

MEDCHI, THE MARYLAND STATE MEDICAL SOCIETY
HOUSE OF DELEGATES

CL Report 3-13

INTRODUCED BY: Council on Legislation

SUBJECT: A Fifty State Survey of Tort Reform Provisions

REFERRED TO: Reference Committee B

Background: Resolution 18-12 required that MedChi study what other states have undertaken to address malpractice reforms and report back at the next MedChi House of Delegates its findings and recommendations for reforms in Maryland. The Board of Trustees assigned this task to the Legislative Council.

Statutes of Limitations

MD Requires: The statute of limitations is three years from the time the injury was inflicted or discovered with a five year statute of repose whichever is earlier. There are special provisions for minors and retained surgical objects.

Statute of Limitations: Statutory deadline for filing a claim.

Statute of Repose: The absolute time frame in which the cause of action exists, and may be filed.

One year Statute of Limitations

- States with one year extension from time of treatment or discovery
 - o CA, KY, LA, OH, TN
- Statute of Repose
 - o 3 Years: CA, LA, TN
 - o 4 Years: OH
 - o 5 Years: KY

Two year Statute of Limitations with no discovery extension or Statute of Repose
AK, AR, ID, NY, SD, VA

- States with a two year Statute of Limitation and a Statute of Repose of:
 - o 3 years: CT, CO
 - o 4 years: AL, FL, IL, KS, UT
 - o 5 Years: GA, OR
 - o 6 Years: HI, IA, MI, ND
 - o 7 Years: MS, PA
 - o 10 Years: MO, NE, TX, WV
- States with discovery extensions of:
 - o 6 months: AL, MI
 - o 1 year: DE, NE
 - o 2 years: AZ, CO, CT, FL, GA, HI, IL, IN, IA, MS, NJ, ND, OK, OR, PA, UT, WV, WY
- States with an extension for fraud or knowing concealment
 - o CO, FL, MI

Three year Statute of Limitation with no discovery extension or Statute of Repose
ME, NM

- States with a three year statute and a Statute of Repose of:
 - o 4 years: NC
 - o 5 years: MD, MT, WI
 - o 6 years: SC
 - o 7 Years: VT
 - o 8 Years: WA

- States with discovery extensions of:
 - o 1 year: **NV**, NC, WA, WI
 - o 2 year: VT
 - o 3 Years: D.C., MD, MT, NM*, RI, SC
 - *Only if the Physician is covered by the excess coverage fund

Only one state has a four year statute of limitations, Minnesota, there is no Statute of Repose or discovery extension.

States with special provisions for **minors**:

AL, AK, AZ, AR, CA, CO, DE, D.C., **FL**, GA, HI, ID, **IL**, IN, IA, KS, KY, ME, MD, **MI**, MN, MS, MO, MT, NE, **NV**, NH, NJ, NM, **NY**, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WI, WY

States with Special Provisions for the **incompetent/disabled**:

AK, AZ, CO, D.C., ID, **IL**, KY, KS, **MI**, MN, MS, NE, NH, NJ, **NY**, NC, ND, OH, OK, OR, RI, SC, TN, UT, VT, VA, WI, WY

States with Special Provisions for the discovery of a **“retained surgical object:”**

AR, CA, GA, ID, IA, ME, MO, NC, SC, TN, UT, VT, VA, WA

Expert Testimony Requirements

MD Requires: Expert testimony is generally required to prove negligence. A certificate of merit is required to be filed by an unrelated expert knowledgeable in the same discipline against whom the claim is filed.

States with NO expert testimony provision

HI, ND, WY

States in which expert testimony is required to establish a breach in the standard of care

AR, GA, ID, MN, NE, **NV**, OH, SD, VA

States in which expert testimony is required unless there is an obvious demonstration of negligence

CA, DE, **FL**, IA, KS, KY, ME, NM, **NY**, NC, OR, PA, SC, UT, VT

States in which expert testimony is usually or generally required

AZ, CT, D.C. IN, LA, MD, MO, MT, NH, WA, WV, WI

States that define the qualifications required for the court to recognize the witness as an expert or similarly situated health care provider

AL, AK, AZ, CA, CO, CT, DE, **FL**, GA, ID, **IL**, IA, MD, **MI**, MT, NH, **NV**, NJ, NC, OH, OK, PA, RI, SC, TN, TX, VA, WV

Arbitration and Pre-Screening Panel Provisions

MD Requires: Arbitration is generally required but may be unilaterally waived by either party. If parties agree to arbitration either party reserves the right to reject the decision and proceed to trial. Either party may also appeal an award of damages made by the panel, to the panel, for further review.

