



WYOMING LEGISLATIVE SERVICE OFFICE

Research Memo

04 RM 024

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Re: Description of Statutory Provisions without Medical Liability Limits and Low Premiums

PURPOSE

Provide a description of the ten states with the lowest average medical malpractice insurance premiums that do not have damage caps and what measures those states have implemented to address the high costs of medical malpractice insurance.

RESULTS IN BRIEF

Based on a descriptive statutory analysis, no clear trend could be identified that explains why states with low average medical malpractice insurance premiums differ from Wyoming. The most noticeable statutory provision is that all ten states require expert testimony in statute. Further statistical analysis (regressions) may shed additional light on the causal relationship between statutory provisions in (a) "non-capped states," (b) other factors, and (c) relatively low insurance premiums. Based upon the descriptive analysis that follows, there appears to be limited evidence to support the claim that any single statutory provision, or potentially even any combination of provisions, is responsible for the comparatively low rates.

For this descriptive analysis, LSO relied upon the average unweighted premiums of the 2003 *Medical Liability Monitor* (MLM), as submitted to LSO by the requestor, to determine which ten states without damage caps would be included in the analysis. LSO also relied upon the 2004 American Medical Association (AMA) and 2003 National Association of Insurance Commissioners (NAIC) statutory summaries for legal provisions, not original sourcing.

Ten states are included in the analysis, all of them having lower average medical malpractice premium rates than Wyoming, as reported by the MLM. Two of the states have partial caps (Maine and Oklahoma) and the remaining eight have no cap on the amount of damages that can be received. Specifically Oklahoma limits damages on OB/GYN or emergency room care. Maine limits non-economic damages for wrongful death cases only.

STATUTORY PROVISIONS

Below is a brief summary of some items the ten states included in this analysis may employ with regard to medical malpractice. (See Table 1, page 2, for an easy reference comparison.)

Joint Liability Reform - Five of the states have joint liability reform and five of the states do not. Wyoming does have joint liability reform.

Collateral Source Reform - Seven of the ten states have instituted collateral source reform. Wyoming does not have collateral source reform.

Limit of Attorney's Fees - Six states do not limit attorney's fees and four states do, though one of the states only places partial limits on attorney's fees. Wyoming does limit attorney fees.

Periodic Payments - Five states do allow for the periodic payment of damage awards and five do not. Wyoming does not allow for periodic payment of damage awards.

Arbitration/Mediation - Five states permit arbitration/mediation and pre-trial screening panels, one state requires it, and four states do not have provisions for or allow this process. Wyoming allows arbitration, but it is not required.

Expert Testimony - Ten states require some form of expert testimony. In contrast, Wyoming does not specifically require expert testimony to establish negligence in statute.

Certificate of Merit - Three states require an affidavit or certificate of merit and the other seven do not. Wyoming does not require a certificate of merit

Statute of Limitations - The general statute of limitations for these ten states vary for each state and range from 2 years to 7 years with the average being approximately 4. The statutes of limitations for these states also depend upon the type and degree of medical malpractice. Wyoming's statute of limitations is generally 2 years, except in the case of minors and the disabled.

Profitability - According to the National Association of Insurance Commissioner's *Profitability by Line by State in 2002*, five of the states analyzed had a negative return on net worth for 2002 and five had a positive return. Wyoming

had a negative return on net worth in 2002. The numbers in Table 1 for Profitability reflect the overall return on net worth as a percentage of net worth.

CONCLUSION

In reviewing the above information, it is important to consider the vast and varied circumstances that may affect the costs of premiums in different states. Although the data collected by the LSO is quite detailed concerning medical malpractice, it only provides a snapshot of the larger issues concerning health care on the state and national levels. There are many factors that contribute to a state's overall medical malpractice situation and there does not appear to be one overriding factor that is common between all states without caps and low premiums.

