

Medical Liability and the Emergency Physician: A State by State Comparison — Part 2

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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 fled.

Which states are particularly favorable for emergency physicians and why? State by state information on medical liability has been compiled many times, but data specific to emergency medicine has 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 the (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 second installment of this state by state review. The initial installment appeared in the July/August issue of *Common Sense* and analyzes the first ten states in alphabetical order, Alabama to Florida (available at www.aaem.org/publications/common-sense). It includes a "methods" section detailing how the ratings are calculated.

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 ten states, Georgia to Maine.

Georgia ★★★★★ 3.5 stars out of 5

Caps: None.³

Average 2012 premiums: \$30,000-\$50,000 for \$1 million/\$3 million coverage for EM.⁵

Liability environment for emergency physicians: Prior to its damage caps being overturned in 2010,⁴ Georgia was lauded as having the best medical liability environment for emergency physicians in the United States. In 2005, Senate Bill 3 was passed, which included a section detailing an enhanced burden of proof for cases arising out of emergency medical care. To recover in these cases, a claimant must prove gross negligence by clear and convincing evidence, a standard more rigorous than a mere preponderance of evidence.¹⁸ The Georgia Supreme Court rejected a constitutional challenge to this section in *Gliemmo v.*

Cousineau in 2010.¹⁹ However, this section is in the process of being challenged once again.²⁰ Additional strengths regarding the Georgia liability environment include: joint liability reform,³ a two year statute of limitations,⁸ and an extremely stringent expert witness reform package.⁸ Unfortunately, damage caps that were initially put into place in 2005 were declared unconstitutional in 2010.⁴ In 2013, legislation (Senate Bill 141) was introduced to transform the Georgia medical malpractice system into something similar to a no-fault workers compensation model, in an attempt to reduce health care costs and decrease defensive medicine. Not surprisingly, the bill received support from physicians, but it is unlikely to be voted on in this year's legislative session.²²

Assessment: Specific laws putting an increased burden of proof on plaintiffs and redefining malpractice as gross rather than ordinary negligence in the emergency setting have been upheld, and have been successful (anecdotally) in recruiting and retaining EM physicians. Caps were recently declared unconstitutional, but this has not made a significant impact (this comes from multiple conversations with practicing GA emergency physicians throughout 2012). Grade: 3.5 stars out of 5.

Hawaii ★★★★★ 3.75 stars out of 5

Caps: \$375,000 cap on non-economic damages (soft cap).³

Average 2012 premiums: \$10,000 for IM, \$37,000 for GS.¹

Liability environment for emergency physicians: All things considered, EPs in Hawaii enjoy a favorable medical liability environment. Hawaii is one of the few states to have implemented mandatory pretrial screening panels.⁸ Hawaii has a cap on non-economic damages,³ low premiums,¹ soft limits on attorney fees,³ joint and several liability reform,³ and relatively low average malpractice award payments.⁷ Hawaii does not have any expert witness reform whatsoever⁸ and the state lacks additional protections for physicians providing EMTALA-mandated emergency care — this has created problems retaining specialty call coverage throughout the state (personal communication, 2012).

Assessment: Mandatory panels, strong reforms, damage caps, and low premiums = terrific liability environment for EM physicians. Grade: 3.75 stars out of 5.

Idaho ★★★★★ 3.75 stars out of 5

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

Average 2012 premiums: \$4,500-\$7,000 for IM, \$16,000-\$30,000 for GS.¹

Liability environment for emergency physicians: Idaho does have a cap on damages, but it is a soft cap that is adjusted for inflation.³ Also, it does not apply to cases involving subjective "willful or reckless conduct" or "felonious acts."²³ Idaho EPs enjoy relatively low annual premiums¹

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and the state has enacted joint and several liability reform,³ and has a two year statute of limitations.³ Negative aspects regarding Idaho's liability climate include no limits on attorney fees,³ no expert witness reform whatsoever,⁸ and no specific provisions to protect physicians providing care in the emergency setting.

Assessment: Idaho's cap on non-economic damages is helpful. Additional reforms have been modest. Premiums remain low. Grade: 3.75 stars out of 5.

