

Medical Liability and the Emergency Physician: A State by State Comparison — Part 3

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When it comes to medical malpractice law, there is immense interstate variability. Some states have passed sweeping reforms that have decreased litigation and provided increased access to medical care. Other states have been reluctant to change, and as a result malpractice insurance premiums have skyrocketed and physicians have departed in droves.

Which states are particularly favorable for emergency physicians and why? State by state information on medical liability has been compiled many times, but data specifically on emergency medicine have been hard to come by — until now. On behalf of the AAEM Legal Committee, I have constructed a medical liability state by state comparison — hopefully the most accurate and comprehensive medical liability database yet for emergency physicians.

Each state's medical liability environment was given a rating (one to five stars) based primarily on 1) the presence of damage caps, 2) malpractice premium costs, and 3) the presence of meaningful laws specifically protecting emergency physicians. In addition, I considered limits on attorney fees, expert witness reform, pretrial panels, and several other factors.

This is the third installment of this state by state review. The initial installment, in the July-August 2013 issue of *Common Sense*, analyzed the first ten states in alphabetical order (Alabama through Florida) and included a "Methods" section detailing how these ratings were calculated. The second installment, in the November-December 2013 issue, analyzed ten more states (Georgia through Maine).

For this installment, addressing the next 15 states, reliable information regarding annual malpractice premiums for emergency physicians could not be obtained. Therefore, I estimated the average EM premiums based on hard data gathered from The Medical Liability Monitor.³¹ For each state, I listed ranges of average 2013 annual premiums for internal medicine (IM) and general surgery (GS) (approximate numbers representative of full time physicians with standard policy limits). Because emergency medicine premiums are typically somewhere between IM on the low end and GS on the high end, the average annual premiums for EM were calculated using the following equation for each state: (Avg IM + Avg GS)/2. These are rough estimates, as premiums can vary immensely within each state — especially in states with a variety of urban and rural areas. In general, for EM annual premiums less than \$20,000 are considered low, annual premiums between \$20,000 and \$40,000 are considered mid-range, and annual premiums greater than \$40,000 are considered high.

I welcome any and all feedback. Please direct your comments or questions to the editor of *Common Sense*, Andy Walker at cseditor@aaem.org.

Now, let's look closely at the next 15 states, Maryland through North Dakota.

Maryland ★★★★★

Caps: \$725,000 cap on non-economic damages (soft cap, increasing \$15,000 annually).³

Average 2013 premiums: \$48,500 (estimated) for EM, \$12,700 to \$26,000 for IM, \$40,000 to \$116,000 for GS.³¹

Liability environment for emergency physicians: Despite the enactment of a cap on non-economic damages in 2004,³ Maryland remains a hazard for well-intentioned EPs. Physicians (in all specialties) near Baltimore and D.C. can expect to pay some of the highest premiums in the nation.³¹ For instance, surgeons and OB-GYNs typically pay between \$115,000 and \$158,000 per year in the greater D.C. and Baltimore areas.³¹ Maryland's damage cap was successfully upheld in 2010.³⁵ However, the cap (currently set at \$725,000) will continue to increase \$15,000 per year indefinitely. The average closed claims severity in Maryland has risen from \$423,000 in 2006 to \$750,000 in 2012 — this further supports the argument that the current cap on non-economic damages is too high to be effective.³⁹ Maryland's per capita malpractice payout (\$19.40 per year) is the 7th highest in the nation.³⁶ Maryland has no joint liability reform,³ no collateral source reform,³ no limits on attorney fees,³ and no significant expert witness reform.⁸ The state's statute of limitations ("within five years of the date of the alleged wrongful act" or "three years from the time the alleged injury was discovered") is one of the most plaintiff-friendly of its kind.⁸ And recently a Maryland court of appeals decided to waive even this statute in a wrongful death suit filed against a physician 14 years after he allegedly misdiagnosed a patient's cancer.³⁹ Typically, a malpractice claim must first be reviewed by an arbitration panel. However, there are numerous exceptions and plaintiffs may waive this step or appeal the panel's decision.⁸ On a positive note, Maryland has been blessed with two physician-friendly medical liability reforms: (1) the plaintiff is required to file a certificate of merit from a qualified expert within 90 days after the claim is filed, and (2) Maryland is one of the few remaining states that recognizes the traditional common law doctrine of pure contributory negligence. Thus, any negligence by a plaintiff will bar his recovery completely. This deep-rooted law was successfully upheld by a Maryland high court in 2013.³⁸

Assessment: Caps on non-economic damages have failed to significantly improve this state's high risk environment. Its high court's recent decision to uphold the doctrine of "contributory negligence" is a step in the right direction for EPs. **Grade:** 1.75 stars out of 5.

