of Health and Environment (KDHE) assumed to be $200,000 (assuming no transfers to or from the Health Care Provider Availability Plan). In total, the cost for the HCSF to break even is $41.548 million. He noted the HCSF has two sources of revenue: its investment income (assumed to be $8.079 million based on 2.70 percent yield) and surcharge payment from providers ($33.469 million needed to break even). Mr. Sutter explained the rate-level indication and stated, based on

existing HCSF law, it is believed the HCSF needs to raise its rates an estimated 3.3 percent in order to maintain its unassigned reserves.

Mr. Sutter reported on trends in the HCSF's loss experience for active and inactive providers from CY 2015 through 2020. Mr. Sutter explained the settlement payment activity ticked upwards over time through 2019 and dropped in 2020 to only $18.449 million. Mr. Sutter stated this change could be chalked this up to the shutdown in the claims resolution process that started late first quarter of 2020. Mr. Sutter drew attention to page 7 of his presentation, the boxed area of Column four, indicating the large increase in the reserves on known claims going from $40.830 million to $63.450 million. Mr. Sutter stated the trend on inactive providers is less concerning; the reserves increased but was still at a level below what it was in the end of CY 2017 and CY 2018. Mr. Sutter indicated the large increase in the reserves on known claims due slightly to paying out less in claims in 2020 is a cause of concern and the reason the overall condition reported in this year's review was a little worse than anticipated.

Mr. Sutter next reported on the HCSF's investment yield earned and its relative yield on its assets over the past several years. Mr. Sutter noted the effective yield has declined over the past seven or eight years, flattening out to the range of approximately 2.7 percent. Mr. Sutter explained, based on this trend, the company has been lowering its assumption over the past several years regarding what the HCSF will earn going forward. Mr. Sutter indicated in the company's latest review conducted earlier this year, the assumed future investment yield rate was lowered from 2.85 percent in their 2020 study to 2.70 percent. Mr. Sutter noted a 10-basis-point change in the assumed rate causes a 0.9 percent change in the CY 2022 indication.

In response to a question from a Committee member, Mr. Sutter said he believes the 2.7 percent yield is still reasonable.

In response to an inquiry from a Committee member, Ms. Moyer stated KSA 2020 Supp. 40-3406 governs the investment of HCSF moneys,. She noted it does not appear they could just invest in an exchange traded fund (ETF) or an index fund in the stock market and the statute references more conservative investments such as commercial paper treasury notes, the municipal investment pool fund, and corporate bonds. After some discussion, Chairperson Kleeb recognized Clark Shultz, Executive Director of the Health Care Stabilization Fund Board of Governors, to respond to questions regarding investment policies. Mr. Shultz explained in addition to this statute, the Board of Governors also votes to determines policy on investments. Mr. Shultz further explained the Board has a very conservative investment policy at this time. Regarding how much is statutory and how much is policy, Mr. Shultz responded the combination is a conservative investment policy and the Board of Governors receives reports from the Pooled Money Investment Board, which reviews the investment portfolio. After more discussion regarding the investments, a Committee member suggested including in the Committee Report a notation to the Board of Governors encouraging the Board to review its investment policy to ensure it still fits the needs of the HCSF.

Mr. Sutter provided an overview of 2021 House Sub. for SB 78 regarding the changes to the primary coverage limits and impact on HCSF costs. Mr. Sutter stated the primary coverage limits every health care provider must obtain increases from $200,000 per claim/ $600,000 annual aggregate to $500,000 per claim/ $1.5 million annual aggregate. The HCSF coverage will now be $500,000 per claim with an annual aggregate of $1.5 million sitting above the primary coverage limits. Mr. Sutter noted the new limits do not apply to claims occurring prior to 2022 even if those claims get reported in CY 2022.

Mr. Sutter explained the actuary company believes the change in the HCSF's limits will eventually significantly reduce costs to the HCSF; their long-run estimate is a 48 percent reduction in the HCSF's costs relative to what those costs would have been under the existing HCSF structure. Mr. Sutter noted that claims take a while to get reported after the date of the incident, so for all of the claims that exceed $200,000 that occur in 2022, only about 10 percent will get reported in CY 2022, with the rest reported after CY 2022. Mr. Sutter indicated the HCSF is still responsible for those claims because the primary coverage limits will not become effective until the providers procure coverage in future years; the primary coverage is based on when the date the claim is made, not the date when the claim occurs ("occurrence-based"). Mr. Sutter indicated the savings in CY 2022 will be approximately 5 percent; however, the savings will increase considerably in CY 2023 and CY 2024 as more of the claims that occur in CY 2023 get covered by primary coverage policies that are effective in CY 2023, CY 2024, and CY 2025. Mr. Sutter noted several aspects of the HCSF's operations are unaffected by the law change; the HCSF continues to be responsible for tail coverage, transfers to or from the Availability Plan and KDHE, and the HCSF's operating expenses.

