

HEALTHCARE INDUSTRY GUIDE

Understanding a Hardening Market for Medical Malpractice Insurance



The \$205 million medical malpractice judgment against the Johns Hopkins Bayview Medical Center in 2019 grabbed headlines. The lawsuit concerned a child born in 2014 after allegedly being deemed non-viable and inadequately monitored during birth. Deprived of oxygen, she was left with cerebral palsy that requires 24/7 care.¹

The case set a new record among the high dollar claims that are plaguing healthcare providers and insurers alike. They are occurring with alarming frequency and are a struggle for even beacons of quality care like Johns Hopkins to manage. It also illustrated a major factor behind the hardening market for medical malpractice insurance that's expected to progressively worsen – with some predicting a doubling of premiums by the end of 2027.

In fact, premiums are rising in many lines of insurance coverage, and not just for the healthcare industry. But the trend in medical professional liability (MPL) insurance follows 14 years of a soft market despite increasingly high dollar judgements. And many of the trends influencing MPL are affecting other lines. In many cases, premiums are increasing and fewer insurance carriers are willing to offer coverage for property, directors and officers (D&O) and auto insurance, for example.

It all calls for healthcare organizations to apply more surgical precision than ever before to their risk management practices.

A hard insurance market develops as pricing for coverage fails to adequately compensate for high-cost claims. It causes underwriters to toughen their standards, reduce the amount of coverage they write, and price it higher.

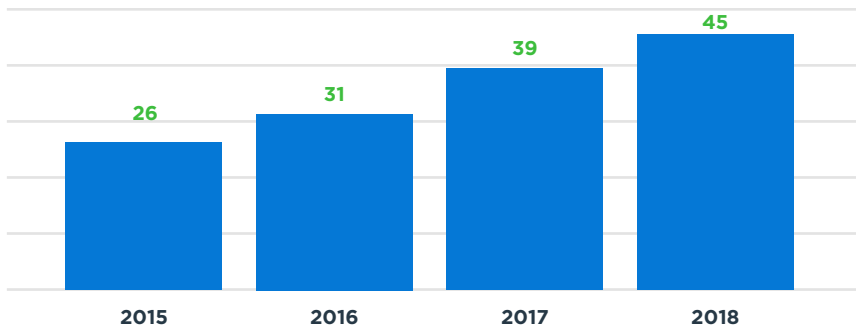
¹ <https://wamu.org/story/19/09/26/largest-medical-malpractice-verdict-in-u-s-history-awarded-to-maryland-woman/>

Anatomy of a Hard Market Under Pressure

The hard market in medical professional liability is driven by the convergence of trends:

- **Consolidation and the changing profile of the healthcare delivery system.** As rules governing mergers have relaxed, many hospitals have become big healthcare systems, private practices come together as super groups, and many once-independent practitioners (44% of them, in fact²) are now employed by hospitals and hospital systems. As the provider community has shrunk, so has insurers' underwriting volume.
- **Conflict between productivity goals and delivering high-touch care.** The pressures of trying to deliver quality care while satisfying the bottom line have caused 42% of physicians to burn out and 15% of them to suffer from depression.³ Improved technology has offered new, but not risk-free efficiencies. It's all combined to increase the exposure to malpractice claims.
- **More severe claims, more often filed.** Since 2015, high cost claims have grown in frequency and the number surpassing \$10 million has jumped by 125%. In 2015, "only" 26 claims surpassed \$10 million. By 2018, that had grown to 45.⁴ And thanks to social inflation, or the shift in societal attitudes towards claims, these claims will keep rising in costs.

Number of Medical Malpractice Claims Costing More Than \$10M



- **Fewer MPL insurers.** Many alternative insurers (like captives and risk retention groups) have failed or exited the business. Others, like two well-established property and casualty firms and a large, state-sponsored carrier, have also gotten out. That's less competition for the business that's out there, a common rationale in any business to raise prices.
- **Decreasing underwriter profitability.** Eight of 22 MPL insurers had negative profitability on their MPL policies in 2019's fourth quarter. While many insurers still have large reserve surpluses from which to pay claims, they still need to maintain profits and keep these surpluses secure.

