Report of the Health Care Stabilization Fund Oversight Committee to the 2024 Kansas Legislature

CHAIRPERSON: Marvin Kleeb

OTHER MEMBERS: Senators Chase Blasi and Cindy Holscher; and Representatives Will Carpenter and Henry Helgerson

NON-LEGISLATIVE MEMBERS: Craig Concannon, M.D.; Darrell Conrade; Dennis George; Douglas Gleason, M.D.; James Rider, D.O.; and Jerry Slaughter

CHARGE

Review the Status of the Health Care Stabilization Fund

The Committee annually reviews the operation of the Health Care Stabilization Fund, reports, and makes recommendations regarding the financial status of the Fund.

December 2023

Health Care Stabilization Fund Oversight Committee

Annual Report

Conclusions and Recommendations

The Health Care Stabilization Fund Oversight Committee considered two items central to its statutory charge: whether the Committee should continue its work and whether a second, independent analysis of the Health Care Stabilization Fund (HCSF or Fund) is necessary. This oversight committee continues in its belief the Committee serves a vital role as a link between the HCSF Board of Governors, health care providers, and the Legislature, and should be continued. Additionally, the Committee recognizes the important role and function of the HCSF in providing stability in the professional liability insurance marketplace, which allows for more affordable coverage to health care providers in Kansas. The Committee is satisfied with the actuarial analysis presented and does not request a second independent review.

The Committee considered information presented by the Board of Governors' representatives, including its statutorily required report; the Board's actuary; and health care provider and insurance company representatives and other interested parties. The Committee acknowledges its role to provide oversight and monitoring of the HCSF, including legislative actions and other contemporary issues affecting the soundness of the HCSF, and makes the following recommendations and comments:

- **Actuarial report and status of the HCSF; income and rate level indications; Board reports.** The Committee notes the analysis provided by the Board of Governors' actuary characterized calendar year (CY) 2023 as a "mixed year," with the Fund's position as of June 30, 2023, similar to the prior forecast. Among those negative indications: loss performance on active providers was worse than anticipated, investment results were worse than anticipated, and rate inadequacy was high for the hospitals (Class 17—medical care facilities). The Committee acknowledges analysis regarding the changes in 2021 law, which increased the coverage option on primary insurers (first $500,000) and also resulted in a reduction of Fund assets, liabilities, and for FY 2024, unassigned reserves. The Committee notes the revenue of the HCSF is limited to two sources: surcharge rate payments by health care providers and interest income on investment of the HCSF.

    - **Fund revenue.** The Committee recognizes both the statutory requirements of the Health Care Provider Insurance Availability Act (HCPIAA) governing the investment and reinvestment of HCSF moneys in accordance with Pooled Money Investment Board (PMIB) investment policies and the ongoing climate affecting the investment yield of the Fund. The Committee encourages the Board to continue in its engagement with the PMIB to seek a better balance for moneys in reserve that can be invested with a goal of using an optimal fiduciary approach. The Committee further notes the rate level indications on surcharge revenues, particularly for Class 17 facilities, which are experiencing narrowing margins and some financial stresses, will place upward rate pressure in the next fiscal year absent an increased investment yield.

- **Private Practice Reserve Fund.** The Committee recognizes the impact of the increased coverage requirements contained in 2021 law on the self-insurance programs for the University of Kansas (KU) Faculty and Foundations and the residents-in-training program. For the residency programs, the HCSF is reimbursed from the State General Fund (SGF) for its administrative costs (namely attorney fees and expenses and settlements). For the KU Faculty and Foundations, the first $500,000 for reimbursable expenses is paid from the Private Practice Reserve Fund. Any costs exceeding this amount must be paid from the SGF. With no change in the moneys available from the Private Practice Reserve Fund, the Committee notes, there will be an ongoing increase in settlements and attorney fees, which will require additional reimbursement from the SGF.

- **Open cases.** The Committee recognizes the impact not only on medical care facilities (hospitals) but also on adult care homes. It notes in Plan Year 2019, 8 adult care homes were insured in the Availability Plan; by 2021, some 49 facilities were insured in the Plan. While there was a slight decline from Plan Year 2022 (58 facilities), 54 adult care homes still seek insurance outside the commercial marketplace. The Committee will continue to monitor health care facility providers, the marketplace concerns stated below, and the issues of affordability and availability of liability coverage and challenges seen in these facilities. The Committee requests available analysis regarding any trends in litigation and loss experience.

