

SESSION OF 2021

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2380

As Amended by House Committee on Insurance
and Pensions

Brief*

HB 2380, as amended, would amend coverage requirements specified in the Health Care Provider Insurance Availability Act (HCPAAA) for all new and renewal professional liability insurance policies for defined health care providers. Beginning January 1, 2022, the bill would increase the required minimum professional liability insurance coverage (termed "basic coverage") maintained by a defined health care provider from \$200,000 per claim and \$600,000 per year aggregate to \$500,000 per claim and \$1,500,000 per year aggregate. The number of options for coverage levels limiting the liability of the Health Care Stabilization Fund (HCSF) would be reduced from three to two. The bill would also amend provisions concerning the membership on the HCSF Board of Governors (Board) and make amendments to criteria associated with the qualification of a medical care or health care facility as a self-insurer.

The bill would delete an expired provision and make technical amendments relating to form and style.

[*Note:* Professional liability insurance is medical malpractice or medical liability insurance and is defined in the HCPAAA (KSA 40-3401) as "insurance providing coverage for legal liability arising out of the performance of professional services rendered or that should have been rendered by a health care provider."]

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

***Required Health Care Provider Professional Liability
Insurance Coverage (Section 1)***

The bill would clarify the current levels of professional liability insurance coverage required to be maintained by a health care provider under the HCPIAA would continue in effect through December 31, 2021. As a condition of active licensure or other statutory authorization to render professional service as a health care provider in Kansas on and after January 1, 2022, each resident health care provider would be required to maintain a policy of professional liability insurance approved by the Commissioner of Insurance (Commissioner) and issued by an insurer duly authorized to transact business in Kansas in which the limit of the insurer's liability would be no less than \$500,000 per claim and subject to an annual aggregate of not less than \$1,500,000 for all claims during the policy period. Self-insured health care providers and those health care providers to whom the current coverage requirements do not apply would be exempt from this coverage limit.

***HCSF Board of Governors Membership; HCSF Liability
(Section 2)***

Board Membership

The bill would amend Board membership provisions to require at least two of the three members appointed by the Commissioner from a list of nominees submitted to the Commissioner by the Kansas Medical Society to be doctors of medicine who are licensed to practice medicine and surgery in Kansas. The bill would make technical updates to language designating the remaining Board member appointments.

Liability of the HCSF

The bill would increase, from \$300,000 to \$500,000, the minimum amount of liability on the HCSF, if the Fund is liable, for the HCSF to pay a judgment or settlement by making installment payments of \$500,000 or 10.0 percent of the judgment, whichever is greater.

Coverage Options

Each health care provider subject to the HCPIAA must choose among HCSF coverage options. The three current HCSF coverage options would remain available through December 31, 2021, and would limit the HCSF liability with respect to judgments or settlements relating to injury or death arising from the rendering of or failure to render professional services from July 1, 1989, and prior to January 1, 2022.

On and after January 1, 2022, every health care provider would be required to choose one of two HCSF coverage options limiting the HCSF liability for judgments or settlements relating to injury or death arising from the rendering of or failure to render professional services, as follows:

- \$500,000 for any one judgment or settlement against a health care provider, subject to an aggregate limit of \$1,500,000 for all judgments and settlements arising from all claims made in the fiscal year against such health care provider; or
- \$1,500,000 for any one judgment or settlement against a health care provider, subject to an aggregate limit of \$4,500,000 for all judgments and settlements arising from all claims made in the fiscal year against such health care provider.

Captive insurers; qualification as self-insurer. The bill would further specify a medical care facility or health care

facility deemed as a self-insurer may opt out of the coverage requirements, as long as such facility substantially meets the minimum coverage requirements created by the bill through coverage provided by the facility's captive insurance coverage.

Excess coverage. The bill would also specify the Board shall have the authority to adjust certain coverage amounts needed to effectuate provisions of the HCPIAA, provided such minimum coverage is not less than \$1.0 million per claim and \$3.0 million in the aggregate.

Inactive Health Care Provider Tail Coverage

The bill would delete a subsection that expired on July 1, 2014, limiting HCSF liability for inactive health care providers to those health care providers in compliance with HCSF requirements for not less than five years or those who remedy noncompliance as provided in statute. [*Note:* 2014 law authorized this "tail coverage" immediately upon the cancellation or inactivation of a Kansas license and that provider's professional liability insurance policy.]

Liability of Insurer for HCSF-Covered Provider or Self-Insurer (Section 3)

The bill would update a provision limiting liability for a claim for personal injury or death arising out of the rendering of or failure to render professional services by such health care provider. The bill would provide for such claims, the insurer of a health care provider covered by the HCSF or self-insurer shall be liable only for the amount of basic coverage in effect on the date of the incident giving rise to the claim, which is subject to an annual aggregate amount of not less than three times the primary amount for all such claims against the health care provider.

***Notification; Actions Filed for Personal Injury or Death
Arising out of the Rendering of or Failure to Render
Professional Services (Section 4)***

The bill would update language regarding a plaintiff's service of a copy of a petition upon the Board to include certified mail, priority mail, commercial delivery service, or first-class mail and require such service within 30 calendar days from the filing of such petition.

***Certificate of Self-Insurance; Requirements on Certain
Facilities (Section 5)***

The bill would modify provisions pertaining to requirements on medical care or health care facilities certified as self-insurers. Those modifications would:

- Increase, from \$100,000 to \$150,000, the aggregate annual insurance premium specified (one of two options for insurance coverage required for facilities obtaining a certificate of self-insurance); and
- Update criteria specified for the determination of the Board regarding qualification for a certificate of self-insurance to include any other factors the Board deems relevant and further specify:
 - Any applicant that owns and operates more than one medical care facility or more than one health care facility shall be deemed qualified by the Board, if such applicant is insured by a captive insurance company (as defined in KSA 40-4301) or under the laws of the state of domicile of any such captive insurance company.

