Report of the Health Care Stabilization Fund Oversight Committee to the 2023 Kansas Legislature

CHAIRPERSON: Marvin Kleeb

OTHER MEMBERS: Senators Cindy Holscher and Gene Suellentrop; and Representatives Henry Helgerson and Richard Proehl

NON-LEGISLATIVE MEMBERS: Craig Concannon, MD; Darrell Conrade; Dennis George; Douglas Gleason, MD; James Rider, DO; and Jerry Slaughter

CHARGE

Review Status of the Health Care Stabilization Fund

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

December 2022

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 among the HCSF Board of Governors, the 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 required statutory report; the Board's actuary; and health care provider and insurance company representatives. 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.** The Committee notes the analysis provided by the Board of Governors' actuary characterized Calendar Year 2022 as a "generally favorable year," with the Fund's position as of June 30, 2022, slightly better than previously forecasted. Loss experience for both active and inactive claims was better than anticipated and assets as of December 31, 2021, were $14.0 million more than assets reported at year-end 2020. However, other indications noted investment income flattening out at 2.70 percent and a high surcharge rate inadequacy for the hospital and nurse midwife provider classes. The Committee notes the Board of Governors' election to make no change in rates for calendar year 2023.

- **Implementation and impact of 2021 House Sub. for SB 78.** The Committee recognizes the rebalance of claims and liability achieved by increasing the basic coverage limits for both individual and annual aggregate of claims. This shift to the primary insurance carrier, as acknowledged in the Committee's previous report, lowers surcharge revenue to the HCSF and reduces the number of claims and level of exposure of the HCSF. The Committee appreciates the update from an insurance carrier acknowledging the continued availability of adequate insurance carriers and coverage in the marketplace.

  The Committee separately acknowledges the impact of the increased coverage requirements 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 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 State General Fund. With the coverage amounts increasing, first seen in FY 2024, pursuant to this 2021 law, the Committee notes the likely corresponding increase in settlements and attorney fees and expenses.

- **Marketplace conditions and headwinds.** The Committee acknowledges the concerns presented by a health care insurer, health care provider representatives, and the Board of Governors' Chief Counsel. (It submits a related comment regarding the COVID-19 pandemic effects.) Among the ongoing and emerging items contributing to the overall hardening of market conditions nationwide, the Committee cites medical malpractice *claims severity* with increased costs for damages (*e.g.*, past and future medical costs), including the *frequency of large verdicts*, concerns within reinsurance programs with the *withdrawal of reinsurance capacity* coupled with tightening terms and increasing rates, and *rate inadequacy* for primary insurer rates due to continuing consolidation in the health care market. On the state level, the Committee notes the open question following the 2019 *Hilburn* decision, regarding whether the cap on non-economic damages is constitutional as it applies to medical malpractice actions and a related consideration of the cap on wrongful death damages. It also notes changes to the *scope of practice* for advanced practice registered nurses and expanded prescribing authority, as well as law relating to the corporate practice of medicine.

- **COVID-19 impacts; adult care homes' liability concerns; medical care facilities.** The Committee notes the testimony presented regarding COVID-19-related claims, with some 40 to 50 pending cases, most of them filed against nursing facilities. While no case has made it to trial, the Committee acknowledges the resources (expense and time) needed for discovery and, ultimately, for defense of such claims. The Committee especially recognizes the impact of market conditions exacerbated by the COVID-19 pandemic on adult care homes and notes the corresponding increase in nursing facilities participating in the Health Care Provider Insurance Availability Plan, with only 8 facilities seeking insurance in the Plan in 2019 (meaning they were unable to secure insurance coverage in the commercial marketplace) and 58 facilities seeking such coverage in 2022. The Committee will continue to monitor health care facility providers, both nursing facilities and, more broadly, medical care facilities, and these above-stated concerns and the issues of affordability and availability of liability coverage and challenges including staffing and supply chain. The Committee requests additional analysis regarding any trends in lawsuits and loss experience.

- **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 State General Fund (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 healthcare 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 University of Kansas faculty and resident self-insurance programs reimbursement). 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"; 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.

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) 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 15, 2022.

