Maryland
Hospital Association

House Bill 684- Civil Actions-Health Care Malpractice Claims- Expert Witnesses

Position: *Support*
February 19, 2020
House Judiciary Committee

MHA Position

Maryland's 61 nonprofit hospitals and health systems care for millions of people each year, treating 2.3 million in emergency departments and delivering more than 67,000 babies. The 108,000 people they employ are caring for Maryland around-the-clock every day—delivering leading edge, high-quality medical service and investing a combined $1.75 billion in their communities, expanding access to housing, education, transportation, and food.

National data show that Maryland's hospital medical malpractice damages climate is reaching a crisis level. Maryland has half the national average of medical liability claims, yet our state's payouts are double the national average.[1] In fact, payouts for claims above $10 million increased by 2,179% from 2016-2018 compared to the previous nine years.[2] Inflated life care plans are driving the economic damages being awarded. As a result, Maryland is seeing an exodus of reinsurers willing to write policies in our state. Insurance premiums are skyrocketing for hospitals (some as high as 60% from the prior year) among insurers who still offer policies in Maryland. These trends are not sustainable.

The Daubert standard would align Maryland's threshold for acceptable expert witness testimony for medical liability cases with the standard used in federal courts and the vast majority of other states and the District of Columbia. The *Daubert* standard requires the testimony of an expert witness to be based on 1) sufficient facts or data; 2) is the product of reliable principles and methods; and 3) the principles and methods have been applied reliably to the facts of the case. *Daubert* requires that the conclusion of the expert's witness testimony sufficiently relies upon generally accepted facts or data through a logical/scientific methodology. By utilizing the *Daubert* standard in medical liability cases, the accuracy and validity of expert testimony in Maryland can be more objective, a benefit to both plaintiffs and defendants.

While the Senate version of this legislation was introduced in a different posture, MHA has requested, and the sponsor has agreed, to align the Senate bill with the House bill.

HB 684 adopts a common-sense approach to improve the expert witness testimony process in Maryland. This legislation is an important step toward rescuing Maryland's medical liability climate.

[1] Aon/ASHRM Hospital and Physician Professional Liability Benchmark Analysis, October 2018
[2] Willis Towers Watson

For these reasons, we urge you to give HB 684 a *favorable* report.

For more information, please contact:
Brian Frazee
Bfrazee@mhaonline.org

MARYLAND'S LIABILITY CLIMATE: A HOSPITAL PROFESSIONAL LIABILITY (RE)INSURER PERSPECTIVE

From: Nat Cross <[redacted]>
Sent: Friday, February 7, 2020 11:52 AM
To: Smith, Larry L <[redacted]>
Cc: Leyko, Rachel A <[redacted]>
Subject: Beazley Healthcare - US Hospitals Focus Group - Current Perception of Maryland including Baltimore City and Baltimore County

Dear Larry,

You have asked me to provide an excess Hospital Professional Liability (re)insurer's perspective of Maryland including the City and County of Baltimore given local, as well as national, trends of increasing medical malpractice ("medmal") severity.

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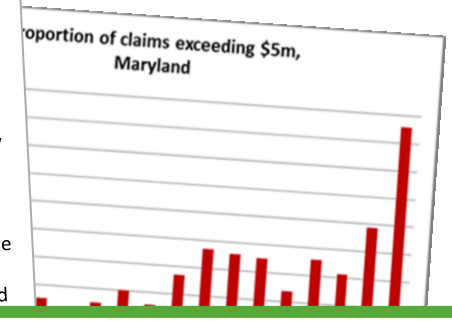

