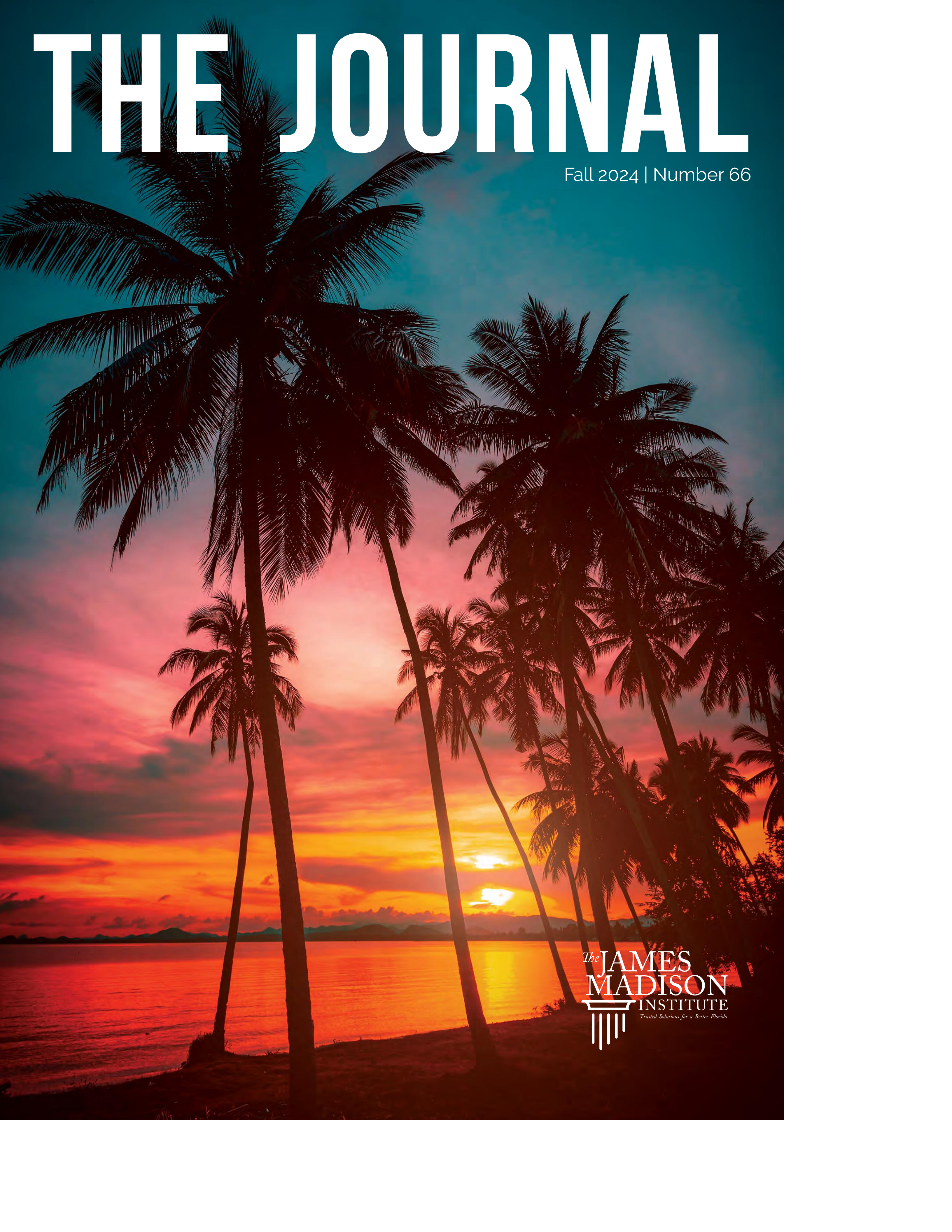
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Bridging the Divide: Achieving Medical Malpractice Reform through Reasonable Damages Recovery Provisions and Expanded Survivor Eligibility

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Escalating healthcare costs are a significant challenge in Florida. Exorbitant medical malpractice claim payouts contribute substantially to this problem. Not only do high medical malpractice claim payouts financially burden the state's healthcare system, but they also adversely affect the affordability and accessibility of healthcare for all Floridians, as more physicians retire and fewer physicians come to Florida, particularly in high-risk specialties, given the existing conditions of the state's medical malpractice regime.

