

Kansas Health Care Stabilization Fund

General Information

(As of January 1, 2018)

The HCSF Board of Governors

The Health Care Stabilization Fund Board of Governors is a state agency governed by an eleven member Board appointed by the Kansas Commissioner of Insurance. The statutory membership is: five physicians, three representatives of Kansas hospitals, one representative of adult care homes, one chiropractor, and one nurse anesthetist. Board members are normally appointed for a four year term. A current list of Board members is posted on the HCSF website.

Health Care Professionals and Facilities Affected by the Fund Law

The phrase "health care provider" is defined in K.S.A. 40-3401 and includes the following:

- Physicians (M.D.s and D.O.s) who have an active license or hold a temporary permit issued by the Kansas Board of Healing Arts,
- Physicians engaged in a postgraduate training program which is approved by the Kansas Board of Healing Arts,
- Chiropractors,
- Podiatrists,
- Nurse Anesthetists,
- Medical Care Facilities (special hospitals, general hospitals, surgical centers, and recuperation centers),
- Psychiatric Hospitals licensed prior to 1/1/1988,
- Mental Health Clinics or Centers,
- Physician Assistants*,
- Nurse-Midwives*,
- Nursing Facilities*,
- Assisted Living Facilities*,
- Residential Health Care Facilities*,
- Dentists who have been certified by the Kansas Board of Healing Arts to administer anesthetics**,
- Kansas Professional Corporations or Partnerships created by defined health care providers**,
- Kansas Limited Liability Companies organized for the purpose of rendering professional services by its members who are defined health care providers**,
- Kansas not-for-profit corporations organized for the purpose of rendering professional services by persons who are defined health care providers**, and
- Nonprofit corporations organized to administer the graduate medical education programs of community hospitals or medical care facilities affiliated with the University of Kansas School of Medicine.

*These categories of health care providers are defined as such in K.S.A. 40-3401 effective January 1, 2015.

**These categories of providers are carefully reviewed to assure they meet the strict statutory criteria for Fund participation. Please note that although health maintenance organizations, optometrists, and pharmacists are defined as health care providers in K.S.A. 40-3401(f), the Legislature discontinued their compliance requirements in 1991 and 1997.

Notes

Fund or *HCSF* means the Health Care Stabilization Fund. *Fund law* means the Health Care Provider Insurance Availability Act (K.S.A. 40-3401 et seq.). *Availability Plan* or *the Plan* means the joint underwriting association created by K.S.A. 40-3413.

Overview of the Health Care Provider Insurance Availability Act

In addition to creating the Health Care Stabilization Fund, the Health Care Provider Insurance Availability Act establishes statutory requirements pertaining to professional liability coverage for health care providers. For example, the Availability Act:

- Requires that basic professional liability insurance covers those professional services authorized by laws governing licensure of a Kansas health care provider.
- Requires that basic professional liability insurance provides coverage with minimum limits of \$200,000 per claim subject to not less than a \$600,000 annual aggregate limit for each individual health care provider.
- Requires that health care providers purchase their basic professional liability insurance from a company that is authorized by the Insurance Commissioner to sell insurance in Kansas. If for some reason a health care provider cannot obtain commercial professional liability insurance from a company admitted to do business in Kansas, the Availability Act creates a joint underwriting association for that purpose.
- Requires that all basic professional liability insurance policies cover all claims made during the policy period. The policy must cover all professional liability claims made during the term of the policy regardless of the date of the incident giving rise to the claim.
- Provides HCSF coverage for eligible Kansas resident health care providers applicable to their professional services wherever those services are rendered. Eligible non-resident health care providers are afforded Fund coverage only for professional services rendered in the State of Kansas.
- Creates special State self-insurance programs to provide the basic coverage for the full-time faculty members, foundations and individuals engaged in the residency training programs at the University of Kansas Medical Center and certain affiliated programs, and for certain non-profit corporations organized to administer graduate medical education programs.
- Provides continued coverage for prior acts when a health care provider retires from his or her practice or leaves Kansas to practice elsewhere, and inactivates his or her Kansas license. In addition, this "tail coverage" is improved beginning July 1, 2014 such that the coverage is equal to both the minimum required basic insurance coverage plus the level of Fund coverage that was in effect at the time of the incident resulting in a claim. This also applies to health care provider facilities that are no longer licensed to operate in Kansas.

