



April 6, 2023

**HAND DELIVERY**

Senator Anne Carney, Chair  
Representative Matt Moonen, Chair  
Joint Standing Committee on Judiciary  
State House, Room 438  
Augusta, Maine

**Re: L.D. 549 "An Act Regarding a Discovery Rule for the Statute of Limitations for Cases of Medical Negligence"**

Dear Senator Carney, Representative Moonen, and Distinguished Members of the Committee,

My name is David Herzer. I am the Vice President of Claims at Medical Mutual Insurance Company of Maine ("Medical Mutual"). Medical Mutual was founded in 1978 by a group of 12 physicians in response to the medical professional liability insurance crisis leaving few affordable options for coverage in Maine. Today, it insures about 3,800 physicians, 2,600 advanced practice providers, 38 hospitals, 73 nursing homes, and 43 allied healthcare facilities in Maine, New Hampshire, Vermont, and Massachusetts. In Maine, specifically, the company insures about 85% of the medical community comprising those demographics. As its name suggests, Medical Mutual is a "mutual" insurance company, which means that it is owned by its individual and institutional medical professional policyholders.

My background includes (i) two years as the Vice President of Claims for Medical Mutual overseeing a team of four Claims Representatives handling about 300 medical professional liability claims at any given time; (ii) 28 years as a litigation attorney at Norman, Hanson & DeTroy working primarily with insurers and insureds in defending liability claims in medical malpractice and other contexts; (iii) nine years on the Professional Ethics Commission of the Board of Bar Overseers (the last two as its Chairperson); and (iv) nine years on the Advisory Committee on the courts' Rules of Civil Procedure.

In short, I am writing on behalf of Medical Mutual and its policyholders to oppose LD 549's pure discovery rule statute of limitations. Enacting a statute that no longer tethers the start of the limitations period to a fixed date in time – currently, from the date the medical care was rendered or forgone<sup>1</sup> – will increase the risk exposure for all medical care providers and

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<sup>1</sup> The current statute of limitations also has a discovery rule allowing suit for damages caused by the leaving of a foreign object in the body within three years from when the plaintiff discovers or reasonably should have

practitioners and for their vicariously liable employers. In turn, it will force an increase in the premium rates for the liability insurance that is intended to protect them from that risk. In an effort to control those rising premiums, the medical community will be compelled to share more of the risk themselves in the form of increased self-insured retentions or deductibles and by entering co-participation programs in which they contribute a percentage of the dollars paid by Medical Mutual for a claim.

The Legislature has made no determination of the need for, or consequences of, such a drastic change to the statutory scheme enacted in 1985 that was the subject of exhaustive study, debate, and negotiations by Legislators, Committees, Work Groups, individual lawyers and legal trade organizations, members of the medical community and their trade associations, and insurance industry representatives for two years prior to the enactment of the Maine Health Security Act in its current form. To enact this Bill and completely change the statute of limitations, furthermore, would be to repeal the component of that well-vetted statutory scheme that was supported by empirical study and statistical analysis predictive of its positive impact on the number of claims filed, or claim frequency, and therefore insurance premiums.<sup>2</sup>

Now is the wrong time to effect a sea change in the medical professional liability landscape by indefinitely extending the legal liability of all providers and practitioners for every patient they treat. Claim Severity has been trending significantly higher in New England and across the nation. An unlimited window of time to bring claims in Maine will compound that claim severity trend and increase claim frequency, too. A pure discovery rule statute of limitations with no limit would make Maine one of a handful of outlier jurisdictions, at least one of which pays higher premiums currently. Maine residents continue to face accessibility challenges when they seek medical care that will be exacerbated by an indefinite extension of

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discovered the harm. The mere presence of a foreign object obviates much, if not all, of the debate about a standard of care breach and causation that would be the central subjects in a typical medical liability claim. Therefore, the concerns about missing witnesses, faulty memories, lost records, and other consequences of a stale claim and their impact in hindering a medical care provider's defense are not implicated in the case of a foreign body. *Choroszy v. Tso*, 647 A.2d 803, 807 (Me. 1994).

<sup>2</sup> The Commission to Examine Problems of Tort Litigation and Liability Insurance in Maine was tasked by the 112<sup>th</sup> Legislature to investigate the liability insurance crisis at that time and its impact on Maine citizens and to evaluate various tort reform responses. In its December 1987 report, the Commission mentioned a General Accounting Office study of the impact on medical malpractice insurance of the tort reforms enacted in the 1970s. "One of the few-existing empirical studies cited in the GAO report was produced for the Rand Corporation by Patricia Danzon. Ms. Danzon's statistical analysis of the impact of state tort reforms on medical malpractice insurance rates leads her to the following conclusions: States that have reduced statutes of limitations by adults and set out limits on discovery rules have experienced less growth in claim frequency than states with statutes more favorable to plaintiffs. . . ." Report of the Commission to Examine Problems of Tort Litigation and Liability Insurance in Maine, pp. 58-60 (December 1987). *Choroszy v. Tso*, 647 A.2d 803, 806 (Me. 1994).

providers' and practitioners' legal liability for providing that care and the increased cost of insuring for that added liability risk.

