



The Doctors Company GOVERNMENT RELATIONS

April 2019

Advocacy Update

The Doctors Company advocates relentlessly to establish and protect medical liability reforms in state legislatures and courts across the U.S. This advocacy takes many forms, including in-person meetings with legislators, finding and preparing witnesses for testimony before committees, creating bill information sheets and PowerPoints, building relationships with local leaders and groups that support reforms, and forming, maintaining and funding amicus curiae “friend of the court” committees that file briefs on behalf of the medical professional community.

Summary

Last November’s midterm elections changed the balance of power in several state legislatures and the courts. Consequences of this change include an increase in the number of attacks on medical liability reforms and an increased likelihood of success in undermining the reforms that The Doctors Company has championed.

These attacks include legislation to eliminate or increase caps on damages, broaden the number of plaintiffs and increase the amount recoverable in wrongful death cases, increase the time limit to file a medical malpractice claim, and create plaintiff-friendly rules for expert witnesses. In addition, courts in several states are considering cases challenging the constitutionality of damage caps on grounds including the remedy clause, equal protection, and the right to a jury trial.

Additionally, legislatures and courts continue to become involved in issues affecting the practice of medicine, such as supervision, prescription authority, and licensing board authority.

This report is a brief overview of some of the legislation and court cases we have been monitoring from January to April of 2019 and does not represent the full extent of our tracking or engagement. For more information, please contact GovernmentRelations@TheDoctors.com.

Spotlight on Advocacy

The following stories illustrate The Doctors Company’s efforts in early 2019 in response to a dramatic increase in attacks on medical liability reforms. As a result of changes in power in state legislatures and the courts following the November 2018 midterm elections, our work to educate legislators, judges, and other policymakers has become even more crucial.

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Advocacy Spotlight: Objecting to Pennsylvania's Venue Change



(© Photo by PCCJR)

The Doctors Company has been actively involved in the fight to protect a 2002 venue rule that requires medical malpractice actions to be brought in the county in which the alleged negligence occurred. The Pennsylvania Supreme Court's Civil Procedure Committee proposed that this rule be repealed.

The Doctors Company joined forces with a broad healthcare coalition, comprised of the Pennsylvania Medical Society (PMS), Insurance Federation, Coalition for Civil Justice Reform, Hospital Association, and many other healthcare organizations.

Among our most significant advocacy efforts was funding and providing data for a study by Milliman, the respected actuarial firm. The Milliman report provided factual evidence to contradict unsupported claims that the 2002 venue rule had no impact on physician liability costs.

In addition, The Doctors Company submitted comments to the Civil Procedure Committee of the Supreme Court arguing that: (1) allowing urban juries to decide rural cases and vice versa would be unfair, because these communities have different healthcare experiences; (2) the crisis of the early 2000s—when over 1,200 medical malpractice cases were filed each year in Philadelphia County due to high jury awards—would return; and (3) the rule change was fundamentally unfair because it would move a case possibly hundreds of miles away from witnesses and evidence.

We also encouraged our members to contact the PMS website and use its online tool to submit opposition letters to the civil procedure committee of the Supreme Court. Thousands of healthcare professionals submitted comments.

Our efforts contributed to the passage of Senate Resolution 20 which requested that the Supreme Court delay any decision on changing the venue rule for medical malpractice cases until the state's Legislative Business and Finance Committee (LBFC) conducted a study. The Supreme Court agreed. The LBFC report is due to be released approximately January 1, 2020. We will continue to work to defeat the venue change proposal.



Advocacy Spotlight: Opposing New Mexico Bill Increasing Medical Liability Damage Cap



The Doctors Company actively opposed HB 629 which would have raised the limit on non-medical damages for medical liability actions in New Mexico to \$2 million with a cost-of-living adjustment (COLA) for qualified healthcare practitioners and set a new cap for hospital and medical facilities of \$25,000,000 with a COLA. The current limit is \$600,000.

Working in a coalition with the New Mexico Medical Society, New Mexico Hospital Association, specialty societies, and other entities, we engaged in approximately 900 legislative contacts. The Albuquerque Journal ran articles, op-eds, and full-page ads created by healthcare providers concerning the bill's negative impact on patient access to medical care.

