Kansas Health Care Stabilization Fund

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FISCAL YEAR 2016 ANNUAL REPORT
Prepared by C. Wheelen, Executive Director
Adopted by the Board of Governors October 13, 2016

The following information is reported on behalf of the Health Care Stabilization Fund Board of Governors in accordance with K.S.A. 40-3403(b)(1)(C). This report is for the fiscal year that ended June 30, 2016.

1. Net premium surcharge collections amounted to $28,114,941.

2. The lowest surcharge rate for a health care provider was $100 for a first year provider selecting the lowest HCSF coverage option ($100,000 per claim subject to $300,000 annual aggregate limit).

3. The highest surcharge rate for a health care professional was $16,510 for a neurosurgeon with five or more years of Health Care Stabilization Fund liability exposure who selected the highest coverage option ($800,000 per claim subject to $2.4 million annual aggregate limit). If a Kansas resident neurosurgeon was also licensed to practice in Missouri, the 30% Missouri modification factor would result in a total premium surcharge of $21,463.

4. There were 14 medical professional liability cases involving 17 health care providers that went to jury trials. Twelve of these cases resulted in defense verdicts, one resulted in a jury award of $100,000 to the plaintiff, and one resulted in a mistrial.

5. During the past fiscal year 557 open claims were closed. Of those claims, only 76 (13.6%) resulted in Fund obligations. Sixty six cases involving 76 claims were settled, which resulted in Health Care Stabilization Fund obligations amounting to $23,539,687. The average Stabilization Fund compensation per settlement was $309,733. These amounts are in addition to compensation paid by primary insurers, typically $200,000 per claim.

6. Because of periodic payment of compensation and other cash-flow characteristics, the amount reported above in item five was not the same as the amount actually paid during FY2016. Total claims expenditures during the fiscal year amounted to $27,278,643.

7. The balance sheet as of June 30, 2016 accepted by the HCSF Board of Governors indicates total assets amounting to $278,583,425 and total liabilities amounting to $229,267,579.

Overview

This year is the 40th anniversary of the Health Care Provider Insurance Availability Act. The original Act contained three principal features that have always remained intact. Those features are: (1) a requirement that all health care providers, as defined in K.S.A. 40-3401, maintain professional liability insurance coverage as a condition of active licensure, (2) creation of a joint underwriting association, the "Health Care Provider Insurance Availability Plan," to provide professional liability coverage for those health care providers who cannot purchase coverage in the commercial insurance market, and (3) creation of the Health Care Stabilization Fund to (a) provide supplemental coverage above the primary coverage purchased by health care providers and (b) to serve as reinsurer of the Availability Plan. For a detailed history of the Health Care Provider Insurance Availability Act, please see the addendum to this report.

Significant Recent Events

In October 2012 the Kansas Supreme Court announced that it upheld the constitutionality of a Kansas Statute that limits the amount a plaintiff can recover for noneconomic damages in a personal injury lawsuit. The media release issued by the Court's Education-Information Officer stated, "Our court has long recognized that the legislature may modify the common law in limited circumstances, as long as the legislature provides an adequate substitute remedy or quid pro quo." The media release went on to say, "The decision relied in part on the statutory cap's relationship to the Health Care Provider Insurance Availability Act. That Act requires that all health care providers maintain liability insurance with designated levels of excess coverage."

The Miller v. Johnson decision corroborated the importance of the Availability Act and the Stabilization Fund. Following the decision, the Legislature added two professions and three types of adult care homes to the Availability Act definition of health care provider.

The Medical Professional Liability Insurance Market

The Health Care Provider Insurance Availability Act creates a favorable environment for responsible professional liability insurance companies. Their liability never exceeds $200,000 per claim and they can engage in selective underwriting practices. They can reject questionable risks by referring them to the Availability Plan. Unlike joint underwriting associations in other states, the Kansas Availability Plan is reinsured by the Stabilization Fund instead of assessments on commercial insurers. In other words, health care providers, rather than their insurers, guarantee the solvency of the Plan. Furthermore, the fact that Kansas has a history of tort reforms makes Kansas a good environment for insurance business in general.

