

Medical Liability and the Emergency Physician: A State by State Comparison — Part 5

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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 fifth installment of this state by state review. The initial installment, in the 2013 July-August issue of *Common Sense*, included a "Methods" section detailing how these ratings were calculated.

For this installment, 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 final 11 states, South Carolina through Wyoming.

South Carolina ★★★★★

Caps: \$350,000 cap on non-economic damages, but up to \$1.05 million for cases involving multiple providers/institutions (soft cap, adjusted annually for inflation).³

Average: 2013 premiums: \$25,275 (estimated) for EM, \$8,700-11,400 for IM, \$36,000-45,000 for GS.³¹

Liability environment for emergency physicians: In many ways, the Palmetto State's medical liability environment is as pleasant and inviting as the low country in April. South Carolina is one of eight states to have passed a law specifically protecting EPs as well as other physicians providing care in the emergency setting.⁸⁶ Enacted in 2005, this legislation states that physicians providing care in an emergency situation (including an emergency department or a surgical/obstetric suite) cannot be found liable unless the physician is "grossly negligent."⁸⁶ The definition of "gross negligence" has been debated vigorously,⁷⁵ and the ultimate impact of this law on South Carolinian EPs remains unclear. The \$350,000 cap on non-economic damages has been upheld, but this cap is adjusted annually for inflation and increased up to \$1.05 million for cases involving multiple providers/institutions.³ This exception significantly limits the cap's effectiveness, as this allows "stacking" and actually encourages plaintiffs to add defendants to the case. This may explain why premiums for EPs remain in the mid-range despite the presence of decent reforms.³¹ Other notable aspects of South Carolina's medical liability environment include: partial joint and several liability reform, a case certification requirement, and a three year statute of limitations that can be extended up to six years in certain cases.^{3,8} The state has no collateral source reform, no limits on attorney fees, and no periodic payment reform.³ South Carolina has upheld several laws governing who can testify as an expert witness, but there are exceptions.⁸ Experts should ideally be board certified and actively practicing (or teaching) in the same specialty as the defendant.⁸ The law reads, "an expert who is not licensed or board certified may still sign an affidavit if the expert has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence."⁸ This opens the door for any nonprofessional walking along Myrtle Beach to testify.

Assessment: Righteous reforms (caps + an increased burden of proof in cases involving EPs) have made Palmetto docs proud. Premiums remain in the mid-range.

Grade: 4.25 stars out of 5.

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South Dakota ★★★★★

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

Average: 2013 premiums: \$8,575 (estimated) for EM, \$3,700-4,800 for IM, \$12,500-13,300 for GS.³¹

Liability environment for emergency physicians: “Great faces. Great places” — that’s the catchphrase for the Mount Rushmore State. Perhaps “Low Med Mal. High Morale” would be a more fitting descriptor, given the state’s benevolent medical liability environment. South Dakotan medical mal reform is not particularly elaborate (no expert witness reform, no case certification requirement, no joint liability reform, and no limit on attorney fees), yet EPs practicing in the Black Hills pay some of the lowest malpractice premiums in the nation — second only to their Nebraska neighbors.^{3,8,31} South Dakota does have collateral source reform, periodic payment reform, a commendable two year statute of limitations, and most importantly a hard cap of \$500,000 on non-economic damages.^{3,8} Litigation and malpractice costs are both kept to a reasonable minimum in this state, as evidenced by SD’s annual per capita malpractice payout of \$4.95 (ninth lowest in the nation).³⁶ South Dakota has been described as “non-contentious” by EPs actively practicing in the state (personal communications, 2013). Could this be due to a relative lack of access to trial attorneys? The Avery Index lists South Dakota as having the 3rd lowest attorney concentration in the nation.¹⁵

Assessment: Tort reform in the Coyote State is plain and simple. Thanks to a reasonable cap on non-economic damages and a non-litigious culture, EPs are paying some of the lowest premiums in the nation.

Grade: 4.5 stars out of 5.

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**Tennessee** ★★★★★

Caps: \$750,000 cap on non-economic damages (soft cap, may be raised to \$1 million in cases of catastrophic injury).³

Average: 2013 premiums: \$20,750 (estimated) for EM, \$6,900-11,000 for IM, \$29,000-36,000 for GS.³¹