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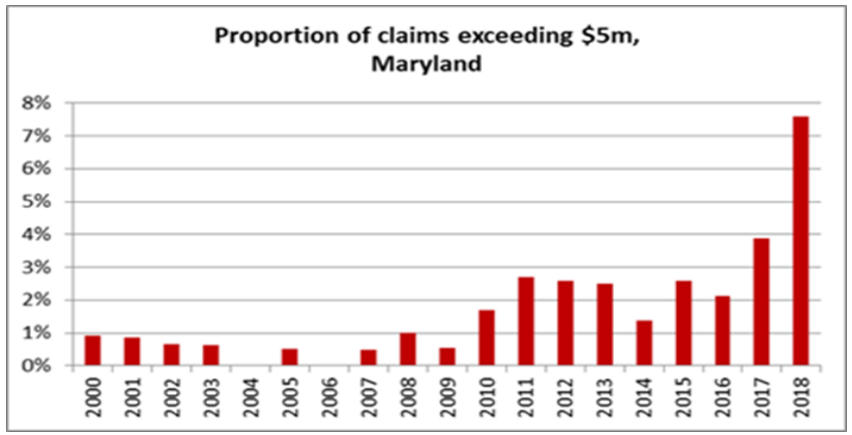
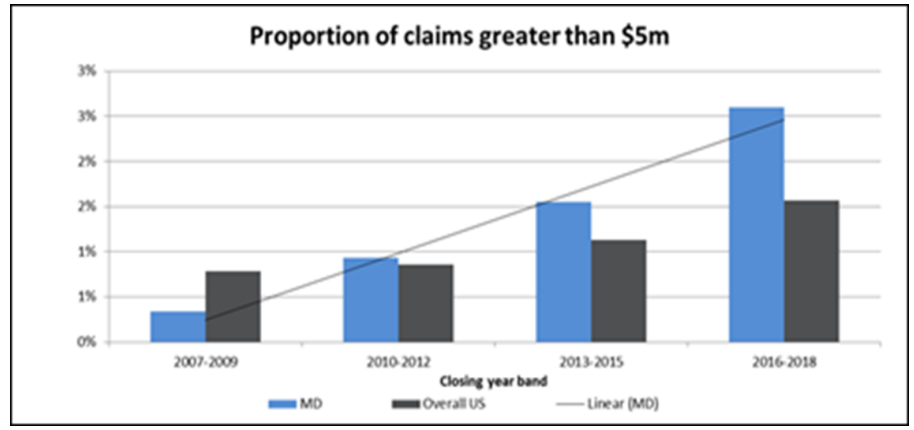
300% Increase in Claims over $5m



Maryland is outstripping the US nationwide



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By way of background, as you kn[ow] offices throughout the globe, em[ploying] writings we own two licensed U[K] European Insurer, BIDAC. In 201[9] $3b, $0.9b of which was writte[n] risk, and of which the Healthca[re] $235m of premium, substanti[al] East, and Australasia, and we [have] London, and European insura[nce]

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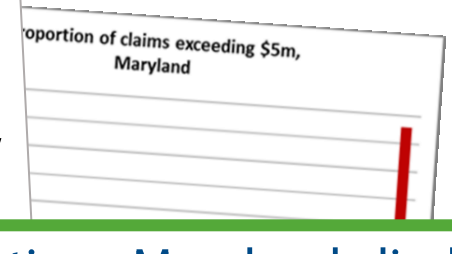