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Massachusetts ★★★★★

Caps: \$500,000 cap on non-economic damages (soft cap).³

Average 2013 premiums: \$33,600 (estimated) for EM, \$13,600 to \$17,400 for IM, \$40,700 to \$63,000 for GS.³¹

Liability environment for emergency physicians: While the Massachusetts medical liability environment is far from perfect, the Bay State has distinguished itself as an innovative leader in Medical Liability Reform.^{57,58} MA is one of the only states on the east coast to have enacted caps (\$500,000) on non-economic damages.³ Unfortunately the cap can be lifted if the claimant can show “a substantial or permanent loss or impairment of a bodily function or substantial disfigurement.”⁷³ The state has also enacted sliding-scale limits on attorney fees,³ collateral source reform,³ and mandatory prelitigation screening panels — and panel opinions are admissible in court.⁸ The state has failed to enact joint liability reform,³ meaningful expert witness reform,⁸ and periodic payment reform.³ The statute of limitations is three years.⁸ Massachusetts is heavy on lawyers, the fourth highest per capita in the U.S.,¹⁵ and litigation dollars remain high. Massachusetts’s per capita malpractice payout (\$22.73 per year) is the fourth highest in the nation.³⁶ The most notable component of the state’s approach to Medical Liability Reform is an avant garde process known as “DA & O” (Disclosure, Apology, and Offering).⁵⁸ Similar to early arbitration in other states, this initiative focuses on early disclosure of mistakes, apologizing when appropriate, and offering up-front compensation in an effort to avoid costly and time-consuming litigation.⁵⁸ Everyone appears to appreciate the emphasis on transparency and the added opportunity to establish systems to prevent the recurrence of adverse incidents.⁵⁸ This new approach has been embraced by parties on all sides of the fence — lawmakers, physicians, and the general public.⁵⁸ In fact, two emergency physicians — Drs. Alan Woodward and Peter Smulowitz — were very active in bringing this model to Massachusetts.⁵⁸ While all of this is promising, a multitude of barriers need to be overcome: physician discomfort with disclosure, opposition by liability insurers, and concerns that this model may not be replicable in certain settings.⁵⁸ And finally, on the docket currently is S.1012 — a bill that would provide a gross negligence standard for EPs, similar to a law in Texas.⁵⁷ This bill grants “qualified civil immunity to physicians, nurses, and other healthcare professionals who provide emergency medical services, so-called EMTALA providers, except in the case of willful or wanton misconduct or reckless disregard.”⁵⁷ This bill pending before the MA Committee on Public Health.⁵⁷ Needless to say, this would be a sensational victory for Massachusetts EPs as well as any other specialists providing care in an emergency setting.

Assessment: With caps on non-economic damages and a revolutionary DA & O approach, Massachusetts is a rising star on the east coast. Premiums remain in the the mid-range and the state’s malpractice payout per capita remains high. **Grade:** 3.25 stars out of 5.

Michigan ★★★★★

Caps: \$280,000 cap on non-economic damages, but up to \$500,000 in catastrophic cases (soft cap, adjusted annually for inflation).³

Average 2013 premiums: \$48,500 (estimated) for EM, \$7,900 to \$35,000 for IM, \$30,000 to \$121,000 for GS.³¹

