# MINUTES

## Health Care Stabilization Fund Oversight Committee

December 14, 2007
Room 514-S—Statehouse

### Members Present

Dick Bond, Chairperson
Senator Greta Goodwin
Representative Jim Morrison
Representative Eber Phelps
Dr. Paul Kindling
Dr. Arthur D. Snow

### Members Absent

Senator Jim Barnett
Dr. Debra Doubek-Phillips
Dr. James Rider
Gene Schmidt

### Staff Present

Melissa Calderwood, Kansas Legislative Research Department
Cindy Lash, Kansas Legislative Research Department
Cody Gorges, Kansas Legislative Research Department
Nobuko Folmsbee, Office of the Revisor of Statutes

### Others Present

Chip Wheelen, Health Care Stabilization Fund
Rita Noll, Health Care Stabilization Fund
Laura Ray, Health Care Stabilization Fund
Lorie Anderson, Health Care Stabilization Fund
Shirley Bowen, Health Care Stabilization Fund
Gary Zook, Health Care Stabilization Fund
Russel Sutter, Tillinghast
Jerry Slaughter, Kansas Medical Society
Lindsey Douglas, Hein Law Firm
Kurt Scott, KaMMCO
Traci Doering Ferrell, KaMMCO

The Chairperson called the meeting to order at 9:10 a.m. Chairperson Bond noted the retirement of Committee member (who represented one of the six health care providers assigned to the Oversight Committee), Gene Schmidt, from his service to Hutchinson Hospital, and indicated representation from hospital providers should be continued. The Chairperson then recognized Chip Wheelen, Executive Director of the Health Care Stabilization Fund Board of Governors, who replaced Bob Hayes. The Chairperson indicated that Mr. Wheelen brings a wealth of experience that will continue the necessary leadership of the Fund and the agency.

The Chairperson then recognized Melissa Calderwood, Kansas Legislative Research Department, for an overview of materials provided to the Committee for its review. Ms. Calderwood first highlighted KSA 40-3414, the self-insured provisions of the Fund law (Attachment 1). Ms. Calderwood noted that in a discussion with Executive Director Wheelen, a review of this statute was requested. 2006 Supp. KSA 40-3414, Ms. Calderwood noted, provides qualifications for self-insurance for both public and private health care providers or systems including the Kansas Soldiers' Home, the Kansas Veterans' Home, the Kansas University residency programs, the private practice foundation and faculty of the Kansas University Medical Center, the private health care providers, and Health Maintenance Organizations and related groups. Ms. Calderwood also provided information about the recent State General Fund reimbursements for both the KU Foundations and Faculty (after the first $500,000 is expended from the Private Practice Reserve Fund) and the KU/ WCGME (Wichita Center for Graduate Medical Education) Residents. Also detailed was the private self-insured providers, including a total of 12 (9 hospitals, 3 ambulatory surgical centers) in FY 2006. A Committee member inquired about the difference in reimbursements for the two residency programs. Ms. Calderwood noted the differences in training for the two programs, with the Wichita program being more hands-on, and recalled a past OB case that involved nine residents. Rita Noll, Claims Attorney, responded that KU has 415 residents and WCGME has 275, yet Wichita has a higher claims experience due to the teaching approach, allowing first and second year residents to have hands-on experience in areas including OB-Gyn and Family Practice. Ms. Calderwood also noted the Committee report to the 2007 Legislature and the recommendations that have been continued in recent reports, as well as an updated article about the Fund in *The 2008 Legislator Briefing Book*.

The Chairperson next recognized Chip Wheelen, Executive Director, Health Care Stabilization Fund, to provide an overview of the 2006-2007 activities of the Health Care Stabilization Fund Board of Governors (Attachment 2). Mr. Wheelen began by noting the service history of Bob Hayes and also noted that Gary Zook was retiring today. Mr. Wheelen introduced other Fund staff, including the new Chief Operating Officer, Shirley Bowen. Mr. Wheelen began his presentation by providing a historical review of the malpractice liability insurance crisis and the changes to the Fund law since its inception in 1976. Among the events and legislative actions highlighted were:

- 1975 – Several insurers had discontinued offering medical malpractice coverage in Kansas, with the remaining insurers reaching their capacity. Some doctors continued to practice without liability coverage, while others limited their services (including the delivery of infants and performing surgery) in order to reduce exposure to liability.

- 1976 – The Legislature enacted the Health Care Providers Insurance Availability Act, creating, among other things, the Health Care Stabilization Fund and a joint underwriting association (plan coverage), the Health Care Providers Insurance Availability Plan.

- 1980 – A total of 87 new cases were filed and by 1981, the number of new cases filed increased to 98. By the end of FY 1982, the Fund had paid out over $5 million in losses and accrued future liabilities were rapidly exceeding cash reserves.

