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Report to the Health Care Stabilization Fund Oversight Committee November 30, 2023 on behalf of the Board of Governors of the Health Care Stabilization Fund

Part A – Russel L. Sutter, F.C.A.S., M.A.A.A., Willis Towers Watson

Actuary Actuarial Analysis

Calendar Year 2024 Surcharge Information

Part B – Rita L. Noll, J.D., HCSF Deputy Director and Chief Counsel

Fiscal Year 2023 Claims Activity

State Self-Insured Physician Faculty and Residents in Training

Part C – Clark Shultz, M.B.A., HCSF Executive Director

Statutory Annual Report

Health Care Provider Insurance Availability Plan

Recent Legislation

Historical Overview

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A presentation to the HCSF Oversight Committee

By Russel L. Sutter

November 30, 2023

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This presentation will address the following topics:

- A history of Fund revenues and claims costs
- Our projections of unassigned reserves at June 2023 and June 2024
- Rate level indications for CY24 (January 1, 2024 – December 31, 2024)
- Recent Fund investment performance
- The experience and indications by provider class
- CY24 surcharge recommendations

Questions are welcome throughout the presentation

This presentation is based on our review of Fund experience as of December 31, 2022 and is an addendum to our report dated September 19, 2023. As such, the *Distribution and Use* and *Reliances and Limitations* sections of that report apply to this presentation.

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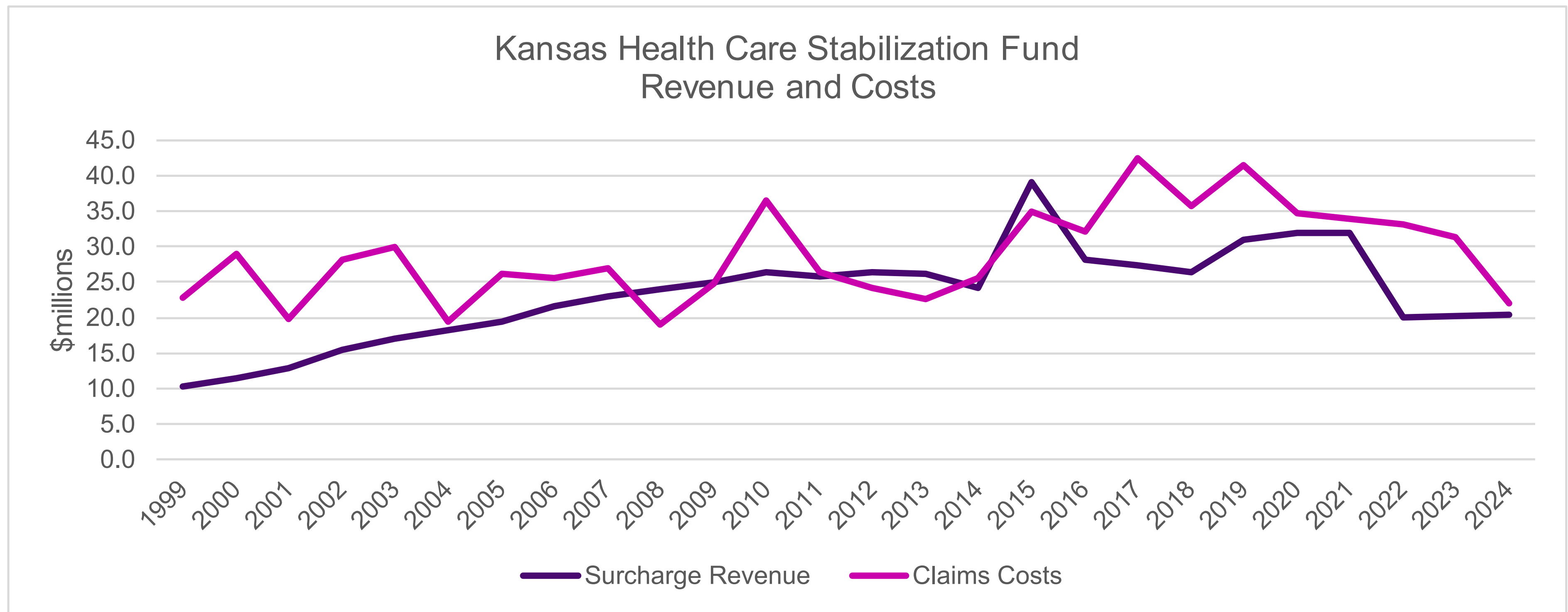
History of Surcharge Revenue and Claims Costs