Committee Activities

Report of Willis Towers Watson

Fund Position and Forecasts

The Willis Towers Watson actuarial report serves as an addendum to the report provided to the HCSF Board of Governors on September 13, 2022. The actuary addressed forecasts of the HCSF's position at June 30, 2022, based on the company's annual review, along with the prior estimate for June 2022. In the 2021 review, the estimate of the HCSF-held assets as of June 30, 2021, was $303.34 million, with liabilities of $264.71 million, and with $38.62 million in unassigned reserves.

The actuary presented the following estimates for the company's 2022 study:

- June 30, 2022: $311.27 million in *assets*; $270.30 million in *liabilities*; and $40.98 million in *unassigned reserves*.
- June 30, 2023: $299.54 million in *assets*; $269.07 million in *liabilities*; and $30.46 million in *unassigned reserves*.

The actuary noted, based on the analysis presented to the Board of Governors, the HCSF needs to raise its surcharge rates by 2.0 percent in calendar year (CY) 2023 in order to maintain its unassigned reserves at the level projected based on the rate actions taken in 2021 for CY 2022. [*Note:* The forecast for unassigned reserves assumes $19.1 million in surcharge revenue in the July 1, 2022 – June 30, 2023 (FY 2023) period. The Committee's report to the 2022 Legislature outlines changes in surcharge revenues adopted by the Board to reflect the impact of and savings associated with 2021 House Sub. for SB 78.]

Rate Level (Surcharge) Indications

The actuary also reviewed the HCSF's rate level (surcharge) indications for CY 2023, noting the indications include a break-even target between revenues and expenses. He detailed various CY 2023 items, including *payments*, with settlement and defense costs of $36.21 million; *change in liabilities* of $2.33 million (positive); *administrative expenses* of $2.08 million; *transfers* to the Kansas Department of Health and Environment 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 $8.40 million. The actuary detailed the two revenue sources for the HCSF: its investment income (assumed to be $8.13 million based on 2.70 percent yield) and surcharge payment from health care providers ($19.62 million needed to break even). In a later review of overall indications, the actuary stated there is a slight positive rate indication for CY 2023 (2.0 percent).

The actuary, however, did not believe that the Board needed to take a significant rate increase for CY 2023.

Investment Yield

The actuary reviewed the HCSF's investment income over the previous ten years, noting the Fund's investment yield has flattened out, after several years of decline. The company chose to keep the assumed future yield rate at 2.70 percent, which is unchanged from the rate used in its 2021 study. [*Note*: Testimony also indicated a 10-basis-point change in the assumed rate would cause a 1.5 percent change in the CY 2023 surcharge rate indication.]

Indications by Provider Class; Loss Experience

The actuary provided an overview of indications by provider class (review of classes 1-30, the number of providers in each class, and the CY 2022 rate). 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 percent (meaning a rate decrease or increase is indicated by relative loss experience for the class) include:

- Decreases greater than 10 percent [greatest to least decrease]: Class 24 (nursing facilities); Class 13 (registered nurse anesthetists); Class 6 (surgery – ER [no major], ENT); Class 12 (chiropractors); Class 11 (surgery – neurosurgery); and Class 23 (assisted living, residential health care facilities); and

- Increases greater than 10 percent [least to greatest increase]: Class 5 (surgery – urology, colon/rectal, GP with major); Class 22 (nurse midwives); and Class 17 (medical care facilities).

The actuary and committee discussed two provider classes cited for rate increase indications: nurse midwives and hospitals (medical care facilities). The actuary also provided a history of surcharge rate changes since 2011, noting the more recent changes, which included raising the relativities for years of compliance.

The actuary addressed the three options for CY 2023 surcharge rates that were provided to the Board of Governors. The actuary highlighted the Board of Governors' decision to implement Option 1, no changes in rates. Two other options had been presented to the Board of Governors: Option 2 would have provided for a base rate increase on classes 1-14, and Option 3 would have provided for selective rate changes by class. The actuary indicated the three options did not include the potential Fund revenue increase due to the higher basic coverage rates, other than for the impact of 2021 House Sub. for SB 78, for classes 15-24 (*i.e.,* Availability Plan insured, certain facilities, residency training programs, and specified mid-level practitioners).