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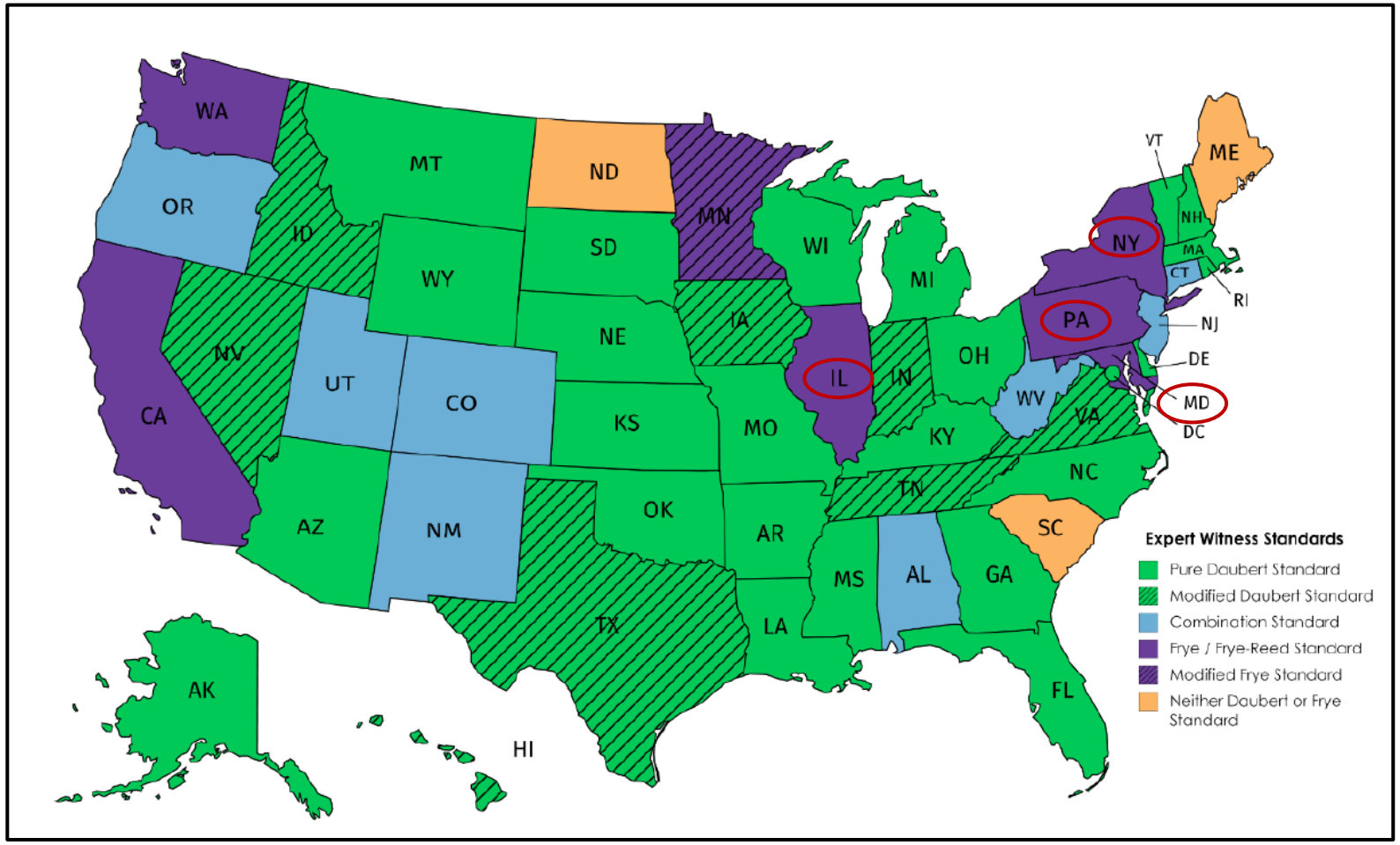
CORRELATION OF HIGH SEVERITY VENUES* & EVIDENTIARY STANDARDS



Source: Aon/ASHRM Hospital and Physician Professional Liability Benchmark Analysis, October 2019

[O]ur analysis has further indicated that **outstanding safety and quality have no bearing whatsoever on the value or quantum (i.e. severity) of claims**. . . [I]t is not hard to envisage a scenario where Baltimore City / County **hospitals are unable to procure sufficient capacity – regardless of cost – for their needs.**

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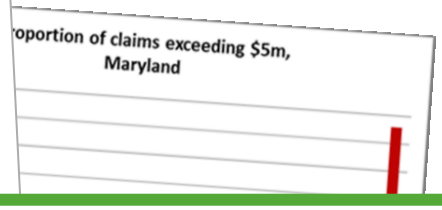

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I regret to inform you that we have now made the decision to include new risks with exposures in Baltimore City and County in this cohort (where Beazley is not writing policies).

Guy Carpenter & Company Ltd
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06 February 2020

To whom it may concern

Medical Malpractice Insurance coverage in Maryland

The recent spate of high value Medical Malpractice settlements and verdicts in Maryland - and in particular Baltimore City - is making the procurement of Insurance and Reinsurance protection extremely challenging.

