Report to
The Vermont Legislature

Report on Impacts of Certificate of Merit and Pre-Suit Mediation Reforms
12 V.S.A. § 1042 and 12 V.S.A. chapter 215, subchapter 2
2019 Report to the Legislature

In Accordance with Sec. 30 of Act 54 of 2015

Submitted to: House Committee on Health Care
House Committee on Judiciary
Senate Committee on Health and Welfare
Senate Committee on Judiciary

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Statutory Charge

Act 54 Sec. 30 of 2015 requires the Secretary of Administration or designee to report on the impacts of certificate of merit and pre-suit mediation reforms (12 V.S.A. § 1042, 12 V.S.A. chapter 215, subchapter 2, respectively) on:

(1) consumers, physicians, and the provision of health care services;
(2) the rights of consumers to due process of law and to access to the court system; and
(3) any other service, right, or benefit that was or may have been affected by the establishment of the medical malpractice reforms in 12 V.S.A. § 1042 and 12 V.S.A. chapter 215, subchapter 2.

These shall be reported to the Senate Committees on Health and Welfare and on Judiciary and the House Committees on Health Care and on Judiciary on or before December 1, 2019.

Introduction

In 2012, the Secretary of Administration submitted a proposal for potential improvement or reforms to the medical malpractice system for Vermont.[1] This proposal considered the findings and recommendations contained in the Vermont Medical Malpractice Study Committee's 2005 report and added to analyses within the report.[2] The recommendations considered changes to the medical malpractice system that could "address any findings of defensive medicine, reduce health care costs and medical errors, and protect patients' rights."[3] The four 2012 recommendations include: 1) requiring plaintiffs filing malpractice claims to file a certificate of merit at the outset of litigation; 2) establishing additional expert witness qualifications; 3) revitalizing protected early disclosure and resolution options; and 4) developing a voluntary, pre-suit mediation program.

Through Act 171 of 2012, the legislature adopted two of the four recommended reform measures which took effect on February 1, 2013. The first reform, pertaining to certificates of merit, requires the attorney or party filing a civil action to recover damages resulting from personal injury or wrongful death due to the negligence of a health care provider to file a certificate of merit concurrent with the filing of the complaint. The certificate of merit certifies that the attorney or plaintiff has consulted with a qualified health care provider who has indicated that there is an applicable standard of care; there is a reasonable likelihood that the plaintiff will be able to show that the defendant failed to meet that standard of care; and there is a reasonable likelihood that the plaintiff will be able to show that the defendant's failure to meet the standard of care caused the plaintiff's injury. According to Act 171 of 2012, the second medical malpractice reform, mediation prior to filing a complaint of malpractice, is intended to: "identify and resolve meritorious claims and reduce areas of dispute prior to litigation, which will reduce the litigation costs, reduce the time necessary to resolve claims, provide fair compensation for meritorious claims, and reduce malpractice-related costs throughout the system." This reform allows a potential plaintiff and a potential defendant to participate in pre-suit mediation regarding alleged injury or death resulting from health care provider negligence prior to the potential plaintiff filing a civil action. Communications associated with the mediation process are confidential.

[1] Medical Malpractice Reforms. Report and Proposal of the Secretary of Administration, Secretary of Administration, 2012.
[2] Vermont Medical Malpractice Study Committee (VMMSC), Medical Malpractice Liability Insurance in Vermont (December 15, 2005)
[3] Act No. 48 of 2011, section 2(a)(7)

The legislature also sought to understand the impact of these reforms on consumers, physicians, and the provision of health care services; the rights of consumers to due process of law and to access to the court system; and any other service, right or benefit that was or may have been affected by these reforms. In response, the "Report on Impact of Vermont Malpractice Reform," submitted by the Secretary of Administration in August 2014 provided an early analysis and additional recommendations, including for an analysis on or after February 1, 2017 to account for the statute of limitations. No conclusive evidence that the reforms impacted relevant key indicators such as malpractice claim payouts, medical malpractice insurance rates, or physician retention were found within the short timeframe between implementation and the initial report. The report also noted the lack of available data and recommended measuring rates of cases going to pre-suit mediation and collecting data on the numbers of individuals unable to access the courts because they were unable to obtain a certificate of merit.