Health Care Stabilization Fund Coverage

Three different levels of Fund coverage are available to defined health care providers. The coverage levels are as follows:

- \$100,000 per claim / \$300,000 annual aggregate
- \$300,000 per claim / \$900,000 annual aggregate
- \$800,000 per claim / \$2,400,000 annual aggregate

The first dollar amount is the amount of coverage available for a single claim. The second dollar amount is the aggregate annual limit on the amount of coverage available for all claims made during a Fund fiscal year. Most health care providers choose \$800,000 per claim subject to a \$2.4 million annual aggregate limit.

Fund coverage is always supplemental to and in excess of any other available professional liability coverage. Kansas law allows a health care provider to reduce HCSF coverage limits upon request, but an increase in coverage limits must be approved by the Board of Governors. A copy of the "Request to Decrease Fund Coverage" or the "Request to Increase Fund Coverage" may be downloaded from the forms page at www.hcsf.org.

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How Fund Coverage Limits Apply to Professional Practice

The Fund coverage limit is based on when the incident occurred that resulted in a claim alleging professional negligence. The coverage limits selected for a specific compliance period remain in effect for any claim or lawsuit attributable to the compliance period.

For example, assuming that: (1) a health care provider first complies with the Fund on January 1, 2014 and selects the \$100,000/\$300,000 coverage limit, then (2) on the policy renewal date of January 1, 2015, the health care provider receives approval from the Board of Governors to increase the Fund coverage limits to \$800,000/\$2,400,000, and (3) in 2016 a claim is made based on professional services that were rendered in 2014; the health care provider has \$100,000 Fund excess coverage for this claim. When combined with the primary commercial insurance coverage, the total coverage is \$300,000 for the claim.

Claims made or lawsuits filed against licensed health care providers, or eligible inactive health care providers, are covered only for those services rendered or failed to be rendered during the period when the health care provider was in compliance with the Fund law.

Resident health care providers, i.e., those who are legal residents of Kansas and are in compliance with the Fund law, are provided coverage from the HCSF for judgments or settlements which exceed the required basic professional liability insurance coverage limits for their services rendered inside and outside of Kansas.

For non-resident health care providers, e.g., a provider who lives in Missouri and practices in Kansas, the Fund's coverage is available only for those professional services rendered in the State of Kansas.

The Fund provides professional liability coverage for defined health care providers only. Some primary insurance carriers may offer an additional coverage limit for the health care provider's professional employees who are not defined as health care providers in K.S.A. 40-3401(f).

For additional assistance in understanding the Fund coverage limits, contact your insurance agent, your insurance company representative, or the HCSF office.

Active or Inactive Health Care Providers

Active and inactive are terms used in the Health Care Provider Insurance Availability Act to establish how Health Care Stabilization Fund coverage applies to claims or lawsuits asserted against a health care provider. The term "inactive" as used in the Availability Act does not mean the same thing as inactive licensure.

Active health care providers are those individuals and entities that maintain an active Kansas license, maintain basic professional liability insurance, and participate in the HCSF by paying the applicable premium surcharge. For active health care providers, the Fund coverage is supplemental to the primary insurance policy.

Inactive health care providers are those individuals who no longer maintain basic professional liability insurance and have discontinued their active Kansas license to practice or operate a facility. Health care providers who become inactive are provided continued Fund coverage without any additional cost. The limits of extended HCSF coverage are based on the level of Fund coverage in effect on the date of the incident that resulted in a claim against the health care provider plus an additional \$200,000 per claim subject to a \$600,000 annual aggregate limit.