Liability environment for emergency physicians: When it comes to med mal, Tennessee isn’t exactly living up to its tag line, “America at its best.” However, things have improved somewhat since the Volunteer State was slapped with the “crisis state” label by the AMA in 2002.³⁶ Several years ago Tennessee enacted a case certification requirement, requiring plaintiffs to provide an affidavit signed by a qualified expert before filing a case, and this has cut the number of lawsuits being filed in half,⁸ (personal communications, 2013). In 2011 the state passed the Tennessee Civil Justice Act, which included a \$750,000 limit on non-economic damages.³⁶ This relatively steep cap, which can be raised to \$1 million in cases of catastrophic loss or injury such as quadriplegia, severe burns, and wrongful death, is probably too high to be effective as plaintiff attorneys push awards for pain and suffering right up to the million dollar limit.³⁶ EPs actively practicing in the state note that this cap has done little or nothing to help physicians (personal communications, 2013). Tennessee has enacted joint and several liability reform, collateral source reform, a limit on attorney fees (33.3%), a most excellent one year statute of limitations, and partial expert witness reform.^{3,8} The law states that experts must be licensed in TN or any state that borders it, and “actively practicing” in the year preceding the date on which the alleged injury occurred.⁸ The expert need not be in the same specialty — just “a specialty which would make that expert’s testimony relevant to the case.”⁸ Also, “the court can waive the requirement if an appropriate witness is not available.”⁸ Tennessee offers no periodic payment reform, no pre-litigation panel review, and — despite the vigorous efforts of AAEM’s Tennessee chapter — no laws specifically protecting physicians bound by EMTALA to provide care in the emergency setting.^{3,8}

Assessment: The high cap on non-economic damages hasn’t helped one bit, but renovation of the state’s case certification requirement has made a difference and the statute of limitations is unbeatable. Premiums remain relatively low.

Grade: 3.25 stars out of 5.

Texas ★★★★★

Caps: \$250,000 cap on non-economic damages for health care providers. \$250,000 cap on non-economic damages per health care institution (up to \$500,000).³

Average: 2013 premiums: \$10,000-30,000 for EM (personal communications, 2013), \$8,800-\$30,000 for IM, \$23,200-\$83,200 for GS.³¹

Liability environment for emergency physicians: Welcome to the Wild West — where the stars shine big and bright! Without question, thanks to the enactment of the Medical Malpractice and Tort Reform Act of 2003 and Proposition 12, the great state of Texas has the country’s most EP-friendly medical malpractice environment. But it wasn’t always this way.

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Like many other states (CA, NM, IN, OH, NV), it took a full-blown disaster to promote change in Texas. In 2002 the state's medical community hit a breaking point, with runaway jury verdicts and skyrocketing malpractice costs.⁷² The malpractice crisis of 2002 and the fight that ensued was the Battle of the Alamo for Lone Star physicians — but with a happier ending. While some Texas doctors fought back with their feet, leaving in droves, others stayed and lobbied relentlessly. Governor Rick Perry responded by enacting the most formidable and comprehensive tort reform package of all time. Perry's legislation included a hard cap of \$250,000 on non-economic damages, which has been upheld in court multiple times, most recently in 2012.⁸² The cap is set at \$250k per claimant regardless of the number of health care providers involved,³⁵ but claimants can receive an additional \$250k or \$500k (for a maximum total of \$750k), if one or two institutions such as hospitals are also found to be at fault.³⁵ Damages in wrongful death suits are capped at \$500,000.³⁵ Prop 12 also requires an increased burden of proof in cases taking place in the emergency setting, so claimants must now prove "willful and wanton negligence."⁸³ Since 2003 the liability climate in Texas has improved dramatically, with both litigation and premium costs dropping about 50% over the past ten years.³⁵ The state's annual per capita malpractice payout of \$3.03 per year is now the lowest in the nation.³⁶ Access to care in Texas has improved substantially over recent years, as herds of physicians now migrate to Texas in search of greener grass. The Texas Medical Board licensed 3,600 new docs in 2011 — 70% more than it did in 2001 — with 82 counties experiencing a net gain in EPs.³⁵ While the explanation for this physician migration to Texas is debatable (with TX having good weather, low taxes, and a favorable cost of living), tort reform is often touted as the main reason. From 2002-2012, while the state's population grew 21%, the physician population within the state grew 44%.⁸⁴ Other notable aspects of Texas's medical liability environment include joint and several liability reform, periodic payment reform, a strict two year statute of limitations, a case certification requirement, and moderate expert witness reform (the expert must be in clinical practice and ideally in the same specialty as

the defendant, but exceptions do exist).^{3,8} There are no limits on attorney fees and there is no collateral source reform.³ Many of these sweeping changes in the legal community have prompted trial attorneys and patient advocate groups to ask, "is the Texas medical liability environment too physician-friendly — are victims of genuine malpractice receiving the compensation they deserve?" Others have noted that tort reform in Texas has failed to curb the practice of defensive medicine, and in turn failed to decrease health care costs.⁸⁵ Despite the expected criticism from these groups, Texas is lauded as the epitome of tort reform. Moving forward, the state's medical community is committed to sustaining and building on this success. When it comes to reform, "Don't mess with Texas."

Assessment: Thanks to ten years of ten gallon reform, physicians are flocking to the Lone Star State. Premium costs and total malpractice costs have dropped 50% since 2003 and plaintiffs must prove "willful and wanton negligence" in cases involving EPs.