Discussion

The actuary characterized the CY 2021 experience for the HCSF as a "generally favorable year." He noted that loss experience was better than expected on both active and inactive claims. Further, assets at December 31, 2021, were $14.0 million higher than assets reported at December 31, 2020. Other indications he noted included investment income flattening out and a high rate inadequacy for the hospital and nurse midwives classes. The actuary concluded, given these indications, the HCSF's financial position at June 30, 2022, was "slightly better" than what the company had forecasted and presented to the Committee in November 2021.

Committee members and the actuary discussed relative loss experience among provider classes, including trends seen in other states for hospitals and other facilities. The actuary noted the escalation in verdict and settlement amounts for hospitals, citing cases in Cook County (Illinois), Detroit, Philadelphia, and southeast Florida; he also pointed to a recent $90.0 million civil verdict in Iowa. In evaluating the trends for the higher amounts, the actuary and a Committee member serving on the Board noted that for these facilities, this is a severity issue, not a frequency issue, and the Board and actuary have discussed pricing, adequacy of rates and reserves, and appropriate coverage levels.

Comments

In addition to the report from the Board of Governors' actuary, the Committee received

information from Committee staff detailing resource materials provided for its consideration, including the Kansas Legislative Research Department's *FY 2023 Appropriations Report* outlining the actual and approved Board of Governors' expenditures, the Committee's conclusions and recommendations from its most recent annual report, and the Omnibus Appropriations bill (2022 HB 2510) proviso language specific to certain maternity care centers and HCSF coverage for defined health care providers effective for FY 2023.

Committee staff also provided an update on legislation of interest to the Committee that was considered or passed during the 2022 Session. The Revisor reviewed SB 399, which would have amended KSA 40-3401 to add maternity centers to the definition of "healthcare provider" in the Health Care Provider Insurance Availability Act (HCPIAA). The bill passed out of the Senate but was not considered by the House Committee of the Whole. She indicated the proviso language in HB 2510 deems a maternity center a "healthcare provider" for the purposes of the HCPIAA if such center is accredited by a recognized national organization or falls within the definition in KSA 65-503. Also highlighted was 2022 SB 502, which would have established a separate licensure and regulatory process for maternity centers.

The Revisor reviewed three additional bills enacted in 2022. Senate Sub. for HB 2279 amends the Kansas Nurse Practice Act to permit advanced practice registered nurses (APRNs) to prescribe drugs without a written protocol with an authorized physician. The Revisor noted the bill did not amend the defined health care provider language in the HCPIAA to include APRNs working in this expanded role. SB 440 authorizes occupational therapists to provide limited services to patients without referral from certain health care providers. HB 2477 temporarily amends certain provisions related to health care providers and adult care homes in response to the COVID-19 pandemic; these provisions expire on January 20, 2023.

Chief Counsel's Update

The Deputy Director and Chief Counsel for the Board of Governors addressed the FY 2022 medical professional liability experience (based on all claims resolved in FY 2022, including judgments and settlements). She characterized FY 2022 as "getting back to normal" in terms of the number of claims and filed cases and the courts being open for business.

Jury Verdicts and Settlements

Using HCSF data, the Chief Counsel stated 16 medical malpractice cases involving 17 Kansas health care providers went to trial during FY 2022. The trials were held in the following jurisdictions: Sedgwick County (5); Johnson County (3); Cowley County (1); Pottawatomie County (1); Republic County (1); Shawnee County (1); Clay County, Missouri (2); and Jackson County, Missouri (2). Nine of the cases resulted in defense verdicts, in six cases the jury found for the plaintiff, and one case ended in mistrial. Four of the plaintiff verdicts resulted in awards greater than the primary coverage limits. HCSF obligations as a result of these verdicts totaled $2,782,229. The presentation also included a chart illustrating numbers of trials and verdicts over the past 20 fiscal years.

The Chief Counsel highlighted the claims settled by the HCSF, noting in FY 2022, 75 claims in 64 cases were settled involving HCSF moneys. Settlement amounts incurred by the HCSF totaled $28,612,434, not including settlement contributions by primary or excess insurance carriers. She compared the FY 2022 experience to that of FY 2018 and FY 2019. She also reported on the severity of claims, providing a comparison of settlement amounts from FY 2015 to FY 2022, which illustrated increasing severity, meaning an increasing number of settlements for individual claims in the ranges of $250,000 – $600,000 and $600,001 – $1,000,000.