As required by Act 54 Section 30 of 2015, this report seeks to provide further analyses on the impact of the certificate of merit and pre-suit mediation reforms. Data included in the 2014 report are updated, however, data limitations due to the lack of available data noted above remain. It is worth noting that the healthcare landscape is also in the process of changing. Vermont began its All-Payer Accountable Care Organization Model on January 1, 2017. The model seeks to improve the quality of care and reduce cost growth through value-based payment reform, promotion of evidence-based care, and coordinated care delivery. Many physicians are bearing greater financial risk for outcomes and have different financial incentives than they had in a fee-for-service system that rewarded quantity of care and even compensated for defensive medicine by volume. Providers and consumers are experiencing new care delivery models that are team-based and that use strategies such as telehealth, patient portals, care coordination, community health workers, and population health approaches to improve health outcomes, foster wellness, and lower costs. These significant changes can impact both provider and consumer behavior and expectations, which could make it more challenging to measure the impact of medical malpractice reforms over time.

Impacts of Certificate of Merit and Pre-suit Mediation Reforms

The 2014 "Report on Impact of Vermont Malpractice Reform," outlines a methodology for assessing the impact of certificate of merit and pre-suit mediation reforms utilizing available data. This report utilizes this methodology and updates data to indicate changes in trends since reforms were enacted.

Effect on per capita malpractice payouts

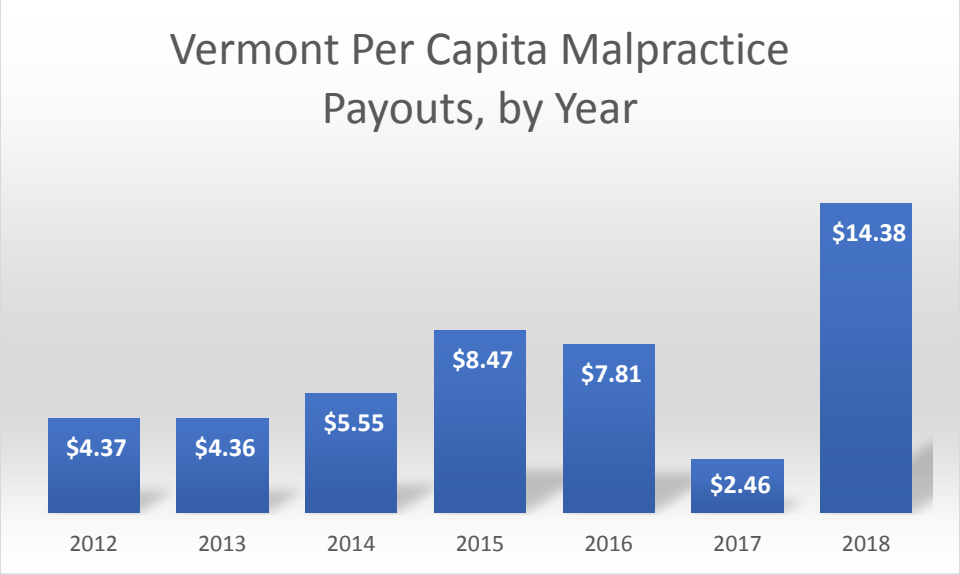
Consistent with the 2014 report, this report assesses consumer impact from medical malpractice reforms by examining the trend of per capita medical malpractice payouts. As noted in the 2014 report, few large settlements or judgements in a small state such as Vermont could skew results and direct causation cannot be determined. However, this data can be used to determine if there may be an association between the implementation of medical malpractice reforms and per capita malpractice payouts. Data used to calculate these variables include data from the National Practitioner Data Bank (NPDB) which is a national registry maintained by the Department of Health and Human Services.[4] NPDB does not include payments made by hospitals and may underreport some practitioner payments such as when a lawsuit involves both physicians and hospitals and the hospital assumes the full liability

[4] Seabury, S, Helland E, and Jena, A. "Medical Malpractice Reform: Noneconomic Damages Caps Reduced Payments 15 Percent, With Varied Effects By Specialty." Health Affairs. 2014; 33(11) 2048-2056

payments. It is also important to note that there is typically a time lag between when a payout occurs and when the malpractice incident occurs.

