

# Report of the Health Care Stabilization Fund Oversight Committee to the 2022 Kansas Legislature

**CHAIRPERSON:** Marvin Kleeb

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

**NON-LEGISLATIVE MEMBERS:** Darrell Conrade; Dennis George; Douglas Gleason, MD; Kevin McFarland; James Rider, DO; Jerry Slaughter

**CHARGE**

*Review the 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.



# 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 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 the following recommendations and comments:

- **Actuarial report and status of the HCSF; income and rate level indications.** The Committee notes the report provided by the Board of Governors' actuary characterized 2021 as having "mixed results," which leaves the Fund at a slightly worse position at June 30, 2021, than had been previously forecasted. While *surcharge revenue* slightly exceeded the forecast, this positive indicator was weighed down by the significant increase in the *reserves on known claims* (from \$40.83 million to \$63.45 million). On the topic of *investment income*, the other source of revenue for the Fund, the Committee acknowledges the concerns regarding the recent flattening of investment income and the most recent decrease in yield from 2.85 to a projected 2.70 percent.
- **Implementation of 2021 House Sub. for SB 78.** The Committee recognizes the following implementation steps taken to date and encourages continued conversation with the Commissioner of Insurance to ensure smooth implementation of the law and no impacts on health care providers, other than as intended by the law :
  - The forms have been prepared, the rates have been properly submitted and approved by the Commissioner, and the Board of Governors has had its own study and subcommittee that has looked specifically at rate level indications.

The Committee further notes the Board selected Version 1 of two proposals submitted by the actuary for the calendar year (CY) 2022 rate level; these proposals reflected enactment of this 2021 law. This decision will result in a 48.0 percent reduction for health care providers from the CY 2021 HCSF rates.

- **HCSF investment policy and strategies.** The Committee recognizes 2021 House Sub. for SB 78 presents an opportunity for the Board of Governors to review its investment policy and to take into account both short-term and long-term considerations, including those specific to the provision of tail coverage and future liabilities but also the changes in rate levels and the expectations in this rate environment for health care providers. The Committee encourages the Board to look at its investment policy and strategies with this lens, as well as the requirements currently provided in statute [KSA 40-3406].
- **Marketplace conditions; emerging 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. Among ongoing and emerging items contributing to the overall hardening of marketplace conditions, the Committee cites continuing contraction in the reinsurance marketplace, which impacts policy pricing and affordability for health care providers and also dictates underwriting restrictions. In both Kansas and the national experience, insurers and the Board continue to highlight the increasing frequency and severity of medical malpractice claims, which contributes to rising legal costs and resources expended. Commenting further on litigation and the legal environment for these claims, the Committee notes the open question following the 2019 *Hilburn* decision, regarding whether the cap on noneconomic damage is constitutional as it applies to medical malpractice actions and a related consideration of the cap on wrongful deaths in Kansas. The Committee also recognizes growing concerns regarding cyberinsurance costs in light of costly ransomware attacks as well as the increased reliance on telehealth solutions and how to adequately insure and understand providers' standard of care wherever the health care service is provided.
- **COVID-19 concerns.** The Committee requests special consideration be given to the present impacts and potential longer-term challenges to the affordability and availability of professional liability insurance. The Committee notes current concern seen in the non-renewal of policies for nursing facilities in Kansas; these facilities have sought and will seek coverage in the Availability Plan, creating both short- and longer-term impacts on the affordability of coverage. The Committee also acknowledges the 41 cases attributed to COVID-19 that have been filed to date and have been termed "very expensive to defend." The Committee recognizes there has been no impact on the ability to file cases, but there have been postponements and delays in those trials.
- **Professional liability coverage for certain birth centers.** The Committee recognizes the issues and possible solutions offered in submitted comments, including:
  - Discussion regarding how these types of birth centers could be regulated as a health care/ medical care facility rather than as a maternity center within child care facility regulations; and
  - Acknowledgment that the Board of Governors is continuing to study the corporate practice of medicine and may make recommendations on that topic.
- **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 health care provider. Those payments made to the HCSF by health providers are not a fee. The State shares no responsibility for the liabilities of the HCSF (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 2020 Supp. 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 16, 2021.