Illinois ★★★★★ 0.5 stars out of 5

Caps: None.³

Average 2012 premiums: \$13,000-40,000 for IM, \$45,000-\$127,000 for GS.¹

Liability environment for emergency physicians: Illinois has twice adopted tort reform legislation that included caps on non-economic damages for medical malpractice claims, but neither act remains in force. Most recently, caps were enacted in 2005, only to be found unconstitutional in 2010 (*Lebron v. Gottlieb*).⁴ Illinois is a litigious state with a remarkably high number of attorneys and malpractice claims filed per capita.^{7,15} There is immense variation within the state with multiple counties (Cook, Madison, St. Clair) identified by the American Tort Reform Association (ATRA) as "judicial hellholes."¹⁷ EM physicians in these counties will pay some of the highest premiums in the country — typically covered by one's employer, resulting in markedly reduced salary.¹ The average malpractice award payment (\$585,000+) is one of the highest in the nation.⁷ Illinois enacted a sliding scale limiting attorney fees, but this sliding scale was eliminated in January 2013. The law simply granted trial attorneys a significant pay raise, and they now collect 33.3 percent of the plaintiff's award.¹¹

Assessment: Illinois has been and probably always will be a highly litigious state. High premiums and the absence of caps (repeatedly overturned) create a challenging environment for EM physicians. Grade: 0.5 stars out of 5.

Indiana ★★★★★ 4.75 stars out of 5

Caps: \$1.25 million cap on TOTAL damages (hard cap).³

Average 2012 premiums: \$13,000-\$21,000 for EM. Approximately \$8,000 goes to the Patient Compensation Fund and \$5,000-\$13,000 for insurance premiums, for a full-time EP with standard \$250k/\$750k policy limits. This is based on my past experience and data from ProAssurance, my former insurance carrier (personal communication, 2012).

Liability environment for emergency physicians: Indiana has a long history of providing its physicians with a relatively safe and welcoming medical liability environment.²³ Due to a health care crisis in the state in the 1970's, Gov. Otis Bowen, a physician, pushed through the Indiana Medical Malpractice Act of 1975 in an effort to recruit and retain quality physicians. This reform package has several components which have stood the test of time: the mandatory implementation of medical review panels (before patients can sue, a complaint must be filed with the Indiana Department of Insurance and the case must be reviewed by a panel of three physicians), a hard cap on total damages, a two year

statute of limitations, and stringent limits on attorney fees.²⁴ Indiana is one of the only states to continually uphold a hard cap on total damages. Plaintiffs cannot recover more than \$1.25 million on any case regardless of the circumstances. Physicians are responsible for no more than \$250,000, resulting in low insurance premiums. Physicians typically do not carry policy limits beyond \$250k/\$750k. Any additional award is paid by the Indiana Patient Compensation Fund, up to a total of \$1.25 million.²⁴ Despite these reforms, the liability climate does have a few weaknesses: no joint and several liability reform,³ weak expert witness reform,⁸ and no specific reforms protecting emergency physicians and physicians providing EMTALA-mandated emergency care. Reforms passed as part of the Indiana Medical Malpractice Act have been repeatedly criticized. Regarding the Medical Review Panel, the process is time consuming, with an average of 32 months elapsing between filing a complaint and receiving a final panel opinion — and this is before a complaint can even be filed as a lawsuit. While the \$1.25 million cap on total damages is admirable, there is no cap on non-economic damages, resulting in plaintiffs repeatedly pushing for awards exceeding \$1 million for pain and suffering, loss of companionship, etc. The cap has been raised multiple times in the past and many still believe that it is not high enough in certain circumstances.²⁵ Its constitutionality has been challenged and successfully defended multiple times. In January 2013, the constitutionality of the cap was once again successfully defended in the Indiana Supreme Court (*Plank v. Community*).²⁶

Assessment: Unique reforms that have stood the test of time, including medical review panels and a hard damage cap, have successfully protected EM physicians for many years. Grade: 4.75 stars out of 5.

Iowa ★★★★★ 3.5 stars out of 5

Caps: None.³

Average 2012 premiums: \$8,000-\$10,000 per year for a full-time EP with standard policy limits (personal communication with a colleague who practices there, 2012).

Liability environment for emergency physicians: Iowa is known for being a very non-litigious state, with a low number of practicing attorneys per capita,¹⁵ low numbers of cases filed,⁷ and low average malpractice awards.⁷ The absolute lack of reform opens the door to potential disaster, but many residents believe that caps and reforms are unnecessary because people in the state are "unlikely to sue," according to multiple colleagues who now practice there (personal communications, 2012). Iowa lacks a cap on damages³ and the state has enacted no reform whatsoever in regard to expert witnesses.⁸ Iowa does have joint and several liability reform, a two year statute of limitations, and soft limits on attorney fees.^{3,8} Most notably, EPs enjoy remarkably low annual malpractice premiums.¹

Assessment: Overall, a non-litigious state. Very low premiums despite the absence of meaningful reform. Grade: 3.5 stars out of 5.

Kansas ★★★★★ 5 stars out of 5

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

Average 2012 premiums: \$13,000-\$16,000 for EM (personal communication, 2013).