- **Marketplace conditions; present headwinds.** The Committee acknowledges the presentations from the representatives of the Board of Governors, a health care insurer, and health care provider representatives regarding the availability and affordability of medical professional liability insurance and present conditions. The Committee notes the increasing enrollment since 2020 in the Health Care Provider Insurance Availability Plan (Availability Plan). The Availability Plan's experience mirrors many of the concerns seen nationwide for the professional liability insurance industry, which has led to insurers and reinsurers tightening underwriting standards and raising rates. The headwinds impacting Kansas health care providers are tied to larger economic concerns as well as State policies, including inflationary issues impacting the cost of providing health care and its delivery, the interest rate environment, increasing litigation costs coupled with higher severity claims (resulting in larger settlements or verdicts), the uncertainty regarding the application of the Kansas Supreme Court's decision in *Hilburn v. Enerpipe Ltd.* (2019) to the cap on noneconomic damages as it applies to medical malpractice actions, and ongoing consolidation of the health care industry and workforce staffing challenges. The impacts of COVID-19 on overall health care delivery also must be acknowledged.

  - The Committee further recognizes Kansas health care providers and the insurance industry benefit from the HCPIAA, state tort law, and the HCSF itself. Health care providers know professional liability insurance is available, given the market stabilization afforded by the HCSF and the oversight provided by the Board of Governors and its actuary. It notes other states with similar funds have weathered these same headwinds without sufficient payments, investments, and other revenues and now face using state general fund dollars to shore up those funds.

- **Defined health care providers.** The Committee appreciates the concerns presented by a licensed maternity care center regarding the difficulty of securing coverage in the commercial marketplace and the increased cost of participation in the Availability Plan. The Committee requests the 2024 Legislature again consider legislation allowing maternity care centers that meet the criteria (licensed maternity center and accredited by

the Commission for the Accreditation of Birth Centers) and pass this legislation in a clean form. This bill has been prefiled as 2024 HB 2478.

  - The Committee further requests the Kansas Legislative Research Department more broadly review the inclusion of advanced practice registered nurses (APRNs) as defined health care providers and the resulting fiscal impact of inclusion in the HCSF and report its fundings to the Legislature and the Committee for consideration. (Some APRNs, such as registered nurse anesthetists and certified nurse midwives have sought and been made part of this definition previously.) The Committee recognizes law enacted in 2022 (S. Sub. for HB 2279) allowed an APRN to prescribe drugs without a written protocol as authorized by a responsible physician and required an APRN to maintain medical malpractice insurance. [*Note:* This requirement is part of the Kansas Nurse Practice Act, as amended, and does not specify the level of coverage that must be maintained.]

- **Fund to be held in trust.** The Committee recommends the following language to the Legislative Coordinating Council, Legislature, and the Governor regarding the HCSF:

  - The Health Care Stabilization Fund Oversight Committee continues to be concerned about and is opposed to any transfer of money from the HCSF to the SGF. The HCSF provides Kansas doctors, hospitals, and the defined health care providers with individual professional liability coverage. The HCSF is funded by payments made by or on behalf of each individual health care provider. Those payments made to the HCSF by health care providers are not a fee. The State shares no responsibility for the liabilities of the HCSF (excepting KU faculty and resident 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.

Legislative review. The Committee requests its report be directed to the standing committees on health, insurance, and judiciary, as well as to the appropriate subcommittees of the standing committees on appropriations.

Proposed Legislation: None.

Background

The Health Care Stabilization Fund Oversight Committee (Committee) was created by the 1989 Legislature and is described in KSA 40-3403b. The 11-member Committee consists of 4 legislators, 4 health care providers, 1 insurance industry representative, 1 person from the general public with no affiliation with health care providers or the insurance industry, and the Chairperson of the Health Care Stabilization Fund (HCSF or Fund) Board of Governors or another member of the Board designated by the Chairperson.

The law charges the Committee to report its activities to the Legislative Coordinating Council and to make recommendations to the Legislature regarding the HCSF.

The Committee met November 30, 2023, in the Statehouse.

Committee Activities

Report of Willis Towers Watson

Fund Position and Forecasts

The Willis Towers Watson actuarial report is based on the actuarial review of Fund experience as of December 31, 2022, and serves as an addendum to the report provided to the HCSF Board of Governors on September 19, 2023. The actuary addressed forecasts of the HCSF's financial position at June 30, 2023, and June 30, 2024, along with the company's 2022 estimate for June 2023. In the 2022 review, the estimate of HCSF-held assets as of June 30, 2023, was $299.54 million, with liabilities of $269.07 million, and with $30.46 million in unassigned reserves.

The actuary presented the following estimates for the company's 2023 study:

- June 30, 2023: $288.0 million in *assets*; $258.03 million in *liabilities*; and $29.97 million in *unassigned reserves*.

- June 30, 2024: $276.93 million in *assets*; $249.40 million in *liabilities*; and $27.53 million in *unassigned reserves*.