## **COMMITTEE ACTIVITIES**

### **Report of Willis Towers Watson**

#### ***Fund Position***

The Willis Towers Watson actuarial report serves as an addendum to the reports provided to the HCSF Board of Governors on February 16, April 19, and July 19, 2021. The actuary addressed

forecasts of the HCSF’s position at June 30, 2021, based on the company’s annual review, along with the prior estimate for June 2021. In 2020, the estimate of the HCSF-held assets as of June 30, 2021, was \$302.68 million, with liabilities of \$261.34 million, and with \$41.34 million in reserve (2020 Study). As of June 30, 2021, the HCSF held assets of \$303.34 million, liabilities of \$264.71 million, and \$38.62 million in reserve. The actuary noted, based on the analysis provided to the Board of Governors, the HCSF needs to raise its surcharge rates by 3.3 percent for calendar year (CY) 2022 in order to maintain its unassigned reserves at the expected year-end CY 2021 level (estimated \$39.0 million). The report separately addressed the impact of new law (House Sub. for SB 78) on the Fund.

#### ***Liabilities***

The actuary reviewed the HCSF’s liabilities as of June 30, 2021. The liabilities highlighted included claims made against active providers (losses) as \$90.7 million; associated defense costs (expenses) as \$14.3 million; claims against inactive providers, as known on June 30, 2021, as \$8.5 million; tail liability of inactive providers as \$145.7 million; future payments as \$9.2 million; claims handling as \$9.3 million; and other liabilities, described as mainly plaintiff verdicts on appeals, as \$100,000. Total gross liabilities were

\$277.7 million; the HCSF is reimbursed \$13.0 million for the KU/WCGME (University of Kansas/ Wichita Center for Graduate Medical Education) programs, for a final net liability of \$264.7 million.

### ***Rate Level (Surcharge) Indications***

The actuary also reviewed the HCSF's rate level (surcharge) indications under existing law for CY 2022, noting the indications assume a break-even target. He highlighted payments, with settlements and defense costs of \$37.09 million; change in liabilities of \$2.21 million; administrative expenses of \$2.05 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]). In total, the cost for the HCSF to break even is \$41.55 million. The actuary noted the HCSF has two sources of revenue: its investment income (assumed to be \$8.08 million based on 2.70 percent yield) and surcharge payment from providers (\$33.47 million needed to break even). He explained the rate-level indication and noted that rates need to be raised an estimated 3.3 percent in order to achieve break-even status.

### ***Loss Experience***

The actuary reported on trends in the HCSF's loss experience for active and inactive providers from CY 2015 through CY 2020. He explained the settlement payment activity increased over time through CY 2019 and then dropped in CY 2020 to only \$18.45 million (\$26.62 million in CY 2019). The actuary indicated this decline could be attributed to the shutdown in the claims resolution process that began late first quarter of CY 2020.

The actuary highlighted the large increase in the reserves on known claims going from \$40.83 million in 2019 to \$63.45 million in CY 2020. He stated the trend on inactive providers is less concerning; those reserves increased but remained at a level below year-end CY 2017 and CY 2018. The actuary indicated the large increase in the reserves on known claims for active providers is a cause for concern and why the overall condition reported in this year's review was a little worse than anticipated.

### ***Investment Yield***

The actuary also reported on the investment yield the HCSF has earned and the Fund's relative yield on its assets over the last several years. He noted the effective yield has decreased over the last seven to eight years, flattening out to the range of approximately 2.7 percent. The actuary explained based on this trend, the company has been lowering its assumption over the last several years regarding what the HCSF will earn going forward. He indicated in their latest review conducted earlier this year, the assumed future investment yield rate was lowered from 2.85 percent in their 2020 study to 2.70 percent. (Testimony also indicated a 10 basis point change in the assumed rate would cause a 0.9 percent change in the CY 2022 indication.)

### ***Impact of House Sub. for SB 78 (2021 Law)***

The actuary addressed these key features of the law:

- Primary coverage limits increase from \$200,000 per claim and \$600,000 annual aggregate to \$500,000 per claim and \$1.5 million annual aggregate;
- Fund coverage will be \$500,000 per claim, with an annual aggregate of \$1.5 million; and
- New limits do not apply to claims occurring prior to 2022 policy effective dates.

