

MINUTES

HEALTH CARE STABILIZATION FUND OVERSIGHT COMMITTEE

November 15, 2022
Room 112-N—Statehouse

Members Present

Marvin Kleeb, Chairperson
Senator Cindy Holscher
Representative Richard Proehl
Craig Concannon, MD
Darrell Conrade
Dennis George
Douglas Gleason, MD
Jerry Slaughter

Members Absent

Senator Gene Suellentrop
Representative Henry Helgerson
James Rider, DO

Staff Present

Melissa Renick, Kansas Legislative Research Department (KLRD)
Jennifer Light, KLRD
Jenna Moyer, Office of Revisor of Statutes
Scott Abbott, Office of Revisor of Statutes
Eileen Ma, Office of Revisor of Statutes
Randi Walters, Committee Assistant

Conferees

Russel L. Sutter, Actuary, Willis Towers Watson
Rita Noll, Deputy Director and Chief Counsel, Health Care Stabilization Fund Board of Governors
Clark Shultz, Executive Director, Health Care Stabilization Fund Board of Governors
Tucker Poling, Vice-President, Claims, Kansas Medical Mutual Insurance Company
Dan Murray, Kansas Medical Society and Kansas Hospital Association

MORNING SESSION

Welcome and Introductions

Chairperson Kleeb called the meeting to order at 8:34 a.m. The Chairperson welcomed members of the Health Care Stabilization Fund Oversight Committee noting this Committee reviews the operation of the Health Care Stabilization Fund (HCSF or Fund), reviews Fund reports submitted by the HCSF Board of Governors, and makes recommendations regarding the financial status of the Fund. The Chairperson next asked the members to introduce themselves including two Committee members participating virtually, Senator Holscher and Dr. Craig Concannon. Following the introductions, Chairperson Kleeb recognized Melissa Renick, Assistant Director for Research, Kansas Legislative Research Department (KLRD). Ms. Renick announced the meeting is being broadcast on the Legislature's audio and video streams and its YouTube channel. Ms. Renick indicated the agenda and meeting testimony are available on the Committee's page on the Legislature's website.

Staff Review of Committee Information and Recent Legislation and Law

Ms. Renick presented an overview of resource materials provided to the Committee. She indicated among the items included in the resource folder is the Committee's report to the 2022 Legislature that was submitted to the Legislative Coordinating Council (LCC) and to the Legislature as required by statute ([Attachment 1](#)). She highlighted the report's conclusions and recommendations that were developed as part of the Committee's November 2021 meeting. Ms. Renick next referenced a report prepared by KLRD staff regarding the budget for the Health Care Stabilization Fund Board of Governors for the Fiscal Year (FY) 2022 and FY 2023 approved budgets ([Attachment 2](#)).

Chairperson Kleeb recognized Jenna Moyer, Assistant Revisor, Office of Revisor of Statutes, to provide an update on relevant health care professional or facility legislation that was considered or passed during the 2022 Legislative Session ([Attachment 3](#)). Ms. Moyer first provided an overview of legislation regarding maternity centers and participation in the HCSF. She highlighted SB 399, which would have added certain maternity centers to the definition of "healthcare provider" in the Health Care Provider Insurance Availability Act (HCPIAA). Ms. Moyer indicated the bill passed out of the Senate, but ultimately was not considered by the House Committee of the Whole and was stricken from the calendar on March 23, 2022. Ms. Moyer indicated the omnibus budget bill, HB 2510, included a proviso that deems a maternity center a "healthcare provider" for the purposes of the HCPIAA (KSA 40-3401) if such maternity center is accredited by a recognized national organization or falls within the definition in KSA 65-503 (licensure of child care and maternity centers). She indicated this proviso is in effect for FY 2023. Ms. Moyer also explained the provisions of SB 502, which would have established a separate licensure and regulatory process for maternity centers. She noted this bill did not receive a hearing and died in the Senate Committee on Public Health and Welfare.

Ms. Moyer next provided an overview of advanced practice registered nurse (APRN) legislation. Ms. Moyer highlighted Senate Sub. for HB 2279, which amends KSA 65-1130 in the Kansas Nurse Practice Act to allow APRNs to prescribe drugs without a written protocol authorized by a responsible physician. This bill passed the Senate and the House and became law on July 1, 2022. She noted the HCPIAA was not amended in this bill to add APRN to the definition of "health care provider." [Note: Certain categories of APRNs are defined as health

care providers under the HCPIAA.] Ms. Moyer further noted that APRNs who are practicing as nurse midwives are already contained within that definition of “healthcare provider,” but not the APRNs who have this expanded licensure authority (prescribing) after July 2022.