**I. Claim Severity is trending significantly higher in New England and across the nation.**

Those who follow the news about the medical professional liability industry know that reports of "claim severity," i.e., the cost of an individual claim in defense expenses and indemnity dollars, is rising at an alarming rate for all claims, let alone those claims yielding the "nuclear" verdicts that make general media headlines. This upward trend can be found across the nation, in New England, and in Maine specifically.

Medical Mutual monitors its claims data in Maine, New Hampshire, Vermont, and Massachusetts on an ongoing basis and has studied that data to understand the claim severity experience among its own insureds. Among the takeaways about the severity trend in Maine are the following.

- The average of the annual indemnity payments made over the six years spanning 2017 to 2022 increased by 52% as compared to the average paid in the eight-year period from 2009 to 2016.
- For the seventeen years spanning 2000 to 2016, the largest amount paid in indemnity for a settlement or verdict was \$4.75MM.
- Over the past seven years, from 2017 to 2023, there have been 9 claims in which the indemnity payment or the jury verdict exceeded \$4.75MM, with a high of \$9.5MM and an average of \$6.4MM.
- Of those 9 claims exceeding the prior seventeen-year high-water mark, Maine is responsible for six, with a high of \$9.5MM and an average of \$6.8MM.
- For the first quarter of 2023, Medical Mutual has paid more in indemnity than it paid in the entire years of 2012, 2013, 2014, 2015, and 2016 – and it paid just \$114,000 less this quarter than 2019's total.

Medical Mutual's experience is shared by insurers and their medical professional insureds nationwide. For example, The Doctor's Company is the nation's largest physician-owned medical malpractice insurer, with over 84,000 member-insureds. It publishes liability claims data and analysis to assist in identifying trends among its members' claims. Among the

recent takeaways on the issue of claim severity The Doctor’s Company has found are the following.<sup>3</sup>

- The average payment for a closed medical malpractice case has been growing well beyond the pace of inflation since 2014.
- There has been a 55% increase in claim severity from 2000 to 2018.<sup>4, 5</sup>
- From 2014 to 2018, the number of verdicts in excess of \$25 million more than tripled.<sup>6</sup>
- From 2010 to 2019, the average of the top 100 jury awards for medical malpractice cases increased by almost half.

**II. An unlimited window of time to bring claims in Maine will compound claim severity and increase claim frequency, too.**

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<sup>3</sup> Anderson, R., “Before COVID-19, Outlier Medical Malpractice Verdicts Were Rising—What’s Next?,” December 14, 2020, <https://www.thedoctors.com/articles/before-covid-19-outlier-medical-malpractice-verdicts-were-risingwhats-next/> (Accessed April 3, 2023).

<sup>4</sup> Jury Verdict data collected by Verisk shows that the average size of a verdict over \$1MM increased by nearly 1,000% from 2010 to 2018 across the country. MLMIC Ins. Co., “What Recent ‘Nuclear’ Verdicts May Mean for Medical Liability in New York,” January 3, 2023, <https://www.mlmic.com/blog/physicians/nuclear-verdicts-in-new-york> (Accessed March 30, 2023). Verisk was founded in 1971 and provides the insurance industry products and services to assist with operations that involve data management, predictive modeling, and regulatory compliance, among other analytics and technology offerings. Verisk, <https://www.verisk.com/insurance/> (Accessed 4.4.2023). The Texas Department of Insurance is one of its clients. Verisk, “Texas Department of Insurance to Deploy Verisk’s Mozart Form Composer,” May 12, 2020, <https://www.verisk.com/newsroom/texas-department-of-insurance-to-deploy-verisks-mozart-form-composer/> (Accessed April 4, 2023).

<sup>5</sup> The U.S. Chamber of Commerce Institute for Legal Reform reports that the median verdict across the country has risen by about 28% from \$19.3MM in 2010 to \$24.6 MM in 2019. MLMIC Ins. Co., “What Recent ‘Nuclear’ Verdicts May Mean for Medical Liability in New York,” January 3, 2023, <https://www.mlmic.com/blog/physicians/nuclear-verdicts-in-new-york> (Accessed March 30, 2023).

<sup>6</sup> Verisk has found that there was a 300% increase in verdicts of \$20MM or more in 2019 as compared to the average verdicts from 2001 to 2010. MLMIC Ins. Co., “What Recent ‘Nuclear’ Verdicts May Mean for Medical Liability in New York,” January 3, 2023, <https://www.mlmic.com/blog/physicians/nuclear-verdicts-in-new-york> (Accessed March 30, 2023).