It has been suggested that because there has been a sustained "soft market" for professional liability insurance, perhaps the Health Care Provider Insurance Availability Act has outlived its usefulness. We disagree with this assessment. It is important to maintain the three essential features under the Availability Act to assure long-term stability. Furthermore, enforcement of compliance with the Availability Act is imperative for purposes of meeting the quid pro quo requirement cited by the Kansas Supreme Court in the Miller v. Johnson decision. But the Legislature may wish to consider adjusting the coverage levels. There will likely come a time when the insurance companies will want to sell policies with higher coverage limits. Such a change can be accommodated by amending K.S.A. 40-3402. If that occurs, the Legislature will want to also adjust the Stabilization Fund coverage options in K.S.A. 40-3403.

Contemporary Issues

Currently there are a few minor issues that deserve our attention. Whereas the original Availability Act was intended to address inadequate professional liability insurance coverage for health care providers, we are now confronted with a couple of situations in which the Availability Act provides too much coverage, resulting in unnecessary duplication.

You probably know that when a physician or other health care provider is employed by an instrumentality of the federal government, he or she is covered under the Federal Tort Claims Act. If the health care provider practices exclusively in his or her capacity as a federal employee, he or she can obtain a federally active license and thereby become exempt from the professional liability insurance and Health Care Stabilization Fund requirements in the Availability Act. This is why the Legislature created the federally active license. But oftentimes the employee of the Veterans Administration, a branch of the military, or a federally qualified health center wants to pursue additional employment which is not covered under the Federal Tort Claims Act. In this case, he or she must have an active Kansas license and comply with the professional liability insurance requirements as well as participate in Health Care Stabilization Fund coverage.

A somewhat different situation exists when a physician or other health care provider renders professional services to a medically indigent patient as a charitable health care provider and he or she is covered under the Kansas Tort Claims Act. If the health care provider is retired and has an exempt license, he or she is exempt from the professional liability insurance and Health Care Stabilization Fund requirements in the Availability Act. But if the health care provider is not yet retired, he or she must maintain an active license and therefore must comply with the professional liability insurance and Health Care Stabilization Fund requirements in the Availability Act.

In order to understand why there is unnecessary duplication it is important to review the principal features of K.S.A. 40-3402. The pertinent part of K.S.A. 40-3402 says (with emphasis added):

> (a) A policy of professional liability insurance approved by the commissioner and issued by an insurer duly authorized to transact business in this state in which the limit of the insurer's liability is not less than $200,000 per claim, subject to not less than a $600,000 annual aggregate **for all claims made during the policy period**, shall be maintained in effect by each resident health care provider as a condition of active licensure or other statutory authorization to render professional service as a health care provider in this state, unless such health care provider is a self-insurer.

To assure that we correctly interpreted this section of the Statutes, we corresponded with the Director of the Property and Casualty Division in the Kansas Insurance Department and inquired whether an insurer could limit coverage in a policy issued to a health care provider. In a letter dated June 30, 2016 the General Counsel for the Kansas Insurance Department opined as follows (with emphasis added):

> K.S.A. 40-3402(a) requires each Kansas resident health care provider maintain in effect a MPLI policy approved by the Commissioner of Insurance. The policy must provide minimum coverage limits for all claims made during the policy period. This includes coverage for any claims that may be attributable to patient care rendered during the term of the policy or during the prior term of a similar policy. A policy that covers only occurrences during the policy term does not meet the requirements of K.S.A. 40-3402(a). **Coverage cannot be limited to a particular scope of employment nor can it be limited to practice in a particular facility or location.** During the term of the policy, it must cover the Kansas resident health care provider anytime and anywhere that he or she renders professional services.

Normally this “all claims made during the policy period” requirement is sound public policy that protects both the insured health care provider and the health care provider’s patients. But it is this requirement that may result in duplication of coverage under either the Kansas Tort Claims Act or the Federal Tort Claims Act. For this reason, we have drafted a bill that would amend the Availability Act to allow exclusion of insurance and Stabilization Fund coverage when the health care provider is covered under the Kansas or Federal Tort Claims Act. We have solicited input from the Kansas Insurance Department as well as organizations that represent health care providers. If those organizations indicate support, we will request introduction of a bill when the Legislature convenes in January 2017.

