

# Medical Professional Liability: The New Landscape



**BRAD D. COX**

**LEXINGTON INSURANCE**  
Senior Vice President and  
Division Executive Healthcare



**CHAD C. KARLS, FCAS, MAAA**

**MILLIMAN**  
Principal and Consulting Actuary



**JOHN W. PATTON JR.**

**PATTON & RYAN LLC**  
Managing Partner



**ROBERT P. HARTWIG, PHD, CPCU**

**INSURANCE  
INFORMATION INSTITUTE**  
President

Experts discuss the medical professional liability market after tort-reform rollback.

**R**ecent challenges to tort reform have rocked the underwriting environment for medical professional liability coverage (often called “med mal”), but that’s not the only element of change afoot in this dynamic field. Developments in health regulation and reform legislation may soon alter the landscape for medical provider coverage. Meanwhile, new practices and technology exposures are expanding the scope of liability. A panel of experts will assess the outlook for legal protections and identifies new and rising areas of exposure that some may be overlooking. This is an edited version of the transcript of the “Medical Professional Liability After Tort-Reform Rollback: The New Landscape” webcast that originally aired in May.

**Webcast moderators:**

Lee McDonald, group vice president communications, A.M. Best Co. and Caroline Saucer, editor of *BestWeek*. The entire transcript and video replay are available at [www.ambest.com/healthcare10](http://www.ambest.com/healthcare10).

## State of the Market

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— Chad C. Karls,  
Milliman

**MCDONALD:** What is the assessment of the state of the med mal market?

**KARLS:** Any discussion of the medical professional liability market today really needs to start with the financial results of the last few years. The past four years the industry's combined ratio has been less than 100 which means for the last four years the industry has made a profit from underwriting, setting aside the investment results. That's four years in a row. To put that in perspective it was 25 years prior to the last four that happened only twice. So we went a period of 25 years in which the combined ratio was less than 100 twice and now for four years in a row it has been less than 100, so certainly unprecedented underwriting results within the industry and that has resulted in a very strong balance sheet across the industry.

That certainly needs to be in the forefront of the conversation about what's going on in the industry today. Partly as a result of that is what we find ourselves in today from a pricing perspective it's characterized as a soft and competitive environment. Rates have been trending down the last few years. In fact, A.M. Best put out a report just recently showing that net premiums written have fallen three years in a row for this industry. That, too, has never happened in the past 30 years. We've never had three years in a row in declines in net written premium which I use as a proxy for

rate levels. That's certainly representative of a soft marketplace.

**HARTWIG:** I agree with a lot of what's just been said and balanced against this very, very competitive market, where we've seen prices fall for the last several years in a row that's mirroring what's going on in the commercial insurance market overall. Now we've got pretty good balance sheets with a lot of capital coming back, post financial crisis, although the med mal insurers were not hit as hard as were insurers overall as a group because they tend to be relatively conservatively invested, so that's good news. So against this very difficult pricing environment, you would normally expect to see deterioration in the underwriting performance, and in fact, in some other commercial lines we're seeing that. In something like workers' compensation, we're seeing that to an extraordinary extent right now with combined ratios that are around 110 at the current point in time.

But in med mal, as we heard, they're down in the 80s. So why is that happening? That is because against all of this we've had favorable claim frequency trends. That's certainly been good news.

Fundamentally, the way that you have less frequency is because there are fewer claims and why is that happening? Well, there's a lot of attention to risk management in the health care space today. There's been a lot of discussion about patient safety and trying to avoid what are obviously avoidable injuries in medical settings. And also bolstering results is the fact that we've had a lot of favorable prior year reserve development. Now this is something we're seeing throughout the commercial insurance space in general. That the underwriting performance is better on paper than it is in reality, in some sense, because of the release of pretty significant prior year reserves. And that's very significant in the MPL space because of the fact that it was expected that medical professional liability losses would be far greater than they turned out to be. So as it turns out there's a fair amount of reserves that can be released over time. And these factors are com-

binating to help offset what would normally be a deteriorating underwriting performance based on a very competitive pricing environment.

## Claims Frequency

**MCDONALD:** Why did the frequency drop the way it did?

**COX:** The reasons that are commonly referenced are patient safety and risk management; we do feel we were in a fairly favorable legal environment that helped to drive down overall costs. We also think clients who had to take on more risk during a period where medical malpractice was harder to obtain, put more emphasis on controlling those exposures. I also think that as we move toward reimbursement that is driven toward minimizing “never” events or any of those types of outcomes will continue to have impact on the frequency of loss. And so the combination of things, including tort reform, which we do think has had some impact on overall frequency.

