

# MEDICAL MUTUAL

*Liability Insurance Society of Maryland*

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**Bill:** House Bill 684 – Civil Actions – Health Care Malpractice Claims – Expert Witnesses

**Date:** February 19, 2020

**Position:** *SUPPORT*

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## *Bill Summary*

House Bill 684 adopts Rule 702 of the Federal Rules of Evidence to determine an expert's qualification in medical malpractice litigation.

## *Medical Mutual's Position*

While Medical Mutual has experienced relative stability in medical professional liability insurance rates and physician premiums have decreased approximately twenty-five percent since the last medical professional liability insurance crisis in the early 2000s,<sup>1</sup> Maryland hospitals report that they have not experienced the same level of stability in the ensuing years.<sup>2</sup> In medical malpractice litigation, both parties generally employ a life care expert to provide a life care plan and an expert economist to calculate future medical expenses associated with the life care plan. A life care plan predicts the amount of medical care an injured party will require for the rest of the party's life. Unfortunately, the current standard for admitting expert testimony has resulted in vastly different expert opinions regarding life care plans and the cost of future medical care. House Bill 684 would not only alleviate these discrepancies among experts but would also bring consistency in admitting all experts in medical malpractice litigation.

House Bill 684 adopts Rule 702 of the Federal Rules of Evidence, and in turn, adopts the *Daubert*<sup>3</sup> standard.<sup>4</sup> Although the Court of Appeals has noted that Maryland has seemingly adopted aspects of the *Daubert* standard,<sup>5</sup> Maryland still applies the *Frye-Reed* standard in cases involving expert testimony of a

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<sup>1</sup> The Maryland Insurance Administration reviews and approves all rate filings made by Medical Mutual. During the last medical professional liability insurance crisis, Medical Mutual took the following rate increases: 9.9% in 2003, 28% in 2004, and 33% in 2005.

<sup>2</sup> Physicians insured with Medical Mutual generally purchase medical professional liability insurance policies that provide coverage of \$1 million per occurrence and \$3 million in the aggregate, per year. There are no coverage limits for physicians employed by hospitals because hospital programs self-insure.

<sup>3</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

<sup>4</sup> In the concurring opinion of *Savage v. State*, 455 Md. 138, 174-187 (2017) (Adkins, J., concurring), now retired Judge Sally Adkins was joined by Chief Judge Mary Ellen Barbera and Judge Robert McDonald in advocating for the explicit adoption of the *Daubert* standard in Maryland.

<sup>5</sup> See *Savage*, 455 Md. at 162-64.

scientific or technical nature.<sup>6</sup> Under the *Frye-Reed* standard, courts consider simply “whether ‘the expert[ ] bridges the analytical gap between accepted science and their ultimate conclusion in [a] particular case.’”<sup>7</sup> Conversely, the *Daubert* standard is a more rigorous, yet flexible, approach that weighs several factors. Under *Daubert*, a court considers the following factors in determining whether an expert may be admitted: (1) “whether the theory or technique is scientific knowledge that . . . can be (and has been) tested[.]” (2) “whether the theory or technique has been subjected to peer review and publication[.]” (3) “in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error[.]” and (4) “general acceptance.”<sup>8</sup> These factors are not exclusive, and a trial court is to consider the weight and relevance of each factor.

In passing House Bill 684, Maryland, at least in medical malpractice cases, would join the majority of states that apply the *Daubert* standard<sup>9</sup> and would provide judges and litigants with well-developed precedent from other federal and state jurisdictions on the admissibility of experts under the *Daubert* standard. As one court aptly summarized the advantages of adopting the *Daubert* standard in 2016: “the ‘ability to focus on the reliability of principles and methods, and their application is a decided advantage that will lead to *better decision-making by juries and trial judges alike.*”<sup>10</sup>

For the reasons contained herein, Medical Mutual respectfully requests a ***FAVORABLE*** report of ***House Bill 684***.

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<sup>6</sup> The Court of Appeals of Maryland is considering whether to adopt the *Daubert* standard in *Rochkind v. Stevenson*, No. 47-2019—a case involving alleged lead paint exposure in a Baltimore City residence. Oral arguments on this case were held on February 7, 2020, and an opinion is expected to be released by the end of August 2020. Although the Court granted writ of certiorari on the issue of adopting the *Daubert* standard, this does not guarantee that the Court will address this issue. Indeed, the appellee has raised whether the issue of adopting the *Daubert* standard was waived and, therefore, not properly before the Court. Appellee Br. 38-39.

<sup>7</sup> See *Burks v. Allen*, 238 Md. App. 418, 453-54 (2018) (quoting *Savage*, 455 Md. at 160).

<sup>8</sup> *Nease v. Ford Motor Co.*, 848 F.3d 219, 229 (4th Cir. 2017) (quoting *Daubert*, 509 U.S. at 593-94).

<sup>9</sup> *Savage*, 455 Md. at 178 n.3 (Adkins, J., concurring) (listing the thirty-eight states that have adopted the *Daubert* standard in full or in part).

<sup>10</sup> *Id.* at 185 (Adkins, J., concurring) (emphasis added) (quoting *Motorola Inc. v. Murray*, 147 A.3d 751, 757 (D.C. 2016)).