Vermont per capita Medical Malpractice Trends

In the first year following implementation of reforms, per capita malpractice payouts remained consistent at $4.37 in 2012 compared to $4.36 in 2013. Per capita malpractice payouts increased in 2014 and, by 2015, were $8.47 which is a 94% increase from the 2012 amounts. While, per capita malpractice payouts decreased to $7.81 in 2016 and decreased further to $2.46 in 2017, they increased 485% to $14.38 in 2018. Because of the substantial increase in 2018, overall growth between 2012 and 2018 was 229%.[5]

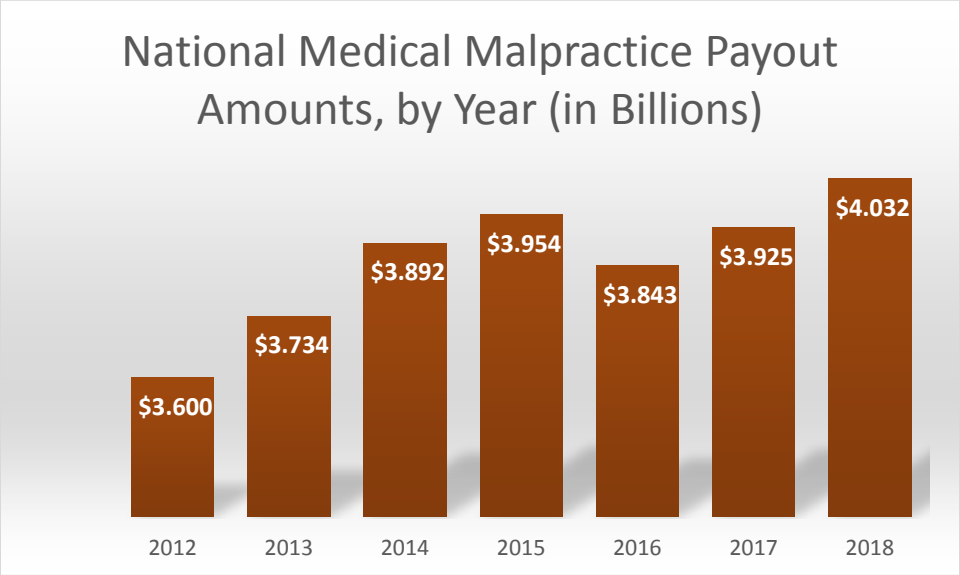


Note: Data compiled from Diederich Healthcare Medical Malpractice Payout Analyses; 2012 data is estimated, 2018 data is compiled from LeverageRx 2019 Medical Payout Report.

[5] 2012 – 2017 data from Diedrich Healthcare Medical Malpractice Payout Analysis, by year. Retrieved from: https://www.diederichhealthcare.com/the-standard/. 2018 data from LeverageRX 2019 Medical Payout Report retrieved from: https://www.leveragerx.com/malpractice-insurance/2019-medical-malpractice-report/.

National Medical Malpractice Payout Trends

National trends can provide context, especially since state data could be more easily skewed by a few large settlements. National data on medical malpractice payout amounts similarly indicate steady annual increases between 2012 and 2014 from approximately $3.6 billion to $3.89 billion. A smaller annual increase to $3.95 billion in 2015 was followed by a decrease in 2016 to $3.84 billion and subsequent annual increases in both 2017 and 2018 to $3.93 billion and $4.03 billion, respectively. The overall growth between 2012 to 2018 was approximately 12%.[6]



Note: Data compiled from Diederich Healthcare Medical Malpractice Payout Analyses; 2012 data is estimated, 2018 data is compiled from LeverageRx 2019 Medical Payout Report.

State rankings of per capita medical malpractice payouts

Prior to the enactment of certificate of merit and pre-suit mediation reforms, as compared to other states, Vermont was ranked the sixth lowest overall in per capita spending on medical malpractice payouts. Since this time and post-implementation, Vermont's ranking remained steady in 2013 and 2014 (5th and 6th, respectively) and then spiked to 25thand 19th in 2015 and 2016. This is not surprising given large increases in per capita malpractice payout in these years but does indicate that other states did not equally experience the same spikes. Vermont dropped to its lowest and most preferential ranking in 2017 at 3rd behind only Wisconsin and South Dakota and then increased to 36th in 2018 when per capita malpractice payouts rose to $14.38.[7]

Discussion

While there are similarities between national payout amount and Vermont per capita payout amount data regarding which years experienced increases and decreases, the magnitude of growth and decline have large variation between Vermont per capita malpractice payouts and national medical malpractice payout amounts. Vermont experienced larger than average growth and declines over this time period,

[6] Ibid.
[7] Ibid.