Insurers and Reinsurers are withdrawing &/or are reducing the amount of limits (capacity) that they are willing to provide to Healthcare providers based in the State. Zurich Insurance have withdrawn and other significant US Domestic Insurance carriers namely Berkshire Hathaway , W R Berkley, C N A, and Chubb have either declined to participate on certain risks based in this jurisdiction or have markedly reduced capacity. The market for USA Medical Malpractice insurance is a global one; The Bermuda and London Insurance markets are important providers of capacity and major carriers such as Sompo, and AXA, have materially cut back the amount of capacity that they are willing to provide, London Insurers particularly based in Lloyd's have followed suit.

The insurers and reinsurers that are still willing to take on Baltimore based risks are requiring

- Far greater risk retention (Self insurance) by the Healthcare Providers
- Dramatically increased premiums
- The imposition of coverage exclusions and restrictions.

A recent settlement of $190 million and verdict of $229 million in Maryland has caused considerable concern within the specialist US Medical Malpractice insurance industry; these widely publicized values engender fear within the healthcare provider community that has the effect of driving up settlement values. These increased values in combination with $100 million plus verdicts make the provision of insurance in Maryland commercially unsustainable.

Yours Sincerely

Charles F Pearch
Managing Director

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By way of background, as you know Beazley is a Lloyd's based specialist insurer, with offices throughout the globe, employing nearly 1,500 people. In addition to our Lloyd's writings we own two licensed US insurance companies, BICI and BAIC, and a licensed European Insurer, BIDAC. In 2019 the combined gross premium of the operation was $3b, $0.9b of which was written by the Specialty Lines division, specialising in liability risk, and of which the Healthcare team is part. Last year the Healthcare team wrote $235m of premium, substantially in the US, but also in LatAm, UK and Europe, the Far East, and Australasia, and we are the largest writer of such business in the Lloyd's, London, and European insurance markets.

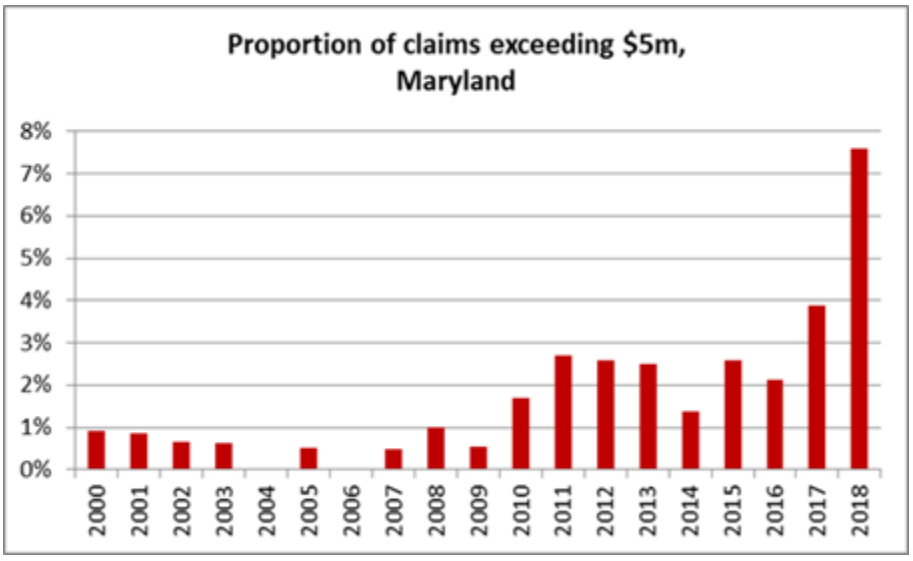
Of this $235m, approximately $41m was written in our (large) US Hospitals Focus Group. This book has shrunk considerably (21%) from its high water mark in 2012 of $52m. Although this can be attributed to a number of different factors (including for example consolidation brought about by the Affordable Care Act), **from my perspective the largest single determining factor has been the effect of increasing severity**, and the need to re-underwrite our portfolio (through amending programme structure and pricing) to protect the profitability of the portfolio. We believe that through our expert team of former medmal defence attorneys claims managers, and our deep analytical bench strength (founded upon our 800,000 HPL claim record HealthRate database), Beazley Healthcare was one of the entities to identify the worsening environment early on, a fact that you have been gracious enough to acknowledge. From a practical standpoint, however, it led our team to lose business, as our efforts to improve the terms on placements were undermined by other markets, ignorant of the worsening environment around them, who were prepared to match or often improve our expiring terms.