Mr. Sutter stated the company provided the Board of Governors with two sets of rates to consider for CY 2022. Mr. Sutter explained Version 1 is based on the long-term eventual savings that the HCSF will achieve from the law change in which the rates can come down by 48 percent from 2021 HCSF rates; and, Version 2, which represents less of a decrease by reflecting only the savings that the HCSF will achieve in CY 2022 of approximately 5 percent. Mr. Sutter stated the Board asked for an estimate of the cost of going with Version 1 instead of Version 2 over a multi-year period. Mr. Sutter reported if the Board chose Version 1, it would sustain losses of approximately $34 million over the 5-year period of CY 2022 through CY 2026 by going immediately to the long-term benefits of the law change to the HCSF as opposed to the phased-in benefits of the HCSF. Mr. Sutter said the Board of Governors considered this information and chose to go with Version 1 rates for CY 2022.

Mr. Sutter next provided an overview of rates by provider class. Mr. Sutter indicated for CY 2022, Classes 1 through 14 (e.g., physicians, chiropractors, register nurse anesthetists, podiatrists) pay a flat dollar amount; and their rates will be coming down considerably for CY 2022. Classes 15 through 24 (partnerships and corporations, healthcare facilities, training programs, physician assistants, nurse midwives) pay a percentage of their basic coverage premium, and those percentages also come down considerably. Mr. Sutter explained for the second group, the company is assuming these providers' basic coverage premiums will increase as a consequence of the law change, so those covered will generally pay a lower percentage on a higher basic coverage premium.

HCSF Case Resolutions

Chairperson Kleeb next recognized Rita Noll, Deputy Director and Chief Counsel, Board of Governors, to address the FY 2021 medical professional liability experience (based on all claims resolved in FY 2021, including judgments and settlements). (Attachment 4)

Ms. Noll stated FY 2021 was an odd year due to the pandemic and it would be hard to draw any conclusions from this year's data. Ms. Noll continued her presentation by noting jury verdicts. Four medical malpractice cases, involving a total of four Kansas healthcare providers, were tried to juries during FY 2021. She noted during most of FY 2021, the courts were closed due to the pandemic. The trials were held in the following jurisdictions: Sedgwick County (2), Neosho County (1), and Douglas County (1). All four cases resulted in defense verdicts.

Ms. Noll highlighted the claims settled by the HCSF: in FY 2021, 50 claims in 40 cases were settled involving HCSF moneys. Settlement amounts incurred by the HCSF totaled $17.352 million and do not include settlement contributions by the primary or excess insurance carriers. She noted this is 23 fewer cases and almost $10 million less than in the previous fiscal year. Ms. Noll explained there are two likely reasons for the large decrease this fiscal year: the COVID-19 pandemic and last year's increased claims and settlement experience with more than $27 million incurred. Ms. Noll further explained that typically a year with a high HCSF settlement amount is followed by a year with a lower total settlement amount. Ms. Noll next reported on severity of the claims, meaning the amount settled or awarded. She noted that, although there were 23 fewer settlements involving the HCSF this past fiscal year compared to FY 2020, about the same number of cases fell into the high category of settlements between $600,000 and $1.0 million. Ms. Noll further noted in FY 2015 and FY 2014, a higher percentage of cases were in the $600,000-$1 million range compared to the percentage in the most recent couple of years. Of the 50 claims involving HCSF moneys, the HCSF incurred $17.352 million in settlement amounts; the primary insurance carriers contributed $8.800 million to these claims. Ms. Noll reported 44 claims were for excess professional liability coverage, and 6 of those claims involved inactive Kansas health care providers for which the HCSF provided tail coverage. In addition, excess insurance carriers provided coverage for 5 claims for a total of $7.650 million. For the 50 claims involving the HCSF, the total settlement amount was $33.802 million. Ms. Noll reported in addition to the settlements involving HCSF contributions, the HCSF was notified primary insurance carriers settled an additional 98 claims in 88 cases. The total amount of these reported settlements was $9,336,634.