² <http://www.physiciansadvocacyinstitute.org/Portals/0/assets/docs/021919-Avalere-PAI-Physician-Employment-Trends-Study-2018-Update.pdf?ver=2019-02-19-162735-117>

³ <https://www.medscape.com/slideshow/2018-lifestyle-burnout-depression-6009235>

⁴ TigerRisk Partners, "MPL State of the Market – November."

How a Hard Market Plays During a Pandemic

All the normal concerns raised by a hardening insurance market – from rising premiums to lower limits and changing terms – become secondary issues (at best) as our healthcare system battles COVID-19.

The financial impact of the pandemic crisis for hospitals and health systems is being felt across the board, especially as profitable elective procedures have been cancelled to care for coronavirus patients. Meanwhile, though, providers are being battered by rising costs, such as temporary staffing at higher crisis pay rates and for protective equipment and supplies like ventilators.

The longer term fallout will likely be especially severe for the already threatened rural hospitals, and hundreds may be forced to shutter before the crisis ends⁵. Many non-profits had slim or negative operating margins before the crisis and little cash on hand; the smaller organizations will be particularly challenged to emerge whole. Federal COVID-19 relief funding will make a critical difference⁶.

For now, one frequent question is whether COVID-19-related losses are covered by business interruption insurance, and the answer is most likely going to be no. That line of coverage is triggered by damage to real or personal property. A more troubling concern for the longer term is the skyrocketing liability risk doctors and nurses on the front lines have faced as they have been forced to ration care and perform unfamiliar jobs because of staff and equipment shortages in a crisis situation. That's something to be closely monitored, for sure.



⁵ <https://khn.org/news/coronavirus-threatens-the-lives-of-rural-hospitals-already-stretched-to-breaking-point/>

⁶ <https://www.modernhealthcare.com/providers/covid-19-poses-long-term-impact-not-profit-hospitals>

Twists and Turns in Malpractice Claims

Around thirty states have caps on malpractice that, as of January, at least, have withstood constitutional challenges. Some cap non-economic damages. Others have a hard cap on all damages. Plaintiff's lawyers have been able to maneuver around caps either way.

For example, California's cap of \$250,000 on non-economic damages for medical malpractice (e.g. battery) claims does not apply to professional negligence (a difference of intent). It's given rise to "hybrid" claims. In the fall of 2019, a jury heard the case of a man who had much of his penis removed during a procedure to remove a mass from his scrotum. The mass had spread and would affect his urethral function. But the man's wife was not asked before the procedure was changed to address this issue. The award: \$22,000 in economic damages and \$9.25 million in non-economic damages.

D&O Rates Rise with Issues like Anti-Trust lawsuits

As healthcare systems get larger, accusations of anti-competitive behaviors step up, leading to antitrust lawsuits and separate claims against the system's directors and officers.

It's an area of growing concern to D&O insurers after settlements in the last two years by big systems like Sutter Health in northern California, CHI Franciscan in Washington state, and Atrium Health in North Carolina. The initial action against Sutter was by 1,500 self-funded health plans⁶ that accused it of charging 70% more for inpatient procedures in northern California than in southern California. Sutter settled in November of 2019 for \$575 million.



⁶ <https://abcnews.go.com/Health/wireStory/trial-approaching-california-hospital-antitrust-case-65780916>