During committee hearings the coalition put forward twenty-five witnesses opposing HB 629. Upon the urging of coalition members, Governor Michelle Lujan Grisham asked the bill's sponsor to table the bill. The sponsor acceded to the Governor's request, ending the attack on the cap for the 2019 session.



Advocacy Spotlight: Fight to Protect Oregon's Limit on Non-economic Damages



The Oregon Trial Lawyers Association (OTLA) sponsored House Bill 2014 to eliminate Oregon's \$500,000 limit on non-economic damages for injury and negligence claims (the bill retains Oregon's \$500,000 cap for wrongful death non-economic damages).

The Doctors Company has led a coalition to oppose this bill and Senate Bill 592, another vehicle to eliminate the \$500,000 non-economic damage cap on injury, negligence and wrongful death claims. Our coalition has worked to educate legislators on behalf of our members, and to mobilize health care providers and other grassroots supporters of medical liability reform and access to healthcare. As a result of these efforts, SB 592 has stalled in committee. However, HB 2014 passed the House by a 36-22 vote. The fight has moved to the Senate.

The proponents will likely push HB 2014 until the very last day of session, scheduled for June 30, 2019. There is a chance to stop HB 2014 with your help. Oregonians should ask their State Senator to oppose HB 2014 because of the impact it would have on access to healthcare, particularly for those in underserved communities.



Advocacy Spotlight: South Carolina's JUA and PCF Deficit



South Carolina has been a focal point for advocacy in the first quarter of 2019. One of the major issues this session has been the status of the South Carolina Medical Malpractice Liability Joint Underwriting Association (JUA) and the South Carolina Patient Compensation Fund (PCF). The JUA is a state-created insurer that provides medical liability insurance when there is not adequate insurance available for medical professionals, or when a medical professional cannot purchase insurance elsewhere. The PCF was created to pay that portion of a liability claim which is in excess of \$200,000 for each incident or in excess of \$600,000 in the aggregate year, for one year.

Currently, the JUA and the PCF have a combined deficit of approximately \$85,000,000. The South Carolina House of Representatives introduced legislation to address this deficit, but the legislation would have created an unreasonable financial burden on South Carolina's medical professionals.

The Doctors Company, through education and coalition building, has been working with the legislature and the Department of Insurance since June of 2018. As a result of our coalition's efforts, compromise legislation has been introduced and is currently under debate. We will continue to protect our members by advocating for compromise legislation that shares the burden of the deficit fairly.



Advocacy Spotlight: New York State 2019 Budget



(© Photo by Matt H. Wade)

The 2019 Legislative Session in New York began with the state budget process. The Legislature passed the budget on March 31. The Doctors Company supported the following proposals:

Medical Indemnity Fund

The final budget extended enhanced payment rates for the Medical Indemnity Fund (MIF) program by one year (from December 31, 2019 to December 31, 2020). The Legislature transferred the program from the Department of Financial Services to the Department of Health, beginning on October 20, 2019.

The budget made two key changes to the program. The first requires a qualified plaintiff to obtain a court order to be enrolled in the MIF. Qualified plaintiffs will continue to need either a court or jury finding that they have suffered medical malpractice that resulted in a birth-related neurological injury, or to have settled a lawsuit or claim for the same injury. The second requires healthcare providers to accept payments from the MIF as payment in full.

Excess Medical Malpractice Program

The final budget extended the Excess Medical Malpractice Program for one year through June 30, 2020. This program provides an additional layer of coverage to physicians with hospital privileges who maintain primary coverage at required levels.



Legislature

Each year, more than 150,000 legislative bills are introduced across the country. We analyze each piece of legislation, prioritize it for advocacy, and monitor each bill and subsequent amendments throughout the legislative process.

We track bills related to medical liability, civil litigation, patient safety, the practice of medicine, opioid prescribing, telemedicine, patient confidentiality and privacy, healthcare professional licensing, medical boards, insurance regulation, corporate regulation, tort reform, employment, cyber-security, and more.

The following are brief summaries of a selection of bills introduced during the first quarter of 2019. Some of the bills have passed, failed, or are still active in the legislative process.