The actuary noted the ongoing impact of the 2021 law change on the assets and liabilities (overall net worth) of the HCSF will require a reduction in reserves of $2 million to $2.5 million. Based on this analysis, the company determined the HCSF needed to raise its surcharge rates by 5.2 percent in calendar year (CY) 2024 in order to maintain its unassigned reserves at the expected year-end CY 2023 level (approximately $28 million). [*Note:* This Committee's report to the 2022 Legislature outlines changes in surcharge revenues adopted by the Board of Governors to reflect the impact of and savings associated with 2021 House Sub. for SB 78 (SB 78).]

Rate Level (Surcharge) Indications

The actuary also reviewed the HCSF's (premium surcharge) rate level indications for CY 2024, noting the indications assume a break-even target between revenues and expenses. He detailed various CY 2024 items, including: payments, with settlement and defense costs of $35.70 million; change in liabilities (due to referenced change in HCSF law) of $8.63 million (negative); administrative expenses of $2.13 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 [Availability Plan]); and planned investment, based on CY 2022 surcharge decisions, of $372,000. The actuary indicated the net operating cost for the HCSF in CY 2024 is an estimated $29.02 million. He further noted the HCSF has two sources of revenue: its investment income (assumed to be $7.48 million based on 2.70 percent yield) and surcharge payments from providers ($21.55 million needed to break even). With the projected surcharge revenue ($20.47 million), this translates to a positive rate level indication for CY 2024 (5.2 percent).

Historical review and comment. The actuary addressed surcharge revenue and claims costs from 1999 through projected 2024 (based on estimates as of December 31, 2022). The actuary highlighted the significant decrease in revenue from 2021 to 2022, which reflects the change in 2021 HCPIAA law (reducing coverage requirements on the HCSF). In CY 2021, the HCSF was responsible for paying amounts for the layer of claims from $200,000 per claim for most providers up to $1.0 million per claim and $800,000 worth of coverage. Beginning in CY 2022, the coverage option changed to $500,000 of coverage, with the primary market responsible for $0 to $500,000, and the HCSF picking up from $500,000 to $1.0 million. The actuary noted the Fund will continue to see reductions over the next immediate years as the inventory of claims under the prior coverage limits wear off and the HCSF, under the new limits (2021 law), will be responsible only for paying the excess of $500,000, instead of the excess of $200,000.

Investment Yield

The actuary reviewed the HCSF's investment income over the previous ten fiscal years, noting the highest level of yield during this time was in 2014 and, in the past two years, that yield has been less than 2.5 percent. The actuary compared the present investment yield with the 5-year Treasury rate, noting the Fund's overall portfolio is impacted by securities (not yet mature, reinvested) and cash flow. He indicated the assumed future

yield rate for next year will be 2.70 percent, unchanged from their 2022 study. [*Note:* Testimony also indicated a 10-basis point change in the assumed rate would cause a 1.5 percent change in the CY 2024 surcharge rate indication.]

Indications by Provider Class; Loss Experience

The actuary provided an overview of rate indications by provider class, defining classes 1-30 and providing the number of providers and the CY 2023 rate for each class). The actuary noted, based on the company's analysis of experience by provider class, differences continue to be seen in relative loss experience among the classes. Classes with decreases or increases greater than 10.0 percent (meaning a rate decrease or increase is indicated by relative loss experience for the class) include:

- Decreases greater than 15.0 percent [greatest to least decrease]: Class 2 (physicians, no surgery); Class 24 (nursing facilities); Class 13 (registered nurse anesthetists); Class 6 (surgery specialty, includes emergency room [ER] [no major] and ear, nose, throat [ENT]); Class 16 (professional corporations, partnerships); and Class 12 (chiropractors); and

- Increases greater than 9.0 percent [least to greatest increase]: Class 15 (Availability Plan insureds); Class 8 (surgery specialty, includes general, plastic ER with major); Class 22 (nurse midwives); Class 3 (physicians, minor surgery); and Class 17 (medical care facilities).

Class 17 comment. The actuary highlighted a concern with rate indications for Class 17; analysis suggests rates need to increase close to 60 percent in order for that revenue to cover the claims costs for hospitals. Looking to the analysis by relative loss experience, Class 17 providers paid 14.0 percent of the total surcharge for the period of 2016-2021, but represented 22.0 percent of the reported losses during that time. Following receipt of this analysis, the Board of Governors determined the need to address this imbalance (*e.g.,* how much and how soon in rate setting).

