Medical Professional Liability Tort Reforms, Times They Are-A-Changin' (Again!)

Casualty Actuarial Society - Casualty Loss Reserve Seminar
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Loss Paid per Capita by State 2012-to-2021 (Physician Only)

Medical professional liability risk varies significantly by state.

Differences by state depend on various factors
- Cost of living / medical care
- Liability environment
- Tort reform
- Available data

Loss data includes only those companies filing Annual Statement with NAIC. Excludes self-insurance; most captives; PCFs, etc.

Countrywide Weighted Average excl NY $6.27

Source: Physician Direct Paid Loss from NAIC Insurance Company Annual Statements Supplement A to Schedule T; Population data from U.S. Census Bureau.
Chart excludes New York ($39.39) for presentation purposes.

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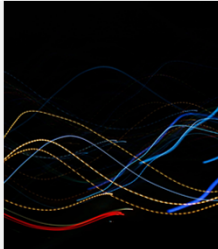
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Typical MPL Tort Reforms

Caps on damage amounts

Caps on plaintiff attorney continency fees

Collateral source rules

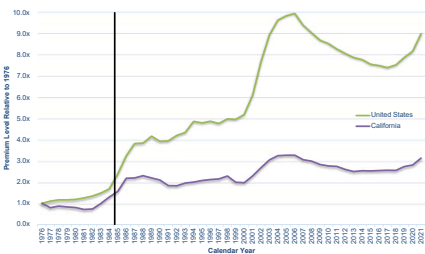Statute of limitations

Certificate of merit

Other

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MPL Premiums 1976+, California vs US Overall

California's Medical Injury Compensation Reform Act (MICRA)
- Enacted 1975
- Fein v. Permanente Medical Group 1985
- $250,000 non-economic damage cap
- Collateral source exceptions
- Sliding scale for plaintiff attorney contingency fees

Premium data includes only those companies filing Annual Statement with NAIC.

Source: NAIC Insurance Company Annual Statements (1996+ Med Professional Liability DPW by State from S&P Capital IQ Pro; prior from Annual AM Best Insurance Reports)

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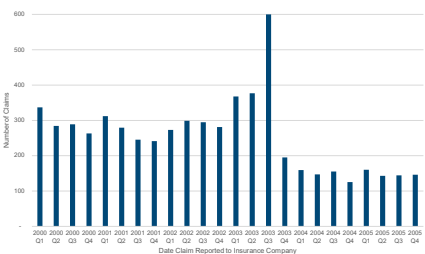
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Texas MPL Claims Reported 2000 through 2005

Proposition 12
- September 2003 Ballot Initiative
- Constitutional Amendment allows legislature to implement non-economic damage caps

Texas House Bill 4
- Effective September 2003
- $250,000 non-economic damage cap

Data from multiple versions of the Texas Department of Insurance Closed Claim Surveys
Includes Medical Professional Liability claims closed between 2000 and 2012

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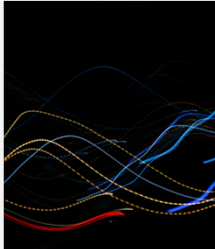

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Fairness for Injured Patients Act

California ballot initiative
- Originally scheduled November 2020
- Delayed to November 2022
- Pulled from ballot with passing of Assembly Bill 35

Inflation adjust
- MICRA $250,000 non-economic damage cap
- Sliding scale commission rates for plaintiff attorney fees

Definition of "catastrophic injuries" exempt from damage cap and attorney fee limits

Revert to traditional collateral source rules

Other changes (statute; certification of merit; etc.)

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California Assembly Bill 35

FIPA compromise; Sponsored by
- Consumer Attorneys of California
- Californians Allied for Patient Protection

AB 35 signed by California Governor on May 23, 2022

Effective January 1, 2023, AB 35 will
- Increase cap on non-economic damages
- Change attorney contingency fee limits
- Change threshold of payments that qualify for periodic payments
- Specify the admissibility of expressions of sympathy, etc. made prior to filing of a claim

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AB 35 Non-Economic Damage Cap

- Cases filed or arbitrations demanded on or after, January 1, 2023
  - Cap applies for each of up to three defendants and depends on the year the claim is resolved.