The actuary also addressed the *impact on HCSF costs*, noting the company's analysis shows that the Fund's costs will eventually decrease by 48.0 percent as a result of the new law. However, most (estimated 90 percent) of the claims exceeding \$200,000 that occur in CY 2022 will be reported some time after CY 2022, which means these claims will remain the responsibility of the Fund until health care providers procure coverage in CY 2023 and subsequent years. This factors into the savings estimate, as the initial savings to the Fund in CY 2022 will be much less (estimated at 5.0 percent). The savings are expected to increase significantly in CY 2023 and 2024. The actuary noted these aspects of the Fund's operating costs

are unaffected by the law change: tail coverage, transfer to/from the Availability Plan and KDHE, and operating expenses.

The actuary reviewed the **CY 2022 rate level indications (surcharge)** submitted to the Board of Governors, which reflect these changes to law. The actuary provided the Board with two sets of rates to consider:

- Version 1: Reflecting the long-term eventual savings rate of House Sub. for SB 78, a 48.0 percent reduction from CY 2021 HCSF rates; and
- Version 2: Considering the delayed impact of the House Sub. for SB 78 cost reductions, a 5.0 percent reduction from 2021 HCSF rates.

The actuary estimated the use of Version 1 rates would cost the Fund approximately \$34.0 million over the five-year period of CY 2022-2026 as compared to using Version 2 rates. The Board chose to use the Version 1 rates for CY 2022.

### ***Indications by Provider Class***

The actuary provided an overview of indications by provider class (review of classes 1-30, the number of providers in each class, the CY 2021 rate, and the CY 2022 rate). The actuary indicated for CY 2022, Classes 1 through 14 pay a flat dollar amount; and those providers' rates will decrease "considerably" for CY 2022. For example, for Class 3 (physicians, minor surgery), the CY 2021 rate using the assumption of \$800,000/\$2.4 million Fund coverage and two years of Fund compliance, would be \$2,144; the CY 2022 rate would be \$1,112.

Classes 15 through 24 providers (e.g., Availability Plan insureds; professional corporations; certain facilities including nursing facilities; physician assistants and nurse midwives) pay a percentage of their basic coverage premium; and those percentages also decrease considerably. The actuary explained for this group, the company is assuming these providers' basic coverage premiums will be increasing as a consequence of the law change, so they will generally pay a lower percent on a higher basic coverage premium.

For example, for Class 21 (physician assistants), the CY 2021 percentage rate would be 38.0 percent; the CY 2022 percentage would be 15.0 percent.

### ***Discussion***

The actuary characterized the CY 2020 results for the HCSF as a "mixed" experience. He explained that surcharge revenue came in slightly higher than anticipated; however, reserves on the open claims at year-end CY 2020 were much higher than at year-end CY 2019. The actuary noted some of this impact on reserves is related to much lower payments in CY 2020 compared to the CY 2019 experience, which may be due to the shutdown in the claims settlement process due to the COVID-19 pandemic. The actuary further explained if claims are not being paid out, the reserves will naturally be higher at year-end because new claims are coming in without other claims getting resolved and paid. He also stated the investment yield seems to have flattened out in the mid to high 2.0 percent range. The actuary concluded, given these indications, the HCSF's financial position at June 30, 2021, was "a little worse" than the company had forecasted and presented to the Committee in October 2020.

Committee members and the actuary discussed the investment yield assumption and the present (November 2021) interest rate environment. The actuary confirmed the 2.70 percent yield was still a reasonable assumption. On the topic of the investment of HCSF moneys, the Committee, the actuary, and the Executive Director of the HCSF (agency) discussed the Board's investment policies and the requirements in the Health Care Provider Insurance Availability Act (HCPIAA) [KSA 40-3406]. KSA 40-3406 permits, after consultation with the Board of Governors, the Director of Investments with the Pooled Money Investment Board (PMIB) to invest and reinvest the HCSF in U.S. Treasury securities, federal agency securities, repurchase agreements (overnight), high grade commercial paper, and high grade corporate bonds. The investment of the Fund would be done in accordance with the PMIB investment policies.

The Executive Director indicated the Board of Governors reviews and passes policy on investments. He explained that presently, the Board has a very conservative investment policy.