Ms. Moyer provided an overview of legislation, which authorized occupational therapists to provide limited services to patients without referral from an appropriate health care practitioner. SB 440 passed the Senate and the House and became law on July 1, 2022. She noted KSA 40-3401 was not amended to add occupational therapists to the definition of “healthcare provider.” Ms. Moyer indicated sections one and two of this bill were codified in KSA 65-5422 and 65-5423.

Ms. Moyer presented an overview of COVID-19 health care licensure. Ms. Moyer highlighted HB 2477, which temporarily amends certain provisions related to health care professionals and adult care homes in response to the COVID-19 pandemic. She described the provisions of the bill that were codified at KSA 48-969 and further explained the bill also amends KSA 48-965 and renews a statute in the Kansas Intrastate Emergency Mutual Aid Act, KSA 48-966. Ms. Moyer indicated the provisions of this bill are set to expire on January 20, 2023.

Presentation of Health Care Stabilization Fund Board of Governors’ Staff and Actuary Reports, 2021-2022

Actuary Report

Chairperson Kleeb next recognized Russel Sutter, Actuary, Willis Towers Watson, to provide an actuarial report. The presentation was based on the review of Health Care Stabilization Fund (HCSF) data as of December 31, 2021, as contained in the Willis Towers Watson September 2022 report to the Board of Governors ([Attachment 4](#)). Mr. Sutter stated the actuarial firm believes the HCSF is in a very strong financial position and was pleased overall with the Calendar Year (CY) 2021 experience.

Mr. Sutter first addressed the history of surcharge revenue and claims costs by program year from 1999 through projected 2023 based on estimates as of December 31, 2021. Mr. Sutter noted the significant increase shown in 2015, which was when the HCSF converted from charging rates on a fiscal year basis to charging rates on a calendar year basis. Mr. Sutter addressed two major legislative changes affecting the data displayed. The actuary explained, as a result of 2014 law, more providers were brought into the HCSF as defined health care providers and the eligibility for tail coverage was expanded at no additional cost (both actions added to the HCSF’s exposure and potential costs). Mr. Sutter explained, in 2021, there was law (House Sub. for SB 78) that reduced the HCSF’s coverage by changing the amount the primary carriers will pick up from \$200,000 to \$500,000, before the HCSF is responsible. Mr. Sutter noted that from a payer’s perspective, there has not been much inflation in the HCSF’s claims costs over this 20-year period when adjusted for the number of providers covered and the coverage provided to those providers.

Mr. Sutter addressed the report’s overall conclusions, indicating calendar year (CY) 2021 was generally a favorable year for the HCSF. Mr. Sutter’s testimony indicated the loss experience was better than expected on both active and inactive claims; assets at December 31, 2021, were valued at \$14.0 million higher than at December 31, 2020; the investment yield has flattened out; and rate inadequacy is high for the hospital and nurse midwife provider classes. Mr. Sutter reported the firm’s conclusion was the HCSF’s financial position at June 30,

2022, was slightly better than forecasted one year ago. Mr. Sutter explained there is a slight positive rate indication, but the company is comfortable with the Board of Governors' decision to not to change rates for CY 2023, which was one of the options it presented to the Board of Governors.

Mr. Sutter next addressed forecasts of the HCSF's financial positions at June 30, 2022, and June 30, 2023, along with the prior estimate for June 2021. Last year, the estimate of the HCSF-held assets as of June 30, 2022, was \$303.34 million, with liabilities of \$264.71 million, and with \$38.62 million in reserve (2021 Study). As of June 30, 2022, the estimate was HCSF-held assets of \$311.27 million, liabilities of \$270.30 million, and \$40.98 million in reserve. The projection for June 30, 2023, is HCSF-held assets of \$299.54 million, liabilities of \$269.07 million, and \$30.46 million in reserve. Mr. Sutter stated the actuarial firm believes the HCSF is going to get smaller in terms of its assets and its liabilities over the next few years as the impact of the 2021 law takes effect on the Fund's claims, and revenues.

Mr. Sutter explained the forecasts of unassigned reserves assume no change in surcharge rates for CY 2023, an estimated surcharge revenue in FY 2023 of \$19.1 million, a 2.25 percent interest rate for estimating the tail liabilities on a present value basis, a 2.70 percent yield on HCSF assets for estimating investment income, full reimbursement for University of Kansas (KU)/ Wichita Center for Graduate Medical Education (WCGME) claims, and no change in current Kansas tort law or HCSF law. Based on these conclusions, it was suggested the Board of Governors consider a small increase in rates for CY 2023 with some level of variation by class. [Note: The Board of Governors opted to make no change in surcharge rates for CY 2023.]

