MINUTES

HEALTH CARE STABILIZATION FUND OVERSIGHT COMMITTEE

November 30, 2012
Room 548-S—Statehouse

Members Present

Dick Bond, Chairperson
Senator Laura Kelly
Senator Vicki Schmidt
Representative David Crum
Representative Eber Phelps
Dr. Steven C. Dillon
Darrell Conrade
Dennis George

Members Absent

Dr. Paul Kindling
Dr. Terry "Lee" Mills
Dr. James Rider

Staff Present

Melissa Calderwood, Kansas Legislative Research Department
Amy Deckard, Kansas Legislative Research Department
Iraida Orr, Kansas Legislative Research Department
Sean Ostrow, Office of the Revisor of Statutes

Others Present

Chip Wheelen, Executive Director, Health Care Stabilization Fund Board of Governors
Russ Sutter, Towers Watson
Rachelle Colombo, Kansas Medical Society
Jerry Slaughter, Kansas Medical Society
Kurt Scott, Kansas Medical Mutual Insurance Company
Rod Mealy, Kearney & Associates
Derek Hein, HCA
Chris Conrade, Conrade Insurance Group, Inc.
Matt Casey, Gaches, Braden and Associates
HCFA representative
John Kiefhaber, Kansas Chiropractic Association
B. Lewis, Society for Health Systems

Chairperson Dick Bond called the meeting to order at 9:05 a.m. The Chairperson welcomed members and recognized the Committee's new member, Dennis George. During

introductions, it was noted that out-going Committee member Representative Eber Phelps was serving in his fifteenth year on the Committee. The Chairperson indicated this would be his twenty-third and final year serving on the Committee, having served as a legislator-member and representative of the general public. The Chairperson also recognized Dr. Steven Dillon, who is now serving on the Committee in his role as Chairperson of the Health Care Stabilization Fund Board of Governors.

The Chairperson then recognized Melissa Calderwood, Kansas Legislative Research Department (KLRD), for an overview of relevant materials provided to the Committee for its review. Ms. Calderwood first reviewed a memorandum outlining the October 5, 2012, *Miller v. Johnson* decision upholding the $250,000 cap on noneconomic damage awards (Attachment 1). The decision specifically cited the Health Care Provider Insurance Availability Act, the analyst noted, by indicating "As noted in several of our prior cases, the legislature's expressed goals for the comprehensive legislation comprising the Health Care Provider Insurance Availability Act and the noneconomic damages cap have long been accepted by this court to carry a valid public interest." The opinion also stated the Legislature enacted this act "in an attempt to reduce and stabilize liability insurance premiums by eliminating both the difficulty with rate setting due to the unpredictability of noneconomic damage awards and the possibility of large noneconomic damage awards."

Ms. Calderwood then reviewed a recent medical malpractice decision in Missouri, *Watts v. Lester E. Cox Medical Centers*, noting the Missouri Supreme Court struck down a 2005 law that had capped noneconomic damage awards at $350,000. This action, the analyst noted, could have implications for Kansas providers in Missouri. The analyst also reviewed other pending court cases on noneconomic damage awards and provided an update on medical malpractice and medical liability legislation in the states.

Ms. Calderwood made available a copy of the *2013 Legislator Briefing Book* article on the Health Care Stabilization Fund and Kansas medical malpractice laws (Attachment 2). The Committee resources also included a copy of the FY 2012 and FY 2013 Subcommittee reports (Attachment 3). Finally, a copy of the Committee report to the 2012 Legislature was provided for the Committee's review and consideration of its prior conclusions and recommendations (Attachment 4).

Following the presentation, Committee members inquired about the State General Fund (SGF) reimbursement amount to be transferred to the Health Care Stabilization Fund, pursuant to 2010 SB 414. Committee members discussed whether the amount would be included in the *FY 2014 Governor's Budget Report* and providing information to budget committees on the required reimbursement.

Chairperson Bond called on Jerry Slaughter, Executive Director of the Kansas Medical Society (KMS), to provide comments on the status of the medical malpractice insurance market. Mr. Slaughter began his remarks by recognizing the contribution of the Committee Chairperson and speaking to the critical need for the work of the oversight to continue and the vital role it provides for the provider community and the Legislature. Mr. Slaughter then spoke to the recent *Miller v. Johnson* decision, indicating the constitutional questions – construct of the Fund, adequate statutory remedy for the cap, mandatory insurance, and the Plan – have been answered. Describing this "most significant decision for the health care community," Mr. Slaughter noted the decision allows the state to maintain relative tranquility and stability, and liabilities can be adequately funded. Mr. Slaughter next spoke to responding to the decision, as representatives of health care providers in Kansas. The KMS Board intends to engage in

conversation about the adequacy of the cap, with a possible comprehensive package rolled out during 2014 Session.

