



To: Senate Judiciary Committee

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Date: May 18, 2020

Subject: Concerning Health Care Liability

The Kansas Medical Society and Kansas Hospital Association appreciate the opportunity to provide testimony today regarding our proposed legislation to provide limited, but necessary liability protection for health care providers in response to the state emergency declaration pertaining to COVID-19. In addition, the proposal includes provisions from SB 493 which address critical structural issues affecting the Health Care Stabilization Fund in light of the collapsing liability reinsurance markets. While there are two important components to this proposal, they are both specifically focused on health care provider liability and contemplate the ongoing impact of COVID-19.

Specifically related to COVID-19, this proposal includes health care provider liability protections for COVID-related professional health care services rendered, or otherwise medically necessary treatment that was delayed or not provided, during Kansas's state of emergency due to COVID-19. A significant portion of non-urgent medical care that would otherwise have been medically appropriate and necessary, such as cancer screenings, other diagnostic and surgical procedures, and immunizations, have been delayed in an effort to preserve personal protective equipment (PPE), prevent the spread of coronavirus, and to maximize the health care system's ability and capacity to respond to COVID-19 challenges. Health care providers that delayed such care under federal, state and local directives that strongly discouraged non-emergency services should not face increased liability risks for care that could not have been responsibly rendered under those circumstances. This time-limited proposal does not immunize providers from acts that constitute gross negligence or willful misconduct, nor does it extend beyond the rendering of or failure to render professional health care services. As reported by the medical professional liability association, more than 35 states have already enacted such measures for health care providers.

Though these narrowly constructed liability provisions for health care providers are limited to those services rendered or delayed during the national emergency declaration period, they must be considered in concert with our current medical professional liability climate and the other components necessary to restoring a stable health care system for all Kansans.

The second component of this bill addresses structural issues around the Health Care Stabilization Fund and allows the offering of higher insurance limits in light of the collapsing reinsurance market. These provisions ensure that Kansas patients will continue to have access to an adequate source of recovery through the HCSF. Though the world reinsurance market began to collapse prior to the onset of COVID-19 in the United States, the effect has been further exacerbated in Kansas by the current circumstances which do not provide any liability protection for health care providers.

In order to illustrate the importance of enacting the totality of this proposal before the 2020 legislature adjourns, we would also like to provide some important background and context for the inclusion of the language contained in SB 493.

Since 1976, Kansas has had a unique insurance arrangement governing professional liability (medical malpractice) insurance for physicians, hospitals and several other categories of health care providers. In response to a nearly complete collapse of the private insurance markets caused by a growing medical malpractice crisis in the 1970's, the legislature enacted the Health Care Provider Insurance Availability Act, which is a structure that combines insurance coverage from private markets with a state-operated insurance facility called the Health Care Stabilization Fund (the Fund). Health care providers are required to purchase liability insurance from this structure in order to render professional services in Kansas. The Fund is supported by the insurance premiums paid by the covered health care providers. The Fund serves two very important purposes – providing a source of liability insurance for health care providers, and ensuring that there is a source of recovery for patients who are injured as a result of medical malpractice. This system has worked exceedingly well for over four decades, and it has provided tremendous benefit to patients, health care providers and the state of Kansas.

Following the establishment of the Fund and the mandate that health care providers participate in purchasing professional liability insurance coverage through it, the legislature then over a period of several years enacted a number of tort law reforms to stabilize the liability environment. Most important of those reforms was a cap on noneconomic (also known as “pain and suffering”) damages. By their nature, noneconomic damages are entirely subjective, not measurable by any means, prone to wide variability, and they interject the possibility of unlimited liability in any given claim. The cap provides a measure of predictability for such losses, which in turn promotes a more stable liability insurance environment, which keeps the mandatory insurance affordable for health care providers, and helps promote access to care for all Kansans. The noneconomic damages cap has been in place for 30 years, and until the Hilburn decision discussed below, had been upheld as constitutional by our Supreme Court two times (Samsel II [1990] and Miller [2012]).

