KANSAS TRIAL LAWYERS ASSOCIATION

To: Kansas Health Care Stabilization Fund Oversight Committee

From: Matt Birch

Date: Nov. 30, 2023

RE: Changes in coverage options

I appreciate the opportunity to appear before the committee to express KTLA's concern that the Board of Governors' is administering the Kansas Health Care Stabilization Fund (The Fund) in violation of KSA 40-3404. Specifically, The Fund is not offering Kansas health care providers the option to purchase the $1,500,000 per-claim excess insurance that is required by KSA 40-3403(l)(1)(B)(ii).

The Board's decision not to offer the $1,500,000 set forth at KSA 40-3403(l)(1)(B)(ii) is based on an erroneous interpretation of the Board of Governors' discretion codified at KSA 40-3403(l)(2). The result of this decision is that Kansas Health Care Providers have not been given the option to purchase the affordable excess coverage intended by the Legislature. We ask this committee, in its oversight role, to require the the Board of Governors to offer the coverages as set forth KSA 40-3403(l)(1)(B). If a determination is made that it is necessary not to offer Kansas health care providers the coverage set forth in the statute, this committee should require that the Board of Governors make an appropriate record so that the courts may review the agency's decision to determine whether it complies with Kansas law regarding agency decisions.

The history of the HCSF

As originally enacted in 1976, the Health Care Provider Insurance Availability Act (HCPIAA) required health care providers to purchase annual liability coverage of at least $100,000 per occurrence subject to a $300,000 aggregate annual limit. The act created the Fund in order to provide excess coverage beyond that underlying limit. As originally enacted, the excess coverage provided by the HCSF had no limits.

In 1984, the HCPIAA was amended to require health care providers to obtain underlying coverage of $200,000 per occurrence subject to a $600,000 aggregate annual limit. At the same time, the statute was amended to limit the The Fund's excess coverage to $3,000,000 per claim.

In 1989, the HCPIAA was amended again. The 1989 amendment did not change the underlying coverage limits required. The 1989 amendment required the Fund to offer Kansas health care providers three options of excess limits. The minimum amount was $100,000 per claim subject to an aggregate annual limit of $300,000 and the maximum amount was $800,000 per claim subject to an aggregate annual limit of $2,400,000.

Note that since the enactment of the HCPIAA and the creation of The Fund, the legislature has determined both the amount of coverage to be purchased by Kansas health care providers and the amount of excess coverage provided by The Fund. The Board of Governors was created to oversee the administration of The Fund and oversee the adjustment of claims involving claims against Kansas health care providers.

The HCPIAA is amended in 2021

By 2021, approximately 95% of health care providers elected the maximum excess coverage provided by the Fund, ie $800,000 subject to an aggregate annual limit of $2,400,000. Thus, as a practical matter in 2021, the vast majority of Kansas health care providers were carrying $200,000 underlying coverage per claim and $800,000 excess coverage per claim meaning that almost all health care providers had $1,000,000 per claim limits.

In 2021, the Kansas Medical Society introduced HB 2380. HB 2380 increased the amount of underlying coverage health care providers were required to purchase to $500,000. Next, HB 2380 set forth two options of Fund coverage from which providers "shall" elect: $500,000 or $1,500,000.[1] As to the higher coverage option, KMS testified that this was necessary because of the lack of reinsurance and excess insurance carriers in the Kansas market.[2] HB 2380 was "worked" by the committee on March 22, 2021. During the March 22, 2021, committee meeting, an amendment was added to HB 2380 and thus, when it was passed out of committee the following language was added to the bill:

> *The board of governors shall have the authority to adjust the amounts provided in [Option 1 and Option 2] as the board deems necessary to effectuate the provisions of the healthcare provider insurance availability act, except that the minimum coverage for a healthcare provider shall not be less than $1,000,000 per claim and $3,000,000 in the aggregate.*

The quoted language is codified at KSA 40-3403(l)(2). The bill was enacted and the signed into law.

The Board of Governors decides not to offer the coverage set forth in the statute

When the Board of Governors convened in the fall of 2021 to determine 2022 surcharges for Fund coverage, the board chose not to offer Kansas health care providers the option of

[1] Subject to the same annual aggregate of three times the single claim limit.