Tom Bell, President, Kansas Hospital Association, was then recognized. Mr. Bell acknowledged the service of the Chairperson, then addressed the *Miller v. Johnson* decision. Mr. Bell spoke to the positives from the decision – it helps with recruiting of young physicians and helps health care providers who participate in the Fund. Mr. Bell noted the care that was taken in crafting the law and the roles of the oversight committee and the Fund. Mr. Bell indicated the conversation regarding the cap was needed and work would need to be done on how to best address the issue.

Kurt Scott, CEO, Kansas Medical Mutual Insurance Company (KaMMCO), was next recognized to address the current status of the medical malpractice marketplace in Kansas. Mr. Scott noted *Miller v. Johnson* and its references to the Plan and the mechanism for providing professional liability insurance coverage in Kansas. Mr. Scott characterized the Plan as "financially responsible," noting the Plan returned moneys to the Fund. Mr. Scott noted there currently are just under 400 individuals in the Plan, and there is a competitive marketplace and reasonably affordable rate available to participants. Mr. Scott noted the Missouri opinion and spoke to two different environments between Kansas and Missouri with a cap/no-cap situation. Mr. Scott addressed the broader context of health care: health care is being more integrated and has a quality focus and there are different payment methods emerging. Mr. Scott also addressed macroeconomic factors to consider in the medical malpractice environment, including inflation, claim frequencies, and the fiscal cliff/ monetary policy.

In response to a Committee member's question, Mr. Scott indicated with more people accessing care, focus is being placed on outcomes and patient safety, as well how health care is delivered and paid for.

Mr. Scott, in response to a question from the Committee, indicated there are more medical malpractice insurance companies in the market, with some six to seven "very active" for physicians and four to five for hospitals. The market was characterized as a soft cycle.

A Committee member then inquired about the volume of claims for filing after the *Miller v. Johnson* decision. Mr. Scott indicated there likely would be an increase in claim frequency.

Another Committee member asked the conferee to comment on the number of Plan insured. Mr. Scott indicated the number of participants is decreasing from around 630 health care providers during 2003-2004.

Mr. Scott also generally discussed the future for the cap on noneconomic damage awards, noting that stability is absolutely essential.

Rita Noll, Deputy Director and Chief Attorney, Health Care Stabilization Fund (HCSF) Board of Governors, was then recognized to address the FY 2012 medical professional liability experience (based on all claims resolved in FY 2012 including judgments and settlements) (Attachment 5). Ms. Noll began her presentation by noting jury verdicts. Of the 21 cases involving 28 Kansas health care providers that were tried to juries during FY 2012, 18 cases were tried to juries in Kansas courts and three cases were tried to juries in Missouri. The largest numbers of cases were tried in the following jurisdictions: Johnson County (6); Jackson County, MO (3); Wyandotte County (3); and Sedgwick County (3). Of those 21 cases tried, 19 resulted in complete defense verdicts and one case resulted in a mistrial. The remaining case returned a

verdict in the amount of $8,700. Ms. Noll noted the three claims in Jackson County, Missouri, and the implications of the *Watts* decision and the prior cap in Missouri; in 2005, with the new cap in place, the number of cases involving Kansas health care providers practicing in Missouri doubled. Ms. Noll's testimony also included a 13-year history of total cases, defense verdicts, plaintiff verdicts, split verdicts, and mistrials.

Ms. Noll next highlighted the claims settled by the Fund, noting in FY 2012 there were no jury verdicts or settlements involving the Fund. During FY 2012, 67 claims in 62 cases were settled involving HCSF monies. Settlement amounts for the fiscal year totaled $21,431,000—these figures do not include settlement contributions by primary or excess insurance carriers. Ms. Noll spoke to trends for claims: increasing medical costs and a decline in the number of claims filed. Of the 67 claims involving Fund monies, the Fund provided primary coverage for inactive health care providers in eight claims. The Fund also "dropped down" to provide first dollar coverage for five claims in which aggregate primary policy limits were reached. In addition to the $21.4 million incurred by the Fund, primary insurance carriers contributed $10.8 million to the settlement of these claims. Six additional claims involving contribution from a health care provider or an insurer whose coverage was excess of Fund coverage totaled $5,083,500.