The Chief Counsel reported, for the 75 claims, the HCSF provided primary coverage for inactive health care providers in 9 claims. In addition, she continued, the Fund "dropped down" to provide coverage for two claims in which aggregate primary policy limits had been reached. Primary insurance carriers tendered their policy limits to the HCSF in 66 claims; 6 of those claims involved contribution from an insurer whose coverage was in excess of HCSF coverage. The Chief Counsel reported in addition to the settlements involving HCSF contributions, the HCSF was notified that primary insurance carriers settled an additional

101 claims in 91 cases. The total amount for these reported cases was $11,475,868.

The Chief Counsel also reported on the number of total HCSF settlements and verdict amounts by fiscal year. She noted this is the first time since FY 2018 that the HCSF was involved in the payment of a verdict. She also provided historical data (FY 1977 – present) for new cases by fiscal year, indicating that the HCSF was notified of 274 new cases during FY 2022. She confirmed the number of cases for FY 2022 was down by 44 from the prior year and pointed to a 7-year decrease in new claims for the period of FY 2009 through FY 2015. With changes to law in 2014, which added five new categories of health care providers, the annual increases seen in FY 2016 – FY 2019 were expected. The FY 2022 decrease, she continued, does not appear to be trend-setting, as there have been 91 new claims in the first 3 months of FY 2023.

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. She reported the FY 2022 KU Foundations and Faculty program incurred $2,380,709.02 in attorney fees, expenses, and settlements; $500,000 came from the Private Practice Reserve Fund and $1,880,709.02 from the State General Fund (SGF). She indicated this amount was an increase of $617,105.84 above FY 2021; the ten settlements in FY 2022 compared to six in FY 2021 largely account for the difference. The Chief Counsel indicated she anticipates the program costs will be similar in FY 2023, and she hopes to report fewer settlements at a level similar to those in FY 2021.

In regard to self-insurance for the KU/ Wichita Center for Graduate Medical Education residents programs, including the Smoky Hill residents in Salina, the total amount for FY 2022 was $865,070.17. There were no claim settlements during this time frame, so the total reported reflects only attorney fees and expenses. The Chief Counsel attributed rising attorney fees and other costs to the number of claims (*e.g.*, 14 pending claims from FY 2020; and 36 from FY 2022). [*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 these two self-insurance programs. She reported the ten-year average for the residents-in-training program is about $980,000 per year and noted FY 2022 would qualify as "slightly below average" in reimbursable costs. In comparison, the ten-year average for the KU Foundations and Faculty program is about $1,900,000, with FY 2022 "above average" in costs. The Chief Counsel noted the growth in faculty meeting criteria for participation in the self-insurance program (506 in FY 2012; 1,004 in FY 2022). The Private Practice Reserve Fund reimbursement amount has not been increased since its creation in 1989 (this fund reimburses the first $500,000 of this program's expenses). The remaining costs for this program are reimbursed by the SGF. The Chief Counsel noted the upcoming impact of 2021 House Sub. for SB 78; it is anticipated that the required level of primary insurance coverage increase from $200,000 to $500,000 will begin to be reflected in claims filed during FY 2024. This increase, coupled with no change in the Private Practice Reserve Fund reimbursement limitation, could require additional reimbursement from the SGF for program expenses incurred by the HCSF.

The Chief Counsel also provided information about moneys paid by the HCSF as an excess carrier. She noted no such claims were paid for the residents in FY 2022. There were ten claims involving KU Foundations and Faculty members in FY 2022; four of those claims involved an amount greater than $200,000, and the total amount for those settlements was $1,482,500.

Discussion

The Committee and the Chief Counsel discussed topics as outlined below.

Adult Care Homes and Claims; COVID-19

The Committee and Chief Counsel discussed emerging trends in cases filed. She indicated there were no new types of claims, but in the prior two fiscal years, the Board of Governors saw a significant number of cases filed related to COVID-19. These cases involved adult care homes (nursing facilities) and some 40 to 50 cases are pending, with the first cases filed at the end of

April 2020. At the time of the meeting, filed cases were pending that involved six nursing facilities in Kansas. Nearly 40 of those claims had been filed against 2 of these facilities, 1 in Wyandotte County and 1 in Johnson County. The Chief Counsel indicated the primary allegation in this type of claim is that the long-term care facility did not following the rules and regulations regarding COVID-19.