The chart below shows Fund history of surcharge revenue and claims costs by program year from 1999 through projected 2024 based on our estimates as of December 31, 2022



Notes: Costs exclude administrative expenses and transfers. Revenues exclude investment income. Program year 2015 is an 18-month period

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Conclusions

2022 was a mixed year for the Fund:

- Payment activity was very high
- Loss performance on active providers was worse than expected
- Loss performance on inactive providers was better than expected
- Investment results were worse than anticipated
- Surcharge revenue was higher than predicted
- Rate inadequacy is high for the hospitals

The Fund’s net financial position at June 30, 2023 is similar to the level forecasted in our 2022 study.

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Conclusions (continued)

Our forecasts of the Fund's financial positions at June 30, 2023 and June 30, 2024, along with our 2022 estimate for June 2023, are as follows (in $millions)

	2022 Review June 30, 2023	2023 Study June 30, 2023	2023 Study June 30, 2024
Assets	$299.54	$288.00	$276.93
Liabilities	269.07	258.03	249.40
Unassigned Reserves	$ 30.46	$ 29.97	$ 27.53

Based on our analysis, the Fund needs to raise its surcharge rates by 5.2% in CY24 in order to maintain its unassigned reserves at the expected year-end CY23 level (approximately $28 million)

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Conclusions (continued)

The forecasts of unassigned reserves assume

- No overall rate level change in surcharge revenue for CY24
- $20.5 million in surcharge revenue in the July 1, 2023 – June 30, 2024 period (FY24)
- A 2.70% interest rate for estimating the tail liabilities on a present value basis
- A 2.70% yield on Fund assets for estimating investment income
- Full reimbursement for KU/WCGME claims
- No change in current Kansas tort law or Fund law

We suggested to the Board that they consider an increase in rates for CY24, particularly for hospitals (class 17)

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Rate Level Indications

The Fund's rate level indications for CY24 are shown below: assumes a break-even target

CY24 Item	Amount ($000s)	Comments
1. Payments in CY24	$35,699	Net of Reimbursement
2. Change in Liabilities	-8,633	YE24 versus YE23
3. Administrative Expenses	2,128	Based on FY22 and FY23
4. Plan and KDHE Transfers	200	Assumes no Plan transfer, $200k KDHE
5. Planned Investment	372	Based on CY22 surcharge decisions
6. Total CY24 Costs (1) + (2) + (3) + (4) – (5)	$29,022	
7. Investment Income	7,477	2.70% on average assets
8. Surcharge Needed for Break-Even (6) – (7)	$21,545	
9. Projected Surcharge Revenue	$20,472	At 2023 rates
10. Rate Level Indications (8) / (9) – 1.00	+5.2%	

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Fund Investment Income

The Fund's investment yield declined in the last two fiscal years

We have kept our assumed future yield rate at 2.70% unchanged from our 2022 study

Fiscal Year	Average Assets ($millions)	Investment Income ($millions)	Effective Yield
(1)	(2)	(3)	(4)
2014	$263.5	$9.3	3.53%
2015	269.7	8.8	3.27%
2016	276.1	8.2	2.96%
2017	282.6	8.1	2.86%
2018	288.8	8.0	2.78%
2019	292.5	7.8	2.67%
2020	295.2	8.2	2.77%
2021	306.8	8.6	2.80%
2022	312.0	7.7	2.47%
2023	300.2	7.2	2.41%

A 10 basis-point increase in the assumed rate causes a 1.5% decrease in the CY24 indication

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Findings – Indications by Provider Class

Our analysis of experience by Fund class showed large differences in relative loss experience among classes. To illustrate, Class 17 paid 14% of the total surcharge for 2016-2021, but has 22% of the reported losses for those years.