To address those rising costs and the accessibility of healthcare in Florida, the healthcare industry and Florida lawmakers must undertake a multifaceted approach to medical malpractice reform. In 2024,

Senator Clay Yarborough offered a compromise solution through CS/SB 248. This legislation would place reasonable limits on the recovery of noneconomic damages in medical malpractice cases while at the same time expanding the class of survivors eligible to recover damages in such cases, ensuring that justice and compensation are accessible to all affected by medical negligence. This dual approach aimed to strike a delicate balance between reducing healthcare costs and upholding the rights of individuals to seek fair compensation, thereby fostering a more sustainable and equitable healthcare environment in Florida. Unfortunately, CS/SB 248 was met with resistance and failed to pass in the 2024 legislative session.

In 2025, the healthcare industry should renew this effort to pass meaningful medical malpractice reform. That means installing sensible, per-claimant limitations on noneconomic damages—offering physicians and hospitals certainty regarding their damages exposure—while at the same time ensuring all claimants affected by medical negligence are able to bring suit and recover damages.

Florida's Longstanding Prohibition on Recovery of Noneconomic Damages by Certain Survivors

To explain how Senator Yarborough arrived at compromise legislation, it is important to outline the trial bar's concern with the state's existing medical malpractice regime and which survivors may recover under that regime.

Under section 768.21, Florida Statutes, survivors in a wrongful death action may recover certain noneconomic damages, including for lost support and services, lost companionship, and mental pain and suffering. Generally, minor children of the "decedent"—i.e., the person who died as a result of another person's negligence or wrongful conduct—and all children (if the decedent had no surviving spouse) may recover for lost parental companionship, instruction, guidance, and for certain mental pain and suffering. Further, each parent of an adult child decedent may recover for mental pain and suffering if their child has no other survivors. But, the case is different if the decedent was the victim of medical malpractice. Section 768.21 states that the damages just described are not recoverable if the survivor is an adult child of the decedent or the parent of an adult decedent where the wrongful death claim is based on medical negligence.

Importantly, any recovery of noneconomic damages by survivors in wrongful death actions is a matter of legislative grace. Before 1990 in Florida, parents had no common law or statutory right to recover noneconomic damages for pain and suffering, grief, or emotional loss associated with the wrongful death of their adult child. Likewise, adult children had no common law or statutory right to recover damages for pain and suffering, grief, or emotional loss for the wrongful death of their parent. This was common across the nation, with many jurisdictions denying the recovery of noneconomic damages like pain and suffering in wrongful death actions by *any* survivors.

In 1990, the Florida Legislature elected to expand the Wrongful Death Act to allow

recovery of noneconomic damages by parents and children as currently outlined in section 768.21. At the same time, the Legislature chose to impose an exception, prohibiting such damages where the damages arise from a claim of medical negligence. This legislative decision to not apply the expansion to medical malpractice was appropriate, as Florida was and continues to be in a medical malpractice crisis, with Florida possessing the highest medical malpractice insurance premiums in the country for physicians and hospitals. The impact of expanded liability in the medical malpractice context would have disproportionately impacted the healthcare community because a higher percentage of these claims involve a death, as compared to automobile accidents. Hence, the Legislature's approach was rational.

But the trial bar has long lamented that these damages limitations in medical negligence cases are unfair—although it is well-established that these survivors had *no* right to recover these damages before 1990.

Florida's Past Attempt at Capping Noneconomic Damages in Medical Malpractice Actions

Meanwhile, in 2003, the Florida Legislature passed section 766.118, Florida Statutes, in an effort to control medical malpractice costs. However, that objective has not been realized due to judicial decisions striking the statute's damages caps.