Ms. Noll reported on the number of HCSF total settlements and verdicts by fiscal year. She stated from FY 2009 through FY 2015, there was a seven-year decrease in the number of new claims. Ms. Noll explained a modest increase for FY 2016 through FY 2019 was expected because the Kansas Legislature added five categories of new health care providers to the HCSF in 2014. Ms. Noll indicated last year there was a small decrease in the number of claims, and then this past fiscal year, there was a small increase in the number of claims. Her report stated for FY 2021, there were 318 new medical malpractice cases. Ms. Noll noted Kansas district courts require all cases to be filed online, so the COVID-19 pandemic did not have any impact on the ability to file cases. In answer to a question from a Committee member, Ms. Noll confirmed the tolling of the statute of limitations has ended. Ms. Noll further indicated there has not been a large number of new cases being filed, which is likely because the courthouses were open so people could file their cases through electronic means.

In response to a question from a Committee member, Ms. Noll addressed the number of claims that are COVID-related and how those claims might be affected by the actions the Legislature took to provide some immunity to certain health care providers. Ms. Noll said in FY 2020, 20 cases were filed against adult care homes (nursing facilities) that alleged negligence on the part of the adult care homes resulting in deaths for COVID patients. In FY 2021, 21 cases were filed against adult care homes. Ms. Noll noted the 2020 Special Session law, which provided some immunity granted to certain healthcare providers such as hospitals and physicians. Ms. Noll further explained nursing facilities were given an affirmative defense on two different kinds of claims. Ms. Noll noted if a nursing facility had to reaccept a COVID patient or if it provided care to a COVID patient in the facility, an affirmative defense was available to these adult care homes. Legislation enacted in 2021 provided some additional immunity if the facility was found to be in substantial compliance with all federal and state regulations. She confirmed no additional cases had been filed recently. Ms. Noll stated she has heard anecdotally there could be claims in certain facilities outside of the adult care homes, such as small hospitals, where it may be alleged that patients did not receive top care because of all the additional COVID restrictions that their health care providers were required to have in place. Ms. Noll

indicated she is concerned about adult care homes, as it will be very expensive to defend these types of claims.

Ms. Noll next addressed the self-insurance programs and reimbursement for the University of Kansas (KU) Foundations and Faculty and residents. Ms. Noll reported the FY 2021 KU Foundations and Faculty program incurred $1,763,603 in attorney fees, expenses, and settlements; $500,000 came from the Private Practice Reserve Fund, and $1,263,603 came from the State General Fund (SGF). Ms. Noll predicted fewer settlements involving the KU full-time faculty for FY2022 but an increase in attorney's fees and expenses due to the increase in the number of claims.

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 2021 was $748,421. Ms. Noll indicated the cost of the program in FY 2020 was half of that for FY 2019, and it decreased again in FY 2021. Ms. Noll stated this decrease was primarily due to the decrease in the number of claims for the past three or four years, but the number of claims increased in FY 2021. Ms. Noll indicated that it is not necessarily concerning, because the average number of claims against the residents in training in FY 2008, FY 2009, and FY 2010 was about 30 claims per year. Ms. Noll noted this past year there were several lawsuits in which the plaintiff attorneys named 10, 15, or 20 defendants in a suit. She noted in one suit, for example, five residents in training were named as defendants. She stated she expects over time these residents will be dismissed from the case, but it takes a lot of time and energy and attorneys' fees and expenses for that to occur.

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 per year, so FY 2021 was slightly less than average. For the residency program the ten-year average cost is about $985,000, so FY 2021 expenditures of about $748,400 represented a decrease. Ms. Noll next reported on moneys paid by the HCSF as an excess carrier. She reported for FY 2021, there was one claim against a resident in which the HCSF paid $800,000. For the faculty and foundations group, three claims totaled $290,000.

In answer to a question from a Committee member, Ms. Noll indicated the reimbursement amount from the SGF is an estimated amount set every year when the HCSF budget goes before the Legislature.

A Committee member commented about the system and coverage for health care providers in Kansas with the HCSF, HCPIAA, and the primary coverage that still maintains coverage for COVID-related claims. He stated the insurance industry has pretty well eliminated any protection to providers anywhere else in the country, so Kansas has done something very special. The member also expressed appreciation that there is coverage to defend adult care homes and possibly some of the smaller rural hospitals in Kansas.

In answer to a question from a Committee member regarding excess coverage and the impact of House Sub. for SB 78, Ms. Noll indicated the residents of training and the faculty members' policies renew on July 1 of each year. She explained that for any claims for care that arose after July 1, 2022, the amount that the HCSF is reimbursed from the Private Practice Reserve Fund or the SGF will increase.