Liability environment for emergency physicians: The battered Wolverine State, home to the beleaguered Motor City, has seen its share of hardship over the years, both inside and outside of the medical community. While the lawmakers of Detroit need to be doing everything possible to keep talented EPs practicing in their struggling city, physicians in “The 3-1-3” (as it’s affectionately referred to by Eminem in the movie 8 Mile) pay some of the highest premiums in the country.³¹ OB-GYNs and surgeons practicing in Wayne, Oakland, and Macomb counties typically pay over \$100,000 per year in premiums.³¹ There is immense variation in premiums throughout the state, with physicians in the western and northern regions paying considerably less.³¹ Despite the presence of reasonable caps on non-economic damages (\$280,000, enacted in 1993),³ Michigan is still considered a risky state — especially for physicians in and around the Detroit (personal communications, 2013). The cap on non-economic damages can be increased to \$500,000 in cases involving brain damage, spinal cord damage, damage to the reproductive system which prevents procreation, or injury to cognitive ability that leaves the plaintiff unable to live alone.³ Michigan has enacted collateral source reform,³ limits on attorney fees,³ expert witness reform (experts must practice in the same specialty as the defendant),⁸ and a certificate of merit requirement.⁸ The state lacks joint liability reform,³ periodic payment reform,³ and pre-litigation screening panels.⁸ The statute of limitations is two years but can be extended to six years under special circumstances.⁸ Following the recent passage of the Patients First Reform Package (SB 1115 and SB 1118), the state appears to be moving in the right direction.⁵³ This newly enacted legislation clarifies the existing cap on non-economic damages, the statute of limitations, and how pre-judgment interest is calculated.⁵³ A new bill (HB 4354) was recently introduced which would increase the burden of proof in cases involving EPs and other physicians providing care in the emergency setting, similar to existing laws in Georgia, Texas, and North Carolina.⁵⁵ The bill states, “the immunity would not attach if the plaintiff proves by clear and convincing evidence that the health care professional’s actions constituted gross negligence.”⁵⁵ This would be an enormous win for Michigan EPs, but as expected, there has been intense opposition from the Michigan Defense Trial Council, the Oakland County Bar Association, and even the Henry Ford Hospital System(?).⁵⁶ A recent *Detroit News* article discussed this bill, as well as the importance of recruiting well-trained EPs to the Detroit area.⁵⁴ That being said, recruiting new docs to D-town is not as big a problem as it might seem — the Detroit area is home to 14 emergency medicine residencies, bringing the total for the state to 26, with over 100 newly minted EPs graduating each year.⁵²

Assessment: The Great Lakes state is a mixed bag for EPs. Caps on non-economic damages have been upheld, but premiums remain sky-high in Motor City. Recent legislation is encouraging, but has yet to make an impact. **Grade:** 2.75 stars out of 5.

Minnesota ★★★★★

Caps: None.³

Average 2013 premiums: \$8,500 (estimated) for EM; \$3,375 to \$4900 for IM; and \$11,300 to \$14,000 for GS.³¹

Liability environment for emergency physicians: Some call it

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"Minnesota Nice," but there is some truth to this cultural stereotype.³² In keeping with their Scandinavian heritage, Minnesotans tend to be averse to confrontation and unlikely to sue.³² And just like their Iowa neighbors, Minnesota EPs may pay some of the lowest premiums in the country despite nonexistent tort reform.³¹ Most notably, in addition to a plaintiff-friendly four-year statute of limitations,⁸ the North Star State has absolutely no caps on damages,³ no limits on attorney fees,³ and no substantial expert witness reform.⁸ For many practicing Minnesota physicians, reform is simply not a priority because the current liability environment is generally favorable (personal communications, 2013). The state does have soft joint liability reform,³ collateral source reform,³ and periodic payment reform.³ Plaintiffs must file an affidavit stating that the case has been reviewed by a qualified expert within 180 days of filing the claim.⁸ Interestingly, despite opposition from the Minnesota Medical Association and the Minnesota Hospital Association, the state's Supreme Court recently established a "loss of chance" doctrine,³³ departing from a precedent set in the state in 1993. Patients are now allowed to seek damages in cases of "medical negligence that reduces his or her chances of recovery or survival."³³

Assessment: Overall, a physician-friendly state. Litigation is rare. Premiums are very low, despite the absence of meaningful reform.
Grade: 3.5 stars out of 5.

Mississippi ★★★★★

Caps: \$500,000 cap on non-economic damages (hard cap).³

Average 2013 premiums: \$19,000 (estimated) for EM; \$4,300 to \$8,500 for IM; \$27,000 and \$36,000 GS.³¹

Liability environment for emergency physicians: Along with Texas, Mississippi is considered a "poster child" for tort reform. For many years Mississippi was Tort Hell.³⁴ In 2004, the state enacted powerful reforms, including a hard \$500,000 cap on non-economic damages and strong joint liability reform.³⁴ Since then, liability insurance costs have dropped

nearly 50% and the number of lawsuits has fallen 70%.³⁵ Premiums remain low,³¹ and many insured physicians are receiving refunds from their carriers.³⁵ Mississippi's per capita malpractice payout (\$4.17 per year) is now the fourth lowest in the nation.³⁶ The state has a two-year statute of limitations,⁸ and periodic payment reform.³ Also, plaintiffs must file a certificate of merit stating that the case has been reviewed by a qualified expert.⁸ Relative weaknesses include a lack of collateral source reform,³ no limits on attorney fees,³ and no meaningful expert witness reform.⁸ In 2013 Mississippi EPs celebrated, when the state's hard cap on non-economic damages was once again upheld.³⁷

Assessment: With low annual premiums and a strong, recently upheld cap on non-economic damages, the Magnolia State should be the "go-to" destination for EPs heading to the southeast. **Grade:** 4.25 stars out of 5.