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Liability environment for emergency physicians: The Jayhawk state's exemplary liability environment has stood the test of time. Kansas enacted a law in 1988 capping non-economic damages at \$250,000.³ This hard cap (with no adjustments for inflation) has been successfully defended on multiple occasions, most recently in October 2012.³⁰ In an effort to keep frivolous cases out of the courts, Kansas offers voluntary pre-screening panels made up of three physicians and a non-voting lawyer. This panel can be requested by either side.⁸ Additional strengths include joint and several liability reform,³ a two year statute of limitations,⁸ and stellar expert witness reform.⁸ Kansas is one of the few states to require experts to have an active clinical practice in the same specialty as the defendant.⁸ And trial lawyers are hard to find in Kansas — the state has the fourth lowest concentration of attorneys of any state in the union.¹⁵ Minor weaknesses include the lack of collateral source reform,³ the absence of periodic payment reform,³ and no limits on attorney fees.³

Assessment: With a recently upheld cap on non-economic damages and consistently low premiums, Kansas EPs can celebrate and rest easy. Grade: 5 stars out of 5.

Kentucky ★★★★★ 2.5 stars out of 5

Caps: None.³

Average 2012 premiums: \$20,000-\$30,000 for EM (personal communication, 2013).

Liability environment for emergency physicians: Just like the race track at Churchill Downs, Kentucky's medical malpractice environment is dangerous and gritty. Most notably, Section 54 of the state's constitution specifically prohibits caps on damages.³ In addition, Kentucky has absolutely no expert witness reform. Experts are not required to practice clinically, nor do they need to be in the same state nor the same specialty as the defendant.⁸ Furthermore, the state does not require the plaintiff to attach an expert's affidavit to the complaint, opening wide the door to frivolous lawsuits.⁸ Kentucky has no collateral source reform,³ no limits on attorney fees,³ no periodic payment reform,³ and only partial joint and several liability reform.³ On a positive note, annual premiums for EPs are slightly below the national mean,¹ there is a relatively low concentration of attorneys — 10th lowest in the country,¹⁵ and Kentucky is one of the few states to uphold a one year statute of limitations as opposed to the customary two years.⁸

Assessment: Despite lacking meaningful reform of any kind, premiums in the Bluegrass state remain modest.¹ Grade: 2.5 stars out of 5.

Louisiana ★★★★★ 3.75 stars out of 5

Caps: \$500,000 on total damages, excluding damages recoverable for future medical care (hard cap).³

Average 2012 premiums: \$16,600-\$18,000 for IM, \$52,700-\$60,400 for GS.¹

Liability environment for emergency physicians: The Pelican State possesses a dynamite tort reform package, but premiums for EPs are curiously high¹ and the state has been chastised by ATRA for being overly litigious and plaintiff-friendly.²⁸ Louisiana has a \$500,000 cap

on total damages, excluding damages recoverable for future medical care.³ This cap has been successfully upheld numerous times,³ most recently in March of 2012.²⁹ Providers are responsible for no more than \$100,000 per decision — a state PCF (patient compensation fund) covers any excess amount awarded up to the cap.⁸ Like Kansas and Indiana, in an attempt to keep frivolous lawsuits out of the courts all cases are pre-screened by a panel consisting of three physicians and one non-voting lawyer.⁸ Additional favorable state laws include joint and several liability reform³ and a one year statute of limitations.⁸ On the negative side of things, Louisiana has no collateral source reform,³ no limits on attorney fees,³ and no expert witness reform.⁸ Experts are not required to be in clinical practice, nor do they need to be in the same specialty or state as the defendant.⁸

Assessment: Louisiana's reforms look spectacular on paper, yet premiums remain high¹ and the state is known to be plaintiff-friendly.²⁸ Grade: 3.75 stars out of 5.

Maine ★★★★★ 3.5 stars out of 5

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

Average 2012 premiums: \$16,000 for EM with standard policy limits (personal communication, 2013).

Liability environment for emergency physicians: Reforms have been modest at best, but EPs in Maine pay the lowest premiums in the Northeast.¹ Maine has a \$500,000 cap on non-economic damages, but it is only applied in cases of wrongful death.³ Additional positives include collateral source reform,³ sliding scale limits on attorney fees,³ and periodic payment reform.³ Also, Maine is one of the few states to have enacted mandatory pre-trial screening panels.⁸ Unfortunately, expert witness reform is nonexistent.⁸ Additional negatives include the lack of joint and several liability reform³ and a three year statute of limitations.⁸

Assessment: Minimal tort reform, but with remarkably low premiums¹ the Pine Tree State is the east coast's superstar. Grade: 3.5 stars out of 5.

Look for this series to continue in future issues!

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