Mr. Sutter reviewed the HCSF's (surcharge) rate level indications for CY 2023. He first highlighted payments, with settlement and defense costs of \$36.205 million; because the firm expects the HCSF will start getting smaller, a change in liabilities of -\$2.330 million; administrative expenses of \$2.080 million; and transfers to the Kansas Department of Health and Environment (KDHE) assumed to be \$200,000 (assumes no transfers to or from the Health Care Provider Availability Plan); and as a result of the 2021 law, a planned investment of \$8.404 million. The actuary indicated the net operating cost for the HCSF in CY 2023 to be an estimated \$27.751 million. Mr. Sutter noted the HCSF has two sources of revenue: its investment income (assumed to be \$8.130 million based on 2.70 percent yield) and surcharge payments from providers (\$19.621 million needed to break even). The projected surcharge revenue is \$19.227 million at current rates. Mr. Sutter stated these projections provide a slight positive rate level indication of two percent based on a lot of assumptions, but the actuaries are comfortable with the Board of Governors' decision to not make a change given the small size of this rate indication.

Mr. Sutter next reported on the HCSF's investment yield over the past several years, noting the investment yield has flattened out after several years of decline. Mr. Sutter indicated the assumed future yield rate for next year will be at 2.70 percent. The actuarial report also noted a 10-basis-point change in the assumed rate causes a 1.5 percent change in the CY 2023 indication. Mr. Sutter next provided information in response to discussion during this Committee's 2021 meeting on whether the HCSF's assets should be invested differently in order to earn more investment income.

Mr. Sutter provided an overview of rate indications by provider class and a brief description of the provider class system. The report states the analysis of experience by HCSF class continues to show differences in relative loss experience among classes. Mr. Sutter explained class definitions, distributions, and rates, indicating classes 1 through 14 pay a flat

dollar amount while classes 15 and above pay a percentage of their underlying basic coverage premium. Mr. Sutter noted from the firm's perspective, the class that is most inadequately priced is Class 17, which is basically the hospitals (medical care facilities). Mr. Sutter indicated the rates are underpriced based on loss experience and rates for this class would need to be raised by 32 percent to get them on level. The actuary indicated this class analysis is reviewed annually. Mr. Sutter provided a history of surcharge rate changes since 2011. He noted as a result of the 2021 law, there was a resulting significant decrease in rates to reflect the basic coverage changes (more responsibility placed on the primary carrier), as the HCSF will be paying fewer claims since it will now attach above \$500,000 per claim instead of \$200,000 per claim.

Mr. Sutter provided an overview of the three options for CY 2023 surcharge rates that were provided to the Board of Governors. Mr. Sutter reported the Board of Governors chose Option 1; there will be no change in surcharge rates for CY 2023. The actuary noted the firm was comfortable with that decision due to the HCSF doing fairly well at that time. Mr. Sutter indicated from its perspective the HCSF continues to be in a very strong financial position.

In response to questions from Committee members:

- The actuary addressed whether other states are having a similar loss experience for hospitals and other facilities as indicated for Kansas. Mr. Sutter stated the firm is seeing verdicts and settlements across the country that are well beyond amounts in similar cases five years ago. He indicated most loss experiences are in hospitals, but also with physician groups in many jurisdictions. Mr. Sutter noted years ago this was something that was seen in areas such as Cook County in southeast Florida, Detroit, and Philadelphia, but now it is being seen all over the country including a recent large verdict in Iowa.
- Mr. Sutter addressed whether doctors are in a better position to practice in Kansas versus Missouri. Mr. Sutter indicated Kansas, in terms of professional liability coverage and claims experience, is in a better position than Missouri. He noted Missouri has a much higher average cost per claim than Kansas.
- Mr. Sutter addressed potential trends regarding the high cost of settlements and impacts generally on health care providers. Mr. Sutter indicated he believes there is a change in the attitudes in the general population. He noted around 20 years ago, the pendulum swung from being very pro-plaintiff to being more pro-defendant, bottoming out around 2012 and 2013. Mr. Sutter indicated he was not sure it was still going up, but the likelihood of a high judgment is at a much higher level than it was five to ten years ago.
- Mr. Sutter indicated, in response to a question regarding investment income and yields on bonds, with the increase in interest rates from 1.6 percent to nearly 4.0 percent, one would have expected a market-based bond portfolio to take quite a hit just as the stock market has over the last year.
- The actuary, responding to a question and comment by a Committee member who also serves on the HCSF Board of Governors, indicated the decisions the Board made regarding rate stability during the transition time (implementing changes associated with the 2021 law) were appropriate and are still a