Relative Rate Change Indicated

Decrease > 15%	Increase <9% or Decrease <15%	Increase >9%
Class 2 (-30%) Class 24 Class 13 Class 6 Class 16 Class 12 (-16%)	Class 23 (-12%) Class 10 Class 1 Class 9 Class 18 Class 7 Class 21 Class 14 Class 5 Class 4 Class 11 (+7%)	Class 15 (+9%) Class 8 Class 22 Class 3 Class 17 (+61%)

Slide 11 has details on class sizes, rates and definitions

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History of Surcharge Rate Changes

The table below shows changes in surcharge rates since 2012. Excludes the increases in the MO surcharge in PY2014. The 2016 through 2023 changes also included raising the relativities for YOCs 1-4

Program Year	Overall Change	Classes 1-14 Range of Rate Changes		Classes 15-24 % Basic Coverage Premium*
		Low	High	
2012	0%	0%	0%	40%
2013	-5%	-10%	0%	40%
2014	-5%	-20%	-5%	38%**
2015	0%	0%	0%	38%**
2016	+2%	0%	5%	38%**
2017	-3%	-7%	5%	38%**
2018	-3%	-7%	5%	36%**
2019	+2%	0%	0%	36%**
2020	+6%	+6%	+6%	38%**
2021	+3%	+0%	+5%	38% - 42%**
2022	-48%	-48%	-48%	15% - 17%**
2023	0%	0%	0%	15% - 17%**

*For maximum Fund coverage
**Higher for Class 15

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CY24 Surcharge Rates

We offered the Board several options to consider in establishing Fund rates for CY24 as it debated the issues regarding the variation by rate adequacy by class. All of our recommendations involved an increase to Class 17. The Board decided on the following rate changes for CY24:

- Rate increases on classes 3, 8, 15, 17 and 22, ranging from +2.5% (Class 15) to +9.4% (Class 17).
- Rate decreases for classes 2, 6, 12, 13, 16 and 24, ranging from -4.8% (Class 12) to -6.7% (Classes 16 and 24)
- No change in rates for classes 1, 4, 5, 7, 9, 10, 11, 14, 18, 19, 20, 21 and 23

- The estimated net overall impact of the selected changes is a 0.0% change in rate level.

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Class Definitions, Distributions and Rates

		CY22 # Providers	CY23 Rate*
Class 1	Physicians, No Surgery. Includes dermatology, pathology, psychiatry	946	$396
Class 2	Physicians, No Surgery	4,619	851
Class 3	Physicians, Minor Surgery	1,734	1,112
Class 4	Family Practitioners, including minor surgery and OB	149	1,310
Class 5	Surgery Specialty – Includes urology, colon/rectal, GP with major	287	1,505
Class 6	Surgery Specialty – Includes ER (no major), ENT	776	1,790
Class 7	Anesthesiology	410	1,337
Class 8	Surgery Specialty – Includes general, plastic, ER with major	522	3,032
Class 9	Surgery Specialty – Includes cardiovascular, orthopedic, traumatic	447	3,434
Class 10	Surgery Specialty – Includes OB/GYN	294	4,459
Class 11	Surgery Specialty – Neurosurgery	71	10,006
Class 12	Chiropractors	1,150	229
Class 13	Registered Nurse Anesthetists	985	393
Class 14	Podiatrists	100	872
Class 15	Availability Plan insureds	348	20%
Class 16	Professional corporations, partnerships	1,112	15%
Class 17	Medical care facilities	194	16%
Class 18	Mental health centers	26	15%
Class 19	Psychiatric hospitals	1	15%
Class 20	Residency training program	876	15%
Class 21	Physician Assistants	1,240	15%
Class 22	Nurse Midwives	38	17%
Class 23	Assisted Living and Residential Health Care Facilities	141	15%
Class 24	Nursing Facilities	232	15%
Class 30	Other	4	15%
		16,700	