States with **NO** provisions on arbitration or pre-screening:

AZ, AR, IA, KY, MO, **NV**, OK, OR, PA, RI

States where arbitration is **not mandated but permitted**:

AL, CA, CO, CT, D.C., **FL**, GA, ID, MD, **MI**, MN, MS, NJ*, **NY****, OH, SD, TN, TX, VT, WA***

- * Arbitration is mandated if damages are less than \$20,000
- ** May agree to arbitration only if the defendant conceded liability, arbitrate on damages
- *** Arbitration awards are capped at \$1,000,000

States with **mandatory** alternative dispute resolution:

CT, **FL**, HI*, NC, ND, SC, WA

- *If damages are less than \$150,000

States where arbitration/panel decision is **binding**:

AL, D.C.***, GA*, **MI****, MS, UT*,

- * If the parties agree
- **If damages are below \$75,000
- ***Party can seek a limited judicial finding if necessary

States where arbitration/panel decision is **non-binding**

HI, MS, MN, MT, NJ, NM, OH, VT, WY

States where arbitration/panel decision is **permitted as evidence**

AK, CT, D.C., DE, IN, KS, LA, MA, ME, NE, VA, WY

States where arbitration/panel decision is **NOT permitted as evidence**

MN, MT, NH, NJ, NM, NC, OH, UT, WV, WI

Some states allow parties to agree to arbitrate all medical malpractice claims **before** offering treatment

IL, KY, LA, UT

- These states allow arbitration agreements if there is a period of time to reconsider
 - o 30 days: AK, OH
 - o 60 days: VA

States with mandatory pre-trial screening panels

AK*, HI, ID, IN**, LA***, MA, ME, MT, NE, NH, NM, WY

- *If parties don't agree to arbitration they must submit to a screening panel
- **Only if damages are greater than \$15,000
- ***Only if provider is covered by Patient Compensation Fund

States with voluntary or specific judge ordered pre-trial screening panels

KS, NH, UT, VA

Affidavit/Certificate of Merit Requirements

MD requires: A certificate of merit to be filed by a qualified expert within 90 days. Defendants must also file a certificate from an expert indicating how the defendant complied with the specific standard of care.

States with NO affidavit or Certificate of Merit Provision:

AL, AK, CA, D.C. HI, ID, IN, IA, KS, KY, LA, MA, ME, MT, NE, NH, NM, NC, OR, RI, SD, VT, WI, WY

States with a requirement to submit to the court a preliminary affidavit from an expert on the standard of care and breach

- Must file affidavit with complaint
 - o CT, DE, **FL**, GA, **MI**, NV, SC, WA
- Within 30 days of filing complaint
 - o AR, WV (must also serve defendant)
- Within 60 days
 - o NJ
- Within 90 days
 - o MD, ND
- Within 120 days
 - o TX (must also serve defendant)

States that also require defendants to submit a preliminary affidavit

FL, MD, PA*

- *requires defendant to file a certificate of review not affidavit

States that require the plaintiff's attorney to file certificate of review, that states an expert was consulted and is competent to express their medical opinion on the breach of standard of care

- With the claim
 - o IL, NC, OH, OK, UT, VA
- Within 60 days
 - o CO, MS, MN, PA
- Within 90 days
 - o MO, **NY**, TN

Misc.

One state, Arizona requires the plaintiffs attorney to file an affidavit on the relevant necessity for an expert to be presented in the case.

Two states don't allow these affidavits to be discoverable or admissible as evidence, DE, and UT.