Grade: 5.0 stars out of 5.

Utah ★★★★★

Caps: \$450,000 on non-economic damages (hard cap).³

Average: 2013 premiums: \$30,750 (estimated) for EM, \$7,000-12,700 for IM, \$37,000-66,300 for GS.³¹

Liability environment for emergency physicians: Utah (the second fastest growing state in 2013) is thriving thanks to a burgeoning energy sector and a pro-business climate, with one of the lowest unemployment rates in the nation (4%).⁸⁹ Major metropolitan areas such as Salt Lake City are bursting at the seams with newcomers in search of the Greatest Snow on Earth. Similarly, on the med mal front, Utah is rapidly improving, thanks to favorable laws that were passed to reinforce the state's cap on non-economic damages and to provide added liability protection for EPs and other well-meaning physicians providing emergency care.^{35,79} As of 2009, in cases taking place in the emergency setting Utah requires

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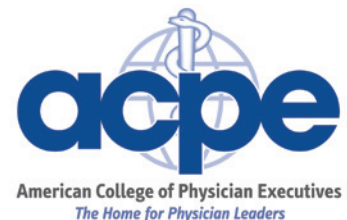


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a plaintiff to prove fault by “clear and convincing evidence,” a standard more rigorous than the mere “preponderance of evidence” standard used in most jurisdictions. Utah thus became the eighth state to provide some form of added liability protection for providers bound by EMTALA to provide emergency care.⁷⁹ This law is encouraging, but contains some unique exceptions which significantly diminish its application. For instance, it does not apply if 1) the physician saw the patient within the preceding three months for the same condition, or 2) the physician is able to consult the patient’s medical records.⁷⁹ In 2010 an amendment to Utah’s Health Care Malpractice Act fixed the state’s cap on non-economic damages at \$450,000 (no exceptions).³⁵ Prior to 2010 the cap was adjusted for inflation.³⁵ Other physician friendly Utah laws include joint liability reform, collateral source reform, limits on attorney fees (33%), and periodic payment reform.³ Most cases are initially screened by a pre-litigation panel consisting of a physician in the same specialty as the defendant, an attorney, and a layperson. However, the decision is not admissible in court and members of the panel may not be called to testify.⁸ Plaintiffs are only required to submit a case certification if the panel deems the claim to be non-meritorious.⁸ On the negative side of things, the state’s statute of limitations is four years and expert witness reform is nonexistent.⁸ All things considered, Utah looks great on paper but its Achilles’ heel is its malpractice premium cost per provider.³¹ Annual premiums for EPs are still significantly above the national average, clearly lagging behind some of the reforms enacted over the past five years.³¹ Utah can be thought of as a work in progress, as some of its most auspicious laws are too new for their efficacy to be fully assessed.

Assessment: The Salt Lake State is heading in the right direction, thanks to propitious reforms involving caps and EMTALA-mandated care. The state’s medical liability environment will join the elite five star circle, however, only if annual premiums for EPs are reduced substantially.

Grade: 4.0 stars out 5.

Vermont ★★★★★

Caps: None.³

Average: 2013 premiums: \$19,425 (estimated) for EM, \$8,200-9,000 for IM, \$28,000-35,000 for GS.³¹

Liability environment for emergency physicians: If you travel to Vermont, you’ll likely encounter maple syrup farms, IBM executives, devout fans of the band Phish, and plenty of Ben and Jerry’s ice cream. You will not come across anything resembling tort reform. This small New England state does not cap damages, nor does it require plaintiffs to provide an affidavit of merit.^{3,8} The state has no joint liability reform, no collateral source reform, no periodic payment reform, no expert witness reform, and no limits on attorney fees.^{3,8} The statute of limitations is three years.⁸ Vermont’s medical liability environment appears very unfavorable for physicians and overly welcoming to plaintiff attorneys, yet the state is not wasting much money on medical malpractice as a whole. Vermont’s annual per capita malpractice payout of \$4.37 is the sixth lowest in the nation, and annual premiums for EPs are surprisingly reasonable.^{36,31}

Assessment: The Green Mountain State comes up short on med mal reform, but annual premiums are slightly below the national average.

Grade: 2.5 stars out of 5.