Responding to a question regarding the direction from statute and the Board's own policy, the Executive Director indicated it is a combination of the two, resulting in a conservative investment policy reviewed by the Board. A Committee member requested the Board review its investment policy to ensure the policy continues to fit the needs of the HCSF.

### ***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 2022 Appropriations Report* outlining the actual and approved Board of Governors' expenditures and the Committee's conclusions and recommendations from its most recent annual report. The information also included a KLRD memorandum outlining amendments to the HCPIAA contained in a larger insurance subject-related bill passed by the 2021 Legislature (House Sub. for SB 78). In review of the memorandum, the analyst summarized the changes, including professional liability insurance coverage options for defined health care providers, the liability of the HCSF as both an agency and a fund, and membership of the Board of Governors. She noted the Committee had reviewed similar legislation at its last meeting (2020 SB 493). The Governor approved House Sub. for SB 78, and the bill became law effective July 1, 2021.

Committee staff also reviewed recent updates to telemedicine law and requirements on health care providers. The Revisor reviewed both SB 283 and Senate Sub. for HB 2208. SB 283 amended KSA 48-963 to allow an out-of-state physician to treat Kansas patients via telemedicine if that physician holds a temporary emergency license that is granted by the State Board of Healing Arts (pursuant to KSA 48-965). The Revisor indicated that changes made to these two referenced statutes were signed into law on April 1, 2021, and are set to expire March 31, 2022. Section 10 of Senate Sub. for HB 2208 allowed an out-of-state physician to treat Kansas patients via telemedicine upon receipt of a telemedicine waiver issued by the State Board of Healing Arts. The Revisor noted provisions relating to telemedicine in this bill are not specifically tied to the COVID-19 pandemic and do not have a specified expiration date.

### **Chief Counsel's Update**

The Deputy Director and Chief Counsel for the Board of Governors addressed the FY 2021 medical professional liability experience (based on all claims resolved in FY 2021, including judgments and settlements). She characterized FY 2021 as an "odd year" due to the COVID-19 pandemic, and said it would be difficult to draw any conclusions from the FY 2021 data. She stated four medical malpractice cases, involving a total of four Kansas health care providers, were tried to juries during FY 2021. The Chief Counsel noted during most of this fiscal year, the courts were closed due to the COVID-19 pandemic. The trials were held in the following jurisdictions: Sedgwick County (2), Neosho County (1), and Douglas County (1). Of the four cases tried, all four cases resulted in defense verdicts.

The Chief Counsel highlighted the claims settled by the HCSF, noting in FY 2021, 50 claims in 40 cases were settled involving HCSF moneys. Settlement amounts incurred by the HCSF totaled \$17,352,000 (these figures do not include settlement contributions by the primary or excess insurance carriers). She noted this is 23 fewer cases and almost \$10.0 million dollars less than the previous fiscal year. She explained there are two likely reasons for this decrease: the COVID-19 pandemic and last year's increased claims and settlement experience with more than \$27.0 million incurred. The Chief Counsel further



explained that in her experience, usually when there is a large year of costs, the next year's costs tend to be much smaller.

The Chief Counsel also reported on the severity of the claims. She noted that while there were 23 fewer settlements involving the HCSF this past fiscal year compared to FY 2020, about the same number of cases fell into the high category of settlements between \$600,000 and \$1.0 million. Of the 50 claims involving HCSF moneys, the HCSF incurred \$17,352,000; the primary insurance carriers contributed \$8,800,000 to these claims. The Chief Counsel reported 44 claims were for excess professional liability coverage, and 6 of those claims involved inactive Kansas health care providers for which the HCSF provided tail coverage. In addition, excess insurance carriers provided coverage for five claims for a total of \$7,650,000. For the 50 claims involving the HCSF, the total settlement amount was \$33,802,000. The Chief Counsel reported in addition to the settlements involving HCSF contributions, the HCSF was notified that primary insurance carriers settled an additional 98 claims in 88 cases. The total amount of these reported settlements was \$9,336,634.