Section 766.118 caps noneconomic damages at $500,000 when the medical malpractice is caused by a practitioner—i.e., a physician or nurse—regardless of the number of practitioners involved. Any one practitioner may not be liable for more than $500,000 in noneconomic damages no matter the number of claimants involved. There is also a so-called aggregate cap: the total noneconomic damages recoverable by all claimants from all practitioner defendants in one occurrence of medical malpractice may not exceed $1 million total. The statute caps noneconomic damages at $750,000 when the medical malpractice is caused by a nonpractitioner, like a hospital. There is also an aggregate cap: the total noneconomic damages recoverable by all claimants from all nonpractitioner defendants must not exceed $1.5 million in the aggregate. The statute also outlines lower caps when the medical negligence is premised on emergency services or the provision of Medicaid-funded care.

The statutory caps increase for certain types of injuries. For medical malpractice caused by practitioners, the caps increase to $1 million in the aggregate where the negligence resulted in a permanent vegetative state or death. The cap also increases to $1 million if the trial court determines, among other things, that a manifest injustice would occur unless increased noneconomic damages are awarded due to a catastrophic injury and particularly severe noneconomic harm. Similar higher caps apply when the medical negligence claim is made against nonpractitioners.

While section 766.118 is still on the books, its caps are largely unenforceable as a result of the Florida Supreme Court's 2014 decision, *Estate of McCall v. United States.*[1]

McCall involved a challenge to the statute's aggregate cap on noneconomic damages for multiple survivors. In the controlling

opinion, Justice Lewis found that the aggregate caps on noneconomic damages in medical malpractice cases violated equal protection because: (1) the caps "irrationally impact[s] circumstances which have multiple claimants/survivors differently and far less favorably than circumstances in which there is a single claimant/survivor," and (2) the cap on noneconomic damages "bears no rational relationship to a legitimate state objective, thereby failing the rational basis test."[2] Justice Lewis noted that the statute provided no benefit whatsoever to survivors in exchange for the noneconomic damages caps. Justice Lewis also reviewed the legislative history giving rise to the caps and doubted the existence of data that supported any correlation between the cap on noneconomic damages and reduced malpractice insurance premiums.

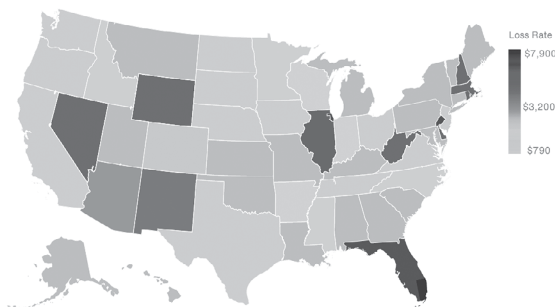
In a concurring opinion, three justices agreed with Justice Lewis on the ultimate conclusion that the arbitrary reduction of survivors' noneconomic damages in wrongful death cases based upon the number of survivors lacked a rational relationship to the goal of reducing medical malpractice premiums. But the concurring justices "disagree[d] with the plurality's independent evaluation and reweighing of reports and data . . . as part of its review of whether the Legislature's factual findings and policy decisions as to the alleged medical malpractice crisis were fully supported by available data."[3] The concurring justices agreed with the controlling opinion that, even if a medical malpractice insurance crisis existed when the caps were first enacted in 2003, such crisis was not a permanent condition, and there was no evidence of a continuing medical malpractice insurance crisis that would justify the arbitrary application of the statutory cap in wrongful death cases.

In 2017, in a case called *North Broward Hospital District v. Kalitan*, the Florida Supreme Court was tasked with deciding whether the statute's caps on noneconomic damages in personal injury medical malpractice actions were unconstitutional when the caps were the same regardless of the severity of the injury. The Court held that these caps violated equal protection "because the arbitrary reduction of compensation without regard to the severity of the injury does not bear a rational relationship to the Legislature's stated interest in addressing the medical malpractice crisis."[4] The Court reasoned that, just like *McCall*, the caps at issue "create[d] a similar distinction between classes of medical malpractice victims, arbitrarily reducing the damages that may be awarded to the most drastically injured victims."[5] Further, based on the agreement in the majority opinions in *McCall* that "there is no evidence of a continuing medical malpractice crisis justifying the arbitrary application of the statutory cap, [the *Kalitan* Court] reach[ed] the same conclusion with regard to the unconstitutionality of the caps in the present case."[6]