The Committee members and Ms. Noll then discussed the application of Kansas law and the cap on non-economic damages. Ms. Noll responded saying the federal courts recognized the law of the state in which the tort arose and also noted the coverage of the Kansas Tort Claims Act for medical students. Ms. Noll's report also included FY 1995 to FY 2012 settlement contributions by primary carriers, the HCSF, and excess carriers; claims settled by primary carriers (FY 2000 to FY 2012); a report of HCSF total settlements and verdict amounts, as well as new cases opened for FY 1977 to FY 2011.

Ms. Noll next addressed the self-insurance programs and reimbursements from the University of Kansas Foundations and Faculty and residents. Ms. Noll highlighted the FY 2012 KU Foundations and Faculty, and KUMC (Kansas University Medical Center) and WCGME (Wichita Center for Graduate Medical Education) program costs, noting, in FY 2012, there were 12 settlements. Eight of those settlements were for amounts under $100,000. In FY 2011, there were six settlements. Ms. Noll indicated it is anticipated there will be an increase in settlements due to increased activity in Missouri and the location of KUMC (serving in a regional institution).

The Committee and Ms. Noll then discussed the issue of reimbursements to the Fund, pursuant to provisions enacted by the Legislature in 2010 SB 414. (Staff Note: SB 414 provided that the funds required to be transferred to the Health Care Stabilization Fund for the payments specified in law (KSA 2009 Supp. 40-3403(j)) for state Fiscal Years 2010, 2011, 2012, and 2013 shall not be transferred prior to July 1, 2013. The Director of Accounts and Reports is required to maintain a record of the amounts certified by the Health Care Stabilization Fund Board of Governors for the specified fiscal years. The bill established a process for the repayment of the deferred SGF payments, as follows: beginning on July 1, 2013, and on an annual basis through July 1, 2017, 20.0 percent of the total amount of the SGF deferred transfers are to be transferred to the Health Care Stabilization Fund. No interest will be allowed to accrue on the deferred payments.)

The total reimbursable amounts not reimbursed for FY 2010, FY 2011, and FY 2012 are as follows: KU Foundations and Faculty – FY 2010 ($945,658.21), FY 2011 ($684,218.79), and FY 2012 ($1,259,733.60); and KUMC and WCGME Residents – FY 2010 ($1,201,718.01), FY 2011 ($455,621.55), and FY 2012 ($1,201,108.99). Ms. Noll's testimony provided a total of the accrued SGF reimbursements receivables to the HCSF: as of June 30, 2012, the accrued amount was $5,748,058.85.

In discussion with Committee members, Chip Wheelen, Executive Director, of the Health Care Stabilization Fund Board of Governors, indicated the FY 2009 reimbursements would not be paid. Those amounts were subject to an allotment order and SB 414 made changes to disallow future allotments. The Committee and Mr. Wheelen then discussed the concept of placing a cap on the Fund; Mr. Wheelen reminded the Committee this approach was taken in the late 1970s and liabilities began to far exceed reserves and surcharges had to be increased to meet the shortfall.

Actuarial Report

Chairperson Bond next recognized Russ Sutter, Towers Watson, to provide an actuarial report. The actuarial report serves as an addendum to the report provided to the Fund Board of Governors dated March 13, 2012 (Attachment 6). The actuary first addressed forecasts of the Funds position at June 30, 2012, and June 2013. The forecast of the Fund's position at June 30, 2012, is as follows: the Fund held assets of $253.37 million and liabilities (discounted) of $189.75 million, with $63.62 million in reserve. The projection for June 2013 is as follows: assets of $259.33 million and liabilities (discounted) of $193.05 million, with $66.28 million in reserve. The report notes the forecasts were passed on a review of Fund data as of December 31, 2011. The actuary highlighted recent developments following the issuance of the report in March: assets at June 30, 2012, were $5.4 million higher than anticipated; the Kansas Supreme Court issued its ruling on *Miller v. Johnson*; and the Missouri Supreme Court ruled caps on non-economic damages are unconstitutional. The actuary then offered some general conclusions: the forecasts assume an average five percent decrease in surcharge rates for FY 2013; $25.4 million in surcharge revenue in FY 2013; continued full reimbursement for KU/WCGME claims, but reimbursement from the state delayed until FY 2013; and no change in current Kansas tort law. The actuaries had suggested the Board either maintain current rates or make a slight decrease (the Board opted to change FY 2013 surcharge rates at an average rate decrease of 5 percent). Mr. Sutter then commented on the financial position of the Fund stating, given the Fund's FY 2012 results and the recent Supreme Court decision, the firm believes the Fund is in the strongest financial position in its 36-year history.