Missouri ★★★★★

Caps: None.³

Average 2013 premiums: \$31,325 (estimated) for EM; \$10,600 to \$22,200 for IM; \$28,500 to \$64,000 for GS.³¹

Liability environment for emergency physicians: While many states have achieved success on the road to tort reform over the past ten years, Missouri's story is one of tragic collapse. Missouri enacted a \$350,000 cap on non-economic damages in 2005, replacing its existing \$625,000 cap, in response to a state-wide medical liability crisis — the average award against medical care providers in the state had increased by 52% between 2001 and 2005.¹⁷ In the five years that followed, the cost of liability insurance in Missouri decreased collectively by \$44 million.¹⁷ Both claim frequency and cost per claim declined sharply, from 1,512 claims in the state in 2005 to 816 in 2011.⁴⁵ In 2012, the courts overturned this effective cap, siding with plaintiffs' attorneys over doctors.¹⁷ The clock was turned back to a time when well meaning

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physicians were forced to leave the state due to skyrocketing premiums.¹⁷ Missouri borders eight states — some with very favorable liability environments — so MO EPs interested in jumping ship have plenty of nearby options to choose from (especially in Kansas City, where docs can simply hop across the border to take advantage of Kansas' five star reforms). The Missouri House of Representatives passed HB 112 in April of 2013, which would reinstate the cap, but as yet there has been no vote on the bill in the senate.⁴⁶ As of now, annual premiums for EPs remain in the mid-range, but this is expected to change if caps are not reinstated.³¹ MO has also enacted partial joint liability reform,³ periodic payment reform,³ and a case certification requirement.⁸ The state has no limits on attorney fees,³ no collateral source reform,³ no pretrial panels,⁸ and no expert witness reform whatsoever.⁸ The statute of limitations is supposedly two years, but it can be extended up to ten years in special circumstances.⁸ Recently, Missouri passed the Volunteer Health Services Act — an act that (1) waives civil penalties against volunteer health workers and (2) allows physicians licensed in other states to practice in Missouri as long as they are providing free care.⁴⁷ MO is the eighth state to have enacted this type of legislation.⁴⁷

Assessment: The “Show Me State’s” recent decision to terminate caps on non-economic damages has triggered another crisis. MO docs are looking elsewhere as premium costs and litigation frequency are expected to increase. **Grade:** 1.75 stars out of 5.

Montana ★★★★★

Caps: \$250,000 cap on non-economic damages (hard cap).³

Average 2013 premiums: \$39,075 (estimated) for EM; \$13,500 to \$16,500 for IM; \$56,300 to 70,000 for GS.³¹

Liability environment for emergency physicians: The Big Sky Country — known for elk herds, golden eagles, rich mineral reserves — and a longstanding, powerful cap on non-economic damages.³ Montana's \$250,000 cap, upheld in 1995 and again in 1997, is global — it applies to total non-economic damages, even if caused by a series of acts by more than one health care provider.³ Additional favorable Montana laws include partial joint liability reform,³ collateral source reform,³ periodic payment reform,³ and partial expert witness reform — experts must be in the same specialty as the defendant and show proof of substantial clinical practice during the five years leading up to the incident.⁸ All potential claims must be reviewed by a pre-litigation screening panel of three physicians and three attorneys. However, the panel's decision is neither binding nor admissible in court, and no member of the panel may be called to testify at a subsequent trial.⁸ Unfavorable state laws include no limits on attorney fees,³ no case certification requirement,⁸ and a three-year statute of limitations that can be extended to five years.⁸ Most notably, EP malpractice premiums are substantially higher than average.³¹ This is unexpected and inexplicable, considering the state's physician-friendly tort reform laws.

Assessment: There is a puzzling disconnect between the state's malpractice premiums, which are fairly high, and the state's tort reforms, which include a powerful \$250,000 cap on non-economic damages.

Grade: 3.75 stars out of 5.

Nebraska ★★★★★

Caps: \$1.75 million in total damages (hard cap).³

Average 2013 premiums: \$7340 (estimated) for EM; \$2,800 to \$4,060 for IM; \$9,500 to \$13,000 for GS.³¹