Virginia ★★★★★

Caps: \$2,100,000 cap on on total damages (increasing \$50,000 per year through July 1, 2031, to \$3,000,000).³

Average: 2013 premiums: \$40,275 (estimated) for EM, \$7,700-\$17,300 for IM, \$30,800-\$74,500 for GS.³¹

Liability environment for emergency physicians: “Virginia is for Lovers.” I don’t know exactly how or why this catchphrase became popular, but I always see it posted on billboards during my trips to Chesapeake

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Bay. In reality these signs should read “Virginia is for Lawyers.” The medical liability environment in “The Birthplace of a Nation” is slightly better than its mid-Atlantic neighbors, but annual premiums remain relatively high, with EPs in the greater D.C. area paying some of the highest premiums in the nation.³¹ Virginia is just one of five states that has incorporated a cap on total damages, but its \$2.1 million cap is the highest in the country.³ While this cap may be effective in curbing some of the rare, astonishing multimillion dollar awards, it does nothing to restrain the majority of cases which involve much lower amounts. The state does not cap non-economic damages, and this opens the door for plaintiffs to push awards for pain and suffering towards the \$2 million mark. To add insult to injury, this cap will increase at \$50,000 annually until it hits \$3 million.³ Additional weaknesses include no collateral source reform, no joint liability reform, no limits on attorney fees, and a meaningless case certification requirement.^{3,8} The plaintiff must certify that he or she has contacted an “expert” and that this expert determined that the defendant deviated from the standard of care, and that the deviation was the proximate cause of the injuries claimed.⁸ This need not be in writing and the expert does not need to meet the same qualifications as an expert who testifies at trial.⁸ In recent years Virginia has become one of the few states to allow parents to sue for the wrongful death of a nonviable fetus.³⁰ Most states require a fetus to be viable in order to bring a wrongful death suit, while mothers who have lost a nonviable fetus are allowed to obtain emotional distress damages.³⁰ Virginia’s medical liability environment does have a few redeeming features. The statute of limitations is two years (without exception), pre-litigation panels are an option, the state has upheld a pure contributory negligence clause in all medical malpractice cases, and experts are required to be in active clinical practice in the defendant’s specialty or a related field within one year of the date of the allegedly negligent act.^{8,49}

Assessment: The Old Dominion’s \$2 million cap on total damages has done very little to help physicians. Additional reforms have been marginally effective and EPs continue to pay out the nose on premiums.

Grade: 1.75 stars out of 5.

Washington ★★★★★

Caps: None.³

Average: 2013 premiums: \$29,800 (estimated) for EM, \$10,500-\$12,000 for IM, \$37,300-\$59,400 for GS.³¹

Liability environment for emergency physicians: Bill Gates’s home state, the birthplace of high-tech juggernauts Microsoft and Amazon, will always be synonymous with innovation. However, Washington’s medical liability environment is far from “cutting edge.” While the vast majority of states have passed at least some type of reform over the years in an effort to reign in costs and preserve access to care, the state of Washington has done no such thing. Washington has no caps on damages, no joint and several liability reform, no limits on attorney fees, no expert witness reform, no pre-litigation panels, and no laws specifically protecting physicians in the emergency setting.^{3,8} The state once required plaintiffs to submit an affidavit of merit, but this law was declared unconstitutional.⁹ The statute of limitations in the state has always been an unusually long eight years, but even this was recently declared

unconstitutional (January 2014) by the state supreme court, which then reinstated tolling of the statute for minors.⁹⁰ Very little has improved since 2002, when Washington was declared a “crisis state” by the AMA.³⁵

Assessment: The medical liability environment in the avant garde Evergreen State is surprisingly archaic. While premiums remain high, they could be even worse considering the state has failed to enact any laws favoring physicians.

Grade: 2.25 stars out of 5.

West Virginia ★★★★★

Caps: \$250,000 on non-economic damages, but up to \$500,000 in cases involving wrongful death, permanent and substantial physical deformity, loss of use of limb or loss of a bodily organ system, or permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself and perform life-sustaining activities (soft cap, adjusted annually for inflation).³

Average: 2013 premiums: \$40,375 (estimated) for EM, \$19,500-\$19,700 for IM, \$55,300-\$67,000 for GS.³¹

Liability environment for emergency physicians: The Mountain State seems to be in the midst of an identity crisis. Is West Virginia the most northern Southern state or the most southern Northern state? The state’s medical liability environment also seems to be struggling with its identity. Is it a safe haven for well meaning EPs thanks to meaningful tort reform, or is it really the judicial hellhole that ATRA (the American Tort Reform Association) has called it for years? Without a doubt, West Virginia’s medical liability environment was tragically collapsing back in 2002.³⁶ The AMA justifiably designated WV as a crisis state, as lawsuit abuse in the state was rampant and docs were jumping across the border en masse due to skyrocketing insurance costs.³⁶ In 2003 Gov. Bob Wise responded by enacting HB 2122, a bill that included an assortment of powerful medical malpractice reforms such as a cap on non-economic damages.³⁶ This soft cap (initially set at \$250,000 and adjusted annually for inflation) is the same regardless of the number of plaintiffs or defendants, can be increased up to \$500,000 in cases involving catastrophic circumstances, and does not apply in cases of “willful and wanton disregard.”³ Also, in what appeared to be a stunning victory for EPs, an additional amendment was passed capping total damages (economic + non-economic) in “emergency cases” at \$500,000.⁸⁷ This law applies to any case involving “an emergency condition occurring at a designated trauma center,” which includes the vast majority of emergency department cases in the state.⁸⁷ The \$250,000 cap on non-economic damages has seen its share of challenges. Most recently, the state supreme court upheld it as constitutional in 2011.⁶⁷ Other strengths in the Mountaineer State include: joint liability reform, collateral source reform, a strong case certification requirement (must be filed 30 days prior to the filing of a professional liability action), and expert witness reform (experts must devote at least 60% of their time to clinical practice and/or teaching). The expert should ideally practice in the same specialty as the defendant, but exceptions do exist.^{3,8} Weaknesses within the system include: no limit on attorney fees, no periodic payments, no pre-litigation panels, and a two year statute of limitations that can be extended up to ten years.^{3,8} Despite enacting several

