Kansas Health Care Stabilization Fund

Website http://hcsf.kansas.gov
E-mail hcsf@hcsf.org
Fax: 785-291-3550

300 S.W. 8th Avenue, Second Floor
Topeka, Kansas 66603-3912
Phone 785-291-3777

PART C
Fiscal Year 2018 Annual Report
by
Charles L. "Chip" Wheelen, HCSF Executive Director

Introduction

The original Health Care Provider Insurance Availability Act was established by the Legislature in 1976. It 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; (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 excess coverage above the primary coverage purchased by health care providers, and (b) to serve as reinsurer of the Availability Plan.

In 1978 the constitutionality of the Availability Act was upheld by the Kansas Supreme Court in *State of Kansas v. Byron Timothy Liggett, M.D.* Dr. Liggett challenged the constitutionality of the Act on the grounds that it denied him substantive due process of the law and equal protection under the law. In its decision the Supreme Court wrote, "The original bill did not require mandatory insurance coverage, nor did it require payment of the surcharge. These provisions were added by the legislature at the behest of Insurance Commissioner Fletcher Bell. The mandatory coverage provision, it was alleged, would provide for the financial stability of the insurance availability program and would assure all Kansans they would have a source of recovery for damages resulting from malpractice."

Statutory Report

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, 2018.

1. Net premium surcharge collections amounted to $27,708,987.

2. The highest surcharge rate for a health care professional was $17,336 for a neurosurgeon with three 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 $22,537. If the same Kansas neurosurgeon obtained his or her basic professional liability insurance via the Kansas Health Care Provider Insurance Availability Plan, the surcharge would have been $25,615 and if he or she was also licensed to practice in Missouri, the surcharge would have been $33,299.

3. 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).

4. There were 12 medical professional liability cases involving 19 health care providers that went to jury trials. Nine of those cases resulted in defense verdicts and three trials resulted in verdicts for the plaintiff. Health Care Stabilization Fund obligations resulting from plaintiff verdicts amounted to $980,370.

5. During the past fiscal year, 578 open claims were closed. Of those claims, only 76 (13%) resulted in Fund obligations. Fifty-eight cases involving 73 claims were settled, which resulted in Health Care Stabilization Fund obligations amounting to $24,238,950. The average Stabilization Fund compensation per claim was $332,040. 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 actual expenditures during FY2018. Total claims expenditures during the fiscal year amounted to $27,385,897.

7. The balance sheet as of June 30, 2018 indicates total assets amounting to $290,884,992 and total liabilities amounting to $246,840,942.

The Availability Plan

Because our Board of Governors is not responsible for administration of the Health Care Provider Insurance Availability Plan, we sometimes overlook its importance. A major component of the original Health Care Provider Insurance Availability Act was the creation of a joint underwriting association called the Health Care Provider Insurance Availability Plan. The Plan assures that health care providers always have access to a basic professional liability insurance policy ($200,000 per claim subject to $600,000 annual aggregate coverage). The existence of the Plan allows commercial insurers to engage in selective underwriting practices. If for some reason an applicant appears to be a questionable risk, the insurer can refer the health care provider to the Availability Plan.

During so-called hard market conditions, insurers become more selective and they are less likely to accept new risks. They may decide to non-renew those health care providers who have had unfavorable claims experience or have been disciplined by their licensing agency. As a result, more health care providers end up participating in the Availability Plan during hard markets. For example, in 2004 there were over 600 health care providers insured by the Availability Plan. This year there are only about half as many insured by the Plan.

The Availability Plan is governed by a Board of Directors appointed by the Commissioner of Insurance, and the Board of Directors has a contract with a servicing carrier. At the Board's recent meeting it was reported that in October this year there were 327 Plan participants. This included 260 physicians, 14 physician assistants, 10 nurse anesthetists, four chiropractors, and one nurse midwife as well as 25 professional corporations and 13 facilities. Among the 260 physicians, 35 were residents in training who needed professional liability insurance for "moonlighting" employment. These are all health care providers that would not be able to provide patient care in Kansas were it not for the Availability Plan.

There is no incentive to participate in the Availability Plan. Individual professional health care providers insured by the Plan pay about 33% more premium for basic coverage than they would if they were insured by a commercial insurance company. They also pay a higher HCSF surcharge rate than they otherwise would, which compounds the difference. As a result, a physician or other health care professional insured by the Plan pays about 36% more than their peers do for the cost of their professional liability coverage.

Similar joint underwriting associations in other states are often funded by way of assessments imposed on commercial insurers. In Kansas, the Health Care Stabilization Fund reinsures the Availability Plan. In those years when the Plan experiences a surplus, the net income is transferred to the HCSF. In those years when losses exceed income, the HCSF is

required by law to transfer the net loss to the Availability Plan. At the conclusion of fiscal year 2018, we transferred $551,504 from the HCSF to the Plan. But over the most recent ten fiscal years, transfers from the Plan to the HCSF have exceeded transfers from the HCSF to the Plan. The net result has been $4,883,640 additional income to the HCSF.

Recent Legislation

Senate Bill 217 was a technical bill that updated statutory references related to the Kansas Department for Aging and Disability Services and the Kansas Department for Children and Families in accordance with Executive Reorganization Order 41. Because community mental health centers and one particular psychiatric hospital are defined as health care providers in the Health Care Provider Insurance Availability Act, SB 217 amended K.S.A. 40-3401, the definition section of the Availability Act. Senate Bill 217 also amended K.S.A. 40-3403 to clarify that the annual statutory report prepared by the Health Care Stabilization Fund Board of Governors is to be submitted to the HCSF Oversight Committee. These amendments are now sections 16 and 17 of the *2018 Session Laws*.