*$500,000/$1,500,000 Fund coverage

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Medical Professional Liability Experience
Fiscal Year 2023

By Rita Noll
Deputy Director and Chief Counsel

This report for the Board of Governors of the Health Care Stabilization Fund summarizes medical professional liability litigation experience in Kansas during fiscal year 2023. (Fiscal year 2023 covers the period of time from July 1, 2022 through June 30, 2023.) The report reflects statistical data gathered by the HCSF in administering the Health Care Provider Insurance Availability Act and is based on all claims resolved during the fiscal year.

Medical professional liability refers to a claim made against a health care provider for the rendering of or failure to render professional services (K.S.A. 40-3403). Health care provider is defined in K.S.A. 40-3401 to include the following individuals: physicians, chiropractors, podiatrists, registered nurse anesthetists, nurse midwives, and physician assistants. "Health care provider" also includes the following entities: hospitals, ambulatory surgical centers, nursing facilities, assisted living facilities, and residential health care facilities. Certain professional corporations and professional limited liability companies may also be defined as a "health care provider".

It should be noted that dollar amounts will not necessarily correspond with the agency's accounting and budgeting documents because claims are not necessarily paid in the same fiscal year that the settlement was approved by the court, or the judgment was rendered by a jury. Data in this report reflects the status of cases at the end of the fiscal year. Data for prior years is for comparison purposes only, as case outcomes may have changed due to subsequent court proceedings.

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MEDICAL PROFESSIONAL LIABILITY EXPERIENCE

A. Jury Verdicts

From HCSF data, 21 medical malpractice cases involving 24 Kansas health care providers went to trial during fiscal year 2023. These trials took place in the following jurisdictions:

Johnson County	5
Sedgwick County	3
Saline County	2
Barton County	1
Pratt County	1
Riley County	1
Shawnee County	1
Wyandotte County	1
Jackson Co., MO	6

Seventeen cases resulted in defense verdicts. One case ended in mistrial. In three cases the jury found for the plaintiff. In these cases the amount awarded by the jury was greater than primary coverage limits, resulting in Fund obligations totaling $1,807,500.

The following chart compares this year's experience to previous fiscal years:

Fiscal Year	Total Trials	Defense Verdict	Plaintiff Verdict	Split Verdict	Mistrials
2023	21	17	3		1
2022	16	9	6		
2021*	4	4			
2020*	12	11	1		
2019	10	9			1
2018	12	9	3		
2017	16	14	1	1	
2016	14	12	1		1
2015	18	13	2		3
2014	27	23	3		1
2013	18	14	4		
2012	21	19	1		1
2011	19	16	2	1	
2010	32	21	7	1	3
2009	27	20	5	1	1
2008	34	25	4	1	4
2007	36	31	5		
2006	29	23	6		
2005	34	22	7	3	2
2004	28	23	3	2	

*There were no trials the last four months of fiscal year 2020 due to the pandemic.
*The courts were closed most of fiscal year 2021 due to the pandemic.

B. Settlements

Claims settled by the HCSF. During FY 2023, 95 claims in 85 cases were settled involving the HCSF. Settlement amounts incurred by the HCSF for the fiscal year totaled $33,419,872.84. This amount does not include settlement contributions by primary or excess insurance carriers. The settlement amounts are payments made, or to be made, by the HCSF in excess of primary coverage or on behalf of inactive health care providers.