States	
 Arkansas	<p>HB 1447 amends the definition of healthcare provider under the Patient Protection Act of 1995 by adding certified behavioral health providers and “licensed intellectual and developmental disabilities service providers” to the definition. (<u>Status: Enacted</u>; <u>Effective: 08/01/2019</u>)</p> <p>SJR 8 is a joint resolution to place on the ballot a state constitutional amendment to permit limits on non-economic damages. Non-economic damages are defined in the bill as loss that cannot be measured in money, including pain and suffering, mental anguish, disfigurement, loss of consortium, and loss of life. (<u>Status: Failed</u>)</p>
 Colorado	<p>SB 109 provides a cost of living increase to caps on damages for claims, except for health professional liability. The bill adjusts the current caps for inflation between 2008 through 2018, and mandates increases every two years beginning in 2020. (<u>Status: Enacted</u>; <u>Effective: 08/02/2019</u> unless referendum filed)</p>
 Florida	<p>SB 514 expands the list of who may sue for wrongful death by authorizing an adult child who was under the care of a legal parental guardian at the time of a parent's death to file a medical negligence claim and authorizing the legal parental guardian of an adult child to file a claim for medical negligence under certain circumstances. (<u>Status: Failed</u>)</p>

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 <p>Idaho</p>	<p>HB 10 authorizes the Board of Pharmacy to hold an emergency proceeding to suspend, revoke, or restrict the license of a pharmacist in the event of immediate danger to public health, safety, or welfare that is based on grounds for discipline. Revocation under this emergency proceeding may be appealed. (<u>Status</u>: Enacted; <u>Effective</u>: 07/01/2019)</p>
 <p>Kansas</p>	<p>HB 2291 increases the cap on damages for wrongful death from \$250,000 to \$500,000 and adds a yearly cost of living adjustment. (<u>Status</u>: In committee)</p> <p>HB 2332 exempts punitive damages from the cap on monetary damages arising from a claim of wrongful death. (<u>Status</u>: In committee)</p>
 <p>Kentucky</p>	<p>HB 5 makes it illegal to perform an abortion, except in the case of an emergency. An emergency means that the procedure averts death or risk of substantial impairment of a major bodily function. It makes abortion illegal if the healthcare provider has knowledge that the pregnancy is being terminated based on the gender, race, color or national origin or on the diagnosis or potential diagnosis of Down syndrome or any other disability of the unborn child. A violation of this law subjects a healthcare provider to the loss of license to practice medicine in the state, as well as subject to compensatory and punitive damages and attorney's fees in a civil suit. (<u>Status</u>: Enacted; <u>Effective</u>: 07/01/2019)</p>
 <p>Maryland</p>	<p>SB 773 changes limits on expert witnesses in personal injury claims. Formerly, experts could not qualify if they spent 20% or more of their time as experts. The bill increases the limit to 25% and provides that an expert who qualifies at any time during a proceeding shall remain an expert for the pendency of the claim. (<u>Status</u>: On Governor's desk waiting to be signed)</p> <p>SB 323 establishes that a defendant in a claim filed with the Health Care Alternative Dispute Resolution Office may seek discovery as to the basis of a certificate of a qualified expert filed by the claimant or plaintiff without affecting later discovery. It further prohibits a deposition of a defendant healthcare provider from being required until the claimant has filed claim. (<u>Status</u>: Failed)</p> <p>SB 813 increases the following: (1) the non-economic damages amount that three claimants may recover in a wrongful death claim from \$500,000 to \$1,000,000; (2) the non-economic damages amount that four claimants may recover in a wrongful death claim from \$500,000 to \$1,500,000; and (3) the non-economic damages amount that five or more claimants may recover in a wrongful death claim from \$500,000 to \$2,000,000. (<u>Status</u>: Failed)</p>



Massachusetts

HB 930 requires professional liability insurers to report to the optometrist licensing board any claim or action for damages for personal injuries alleged to have been caused by error, omission, or negligence in the performance of such optometrist’s services if the claim has resulted in a final judgement with a payment, settlement involving any amount, or final disposition without payment. (Status: In committee)

HB 1382 extends the time for a minor child under the age of eighteen to commence a medical malpractice case to within three years from the discovery of the act or omission which is the alleged cause of the injury on which the action is based, but no later than seven years after the injured party’s twenty-first birthday, whichever is sooner. (Status: In committee)

SB 956 creates an exception to the cap of \$100,000 on medical malpractice non-economic damages for charitable healthcare organizations, if there is a finding of substantial or permanent loss or impairment of a bodily function or substantial disfigurement, wrongful death, or other special circumstances in the case which warrant a finding that imposition of such a limitation would deprive the plaintiff of just compensation for the injuries sustained. (Status: In committee)