Additional Excess Professional Liability Insurance

Excess professional liability insurance above the Fund coverage limit may be available via basic professional liability insurance companies. This is an individual decision to be made by each health care provider.

Excess professional liability insurance may be available on a claims made basis. Health care providers may want to inquire about the cost of an extended reporting endorsement ("tail coverage").

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HCSF Guidelines for Health Care Providers Licensed to Practice in Kansas

Kansas Resident Health Care Providers

Health care providers who are legal residents of Kansas and have an active Kansas license, as well as health care providers that are licensed facilities located in Kansas, are required to maintain the minimum basic professional liability coverage as a condition of active licensure. In addition, they are required to participate in the Fund. The primary insurance carrier collects the provider's payment for the professional liability insurance coverage and remits the premium surcharge to the Fund without any reductions for commissions, collection or processing expenses.

The primary insurer is responsible for calculating the provider's premium surcharge based on the Fund coverage limit selected by the provider, the rating classification code of the provider and the number of years the provider has been in compliance with the Fund.

Approximately twenty five commercial insurance companies and risk retention groups offer medical professional liability coverage in Kansas. Some of these insurers offer coverage only to a specific profession or specialty. If coverage is not available through a primary carrier, the provider can apply for coverage offered by the Health Care Provider Insurance Availability Plan. Providers should contact their agent for information regarding the Plan.

Kansas Residents Practicing Out of State

Health care providers who reside in Kansas and have an active Kansas license, but practice exclusively in another state are still required to comply with the Fund. A resident health care provider who does not wish to maintain Fund compliance or pay the surcharge should contact the appropriate licensing agency to discuss inactivating or discontinuing his or her Kansas professional license. A license may be converted to inactive status or another licensure category that is exempt from the Fund law.

Kansas Residents Practicing in Missouri

Kansas resident health care providers who have an active license to practice in Missouri or are otherwise authorized to render professional services in Missouri are required to pay an additional surcharge to the Fund. If the health care provider does not actually practice in Missouri, he or she may convert their license to inactive until such time that he or she decides to resume practice in Missouri.

Inactive Kansas Residents Who Reinstate Their Active Kansas License

The required primary insurance coverage must be obtained from an admitted Kansas company. The primary carrier will be responsible for enrolling the provider in the HCSF. The Fund does not provide prior acts coverage for services rendered in another state prior to reinstating Fund compliance.

Non-Resident Health Care Providers

Health care providers who do not reside in Kansas but have an active license to practice in Kansas are subject to the basic professional liability coverage requirements (minimum of \$200,000 per claim with \$600,000 annual aggregate limits) plus a Fund surcharge that is based upon the percentage ratio of their Kansas practice. This is a statutory requirement and is a condition of licensure. If a licensee is no longer actively practicing in Kansas, he or she must convert their license to inactive in order to avoid the basic insurance and HCSF surcharge required by Kansas law.

Unlike Kansas resident health care providers, nonresident health care providers who have an active license to practice in Kansas must initiate compliance with the Fund law by completing the HCSF Non-Resident Certification Form. The surcharge payment is submitted to the Fund with the completed Non-Resident Certification Form and a copy of a current Certificate of Insurance from the primary insurance carrier. A "Non-Resident Certification" form may be downloaded from the forms page at www.hcsf.org.

Non-Residents Relocating to Kansas

The required primary coverage must be obtained from an admitted Kansas insurance company. When the provider becomes a legal resident of Kansas the primary carrier will be responsible for enrolling the provider in the Fund.

Notes

Locum Tenens Practicing in Kansas

The Availability Act defines a locum tenens as a health care provider who renders professional services during a short-term assignment not exceeding 182 days per calendar year. A locum tenens must be licensed to practice in Kansas and must comply with the Fund law.

Kansas Residents

If the health care provider is a Kansas resident and maintains a separate professional liability policy for the locum tenens assignment, it is important to know that both insurance policies are required to provide coverage for all services rendered. Pursuant to K.S.A. 40-3402, each policy is required to be liable "for all claims made during the policy period."