The Chief Counsel also reported on the number of HCSF total settlements and verdicts by fiscal year, noting that from FY 2009 through FY 2015, there was a seven-year decrease in the number of new claims. She highlighted the modest increase for FY 2016 through FY 2019, which was to be expected because five categories of new health care providers were added to the HCSF in 2014. The Chief Counsel's report indicated for FY 2021, there were 318 new medical malpractice cases. She noted Kansas district courts require all cases to be filed online, so the COVID-19 pandemic did not have any impact on the ability to file cases. In response to a question, she confirmed the tolling of the statute of limitations has ended.

### ***Adult Care Homes and Claims***

The Chief Counsel addressed the number of COVID-related claims and how those claims could be affected by the actions the Legislature took to provide some immunity to certain health care providers. She indicated in FY 2020, there were 20 cases filed against adult care homes (nursing facilities) that alleged negligence on the part of the

adult care homes resulting in deaths of COVID-19 patients. In FY 2021, 21 cases were filed against adult care homes. The Chief Counsel noted the 2020 Special Session law, which provided some immunity granted to certain health care providers like hospitals and physicians. She further explained nursing facilities were given an affirmative defense on two different kinds of claims. If a nursing facility had to reaccept a COVID-19 patient or if it provided care to a COVID-19 patient in its facility, the adult care home had an affirmative defense provided.

Legislation passed in 2021 provided some additional immunity if the facility was found to be in substantial compliance with all of the federal regulations and state regulations. She confirmed there have not been any additional cases filed recently. The Chief Counsel stated she has heard anecdotally there could be claims in certain facilities outside of the adult care homes, such as small hospitals, where it may be alleged that patients did not receive the top care because of all the additional COVID-19 restrictions that their health care providers were required to have in place. She also addressed the level of concern about adult care homes' liability, stating it will be very expensive to defend these types of claims.

### ***Self-insurance Programs***

The Chief Counsel also addressed the self-insurance programs and reimbursement for KU Foundations and Faculty and residents. She reported the FY 2021 KU Foundations and Faculty program incurred \$1,763,603.18 in attorney fees, expenses, and settlements; \$500,000 came from the Private Practice Reserve Fund, and \$1,263,603.18 came from the State General Fund (SGF). She projected the FY 2022 experience would likely see fewer settlements involving the KU full-time faculty, but there would be an increase in attorney's fees and expenses due to the increase in the number of claims.

In regard to the self-insurance programs for the KU/WCGME resident programs, including the Smoky Hill residents in Salina, the total amount for FY 2021 was \$748,420.73. The Chief Counsel indicated the cost of the program in FY 2020 was half of that for FY 2019, and FY 2021 saw another decrease. She stated this decrease was primarily due to the decline in the number of claims seen in

the last few years, but FY 2021 had an increase in the number of claims. She said this increase is not yet of concern given the historical experience in FY 2008 to FY 2010, where the program averaged about 30 claims per year. The Chief Counsel also noted there were several lawsuits in the past year in which the plaintiff attorneys named between 10 and 20 defendants in a single suit. She noted in one suit, for example, there are five residents in training named as defendants. The Chief Counsel stated that in these instances, she expects these residents will be dismissed from the case, but it takes a lot of time and energy and attorneys' fees and expenses for that to occur.

The Chief Counsel provided a list of the 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 program cost for the Faculty and Foundations self-insurance programs is about \$1.8 million per year; FY 2021 was slightly under this average. For the residency program, the ten-year average cost is about \$985,000; FY 2021 represented a decrease. The Chief Counsel next provided information about moneys paid by the HCSF as an excess carrier. She reported for FY 2021, there was one claim against a resident in which the HCSF paid \$800,000. For the Faculty and Foundations, there were three claims for a total amount of \$290,000.

### ***Discussion***

During Committee discussion, the Chief Counsel confirmed the SGF reimbursement amount for the administration of the self-insurance programs is an estimate that is set each year when the HCSF (agency) budget goes before the Legislature. A Committee member commented on the overall environment and stability afforded to Kansas health care providers through the HCSF, HCPIAA, and a primary coverage that still maintains coverage for COVID-19. The member also expressed appreciation that there is coverage to defend adult care homes and possibly some of the smaller rural hospitals in Kansas.

In response to a question regarding excess coverage and the impact of 2021 House Sub. for SB 78, the Chief Counsel indicated the residents in training and the faculty members' policies renew

on July 1 of each year. She explained any claims for care that arose after July 1, 2022, the amount that the HCSF is reimbursed from the Private Practice Reserve Fund or the SGF will increase.