reasonable approach. He explained that other clients of his in the health care business that are having bad results are not because they are having more claims, it is because claims that used to cost \$200,00 are now costing \$2.0 million. Health care clients are still having the same number of claims; it is a severity issue not a frequency issue. The actuary indicated he believes the HCSF is insulated from a big severity impact because it is exposed less now than it was a year or two ago. Mr. Sutter explained the HCSF is somewhat insulated from the severity problem that particularly hospitals are having right now. He further explained it goes to a discussion the actuaries have had with the HCSF Board of Governors about whether to offer higher limits of coverage. Mr. Sutter indicated he is not second-guessing what he has told the HCSF Board of Governors nor what the Board of Governors decided to do with its rates for CY 2023.

Chief Counsel's Update

Chairperson Kleeb next recognized Rita Noll, Deputy Director and Chief Counsel, HCSF Board of Governors, to address the FY 2022 medical professional liability experience (based on all claims resolved in FY 2022, including judgments and settlements) ([Attachment 5](#)).

Ms. Noll stated to sum up FY 2022, given the disruption of the pandemic, as a time where the number of filed claims and cases are “getting back to normal”. Ms. Noll continued her presentation by noting jury verdicts. Sixteen medical malpractice cases, involving a total of 17 Kansas health care providers, were tried to juries 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 cases resulted in defense verdicts: in six cases the jury found for the plaintiff, and one case ended in mistrial. Twenty-five percent of the cases (four cases) were in Missouri courts; all four resulted in defense verdicts. Six cases resulted in a verdict for the plaintiff. Four of those plaintiff verdicts were in an amount greater than primary coverage limits (resulting in HCSF obligations) for a total of \$2,782,228.70. Ms. Noll noted for FY 2023, to date, six cases went to trial.

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 \$28,612,433.86 (these figures do not include settlement contributions by the primary or excess insurance carriers). Ms. Noll reported on severity of the claims noting FY 2022 had similar numbers of claims as FY 2018, 2019, and 2020, but those years had far less cases that fell into the \$600,001-\$1,000,000 settlement range (highest level). Ms. Noll noted in FY 2022, 21 claims fell into the top level of severity. Ms. Noll indicated the primary reason for the increase in the severity of claims is when a claim is made for personal injury, there are past medical expenses and also future medical expenses considered. Of the 75 claims involving HCSF moneys, the HCSF incurred \$28,612,433.86 in settlement amounts; the primary insurance carriers contributed \$13,105,866.14 to these claims. Ms. Noll noted 9 of those claims involved inactive Kansas health care providers for which the HCSF provided primary coverage. In addition, the HCSF “dropped down” to provide first dollar coverage for two claims in which aggregate primary policy limits were reached. Primary insurance carriers tendered their policy limits to the HCSF in 66 claims. Ms. Noll reported six cases involved contribution from a carrier in excess of the HCSF coverage: two were hospitals and four were physician cases. The excess insurance carriers contributed \$14,850,000. For the 75 claims involving the HCSF, the total settlement amount was \$56,568,300.

Ms. Noll reported in addition to the settlements involving HCSF contributions, the HCSF was notified primary insurance carriers settled an additional 101 claims in 91 cases (these are claims settled within the primary coverage limits and do not require excess coverage). The total amount of these reported settlements was \$11,475,868. Ms. Noll included a historical report of HCSF total settlements and verdicts, FY 1977 to FY 2022. Ms. Noll indicated for FY 2022, the HCSF incurred \$28,612,433.86 in 75 claim settlements and \$2,782,228.70 in four verdicts for plaintiffs for a total of 79 claims in the amount of \$31,394,662.56. Ms. Noll noted this is the first time since FY 2018 that the HCSF was involved in the payment of a plaintiff verdict.

Ms. Noll reported on the numbers of new cases by fiscal year. Ms. Noll noted the number of cases for FY 2022 was down by 44 from the prior year. Ms. Noll noted from FY 2009 to FY 2015, there was a consecutive seven-year decrease in the number of new claims. Ms. Noll reminded the Committee due to a 2014 law, five new categories of health care providers were added to the HCSF: nursing facilities, assisted living facilities, and residential health care facilities; nurse-midwives; and physician assistants. Therefore, it was not unexpected that in FY 2016, 2017, 2018, and 2019, there was an increase in the number of claims. Ms. Noll does not believe the decrease of FY 2022 is an overall trend yet because during the first three months of the FY 2023, there were 91 new claims. Ms. Noll believes this may be attributed to when the claims were filed, and the claims will average out between FY 2023 and FY 2022 to be about the same as FY 2021.