The actuary then reviewed the Fund's liabilities at June 30, 2012, highlighting future claims against inactive providers—future claims and inactive providers' tail coverage. In response to a question from a Committee member, Mr. Sutter clarified "tail coverage" generally includes claims that occurred while providers were actively practicing and in Kansas. The actuary next reviewed the Fund's rate level indications for FY 2013; the indications assume a break-even target. The actuary commented on item 6, investment income, noting the assumption of a reasonably high yield. Mr. Sutter provided observations on Fund loss experience, noting its claim volumes have decreased over time while the cost per provider has been relatively stable.

Mr. Sutter then provided additional observations for the Committee's consideration:

- From 1999 to 2010, the Fund's surcharge revenue ranged from 23 percent of basic coverage premium (2005) to 36 percent of premium (2010). The FY 2011 ratio was 37.7 percent and the sixth consecutive year with an increase.

- Availability Plan insureds increased from 251 in FY 2001 to 674 in FY 2006, but have dropped since then. In FY 2011, there were 438 Plan insureds.

- The Fund's investment income continues to show a reasonably high yield (4.6 percent effective yield in July 2011 – June 2012), given market rates.

- Fund assets have increased from $215 million at December 31, 2008, to $248.3 million at December 31, 2011.

The actuary's report next addressed the findings by provider class. Mr. Sutter commented on the loss experience by class, noting analysis continues to show differences in relative loss experience among classes. Classes identified as relatively underpriced included Class 11 [Surgery Specialty—Neurosurgery] and Class 15 [Availability Plan]. The actuary described the experience of Class 2 [Physicians, No Surgery)] noting it is the largest group of providers and has a relatively stable experience. For FY 2013, Classes 2 and 5 [Surgery Specialty – urology, colon/rectal, GP-Major] will see a 5.0 percent reduction in the surcharge rates. Under the option approved by the Board, some classes will see a 10.0 percent reduction, with the goal to achieve an overall 5.0 percent reduction and provide for some rate equity.

A Committee member inquired about the drop in average claims per year for FY 2011. Mr. Sutter indicated a similar pattern is seen in a majority of states and reflects improvements in patient safety and the costs associated with bringing an action. A Committee member asked Mr. Sutter to comment on the Missouri Rate Modification Factor and any consideration for adjustment following the Missouri Supreme Court decision. The actuary indicated the factor had been increased from 20 percent to 25 percent a few years ago and there will not be new claims data for one to two years. It is an item the Board will need to consider in the future.

Statutory Report

Following a brief recess, Chairperson Bond called on Mr. Wheelen to provide the Board's statutory report (as required by KSA 40-3403(b)) for FY 2012 (Attachment 7). The Executive Director first highlighted the balance sheet as of June 30, 2012, indicating assets amounting to $258,803,104, and estimated liabilities amounting to $221,335,885. Among the items provided in Mr. Wheelen's report, net premium surcharge revenue collections amounted to $29,145,143, with the lowest surcharge rate of $50 (chiropractor, first year of Kansas practice who selected the lowest coverage option) and the highest surcharge rate of $16,552 (neurosurgeon, five or more years of Fund liability exposure who selected the highest coverage option). Mr. Wheelen noted the medical professional liability cases previously reviewed by Ms. Noll. The average compensation per claim (62 cases involving 67 claims were settled) was $319,866, an 11.4 percent increase compared to FY 2011. These amounts are in addition to the compensation paid by primary insurers (typically, $200,000 per claim). The amounts reported for verdicts and settlements, the report indicates, were not necessarily paid during FY 2012. Total claims paid during FY 2012 amounted to $21,910,074. Mr. Wheelen also submitted historical information about the creation of the Health Care Provider Insurance Availability Act (HCPIA) and the Legislature's responses to liability crises. Three principle features of the HCPIA have remained intact since 1976:

- A requirement that all health care providers, as defined in KSA 40-3401, maintain professional liability coverage as a condition of licensure;

- 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

- Creation of the Health Care Stabilization Fund to:
  - Provide supplemental coverage above the primary coverage purchased by health care providers; and
  - Serve as the reinsurer of the Availability Plan.