While medical professional liability claim severity is trending significantly higher, the trend of “claim frequency,” i.e., the number of claims made, has plateaued by some measures<sup>7</sup> and reduced by others. The Doctor’s Company reports that it has seen a reduction in the number of claims brought against its physician-member insureds from a high of 17 claims per 100 physicians to fewer than seven claims per 100 physicians.<sup>8</sup> Medical Mutual’s claim frequency reflects a trending reduction that has continued through the Pandemic years and into 2023. It is anticipated that claim frequency will rebound as the courts’ backlogs clear and lawsuits return to a pre-Pandemic pace, however.

Extending the time during which medical care providers and practitioners are exposed to liability beyond the current three years from a date certain – the date when the care was rendered or forgone – to an indeterminable date three years from when the patient discovers or reasonably should have discovered the harm<sup>9</sup> necessarily means that Maine claim frequency will increase. An indefinite extension of the time to file suit expands the group of eligible plaintiffs significantly. With that expansion in the number of suing plaintiffs bringing new claims comes an increase in claim frequency and in the upward trend of claim severity. Some of the new claims will be resolved by large settlements or verdicts, affecting the settlement or verdict severity numbers cited above. But all of those new claims, large or small, will contribute to an overall increase in the defense costs Medical Mutual and its policyholders incur.

The Bill’s discovery rule provision means more litigation and costs in a category of liability claims that already is litigious and expensive. The determination of when a patient discovered or reasonably should have discovered the harm does not lend itself to an expeditious and cost-effective decision by a judge on a motion, as the current date-certain statute of limitations does. Instead, the discovery rule standard requires factual findings that are not properly made by a judge in the vast majority of cases. When a patient discovered the harm and whether they reasonably should have discovered it sooner are factual findings that generally must be made by a jury on the basis of admissible evidence in a trial.

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<sup>7</sup> Leander, E., “Medical Malpractice Insurance Rates: What the Data Tells Us,” November 19, 2021, <https://www.cunninghamgroupins.com/news/2022-medical-malpractice-insurance-rates-what-the-data-tells-us/> (Accessed April 3, 2023).

<sup>8</sup> Anderson, R., “Before COVID-19, Outlier Medical Malpractice Verdicts Were Rising—What’s Next?,” <https://www.thedoctors.com/articles/before-covid-19-outlier-medical-malpractice-verdicts-were-risingwhats-next/>, December 14, 2020 (Accessed April 3, 2023).

<sup>9</sup> It is unclear whether “harm” in this statute will be interpreted by the courts to mean the injury alone or the injury and its medical negligence cause. Starting the three-year clock for filing suit from when the patient discovered not only the injury, but also that it was caused by a breach of the medical standard of care is far more expansive a period of time than from when the patient discovers, merely, that they have suffered an injury.

**III. A pure discovery rule statute of limitations with no limit would make Maine one of a handful of outlier jurisdictions.**

Currently, only 11 jurisdictions in the United States have a statute of limitations stating a discovery rule without any limit in the form of a repose provision to cap the number of years to bring suit. One of those jurisdictions is New Hampshire. A medical professional liability insurer in those jurisdictions necessarily assumes more risk by issuing an insurance policy to cover a health care provider or practitioner who is exposed to liability claims longer. More risk, of course, means higher premiums. Medical Mutual's premium rates for New Hampshire family practice and general surgery, for example, are 75% higher than the rates for their Maine counterparts, in large part due to the added risk exposure posed by the open-ended statute of limitations in New Hampshire.

**IV. Maine residents continue to face accessibility challenges when seeking medical care that only can be exacerbated by an unlimited extension of the legal liability for providing that care.**

It has been true for some time that patients in parts of Maine suffer from limited access to medical care. The New England Rural Health Roundtable observed,

Establishing and maintaining health care resources in rural areas is an ongoing struggle, and solutions that may work in more urban settings are often not practical in a rural context. . . .

Discrepancies regarding the availability and mix of primary care providers, and related access indicators, persist and are likely to expand. Primary medical care provider levels are up regionally, but remain lower in Rural areas. The rural physician workforce is also older, suggesting that this gap could widen in coming years. Rural areas continue to be more dependent on non-physician providers for primary care, which may help offset losses of physicians in the future, but the level of growth in Physician Assistants was faster in Metro areas.<sup>10</sup>

Those difficulties are not limited to the delivery of primary care, but include specialty care too. Hospital obstetric care units that once serviced largely rural areas have been closing at an alarming pace. Five Maine hospitals have ceased to provide obstetrics services since 2015, the latest of which was on March 31, 2023:

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<sup>10</sup> New England Rural Health Roundtable, "Rural Data for Action: A Comparative Analysis of Health Data for the New England Region," pp. 2-3 (2<sup>nd</sup> Ed. October 2014), link found at Maine Center for Disease Control & Prevention website <https://www.maine.gov/dhhs/mecdc/public-health-systems/rhpc/data.shtml> (Accessed April 3, 2023).