Of course, the industry has now largely caught up, and the insurance press is awash with coverage of "social inflation". From our perspective we first noticed this increasing severity in 2012, when we began to provide bespoke analytical reports to our insureds in certain high severity venues such as Philadelphia. With the benefit of hindsight, the origins of this phenomena are clear: the suppression of the medmal plaintiff's bar in the early noughties (through tort reform, patient safety and quality, and increased risk assumption through captives and other vehicles), and the undermining (through reduced credit brought on by the global economic downturn) of their attempts to develop strategies to counteract this in the latter part of the decade. However, come the next decade (the 2010's), with increased liquidity, and a new strategy finalised, they were off to the races.

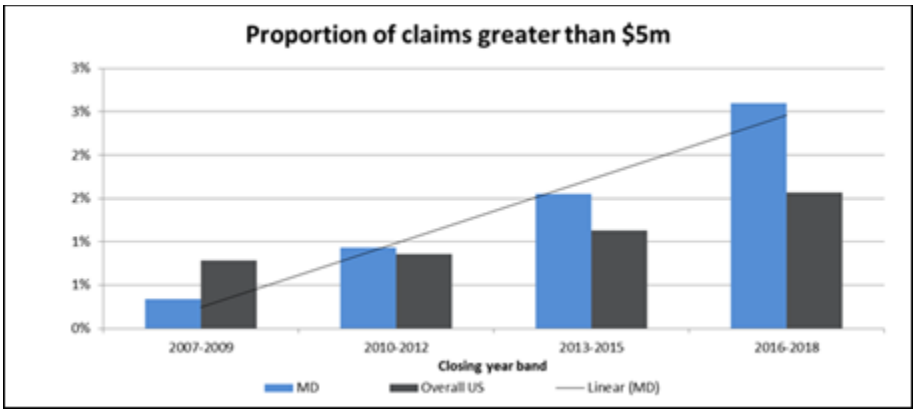
Their primary strategy was twofold: firstly bypass the impact of damage caps by focussing on *economic* rather than *non-economic* damages, and focus on claims with the maximum possible damages therein (cases involving high earners with the commensurate loss of income, and those with a lifetime's care costs such as infants and babies); and secondly, optimise the chance of getting the jury to find in favour of the plaintiff by deploying the so called "Reptile Theory" tactics designed to influence jury's decision making by appealing to the "reptilian complex" of juror's minds in the hope of prompting them to make decisions based on instincts such as fear, rather than logic and reasoning. A second, complimentary, strategy was to identify cases involving multiple claimants, wherein, even if the individual damage awards were relatively small, in the aggregate, very large sums could be blackboarded.

You are of course aware that Maryland and Baltimore was one of the first places for these strategies to manifest themselves. In June 2012, Johns Hopkins Hospital in Baltimore received a $55m verdict arising from a single plaintiff birth injury case from 2010, and then in 2014, the same institution paid $190m to settle with many thousands of patients of the infamous Dr Levy. I'm sorry to say that these cases, and the many other seven, eight, and even nine figure cases that Hopkins, Medstar, and other Maryland Healthcare providers have suffered since then, **epitomise more than any other venue**, the effectiveness of the plaintiff's bar's strategy, for a simple reason: Maryland is a tort reform state, with the holy grail of such legislation, damage caps. Actuarially, until the last decade we were able to stratify the US's states into 4 buckets of declining severity: High, Medium, Low, and Tort Reform. But over time, Maryland climbed the ladder, from the lowest category to the highest, **and now has the unfortunate accolade of being one of the four worst venues for medical malpractice in the nation alongside New York City, Philadelphia, and Cook County (Chicago)**.

Actuarially this can be seen in the following chart where the number of non-zero cases with indemnity closing over $5m has risen in the region of 300% in recent years (c. 2.5% in 2013 to c. 7.5% in 2018).