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physician-friendly laws, West Virginia is perennially labeled a “judicial hell-hole” by ATRA due to its history of jackpot jury awards and several overly plaintiff-friendly jurisdictions.⁶⁷

Assessment: Tort reform appears to be working in the Mountain State, but annual premiums for EPs remain inexplicably high.

Grade: 3.0 stars out of 5.

Wisconsin ★★★★★

Caps: \$750,000 cap on non-economic damages (hard cap).³

Average: 2013 premiums: \$11,050 (estimated) for EM, \$3,600-\$7,000 for IM, \$10,800-\$22,800 for GS.³¹

Liability environment for emergency physicians: The medical liability environment in America’s Dairyland is welcoming and physician-friendly thanks to strong reforms, low malpractice costs, and low litigation frequency. Annual premiums for EPs are some of the lowest on record and the state’s annual per capita malpractice payout (\$3.08) is the third lowest in the nation.^{31,36} Perhaps not coincidentally, the state has the seventh lowest concentration of attorneys.¹⁵ Other strengths include collateral source reform, joint liability reform, periodic payment reform, and a sliding scale limiting attorney fees to 33% of the first million recovered and 20% for any amount exceeding \$1 million.³ The state has a formidable patient compensation fund, which remains in good standing with a \$361 million net balance.²² The Injured Patients and Families Compensation Fund was created in 1975, and covers verdicts in excess of the physician’s underlying coverage of \$1 million per claim and \$3 million per policy year.²² 2013 was a banner year for Wisconsin docs from a medical malpractice perspective, thanks to three court decisions that ultimately favored physicians: 1) apology laws were finally enacted (WI became the 37th state to do so), 2) the \$250,000 cap on total damages — which applies only to physicians employed by the University of Wisconsin — was successfully upheld, and 3) a new informed consent statute was passed. Wisconsin Act 111 repealed the former informed consent statute, a “reasonable patient standard” which had collapsed into a standard that had little or no definition, and replaced it with the “physician-based standard” which is based on a doctor providing information that other doctors would expect to be provided.^{61,91,92} While Wisconsin’s medical liability environment seems ideal, there are a few weak spots dragging it down: no expert witness reform, no affidavit of merit requirement, no specific laws providing added protection for emergency physicians, no pre-litigation panels, and a statute of limitations that can be extended to five years.⁸ Most notably, while Wisconsin has enacted a cap on non-economic damages, it is relatively high at \$750,000 (in comparison to the \$250,000 “gold standard” enacted by states such as CA and TX).³ A \$350,000 cap was struck down in 2005, only to be almost doubled and reinstated in 2006.³ Wrongful death actions are capped at \$500,000 per occurrence for minors and \$350,000 for adults.³

Assessment: Cheesehead EPs have been blessed with comprehensive reform and an essentially benign medical liability climate. Wisconsin’s relatively high cap on non-economic damages is a minor weakness, but overall malpractice costs and annual premiums remain on the low end.

Grade: 4.25 stars out of 5.

Wyoming ★★★★★

Caps: None.³

Average: 2013 premiums: \$41,825 (estimated) for EM, \$13,300-\$19,000 for IM, \$47,000-\$88,000 for GS.³¹

Liability environment for emergency physicians: The sparsely populated Cowboy State, with just over 1,000 practicing physicians, has the fewest doctors of any state in the union.⁸⁸ With no accredited medical schools, just two accredited residency programs, and a large number of underserved communities, Wyoming needs to be doing everything possible to recruit and retain physicians.⁸⁸ Jackson Hole and Yellowstone are gorgeous selling points, but the state’s medical liability environment is an eyesore. Little has changed since the AMA dubbed Wyoming a “crisis state” in 2002.³⁵ Premiums remain high and tort reform is almost nonexistent.³¹ Wyoming is one of five states to specifically prohibit caps within its constitution.³ The state offers joint and several liability reform, but there is no case certification requirement, no expert witness reform, no collateral source reform, no limit on attorney fees, and no periodic payment reform.^{3,8} A strong two year statute of limitations is enforced.⁸ Wyoming has embraced one redeeming feature — a mandatory pre-litigation panel for all medical malpractice cases.⁸ The panel — composed of two health care providers, two attorneys, and one layperson — must determine whether malpractice occurred. The panel’s decision is not binding but its findings are admissible at trial.⁸

Assessment: Emergency physicians are a scarce commodity in Wyoming. The state’s high premiums are not helping the situation and its lack of meaningful reform is surprising.