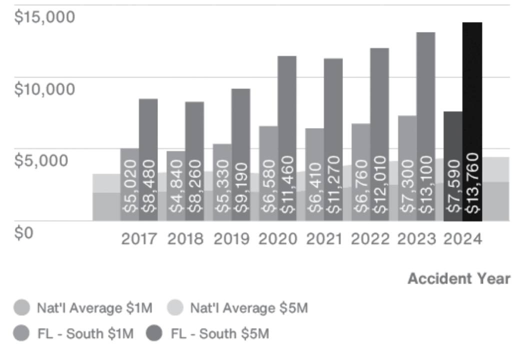
Florida Leads the Country in Medical Malpractice Costs, Leading to an Impending Physician Supply-and-Demand Problem

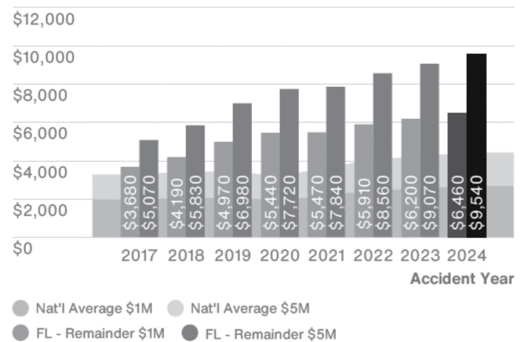
Since Florida's aggregate caps on noneconomic damages were struck in 2014, medical and hospital professional liability claims costs have been increasing,

particularly in South Florida. A key finding of a recent benchmark study conducted by Aon and the American Society for Health Care Risk Management (ASHRM) determined that, although the frequency of hospital and physician professional liability or medical professional liability claims has remained relatively stable in recent years, the *severity* of claims—including indemnity and defense costs per claim—is steadily increasing.[7] When focused on hospital professional liability claims in particular, Florida stands alone based on projected 2025 loss rates (limited to $1 million per occurrence),[8] with South Florida (Broward, Miami-Dade, and Palm Beach counties) likely to produce projected loss rates exceeding $7,500 per occupied bed equivalent,[9] the highest in the nation, with the remainder of Florida not far behind.[10]

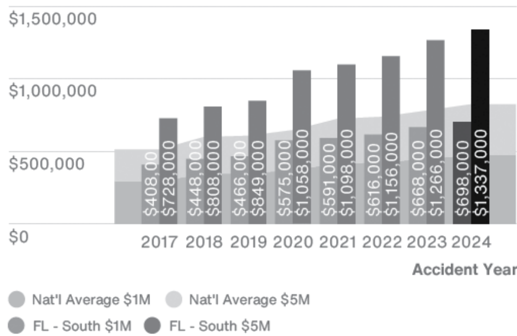


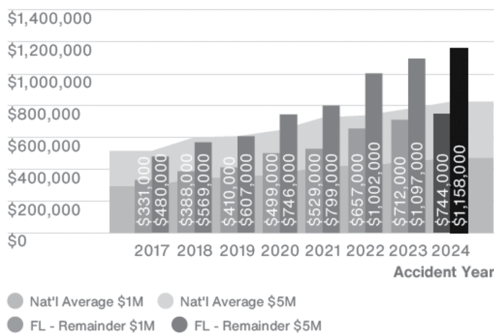
As the next two graphs show, while the national average loss rate per occupied bed equivalent has remained relatively steady, the same loss rates in Florida have continued to climb each year, with the average loss rate in 2024 doubling or even tripling the national average.[11]





The average severity of such claims in Florida—i.e., the ultimate dollar loss associated with the claim[12]—also outpaces the national average by a wide margin. The severity of indemnity claims made in South Florida is more than *$300,000 higher per occurrence* as compared to the national average, and the severity of indemnity claims made in the rest of the state is also higher than the national average, as the next two graphs demonstrate.[13]