In response to questions from Committee members:

- The Chief Counsel indicated there has not really been a trend in the type of new cases filed. She noted in the last two fiscal years, the agency saw a great number of COVID-related cases being filed, but in this past year it did not.
- In regard to observations on COVID claims with the long-term care industry, Ms. Noll indicated there are between 40 to 50 cases pending. She noted the first COVID cases were filed at the end of April 2020. Ms. Noll indicated there are six nursing homes across the state of Kansas that have had COVID cases filed against them. Ms. Noll noted two nursing homes, one in Wyandotte County and one in Johnson County, have close to 40 of those claims. Ms. Noll indicated there have not been any settlements involving nursing home claims to date and noted the claims against those two facilities in Johnson County and Wyandotte County are being vigorously defended by the primary insurance carrier. Ms. Noll stated the primary allegations in these type of claims is these nursing facilities did not follow the rules and regulations regarding COVID. Ms. Noll noted the 2020 law provided some immunity for physicians and hospitals, but not nursing facilities; then in 2021, the Legislature did provide some immunity if the facility was in “substantial compliance”. Ms. Noll indicated the discovery taking place on those COVID-related issues and the determination of whether the nursing facility met the standard of care takes a lot of discovery. Ms. Noll noted there is going to be a lot of claims expenses involved in defending those claims.
- To explain the increase in the severity of claims, Ms. Noll provided an example of when a suit is filed for a malpractice action and the claim is made. Ms. Noll explained one of the components of damages for a claimant is for past medical expenses and another component is for future medical expenses. Ms. Noll noted as medical expenses rise, the claim that can be made for those expenses also rises.

Ms. Noll next addressed the self-insurance programs and reimbursement for the KU Foundations and Faculty and residents, noting these programs provide the basic professional liability coverage and by statute, the HCSF administers these programs and handles the claims for first dollar coverage. Ms. Noll 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 came from the State General Fund (SGF). Ms. Noll indicated this was an increase over FY 2021. She reported there were 10 settlements compared to 6 the previous year. Ms. Noll indicated she anticipates similar program costs in FY 2023 and is hopeful there will be fewer settlements.

In regard to the self-insurance programs for the KU/WCGME resident programs, including the Smoky Hill residents in Salina, total amount of \$865,070.17. Ms. Noll reported there were no claim settlements for FY 2022. Ms. Noll indicated there was an increase in attorney's fees and expenses due to the number of claims against residents rose from 14 to 41 for FY 2021. Ms. Noll noted the pending claims at the end of FY 2022 are down.

Ms. Noll provided a list of historical expenditures by fiscal year for the KU Foundations and Faculty program and the residents in training since the inception of the two self-insurance programs. She reported the ten-year average for the residents-in-training program costs is about \$980,000 a year and noted FY 2022 was "slightly below average" at \$865,070.17. The ten-year average for the Foundations and Faculty program costs is about \$1.9 million a year; noting FY 2022 was above average. Ms. Noll noted that the number of faculty has doubled in the last 10 years, and the Private Practice Reserve Fund amount of \$500,000 has stayed the same since 1989. Ms. Noll indicated it will probably be FY 2024 before claims will be seen with the primary insurance coverage increase from \$200,000 to \$500,000. Ms. Noll noted something that needs to be considered when those claims start coming in is if the settlement will come from the SGF rather than the HCSF. Ms. Noll reported on moneys paid by the HCSF as an excess carrier. Ms. Noll noted there were no claims regarding residents in FY 2022. She indicated of the 10 claims involving faculty members in FY 2022, four of those claims involved an amount greater than \$200,000. The total amount of those four settlements was \$1,482,500 that came from the HCSF excess coverage.

In response to questions from Committee members:

- Ms. Noll indicated she was not aware of any proposals before the legislature regarding COVID-related issues with nursing homes.
- Ms. Noll addressed the qualifications for the self-insurance program. Ms. Noll stated pursuant to statute to qualify under the state self-insurance program, a faculty member has to be a member of the foundation and must have a full-time faculty appointment. Ms. Noll indicated not all of the 1,004 faculty members are supervising residents, but by statute faculty qualify for the self-insurance program if they have a full-time faculty appointment. She noted faculty are given a volunteer faculty appointment letter. Ms. Noll reported none of the physicians at the Great Bend campus are faculty members, Topeka has three physicians at the St. Francis campus who are qualified as faculty, and she has not heard what is going to happen with the Olathe facility.
- Ms. Noll agreed that the \$500,000 from the Private Practice Reserve Fund could be just one claim. Ms. Noll noted this past year, there were 10 claims involving faculty, four of which involved an amount from the HCSF. She indicated if those

claims had been under the new coverage limits, an additional \$630,000 would have been reimbursed from the SGF.