Whilst nationwide we are seeing these trends, unfortunately Maryland is outstripping the US nationwide in this regard by a considerable margin. The chart below is presented on a slightly different basis, where the denominator is all non-zero cases (i.e. not only ones with indemnity but ones with just defence costs as well):



As you know, we hold Medstar in especially high regard, and consider it as one of our most core (re)insureds with a unique and singular focus on patient safety and quality which from our perspective is unparalleled in the US. Further, you know that Beazley has invested heavily in support our (re)insured's efforts in this regard through our QuIRP programme, in the belief that those (re)insureds providing the best and safest care will

have a lower number (i.e. frequency) of claims. Pleasingly, actuarially we have been able to confirm this hypothesis. Unfortunately, our analysis has further indicated that outstanding safety and quality have no bearing whatsoever on the value or quantum (i.e. severity) of claims. This of course has meant that Beazley and Medstar have held increasingly difficult negotiations over recent annual renewals as we as (re)insurers have sought to protect the integrity of our book, and you as steward of malpractice spend for Medstar have asked for recognition of your efforts. My understanding is that negotiations for the most recent renewal for your overall programme were particularly fraught following the withdrawal of carriers that had historically provided capacity to your tower of coverage, as well as the actions of others to reduce the amount limit that they provide. Pleasingly for us as (re)insurers, but reciprocally displeasingly for Medstar as a buyer, these actions at best serve to bring upward pressure on pricing; my understanding is that in the last medmal crisis in the early noughties certain hospital systems in Cook County had malpractice costs representing approaching a staggering 10% of their operating revenue. At worst, however, it is not hard to envisage a scenario where Baltimore City / County hospitals are unable to procure sufficient capacity - regardless of cost - for their needs. Indeed, in 2018 the Beazley US Hospitals team made the determination that it would not entertain hospital and health risk in Chicago, New York City, and Philadelphia with a per claim attachment point beneath $25m/-. **I regret to inform you that we have now made the decision to include new risks with exposures in Baltimore City and County in this cohort.**

I hope that this provides you with the information that you require.