CY 2024 surcharge rates. The actuary also provided a history of surcharge rate changes since 2012, noting the reduction in CY 2022, which corresponds to the 2021 law (providers receiving less coverage from the HCSF). In addition, there were no changes in the CY 2023 surcharge rates. Addressing the CY 2024 surcharge rates, the actuary noted the company provided several options to the Board of Governors to consider in establishing HCSF rates. It was noted that all of these options included an increase to Class 17. The Board decided on the following rate changes for CY 2024:

- Rate increases on classes 3, 8, 15, 17, and 22, ranging from a positive 2.5 percent (Class 15) to a positive 9.4 percent (Class 17);

- Rate decreases for classes 2, 6, 12, 13, 16, and 24, ranging from a negative 4.8 percent (Class 12) to negative 6.7 percent (classes 16 and 24); and

- No change in rates for classes 1, 4, 5, 7, 9, 10, 11, 14, 18, 19, 20, 21, and 23.

[*Note:* The estimated net overall impact of these selected changes is a 0.0 percent change in rate level.]

Discussion

CY 2022 observations. The actuary characterized the CY 2022 experience for the HCSF as a "mixed" year. He pointed to positive and negative indications for the year: payment activity was very high; loss performance on active providers was worse than expected; loss performance on inactive providers was better than expected; investment results were worse than anticipated; surcharge revenue was higher than predicted; and rate inadequacy is high for the hospitals (how much the hospitals are paying relative to the claims costs those facilities are experiencing). The actuary concluded, given these indications, the HCSF's net financial position at June 30, 2023, is similar to the level previously forecasted in the company's 2022 study.

Stabilization mechanisms in other states. The actuary highlighted other states' programs to address health care provider liability and patient compensation, indicating Indiana, Wisconsin, Pennsylvania, Louisiana, New Mexico, and

Nebraska have similar programs. He noted a review of New Mexico's actuarial report (which was not prepared by the HCSF actuary/actuarial firm) details a similar coverage option: that fund is responsible for the claims costs exceeding $250,000. The New Mexico liabilities at year-end 2022 were $267.0 million, which is similar to the HCSF's liabilities; however, assets were only one-half of that total, or $136.0 million, which puts this program to the negative by $131.0 million. The New Mexico Legislature appropriated $32.0 million from general fund taxpayer moneys to help address this shortfall in the Patient's Compensation Fund. With a deficit remaining, it is likely additional and large surcharges to all participating providers will be necessary. The actuary contrasted the New Mexico situation with the position of the HCSF, indicating the HCSF is in a strong financial position.

Committee discussion. Committee members, the actuary, and Board of Governors' representatives discussion topics included the Board's *investment policy* (outlined in KSA 40-3406), the management of the investment process by the Pooled Money Investment Board (PMIB), average duration of the investments and the longer-term liabilities of the Fund, and the relationship of investment income to overall Fund assets (*i.e.,* increased investment income reduces the needed income from health care provider surcharge revenues). On the topic of increased *payment activity* in CY 2022, it was noted it was a higher-than-average year for settling claims, with several jury trials. In addition, the courts were opened to civil cases (following the COVID-19 closures and restrictions), which led to an interest on both sides to resolve a backlog of claims.

On the topic of *rate level indications (surcharge)*, the actuary addressed costs and losses affecting hospitals and health systems nationwide, noting several unfavorable verdicts in jury trials against these facilities. Once a hospital or system experiences a verdict of this type, the result, the actuary indicated, is upward pressure on future settlement amounts. He highlighted a $31.0 million verdict in Arizona, noting this raises the bar and a facility or system likely could not take on the risk of another $31.0 million verdict and would settle instead. Further discussion focused on the experiences of Class 17 participants with cost drivers discussed (*e.g.,* birth-related cases and valuation of relevant economic damages) and the Board action to address provider rate class relative experience. The rate discussion also included the applicability and present rate set for the Missouri Modification Factor. [*Note:* All Kansas resident health care providers who are also licensed to practice in Missouri must pay an additional 30.0 percent surcharge.]

Comments

In addition to the report from the Board of Governors' actuary, the Committee received information from Committee staff detailing resource materials provided for consideration, including the Kansas Legislative Research Department's FY 2024 Appropriations Report and relevant budget and subcommittee reports outlining the actual and approved Board of Governor's expenditures, the Committee's conclusions and recommendations from its most recent annual report, proviso language from the Omnibus Appropriations bill (2023 SB 25) specific to certain maternity care centers and HCSF coverage for defined health care providers effective for FY 2024, and a reference copy of the statutes comprising the HCPIAA.

Committee staff also provided an update on relevant health care professional or facility legislation that was considered or passed during the 2023 Session. An Assistant Revisor of Statutes reviewed HB 2325, which would have amended KSA 40-3401 to add maternity centers to the definition of "healthcare provider" in the HCPIAA if the facility has accreditation by the Commission for the Accreditation of Birth Centers and meets the licensure definition for maternity center in KSA 65-503. The Assistant Revisor detailed amendments and committee actions and stated the bill was vetoed by the Governor and the veto was sustained. She noted the language specific to maternity care centers (HB 2325, as amended by the House Committee on Insurance) was incorporated into proviso language in SB 25 (section 17).