New Mexico

SB 9 adds physician assistants and clinical nurse specialists to the definition of “healthcare practitioner.” It also adds licensed physicians, osteopathic physicians, nurse practitioners, psychiatric nurse practitioners, and clinical nurse specialists to the Professional Psychologist Act for “independently licensed prescribing clinicians.” Nurse practitioners, clinical nurse specialists, and osteopathic physicians may now supervise psychologists licensed for prescriptions. The licensing board may deny, revoke, or suspend a practitioner’s license for failure to adequately supervise a licensed psychologist holding a conditional prescription certificate. (Status: **Enacted**; Effective: 02/04/2019)

SB 72 provides definitions regarding the practice of occupational therapy. It prohibits the practice of occupational therapy by occupational therapy assistants or persons practicing on a provisional permit, unless supervised by a licensed occupational therapist. (Status: **Enacted**; Effective: 06/14/2019)

SB 82 requires employers to offer safe harbor to nurses (RNs and LPNs) who are requested to engage in practices that the nurse believes to be in violation of their legal duties. A nurse who intends to invoke safe harbor shall invoke it before the nurse engages in conduct or an assignment giving rise to the nurse’s request for safe harbor. Safe harbor may also be invoked at any time during the work period when an initial assignment changes, and in the nurse’s good faith judgment, the change creates a situation that comports with the requirements for invoking safe harbor. Invoking “moral, religious or personal beliefs” will not trigger the safe harbor provisions. (Status: **Enacted**; Effective: 06/14/2019)



 <p>New York</p>	<p>AB 6903 and SB 4501 would extend the statute of limitations to bring a medical malpractice action against a hospital if the hospital has failed to file an incident report which is the subject of a malpractice action and there is a continuous treatment of the same illness. Under these circumstances, the action may be brought within one year of the required filing. (<u>Status</u>: In committee)</p> <p>AB 1164 and SB 1801 permits qualified group practices to operate a malpractice prevention program, including the sharing of confidential information. (<u>Status</u>: In committee)</p> <p>AB 2370 prohibits any party from either directly or indirectly conducting ex-parte interviews with the treating physician, other healthcare providers or other parties in personal injury, medical or dental malpractice or wrongful death action. An exception is provided for an attorney representing a patient whose condition is at issue in a legal action or his or her agent or guardian. (<u>Status</u>: On the Assembly floor)</p>
 <p>Oregon</p>	<p>SB 592 repeals the \$500,000 limitation on awards of non-economic damages in civil actions seeking damages for bodily injury, death or property damage. (<u>Status</u>: In committee)</p> <p>HB 2014 eliminates Oregon’s \$500,000 cap on non-economic damages for injury and negligence claims but retains the \$500,000 cap for wrongful death non-economic damages. (<u>Status</u>: Passed first house and in second chamber)</p>
 <p>Rhode Island</p>	<p>SB 463 expands the damages recoverable in a wrongful death action of a child, parent or spouse to include recovery for the emotional distress, grief, and loss of enjoyment of life. (<u>Status</u>: In committee)</p>
 <p>Texas</p>	<p>HB 765 would tie the cap on non-economic damages to the Consumer Price Index. (<u>Status</u>: In committee)</p> <p>HB 2362 and SB 2378 would restrict the application of the “wanton and willful” standard for medical professionals in providing emergency medical care. (<u>Status</u>: House bill is on the House floor; Senate bill is in committee)</p>
 <p>Virginia</p>	<p>HB 1767 provides parents, who were dependent on a decedent within twelve months of the decedent’s death, the right to wrongful death benefits. Dependence means regularly receiving support or services for necessities including living expenses, food, shelter, healthcare expenses or in-home assistance or care. (<u>Status</u>: Enacted; Effective: 07-01-2019)</p>

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<p>Virginia (cont.)</p>	<p>HB 2197 provides that when \$50,000 or more is at issue in a case, discovery depositions and affidavits of a business (if it is a party to a lawsuit) may be submitted in support of a motion for summary judgement. This is a positive development because Virginia was one of the few states that prohibited depositions for use in summary judgement motions. (<u>Status: Enacted</u>; <u>Effective: 07/01/2019</u>)</p>
 <p>Washington</p>	<p>HB 1135 and SB 5163 seek to add to the list of individuals who may sue for wrongful death to include immediate family of adult children where there is no financial dependence. This bill also makes liability joint and several, which could require a defendant even one percent at fault to pay 100% of liability. (<u>Status: HB 1135 defeated</u>; <u>SB 5163 Enacted</u>; <u>Effective: 04/26/2019</u>)</p>