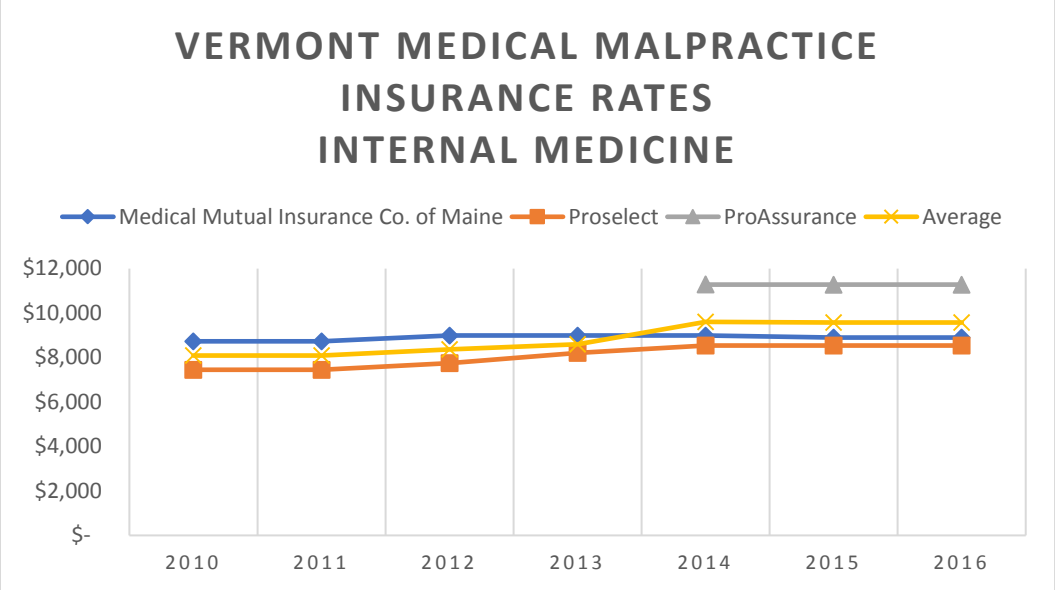
as evidenced by stark changes to its state ranking. While national yearly medical malpractice payout amounts increased in 2017 and 2018, per capita malpractice payouts in Vermont decreased in 2017 before dramatically increasing in 2018. There is no evidence that state policies are having a positive impact when comparing data from before and after implementation and comparing state and national data. Review of data for future years will be useful to determine if per capita malpractice payouts are trending upwards or if 2018 is an anomaly.

Effect on medical liability premium rates

The 2014 report reviewed medical malpractice insurance premium rate trends to estimate the potential impact of medical malpractice reforms. Given the short timeframe between reforms and the 2014 report, only two years of data were reviewed. This report updates the initial analysis by including additional years of analysis.

Vermont Malpractice Premium Rate Trends

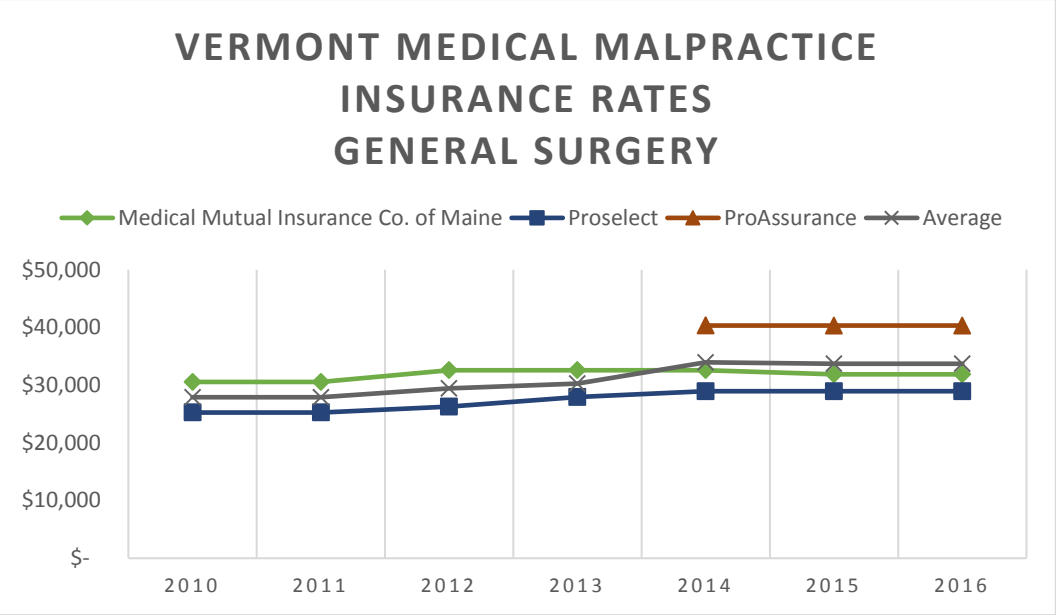
According to available data, Vermont medical malpractice insurance rates for internal medicine experienced 0%, 3.5%, and 2.8% change between 2010 and 2011, 2011 and 2012, and 2012 and 2013, respectively. An average increase of 11.6% occurred in 2014 which was largely due to an additional insurer within the data. The two insurers that had previously been in the data had 0% and 4.0% increases that year. Following 2014, the average rates were steady with -0.3% and 0% changes between 2014 and 2015, and 2015 and 2016.[8]