The Assistant Revisor highlighted three additional relevant bills that became law: HB 2014 (liability for emergency health care providers); HB 2264 (amended the definition of abortion; amendments to the Woman's-Right-to-Know Act regarding medication abortion reversal notification; veto overridden; portions temporarily

enjoined by a District Court judge); and SB 131 (out-of-state physician sports waiver).

Chief Counsel's Update

The Deputy Director and Chief Counsel for the Board of Governors addressed the FY 2023 medical professional liability experience based on all claims resolved in FY 2023, including judgments and settlements. She characterized FY 2023 as a "very busy year," explaining the increase in claim settlements and trials is partly due to closures or restrictions during the pandemic years and cases going through the system now.

Jury Verdicts and Settlements

Using HCSF data, the Chief Counsel stated 21 medical malpractice cases, involving a total of 24 Kansas health care providers, were tried to juries during FY 2023. The trials were held in the following jurisdictions: Johnson County (5); Sedgwick County (3); Saline County (2); Barton County (1); Pratt County (1); Riley County (1); Shawnee County (1); Wyandotte County (1); and Jackson County, Missouri (6). Seventeen of these cases resulted in defense verdicts; one case ended in mistrial; and, in three cases, the jury found for the plaintiff. In these cases, the amount awarded by the jury was greater than primary coverage limits (resulting in HCSF obligations) for a total of $1,807,500. It was noted that of the 30.0 percent of the cases (six cases) in Jackson County, Missouri, courts, five resulted in defense verdicts, and one case resulted in a plaintiff verdict.

The Chief Counsel highlighted the claims settled by the HCSF, noting in FY 2023, 95 claims in 85 cases were settled involving HCSF moneys. She noted this claims total exceeds, by more than 20, the number of settlements and acknowledged the impact of COVID-19 on the flow of court cases. The Chief Counsel commented on the severity of the claims, noting while there were increased settlements in FY 2023, three fewer claims were in the top category of damages settlement amounts.

The Chief Counsel reported, for the 95 claims, primary insurance carriers tendered their policy limits to the HCSF in 76 claims; the HCSF provided primary coverage for inactive health care providers in 13 claims; and the HCSF "dropped down" to provide coverage for 6 claims in which the aggregate primary policy limits were reached. The Chief Counsel noted when the claims involved the HCSF, the primary coverage limitation was $200,000. She further reported that for the claims involving HCSF moneys, the HCSF incurred $33,419,873 in settlement amounts; in addition, the primary insurance carriers contributed $15,200,000 and the excess insurance carriers contributed $9,135,377, for a total settlement amount of $57,755,250. She also reported, in addition to the 95 settlements, 7 claims were settled by an excess insurance carrier when both the primary and HCSF coverage were exhausted. The report notes this is the first instance in the Fund history when aggregate Fund coverage for a policy was exhausted.

The Chief Counsel also reported that, in addition to the settlements involving HCSF contributions, the HCSF was notified primary insurance carriers settled an additional 114 claims in 102 cases. [*Note:* These are claims settled within the primary coverage limits and do not require excess coverage.] The total amount of these settlements was $11,388,362. The Chief Counsel also referenced a historical report of HCSF total settlements and verdicts, FY 1977 to FY 2023. She also provided historical information on new cases by fiscal year, noting 307 new cases during FY 2023. Of these new cases, 71 were against adult care facilities. There were 274 new cases in FY 2022, including 55 against adult care facilities. The Chief Counsel provided historical context for recent claims, noting the impact of COVID-19, as well as the addition of five new categories of health care providers to the HCSF in 2015: certified nurse midwives, physician assistants, nursing facilities, residential health care facilities, and assisted living facilities. She noted there has been a corresponding gradual increase in the number of cases due to these new provider categories.

Self-insurance Programs

The Chief Counsel also addressed the self-insurance programs and reimbursement for the University of Kansas (KU) Foundations and Faculty and residents that provide basic liability coverage. (As directed by statute, the HCSF administers these programs and handles the claims for first-dollar coverage.) She reported the FY 2023 KU Foundations and Faculty program incurred $3,043,026 in attorney fees expenses and

settlements; $500,000 came from the Private Practice Reserve Fund; and $2,543,026 came from the State General Fund (SGF). The Chief Counsel noted the largest reason for the increase above FY 2022 program costs was attorney fees and expenses. She further explained there was a KU case involving KU health care faculty and residents that went to trial, for which there was a defense verdict. The Chief Counsel also indicated she anticipates the program costs for FY 2024 will reflect fewer settlements as the number of claims, to date, are slightly lower; however, attorney fees and expenses will likely remain at a similar amount.