Three states allow exceptions (obvious malpractice or an inability to obtain a physician etc.) ND, WV, **NY**

Malpractice Rates

MD Rates	Internist Non Surgical /Surgical	General Surgeon	OB/GYN
Baltimore City/County	\$10,557/\$19,003	\$39,918	\$86,572
Central MD (MC,HC, AA, PG)	\$9,596/ \$17,274	\$36,468	\$78,694
All other MD	\$8,445/\$15,205	\$32,095	\$69,257

Highest malpractice rates	Internists	General Surgeons	OB/GYN
- Florida (Dade County)	\$47,731	\$190,926	\$201,808
- Illinois (Cook Madison St. Clair County)	\$40,862	\$127,083	\$177,441

-	Michigan (Wayne, Oakland)	\$35,139	\$142,731	\$154,165*
-	Connecticut/NY (Nassau/Suffolk)	\$34,700	\$128,542	\$201,808
-	Nevada (Clark)	\$33,750	\$118,125	\$168,750

Lowest malpractice rates	Internists	General Surgeons	OB/GYN
- <u>Minnesota</u>	\$3,375	\$11,360	\$16,449
- <u>South Dakota</u>	\$3,697	\$12,569	\$19,946
- <u>Wisconsin</u>	\$3,946	\$13,813	\$18,154
- <u>California</u> (Northern counties)	\$3,988	\$15,344	\$15,484
- <u>Mississippi</u>	\$4,311		

*: 2004 data

Noneconomic Damages Cap

MD Rule: Currently the cap is \$785,000

\$ 5,000	\$150,000	\$250,000
NV (ED Only)	FL (ED Only)	AK, <u>CA</u> , ID, KS, MT, TX, UT

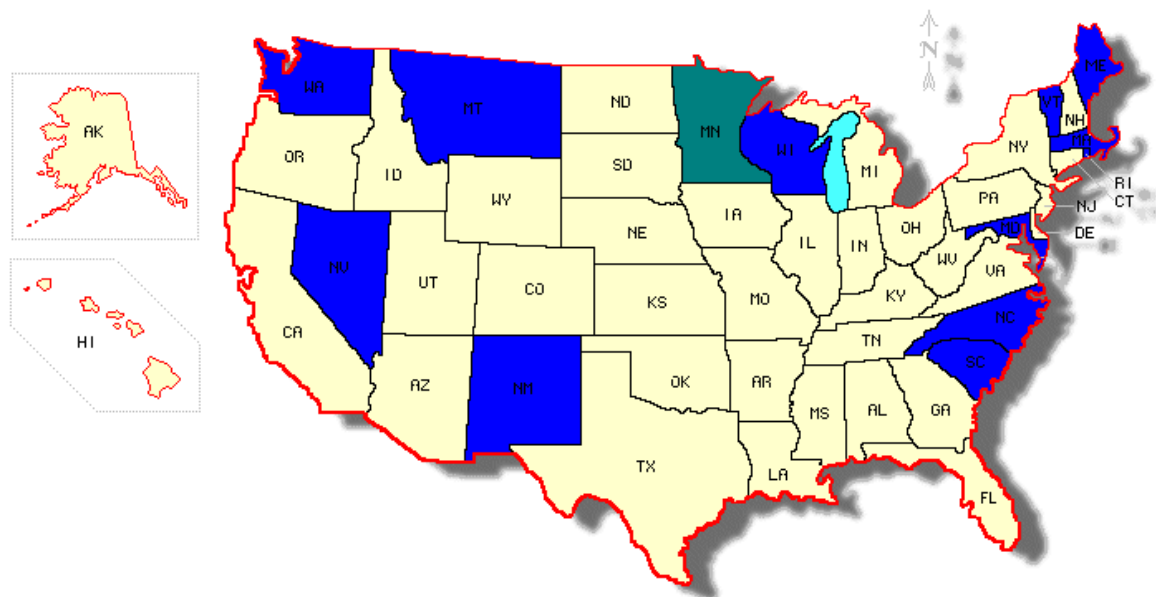
\$300,000	\$350,000	\$375,000
CO	GA, MO, NV , OH, OK, SC, <u>WI</u>	HI