- 1984 – The Legislature amended the original Act to limit the Fund's liability to $3 million/claim with an annual aggregate liability of $6 million. Another amendment removed the statutory limit on the Fund's balance and prescribed that premium surcharges should be based on estimated future liabilities (actuarially sound).

- Late 1980s – Tort reform became a topic of discussion for the Legislature. The medical profession and its allies engaged, Mr. Wheelen noted, in an aggressive campaign for tort reform, while some members of the legal profession and certain consumer organizations remained adamantly opposed. The Legislature eventually passed a number of tort reform measures, with the cornerstone of a $250,000 limit on non-economic damages.

- The Fund became part of the focus on reform and some legislators argued that divestment of the Fund would allow commercial insurers to respond by offering adequate coverage. Legislators, however, were unwilling to use general tax revenue to pay for HCSF liabilities (not funded by existing reserves).

- The Legislature reduced the Fund coverage to $1 million per claim with an annual aggregate limit of $3 million. The Legislature also addressed tail coverage – health care providers were required to participate in the Fund for at least five years before the provider became inactive and could receive the benefit of prior acts coverage.

- 1992 – The filing of new cases had begun to level off and by this year, the Fund was considered actuarially sound and premium surcharges were reduced. Interest in phasing out the Fund (divestment) had waned.

- 1994 – The Fund was moved from the Kansas Insurance Department and became administered by the Health Care Stabilization Fund Board of Governors.

Mr. Wheelen continued his presentation by noting the principle features of the Fund. He noted that most health care providers choose the highest coverage option ($1 million/claim and annual aggregate of $3 million when combined with the basic level of liability insurance). Mr. Wheelen also discussed the experience other states are having, with what had been termed the "malpractice crisis" now termed, the "professional liability insurance (PLI) crisis." Mr. Wheelen noted that Kansas has avoided such experience, as the Health Care Stabilization Fund has accomplished precisely what was intended. He also noted that currently over 20 insurance companies or risk retention groups are offering the primary level of insurance in Kansas, while nearly 600 health care providers participate in the Availability Plan (cannot purchase professional liability coverage from a private carrier). Mr. Wheelen also noted that this year, the Fund will be required to transfer over $2 million to subsidize underwriting losses attributable to the Availability Plan. He noted that over the past five years, however, the Plan has produced modest surplus revenues and it is hoped that the Plan will continue to serve its purpose without requiring substantial transfers from the Fund.

The Executive Director next commented on the financial status and trends of the Fund. He noted that the final FY 2007 balance for the Fund was $206,861,948. The surcharge rates continue to be adjusted based on loss experience for the category of health care providers. The FY 2007 increase ranged from 3 percent for chiropractors and physicians who do not perform invasive procedures to 15 percent for surgical specialists and nurse anesthetists. During FY 2007, the Fund collected premium surcharges amounting to $23,056,279. Mr. Wheelen noted that premium surcharge rates did not change for the current fiscal year.

Other FY highlights included the July 2007 action of the Board of Governors to, beginning in FY 2008, estimate future liabilities for tail coverage (past actions' coverage for inactive providers) while health care providers are still actively practicing. Mr. Wheelen noted this will reduce the Fund's unassigned reserves but also will improve the accuracy of estimated future liabilities. Mr. Wheelen also highlighted the Missouri modification factor – in FY 2007, those health care providers who also provided services in Missouri were charged an additional 20 percent because of the added liability exposure. For FY 2008, the amount was increased to 25 percent. FY 2007 investment income totaled $7,900,081. The claim history also was noted, as FY 2007 began with 707 open cases. During the year, 374 cases were closed and 239 were open, leaving a total of 572 open cases at the end of the fiscal year. FY 2007 claims amounted to $22,467,114 and the Fund expended $4,840,828 for claims-related to costs such as attorney fees.

Mr. Wheelen concluded his testimony noting two items that will require legislative attention during the 2008 Session. The first was a request for a supplemental expenditure authority increase to reflect expenditures needed (estimated at $75,000) for an appropriate database or financial management software system. The system will be used to better manage accurate records for all health care providers participating in the Fund (for long periods of time due to tail coverage obligations), to retain volumes of information pertaining to hundreds of cases and the separate claims within each case, and to correlate income data with providers who pay premium surcharges and expense data with claims and cases. Mr. Wheelen requested the Oversight Committee endorse this request and include a recommendation in its report. Mr. Wheelen also noted the definition of "medical care facility" would be clarified, after working with the hospital providers, in administrative rules and regulations. Mr. Wheelen concluded his remarks, noting the contributions of Jerry Slaughter, Dr. Jimmie Gleason, Tom Bell, and Dick Bond to the success of the Fund and their guidance to the Legislature.