ADDITIONAL READING

Medical Liability Monitor, 2003

American Medical Association (AMA): *State Laws Chart*, 2004

National Association of Insurance Commissioners (NAIC): *State Laws Chart*, 2003

Table 1. State Statutory Provision Reference

States	Joint Liability Reform	Collateral Source Reform	Limit Attorney's Fees	Periodic Payment Permitted	Arbitration/Mediation Allowed	Expert Testimony	Affidavit/Certificate of Merit	Statute of Limitations	Profitability (Percent of Net Worth)
Tennessee	Yes	Yes	Yes	No	Permitted	Yes	No	3 Years	-11.7
Oregon	Yes	Yes	Partial	No	No	Yes	No	5 Years	-8.1
Alabama	No	Yes	No	Yes	Permitted	Yes	No	4 Years	15.2
South Carolina	No	No	No	No	Permitted	Yes	No	6 Years	2.9
Vermont	No	No	No	No	Permitted	Yes	No	7 Years	-19.7
Arkansas	Yes	No	No	Yes	No	Yes	Yes	2 Years	-33.7
Maine	No	Yes	Yes	Yes	Mandatory	Yes	No	3 Years	13.8
Iowa	Yes	Yes	No	Yes	No	Yes	No	6 Years	16.6
Oklahoma	No	Yes	Yes	No	No	Yes	Yes	2 Years	-14.2
Minnesota	Yes	Yes	No	Yes	Permitted	Yes	Yes	4 Years	20.6
Wyoming	Yes	No	Yes	No	Permitted	No	No	2 Years	-1.4

Source: LSO summary of AMA (2004) and NAIC (2003) state law charts, and NAIC *Profitability by Line by State*, 2002.

STATE LAWS: Liability Reform Low Premium/Non-Cap States

STATE	Joint Liability Reform	Collateral Source Reform	Limited Attorney Fees	Periodic Payments Permitted	Arbitration/Mediation and Pre-Trial Screening Panels	Expert Testimony and Qualifications	Affidavit/Certificate of Merit	Statute of Limitations
Tennessee	Yes. Courts have held joint and several liability obsolete.	Yes. Damages awarded will be reduced by collateral sources of payment. Such reduction shall be offset by the amount paid by the claimant to secure the benefit.	Yes. Attorney compensation shall be awarded by the court, but may not exceed 33 1/3% of total damages.	No.	Not mandated, but permitted. (Tenn. Code An. § 29-5-101)	Expert witnesses must be licensed in Tennessee or a contiguous bordering state in a profession or specialty which would make that person's expert testimony relevant to the issues of the case and have practiced in such profession or specialty during the year preceding the date the alleged injury or wrongful act occurred. The court can waive the requirement if an appropriate witness is not available.	No.	<p>Medical malpractice: within one year after discovery of the injury, but no more than three years after the alleged negligence occurred, except in cases of foreign objects. (Tenn. Code Ann. Sec 29-26-116)</p> <p>Minors, unsound mind: within one year following removal of the disability. (Tenn. Code Ann. § 28-1-106)</p>
Oregon	Yes. Defendants are responsible only for their proportionate share of negligence, but if within one year after the final judgment the court determines that all or part of a defendant's proportionate share is uncollectible, it shall reallocate the uncollectible noneconomic damages among other defendants according to their percentages of negligence.	Yes, but no deduction can be made for life insurance, benefits for which the claimant has paid, retirement/disability, social security, or insurance benefits for which the person injured or deceased paid premiums.	Partially. Attorney fees recovered from an award for punitive damages are limited to 20% of the 40% paid to the prevailing party. No limit on attorney fees for economic or noneconomic damages.	No	No provision.	Expert testimony is required to establish a prima facie case, unless the negligence is obvious to a lay person.	No	<p>Medical malpractice: within two years of the date an injury is or should reasonably have been discovered, but in no event more than five years from the date of treatment.</p> <p>Wrongful death: within three years after the injury causing the death is or should reasonably have been discovered, but in no event more than three years after the date of death or five years as applicable to the medical malpractice statute.</p> <p>Minors through age 18, insane: statute is tolled until disability is removed, but such extension shall not last longer than five years for any disability, nor shall it be extended in any case longer than one year after such disability ceases. (ORS § 12.110 and 12.160)</p>