- Ms. Noll indicated the Health Care Provider Insurance Availability Plan (Availability Plan) is not reflected in her presentation except when a claim is tendered to the HCSF. Then, the HCSF would have the excess coverage for that Availability Plan for the plan insured.

Board of Governors Overview

Chairperson Kleeb recognized Clark Shultz, Executive Director of the HCSF Board of Governors ([Attachment 6](#)). Mr. Shultz provided a brief history of the Health Care Provider Insurance Availability Act (HCPIAA). He explained that when the 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 Health Care Provider Insurance Availability Plan (Availability Plan), to provide professional liability coverage for those health care providers who cannot purchase coverage in the commercial insurance market; and creation of the HCSF to provide excess coverage above the primary coverage purchased by the health care providers and to serve as reinsurer of the Availability Plan.

Mr. Shultz provided the Board of Governors' statutory annual report (as required by KSA 2020 Supp. 40-3403(b)(1)(C)), issued October 1, 2021). The FY 2022 report indicated net premium surcharge revenue collections total \$24,452,941. The report indicated the highest surcharge rate was \$10,006 for a health care professional for coverage of \$500,000 per claim/ \$1.5 million annual aggregate limit. Application of the Missouri modification factor for a Kansas resident neurosurgeon (if licensed in Missouri) would result in a total premium surcharge of \$13,008 for this health care practitioner. The lowest surcharge rate for a health care provider was \$200 (primarily used by a non-resident provider providing minimum health care services in Kansas). The report detailed the medical professional liability cases. The average compensation per settlement (64 cases involving 75 claims were settled) was \$381,499. These amounts are in addition to compensation paid by primary insurers (typically \$200,000 per claim). The report stated amounts reported for verdicts and settlements were not necessarily paid during FY 2022, and total claims paid during the fiscal year amounted to \$29,899,438. The statutory report also provided the balance sheet, as of June 30, 2022, indicating total assets of \$310,120,249 and total liabilities of \$278,776,996.

Mr. Shultz presented an overview of the Availability Plan. Mr. Shultz reported as of October 24, 2022, there were 362 plan participants. Mr. Shultz noted these participants are health care providers that would not be able to provide patient care in Kansas if it were not for the Availability Plan.

Mr. Shultz reviewed provisions of 2021 House Sub. for SB 78, which increased the amount that a provider must obtain from a base insurance carrier from \$200,000 to \$500,000 per claim. Mr. Shultz indicated the implementation working with the private insurers went smoothly without any big issues. Mr. Shultz noted a historical overview of the HCPIAA is in his written report.

Mr. Shultz concluded by stating the HCPIAA has been very successful, and the HCSF plays a vital role.

In response to questions from Committee members:

- Mr. Shultz commented on whether the surcharge for the Class 17 can be kept stable in the future or will it need to be increased. Mr. Shultz indicated the Board of Governors examined the numbers and tried to find the correct balance of ensuring surcharges were reasonable. Mr. Shultz stated the Board made the right choice this year to not change the surcharges. He indicated he is confident the Board will make appropriate adjustments as needed. A Committee member extended his thanks on behalf of the medical facilities indicating they appreciate the Board of Governors keeping the increases minimal.
- Mr. Shultz indicated he is not aware of any legislation regarding COVID issues with nursing homes.
- Mr. Shultz indicated he was not aware of any legislation being reintroduced for the nurse midwives' facilities. He indicated the HCSF (agency) is there to help facilitate that, but it would be the Board of Governors that would take an official position.
- In regard to the HCSF offering an excess million dollars above what the HCSF limits are today, Mr. Shultz indicated the Board of Governors decided they did not have the experience to offer coverage at that level. He believes if the Board of Governors perceives there is a time that coverage is appropriate, the Board will consider it.