Grade: 2.0 stars out of 5.

References:

1. The Medical Liability Monitor, Annual Survey, Annual Rate Survey Issue, October 2012, Vol. 37, No. 10. Retrieved from <http://www.thehybridsolution.com/articles/MedicalLiabilityMonitor2012.pdf>.
2. Health Coalition on Liability and Access. Protect Patients Now. Retrieved from <http://protectpatientsnow.org/sites/default/files/HCLA-Fact-Sheet-Defining-theTerms-Final.pdf>.
3. Health Coalition on Liability and Access. Protect Patients Now. Retrieved from www.protectpatientsnow.org/actioncenter/State-by-State.
4. American Medical Association, Caps on Damages. Retrieved from <http://www.ama-assn.org/ama1/pub/upload/mm/378/capsdamages.pdf>.
5. The Student Doctor Network. Retrieved from www.studentdoctor.net.
6. Contributory Negligence.net, The Facts About Contributory Negligence. Retrieved from www.contributorynegligence.net.
7. Kaiser Family Foundation. Analysis of Data from the National Practitioner Data Bank (NPDB), Public Use Data File (NPDB1110.POR), U.S. Department of Health and Human Services, Health Resources and Services Administration, Bureau of Health Professions, Division of Practitioner Data Banks; accessed 3/27/12. Available at: <http://www.npdb-hipdb.hrsa.gov/>.
8. American Medical Association, Advocacy Resource Center: State Laws Chart II. Retrieved from <http://www.ama-assn.org/resources/doc/arc/state-laws-chart-2-jan-2012.pdf>.
9. American Tort Reform Association, 2009 State Tort Reform Enactments. Retrieved from <http://www.atra.org/sites/default/files/documents/2009%20Enact%20-%20Dec.pdf>.
10. American Tort Reform Association, Judicial Hellholes. Retrieved from <http://www.judicialhellholes.org/2013/03/13/arizona-high-court-upholds-law-designed-to-limit-meritless-medical-liability-lawsuits/>.