Board of Governors Overview

Mr. Shultz, Executive Director of the Board of Governors, provided a brief history of the HCPIAA. (Attachment 5) He explained that 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 healthcare 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 2020 Supp. 40-3403(b)(1)(C)) issued October 1, 2021). The FY 2021 report indicated net premium surcharge revenue collections total $33,582,227. The report indicated the highest surcharge rate was $19,295 for a neurosurgeon with two or more years of HCSF liability exposure who selected the highest coverage option of $800,000 per claim/ $2.4 million annual aggregate limit. Application of the Missouri modification factor for this Kansas resident neurosurgeon (if licensed in Missouri) would result in a total premium surcharge of $25,084 for this health care practitioner. The lowest surcharge rate for a health care professional was $100 (a first-year provider selecting the lowest coverage option, $100,000/ $300,000). The report detailed the medical professional liability cases. The average compensation per settlement (40 cases involving 50 claims were settled) was $347,040. 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 2021, and total claims paid during the fiscal year amounted to $21,453,297. The statutory report also provided the balance sheet, as of June 30, 2021, indicating total assets of $313,929,994 and total liabilities of $267,109,185.

Mr. Shultz presented an overview of the Availability Plan. Mr. Shultz reported as of October 25, 2021, there were 352 plan participants. The report indicated the Plan participants included 198 physicians, 8 physician assistants, 11 nurse anesthetists, 2 chiropractors, and 13 nurse midwives, as well as 29 professional corporations and 59 facilities. Mr. Shultz noted the HCSF acts as a reinsurer for the Availability Plan and provided a brief explanation. Mr. Shultz stated this current year, the HCSF transferred $933,354 to the Availability Plan.

Mr. Shultz reviewed provisions of House Sub. for SB 78, stating the bill will require healthcare providers to begin purchasing basic coverage at the $500,000 level per claim and then obtain an additional $500,000 per claim coverage from the HCSF. Mr. Shultz reported the agency is updating all of its forms and preparing for that change. Mr. Shultz noted a historical overview of the HCPIAA in his written report outlines some of the changes over the years.

Mr. Shultz concluded stating the Board of Governors believes the HCPIAA has been a successful public-private partnership and has provided coverage for healthcare providers in Kansas. He indicated it has provided a reliable source of compensation for unintended medical outcomes, and it has been good for the state and the citizens of Kansas. Mr. Shultz further indicated it is the Board of Governor's opinion that the HCSF and the HCPIAA be recommended to continue.

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

Kansas Medical Mutual Insurance Company

Chairperson Kleeb recognized Kurt Scott, President and Chief Executive Officer, Kansas Medical Mutual Insurance Company (KAMMCO) to address the current status of the medical malpractice marketplace in Kansas. (Attachment 6) Mr. Scott provided a graph showing the number of plan participants since KAMMCO became the servicing carrier on July 1, 1990. Mr. Scott noted the graph demonstrates the swings that happen in the marketplace. He explained when the regular insurance market becomes difficult and the insurance companies retreat, more healthcare providers end up in the Availability Plan. Mr. Scott described a "hard market" and described how the participation in the Availability Plan reflects market conditions. Mr. Scott next addressed the types of insureds in the Availability Plan. Mr. Scott noted 49 long-term care facilities are in the Availability Plan, which is up from 20 from the previous year and from 8 two years ago. Mr. Scott addressed the transfer the HCSF is making to the Availability Plan of $933,354. Mr. Scott explained a large part of the Availability Plan loss this last year was a direct result of COVID-related claims for adult care homes that moved into the Availability Plan because their coverage was not renewed. Mr. Scott call attention to the risk count which is further broken down to show the different types of physicians and surgeons and the different types of other individual risks that end up in the Availability Plan. Mr. Scott indicated reinsurance markets over the course of the last year or two have become increasingly difficult in the professional medical healthcare professional liability business. Mr. Scott explained all of those things have a rippling effect throughout the entire industry, and there will be a continuation of that over the course of the next few years.

Mr. Scott indicated their business from a market standpoint is affected by two main things: the frequency of claims and the severity of those claims. Mr. Scott noted frequency of claims on a national basis, not just in Kansas, has remained fairly constant over the past several years. He indicated what has changed is the severity of those claims, not just the severity of the amounts paid in settlements or judgments, but also the legal costs of handling those claims have increased. Mr. Scott explained those costs have also been affected by the COVID-19 pandemic. In response to a previous question from a Committee member, Mr. Scott indicated it is hard to know what COVID-19 is going to mean to the insurance industry. Mr. Scott noted the courts have been closed, cases are delayed, and the statute of limitations has been tolled for a year by the Kansas Supreme Court. He stated there is a lot of uncertainty and, when the insurance industry gets uneasy, reinsurers get uneasy, market conditions continue to constrict, prices go up, and underwriting conditions become more difficult. Mr. Scott indicated this will translate to more activity in the HCSF and in the Availability Plan.