Committee members then asked Mr. Wheelen to clarify his expenditure request. Mr. Wheelen indicated the Fund budget has a State Operations expenditure limit that needs to be enhanced. He indicated that the Fund would likely issue an RFP and secure the services of an audit firm. A Committee member asked what the biggest mistake was in other states, in terms of liability insurance/malpractice. Mr. Wheelen responded that many states are reluctant to adopt any changes to their civil litigation and noted successes in California and Texas. The Committee member also inquired about the definition of "surcharge" and Mr. Wheelen responded the surcharge applies to the premium for basic coverage. Chairperson Bond then commented that the response of Kansas to the medical malpractice insurance crisis needs to be told by the Board of Governors to the Legislature and others. The state's actions from the developing crisis in the 1970s and the establishment of the Fund and its Act today needs to be told.

After a brief break, the Committee reconvened, and Russel Sutter, Tillinghast, actuary to the Fund, began his formal presentation, noting that findings reported to the Board in March 2007 included: the Fund is financially sound; loss experience in 2006 was better than in 2004 and 2005; Fund assets were higher than expected; and experience by class varied significantly. The actuary noted that since the March report, the Fund's assets have increased more than expected; however, he also noted that reserves on known claims also have increased more than expected (Attachment 3). Responding to a Committee member's inquiry, Mr. Sutter indicated that the "reserves on known claims" reflects an estimated amount on a claim that has been filed.

Mr. Sutter next reported to the Committee that as of June 30, 2007, the Fund held assets of $203.7 million and liabilities of $149.6 million, with $54.1 million in reserve. Projections for June 2008 (updated in October 2007) include $208.4 million in assets and liabilities of $156.0 million, with $52.4 million in reserve. The actuary then highlighted the Calendar Year (CY) 2006 performance, noting that Fund loss performance during CY 06 was much better than CY 04 and CY 05. Improvements noted include a decrease in the settlements on active providers and inactive providers and a stable number for claims reserves on active providers at year-end. Responding to a question from the Chairperson, Mr. Sutter indicated that the CY 2004 experience included more open claims and higher reserves which led to an increase in the premium surcharge. Ms. Noll also responded to a question regarding future debt, noting that there is an annual limit of $300,000 per provider, then a second installment (if the amount exceeds the $300,000) is paid one year later from the date of settlement. The actuary then highlighted the findings by provider class and noted that the differences are narrowing due to the rate changes in FY 06 and FY 07, but there are four classes that could be increased (surcharge) due to loss experience: Class 7 (anesthesiology); Class 8 (Surgery Speciality – general, plastic, ER with major); Class 11 (Neurosurgery); and Class 13 (Registered Nurse Anesthetists). On the Missouri surcharge, the actuary noted that the data suggests the surcharge could be increased to 30 percent based on the Fund's experience. The actuary also highlighted the Fund's history in terms of surcharge revenue and losses from active providers, as well as recent surcharge rate changes. The actuary noted that Fund Classes 11 and 13 (Neurosurgery and Nurse Anesthetists) would see increased FY 2008 surcharge rates due to loss experience, while all other classes would experience no change. Mr. Sutter concluded his testimony by noting the Board of Governors' decision to account for active providers' future liabilities (when inactive providers). Mr. Sutter noted that the rough estimates for the additional liabilities are approximately $25 million to $35 million and the unassigned reserve reported for June 2008 would likely be reduced from $52.4 million to an amount more like $20 million to $30 million.

A Committee member then inquired about the Fund's experience with tail coverage. Mr. Sutter noted that the tail coverage claims are tracked separately from those of active providers and, on average, the Fund has more expenses on settlements, as all claims must be worked by the Fund staff. More information on tail coverage claims and experience will be provided at the next Committee meeting. Mr. Sutter also was asked to comment on the inclusion of optometrists in the Fund (have previously been included in the Fund). Mr. Sutter speculated that if optometrists were participating in the Fund, this could spread the risk out, but they would need to be priced accurately. He further characterized the participation as "neutral."

The Chairperson next recognized Rita Noll, Deputy Director and Chief Attorney for the Fund, to present a review of claims against the Fund involving full-time faculty of the University of Kansas School of Medicine and residents in programs in Wichita and Kansas City (<u>Attachment 4</u>). Ms. Noll began her presentation by noting the Fund's overall medical professional liability experience for FY 2007. She noted that there were 36 medical malpractice cases (involving 46 providers) tried to juries during the fiscal year, of which 31 cases resulted in defense verdicts. Her testimony also indicated that during FY 2007, 61 claims in 53 cases were settled involving Fund monies, with settlements incurred by the Fund totaling $20,929,250. Ms. Noll responded to a question about Sedgwick County cases, noting that 13 cases went to trial and one case resulted in a plaintiff's verdict. The Fund also became liable for $1,660,405.27 as a result of three jury verdicts during the fiscal year.