The Committee and Chief Counsel discussed defense of these type of claims; the Chief Counsel indicated the primary insurance carrier for the facilities in Johnson and Wyandotte counties was engaged vigorously in the defense. Committee members discussed immunity protections provided by the Legislature in 2020 (for physicians and hospitals) and the more broad protections provided in 2021 (if the facility was in substantial compliance). The Chief Counsel indicated these claims will take a substantial period of time and claims expenses for defense, noting the discovery stage has been lengthy and is generally focused on whether the nursing facility met the standard of care. The Chief Counsel was not aware of any pending legislative proposals to further address COVID-related cases for nursing facilities.

Self-insurance Programs

The Chief Counsel addressed questions regarding the growth in and criteria for participation in the KU Faculty and Foundations program. She stated, pursuant to statute [KSA 40-3414(h)], a qualifying faculty member must be a member of the foundation and have a full-time faculty appointment. She noted that not all of the 1,004 faculty members in the program supervise residents; in this instance, they qualify because they have full-time faculty appointments. The Chief Counsel confirmed no faculty member physicians are employed at the University of Kansas Health Systems (KUHS) hospital in Great Bend; three faculty members are employed at the KUHS St. Francis campus in Topeka. She did not have information regarding the potential faculty member participants associated with the recently announced KUHS merger with OlatheHealth.

Severity of Claims

The Chief Counsel responded to questions regarding the increase in severity of claims, as reported in the HCSF settlements' data. The Chief Counsel detailed the filing of a suit for a medical malpractice action, explaining the components of damages for a claimant include both past medical expenses and future medical expenses. As medical expenses rise, the claim will be made to increase the request for damages.

Medical Malpractice Insurance Marketplace; Availability Plan Update

The Vice President for the Claims division, Kansas Medical Mutual Insurance Company (KAMMCO), appeared to present testimony on behalf of KAMMCO's President and Chief Executive Officer addressing the current status of the medical malpractice marketplace in Kansas and the Availability Plan.

Health Care Provider Insurance Availability Plan

The KAMMCO conferee addressed participation in the Availability Plan, noting the correlation between the number of Plan participants and the cyclical nature of the medical malpractice market. As the market hardens or becomes more restrictive, health care providers use the Plan to find insurance. Identifying a hard market cycle's impact on health care providers (2002 – 2010), the conferee noted that the period beginning in 2021 may signal the start of a tightening cycle.

Adult care homes. The KAMMCO conferee pointed to nursing facility Plan participants as notably impacted by market conditions brought on by the COVID-19 pandemic, and provided data regarding recent Plan participation:

- Plan Year 2019: **8** insured facilities;
- 2020: **20** insured facilities;
- 2021: **49** insured facilities; and
- 2022: **58** insured facilities.

The KAMMCO conferee noted the mitigating effects of recent immunity provisions addressing health care providers passed by the Kansas Legislature and confirmed earlier testimony noting, to date, no claims payments have been made on COVID-related claims.

Claims Environment; Industry Headwinds

The KAMMCO conferee addressed the broader impact of the COVID-19 pandemic, noting its affect on health care delivery nationwide, resulting in the acceleration of concerning trends already underway in health care and the professional liability insurance market. After a decade of profitable underwriting results, for example, this line of insurance has produced underwriting losses for the past five years. The factors contribution to these losses include *claims severity*, an increase in the *frequency of large verdicts* ("mega" verdicts), *withdrawal of resinsurance capacity* with tightening terms and increasing rates for reinsurance programs, *rate inadequacy* for primary insurer rates due to consolidation in the health care market, and state-specific issues. These challenges, paired with the broader economic conditions resulting from inflation and rising interest rates, have direct bearing on rate increases affecting Kansas health care providers across all lines of insurance.

The KAMMCO conferee highlighted those Kansas-specific issues, noting the uncertainty surrounding the State's cap on non-economic damages resulting from the *Hilburn v. Enerpipe Ltd.* decision, which creates a question for insurance companies about the applicability of the cap in professional liability cases. This uncertainty, he further stated, could hinder the efficient resolution of malpractice claims in a fair and reasonable manner. The Committee and the KAMMCO conferee discussed the applicability of *Miller v. Johnson* and which case would be considered controlling in medical malpractice claims.