[2] *Written testimony of Rachelle Colombo, Executive Director of The Kansas Medical Society to the House Insurance and Pensions Committee in favor of HB 2380*, Feb. 22, 2021.

purchasing $1,500,000 of coverage that the Legislature codified at KSA 40-3403(l)(1)(B)(ii).[3] According to the minutes of the meeting, the basis of the decision was that the board wanted to be "cautious" and "revisit" the higher limits on a yearly basis.[4] Despite the decision to "revisit" the coverage set forth in the statute at KSA 40-3403(l)(1)(B)(ii), there has been no such discussion at board meetings in 2022 or 2023. Thus, once again, the board has stripped Kansas health care providers of the opportunity to purchase the coverage set forth at KSA 40-3403(l)(1)(B)(ii).

The basis of the Board of Governors' decision not to offer the option of higher excess coverage was the amendment added to the original bill providing that "[t]he board of governors shall have the authority to adjust the amounts provided in [Option 1 and Option 2] as the board deems necessary to effectuate the provisions of the healthcare provider insurance availability act, except that the minimum coverage for a healthcare provider shall not be less than $1,000,000 per claim and $3,000,000 in the aggregate." KSA 40-3403(l)(2).

The Board of Governor's decision not to offer the coverage set forth at KSA 40-3403(l)(1)(B)(ii) ignores the will of the Legislature and exceeds the board's discretion under KSA 40-3403(l)(2). In order to support the decision taken by the board, one would have to interpret KSA 40-3403(l)(2) as giving the Board of Governors unfettered authority to set the amount of excess coverage afforded by The Fund as long as the coverage remains at least $1,000,000. Such an interpretation would raise separation of powers issues as it would mean that the legislature is ceding an area of law-making, one over which it has specifically exercised authority since 1976, to an unelected group of appointees with no required process or mechanism of objection. While these policy arguments are worth noting, they are not necessary because the plain language of the statute makes clear that the Fund's interpretation of the statute is wrong.

Under KSA 40-3403(l)(2), the Legislature delegated the Board of Governors limited discretion to adjust the two amounts set forth in KSA 40-3403(l)(1)(B)(i) and KSA 40-3403(l)(1)(B)(ii) if the board deemed that a change was "necessary" to effectuate the provisions of the HCPIAA. In other words, if the board is going to substitute its judgment for the amount of Fund coverage set forth in statute by the Legislature it must be "necessary" *not* to offer the coverage in order to effectuate the HCPIAA. Furthermore, under Kansas law, there must be a record of the basis of the decision along with analysis of the potential options.

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[3] In fact, despite language in the statute requiring two options of excess coverage be offered to health care providers, instead of adjusting the amount of the higher option set forth in KSA 40-3403(l)(1)(B)(ii), the board simply chose to ignore the subdivision of the statute altogether.

[4] *Section IV of the Approved Minutes of the September 9, 2021, Meeting of the Board of Governors of the Health Care Stabilization Fund*

The word "necessary" does not appear in the minutes of the 2021 board meeting at which the decision was made. There was never a determination made that it was "necessary" not to offer the coverage set forth at KSA 40-3403(l)(1)(B)(ii). Even worse, the board in meetings since has not even discussed the coverage set forth at KSA 40-3403(l)(1)(B)(ii). Thus, the coverage set forth at 40-3403(l)(1)(B)(ii) was not offered in 2022 or 2023 and will not be offered in 2024.

In addition to the fact that the board's decision is contrary to the statute, the conditions that necessitated the higher coverage in 2021, according to the KMS, still exist. In fact, barely more than one month after the board's decision not to offer the coverage set forth in KSA 40-3403(l)(1)(B)(ii), the President and Chief Executive Officer of the Kansas Medical Mutual Insurance Company (KAMMCO) testified to the "the continued withdrawal of reinsurance companies, which in turn creates challenges ("contraction") in the professional liability marketplace." The report of this committee noted that "[c]hanges 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." *Report of the Health Care Stabilization Fund Oversight Committee to the 2022 Kansas Legislature (Dec. 2021).*

This oversight committee was created to ensure the Board of Governors administered The Fund responsibly and in conformance with Kansas law. The board's decision not to offer the coverage set forth in KSA 40-3403(l)(1)(B)(ii) is contrary to Kansas law. This sort of action is the reason oversight is necessary. This committee should require the Board of Governors to offer the coverages as set forth KSA 40-3403(l)(1)(B). If a determination is made that it is necessary not to offer Kansas health care providers the coverage set forth in the statute, this committee should require that the Board of Governors make an appropriate record so that the courts may review the agency's decision to determine whether it complies with Kansas law regarding agency decisions.