Judiciary

The Doctors Company tracks judicial challenges to medical liability reform laws in all U.S. states. Plaintiffs' lawyers consistently work to overturn medical liability reform laws in the courts. We are currently tracking almost thirty cases that will impact our members. The impact of the elections will also be reflected in the outcomes of the cases decided in the state appellate courts.

The Doctors Company is actively involved in formulating and supporting *amicus* (friend of the court) briefs to defend medical liability reform laws and advocate for our members in active cases before they have reached resolution.

The Doctors Company is a member of several formal and informal state *amicus* committees across the nation. We join and help fund these committees in order to focus the committees' attention on appellate court cases that affect medical liability reform, and with the committees' help, to submit briefs and make court appearances to protect those reforms.

Judicial Decisions

The following are brief summaries of selected judicial decisions handed down in late 2018 and the first part of 2019.

Colorado	
<p>Supreme Court</p>	<p>Fox v. Alfini (2018)</p> <p>The attorney-client privilege between an adult defendant and counsel is destroyed when the defendant's parents are present, unless defendant shows that the parents were reasonably necessary to facilitate communication with counsel. (Effective 12/04/2018)</p>



North Dakota

Supreme Court

Condon v. St. Alexius Medical Center (2019)

North Dakota’s non-economic damages cap in medical malpractice actions did not violate the state constitution’s equal protection clause and was held constitutional. (Effective 04/22/2019)

Oklahoma

Supreme Court

Beason v. I.E. Miller Services (2019)

Oklahoma’s non-economic damages cap in civil actions violated the state’s constitution’s prohibition on legislating “special laws.” (Effective 04/23/2019)

Oregon

Supreme Court

Vasquez v. Double Press Mfg., Inc. (2019)

A third-party action based on a workplace injury falls into an exception to the state cap on non-economic damages. The Court did not need to reach the constitutionality of the cap on non-economic damages under the remedy clause. (Effective 04/04/2019)

Texas

Supreme Court

Texas Health Presbyterian Hospital v. D.A. (2018)

In medical malpractice cases involving emergency medicine, the Texas Medical Liability Act requires plaintiffs to prove “willful or wanton negligence” for alleged medical errors regardless of whether the patient was first treated in the emergency department. (Effective 12/21/2018)

Supreme Court Cases Argued Orally and Awaiting Decision

Indiana

Morrison v. Vasquez and *Indiana Univ. Health S. Indiana Physicians, Inc. v. Noel* (Indiana Supreme Court considering whether to grant transfer in two medical malpractice cases seemingly in conflict with each other.)



Pennsylvania

Mitchell v. Shikora (Pennsylvania Supreme Court considering whether evidence that general risks and complications provided to plaintiff in a medical malpractice case are admissible in evidence.)

Conclusion

As long as personal injury trial lawyers continue to find new and inventive ways to undermine medical liability reforms, The Doctors Company will work to protect you and to safeguard your patients' access to healthcare.

More Information

For more information please contact The Doctors Company's Government Relations team at GovernmentRelations@TheDoctors.com.

About The Doctors Company

Founded and led by physicians, The Doctors Company has always been guided by our mission: to advance, protect, and reward the practice of good medicine. The company was founded in 1976 in response to the medical malpractice insurance crisis in California that closed thousands of physician offices and threatened patient access to affordable care. After leading the charge for comprehensive tort reform, our founders established The Doctors Company to [continue the cause of advocating for physicians and advancing the practice of good medicine.](#)

The Doctors Company takes the mal out of malpractice insurance by helping practices of all sizes manage the complexities of today's healthcare environment—with expert guidance, resources, and coverage. The Doctors Company is the nation's largest physician-owned medical malpractice insurer, with more than 80,000 members, and is rated A by A.M. Best Company and Fitch Ratings. To learn more about data-driven insights and to stay up to date on industry trends, follow and subscribe to The Doctors Company on Twitter (@doctorscompany), YouTube, LinkedIn, Facebook, and Google+.