Fiscal Year	Number of Claims/Cases	HCSF Amount	Settlement Average
FY 2023	95/85	$33,419,872.84	$351,788
FY 2022	75/64	$28,612,433.86	$381,499
FY 2021	50/40	$17,352,000.00	$347,040
FY 2020	73/69	$27,121,225.00	$371,524
FY 2019	74/61	$23,407,875.00	$316,323
FY 2018	73/58	$24,238,950.00	$332,040
FY 2017	64/53	$21,745,583.00	$339,775
FY 2016	76/66	$23,539,687.07	$309,733
FY 2015	60/53	$24,322,582.00	$405,376
FY 2014	63/52	$24,005,914.00	$381,046
FY 2013	79/62	$27,610,000.00	$349,494
FY 2012	67/62	$21,431,000.00	$319,866
FY 2011	61/57	$17,518,727.54	$287,192
FY 2010	61/54	$19,745,200.00	$323,692
FY 2009	81/72	$23,867,283.72	$294,658
FY 2008	65/57	$17,352,500.00	$266,962
FY 2007	61/53	$20,929,250.00	$343,102
FY 2006	89/81	$24,917,984.00	$279,977
FY 2005	90/74	$23,544,658.00	$261,607
FY 2004	79/64	$18,905,505.00	$239,310

HCSF settlement amounts fall within the following ranges and are compared to individual claim settlements in previous years:

	FY 23	FY22	FY21	FY20	FY19	FY18	FY 17	FY 16
$1 - $50,000	10	8	5	6	7	8	11	14
$50,001 - $250,000	37	27	20	22	30	23	21	26
$250,001 - $600,000	30	19	13	32	26	31	19	23
$600,001 -$1,000,000	18	21	12	13	11	11	13	13
Total Claims	95	75	50	73	74	73	64	76

Of the 95 claims, (1) primary insurance carriers tendered their policy limits to the HCSF in 76 claims; (2) the HCSF provided primary coverage for inactive health care providers in 13 claims; and (3) the Fund "dropped down" to provide coverage for six claims in which aggregate primary policy limits were reached. Nine claims involved contribution from an insurer whose coverage was excess of HCSF coverage.

FY	Primary Carriers	HCSF	Excess Carriers	Total
2023	$15,200,000.00	$33,419,872.84	$ 9,135,377.16	$57,755.250.00
2022	$13,105,866.14	$28,612,433.86	$14,850.000.00	$56,568,300.00
2021	$ 8,800,000.00	$17,352,000.00	$ 7,650,000.00	$33,802,000.00
2020	$12,400,000.00	$27,121,225.00	$ 7,700,000.00	$47,221,225.00
2019	$11,797,022.00	$23,407,875.00	$ 550,000.00	$35,754,897.00
2018	$12,755,050.00	$24,238,950.00	$ 2,895,000.00	$39,889,000.00
2017	$11,057,500.00	$21,745,583.00	$ 1,425,000.00	$34,228,083.00
2016	$11,000,000.00	$23,539,687.07	$ 3,400,000.00	$37,939,687.07
2015	$11,200,000.00	$24,322,582.00	$14,400,000.00	$49,922,582.00
2014	$10,135,000.00	$24,005,914.00	$ 3,875,000.00	$38,015,914.00
2013	$13,310,000.00	$27,610,000.00	$ 6,000,000.00	$46,920,000.00
2012	$10,800,000.00	$21,431,000.00	$ 5,083,500.00	$37,314,500.00
2011	$10,400,000.00	$17,518,727.54	$ 4,350,000.00	$32,268,727.54
2010	$ 9,400,000.00	$19,745,200.00	$14,972,500.00	$44,117,700.00
2009	$11,471,170.00	$23,867,283.72	$ 4,954,830.00	$40,293,283.72
2008	$10,612,500.00	$17,352,500.00	$ 2,425,000.00	$30,390,000.00
2007	$ 9,488,750.00	$20,929,250.00	$ 3,125,000.00	$33,543,000.00
2006	$14,580,000.00	$24,917,984.00	$ 5,089,425.00	$44,587,409.00
2005	$15,800,000.00	$23,544,658.00	$10,450,000.00	$49,794,658.00
2004	$12,600,000.00	$18,905,505.00	$ 8,550,000.00	$40,055,505.00

Claims settled by excess insurers. In addition to the above 95 settlements, seven claims were settled by an excess insurance carrier when both primary and HCSF coverage were exhausted. (This is the first time in Fund history that aggregate Fund coverage for a policy year was exhausted.)