In regard to the self-insurance programs for the KU/Wichita Center for Graduate Medical Education (WCGME) residents programs, including the Smoky Hill residents in Salina, the total amount for FY 2023 was $1,003,622. Commenting that the program costs for the residents' self-insurance program has remained fairly steady historically, the Chief Counsel noted the increase in program costs for FY 2023 is attributable to two cases involving residents in training that settled. [*Note:* All expenses—settlement amounts and attorney fees and expenses—are reimbursed from the SGF.]

The Chief Counsel provided a list of historical expenditures by fiscal year for the KU Foundations and Faculty program and the residents in training since the inception of the two self-insurance programs. She reported the ten-year average for the Foundations and Faculty program cost is about $2.0 million a year and noted FY 2023 was an "above average" year. The ten-year average for the residents-in-training program cost is about $988,000 and FY 2023 was "slightly above average." The Chief Counsel noted the increase in faculty meeting the criteria for participation in the self-insurance program (557 in FY 2013; 1,014 in FY 2023). She advised the Committee that the Private Practice Reserve Fund reimbursement amount (which reimburses the first $500,000 of this program's expenses) has not changed since 1989, in contrast to the substantial growth of full-time faculty (277 in FY 1990) and the primary insurance coverage limit change in CY 2022 from $200,000 to $500,000 for new claims. The remaining costs of the KU Foundations and Faculty program are reimbursed by the SGF.

The Chief Counsel also provided information about moneys paid by the HCSF as an excess carrier. She noted two settlements involved residents in training in FY 2023; neither claim involved an amount exceeding the claim's primary coverage. There were 13 settlements involving full-time faculty members in FY 2023; only two of those exceeded the primary amount of $200,000, with a total amount of $450,000.

Discussion

The Committee and Chief Counsel discussed topics as outlined below.

Judgments and Settlements

The Committee and Chief Counsel further discussed licensure requirements and HCSF coverage for Kansas licensed health care providers who choose to practice in Missouri and must also be licensed in Missouri. It was noted it is typically less expensive for a Kansas health care provider who lives in Kansas and practices in both states to have coverage from a primary carrier in Kansas and excess through the HCSF, rather than purchasing a Missouri policy. A Missouri doctor (a resident of Missouri) who holds a Missouri license and comes across state lines to render services in Kansas is required to participate in the HCSF for the portion of services rendered in Kansas. On the topic of the seven claims settled by excess insurers, the Chief Counsel reported a hospital experienced machine malfunctions involving cardiac surgery, which contributed to several large claims.

Self-insurance Programs

The Committee and the Chief Counsel discussed the number of slots allocated for program residents. It was noted the self-insurance program covers only KU affiliates, and residents from other programs outside Kansas would either need to meet the definition of "healthcare provider" or receive professional liability coverage from their own school of medicine. On the topic of the new Doctor of Osteopathic Medicine (DO) school in Wichita, it was noted the school would either need to be affiliated with KU or separate legislation would be needed to add the DO residents to the self-insurance program requirements in the HCPIAA. Committee members and the Chief Counsel discussed the

reimbursement arrangements and eligibility criteria for the KU Faculty and Foundations program and the level of training (versus clinical) services provided by faculty members.

Medical Malpractice Insurance Marketplace; Availability Plan Update

The President and Chief Executive Officer (CEO), Kansas Medical Mutual Insurance Company (KAMMCO), reviewed the current status of the medical malpractice marketplace in Kansas and the Availability Plan.

Health Care Provider Insurance Availability Plan; Market Conditions

The KAMMCO conferee addressed several aspects of the Availability Plan and its current participants, noting as of October 1, 2023, 402 providers were in the Plan. The conferee outlined the Plan's participants by risk type, with the largest year-over-year growth seen in physicians (14.72 percent); other health care providers (*e.g.,* registered nurse anesthetists, chiropractors, nurse midwives, physician assistants, and podiatrists) (24.39 percent); and professional associations (9.09 percent). Long-term care facilities showed a slight decrease, from 58 to 54 participants (-6.90 percent). The conferee also provided details on participation by physicians and surgeons by classification (*e.g.,* Family or General Practice, no surgery) and on other individual risks written by the Plan (*e.g.*, 16 nurse midwives). The conferee addressed the historical Plan participation trends (1990-2023), noting the variations over time reflect the insurance market cycle. Low points indicate soft market cycles, meaning there is availability in the marketplace. Triggering events (*i.e.,* 9/11, recessionary periods) led to constriction in the marketplace. A market firming, which could lead to a hard market, began in 2020 and has continued into 2023. This most recent firming has led to carriers, reinsurers, and others tightening underwriting standards and raising rates. The conferee provided the numbers of total claims, total lawsuits, Plan insureds, and claims per 100 insureds over the past ten years. The 2023 claims data are as follows: 25 claims, 15 lawsuits, 402 insureds, and 6.2 claims per 100 insureds.