### **Medical Malpractice Insurance Marketplace; Availability Plan Update**

The President and Chief Executive Officer, Kansas Medical Mutual Insurance Company (KAMMCO), reviewed the status of the Availability Plan, overall market conditions in Kansas, and issues and topics of concern to insurers. The KAMMCO conferee outlined the number of plan participants over time, beginning with July 1, 1990, when KAMMCO became the servicing carrier. He pointed to the "swings" in the marketplace and explained how difficult market conditions contribute to increased participation in the plan (it is more difficult to secure coverage in the commercial marketplace). The conferee addressed the types of insureds currently in the plan, noting there are now 49 long-term care facilities, which is up from 20 in the prior year, and 8 two years prior. The transfer from the HCSF (described in the Executive Director's report) is, in large part, a direct result of COVID-19-related claims for the adult care homes that moved into the Availability Plan because their coverage was not renewed by their insurance carriers. The conferee also addressed the provided October 1, 2021, risk count for plan insureds, which outlined physician and surgeon risks and the number of individuals insured (e.g., emergency medicine—no major surgery, 12 individuals and family practice or general practice—no surgery, 42 individuals).

### ***Reinsurance Industry; Claims Environment and COVID-19 Impact***

The KAMMCO conferee highlighted the continuing withdrawal of reinsurance companies, which in turn creates challenges ("contraction") in the professional liability marketplace. Changes like this in the marketplace compounded with other market conditions will continue to have a rippling effect throughout the entire industry in the next few years. The KAMMCO conferee noted the two significant factors affecting the business of insurers in this marketplace: the frequency of claims and the severity of those claims.

He noted frequency of claims on a national basis, not just in Kansas, has remained fairly constant over the last several years. What has changed is the severity of those claims, not just the severity of the amounts paid in settlements or judgments, but also the legal costs of handling those claims has increased. He further explained those costs have also been affected by the COVID-19 pandemic. In discussion with the Committee, the KAMMCO conferee indicated it is hard to know what COVID-19 will mean, in these next few years, to the insurance industry. He noted the courts have been closed, cases are delayed, and the statute of limitations have been tolled for a year by the Kansas Supreme Court. He said this translates to uncertainty—reinsurers get uneasy, market conditions continue to constrict, prices go up, and underwriting conditions become more difficult. This will likely also translate to more activity in the HCSF and in the Availability Plan.

### ***Other Contemporary Issues***

The KAMMCO conferee addressed legal issues, noting the question of the constitutionality of the cap on noneconomic damages remains unresolved (*Hilburn* decision). He pointed to recent developments in the filing of statements of monetary damages, a requirement on the plaintiffs' bar. Previously, a statement of monetary damages in a particular case might have been \$4.0 million to \$8.0 million, where now, those statements show \$40.0 million to \$80.0 million. He noted one case where the statement of monetary damages is \$100.0 million. The KAMMCO conferee also noted a recent jury verdict in a wrongful death case in excess of the policy limits of the insured. The damages requested for wrongful death (the case was in south central Kansas) by the plaintiff was \$500,000. The conferee noted the cap on wrongful death in the state of Kansas of \$250,000. He commented that it appears the stated objective of the plaintiff's attorney and the plaintiffs' bar is to use the *Hilburn* decision to strike down the cap on wrongful death. The next topic addressed was cyberinsurance. The KAMMCO conferee indicated cyber extortion or ransomware at some of the Kansas hospitals started out at \$10,000 or \$15,000; ransomware attacks are now generally in the millions of dollars. On the topic of telehealth, he noted health care provider licensing laws have been adjusted on at least a temporary basis to allow for telehealth services, including practice by out-

of-state providers. The KAMMCO conferee cautioned, however, that the standard of care and protocols for telehealth services delivery has not been developed. This topic will be an emerging issue in professional liability cases (*i.e.*, defending actions where the care was "provided").