2021 House Sub. for SB 78. The KAMMCO conferee testimony stated the law with its increase in basic coverage from $200,000 to $500,000 per claim appears to be working, without any shocks to the insurance marketplace or loss of any insurers offering coverage.

Comments from Health Care Providers

A representative of the Kansas Medical Society (KMS) provided joint remarks on behalf of KMS and the Kansas Hospital Association and referenced written testimony submitted by the KMS Executive Director. The two organizations commented on both the continuation of this Committee's oversight and the actuarial reporting provided by the Board of Governor's actuary, stating the HCSF has performed exactly as it was intended, achieving a balance in the market that protects patients and providers. The KMS conferee stated the Committee plays a vital role in protecting the public by ensuring that the Fund remains solvent and independent. The conferee cited new challenges and aspects affecting the HCSF: the *Hilburn* decision, the inclusion of corporations employing physicians, and complications around reinsurance exacerbated by the COVID-19 pandemic, and each of these topics underscore the need for the continued oversight of the Committee and reporting to the Legislature. The KMS conferee indicated the two organizations do not believe an additional outside actuarial analysis is necessary.

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 health care providers and to serve as a 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 October 1, 2022]. The FY 2022 report indicated:

- Net premium surcharge revenue collections amounted to $24,452,941. 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 (2021 House Sub. for SB 78 coverage option, effective January 1, 2022). Application of the 30.0 percent 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 provider; the lowest surcharge rate for a

health care provider was $200. This minimum rate is primarily used by non-resident providers who provide minimal health care services in Kansas;

- The average HCSF compensation per settlement was $381,499; 64 cases involving 75 claims were settled. These amounts are in addition to compensation paid by primary insurance carriers (typically $200,000 per claim). Total claims expenditures for FY 2021 amounted to $29,899,438;

- The balance sheet, as of June 30, 2022, indicated total assets of $310,120,249 and total liabilities of $278,776,996.

Availability Plan

The Executive Director's presentation also included an update on the Availability Plan. He reported that as of October 24, 2022, there were 362 plan participants. The Executive Director noted, for comparison, in 2004, more than 600 health care providers were insured by the Availability Plan. More providers end up participating in this plan during hard markets where insurers typically become more selective and less likely to accept new risks. Individual health care providers insured by the Plan pay about 33 percent more premium for basic coverage than if insured by a commercial insurance company; these individuals also pay a higher HCSF surcharge.

Contemporary Issues; 2021 Law Update

The Executive Director commented on the implementation of 2021 House Sub. for SB 78, which provided, effective January 1, 2022, the required basic coverage that defined health care providers must obtain from an insurer be increased from $200,000 to $500,000 per claim. The 2021 law also requires defined health care providers to obtain $500,000 per claim coverage from the HCSF. The Executive Director further noted the Board of Governors maintained the FY 2023 surcharge rates at the FY 2022 level. He concluded his testimony by stating the HCPIAA has been a very successful public-private partnership and creates a favorable environment for responsible professional liability insurance companies.

Discussion

The Committee and Executive Director discussed the relative loss experience of Class 17 (medical care facilities) and efforts to provide balanced and reasonable rate surcharges. The Executive Director noted the Board will continue its review and make appropriate adjustments as it deems necessary. Members of the Committee inquired about possible legislation regarding nursing facilities and the topic of nurse midwives and participation by certain entities in the HCSF. The Executive Director indicated he is unaware of any legislation to address either topic. In response to a question regarding the excess coverage ($1.0 million) option provided to the Board in 2021 House Sub. for SB 78, the Executive Director indicated the Board has reviewed this provision and decided it did not have sufficient experience to offer coverage at that level. The Board could choose to review this option if and when it is determined to be an appropriate option.

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 among the HCSF Board of Governors, the 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.

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 and status of the HCSF, and income and rate level indications;
- Implementation and impact of 2021 law (House Sub. for SB 78);
- Marketplace conditions and headwinds;
- COVID-19 and adult care home liability concerns, medical care facilities; and
- The Fund is to be held in trust.

The Committee requested 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.