Adult care homes. The KAMMCO conferee noted much of the recent rise in health care providers insured by the Plan is due to the insurance market conditions for adult care facilities, which likely results from conditions brought on by the COVID-19 pandemic. Recent plan participation data shows:

- Plan Year 2019: 8 insured facilities;
- 2020: 10 insured facilities;
- 2021: 49 insured facilities;
- 2022: 58 insured facilities; and
- 2023: 54 insured facilities.

Claims Environment; Firming Conditions

The KAMMCO conferee addressed the current environment for the insurance industry, which he characterized as "difficult," noting high interest rates, higher costs of claims and settlements, and expensive litigation costs. Commenting on the nationwide changes in health care delivery in the past ten years, he noted one of the effects of the Affordable Care Act was a significant consolidation and vertical integration in the health care industry (*e.g.,* hospitals buying physician clinics, others buying hospitals). He stated this and other factors, COVID-19, for example, have accelerated these industry changes nationwide and increased the uncertainty of predicting rates and making projections, whether next year or five years from now. Speaking to Kansas-specific challenges, the KAMMCO conferee noted the continued uncertainty surrounding the cap on noneconomic damages resulting from the Kansas Supreme Court opinion in *Hilburn v. Enerpipe Ltd.* (2019), and whether *Miller v. Johnson* remains the precedent for maintaining the cap in medical professional liability cases. Other contemporary issues continue to define potential headwinds, the conferee concluded, pointing to cyberattacks on systems, hospital and health care industry workforce (*i.e.,* staffing and the cost to maintain the workforce), and the potential the increase in risk creates for possible litigation and the costs to insure those risks.

Comments from Health Care Providers and Other Interested Parties

Kansas Medical Society and Kansas Hospital Association. The Executive Director of the Kansas Medical Society (KMS) provided comment, in conjunction with written remarks submitted by the Kansas Hospital Association, on

both the continuation of the Committee's oversight and the report provided by the Board of Governors' actuary, stating that, over the years, the HCSF has done exactly what was intended: providing stability in the malpractice environment by allowing providers to afford coverage to practice in Kansas and giving patients access to a right to recovery in the event of an adverse outcome. The KMS conferee stated the Committee plays a vital role in protecting the public by ensuring that the Fund remains solvent and independent and encouraged the continued oversight and reporting to the Legislature. The KMS conferee indicated the organizations do not believe an additional outside actuarial analysis is necessary.

Maternity centers; certified nurse midwives. The CEO for New Birth Company provided comment regarding barriers for maternity centers in obtaining malpractice insurance and referenced written testimony submitted by the Kansas Affiliate of the American College of Nurse-Midwives. [*Note*: As defined in KSA 65-503, a "maternity center" is a facility that provides delivery services for normal, uncomplicated pregnancies.] Maternity centers are not currently included among the defined health care providers under the HCPIAA; legislation has previously been sought (a proviso has been enacted for FY 2024; the 2023 bill containing these provisions was vetoed) to include such facilities in the HCSF. The conferee noted challenges with securing underwriting for New Birth Company, stating a third-party carrier interested in underwriting coverage for nurse midwives declined to write coverage. citing the Company's absence from the HCSF definition. The conferee noted a bill (2024 HB 2478) has been pre-filed to address inclusion of certain maternity care centers as defined health care providers.

Speaking more generally to issues of insurance availability for nurse midwives, testimony provided by the American College of Nurse-Midwives (CNMs) noted that after 2020, no insurance providers in the HCSF offered coverage to CNMs, which left the more costly Availability Plan as the only remaining coverage option. The testimony noted one carrier offering coverage but choosing to not cover some practices. The testimony referenced different scopes of practice within the profession and lower litigation rates, indicating rating should be based on complexity and risk of services provided. Both conferees' testimony also addressed broader concerns about the need to improve maternal and infant health outcomes, the need to have a more robust workforce to meet those needs, and the importance of providing more affordable coverage options for certified nurse midwives and maternity centers.

Kansas Trial Lawyers Association. A partner with Shamberg, Johnson, and Bergman, Chtd., appeared on behalf of the Kansas Trial Lawyers Association (KTLA). The conferee addressed KTLA's concern that the Board of Governors is not in compliance with HCPIAA provisions in KSA 40-3404, as the Fund is not offering health care providers the option to purchase the $1.5 million-per-claim excess insurance that is required by KSA 40-3403(l)(1)(B)(ii). The conferee noted since the enactment of the HCPIAA, the Legislature has determined both the amount of coverage purchased by health care providers and the amount of excess coverage provided by the Fund.