Next, Mr. Scott discussed some additional challenges in Kansas. Mr. Scott provided an overview of the *Hilburn v. Enerpipe Ltd.* case and noted that the question remains—is the cap constitutional or not? Mr. Scott indicated the plaintiffs' bar has a procedural issue in every case where they are required to file a statement of monetary damages which identifies what a case is believed to be worth. Mr. Scott indicated, previously, a statement of monetary damages in a particular case might have been $4 million to $8 million, where now, those statements show $40 million to $80 million. He noted one case where the statement of monetary damages is $100 million. Mr. Scott indicated a recent verdict handed down by a jury in south central Kansas for a wrongful death case exceeded the policy limits of the insured; the damages requested for wrongful death by the plaintiff were $500,000. Mr. Scott explained there is a cap on damages

related to wrongful death in the state of Kansas of $250,000. Mr. Scott indicated his understanding is the stated objective of the plaintiff attorney and the plaintiffs' bar is to use the *Hilburn* decision to strike down the cap on wrongful death damage amounts.

Mr. Scott next addressed cyberinsurance. Mr. Scott indicated cyber extortion or ransomware at some of the Kansas hospitals started out demands for as $10,000 or $15,000 in costs to the facility; ransomware attacks are now in the millions of dollars. Mr. Scott also addressed telehealth, indicating the licensing laws have been adjusted on at least a temporary basis to allow for that; what has not been developed, he commented, are standards of care or protocols for how telehealth services are being delivered. Mr. Scott indicated telehealth is going to be a new emerging issue in professional liability cases.

Mr. Scott addressed a comment from the Committee regarding the effect of the decrease in the HCSF's surcharge rates on professional liability insurance rates in the marketplace. Mr. Scott indicated for 2022, KAMMCO's rate increase is essentially offset by the HCSF's surcharge rate decrease, so providers and hospitals will not see a change as a result of that. Mr. Scott indicated, in regard to changes enacted in House Sub. for SB 78, all of the carriers writing professional liability coverage for health care, both hospitals and physicians, have made their policy form changes. He noted rate changes had been filed with and approved by the Insurance Department, and the companies are ready to transition forward effective January 1.

In response to a question from a Committee member, Mr. Scott addressed the hard market noting this is a national phenomenon, not just happening in Kansas. Mr. Scott explained claim frequency is not causing it, what is happening is a significant increase in the frequency of large verdicts; huge verdicts are coming out from across the country. Mr. Scott explained there is something the reinsurers refer to as "social inflation" that has affected what people view as a reasonable judgment. Mr. Scott indicated currently amounts paid in judgments cannot be made up in investments and must come from policyholders. Mr. Scott characterized the present conditions as the front edge of a hardening market, but not yet in a hard market.

Mr. Scott commented on the issue of investments, indicating a HCSF statutory provision directs what the Board of Governors may invest in, the Pooled Money Investment Board makes those investments, and the Board is also able to develop its own guidelines. Mr. Scott discussed the tail claims on active providers and mentioned there might be an opportunity to make some changes to investment policy with a little more flexibility, but noted that would require statutory change.

In response to a question from a Committee member, Mr. Scott addressed whether states are doing anything to address some of the legal challenges and social inflation that was mentioned. Mr. Scott explained a lot of that is tempered or softened with the caps on noneconomic damages and the caps on wrongful death. Mr. Scott noted those can be capped by state statute or, in the case of Texas, by the state's constitution. Mr. Scott indicated those guardrails are put into place to make sure costs of judgments do not then get passed on to the customers and then ultimately, to the public.

Kansas Medical Society

Chairperson Kleeb next recognized Rachelle Colombo, Executive Director, Kansas Medical Society (KMS) (Attachment 7) Ms. Colombo noted that KMS was the institution that brought forth the legislation establishing the HCSF, and the HCSF and HCPIAA has continued to serve exactly as was intended. Ms. Colombo indicated this was one of the pieces put into

place to stabilize the malpractice environment with the other being a cap on noneconomic damages.