Continued on next page

11. The Medical Liability Monitor. February 2013, Vol 38, No 2.
12. American Medical Association, Statement of the American Medical Association to the Committee on the Judiciary United States House of Representatives RE: Medical Liability Reform — Cutting Costs, Spurring Investment, Creating Jobs. Retrieved from <http://www.ama-assn.org/ama1/pub/upload/mm/399/amastatement-medical-liability-reform-2011.pdf>.
13. RAND Corporation, Changing the Medical Malpractice Dispute Process: What Have We Learned From California's MICRA? Retrieved from http://www.rand.org/pubs/research_briefs/RB9071/index1.html.
14. Connecticut State Medical Society, Physicians Defend Profession at Certificate of Merit Hearing. Retrieved from https://www.csms.org/index.php?option=com_content&task=view&id=3115&Itemid=368.
15. The Avery Index, Highest Per Capita Lawyers. Retrieved from http://www.averyindex.com/lawyers_per_capita.php.
16. American Tort Reform Association, 2003 State Tort Reform Enactments. Retrieved from <http://www.atra.org/sites/default/files/documents/2003%20enact.pdf>.
17. American Tort Reform Association, Judicial Hellholes. Retrieved from http://www.judicialhellholes.org/wp-content/uploads/2012/12/ATRA_JH12_04.pdf.
18. American Tort Reform Association, 2005 State Tort Reform Enactments. Retrieved from <http://www.atra.org/sites/default/files/documents/Enact-Dec05.pdf>.
19. The American Medical Association, Amicus Curiae Brief on Behalf of the Medical Association of Georgia and the American Medical Association. Retrieved from <http://www.ama-assn.org/ama1/pub/upload/mm/395/gliemmo-vcousineau.pdf>.
20. Manly, R. and Purser, B. Jury awards Warner Robins Woman \$5 million for leg amputations below the knee. The Telegraph. September 25, 2012. Retrieved from <http://www.macon.com/2012/09/25/2191093/jury-awards-warner-robinswoman.html>.
21. Patients for Fair Compensation, Patients' Compensation System Introduced in Florida Legislature. Retrieved from <http://www.patientsforfaircompensation.org/microsites/florida/news/patients%E2%80%99-compensation-system-introduced-in-florida-legislature/>.
22. The Medical Liability Monitor, April 2013 Vol 38, No. 4.
23. Indiana State Medical Society, Key Features of Indiana's Medical Malpractice Act. Retrieved from http://www.ismanet.org/pdf/legal/Overview_Med_Mal_Act_summary.pdf.
24. Indiana State Medical Society, Overview of Indiana Medical Malpractice Act. Retrieved from http://www.ismanet.org/legal/malpractice/#key_features.
25. Indiana State Medical Society, Strengths and Weaknesses. Retrieved from http://www.ismanet.org/legal/malpractice/strengths_weaknesses.htm.
26. Plank v. Community Hospitals of Indiana, Inc. & State of Indiana. No. 49S04-1203-CT-135 (Indiana Supreme Court). Retrieved from <http://www.in.gov/judiciary/opinions/pdf/01151301rdr.pdf>.
27. DiPietro, S., Carns, T., & Kelley, P. Alaska's English Rule: Attorney's Fee Shifting in Civil Cases. Alaska Judicial Council. Retrieved from <http://www.ajc.state.ak.us/reports/atyfeexec.pdf>.
28. American Tort Reform Association, Judicial Hellholes. Retrieved from <http://www.atra.org/newsroom/california-replaces-reforming-philly-atop-judicial-hellholes-%C2%AE-list-joined-jurisdictions>.
29. American Tort Reform Association. Retrieved from <http://www.atra.org/newsroom/louisiana-supreme-court-joins-growing-number-state-high-courts-upholding-limits-medical>.
30. The Medical Liability Monitor, November 2012 Vol 37, No 11.
31. The Medical Liability Monitor, Annual Survey, Annual Rate Survey Issue, October 2013, Vol. 38, No. 10.
32. Atkins, Annette (2008). Creating Minnesota: A History from the Inside Out. Minnesota Historical Society, pp. 242, 243, 248.
33. The Medical Liability Monitor, August 2013 Vol 38, No 8.
34. Mississippi Medical News <http://mississippimedicalnews.com/a-year-later-life-after-tort-reform-cms-330>
35. Medical Liability Reform NOW! The facts you need to know to address the broken medical liability system. Developed by The American Medical Association, 2013 edition <http://www.ama-assn.org/resources/doc/arc/mlr-now.pdf>
36. Diederich Healthcare Medical Malpractice Payout Analysis 2013 <http://www.diederichhealthcare.com/medical-malpractice-insurance/2013-medical-malpractice-payout-analysis/>