Another minor issue that has been brought to our attention is the lack of an inactive license category for advanced practice nurse anesthetists and nurse midwives. This makes it somewhat difficult to verify eligibility for tail coverage when a nurse anesthetist or nurse midwife retires or relocates out of state. For this reason, we have drafted amendments to the Nurse Practice Act and have sent the draft language to the Board of Nursing as well as the associations that represent the professions.

Conclusion

The Health Care Provider Insurance Availability Act is a successful public-private partnership that has accomplished legislative intent. It provides stability in the commercial medical professional liability insurance market and guarantees that health care providers always have access to the liability coverage they need. Equally important, it assures that in the event that a patient is injured because of an unfortunate medical outcome, he or she always has a reliable remedy available to them. As a result, it provides the quid pro quo needed to accomplish meaningful tort reforms.

There are two principal reasons the Kansas Health Care Provider Insurance Availability Act has been successful: (1) the HCSF Board of Governors has made an extraordinary effort to maintain the actuarial integrity of the Fund, and (2) the Legislature has maintained fiscal discipline by avoiding the temptation to divert HCSF revenues.

The HCSF Oversight Committee has consistently supported the principle that the HCSF should be used exclusively for its statutory purposes. On a number of occasions we have referred to your reports and recommendations during legislative hearings, particularly in the Senate Ways and Means Subcommittee and the House Budget Committee. We are grateful for your support.

We recognize that the HCSF Board of Governors is an agency of the State of Kansas and the HCSF is a state fund. The Legislature can amend or repeal the Health Care Provider Insurance Availability Act in any session of the Legislature. We appreciate the continuous support of the Kansas Legislature.

The Health Care Stabilization Fund is actuarially balanced; its liabilities are funded and there is a reasonable margin of unassigned reserves. Other than a few technical adjustments, we do not believe there are any reasons to substantially amend the Availability Act. After four decades of success, we look forward to serving Kansas health care providers and their patients for years to come.

Addendum

The Health Care Provider Insurance Availability Act was passed in 1976 at a time in Kansas history when many physicians and other health care providers could not purchase affordable professional liability insurance. In some cases, insurers were not willing to provide adequate coverage limits and some physicians could not obtain liability insurance at all.

The original Act contained three principal features that have always remained intact. Those features are: (1) a requirement that all health care providers, as defined in K.S.A. 40-3401, maintain professional liability insurance coverage as a condition of licensure, (2) creation of a joint underwriting association, the "Health Care Provider Insurance Availability Plan," to provide professional liability coverage for those health care providers who cannot purchase coverage in the commercial insurance market, and (3) creation of the Health Care Stabilization Fund to (a) provide supplemental coverage above the primary coverage purchased by health care providers and (b) to serve as reinsurer of the Availability Plan. The original Act delegated responsibility for premium surcharge collections and administering the Stabilization Fund to the Kansas Insurance Commissioner.

Unlike commercial insurance policies, the original HCSF provided unlimited coverage. In other words, a doctor or hospital could be sued for any amount, and there was no limit on the amount a jury could award to a plaintiff, or the amount that could be agreed to in a settlement. Yet there was a statutory limit on the reserves that could be maintained in the Fund. In a few years, the accrued liabilities of the HCSF exceeded the $10 million cap on reserves for payment of claims and expenses.

The 1984 Legislature attempted to correct problems inherent in the original Act. The law was changed to limit the Fund's liability to $3 million per claim and $6 million annual aggregate liability for any one health care provider. Another major amendment removed the statutory limit on the Fund's balance and prescribed that the premium surcharges should be based on estimated liabilities. In other words, the Legislature decided the HCSF should be actuarially sound.

During the second half of the eighties decade there was significant pressure on the Legislature to reform the rules of civil litigation. The controversy surrounding tort reform focused a great deal of attention on the HCSF because there were those who blamed the Fund for the cost of medical liability coverage.

Significant amendments to the Health Care Provider Insurance Availability Act were initiated as the result of a 1988 interim study by a special committee of the Legislature. The interim committee report was published in the January 18, 1989 Journal of the House and concluded by saying, "The Committee agreed with the near unanimous position of

the conferees that the Health Care Stabilization Fund should be phased out and recommends that the 1989 Legislature enact legislation to abolish the Fund."