Ms. Colombo provided an overview of 2021 House Sub. for SB 78. She also stated the HCSF was intended to be a public-private partnership; the HCSF was never intended to supplant the role of the private insurers. Ms. Colombo indicated the bill was an attempt to rebalance the participation of the private insurers, as well as the HCSF and to take into consideration the increase in the severity of claims. Ms. Colombo stated this was achieved through the minimum coverage requirements on physicians and other defined healthcare providers. Ms. Colombo indicated the second thing was the cap on noneconomic damages and the KMS intention to make sure that remains in place. She described some of what has been done over the years to address that. Ms. Colombo indicated the bill also addressed that by changing minimum coverage requirements and rebalancing the public and private roles in managing those claims. Ms. Colombo noted both makes sure providers can have access to adequate coverage and that plaintiffs, in the event of an unexpected medical outcome, have a right to recovery or have an adequate recovery. Ms. Colombo indicated the 2021 legislation went through the Legislature unopposed. She stated KMS worked with the trial bar, brought the changes before them, and sought their input. Ms. Colombo stated KMS is supportive of the changes that were established through the bill. She indicated the majority of Kansas physicians were already buying million-dollar policies, so the statutory change really does not represent a change in the provider's overall coverage; it just repositions how the provider accesses that insurance between the private and the public market. Ms. Colombo stated the overall cost should be about the same, if not decreasing, over time, as those claims are better managed. Ms. Colombo noted the provider community was in support of this legislation and all defined health care providers were consulted before the KMS proposed those changes in House Sub. for SB 78. Ms. Colombo concluded by indicating KMS believes the Committee should continue and there is no need for an independent actuarial analysis at this time.

Maternity Centers

Chairperson Kleeb recognized Kendra Wyatt, CEO, New Birth Company. (Attachment 8) Ms. Wyatt indicted she is appearing before the Committee in response to the July 1, 2021, closure of New Birth Company, a birth center, in Kansas City, Kansas. Ms. Wyatt discussed the reasons for the closing, and indicated the leading issue was the status of malpractice insurance that is offered to certified nurse midwife practices and maternity centers that are not owned by physician practices and other facilities. Ms. Wyatt stated when she tries to purchase malpractice insurance from the free market for the birth center, all of the companies listed on the HCSF site tell them the business does not meet their current underwriting requirements. Ms. Wyatt's testimony stated as of this date, no Kansas Department of Insurance-admitted companies provide malpractice coverage to their business other than the Availability Plan.

Ms. Wyatt requested the Committee's support for the addition of "maternity centers" to be added to the defined health care providers listed in KSA 40-3401. Ms. Wyatt explained the need for legislation to fix the gap that means a maternity center can purchase malpractice insurance and, more specifically, facility malpractice insurance, only if it is owned by a defined health care provider. Ms. Wyatt indicated the birth center's national association, American Association of Birth Centers, and the underwriters the center works with also suggested Kansas should consider the requirements regarding admission through the Commissioner of Insurance. Ms. Wyatt explained companies had expressed interest in serving the birth center but did not want to meet the criteria of becoming an admitted carrier in Kansas. Ms. Wyatt concluded by stating the birth center is very pleased it was able to access the HCSF, noting the Fund plays a

vital role in supporting Kansas entrepreneurs. Ms. Wyatt further noted companies like their birth center want the HCSF to be a place of last resort and not the first place to do business.

Chairperson Kleeb recognized Cathy Gordon, Consultant. (Attachment 9) Ms. Gordon indicated she would address the legal definitions for freestanding birth centers that are referred to as maternity centers in Kansas. Ms. Gordon described some of the issues she has had in starting her birth centers, one being that KSA 40-3401 does not include birth centers in the definition of healthcare providers or facilities in the provisions applying to defined healthcare providers. Ms. Gordon requested the Committee consider adding birth center facilities in the definition of health care facilities. Ms. Gordon stated birth centers are licensed by KDHE, and the Secretary of State signs their license. Ms. Gordon indicated they are working on legislation to update definitions. Ms. Gordon concluded by requesting the Committee consider adding birth center facilities to the definition health care providers in KSA 40-3401.

In response to questions from Committee members, Ms. Gordon stated she did not know why maternity centers have not been a part of the health care provider insurance availability law. Ms. Gordon indicated she is working on legislation with a revisor right now on some of the other definitions pertaining to birth centers that need to be better articulated. Ms. Gordon stated the biggest problem is that the birth center facilities are grouped with child care facilities in licensing statutes. She explained that is a problem and she is working with a revisor to move them under health care facilities in that component. Ms. Gordon stated they are licensed by health care facilities.

In response to a Committee member's question asking if there are any other health care providers that are not covered under the HCSF, Ms. Gordon indicated she was not aware of any [*Note:* Later testimony confirmed optometrists and pharmacists are not defined healthcare providers.] She noted the State Fire Marshal calls a dialysis clinic a healthcare facility due to certain similarities (classification in a national system); how they would be covered under the insurance plan with the HCSF is yet to be determined.