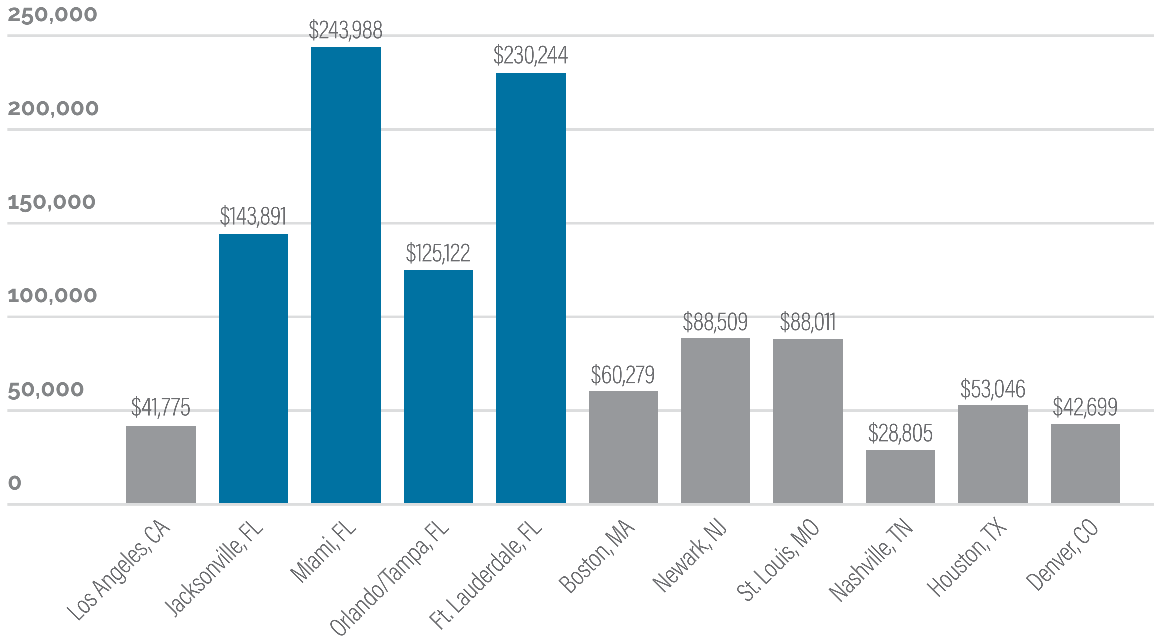


This hospital professional liability data is particularly important to consider as hospitals are often the target for medical malpractice claims. Most physicians have relatively low insurance limits; hospitals, however, have higher coverages—often in the tens of millions of dollars—with additional assets. As a result, medical malpractice lawsuits are often filed not just against the physician or other healthcare provider that directly rendered the allegedly negligent care, but the hospital at which the care was provided, as the hospital is perceived to be—and often is—the deeper pocket.

At the same time overall claims costs are increasing, so too are medical malpractice insurance premiums. The Medical Liability Monitor publishes an annual rate survey issue, which reflects survey responses by the major writers of professional liability insurance for physicians. According to the Medical Liability Monitor's October 2024 survey, Florida has experienced a notable 4.7% increase in premiums, surpassing the regional average increase of 2.1%.[14] This surge in premiums, coupled with the rising costs of claims, presents a significant challenge.

The Medical Liability Monitor also catalogues examples of manual rates from the major insurers for specific mature, claims-made specialties with limits of $1 million per claim with a $3 million aggregate, by far the most common limits, across three specialties, general surgery, obstetrics/gynecology, and internal medicine. As one example, the Doctors Company's[15] manual rates are astronomically higher in Florida than they are in other states—particularly when compared against municipalities in states which cap medical malpractice damages (including two states that are larger than Florida, California and Texas).[16]

Increased claims costs and increased premiums have very real and significant implications for physicians' decisions with regard to their ongoing practice of medicine in Florida, particularly in high-risk specialties like obstetrics. As the Florida Department of Health reported in 2023, *over 21 percent* of the 2,340 obstetricians in Florida who responded to survey questions plan to discontinue providing obstetric care within