Note: Data compiled from Cunningham Group, Historic Rates by State. Retrieved from: https://www.cunninghamgroupins.com/historic-medical-malpractice-insurance-rates/

[8] Cunningham Group, Historic Rates by State. Retrieved from: https://www.cunninghamgroupins.com/historic-medical-malpractice-insurance-rates/

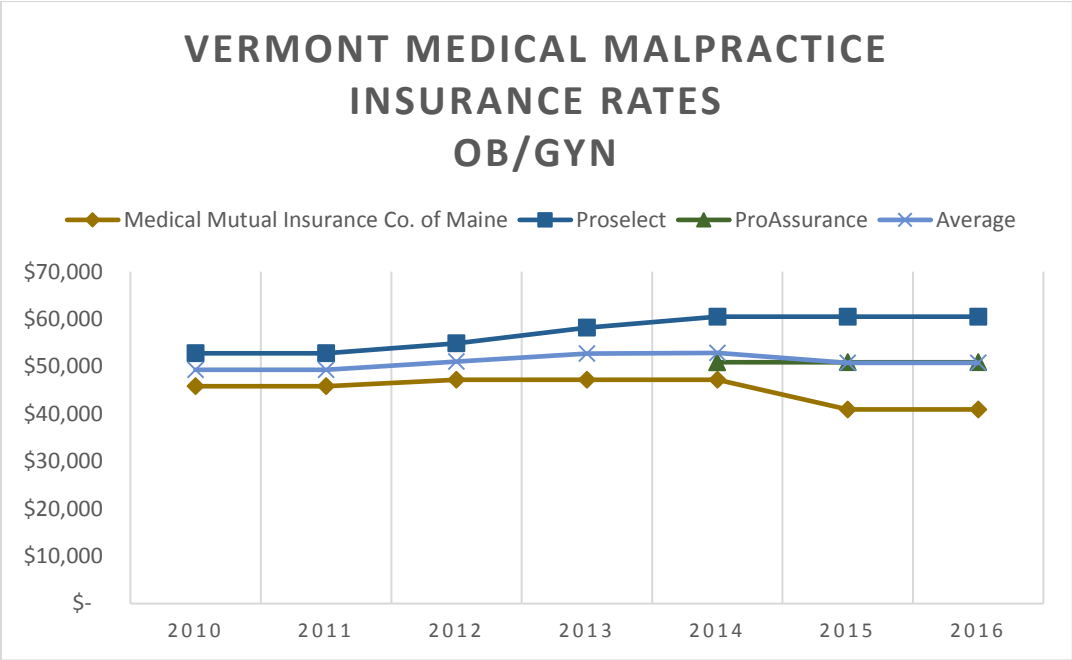
According to available data, Vermont medical malpractice insurance rates for general surgery experienced slightly higher increases with a 0%, 5.4%, and 2.8% change between 2010 and 2011, 2011 and 2012, and 2012 and 2013, respectively. An average increase of 12.2% occurred in 2014 which was also largely due to an additional insurer within the data. The two insurers that had previously been in the data had 0% and 3.6% increases that year. Following 2014, the average rates were steady with -0.7% and 0% changes between 2014 and 2015, and 2015 and 2016.[9]



Note: Data compiled from Cunningham Group, Historic Rates by State. Retrieved from: https://www.cunninghamgroupins.com/historic-medical-malpractice-insurance-rates/

[9] Ibid.