\$400,000	\$500,000	
AL	FL, IL , <u>MS</u> , NC, ND, OR, <u>SD</u> , WV	

FL has 150 insurance carriers, (23 own 80% of market) 2,520 closed claims in 2010
MN has 56 companies (top 10 own 87% of the market) 63 total claims in MN in 2009

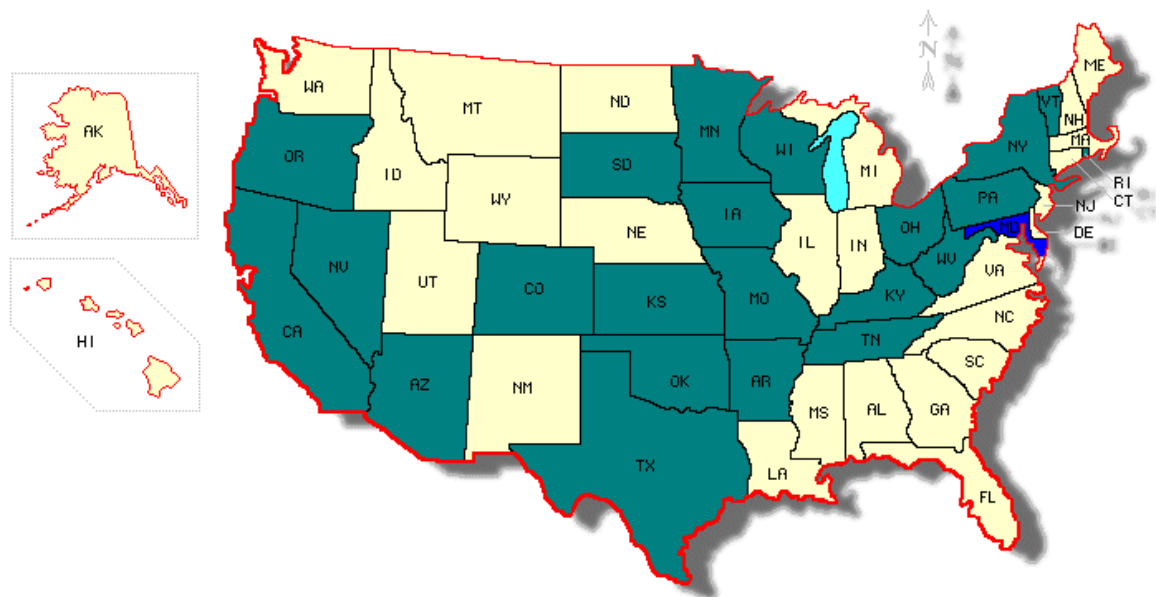
Statute of Limitations

- - Shorter Statute
- - Same as MD
- - Longer Statute



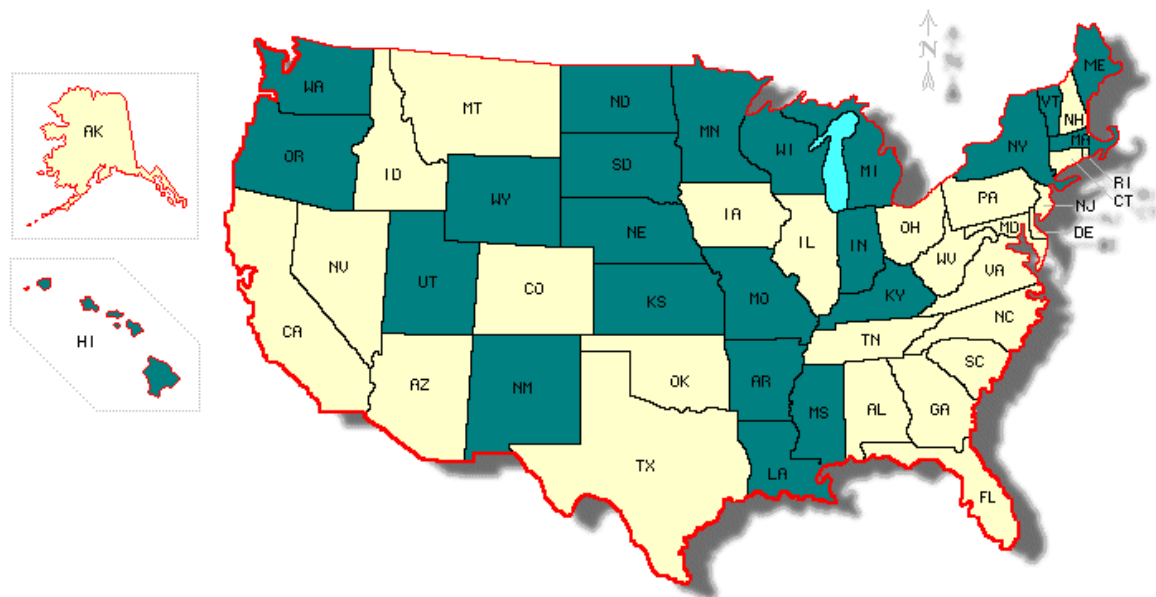
Arbitration/Pre-Screening Panel

- More ADR than MD
- Less ADR than MD
- Maryland



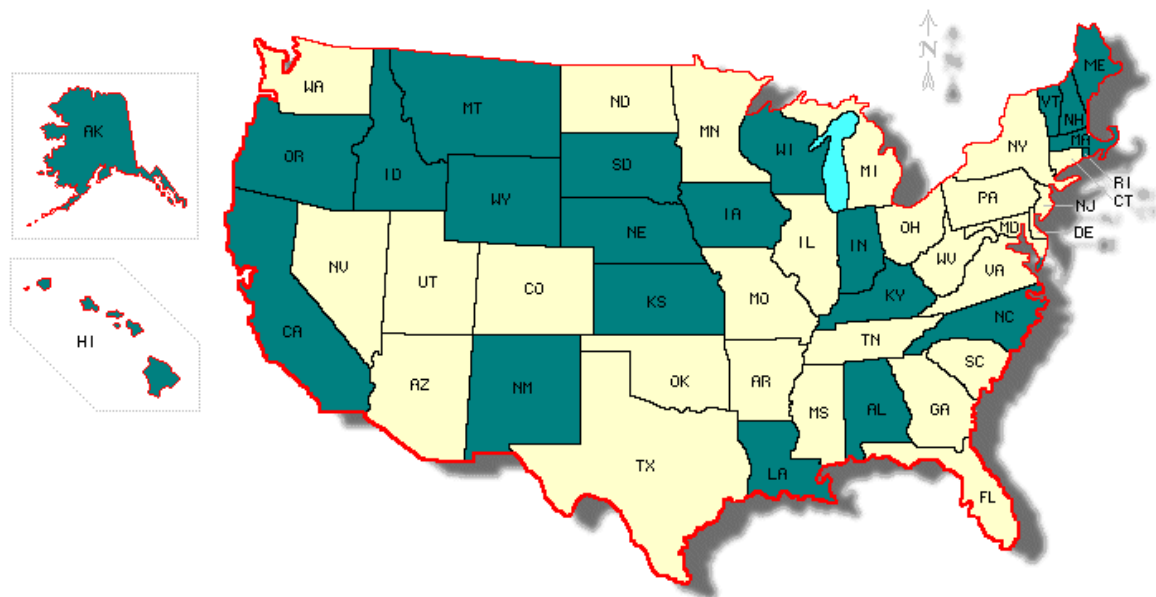
Enumerated Qualifications for Experts

- - Enumerated
- - Silent



Certificate of Merit Requirements

- - Require Certificate
- - No Requirement



Recommendations:

1. Current MedChi policy is to continue to strongly oppose trial lawyer attempts to increase the cap on damages in medical malpractice cases and to abolish the defense of contributory negligence; support efforts to establish a pilot project for specialized health courts and to limit repeated continuances in medical malpractice cases and otherwise work to protect and strengthen the legal liability environment for physicians in Maryland.
2. After reviewing the survey it is recommended that the above agenda be continued and, in addition, MedChi shall work to establish a requirement that all certificates of merit must be filed when the claim is filed.

As adopted by the House of Delegates at its meeting on September 21, 2013.