Chairperson Kleeb recognized Rebecca Williams, Account Executive, HUB International Mid-America. (Attachment 10) Ms. Williams stated she is the insurance agent who has handled the insurance for New Birth Company. Ms. Williams indicated this year was quite a struggle because the standard markets all declined coverage even though HUB has placed the insured with these carriers for years, and the company has never had a claim. Ms. Williams stated the coverage ended up being placed in the Availability Plan, which is the place of last resort. Ms. Williams described some of the differences between HCSF coverage and the Availability Plan. Ms. Williams indicated her big concern is whether New Birth Company is going to be able to keep its doors open. She stated with the escalating premium for the malpractice insurance (new law), it is a great concern. Ms. Williams indicated she is concerned with the change in the HCSF law because, as an insurance agent, she is seeing much higher primary rates through the private insurance companies because of the change from a $200,000 exposure to a $500,000 exposure. Ms. Williams stated the premiums are escalating to the point where it could put a number of these midwifery services out of business. Ms. Williams explained, without the change in wording, a defined healthcare provider could have their corporation insured through the HCSF, but because Ms. Wyatt, who is not a midwife, serves as the owner of New Birth Company, she did not qualify for coverage through the HCSF. Ms. Williams indicated she had to actually make a change to her corporation in order to get corporate coverage for the center itself, and then was able to get it through the Availability Plan. Ms. Williams concluded by stating she believes without that change in wording, this present lack of coverage would be a disservice to the women in Kansas because centers owned by midwives would be considered for coverage but anyone else as an entrepreneur would not be eligible for coverage.

In response to a question from a Committee member regarding how many birth centers that she was describing are in Kansas, Ms. Williams indicated the only ones she knows of are in the greater Kansas City area where there were two and now there is only one (New Birth). Ms. Williams stated it is her understanding there are several facilities elsewhere in Kansas in towns without MDs or DOs and those healthcare services are handled just by midwives.

A Committee member directed a question to Ms. Colombo asking if there are any other avenues that can be pursued other than what has been proposed. Ms. Colombo provide some background on who is involved in the HCSF. She stated there is a specific definition in current statute that defined healthcare providers who must participate in the HCSF. She explained when this legislation was put together, some of the healthcare providers in Kansas chose to be determined as defined healthcare providers to comply with the HCSF, and some determined they did not want to participate. Ms. Colombo indicated each provider group decided independently whether they wanted to be included and therefore get the protection that is extended to those who participated, namely the benefit of the cap on noneconomic damages. Ms. Colombo explained additionally anyone included in that definition of healthcare provider must actually be a healthcare provider. Ms. Colombo further explained that in 2019, legislation was enacted (HB 2119) that allowed for the corporate practice of medicine; more specifically, a corporation was permitted to employ physicians or other healthcare providers. Ms. Colombo stated with that change in law came a stipulation that the HCSF needed to contemplate how to incorporate corporations into the HCSF, so that there was not an upset in the balance of coverage for all healthcare providers and consideration was given to any risk on the cap on noneconomic damages. Ms. Colombo reported there is a requirement in this 2019 law requiring the Board of Governors to bring back to the Legislature some information about how to include corporations. Ms. Colombo indicated if that were done and if that structure existed, then the birth companies would be able to participate in the HCSF through that avenue. Ms. Colombo indicated there is a chance if that legislation or that wording would be incorporated into current law, it would fall under the corporate practice of medicine provisions affecting the HCSF. Ms. Colombo additionally explained a birth center owned by a clinician would meet with the requirements of the law. Ms. Colombo stated as of now, the two avenues would be either to purchase coverage through a healthcare provider or to change the definition of healthcare provider to include non-clinician corporations.

In response to a question from a Committee member asking if Ms. Wyatt stated Liberty Mutual was not licensed in Kansas, Ms. Wyatt said her understanding was that Liberty Mutual was not admitted to provide malpractice insurance coverage in Kansas but can sell other coverage. Responding to a question from a Committee member, Ms. Wyatt agreed this issue might be addressed by a reclassification within KDHE from a child care facility to a health care facility.

Written-only testimony was provided by Vicki Whitaker, Executive Director, Kansas Association of Osteopathic Medicine (Attachment 11)

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

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

Committee Discussion for the Purposes of Determining Conclusions and Recommendations to the 2022 Legislature, and Direction to Staff for the Committee Report to the Legislative Coordinating Council

Chairperson Kleeb invited Committee discussion for the purpose of reaching conclusions and making recommendations to the 2022 Legislature.

Mr. Slaughter moved, seconded by Representative Helgerson, to continue the language that has been previously stated in the Committee Report regarding the function of the HCSF and the oversight of the Committee continuing. With no further discussion, the motion carried.

Mr. Slaughter moved, seconded by Representative Helgerson, to include there is no need to request an independent actuarial review. Mr. Slaughter stated a separate comment regarding the implementation of 2021 law will be considered in a future motion. *With no further discussion on the need for the independent review, the motion carried*.