Claims settled within primary coverage limits. Along with the above settlements, the HCSF was notified that primary insurance carriers settled an additional 114 claims in 102 cases.

Fiscal Year	Claims/Cases	Primary Insurance Carriers
2023	114/102	$11,388,362.00
2022	101/91	$11,475,868.00
2021	98/88	$ 9,336,634.00
2020	106/98	$ 9,868,875.00
2019	120/107	$ 8,779,783.00
2018	110/97	$10,537,420.00
2017	82/74	$ 8,622,021.00
2016	98/93	$ 8,968,479.00
2015	89/80	$ 7,268,626.00
2014	97/86	$ 8,909,740.00
2013	88/76	$ 6,664,000.00
2012	98/81	$ 6,603,521.00
2011	99/83	$ 7,865,915.00
2010	110/92	$ 8,958,622.00
2009	90/80	$ 7,182,241.00
2008	104/88	$ 8,486,032.00
2007	167/146	$10,870,339.00
2006	110/98	$ 8,545,218.00
2005	103/88	$ 8,058,894.00
2004	99/85	$ 6,978,801.00

C. HCSF Total Settlements and Verdict Amounts

During fiscal year 2023, the HCSF incurred $33,419,872.84 for 95 claim settlements and $1,807,500 as a result of three jury verdicts. The following figures show total Fund settlements and jury awards since the inception of the Health Care Stabilization Fund.

Fiscal Year	Total Claims	Settlements & Jury Awards	Average Per Claim
FY 2023	98	$35,227,372.84	$359,462.98
FY 2022	79	31,394,662.56	397,400.79
FY 2021	50	17,352,000.00	347,040.00
FY 2020	73	27,121,225.00	371,523.63
FY 2019	74	23,407,875.00	316,322.64
FY 2018	75	25,219,320.00	336,257.60
FY 2017	65	22,545,583.00	346,855.12
FY 2016	76	23,539,687.07	309,732.72
FY 2015	62	24,904,319.61	401,682.57
FY 2014	66	25,559,409.00	387,263.77
FY 2013	79	29,382,484.69	371,930.19
FY 2012	67	21,431,000.00	319,865.67
FY 2011	63	19,118,727.54	303,471.87
FY 2010	65	20,970,021.10	322,615.71
FY 2009	85	25,505,208.67	300,061.28
FY 2008	68	19,085,004.00	280,661.82
FY 2007	64	22,589,655.27	352,963.36
FY 2006	90	25,017,984.00	277,977.60
FY 2005	97	26,119,569.91	269,273.30
FY 2004	81	19,055,505.00	235,253.15
FY 2003	90	18,295,320.32	203,281.34
FY 2002	71	17,467,033.19	246,014.55
FY 2001	58	17,114,748.80	295,081.86
FY 2000	73	20,868,192.91	285,865.66
FY 1999	71	21,344,368.15	300,624.90
FY 1998	66	12,834,705.13	194,465.23
FY 1997	41	13,653,618.34	333,015.08
FY 1996	70	23,258,406.14	332,262.94
FY 1995	45	17,023,882.17	378,308.49
FY 1994	65	21,194,765.96	326,073.32
FY 1993	48	24,614,093.06	492,281.86
FY 1992	35	8,824,834.14	252,138.11
FY 1991	49	19,666,797.32	401,363.21
FY 1990	48	13,627,222.20	283,700.46
FY 1989	58	18,713,543.00	315,750.00
FY 1988	51	13,402,756.00	262,799.00
FY 1987	47	13,296,808.00	282,910.00
FY 1986	42	11,492,857.00	273,639.00
FY 1985	41	15,152,042.00	369,562.00
FY 1984	34	9,538,741.00	280,551.00
FY 1983	25	6,522,369.00	260,894.00
FY 1982	24	3,060,126.00	127,505.00
FY 1981	8	1,760,645.00	220,080.00
FY 1980	0	0.00	-
FY 1979	3	203,601.00	67,867.00
FY 1978	0	0.00	-
FY 1977	1	137,500.00	137,500.00

D. New Cases by Fiscal Year

The Health Care Stabilization Fund was notified of 307 new cases during fiscal year 2023. The following chart lists the number of new cases opened in each fiscal year since the HCSF was created.