It is noteworthy that the Revisor of Statutes made a number of other technical amendments in K.S.A. 40-3401 to change the spelling of the phrase “health care” to the single term “healthcare.” As a result, the definition section of the Availability Act now employs the term healthcare, whereas the other 24 sections of the Availability Act use the phrase health care. The next time we need to request any kind of substantive amendment, we will include the technical amendments to make all sections of the Availability Act consistent with one another. But at this time, our Board of Governors does not have any recommendations for legislation.

Contemporary Issues

Historically, members of the Kansas Legislature have been concerned about constituent access to medical care. That is one of the principal reasons the Legislature enacted the Health Care Provider Insurance Availability Act in 1976. At that time, some physicians could not obtain the professional liability insurance they needed in order to practice in Kansas. Others could obtain insurance, but the coverage limits were inadequate or there were policy exclusions that restricted the scope of their medical practice. The principal purpose of the Health Care Provider Insurance Availability Act was to stabilize the otherwise unreliable medical professional liability insurance market, thus the reason for the name, Health Care Stabilization Fund.

A great deal of thought was given to the details in the 1976 legislation and the Insurance Commissioner provided a number of important recommendations. It was decided to require that all health care providers maintain a policy of professional liability insurance as a condition of rendering professional services in Kansas. In this context, it is important to keep in mind that the statutory definition of health care provider includes out of state licensees as well as those licensees who reside in Kansas.

It was also decided to require that the insurance policy provide claims-made coverage. The law stipulates minimum coverage limits "for all claims made during the policy period" and goes on to say the policy "shall provide as a minimum coverage for claims made during the term of the policy which were incurred during the term of such policy or during the prior term of a similar policy." Furthermore, if the health care provider is a Kansas resident, the policy must be issued by an insurance company that has been approved by the Commissioner of Insurance. If the health care provider is not a Kansas resident, the policy may be issued by a non-admitted insurer, but only if the insurance company has agreed to comply with the Health Care Provider Insurance Availability Act.

This claims-made coverage is in contrast to occurrence coverage, which covers only those claims that are attributable to professional services rendered during the term of the policy (on or after the effective date and on or before the expiration date). The major difference between claims-made versus occurrence policies is the so-called tail coverage that is needed when an insured health care provider discontinues his or her claims-made policy. In the insurance industry this is often referred to as an extended reporting endorsement and normally there is a significant premium cost.

In Kansas, if a health care provider retires or otherwise discontinues his or her Kansas practice, the tail coverage liability is assumed by the Health Care Stabilization Fund. This protects Kansas patients if an injury is discovered and a claim is filed after the health care provider has become inactive.

A lot of things have changed since 1976, including the health care industry. In the seventies physicians were often employed by a partnership or a small medical practice. They were painfully aware that professional liability insurance was unavailable or inadequate and when it was available, it was expensive. Four decades later, physicians are often employed by hospitals or large professional corporations.

In the meantime, technology has had a remarkable impact on the delivery of medical care. The advent of telemedicine has been dramatic, resulting in the formation of large companies that compete for telemedicine clients all over the country. Because of the changes in the delivery model and the changing employment relationships, professional liability insurance is oftentimes purchased by the employer rather than the physician or medical group. Some of these employers use non-traditional arrangements to insure their network of health care providers.

There are also large interstate companies that employ physicians who are available to serve as locum tenens all over the country. In this case, it makes sense for the employer to purchase a short-term occurrence policy that covers the liability of the locum tenens health care provider for the duration of the assignment. The employer does not want to insure the health care provider's previous liability exposure by purchasing a claims-made policy nor does the employer wish to insure the health care provider when he or she is working for another employer. This is particularly problematic for a Kansas resident health care provider who must maintain continuous claims-made insurance coverage as a condition of active licensure.

One thing that has not changed in forty years is the Legislature's continued interest in promoting access to health care services for Kansas constituents. For this reason, a couple of years ago the Kansas Legislature endorsed the concept of interstate medical practice by passing an interstate medical licensure compact law. More recently, our Legislature endorsed the interstate practice of health care by passing the Kansas Telemedicine Act. These developments have created some new challenges for our agency.

If the telemedicine company or locum tenens firm has purchased an occurrence policy or has subscribed to some kind of unique insurance arrangement, then the Kansas licensees in their network cannot be in compliance with the Health Care Provider Insurance Availability Act. In other words, the requirements stipulated in the Health Care Provider Insurance Availability Act can sometimes create an obstacle to interstate licensure and the delivery of telemedicine services or the assignment of a locum tenens in Kansas.

There are some rather obvious solutions to these problems but we are concerned about the possibility of unintended consequences. We believe it is important to preserve the basic public policy that when a Kansas patient receives health care services, he or she will have reasonable assurance that the health care provider has professional liability coverage. We do not want to jeopardize the *quid pro quo* that was identified by the Kansas Supreme Court in the October 2012 Miller v. Johnson decision.

We do, however recognize that we may need to update the Health Care Provider Insurance Availability Act or the Kansas licensing laws to be more compatible with contemporary insurance practices. K.S.A. 40-3403(b)(5) imposes a duty on our Board of Governors to, "study and evaluate the operation of the fund and make such recommendations to the legislature as may be appropriate to ensure the viability of the fund." Our Board of Governors will continue to study these issues in collaboration with the associations that represent physicians, hospitals, and other health care providers. We invite recommendations from health care providers, insurers, locum tenens companies, telemedicine companies, and other interested organizations.

Conclusion

For more than four decades the Health Care Provider Insurance Availability Act has accomplished legislative intent. The Availability Act is a successful public-private partnership that creates a favorable environment for responsible professional liability insurance companies. It has assured Kansans a reliable source of recovery when it is determined that compensation should be paid for an unintended medical outcome, and it has assured Kansas health care providers that they will always have access to adequate professional liability insurance coverage.