General Surgery
250,000
200,000
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0
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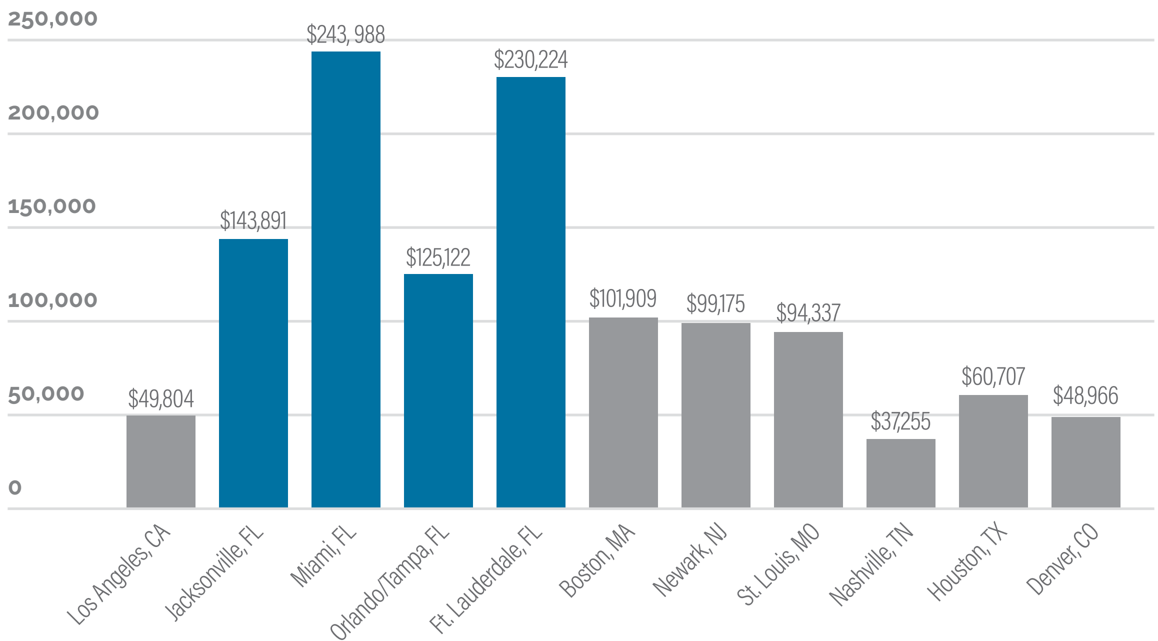
$143,891
$243,988
$125,122
$230,244
$60,279
$88,509
$88,011
$28,805
$53,046
$42,699
Los Angeles, CA
Jacksonville, FL
Miami, FL
Orlando/Tampa, FL
Ft. Lauderdale, FL
Boston, MA
Newark, NJ
St. Louis, MO
Nashville, TN
Houston, TX
Denver, CO