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Alabama	No. Each defendant is jointly and severally liable.	Yes	No	Yes. For awards of future damages in excess of \$150,000	Arbitration is permitted if both parties agree in writing. Arbitration agreements are valid, binding, irrevocable, and enforceable, except as otherwise permitted in contract law. Both parties shall select one competent and disinterested arbitrator and the two arbitrators shall select a third arbitrator. The arbitrators shall follow the rules and procedures set forth by the American Arbitrators Association. Their written decision is binding. Each party pays the fee for their own arbitrator and splits the expenses for the third. (Code. Of Ala. § 6-5-485)	Expert testimony is mandatory, unless an understanding of the defendant's lack of due care or skill requires only common knowledge or experience. Experts must be certified in the same specialty as the defendant and must have practiced within the past year.	No	Medical malpractice: within two years of the act or omission giving rise to the cause of action, unless the cause of action was or could not have reasonably been discovered within the two years. In such cases, an action must commence within six months of its discovery, with a maximum limit of four years from the time of the act / omission giving rise to the action. Minors: statute does not begin to run until age eight. (Code. Of Ala. § 6-5-482)
South Carolina	No. Each party is jointly and severally liable.	No	No	No	Not mandated, but permitted.	Expert testimony must be introduced to prove the defendant did not meet the standard of care, unless a layperson would be capable of inferring negligence.	No	Medical malpractice: within three years from the date of the occurrence, or within three years from the date it should have been discovered, but in no event more than six years from the date of the occurrence. (SC Code Ann. 15-3-545) Wrongful death: same (SC Code Ann. 15-3-545) Discovery of a foreign object: within two years from the date of discovery. (SC Code Ann. 15-3-545) Minor: statute is tolled. (SC Code Ann. 15-3-545) Insanity: statute is tolled for no more than five years from the date of the occurrence, or one year after the disability is lifted. (SC Code Ann. 15-3-40)

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Vermont	No. Each party is jointly and severally liable.	No	No	No	All parties may agree to submit the claim to arbitration. The panel shall consist of three members, including a judicial referee, layperson, and member of the same profession as the defendant. The panel must issue a written decision, which shall state certain findings of fact, and shall specify damages if such decision is in favor of the defendant. Either party may appeal the panel's decision. (12 V.S.A. § 7001)	Expert testimony is required to establish a deviation from the applicable standard of care, unless the negligence is so apparent as to be comprehensible to an average juror. (12 VSA Ch. 61 § 1643)	No	<p>Medical malpractice: within three years from the date of the alleged conduct, or two years from the date the plaintiff knew/should have known of the alleged injury, but in no event more than seven years after the alleged conduct.</p> <p>Foreign object: within two years from the date the object was discovered (seven year limit does not apply)</p> <p>Minor or Insane: Same, following removal of the disability (12 VSA §§ 521 and § 551)</p>
Arkansas	Yes. Except where the court determines, upon motion by the plaintiff and by a preponderance of the evidence, that all or part of each defendant's share will not be reasonably collectible. The court shall increase the percentage points of the several share attributed to each of the remaining defendants as follows: defendants 10% or less at fault - no increase; defendants 10-50% at fault - no more than a 10% increase; defendants 50% or more at fault - no more than a 20% increase	No	No	Yes, mandatory, upon motion by either party, for future damages in excess of \$100,000.	No provision	In any action for medical negligence, the plaintiff must establish negligence through expert testimony provided by a medical care provider in the same specialty as the defendant. (Ark. Stat. Ann. § 16-114-206(a))	Within 30 days after the complaint is filed, plaintiffs must file an affidavit of merit, signed by an expert in the same specialty as the defendant. The affidavit must state with particularity: the expert's familiarity with the applicable standard of care, the expert's qualifications, the expert's opinion as to how the applicable standard of care has been breached, and The expert's opinion as to how the breach resulted in the injury or death. Failure to file affidavit of merit shall result in dismissal of the complaint. (Ark. Stat. Ann. § 16-114-209)	<p>Medical malpractice: within two years of the wrongful act.</p> <p>Discovery of a foreign object: within one year of its discovery or when it could have reasonably been discovered.</p> <p>Minor under age 9 at the time of the wrongful act: before his/her eleventh birthday, or within two years from the act, omission, or failure unless no medical injury is known or could have been reasonably discovered prior to the minor's eleventh birthday, then the minor shall have two years after the date in which such injury could have reasonably been discovered, or until the minor's 19th birthday, whichever is earlier. (Ark Stat. Ann. § 16-114-203)</p>