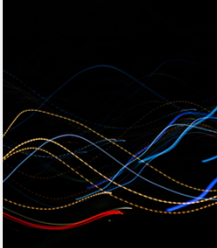| Year Claim Resolved	Claim Filed Prior to 2023 (per Claimant)	Claim Filed 2023+ (per Stacked Defendant)	
		Wrongful Death	Other
2023	$250,000	$500,000	$350,000
2024	250,000	550,000	390,000
2025	250,000	600,000	430,000
2026	250,000	650,000	470,000
2027	250,000	700,000	510,000
2028	250,000	750,000	550,000
2029	250,000	800,000	590,000
2030	250,000	850,000	630,000
2031	250,000	900,000	670,000
2032	250,000	950,000	710,000
2033	250,000	1,000,000	750,000
2034+	250,000	+2.0% per year	+2.0% per year

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Estimated Impacts of Assembly Bill 35

Number of Claims
Increased incentive to file

Size of Claims
Increased non-economic damages
Increased defense costs

Other Impacts
Delay in claim filings until 2023
Delay in claim resolution
Cap increases based on resolution date
Attorney contingency fee limit
Increase in claim volume
Uncertainty as new case law is developed (stacking of caps)

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Modeling Overview

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Model Introduction
Background

- Simulation model – used for impact analysis for many states
- No two scenarios are the same
  - Current environment
  - Proposed environment
- Caps structures vary
  - Non-economic loss only versus total loss
  - Wrongful death versus non-wrongful death
  - Inflation-adjusted versus stable cap
  - Physicians versus non-physicians

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ASOP 56 Considerations
3.1.4 Model Structure

The actuary should assess whether the structure of the model (including judgments reflected in the model) is appropriate for the intended purpose. The actuary should consider the following, as applicable, for a particular model:

d. which provisions and risks specific to a business segment, contract, or plan, if any, or interactions more broadly, are material and appropriate to reflect in the model;

e. whether the form of the model is appropriate, such as a projection model (deterministic or stochastic), statistical model, or predictive model;

f. whether the use of the model dictates a particular level of detail, for example, whether grouping inputs will produce reasonable output, or whether a certain level of detail in the output is needed to meet the intended purpose;

g. whether there is a material risk of the model overfitting the data; and

h. whether the model appropriately represents options, if any, that could be reasonably expected to have a material effect on the output of the model. Examples include call options on fixed income assets, policyholder surrender options, and early retirement options.

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Model Structure
Hospitals and Physicians

Total Loss

Stacked cap based on number of physician and hospital claims

Physicians   Hospitals

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Model Structure
Wrongful Death versus Non-Wrongful Death

Total Loss

Stacked cap based on number of physician and hospital claims

Cap varies based on wrongful death or non-wrongful death

Physicians   Hospitals

Wrongful Death   Non-Wrongful Death   Wrongful Death   Non-Wrongful Death

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Model Structure
Economic versus Non-Economic Losses

Stacked cap based on number of physician and hospital claims

Cap varies based on wrongful death or non-wrongful death

Cap applies to non-economic losses only
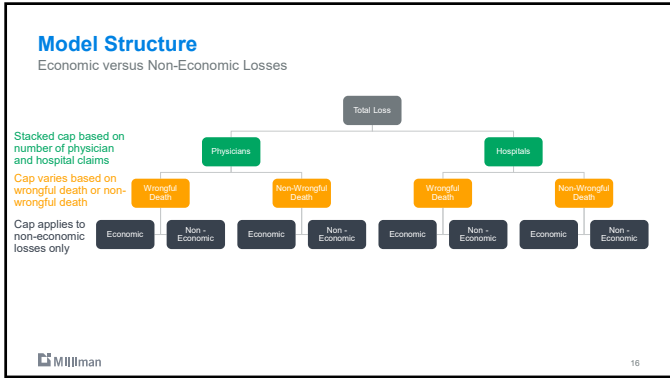
Total Loss → Physicians, Hospitals

Physicians → Wrongful Death, Non-Wrongful Death

Hospitals → Wrongful Death, Non-Wrongful Death

Wrongful Death → Economic, Non-Economic

Non-Wrongful Death → Economic, Non-Economic

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Data Sources

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ASOP 56 Considerations
3.1.6 Assumptions Used As Input

d1Setting Assumptions—When setting assumptions for which the actuary is taking responsibility, the actuary should consider using the following data or information:

1. **actual experience** properly modified to reflect the circumstances being modeled, to the extent actual experience is available, relevant, and sufficiently reliable;

2. **other relevant and sufficiently reliable experience**, such as industry experience that is properly modified to reflect the circumstances being modeled, if actual experience is not available, relevant, or sufficiently reliable;

3. future expectations or estimates, including those derived from market data, when available and appropriate; and

4. other relevant sources of data or information.

