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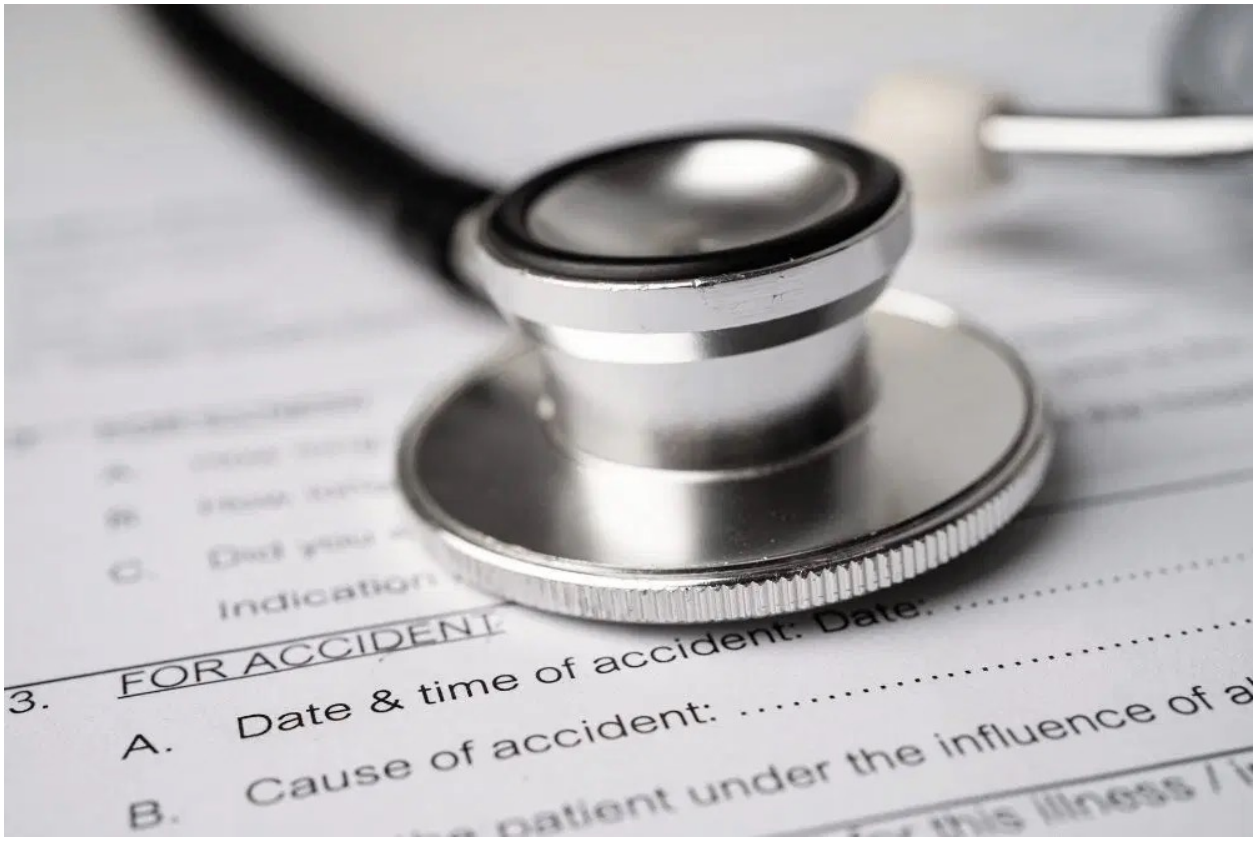
As Healthcare Litigation Costs Rise, Proactive Claim Management Becomes Critical

By Todd DeStefano and Megan Feinberg



Tort reforms that have held lawsuits and damages in check for decades have begun to erode, increasing litigation, especially for healthcare organizations and professionals.

Over the past several years, while the number of medical professional liability claims remained relatively steady and even turned down more recently, claim severity has been trending upward. For example, according to the Aon/American Society of Healthcare Risk Management 2023 Hospital and Physician Professional

Liability benchmark analysis report, hospital professional liability (HPL) claims that closed for more than $1 million rose from 2.6% of claims in 2016 to 5.9% in 2022. During this time, the average indemnity payment on closed HPL claims of up to $5 million increased from $354,000 to $504,000, while the average expense payment reached $78,000 per claim. Not surprisingly, obstetricians continue to rank as the most sued specialties and cases with the highest jury awards.

Overall, the National Association of Insurance Commissioners reported that total medical professional liability indemnity losses in 2022 were $6.25 billion, an increase of 39% from 2018, while defense costs were an additional $2.2 billion.

States Expanding Damage Caps And Other Claim Restraints

Adding to this trend, states are raising the cap on damages and loosening other restrictions for healthcare cases.