Update on the Current Status of the Medical Malpractice Insurance Market; Update on the Health Care Provider Insurance Availability Plan; and Comment from Health Care Provider Representatives

Kansas Medical Mutual Insurance Company

Chairperson Kleeb recognized Tucker Poling, Vice President, Claims, Kansas Medical Mutual Insurance Company (KAMMCO) on behalf of Kurt Scott, KAMMCO President and CEO, to address the current status of the medical malpractice marketplace in Kansas ([Attachment 7](#) and [Attachment 8](#)). Mr. Poling commented on the environmental factors discussed in Mr. Scott's written testimony. He stated claim frequency is either flat or a little bit below last year. Mr. Poling noted a significant environmental factor is that severity is up in Kansas as it is across the country. Mr. Poling indicated costs are up, settlement demands are up, and the amount of settlements and judgments are up. Mr. Poling explained contributing factors include "mega verdicts" across the country where there are unusually large verdicts that are driving up the indemnity prices, the macro-economic factors of inflation, and there are some factors that are unique to Kansas such as the *Hilburn v. Enerpipe, Ltd. (Hilburn)* opinion which drew the non-economic damages statutory cap into question. Mr. Poling stated that decision has caused demands to go up and the price of indemnity settlements to go up.

In response to a question from a Committee member, Mr. Poling discussed the cases of and court decisions in *Miller v. Johnson (Miller)* and *Hilburn*. Mr. Poling stated in the *Hilburn* case there was no majority opinion. There was a plurality of three and then there was another justice who concurred in the result. Mr. Poling noted there is a lot of debate within the legal

community regarding the extent to which that opinion serves as precedent and whether it applies specifically to medical malpractice claims. He indicated as a servicing carrier of the plan and as a liability carrier managing litigation, KAMMCO is certainly preserving that issue and look forward to the issue potentially being clarified. Mr. Poling stated right now there are significant arguments that would favor the argument that *Miller* might still apply to medical malpractice. There are also contrary arguments that suggest that *Hilburn* would apply and overrule *Miller* in the malpractice context. Mr. Poling stated he believes the bottom line is there is uncertainty right now as to what the noneconomic damages cap effect is in Kansas in the medical malpractice sector.

Kansas Medical Society and Kansas Hospital Association

Chairperson Kleeb next recognized Dan Murray, appearing jointly on behalf of the Kansas Medical Society (KMS) and the Kansas Hospital Association (KHA). Mr. Murray stated Rachelle Colombo, Executive Director, KMS, was not able to attend but has submitted written testimony ([Attachment 9](#)). Mr. Murray emphasized the importance of the HCSF and this Committee. Mr. Murray commented on the need to continue both the Committee and its oversight and the HCSF. Mr. Murray stated its been extremely vital to the stabilization of the medical malpractice marketplace in Kansas. It has been a rare public/private partnership that has provided the intended outcomes of its enactment. Mr. Murray indicated there are new challenges such as the *Hilburn* decision, the inclusion of corporations having the ability to employ physicians, the authorization of APRNs to practice independently, and some tightening/hardening of the market on reinsurance impacting the environment in Kansas.

Consideration of Proposed Amendments to the Health Care Provider Insurance Availability Act, If Any

Chairperson Kleeb asked for any proposed amendments to the HCPIAA. No amendments were brought before the Committee.

A Committee member commented that he saw a chart showing about 80 percent of the medical malpractice carriers nationally were running a loss ratio in excess of 100 percent. He indicated the HCSF has provided our providers, physicians, and hospitals with rates that are far better than what is seen nationally.

Committee Discussion for the Purposes of Determining Conclusions and Recommendations to the 2023 Legislature, and Direction to Staff for the Committee Report to the Legislative Coordinating Council

Chairperson Kleeb invited Committee discussion for the purpose of reaching conclusions and making recommendations to the 2023 Legislature.

Ms. Renick discussed the two functions unique to the Committee's statutory role: the continuation of the Committee and whether an independent actuarial analysis of the HCSF would be necessary.

Representative Proehl moved, seconded by Mr. Slaughter to continue the language that has been previously stated in prior Committee reports regarding the function of the HCSF and the continued oversight role of the Committee. With no further discussion, the motion carried.

Mr. Slaughter moved, seconded by Dr. Gleason, that there is no need to request an independent actuarial review. After some discussion, the motion carried.

Mr. Slaughter moved, seconded by Mr. Conrade, to comment on the actuarial analysis and status of the HCSF's financial position at June 30, 2022; include comments relevant to the rate level indications; and no change in surcharge. With no further discussion, the motion carried.

Ms. Renick outlined the following topics for the Committee's consideration regarding current and future impacts of 2021 House Sub. for SB 78:

- Recognizing the rebalancing of claims and costs (liabilities) between the HCSF and primary insurance carriers.
- Comments from the HCSF and from insurance carriers regarding lowering of surcharge revenue, the 2021 rate reduction (by 48 percent) to the 2022 rates to recognize there would be less claims exposure in that primary coverage on the HCSF.
- KAMMCO's language regarding House Sub for SB 78 to state insurance is available and adequate; and there were not concerns about loss of coverage with the change in law.