### ***New Law and Compliance***

The KAMMCO conferee and the Committee discussed the effect of the decrease in the HCSF's surcharge rates on professional liability insurance rates in the marketplace (those offered by primary carriers, like KAMMCO). The conferee indicated for CY 2022, KAMMCO's rate increase is essentially offset by the HCSF's surcharge rate decrease. He also noted all of the carriers writing professional liability for health care, both hospitals and physicians, have made their policy form changes and rate changes with the Insurance Department have been filed, approved, and the companies are ready to transition forward effective January 1, 2022.

Committee members and the KAMMCO conferee further discussed the hardening market on a nationwide level. The frequency of the severity of claims was highlighted; the concept of "social inflation" as it applies to determining a "reasonable" judgment was established as a contributing factor to large verdicts nationwide. The KAMMCO conferee also spoke to the current low-yield environment; revenue that cannot be made up from investments has to then come from policyholders. He characterized the present conditions as the front edge of a hardening market, but not yet in a hard market. Other topics discussed included the permissible investments of the HCSF moneys and states' actions to address legal challenges, including caps on noneconomic damages and wrongful death (such actions could be addressed in state statute or in the state's constitution).

### ***Comments from Health Care Providers***

The Executive Director of the Kansas Medical Society (KMS) addressed the establishment of the HCSF, noting KMS was the institution that brought forth the legislation establishing the HCSF, and the Fund has continued to serve exactly as it was intended. She noted the balance achieved through both the establishment of the Fund and

professional liability insurance coverage requirement on defined health care providers and the cap on noneconomic damages (then set at \$250,000).

The Executive Director commented on 2021 House Sub. for SB 78, stating the bill offered the opportunity to rebalance the participation of the private insurers, as well as the HCSF and to take into consideration the increase in the severity of claims. The bill addresses this rebalance through significant changes in the minimum coverage requirements. The Executive Director described the process to bring legislation forward; KMS worked with the trial bar, brought the changes before them, and sought their input; in addition, all defined health care providers were consulted regarding the proposed changes to the HCPIAA. She further noted the majority of Kansas physicians were already buying million-dollar policies, so this really does not represent a change in the provider's overall coverage; it just repositions how the provider accesses that insurance between the private and the public market. The Executive Director then commented the overall cost should be about the same, if not going down over time, as those claims are better managed.

The KMS Executive Director supported the continuation of the Committee and its oversight and indicated there is no need for an independent actuarial analysis at this time. Similarly, submitted testimony from the Kansas Association of Osteopathic Medicine (KAOM) supported the continued operation of the HCSF and annual actuarial analysis by the Board of Governors. The KAOM requested the Committee continue to maintain language in its report regarding the purposes of the HCSF and continuing to credit its reserves and revenues to the HCSF (Fund held in trust recommendation). The KAOM addressed the current medical malpractice environment and the uncertainty created by both *Hilburn* and the COVID-19 pandemic. One issue requested for continued monitoring was telehealth concerns, namely out-of-state physicians and other defined health care professional providing telehealth services and ensuring their payment into the HCSF.

The Chief Executive Officer and co-founder of New Birth Center, a health care consultant and business owner, and a professional liability

insurance specialist addressed the challenges of obtaining adequate coverage for stand-alone birth centers. The New Birth Center CEO stated the medical malpractice carrier servicing certified nurse midwife (CNM) and maternity center businesses notified their company that it would no longer serve New Birth Center's business as of July 1, 2021; the servicing carrier chose to no longer cover CNMs not employed by physicians or maternity centers. A separate issue related to coverage for maternity centers was highlighted—to date, there are no admitted carriers to provide medical malpractice coverage to New Birth Center (insurance carriers must be admitted by the Commissioner of Insurance to write this coverage in Kansas). This leaves only the Availability Plan for such coverage, which was accessed to provide facility malpractice coverage that is required by KanCare and commercial health insurance companies for maternity care facilities. The New Birth Center CEO asked the Committee to support or remain neutral on the addition of maternity centers as defined health care providers in KSA 40-3401 and to assign a task force representing providers, brokers, underwriters, HCSF, KAMMCO, and the Department of Insurance to present policy and regulatory options to this Committee. The insurance agent noted this type of business does not have a history of claims. She stated she was able to write CNMs who are employed by physician groups or hospitals easily with multiple carriers. She characterized differences between working with the Availability Plan and with insurers like KAMMCO and Medical Protective; the plan does not provide risk management assistance or quality improvement counseling like a standard carrier would provide. She also stated the change in the primary limit (House Sub. for SB 78), absent changes to include stand-alone birth centers, will put independent nurse midwives at an even greater financial disadvantage with the resulting premium increases.