Yours sincerely,

Nat Cross

Nat Cross
Specialty Lines - Healthcare

BEAZLEY GROUP
Syndicate 2623/623 at Lloyd's

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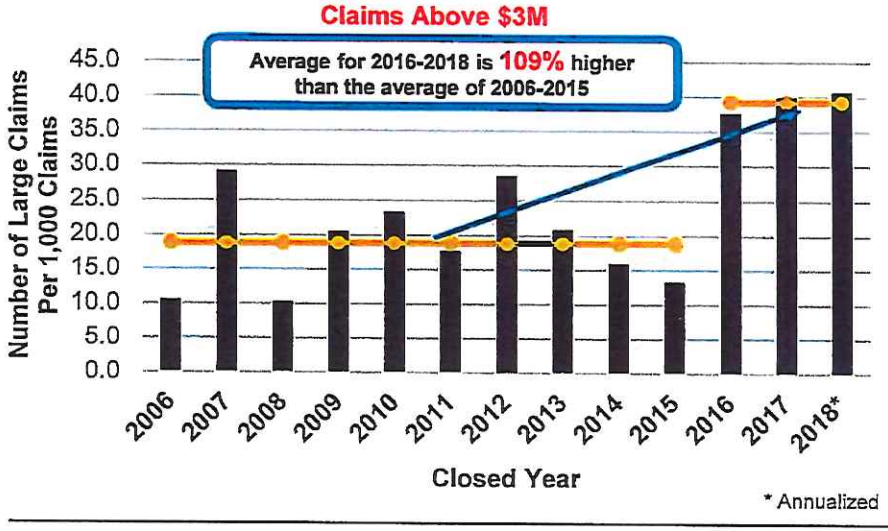
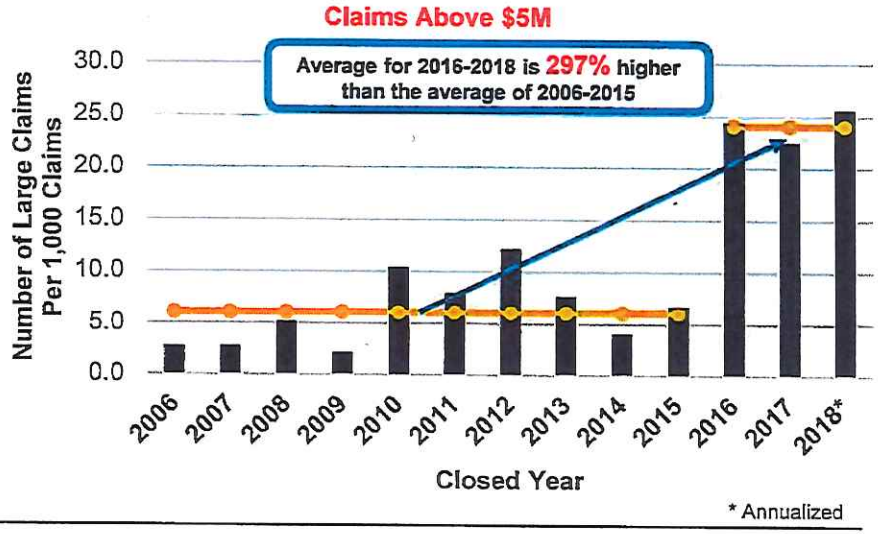
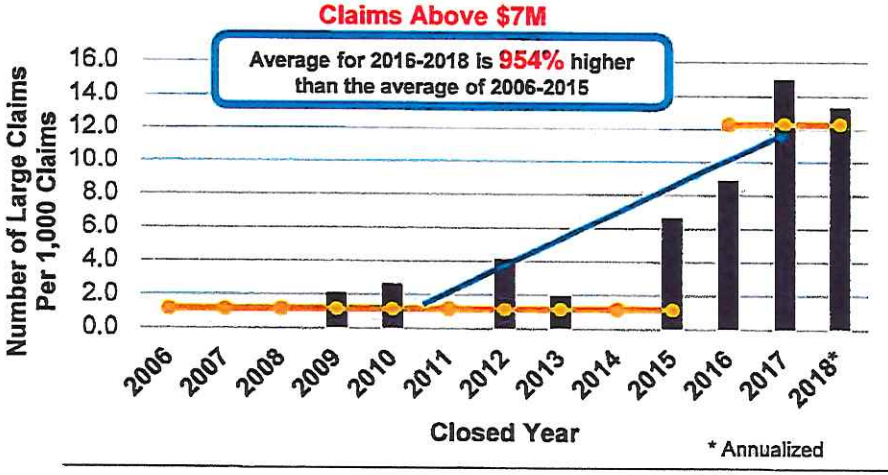
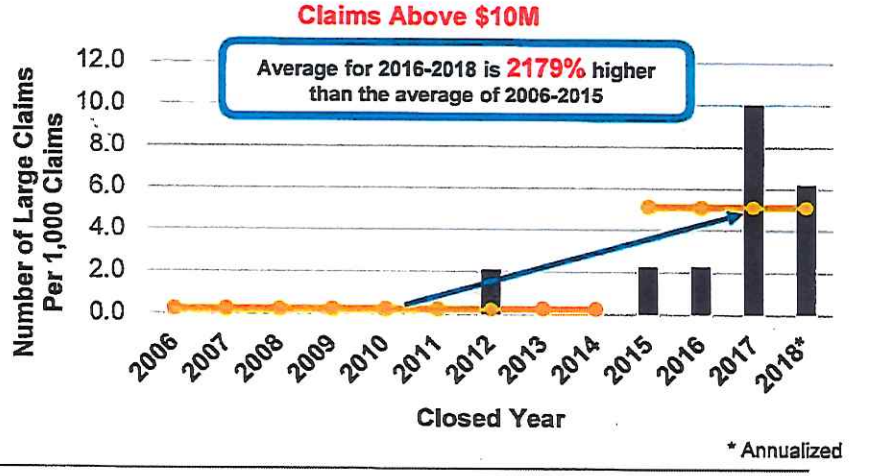
e: nat.cross@beazley.com
w: www.beazley.com

Maryland closed claim data shows an even more dramatic spike and the same increase at higher layers









Willis Towers Watson