Non-Residents

A non-resident health care provider who will participate in a locum tenens assignment must comply with the Health Care Provider Insurance Availability Act. The health care provider must complete a non-resident application. A copy of the "Non-resident Certification" form may be downloaded from the forms page at www.hcsf.org.

The primary liability insurance company must either be authorized to issue professional liability insurance in Kansas or must provide a signed "Declaration of Compliance" form to the Health Care Stabilization Fund which confirms: 1) that the insurer will provide the required \$200,000/\$600,000 minimum level of primary coverage and 2) the insurer is aware that they are responsible for any and all prior acts that occurred in Kansas.

An exception from the normal claims made insurance policy requirement is allowed for those non-resident locum tenens health care providers who have an occurrence policy, but the "Declaration of Compliance" means the insurer agrees to generally comply with the Health Care Provider Insurance Availability Act if any claims arise as a result of professional services rendered during the locum tenens assignment.

Important Points to Remember

- A self-insurance policy provided by an employer will not satisfy the basic coverage requirement in Kansas.
- A primary policy with coverage exceeding the basic \$200,000/\$600,000 (minimum required) does not exempt a health care provider from participation in the Fund.
- If a health care provider is unable to secure a basic policy, he or she may need to have the insurance agent or locum tenens company contact the Kansas Availability Plan for assistance.
- If a health care provider maintains an active Kansas license, he or she must continuously maintain the basic \$200,000/\$600,000 coverage and comply with the Fund law. This is a statutory requirement.

Termination of Assignment

The health care provider should contact the appropriate Kansas licensing agency to discuss the status of his or her license. If the license is converted to inactive, the health care provider will no longer be required to maintain the basic insurance policy nor participate in the Fund.

Obtaining Basic Professional Liability Coverage from the Availability Plan

The Health Care Provider Insurance Availability Plan is one of the principal features of the Act. Without this Availability Plan, some individual health care providers would not be able to obtain professional liability insurance.

Any defined health care provider who has an active license to render professional services in Kansas may obtain basic professional liability insurance from the Health Care Provider Insurance Availability Plan if the provider has been denied basic coverage from the commercial insurance market.

Any licensed insurance agent should be able to provide assistance in making application to the Availability Plan. At the time this document was published, the Availability Plan was administered by the Kansas Medical Mutual Insurance Company of Topeka, Kansas (telephone 785-232-4740 or 1-800-232-2259).

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How the HCSF Becomes Aware of Lawsuits and Claims

If a claim is made without a formal legal action being filed, the provider should notify their primary insurance company and the Fund's Legal Section as soon as possible. All inactive health care providers should contact the Fund as soon as they have any notice of a claim, regardless of whether or not actual court proceedings have been commenced by the filing of a petition.

Any health care provider, active or inactive, who is sued outside Kansas, has an obligation to notify the Health Care Stabilization Fund. If any action is filed against a resident health care provider outside of this State, the health care provider or the health care provider's insurance company must notify the HCSF Board of Governors as soon as possible.

When and How the HCSF Defends Health Care Providers

Primary insurance companies provide a defense on behalf of active health care providers. If the claim or lawsuit exceeds the basic coverage limits and results in a tender, the Health Care Stabilization Fund will assume the cost of defending the health care provider. In most situations, the Fund continues to provide a defense using the same attorney utilized by the primary insurer.

Inactive health care providers, who are qualified for Fund tail coverage, rely on the Fund to appoint a defense attorney. Defense attorneys appointed by the Fund to defend actions against inactive providers are skilled medical malpractice defense lawyers.

If a health care provider has questions or concerns regarding the primary insurer's defense or the Fund's defense activities relating to a specific claim or suit, the provider should contact the Fund's Chief Attorney at 785-291-3777.

University of Kansas Postgraduate Training Programs

The professional liability exposure of residents in training at KU Medical Center or one of the affiliated residency programs is self-insured by the State of Kansas for the physician's basic coverage. This self-insurance does not, however, cover extracurricular medical practice (moonlighting).