Mr. Wheelen also noted 1989 SB 18 and the efforts to ensure actuarial integrity through the creation of three distinct levels of coverage. The bill would have phased out the Fund; interim studies and further consideration by the Legislature continued the Fund and the goals of the HCPIA. Mr. Wheelen addressed Committee questions regarding electronic forms, noting the Board can receive entire batches of compliance records and will be 50 percent "paperless" next year. He also commented about the reimbursement issue, estimating SGF transfers of $4 million per year for the next five fiscal years.

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

The Chairperson then invited Committee discussion on recommendations for the Committee report. The Chairperson asked the Committee to consider the two statutory questions posed to the Oversight Committee:

- Should the Committee request an independent actuarial review of the Fund be completed in 2012?

- Should the Committee be continued for another year?

Committee discussion on the necessity of an independent review followed. *The motion was made by Senator Kelly and seconded by Senator Schmidt that it was not necessary to request an independent actuarial review in 2012. The motion carried*.

The Committee then discussed the role of the Oversight Committee and *the motion was made by Dr. Dillon and seconded by Senator Schmidt to continue the Oversight Committee.* The report will reflect the Oversight Committee's recognition of the important role and function of the Health Care Stabilization Fund in providing stability in the professional liability insurance marketplace, which allows for more affordable professional liability coverage to health care providers in Kansas. *The motion carried*.

The Chairperson invited Ms. Calderwood to review the Committee's prior report and summarize issues presented to the Committee. Those items requested by the Committee for inclusion in the Committee report are as follows:

- Language stating the Committee's concern about and opposition to transfers of money from the HCSF to the SGF and the purpose of provider surcharge payments (the language is stated below);

- Fund To Be Held In Trust. The Committee recommends the continuation of the following language to the Legislative Coordinating Council, the Legislature, and the Governor regarding the Health Care Stabilization Fund:

  The Health Care Stabilization Fund Oversight Committee continues to be concerned about and is opposed to any transfer of money from the HCSF to the State General Fund. The HCSF provides Kansas doctors, hospitals, and the defined health care providers with individual professional liability coverage. The HCSF is funded by payments made by or on the behalf of each individual health care provider. Those payments made to the HCSF by health providers are not a fee. The State shares no responsibility for the liabilities of the HCSF. Furthermore, as set forth in the Health Care Provider Insurance Availability Act, the HCSF is required to be ". . . held in trust in the state treasury and accounted for separately from other state funds."

  Further, this Committee believes the following to be true: All surcharge payments, reimbursements, and other receipts made payable to the Health Care Stabilization Fund shall be credited to the Health Care Stabilization Fund. At the end of any fiscal year, all unexpended and unencumbered moneys in such Health Care Stabilization Fund shall remain therein and not be credited to or transferred to the State General Fund or to any other fund.

- Recognition of the obligation to reimburse the Health Care Stabilization Fund for administrative services provided to self-insurance programs for the University of Kansas Foundations and Faculty and residents at KUMC and the WCGME. The Committee requests the Fund be reimbursed pursuant to the time line created by 2010 SB 414: funds are required to be transferred to the Health Care Stabilization Fund for the payments specified in law (KSA 2009 Supp. 40-3403(j)) for state Fiscal Years 2010, 2011, 2012, and 2013 shall not be transferred prior to July 1, 2013. The law allowed for a deferral of payments for these fiscal years and allowed payments to be made, 20.0 percent per year, beginning on July 1, 2013, and on an annual basis through July 1, 2017. The Board indicated that, as of June 30, 2012, the total accrued State General Fund reimbursements receivables to the Fund totaled S5,748,058.85. (The report will provide the total reimbursable amounts for FY 2010, FY 2011, FY 2012, and FY 2013.)

- Recognition of the amounts that the Fund, pursuant to the law and a prior allotment, did not receive as reimbursement for services rendered in FY 2009.

- Update on the *Miller v. Johnson* decision:

  - Noting the relevant conclusions on the role of the HCPIA and the mechanism of the Availability Plan and the impact on young physicians and providers entering the Kansas health care work force;
  - Encouraging the Kansas Medical Society and other interested parties to continue the conversation about the cap on noneconomic damages and the larger role of the HCPIA in the wake of this significant decision;

- ○ Facilitating the discussion – The Committee looks forward to being a partner in this discussion and having further communication at its meeting next year.

The motion to include those items identified for the report was made by Representative Crum and seconded by Senator Schmidt. The motion carried.

The motion was made by Mr. George and seconded by Dr. Dillon to direct the Oversight Committee report to the appropriate committees. The motion carried.

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 11:50 a.m.

Prepared by Melissa Calderwood
Edited by Iraida Orr

Approved by the Committee on:

May 9, 2013
(Date)