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37. Health Coalition On Liability Access <http://protectpatientsnow.org/content/medical-liability-reform-quick-trigger-legal-challenges>
38. American Tort Reform Association, <http://www.atra.org/newsroom/atra-lauds-maryland-high-court-decision-upholding-%E2%80%99contributory-negligence%E2%80%99-doctrine>
39. The Medical Liability Monitor, December 2013 Volume 38, Number 12
40. Shactman, Brian (August 28, 2011). "Unemployed? Go to North Dakota" CNBC.
41. The Medical Society of the State of New York, <http://readme.readmedia.com/NY-Physicians-Demand-Liability-Cost-Reduction-Protest-Medicare-Cuts-at-Annual-Meeting/5974656>
42. The Medical Liability Monitor, July 2013 Volume 38, No 7
43. The Medical Society of the State of New York, <http://readme.readmedia.com/Poll-Finds-New-York-State-Physicians-Frustrated-by-Liability-Costs-and-Mandates/7107979>
44. American Medical News - <http://www.amednews.com/article/20130610/profession/130619978/6/>
45. The Medical Liability Monitor, February 2013, Volume 38, No 2
46. The Medical Liability Monitor, May 2013, Vol 38, No 5
47. Missouri Watchdog.org, <http://watchdog.org/105583/mo-lawmakers-relax-volunteers-medical-malpractice-liability/>
48. Adam Liptak and Michael Moss (January 31, 2004). "In Trial Work: Edwards Left a Trademark" The New York Times
49. American Medical News - <http://www.amednews.com/article/20120723/profession/307239944/5/>
50. Silverman, Stacey Beth. Relationship Between Residency Training and Practice Location in Primary Care Residency Programs in Texas, ProQuest 2007
51. American Academy of Orthopedic Surgeons: <http://www.aaos.org/news/aaosnow/aug08/reimbursement4.asp>
52. National Resident Matching Program www.nrmp.org
53. Michigan Academy of Family Physicians, <https://www.mafp.com/advocacy/policy-issues/medical-liability-reform>
54. The Detroit News, <http://www.detroitnews.com/article/20131101/OPINION01/311010004>
55. Michigan Legislative website, <http://www.legislature.mi.gov/documents/2013-2014/billanalysis/House/pdf/2013-HLA-4354-92E633B4.pdf>
56. Michigan House of Representatives <http://house.michigan.gov/sessiondocs/2013-2014/testimony/Committee232-10-24-2013.pdf>
57. Massachusetts Medical Society <http://www.massmed.org/Advocacy/MMS-Testimony/Testimony-in-Support-for-S-1012-An-Act-Relative-to-Emergency-and-Disaster-Planning-for-Health-Care-Providers#.UshQO2RDsrw>
58. Massachusetts Medical Society <http://www.massmed.org/News-and-Publications/Vital-Signs/Back-Issues/Disclosure,-Apology-and-Offer--A-New-Approach-to-Medical-Liability#.UshVEmRDsrw>
59. The Oklahoman <http://newsok.com/many-oklahoma-towns-benefiting-from-states-booming-oil-economy/article/3926977>
60. USA Today http://usatoday30.usatoday.com/news/nation/census/2011-03-09-ohio-census_N.htm
61. The Medical Liability Monitor. November 2013, Vol 38, No 11
62. Constitution of The Commonwealth of Pennsylvania http://www.pahouse.com/pa_const.htm
63. Judicial Hellholes 2012-2013 http://www.judicialhellholes.org/wp-content/uploads/2012/12/ATRA_JH12_04.pdf
64. Huffington Post <http://www.huffingtonpost.com/tag/lebron-james-the-decision>
65. Forbes <http://www.forbes.com/sites/sportsmoney/2011/12/21/top-10-lessons-from-ohio-states-tattoo-gate/>
66. American Academy of Orthopedic Surgeons <http://www.aaos.org/news/aaosnow/sep08/reimbursement9.asp>
67. The Medical Liability Monitor. January 2013, Vol 38, No 1
68. Risk Management Monthly Emergency Medicine, From The Center for Medical Education, Inc., www.riskmanagementmonthly-emergencymedicine.com, Volume 7, Number 10
69. The Medical Liability Monitor. April 2014 Vol 39, No. 4
70. <http://caselaw.findlaw.com/ga-court-of-appeals/1616486.html>
71. Medical Malpractice Review Panel bill passes Kentucky Senate http://www.courier-journal.com/article/20140219/NEWS0101/302190099/Medical-malpractice-review-panel-bill-passes-Kentucky-Senate?gcheck=1&nlick_check=1
72. The Reporter 2013 Volume 5, "Ten Years of Ten-Gallon Tort Reform."
73. Risk Management Monthly Emergency Medicine, From The Center for Medical Education, Inc., www.riskmanagementmonthly-emergencymedicine.com, Volume 8, Number 4
74. Pre-filed Bill would restore caps on Medical Malpractice damages <http://www.msahq.com/pre-filed-bill-would-restore-caps-on-medical-malpractice-damages>
75. EP Monthly (<http://www.epmonthly.com/features/current-features/gross-negligence-a-slippery-slope-for-dubious-expert-testimony/>)
76. Thorpe, K. The Medical Malpractice 'Crisis': Recent Trends And The Impact Of State Tort Reforms (Health Affairs) 2004
77. Viscusi and Born. Damages Caps, Insurability, and the Performance of Medical Malpractice Insurance, Journal of Risk and Insurance Vol 72, Issue 1, March 2005
78. Kilgore, Morrissey, Nelson. Damage Caps in Medical Malpractice Cases Milbank Quarterly Volume 85, Issue 2, June 2007
79. Utah Legislature <http://le.utah.gov/~2009/bills/sbillint/sb0079s03.pdf>
80. Walker A "Malpractice" *Common Sense* March/April 2014
81. ED Leadership Monthly Volume 6, Number 3
82. American Medical News <http://www.amednews.com/article/20120924/profession/309249946/6/>
83. No. 10-1043 Texas Supreme Court <http://www.supreme.courts.state.tx.us/ebriefs/10/10104305.pdf>
84. Family Practice News <http://www.familypracticenews.com/single-view/texas-has-more-doctors-since-tort-reform/dd227721ce0abce885b311a812d06278.html>
85. Silver et al. Will Tort Reform Bend the Cost Curve? Evidence from Texas. Journal of Empirical Legal Studies Volume 9, pp 173-216 (2012)
86. South Carolina legislature <http://www.scstatehouse.gov/code/t15c032.php>
87. West Virginia legislature <http://www.legis.state.wv.us/wvcode/ChapterEntire.cfm?chap=55&art=7B>
88. USA Today <http://www.usatoday.com/story/money/business/2012/10/20/doctors-shortage-least-most/1644837/>
89. Business in Utah http://business.utah.gov/wp-content/uploads/BU_2014-Full-low-res.pdf
90. Medical Liability Monitor. February 2014 Vol 39, No. 2
91. Pediatric News <http://www.pediatricnews.com/news/single-view/wisconsin-law-shields-doctors-apologies-from-malpractice-cases/cc49c307e2877bbc81e1c330487cd643.html>
92. Medical Liability Monitor. March 2014 Vol 39 No. 3 ■