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Data Sources
Overview

California Data	Other Sources
• NPDB claim-level detail • Annual Statement data • Milliman's Aggregated HPL Database	• Economic versus non-economic losses • Relationship between loss and ALAE • Wrongful death versus non-wrongful death losses • Frequency Impacts

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Data Sources
National Practitioner Data Bank Public Use File (NPDB)

- Aggregates information from Medical Malpractice Payment Reports (required to be submitted to NPDB if a physician is a named defendant on a claim)
- Useful for:
  State-specific, claim-level detail
  Wrongful death flag
- Considerations:
  Physicians only
  Decline in frequency

NPDB NATIONAL PRACTITIONER DATA BANK
https://www.npdb.hrsa.gov/resources/publicData.jsp

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Data Sources
Texas Department of Insurance (TDI)

- Texas Insurance Code (§§38.159 - 38.163) allows TDI the authority to gather and compile closed claim information in order to address "an absence of reliable information concerning liability insurance claims, related court actions, and other information pertinent to the claims settlement process and the civil justice system in Texas." (*The 2012 Texas Liability Insurance Closed Claim Annual Report*)
- Publicly available claim-level data for closed years 2000 – 2012
  Only 2007 - 2012 currently available on website
- Useful for:
  Non-economic and economic losses
  Wrongful death flag
- Considerations:
  Texas specific
  Cap on non-economic damages implemented in 2005
  Only available through 2012

TDI Texas Department of Insurance
https://www.tdi.texas.gov/reports/report4.html

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Data Sources
Florida Office of Insurance Regulation (FLOIR)

- Florida Statute 627.912 requires claim reporting
- 20+ years of publicly available closed claim-level data, continues to be updated
- Useful for:
  - Non-economic and economic losses
  - Loss to ALAE relationship
- Considerations:
  - Florida specific
  - Cap on non-economic damages overturned in 2014

FLORIDA OFFICE OF Insurance Regulation

https://www.floir.com/sections/pandc/profliab_db/index.aspx

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Key Parameters

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Key Parameters
Claim Characteristics

1. Claims per occurrence

Claim 1
Claim 2
Claim 3

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Key Parameters
Claim Characteristics

1. Claims per occurrence
2. Physician or hospital claim?

Claim 1	Physician
Claim 2	Physician
Claim 3	Hospital

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Key Parameters
Claim Characteristics

1. Claims per occurrence
2. Physician or hospital claim?
3. Closed with indemnity or closed with expense

Claim 1	Physician	CWI
Claim 2	Physician	CWE
Claim 3	Hospital	CWI

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Key Parameters
Claim Characteristics

1. Claims per occurrence
2. Physician or hospital claim?
3. Closed with indemnity or closed with expense
4. Wrongful death?

Claim 1	Physician	CWI
Claim 2	Physician	CWE
Claim 3	Hospital	CWI

Non-Wrongful Death Occurrence

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Key Parameters
Loss Amounts

4. Simulate <u>unlimited</u> economic and non-economic loss amounts

Claim 1 (Physician, CWI)	Econ $100,000	Non-Econ $200,000
Claim 2 (Physician, CWE)	Econ N/A	Non-Econ N/A
Claim 3 (Hospital, CWI)	Econ $300,000	Non-Econ $800,000

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Key Parameters
Loss Amounts

4. Simulate <u>unlimited</u> economic and non-economic loss amounts
5. Calculate total given current cap (MICRA)

Claim 1 (Physician, CWI)	Econ $100,000	Non-Econ ~~$200,000~~ $50,000	MICRA $150,000
Claim 2 (Physician, CWE)	Econ N/A	Non-Econ N/A	MICRA N/A
Claim 3 (Hospital, CWI)	Econ $300,000	Non-Econ ~~$800,000~~ $200,000	MICRA $500,000

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Key Parameters
Loss Amounts

4. Simulate <u>unlimited</u> economic and non-economic loss amounts
5. Calculate total given current cap (MICRA)
6. Calculate total given new cap (AB 35 – simulate closed year)

Closed Year = 2025
Cap = $430,000

Claim 1 (Physician, CWI)	Econ $100,000	Non-Econ $200,000	MICRA $150,000	AB 35 $300,000
Claim 2 (Physician, CWE)	Econ N/A	Non-Econ N/A	MICRA N/A	AB 35 N/A
Claim 3 (Hospital, CWI)	Econ $300,000	Non-Econ ~~$800,000~~ $430,000	MICRA $500,000	AB 35 $730,000

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Key Parameters
Other Considerations

7. Calculate ALAE under MICRA and AB 35 (log-linear relationship with loss)
8. Apply policy limits
9. Calculate average impact over simulated trials