In June 2019, the Kansas Supreme Court struck down the cap on noneconomic damages in a motor vehicle-related personal injury case, *Hilburn v. Enerpipe Ltd.* (*Hilburn*). The Court's decision is viewed by many as reversing its October 2012 ruling upholding the same cap in *Miller v. Johnson*, a medical malpractice personal injury case. In *Miller*, the Court upheld the cap because the defendant physician was insured under the unique statutory construct which includes the Health Care Stabilization Fund. The *Miller* Court recognized that the mandatory insurance in conjunction with the Fund structure represents a key public policy difference that distinguishes medical malpractice cases from other personal injury cases. Although it is clear that in *Hilburn* the Court struck down the cap in motor vehicle personal injury cases, we believe the question is unsettled as it relates to medical malpractice actions. In conjunction with its *Hilburn* opinion the Court also issued a public press release which said it "struck down the statutory noneconomic damages cap in personal injury cases other than medical malpractice actions" (emphasis added). Although the court-issued press release isn't a part of the Court's opinion, and cannot be cited as such, we believe it was intended by the Court to signal that *Hilburn* did not invalidate the *Miller* decision, which was limited to medical malpractice personal injury cases that involve the Fund insurance arrangement. The fact that the Court has previously upheld the law in a medical malpractice action, but struck the law in a non-medical malpractice personal injury action, creates uncertainty which we believe can only be resolved when the Court has the opportunity to provide explicit clarification in another medical malpractice case. For that reason, we believe any attempt to amend the current cap law is just simply premature. Moreover, post-*Hilburn*, it is uncertain whether the Legislature could amend the law in a way that would make it constitutionally palatable to the Court in any event.

Which brings us to the reason we have chosen to seek enactment of this comprehensive health care provider liability proposal. To be clear, under the right conditions we strongly favor keeping the Health Care Stabilization Fund structure in place. For over four decades the Stabilization Fund has been a key component of a comprehensive legislative approach which balances the rights of injured patients with the state's need to ensure access to medical care for all of its citizens. The Stabilization Fund assures patients that there will be a pool of money available to compensate them in the event they are injured as a result of a health care provider's negligence. However, if the noneconomic damages cap is ultimately struck down in medical malpractice actions, the Health Care Stabilization Fund is certain to sustain much larger losses with much greater frequency. Without the restraint of a cap on excessive jury awards, the liability environment will worsen, putting the Fund's solvency at risk, driving liability premiums significantly higher for physicians and other health care providers, and threatening access to care. Already, since the *Hilburn* decision, plaintiffs are significantly increasing their demands for noneconomic damages in such cases, claiming pain and suffering damages in the tens of millions of dollars.

Given all of the above, we believe the most prudent approach at present is to give the Court the opportunity to rule in a medical malpractice action, which is the only way we will have certainty about whether the cap is still applicable in those cases. In the meantime, however, we would ask the Legislature to help us prepare for either outcome, favorable or adverse, by passing SB 493, which:

- amends the Fund law to provide that if the noneconomic damages cap is ever declared unconstitutional by the Kansas Supreme Court in a medical malpractice action, then that would trigger the orderly closure of the Fund under the control of the Insurance Commissioner, and also trigger the elimination of the mandatory insurance coverage requirements for health care providers; and
- further amends the Fund law to increase the required minimum coverage limit to \$1 million per claim (increased from \$300K), as well as allowing health care providers the option of obtaining an additional \$1 million of excess coverage from the Fund. This approach gives us the opportunity to update the Fund coverage components to address concerns over the adequacy of the minimum coverage requirement which the Court identified in the Miller ruling, while we await clarity from the Court on the cap.

This approach basically prepares us for a future with or without the Fund. The bill does not alter the damages cap in any way. Health care providers who are in compliance with the Fund provisions would have the benefit of the cap on noneconomic damages, until such time as the cap is declared unconstitutional by the Supreme Court in a medical malpractice case. When, and if, that happens, a process would begin to eliminate the entire Fund structure, including the mandatory insurance requirements, so that health care providers would be free once more to purchase as much or as little insurance as they desire. The state would no longer mandate insurance coverage requirements, and there would no longer be a state-run pool of provider money to compensate medical malpractice claimants. In other words, we believe the Health Care Stabilization Fund structure is only viable and affordable when it has the stability provided by the cap on noneconomic damages.

Alternatively, if the Court upholds the cap, the Fund law would remain in place, but the minimum coverage limit would be increased from the current \$300,000 per claim to \$1 million per claim, which is the coverage limit already purchased by over 95% of the health care providers in the Fund. In addition, health care providers would be able to purchase another \$1 million of coverage from the Fund, if they desire it. This provision in particular is timely and significant, as the reinsurance market is significantly contracting, making it more difficult for providers to obtain and afford higher limits of insurance. Since the first of the year the two largest providers of excess limits reinsurance have announced their plans to exit the medical malpractice line of business, which is very troubling news for the health care community.

We believe this legislation's approach allows us to be as prepared as possible for an uncertain medical malpractice liability environment and provide some stabilizing protections in light of COVID-19. While we strongly support the continuation of the Health Care Stabilization Fund structure and the mandatory provider insurance which funds it, we also are prepared to vigorously advocate for its repeal if the sensible reforms which have existed for the past thirty years are struck down. We urge your support of this carefully constructed proposal to ensure ongoing access to care for Kansas patients both during and after this pandemic. Thank you.