The conferee addressed changes to liability coverage requirements (per occurrence and in the aggregate) over time and amendments in 2021 that included the provision regarding an HCSF-provided excess coverage option. The conferee noted the Board of Governors chose not to offer the option to purchase $1.5 million of coverage (2021 law) when it met in 2021 to consider surcharges for Fund coverage. The conferee further stated the Board has not discussed offering this option of higher excess coverage in either its 2022 or 2023 meetings. The conferee requested the Committee either require the Board to offer such coverage or, if a determination is made that is not necessary to offer the coverage, to require the Board to make an appropriate record so the courts may review the HCSF's decision to determine compliance with Kansas law regarding agency decisions.

Board of Governors' Statutory Report

The Executive Director of the HCSF Board provided a brief history of the HCPIAA, noting that when this law was enacted 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 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 HCSF to provide excess coverage above the primary coverage purchased by the health care providers and to serve as reinsurer of the Availability Plan.

The Executive Director provided the Board of Governors' statutory report [as required by KSA 40-3403(b)(1)(C)] and issued on October 1, 2023. The FY 2023 report indicated:

- Net premium surcharge revenue amounted to $19,782,219. The highest surcharge rate for a health care professional was $10,006 for coverage of $500,000 per claim/ $1.5 million annual aggregate limit. Application of the Missouri modification factor for a Kansas resident neurosurgeon licensed to practice in Missouri would result in a total premium surcharge of $13,008 for this health care practitioner; the lowest surcharge rate for a health care provider was $200 (primarily used by a non-resident provider providing minimum health care services in Kansas);

- The average HCSF compensation per settlement (85 cases involving 95 claims were settled) was $351,788; these settlements resulted in a total HCSF obligation of $33,419,872. (These amounts are in addition to compensation paid by primary insurance carriers.);

- The balance sheet, as of June 30, 2023, indicated total assets of $290,328,876 and total liabilities of $278,720,437.

Health Care Provider Insurance Availability Plan

The Executive Director's presentation also included an update on the Availability Plan. He reported 402 plan participants as of October 23, 2023. The Executive Director noted the Plan's purpose and reported that individual providers pay about 33.0 percent more in premiums for basic coverage than if insured by a commercial insurance company and also must pay a higher HCSF surcharge. He also discussed the HCSF's role as the reinsurer to the Plan, noting in years (including FY 2023) when the Plan's losses exceed income, the HCSF is required by law to transfer the net loss to the Availability Plan. For FY 2023, the Plan will transfer $401,820.

Recent Legislation and Changes; Conclusions

The Executive Director's report highlighted the 2021 law change that increased, effective January 1, 2022, the required basic coverage that specified health care providers must obtain from an insurer, from $200,000 to $500,000 per claim. Providers are also required to obtain $500,000 per claim coverage from the HCSF. The report also addressed the Legislature's continued interest in the promotion of health care services for Kansans and the ongoing role of the HCPIAA in ensuring access to adequate professional liability insurance coverage.

Discussion

The Executive Director responded to an earlier discussion with the Board actuary and generally reviewed the Board's investment procedures and statutory requirements. He noted the Board of Governors will hear from the PMIB Executive Director at its next meeting and the Board routinely reviews its investment policy and guidelines and makes adjustments as needed (conforming to requirements in the HCPIAA for investments of HCSF revenue by the PMIB).

Conclusions and Recommendations

The Committee considered two items central to its statutory charge: whether the Committee should continue its work and whether a second, independent analysis of the HCSF is necessary. This oversight committee continues in its belief the Committee serves a vital role as a link between the HCSF Board of Governors, health care providers, and the Legislature, and should be continued. Additionally, the Committee recognizes the important role and function of the HCSF in providing stability in the professional liability insurance marketplace, which allows for more affordable coverage to health care providers in Kansas. The Committee is satisfied with the actuarial analysis presented and does not request the independent review.

The Committee considered information presented by the Board of Governors' representatives, including its required statutory report; the Board's actuary; and health care provider and insurance company representatives and other interested parties.

The Committee acknowledges its role to provide oversight and monitoring of the HCSF, including legislative actions and other contemporary issues affecting the soundness of the HCSF, and agreed on recommendations and comments on the following topics:

- Actuarial report; income and rate level indications; other Board reports;
- Marketplace conditions; present headwinds;
- Defined health care providers; and
- The Fund is to be held in trust.

The Committee requested its report to be directed to the standing committees on health, insurance, and judiciary, as well as to the appropriate subcommittees of the standing committees on appropriations.