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Maine	No. Each defendant is jointly and severally liable.	Yes. Evidence is admissible after a verdict has been rendered, and the judgment must be reduced by the amount received from collateral sources.	Yes. Fees are limited to 33 1/3% of the first \$100,000; 25% of the next \$100,000; and 20% of amounts over \$200,000.	Yes. If damages exceed \$250,000 either party may request periodic payment.	Mandatory pre-litigation screening panel, which shall consist of a chair appointed by the Chief Justice and an attorney and health care provider selected by the chair. The panel shall submit a written opinion determining whether the acts or omissions of the defendant proximately caused the injury complained of, and if so, whether the negligence of the plaintiff was equal to or greater than that of the defendant. The findings of the panel are confidential and not admissible as evidence except if the panel's determination was unanimous in favor of the plaintiff or defendant and the opposing party takes the case to trial based on the same facts. (24 MRS §§ 2851 through 2589)	Expert testimony is required to establish a prima facie case of negligence, unless the facts can clearly demonstrate negligence to the layperson.	No	<p>Medical malpractice injury and wrongful death: within three years of the alleged wrongful act or omission.</p> <p>Foreign object cases: statute of limitations does not accrue until the object is / should reasonably have been discovered.</p> <p>Minors: within six years of the alleged wrongful act / omission, or within three years of reaching majority, whichever comes first. (24 MRS § 2902)</p>
Iowa	Yes. Defendants are responsible only for their proportionate share of negligence where a defendant is found to bear less than 50% of the total fault. If a defendant is 50% or more liable, he is jointly and severally liable for economic damages only.	Yes, and damages must be reduced by the amount received from collateral sources.	No, but courts determine reasonableness of fee arrangements.	Yes. Any party may request periodic/structured payment. Court determines the reasonableness.	No requirements	Medical malpractice claims must be established through the use of expert testimony, unless the facts clearly establish negligence. The expert's qualifications must relate directly to the medical problem or problems at issue and the type of treatment administered in the case. (Iowa Code § 147.139)	No	<p>Personal injury or death: within two years of the date the claimant became aware of the injury or should have discovered the injury through reasonable diligence, whichever occurs first. In no event may an action be brought more than six years from the date from which the alleged wrongful act or omission took place unless a foreign object unintentionally left in the body caused the injury or death.</p> <p>Minors: under the age of eight shall be brought no later than the minor's tenth birthday or as provided in the general statute of limitations for personal injury or death, whichever is later. (Iowa Code § 614.1)</p>