There was discussion that one of the responsibilities of the Committee is to monitor the oversight of the HCSF and the contemporary issues that affect the HCSF, and the following steps have been taking place to ensure implementation of House Sub. for SB 78 is smooth and has no impact on providers other than what was intended by the law:

- The forms have been prepared, the rates have been properly submitted and approved, and the Board of Governors has had its own study and subcommittee that looked specifically at rate level indications.

- Encourage that a conversation occur between the Board of Governors and its staff with the Department of Insurance to ensure this implementation continues as planned.

Mr. Slaughter moved, seconded by Representative Helgerson, the above-stated language. With no further discussion, the motion carried.

Chairperson Kleeb invited discussion on the rate of return and investment policy for the Board of Governors. Following discussion on short- and longer-term investments and features unique to the Fund, the following recommendation was stated:

- Framed in a similar manner of monitoring legislation and contemporary topics, the Committee recognizes 2021 House Sub. for SB 78 presents an opportunity for the HCSF Board of Governors to review its investment policy and to take into account both short-term and long-term considerations, including those specific to the provision of tail coverage and future liabilities but also the changes in rate levels and the expectations in this rate environment for healthcare providers. The Committee encourages the Board to look at its investment policy and strategies with this lens, as well as the requirements currently provided in statute [KSA 2020 Supp. 40-3406];

Representative Helgerson moved, seconded by Mr. Slaughter, the above-stated language. With no further discussion, the motion carried.

Chairperson Kleeb invited discussion regarding the birth centers. While the Committee would make no formal recommendation regarding legislation or policy, it was agreed that recognition of and information submitted to the Committee would be made part of the report's conclusions as follows:

- Recognizing the issue and potential solutions that were offered to this Committee and could be considered in 2022 Session:
    - How the birth centers could be regulated as a health care/ medical care facility rather than as a maternity center within child care facility regulations; and
    - Acknowledge that the Board is continuing to study the corporate practice of medicine.

Representative Helgerson moved, and Mr. Slaughter seconded, the above-stated language. With no further discussion, the motion carried. Senator Holscher stated she would work with the birth centers on classification issues and potential legislation.

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

- 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 healthcare providers with individual professional liability coverage. The HCSF is funded by payments made by or on behalf of each individual healthcare provider. Those payments made to the HCSF by healthcare providers are not a fee. The State shares no responsibility for the liabilities of the HCSF (excepting University of Kansas faculty and residents' 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.

Mr. Slaughter moved, and Representative Helgerson seconded, the above-stated language. With no further discussion, the motion carried.

Ms. Renick outlined the following topics for the Committee's consideration regarding challenges and issues discussed in the meeting affecting the adequacy and affordability of the HCSF and its marketplace:

- Comment on the mixed year that the actuary commented on in terms of the status for the HCSF.

    - Concerns that the investment income has flattened out,
    - Concern with the number of reserves on open cases that are higher.

- Comment on market conditions particularly with reinsurance issues:
    - Frequency of claims,
    - Severity of claims, and
    - Concerns about rising legal costs.

- The open question regarding whether the cap on noneconomic damages is constitutional as it applies to medical malpractice actions.

- Concern regarding wrongful deaths and whether that cap is also being considered in legal matters.

- Concern for those insurers who are seeking reinsurance and trying to make sure they have adequate funds to support their carriers and support their healthcare providers.

- Concern with the hardening of the marketplace, the cyberinsurance risk, and where is telehealth going to take providers in terms of their standard of care and how that would be insured.

Representative Helgerson moved, and Mr. Conrade seconded, the above-stated language. With no further discussion, the motion carried.

Upon request of Representative Helgerson, Ms. Renick outlined COVID-related issues of the HCSF and healthcare providers for special consideration by the Legislature that were detailed in the meeting today:

- Directing the Committee Report to specific committees of the Legislature that would be most interested in following up, such as the appropriations, judiciary, insurance, and health committees;

- Comment on non-renewal of policies for nursing facilities, resulting in those facilities seeking coverage in the Availability Plan causing short-term and long-term impact;

- Acknowledge the 41 cases that have been filed to date and have been termed very expensive to defend; and

- Also acknowledge that there was no impact on the ability to file cases, but there have been postponements and delays in those trials.

Representative Helgerson moved, seconded by Mr. Slaughter, to incorporate language of the above-mentioned items in the report. With no further discussion, the motion carried.

Adjourn

Chairperson Kleeb thanked the Committee members, staff, and attendees for their participation in the annual review. There being no further business to come before the Committee, the meeting was adjourned at 11:30 a.m.

Prepared by Randi Walters

Edited by Melissa Renick

Approved by the Committee on:

December 31, 2021
(Date)