Expect the Unexpected at Renewal for MPL

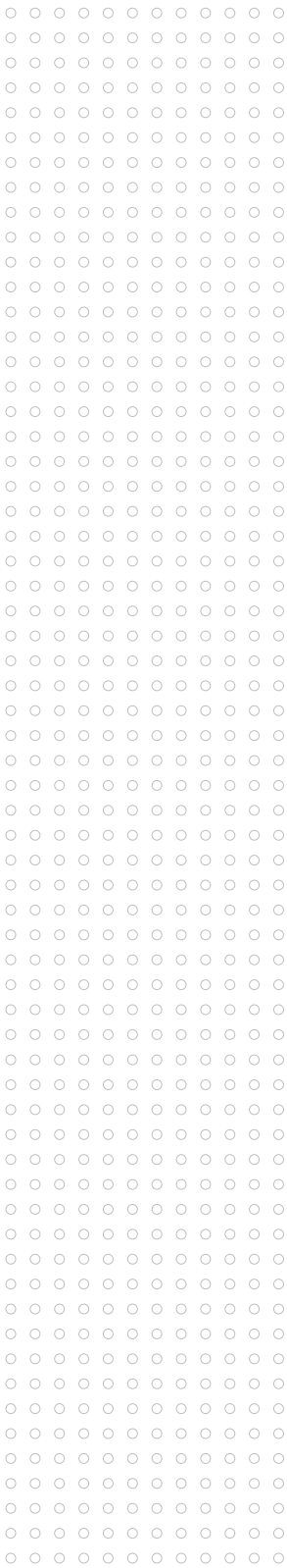
As these trends deepen, premium increases will be the norm in MPL. The severity of these increases will depend on past claims experience – the fewer extraordinary losses, the better. A demonstrable adherence to a rigorous risk management plan makes a difference, too. HUB International’s healthcare practice members are currently projecting rates to increase by up to 10% for hospitals and large practice groups. But each case plays out differently.

For one large medical group client with a premium of over \$3.5 million, HUB’s detailed submission to five carriers included a loss analysis and target premiums. They came back with proposed premium increases that ranged from 10% to 112%, and coverage reductions but no limit increase. The incumbent’s eventual package, a flat rate renewal with coverages restored, won the day.

Sometimes we’re surprised. HUB’s team told one hospital client to expect a 10% increase at renewal which didn’t, in fact, occur. Instead, the insurer halved the client’s \$20 million limit in excess coverage kept as a protection against high dollar claims. (It comes into play when claims covered by the primary policy are exhausted, another factor in mega-verdicts.)

...and other lines are cause for concern, too

Accelerating losses, shrinking capacity and other issues that are influencing medical malpractice are playing out in other lines for the healthcare market, too. Property lines are pressured from the unremitting claims costs related to hurricanes, tornadoes, floods and fires. Directors and Officers (D&O) and employment practices liability (EPL) are facing challenges, too, as senior level decision-making in healthcare systems comes under fire, sparking claims with high settlements and high defense expenses that keep pushing rates up. Another hot spot is auto coverage, necessary not just for ambulances but also for transporting the aged or individuals with mobility issues.



RATE INCREASE PROJECTIONS

Line of Business	Hospitals	Large Practice Groups
Medical Professional/ GL	+0 - 10%	+0 - 10%
D&O/EPL	+10 - 15%	+10%
Workers' Compensation	-5% - 0%	-5% - 0%
Automobile	+10 - 15%	+5 - 10%
Property	+15 - 20%	+5 - 10%
Cyber	+0 - 5%	+0 - 5%
Aviation Helipad	0%	0%
Pollution/Environmental	+0 - 5%	+0 - 5%

NOTES:

- HUB projections are based off presumed risks with favorable loss experience in favorable jurisdictions from a litigation standpoint.
- Some increases can be offset with higher retentions/deductibles
- The impact of COVID-19 may affect these projections
- **Property caveats:** Larger increases in areas prone to events such as hurricanes, wind and hail, and wildfires.
- **Auto caveats:** Much higher (15% - 20% increase) There is also a much higher increase if patient transport is involved.
- **Projections:** Obtained from HUB credentialed Healthcare Specialty Experts in California; Massachusetts; Connecticut; Maine; Iowa; Illinois; Kansas City; Texas; Colorado; South Carolina.

How to Manage Your Risk Moving Forward

Now is the time to ensure you are following best risk management practices in your policies and procedures. Start with a thorough risk assessment, lending a particularly critical eye to the two troublesome areas of credentialing and electronic medical management. Also understand the importance of the right broker partnership for tough times ahead. Here are key starting points.