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Oklahoma	No. Each party is jointly and severally liable. However, case law has held that several liability exists where a claimant is held partially responsible for a tortious act.	Yes. In any medical liability action, the court will admit evidence of payments made to the plaintiff from collateral sources unless the court makes a determination that the payment from a collateral source is subject to subrogation or other right of recovery.	Yes. In contingency fee arrangements, attorney may not contract to receive more than 50% of the recovery.	No	No provision.	Expert testimony must generally be used to establish causation in medical liability cases, unless the alleged negligence is apparent to a layperson.	Yes. A plaintiff in a medical liability action must obtain a written opinion from a qualified expert stating that the acts or omissions of the health care provider against whom the action is brought constituted professional negligence. A "qualified expert" is a health care provider who has knowledge of standards of care relevant to the medical liability claim at issue in the case. The opinion must be provided to defense counsel within ten (10) business days of request, and must specifically state the acts or omissions that constitute the alleged negligence. The certificate of merit is not discoverable or admissible at trial.	<p>Medical malpractice: within two years from the date upon which the claimant knew or should have known of the alleged injury.</p> <p>Wrongful death: within two years from the date of death.</p> <p>Minors under 12: within seven years from the date of injury.</p> <p>Minors 12 and over: within one year from obtaining the age of majority, but not more than two years from the date of injury.</p> <p>Incompetence: within seven years from the date of the injury, and within one year after deemed competent. (76 Okl. St. § 18 and 12 Okl. St. § 96)</p>
Minnesota	Yes. Joint and several liability law is abolished except for the following persons: persons who are greater than 50% at fault, persons who engage in a common scheme or plan that causes the injury, persons who commit an intentional tort, or persons whose liability is based on an environmental or similar statute.	Yes, within 10 days of the verdict and upon motion of a party. In such cases, the court must reduce the award by the amount received from collateral sources. Such reduction shall be offset by any amount paid by the plaintiff to secure the award.	No	Yes. Court must hold hearing in cases where future damages exceed \$100,000 to allow the claimant to consider if damages should be paid periodically.	Arbitration of medical malpractice disputes is not required, but a system of voluntary, non-binding ADR processes has been established to assist the courts. (Minn. Stat. § 484.76)	Expert testimony is required to establish a prima facie medical malpractice claim, particularly with regard to the alleged deviation from the standard of care by the defendant, and the consequences of such deviation.	An affidavit must be filed in cases in which expert testimony is required to establish a prima facie case within 180 days of filing a claim. The affidavit must state that a qualified expert has reviewed the facts and has determined that one or more defendants deviated from the applicable standard of care. Failure to file the certificate will result in dismissal of each cause of action in which expert testimony is necessary to establish a prima facie case. (Minn. Stat. § 145.682)	<p>Medical malpractice/personal injury/other: within four years from the date the cause of action accrued. (Minn. State. § 541.076)</p> <p>Wrongful death: three years from the date of death no longer than four years from the date of harm. (Minn. Stat. § 541.16)</p> <p>Infant: tolled until plaintiff reaches the age of maturity. The extension shall not exceed beyond seven years or one year after the disability is removed. (Minn. Stat. § 541.15)</p> <p>Insanity: statute is tolled until the disability is removed. The extension shall not be extended for more than 5 years, nor more than one year after the disability is removed. (Minn. Stat. § 541.15)</p>

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Wyoming	Yes. Defendants are responsible only for their proportionate share of negligence.	No	Yes. When recovery is \$1 million or less as follows: 33 1/3% if claim is settled prior to or within 60 after filing; 40% if claim is settled more than 60 days after filing or upon judgment. If recovery is more than \$1 million, 30% of recovery in excess of \$1 million is considered reasonable. (Rule 5 of the Rules Governing Contingent Fees for Members of the Wyoming State Bar.)	Not mandated	Arbitration permitted but not required. (W.S. 1-36-101 et seq)	None specifically required in statute.	No	<p>Medical malpractice claims must be brought within two years from the alleged act, error, or omission. If the claimant can prove the alleged act, error, or omission was not discoverable within a two year period, or failed to discover it within the two years despite due diligence then the cause of action must be brought within two years from the date of discovery. (If act discovered during the 2nd year of the two year period from the date of the act, the statute of limitations shall be extended six months)</p> <p>Minor: must be brought before minor's eighth birthday or as above, whichever is greater.</p> <p>Disabled: within one year from the removal of the disability. (Wyo. Stat. 1-3-107)</p>

Source: American Medical Association, Advocacy Resource Center

Notes:

- 1) Based on information originally prepared by National Conference of State Legislatures (NCSL)
- 2) Unlike information on Wyoming's neighboring states, LSO has not verified the accuracy of this information