OB / GYN
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$49,804
$143,891
$243, 988
$125,122
$230,224
$101,909
$99,175
$94,337
$37,255
$60,707
$48,966
Los Angeles, CA
Jacksonville, FL
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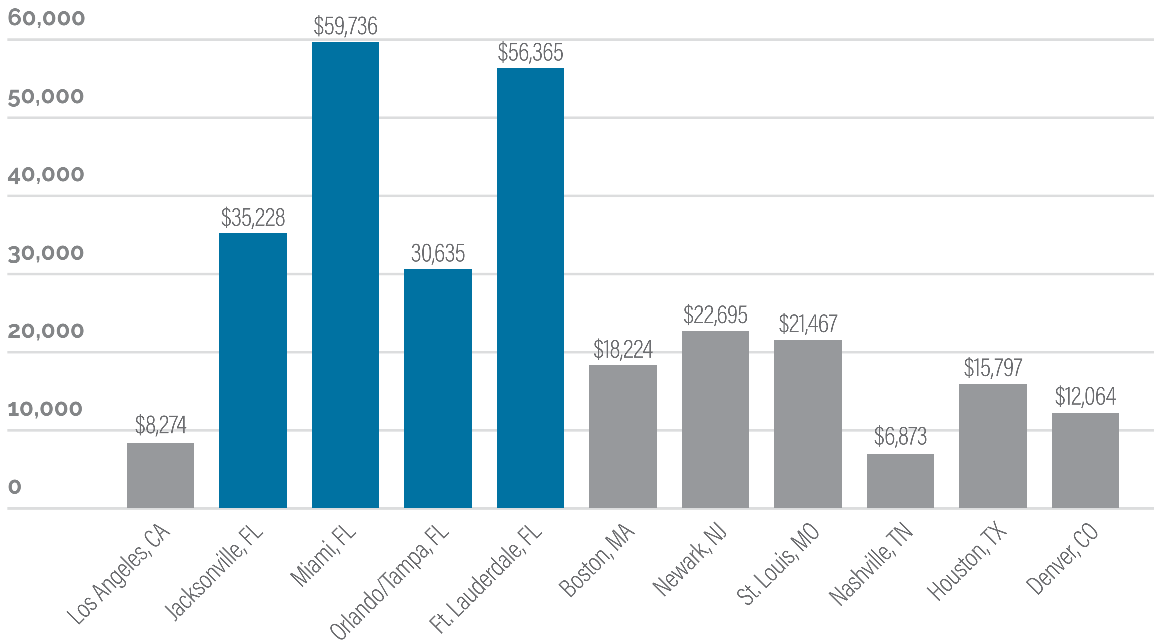

two years, with "[t]he most frequently selected reasons pertain[ing] to retirement, liability exposure, [and] high medical malpractice litigation," among others.[17] Even in 2023, only about 60 percent of the state's obstetricians were performing deliveries.[18] While the supply of practicing obstetricians decreases, demand will only increase, with one report finding that Florida needs *500 more* obstetricians by 2035 to keep up with the growing population[19]—a staggering statistic that does not account for the fact that approximately *512* obstetricians already indicated their intent in 2023 to leave their practice within two years. But obstetrics is only one example. As an HIS Markit report forecasted, "signs indicate that a significant shortage [of physicians] is looming," despite efforts to increase programs designed to incentivize the creation of new residency slots.[20]

To Achieve Medical Malpractice Reform, the Legislature Should Afford an Opportunity for the Recovery of Reasonable Noneconomic Damages and Expand the Class of Eligible Survivors

In response to these escalating costs and liability concerns, implementing caps on recoverable damages in medical malpractice claims emerges as a viable strategy to moderate claim values. A recent analysis of states with and without caps reveals that caps provide a generally positive effect on controlling average claims costs. This impact is particularly pronounced in states with "small caps," defined as $500,000 or less, and minimal exceptions.[21] This approach suggests a pathway to mitigating the financial pressures on the healthcare system, maintaining a fair and balanced

legal framework for addressing medical malpractice, and disincentivizing excessive filing of otherwise unwarranted lawsuits in pursuit of exorbitant damages. However, such an effort is likely to be met with resistance by the trial bar.

In the 2024 session, the Senate Judiciary Committee and Senator Yarborough proposed legislation, CS/SB 248, which offered a compromise: the legislation would allow more families to seek justice for medical malpractice by eliminating the noneconomic damages exception for certain survivors at the same time as instituting sensible, per-claimant caps on noneconomic damages. To address rising healthcare and medical malpractice insurance costs, the Florida Legislature should enact legislation like 2024 CS/SB 248 in the 2025 legislative session.

Specifically, such legislation would:

- Limit noneconomic damages to $500,000 per claimant in medical malpractice actions against practitioners.
- Limit noneconomic damages to $750,000 per claimant in medical malpractice actions against nonpractitioners.
- Maintain the statutory caps on noneconomic damages per claimant applicable to providers of emergency services and Medicaid-funded care already set forth in section 766.118.
- Delete the exception in section 768.21(8), Florida Statutes, which presently bars recovery of noneconomic damages by adult children and parents of an adult child bringing a medical malpractice claim.

Importantly, this legislation would likely withstand constitutional challenge.