Liability environment for emergency physicians: The Cornhusker State is one of six states placing a hard cap on total damages.³⁵ This hard cap (\$1.75 million per case) was introduced in 1975 and has been successfully upheld three times (1984, 1986, and 1992).³ Physicians carry minimum levels of liability insurance and then pay a surcharge into an excess coverage fund.³ Physicians are not liable for more than \$500,000 per case, and any excess damages are paid for from the excess fund.³ On average, EPs practicing in Nebraska pay the lowest premiums in the country, and these estimated figures include the excess coverage fund surcharge.³¹ Additional state reforms include joint liability reform,³ collateral source reform,³ and a strict two-year statute of limitations.⁸ All cases must be initially reviewed by a pretrial screening panel consisting of three physicians and one voting attorney.⁸ This panel will determine whether the defendant failed to meet the standard of care and whether the damages were proximately caused by this failure to meet the standard of care.⁸ Most importantly, the panel's findings are admissible in court.⁸ Minor weaknesses in Nebraska's medical liability reform environment include: no limits on attorney fees,³ no meaningful expert witness reform,⁸ and no certificate of merit required at the time of filing.⁸ Despite strong reforms, average awards/settlements are relatively (and curiously) higher than average.⁷ One explanatory hypothesis is that the lack of a cap on non-economic damages allows plaintiff attorneys to push awards for pain and suffering closer to the \$1.75 million total cap (personal communications, 2013).

Assessment: Thanks to robust caps and mandatory pretrial screening panels, EPs in this state pay the lowest premiums in the nation! **Grade:** 4.25 stars out of 5.

Nevada ★★★★★

Caps: \$350,000 on non-economic damages (hard cap).³

Average 2013 premiums: \$47,250 (estimated) for EM; \$8,000 to \$34,000 for IM; \$29,000 to \$118,000 for GS.³¹

Liability environment for emergency physicians: Despite the overwhelming presence of the plaintiff-friendly Sin City, the state's medical liability environment strongly favors physicians — thanks to conservative lawmakers advocating for physicians in the northern half of the state (personal communications, 2013). Nevada's medical liability crisis came to a head in 2002, when the state's only trauma center closed due to the lack of available surgical specialists.⁵¹ Astronomical jury awards led to skyrocketing premiums, which then lead to physicians moving out of Nevada because they could no longer afford liability coverage.⁵¹ Lawmakers quickly passed sweeping reforms to stabilize the situation.⁵¹ The initial reform package, passed in 2002, included a \$350,000 cap on non-economic damages (with exceptions), a shortened statute of limitations of three years, a case certification requirement, and expert

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witness reform requiring experts to be at least 75% clinically and/or academically active and of the same specialty as the defendant.³⁵ In addition, the Nevada legislature passed an extraordinary new law offering cardinal protection for emergency physicians: a \$50,000 cap on non-economic damages for any case involving emergency care (this applies to EPs as well as specialists providing emergent on-call coverage).³⁵ In 2004, Nevada took another step in the right direction with the “Keep Our Doctors in Nevada” campaign, which included: a reinforced cap on non-economic damages (with no exceptions), enhanced joint and several liability reform, periodic payment reform, and limits on attorney fees.³⁵ Keeping doctors in Nevada, and recruiting new ones, is a priority for this state (personal communications, 2013). Nevada’s population is rapidly growing and training programs in the state are few and far between.⁵² With the majority of physicians across the country ultimately practicing in the same state in which they complete their residencies, states like Nevada that offer limited training opportunities are left under-served.⁵⁰ In 2002, only seven new physicians obtained a license to practice medicine in Nevada. By 2004, thanks to the state’s transformed medical liability environment, more than 200 physicians were applying each year.⁵¹ The only weaknesses in Nevada’s liability system include: ambiguity involving the state’s certificate of merit law (the time frame for submission is not specified),⁸ the lack of pre-litigation screening panels (phased out in 2002),⁸ and most notably, outrageously pricey malpractice premiums in Las Vegas.³¹ Premiums are especially high for specialists.³¹ Las Vegas docs typically pay twice as much as their colleagues practicing in the remainder of the state.³¹ Data exist to support the notion that Nevada’s reforms have lowered costs.³⁵ For example, the Independent Nevada

Doctors Insurance Exchange lowered its premiums for internists and surgeons by more than 20% in 2007, and rates have held steady since this decrease.³⁵ Nevada’s per capita malpractice payout (\$4.95 per year) is now the eighth lowest in the nation.³⁶ With formidable reforms, unparalleled damage caps favoring EPs, and legitimate proof of cost savings within the system, the current annual premiums for EPs, estimated at \$40,000-\$50,000 per year, are unjustifiable. If annual premium costs were not factored into the equation, Nevada’s medical liability environment would receive a five star rating.

Assessment: Thanks to 2004’s “Keep Our Doctors In Nevada” initiative, the Silver State is home to the country’s most EP-friendly liability environment — at least on paper. Non-economic damages in cases involving EPs are capped at an unprecedented \$50,000! Yet, premiums for EPs remain remarkably high. This is beyond puzzling. **Grade:** 4.0 stars out of 5.