For example, for the first time in nearly 50 years, California rolled back a tort reform by updating its Medical Injury Compensation Reform Act. The new law, which went into effect at the beginning of 2023, increases the cap on non-economic damages for non-death cases from the previous $250,000 level to $350,000, then rising to $750,000 over the next 10 years. Similarly, for cases involving a death, the cap has been raised to $500,000 and will increase to $1 million over the next 10 years. With more money on the table, plaintiff attorneys are beginning to advertise more aggressively to cultivate cases.
In February 2023, Iowa enacted a law that places a $2-million cap on non-economic damages in lawsuits against hospitals and $1 million for independent clinics and individual physicians related to permanent injuries or death.

A new Nevada law raises the cap on damages in medical malpractice cases by $80,000 each year, from the previous $350,000 up to $750,000 in 2028, then increases the cap by 2.1% per year. The law also extends the statute of limitations for filing a medical malpractice lawsuit to two years from discovery of the injury or up to three years from the date of the incident.

Finally, additional states such as New York, Utah, Wisconsin, and New Mexico are either in the process of changing their malpractice laws or debating potential changes to them.

Key Court Jurisdictions Add To Cost Pressure

In addition, jurisdictions where cases can be filed often matter to the ultimate outcome.
In January 2023, Pennsylvania changed a 20-year-old rule that limited the court venue for medical malpractice lawsuits against healthcare professionals or facilities to the county where the medical treatment was provided. Now, healthcare providers in Pennsylvania can be sued in any county where they conduct business or have significant contacts, such as hospital privileges, allowing plaintiff attorneys to "venue shop" jurisdictions that have delivered higher payouts to plaintiffs, such as Philadelphia and Allegheny counties.

Not surprisingly, 468 medical malpractice cases were filed in Philadelphia through October 2023, more than double the number during that timeframe in 2022.

Making matters worse, there is no cap on damages for medical malpractice cases in Pennsylvania.

Proactive Strategies Needed To Control Costs

With these factors pointing to an acceleration in claim costs, healthcare organizations and professionals need to have a proactive strategy for managing claims and minimizing insurance premium increases.

The first step is recognizing the potential for a claim. A medical record request from a patient or their attorney is often the first indication that a claim will be made. By regulation, properly authorized records requests must be handled expeditiously. Delaying or avoiding a response to these requests not only could lead to an unnecessary escalation toward a claim but also could result in a coverage denial or eventual nonrenewal by the insurance carrier.

It's also critical to notify your claim administrator promptly of any informal request or formal action involving an attorney so they can begin taking appropriate action to minimize any potential impact.

Claim Administrator Actions Can Lead To Better Case Outcomes

This is where your choice of claim administrator makes a difference. Make sure that they have deep expertise in healthcare professional liability claims, preferably staffed by former defense counsel who specialized in managing these types of cases at law firms, or even have a dedicated healthcare practice. These professionals will know the diligent claim management actions to take that will have the most impact on the case outcome and can work seamlessly with your insurer's defense counsel.

For example, once ESIS receives a lawsuit and assigns defense counsel, the case strategy commences immediately to ensure all parties are aligned so we do not waste time and money unnecessarily on protracted litigation and motion filings. Early expert reviews and taking a position on liability are critical to the case strategy to reduce costs, whether the course of action is early resolution, mediation or preparing for trial.

For example, an insured physician reported a new suit filed against them in June 2023, even though they received a request for medical records by the plaintiff's attorney almost a year earlier. Outside counsel was immediately assigned, experts retained, records reviewed, and an in-depth initial suit evaluation prepared, all within 30 days of the claim report. The choice of counsel and their quick action in isolating the valid issues with the physician's care, as well as identifying procedural issues caused by their delay in reporting the initial attorney contact to ESIS, led to resolution of the matter in less than 60 days from the first claim report.

Focused, proactive approaches like these can make a major difference not only in the cost of claims but also in the potential impact on insurance coverage. In our experience, there is an average 30% reduction in indemnity payments on cases resolved with early resolution strategies compared to cases that run their course through protracted court proceedings. Also, the ability to employ these resolution strategies increases significantly when cases are reported to the claim administrator

soon after an inquiry is made by an attorney or when a lawsuit is filed. Considering that the average HPL claim nationwide in 2022 was more than $500,000 (see beginning of article), the potential savings can be substantial.

In the specific case noted above, resolving the claim quickly also kept the claim exposure within the liability policy's coverage limits and helped contain the organization's overall loss experience, while reducing the chances of a bad faith claim against the insurance carrier and potential nonrenewal of insurance coverage.

In today's increasingly litigious environment, employing these types of proactive strategies through an expert claim administrator provides the best chance of containing loss costs and insurance premiums.

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