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Model Validation

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ASOP 56 Considerations
3.6.2 Model Output Validation

The actuary should validate that the model output reasonably represents that which is being modeled. Depending on the intended purpose, model output validation may include the following:

d) testing, where applicable, preliminary model output against **historical actual results** to verify that modeled output would bear a reasonable relationship to actual results over a given time period if input to the model were set to be consistent with the conditions prevailing during such period;

e) evaluating whether the model applied to hold-out data produces model output that is reasonably consistent with model output developed without the hold-out data, as may be used for predictive models;

f) performing **statistical or analytical tests** on model output to assess their reasonableness;

g) running tests of **variations on key assumptions** to test that changes in the output are consistent with the expectations given the changes in the input; and

h) comparing model output to those of an alternative model(s), where appropriate.

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Claim Frequency

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Claim Frequency
Texas – implementation of cap on damages

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Claim Frequency
Florida – implementation and repeal of cap on damages

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Claim Frequency
Oregon – cap overturned (bodily injury only)

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Claim Frequency
South Carolina – implementation of cap on damages

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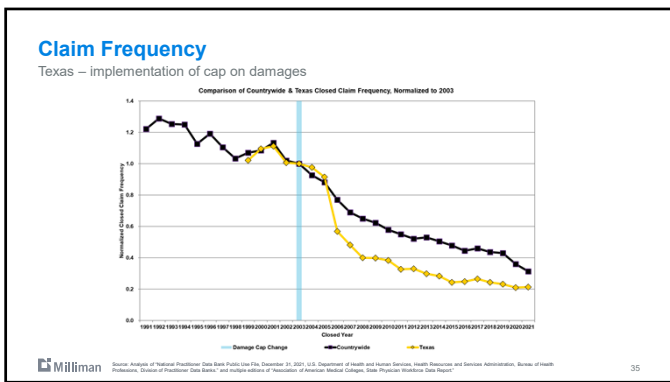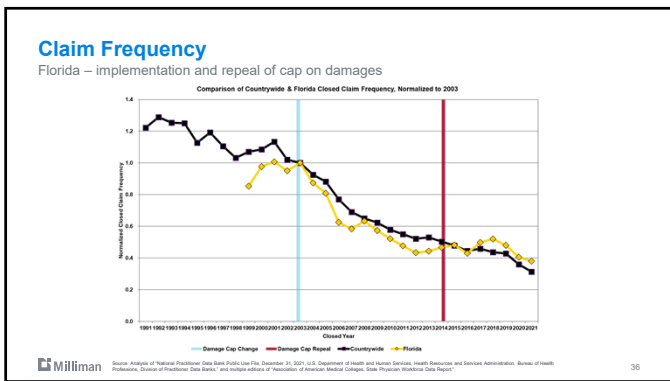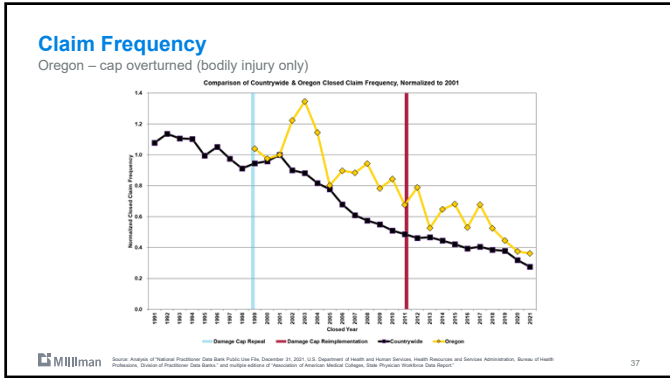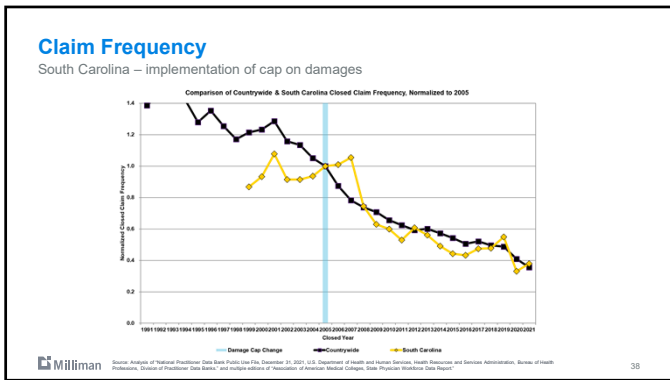
Thank you

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