Claims Made for Incidents Occurring after January 1, 2022 (Section 6)

The bill would update language referencing claims made against a resident or nonresident health care provider on and after July 1, 2014, to specify the minimum professional liability coverage policy limits associated with the HCSF liability would be the limits in effect on the date of the incident giving rise to a claim.

The bill would also specify for claims made for incidents occurring on or after January 1, 2022, the aggregate Fund liability for all judgments and settlements made in any fiscal year against a resident or nonresident inactive health care provider shall not exceed three times the basic coverage limit.

Background

The bill was introduced by the House Committee on Insurance and Pensions at the request of the Kansas Medical Society. [Note: The provisions of HB 2380, as introduced, are similar to those of 2020 SB 493, absent provisions pertaining to the dissolution of the Fund if certain circumstances exist and technical updates. The Senate Committee on Ways and Means introduced 2021 SB 290, which is substantially similar to HB 2380, as amended by House Committee.]

History of the HCSF and coverage limits. The HCPIAA (enacted in 1976) created the Health Care Stabilization Fund in an effort to stabilize the availability of medical professional liability coverage for health care providers. The law created a basic liability requirement for certain health care providers and established an availability plan in order to provide required basic professional liability insurance coverage for those providers of health care in Kansas unable to obtain such coverage from the commercial market. The HSCF receives revenue from professional liability coverage surcharge payments made by health care providers. Responding to a medical malpractice liability crisis,

the 1988 Legislature conducted an interim study and authorized significant changes to the HCPIAA in 1989 SB 18. Among those changes, the bill created three different options for health care providers to supplement their basic \$200,000 per claim coverage purchased from a commercial insurer or the Health Care Provider Insurance Availability Plan: \$100,000, \$300,000, or \$800,000 per claim (with annual aggregate limits three times the per claim coverage).

House Committee on Insurance and Pensions

In the House Committee hearing on February 22, 2021, representatives of the Kansas Medical Society provided **proponent** testimony, stating the bill is intended to address two areas that require attention to reflect both current needs as well as anticipated market conditions in the coming years. Those main areas are the new minimum coverage requirements, which would increase both the “basic coverage” and the Fund’s “excess coverage” limits. This update of both coverage limits (previously updated in 1984 and 1989 law) would address a concern noted by the Supreme Court. The bill would also permit the HCSF to offer a higher limit of excess coverage. The conferees’ testimony noted a concerning trend is developing with reinsurance markets significantly contracting and limiting their underwriting of higher limit policies. By increasing the excess coverage limits, the bill would help ensure the availability of such coverage. Written-only **proponent** testimony was submitted by a representative of the Kansas Hospital Association and addressed concerns about an unknown medical malpractice environment following the June 2019 *Hilburn v. Enerpipe Ltd.* decision.

The Executive Director of the HCSF submitted written-only neutral testimony, highlighting the history of the HCPIAA and the effort to provide affordable professional liability insurance for health care providers. The testimony indicated the HCSF currently provides coverage for over 16,000 defined health care providers. During FY 2020, the Fund

closed 524 claim files and paid nearly \$28 million in compensation to those who were injured. The testimony noted the Kansas Medical Society is working with the agency to ensure a smooth transition if this bill becomes law.

[*Note:* In its report to the 2021 Legislature, the Health Care Stabilization Fund Oversight Committee indicated support for a proposal to change the required coverage limits and number of offerings to be introduced by the Kansas Medical Society and Kansas Hospital Association in the 2021 Session.]

On March 5, 2021, the bill was withdrawn from the House Committee on Insurance and Pensions and referred to the House Committee on Appropriations. On March 10, 2021, the bill was withdrawn from the House Committee on Appropriations and re-referred to the House Committee on Insurance and Pensions.

On March 23, 2021, the House Committee on Insurance and Pensions amended the bill to:

- Add language pertaining to the qualifications of certain facilities as self-insurers under KSA 40-3414, to allow facilities to meet minimum coverage requirements through coverage provided by the facility's captive insurance company and update a required insurance premium level of coverage;
- Assign the Board authority to adjust the basic coverage levels, in order to effectuate the HCPIAA, by specifying an excess coverage threshold;
- Update provisions pertaining to service of notice upon petitions to the Board; and
- Update language pertaining to the aggregate fund liability for judgments and settlements arising from claims made against a resident or nonresident inactive health care provider.

Fiscal Information

According to the fiscal note prepared by the Division of the Budget on the bill as introduced, the HCSF indicates enactment of the bill would increase the current levels of coverage. The Fund would collect higher surcharge rates from providers. Expenditures would increase if the changes in the bill result in higher judgments and settlements. The cost of attorney and attorney-related expenses would also increase. The changes in the bill would, the agency notes, require an actuarial study to be conducted to determine the fiscal effect. The cost of the study would be approximately \$27,000 from the HCSF.

The Kansas Insurance Department indicates enactment of the bill would result in an increase of premium taxes collected from insurance companies, as the bill increases the minimum professional liability insurance coverage. The Kansas Insurance Department would retain 1.0 percent of any additional premium tax collected from enactment of the bill, and the remainder would be remitted to the State General Fund. However, the fiscal effect cannot be estimated.

The Office of Judicial Administration and the Kansas State Board of Healing Arts both state enactment of the bill would not have a fiscal effect.

Any fiscal effect associated with the bill is not reflected in *The FY 2022 Governor's Budget Report*.

Health Care Stabilization Fund; professional liability insurance; health care providers; minimum coverage; Health Care Stabilization Fund Board of Governors