According to available data, Vermont medical malpractice insurance rates for OB/GYN experienced changes similar to Internal Medicine with a 0%, 3.5%, and 3.2% change between 2010 and 2011, 2011 and 2012, and 2012 and 2013, respectively. In contrast to Internal Medicine and General Surgery, there was an average increase of only 0.3% in 2014 when an additional insurer was added to the data. Following 2014, the average rates decreased with changes of -3.9% and 0% between 2014 and 2015, and 2015 and 2016.[10]



Note: Data compiled from Cunningham Group, Historic Rates by State. Retrieved from: https://www.cunninghamgroupins.com/historic-medical-malpractice-insurance-rates/

Discussion

Between 2010 and 2016, Vermont medical malpractice insurance rates for Internal Medicine, General Surgery, and OB/GYN practitioners increased 18.3%, 20.8%, and 3.0%, respectively. However, not all insurers raised rates equally. One insurer had 1.9%, 4.2% and -10.7% rate changes over this seven-year time period for Internal Medicine, General Surgery and OB/GYN practitioners. Another insurer had data available as of 2014 which impacted average rates calculated across insurers. Average rates declined in 2015 and remained constant in 2016. Although it is not possible to conclude that implementation of medical malpractice reforms in Vermont have impacted medical malpractice insurance rates, the increases experienced immediately after medical malpractice reform stabilized in 2015 and 2016 suggesting that there is no positive or negative association in the longer term. Also, it is important to note that there are other changes to the healthcare system that can impact medical malpractice insurance rates. For example, the numbers of physicians who own their own practice is declining

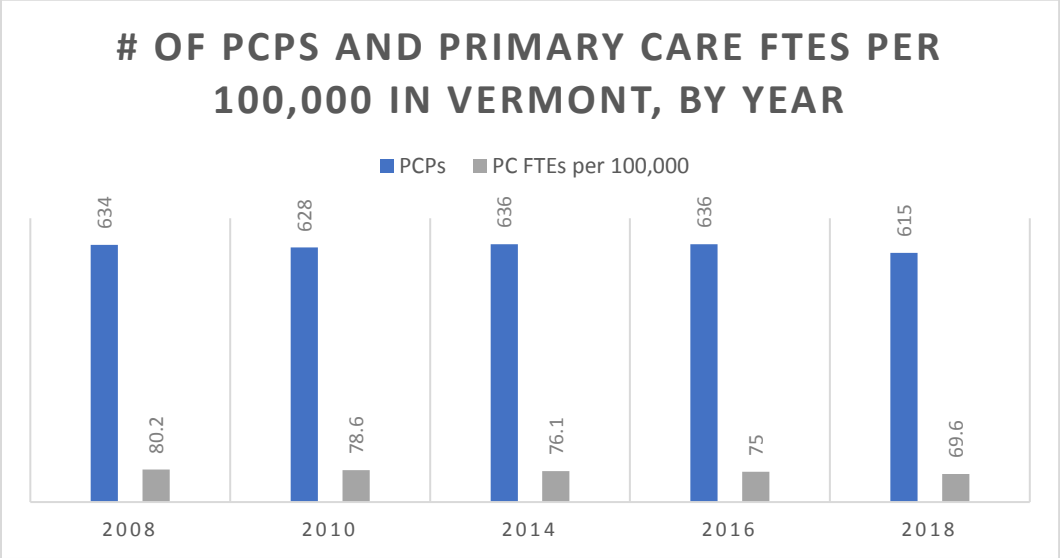
[10] Ibid.

nationwide and many hospital systems and multi-specialty physician groups are using self-insurance vehicles instead of the commercial market.[11]

Effect on Physician Retention

The 2014 report uses primary care physician rate trends as a proxy for changes to the physician practice environment. It assumes that a positive physician practice environment would result in an influx of physicians into the state while a negative physician practice environment would result in an efflux of physicians from the state. According to the Vermont Department of Health 2018 Physician Census, 25% of the 2,473 physicians in Vermont worked mainly in primary care, defined as family practice, primary care internal medicine, OB/GYN, and pediatric primary care.[12] While the number of PCPs increased between 2010 and 2016, the number of PCPs decreased in 2018 to fewer than the number of PCPs prior to medical malpractice reform. In addition, the number of primary care full time equivalents (FTEs) per 100,000 individuals has steadily decreased from 80.2 in 2008 to 69.6 in 2018. Despite these decreases, Vermont still has more PCPs per capita than the national average.[13]