First, the proposed caps are not arbitrary because they provide a commensurate benefit to survivors. Specifically, the legislation would end the longstanding prohibition on the recovery of noneconomic damages by certain survivors in medical malpractice cases. This would ensure all survivors in wrongful death actions are eligible to recover the same types of damages, addressing concerns that the law as it stands today unduly discriminates against certain claimants.

Second, the legislation would impose only per-claimant caps. The focus in the Florida Supreme Court's *McCall* decision was the fact that the statute's aggregate caps "discriminated" based on the number of survivors. The legislation would address that by capping survivors' damages equally. A claimant's recovery would not be reduced simply based upon the number of survivors who are entitled to recovery. And no matter the level or type of injury, the cap would be the same for any claimant; thus, the legislation would not create different "classes" of claimants based on whether, for example, the medical negligence caused a vegetative state.

Although the legislation described above would involve a significant concession by the healthcare community in expanding the class of survivors eligible to recover in medical malpractice actions, it is a necessary one. By setting reasonable limits on noneconomic damages, the legislation would address concerns over escalating healthcare costs and the financial sustainability of providing care. Simultaneously,

the legislation introduces a novel and substantial benefit for survivors who, under longstanding law, find themselves without recourse to claim such damages. Providing such a compromise is likely the only way the healthcare community will succeed in achieving medical malpractice reform.

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REFERENCES

1 134 So. 3d 984 (Fla. 2014).
2 *Id.* at 901, 905.
3 *Id.* at 916 (Pariente, J., concurring in result).
4 *N. Broward Hosp. Dist. v. Kalitan*, 219 So. 3d 49, 56 (Fla. 2017).
5 *Id.* at 57.
6 *Id.*
7 Aon/ASHRM Hospital and Physician Professional Liability Benchmark Analysis at 10 (Oct. 2024) [hereinafter AON/ASHRM Study].
8 Per the AON/ASHRM Study, "Loss Rate" is defined as the "annual ultimate loss dollars per [occupied bed equivalent] or per Class 1 physician equivalent." "Occupied Bed Equivalent" is a "standard measure of the overall hospital professional liability risk comprising a weighted contribution from twelve hospital volume metrics." A "Class 1 Physician Equivalent" is a "standard measure of the physician professional liability risk based on the exposure represented by one full-time Family Practice (no surgery) physician over the course of one year." Aon/ASHRM Study at 5.
9 Again, "Occupied Bed Equivalent" is a "standard measure of the overall hospital professional liability risk comprising a weighted contribution from twelve hospital volume metrics." Aon/ASHRM Study at 5.
10 Aon/ASHRM Study at 14. This analysis is also further limited to loss rate per occupied bed equivalent of up to $1 million per occurrence in order to reduce the influence of outlier claims.
11 Aon/ASHRM Study at 67-68.
12 The Aon/ASHRM Study defines severity to mean "average loss per claim, where loss comprises indemnity and defense costs." AON/ASHRM Study at 5.
13 AON/ASHRM Study at 67-68.
14 Medical Liability Monitor, Vol. 49, No. 10, at 3 (Oct. 2024).
15 The Doctors Company is the "nation's largest physician-owned medical malpractice insurer." *See* The Doctors Company, https://www.thedoctors.com/about-the-doctors-company/.
16 The charts that follow are sourced from information provided in the Medical Liability Monitor, Vol. 49, No. 10 at 1-2, 6-48 (Oct. 2024).
17 Florida Department of Health, *2023 Florida Physician Workforce Annual Report* at 43-44 (Nov. 1, 2023), https://www.floridahealth.gov/provider-and-partner-resources/community-health-workers/HealthResourcesandAccess/physician-workforce-development-and-recruitment/2023DOHPhysicianWorkforceAnnualReport-FINAL1.pdf.
18 *Id.* at 42.
19 IHS Markit, *Florida Statewide and Regional Physician Workforce Analysis: 2019 to 2035* at 10 (Dec. 2021), https://fha.org/common/Uploaded%20files/FHA/Florida-Physician-Workforce-Analysis.pdf.
20 *Id.* at 1.
21 *An Analysis on How Caps on Medical Malpractice Claims Have Restrained Claim Values by State* in Aon/ASHRM Study at 24-29.