- Rumford Hospital, Rumford, 2023
- St. Mary's Regional Medical Center, Lewiston, 2022
- Bridgton Hospital, Bridgton, 2021
- Calais Regional Hospital, Calais, 2018
- Penobscot Valley Hospital, Lincoln, 2015

Exacerbating the care accessibility problem is the financial condition of Maine's hospital systems. Northern Light Health, for example, has been forced by financial constraints to reduce its service offerings, including closing a primary care practice in Orono and a specialized rehabilitation program at Eastern Maine Medical Center. Northern Light Health suffered a \$131.7 million loss in the fiscal year that ended September 2022.

But Northern Light Health is not alone. Approximately two-thirds of Maine's hospitals reported negative operating margins during the first half of 2022. "[A]ccording to data analyzed by the firm Franklin Trust Ratings — which provides health care insights to a range of clients — the median operating profit margin for many Maine hospitals was negative 17.74% in the most recently reported fiscal year, down from negative 11.1% in the prior year."<sup>11</sup> MaineHealth has increased wages to its existing employees in order to keep pace with inflation and has been using private staffing agencies at much higher pay rates in order to compensate for staffing shortages, both of which measures have caused financial strain. "Hospital officials and experts point to a variety of reasons for the [financial] troubles, including a shrinking of Maine's hospital workforce from a recent high of more than 34,000 in 2017, down to 31,000 by early 2021, according to state labor data."<sup>12</sup>

The Maine medical community will struggle to recover from the financial challenges caused by the exodus of medical professionals and the other financial challenges generated by the Pandemic for some time. "2023 will likely be a year of upheaval and market transformation for hospitals bouncing back from a financially distressing 2022 amid several post-pandemic headwinds . . . . 'Fitch[Ratings]<sup>13</sup> does not expect a rapid financial recovery for most providers .

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<sup>11</sup> Eichacker, C., "Maine's hospital systems are working to recover from a tough financial year," February 21, 2023, <https://www.mainepublic.org/health/2023-02-21/maines-hospital-systems-are-working-to-recover-from-a-tough-financial-year> (Accessed April 3, 2023).

<sup>12</sup> Id.

<sup>13</sup> FitchRatings is a 100-year-old provider of global credit ratings, commentary, and research with over 2000 employees drawing on the economic experiences of over 20,000 entities around the world. FitchRatings, <https://www.fitchratings.com/about-us#our-approach> (Accessed April 4, 2023).

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... Margins are not expected to return to pre-pandemic levels for quite some time.'<sup>14</sup>

The unlimited extension of medical professional liability exposure caused by a pure discovery rule statute of limitations – and the rise in insurance premiums and increased shared risk options in the form of self-insured retentions, deductibles, and co-participation programs that will follow – can only compound that financial stress. Roughly 80% of Medical Mutual's premiums charged to its hospital-insureds are attributed to the liability risks posed by their employed physicians, so hospitals that already are struggling financially likely will see the biggest impact. However, hospitals will not suffer alone; the Bill's discovery rule limitation will drive premium rates and risk-sharing higher for individual physician practices, nursing homes, and allied healthcare facilities too.

### Conclusion

What the medical community and the insurance industry that protects its interests need in these turbulent times is more stability, not more upheaval. This Bill will put Maine at risk of a reprise of the insurance availability and cost crisis that was the genesis of the Maine Health Security Act's 1985 measures, including its statute of limitations, which measures were studied, crafted, debated, and negotiated by this body over the course of two years. There has been no such vetting of the purported need for this Bill's sea change in the law or the consequences it will visit upon the medical community or the Maine patients who need access to its services.

If you have any questions, concerns, or requests that I can address, please do not hesitate to contact me. I can be reached at (207) 523-1505, which is my direct work telephone line; by using our toll-free number, 800-942-2791; or by email at [dherzer@medicalmutual.com](mailto:dherzer@medicalmutual.com). Thank you for your time and attention to this important matter.

Sincerely,



David L. Herzer, Jr., JD  
Vice President – Claims

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<sup>14</sup> Muoio, D., "Lower margins, softer liquidity sets the stage for hospital dealmaking in 2023," March 6, 2023, <https://www.fiercehealthcare.com/providers/lower-margins-softer-liquidity-sets-stage-hospital-dealmaking-2023> (Accessed April 3, 2023).