The 1988 interim committee reported that there were insufficient reserves to afford the accrued HCSF liabilities and recommended that, "the providers develop a plan by January 1, 1990, for paying the unfunded liabilities of the Fund and submit that plan to the Insurance Commissioner for his approval."

The 1989 Legislature passed Senate Bill 18 which amended several features of the Availability Act. A major change in the Act created three different options allowing health care providers to choose one of three levels of HCSF coverage to supplement the basic $200,000 per claim coverage they are required to purchase from a commercial insurer or the Availability Plan. The three options are $100,000 per claim, $300,000 per claim, or $800,000 per claim. Annual aggregate limits are three times the per claim coverage.

Another significant change pertained to "tail" coverage. Until 1989, tail coverage was immediately provided when a health care provider became inactive. In other words, statutory HCSF coverage was similar to an occurrence type insurance policy. Any professional liability claims that arose after a health care provider had retired or otherwise discontinued his or her Kansas practice were still covered by the HCSF.

Because of concerns about the additional Fund liabilities attributable to tail coverage, the Legislature imposed a new requirement that health care providers must be in compliance, that is, pay surcharges into the Fund for at least five years in order to receive tail coverage. Provision was made such that any health care provider who lacked five years compliance could make additional payment to the Fund for the tail coverage. The payment had to be "sufficient to fund anticipated claims based upon reasonably prudent actuarial principles." In other words, tail coverage for health care providers with fewer than 1,825 days participation in the Fund became voluntary.

Senate Bill 18 also created a new eleven member Health Care Stabilization Fund Oversight Committee with a very specific duty. The new law required the Oversight Committee to meet and make a report to the Legislative Coordinating Council on or before September 1, 1990 and "include recommendations to the legislature for commencing the phase-out of the fund on July 1, 1991." It was the consensus of the 1989 Legislature that the HCSF should be abolished, but the Legislature was uncertain how to accomplish that task.

Somewhat inconsistent with the plan to phase out the HCSF and repeal the Availability Act, SB18 was amended such that full-time physician faculty members and their foundations at the University of Kansas Medical Center "shall be deemed a self-insurer for the purposes of the health care provider insurance availability act." The Availability

Act was further amended to delegate responsibility for administration of claims against physician faculty members to the Insurance Commissioner and provisions were made for reimbursement from the state general fund as well as a new "private practice foundation reserve fund." This new fund was to receive $500,000 per year from the private practice corporations at K.U. Medical Center.

The filing of new cases began to level off during the early nineties and Fund assets steadily increased because the Commissioner imposed comparatively high surcharge rates. By 1992 the Fund was considered actuarially balanced, and premium surcharges were reduced accordingly. By this time, interest in phasing out the HCSF had waned. Instead, the 1994 Legislature decided to delegate responsibility for administration of the Fund to a Board of Governors appointed by the Insurance Commissioner.

In October 2012 the Kansas Supreme Court announced that it upheld the constitutionality of a Kansas statute that limits the amount a plaintiff can recover for noneconomic damages in a personal injury lawsuit. The media release issued by the Court's Education-Information Officer stated, "Our court has long recognized that the legislature may modify the common law in limited circumstances, as long as the legislature provides an adequate substitute remedy or quid pro quo." The media release went on to say, "The decision relied in part on the statutory cap's relationship to the Health Care Provider Insurance Availability Act. That Act requires that all health care providers maintain liability insurance with designated levels of excess coverage."

As a result of the Miller v. Johnson decision there was renewed interest in the Availability Act. Certain organizations representing health care professionals or health care facilities asked the Legislature to make them defined health care providers under the Act.

Early in the 2014 Session a bill was introduced that added five new categories of defined health care providers: nurse midwives, physician assistants, assisted living facilities, nursing homes, and residential health care facilities. The bill also contained a number of technical amendments intended to update the Availability Act as well as amendments to improve HCSF tail coverage for Kansas health care providers. The five-year compliance requirement for tail coverage was repealed. The bill was passed unanimously in both the House and the Senate and became law July 1, 2014.