Fiscal Year	Number of Cases
2023	307
2022	274
2021	318
2020	302
2019	323
2018	300
2017	276
2016	248
2015	235
2014	268
2013	229
2012	260
2011	267
2010	290
2009	310
2008	329
2007	304
2006	457
2005	336
2004	368
2003	392
2002	361
2001	341
2000	294
1999	319
1998	293
1997	318
1996	296
1995	326
1994	247
1993	263
1992	245
1991	230
1990	205
1989	251
1988	285
1987	320
1986	276
1985	245
1984	175
1983	153
1982	124
1981	98
1980	87
1979	50
1978	19
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University of Kansas Foundations and Faculty; Residents Self-Insurance Programs/Primary Coverage Reimbursement to the Health Care Stabilization Fund

I. KU Foundations and Faculty

Foundation Self-Insurance Program Costs

FY 2023	FY 2022	FY 2021	
$1,437,000.00	$1,307,134.02	$1,050,000.00	Settlement Amounts
$1,606,025.77	$1,073,575.00	$ 713,603.18	Attorney Fees and Expenses
$3,043,025.77	$2,380,709.02	$1,763,603.18	Totals
13	10	6	Number of settlements
46	59	54	Number of pending clams (end of FY)

Reimbursable Amounts

FY 2023	FY 2022	FY 2021	
$ 500,000.00	$ 500,000.00	$ 500,000.00	Reimbursement Private Practice Reserve
$2,543,025.77	$1,880,709.02	$1,263,603.18	Reimbursement State General Fund
$3,043,025.77	$2,380,709.02	$1,763,603.18	Totals

Foundations and Faculty:
Amounts up to $500,000 are reimbursed from the Private Practice Reserve Fund.
Amounts over $500,000 are reimbursed from the State General Fund.

II. Residents in Training

Residents Self-Insurance Program Costs

FY 2023	FY 2022	FY 2021	
$ 200,000.00	$0	$231,000.00	Settlement Amounts
$ 803,621.97	$865,070.17	$517,420.73	Attorney Fees and Expenses
$1,003,621.97	$865,070.17	$748,420.73	Totals
2	0	3	Number of settlements
35	36	41	Number of pending claims (end of FY)

Residents in Training: All amounts are reimbursed from the State General Fund.

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III. Expenditures by Fiscal Year

Fiscal Year	Foundations and Faculty	Total Number Faculty	Residents in Training	Total Number Residents
2023	$ 3,043,025.77	1,014	$ 1,003,621.97	897
2022	2,381,209.02	1,004	865,070.17	864
2021	1,763,603.18	955	748,420.73	902
2020	1,565,444.80	919	933,533.33	820
2019	2,761,718.05	807	1,877,296.97	843
2018	1,631,654.34	735	1,628,132.34	849
2017	2,673,879.29	650	642,342.05	825
2016	1,028,751.91	652	693,324.56	856
2015	1,917,190.41	583	690,599.54	814
2014	2,175,457.87	573	799,363.81	789
2013	1,537,668.29	557	934,695.09	809
2012	1,759,733.60	506	1,201,108.99	787
2011	1,184,218.79	514	455,621.25	812
2010	1,445,658.21	412	1,201,718.01	698
2009	2,693,099.94	404	812,492.66	712
2008	966,327.58	366	648,269.80	692
2007	2,037,227.63	348	1,194,968.11	682
2006	1,407,837.70	361	871,719.27	675
2005	1,706,763.57	336	1,749,032.25	670
2004	1,825,116.29	317	2,787,112.99	627
2003	1,113,326.84	308	1,418,927.85	643
2002	583,566.19	307	723,834.54	645
2001	1,540,133.41	298	953,304.62	625
2000	691,253.39	310	735,633.12	645
1999	1,371,640.73	295	645,997.65	669
1998	1,018,435.78	283	1,072,324.05	637
1997	1,111,787.72	279	999,388.16	647
1996	4,003,062.51	285	1,331,521.75	641
1995	255,117.85	286	534,124.84	532
1994	1,959,284.79	287	574,758.65	603
1993	1,453,444.21	287	650,033.67	594
1992	645,670.10	281	810,703.77	592
1991	435,540.69	288	458,561.65	615
1990	261,035.55	277	120,796.12	546