New Hampshire ★★★★★

Caps: None.³

Average 2013 premiums: \$31,050 (estimated) for EM; \$11,200 to \$14,700 for IM; \$45,000 to 53,200 for GS.³¹

Liability environment for emergency physicians: Compared to other states in the northeast, New Hampshire offers a slightly more favorable medical liability environment. New Hampshire’s per capita malpractice payout (\$17.02 per year) is the ninth highest in the nation.³⁶ Premiums are above the national average, but EPs practicing in the Granite State will pay less than their colleagues in neighboring New England states.³¹ New Hampshire has no caps of any kind (voted down in 1980),³ no collateral source reform (also voted down in 1980),³ no expert witness reform,⁸ no certificate of merit requirement,⁸ and no limits on attorney fees (the court must approve these fees, but there are no limits).³ The state’s two year statute of limitations was recently deemed unconstitutional, and the statute has been extended to three years.⁸ The state has enacted joint liability reform and periodic payment reform.³ New Hampshire’s only substantial liability reform comes in the form of a mandatory pre-litigation screening panel. This law, established in 2005, requires all claims to first be vetted by a panel consisting of a chair appointed by the Chief Justice, and an attorney and a health care provider selected by the chair. This panel decides whether the defendant deviated from the standard of care and proximately caused the alleged injury.⁸ Unfortunately, the findings of the panel are confidential and not admissible as evidence, unless the panel’s determination is unanimous and the opposing party takes the case to trial.⁸ Since the law was enacted, juries have always sided with the panel when its findings were unanimous — until now.³⁰ For the first time ever, a New Hampshire jury recently awarded a plaintiff’s estate 1.5 million dollars after disregarding the panel’s unanimous findings of no fault.³⁰ On a final positive note, New Hampshire lawmakers recently passed an act establishing an early-offer alternative in medical injury cases.³⁰ Essentially, the patient has the option to settle medical liability claims within 90 days of injury.³⁰ While this new program is admirable, its impact remains uncertain.

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Assessment: Premiums are reasonably affordable despite the lack of meaningful reform. Mandatory pretrial screening panels have been helpful. The state's "early-offer alternative" is promising, but remains in the development phase. **Grade:** 2.0 stars out of 5.

New Jersey ★★★★★

Caps: \$350,000 (or five times compensatory damages, whichever is greater) on punitive damages.³

Average 2013 premiums: \$41,125 (estimated) for EM; \$17,000 to \$19,700 for IM; \$54,800 to \$73,000 for GS.³¹

Liability environment for emergency physicians: The following quote from ATRA says it best. "Medical liability cases continue to pop up like weeds in the litigious Garden State, and there seems to be no shortage of 'detestable' plaintiffs and personal injury lawyers otherwise willing to make outrageous claims against Little Leaguers, life-saving police officers, and girlfriends who send their boyfriends text messages."¹⁷ In 2011, New Jersey's 630 new medical liability claims more than doubled those in Ohio, a state with roughly 2.5 million more residents.¹⁷ Even Texas, a state with nearly three times New Jersey's population, had fewer new claims with 550.¹⁷ New Jersey's per capita malpractice payout (\$23.31 per year) is the third highest in the nation.³⁶ While already saddled with an extremely high cost of living, NJ docs pay some of the highest malpractice premiums in the country.³¹ On a positive note, New Jersey has enacted partial joint liability reform,³ collateral source reform,³ a two year statute of limitations,⁸ and a sliding-scale limit on attorney fees.³ An affidavit of merit must be filed within 60 days of filing a claim.⁸ Expert witnesses must be in the same specialty as the defendant and must spend the majority of their time in clinical practice or teaching.⁸ Punitive damages are capped at \$350,000 or five times compensatory damages, whichever is greater.³ This cap is insignificant, as punitive damages are rarely relevant.

Assessment: Modest expert witness reform and caps on punitive damages have been completely overshadowed by this litigious state's massive malpractice payouts, and the exorbitant premiums that docs are forced to pay as a result. **Grade:** 0.75 stars out of 5.