State self-insurance of the KUMC postgraduate training programs provides continuing coverage for any future claims or suits that are attributable to an event that occurred during the postgraduate training program.

Therefore, a physician establishing private practice after completing a Kansas postgraduate training program may obtain the required basic professional liability insurance coverage at a first year claims-made rate and will pay a lower HCSF surcharge rate.

Residents who engage in moonlighting activities which are not part of the residency training program should obtain separate basic professional liability insurance coverage for those activities. One of the few sources for this specific coverage is the Health Care Provider Insurance Availability Plan.

Contact Information

The HCSF website at <https://hcsf.kansas.gov/> is designed for use by health care providers, their insurers, and their attorneys. The website provides access to numerous reference documents and forms.

Questions not addressed in this document or via the website may be sent to e-mail address hcsf@ks.gov to be referred to the appropriate staff person. The HCSF office phone number is (785) 291-3777 and the fax number is (785) 291-3550.

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Brief History of the Health Care Stabilization Fund

The 1976 Legislature enacted the original version of the Health Care Provider Insurance Availability Act. Among other things, the Availability Act created the Health Care Stabilization Fund (HCSF). The Availability Act requires that all hospitals and other defined health care facilities and professionals purchase professional liability insurance and participate in capitalization of the Fund by paying a premium surcharge to the HCSF. To enforce the insurance and HCSF requirements, the Legislature decided to make liability insurance a condition of licensure in Kansas. To accommodate those doctors who could not buy commercial insurance coverage, a joint underwriting association was created; the Health Care Provider Insurance Availability Plan.

An important feature of the early version of the Availability Act was a requirement that health care providers obtain "claims made" coverage. In other words, the health care provider is insured for any claims made during the term of the insurance policy, regardless of when the incident occurred. Equally important, if a health care provider retires or leaves Kansas to practice elsewhere, the HCSF remains liable for any claims attributable to professional services rendered when the health care provider was covered by the Fund.

In 1984 the Legislature enacted a number of significant amendments to the original Availability Act. Among other things, there was a limit imposed on the amount that could be recovered from the HCSF. That year, the Legislature also established a Board of Governors to advise the Commissioner of Insurance.

Another major 1984 amendment removed the statutory limit on the Fund's balance and prescribed that premium surcharges should be based on estimated accrued liabilities. In other words, the Legislature decided the HCSF should be actuarially sound.

During the second half of the eighties there was continued 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.

Some legislators insisted that the State should divest the HCSF and legislation was passed in 1989 that provided for a gradual phase-out of the Stabilization Fund. The Fund was scheduled for discontinuation in 1994 based on a five-year plan to collect sufficient revenue from Kansas health care providers to pay for all accrued liabilities.

The filing of new cases began to level off during the early nineties, and Fund assets gradually increased. By 1992 the HCSF was considered actuarially sound, and premium surcharges were reduced accordingly. By this time, interest in phasing out the HCSF had waned. Instead, the 1994 Legislature decided to remove the HCSF from the Insurance Department. On July 1, 1995, the HCSF was made independent, and the Board of Governors appointed an Executive Director. The Commissioner of Insurance retains an important role, however. Members of the Board of Governors are appointed by the Commissioner.

In October 2012 the Kansas Supreme Court cited the Health Care Provider Insurance Availability Act in an important decision that upheld the constitutionality of a statutory limit on noneconomic damages in personal injury lawsuits. Then in 2014 the Legislature passed a bill that updated the Health Care Provider Insurance Availability Act and broadened its application to five new categories of health care providers. The Legislation included major improvements in HCSF tail coverage for health care providers.

The Kansas Health Care Provider Insurance Availability Act has accomplished legislative intent. It provides stability by assuring that physicians and other health care providers have access to liability insurance, it promotes a favorable market environment for the commercial insurance companies, it provides for efficient administration of the Health Care Stabilization Fund, it assures a reliable source of compensation if a patient is injured, and it assures timely payment when it is decided a patient should be compensated.

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