Although the numbers of PCPs and Primary Care FTEs per 100,000 have decreased, during the same 2008-2018 time period, Vermont experienced an increase of 659 specialty care physicians. Included in this increase is hospitalists who reduce the need for hospital rounds by PCPs.[14]



Note: Data compiled from Vermont Department of Health, 2018 Physician Census. Retrieved from:https://www.healthvermont.gov/sites/default/files/documents/pdf/HS-Stats-phys18-ppt-.pdf/

[11]Medical Liability Monitor. "Medical Liability Monitor's 2018 Annual Rate Survey Indicates the Medical Professional Liability Insurance Industry Could be Turning Away from Stability." 08 October, 2018. Retrieved from: https://www.prweb.com/releases/medical_liability_monitors_2018_annual_rate_survey_indicates_the_medical_professional_liability_insurance_industry_could_be_turning_away_from_stability/prweb15817320.htm

[12] Vermont Department of Health. "2018 Physician Census: Summary Report." October 2019. Retrieved from: https://www.healthvermont.gov/sites/default/files/documents/pdf/HS-Stats-phys18-ppt-.pdf

[13] While Vermont had about 98 PCPs per 100,000 persons in 2018, the U.S. national average is 76 PCPs per 100,000 persons. Robert Graham Center. "The State of Primary Care Physician Workforce." January 2019. Retrieved from: https://www.graham-center.org/content/dam/rgc/documents/publications-reports/reports/StateFactSheetReport.pdf

[14] Vermont Department of Health. "2018 Physician Census: Summary Report." October 2019. Retrieved from: https://www.healthvermont.gov/sites/default/files/documents/pdf/HS-Stats-phys18-ppt-.pdf

Discussion

While it is not possible to conclude that implementation of medical malpractice reforms in Vermont have resulted in primary care physician migration to or from the state, the decreases in numbers of PCPs and PCP FTEs per 100,000 indicate that medical malpractice reform has not had a positive impact on primary care physician retention. However, medical malpractice reforms may have had a positive impact on specialty care physicians which saw a population increase over this time period.

Impact on Stakeholders

Impact on stakeholders was further explored through key constituent interviews. Although findings are anecdotal, they illustrate some of the experiences and opinions of providers and defense attorneys in the state. According to a provider organization, medical malpractice suits are generally lower priority concerns among physicians today, although they previously were considered higher priority concerns. Regardless of priority level, the potential incidence of a medical malpractice lawsuit is intimidating to physicians and is a threat that causes worry. 2012 medical malpractice reforms have not been cited or referenced by physicians directly to the provider organization over the past three years. A second provider organization sought opinions on reform impact from provider members. Several providers indicated that current reforms have not changed the way they practice medicine and no providers offered a differing opinion.

A provider organization noted perceptions of the impact of 2012 medical malpractice reforms of a defense attorney. The defense attorney stated that while the certificate of merit reforms are mildly helpful, particularly for less experienced attorneys, pre-suit mediation is not a common practice. A second provider organization echoed this comment and noted that three compliance officers stated that certificate of merit reforms have made a difference and indicated that they have saved time and resources by eliminating claims without merit.

Certificate of Merit and Pre-suit Mediation Metrics

Previous recommendations made in the 2014 report include the implementation of a tracking system within the courts to identify:

- The success rate of cases going to pre-suit mediation; and
- The number of patients unable to access the courts given their inability to obtain a certificate of merit.

Currently, there is no system in place to report these metrics. A sampling of county courts responded to a direct request for the number of medical malpractice cases filed each year from 2014 to 2018 and, within those cases, the numbers of certificates of merit that have been filed. Caledonia, Essex and Orange county courts responded. In total, eight medical malpractice cases were filed between 2014 and 2018 and seven of these cases included certificates of merit. Based on this convenience sample, one out of eight cases did not have a certificate of merit, potentially limiting the patient's access to the courts.

The recommendation to implement a tracking system remains applicable today. Further evaluation of the impact on medical malpractice reforms would benefit from consistent and timely reporting of the data points indicated above and included in the 2014 report.