Mr. George moved, seconded by Mr. Slaughter, the above-stated language. With no further discussion, the motion carried.

Ms. Renick outlined the following topics for the Committee's consideration regarding market conditions and comments from health care providers:

- KAMMCO's testimony regarding headwinds and continued uncertainty in health care delivery itself and in the marketplace:
 - There was an increased claim frequency; not necessarily the number of claims, but the frequency of the more severe claims.
 - Large verdicts which were also addressed in questions presented to Russ Sutter (the actuary) that was also being experienced in other states.
 - Limitations and tightening in reinsurance.
 - The lack of uncertainty of the application of *Hilburn* to the medical malpractice marketplace.
- KMS' testimony regarding the corporation of physicians and the APRN laws and whether there would be an impact as well on medical malpractice.

Mr. Conrade moved, seconded by Dr. Gleason, the above-stated language. With no further discussion, the motion carried.

Ms. Renick outlined COVID-related trends of the HCSF and health care providers that were detailed in today's meeting:

- Rita Noll’s testimony (Chief Counsel) mentioned the slow development of COVID cases and the particular concern regarding cases involving nursing facilities.
- KAMMCO’s report regarding the participation of nursing facilities and that the Availability Plan has increased from 8 in 2019 to 58 in 2022.
- Acknowledgment in the increase in the severity of claims in terms of past and future medical claims.

Mr. Slaughter moved, seconded by Mr. George, the above-stated language. With no further discussion, the motion carried.

Ms. Renick outlined the following topics for the Committee’s consideration:

- Self-insurance programs. The impact of House Sub. for SB 78 acknowledging the increase of settlements and pending claims regarding the KU Foundations and Faculty and residents-in-training, which has resulted in increased cost projections to the SGF. Ms. Renick noted both of those are currently increasing; as the Committee discussed, what will happen to those costs in 2024 if the Private Practice Reserve Fund remains unchanged at \$500,000.
- Funds to be held in trust. The Committee recommends the continuation of the following language to the Legislative Coordinating Council, Legislature, and the Governor regarding the Health Care Stabilization Fund:
 - The Health Care Stabilization Fund Oversight Committee continues to be concerned about and is opposed to any transfer of money from the HCSF to the SGF. The HCSF provides Kansas doctors, hospitals, and the defined health care providers with individual professional liability coverage. The HCSF is funded by payments made by or on behalf of each individual health care provider. Those payments made to the HCSF by health care providers are not a fee. The State shares no responsibility for the liabilities of the HCSF (excepting University of Kansas faculty and residents’ self-insurance programs reimbursement). Furthermore, as set forth in the HCPIAA, the HCSF is required to be “held in trust in the state treasury and accounted for separately from other state funds;” and
 - Further, this Committee believes the following to be true: all surcharge payments, reimbursements, and other receipts made payable to the HCSF shall be credited to the HCSF. At the end of any fiscal year, all unexpended and unencumbered moneys in such HCSF shall remain therein and not be credited to or transferred to the SGF or to any other fund.

Mr. Slaughter moved, seconded by Mr. George, to incorporate language of the above-mentioned items in the report. After some discussion, the motion carried.

Mr. Conrade moved, seconded by Dr. Gleason, to direct the Committee Report to specific committees of the Legislature that would be most interested in following up, such as the appropriations, judiciary, insurance, and health committees. With no further discussion, the motion carried.

A Committee member commented on concerns regarding liability exposure for nursing facilities. The member indicated there needs to be more discussion and analysis of how to protect the nursing facilities.

Mr. George moved, seconded by Mr. Proehl, to continue to monitor health care providers particularly medical care facilities including nursing facilities for the need for liability coverage due to the uncertainty in the marketplace and concerns such as COVID, supply chain issues, and lawsuits. With no further discussion, the motion carried.

Mr. Slaughter asked to be recognized to express his admiration and thanks to Representative Proehl for his service to the Committee and wished him well.

Adjourn

Chairperson Kleeb thanked the Committee members, staff, and attendees for their participation in the annual review. The Chair thanked Ms. Renick for helping to get the Committee's work done in an organized and reasonable manner. There being no further business to come before the Committee, the meeting was adjourned at 10:32 a.m.

Prepared by Randi Walters

Edited by Melissa Renick

Approved by the Committee on:

November 30, 2023

(Date)