Risk Assessments Can Identify Problems Before They Happen

Surprisingly enough, nearly 70% of physicians have never undertaken a risk assessment⁷ even though it can make a difference in their medical malpractice rates. Important areas to evaluate include:

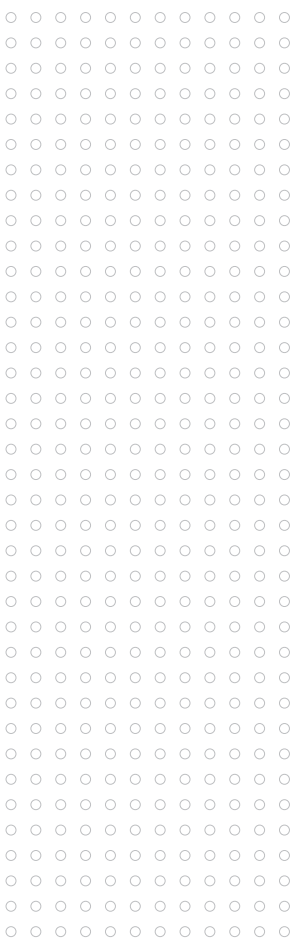
- **Loss history.** Long-term loss and incident data can reveal breakdowns in or needs for new policies and procedures. Finite data provides a more precise view of departments in a hospital system or large practice groups that require a closer look.
- **Procedural review policies.** These guard against errors like wrong-side surgeries. Detailed checklists, thoughtfully developed and consistently used, will reduce negative outcomes and lessen liability.
- **Processes for managing hospital patients outside of surgery.** This includes how patients are informed about post-surgical costs, like physical therapy. Getting hit with unexpected and unexplained costs leads to more malpractice claims, studies show. And hospitalists — doctors who specialize in hospital patients — are important for responding quickly to post-surgery emergencies. They communicate immediately and directly with the primary physician and handle issues quickly, thereby reducing malpractice claims.
- **Claims-handling, pre- and post-lawsuit.** Mistakes are made. It's best thing to step up and try to resolve them favorably with the patient. People are less likely to sue a medical professional with whom they've established a good relationship. Apologizing may make a difference, but only if you are in a "sorry" state that has legislated that it can't be considered an admission of guilt. (And if doing so won't jeopardize your professional liability policy.)
- **Charting and documentation.** Quality assurance and efficient claims processing depend on good charting and documentation practices. Listing medical procedures proves they were done. It also is a counter to patients who don't follow advice or come back with the same complaint without improvement.
- **EMR management.** Electronic medical records (EMR) are a boon but also a big malpractice risk when the cut and paste function is misused. Policies around its use should be reviewed to cut back on risks. Set ground rules and communicate on when and how to use the function. Using a voice-activated dictation system with your EMR system can also help. Also, audit it manually on a regular basis to insure you are on top of issues.

⁷ <https://www.medpro.com/>

Credentialing Done Right Helps Head Off Claims

Credentialing procedures also are an important aspect of your risk assessment and management over time. Sloppy practices mean medical professionals with poor malpractice track records can slip in under the radar and cause big claims problems. Your procedures should include:

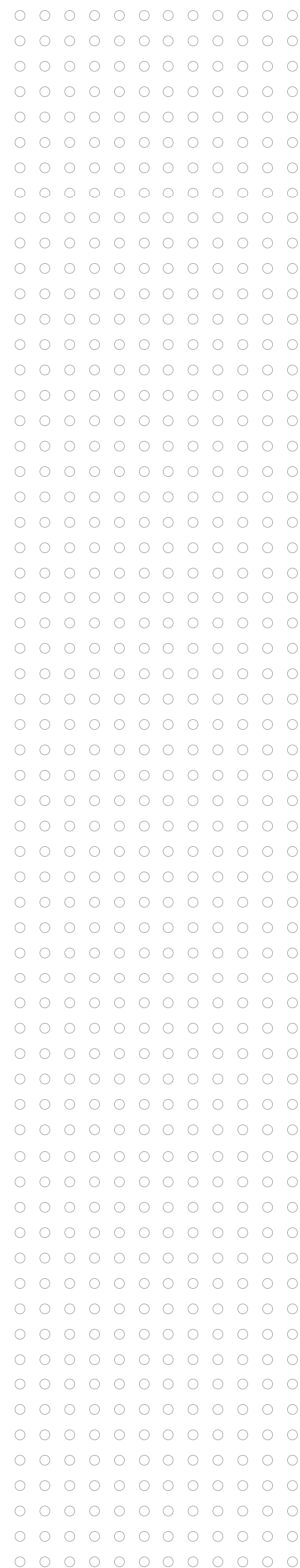
- **Verify all the details.** There's more to credentialing than checking on educational background. The verification process should evaluate the practitioner's complete records, including loss history. A surgeon will have more of one than an internist, but a two-page loss run in either signals a problem.
- **Be aware of referral circumstances.** Not all referrals are necessarily good. Take, for instance, a university whose board members or professors periodically proposed their physician golf buddies to the medical school staff. Although it may be politically uncomfortable if candidates' claims histories aren't up to snuff, it is still important to evaluate every medical professional's record thoroughly
- **Look for red flags.** Frequent moves from one hospital or practice to another are concern. Plus, certain specialties are more prone to substance abuse which might trigger medical malpractice cases. Check for license suspensions by the medical board for such issues; they're public record.