New Mexico ★★★★★

Caps: \$600,000 cap on total damages.³

Average 2013 premiums: \$36,700 (estimated) for EM; \$13,344 for IM; \$45,000 to \$60,203 for GS.³¹

Liability environment for emergency physicians: Long before there was *Breaking Bad*, there was a period in the 1970s when physicians were fleeing New Mexico in droves due to a medical malpractice crisis.⁴⁴ Recruiting new docs to this rural state became an insurmountable challenge.⁴⁴ In response, the state enacted a package of meaningful reforms. Most notably: 1) a \$600,000 cap limiting total damages,³ and 2) mandatory pre-litigation screening panels.⁸ NM is one of just six states to impose a cap on total damages,³⁵ and NM's cap is the smallest of the six.³ The cap excludes medical expenses and punitive damages.³ Physicians are only responsible for \$200,000 and any award in excess of this amount is paid by a patient compensation fund.³ Despite all of this, malpractice premiums are relatively (and curiously) higher

than average.³¹ One explanatory hypothesis is that the lack of a cap on non-economic damages allows plaintiff attorneys to push awards for pain and suffering closer to the \$600,000 total cap (personal communications, 2013). Additional strengths within the state include joint liability reform,³ periodic payment reform,³ and a medical review commission made up of three attorneys and three physicians — with two from the same specialty as the defendant — which reviews all claims prior to filing.⁸ Unfortunately, the panel's determination is non-binding and inadmissible in court.⁸ Additional minor weaknesses include no collateral source reform,³ no limits on attorney fees,³ a three year statute of limitations,⁸ no case certification requirement,⁸ and an expert witness law with a major loophole ("expert testimony is generally required unless negligence is so apparent that a lay person could so comprehend").⁸ Also unfortunately, the state's \$600,000 cap is in the process of being challenged.⁴⁴ Higher courts will decide whether this cap applies to a single injury or to every instance in which the injury may have been addressed.⁴⁴ In the case in question, a patient went to three ERs in one night — all three treating physicians were accused of having mismanaged her heart attack. A lower court ordered all three physicians to pay \$600k, for a total award of \$1.8 million, and to share the costs of her medical care based on their portion of fault.⁴⁴

Assessment: The state's hard cap on total damages, pre-litigation screening panels, and patient compensation fund have helped EPs. Premiums are above mid-range and higher than expected given the state's reforms. **Grade:** 3.75 stars out of 5.

New York ★★★★★

Caps: None.³

Average 2013 premiums: \$54,200 (estimated) for EM; \$7,000 to \$36,000 for IM; \$25,300 to \$148,500 for GS.³¹

Liability environment for emergency physicians: New York, New York — it can be a hard place to live and an even harder place to work as a doc. You know what they say: "If you can make it there ... "as an EP and endure the crushing medical liability environment, the traffic, cold winters, and extraordinarily high cost of living "... you can make it anywhere!" New York state holds the dubious distinction of having the worst medical liability environment in the country. With the second highest concentration of attorneys per capita,¹⁵ the Empire State is referred to as "Sue York" by ATRA.¹⁷ New York leaders can't seem to break free of the grip of the personal injury bar. Damage caps are non-existent and all physicians, EPs included, pay the highest malpractice premiums in the country.³¹ Surgical specialists in and around NYC routinely pay over \$100,000 per year.³¹ Neurosurgeons in Nassau and Suffolk counties reportedly pay \$315,524 per year.⁴¹ New York's per capita malpractice payout (\$38.99 per year) is the highest in the nation.³⁶ According to the Kaiser Family Foundation, in 2011 NY state had 1,379 paid medical liability claims — over 50% more than the next highest state and 80% more than the third highest state.⁷ The state does offer partial joint liability reform, collateral source reform, sliding scale limits on attorney fees, and periodic payment reform.³ The statute of limitations is 2.5 years,⁸ and New York is one of just six states in which the clock begins running at the time the negligence occurs rather than at the time the negligence is discovered. However, this law is in the process of being challenged.⁴²

The state's laws regarding expert witnesses are exceedingly weak: "expert testimony is required unless within the ordinary experience and knowledge of a lay person, negligence is apparent. Experts are generally not deposed prior to trial and their identity need not be revealed prior to trial."⁸ The laws regarding case certification are even weaker: "an affidavit of merit is not required if such consultation could not occur due to time limitations or because the attorney made three separate attempts to obtain a consultation and three physicians would not agree to a consultation. This does not apply in cases where the 'facts speak for themselves'."⁸ Physician morale in this state remains low, as evidenced by a recent survey noting that only 22% of NY physicians would recommend to medical students that they practice in New York state, with the majority of the respondents setting the extraordinarily high liability costs as the reason.⁴³

Assessment: This highly litigious state spends more on malpractice per citizen than any other state in the union. Premiums for all physicians, especially those practicing in NYC, are astronomical. Will this situation ever get better? As Sinatra says, "It's up to you, New York, New York!"
Grade: 0.0 stars out of 5.