## Tort Reform

**“If you're going to talk about what happens when tort reform is passed, Illinois is probably a good case study. We have a greater likelihood of the Chicago Cubs winning the World Series than we do having a medical malpractice cap staying in place.”**

—John W. Patton Jr.,  
Patton & Ryan, LLC

**MCDONALD:** What happened to tort reform caps in Illinois and as a result of that what do you think you'll see?

**PATTON:** Well, if you're going to talk about what happens when tort reform is passed, Illinois is probably a good case study. We have a greater likelihood of the Chicago Cubs winning the World Series than we do having a medical malpractice cap staying in place.



Over 30 years we've had three attempts to put in tort reform. All three attempts have pulled out the bill and targeted medical malpractice reform. The concept of the cap is self evident. The noneconomic damages is where the risks are greatest because the plaintiff's attorneys are allowed to ask any amount of money for pain and suffering, disability, loss of society, loss of consortium. They can write down any number they want on the verdict form and if you get into the inner cities where the demographics point to a jury that's not as sophisticated as you would have perhaps out in the rural areas, they may very well give those numbers. You cap those numbers—the latest bill that we had was from 2005—you capped the noneconomic damages for hospitals at a million dollars. You cap the liability of a doctor, a neurosurgeon, orthopedic surgeon, ER doctor at \$500,000. Whether it's a wrongful death case or a bad baby case that has a profound impact, obviously, on what the exposure is to the insurance industry. However, when you pass these caps ultimately they're going to go on a track up to whatever supreme court makes that decision in a particular state. In Illinois, three chances before the Illinois Supreme Court, three rejections of caps for the health care industry. So we had it in 2005, the county judge in record time struck down the legislation as unconstitutional. Then it made its way up straight to the Illinois Supreme Court. That decision came down in February of this year and it basically reiterated its position in 1995 and in 1975 that putting caps on jury verdicts is unconstitutional because of a separation of powers argument. We don't want the legislature telling us, the judicial branch, what should be a fair verdict.

## Caps

**MCDONALD:** Can you tell at a glance, which states have medical tort reform and which haven't? And in terms of underwriting results and rates, have we seen that dramatic of a difference?

**HARTWIG:** When we talk about

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—Robert P. Hartwig PhD, CPCU, Insurance Information Institute

30 states with caps, we talk about Illinois where the Supreme Court ruled they are basically unconstitutional. In Georgia, something similar happened. I think what might be even more common and is kind of happening behind the scenes and that people aren't paying enough attention to is an erosion in the cap itself. For instance, earlier this year Wisconsin reinstated the ability for parents of adult children to obtain pain and suffering awards in areas of medical negligence whereas that was not previously possible. So we have, for instance, maybe my 70-year-old parents could receive a reward on me, someone who in their mid-40s even though yes, I'm their child, but it's different when the child is at home as a dependent. So for some reason, this has worked its way back and this will have an incremental—so they haven't rolled back the cap, but what they've done is they've partially eroded it around the edges. There's been something similar in Michigan where there are questions about whether or not perhaps a health care provider had manipulated medical records in the courts here. In this case the cap might not apply. So I think what we're seeing in addition if you can't beat the cap per se, try to weaken it, and that will be a tactic that trial lawyers will begin to use.

Incrementally, when you add together the rollback of some of the caps, first in two states then in maybe two, three, four, five, six states in the next couple of years, who knows, and then we see the erosion ... yes, I think it will have a notable impact on the bottom line of medical professional liability insurers. I think it can only move in that direction. We're

certainly not headed in the direction we were a decade ago where we were seeing the caps implemented. We're moving in the opposite direction, slowly but surely.

## Product Development

**“It isn't just tort reform that has driven down frequency, it's been the actions of those customers and the controls they've put in place that have helped to drive down frequencies.”**  
—Brad D. Cox, Lexington Insurance

**MCDONALD:** How do you underwrite or develop products in an environment in which you may have tort reform, you may not. Obviously that colors your thinking. What do you do?

**COX:** We've operated in both environments so we've operated pre-tort reform and post-tort reform. What you have to do is underwrite the risk. I think that's what we talked earlier about. What is that risk doing to control costs. That's something that we and other areas need to do. They need to underwrite the risk for that individual customer and try to understand where we're attaching, what are they doing to control their costs because, again, it isn't just tort reform that has driven down frequency, it's been the actions of those customers and the controls they've put in place that have helped to drive down frequencies. So you need to maintain getting the best customer who has the best controls in place and you have to look very closely at what is the adequate price. I know everybody's got a different view of that, but we as underwriters need to understand what is the adequate price and price to that, and in the long run we'll get a favorable result. You're not going to time the market perfectly. We all know that. You just have to stay disciplined—coverage, terms and then understand what your customer is doing to control their risk. **BR**