Your Insurance Broker Is Your Partner — How You Can Meet in the Middle

You don't have time to become an insurance industry expert. That's why you need an experienced insurance broker. Look for a healthcare industry specialist who ideally specializes in hospital and medical practices and knows how to help you plan for renewals and advocate on your behalf with insurance companies. Here are six ways to make the most of the relationship:

- 1. Have regular meetings.** Begin planning for your next renewal at least 120 days in advance. But also engage in regular reviews of your losses year-round. The better your broker understands them, the better equipped he or she is to negotiate at renewal.
- 2. Establish a relationship with your insurer, too.** A good insurance broker will foster long-term relationships between his clients and insurance companies. The better they know each other, the better they'll respond to negative news. Insurers are willing to reward accounts that remain loyal versus those who shop every renewal for the lowest price. Longer-term relationships make for better business all around.
- 3. Take on more of your own risk.** Consider shouldering more of your own risk and taking it off the insurance company as a way to reduce your premium. Your broker can restructure your insurance program by reviewing account limits and replacing first-dollar coverage with deductibles and retentions. Sharing risk with your insurers sends a strong signal that you are serious about actively managing your loss exposure.
- 4. Know your numbers and tell your story.** Be proactive. Tell your broker and insurer what you're doing to prevent future losses. Make sure you are familiar with your large losses (\$100,000+) and loss trends so you can demonstrate to the carrier that you understand their root causes.
- 5. Best terms require best information.** When applying for or renewing coverage on your behalf, your insurance broker needs to develop a high quality submission with detailed information. If you have had a large loss, it must be well-researched and explained in the most positive light possible. Every detail counts in today's hard market.
- 6. Seek Alternative Markets.** If your broker hasn't suggested it, ask about the benefits of a captive or risk retention group for your medical professional liability coverage.





CHECKLIST

Choosing the Right Insurance Broker

You want to get advice from people who understand your business and know your industry, and that includes your insurance broker. Before choosing one, ask these important questions.

☐ **How long have you been involved in the healthcare industry?**

You don't want to be the first. Your business is risky enough.

☐ **What percentage of your book are clients like me?**

Confirm that your broker spends most of his or her time in your industry and understands trends and issues that could impact your business.

☐ **How many insurance carriers can you bring to the table?**

Not all brokers have access to specialty insurance companies who serve the healthcare industry. A brokerage firm that is in good standing with top-rated carriers has the best chance of securing optimal coverage and pricing for your business.

☐ **In addition to insurance, what expertise and services do you offer?**

Your broker should have clinical risk management capabilities, and should be able to advise you on patient safety, staff training, and other healthcare risk management strategies.

☐ **Can the broker review your contracts and advise you on risk exposures?**

Experienced brokers will review insurance clauses in all contracts and advise you on changes you should make – at no additional charge. They should direct you to attorneys who know your business and can review your other business contracts for liability exposures.

☐ **What experience does the broker's staff have when it comes to claims?**

When you file a claim, both your broker and your account management team should be committed to advocating on your behalf with the insurance carrier.

☐ **What other services or expertise can the broker offer?**

Ask for an introduction to your broker's counterparts in employee benefits consulting. There are so many new ways to support your workforce and you need a specialist to advise you on benefits.

Strategic support that puts you in control

When you partner with us, you're at the center of a vast network of experts who will help you reach your goals. With HUB, you have peace of mind that what matters most to you will be protected — through unrelenting advocacy and tailored solutions that put you in control.

For more information on how to manage your insurance costs, reduce your risk and take care of your patients and employees, contact a HUB healthcare insurance specialist.

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