North Carolina ★★★★★

Caps: \$500,000 on non-economic damages.³

Average 2013 premiums: \$26,500 (estimated) for EM; \$9,000 to \$11,000 for IM; \$33,000 to \$53,000 for GS.³¹

Liability environment for emergency physicians: Back in the day,

North Carolina's dubious justice system gained notoriety as John Edwards and his disciples raked in millions — thanks to excessive jackpot jury awards at the expense of competent, dedicated obstetricians.⁴⁸ Those days are gone. In response to the state's deteriorating medical liability environment and an impending crisis, the "Tar Heel" state passed vigorous reforms (SB 33) in 2011.³⁵ The most pivotal aspect of this reform package was the enactment of a robust \$500,000 cap on non-economic damages.³⁵ Plaintiffs are limited to \$500,000 per incident, regardless of the number of defendants involved.³⁵ Weaknesses associated with this cap include adjustments for inflation every three years, exceptions in cases involving "disfigurement, loss of use of part of the body, permanent injury or death," and exclusions if "the defendant's acts or failures, which are the proximate cause of the plaintiff's injuries, were committed in reckless disregard of the rights of others, grossly negligent, fraudulent, intentional or with malice."³⁵ For emergency physicians and specialists actively participating in emergency call, the most auspicious component of SB 33 came in the form of an increased burden of proof for physicians providing care in the emergency setting.³⁵ For cases involving the treatment of an "emergency medical condition" as defined by EMTALA, plaintiffs must prove a violation of the standard of care by clear and convincing evidence. The prior standard was defined as "by greater weight of the evidence," more commonly known as by a preponderance of the evidence.³⁵ North Carolina has no joint liability reform, no collateral source reform, no limits on attorney fees, no periodic payment reform,³ and no case certification requirement.⁸ Expert witnesses are required to either practice or teach in the same specialty as the defendant, but there are no requirements regarding state licensing, board certification, or time devoted to active clinical practice.⁸ The statute of limitations is three years from the date of the last act giving rise to the action, or within one year of when the injury should have been discovered, but in no event more than four years.³⁵ In the case of wrongful death, the statute is a strict two years.³⁵ With only two years passing since the enactment of SB 33, it is difficult to assess its efficacy. Premiums for EPs remain in the mid-range, and there are no data on whether or not premiums have decreased since this legislation was passed.³¹ Malpractice costs for the state are definitely on the low end — North Carolina's per capita malpractice payout (\$4.55 per year) is now the seventh lowest in the nation.³⁶ North Carolina is one of just four states that has upheld the traditional common law doctrine of pure contributory negligence.⁴⁹ Thus, any negligence by a claimant will bar his recovery completely.⁴⁹

Assessment: The "Tar Heel" State is the "comeback kid" of Medical Liability Reform. With recently enacted caps on non-economic damages and an increased burden of proof providing physicians with added protection in the emergency setting, North Carolina is one step closer to EP Nirvana. Premiums remain mid-range. **Grade:** 4.5 stars out of 5.

North Dakota ★★★★★

Caps: \$500,000 cap on non-economic damages (hard cap).³

Average 2013 premiums: \$13,500 (estimated) for EM; \$4,700 to \$9,000 for IM; \$15,400 to \$25,250 for GS.³¹

Liability environment for emergency physicians: Yes, the temperatures

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are ice cold, but the state's economy is red hot. With a booming oil industry and the lowest unemployment rate in the nation,⁴⁰ the non-litigious "Rough Rider State" might be the ideal opportunity for an EP contemplating a new adventure. Malpractice premiums for EPs are relatively low,³¹ and North Dakota's per capita malpractice payout (\$3.06 per person per year) is now the second lowest in the nation.³⁶ The state has capped non-economic damages at \$500,000 since 1995.³ Furthermore, economic damage awards in excess of \$250,000 are closely scrutinized.³ Additional strengths include a two year statute of limitations,⁸ as well as joint liability reform, collateral source reform, and periodic payment reform.³ Also, North Dakota has the lowest number of attorneys per capita of any state in the union.¹⁵ Weaknesses of this state's medical liability environment include no limits on attorney fees,³ as well as no expert witness reform, no pretrial screening panels, and no special reforms for physicians treating patients in an emergency setting.⁸ An affidavit must be filed within three months of filing a claim, but this law contains numerous exceptions.⁸ This rule does not apply to cases involving retained foreign objects, lack of informed consent, performing a procedure on the wrong person or the wrong body part, or any case involving "obvious malpractice."⁸

Assessment: If you can endure the frigid winter wind and the punishing summer humidity, this thriving state (with its low premiums, damage caps, and limited litigation) is the place to be! **Grade:** 4.5 stars out of 5.


Look for this series to continue in future issues!

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