IV. Monies Paid by the Health Care Stabilization Fund for Excess Coverage Claims

	FY 23	FY 22	FY 21	FY 20	FY 19
Residents	0	0	$ 800,000	$300,000	$ 622,500
Faculty, Foundations	$450,000	$1,482,500	$ 290,000	$535,000	$2,110,000
Total	$450,000	$1,482,500	$1,090,000	$835,000	$2,732,500

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PART C
Fiscal Year 2023 Annual Report by
Clark Shultz, Executive Director
October 1, 2023

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 provide excess coverage above the primary coverage purchased by health care providers, and also to serve as the 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, 2023.

1. Net premium surcharge collections amounted to $19,782,219.

2. The highest surcharge rate for a health care professional was $10,006 for coverage of $500,000 per claim, subject to a $1.5 million annual aggregate limit. A Kansas resident neurosurgeon also licensed to practice in Missouri would be subject to the 30% Missouri modification factor resulting in a total premium surcharge of $13,008.

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3. The lowest surcharge rate for a health care provider was $200. Primarily this minimum rate is used by non-resident providers who are providing minimum health care services in Kansas.

4. There were 21 medical professional liability cases involving 24 health care providers that went to jury trials. Of those, 17 cases resulted in complete defense verdicts, 3 cases resulted in a verdict for the plaintiff, and 1 case resulted in a mistrial.

5. During the past fiscal year, 540 open claims were closed. Of those claims, 17.5% resulted in Fund obligations. There were 85 cases involving 95 claims settled resulting in Health Care Stabilization Fund obligations of $33,419,872. The average Stabilization Fund compensation per claim was $351,788. These amounts are in addition to compensation paid by primary insurers, typically $200,000 per claim.

6. The balance sheet as of June 30, 2023, accepted by the HCSF Board of Governors, indicates total assets amounting to $290,328,876 and total liabilities amounting to $278,720,437.

<u>The Availability Plan</u>

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 have access to a basic professional liability insurance policy of $500,000 per claim, subject to $1.5 million annual aggregate coverage. The existence of the Plan allows commercial insurers to engage in selective underwriting practices. If an applicant appears to be a questionable risk, the insurer can refer the health care provider to the Availability 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 most recent meeting, October 23, 2023, it was reported that there were 402 Plan participants. These are health care providers that would not be able to provide patient care in Kansas were it not for 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. 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. For FY 2023, the Fund will transfer $401,820 to the Availability Plan.

Recent Legislation and Changes

Effective January 1, 2022, the required basic coverage that defined health care providers must obtain from an insurer, increased from $200,000 to $500,000 per claim. Providers are also required to obtain $500,000 per claim coverage from the Health Care Stabilization Fund. The 2024 surcharge rates recently adopted by the Board of Governors are based on the results of an actuarial study which included analysis of loss experience among the 24 classification groups.

Historical Overview of the Health Care Provider Insurance Availability Act

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.

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. 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 has changed since 1976, including the health care industry. In the 1970’s some medical practices were sole proprietorships. Other physicians were often employed by a partnership or professional corporation. Normally, physicians were not employed by hospitals. Instead, they were granted medical staff privileges and there was general adherence to the common law corporate practice doctrine.

Today, hospital ownership of medical groups is not unusual and 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 over the years is the Legislature's continued interest in promoting access to health care services for Kansas constituents. For this reason, several 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. 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

The Health Care Provider Insurance Availability Act is a successful public-private partnership. It creates a favorable environment for responsible professional liability insurance companies. Since 1976, the Availability Act has accomplished legislative intent. 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.