The health care consultant further addressed the need to better address birth centers in Kansas law, including the addition to defined health care providers in the HCPIAA. She cited present definitions in Chapter 65 of the *Kansas Statutes Annotated* (65-502—excluded from the definition of “medical care facility”) and article 4 in the *Kansas Administrative Regulations* (28-4-1300). The consultant provided other definitions for birth centers present in the National Fire Protection

Association Life Safety Code (3.3.33 Birth Center), the North American Industry Classification system (NAICS—621498—All other outpatient care centers), and Ohio law (Chapter 2, “Freestanding birthing center”).

During Committee discussion, it was determined there is currently one stand-alone birth center in the Kansas City area. The Committee, the individuals representing the concerns of New Birth Center and birth centers generally, and the Executive Director of KMS discussed the options available to secure professional liability insurance coverage. It was noted one option could be available, following the conclusion of the Board of Governors required study and recommendations, through provisions in the HCPIAA created in 2019; those provisions relate to the corporate practice of medicine (a corporation was permitted to employ physicians or other health care providers). If such corporations were permitted to secure HCSF coverage, this avenue could be opened to facilities like New Birth Center. Other options discussed included the ability to secure coverage through an admitted carrier and changes to other definitions and classifications in Kansas law applicable to maternity centers.

### **Board of Governors’ Statutory Report**

The Executive Director of the HCSF provided a brief history of the HCPIAA, noting that when this law was passed 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, 2021). The FY 2021 report indicated:

- Net premium surcharge revenue collections amount to \$33,582,227. The lowest surcharge rate for a health care

professional was \$100 (a first-year provider selecting the lowest coverage option) and the highest surcharge rate was \$19,295 for a neurosurgeon with two or more years of HCSF liability exposure (selecting the highest coverage option). Application of the Missouri modification factor for this Kansas neurosurgeon (if also licensed to practice in Missouri) would result in a total premium surcharge of \$25,084 for this health care provider;

- The average compensation per settlement was \$347,040 (40 cases involving 50 claims were settled). These amounts are in addition to compensation paid by primary insurers (typically \$200,000 per claim). Total claims expenditures for FY 2021 amounted to \$21,453,297; and
- The balance sheet, as of June 30, 2021, indicated total assets of \$313,929,994 and total liabilities of \$267,109,185.

### ***Health Care Provider Insurance Availability Plan***

The Executive Director’s presentation also included an update on the Availability Plan. The Executive Director reported that as of October 25, 2021, there were 352 plan participants, including 198 physicians, 8 physician assistants, 11 nurse anesthetists, 2 chiropractors, and 13 nurse midwives, as well as 29 professional corporations and 59 facilities (the physician total includes 31 residents in training who are employed via “moonlighting”). He noted that without the Availability Plan, these health care providers would be unlikely to provide patient care within the state. It was noted that the HCSF will transfer \$933,354 to the Availability Plan this year (the HCSF is required by law to transfer the net loss, when losses exceed income for the plan, to the Availability Plan).

### ***Contemporary Issues***

The Executive Director provided an update on 2021 House Sub. for SB 78, including the requirements for the purchase of coverage. He reported the HCSF agency is updating all of its forms and preparing for the changes specified in the law. The Executive Director also noted the

*Hilburn* decision and indicated the Board of Governors continues to receive information from various parties and its actuary regarding how this decision could possibly impact medical malpractice coverage in the future. He pointed to the historical overview of the HCPIAA in his written report and commented on the successful public-private partnership established in this act and the reliable source of compensation provided.

## 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 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 did not request the independent review.

The Committee considered information presented by the Board of Governors' representatives, including its required statutory report; the Board of Governors' 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 regarding the following:

- Actuarial report and status of the HCSF, and income and rate level indications;
- Implementation of 2021 House Sub. for SB 78;
- HCSF investment policy and strategies;
- Marketplace conditions and emerging headwinds;
- COVID-19 concerns;
- Professional liability coverage for certain birth centers; and
- Fund to be held in trust.

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.