Ms. Noll then commented on the KU Foundations and Faculty and KU and WCGME Residents' reimbursements. Ms. Noll noted that 15 claims were settled during FY 2007 for the KU Foundations and Faculty for a total of $2,037,227.63 (first $500,000 from the Private Practice Reserve Fund; remaining reimbursement from the State General Fund). FY 2007 reimbursements, all State General Fund moneys, for the two residency programs totaled $1,194,968.11

($1,100,719.43 for WCGME and $94,248.68 for KU). Moneys paid by the Health Care Stabilization Fund for its excess coverage totaled $3,075,000 ($0 in FY 2006).

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

The Chairperson then asked for additional comments on the current status of the medical malpractice market in Kansas and recognized both Kurt Scott, Chief Operating Officer, KaMMCO, and Jerry Slaughter, Executive Director, Kansas Medical Society. Mr. Scott began his comments, noting the nationwide view of medical malpractice insurance and that most insurers have "healed" themselves through higher prices and higher premiums with physicians and hospitals paying more. He also noted that in the past few years, fewer claims are being reported, which combined with the higher premiums, is attracting new capital and insurers into the marketplace. He further noted there is interest in Kansas and new companies are getting licensed and existing companies are writing new business. The number of participants in the Availability Plan, Mr. Scott predicted, should decrease and reduce costs to the Plan. KaMMCO's own history, Mr. Scott indicated, has seen no rate increase in the last two years and a 3.9 percent reduction for 2008. Overall, Mr. Scott concluded, the Kansas environment is stable due to good tort reform, reasonable competition, a well-run, financially secure Fund, and a responsible plaintiff's bar.

Chairperson Bond asked Mr. Scott to respond to the two questions posed to the Committee about its oversight and actuarial review. Mr. Scott noted that there was no need for an independent actuarial opinion, but he was supportive of the agency's request for information systems support. He asked that Mr. Slaughter respond to the question of continued legislative review. The Chairperson then recognized Mr. Slaughter for his comments on the malpractice marketplace. Mr. Slaughter concurred with Mr. Scott's opinion on the need for actuarial review. He noted his appreciation for legislative involvement and the importance of having an oversight committee. Mr. Slaughter noted the important linkage the Committee provides between the Fund and the Legislature. He also expressed his thanks for the efforts of Robert Hayes and Gary Zook and their service to the Fund and to the State, and indicated he was delighted with the selection of Chip Wheelen.

The Chairperson then invited Committee discussion on the two annual statutory questions and any other items addressed by the conferees. *It was moved by Representative Morrison and seconded by Representative Phelps to endorse the Board of Governors' supplemental enhancement request to exceed its expenditure authority for State Operations in an amount not to exceed $100,000*. <u>*The motion carried*</u>.

The Chairperson then asked for a motion regarding the request for an independent actuarial review. *It was moved by Representative Morrison and seconded by Dr. Snow that the Committee not request an independent actuarial review*. <u>*The motion carried*</u>. After further discussion, the Committee agreed that it was appropriate to continue legislative oversight of the Fund and serve as a link to the Legislature. Committee members then encouraged the Fund representatives to provide more information, such as a brochure, to better outline the Fund, the contributions of health care providers, and its history. A luncheon session on the Fund, including its legislative history and review of the insurance crisis, was suggested for the upcoming legislative session.

Finally, the Committee agreed, by consensus, to continue the following language in its annual report to the Legislature:

> *The Health Care Stabilization Fund Oversight Committee continues to be concerned about and is opposed to any transfer of money from the HCSF to the State General Fund. The HCSF provides Kansas doctors, hospitals and the defined health care providers with individual professional liability coverage. The HCSF is funded by payments made by or on the behalf of each individual health care provider. Those payments made to the HCSF by health care providers are not a fee. The State shares no responsibility for the liabilities of the HCSF. Furthermore, as set forth in the Health Care Provider Insurance Availability Act, the HCSF is required to be "...held in trust in the state treasury and accounted for separately from other state funds."*
>
> *Furthermore, this Committee believes the following to be true: All surcharge payments, reimbursements, other receipts made payable to the Health Care Stabilization Fund shall be credited to the Health Care Stabilization Fund. At the end of any fiscal year, all unexpended and unencumbered moneys in such Health Care Stabilization Fund shall remain therein and not be credited or transferred to the State General Fund or to any other fund.*

There being no further business to come before the Committee, the meeting was adjourned at 11:50 a.m.

Prepared by Melissa Calderwood
Edited by Cindy Lash

Approved by Committee on:

January 3, 2008
(date)